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Judicial Foreclosures in Kansas:
Recent Developments Following the Subprime Mortgage Crisis
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20 | Judicial Foreclosures in Kansas: Recent Developments Following the Subprime Mortgage Crisis
By David L. McCain Jr.

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Attorneys are always welcome to submit legal or feature article ideas to the Journal. If you are interested in submitting a topic, please contact Beth Warrington, communication services director, at bwarrington@ksbar.org.

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The Journal Board of Editors is responsible for the selection and editing of all substantive legal articles that appear in The Journal of the Kansas Bar Association. The board reviews all article submissions during its quarterly meetings (January, April, July, and October). If an attorney would like to submit an article for consideration, please send a draft or outline to Beth Warrington, communication services director, at bwarrington@ksbar.org.

The Journal of the Kansas Bar Association (ISSN 0022-8486) is published monthly with combined issues for July/August and November/December for a total of 10 issues a year. Periodical Postage Rates paid at Topeka, Kan., and at additional mailing offices. The Journal of the Kansas Bar Association is published by the Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612-1806; Phone: (785) 234-5696; Fax: (785) 234-3813. Member subscription rate is $45 a year. Nonmember subscription rate is $54 a year.

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Tradition . . . the KBA Annual Meeting

As I mentioned in last month’s column, changes have occurred with respect to our annual meeting. Historically and since 2005, the annual meeting has been rotating between three venues, Overland Park, Wichita, and Topeka. Before that, there was a fourth location, Western Kansas, though for some reason (and as a Western Kansas lawyer, I won’t even begin to opine why) the meetings were actually held in Colorado. Since 2005, however, the annual meeting has rotated between the current three venues. Traditionally, the annual meeting has been a three- to four-day event, with a blend of social activities, sporting events, CLE, meetings of various specialty bars, law school luncheons, the bar show, an evening awards banquet and installation dinner, and the like. Finally, the annual meeting, at least in my recent memory, has been held in either May or June. Sometimes we have met at the same time, if not at the same location, with the judicial conference.

Other years, our meetings have not coincided.

Following tradition, this year’s annual meeting is in Topeka. But unlike prior years, it will be held September 18-20, and its length has been shortened by one day. Aside from a golf tournament, and candidate’s forum and reception on September 18, the actual meeting will just be September 19-20. We are not meeting in conjunction with the judges, and rather than a three-day meeting, it will only be two days. There are still CLEs, law school luncheons, social activities, a bar show, a golf tournament and a 5k walk/run, but the awards banquet will be at lunch, rather than in the evening. More details and specifics are available on the KBA’s website, as well as the opportunity to register online for this year’s meeting.

One might ask why the changes? At least I hope someone asks that question, if for no other reason than to justify this column. The fact is, the Board of Governors has been contemplating and considering the annual meeting for some time. In recent memory, it has been studied by two specially created committees and has been the subject of at least two, if not three, surveys. While a long-standing tradition of the KBA and many, if not all, other state bars, the fact is that attendance is not what it used to be. With some exceptions, declining attendance at annual meetings is not unique to the Kansas Bar. It is occurring and has occurred in other state bars as well. While our attendance has generally been steady over the last 10 years or so, it is not what it was before, or frankly what we would like to see. There are many reasons for the drop in attendance. Survey results and anecdotal comments suggest a wide array of reasons members don’t attend the annual meeting. Everything from the economy, concerns about the cost, the increase of specialty bars, the availability of CLE elsewhere, the time commitment, different methods of social networking, and a myriad of other reasons are given.

Financially, the annual meeting has typically been a break even proposition from a direct cost standpoint. Registration fees and sponsorships generally cover the actual costs. But, the annual meeting consumes considerable KBA staff time in planning, organizing, and putting it on. Time, if not spent on the annual meeting, could be spent on other existing projects or programs, or possibly developing new initiatives.

Now, back to why the changes in this year’s meeting. One reason is simply logistics; finding an appropriate location and available hotel space. But as well, the Board of Governors felt some “experimenting” with the time and format was worthy of consideration. The primary changes have been moving the meeting to September, and shortening it by one day. These changes are certainly not set in stone, and in fact, the Board has been and is considering other options or changes; everything from an annual meeting every other year (OK, I do realize that is an oxymoron, and we might have to come up with a different title) to different locations, more emphasis on social events and activities, to more emphasis on CLE, less emphasis on CLE, lower cost, and even whether the annual meeting remains a viable or relevant part of the KBA’s programming and services.

Personally, I feel the annual meeting is valuable and worthwhile. It is a part of our tradition. It is an opportunity for members all across the state to get together at one time and in one location. It can be argued that we need more of that as a profession. But I would also like to see a bigger attendance and an annual meeting that offers more alternatives to what we have been doing. This year’s meeting is just one experimental step in a slightly different direction.

What is clear to me, or at least seems to be, is that to a significant number of our members, the annual meeting is important, and they want it to continue; though the reasons for their feelings in that regard vary widely. I know the annual meeting is not for everyone, nor does it have to be. Every member does not partake of everything the KBA has to offer. But having said that, it is my hope that we can find ways to increase participation and to make the annual meeting more attractive to even more of our members.

For now, I hope you have already registered for this year’s meeting. If you have not, I hope you will, and that you will encourage other attorneys and members of your firm to attend. This year’s planning committee has worked hard to create what I believe will be an exceptional meeting. Hope to see you in Topeka.

About the President

Gerald L. “Jerry” Green is a member of the Hutchinson law firm Gilliland & Hayes LLC. He currently serves as president of the Kansas Bar Association.
ggreen@ksbar.org

(620) 662-0537
**THURSDAY, SEPTEMBER 18** *(MANER CONFERENCE CENTER UNLESS NOTED)*

<table>
<thead>
<tr>
<th>Event Description</th>
<th>Start</th>
<th>End</th>
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<tbody>
<tr>
<td>KBF Golf Tournament (Topeka Country Club)</td>
<td>10:00 AM</td>
<td>4:00 PM</td>
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<tr>
<td>$100/person • $25 KBF donation with mulligans &amp; strings</td>
<td></td>
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<tr>
<td>Driving range &amp; putting greens open for practice • 10 a.m. shotgun start • Lunch</td>
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<tr>
<td>provided on the course Prizes awarded! • 2 drink tickets</td>
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<td>Participant Name</td>
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<td>Please assign me to a foursome. Please assign me to the following foursome:</td>
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<td>Handicap or average score/18</td>
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Please note: the cost of golf is NOT tax deductible

Candidate Forum and Reception                                                      | 5:30 PM | 7:00 PM |

**FRIDAY, SEPTEMBER 19** *(MANER CONFERENCE CENTER UNLESS NOTED)*

<table>
<thead>
<tr>
<th>Event Description</th>
<th>Start</th>
<th>End</th>
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<tbody>
<tr>
<td>Breakfast with Champions for a Diverse and Inclusive Bar</td>
<td>7:15 AM</td>
<td>8:30 AM</td>
</tr>
<tr>
<td>Welcome</td>
<td>8:45 AM</td>
<td>9:00 AM</td>
</tr>
<tr>
<td>U.S. Supreme Court Review <em>(1.0 CLE)</em></td>
<td>9:00 AM</td>
<td>10:00 AM</td>
</tr>
<tr>
<td><strong>PRESENTER: ERWIN CHEMERINSKY</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kansas Appellate Court Update</td>
<td>10:20 AM</td>
<td>11:10 AM</td>
</tr>
<tr>
<td>Online Law Practice Strategies: Law Firm Websites, Content, Social Media, Blogs,</td>
<td>10:20 AM</td>
<td>11:10 AM</td>
</tr>
<tr>
<td>and Your Overall Online Presence <em>(1.0 CLE, 1.0 LPM)</em></td>
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</tr>
<tr>
<td>KBA Awards Luncheon</td>
<td>11:30 AM</td>
<td>1:00 PM</td>
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<td># of guests ____ @ $40/guest • Total $_______</td>
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</tr>
<tr>
<td>Hot Topics in Constitutional Law <em>(1.0 CLE)</em></td>
<td>1:15 PM</td>
<td>2:05 PM</td>
</tr>
<tr>
<td><strong>PRESENTERS: ERWIN CHEMERINSKY &amp; STEPHEN R. MCGILLISTER</strong></td>
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<tr>
<td>Daubert Comes to Kansas – How the Federal Standard Will Be Applied in State Court</td>
<td>2:25 PM</td>
<td>3:15 PM</td>
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<tr>
<td><em>(1.0 CLE)</em></td>
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<tr>
<td>E-filing in State Courts <em>(1.0 CLE)</em></td>
<td>2:25 PM</td>
<td>3:15 PM</td>
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<tr>
<td>Legislative Updates <em>(1.0 CLE)</em></td>
<td>2:25 PM</td>
<td>3:15 PM</td>
</tr>
<tr>
<td>Social Hour with Attendees and Vendors</td>
<td>3:15 PM</td>
<td>4:15 PM</td>
</tr>
<tr>
<td>Foundation Dinner <em>(Reservations taken until Sept. 5)</em></td>
<td>5:00 PM</td>
<td>7:30 PM</td>
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<tr>
<td># of attendees ____ @ $85/person • Total $_______</td>
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Please note: the cost of the dinner is NOT tax deductible

The Bar Show                                                                     | 8:00 PM | 10:00 PM|
| Curtain Call Celebration with Bar Show Cast and Crew                            | 10:00 PM| MIDNIGHT|

**SATURDAY, SEPTEMBER 20** *(MANER CONFERENCE CENTER UNLESS NOTED)*

<table>
<thead>
<tr>
<th>Event Description</th>
<th>Start</th>
<th>End</th>
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</thead>
<tbody>
<tr>
<td>5k Fun Run and Walk @ Shunga Trail</td>
<td>7:00 AM</td>
<td>8:15 AM</td>
</tr>
<tr>
<td>“Just Us” Breakfast with Judges</td>
<td>7:30 AM</td>
<td>8:45 AM</td>
</tr>
<tr>
<td>It’s Not the Fruit, it’s the Root: Getting to the Bottom of Our Ethical Ills <em>(1.0 CLE, 1.0 EP)</em></td>
<td>9:00 AM</td>
<td>9:50 AM</td>
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<tr>
<td><strong>PRESENTER: SEAN CARTER</strong></td>
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Continued on the next page...
SUNDAY, SEPTEMBER 20 (CON’T.) (MANER CONFERENCE CENTER UNLESS NOTED)

START END

Attorneys in Transition: Insights from Differing Practice Perspectives (No Credit) 10:00 AM 10:50 AM
Please select the specific session you’d like to attend:
☐ My Desk, My Office, My Client, Our Firm: Practicing Law in a Large Firm
☐ Government
☐ Solo/Small Firm

☐ Reinvigorate Your Law Firm: Proactive vs Reactive Systems (1.0 CLE, 1.0 LPM) 10:00 AM 10:50 AM

☐ Fall Better: Continuing Efforts to Eliminate Bias in the Legal Profession (1.0 CLE, 1.0 EP) PRESENTER: SEAN CARLIER

☐ Brown v. Board of Education Luncheon (No Credit) 12:15 PM 1:30 PM

Law School Luncheons (Registrant FREE) 12:15 PM 1:30 PM
KU ☐ WU ☐ # of guests ______ @ $40/guest • Total $________

CHECK ALL THAT APPLY (FOR BADGES)

☐ 2014 Annual Meeting Planning Committee Member
☐ Author (Journal or Handbook)
☐ Award Recipient
☐ Board of Governors
☐ Board of Trustees
☐ Committee Chair
☐ Faculty (Meeting Speaker)
☐ First Time Attendee
☐ Guest
☐ Judge
☐ KBA Past President
☐ KBF Fellow
☐ Moderator
☐ Section Officer
☐ Young Lawyer

GOING GREEN

Most conference materials will be available online one week prior to the conference and available on flash drives to all registrants attending the conference. Questions? Call (785) 234-5696.

Name ________________________________________________________________
Firm/Company Name _________________________________________________
Address _______________________________________________________________________________________________________
City __________________________________ State ________ Zip ____________
Phone ______________________________ Fax __________________________
KBA Member # ______________ Email ________________________________

Your name as you’d like it to appear on your name badge:
________________________________________

Guest(s) name as they’d like it to appear on their name badge:
_______________________________________

THREE WAYS TO REGISTER!

1. Mail this registration with payment or credit card information to:

Kansas Bar Association
KBAAM14
1200 SW Harrison St.
Topeka, KS 66612-1806

2. Fax registration to KBA at (785) 234-3813.

3. Register online at (LOG IN FIRST)
www.ksbar.org/event/KBAAM14

Full registration includes 1.5 days of CLE, program materials, and Topeka Bar Show tickets (limit of 2). Foundation Dinner and golf fees are not included. Full refunds for registration will only be issued before Thurs., Sept. 4.

FULL CONFERENCE REGISTRATION

<table>
<thead>
<tr>
<th>Event</th>
<th>Price</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full Conference Registration</td>
<td>$199</td>
<td>$______</td>
</tr>
</tbody>
</table>

PAYMENT INFORMATION

☐ Check Enclosed (Payable to Kansas Bar Association)

☐ Bill to: ☐ MasterCard ☐ Visa ☐ AmEx ☐ Discover

Account Number __________________________________________
Expiration Date ________________________ CVC ____________

Signature ________________________________
A
ugust can be a difficult month. After all, August means
that summer is coming to a (sweating) end—a real-
ization that sneaks up and smacks me over the head, even though it has been many years since I experienced anything akin to the elusive “summer vacation.” It means that the year is more than half over, leading to frank re-
evaluations of goals set during the exuber-
ance of New Year’s Day.

And perhaps above all, August is difficult because it always causes me to reflect on my dear friend, mentor, and former boss, Hon. Robert E. Davis of the Kansas Supreme Court.

You see, the month of August in many ways bracketed our relationship. I began clerking for Justice Davis on August 1, 2006 (the week after I took the Kansas bar exam). I learned quickly that August is a (stealthily) busy month at the Kansas Supreme Court, as each justice and his or her staff work long hours to finish opinions from the past year and to prepare for the first docket of the new term. Justice Davis’ birthday was at the end of August, and we would always celebrate it (and the beginning of the term) over lunch at Chez Yasu in Topeka. I informed Justice Davis in August 2009 that I was going to accept a position with a private law firm in Lawrence. And Justice Davis passed away in August 2010. Thus, though I think of him daily, August seems a particularly fitting time to meditate on Kansas’ former chief justice.

One of the best birthday presents I ever received came by way of a phone call on a gray November afternoon in 2005. My husband, Brandon, and I were rushing around our apartment in Ann Arbor, trying to get out the door for a half-off birthday dinner at a fancy restaurant (a treat anytime, but par-

special: Justice Davis genuinely cared for and respected peo-
ple. As chief justice, he would invite lawyer-legislators to his chambers, and they would discuss in equal parts kids’ soccer games and the need for adequate court funding. One morn-
ing in early 2008 during “court week”—the week of oral argu-
ments—Justice Davis swept in just before having to don his robe and join the other justices on the bench (his assistant and I had been, ahem, concerned about where he might be). I later learned that he was running behind because he had sought out a Judicial Center employee from Kenya on the way in; that country was engulfed in violence in the wake of a disputed election, and Justice Davis wanted to ensure that the employee’s family was safe before he began his day.

Justice Davis had a warmth that made you smile and, at the risk of sounding trite, made you want to be a better lawyer. When he first met my family at the Kansas swearing-in cer-
emony, he grinned and gave my grandmother a hug. His first words to my mom were, “Hi! Call me Bob!” (A brand new attorney, I immediately pulled my mom and stepdad aside and informed them that under no circumstances would they actually refer to him as “Bob.” But looking back on it, I really think he would have preferred it.)

On Christmas Eve in 2006, our house phone rang. When his name popped up on Caller ID, my mind started racing. Was it about a case? Was there a question about a prehear-
ing memo I had drafted? Did I need to do more research? It was none of those things. Rather, Justice Davis explained that every year he reserved Christmas Eve for making personal phone calls to people who had made a difference in his life
and thanking them. And he did. Every year. Even after I left the court and had gone into private practice.

Similarly, while Justice Davis was adept with email and had (often to his chagrin) a Blackberry, he still handwrote letters. He did this to thank people, to congratulate them, to let them know he was thinking of them. One morning, after spending hours writing letters, he came into my office, massaging his tired hand—and beaming. One of the letters he had written was to a former clerk’s newborn baby boy. “Letters,” he said. “Email gets deleted. But years from now, he will have this letter to read and reread. Letters are forever.”

Justice Davis loved his family. His father, Homer Davis, was also an influential lawyer and practiced law for many years in Leavenworth. Homer introduced Justice Davis at his son’s swearing-in at the Kansas Court of Appeals in 1986. And Justice Davis would often talk of his mother and his siblings, and especially about his five children—about taking them on trips when they were growing up, about how he was excited about some new venture or interest of theirs, about how thrilled he was to spend time with each of them.

The last years of his life—the time I knew him—were, to an outside observer, fraught with sadness. Four of his five children lived on the west coast, and he seldom saw them. His youngest son had health challenges, along with the normal trials and tribulations of being a teenager. His wonderful wife, Jana, struggled with lupus and passed away in 2007. He endured at least two major surgeries during the course of my clerkship. And then, of course, there was the merciless cancer that seemingly came out of nowhere and ravaged him for the last months leading up to his death.

Yet you would never know. Justice Davis loved life and loved the law. Every day as he walked down the third-floor hallway of the Kansas Judicial Center from the elevator to chambers, he would whistle. You could always hear when he was coming.

In May 2010, when he was in the midst of his harsh cancer treatments, I called Justice Davis’ cell phone. I had just won my first summary judgment motion after a harrowing four-hour hearing; in a strange twist of fate, the hearing had taken place in Leavenworth, where Justice Davis had presided as a district judge; his (much younger) portrait was hanging on the wall behind the podium where I argued.

Over the phone, I could tell he was obviously in pain, and his voice sounded so weak. Yet he laughed and whistled again. “Well done, Sarah. You’re a lawyer. We are lawyers. Now call your client.”

Justice Davis would have turned 75 last month. He passed away on August 4, 2010. I miss him so very much—and I think our profession does, too.

About the YLS President

Sarah E. Warner is an attorney at the Lawrence firm of Thompson Ramsdell Qualseth & Warner P.A. She serves as an adjunct professor at Washburn University of Law, serves in leadership positions with the Kansas Association of Defense Counsel and Douglas County Bar Association, and is a member of both the KBA Appellate Practice Section executive committee and Board of Publishers.

sarah.warner@trqlaw.com

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A fundraiser for Kansas Legal Services.

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57 Years Ago in 1957

Fifty-seven years ago, in 1957, a special committee of the Kansas Bar Association recommended the establishment of the Kansas Bar Foundation to the KBA Board of Governors. The committee envisioned an organization that would provide a vehicle for KBA members to give their time and money to support programs in Kansas that enhance equal justice. Over the years, the KBF has provided almost $4 million for programs that meet its mission to serve the citizens of Kansas and the legal profession through funding charitable and educational projects that enhance the welfare, honor, and integrity of the legal system by improving its accessibility, equality, and uniformity. The additional mission of enhancing the public opinion of the role of lawyers in our society has been supported as lawyers generously volunteer their time to programs that provide pro bono services.

Four times a year, the 28 members that make up the KBF Board of Trustees meet to provide oversight and planning for the foundation. Several of the programs that they regularly provide updates for and help administer include:

- The KBF Scholarship Program for Law Students
- The Kansas Mock Trial Program for High School Students
- The Investment Committee
- The Law Related Education Committee
- The Fellows Program
- The IOLTA Program

The last two programs listed are the programs that enable the KBF to support the other programs listed. The IOLTA program provides thousands of dollars each year to support organizations, such as Kansas Legal Services, Kansas CASA, YMCA Safe Visit, YWCA Wichita Women's Crisis Center, the National Institute of Trial Advocacy-Kansas program, and many other similar programs. You can read more about the IOLTA program at http://www.ksbar.org/grants.

The Fellows Program is designed for Kansas attorneys who commit at least $1,000 to the KBF. This commitment can be made at once or through $100 annual payments over 10 years. Fellows are recognized at its annual recognition dinner for the Fellows of the Kansas Bar Foundation. Attorneys who sign a Fellow pledge form, complete their pledge, and meet the next giving level are all recognized.

In addition, the foundation presents the Robert K. Weary Award to an attorney or law firm selected by the Board of Trustees. The Robert K. Weary Award or “Weary” Award was first given in 2000 to recognize Robert K. Weary for his exemplary service to the goals of the KBF. This year, Fellows and any KBA member who would like to learn more about the Fellows Program and see the Weary Award presented, can attend the annual recognition dinner on September 19 in Topeka. The Board of Trustees invite you to attend and learn more about the foundation and to explore opportunities to be a volunteer and or a donor. In honor of 57 years of operation, consider giving the KBF a donation of $57 dollars or even $5,700! It is time to celebrate what KBA members established in 1957!
Mobilize!
Some Tips to Improve Documents for Mobile Devices

Your audience probably isn’t reading your documents. They’re reading the content, to be sure—clients rely on your letters, judges have to read your arguments, colleagues thrill to your memos. When they read the content, however, it is likely not in the form or format you created when you drafted the document. Increasingly, people read email and legal documents on mobile devices, which alter or eliminate document formatting.

The crank says: Who cares? The important thing is the words. As long as the substance comes through, what difference does it make if the reader looks at the document on paper, a tablet computer, a phone, or a stone slab?

As a writer trying to hang onto an audience, content is only half the battle. A document’s appearance is crucial to keeping audience attention. Just as we present ourselves carefully for important meetings and court appearances, we should take care to present our documents in a helpful form. Page layout, font size and style, and other “visual components of the written word” help readers stay tuned in and digest the substance of what they are reading.

As a document goes from the formatting of the word processing software to the mobile device’s visual presentation, its appearance may change dramatically—and it’s a good idea to make sure that the presentation remains effective no matter where or how the audience views the document.

I. Emails

Most readers check email on a phone. Whether you’re emailing marketing materials or substantive memos, that message displays on a screen that is about 5 inches long and 2 or 3 inches wide. Effective document design for emails, therefore, must account for the screen size and the amount of scrolling readers must do to read the entire document.

A. Subject line

Help your readers by labeling the email with a meaningful but brief subject line. If the subject line is too general, the email’s importance may be lost. If, however, the subject line is too long, it won’t all appear in a mobile inbox.

Compare the following subject lines:

SUBJ: Jones Case
SUBJ: Jones case: Ideas for Argument on Failure to Mitigate Damages
SUBJ: Jones: Failure to Mitigate

The first example is too vague and general. It leaves readers without a clue about the email’s content or importance. The second example, although specific enough to be useful, is too long for a mobile device. On a phone, the second example would probably appear as “Jones case: Ideas for…”, erasing its helpfulness.

The third example is optimal for a mobile device. It is concise enough that the entire line will appear in the mobile inbox, and specific enough that readers can tell at a glance what the email is about and why it is important. Craft a subject line that front-loads key information in the first four or five words, focusing on what your readers most need to know about the email’s subject.6

B. Body

Writing emails as though they are printed letters is ineffective for mobile readers. In the email’s body, consider what will appear on that tiny phone screen. Most of the content won’t appear on the first screen. If the most important information appears in the second paragraph or later, readers will have to do a lot of scrolling to get there, and their attention may be lost. If the email is too long, it may take significant time to download to a mobile device, and readers may skip it altogether.

To improve email readability on mobile devices, put the most important information at the front. Bullet-point the key points or action items as a kind of introduction to the email. For instance, compare the images below of emails responding to my request for help for this essay.7 Both are screen captures from my phone. On the left is one in a letter-like format, thanking me for some gifts before getting to the substance—which does not have room to appear on the screen at all. On the right is the same content, improved for a mobile reader.

Footnotes
1. The clerk of court for the Fifth Circuit U.S. Court of Appeals reports that most of that court’s judges read briefs on iPads. Raymond P. Ward, How U.S. 5th Circuit Judges Read Briefs, LOUISIANA CIVIL APPEALS (Oct. 8, 2013), http://raymondward.typepad.com/la-appealate/2013/10/how-us-5th-circuit-judges-read-briefs.html. Although no official survey exists, it seems likely that this trend is not limited to the Fifth Circuit.
2. A lawyer’s audience is usually forced to read most of what the lawyer writes, as a matter of either need or professional duty. That the audience is compelled does not mean the audience is paying optimal attention.
6. Id.
7. Thanks to my sister, Amy Allshouse, for her help.
8. Notice how the subject line is improved from the first email in the mobile-optimized email.
For long memos or newsletters containing detailed analysis, bullet-point the content in the email and attach a PDF file with the longer version. Readers can get the gist on the mobile device and settle into the analysis later.

Besides length, images and hyperlinks can make email obnoxious for a mobile reader. Do not include images, including firm letterhead graphics, in your email, unless you have the technical expertise to make the images appropriate for mobile devices. On a mobile device, images can take up too much space and interfere with downloading. If you include hyperlinks in the email, make sure they are far enough apart that readers can tap the desired link without accidentally tapping others. Finally, try it out: Send your email to yourself to see what it looks like on your mobile device before sending it to others.

II. Briefs

Judges and law clerks likely will read briefs on an iPad or another tablet computer. Tablet readers can significantly alter the appearance of briefs, as well as the experience of reading them. It can be tough to adjust brief formatting for mobile readers because court rules dictate much of document design. Even within those constraints, however, there are a few ways to improve document presentation for readers using an iPad or other tablet.

A. Footnotes

The tablet reading experience makes footnotes a nuisance. Reading a paper brief, the eye can move easily from the main text to the footnoted reference. By contrast, on a tablet, footnotes require readers to scroll to the bottom, losing their place in the text—and the more footnotes, the more often readers must scroll. The risk, of course, is that readers will skip the footnotes.

The solution: Use footnotes sparingly, if at all. Keep citations in the text. This advice contradicts many advocates of good legal writing, who argue that in-text citations constantly interrupt the text and needlessly lengthen paragraphs. Although those points are valid, the stylistic advantages to putting citations in footnotes are lost if the reader is using a tablet. There is too great a chance of annoying the reader. Moreover, if citations appear on the tablet as hyperlinks, it is far more advantageous to have the links right next to the propositions they support. For tablet readers, footnotes are out, at least until the software improves.

B. Subheadings

Consider changing the method of labeling subheadings when writing for readers likely to read on a tablet or other mobile device. On paper, the appearance of subheadings tells readers about the relationships between sections. That information may be lost on a tablet, which prevents readers from flipping back and forth and often erases indentations, italics, and other formatting clues.

Daniel Sockwell, writing in the online Columbia Business Law Review, suggests using scientific numbering in briefs. Thus Part One, Section Two, Subsection One would be labeled “1.2.1.” Another approach, perhaps more familiar to judges and other law-trained readers, would retain traditional labels but convey all the levels appropriate to each subpart. Thus Part One, Section Two, Subsection One would be labeled “1.B.1.” Either approach conveys the relationship between the argument’s various sections at a glance, even without formatting.

Along with these tips, it is worth reconsidering almost every aspect of document design for mobile devices. Legal writing has developed conventions for typeface, font size, margins, justification, and spacing based on printed (or typed) documents. Both court rules and daily professional practice reflect these conventions. But what works in print may be ineffective on a screen. To make sure your audience gets the complete message, consider how that message will appear when the audience actually reads it.

About the Author

Joyce Rosenberg teaches Lawyering Skills and directs the Externship Clinic at the University of Kansas School of Law.

jorose@ku.edu

In a future column, we would like to answer your legal writing questions. Email questions to pkeller@ku.edu with the subject line SUBSTANCE & STYLE. You can also mail your questions to Pam Keller, University of Kansas School of Law, 1535 W. 15th St., Lawrence, KS 66045.
Honoring Our Founders

It was tempting to use the headline “When I was a Nun Back in the 60s” again because we got more feedback than usual about that article on meditation in the June issue of this Journal. I know the headline was what pulled people in and I also know I can probably never top that. So we’re back to a more mundane headline, but a very important topic and I hope you’ll read on.

KALAP board members and staff saw the need for additional resources for those lawyers who wanted and needed help but did not have the financial ability to pay for it and so a few years ago they established the KALAP Foundation. Jack Focht wrote a moving article about the need for the Foundation that appeared in this publication in June 2012. He urged members of the profession to take care of their own, for a number of reasons. For one, it reflects well on the profession when we police ourselves, help those who have hit a rough patch and thus avoid ethical lapses and public disapproval. And it’s the right thing to do. (Plus, it is tax deductible.)

The Foundation began with some seed money donated by a malpractice insurance provider and has grown some from individual donations. We have not had a big, statewide formal fundraising effort. Some of us who support the Foundation have made memorial contributions to it when a person associated with KALAP has died. And I would suggest this to each of you as a wonderful way to honor a colleague or friend – living or deceased.

Along those same lines, a board member has proposed that the Foundation establish Scholarship Funds bearing the name of two of the people who were instrumental in starting the whole lawyer assistance movement in Kansas back in the 1970s: Wayne Hundley in Topeka and Cliff “Teno” Ratner in Wichita. Both were members of the very first board appointed by the Supreme Court under the then newly revised Rule 206. Wayne was the first chair and Teno was the second. Teno died in 2009 and the Supreme Court passed a Resolution, which said in part:

WHEREAS, Teno Ratner was the catalyst in the initial establishment of a movement in which recovering lawyers reached out to other lawyers to help them address a problem with alcohol, this movement having found expression and embodiment in many local bar committees, the former Kansas Bar Association Committee on Impaired Lawyers and ultimately the Kansas Lawyers Assistance Program; and . . .

NOW THEREFORE it is resolved that Clifford “Teno” Ratner be, and hereby is, gratefully commemorated for his many achievements, particularly his role as a founder of the Wichita Bar Association Lawyer Assistance Committee and the Kansas Lawyers Assistance Program.

There can be few more lasting and reverential ways of celebrating a person’s life and legacy than to help perpetuate the good works that person accomplished. Donations to these scholarship funds will do just that.

“All well and good,” you say, “but what will this money be used for?” A timely and proper question that deserves a straightforward answer. The two things I believe that are most important for you to know are: (1) The money will be paid to treatment providers to obtain evaluations and treatment for Kansas lawyers who are working with KALAP to improve their health, whether substances, mental illness, or other debilitating conditions are involved, and who are determined to be financially unable to secure such assistance on their own. (2) The IRS, in its Form 1023 application for tax exempt status, requires the KALAP Foundation to have proper procedures in place, and there is a committee which will use a set of criteria adopted by the Foundation board to review all applications and financial statements and assure that all monies are disbursed properly.

One other item you should know. Valley Hope was one of the first treatment centers in the nation and the first in Kansas, opening its first facility in Norton in 1967. It too has a Foundation. Over the years many attorneys have found sobriety after treatment at Valley Hope, and a couple of them have set up a sub-fund within the Valley Hope Foundation to help provide treatment for Kansas lawyers. The Valley Hope Foundation is separate from the KALAP Foundation but provides yet another avenue to help Kansas lawyers.

If you know Wayne Hundley, or knew Teno Ratner, or know any Kansas lawyer helped by KALAP or by Valley Hope, send a contribution to honor them today.

Contributions may be sent to:
KALAP Foundation
PO Box 1247
Salina, KS 67402

About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission since its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.
On my first day of law school, I felt extremely nervous, but a sense of calm spread over me when I saw a friendly face behind the circulation desk of the law library. He greeted me by name and made some small talk about classes. This conversation gave me the false sense of security I needed to tackle my first day of law school. I felt like I somehow had a leg-up because I had worked in the law library since my sophomore year of undergrad. KU Law was full of familiar faces and stories, and I thought I knew exactly what to expect for my first year of law school.

I always knew I wanted to go to law school, and while working in the law library I spent time gathering information, as if I was an undercover reporter. I observed the professors as they passed through the entrance of the library reading blurbs about co-faculty publications or greeting former students. I continuously questioned the library staff about resources and classes, wanting to know which study aids students preferred, what research projects were going on, and when I should expect the students to turn into zombies because finals were nearing. I eagerly absorbed advice from students, who were all-too-willing to avoid getting back to reading for the next day’s class to impart some of their wisdom to me. They would groan about the everyday life as a law student, but none could smother their impassioned speeches about how that day’s class challenged their personal beliefs and shaped their views, or how after that first summer internship, their legal path was clear as day.

The generosity of the law school’s library staff, faculty, and students, who spent numerous hours mentoring me during my path to law school, caused me to want to practice law more than they ever could have anticipated. I felt like I was a part of KU Law before ever being admitted and because of that I could go into my first day of classes with some security. I did, however, find out the security was false. I hid in the last row of the class thinking I would be safe. To my horror, I was called on first in our first class to brief the first case. Hours of hoarding information and intently absorbing anything that might be useful was quickly thwarted. I was frozen, bright red in the face, hands shaking, going completely blank on what was the skill I needed for my first year because of my past interests and experiences and that this would be what continues to truly influence my legal journey.

I was strongly involved in my sorority in undergrad. Through that organization, we planned events to raise awareness for women’s rights through Circle of Sisterhood, an organization that uses the strength of sorority women to help eliminate educational barriers for women around the world. I joined Women in Law because of advice I received while working in the law library. I continued my involvement because the organization furthers my interests in women’s rights and allows me to use my contacts and skills from undergrad by combining forces with KU sorority women. Last year I founded a babysitting program that creates a relationship between KU sorority women and KU law students who have children. We are also teaming up with KU sorority women for a philanthropy event to encourage women to register to vote, and I am excited to help co-plan “Pub Night” this year, a fundraiser that Women in Law puts on to raise money for Willow Domestic Violence Center.

I came into law school thinking I knew what was in store. I quickly learned I was in the exact same position as every other first year law student. Even though working in the law library could not have prepared me for what my first year would be like, that was irrelevant. I had started preparing for law school long before because my legal journey will be shaped from my own experiences. My path as an attorney is far from clear as I enter my second year of law school, but it is my own.

About the Author

Addison Polk is a 2L from Wichita who received her Bachelor of Arts in Spanish from the University of Kansas. She is the vice president of the KU Women in Law Society and the 2L representative for Phi Alpha Delta. Polk is pursuing the Advocacy, and the Business and Commercial Law certificates, as well as participating in the Project for Innocence and Post-Conviction Remedies Clinic.
often grouse that Kansas courts still struggle to adopt the technologies of the Victorian era. Specifically, we too frequently disfavor the telephone for simple hearings or appearances when several hundred miles of driving will do nicely. (It is important to support the state’s oil industry.) An opportunity to spring into the 21st century of technology is now presented through the independent work of the Judicial Branch Videoconferencing Committee and Johnson County District Court.

The committee's Recommendations for Videoconferencing in Kansas Courts were released in April 2014 for a 60-day public comment period. Those recommendations may be found at the Judicial Branch website (direct link at http://bit.ly/1n2Ww7Z). The formation of the committee and the preparation of the recommendations are a direct response to comments and suggestions accumulated from the public in the Kansas Supreme Court Blue Ribbon Commission reports which concluded that videoconferencing could produce cost savings and efficiencies for the courts and parties alike. As the recommendations suggest, those benefits have been realized in other states.

Prior to the 2000s, videoconferencing was really not a practical suggestion. Most of the technology required for real-time, simultaneous audio and video transmission over distance required specialized equipment and services. The communication points (camera, microphone, and video display) were priced for government or corporate pocketbooks and the data pipe to connect the points often bore price tags that made your eyes water. As a result, most of the experience and statutes noted by the committee are from the criminal code because government-to-government videoconferencing was really all that was economically feasible. That has completely changed.

**The Johnson Experiment**

Johnson County District Court has leapt ahead in deploying videoconferencing using a service called Blue Jeans (bluejeans.com). Blue Jeans is a videoconferencing provider with apps available for both PC and Mac worlds, as well as iPhone and Android smartphones and tablets. For the court, setting a videoconference hearing is as simple as clicking an add-on button in Outlook. An email notice is created which, when accepted by the email recipient, sets a hearing on the recipient's calendar and provides all the click-through access links to the videoconference. Judge James F. Vano is probably the most vocal proponent of the technology, and I joined a demonstration he arranged with just three clicks. Similar services are available from Citrix's GoToMeeting, Google's Hangout, Skype, etc. but Blue Jeans is a fast-moving competitor with a streamlined product. Notably, none of these established services would pass muster with the Committee draft recommendation requiring witnesses to provide IP addresses in hearing requests. That is a relic of older, point-to-point services made irrelevant with modern cloud providers like Blue Jeans. The court issues the hearing ID and credentials. Parties just click into the hearing.

Audio and video quality as tested had minimal lag or compression artifacts even on Wi-Fi and smartphone. There are occasional periods when video and audio are not fully synchronized and it looks like a poorly dubbed film. Picture quality can also degrade or briefly freeze on slow connections. The Committee’s technical recommendations require that audio and visual recordings must be synchronized and undistorted, so it is not clear whether these normal issues in services like Blue Jeans can meet that requirement. Nevertheless, the minimal issues encountered in the demonstration certainly did not negatively impact or impair the videoconference. In this area, the perfect can be enemy to the good.

With the technological and economic barriers to videoconferencing largely removed, progress now shifts toward changing attitudes of judges, attorneys, and parties and establishing reasonable procedures for videoconferencing. Procedures should not be too difficult, but the committee's first draft reveals some dated ideas and, in some cases, introduces requirements for videoconferencing which exceed the requirements of in-person hearings. As Judge Vano notes, making videoconferencing easier (and cheaper) than in-person hearings encourages its use, helping everyone. Some small tweaks to the proposed procedures and standards can avoid that and incentivize videoconferencing.

**Hearts and Minds**

A more significant barrier will be the attitudes of judges, attorneys, and parties. The telephone is older than Huck Finn and yet we still struggle with widespread, reliable allowance of telephonic hearings. Some issues are purely technical – like when a courthouse has only two phone lines – but mandating in-person appearance frequently serves other aims. Though not always explicitly stated, some courts favor in-person appearances for docket management to help limit pleadings and hearings. Another purpose has been to “raise the price of poker” so parties spend more time in settlement negotiations if long, expensive travel is involved in litigation. Some courts will even use in-person appearances to keep a thumb on a particular attorney. Making cost-effective videoconferencing available to attorneys and parties runs counter to those sorts of considerations, and it seems unlikely to seep into common use any more quickly or broadly than phone conferencing has.

At some point, Supreme Court rules or even legislative action through statute might be helpful to requiring courts to favor remote appearance solutions. Our profession needs a nudge to encourage us to follow experimenters like Judge Vano. We are now to the second generation, at least, which has seen great distance conquered by cheap, reliable technology. That public, ostensibly served by the legal system, has grown impatient with time travelling backwards to the Victorian era whenever it must interact with the legal system. Videoconferencing can push us forward toward the public rather than pulling the public backwards to us.

**About the Author**

**Larry N. Zimmerman** is a partner at Zimmerman & Zimmerman P.A. in Topeka and an adjunct professor teaching law and technology at Washburn University School of Law. He is one of the founding members of the KBA Law Practice Management Section.

kslpm@larryzimmerman.com
Members in the News

Changing Positions
Andrew J. Goodwin has joined Seigfreid Bingham P.C., Kansas City, Missouri, as an associate.
Jennifer N. Horchem has joined Slawson Companies, Wichita, as associate general counsel.
Grant Klise has joined Triplett, Woolf & Garretson LLC, Wichita, as a summer associate.
Allison D. Kuhns is the new Clark County attorney and new owner of Woolwine-Kuhns LLC, Ashland.
Catherine A. Zollicker has joined Martin, Pringle, Oliver Wallace & Bauer, Overland Park, as a summer clerk.

Changing Locations
The Henry Law Firm P.A. has moved to 9225 Indian Creek Parkway, Ste. 1150, Overland Park, KS 66210.

Scott M. Mann has become part of Mann Tucker Muir LLC, 6201 College Blvd., Ste. 625, Overland Park, KS 66211.
David P. Trevino has started his own practice, Trevino Law Office L.C., 120 E. 9th St., Ste. 202, Lawrence, KS 66044.

Miscellaneous
Hon. Larry D. Hendricks has been appointed to the Judicial Qualifications Commission, Topeka.
Hon. Kathleen M. Lynch, Kansas City, Kansas, was given the Community Outreach and Education Award by the Kansas District Judge Association.
Ali N. Marchant, Wichita, has been named to a four-year term as a workers compensation administrative law judge.
Amanda Marshall, Goddard, received the Robert F. Bennett Award from the University of Kansas School of Law.
Polsinelli earned the Beacon of Justice Award: Innovative Pro Bono Efforts at the National Legal Aid and Defender Association 2014 Exemplar Award Dinner in Washington, D.C.
David J. Rebein, Dodge City, has been elected to serve as 2014-15 treasurer and Eagles Chair for the Kansas Association for Justice.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.

Obituaries
Walter N. Scott Jr.
Walter N. Scott Jr., 83, of Topeka, died August 9 at Legend at Capital Ridge. He was born October 27, 1930, in Topeka, the son of Walter N. Scott Sr. and Agnes S. Scott. He graduated from Seneca High School, Washburn University, and Washburn University School of Law. Scott served as an officer in the U.S. Air Force from 1952-1955, was a lifetime member of the Kansas Bar Association, and was past president of the Topeka Bar Association.
He is survived by his children, Cynthia Scott Anderson, of Monument, Colorado, Walter N. Scott III, of Broken Arrow, Oklahoma, Carol Steves, of Topeka, Todd Scott, of Kansas City, Missouri, and Susan Jones; two sisters, Peggy Kimbrough, of Topeka, and Sylvia Foreman, of San Clemente, California; and 12 grandchildren.

Elder Law and Real Estate, Probate & Trust Law Conference
Thursday, October 9 • Friday, October 10
Courtyard Marriott
310 Hammons Dr.
Junction City, Kansas

Save the Date!
More details coming soon

www.ksbar.org  |  September 2014  17
2014 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from April through June 2014. Your commitment and invaluable contribution is truly appreciated.

Christopher Allman, U.S. Attorney’s Office, District of Kansas, Kansas City, Kansas
John J. Ambrosio, Ambrosio & Ambrosio Chtd., Topeka
Kathleen Ambrosio, Ambrosio & Ambrosio, Topeka
John Anderson, Shook, Hardy & Bacon, Kansas City, Kansas
Tony Andersen, McAnany Van Cleave Phillips P.A., Kansas City, Kansas
Gary Ayers, Foulston Siefkin LLP, Wichita
Mark Bassigninthewightle, Esq., ALPS, Olathe
Ronnie Beach, Conflict Resolution Services Inc., Lawrence
Hon. Robert D. Berger, U.S. Bankruptcy Court, Kansas City, Kansas
Dave Berson, Berson Law Group LLP, Leawood
Doug Bonney, ACLU Foundation of Kansas, Kansas City, Missouri
Andrea Boyack, Washburn University School of Law, Topeka
Kevin Breer, Breer Law Firm, Overland Park
Jim Calloway, Oklahoma Bar Association, Oklahoma City, Oklahoma
Christopher V. Carani, McAndrews, Held & Malloy Ltd., Chicago
Heather Cessna, Kansas Appellate Defender Office, Topeka
Mary Christopher, Goodell Stratton Edmonds & Palmer LLP, Topeka
Lori Church, Kansas Association of School Boards, Topeka
Joseph Colantuono, Colantuono Bjerg Guinn LLC, Overland Park
Patricia N. Colloton, Anti-Human Trafficking Unit, Office of the Kansas Attorney General, Topeka
Will Covey, U.S. Patent & Trademark Office, Alexandria, Virginia
Mark Cowing, Shook, Hardy & Bacon, Kansas City, Missouri
Dennis D. Crouch, University of Missouri School of Law, Colombia, Missouri
Toby Crouch, Foulston Siefkin LLP, Overland Park
Dr. Bud Dale, Law Offices of Bud Dale, Topeka
Dustin J. Denning, Clark Mize & Linville Chtd., Salina
Thomas Diehl, Ralston Pope & Diehl LLC, Topeka
Pat Donahue, Disability Professionals, Lawrence
Diana Edmiston, Glaves, Irby & Rhoads, Wichita
Marc Elkins, Cerner Corp., Kansas City, Kansas
David P. Eron, Eron Law P.A., Wichita
Hon. Robert J. Frederick, Finney County Courthouse Div. 1, Garden City
Hon. Phillip M. Fromme, Coffey County Courthouse Div. 1, Burlington
Webster Golden, Stevens & Brand LLP, Lawrence
William H. Griffin II, Chapter 13 Trustee, Overland Park
Natalie Haag, Capitol Federal Bank, Topeka
Danielle Hall, Kansas Bar Association, Topeka
Jan Hamilton, Chapter 13 Trustee, Topeka
Jerry Hawkins, Hite Fanning & Honeyman LLP, Wichita
Stanton Hazlett, Office of the Disciplinary Administrator, Topeka
Pascale Henne, Pascale Henne, Business Law Advisors LLC, Lenexa
J. Todd Hiatt, Shawnee County District Attorney’s Office, Topeka
Jane Chandler Holt, Blue Cross Blue Shield, Kansas City, Missouri
Patrick Hughes, Adams Jones Law Firm PA, Wichita
Don Hymer, Johnson County District Attorney’s Office, Olathe
Thomas L. Irving, Finnegan, Henderson, Farabow, Garrett & Dunner LLP, Washington, D.C.
Eric L. Johnson, Spencer Fane Britt & Boyer LLP, Kansas City, Missouri
Sarah Johnson, Kansas Appellate Defender Office, Lawrence
Hon. Janice Karlin, U.S. Bankruptcy Court, District of Kansas, Topeka
Cynthia Lutz Kelly, Topeka Public Schools, Topeka
Amanda Kiefer, FH LLC, Overland Park
Kimberly Knoll, Office of the Disciplinary Administrator, Topeka
Rebecca Kreisman, PNC Investments LLC, Overland Park
Michael Lampert, Ropes & Gray LLP, Boston
Nathan Leadstrom, Goodell Stratton Edmonds & Palmer LLP, Topeka
L.J. Leatherman, Palmer Leatherman White & Dalton LLP, Topeka
Brian L. Leininger, Leininger Law Offices, Leawood
Shawn Leisinger, Centers for Excellence, Washburn University, Topeka
Patrick M. Lewis, Law Office of Patrick Lewis, Olathe
Andrew Mayo, Kansas Court of Appeals, Topeka
Stephen McAlister, University of Kansas School of Law, Lawrence
Katie McClain, Manson & Karbank, Overland Park
J. Kyle McCurry, Stinson Leonard Street, Kansas City, Missouri
Lori McMillen, Washburn University School of Law, Topeka
Mira Mdivani, Mdivani Corporate Immigration Law Firm, Overland Park
Joseph N. Molina III, Kansas Bar Association, Topeka
C. Robert Monroe, Stinson Leonard Street, Kansas City, Missouri
Valerie Moore, The Law Offices of Valerie L. Moore LLC, Lenexa
Scott Nehrberg, Foulston Siefkin LLP, Overland Park
Hon. Russell F. Nelms, U.S. Bankruptcy Court, Northern District of Texas, Fort Worth, Texas
In July/August issue of the KBA Journal, the “2014 Legislative Wrap-Up” incorrectly listed a proposed change to the school finance bill as having been passed into law. This proposal would have allowed home-schooled or private school enrollees to receive a property tax credit ranging from $1,000 – $2,500, depending on the number of children who met the requirements. This proposal was removed from the final version of the bill prior to its passage.

In addition, the article also discussed the Corporate Education Tax Credit Scholarship program. To clarify, under HB 2506, corporations will be eligible for tax credits if they donate to a newly established scholarship fund that will pay for low-income students to attend private schools. The scholarship granting organizations created in the bill to collect and disperse scholarship money will have oversight from the Kansas Department of Revenue.

The KBA apologizes for this error. If you have any question please feel free to contact Joseph Molina, Director of Legislative Services, at joem@ksbar.org.
Judicial Foreclosures in Kansas: Recent Developments Following the Subprime Mortgage Crisis

By David L. McCain Jr.
Although the Kansas economy seems to be improving, Kansans are still recovering from the financial market collapse of 2008. One of the primary causes of the collapse was the subprime mortgage crisis, which involved out-of-control subprime lending practices, mortgage backed securities, and collateralized debt obligations. Because of the subprime mortgage crisis, states saw an increase in foreclosure filings. Kansas was no exception. Thus, Kansas state courts began to see a variety of new and not so new issues relating to real estate foreclosures.

Nationally, the current pace of foreclosure filings has decreased over the past year. That also is true in Kansas. Nevertheless, Kansas courts still are being faced with a variety of legal issues stemming from foreclosure actions filed after the 2008 market collapse. This article will examine some of the recent foreclosure issues addressed by Kansas state courts since the beginning of the subprime mortgage crisis.

I. Development of MERS

Before turning to a discussion on our Supreme Court’s Landmark decision, a general overview of the MERS mortgage registration system is in order. MERS is a national electronic database that tracks changes in mortgage servicing rights and beneficial ownership interest in loans secured by residential real estate. In other words, MERS is similar to a “transfer agent” because it stands in the place of a lender during a real estate transaction and keeps track of mortgages so the lender does not have to record them locally each time a mortgage is sold or otherwise assigned.

MERS is a member-based organization made up of thousands of lenders, servicers, sub-servicers, investors, and government institutions. But MERS “does not originate, lend, service, or invest in home” mortgage loans. Instead, MERS serves only as the nominee or agent for the holder of a promissory note for loans registered on the MERS system. Loan originators and secondary market players pay membership dues and per-transaction fees to MERS in exchange for the right to use and access MERS’ records. Currently, MERS is involved in the origination of more than 60 percent of all mortgage loans in the United States.

MERS was designed to improve the efficiency and profitability of the mortgage markets. The primary market in the home mortgage industry mainly consists of consumer loans. Usually, those loans are evidenced by a promissory note and secured by a security instrument, such as a mortgage or deed of trust. The originator often sells the real estate loans on the secondary market to investors. Once on the secondary market, loans may be sold numerous times or bundled into mortgage-backed securities. When residential mortgages started to be securitized on the secondary market in the 1990s, many local recording officers struggled to keep pace with the increasing requests to record assignments and other associated transactions.

Traditionally, each transfer of a real estate loan included an assignment of the security instrument (usually a mortgage or deed of trust) so that it could be recorded in the local register of deeds where the real property securing the note was located. MERS created an electronic national recording system that mitigates chain-of-title problems that often resulted from the delays associated with filing in county recording systems.

Certainly, MERS provides a more centralized and efficient way to record mortgages than the old system of recording each transfer with a county register of deeds. Indeed, MERS gives each loan a unique identifier which is accessible online and organized in one nationwide system. In addition, lenders and other members of the mortgage finance industry save money by recording mortgages under MERS’ name rather than in the name of the lender because recording with MERS allows financiers to avoid local recording fees. Ultimately, those savings can be passed on to consumers, reducing mortgage lending costs.

MERS, however, is not perfect. In fact, MERS has been criticized or sued for the following: evading county recording fees, creating potential clouds on the title of real property, insulating predatory lenders, and creating a decay in the accuracy of public real property records. Those criticisms are justified. For example, decay in the accuracy of public real property records could make it more difficult for attorneys and title companies to determine whether a
property has a lien, or the owner of the lien. Even so, the benefits of MERS seem to outweigh its burdens, and it’s unlikely that the system will go away in the near future.

II. The Kansas Supreme Court’s Landmark Decision

In recent years, courts across the United States have had to determine the role that MERS actually plays in the real estate foreclosure process. In Kansas, Landmark National Bank v. Kesler involved an attempt by MERS to set aside a default judgment. The debtor, Kesler, obtained a $50,000 loan from Landmark National Bank (Landmark). To secure the loan, Kesler provided Landmark with a real estate mortgage. The mortgage was duly recorded with the register of deeds in Ford County.25

Approximately a year later, Kesler obtained an additional loan of $93,000 from Millennia Mortgage Corp. (Millennia), which was secured by the same real property. A second mortgage was recorded in Ford County to secure the new loan.24 The second mortgage listed MERS as “nominee” for the lender, Millennia.25 Later, the second mortgage may have been assigned to Sovereign Bank (Sovereign). Sovereign may have taken physical possession of the promissory note, but the assignment of the second mortgage was not recorded.26

Eventually, Landmark filed a foreclosure action naming both Kesler and Millennia as defendants.27 Because neither defendant filed an answer, the trial court entered default judgment against them.28 Subsequently, MERS joined Sovereign’s motion to set aside or vacate the default judgment.29 Citing K.S.A. 60-219(a), Sovereign argued that MERS was a contingent necessary party to the foreclosure action.30 The trial court disagreed, holding that MERS was not a real party in interest and therefore Landmark was not required to name it as a party to the foreclosure action.31

On appeal, the Kansas Supreme Court affirmed. In reaching its decision, the Landmark Court reasoned that “the relationship that MERS has to [the lender and its assigns] is more akin to that of a straw man than to a party possessing all the rights given a buyer.”32 In other words, MERS as nominee simply serves as an agent to the lender and its assigns. Thus, it possesses “few or no legally enforceable rights beyond those of a principal with whom the nominee serves.”33

The primary holding of Landmark was straightforward: MERS had the rights and duties as an agent to its principal and it was not a contingently necessary party to the foreclosure action. While the Landmark decision explained the limited role MERS plays in the foreclosure process, parts of the opinion have been used to raise a variety of other legal issues in foreclosure actions.

III. Foreclosure Issues Arising After Landmark

Separation of Note and Mortgage

One of the primary issues that Kansas state courts have dealt with since Landmark involves the separation of the promissory note from the mortgage. For instance in U.S. Bank N.A. v. Howie, the debtor argued that a promissory note was irreparably severed from the mortgage because the promissory note and the mortgage were held by separate entities.34 To support its argument, the debtor relied on the following language from Landmark:

The practical effect of splitting the deed of trust [or mortgage] from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust.35

The trial court rejected the debtor’s argument, holding that even if the note and mortgage had been severed, any severance was cured by MERS’ subsequent assignment of the mortgage to U.S. Bank.36 On appeal, the Kansas Court of Appeals affirmed, relying on different grounds than the trial court.37 Specifically, the Howie Court determined that MERS, as the initial holder of the mortgage, was acting as an agent of U.S. Bank the holder of the note. Thus, the note and the mortgage were never severed, and U.S. Bank had standing to foreclose on the mortgage.38

The Court of Appeals was faced with a similar issue in MetLife Home Loans v. Hansen.39 In that case, the debtor and junior lienholder argued that ownership of the promissory note and mortgage had irreparably split when the note was endorsed and assigned between various banks.40 Accordingly, the junior lienholder and debtor argued that the bank currently holding the promissory note either lacked an interest in the debtor’s real property, or held an unsecured interest that was inferior to the junior lienholder’s interest.41 The Hansen court held that the bank holding the promissory note had standing to file a foreclosure action because, as a downstream assignee of the note, it retained a beneficial interest in the mortgage.42

A similar issue was raised in U.S. Bank N.A. v. McConnell.43 There, the debtors argued that the bank could not foreclose because it was not the holder of the note and mortgage on the day the foreclosure action was filed.44 The McConnell court held that because a mortgage follows a promissory note, a bank holding the note has standing to pursue a foreclosure action.45

Likewise, the Court of Appeals reached the same conclusion in Sun Trust Mortgage Inc. v. Giardina.46 In that case, the debtors argued that the mortgage was rendered unenforceable because it was separated from the note at its inception.47 Moreover, the debtors contended that there was no evidence that MERS was acting as the foreclosure bank’s agent.48 Specifically, the debtors maintained that there was a question of fact as to whether MERS held the mortgage as the bank’s agent because the bank failed to come forward with a document authorizing MERS to assign it the mortgage.49

In rejecting the debtors’ arguments, the Sun Trust court reasoned that a mortgage—even if held by another entity—is not separated from the promissory note if the holder of the mortgage serves as the agent of the holder of the note.50 Under the undisputed language of the mortgage, MERS acted as the express agent of the bank. Consequently, the bank currently
holding the promissory note did not need any documents other than the mortgage itself to establish the agency relationship or that the note and mortgage were never separated.\(^5\)

All four of the cases discussed above are examples of arguments raised following the Kansas Supreme Court’s *Landmark* decision. Although *Landmark* focused on determining whether MERS was a contingently necessary party to a foreclosure action, creative attorneys have used portions of the opinion to challenge other aspect of the foreclosure process. Even though none of those arguments have succeeded, the recent opinions from the Court of Appeals have helped clarify the role MERS plays in the foreclosure process.

**IV. Practical Tips for Attorneys Handling Foreclosures in Kansas**

In addition, the cases following *Landmark* contain practical advice that must be considered when handling Kansas foreclosures. Indeed, the influx of foreclosure related litigation stemming from the 2008 economic crisis has given Kansas courts the opportunity to analyze new issues and further clarify previous decisions. The analysis and the inferences that can be drawn from recent appellate decisions provide attorneys with guidance for handling foreclosures in Kansas. Below are some practical tips for attorneys to consider when handling Kansas foreclosures.

**Who Holds the Promissory Note?**

Regardless of whether an attorney is representing a debtor or creditor, he or she first must determine the entity that currently holds the promissory note. As discussed in *Hansen* and *McConnell*, a mortgage follows a promissory note. In other words, “[t]he transfer of an obligation or debt secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.”\(^5\) As a result, the holder of a promissory note will have standing to bring a foreclosure action.\(^5\) If an attorney is representing a creditor, then he or she will need to determine whether the client actually holds the promissory note before filing a foreclosure action. If the client does not currently hold the promissory note, then it should have the note assigned to it before initiating foreclosure proceedings.

Conversely, if an attorney is representing the debtor, he or she should ensure that the party filing a foreclosure action currently holds the promissory note for which the mortgage serves as security.\(^5\) Determining the current holder of the promissory note is important because the debtor might have a valid defense to the foreclosure action if the foreclosure party does not currently hold the note.

**Is Quiet Title an Option?**

Another practical tip for attorneys is to understand the differences between a quiet title action and a foreclosure action. In Kansas, and other judicial foreclosure states, the foreclosure process can be quite long because the parties must go through the traditional litigation process.\(^5\) Moreover, Kansas law provides defendant owners with the right to redeem the foreclosed property within 12 months from the day of sale.\(^5\) Unlike Kansas, non-judicial foreclosure states have a streamlined foreclosure process.\(^5\) Some attorneys may be tempted to use a quiet title action as a way to shorten the length of time necessary to complete the judicial foreclosure process.\(^5\)

But as stated in *Bank of Blue Valley v. Duggan Homes Inc.*, the Court of Appeals noted that “K.S.A. 60-1002[b] ‘extends the right to the property owner to bring an action to quiet title against any and all types of liens which have ceased to exist or which have become barred [by a statute of limitations], whether the lien was that of a mortgage or of some other character.’”\(^5\) Said differently, it may be possible to use a quiet title action as an alternative to a foreclosure action, but only when the mortgage has ceased to exist or is unenforceable because of the statute of limitations. If there is a valid mortgage, however, a foreclosure action is the only means by which “a senior lienholder [can] strip the real property of known or recorded junior liens.”\(^5\)

In Kansas, “the statute of limitations for an action on a promissory note and mortgage is 5 years.”\(^6\) And “an action to foreclose a [mechanic’s lien] shall be brought within one year from the time of filing the lien statement, but if a promissory note has been attached to the lien statement in lieu of an itemized statement, the action shall be commenced within one year from the maturity of said note.”\(^5\) Based on the applicable statutes of limitation, an action to quiet title would rarely be a viable alternative to the judicial foreclosure process. While it’s certainly possible that a creditor may sit on its rights and allow the applicable statute of limitation to run, it’s unlikely. As a result, attorneys in Kansas should not depend on the theory of quiet title as an alternative to the judicial foreclosure process.

**Are Multiple Parties or Claims Involved?**

Attorneys also need to be mindful about all of the parties and claims that may be involved in a foreclosure action. For instance, many different parties might have an interest in the property being foreclosed.\(^5\) Moreover, any counterclaims that arise out of the same transaction or occurrence must be raised during the foreclosure action.\(^5\) While this point seems like common sense, failure to understand all of the potential parties and all of the potential claims can influence the length of the foreclosure process and may affect the parties’ substantive rights. Real estate transactions, especially commercial transactions, are much more complex than they used to be. Often times, multiple lenders and debtors are involved with the transactions. Transactions typically include commitment letters, promissory notes, mortgages, guaranty agreements, assignments, and potentially dozens of other documents tailored for each individual transaction.

Because of the increased complexity of real estate transactions, many modern foreclosure actions involve multiple parties and claims. Hence, attorneys participating in Kansas foreclosure actions need to understand who needs to be joined as a party as well as what claims and defenses need to be asserted. For instance, when a foreclosure action presents multiple claims or parties and the trial court enters a judgment for fewer than all of the parties or fewer than all of the claims, the judgment is final only if the court expressly determines there is “no just reason for delay.”\(^5\) Indeed, “a trial court, intending to enter a final judgment on less than all claims or against less than all parties, must make an express determination that there is no just reason for delay and must expressly direct the entry of judgment. These must appear affirmatively in the record, preferably by use of the statutory language.”\(^5\) *Prime Lending II LLC v. Trolley’s Real Estate Holdings LLC* illustrates this problem.
In *Prime Lending*, a lender brought an action to foreclose a mortgage on real property located in Overland Park. The defendants filed responsive pleadings and counterclaims against Prime Lending. Before a judgment was entered, the defendants individually filed for bankruptcy. Because of the bankruptcy filings, Prime Lending was prevented from pursuing its foreclosure action until the bankruptcy court’s jurisdiction ended or until it was granted relief from stay. After some of the bankruptcy cases were dismissed, the trial court issued a memorandum decision granting Prime Lending’s summary judgment as a matter of law. The trial court’s decision, however, was not final because it did not resolve the defendants’ counter claims, and because at least one of the defendants’ bankruptcy proceedings had not been resolved.82 Approximately a week later, the trial court entered its journal entry of judgment of foreclosure.69

About a month later, the trial court entered an order of sale, which directed the Johnson County sheriff to advertise and conduct a judicial sale of the real property secured by the mortgage. The property was sold to Prime Lending based on its high bid of $2.2 million.70 Subsequently, the trial court granted Prime Lending’s motion to certify its memorandum decision granting summary judgment as a final judgment under K.S.A. 2012 Supp. 60-254(b).71

On appeal, the Court of Appeals held that neither the trial court’s memorandum decision of summary judgment nor its journal entry of judgment of foreclosure was sufficient to establish a final judgment.72 In addition, the court held that the trial court could not retroactively make its memorandum decision granting summary judgment a final judgment. The *Prime Lending* court reasoned that the trial court’s retroactive certification created a major problem for the court and the defendants. The court noted that if it were to determine that the prior memorandum decision was validly certified as a final judgment as to the defendants and they had failed to timely appeal from the prior memorandum decision, it would be required to dismiss the appeal as untimely.73 Thus, the appeal was dismissed.74

In *Prime Lending II*, the failure to ensure that the trial court’s decision contained the necessary “no just reason for delay” language increased the time and expenses associated with its foreclosure action. Indeed, the finality of the foreclosure in *Prime Lending II* was delayed because of the bankruptcy filings, the filing of counterclaims, and the appeal. And after the appeal was dismissed, more proceedings were required at the trial court level before a final judgment could be entered.83

Although some of the time delay in *Prime Lending II* was unavoidable, the time and expenses associated with the foreclosure action could have been reduced if the attorneys had a full grasp of the parties and claims involved. Attorneys representing parties in a foreclosure action can avoid this pitfall by understanding the parties and claims involved and the potential effects that those parties and claims can have on the foreclosure process.

**Knowledge of Bankruptcy Law**

Finally, attorneys participating in Kansas foreclosure actions must have a good understanding of bankruptcy law. Debtors may use bankruptcy and the safeguards of the automatic stay as a method to delay or prevent foreclosure. In part, the automatic stay forbids any entity from committing “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.”73 In some instances, even lawsuits against co-debtors are stayed.76 Once a debtor has filed for bankruptcy, “all legal or equitable interests of the debtor in property as of the commencement of the case” becomes property of the bankruptcy estate.77 As a result, creditors are barred from collecting on the mortgage debt or recovering the property unless they are granted relief from the automatic stay or the bankruptcy action is dismissed.78

Because the automatic stay halts—at least temporarily—the foreclosure process, attorneys representing creditors must take an active role in a debtor’s bankruptcy proceedings to protect their interest. If the debtor petitions under Chapter 7, all the debtor’s assets are included in the bankruptcy estate, which is administered by a bankruptcy trustee.79 The trustee gathers all of the debtor’s non-exempt property, sells it, and distributes the proceeds to creditors.80 At the end of the process, the creditors have their proportional share of whatever the debtor had, and the debtor is discharged from the remaining outstanding debts.81

Typically, a Chapter 7 bankruptcy lasts four to six months.82 During that time, the foreclosing party may seek relief from the automatic stay under two circumstances: (1) if the debtor had defaulted before the bankruptcy petition was filed; or (2) if the debtor defaults during the pendency of the case.83 If relief from the stay is granted, then the foreclosing party may restart the foreclosure process.84 But even if relief from the stay isn’t granted, the real property still serves as collateral for the loan. Thus, the secured creditors of the property can seek recovery under the terms of the note and mortgage following the closure of the bankruptcy case.85 So even though a Chapter 7 bankruptcy can temporarily stop foreclosure proceedings, if the debtor has a mortgage on the property, that debtor will still face foreclosure proceedings following bankruptcy.

A Chapter 13 bankruptcy, however, presents a much different scenario. Generally, a Chapter 13 bankruptcy focuses on using future earnings, rather than accumulated assets, to pay creditors.86 The debtor gets to keep all of its assets, but has to turn over a portion of all of his or her future income for a minimum of three years.87 For more than half the debtors in Chapter 13, their single biggest asset is their home.88 Those debtors structure their Chapter 13 plans around their home mortgage payments to avoid foreclosure. Specifically, Chapter 13 debtors may “cure and maintain” their mortgage default under their bankruptcy plan, i.e., they are permitted to catch up on the past due arrearage while making current payments on the mortgage as they come due.89 If the debtor makes all payments under the plan, then that debtor will receive a discharge and emerge from the bankruptcy with a current loan.90 Thus, Chapter 13 debtors may be able to avoid bankruptcy altogether.

Generally, people facing foreclosure are suffering financial difficulties. Accordingly, petitioning for bankruptcy, which can delay or prevent foreclosure, might be a viable option for a debtor facing foreclosure. Likewise, attorneys participating in Kansas foreclosures must understand the features of the bankruptcy process and the impact that it can have on a foreclosure.
V. Conclusion

Kansas, as well as most other states, is still recovering from the financial market collapse of 2008. The collapse caused many Kansas citizens to default on their mortgage loan obligations, which ultimately led to foreclosure proceedings and the loss of their homes. But through this crisis, Kansas courts have had the opportunity to address a wide range of judicial foreclosure issues. Because of the arguments that have been raised since 2008, Kansas attorneys know the proper role that MERS plays in the foreclosure process.

In addition, the courts’ decisions contain practical advice that must be considered when handling Kansas foreclosures. Specifically, attorneys practicing foreclosure-related law in Kansas must determine the entity that currently holds the promissory note, understand the difference between quiet title and foreclosure, understand the parties and claims involved in the action, and understand bankruptcy law. As a judicial foreclosure state, the foreclosure process in Kansas can be quite long because the parties must go through the traditional litigation process. Consequently, it has taken time for the foreclosures that followed the 2008 collapse to make it through the court system, and it might take another year or so for all of those cases to work their way through the appellate system.

Regardless of the number of foreclosures, foreclosures will continue to occur. This article has provided Kansas attorneys an overview of the recent development in judicial foreclosure law along with practical advice for attorneys handling Kansas foreclosure cases.

About the Author

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Judicial Foreclosures in Kansas

21. For instance, in Jackson County v. MERScorp Inc., 915 F. Supp. 2d 1064, 169-72 (2013), the county clerks of Missouri filed a class action
complaint alleging unjust enrichment and prima facie tort. The basis for
the clerks’ unjust enrichment allegation was that MERS gained priority
through an initial recording of deeds of trust, but later transferred the
deeds of trust without recording the transfers and without paying the
applicable recording fees. Rejecting the clerks’ arguments the court held that
“there is no duty to record assignments under Missouri law.” Because no
duty to record existed under Missouri law, MERS was not unjustly en-
riched by failing to record each transfer.


(2009).

24. Id.
25. Id.
26. Id.
27. Id. at 531.
28. Id.
29. Id.
30. Id.
31. Id. at 532.
32. Id. at 539.
33. Id. at 538.

(2012).

36. Id. at 692.
37. Id. at 702.
38. Id.
40. Id. at 216.
41. Id.
42. Id. at 225.
44. Id. at 896.
45. Id. at 901.

opinion).

47. Id. at * 6.
48. Id.
49. Id. at * 7.

50. See Landmark, 289 Kan. at 540.
2d at 901.

53. See McConnell, 48 Kan. App. 2d at 892, discussed in Part III.

P.3d 696, 702 (2013) (“to grant summary judgment in a mortgage fore-
closure action, the trial court must find undisputed evidence in the record
that the defendant signed a promissory note secured by a mortgage, that
the plaintiff is the valid holder of the note and the mortgage, and that
the defendant has defaulted on the note.”).

55. “In the judicial foreclosure states, the mortgage holder must file an
action in court and obtain a court decree authorizing a foreclosure sale.
. . . . The plaintiff must show that there is a valid mortgage between the
parties and that it is the holder of the mortgage or, otherwise, is a proper
party with authority to foreclose. The homeowner may respond to the
lawsuit in a fashion similar to other civil cases and raise defenses to the
foreclosure. If the homeowner defaults or the plaintiff otherwise prevails,
the court may enter a judgment of foreclosure and order the sale to pro-
cceed.” Renuart, supra note 9, at 139-40.

56. K.S.A. 60-2414.
57. Jennifer M. West & Daniel A. West, The New Face of Foreclosure in
Missouri: A Look at Statutory Procedure and Both Statewide and National
Trends Following the Great Recession, St. Louis Bar Journal (November 2014) (when compared to Kansas, Missouri’s foreclosure process is much
shorter because the process is governed primarily by the loan documents
and Missouri statutes. If the foreclosing party has provided the necessary
documents to its attorney, then the average time for a non-judicial foreclo-
sure in Missouri is approximately 60 days).

58. See Bank of Blue Valley v. Duggan Homes Inc., 48 Kan. App. 2d 828,
59. Id. at 836 (emphasis added).
60. Id.
P.2d 520, 521 (1996). Generally, Kansas law provides that the accelerate-
ration clause in a promissory note or mortgage dictates when the statute of
limitations begins to run in a foreclosure action. If the entire debt becomes
due on the failure to make payments, then the statute of limitations begins
to run with the default. If but if the acceleration clause gives the holder
of the promissory note the option to mature the entire debt upon default,
then the statute of limitations does not begin to run until the holder ex-
erises the option to accelerate the entire amount. Kennedy v. Gibson, 68
Kan. 612, 617, 75 P. 1044 (1904). If the holder elects not to exercise the
option upon default, then “the statute would not run earlier than the time
originally fixed for the maturity of the note.” Id.
62. K.S.A. 60-1105(a).
63. Some examples of parties that might have an interest in the property
being foreclosed include the following: tenants; other lenders; counties;
former spouses or other relatives; and subcontractors that have supplied
material, equipment, or labor on the subject property (mechanic’s liens).
64. K.S.A. 60-213(a); Loving v. Fed. Land Bank of Wichita, 244 Kan.
96, 99, 766 P.2d 802, 804 (1988) (“It is well established in Kansas that the
failure to assert a compulsory counterclaim prevents a party from bringing
a later independent action on that claim. It is clear that the claims asserted
in the present action should have been asserted in the earlier foreclosure
action.”).
65. K.S.A. 60-254(b).
68. Id. at 855.
69. Id. at 849.
70. Id.
71. Id.
72. Id. at 853.
73. Id. at 854; see K.S.A. 2012 Supp. 60-254(b),
74. 48 Kan. App. 2d at 857.
77. 11 U.S.C. § 541(a)(1).
78. 11 U.S.C. § 362(d).
79. Elizabeth Warren & Jay Lawrence Westbrook, The Law of
80. Id.
81. Id.
82. West & West, supra note 57, at 12.
83. Id.
84. Id.
85. Id.
86. Warren & Westbrook, supra note 79, at 275.
87. Id.
88. Id. at 301.
89. Id.; 11 U.S.C. § 1322(b)(5).
90. West & West, supra note 57, at 13.
CIVIL
ADOPTION
IN RE N.A.C.
SEDGWICK DISTRICT COURT
COURT OF APPEALS – REVERSED AND APPEAL
DISMISSED FOR LACK OF JURISDICTION
NO. 109,208 – JULY 11, 2014

FACTS: Mother gave birth to N.A.C. on the sidewalk in front of a sandwich shop in Wichita. N.A.C. was born six weeks prematurely, weighed less than 5 pounds, and tested positive for cocaine. N.A.C. was placed into police protective custody that same day. H.G. and D.G. (Maternal Cousins from Idaho) appealed from the district court’s order (1) finding that the Department of Social and Rehabilitation Services (SRS) failed to make reasonable efforts or progress toward finding an adoptive placement for N.A.C., (2) removing N.A.C. from the custody of SRS for adoptive placement, and (3) granting custody directly to S.D. and D.D. (Foster Parents) with court approval to adopt. Court of Appeals concluded the district court’s finding regarding the lack of reasonable efforts by SRS toward finding an adoptive placement was not supported by substantial competent evidence, which in turn divested the court of its legal authority to remove N.A.C. from the custody of SRS for adoptive placement or grant legal custody directly to Foster Parents for adoption. Court of Appeals reversed the district court’s finding regarding reasonable efforts, vacated the court’s orders regarding custody, and remanded the case while the Department for Children and Families proceeds with and finalizes adoption placement.

ISSUE: Adoption

HELD: Court held that the Maternal Cousins’ claim that K.S.A. 2012 Supp. 60-2102 confers appellate jurisdiction and allows an appeal from any final order in a CINC proceeding under the Revised Code lacked merit. Court focused on whether the order was appealable under K.S.A. 2012 Supp. 38-2273(a), which specifically limits the types of orders that can be appealed in a child in need of care case under the Revised Kansas Code for Care of Children. Under that statute, appealable orders are limited to “any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights.” If an order in a child in need of care case does not fit within those five categories, it is not appealable. The terms “order of temporary custody,” “adjudication,” and “disposition” are terms of art within the Revised Kansas Code for Care of Children with particular meanings assigned within its context. The Revised Kansas Code for Care of Children creates a legislatively designated framework of sequential steps of judicial proceedings with each step occurring in a specific order leading toward permanency in the child’s placement. Applying that framework, the temporary custody hearing and order comprise the first step in the proceedings. The second step involves the adjudication. The third involves the disposition. An order terminating parental rights is the last appealable order under K.S.A. 2012 Supp. 38-2273(a). Court held that a post-termination permanency order issued under K.S.A. 2012 Supp. 38-2264(h) is not subject to appellate review. Court held that the court lacked jurisdiction to review the case.

DISSENT: Justice Johnson dissented and would hold that the Court had jurisdiction to consider the appeal under K.S.A. 2012 Supp. 38-2273 and the plain language of the statute, including the term “any.”


EMPLOYMENT, CIVIL SERVICE, AND SHERIFF
DENNING V. JOHNSON COUNTY
SHERIFF’S CIVIL SERVICE BOARD ET AL.
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 104,318 – JULY 11, 2014

FACTS: Johnson County Sheriff’s Department Master Deputy Maurer cracked a department vehicle’s windshield with a binder while attempting to shoo a bothersome horsefly. Maurer initially reported the incident by writing “crack in windshield—rock” on a yellow sticky note and leaving the note for his commanding officer, Sgt. Greenwood. The next morning, Maurer briefly spoke with Greenwood and advised him the crack on the windshield had “spiderwebbed” as the result of a rock chip. But another deputy who witnessed the horsefly incident soon reported that Maurer caused the damage when he hit the windshield with the binder. Maurer eventually responded to questions regarding the incident in two separate written reports and disclosed additional facts regarding his role in damaging the windshield. After an internal investigation and hearing before an internal review board, Johnson County Sheriff Denning terminated Maurer’s employment for violating the department’s professional standard on truthfulness. In doing so, Denning adopted the position of the review board recommending termination based on Maurer’s false statements in the sticky note and his verbal statement to his commanding officer indicating the windshield damage was caused by a rock rather than Maurer’s own actions. Maurer appealed to the Johnson County Sheriff’s Civil Service Board (CSB), and the CSB reversed Denning’s decision and ordered Maurer’s reinstatement. Denning appealed to the district court, and the district court reversed the CSB’s decision and remanded the case to the CSB for further proceedings. Maurer appealed the district court’s decision to the Court of Appeals, which dismissed the appeal for lack of jurisdiction, reasoning that the district court’s decision to remand the case to the CSB for further proceedings was not a final order. On remand, the CSB reversed itself, upholding Denning’s decision to terminate Maurer. Maurer appealed to the district court, and the district court affirmed the CSB’s second decision.
Maurer appealed to the Court of Appeals, and the panel majority affirmed both district court decisions, ultimately upholding Maurer’s termination. Judge Leben dissented and would have affirmed the CSB’s first decision upholding Maurer’s reinstatement.

ISSUES: (1) Employment, (2) civil service, and (3) sheriff

HELD: Court agreed with Maurer that in this case the plain language of K.S.A. 19-4327(b) and (d) authorizes the CSB to receive and consider evidence for and against a dismissal in determining the reasonableness of the sheriff’s personnel decision, to approve or disapprove of the sheriff’s decision, and to make appropriate orders based on its findings and conclusions. Court rejected Denning’s argument that the CSB either had no authority, or had only limited authority, to review his personnel decision. However, Court held the CSB exceeded its scope of authority in this case because it failed to understand or apply the reasonableness standard, and its failure to understand that standard is demonstrated by the lack of evidentiary support for its own decision.

DISSENT: Justice Johnson agreed with Judge Leben’s dissent in the Court of Appeals decision that “The civil-service board concluded that firing Maurer wasn’t reasonable, and we are not allowed to substitute our judgment for that of the administrative agency charged by statute with making such a decision.” Justice Johnson agreed and found that no matter how the majority tried to spin what it was doing, the bottom line is simply a reversal of a decision that the majority does not like – “That is not our function, and I would not do it.”

STATUTES: K.S.A. 19-805(a), -4303, -4304, -4311, -4327; K.S.A. 20-3018; K.S.A. 60-2101, -2102; and K.S.A. 77-601

PRISONER MEDICAL EXPENSES
UNIVERSITY OF KANSAS HOSPITAL AUTHORITY V. THE BOARD OF COMMISSIONERS OF THE COUNTY OF WABAUNSEE, KANSAS

WABAUNSEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 104,236 – JUNE 27, 2014

FACTS: The University of Kansas Hospital Authority (Hospital Authority) sued the Board of Wabaunsee County Commissioners (County) for reimbursement of the medical expenses incurred in the treatment of a man (Contreras) who jumped through the fourth-story window of an unlocked interrogation room in the Wabaunsee County jail where he had been placed by sheriff officials during an investigation. Prior Kansas appellate decisions require a sheriff to provide medical care to a prisoner in the sheriff’s custody and a county to pay for the care if the prisoner is indigent and has no other means of payment. The district court granted summary judgment to the County finding that Contreras was not under arrest, a prisoner committed to the county jail or held within the county. The Court of Appeals held that the district court’s definition of custody was too limited and significant restraints had been placed on Contreras’ freedom requiring the sheriff to assume responsibility for all costs associated with Contreras’ medical care.

ISSUE: Prisoner medical expenses

HELD: Court held the County is not obligated to pay the expenses because Contreras, although temporarily detained, was not a prisoner committed to or held in the county jail at the time he was injured and hospitalized. Court held that under K.S.A. 19-1910, the County would only be obligated to pay for Contreras’ medical care if he had no resources to pay for his own care and if he was a prisoner committed to or held in the county jail, meaning he had been sentenced to jail; had been arrested and was being detained in jail while awaiting trial; had been apprehended and arrested and was to be detained in jail while awaiting trial but for his injuries; or had been otherwise committed to jail, such as in a civil commitment proceeding. Under the uncontroversial facts, Contreras was not serving a jail sentence, had not been arrested, and was not otherwise committed to jail at the time of his hospitalization. Court reversed the Court of Appeals and affirmed the district court.


CRIMINAL

STATE V. BROWN
SEDGWICK DISTRICT COURT – AFFIRMED

FACTS: Brown was initially charged with felony murder of Bolden and aggravated assault of Green. After preliminary hearing...
the amended information also charged one alternative count of first-degree premeditated murder, and one count of aggravated burglary based on evidence that Brown unlawfully entered the apartment in which there were Green and Bolden, with intent to commit an inherently dangerous felony. Jury convicted Brown of felony murder, aggravated burglary, and aggravated assault. On appeal Brown: (1) challenged district court's jurisdiction to convict him of felony murder and aggravated burglary because the amended information was defective, and insufficient evidence of aggravated assault against Bolden was presented at preliminary hearing; (2) raised two alternative means arguments, the first based on being charged either as a principal or as an aider and abettor, and the second based on claim that K.S.A. 21-3205 provides six alternative means for aiding and abetting; (3) argued aiding and abetting was a specific and distinct crime requiring proof of specific intent to aid and abet; (4) argued the felony murder instruction was clearly erroneous because it failed to instruct jury to make factual finding whether the underlying felony of aggravated burglary had been abandoned or completed prior to the killing; and (5) district court erred in narrowing the crime elements in the jury instructions without first amending the information.

ISSUES: (1) Jurisdiction to convict on felony murder and aggravated burglary, (2) alternative means, (3) aiding and abetting as a separate crime, (4) felony murder jury instruction, and (5) narrowing charges in jury instructions without amending the information.

HELD: The amended information filed in this case was sufficient to invest district court with jurisdiction to prosecute Brown for felony murder and aggravated burglary. Brown failed to timely challenge the sufficiency of the preliminary hearing; there were no infirmities in the preliminary hearing proceedings; and the evidence at the preliminary hearing was sufficient to establish probable cause that Brown entered Bolden's apartment with intent to commit an aggravated assault upon Bolden.

Brown's first alternative means argument was rejected in State v. Betancourt, 299 Kan. 131 (2014). His second alternative means argument failed because jury was instructed on only one of the statutory "means" by which a person can aid and abet.

It is well established precedent in Kansas that aiding and abetting does not constitute a separate crime, and does not have to be charged separately prior to trial.

Brown's claim regarding the felony murder instruction was rejected in State v. Bailey, 292 Kan. 449 (2011). The instruction given in this case was not erroneous.

Trial judges perform gatekeeping function of matching jury instructions to the evidence presented at trial. In this case, the narrowed jury instructions on the elements of felony murder and aggravated burglary were not erroneous.

STATUTES: K.S.A. 21-3205, -3401(b), -3716; and K.S.A. 22-2902(3), -3201(b), -3414(3)

STATE V. BURNETT
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 107,571 – JULY 25, 2014

FACTS: Burnett was convicted of felony murder, criminal discharge of a firearm at an occupied dwelling, and criminal possession of firearm. On appeal he claimed district court erred by: (1) excluding evidence of prior and subsequent shootings at the same residence; (2) refusing to grant a continuance during trial to allow defense to edit and present a redacted admissible video recording of Burnett's interview with a detective; (3) instructing jury on felony murder; (4) admitting into evidence copies of sealed letters Burnett placed in jail's outgoing mail; (5) failing to give limiting instruction regarding evidence of Burnett's other crimes or civil wrongs; (6) failing to adequately investigate Burnett's request for substitute counsel; (7) and failing to grant new trial based on ineffective assistance of trial counsel. Burnett also claimed cumulative error denied him a fair trial.

ISSUES: (1) Evidence of other shootings, (2) denial of continuance, (3) alternative means of felony murder, (4) admission of Burnett's letters, (5) limiting instruction, (6) inquiry into Burnett's request for substitute counsel, (7) ineffective assistance of trial counsel, and (8) cumulative error.

HELD: Third-party evidence was discussed, finding no abuse of district court's discretion in excluding evidence proffered for purpose of establishing a third party's responsibility for the crime. District court erred in denying Burnett's request to question investigators about gunshot holes to house, but error was harmless. District court did not err in denying continuance. Burnett made no showing of good cause for this request.

State v. Cheffen, 297 Kan. 689 (2013), defeats argument that felony murder statute creates alternative means of felony murder. Here, sufficient evidence was presented to establish that the victim was killed during commission of underlying felony.

Fourth Amendment law in context of outgoing prison mail was discussed. District court did not err in denying Burnett's motion to suppress evidence gained through inspection of his outgoing letters. Burnett did not request a limiting instruction regarding evidence of prior crimes, and did not object to admission of this evidence. There was no clear error even, if error is assumed.

Burnett's statements concerning defense counsel's actions or inactions implicated no ground warranting further inquiry, let alone substitute counsel.

Court examined each claim regarding defense attorney's performance, and found no showing of ineffective assistance of counsel.

There was no reasonable probability that one harmless error, combined with one error presumed without deciding, affected the outcome of trial.

STATUTES: K.S.A. 21-4204(a)(3); K.S.A. 22-3401, -3414(3); and K.S.A. 60-261, -401(b), -455, -455(b)

STATE V. CAMERON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 105,828 – JULY 25, 2014

FACTS: Cameron was convicted of felony murder of 2-year old child (Damion), and aggravated battery arising from injuries sustained by the victim's twin brother (Trayvion). On appeal Cameron claimed: (1) he was entitled to instruction on manslaughter as a lesser included offense of felony murder; (2) jury should have been instructed on reckless aggravated battery as a lesser included offense of intentional aggravated battery; (3) trial court erred in allowing victim's older brother (Sedrick) to testify because the five year old witness was unqualified and thus not subject to cross-examination, (4) PIK Crim. 3d 51.10 instruction to jury unconstitutionally shifted burden of proof; (5) Damion's death after being hospitalized did not support felony murder; (6) prosecutor repeatedly misled jury during voir dire and closing argument in setting out burden of proof, and (7) cumulative error denied him a fair trial.
ISSUES: (1) Jury instruction on lesser included offense of felony murder, (2) instruction on lesser included offense of intentional battery, (3) young witness’s out-of-court statements, (4) jury instruction – burden of proof, (5) evidence supporting felony murder, (6) prosecutorial misconduct, and (7) cumulative error

HELD: Under State v. Todd, 299 Kan. 263 (2014), and 2013 amendment of K.S.A. 21-5402, Cameron was not entitled to instruction on lesser included offense of felony murder.

Under facts in case, no jury would have found beyond a reasonable doubt that Cameron engaged in merely reckless conduct toward Trayvion, but there was no clear error even if error were to be found.

There was no error in district court admitting Sedrick’s out-of-court statements. Cameron did not object to Sedrick’s out-of-court statements as various witnesses presented them to jury, and Cameron waived his right to cross-examine Sedrick. There was no evidence in appellate record that Sedrick was unavailable.

The challenged instruction did not dilute or undermine the presumption that Cameron was not guilty because other instructions in this case clearly and accurately stated burden of proof.

Evidence presented to jury established a compelling case that Damion was killed as a direct consequence of child abuse. It would not have mattered if Damion had actually died weeks or months after the abusive conduct; the commission of the crime of child abuse was identical in time to the cause of death resulting in the murder.

Prosecutor’s statements to jury during voir dire and closing argument lay well within wide latitude afforded to prosecutors.

No multiple errors support Cameron’s cumulative error claim.

STATUTES: K.S.A. 2013 Supp. 21-5109, -5402, -5402(a)(2), -5402(d), -5402(e); K.S.A. 21-3401, -3414(a), -3414(a)(1), -3414(a)(2); K.S.A. 22-3414(3); and K.S.A. 60-407, -417
Issues Disposed of by Opinion in R. Carr Appeal

Issues Affecting All Incidents

1. Did the district judge err in refusing to grant defense motions for change of venue? A majority of six of the Court’s members answered this question no for reasons explained in Section 1 of the R. Carr opinion, while one member of the court dissented and wrote separately on this issue and its reversibility, standing alone.

2. Did the district judge err in refusing to sever the guilt phase of defendants’ trials? A majority of six members of the Court answered this question yes for reasons explained in Section 2 of the R. Carr opinion, while one member of the court dissented and wrote separately on this issue. A majority of four members of the Court agreed that any error on this issue was not reversible standing alone for reasons explained in the R. Carr appeal, while three members of the Court dissented, and one of them wrote separately for the three on the reversibility question.

3. Was it error for the state to pursue conviction of J. Carr for all counts arising out of the three December 2000 incidents in one prosecution? The Court unanimously answered this question no for reasons explained in Section 3 of the R. Carr opinion.

4. Did the district judge err (a) by excusing prospective juror M.W., who opposed the death penalty, for cause, (b) by failing to excuse allegedly mitigation-impaired jury panel members W.B., D.R., D.G., and H.G. for cause, or (c) by excusing prospective jurors K.J., M.G., H.D., C.R., D.H., and M.B., who expressed moral or religious reservations about the death penalty, for cause? The Court unanimously agreed there was no error on any of these bases, for reasons explained in Section 4 of the R. Carr opinion.

5. Did the district judge err by rejecting a defense challenge under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the state’s peremptory strike of juror and eventual foreperson W.B.? The Court unanimously answered this question yes for reasons explained in Section 5 of the R. Carr opinion. A majority of four members of the Court agreed that any error on this issue was not reversible standing alone, for reasons explained in Section 5 of the R. Carr opinion, while three members of the Court dissented, and one of them wrote separately for the three on the reversibility question.

6. Was the district judge’s admission of statements by Walenta through law enforcement error under the Sixth Amendment and Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)? The Court unanimously answered this question no for reasons explained in Section 6 of the R. Carr opinion, but the Court also unanimously agreed that this error was not reversible standing alone.

Issues Specific to Walenta Incident

7. Did faulty jury instructions on all four K.S.A. 21-3439(a)(4) sex-crime-based capital murders and a multiplicity problem on three of four K.S.A. 21-3439(a)(6) multiple-death capital murders combine to require reversal of three of J. Carr’s death-eligible convictions? The Court unanimously answered this question yes for reasons explained in Section 9 of the R. Carr opinion.

8. Was a special unanimity instruction required for counts 1, 3, 5, and 7 because of multiple sex crimes underlying each count? The Court declined to reach the merits of this issue for reasons explained in Section 10 of the R. Carr opinion.

9. Must sex crime convictions underlying capital murder counts 1, 3, 5, and 7 be reversed because they were lesser included offenses of capital murder under K.S.A. 21-3439(a)(4)? The Court declined to reach the merits of this issue for reasons explained in Section 11 of the R. Carr opinion.

10. Was the state’s evidence of aggravated burglary sufficient? The Court unanimously answered this question yes for reasons explained in Section 12 of the R. Carr opinion.

11. Did the state fail to correctly charge and the district judge fail to correctly instruct on coerced victim-on-victim rape and attempted rape, as those crimes are defined by Kansas statutes, rendering J. Carr’s convictions on those offenses void for lack of subject matter jurisdiction? The Court unanimously answered this question yes for reasons explained in Section 13 of the R. Carr opinion.

12. Was the state’s evidence of J. Carr’s guilt as a principal on Count 41 for Holly G.’s digital self-penetration sufficient? A majority of four of the Court’s members answered this question yes for reasons explained in Section 14 of the R. Carr opinion, while three members of the Court dissented, and one of them wrote separately for the two of them on this issue and its reversibility.

13. Were Count 41 and Count 42 multiplicitous? The Court unanimously answered this question yes and reversed J. Carr’s conviction as a principal on Count 42 for reasons explained in Section 15 of the R. Carr opinion.

14. Was evidence of results from mitochondrial DNA testing of hairs found at the Birchwood home erroneously admitted? The Court unanimously answered this question no for reasons explained in Section 19 of the R. Carr opinion.

15. Did the district judge err by failing to instruct on felony murder as a lesser included crime of capital murder? The Court unanimously answered this question no for reasons explained in Section 21 of the R. Carr opinion.

Other Evidentiary Issues

16. Did the district judge err by automatically excluding eyewitness identification expert testimony proffered by the defense? The Court unanimously answered this question yes for reasons explained in Section 22 of the R. Carr opinion, but the Court also unanimously agreed that any error on this issue was not reversible standing alone.

17. Did the district judge err by permitting a jury view of locations referenced in evidence, in violation of the defendants’ right to be present, right to assistance of counsel, and right to a public trial? The Court unanimously answered this question no for reasons explained in Section 23 of the R. Carr opinion.

Other Instructional Issues

18. Did the district judge err by failing to include language in the instruction on reliability of eyewitness identifications to ensure that jurors considered possible infirmities in cross-racial identifications? The Court unanimously answered this question no for reasons explained in Section 24 of the R. Carr opinion.

19. Was the instruction on aiding and abetting erroneous because (a) it permitted jurors to convict the defendants as aiders and abettors for reasonably foreseeable crimes of the other, regardless of whether the state proved the aider and abettor’s premeditation, (b) it failed to communicate that the defendant aider and abettor had to possess the premeditated intent to kill in order to be convicted of capital murder, or (c) it omitted language from K.S.A. 21-3205(2)? The Court unanimously answered the first question yes for reasons explained in Section 25 of the R. Carr opinion. The Court unanimously answered the second question no for reasons explained in Section 25 of the R. Carr opinion. The Court unanimously answered the third question no for reasons explained in Section 25 of the R. Carr opinion. The Court unanimously agreed that the error on the first question was not reversible standing alone for reasons explained in Section 25 of the R. Carr opinion.
**Appellate Decisions**

**Prosecutorial Misconduct**

20. Did one of the prosecutors commit reversible misconduct by telling jurors to place themselves in the position of the victims? The Court unanimously answered this question no for reasons explained in Section 26 of the R. Carr opinion.

**Cumulative Error**

21. Did cumulative error deny J. Carr a fair trial on his guilt? A majority of four of the Court’s members answered this question no for reasons explained in Section 27 of the R. Carr opinion, while three members of the Court dissented, and one of them wrote separately for them on this issue.

**Issues Not Disposed of by Opinion in R. Carr Appeal**

1. Did the district judge err by refusing to grant a mistrial when the opening statement by R. Carr’s counsel implicated J. Carr and another unknown man as the perpetrators of the Birchwood crimes? A majority of four of the Court’s members answered this question no. Three members of the Court would hold this to be error and include it among those considered under the cumulative error doctrine.

2. Did admission of Walenta’s statements violate J. Carr’s confrontation rights under Section 10 of the Kansas Constitution Bill of Rights? The Court declined to reach the merits of the Section 10 argument.

3. Did J. Carr’s conviction on the Walenta felony murder depend upon impermissible inference stacking, meaning that the state’s evidence was insufficient? A majority of six members of the Court answered this question no. One member of the Court dissented and wrote separately on this issue and its reversibility, standing alone.

4. Was the state’s evidence of J. Carr’s guilt as an aider and abettor of R. Carr’s rape and aggravated criminal sodomy of Holly G. sufficient? The Court unanimously answered this question yes.

**STATE V. REGINALD CARR**

SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, SENTENCE OF DEATH VACATED, AND CASE REMANDED

NO. 90-044 – JULY 25, 2014

FACTS: Defendant Reginald D. Carr Jr. and his brother, Jonathan D. Carr, were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents in December 2000 in Wichita. This is R. Carr’s direct appeal from his 50 convictions, including three of four counts of capital murder committed on December 15. They each received a hard 20 life sentence for the Walenta felony murder. J. Carr received a controlling total of 492 months’ imprisonment consecutive to the hard 20 life sentence, and R. Carr received a controlling total of 570 months’ imprisonment consecutive to the hard 20 life sentence for the remaining nondeath-eligible crimes.


HELD: After searching review of the record, careful examination of the parties’ arguments, extensive independent legal research, and lengthy deliberations, Court affirmed 32 of R. Carr’s 50 convictions, including those for one count of capital murder of Heather M., Aaron S., Brad H., and Jason B. under K.S.A. 21-3439(a)(6); for the felony murder of Walenta; and for all of the crimes against Schreiber. Court reversed the three remaining convictions for capital murder because of charging and multiplicity errors. Court also reversed his convictions on counts 25, 26, 29 through 40, and 42 for coerced sex acts for similar reasons. Court affirmed the convictions based on counts 2, 9 through 24, 27, 28, 41, and 43 through 58.

The court unanimously reversed three of Carr’s four capital convictions because jury instructions on sex-crime-based capital murder were fatally erroneous and three of the multiple-homicide capital murder charges duplicated the first. The Court also unanimously declared certain of the defendants’ sex crime convictions void for lack of district court jurisdiction and reversed a particular rape conviction of each defendant because of multiplicity with another, affirmed conviction.

**Issues Affecting All Incidents**

1. Did the district judge err in refusing to grant defense motions for change of venue? A majority of six of the Court’s members answered this question no. One member of the Court dissented and wrote separately on this issue and its reversibility, standing alone.

2. Did the district judge err in refusing to sever the guilt phase of defendants’ trial? A majority of six members of the Court answered this question yes. One member of the Court dissented and wrote separately on this issue. A majority of four members of the Court agreed that any error on this issue was not reversible standing alone. Three members of the Court dissented, and one wrote separately for the three on the reversibility question, standing alone.

3. Was it error for the state to pursue conviction of R. Carr for all counts arising out of the three December 2000 incidents in one prosecution? The Court unanimously answered this question no.
4. Did the district judge err (a) by excusing prospective juror M.W., who opposed the death penalty, for cause, (b) by failing to excise allegedly mitigation-impaired jury panel members W.B., D.R., D.Ge., and H.Gu. for cause, or (c) by excusing prospective jurors K.J., M.G., H.D., C.R., D.H., and M.B., who expressed moral or religious reservations about the death penalty, for cause? The Court unanimously agreed there was no error on any of these bases.

5. Did the district judge err by rejecting a defense challenge under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the state's peremptory strike of juror and eventual foreperson W.B.? The Court unanimously answered this question yes. A majority of four members of the Court agreed that any error on this issue was not reversible standing alone. Three members of the Court dissented, and one wrote separately for the three on the reversibility question, standing alone.

Issues Specific to Walenta Incident

6. Was the district judge's admission of statements by Walenta through law enforcement error under the Sixth Amendment and Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)? The Court unanimously answered this question yes. The Court unanimously agreed that this error was not reversible standing alone.

7. Was the evidence of attempted aggravated robbery of Walenta sufficient to support R. Carr's felony murder conviction? A majority of four of the Court's members answered this question yes. Three members of the Court dissented, and one wrote separately for the three on this issue and its reversibility, standing alone.

8. Did the district judge err by failing to instruct the jury on second-degree murder as a lesser included offense of felony murder of Walenta? The Court unanimously answered this question no.

Issues Specific to Quadruple Homicide and Other Birchwood Crimes

9. Did faulty jury instructions on all four K.S.A. 21-3439(a)(4) sex-crime-based capital murders and a multiplicity problem on three of four K.S.A. 21-3439(a)(6) multiple-death capital murders combine to require reversal of three of R. Carr's death-eligible convictions? The Court unanimously answered this question yes.

10. Was a special unanimity instruction required for counts 1, 3, 5, and 7 because of proof of multiple sex crimes underlying each count? The Court declined to reach the merits of this issue because it is moot.

11. Must sex crime convictions underlying capital murder counts 1, 3, 5, and 7 be reversed because they were lesser included offenses of capital murder under K.S.A. 21-3439(a)(4)? The Court declined to reach the merits of this issue because it is moot.

12. Was the state's evidence of aggravated burglary sufficient? The court unanimously answered this question yes.

13. Did the state fail to correctly charge and the district judge fail to correctly instruct on coerced victim-on-victim rape and attempted rape, as those crimes are defined by Kansas statutes, rendering R. Carr's convictions on those offenses void for lack of subject matter jurisdiction? The Court unanimously answered this question yes.

14. Was the state's evidence of R. Carr's guilt as an aider and abettor on count 41 for Holly G.'s digital self-penetration sufficient? A majority of four of the court's members answered this question yes. Three members of the court dissented and one of them wrote separately for them on this issue and its reversibility.

15. Were Count 41 and Count 42 multiplicitous? The Court unanimously answered this question yes. The Court unanimously agreed that this error requires reversal of R. Carr's conviction as an aider and abettor on Count 42.

16. Was the evidence of R. Carr's aiding and abetting of J. Carr's rape of Holly G. and attempted rape of Heather M. sufficient? The Court unanimously answered this question yes.

17. Did Count 43 of the charging document confer subject matter jurisdiction to prosecute R. Carr for attempted rape of Heather M.? The Court unanimously answered this question yes.

18. Did the district judge misapply the third-party evidence rule and hearsay exceptions, preventing R. Carr from presenting his defense? The Court unanimously answered this question yes. The Court unanimously agreed that any error on this issue was not reversible standing alone.

19. Was evidence of results from mitochondrial DNA testing of hairs found at the Birchwood home erroneously admitted? The Court unanimously answered this question no.

20. Did the district judge err by denying R. Carr's motion for mistrial after evidence developed at trial that R. Carr had genital warts and that the surviving victim, Holly G., contracted HPV after the second intruder she identified as R. Carr raped her? The Court unanimously answered this question no.

21. Did the district judge err by failing to instruct on felony murder as a lesser included crime of capital murder? The Court unanimously answered this question no.

Other Evidentiary Issues

22. Did the district judge err by automatically excluding eyewitness identification expert testimony proffered by the defense? The Court unanimously answered this question yes. The Court unanimously agreed that any error on this issue was not reversible standing alone.

23. Did the district judge err by permitting a jury view of locations referenced in evidence, in violation of the defendants' right to be present, right to assistance of counsel, and right to a public trial? The Court unanimously answered this question no.

Other Instructional Issues

24. Did the district judge err by failing to include language in the instruction on reliability of eyewitness identifications to ensure that
jurors considered possible infirmities in cross-racial identifications? The Court unanimously answered this question no.

25. Was the instruction on aiding and abetting erroneous because (a) it permitted jurors to convict the defendants as aiders and abettors for reasonably foreseeable crimes of the other, regardless of whether the state proved the aider and abettor's premeditation, (b) it failed to communicate expressly that an aider and abettor had to possess premeditated intent to kill personally in order to be convicted of capital murder, or (c) it omitted language from K.S.A. 21-3205(2)? The Court unanimously answered the first question yes. The Court unanimously answered the second question no. The Court unanimously answered the third question no. The Court unanimously agreed that the error on the first question was not reversible standing alone.

Prosecutorial Misconduct
26. Did one of the prosecutors commit reversible misconduct by telling jurors to place themselves in the position of the victims? The Court unanimously answers this question no.

Cumulative Error
27. Did cumulative error deny R. Carr a fair trial on his guilt? A majority of four of the Court's members answered this question no. Three members of the Court dissented, and one of them wrote separately for them on this issue.

Although the Court identified a total of 11 errors in the guilt phase of trial, a majority of four justices ruled that the accumulated errors did not require further reversals of the defendants’ convictions: “The combined weight of these individually harmless errors pales in comparison to the strength of the evidence against the defendants.”

Individual justices and two combinations of justices filed a total of four separate opinions in each case.

Justice Beier, joined by Justices Luckert and Johnson, disagreed with, among other things, the majority’s decision on whether the 11 guilt phase errors, considered collectively, required reversal of the defendants’ remaining convictions. Among the guilt phase errors the three justices emphasized were the trial judge’s refusal to sever and the judge’s mishandling of the defense’s peremptory strike of the eventual presiding juror. The justices said that it was, “hard to imagine, for instance, a single error with more pervasive likely impact on the direction and content of the evidence before the jury than [the judge’s] refusal to sever the defendants’ prosecutions.”

Justice Johnson also dissented on the basis of the trial judge’s repeated refusal to change venue from Sedgwick County. He wrote that historical Kansas decisions and the majority’s opinion, “set the bar so high [for change of venue] that nothing will suffice short of an actual mob storming the courthouse, carrying burning torches and a rope tied with a hangman’s noose.”

Justice Biles, joined by Justice Moritz, noted his dissent from the majority’s discussion of the standard of proof governing evidence of mitigating circumstances in the penalty phase of capital trials. His opinion asserted that U.S. Supreme Court precedent interpreting the Eighth Amendment did not compel the mitigating circumstances instruction the majority would demand.

Justice Moritz dissented from the majority’s decision to vacate the remaining capital sentence for each defendant. She said the evidence against Reginald and Jonathan Carr was so strong that the failure to sever the penalty portion of the trial could not have affected the ultimate outcome: “[G]iven the unusually egregious facts of this case, [a surviving victim’s] powerful testimony, the overwhelming evidence of aggravating circumstances found by the jury, and the lack of persuasive mitigating evidence, I would hold beyond a reasonable doubt that the jury’s decision to impose the death penalty was not attributable to any joinder error below.”

Court vacated R. Carr’s death sentence for the remaining capital murder conviction, because the district judge refused to sever the defendants’ penalty phase trials. Court remanded to the district court for further proceedings.

STATUTES: K.S.A. 21-3205, -3301, -3436, -3429, -3439, -3501, -3502, -3506, -3716, -4624, -4626, -4635, -5109, -5210,

STATE V. CLAY
WYANDOTTE DISTRICT COURT – CONVICTIONS AFFIRMED, SENTENCE AFFIRMED IN PART, VACATED IN PART, AND REMANDED NO. 107,038 – JULY 25, 2014

FACTS: Clay was convicted of felony murder, attempted aggravated robbery, and criminal possession of firearm. District court, in part, orally sentenced Clay to 25 years to life for murder conviction and lifetime parole, but jury entry of sentencing sentenced Clay to 20 years to life imprisonment and lifetime post-release supervision. Journal entry also directed Clay to reimburse Board of Indigent Defense Services (BIDS) $1,000. On appeal Clay claimed district court erred by: (1) failing to sua sponte instruct jury on lesser included offenses of felony murder; (2) giving eyewitness identification instruction that included degree of certainty factor; (3) denying motion for new trial because Clay was prejudiced by jury improperly seeing him escorted by deputies, and hearing witness testify that he knew Clay from prison; (4) responding to jury’s question in writing rather than in Clay’s presence in open court; and (5) sentencing error.

ISSUES: (1) Instructing jury on lesser included offenses of felony murder, (2) degree of certainty factor in eyewitness jury instruction, (3) motion for new trial, (4) written response to jury’s questions, and (5) sentencing error.


No abuse of discretion in trial court’s denial of motion for new trial based on jury’s momentary view of Clay in police presence, or on witness’s isolated statement.

Citing lack of adequate briefing, court does not consider merits of claim that district court’s written response to jury’s questions denied Clay his right to a public trial and an impartial judge. District court violated Clay’s constitutional and statutory right to be present when it answered a jury question in writing, but error was harmless in this case.

State concedes sentencing error. Clay’s sentence is vacated and remanded for resentencing, and for district court to inquire about Clay’s ability to repay BIDS.


STATE V. EDWARDS

FACTS: Edwards raised numerous issues in appealing his conviction for aggravated robbery. Court of Appeals affirmed, 48 Kan. App. 2d 383 (2012). Review granted on all issues including the following two issues of first impression: First, citing State v. Montgomery, 26 Kan. App. 2d 346 (1999), he claimed the telephone and hammer taken from the residence were incidental to a battery, and thus were insufficient to support the robbery conviction. Second, he claimed the state failed to comply with the obligation in K.S.A. 60-226 to provide him notice that it intended to call an expert witness.

ISSUES: (1) Elements of robbery, K.S.A. 21-3426, (2) expert witness in criminal proceedings, and (3) remaining issues

HELD: Under plain language of K.S.A. 21-3426, robbery and aggravated robbery are general intent, not specific intent crimes. To prove elements of the crimes, the state need only prove the defendant took property from the person or presence of another by force or by threat of bodily harm to any person. To the extent Montgomery is inconsistent with this legislative mandate, it is disapproved.

Civil discovery rules of K.S.A. 60-226, relating to notice for parties introducing testimony of expert witnesses, do not govern in criminal proceedings. State is not required to provide advance notice of expert witnesses called for the purpose of rebutting expert witnesses called for the defense.

The remaining issues were affirmed for reasons stated in Court of Appeals’ decision. There was substantial and uncontroverted evidence that Edwards took victim’s property by force; robbery statute does not establish alternative means of committing aggravated robbery; no error in not instructing jury on incidental taking under Montgomery because it is not good law; no error in limiting scope of testimony of defense expert witness; no merit to claim of ineffective assistance of trial counsel; and claim of multiple acts requiring jury unanimity was not raised below.

CONCURRING (Johnson, J., joined by McQuinn, District Judge, assigned): Case could have been resolved without necessity of disapproving holding in Montgomery, which can be considered dictum.


STATE V. FLYNN


ISSUE: Rape – withdrawal of consent

HELD: Court disapproves of Bunyard’s holding that a defendant is entitled to a reasonable time in which to act after consent is withdrawn and communicated to the defendant; and reaffirms Bunyard’s conclusion that K.S.A. 21-3502(a)(1)(A) proscribes all nonconsensual sexual intercourse accomplished through force or fear. When a defendant is charged with rape as defined in K.S.A. 21-3502(a)(1) for an offense committed prior to the 2012 amendment of that statute, and evidence presented at trial suggests the victim initially consented but withdrew consent after penetration, trial court must instruct jury as to the elements of rape and give an additional instruction. Namely, the court must instruct jury that the defendant may be convicted of rape even though consent is given to the initial penetration, but only if consent is withdrawn, the withdrawal of consent is communicated to the defendant, and the defendant continues the intercourse through compulsion. Trial court’s failure to do so in this case was not harmless error. Court of Appeals’ decision is affirmed. Flynn’s rape conviction is reversed. Remanded for a new trial with a supplemental instruction based on Bunyard as modified in this decision.
STATE V. GLEASON
BARTON DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED
NO. 97,296 – JULY 18, 2014

FACTS: Jury convicted Gleason of capital murder, first-degree premeditated murder, aggravated kidnapping, aggravated robbery, and criminal possession of firearm. Death penalty imposed with consecutive controlling sentence of life without parole for 50 years on remaining convictions.

Gleason appealed guilt phase of trial, claiming his actions in killing Wornkey and aiding and abetting Martinez’s murder do not constitute capital murder under K.S.A. 21-3439(a)(6), thus district court lacked subject matter jurisdiction over the capital charge. He also claimed that the state failed to prove every element of capital murder; district court erred in refusing Gleason's request to instruct jury on law of aiding and abetting; and district court erred in refusing Gleason’s request for a felony murder instruction. The 2013 amendment excluding felony murder as a lesser included offense of capital murder does not violate a capital defendant’s due process rights or violate Ex Post Facto Clause. District court did not violate Gleason's confrontation rights by declaring Thompson unavailable and admitting his preliminary hearing testimony, and did not abuse its discretion in failing to declare a mistrial. Considered in context of the entire closing argument, the challenged statements of prosecutor were not improper. Giving an Allen-type instruction was error, but not clear error. Sua sponte the court found district court abused its discretion by allowing state witnesses to testify in prison clothing, and found the district court erred when it failed to respond to a jury question in open court and in Gleason’s presence, but both errors were harmless. Gleason’s convictions of capital murder, aggravated kidnapping, aggravated robbery, and criminal possession of firearm were affirmed.

Gleason appealed the penalty phase of his trial, challenging the constitutional validity of three of the four aggravating factors found by the jury, and claiming that insufficient evidence supported those three factors. He also claimed the district court erred in failing to instruct jury that mitigating circumstances need not be proven beyond a reasonable doubt.

ISSUES: (1) Guilt-phase issues, (2) multiplicity, and (3) penalty-phase issues

HELD: District court had subject matter jurisdiction over the capital murder charge. State may rely on theory of aiding and abetting to support one or more of the intentional, premeditated murders necessary to support a capital murder charge under K.S.A. 21-3439(a)(6). State proved every element of capital murder. District court adequately instructed jury on law of aiding and abetting, and did not err in denying Gleason’s request for a felony murder instruction. The 2013 amendment excluding felony murder as a lesser included offense of capital murder does not violate a capital defendant’s due process rights or violate Ex Post Facto Clause. District court did not violate Gleason’s confrontation rights by declaring Thompson unavailable and admitting his preliminary hearing testimony, and did not abuse its discretion in failing to declare a mistrial. Considered in context of the entire closing argument, the challenged statements of prosecutor were not improper. Giving an Allen-type instruction was error, but not clear error. Sua sponte the court found district court abused its discretion by allowing state witnesses to testify in prison clothing, and found the district court erred when it failed to respond to a jury question in open court and in Gleason’s presence, but both errors were harmless. Gleason’s convictions of capital murder, aggravated kidnapping, aggravated robbery, and criminal possession of firearm were affirmed.

Gleason’s first-degree murder conviction for killing Wornkey was reversed as multiplicitous with his capital conviction for killing Wornkey and Martinez. The corresponding hard 50 sentence is vacated, as are the unauthorized periods of lifetime post-release supervision for each of Gleason’s on-grid convictions. Remanded to district court for resentencing.
Gleason's challenges to the legal validity and evidentiary sufficiency of the aggravating circumstances supporting his death sentences were rejected. But the district court failed to properly instruct jury on its duty to consider mitigating circumstances, and a reasonable likelihood exists that this erroneous instruction precluded the jury from considering relevant mitigating evidence. Gleason's death sentence was vacated. Case was remanded for further proceedings. Gleason's remaining constitutional and statutory challenges to his death sentence were not considered.

CONCURRENCE IN PART, DISSENT IN PART (Lukert, J.) (joined by Beier and Johnson, JJ.): Would hold the district court's admission of Thompson's preliminary hearing testimony violated Gleason's constitutional right to confront witnesses. Under facts in this case, state did not make a good-faith effort or act with reasonable diligence to obtain Thompson's in-person testimony before the jury. Would also hold the district court's denial of motion for mistrial were an abuse of discretion.

DISSENT (Biles, J.) (joined by Moritz, J.): Would affirm the sentence. Majority's rationale for reversing the sentence did not conform to Eighth Amendment jurisprudence, and Gleason's other sentence. Majority's rationale for reversing the sentence did not conform to Eighth Amendment jurisprudence, and the district court's denial of motion for mistrial were an abuse of discretion.

STATE V. GLEASON
JOHNSON DISTRICT COURT – AFFIRMED, SENTENCE VACATED, AND REMANDED
NO. 106,640 – JULY 11, 2014

FACTS: Jury convicted Gleason of rape for having sexual intercourse with 22-year-old victim incapable of giving consent. District court found Greene to be an aggravated habitual sex offender, and imposed life sentence without possibility of parole. On appeal, Greene claimed the district court erroneously admitted statements Green made in his pro se pretrial notice of alibi, where no alibi defense was presented at trial. He also claimed under State v. Turner, 293 Kan. 1085 (2012), the district court should have sentenced Greene as a persistent sex offender under K.S.A. 21-4704(j), rather than as an aggravated habitual sex offender under K.S.A. 21-4642.

ISSUES: (1) Statements in alibi notice and (2) sentencing
 HELD: The admissibility of evidence related to a pretrial alibi notice is issue of first impression in Kansas. When a defendant submits an alibi notice to the state but withdraws or abandons alibi defense before trial, evidence related to the alibi notice or the statements made therein is inadmissible. Greene did not present an alibi defense at trial, thus district court erred in admitting evidence related to Greene’s alibi notice. Under facts in case, however, the error was harmless.

Greene's criminal history made him equally subject to sentencing as a persistent sex offender under K.S.A. 21-4704(j)(2)(B), and as an aggravated habitual sex offender under K.S.A. 21-4642. Under Turner, Greene must be sentenced under the more lenient statute. Greene's sentence was vacated. Case was remanded for resentencing.

STATE V. MCCUNE
JOHNSON DISTRICT COURT – CONVICTIONS AFFIRMED AND SENTENCE AFFIRMED IN PART AND VACATED IN PART
NO. 102,883 – JULY 18, 2014

FACTS: After a jury convicted McCune of two counts of rape of a child under 14, the district court sentenced him in accordance with Jessica’s Law, K.S.A. 21-4643, to two consecutive life sentences with no possibility of parole for 1,098 months. McCune appealed, alleging the district court erroneously admitted evidence, placed an unconstitutional condition on his defense, and abused its discretion by refusing to order a psychiatric evaluation of the complaining witness. He further asserted his sentence was void because K.S.A. 21-4643 is unconstitutionally vague. McCune also submitted a pro se brief asserting the prosecutor committed misconduct in his closing argument, the district court should have struck a detective's testimony that he “believed” the victim, and the district court erroneously imposed lifetime post-release supervision.

ISSUES: (1) Prior crimes evidence, (2) theory of defense, (3) psychiatric evaluation of complaining witness, (4) prosecutorial misconduct, (5) credibility testimony, and (6) Jessica's Law
 HELD: Court agreed with the state that the district court appropriately admitted evidence of McCune's prior sexual and physical abuse to show the relationship between McCune and A.R. and to explain A.R.’s delay in disclosing the abuse. Much as K.S.A. 60-455 permits the state to use prior misconduct evidence to explain the defendant’s opportunity to commit the crime or to show that an act was not accidental, the state here appropriately introduced the prior sexual and physical abuse of A.R. and her family to show that A.R.’s failure to disclose the Lenexa rapes arose from a legitimate fear McCune would injure or kill her or her family. Accordingly, the trial court did not err in admitting the evidence. Court found no error in the district court's advise to McCune that if he attacked A.R.’s credibility as it related to the events occurring in Missouri, then the court would find his prior Missouri convictions of statutory rape and child abuse admissible. Court also found no error in the district court’s denial of a psychiatric evaluation of A.R. McCune also submitted a pro se brief asserting the prosecutor committed misconduct in his closing argument, the district court should have struck a detective’s testimony that he “believed” the victim, and the district court erroneously imposed lifetime post-release supervision.

STATE V. MORNINGSTAR
SUMNER DISTRICT COURT – AFFIRMED ON ISSUE SUBJECT TO REVIEW
COURT OF APPEALS – DISMISSAL OF THE APPEAL REVERSED
NO. 103,433 – JULY 18, 2014

FACTS: Morningstar was convicted of rape of a child, aggravated battery, abuse of a child, and child endangerment. Supreme Court affirmed the convictions but vacated off-grid rape sentence and remanded for resentencing. 289 Kan. 488 (2009) (Morningstar I). District court resentenced Morningstar to KSGA grid rape sentence to run consecutive to the aggravated battery sentence. Morningstar ap-
pealed, challenging district court’s authority on remand to order consecutive service of the rape sentence. In unpublished opinion, Court of Appeals found no violation of the Morningstar I mandate, but dismissed the appeal because it had no jurisdiction to review a presumptive KSGA sentence. Morningstar’s petition for review was granted.

ISSUES: (1) Appellate jurisdiction and (2) imposition of consecutive sentence

HELD: Court of Appeals erred in dismissing the appeal for lack of jurisdiction. Appellate jurisdiction exists to determine whether the district court had authority to impose a consecutive sentence, even if that sentence fell within the presumptive range.

KSGA permits a district court imposing a term of imprisonment upon resentencing to determine anew whether the prison term runs consecutive to the defendant’s other sentences. A district court may designate that the sentence for the primary crime of conviction runs consecutive to the defendant’s other sentences under the KSGA’s multiple-conviction sentencing statute. Sentence imposed by district court is affirmed.

DISSENT (Johnson, J.)(joined by Beier, J.): Agreed that Court of Appeals had jurisdiction to review district court’s application of KSGA. Disagrees that sentencing court, on remand, had authority to order consecutive sentences. Would vacate that portion of the rape sentence that unlawfully ordered it to be served consecutive to the nonbase offenses that were not before the court for resentencing.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-3502(c), -4603d, -4608, -4608(a), -4643, -4704, -4704(e)(i), -4716, -4720, -4720(a), -4720(b)(1)-(5), -4721(c)(i), -4721(i); K.S.A. 22-3504; and K.S.A. 60-2101(a), -2101(b)

STATE V. PRADO
JOHNSON DISTRICT COURT – REVERSED, VACATED, AND REMANDED WITH DIRECTIONS
NO. 105,401 – JULY 18, 2014

FACTS: Smith was convicted of two counts of aggravated indecent liberties with a child under 14 years old. However, Prado pled guilty to two counts of rape of a child under 14 and the state agreed to recommend a departure from the Hard 15 sentence for each rape count and instead impose two consecutive on-grid terms of 147 months’ imprisonment. Prado attempted to withdraw his plea, but the court found no good cause to allow withdrawal based on a conflict of interest. The district court sentenced Prado consistent with the plea and ordered a sentence of two consecutive 147-month prison sentences, lifetime parole, and sex offender registration.

ISSUES: (1) Motion to withdraw plea and (2) conflict of interest

HELD: Court stated that when the record demonstrates an actual conflict of interest between the defendant and his or her counsel, a complete denial of assistance of counsel has occurred and prejudice to the defendant is presumed. Court held that under the unique circumstances of this case, Prado and his counsel alerted the trial court to a potential conflict between them, and the district court erred by failing to further inquire into the nature of that conflict. Additionally, Court held that Prado was denied his right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution because he was not provided conflict-free counsel to assist him in arguing his motion to withdraw his plea. Therefore, Court reversed the district court’s denial of Prado’s motion to withdraw his plea, vacated Prado’s sentence, and remanded to the district court to conduct a hearing on Prado’s motion to withdraw his plea and to appoint new, conflict-free counsel to represent Prado at that hearing.

DISSENT: Justice Biles dissented from the majority opinion because the district court acted reasonably in resolving any potential conflict of interest that might have arisen from Prado’s statement that his attorney had not properly explained the plea agreement and the record does not affirmatively disclose a Sixth Amendment violation as the majority concluded.

STATUTES: K.S.A. 21-3502, -4643, -4706, -4722; and K.S.A. 22-3210

STATE V. SIMPSON
JEFFERSON DISTRICT COURT – AFFIRMED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 105,182 – JUNE 27, 2014

FACTS: State charged Simpson with aggravated indecent liberties with a child and aggravated child endangerment. District court granted Simpson’s request under State v. Gregg, 226 Kan. 481 (1979), for psychiatric evaluation of the 13-year-old complaining witness. Child’s mother refused to give necessary consent. District court granted Simpson’s motion in limine to suppress child’s testimony and statements, citing child’s age and low cognitive abilities. State filed interlocutory appeal. In unpublished opinion, Court of Appeals reversed the district court’s suppression order, rejecting several possible justifications for that order. Simpson petitioned for review of whether district court abused its discretion in making a competency determination.

ISSUE: Appellate review

HELD: State’s failure to adequately develop the record on the narrow issue it presented prevents Supreme Court from entertaining state’s argument on appeal. Court of Appeals is reversed, district court’s decision is affirmed, and matter is remanded.

CONCURRENCE (Rosen, J.): Wrote separately to emphasize belief that district court was empowered to take measures employed here to ensure that a valid, enforceable court order for a Gregg evaluation was complied with.

DISSENT (Moritz, J.): Would affirm Court of Appeals’ reversal of the district court’s order because district court abused its discretion by disqualifying the child from testifying and failing to provide a sound legal basis for its ruling. Alternatively, would find Gregg is no longer sound law and should be overturned.

STATE V. SIMPSON
BOURBON DISTRICT COURT – CONVICTIONS AFFIRMED, SENTENCES VACATED IN PART, AND REMANDED
NO. 102,245– JUNE 27, 2014

FACTS: Smith was convicted of two counts of aggravated indecent liberties with a child, and two counts of indecent liberties with a child. Charges stem from Smith touching two girls, ages 13 and 15, while photographing them in provocative poses wearing two piece bikini bathing suits, and orchestrating the poses including having the two girls touch each other. On appeal Smith claimed the trial court: (1) erroneously admitted Smith’s 1993 crimes to prove motive and intent; (2) erroneously admitted photos of pornographic magazine and DVD covers discovered during search of Smith’s residence; and (3) erroneously instructed jury on reasonable doubt. Smith also claimed sentencing court erroneously used a prior conviction for multiple sentencing purposes, exceeded its authority by entering orders prohibiting contact with the victims, erroneously ordered lifetime electronic monitoring, and erroneously imposed lifetime supervision for off-grid offenses.

ISSUES: (1) Prior crimes evidence, (2) admissibility of photographs of pornographic material, (3) reasonable doubt instruction, and (4) sentencing claims

HELD: Evidence of Smith’s 1993 crimes was admissible to prove Smith’s intent. Any error in admitting evidence to prove motive would have been harmless. Photos of covers of pornographic magazines and videos were not relevant to the charged offenses. Nor was evidence that Smith possessed legal pornography of any particular sexual orientation proba-
vative to rebut or impeach his claim that he does not actively engage in the particular sexual practice portrayed in the pornography. Error in admitting that evidence, however, was harmless.

Smith's challenge to trial court's use of "until" and "any" language in reasonable doubt instruction is defeated by 2013 Kansas cases. Illegal sentence resulted when sentencing court used a prior conviction to classify Smith as a persistent sex offender, and then used same prior conviction to determine criminal history. Remanded for resentencing on that count. Sentencing court erroneously ordered no contact with victims, lifetime electronic monitoring, and lifetime post-release supervision for indeterminate sentences. Those portions of Smith's sentence were vacated.

DISSENT (Johnson J., joined by Lukert and Beier, JJ.): Disagreed that admission of photos of pornographic magazine and DVD covers was harmless error in this case.


STATE V. SUADY
JOHNSON DISTRICT COURT
COURT OF APPEALS – AFFIRMED IN PART, REVERSED IN PART DISMISSED IN PART, AND REMANDED TO COURT OF APPEALS
NO. 105,603 – JUNE 27, 2014

FACTS: Suady convicted of aggravated robbery, attempted aggravated robbery, and intentional aggravated battery. In unpublished opinion, Court of Appeals affirmed all convictions but for the aggravated robbery. It reversed that conviction relying on holding in State v. Montgomery, 26 Kan. App. 2d (1999), that aggravated robbery is a specific intent crime, and finding Suady's brief taking of the victim's vehicle was merely ancillary to other crimes which did not satisfy coercive taking element. Supreme court granted state's petition for review, and denied Suady's petition.

ISSUE: Robbery, K.S.A. 21-3426

HELD: Court of Appeals' decision to reverse aggravated robbery conviction is reversed and remanded to Court of Appeals for resolution in light of State v. Edwards, decided this date and digested herein, which disapproved the Montgomery analysis. Remanded to Court of Appeals for resolution of Suady's claim that aggravating robbery and attempted aggravated robbery convictions were multiplicitous.

DISSENT (Johnson J., joined by Lukert J. and McQuinn, District Judge, assigned): Disagreed that disapproval of Montgomery in Edwards automatically validates Suady's conviction for aggravated robbery, and would affirm Court of Appeals' reversal of the aggravated robbery conviction under facts in this case.

STATUTE: K.S.A. 21-3426

STATE V. WILLIAMS
SEDGWICK DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED
NO. 102,036 – JUNE 27, 2014

FACTS: Williams drove the car for two passengers who entered an apartment where they assaulted and fatally shot occupant. Williams was convicted of felony murder, aggravated burglary, and aggravated assault. On appeal she claimed: (1) district court erred in finding highly emotional witnesses constituted unique circumstances for providing a no-sympathy instruction to jury over defense objection; (2) district court erred in refusing defense request to supplement pattern jury instruction on aiding and abetting to include "mere association" language in PIK instruction's official comment; (3) trial counsel provided ineffective assistance during closing argument; and (4) cumulative error denied Williams a fair trial.

ISSUES: (1) No-sympathy jury instruction, (2) supplementation of pattern jury instruction on aiding and abetting, (3) ineffective assistance of trial counsel, and (4) cumulative error

HELD: Under current case law, a trial court should not use a jury instruction that tells the jury not to consider sympathy toward either party except under very unusual circumstances. No factually similar cases mandate whether circumstances in this case were unusual enough, and discretion of veteran trial judge is upheld. Even if the no-sympathy instruction was not factually appropriate, no reversible error resulted.

As in State v. Hilt, 299 Kan. 176 (2014), it would have been better practice for district court to give the modified aiding and abetting instruction, but failure to do so was not reversible error.

No remand for a hearing is warranted under facts presented. Williams can pursue claim through a K.S.A. 60-1507 motion for post-release supervision for indeterminate sentences. Those portions of Williams' sentence were vacated.

STATE V. WILLIAMS
SEDGWICK DISTRICT COURT – AFFIRMED

FACTS: Williams drove the car for two passengers who entered an apartment where they assaulted and fatally shot occupant. Williams was convicted of felony murder, aggravated burglary, and aggravated assault. On appeal she claimed: (1) district court erred in finding highly emotional witnesses constituted unique circumstances for providing a no-sympathy instruction to jury over defense objection; (2) district court erred in refusing defense request to supplement pattern jury instruction on aiding and abetting to include "mere association" language in PIK instruction's official comment; (3) trial counsel provided ineffective assistance during closing argument; and (4) cumulative error denied Williams a fair trial.

ISSUES: (1) No-sympathy jury instruction, (2) supplementation of pattern jury instruction on aiding and abetting, (3) ineffective assistance of trial counsel, and (4) cumulative error

HELD: Under current case law, a trial court should not use a jury instruction that tells the jury not to consider sympathy toward either party except under very unusual circumstances. No factually similar cases mandate whether circumstances in this case were unusual enough, and discretion of veteran trial judge is upheld. Even if the no-sympathy instruction was not factually appropriate, no reversible error resulted.

As in State v. Hilt, 299 Kan. 176 (2014), it would have been better practice for district court to give the modified aiding and abetting instruction, but failure to do so was not reversible error.

No remand for a hearing is warranted under facts presented. Williams can pursue claim through a K.S.A. 60-1507 motion if she develops further evidence that trial counsel was ineffective.

No errors support Williams' claim under cumulative error doctrine.

STATUTES: K.S.A. 22-3414(3); and K.S.A. 60-1507
CIVIL

ALCOHOLIC BEVERAGE CONTROL AND STRICT LIABILITY
KITE’S BAR & GRILL INC. v. KANSAS DEPT. OF REVENUE, ALCOHOLIC BEVERAGE CONTROL DIVISION
RILEY DISTRICT COURT – REVERSED
NO. 110,315 – JUNE 27, 2014

FACTS: The Alcoholic Beverage Control Division (ABC) of the Kansas Department of Revenue (KDOR) suspended the liquor license of Kite’s Bar and Grill (Kite’s) for four-weekend days due to a minor obtaining or possessing alcohol on Kite’s premises. Kite’s appealed through the administrative process and then to the district court, which upheld the suspension. Kite’s argues that statutory law does not impose strict liability upon it in this civil action when a minor possesses alcohol while on its premises. Secondly, it argues the district court incorrectly found that substantial compliance by ABC was all that was necessary to give notice to Kite’s of the administrative action.

ISSUES: (1) Alcoholic beverage control and (2) strict liability

HELD: Court reversed, finding the applicable notice provisions of the Kansas Liquor Control Act (Act) specifically require ABC to deliver a citation to Kite’s at the time of the violation and, because ABC did not do so here, the citation it later mailed to Kite’s was unenforceable and void. Court held that, under the plain language of the notice requirements set forth in K.S.A. 41-106, there is no substantial compliance with the terms of the statute to allow enforcement of a civil citation for violation of the Kansas Liquor Control Act when the citation is not delivered at the time of the violation but a copy of the citation is mailed within 30 days. Court found the first issue moot.


DRUG FORFEITURE AND NOTICE
STATE v. $17,023 IN U.S. CURRENCY AND 721.38 GRAMS OF MARIJUANA
DOUGLAS DISTRICT COURT – REVERSED AND REMANDED
NO. 111,048 – JULY 3, 2014

FACTS: As part of a criminal investigation, law enforcement officers seized money and marijuana from Gillihan. Several months later, the state initiated forfeiture proceedings against this property. After the state moved for default judgment, the district court determined that it lacked jurisdiction over the action because the state failed to file its notice of pending forfeiture within 90 days of seizing the property. The district court dismissed the case.

ISSUES: (1) Drug forfeiture and (2) notice

HELD: Court stated that property seized for forfeiture under the Kansas Standard Asset Seizure and Forfeiture Act, K.S.A. 60-4101 et seq., must be released to the owner or interest holder when the state fails to act within 90 days of the seizure by filing a notice of pending forfeiture or a judicial forfeiture action. This language incentivizes swift action by state actors in forfeitures because it allows another individual to obtain some level of control over the seized property if the action is not timely pursued after seizure. But the release only occurs after a property owner or interest holder requests it, and it only allows the property owner or interest holder to recover the property and retain possession, as custodian for the court, for up to 90 days unless further extensions are granted by the court. The failure of the seizing agency to file a notice of pending forfeiture within 90 days of the seizure of property under the Kansas Standard Asset Seizure and Forfeiture Act does not deprive the district court of jurisdiction over the forfeiture action. Court stated that nothing in the record suggested that Gillihan or any other interest holder requested release of the property in this case. Court held that the time limitation in K.S.A. 60-4109 was inapplicable. Because the 90-day rule relied on by the district court did not deprive it of jurisdiction, court reversed.

STATUTE: K.S.A. 60-4101, -4102, -4107, -4108, -4109, -4110, -4111, -4120, -4123

HABEAS CORPUS
VERGE v. STATE
DICKINSON DISTRICT COURT – AFFIRMED
NO. 110,421 – JULY 18, 2014

FACTS: Verge was convicted of capital murder. When jury did not unanimously agree on the death penalty, sentencing court weighed aggravating and mitigating factors, and imposed life sentence without possibility of parole for 40 years. In third pro se K.S.A. 60-1507 motion, Verge claimed the new rule established in Alleyne v. United States, 133 S. Ct. 2151 (2013), was an intervening change in the law that required remand for resentencing. District court summarily dismissed the motion as successive and untimely filed. Verge appealed.

ISSUE: Retroactive application of Alleyne on collateral review

HELD: Retroactive application of Apprendi and Alleyne is discussed, noting the United States and Kansas supreme courts have not specifically addressed whether the new rule in Alleyne should
apply retroactively to a collateral action. Although Alleyne created a new constitutional rule requiring any fact that increases the penalty for a crime beyond the prescribed statutory minimum sentence be submitted to a jury, that rule does not apply retroactively to cases before the court on collateral review. Even if Verge's pro se motion were to be liberally construed as a motion to correct an illegal sentence under K.S.A. 22-3504, his constitutional challenge based upon Alleyne would still fail. District court's summary dismissal is affirmed.

STATUTES: K.S.A. 21-3401(a), -4635, -4635(b), -4635(d), 4636, -4637, -4638, -4701 et seq., -4706(c), -4716(a); K.S.A. 22-3504, -3717, -3717(b)(1); and K.S.A. 60-1507, -1507(c), -1507(f)

JUDGMENT AND METHOD OF PAYMENT
STORMONT-VAIL HOSPITAL ET AL. V. IMLER
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 110,553 – JULY 25, 2014

FACTS: Imler was involved in a bar fight and, when the Topeka police officer arrived and arrested him, he refused medical treatment. However, the police officer took him to Stormont-Vail Hospital for treatment. He remained in custody until his release after posting bond the next day. Stormont-Vail Hospital and Cotton O'Neil Clinic brought suit against Imler for his hospital care in the amount of $3,825.20. Imler did not dispute the amount of the bill; he simply argued that the Topeka Police Department should be responsible for it. After trial, the trial court found that Imler was responsible for the medical treatment provided. However, the trial court found, on its own motion, that the charge was not reasonable and reduced it to $2,000. In addition, the trial court further ordered Imler to make payments of $50 per month on the debt. The Hospital appealed the trial court's order allowing Imler to pay a lesser amount and to pay it in $50 monthly installments.

ISSUES: (1) Judgment and (2) method of payment

HELD: Court found the trial court lacked both the authority and the evidence to reduce the amount owed and direct the method of payment. Court stated there was absolutely no evidence presented at trial that the medical costs were unreasonable. Moreover, there was no evidence to support the trial court's final amount of $2,000. It appears to be an arbitrary amount based upon “a very rough estimation of the 60 percent” that an insurance company, under contract with the hospital, would have paid. Court also held the hospital would not be allowed to obtain a garnishment as provided by K.S.A. 2013 Supp. 61-3504 until Imler failed to make a monthly payment. In this case neither party requested a payment plan and the judge simply asked Imler what he could afford to pay on a monthly basis and ordered Imler's response of $50 a month as the monthly payment. There was absolutely no evidence to support such a decision. Accordingly, the trial court erred when it ordered the medical costs of $2,000 to be paid in $50 monthly installments. Court reversed and ordered that the case be remanded for entry of judgment in favor of the hospital for the full amount of $3,825.20.

STATUTE: K.S.A. 61-3504

PRICE FIXING AND TOBACCO COMPANIES
SMITH ET AL. V. PHILIP MORRIS COMPANIES ET AL.
SEWARD DISTRICT COURT – AFFIRMED
AND CROSS-APPEALS DISMISSED
NO. 108,491 – JULY 18, 2014

FACTS: In February 2000, Smith, seeking to represent a class of Kansas retail purchasers of cigarettes (Plaintiffs), commenced this action against several tobacco companies (Defendants) in the Seward County District Court, alleging they conspired to fix the wholesale price of cigarettes in violation of the Kansas Restraint of Trade Act (KRTA), K.S.A. 50-101 et seq. Defendants are: Altria Group Inc., formerly Philip Morris Companies Inc.; Philip Morris USA Inc., a subsidiary of Altria; Philip Morris International Inc., a subsidiary of Altria until 2008; R.J. Reynolds Tobacco Co.; Lorillard Tobacco Co. (Lorillard); Brown & Williamson Tobacco Corp.; Liggett Group Inc.; and British American Tobacco (Investments) Ltd. The district court certified the class with Smith as its representative. After 12 years of litigation and extensive discovery, the district court entered summary judgment for Defendants. The court found Plaintiffs failed to come forward with direct evidence or sufficient circumstantial evidence from which a jury could draw a reasonable inference of collusive behavior in fixing the wholesale price of cigarettes in Kansas. Moreover, the court found Plaintiffs’ theory economically untenable.

ISSUES: (1) Price fixing and (2) tobacco companies

HELD: Court held that under the facts presented, evidence of the oligopolistic structure of the cigarette market is relevant. But such evidence does not tend to exclude the possibility that the alleged conspirators acted independently. In and of itself, it does not suffice to defeat summary judgment on a claim of horizontal price-fixing among oligopolists. A plus factor must be something that tips the scales from otherwise legal synchronous conduct among competitors in an oligopoly to a price-fixing conspiracy condemned by our antitrust laws. Conscious parallelism, which is lawful conduct, arises in markets containing the very factors which define an oligopoly. Thus, these factors, which describe market characteristics for legal conscious parallelism, cannot tip the evidentiary scale out of equipoise so as to provide evidence from which a reasonable factfinder could infer illegal conduct. Court also held that under the facts presented, the use of an intermediary agency to exchange information on sales volumes does not constitute a plus factor which assists the factfinder in determining whether defendants’ synchronous pricing was the product of an illegal price-fixing conspiracy. Court also held that under the facts presented, and in light of the more recent history of vigorous price competition among defendants, evidence of antitrust violations more than 50 years ago is not indicative of a price-fixing agreement during the relevant time period. Court held that under the facts presented, Plaintiffs’ contention that defendants conspired to fix the prices of cigarettes in foreign countries, thereby diverting domestic cigarette supplies to foreign markets and increasing cigarette prices in the United States, does not constitute a plus factor to support a domestic price-fixing scheme. However, the market for cigarettes had been declining since the 1980s, resulting in a number of manufacturer-defendants having substantial excess production capacity with which to expand supply in order to meet any unsatisfied market demand. Evidence supporting such a theory does not tend to establish defendants’ domestic wholesale pricing was the product of an unlawful conspiracy. Court also held that under the facts presented, evidence that defendants conspired to suppress information on the health risks of cigarettes, thereby artificially maintaining the demand for and wholesale prices of cigarettes, does not have a tendency in reason to prove that defendants entered into an entirely separate conspiracy to fix the wholesale prices for cigarettes sold in Kansas. Court found no abuse of discretion in the trial court’s denial of plaintiffs’ motion to file second amended petition or in refusing to grant a default judgment to a class claiming damages of $7.58 billion.


WORKERS COMPENSATION, ADMISSION OF EVIDENCE, AND VIOLATION OF NO-CONTACT ORDER
BASE V. RAYTHEON AIRCRAFT CO. ET AL.
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 110,535 – JULY 3, 2014

FACTS: Base alleged that his lower back was injured in a “series of events, repetitive use, cumulative traumas or microtraumas” as
a maintenance worker at Raytheon Aircraft Co. (Raytheon). The administrative law judge (ALJ) denied Base's claim for payment of medical expenses he incurred for surgical treatment, finding that he failed to prove that he suffered personal injury in a series of accidents or that his back surgery was causally related to his work duties. Upon review, the Workers Compensation Board (Board) affirmed the ALJ's denial, finding that Base failed to prove that his initial injury arose out of and in the course of his employment or that the aggravation, acceleration, or intensification of his condition stemmed from his job. Base raises two arguments on appeal: (1) the Board erred in excluding Dr. Paul Stein's medical testimony and report in violation of K.S.A. 2013 Supp. 77-621(c)(5); and (2) the Board erred in excluding Dr. John Estivo's medical testimony in violation of K.S.A. 2013 Supp. 77-621(c)(5).

ISSUES: (1) Workers compensation, (2) admission of evidence, and (3) violation of no-contact order

HELD: Court held the administrative law judge and the Workers Compensation Board did not act unreasonably, arbitrarily, or capriciously in excluding the report and deposition testimony of two independent medical examiners as a sanction for claimant's counsel's violation of the administrative law judge's no-contact order. Court stated that the ALJ's order of exclusion did not demonstrate a disregard of the relevant factual and legal circumstances bearing on the determination. Rather, the ALJ acted in an impartial manner with the stated objective of restoring each of the parties to the position they occupied before Base's counsel violated the court's order barring ex parte contact between counsel and the court-appointed neutral examining physician.

STATUTES: K.S.A. 44-523, -556; and K.S.A. 77-601, -621

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**CRIMINAL**

**STATE V. DICKEY**

**SALINE DISTRICT COURT – SENTENCE VACATED AND CASE REMANDED WITH DIRECTIONS**

**NO. 110,245 – JUNE 27, 2014**

FACTS: Dickey appealed from the sentence imposed by the district court after he pled guilty to one count of felony theft. Relying on *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Descamps v. United States*, 570 U.S. ___ , 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), Dickey contends the district court violated his constitutional rights by classifying a 1992 juvenile adjudication for burglary as a person felony, which enhanced the penalty for his sentence beyond the statutorily prescribed maximum.

ISSUES: (1) Sentencing and (2) prior convictions

HELD: Applying the holdings in *Apprendi* and *Descamps* to the facts presented here, Court agreed that the district court erred by examining record evidence to determine whether Dickey's prior adjudication constituted a person felony for purposes of enhancing his current sentence. Although error, court believed it was significant to point out that *Descamps* was decided on June 30, 2013, so the district court in this case did not have the benefit of its guidance when sentencing Dickey on May 16, 2013. But under the analysis that is now required by *Descamps*, court found that the district court was precluded from looking beyond the statutory elements of Dickey's 1992 prior burglary adjudication to determine whether it would now qualify as a person felony for purposes of enhancing the penalty for his current crime of felony theft beyond the statutorily prescribed maximum. Accordingly, court vacated Dickey's sentence with instructions to resentence him using a criminal history score of B, instead of A.

CONCURRENCE: Judge Pierron concurred with the majority, but stated that all the majority needed to do was cite to *State v. Murdock*, 299 Kan. __, 323 P.3d 846, 851 (2014), where the court, after explaining the need to find that the two prior out-of-state convictions must be scored as nonperson felonies, states: “We recognize this rule results in the classification of all pre-1993 crimes as nonperson felonies—an outcome the state characterizes as unreasonable. But the solution to the state's complaint sits with the legislature.”

STATUTE: K.S.A. 21-3426, -3715, -4710, -4711, -5807, -6810, -6811, -6820

**STATE V. GARCIA-BARRON**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 109,005 – JULY 3, 2014**

FACTS: In November 2009, Sgt. Germany of the Wichita Police Department received a call from a local high school indicating that a student had reported a sexual assault. When Germany contacted the suspect, Garcia-Barron, he discovered that Garcia-Barron spoke only Spanish. Germany requested assistance from Sgt. Salcido, a Spanish-speaking police officer. Salcido arrived and Garcia-Brown agreed to speak with Salcido at the police station. Salcido presented Garcia-Barron with a Spanish-language *Miranda* warning and waiver form. Salcido told Garcia-Barron that he could not discuss the details of the case with Garcia-Barron until the *Miranda* waiver form was signed. Garcia-Barron then signed the waiver form. Salcido proceeded with questioning and Garcia-Barron confessed to having had sexual intercourse with T.M.G., stating that he believed her to be 16 or 17 years old. T.M.G. was, in fact, 15 years old at the time of the incident. The state charged Garcia-Barron with one count of rape and, in the alternative, one count of aggravated indecent liberties with a child older than 14 but less than 16. Garcia-Barron filed a motion to suppress the statements he had made to Salcido. Garcia-Barron argued that because the state had failed to appoint an interpreter prior to questioning, his confession was involuntary and should be suppressed. Following an evidentiary hearing, the district court ruled that Salcido “clearly meets the qualifications [to be an interpreter] set out by the statute” and “is qualified to act as an interpreter for this case.” The district court denied the motion to suppress, finding Garcia-Barron’s waiver of his *Miranda* rights and his confession to have been knowingly and voluntarily made. The state then dismissed the rape charge and Garcia-Barron was found guilty of aggravated indecent liberties with a child based upon stipulated facts. On appeal, Garcia-Barron reprised the arguments he made to the district court. He claimed the district court erred when it declined to suppress his confession to Salcido. Garcia-Barron argued that his statements were not voluntarily and knowingly made because: (1) Salcido was not an appointed interpreter pursuant to K.S.A. 75-4351 et seq.; (2) Salcido was not statutorily qualified to be an interpreter because he had an interest in the outcome of the interview; and (3) Salcido made revealing the reason for the interrogation contingent on Garcia-Barron signing the *Miranda* waiver.

ISSUES: (1) Interpreters, (2) Spanish-speaking officers, (3) motion to suppress, and (4) *Miranda*

HELD: Court held that because Salcido and Garcia-Barron were the only two people involved in their conversation, it is logically impossible for Salcido to have been acting as an interpreter. He was not a conduit for communication between Garcia-Barron and a third person and he was not translating words from one language to another. Court stated that because Salcido was not acting as an interpreter, it did not need to address Garcia-Barron’s contention that Salcido was not statutorily qualified to serve as an interpreter. Court stated that even if Garcia-Barron was entitled to an interpreter, that did not necessarily render his statements involuntary. Court stated there is ample substantial evidence to support the district court’s finding that Garcia-Barron’s statements were knowingly and voluntarily made after a full waiver of his *Miranda* rights. Court also stated there is ample case law holding that the failure of police to inform Garcia-Barron of the reason for the investigation until after the *Miranda* waiver was signed did not render Garcia-Barron’s waiver involuntary.

STATUTE: K.S.A. 75-4351, -4353, -4354
STATE V. SIMMONS
SALINE DISTRICT COURT – AFFIRMED
NO. 108.885 – JUNE 27, 2014

FACTS: Simmons appeals from her conviction for failing to register as a drug offender. Specifically, Simmons argued retroactive application of 2007 legislation that requires her to register as a drug offender for a prior conviction that did not require registration at the time she originally was sentenced (1) illegally modifies the original sentence imposed and (2) violates the Ex Post Facto Clause of the U.S. Constitution. She also challenged the $200 DNA database fee imposed by the district court.

ISSUES: (1) Duty to register as drug offender, (2) retroactivity, and (3) DNA database fee

HELD: Because an offender’s statutory duty to register is imposed automatically by operation of law, without court intervention, as a collateral consequence of judgment with a stated objective of protecting public safety and not punishment, Court held that the registration requirements—no matter when imposed—are not part of an offender’s sentence. As such, Simmons’ illegal sentence and ex post facto claims both failed. Court also held Simmons’ challenge to the $200 DNA database fee imposed by the district court also failed because under K.S.A. 2013 Supp. 75-724(b), the court was required to order Simmons to pay the DNA database fee upon conviction—regardless of whether the person’s DNA sample was already on file with the KBI at the time such person was arrested, charged, or placed in custody—unless Simmons provided evidence to establish to the court that (1) she already paid the fee in connection with a prior conviction and (2) she was not ordered to submit a DNA sample for the current offense. Therefore, even if Simmons had submitted a DNA sample upon her release from prison in 2008 and that sample had been entered into the database, the court would still be required to order her to pay the fee unless she could prove she paid the fee for the prison test.

STATUTES: K.S.A. 21-2511, -6801; K.S.A. 22-3504, -4902, -4904, -4905, -4906; K.S.A. 65-4161; and K.S.A. 75-724

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