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The purpose of the KCDAA is to promote, improve and facilitate the administration of justice in the state of Kansas.

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Table of Contents

Outgoing President’s Column: Reflection
by Marc Bennett.................................................................4

KCDAA Milestones.........................................................5 & 10-11

President’s Column: Higher Legislative Involvement
by Stephen M. Howe ......................................................6

Member Highlight: Jose Guerra
by Nicole Van Velzen...........................................................8

KCDAA Award Winners..................................................12-15

Challenging Smith-Parker
by Natalie Chalmers..........................................................16

Absconding from Probation in Kansas, Post-Huckey
by Joseph Uhlman.............................................................19

The Death of Prosecutorial Misconduct?
by Shawn E. Minihan and James E. Crux..........................22

About the Cover

Pictured on the cover is the Jackson County Courthouse. In 1854, the Kansas Territory was organized, then in 1861 Kansas became the 34th U.S. state. In 1859, Jackson County was established. The current population is approximately 13,462.

The courthouse is located at:
400 New York Avenue
Holton, Kansas 66436

Photo by John Morrison, Prairie Vistas Gallery.
Reflection

After handing off the reigns of KCDAA President to Steve Howe, Johnson County District Attorney, at the Fall Conference in October, I had one last column to write.

Membership on the board of directors of the KCDAA these past few years has been a time-consuming but ultimately rewarding experience. I’ve enjoyed getting to know other prosecutors around the state and working with the Legislature to implement laws that improve the system of justice in Kansas and, at times, to blunt proposals that, while well-intended, would have undermined public-safety.

Calls for criminal justice, juvenile justice and mental health reform will continue. The fiscal realities of tight budgetary times will cause legislators to look to the criminal justice system for cost savings. In this context, the role of the KCDAA has never been more important. As my time on the board ends, though, I am confident that KCDAA has positioned itself well for a promising future. I am especially excited by the possibility of adding a Prosecutor Coordinator to further the cause of Kansas prosecutors with subject-matter expertise.

With the election season now (mercifully) concluded, there are many new faces in the legislature. Likewise, long-time stalwarts of the KCDAA, Jerry Gorman, Kim Parker and Steve Obermeier will be gone. At the same time, we have added nearly thirty new members to the ranks of elected prosecutors around the state. But just as our organization continued to grow and further our message after the like of Nick Tomasic, Gene Olander and Nola Foulston left the profession, our new members will provide the KCDAA the opportunity for growth and development.

I appreciate the time on the board, the friendships and the opportunity to positively impact my profession. Please get - or stay - involved with the KCDAA. Join the CLE committee, attend the Fall and Spring conferences and offer to be a conferee before the legislature.

We want every prosecutor in the state to be successful. In this age of real-time social media coverage and 24 hour news cycles, what goes on in one county can have a profound impact on citizens’ perceptions of our profession and the criminal justice system in other parts of the state. Your success, is a positive reflection on us all.

I’ll leave you with the message set forth by Justice Stegall in the recent and decidedly important opinion of State v. Sherman, 113,105 (September 9, 2016):

“The power of the State to charge and prosecute its citizens for criminal violations of the law is a fearsome one, and it is vested exclusively in a prosecutor who is given vast discretion to make both charging decisions and the myriad of practical and strategic decisions that occur in the course of a prosecution. “The prosecutor has more control over life, liberty, and reputation than any other person in America.” Robert H. Jackson, U.S. Attorney Gen., The Federal Prosecutor, Address Before the Second Annual Conference of United States Attorneys (April 1, 1940). To suffer an abuse of this power at the hands of an unethical prosecutor is one of the grossest inequities and indignities that can be visited upon a citizen by the State. Such abuse cannot be tolerated in a free society.”
But to the credit of our membership, Justice Stegal went on to recognize and acknowledge, “. . . the vast majority of our State’s fine and ethical prosecutorial corps . . .” This positive and ethical reputation is one that those of us who continue to stand up in courtrooms around the state on behalf of our fellow citizens must continue to guard.

Thank you for the work you do and many thanks for the opportunity I’ve had to serve on the board. I’ll see you next June in Wichita.

KCDAA Milestones

Babies

Anna Wolf, Wyandotte County Assistant District Attorney, and her husband have welcomed their first child, Noah Matthew Wolf, on August 5, 2016. He was 5lbs. 11oz. and 18.5 in. long. Mom, Dad, and baby are doing well.

Heather Botter, Assistant District Attorney in Sedgwick County, and Robert Figger were married 12/31/16 in Hutchinson KS at the State Fair Grounds. It was a New Year’s Eve wedding, complete with a balloon drop. The couple honeymooned in Las Vegas with a trip to the inside of the Hoover Dam and the glass walkway over the Grand Canyon.

Marriage

Wyandotte County Assistant District Attorney Francis Gipson and Robert Givens were married July 23, 2016 at Jacob’s Well Church in Kansas City, Missouri. Robert is the law clerk for the Honorable Marco Roldan in Jackson County, Missouri.

Michelle Fuchs, Wyandotte County Assistant District Attorney, and Ben McFarlane were married October 8, 2016 in Prairie Village, KS.

New Faces

Amy Hanley has been appointed District Court Judge in Douglas County. She was sworn in on December 1, 2016. Amy left the Kansas Attorney General’s Office where she had been in the Criminal Litigation Division for more than seven years. She has served as Assistant Attorney General and Prosecution Section Lead, handling many high profile cases.
In the spring of 2016 the Kansas County and District Attorney’s Association Board of Directors approved the creation of a Prosecutor Coordinator position. The purpose of this position is to be an expert resource to the legislature. In the fall, the KCDAA contracted with Kim Parker, former Deputy District Attorney from Sedgwick County. Many of you already know Kim. She has been a stalwart prosecutor for 34 years, with over 200 jury trials, including some of Sedgwick County’s most high profile cases, such as Dennis Rader (BTK serial killer) and Reginald and Jonathan Carr. She has been the Chief Deputy District Attorney for Sedgwick County since 1997. In addition to her work in the courtroom, Kim has worked through various organizations to develop policies in the criminal justice system, including the Board of Directors for the National District Attorneys Association (NDAA), the American Bar Association Discovery Taskforce, and Chair of the KCDAA/Bureau of Justice Best Practice’s Committee.

Kim will work at the direction of the board to draft testimony and testify on behalf of the board. However, there will still be times where board members and other prosecutors across the state will be needed to assist in the crafting of legislation and testimony and to answer questions or concerns raised by their legislators. Steve Kearney and Kari Presley with Kearney and Associates, Inc. will continue to lobby on behalf of the KCDAA every day.

The decision to form the position of Prosecutor Coordinator advances the KCDAA to the next level. Kansas joins the ranks of many other states in the country where this position exists. The KCDAA Board of Directors consulted other Prosecutor Coordinators from around the country to assist in drafting the framework for this position. Kim’s role as Prosecutor Coordinator will enable the KCDAA to be much more nimble in reacting to judicial decisions that require statutory amendments. It will also allow us to interact closely with the Attorney General’s Office when crafting amendments to current laws.

This position was created based on the time sensitive nature in which the legislature is required to act.

Kansas Constitution Article 2, Section 8 states:

“The legislature shall meet in regular session annually commencing on the second Monday in January, and all sessions shall be held at the state capital. The duration of regular sessions held in even-numbered years shall not exceed ninety calendar days. Such sessions may be extended beyond ninety calendar days by an affirmative vote of two-thirds of the members elected to each house. Bills and concurrent resolutions under consideration by the legislature upon adjournment of a regular session held in an odd-numbered year may be considered at the next succeeding regular session held in an even-numbered year, as if there had been no such adjournment.”

Numerous bills are introduced in every legislative session. Legislators are inundated with huge volumes of information to study. I have been involved with Kansas House and Senate members for a number of years and while they are deemed “part-time” legislators, they actually put in long and tedious hours drafting and amending proposed bills. It is unreasonable to think that legislators could be well informed about every bill that comes through.
Often, they reach out to various groups impacted by the bill for guidance and analysis on proposed legislation.

The KCDAA regularly calls upon individual prosecutors to provide input to legislators, generally through the submission of written and oral testimony during committee meetings and often with very short notice. Testimony is sometimes not sufficient to ensure the proper construction of legislation. We recognize that while most bills are well intentioned, there are times that unintended and negative consequences exist with the passage of certain legislation. This is why it is important for our association to have an expert resource provide guidance on how proposed legislation could impact our criminal justice system and the citizens of our state.

A higher level of involvement in the legislative process is needed to provide the best input on any proposed legislation. Involvement in exploratory committees while the legislature is out of session, formal and informal meetings with legislators both before and during the legislative session, responding to legislator’s questions about bills via phone calls and emails, and work with the revisers on crafting specific language is time intensive.

The Prosecutor Coordinator position will allow our members to have a stronger voice on legislation that impacts their work and the safety of the public. Kim Parker’s experience inside and outside the courtroom will be of great benefit to our organization and to legislators. She is highly qualified to provide concise and objective analysis of pending pieces of legislation. As an experienced prosecutor, she is knowledgeable on the effects that any proposed legislation will have on existing law and the people we serve.

I know she looks forward to working with members of the House and Senate during the 2017 legislative session.

If you have any questions or concerns about any proposed legislation, feel free to contact Kim anytime a kteresep@gmail.com.
KCDAA Member Highlight: Jose Guerra

by Nicole Van Velzen, Kansas Prosecutor Editor

In the Summer edition of The Kansas Prosecutor, Jose Guerra was featured in the Milestones section as a new prosecutor in Wyandotte County as of May 2016. He had interned in the Johnson County District Attorney’s office during his third year of law school at the University of Kansas. Because of Jose’s unique background as an immigrant from Ecuador, we wanted to learn more about him and share that with all of you.

Jose grew up in Quito, Ecuador, and moved to the United States almost 10 years before beginning law school. He is the youngest of three brothers, and his immediate family all lives in the United States. Jose’s father has been an educator for more than 55 years and his mother devoted her time to raising her children.

He received a bachelor’s degree from Creighton University and his J.D. from the University of Kansas School of Law. “My background gave me a unique worldview about society and the legal system. I realized the legal system was in essence the building blocks of society. Given that safety was rather fundamental in one’s own hierarchy of needs, the criminal justice system was the cornerstone of the community we lived in,” said Jose.

Experiences during his time in law school ignited Jose’s interest in prosecution; in keeping his community safe, and ultimately in seeking justice. Following his first year of law school, he understood how prosecutors ensured the safety of the community through specific and general deterrence. And during his third year in law school, he was able to play a more active role serving as a legal intern prosecuting cases involving domestic violence. “I was exposed to situations in which prosecutors would often advocate for the safety of household members, in spite of reluctant victims, with the hope of breaking the cycle of violence,” explained Jose.

Jose describes his career path as diverse. He started as a summer intern in Johnson County focused mostly on research and writing in traffic cases; mainly search and seizure issues. Two years later, while still in school, he was a legal intern prosecuting mostly crimes involving domestic violence in Johnson County. Then, as an Assistant District Attorney in Shawnee County, his main focus was the prosecution of cases pursuant to the care and treatment act for mentally ill persons, the revised Kansas juvenile justice code, and the revised Kansas code for care of children. At that time Jose also handled appellate work and covered some adult criminal cases. Now, in Wyandotte County, he is currently prosecuting adult felony crimes.

Throughout all of his experience, Jose has been given the opportunity to practice in front of several judges in different jurisdictions, each with its own distinct and diverse jury pools. He says, “It has been an amazing experience and I am very grateful to have been given the privilege to work in each of these communities.”

As far as advice for new prosecutors, Jose had this to share: “Every case counts. Regardless of how “trivial” a case may seem, every case matters in how you treat victims, witnesses, officers, defense attorneys, and defendants. We must always do our best to make sure people can trust our criminal justice system. As a seasoned prosecutor once said during a training I attended, “[I]t takes an entire career to earn your reputation and the reputation of your office, but only one case to waste it away.”
He goes on to describe what he has learned in his time as a prosecutor: “Prosecution does not happen in a vacuum. The decisions I make on how I prosecute a case will have a deeper impact than just deterring a defendant from re-offending or deterring others from committing the same offense. For instance, the decisions I make in a case involving domestic violence will affect more people than just the defendant. Also, the cases I prosecute are sometimes connected with other cases prosecuted in my county. There are times when a child in need of care will unfortunately become a juvenile offender and eventually will continue to commit crimes as an adult. Therefore, it is helpful to be aware of other cases pending in my office or in other jurisdictions involving those who may be connected to a defendant, a juvenile, or a child in need of care. This helps ensure the safety of others, and sometimes curtails the behavior of those who follow the footsteps of negative role models.

In conclusion, Jose states, “I am grateful that in every district attorney’s office in which I’ve worked there was always an open-door policy. Throughout the years, people have always been willing to help and offer input in cases when needed. I am thankful for those who have helped me throughout the years as a prosecutor and I am grateful to work in a state with prosecutors who are willing to help each other in a moment of need.”

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We want to share your news!

If you have something you would like to share with the KCDAA membership, please keep us informed.

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

Information submitted is subject to space availability and the editorial board reserves the right to edit material. Send your information and photos to:

Editor Nicole Van Velzen
nickiv@gmail.com

Next Deadline: April 14
New Faces

The Wyandotte County District Attorney’s Office is pleased to announce the hiring of Candice Alcaraz. Candice is originally from Chicago, Illinois. Candice graduated from Seton Academy High School then received her bachelor’s degree in Justice Systems from Truman State University and then her law degree from Washburn University School of Law. During law school, Candice was the president of the Moot Court Counsel. She has worked in three law clinics: Family Law/Immigration, Criminal Appellate and Veteran’s Law Clinic: Expungement. She also interned for Kansas Court of Appeals Judge Stephen D. Hill. Candice will be working in the juvenile division.

The Wyandotte County District Attorney’s Office is proud to announce the hiring of Dan Obermeier. Dan is from Olathe, KS and graduated from St. Thomas Aquinas High School. Dan majored in History at the University of Kansas before taking his juris doctorate from Washburn in May 2016. While at Washburn, he served as Vice President of the Moot Court Council and interned at the Johnson County DA’s office, Juvenile Unit. Dan will be prosecuting adult felony cases.

The Wyandotte County District Attorney’s Office is pleased to announce the hiring of Danielle Onions. Danielle is from Shawnee, Kan. and graduated from Shawnee Mission Northwest High School. Danielle received both her bachelor’s degree (Political Science and Women’s Studies) and her J.D. from the University of Kansas. During law school, Danielle served as President of Women in Law. She also interned at the U.S. Attorney’s Office in Topeka and with the Johnson County District Attorney’s Office. Danielle is prosecuting adult cases for Wyandotte County.

The Wyandotte County District Attorney’s Office is pleased to announce the hiring of Nic Campbell. Nic grew up in Nashville, Tennessee. Nic graduated from Halstead High School. He received his bachelor’s degree in Political Science from Washburn University and his juris doctorate from the University of Alabama. While in law school, he volunteered with Habitat for Humanity and interned for both the Wyandotte County DA’s office and for the Tuscaloosa County DA’s Office. Nic also competed on the trial advocacy team and the Criminal Procedure Moot Court Team in law school. Nic will be prosecuting adult felony cases.

Office Changes

Ian Tomasic, Assistant District Attorney, left the Wyandotte County District Attorney’s Office after 3 years. He has moved on to the Department of Homeland Security where he is now the Assistant Chief Counsel.

Kristiane Bryant, Deputy District Attorney, has left the Wyandotte County District Attorney’s Office. Kristiane has moved on to the Jackson County Prosecutor’s Office as an Assistant Prosecuting Attorney.

Johnathan Grube, Assistant District Attorney, has left the Wyandotte County District Attorney’s Office to get his doctorate at K-State University.
Anniversary

Johnson County Chief Deputy District Attorney Chris McMullin celebrated 25 years of serving as a Kansas prosecutor on November 4, 2016. He began his career as a Kansas prosecutor on November 4, 1991 in Sedgwick County.

Photos from the KCDAA Fall Conference
The Kansas County and District Attorneys Association (KCDAA) is pleased to announce its annual award winners who were honored during the 2016 KCDAA Fall Conference at the Hyatt Regency Hotel in Wichita:

- Vanessa M. Riebli, Prosecutor of the Year Award;
- Kim T. Parker, Lifetime Achievement Award;
- John Settle, Lifetime Achievement Award;
- Rep. Blaine Finch, Policymaker of the Year Award; and
- Victor Braden, Associate Member of the Year Award.

**2016 Prosecutor of the Year**

**Vanessa M. Riebli**

Johnson County District Attorney

This award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year. The nominee must be a regular member of KCDAA.

“Over the last year, Vanessa Riebli has had six jury trials. They included domestic violence, aggravated burglary, felony theft, mistreatment of a dependent adult and two murder cases. The Economic Crime / White Collar unit she supervises also filed charges on over 50 individuals who obtained fraudulent drivers licenses. She has also handled numerous hearings on four individuals charged with the murder of a gun store owner in the course of a robbery of the store. This is on top of her duties as Section Chief of her unit.

[In] her last jury trial involving Dale Willis, who was charged with premeditated first degree murder, Vanessa demonstrated excellence in her work both inside and outside of the courtroom. Following a two week trial, the jury came back with a guilty verdict after just one hour of deliberation. Vanessa’s organization, dogged perseverance and litigation skills played a huge role in obtaining justice. Vanessa and her co-counsel, Alex Scott, did a huge service to the community by taking this dangerous individual off the streets.”
Kim T. Parker has been a prosecutor for 34 years, and has dedicated her entire career to serving others.

“She has been a tireless voice and staunch advocate for victims of some of the most horrific crimes our country has suffered. Kim has been lead counsel in over 200 jury trials. [T]he following are some of the most notable crimes she prosecuted, all resulting in victory and justice for victims and their families:

- *Kansas v. Reginald* and Jonathan Carr (Capital Murder and numerous other offenses)
- *Kansas v. Stanley Elms* (Capital Murder)
- *Kansas v. Dennis Rader* (BTK Serial Killer)
- *Kansas v. Marc Warden* aka the Ouija Board Case (First admission in the United States of court testimony via facilitated communication)
- *Kansas v. Scott Roeder* (Murder of abortion provider)
- *Kansas v. Daniel Perez* (Commune leader / multiple sexual assaults and murder)

Kim has been very active in the KCDAA and the NDAA where members have had the benefit of her knowledge and expertise through her numerous presentations. She is considered an expert on trial advocacy, presentation of testimony of witnesses with language disorders, Giglio and Brady matters. Kim has been an active member of both organizations giving a credible voice to America’s prosecutors. She is also very involved in the American Bar Association.

Kim has touched the lives of many young prosecutors, giving them confidence, guidance and direction in their careers. Her advice and wisdom is greatly appreciated. Kim has always had the ability to communicate with victims of violent crime with honesty and compassion; a trait many young lawyers in our office have had the opportunity to observe as a model of respect and justice.”
2016 Lifetime Achievement Award
John Settle
Reno County Senior Assistant District Attorney

This 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.

Former Kansas County and District Attorney Association President John M. Settle was awarded a Lifetime Achievement Award for his longtime professional leadership as a prosecutor during the KCDAA Annual meeting last fall.

Settle began his career as a prosecutor by interning for the District Attorney of the 6th Oklahoma Prosecution District in 1979 before being offered a position as an Assistant District Attorney for that district after graduation from the Oklahoma University School of Law. During his career as an Oklahoma prosecutor Settle also worked as an ADA in the 26th Oklahoma Prosecution District before moving to Kansas in 1988 to manage his family’s Kansas newspaper in Larned.

From 1989 to June of 1995 in between his duties as the managing editor of his family’s newspaper, Settle’s legal career was limited to acting as a GAL in child in need of care cases, representing mental patients in involuntary commitment cases at Larned State Hospital, handling a few court appointments as defense counsel and occasionally covering cases as a prosecutor for then Pawnee County Attorney Terry Gross, who Settle had become friends with.

In late June of 1995 Gross surprised Settle with news he had accepted a position as an assistant attorney general in charge of the prosecution of Kansas’ sexual predators for then Attorney General Carla Stoval. Gross thought Settle might be interested in the Pawnee County Attorney position and offered to recommend him to the Pawnee County Republican Central Committee that would be charged with providing a name to Governor Graves.

Settle didn’t have to think about it for very long and on July 7, 1995 Governor Graves appointed him as Pawnee County Attorney.

From July 1995 to January 9, 2017, Settle served as the Pawnee County Attorney. During that time he also represented the Pawnee County Commission and all county department heads as the County Counselor.

In addition to his responsibilities as County Attorney and County Counselor, Settle worked closely with Steve Kearney and Kearney & Associates on behalf of the county commission in their efforts to coordinate Pawnee County’s lobbying efforts in the Kansas Legislature.

When asked what he liked most about his career as a prosecutor Settle stated, “The best thing about being a prosecutor is the opportunity to do good; to wear the “White Hat.” I get up every day knowing that I am personally going to have the opportunity to make a positive difference in my community each day. It is a great responsibility, as well as a great opportunity that I enjoy and am thankful for.”

KCDAA leadership has been a large part of John’s career as well, serving on the KCDAA Board of Directors for several years before becoming the association’s president in 2003. He also helped establish this publication, The Kansas Prosecutor, during his tenure as president. In addition, he has served on the Criminal Law Advisory Committee of the Kansas Legislative Judicial Council since 2003.
KCDAA Award Winners

State Representative Blaine Finch was honored with the 2016 Policymaker of the Year award.


“Mr. Braden was co-counsel in the prosecution of Kyle Flack, a quadruple homicide capital murder case. The trial commenced in early 2016 and lasted nearly seven weeks. Throughout the nearly three years leading up to the trial, Mr. Braden assisted in structuring a litigation plan, and during the trial he handled specific aspects of the litigation, notably the admissability and usage of the defendant’s statements. Additionally, he made the argument during the penalty phase of the trial. The jury ultimately convicted Mr. Flack, and sentenced him to death.

Throughout the litigation, Mr. Braden displayed a high level of talent and skill in and out of the courtroom. He provided intelligence and wisdom, and conducted himself with honor and pride. He has a true commitment to excellence and an amazing work ethic. He brings honor to our profession.”

Settle currently serves on the Board of Trustees of the Kansas Prosecutor Foundation and as a member of the KCDAA Best Practices Committee.

Settle doesn’t even try to hide how proud he is of the KCDAA and its members stating, “The most exciting thing I have experienced as a Kansas prosecutor was the opportunity to serve as the President of the KCDAA. That was a great responsibility which I enjoyed enormously. It was truly an honor to serve in that position, knowing as I do the tremendous class, character and competence of our Kansas prosecutors.”

Settle is currently serving the citizens of Kansas as Senior Assistant District Attorney for Reno County District Attorney, Keith Schroeder.
Challenging *Smith-Parker*

by Natalie Chalmers, Assistant Solicitor General

If you’ve had to write an appellate brief in the last few years, the odds are good that you’ve come across a defense argument that references *State v. Smith–Parker*¹ and argues: 1) the use of the word “should” in the reasonable doubt instruction was error; 2) any instruction that tells the jury to follow the law is error; or 3) the prosecutor committed error (formerly misconduct) when he or she told the jury to follow the law or to convict based on the evidence presented at trial. This article explains why prosecutors should argue *Smith-Parker* is wrongly decided in hopes of ending these numerous issues.

So why is *Smith-Parker* creating numerous appellate issues? It all stems from the Kansas Supreme Court’s conclusion that the judge telling the jury to convict if all of the elements are proven beyond a reasonable doubt comes close to a directed verdict and amounts to a judge compelling a verdict. In *Smith-Parker*, the following instruction was given: “If you do not have a reasonable doubt from all the evidence that the State has proven murder in the first degree on either or both theories, then you will enter a verdict of guilty.”² In finding the phrase “you will enter a verdict of guilty” erroneous, the court held:

> Although we have rejected a defense argument that a criminal jury should be instructed on its inherent power of nullification, see *State v. Naputi*, 293 Kan. 55, Syl. ¶ 4, 260 P.3d 86 (2011) (juries possess power to decide case contrary to applicable facts and law, i.e., power of jury nullification, but defendant not entitled to instruction on power), the district judge’s instruction in this case went too far in the other direction. It essentially forbade the jury from exercising its power of nullification. Cf. *State v. McClanahan*, 212 Kan. 208, Syl. ¶ 3, 510 P.2d 153 (1973) (“Although it must be conceded that the jurors in a criminal case have the raw physical power to disregard both the rules of law and the evidence in order to acquit a defendant, it is the proper function and duty of a jury to accept the rules of law given to it in the instructions by the court, apply those rules of law in determining what facts are proven and render a verdict based thereon.”).

Both the wording of the instruction at issue in *Lovelace*—“must”—and the wording at issue here—“will”—fly too close to the sun of directing a verdict for the State. A judge cannot compel a jury to convict, even if it finds all elements proved beyond a reasonable doubt.³

From this, appellate defense counsel has divined that any instruction or statement that requires the jury to follow the law negates the jury’s power to commit jury nullification, and thus constitutes error under *Smith-Parker*. Defense counsel’s position is not particularly surprising based on the holding in *Smith-Parker*.

Thus, *Smith-Parker*, if not limited or otherwise explained, is rather bewildering. After all, the power a jury has to commit jury nullification is the power to completely disregard the law and the judge’s instructions. Telling the jury to follow the law in no way prevents jury nullification, as nullification can only occur when the jury disregards the law.⁴ In fact, the Kansas Supreme Court subsequently recognized this fact in *State v. Robinson* when the Court stated: “Indeed, the possibility of jury nullification logically requires, as a necessary precondition, the existence

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². 301 Kan. at 163.
³. 301 Kan. at 164.
⁴. E.g., *State v. Hooks*, 752 N.W.2d 79, 87 (Minn. Ct. App. 2008) (“The jury instructions did not direct the jury not to exercise its extraordinary power of jury nullification. Because the inherently lawless power of jury nullification exists regardless of whether (and particularly when) a judge orders a jury to convict a defendant if the elements are proven, the district court did not err by instructing the jury that it must find Hooks guilty if the state proved all elements of the crime beyond a reasonable doubt.”).
of a mandatory charge from the court, such as ‘shall impose.’”

While Robinson provides support for undermining the conclusion in Smith-Parker, the Kansas Supreme Court noted that the situation was different in Robinson because the language in the death penalty instruction tracked the language in the statute. In that case, the instruction read: “if you find unanimously beyond a reasonable doubt that the aggravating circumstance claimed by the State exists and that it outweighs mitigating circumstances believed to exist, then you shall impose a sentence of death…” Robinson seems to directly contradict Smith-Parker. Even so, the Kansas Supreme Court more recently reaffirmed Smith-Parker in State v. Carter.

In Carter, the court found error when the judge told the jury prior to voir dire that: “It’s only if and when you are convinced beyond a reasonable doubt that what the State alleges occurred, that they have proven their case, the presumption then leaves the defendant and then your obligation becomes to vote guilty, if you are convinced beyond a reasonable doubt.” The Kansas Supreme Court found “[t]elling a jury it has an obligation to find a defendant guilty also all but directs a verdict for the State, and it is error.” But in Carter, the State did not argue Smith-Parker should be modified.

Thus, unless prosecutors urge the Kansas Supreme Court to rethink, or at least limit, Smith-Parker, it seems likely that the numerous issues springing from Smith-Parker will continue.

And there are several reasons Smith-Parker should be reconsidered. First, as noted above, giving the jury a mandate to follow the law does nothing to negate the jury’s raw ability to disregard that mandate.

Second, it not immediately apparent why an instruction compelling the jury to follow the law would be erroneous. As there is no right to jury nullification, precluding the jury from exercising a non-existent right cannot be a statutory or constitutional error. And the Kansas Supreme Court has not pointed to any statutory or constitutional error it believes exists in its limited analysis of the issue. Therefore, it is not clear what error the Court believes is necessary to fix by excising the use of will, must, and other similar language from the reasonable doubt instruction. If anything, the State should attempt to have the Court clarify if it believes it is addressing a constitutional error so that intervention by the United States Supreme Court can be considered.

Third, the Kansas Supreme Court’s conclusion that telling the jury to convict if the State proves its case beyond a reasonable doubt “flies too close to the sun of directing a verdict for the State,” is questionable. In fact, the Colorado Court of Appeals recently disagreed with the Kansas Supreme Court’s opinion while noting that the Court’s analysis was lacking:

Although the court in Smith-Parker held that use of the terms “will” and “must” flew “too close to the sun of directing a verdict for the State,” the court did not provide any analysis for its conclusion. 340 P.3d at 507. By contrast, we are more persuaded by the

6. 303 Kan. at 334.
7. 303 Kan. at 333.
9. 380 P.3d at 204.
10. 380 P.3d at 205.
11. United States v. Davis, 724 F.3d 949, 954 (7th Cir. 2013) (“[J]ury nullification is a fact, because the government cannot appeal an acquittal; it is not a right, either of the jury or of the defendant.” United States v. Perez, 86 F.3d 735, 736 (7th Cir.1996).”); United States v. Thompson, 253 F.3d 700 (5th Cir. 2001) (“Jury nullification is not a ‘right’ belonging to the defendant. [Citation omitted.]”).
reasoning of cases such as *Farina*, where the court concluded otherwise, finding that the use of the word “must” in a reasonable doubt jury instruction did not constitute a directed verdict of guilt. 622 A.2d at 61; see also *Ragland*, 519 A.2d at 1365–73.12

In rejecting the defendant’s attempts to have Colorado follow the logic set forth in *Smith-Parker*, the court noted: “Indeed, based on our research, we agree with the [State] that *State v. Smith–Parker* is a minority—perhaps sole—view on this issue. We have not found, nor has Waller cited, a case from any other jurisdiction agreeing with the holding and reasoning in *Smith–Parker*.”13

Thus, for the above reasons, it is at least possible that, with more analysis, the Kansas Supreme Court may reverse or limit *Smith-Parker*. And, due to the numerous issues being raised on appeal in light of *Smith-Parker*, prosecutors should at least try to have the Kansas Supreme Court reconsider its holding.

**Conclusion**

Until the Kansas Supreme Court thoroughly analyzes the issue, prosecutors should challenge *Smith-Parker*’s viability. At the very least, maybe such challenges will result in limiting *Smith-Parker* to the reasonable doubt instruction issue it squarely addressed. And unless *Smith-Parker* is reconsidered or limited, making any argument or providing an instruction that requires the jury to follow its oath and uphold the law will seemingly have the inevitable fate of winding up as an issue on appeal. 

Absconding from Probation in Kansas, Post-Huckey

by Joseph Uhlman, University of Kansas School of Law Student

The following article was written by law student, Joseph Uhlman. Joseph is a 2L at the University of Kansas School of Law, and recently interned for the Harvey County Attorney’s Office during the summer of 2016, and will intern there again next summer. Joseph intends to pursue a career in criminal prosecution in Kansas after he passes the bar.

In the 2014 case State v. Huckey, the Kansas Court of Appeals significantly altered the caselaw definition of what it means for a probationer to abscond.\(^1\) Prior to this, any failure by a probationer to report to his probation officer was a sufficient basis to find ‘absconder status’ and revoke the probation.\(^2\) After Huckey, the definition of ‘absconds’ is much narrower.

Since its announcement, 20 cases have cited Huckey, and all but three involve dealing with a contested assertion by the state that the probationer absconded.\(^3\) Understanding the implications of Huckey is key to effective prosecution of probation violators. While this is still an unsettled area of law, case decisions in the past year offer principles prosecutors may use as a basis for finding the probationer absconded.

“Absconder” under Huckey

In 2013, the Kansas legislature sought to ease the strain on the state prison system by enacting K.S.A. § 22-3716, which requires imposition of intermediate sanctions for probation violators before their probation is revoked.\(^4\) The statute provides three exceptions to the imposition of an intermediate sanction. If the probationer absconds, commits another criminal offense, or is a danger to himself or his community, the State may seek to have the probation revoked and the underlying sentence served instead of intermediate sanctions.\(^5\)

While in prison on a felony charge, the State charged Randy L. Huckey with possession of contraband.\(^6\) He was subsequently paroled, and was sentenced to a suspended 43 months in prison with a 24-month probation following his plea of no contest to the possession of contraband.\(^7\) Huckey violated his probation, and after an unstated period of time – but at least four months – Huckey turned himself in to authorities for failing to report to his supervisor.\(^8\) The State sought the application of the absconder status to Huckey under K.S.A § 22-3716(c)(8)(B) and revocation of his probation.\(^9\) The district court agreed.\(^10\)

On appeal, the Court stated that to ‘abscond’ means more than simply failing to report.\(^11\) Citing Black’s Law Dictionary, the Court defined ‘abscond’ as: “To depart secretly or suddenly, especially to avoid arrest, prosecution or service of process.”\(^12\) Since Huckey had no other probation violation, the Court held that revocation of his probation was not appropriate, and that Huckey should be subject to the intermediate sanctions outlined by the legislature in K.S.A. § 22-3716.\(^13\)

This ruling alters the landscape of probation revocation hearings in a significant way. As the court in Huckey gave no further specification as to what actions would constitute ‘absconding,’ various avenues have been pursued in attempts to find what grounds form a sufficient basis for this determination. A review of the subsequent cases

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3. A comprehensive list of cases citing to Huckey available at: goo.gl/DopcPU.
6. Id at 452.
citing Huckey reveals four relevant factors to find a probationer “absconded”: (1) admissions of fleeing or eluding authorities by the probationer, (2) follow-up attempts by the probation officer, (3) and the probationer’s use of multiple addresses or leaving the state.

Admissions by the Probationer

1. State v. Croslin: Probationer failed to report to his Intensive Services Officer (ISO) for over a year. When located, he admitted to failing to meet with his ISO because he had an outstanding warrant for his arrest. Based on this admission, the court found him to be an ‘absconder’.14

2. State v. Delpercio: Probationer failed to report to his ISO several times. At his revocation hearing, the probationer admitted to failing to report to ISO because he did not want to test positive for cocaine use. The court found this admission constituted absconding.15

Investigation by the Probation Officer

1. State v. Coffman: Probationer lived at four addresses during her probation that were not made aware to her ISO. Probationer failed to report for at least two months, and investigators could not locate Coffman despite a thorough investigation. The court held that the multiple addresses coupled with the ISO’s multiple attempts at contact constituted absconding.16

2. State v. Jackson: Probationer failed to report after one month of probation. The State moved to revoke probation on the grounds of absconding. The court held that there was no indication that probation officers looked for Jackson, and thus, she was not found to be an absconder.17

Use of Multiple Addresses or Leaving the State

1. State v. Seaman: Probationer failed to report for three weeks, and did not inform his ISO of an address change. Additionally, probationer admitted to not returning any of the phone calls he received from his probation officer. Due to this, Seaman was found to be an absconder.18

2. State v. Anhorn: Probationer failed to report for 3 months, and during that time he moved to Nebraska. He did not leave any information to his ISO about changing his address, and was only found after being arrested following a bench warrant for his failure to report. The court noted that it was not required to determine Anhorn’s subjective intent for moving, rather, the court only had to determine if his actions fit the dictionary definition of absconds. Because he left Kansas without notice, Anhorn was found to have left ‘secretly’ and thus an absconder.19

Possible Alternative Approaches

While designating a probationer an ‘absconder’ is currently difficult, the state can use evidence of failing to report to support arguments that probation should be revoked on other grounds. K.S.A § 22-3716(c)(9) provides that probation can be revoked due to a finding that the that the welfare of the probationer or the safety of the community will not be served by

continuing probation. These arguments will almost certainly appear more substantive to a court than a probationer’s simple failure to report.

The underlying logic in all 20 cases citing *Huckey* appears to designate a shift from focus on technical violations of probation to substantive violations in instances where a prosecutor seeks an individual’s probation revoked. A technical violation of probation is a violation that is not otherwise unlawful, while a substantive violation is unlawful on its own. While the contours of K.S.A § 22-3716(c)(9) do not constitute substantive violations, they provide the courts a better idea of possible future substantive violations that could be used, if the probationer is only given an intermediate sentence.

That a probationer who fails to appear is not having his welfare served by probation is an easy inference. Because of a probationer’s pre-established propensity to commit crimes, it is plausible a probationer might cause further harm to himself or his community. This possibility might appear more likely if the probationer is failing to report to drug treatment post drug conviction, or failing to report for mandatory counseling or treatment after committing a violent offense. A prosecutor who believes a probationer is returning to criminal behavior or self-harm based on his or her failure to appear, must present explicit evidence that continuing probation fails to serve the probationer or the public’s interests.

### Conclusion

*State v. Huckey* has drastically changed the landscape of probation revocation hearings which include a contested ‘absconder status,’ and is likely to remain a watershed case. A prosecutor who seeks to prove that a probationer has absconded should focus his or her attention to evidence of a probationer’s actions that are more substantive than a simple failure to report, such as admissions made by the probationer, information found in investigations done by probation officers, and the probationer’s use of multiple or out-of-state addresses.

Alternatively, focus on specific concerns for the welfare of the probationer or the safety of the community may strengthen a prosecutor’s arguments that a probationer who fails to report should have his probation revoked. While a clear definition of ‘absconder’ remains uncertain, the decision in *Huckey* and subsequent cases citing it indicate that prosecutors must alter their approach when seeking revocation in contested probation revocation hearings.

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As discussed in To Err is Human: A New Outlook on “Prosecutorial Misconduct,” appellate courts across the nation have generally not delineated between “prosecutorial error” and “prosecutorial misconduct.” As such, prosecutors have wrongfully been alleged to have committed misconduct for even the slightest, and most innocent, of mistakes.1

In accordance with recommendations from the American Bar Association, on September 9, 2016, the Kansas Supreme Court, in State v. Sherman, rejected the term “prosecutorial misconduct,” opting, instead, for the term “prosecutorial error.” In doing so, it also struck down that part of the Tosh prosecutorial misconduct test that focused on the prosecutor’s ill intent.2 3 4

Alton Simmons and felony murder

The facts in Sherman read like a modern-day Shakespearean tragedy. Chirod Lewis and his wife, Laura Lewis, were walking home from Thanksgiving dinner when they bummed a ride from the victim, Cecilio Mendez. This prompted Chirod to encourage Laura to connive Cecilio out of money. She flirted with Cecilio, and even offered her phone number. Cecilio was persuaded by her advancements, and offered her money for beer.5

Later that night, while Chirod, Laura, Rozanna Heilig (Laura’s sister), and Rozanna’s boyfriend, Alton Sherman, were together, Laura called and made arrangements to meet Cecilio. Laura took Rozanna with her, later returning with 60 dollars and an agreement from Cecilio to meet the next day.6

On Friday, Laura met Cecilio, but returned home explaining that he was, instead, interested in Rozanna. This prompted Rozanna to tease Sherman about her newfound admirer. Not unexpectedly, this angered Sherman. Still, the group encouraged Cecilio to meet Rozanna at the Lewis home the next night.7

Chirod testified that, on Saturday night, as he was walking around the side of his house to meet Lewis, he felt a strike to the top of his head. Lewis fell forward onto Cecilio who, in turn, fell to the ground. When Chirod looked up, he saw Sherman striking Cecilio in the head with a stick. Cecilio lapsed into a coma and died a few weeks later.8

Sherman was charged with the first-degree felony murder of Cecilio: the underlying felony being the aggravated battery of Chirod. Sherman told the police, which he later claimed was a lie, “that Lewis and [Cecilio] had attacked him and that he inflicted the wounds on Lewis and [Cecilio] in self-defense.”9

Prosecutorial statements in Sherman

During voir dire, the prosecutor told the jury panel that the beyond-a-reasonable-doubt standard was the “highest burden in law, but it doesn’t mean that there can’t be any doubt in the case because there’s always some doubt.”10

5. Sherman, 378 P.3d at 1066.
7. Sherman, 378 P.3d at 1066.
8. Sherman, 378 P.3d at 1066.
10. Sherman, 378 P.3d at 1067.
During closing arguments, the prosecutor “referenced a slide in a PowerPoint presentation that showed Mount Rushmore with Theodore Roosevelt’s face removed. Above the drawing were the words: ‘Do you have a REASONABLE DOUBT this is Mt. Rushmore??’ Below the drawing were the words: “Even though you can’t see all four figures!!”’

The prosecutor then told the jury, “I’m going to show you one diagram though. Not all the gaps are going to be filled by the state in this case. Every case always has some gaps. And like the jury instructions said it’s up to you to listen to the witnesses[‘] testimony and use your life experience and inferences as to what happened in this case. Do you have any reasonable doubt that’s Mt. Rushmore? But there’s a gap. You’re allowed to fill in those gaps, folks.”

Sherman opted to exercise his right to testify, and explained to the jury that “he came out of Lewis’ house only to discover Lewis kneeling over an injured [Cecilio], rifling through his pockets and bleeding from a head injury of his own.” The jury did not believe Sherman’s version of events, and convicted him of the felony murder of Cecilio.

**State v. Tosh: former standard**

At the time of Sherman’s trial, *State v. Tosh* controlled the standard for judging prosecutorial statements. *Tosh* required a court to first determine whether the prosecutor’s statements were outside the wide latitude afforded to prosecutors. If the statements were improper, the court was then required to determine whether the statements prejudiced the jury against the defendant and denied him a fair trial, thereby requiring reversal of his convictions.

As part of the second step, the court was required to consider three factors; “(1) whether the misconduct is gross and flagrant; (2) whether the misconduct shows ill will on the prosecutor’s part; and (3) whether the evidence against the defendant is of such a direct and overwhelming nature that the misconduct would likely have little weight in the minds of the jurors.”

**Court’s concerns with Tosh**

The Sherman Court expressed several concerns with the *Tosh* test. First, it left district courts with no analytical tools to distinguish unintentional prosecutorial error from misconduct, “thus tainting merely negligent prosecutors with ethically tinged court rulings.” Second, it grouped acts of misconduct and error together, diluting the stigmatization of those prosecutors that did commit misconduct, while unfairly stigmatizing those prosecutors who simply committed error.

Third, by focusing on the intent of the prosecutor, courts overlooked the ultimate issue: whether the defendant was denied a fair trial by the statements of the prosecutor. Finally, some courts made the opposite mistake: overturning convictions where the prosecutorial statements were harmless, but “were so egregious as to demand the only recourse *Tosh* left available—reversal.”

The Sherman Court summarized its concerns: “In short, the asymmetrical system of reward and punishment inherent in our particularized harmlessness inquiry resulted in misaligned incentives. Our system can and must foster error-free prosecutions and deter actual misconduct—all

19. *Sherman*, 378 P.3d at 1074  
21. *Sherman*, 378 P.3d at 1074
while safeguarding the demands of justice for the protection of society through fair trials.”

**State v. Sherman: new name & standard**

In addition to rejecting the term “prosecutorial misconduct” and replacing it with “prosecutorial error,” the *Sherman* Court overruled the ‘particularized harmlessness inquiry’ commanded by *Tosh* and adopt[ed] a new, simpler second step.”

Pursuant to *Sherman*, an appellate court must first determine whether prosecutorial error has occurred. “[T]he appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State’s case and attempt to obtain a conviction in a manner that does not offend the defendant’s constitutional right to a fair trial.”

If the prosecutor has committed error, the appellate court must then determine whether the error prejudiced the defendant’s due process right to a fair trial. Prejudice is determined under the *Chapman* constitutional harmless error standard. “[P]rosecutorial error is harmless if the State can demonstrate ‘beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.”

The *Sherman* Court summarized: “In short, we agree with the criticisms of *Tosh* and adopt a modified approach that accords with the best interests of defendants, prosecutors, victims, and society at large.” The Court believed that its “modified approach will more effectively and fairly preserve and protect the integrity of our constitutionally defined criminal justice system.”

**Sherman Court found prosecutor did not commit error**

The State, in *Sherman*, conceded that the “Mount Rushmore” analogy would have been error had it had occurred in the present day. The *Sherman* Court, however, recognized that the prosecutor made these comments “many years prior to” *Stevenson*, where the Court forbade the use of a similar analogy (“Wheel of Fortune” television show) in discussing with the jury the concept of reasonable doubt.

The *Sherman* Court ruled, “We find the Mount Rushmore analogy and the manner it was used in Sherman’s case sufficiently similar to the Stevenson’s Wheel of Fortune analogy to conclude—given that it occurred many years prior to *Stevenson*—that it too may have scuffed the outside edge of the wide latitude afforded prosecutors at the time *Sherman* was tried, but it did not cross it.”

While refusing to exercise supervisory jurisdiction to punish prosecutors who commit misconduct, the Kansas Supreme Court called upon all Kansas courts to enforce a prosecutor’s ethical obligations. When an act of prosecutorial misconduct has occurred, a court should order the prosecutor, in a separate proceeding, to show-cause why he or she should not be held in contempt of court.35

Conclusion

In determining whether prosecutorial error has occurred, a court need only consider whether the statements fell outside the wide latitude given to prosecutors and, if so, whether the statements were harmless under the \textit{Chapman} constitutional harmless error standard. This procedure is fairer to Kansas prosecutors who may not deserve his or her name attached to the term “misconduct,” while at the same time preserving ethical oversight of prosecutors. As such, \textit{Sherman} has redefined prosecutorial error, and placed misconduct back where it belongs; in the realm of ethics. 34

The \textit{Sherman} Court found that the prosecutor did not commit error. “Therefore, we hold that under the somewhat strange circumstances of this delayed appeal, the prosecution did not venture outside the wide latitude given to it at the time of trial.”33

\textbf{Prosecutorial misconduct as an ethical violation}

Although \textit{Sherman} redefined prosecutorial error/misconduct in criminal cases, it did not abandon the term “prosecutorial misconduct.” Prosecutorial misconduct is still alive and well in the context of ethics. Misconduct can be sanctionable behavior if committed with a level of culpability that exceeds mere negligence. “A prosecutor who acts with knowledge and intent outside the wide latitude afforded prosecutors, or with a malicious or gross disregard for the fair trial rights of the defendant, is subject to sanction for such misconduct in a separate proceeding…”34

\begin{itemize}
\item 33. \textit{Sherman}, 378 P.3d at 1080.
\item 34. \textit{Sherman}, 378 P.3d at 1078.
\item 35. \textit{Sherman}, 378 P.3d at 1078-79.
\end{itemize}
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