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Let your VOICE be Heard!
Feature Article

22 Doing More With Less – Expanding the Grand Jury System to Meet the Demands of a Large Volume Prosecution Office

By Chad J. Taylor

Cover layout & design by Ryan Purcell
rpurcell@ksbar.org

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The Journal of the Kansas Bar Association
November/December 2013
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The Journal of the Kansas Bar Association 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 (ISSN 0022-8486) 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 is $25 a year, which is included in annual dues. Nonmember subscription rate is $45 a year. POST-MASTER: Send address changes to The Journal of the Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612-1806.

The Kansas Bar Association and the members of the Board of Editors assume no responsibility for any opinion or statement of fact in the substantive legal articles published in The Journal of the Kansas Bar Association.

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Giving Thanks

The holiday season is upon us and with it comes the time we should be giving thanks for the good things in our lives. At times, due to factors that are both beyond and within our control, the simple art of giving thanks can be somewhat difficult.

As I write this, we are just starting the third week of the federal government partial shutdown and are three days away from reaching the nation’s debt limit. We are frustrated by the impact the continuing crisis has on our fellow citizens and our own peace of mind. The entire Washington, D.C., fiasco of “government by crisis” has more than worn thin at this point as we consider the impact on our lives of the continuing political gamesmanship. As attorneys, we are used to resolving our client’s disputes one way or another, but we are accustomed to getting a resolution. As a mediator, I cringe when I watch the endless TV coverage of our elected officials bating each other with incendiary statements that sabotage the efforts of those who think more rationally and are still trying to work for the common good. In a recent Wall Street Journal poll, 60 percent of those polled wanted to throw everyone in Washington out of office. Count me in.

Here in Kansas, as we head toward the upcoming legislative session, the future appears uncertain on issues of importance to our profession. Matters of court funding, court efficiency and flexibility, e-filing, selection of the Kansas Supreme Court, separation of powers between the judicial and legislative branches, etc., are all looming large as 2014 approaches. In our own practices and personal lives, there are always those matters that need more time, attention, and care than we are able to give them, causing further stress.

In light of all of these factors, it would be totally reasonable to simply throw up our hands and announce that there is not a lot to be thankful for in the holiday season of 2013. However, to do that would be a grave disservice to all of the good things that are present in our professional and personal lives. These are the things that we often forget and/or take for granted. These are the things that we, frankly, need to think about more often.

Here are the things that I am thankful for as we bring an end to 2013:

Professionally

I am thankful for having clients who allow me to serve them. Without clients, none of us would be able to do what we have worked so hard to be in a position to do, which is assist clients with their legal needs. For me this year, having clients who have patience with my frequent absence due to association duties is especially appreciated.

We are blessed to have a hard working and diligent judicial branch, whose justices, appellate, district, and magistrate judges and employees have been working under short-staffed and difficult conditions for some time. They have had no raises and no real legislative consideration of improvements to judicial branch operations that have been identified after thoughtful consideration by independent commissions. Despite those difficulties, the work of the court system continues to get done to a degree that recognizes that the courts of Kansas as being among the highest rated court systems in the nation.

We have, overall, a group of thousands of Kansas lawyers and support staff that not only competently address the needs of clients, but also donate tens of thousands of hours annually of pro bono, civic, association, charitable, and educational work that benefit all of Kansas on a local, regional, and statewide basis. Everywhere I go, I continue to be impressed at the stories of Kansas lawyers making a real difference in the lives of fellow Kansans just because they care.

We have a hard working staff at the KBA, who are actively engaged in helping reinvent the KBA and are constantly looking at ways to improve the KBA member experience and service to our members. Those efforts involve being willing to listen to constructive criticism and be always looking for ways to do things better as the association moves forward. Our membership continues to assist in this process and offer relevant, thoughtful input.

We have a dedicated board at the KBA whose members do not hesitate to offer thoughtful input to the discussion of the issues that we face. One of my favorite quotes is that of General George Patton, who said “If everyone is thinking the same thing, then someone isn’t thinking at all.” At the KBA Board of Governor’s meetings, there is a lot of thinking going on. However, at the end of the day, the Board is able to move forward and deal with the issues at hand after all viewpoints have been considered and discussed.

Personally

I am thankful for a supportive family who puts up with my desire to serve in the KBA and the Kansas Association of School Boards, and the time away from home and office that results from this service. This extends to my office family as well, as they pick up the resulting slack that occurs in my absence.

I am thankful for the opportunity to work with other attorneys and their staff, the judges in front of whom I practice, and the court personnel that I deal with daily. For the past 30 years Southeast Kansas has been and continues to be a great place to practice law.

I am thankful for the group of friends, both personal and professional, that keeps me grounded and on track in my pursuits. Whenever I start letting the ego get a little too large, a simple reminder that it is time to go work on the Lions Club Shelter House roof or that “Topeka can wait” or “you really goofed on that one” brings me back into focus very rapidly.
I am thankful that I live in small town southeast Kansas because in this community we all have each other’s back. When our home burned a few years ago, the outpouring of immediate concern and support was beyond comprehension. Even people we didn’t know were there asking how they could help. It was more than humbling to be in a position of needing help from others and then be overwhelmed by what was offered.

Finally, I am thankful for the opportunity to serve the KBA and KASB. As a result of these opportunities, I have expanded my horizons and had the chance to meet and work with leaders in the legal and educational communities all over Kansas and across the nation. I try to act like a sponge around these people, because they have so much to share both professionally and personally and they are more than willing to do so.

So, there you have it. Despite all of the bad news that continually bombards us and elevates our stress level, all it takes is a few moments of reflection to realize that there is a lot to be thankful for this holiday season. When you are having a bad day, take just a few moments to think about all the good things in your professional and personal life. Then take the next step and recognize those around you and thank them for being part of your personal “good news.”

On both a personal and professional level, please accept my best wishes for a wonderful holiday season and a happy and successful new year!

KBA President Dennis D. Depew may be reached by email at ddepew@ksbar.org or by phone at (620) 325-2626.

———

A message from your KBA Awards Committee Chair, Sara Beezley

Begin thinking about those champions in the legal profession who ought to be recognized and commended for their steadfast efforts.

Please stay tuned as the KBA Awards Nomination form will be printed in the January and February Journals.

We eagerly await and encourage numerous submissions for our 2014 award selection process.

Sincerely,

Sara Beezley

Sara
E\text{veryone has secrets and I’m no exception. I’m willing to share one with you; however, if you are relatively close to me, it’s really no secret. I like to juggle. Well, to be honest, I \textit{try} to juggle. Give me three or more objects and I’ll try to juggle them. I do it at home, at the office, in the produce department, and even at Walmart in the toy section. I’ll figure it out one of these days.

While I may not have mastered juggling objects, as an attorney I have learned through trial and error the importance of juggling life! To be able to juggle a career, social, civic, and family activities is a true art form, and I am still in the infant/toddler stages with some growing pains. It is an ongoing process, but the rewards that come with mastering the art of juggling life are too numerous to recount here.

I have personally found that while getting myself up and to the office is important, it is not always the MOST important. I need to know what is going to happen at the office when I get there before I arrive. Do I need a tie? Do I need a jacket? Will I have time for a lunch break to let the dog out? I learned the importance of remembering a tie early in my career. I’ll save the rather funny details for another day, but I can assure you that putting on a tie found in a judge’s chambers is not wise, especially when that tie belongs to the judge in front of whom you are appearing. Embarrassing moments like that can be avoided with a good calendaring system, or common sense I suppose.

For the young attorney a good calendaring system is invaluable. While I’m not going to get all “techy” here, I will just point out that there are many products available on the market, and it is of the utmost importance to find the one(s) that work the best for you, your firm, and your lifestyle. It may not happen right out of the gate, but it can happen. You must have something in place from the start, but also fine tuning it and trying out other methods until you get it just right is the key to being where you need to be, when you need to be there, and keeping judges, opposing counsel, and clients happy. (It also doesn’t hurt when personal tokens are presented to those near and dear on actual birthdays, anniversaries, and holidays instead of a week late!) For example, I quickly discovered that using the “DayMinder” type calendar does not work for me. It required being able to read my own chicken scratch handwriting (not easy) and frequently syncing with my secretary’s calendar (time consuming if not done regularly). Then I moved on to an electronic calendar similar to a Palm Pilot. It worked well, but also required frequent syncing with my secretary and was useless if I forgot to bring it to court. Finally, after some convincing from my secretary and colleagues, I started using my smart phone for calendaring. I’m still trying to figure out why I didn’t use it from day one.

The advent of the smart phone has been a salvation to many. It has been for me. The calendar that travels with you, can be updated simultaneously and shared with your office staff directly from the courtroom makes scheduling and syncing a breeze. The fact that you can view the schedule for your entire day from the moment your alarm goes off in the morning makes choosing what to wear, or knowing whether you need a tie, much less tedious. If your office has worked late after you took off to get nine holes in the previous day, you know instantly if you have a conference call scheduled immediately upon your arrival the next morning allowing you to pick up coffee on the way to work instead of getting slammed the minute you walk in the door! Technology! Sigh!

But the juggling only begins there! Multiple calendars is the key! Work, civic, family. Three calendars (just like oranges, pens, shoes, etc.) work in unison. Share work calendar with office staff. Share civic calendar with other volunteers on the same committees. Share family calendar with, well, family. You can see them all. Juggle them all. Aunt Martha calls. “Can you come to Uncle Henry’s 95th birthday?” Well, red work calendar is open, green civic calendar is open, so, “Yes, Aunt Martha, I’d be happy to attend.” No dropped ball there! Just enter the date on the blue family calendar and the entire family (with whom you have shared your calendar) will be looking forward to your arrival. That’s what I’m talking about!

Is it perfection? Not always. There are still only 24 hours in a day and only seven days in a week. And there will be times when you want to do two things in the same time slot. I’m talking about juggling, not making choices. Two entirely separate things here. Maybe next month we’ll delve into making choices...□

About the Author

Jeffrey W. Gettler is a partner at the firm of Emert, Chubb & Gettler LLC in Independence. He maintains a general practice of law with an emphasis in family law and criminal defense. He is also the prosecutor for the City of Independence. Gettler graduated from Loyola University Chicago in 2003 and the University of Kansas School of Law in 2005. He may be contacted at jgettler@sehc-law.com.
Just Do It!
By Kathy Kirk, Law Offices of Jerry K. Levy P.A., Lawrence, Kansas Bar Foundation president, kathykirk@earthlink.net

Over the next few months I will be highlighting some of the things the KBF does and how important it is to our collective community and organizational outreach to be involved. While I have the advantage of space in the Journal, I am going to keep encouraging you to do a few things:

1. Join the KBF.
2. Encourage a colleague to join the KBF.
3. Sign up for an IOLTA account.
4. Encourage a colleague to sign up for an IOLTA account.
5. Give to a project of your choice.

JOIN. Joining the KBF is easy. It can be done with a click on-line. You can become a fellows pledge for as little as $100. Fellows contributions are the life blood of the foundation and provide the basis to maintain the KBA building, support staffing for the voluntary board of trustees, fund scholarships, law related education, disaster relief, and support access to justice projects.

PARTICIPATE. If you don’t have an IOLTA account, please get one! Pooled interest goes a long way to help citizens obtain access to justice. There is no paperwork for you beyond what you would normally do to open an account. There are many participating banks and Joyce at the KBA will help you find the one with the best interest rates in your area. IOLTA funds can contribute to projects you might not find individually feasible.

INVENT. The KBF is a charitable foundation with a board of trustees. It is separate from, but works in collaboration with, the KBA. Several firms and families have chosen to recognize their firms or honor an esteemed colleague by setting up a specific endowed scholarship or gift. However, there are infinite ways to provide a specific gift for a personal goal or recognition. Currently pending is a law school loan repayment program in addition to new scholarships. Residuals from a recent cy pres award have gone to specific access to justice programs throughout the state.

You do not have to be a member of the KBA or KBF to avail yourself of the foundation infrastructure. The KBF works for you and the community at large. Help it work even better by joining or contributing.

About the Author
Kathy Kirk has been involved in bar and foundation activities for many years. Prior to being in small firm practice focusing on ADR, personal injury, professional negligence, and family law, she served as the first ADR coordinator for the Kansas Supreme Court. Kirk is currently president of the Kansas Bar Foundation; treasurer of the Kansas Association for Justice; served on the recent Ethics 20/20 Commission; and has served on the ADR, Access to Justice, Ethics Advisory, Fee Dispute, and CLE committees. She is also an active member of the Kansas Women Attorneys Association and the Douglas County Bar Association.

www.ksbar.org/kbf
Loss – We All Experience It

By Anne McDonald, Kansas Lawyers Assistance Program, Topeka, Executive Director, mcdonalda@kscourts.org

More and more often it seems that my husband and I peruse the obituaries and instruct the other as to what we don’t want in ours. We know one of us will have to write an obituary for the other in the not-as-distant future; that is, not as distant as we’d like, and not as distant as it was 20 years ago. Of course none of us are guaranteed tomorrow, but that notion is too intense to hold in our mind for long.

So this column is about death and about loss. I hope you’ll keep reading nonetheless.

I want to skip around a bit to mention various aspects. Loss first, because we can all relate to loss at any age. Some are huge – we lose a parent. Others not as huge but still major – our children enter school or we lose a trial. Maybe some recent loss comes to your mind now. We all know loss is inevitable, and we know too that it can have some benefit even though the event is painful. What we might not know, or perhaps not wish to acknowledge, is that we do need to admit to ourselves that the loss occurred and that it is upsetting. Lawyers in particular like to just soldier on and pretend that the event had no effect on them. But unaddressed pain seems to hang around longer and keeps popping up.

We need to absorb the loss, reorganize our life, mourn appropriately, and gain insight into whatever can be learned from the grief process. This all takes time; it can’t be microwaved and done in 30 seconds. The loss of a person comes first to mind – a parent, sibling, spouse, friend, colleague, or heaven forbid, a child. Many of us have certain “lawyer personality” characteristics and beliefs. We think we can just keep going and that we don’t need time or comforting after a death. We’re pretty matter of fact about it and may not show our feelings. In fact, we may not even feel our feelings. But they’re there, and if unacknowledged now, may well demand attention later.

A loss from suicide is different in some ways from death by illness or even accident. (By the way, did you know that the majority of gun deaths are now suicides?) Some states have experienced a notable increase in lawyer suicides in the last few years. Most believe the economy was a contributing factor. Kansas, so far as I am aware, has not seen a big increase, though there is no specific mechanism for keeping track, and there have been a few. Lawyer assistance programs across the country are presenting more programs and educating attorneys about suicide. Don Zemites, the first KALAP executive director, attended the QPR Institute. http://www.qprinstitute.com/. QPR stands for question, persuade, and re-

“ We all know loss is inevitable and we know too that it can have some benefit even though the event is painful. ”

fer, an emergency mental health intervention that teaches lay and professional gatekeepers to recognize and respond positively to someone exhibiting suicide warning signs and behaviors. One common belief some people have is that if they ask “Are you thinking of harming yourself?” it will plant the idea so they shy away from asking the question or expressing their concern. But those who work in the field say that is not true; if a person is suicidal they have already had the thought and may actually be glad to know someone has picked up on that.

When lawyers experience a loss, too often we just dull our pain with alcohol or other substances or addictions. We may sink into depression and paralysis. But that behavior does not allow us to gain the insight and growth that can come from a loss when that loss is handled well. A local counselor puts it this way in her newsletter: “When you undergo a major life crisis, you need time to gain insight and achieve integration again.” Lawyers can be well served by using proven coping skills. One such mechanism is diversion. We need some time away, physically or mentally, from the situation. Reading for pleasure, golf, short trips – you know what appeals to you.

Another is staying in control – of those things you can control. Many of course, we cannot, and the Serenity Prayer says wisdom lies in knowing the difference. But we can continue to maintain a routine and engage our self discipline to take care of the daily business of living.

Finally, seeking empathy helps. One of the kindest things a woman friend did for me when my brother died some years ago was to come and sit in my kitchen and say: “Talk to me about your brother.” Talking with a friend, a therapist, or a support group who can say with sincerity that they care is immensely comforting. KALAP is developing a program on grief and loss which we hope to have available to Kansas lawyers in the next few months.

About the Author

Anne McDonald graduated from the University of Kansas School of Law in 1982. She was in private practice before being appointed Court Trustee in Wyandotte County. She retired from there in 2006 and served as a judge pro tem in District and Municipal Court in Wyandotte County. She was appointed to the Lawyers Assistance Program Commission when it began in 2001, and she has served as the Executive Director of KALAP since 2009. McDonald has also served as a CLE presenter on child support and lawyers assistance topics around the state.

Endnote

1. Culle Vande Garde, LCSW, CAC
It’s not too early to start thinking about KBA leadership positions for the 2014-15 leadership year.

Advance Notice
Elections for 2014 KBA Officers and Board of Governors

The KBA Nominating Committee, chaired by Lee M. Smithyman, of Overland Park, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates.

OFFICERS

**President:** Dennis D. Depew, 2013-14; Gerald L. Green, 2014-15
**President-elect:** Gerald L. Green, 2013-14; Natalie G. Haag, 2014-15
**Vice President:** Natalie G. Haag, 2013-14; Stephen N. Six, 2014-15; and nominations welcome
**Secretary-Treasurer:** Stephen N. Six, 2013-14; open
**KBA Delegate to ABA House of Delegates:** Linda S. Parks, 2014-15; nominations welcome

If you are interested, or know someone who should be considered, please send detailed information to Jordan Yochim, KBA Executive Director, at 1200 SW Harrison St., Topeka, KS 66612-1806, or at jeyochim@ksbar.org by **Friday, January 17, 2014.** This information will be distributed to the Nominating Committee prior to its meeting on **Friday, January 24, 2014.** In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

BOARD OF GOVERNORS

There will be eight positions on the KBA Board of Governors up for election in 2014. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Jordan Yochim by **Friday, February 21, 2014.** If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2014 are:

- **District 1:** Incumbents Gregory P. Goheen and Mira Mdivani are eligible for re-election. Johnson County.
- **District 3:** Incumbent Eric L. Rosenblad is eligible for re-election. Allen, Anderson, Bourbon, Cherokee, Crawford, Labette, Linn, Montgomery, Neosho, Wilson, and Woodson counties.
- **District 5:** Incumbent Terri S. Bezek is eligible for re-election. Shawnee County.
- **District 7:** Incumbent Matthew C. Hesse is not eligible for re-election. Sedgwick County.
- **District 8:** Incumbent John B. Swearer is eligible for re-election. Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties.
- **District 11:** Incumbent Nancy Morales Gonzalez is eligible for re-election. Wyandotte County.
- **District 12:** Incumbent William E. Quick is eligible for re-election. Out-of-State.

For more information
To obtain a petition for the Board of Governors, please contact Jordan Yochim at the KBA office at (785) 234-5696 or via email at jeyochim@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Lee M. Smithyman at (913) 681-3260 or via email at lsmithyman@ksbar.org or Jordan Yochim at (785) 234-5696 or via email at jeyochim@ksbar.org.
This article is based on our experiences as lobbyists in Texas (A.J. Bingham) and Kansas (Moji Fanimokun).

To be clear, we do not believe in diversity for its own sake. Rather, we are advocating that diverse law students, JDs and attorneys should look beyond the traditional legal market when searching for job opportunities. Our goal is to provide an introduction to a viable, challenging, fun, and potentially lucrative career that diverse students and legal professionals may not see as opportune.

As background we have been good friends since meeting in 2005, during our 1L year at Washburn University School of Law; a friendship that grew professionally as we both entered the lobbying field. The impetus for this article began over a recent conversation. While we operate in different states and lobby on different issues, a commonality we found was the lack of diversity, both in race and in gender, amongst our colleagues.

What We Do

A lobbyist argues legislative policy as the law is being created or amended by elected officials in the same fashion traditional attorneys argue points of law to the court. Our job is to inform and educate elected officials on the realities of proposed legislation and to advocate that they vote in favor of our client. A large part of our work involves the essential skills taught in law school: writing, issue spotting, legal research and analysis. Lobbying involves a great deal of personal interaction, such as explaining your clients position to elected officials and their staff, government agency personnel, and other lobbyists. The field is socially dynamic and requires the ability to process and deliver information in a logical, yet simple manner.

The old adage “you can do anything with a JD” holds true in the lobbying profession.

Our First Steps

A.J.’s Story

Getting into our profession is not easy. I attribute my break largely to tireless networking and a little luck. My path to lobbying started at the beginning of my 3L year. After returning from a summer associateship with a corporate law firm in Kansas City, Mo., I felt something was missing. The field was not quite what I had envisioned. Being a social guy, I knew I would likely be happier and more successful in a field where sociability was an asset. That realization, along with an interest in politics and my desire to return home to Austin, led me to the lobbying profession.

Finding a job, however, became a challenge. Unlike law firms which have a fairly lock-step hiring cycle, lobbying firms recruit as needed. The most conventional recruiting ground is with the legislature. Following graduation in 2008, I spent many summer days calling on legislative offices with my resume, as well as networking with staffers and established lobbyists (both of which often had the inside track on open positions). My first job was in the Texas senate, which lasted only for the session. During that time, I continued to build networks (note: networks are a key element to your success in this profession, or any other for that matter). It was while at my second capitol job, working for a powerful Texas house committee, that I happened to be in the right place at the right time. My current employer had a need; I successfully interviewed for the position and I was hired.

Moji’s Story

I love politics, but I also have a love for the law. I made the choice to attend law school and become an attorney because I thought it was the realistic option; law would be my career and politics my dream. After meeting Delano Lewis, Washburn Law alum and former ambassador to South Africa during a banquet with the Black Law Student Association my 1L year, I began to consider options outside the traditional attorney role. That allowed my suspended dream to reemerge. After passing the Kansas bar, I took advantage of being in the capital city and began sending resumes to every governmental agency and legislative department in lieu of law firms.

Lobbying is not an easy career to break into. The field is very much about who you know before you get the opportunity to prove what you know. Because of the numerous barriers to entry, many JDs think lobbying is not a practical option. In addition to summer clerkships, my resume detailed my participation in a variety of student groups during my time at Washburn Law. My student involvement and various participation in organizations and associations, in addition to a strong academic record, helped separate my resume from other applicants. I received my first job offer as a lobbyist because my employer wanted someone who could provide a different name, face, and perspective.

Conclusion

Lobbying can be a rewarding career choice for law students or attorneys who have a love for the law that is coupled with a love of the political process. Given the lack of diversity amongst
legislators and lobbyist, being a diverse professional will inherently distinguish you from others in the field. Always maintain the view your diversity is an asset, not a hindrance.

About the Authors

**A.J. Bingham** is a registered lobbyist and the legislative director for one of Texas’ top lobbying firms. He has represented public and private sector clients before the Texas Legislature, state agencies and commissions, as well as the executive branch on range of issues, including cybersecurity, energy, satellite communication, local governments, taxation, and transportation. Prior to becoming a lobbyist, Bingham was a staffer for the Texas House Committee on State Affairs, and a research associate in the Texas Senate Research Center. He has a Bachelor of Arts in political science from Wake Forest University and received his Juris Doctor from Washburn University School of Law. He currently serves on the boards of the Young Men’s Business League of Austin, Austin School for the Performing and Visual Arts, and the LBJ Presidential Library Future Forum; and is co-chair of the Capital City African American Chamber of Commerce’s Government Affairs Committee. He may be reached via email at aj.bingham@gmail.com.

**Moji Fanimokun** is the director of governmental affairs for the Wichita Area Association of REALTORS, where she lobbies for the protection and support of private property rights, economic development, sustainable communities, and affordable housing opportunities. Prior to joining the Realtor Association, she worked as a staff attorney and lobbyist for the League of Kansas Municipalities. Fanimokun has served as registered lobbyist in the state of Kansas since 2009. She graduated from Wichita State University in 2005 and obtained her Juris Doctor from Washburn University School of Law in 2008. She is a member of the Kansas Bar Association’s Diversity Committee, as well as serving on the Real Estate Practice, Legislative, and Professional Diversity committees for the Wichita Bar Association. Additionally, Fanimokun is a member of the Wichita Chamber’s Government Relations Committee, Wichita’s Women in Commercial Real Estate organization, and the Wichita Transit Authority Advisory Board.

We humans are familiar with the inevitability of mistake, error, and fault. Our arts, science, and vernacular are laced with a tip o’ the hat to the universal condition that things do not always work out as planned. With that understanding, I chuckled empathetically when a court asked me to review some process anomalies.

Random Sample
The first case was most intriguing. The timeline went as follows:

1. April 1 – Petition filed.
2. April 5 – Petition and summons served.
3. April 8 – Petition entered into FullCourt case management system.
4. April 9 – Petition scanned into court’s document imaging system.
5. April 11 – Petition file-stamped by clerk.

A second case from the same court turned up a document with a date stamp of “May 32, 2005.”

While I do not have a ready diagnosis as to how such errors occurred, I do believe those errors provide opportunity to discuss approaches and processes aimed at minimizing reoccurrence. (Note: Eradication of error is indisputably impossible.) Such processes create an umbrella of “reasonable care” evidencing the fact that people have considered potential fault zones and made some hopeful attempt at minimizing failure. Though the examples are from a court, law firms can and should consider implementing and using similar processes to protect file integrity as well.

Technological Controls
1. Input should be reviewed against a standardized checklist for a process. In the example above, the system might be programmed to note that a petition was entered on April 1 and, therefore, anticipates a FullCourt petition entry as well. Without a FullCourt entry, up pops a red flag.
2. The red flag issues detected then trigger responsive processes. At a minimum, an exception report is generated to warn the humans that a case or range of cases were issued filing dates but did not have a prerequisite petition codes.
3. Red flags can go further by actually implementing process lockdowns. In other words, if a prerequisite petition code is not entered, then later entry of a summons, return of service, appearance, etc., would be prevented until the red flag is removed.

These sorts of “business logic” implementations serve the same aim – figuring out where that wandering petition has gone for the 10 days from receipt to file-stamping. Such processes also aid detection of errors in system interactions like those in the example where a document file-stamped April 11 time travels backwards to be imaged on April 9.

Human Controls
1. Two-person, independent review helps corner and trap errors. While it is a strategy favored by boring accountants, I prefer to imagine it as the two-key authentication for nuclear launch on a movie-set submarine. When all review rests on one set of eyes, error creeps up fast – especially in mundane and routine tasks.
2. Cross-training is an essential component of two-person review. Gaps due to absence can be filled more readily creating reliable output. Also, team members from outside the two-person review team can better recognize when a checklist process has detailed.

Chill Out!
Error is inevitable and ineradicable. Lawyers might casually drift into assumptions that a mistake must mean negligence or maliciousness is nearby. That may pay the bills but can also cloud our perception of anecdotal experience and statistical analysis. There is no perfect process or practitioner and reducing error relies heavily on understanding that condition.

We must also train to recognize that the ebb and flow of error often traces the path of resources. Courts feel the pinch of the economy (because attorneys and litigants have first felt the pinch) and resource-tight times make developing and implementing technological and human controls difficult.

Most important to “chilling out” means figuring out safe harbors for reporting errors – those we make and those of others’ we might find. Retribution creates an environment conducive to hiding errors. Assessing blame ought to take a back seat to plugging holes in the procedural dike. After all, Murphy’s Law visits the just and the unjust alike.

About the Author
Larry N. Zimmerman, Topeka, is a partner at Zimmerman & Zimmerman PA. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.
Follow me here for a bit. Airlines charge to check bags. So no one is checking bags these days. And that means travelers are bringing the equivalent of Jed Clampett’s pickup truck onto planes, and then shoving it all in the overhead storage bins. Boarding now is interminable, on-time departures are going the way of the Dodo bird and flying is less attractive than hernia checks.

Some blame airlines, others blame travelers. I have my own culprit: wheels. On bags.

Yes, the roller bag. The bane of my existence, it appears that almost everyone on the planet is a wheel bagger. Except me. And that’s not changing anytime soon.

Bags started with two wheels. Debuted by flight attendants, their bags had long handles and moved upright with very little fanfare. And life was good. But then someone decided to use the wheel concept with four wheels and shortly thereafter, Jed Clampett arrived and the earth tilted off its axis.

Consider what happens on every flight – infrequent traveler lugs her pickup on wheels down the aisle, bumping every armrest while the rest of the world watches. Ever tried to make a connection while “never travel lady” tries to pull her mobile home on wheels down 45 rows of seats? I’ve celebrated birthdays watching people do this. Ladies whose bag-wheels turn nine different ways but forward. And all this is before the bins get jammed.

People carry on junk they don’t need. OK. I get that. But I have a simple rule. If you pack it, you carry it. You have to lift it and lug it from the security check-point to gate D-46. Four wheels encourage packing gold bricks, lead fishing weights, 50 pairs of shoes, and nine types of hand moisturizers. Meanwhile, the seat belt extender business is soaring. Coincidence? Duh. Just like the car alarm business – it was a great concept until alarms starting blaring outside churches, funeral homes, and libraries. All because someone bumped into their car.

I can’t turn the clock back, but I can at least help identify the culprits. So here is my profile of the bag roller and those who carry.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Holiday Gifts for the Legal Writer

By Joyce Rosenberg, University of Kansas School of Law, Lawrence, jorose@ku.edu

Introduction

The gift-giving holidays approach! For your favorite legal writer, why not consider some useful gifts? (You could even make a legal writing wish list for yourself.) Friends and family like to give law-related gifts, and who can blame them? It's hard to resist the offerings in the For Counsel catalog.1 If, however, you don't need another set of bookends featuring the Scales of Justice, here are some ideas.2

Books

Great legal writers need great books to read. We need references—for tips and reminders on grammar, usage, style, and advocacy.3 Perhaps more importantly, we must read examples of great writing. We become better writers when we have excellent models. For lawyers, “great writing” means effective use of language—prose that is concise but still evocative, precise, and clear. I took an informal survey of some talented writers, and I was surprised at how consistent their responses were about the works that helped them improve their own style. Any of these books, nonfiction and fiction, would be a welcome addition to the legal writer’s bookshelf. They’re worth owning in hard-copy form, not just borrowing or downloading.

Non-fiction

The Elements of Style, Illustrated (hardcover, about $75; paperback, about $12).4 This classic style manual is supremely useful for everyday writing concerns like punctuation, syntax, and paragraph structure. Although the book is not tailored to legal writing, it is a great resource for the fundamentals of all good writing. The illustrated edition includes vibrant and lovely images by artist Maira Kalman.5

Typography for Lawyers (paperback, about $25).6 This book offers ideas for refreshing the appearance of legal documents.

More interesting, though, is what it suggests about some traditions of law practice and conventions of written advocacy.

Legal Writing in Plain English (paperback, about $15) and The Winning Brief (hardcover, about $35).7 Alternatively, Making Your Case (hardcover, about $20) and Reading Law (hardcover, about $32).8 Eventually, Bryan Garner's publisher will come out with a leather-bound gift set. Until then, however, why not put one together for the legal writer in your life? These volumes offer big ideas and concrete tips for improving a lawyer's writing, advocacy, and analysis.

Fiction

The Blind Assassin (paperback, about $15)10 or The Handmaid's Tale (hardcover, about $17).11 Margaret Atwood's spare prose and descriptive storytelling provide a worthwhile example for any lawyer.

Ernest Hemingway compilations: Four Novels (hardcover, about $68)12 or The Complete Short Stories (paperback, about $15).13 My survey respondents valued Hemingway for his short sentences and uncluttered style, both crucial to effective legal writing.

The Book Thief (paperback, about $7).14 Markus Zusak's story is engaging, but his character development has something to teach legal writers. He figured out how to portray Death—that most difficult of clients—as a sympathetic character.

One Movie

The list of movies about legal writing is pretty short.15 “The People vs. Larry Flynt” (about $12 on Blu-ray)16 isn't exactly about legal writing, but it is worth watching for the last scene's Supreme Court oral argument. The film, about the Hustler Magazine publisher and his First Amendment battles, adapted the argument transcript almost verbatim (though it's smoothed out for Hollywood purposes). Edward Norton,
playing attorney Alan Isaacman, portrays the perfect advocate: prepared, articulate, persuasive, and relaxed but respectful.

**Apps and Software**

For the technology-inclined, there are many electronic resources to make a legal writer’s job easier. *The Bluebook* may not be fun, but it’s the essential legal citation reference. Its two online incarnations, *The Bluebook* online\(^{17}\) (annual subscription, $3218) and *Rulebook* for Apple devices ($39.99 in iTunes), make supremely useful gifts.

*WordRake*\(^{19}\) (annual subscription, $9920) works as a kind of advanced grammar check for Word documents. The software scans writing and highlights instances of legalese and wordy construction.\(^{21}\) *iWriteLegal* (free in iTunes), developed by Kathleen Vinson of Suffolk University Law School, provides tips, checklists, and resources for improving legal writing. It is geared toward fundamentals, not advanced skills—but attention to the basics never hurts.

**One Last Thing**

There: Your easy holiday shopping, accomplished. Finally, consider perhaps the ultimate gift for the legal writer: A baseball cap, coffee mug, or beer stein emblazoned with “The pen is mightier than the sword.”\(^{22}\) Happy holidays from Substance & Style!

**About the Author**

Joyce Rosenberg teaches Lawyering Skills and directs the Externship Clinic at KU Law School. She can be reached at jorose@ku.edu.

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18. Subsequent renewals are $15. A three-year subscription is $50.
20. A two-year subscription is $178; three years is $237.
Reducing Stress Through “America Ninja Warrior”

By Zen Mayhugh, University of Kansas School of Law, Lawrence

I first heard of the television show, “America Ninja Warrior” (ANW), when one of my classmates confessed that he could not stop watching it. I stifled a laugh as I thought of “Wipeout,” a television show intended to produce comedy rather than competition—but ANW is no laughing matter. Consisting of an obstacle course that demands agility, endurance, and grip strength, only three competitors in 34 seasons of the show have ever touched the final buzzer.

ANW intrigued me immediately. The course plays well to my strengths, and I am always on the lookout for a physical challenge to shake off the psychological distress that so often accompanies law school.

Exercise as a tool to combat stress and elevate mood is well documented. The researchers of one study reported that participation in any form of daily activity was associated with reduced risk for all types of psychological distress, even when controlling for factors, such as age, gender, SES, marital status, BMI, chronic illness, and smoking.1 Research has also consistently shown that exercise alone can significantly reduce symptoms of depression and anxiety.2 It has even been shown to be as effective as antidepressant medication in the treatment of clinical depression,3 which may not come as a surprise, given that exercise acts on the same pathways in the brain that antidepressant medications target.4

I have always been active, but, during law school, I have made a concerted effort to capture the stress reducing and mood enhancing effects of exercise. One method I have used is to commit myself to demanding activities. During my first semester I trained for a winter backpacking trip to a mountain cabin that sits at 12,000 feet. During my second semester I trained for and completed a triathlon. Many law students put aside their personal life and health in their efforts to become a lawyer.5 Research shows the incidence of clinical depression among law students to be as high as 40 percent.6 Incidence of other symptoms such as clinically elevated anxiety and hostility among law students have been measured at 15 times the general population.7 This significantly exceeds the emotional distress of medical students, and even approaches that of psychiatric populations.8 Most troubling is that these problems seem to carry over into professional practice. In a Johns Hopkins study, practicing lawyers ranked highest in major depressive disorder among 104 occupational groups.9

At the beginning of my 2L year, I was in need of a new physical challenge. So when I discovered ANW I thought, why not audition? I organized a training regimen around the obstacles on the ANW course: rock climbing, strength training, agility drills, and mobility work. This was certainly a time commitment, but intense training took my mind completely away from law school, and soreness was something to feel good about—especially when I was stuck in a chair for most of the day.

When I got the announcement that auditions videos were being accepted, I recruited some of my cinematographer friends to capture my best ANW moves, and a little personality, on film. Along with 7,000 other ANW hopefuls, I submitted an audition tape and waited.10

I got the call during finals. I had taken three tests, had two to go, and, at that point, had forgotten what ANW was. Still, I was awarded one of 400 slots to compete on ANW. The competition would happen in Denver 10 days after I was scheduled to take my last final. All I could do at the moment was make a note to buy a flight to Denver, and I went back to my study carrel.

Check in for the competition was at Denver’s Civic Center Park. The obstacle course constructed there took 10 semi-trailers to transport and a staff of 130 to assemble.11 Security staff was on hand to keep the public—and competitors—outside of the gates surrounding it. They bristled as other competitors and I loitered at the gates, peering in at the obstacles and running through them in our heads.

The competitors were divided into two groups. The start times for the obstacle course was an obstacle in itself, with the

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Footnotes


6. Id., at 114.

7. Id.


11. Id.
first group running the course between sunset and 1 a.m., and
the second group running between 1 a.m. and sunrise. I was
assigned to the first group, and we were finally allowed inside
the gates surrounding the course but only for a demonstration
of each obstacle. We were not permitted to attempt or other-
wise touch any of the obstacles.

After the sun went down, the temperature dropped into
the mid-40s. The challenge quickly became to stay warm and
loose. The designated warm-up area was equipped with pull-
up bars and a vault trampoline; not ideal equipment to stay
warm for hours on end. Sleeping bags appeared all around,
and many competitors disappeared into them.

My turn to run the course came just after 11 p.m. To see
how I did, you will have to watch the show, but I can say I was
awarded the “Warrior Wipeout of the Day.” Not exactly what
I had in mind, but being featured on the show, especially in
slow motion, bodes well for making a repeat attempt at the
course, which I’m training for now. After all, I have another
year of law school, and I need a little competition to get my
mind outside the walls of Green Hall. ■

About the Author

Zen Mayhugh is a third-year law student at the University of
Kansas. He hopes to practice in recreation risk management. You
can watch his audition video and the ANW episode in which he
was featured on his blog at www.zenmayhugh.blogspot.com.
**Members in the News**

### Changing Positions

**Katie L. Anderson** has joined Creative Artists Agency, Nashville, as the executive of business affairs.

**Adam R. Andrus** has joined Adam Jones, P.A., Wichita, as an associate.

**Jennifer Bailey** has joined Erise IP, Overland Park, as a partner.

**David J. Bideau** has been elected as the new county commissioner for Neosho County.

**Hillary J. Boye** has filled the position as public defender for Brown County, Hiawatha.

**Cory R. Buck** and **Stephen Netherton** have joined Hite, Fanning & Honeyman LLP, Wichita.

**Taylor Concannon** has joined Foulston Siefkin LLP, Wichita, as a summer associate.

**Hon. Daniel D. Creitz** has been reappointed as the chief judge of the 31st Judicial District, Iola.

**Hon. Kim W. Cudney** has been reappointed as chief judge of the 12th Judicial District, Washington.

**Brandon W. Deines** has joined Fagan, Emeret & Davis LLC, Lawrence.

**Diane D. Durbin** has joined Horn Aylward & Bandy LLC, Kansas City, Mo., as of counsel and **Anne Erickson** has joined as an associate.

**Alex P. Flores** and **Jade M. Martin** have joined Klenda Austerman LLC, Wichita.

**Hon. Bruce T. Gatterman** has been reappointed as the chief judge of the 24th Judicial District, Larned.

**Thomas D. Haney** has joined Stevens & Brand LLP, Topeka, as of counsel.

**Nathan R. Hoffman** has joined Cargill Meat Solutions Corp., Wichita, as a general attorney.

**Carol A. Krstulic** has joined Blake & Unlig P.A., Kansas City, Kan.

**Ahsan A. Latif** has joined MKL P.C., Kansas City, Mo., as an associate.

**Kurtis I. Loy** has been appointed by Gov. Sam Brownback as an 11th Judicial District judge, McPherson.

**David P. Madden** has joined Hinkle Law Firm LLC, Overland Park, as of counsel.

**Patrick J. Martin** has joined Rankin Law Offices, Fredonia.

**Katie A. McClain** has joined the Overland Park offices of Manson Karbank Burke as an associate.

**Nicholas J. Means** has joined Joseph, Holland & Craft LLC, Wichita.

**Robert D. Myers** has joined the City of Newton as city attorney.

**Hon. Gary L. Nafziger** has been reappointed as chief judge of the 2nd Judicial District, Oskaloosa.

**Kelly Ann Navinsky-Wenzl** has joined Bolton & McNish LLC, Clay Center.

**Starla B. Nelson** has been selected by the 12th Judicial District Nominating Commission as district magistrate judge in Jamestown.

**Karen R. Palmer** has joined the legal department of St. Francis Community Services, Wichita.

**Hon. James A. Patton** has been reappointed as chief judge of the 22nd Judicial District, Hiawatha.

**Holly M. Perkins** has joined Joseph, Holland & Craft LLC, Topeka.

**Melissa T. Pope** has joined the Law Office of Jennifer L. Stultz LLC, Wichita.

**Hon. Michael F. Powers** has been reappointed as chief judge of the 8th Judicial District, Marion.

**Hon. Preston A. Pratt** has been reappointed as chief judge of the 17th Judicial District, Norton.

**Joseph F. Reardon** has joined McNany, Van Cleave & Phillips P.A., Kansas City, Kan.

**Anthony F. Rupp** has joined Foulston Siefkin LLP, Overland Park.

**Hon. Richard M. Smith** has been appointed as chief judge of the 6th Judicial District, Mound City.

**Kyle P. Sollars** has joined Stinson, Lasswell & Wilson L.C., Wichita.

**Sabrina Stadnifer** has joined the Wichita office of Morris, Laing, Evans, Brock & Kennedy Chtd.

**Selena Sujoldzic** has joined Arn, Mullins, Unruh, Kuhn & Wilson, Wichita.

**Gregory J. Trum** has joined Cross-Midwest Tire Co., Kansas City, Kan., as legal counsel.

**Eric V. Turner** has become a law clerk for the U.S. District Court for the District of Kansas, Wichita.

**Anthony E. Valenti** has joined Veritas HHS, Kansas City, Kan., as a contract attorney.

**Elizabeth M. Weingart** has joined Finley, Miller, Cashman, Schmitt & Boye LLP, Hiawatha, as an associate.

**Margaret F. White** was appointed Morris County district judge, Council Grove.

### Changing Places

**A.D. Schup Law LLC** has moved to 7242 W. 121st St., Overland Park, KS 66213.

**Lauren P. Allen** has started her own practice, Allen Law Office, 420 Nichols Rd., Ste. 200, Kansas City, MO 64112.

**Chris Bailey** and **Gabrielle Thompson** have started a firm, Thompson & Bailey, Attorneys at Law, 630 Humboldt, Ste. 110, Manhattan, KS 66502.

**Nathan D. Burghart** has started his own practice, Burghart Law LLC, 825 Vermont, Ste. B, PO Box 865, Lawrence, KS 66044.

**Jay D. Befort** has opened up a firm, Befort & Befort, 1122 SW 10th Ave., Topeka, KS 66604.

**Brian L. Burge** has moved to 40 Corp. Woods, 9401 Indian Creek Parkway, Ste. 1250, Overland Park, KS 66210.

**The Cochran Law Office LLC** has moved to 1080 NW South Road, Blue Springs, MO 64105.

**Tamara L. Davis** has opened a law firm at 113 S. Main St., Ste. C, Ulysses, KS 67880.

**Ferreer Bunn Rundberg Radom & Ridgway Chtd.** has moved to 9393 W. 110th St., Ste. 200, Overland Park, KS 66210.

**Jennifer L. Lautz** has started her own practice, Lautz Law LLC, 1041 N. Waco, Wichita, KS 67203.


**Martinez Madrigal & Machicao LLC** has moved to 616 W. 26th St., Kansas City, MO 64108.

**John M. Molle** has started his own firm, Molle Law Firm LLC, 4010 Washington, Ste. 501, Kansas City, MO 64111.

**Polsinelli PC** has opened its new headquarters, located at 900 W. 48th Place, Kansas City, MO 64112.

**Stevens & Brand LLP** has moved its Topeka office to 917 S.W. Topeka Blvd., Topeka, KS 66612.

**Clyde W. Toland** has started his own practice, Law Office of Clyde W. Toland LLC, 103 E. Madison Ave., Ste. B, PO Box 404, Iola, KS 66749.

**William J. Paprota P.A., Attorney at Law** has moved to 10561 Barkley, Ste. 510, Overland Park, KS 66212.

**Joy K. Williams** has started her own practice, Joy K. Williams, Attorney at Law, 1540 N. Broadway, Ste. 101, Wichita, KS 67214.

**Wright Schimmel LLC** has moved to 6900 College Blvd., Ste. 285, Overland Park, KS 66211.

### Miscellaneous

**Kevin N. Berens**, Colby, has been reappointed to a two-year term on the Kansas Sentencing Commission.

**Robert M. Collins**, Wichita, has been selected by the Kansas Continuing Legal Education Commission as the recipient of the 2013 Robert L. Gernon Award.

**Hon. W. Lee Fowler**, Emporia, has been appointed to serve on the Kansas Sentencing Commission.
Obituaries

Richmond Martin Enochs II

Richmond Martin Enochs II, died October 29; he was 74. He was born November 4, 1938, to the late Mildred and Richmond Enochs in Topeka. He graduated from Baker University and Washburn University School of Law.

Enochs practiced law for 50 years, the last 48 years with the law firm of Wallace, Saunders, Austin, Brown & Enochs. He was recently awarded the Justinian Award from the Kansas Womens Attorneys Association.

Enochs is survived by his wife, Barbara; his four children, Rick, Wayne, Darren, and Lesleigh; and eight grandchildren.

C. Michael Lennen, Topeka, was honored as the Washburn University School of Law 2013 Alumni Fellow.

Jeffrey N. Lowe, Wichita, is now a fellow of the American Academy of Matrimonial Lawyers.

Hon. Patrick D. McAnany, Topeka, has been named the recipient of the 2013 American Judges Association Chief Justice Richard W. Holmes Award of Merit.

David J. Rebein, Dodge City, has been re-elected to serve as chair on the Legacy of Justice Foundation board of directors.

Sally B. Shattuck, Ashland, received the Jennie Mitchell Kellogg Achievement Award presented by the Kansas Womens Attorneys Association.

The Kansas City Legal Secretaries Association honored Carol Smith, esq., Hays, with Boss of the Year at its Annual Bosses’ Appreciation Night.

Susan K. Teel, Wichita, has been named to the Kansas Association of Legal Assistants/Paralegals board of directors as a director.

Marcia Ann Wood, Wichita, has been recognized as out-going president of the Wichita Women Attorneys Association and inducted as the Wichita Bar Association’s incoming secretary/treasurer.

Diane S. Worth has been approved by the Kansas Supreme Court as a core mediator, Wichita.

Correction: In the October Journal it was listed in error that Dana Edwards and Mary A. Winter joined the Johnson County District Court Trustee Office, Olathe, when, in fact, both have worked in that office for a number of years. We sincerely apologize for the error.

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.

KBA CLE is Going Green

In moving forward with an initiative to go green, effective January 1, 2014, KBA CLE will start providing registrants their CLE materials in electronic format. Materials will be sent to the email address on file with the Bar. Please make sure your email is updated on your profile page to ensure receipt of materials. If you wish to still receive a hard copy, you must mark that on your registration, as hard copies will only be available at the door for walk-in registrants and those who made a request.

NOTICE OF AMENDMENT OF THE LOCAL RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT

The United States District Court for the District of Kansas gives notice of the amendment of local rules 26.1, 83.1.1, 83.8.5, 83.8.6, 83.8.7, 83.8.8, and 83.8.9. Copies of the amendments are available to the bar and the public at the offices of the Clerk at Wichita, Topeka, and Kansas City. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The amendments are also available on the United States District Court website at www.ksd.uscourts.gov.

Interested persons, whether or not members of the bar, may submit comments on the amendments addressed to the Clerk at any of the record offices. All comments must be in writing and, to receive consideration by the Court, must be received by the Clerk on or before 4:30 p.m., December 29, 2013.

The addresses of the Clerk’s offices are:

204 U.S. Courthouse
401 N. Market
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Signed:
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United States District Court
District of Kansas
Doing More With Less – Expanding the Grand Jury System to Meet the Demands of a Large Volume Prosecution Office

By Chad J. Taylor, Shawnee County District Attorney, Topeka

On January 12, 2013, I began my fifth year serving the citizens of Shawnee County as district attorney. Much like the preceding years, 2013 is turning out to be both busy and eventful. So far, the rate of case filings for 2013 appears to be about average or just slightly above recent years. The bottom line is that our community simply has too much crime and too little resources.

However, this is not a criticism of those folks who control the purse strings. It is just an acknowledgment of the times. There is certainly no doubt that resources are scarce across the board. We have all heard the expression “do more with less.” Those four words have virtually become a mantra for anyone discussing the economic conditions of the present and the foreseeable future. I can tell you without hesitation that “do more with less” is equally as applicable to the realm of criminal prosecution as it is to any business trying to keep the doors open and the customers served.

Given that we are all trying to do more with less, the district attorney’s office has been looking for ways to remain efficient while also being a good steward of taxpayer dollars. Recently, we undertook a project that we felt would help in that endeavor by forging into the legislative arena and asking the Kansas legislature to expand the scope of the grand jury statute. It is our hope that an expansion would lead to increased efficiency in the processing of the large volume of felony cases that are handled in Shawnee County on a daily basis.

The proposal to the legislature was simple – amend the grand jury statute to allow the convening of grand juries to investigate any felony law violation. Previously, the law allowed for grand juries to be convened only for the highest levels of felony cases classified by the Kansas Sentencing Guidelines. After reviewing our felony case load across the board, we believe that the ability to present the lower level felonies, including property crimes and drug offenses, will lead to enhanced efficiency with the added benefit of per case cost reduction.

Keep in mind that a grand jury essentially serves the same function as a district court or magistrate judge conducting a preliminary hearing to determine whether probable cause exists in felony cases. If either the court or the grand jury determines that probable cause exists, the defendant is then required to stand trial.

By presenting cases to a grand jury, the number of witnesses who must be subpoenaed is dramatically reduced. For example, let’s say that a suspect is arrested and charged with five counts motor vehicle burglary, all felony level offenses. Also, assume that the five vehicles have different owners. If that case proceeded to a preliminary hearing, the state would be required to issue and serve a subpoena on all five vehicle owners to appear in court for the preliminary hearing. Those vehicle owners would be required to appear for the sole purpose of testifying that they don’t know the defendant and didn’t give him or her authority to enter their vehicle. In addition to the vehicle owners, there are generally multiple police officers who are also subpoenaed for the preliminary hearing. All in all, that case would require the issuance and service of somewhere between seven to 10 subpoenas in order to support a probable cause determination at preliminary hearing.

On the other hand, a grand jury can generally receive that same testimony through one police officer witness. In essence, the same testimony is presented to the entity determining probable cause, but at a dramatically reduced expense. Considering the large number of felony cases filed annually, the total number of subpoenas for preliminary hearings and the costs associated with their issuance and service is substantial. This is a dramatic waste of resources considering that only around 8 percent of all felony cases in Shawnee County actually have the preliminary hearing. In almost all felony cases, the defendant simply appears and waives his or her right to have the hearing, even though all of the subpoenas for those hearings have been processed and served.

However, we recognize that there are still some felonies that need to progress through the use of preliminary hearings. Looking forward, we envision that the bulk of felony cases presented to the grand jury will be drug crime and lower level felony offenses, such as the motor vehicle burglary in the above example.

In conclusion, it is apparent that we not only live in interesting times but also in lean times as well. Regardless, there is still a job to be done. We must provide the best possible level of service with the resources available. We are, in part, responsible for the safety of this community and it is incumbent upon this office to do everything in our power to utilize our resources in the most efficient way possible. Our hope is that the utilization of the expanded grand jury system in Shawnee County will help us to meet our challenge and our obligation.

About the Author

Chad J. Taylor has served as the Shawnee County district attorney since January 2009. He is a graduate of the University of Kansas with a bachelor’s in accounting and business administration and also a graduate of the Chicago-Kent College of Law with a juris doctorate.

After law school, Taylor worked in the public power industry. In 2001, he opened a private practice in Topeka, where he handled a broad range of cases in both federal and state courts. As district attorney, he oversees a dedicated staff whose commitments include an emphasis on public safety, a focus on accountability and incarceration for repeat offenders, providing a voice for victims of crime, and building positive relationships with law enforcement partners.
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Unauthorized Immunity Agreements: Honesty is the Best Policy
By Joshua I. Marrone
Introduction

The criminal justice system is often a game of “us vs. them.”1 Understandably, it is difficult to avoid falling into an ends-justifies-the-means mentality. Confidential informants are crucial to the investigation and apprehension of the most noteworthy criminals among us. We need informants. And because confidential informants are necessary, it is important to ensure that the procedures that law enforcement officers use to recruit them are honest. Confidential informants and law enforcement officers may not like each other, but they often must work together in the interest of a greater good. For that to continue, trust is necessary.2

In cases of unauthorized immunity offers, three important considerations are at stake: a defendant’s right to a fair trial, the need for law enforcement to work within its authority, and the protection of the public from those that would violate the law. And importantly, the courts are tasked with ensuring that the government plays by the rules regardless of whether citizens do.3 Law enforcement officers know, or should know, that they do not have the authority to grant anyone immunity from prosecution.4 On that point the law is clear; only prosecutors have the authority to grant immunity from prosecution.5 Occasionally, however, law enforcement officers neglect to make that distinction clear to the suspects they encounter. Sometimes, the prospect of recruiting an informant to catch a “bigger fish” leads an officer to make an offer of immunity that a soon-to-be defendant cannot refuse. So what happens when informants do their part of the bargain but the government fails to perform?

Courts across the United States have gravitated toward two analytical frameworks to handle cases involving broken, albeit unauthorized, immunity agreements. First, courts rely on contract theories such as apparent authority, ratification, or detrimental reliance to analyze the cases. But these contract theories aren’t suitable for resolving criminal law issues—the justifications for contract law and criminal law are different. Second, courts sometimes apply the concept of “fundamental fairness” to dismiss cases or enforce otherwise unauthorized agreements. Case law, however, does not make clear when courts should apply “fundamental fairness,” other than when a court feels like applying it. Kansas courts have existing tools to a suspect.13 Yet the court did believe that Ralston suffered a wrong. The promise coerced Ralston into making incriminating statements he otherwise may not have made, which in turn created unreliable evidence. Naturally, suppressing the incriminating statements solved that problem; enforcing the agreement and dismissing the case would have been overkill.14

Sometimes the facts of a particular case are particularly egregious such that suppression of coerced statements isn’t enough. Sometimes a caught criminal bets more than a confession on (1) the reasonable belief that law enforcement officers have the authority to make promises of immunity, and (2) the belief that the officers will keep that promise. Consider the following hypothetical:

Billy is driving down the street. Officers are watching him because Billy sold an undercover agent a bit of marijuana in the not too distant past. Not paying attention, Billy fails to stop at a stop sign, so the officers go ahead and pull him over. An officer tells Billy that they are aware of his illicit business and inform him that he had, in fact, sold some marijuana to the officer currently looking at him through the passenger window. Despite Billy’s memory loss (probably drug induced),15 he remembers that particular sale. The officers do not arrest Billy or read him Miranda—they had been planning the whole time to negotiate a deal.

Sometimes dealing with an unauthorized promise of immunity is relatively simple, and Kansas courts resolve the issue under the first of the suppression justifications—excluding unreliable evidence. In fact, the Kansas Court of Appeals recently addressed the problem in State v. Ralston.16 Ralston got a call requesting that he bring some marijuana to a hotel room. Unfortunately for Ralston, he made the delivery to a room full of law enforcement officers.8 After officers arrested him and read him his rights under Miranda, an officer told Ralston that if he helped them out, they would help him out. Ralston, eager to please, admitted that he brought marijuana to the hotel room to sell it. He also provided officers with names of other drug dealers and attempted to get another dealer to bring a larger quantity of marijuana to the scene. But Ralston failed to get any bigger fish to bite. And a while later, prosecutors charged Ralston for his drug crimes.9

Ralston filed a motion to suppress the incriminating statements—which included a confession—that he made after the vague offer of immunity. In addition, he filed a motion to dismiss that depended on enforcement of the alleged immunity agreement.10 Although the district court suppressed the statements, it did not grant his motion to dismiss. Despite suppression of the incriminating statements, Ralston was convicted for possession.11 Ralston appealed, alleging that the district court should have enforced the agreement and dismissed the case.12

The Court of Appeals made clear the law in Kansas—law enforcement officers do not have the authority to grant immunity. So they cannot, by themselves, make binding promises to a suspect.13 Yet the court did believe that Ralston suffered a wrong. The promise coerced Ralston into making incriminating statements he otherwise may not have made, which in turn created unreliable evidence. Naturally, suppressing the incriminating statements solved that problem; enforcing the agreement and dismissing the case would have been overkill.14

Prosecutors, Let Law Enforcement Officers Know They Shouldn’t Make Promises They Have No Authority to Keep

Billy’s options here would make Hobson proud.16 “Negotiation” is probably not the best term to describe the situation.17 Billy knows he has been caught; he has no plausible deniability. Billy has no lawyer. No one has informed Billy of his rights. Billy does not know the punishment he will face or where he will be spending the night. The only thing Billy knows is that his life seemed a whole lot better a half an hour earlier. And in this moment of adrenaline, panic, and disbelief, he gets an offer he can’t refuse. The officers say they can make this all go away. All Billy has to do is help officers catch his supplier, who they are really after anyway.
Law enforcement officers tell Billy to call them later and they let Billy go home, as promised. Faithful Billy calls the next day and a law enforcement officer tells him to contact his supplier, Sally, to set up a supply purchase. Billy sets up the deal and notifies officers of the details. To document the deal, officers have Billy come down to the station and they wire him with a device to record the transaction. Billy complies with the request. He makes the purchase, officers make the arrest, and later Billy assists prosecutors by testifying in Sally’s trial.

Billy never contacts law enforcement again after making the controlled buy from Sally because a couple of Sally’s associates threaten Billy and his family. Officers do not feel like Billy did enough. So, not hearing from Billy, law enforcement officers send his file over to the prosecutor’s office. The prosecutor in Sally’s case had since retired, and the newly elected prosecutor files a complaint against Billy for the original charges. Shortly thereafter, Billy files a motion to dismiss in which he begs the court to enforce his alleged deal.

Considering the law in Kansas, the district court does not have many options. Only the prosecutor has the authority to enter into immunity agreements—not law enforcement officers. Immunity agreements are essentially contracts between a citizen and an authorized representative of the government. Without proper authority, an individual cannot enter a contract. As such, enforcing any deal between a law enforcement officer and a confidential informant is not an easily available remedy.

Yet suppression as the court used it in Ralston does not sufficiently cure the ill effects of Billy’s detrimental reliance on the officer’s offer. Officers caught Billy; they had plenty of evidence against him and weren’t looking for a confession when they confronted him. They wanted something more from Billy, and Billy put his and his family’s lives in real danger when he became an informant, as is the nature of the bargain. Regardless of the fact that Billy broke the law, considering the risks he took, it seems unfair for the state to completely disregard the agreement.

Importantly, this entire situation is best dealt with by prevention. In any immunity discussion, law enforcement officers should tell suspects the truth—make sure a suspect’s reliance on their proposition is not reasonable. In United States v. Wilson, federal agents picked up Wilson in a large scale ecstasy conspiracy. Wilson agreed to help the agents in their investigation after they hinted at possible immunity. Despite Wilson’s efforts to obtain a promise of immunity, the agents consistently told Wilson that only prosecutors had the authority to grant immunity. Wilson could not reasonably rely on any suggestions of immunity because he knew he was not speaking with the people with the authority to grant it to him. Even so, the prospect of immunity was enticing enough for Wilson to help. So prosecutors should inform law enforcement officers to be up front about their lack of authority to grant immunity. Honesty really is the best policy, and it will prevent potential problems in the future.

**Kansas Courts Have Appropriate Tools to Handle Any Situation**

Whether due to honest oversight, ignorance, or calculated deceit, courts are faced with situations in which law enforcement officers have made unauthorized immunity offers that a suspect could not refuse. Appellate courts from a variety of jurisdictions have approached this problem in a number of ways. As is the temptation, reviewing courts often analyze the situation with one or more contract theories: apparent authority, ratification, and quasi-contract. But contract theories do not provide the appropriate analytical framework for a sound resolution of the issue.

**Apparent authority**

Apparent authority is one possible avenue by which defendants seek redress from unauthorized law enforcement officer promises. Apparent authority arises when a principal holds out to a third party that an agent has the authority to make a particular promise. But the principal here—the prosecutor—often will not have done anything that could be construed as “holding out” to a third-party suspect that an officer had authority for the agreement. The immunity promises generally occur before any prosecutor involvement, notwithstanding that a suspect is likely unaware of the distinctions between a prosecutor’s authority and that of a law enforcement officer. And in some jurisdictions, as a matter of law, apparent authority is not sufficient to bind a sovereign. Accordingly, enforcing the agreement using the contract principle of apparent authority does not solve the problem.

**Ratification**

Another possible avenue of relief is the contract principle of ratification. When a principal gains knowledge of an agent’s unauthorized agreement, the principal ratifies or authorizes it by accepting the benefits of the agreement or by failing to...
repudiate the offer. In State v. Roberts, the Ohio Court of Appeals upheld a dismissal of an indictment, a decision premised on enforcement of a cooperation agreement between law enforcement officers and the defendant. After officers offered immunity, the defendant acted as a confidential informant and conducted a controlled buy from a dealer. Because the prosecutor later used evidence obtained from that same controlled buy to convict the dealer, the Ohio Court of Appeals concluded that the prosecutor had ratified the officers’ initially unenforceable immunity offer.

But the contract analysis of ratification is a problematic proposition when applied to unauthorized offers of immunity. Statutes vest a prosecutor with the sole authority to offer immunity because otherwise “a minor government functionary hidden in the recesses of an obscure department would have the power to prevent the prosecution of a most heinous criminal simply by promising immunity in return for some act which might benefit his department.” That remains a problem if a prosecutor is deemed to have authorized an otherwise unenforceable agreement simply by accepting its benefits.

Assume that a suspect acts as a confidential informant in reliance on a law enforcement officer’s unenforceable offer of immunity. If the prosecutor uses any of the evidence that the confidential informant uncovered, the prosecutor could be deemed to have ratified the unauthorized offer of immunity. The ratification theory forces the prosecutor to choose between ratification (using the evidence that the confidential informant uncovered to prosecute another) and prosecuting the confidential informant for the original crimes. And if the prosecutor chooses to forgo ratification of the agreement, then the state essentially manufactured illegal conduct (whatever illegal act the confidential informant committed for evidentiary purposes) for no purpose. As such, ratification does not completely remove a prosecutor’s discretion, but it puts too much authority in the hands of those who are not supposed to have it.

A meeting of the minds is tough to find

Similarly, contract law plays a role in immunity agreements in Kansas. But problems arise. Even assuming that ratification or apparent authority could bind a prosecutor to a law enforcement officer’s offer of immunity, the offer itself must be clear enough to form a contract. For a contract to arise there must be a meeting of the minds between the officer and the informant. A meeting of the minds is “a fair understanding between the parties which normally accompanies mutual consent and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract.” As the Kansas Court of Appeals dealt with in Ralston, offers of immunity by law enforcement officers are often too vague to support a meeting of the minds.

In Ralston, the law enforcement officer thought that to comply with his offer, Ralston had to get another dealer to bring a larger quantity of marijuana than what Ralston initially brought. But Ralston thought all he had to do to fulfill his part of the bargain was give officers some names of other dealers. Even if immunity agreements are enforceable through apparent authority or ratification, determining the agreement-upon terms is difficult, if even possible. Unlike contracts under the Uniform Commercial Code, there are not any “gap fillers” for omitted terms of an immunity agreement. Hence, contract law formalisms don’t always resolve the issues presented in these cases.

Detrimental reliance

The quasi-contract theory of detrimental reliance often arises in the case of unenforceable immunity agreements. And while it is a helpful analytical tool, courts often limit its application to situations in which the promise induces a suspect into giving up a constitutional right—the criminal confesses. Basically, the court treats the situation as a coerced confession, which cannot be used as evidence.

The Colorado Supreme Court, in People v. Fisher, had the opportunity to apply the detrimental-reliance remedy under an interesting set of circumstances. Officers arrested Fisher for burglary, and the prosecutor charged him. While Fisher and prosecutors worked out a plea agreement, a detective asked Fisher if he would be willing to conduct a videotaped interview that the detective could later use to instruct new cadets. Fisher agreed and participated in an interview in which he explained his methods of burglarizing and disposing of stolen property. This was not part of any plea agreement, and the detective assured Fisher that nothing in the video would be used against him.

A couple of years later, law enforcement picked up Fisher for a series of new burglaries. Once Fisher was charged, his attorney filed a motion to suppress the videotaped interview, a motion the district court granted. The state appealed. While affirming the district court, the Colorado Supreme Court recognized that contract remedies were not always an adequate analytical tool for promises between a government and a citizen—absolute fairness is not contract law’s guiding principle. Likewise, the court developed a three-part test to determine whether courts should enforce an otherwise unenforceable government promise.

1. Did the promise implicate the defendant’s constitutional rights?
2. Did the defendant reasonably rely on the promise to his or her detriment?
3. Would anything short of enforcing the agreement approximate fundamental fairness?

The Colorado Supreme Court noted that while the implication of a constitutional right was a sufficient basis to enforce an otherwise unenforceable agreement, the implication of a clear constitutional right may not always be necessary. The implication of a constitutional right makes the issue of the promisor’s authority less relevant because any law enforcement officer can implicate a constitutional right just as easily as a prosecutor. Application of the Fisher Court’s three-part test was really not much different from the Kansas Court of Appeals’ analysis in Ralston. In Fisher, the court suppressed the videotape, which contained the incriminating statements that the promise induced—the videotape was essentially a coerced confession. But in situations like the hypothetical involving Billy, the results of detrimental reliance go beyond incriminating statements. Likewise, excluding unreliable evidence may not properly resolve the issue.

In recognizing the limitations of contract analysis and in acknowledging that the remedy of enforcement may be appro
priate even in the absence of a clear constitutional rights violation, the Fisher court was likely struggling with the concept of “fundamental fairness” (the court even uses the term). A pair of federal cases often appears as the basis for the fundamental-fairness concept when applied to unauthorized promises of immunity.64

Fundamental fairness

In United States v. Rodman, Securities and Exchange Commission (SEC) officers told Rodman that if he assisted them in obtaining information about other individuals, they would “strongly recommend” that he not be prosecuted.62 He assisted, but the entire time the SEC officers were compiling evidence on Rodman. They fully intended that prosecutors bring a case against him.63 When U.S. attorneys charged Rodman, the district court dismissed the indictment and held the government to its promise. With little analysis, the First Circuit affirmed: “In light of the failure of the SEC to comply with what the district court found to be its agreement, the district court’s view that the unfairness to the appellee warranted dismissal of the indictment was not an abuse of the court’s supervisory function.”64

In the next case, United States v. Carrillo, Drug Enforcement Administration (DEA) agents arrested Carrillo with heroin in his possession.65 The DEA agents promised not to prosecute him if he helped them investigate other drug traffickers, specifically, his supplier.66 Carrillo helped, but he refused to testify against the individuals that he implicated because he feared for the safety of his family if it became known that he was acting as an informant.67 Regardless of his help, prosecutors filed charges against Carrillo, maintaining that testifying was part of his possession.68 The district court dismissed the indictment.59

In affirming the dismissal in Carrillo, the Ninth Circuit found that the district court did not abuse its discretion by essentially enforcing the agreement.70 The court concluded that there was in fact a binding agreement; it just did not include an obligation to testify: “Inasmuch as an obligation to testify did not become a condition and because Carrillo fulfilled all other obligations under the agreement, under settled notions of fundamental fairness the government was bound to uphold its end of the bargain.”71 Interestingly, those “settled notions of fundamental fairness” provide little actual guidance.

Washington v. Bryant

One particular case illustrates the shortcomings of vague notions of fundamental fairness and contract analysis, because terms of the offer are often too complicated and too under-developed for meetings of the minds ever to occur. In Washington v. Bryant,72 officers suspected that Bryant was involved in a series of robberies. King County officers later arrested him on unrelated charges. In exchange for immunity, Bryant offered to provide information in their investigation into the robberies. So Bryant gave officers names of other individuals involved in the robberies, including a man named Dorman.73

When plea negotiations between the state and Bryant broke down, King County contacted Dorman, offered him immunity, and he gave incriminating information against Bryant.74 Later, Snohomish County also contacted Dorman and offered him immunity, which worked alongside the immunity that he received from King County. And again, Dorman offered evidence against Bryant. Moreover, Dorman offered to testify against Bryant in Snohomish County, which then brought charges against Bryant for the robberies that occurred in its jurisdiction (the King County charges against Bryant had previously been dismissed for other reasons).75 But the district court dismissed the Snohomish County charges against Bryant, finding that the state’s case was based entirely on Dorman’s testimony. Dorman’s testimony was incriminating evidence derived from the original unauthorized immunity agreement between Bryant and the King County officers because Bryant led King County officers to Dorman in the first place, so his testimony was tainted.76 It’s difficult enough for a suspect to understand who has authority to grant immunity, and when differing jurisdictions are thrown into the mix, it’s tough to establish a true meeting of the minds.

On appeal, the Washington Supreme Court eliminated several contract theories that might have made Bryant’s original, unauthorized immunity agreement enforceable. Nonetheless, the court ultimately affirmed the dismissal of the case by resting its decision on “fundamental fairness.” In doing so, it cited federal cases that vaguely described the principle, noting that there was not a “precise rule or test” to determine its applicability.77 The law is better than that. Confidential informants and immunity agreements are important. Methods involved in obtaining them should be analyzed by frameworks that balance the right factors. As the Fourth Circuit aptly expressed: “There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice.”78 Dismissing a case and enforcing an improper agreement lets a guilty person free—that is a drastic remedy.79 Because the remedy is drastic, the problem should not be analyzed with ill-fitting analogies to contract law or a vague notion of “fundamental fairness” that doesn’t even have rules to determine its applicability. Fortunately, Kansas courts have methods sufficient to address any situation—motions in limine and suppression.

Weighing the Right Factors

For less complicated cases, where confessions or significant threats to life and family aren’t concerned, motions in limine are sufficient to resolve issues that may result from an unauthorized immunity agreement. A motion in limine, generally, deals with potential prejudice preemptively. And a court will enter an order in limine when (1) evidence will be otherwise inadmissible, and (2) mere mention of the matter would tend to prejudice the jury.80 If a defendant takes the stand, the prosecutor may attempt to inquire about the unenforceable agreement to lead the jury to an inference of guilt. After all, why would a suspect entertain an offer of immunity if there wasn’t a need for immunity from something? So, to ensure fairness, the district court could tailor an order in limine to the circumstances surrounding an unauthorized immunity agreement.

In other cases, suppression might better fit the situation. Suppression is a judicially created tool that is justified for two distinct reasons.81 We suppress some things, i.e., coerced confessions, because they are unreliable.82 We suppress other things, i.e., reliable evidence from unreasonable searches, be-
cause we want to deter law enforcement from relying on improper tactics. Either of the justifications may be appropriate in cases of unauthorized offers of immunity, depending on the facts. Under either justification, suppression theory provides an analytical framework better suited to address unauthorized immunity agreements as compared to contract theories or the vague notion of fundamental fairness.

The Kansas Court of Appeals has upheld suppression under the first justification. In Ralston, a coerced confession was the result of Ralston's detrimental reliance on an unauthorized offer of immunity. As such, suppression of the unreliable confession was warranted. But in cases similar to the Billy hypothetical, suppression might be justified as a deterrent. Billy's reliance on an unauthorized offer of immunity did not result in unreliable evidence; it put him and his family in real danger. If we expect informants to continue to risk their safety to further law enforcement's investigations, there has to be a minimum level of trust. So it is appropriate to ensure that law enforcement officers bargain honestly and fairly.

Luckily, and unlike contract theory or fundamental fairness, our doctrine of suppression, also known as exclusion, takes the right factors into consideration when determining if suppression is appropriate as a deterrent:

Real deterrent value is a 'necessary condition for exclusion' but it is not 'a sufficient' one. The analysis must also account for the 'substantial social costs' generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.' For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Contract law and principles of fundamental fairness completely disregard the fact that individuals like Billy committed crimes against society. And the remedy these principles provide not only results in the dismissal of cases, it results in a complete bar to prosecution in the future. Suppression, on the other hand, balances the state's interest in bringing criminals to justice, the defendant's right to be subjected to fair proceedings, and the judicial interest in ensuring that our system operates fairly.

Suppression is not a remedy for Billy. In cases similar to the Billy hypothetical, the negative effects of a law enforcement officer's unauthorized promise, frankly, cannot be remedied. Billy acted in reliance on the offer and his family was threatened—nothing can unring that bell. Courts utilize suppression as a deterrent to prevent bells that should not be rung from ringing in the future. Under a particular set of facts, trial courts may need to utilize suppression to dissuade law enforcement officers from using deceitful tactics to recruit future confidential informants. In this way, suppression can maintain a minimum level of trust.

In cases where law enforcement officers offer immunity to a known criminal fully intending to recruit an informant, and
the suspect performs his or her part of the bargain, exclusion may need to extend to evidence gathered before the unauthorized immunity offer. In such cases, trial courts might exercise their discretion, as a deterrent, to suppress evidence that the law enforcement officer used to induce the detrimental reliance. Determining what specific evidence law enforcement officers used to obtain the informant’s cooperation may be difficult. But trial courts are adept at resolving difficult factual and legal questions.

In Billy’s situation, he sold some marijuana to an undercover officer, and that same undercover officer showed up during the discussion of immunity. Knowing that there was evidence against him, Billy believed he accepted an offer of immunity. As such, suppressing the evidence obtained by that particular undercover officer might suffice as a deterrent. Even if the evidence is suppressed, that does not necessarily result in the drastic remedy of dismissal.91 If the state has other evidence against him, Billy believed he accepted an offer of immunity. In such cases, trial courts might exercise their discretion, as a deterrent, to suppress evidence that the law enforcement officer used to induce the suspect to perform his or her part of the bargain, exclusion may need to extend to evidence gathered before the unauthorized immunity offer. In such cases, trial courts might exercise their discretion, as a deterrent, to suppress evidence that the law enforcement officer used to induce the detrimental reliance. Determining what specific evidence law enforcement officers used to obtain the informant’s cooperation may be difficult. But trial courts are adept at resolving difficult factual and legal questions.

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As is the case with suppression, sometimes relevant evidence is inadmissible and sometimes the guilty go free.92 Again, the complicated case of Washington v. Bryant is illustrative; rather than enforcing the agreement out of “fundamental fairness,” the standard remedy of suppressing the evidence would have achieved the same result.93 Had the Washington Supreme Court simply suppressed Dorman’s testimony, the state would have been without probable cause to charge Bryant. Fundamental fairness was not a necessary analysis. Depending on what evidence officers use to induce reliance on the agreement, or how necessary the incriminating statements are to the case, suppression may result in dismissal for lack of probable cause. Nevertheless, suppression, under either justification, provides Kansas courts with an analytically and legally sound framework to address the unauthorized immunity problem.

Officers make immunity offers as representatives of the state, and in so doing, the government’s honor is implicated.94 For matters of simple prejudice, an order in limine can adequately handle the effects of an unauthorized immunity agreement.95 For more serious cases, suppression may be an appropriate tool that does not always result in the dismissal of a case or a flat out bar to prosecution.96 Suppression is available for trial courts to rid a case of unreliable evidence, and it is available to deter police from particularly egregious conduct. Suppression, unlike contract law and notions of fundamental fairness, considers the public’s interest in bringing criminals to justice.97 Utilizing the right analytical frameworks maintains the public’s trust in our system and leads to more just outcomes.

**About the Author**

Joshua I. Marrone graduated from the University of Missouri-Kansas City with a Bachelor of Arts in history, magna cum laude, in 2007. He was awarded the Jack & Helyn Miller Law Scholarship and attended the University of Missouri-Kansas City Law School, where he graduated summa cum laude in 2011. During law school, Marrone served as a teaching assistant for the legal writing department, research assistant for Professor June Carbine, a staff member of the UMKC Law Review and Urban Lawyer, and the managing editor for the Urban Lawyer. Currently, Marrone is a research attorney for Judge David E. Bruns of the Kansas Court of Appeals.

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**Endnotes**


2. Puckett v. United States, 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L. Ed. 2d 266 (2009) (noting that prosecutors are bound to their bargains in plea agreements because of “a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining—an ‘essential’ and ‘highly desirable’ part of criminal process”).


6. See Davis v. United States, 131 S. Ct. 2419, 2426-27, 180 L. Ed. 2d 285 (2011) (suppression is not a constitutional right or a remedy to redress an injury; it is a judicially created deterrent for flagrant police misconduct); State v. Graham, 244 Kan. 194, 202, 768 P.2d 259 (1989) (a coerced confession is suppressed because it is unreliable).


8. Id. at 355.

9. Id. at 355-56.

10. Id. at 356.

11. Id.

12. Id. at 357.


14. Id. at 365. Suppression is often the best method available to balance a violation of a defendant’s right against self-incrimination with the public’s interest in seeing criminals brought to justice. Lekick, supra note 1 at 2372.


17. There is dispute about the fairness of plea agreements in general, even with statutory safeguards and legal representation. See Julian A. Cook, III, All Aboard! The Supreme Court, Guilty Pleas, and the Railroadings of Criminal Defendants, 75 U. Colo. L. Rev. 863 (2004). In the context of a police officer’s offer of immunity just before an arrest, the lopsidedness of the situation is more pronounced. See State v. Sturgill, 121 N.C. App. 629, 635, 469 S.E.2d 557 (1996) (noting that unrepresented suspects are more sensitive to inducement).
18. Ralston, 43 Kan. App. 2d at 361-62. Compare K.S.A. 22-3415(b) and K.S.A. 22-3102 (discussing prosecutor's authority to grant immunity) with K.S.A. 22-2203(13) (defining the duties of law enforcement officers without any mention of the authority to grant immunity).


21. 392 F.3d 1055, 1057 (9th Cir. 2004).

22. Id. at 1058.

23. Id. at 1059-60.

24. Id. at 1060-61.

25. Id.


30. Id. at 643 (“distinctions between the authority of the police and that of the prosecutor mean little to a defendant negotiating with a government officer”).


34. Roberts, 2003 WL 22417247, at *1, 5.

35. Id. at *5.

36. Id.


38. See Ralston, 43 Kan. App. 2d at 362 (noting the public policy that prosecution of a case should at all times be in the hands of a prosecutor); see also State v. Smith, 809 A.2d 211, 1174, 1176 (Del. 2002).

39. State v. Ralston, 43 Kan. App. 2d 353, 359 (2010). The Kansas Court of Appeals was careful to use the phrase “To the extent contract law applies here,” which seems to leave open the possibility that resolution of immunity agreements may not absolutely turn on contract law.

40. Id. at 360.

41. Id.

42. See also United States v. Blackmon, No. 1:05CR82-2, 2005 WL 1719106, at *1-3, 5 (M.D. N.C. July 21, 2005) (dealing with a vague discussion of immunity between an officer and a defendant).


44. Id.


50. Id. at 923.

51. Id. at 923-24.
SUPREME COURT

ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN RE QUENTIN JOHN BOONE,
NO. 20413 – SEPTEMBER 20, 2013


HELD: Court, having examined the files of the Office of the Disciplinary Administrator, finds that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred. Court ordered the Clerk of the Appellate Courts to strike the name of Quentin John Boone from the roll of attorneys licensed to practice law in Kansas.

ORDER OF REINSTATEMENT
IN RE WILLIAM J. HUNSAKER
NO. 102,411 – SEPTEMBER 24, 2013

FACTS: On October 9, 2009, the Court suspended the respondent, Hunsaker, from the practice of law in Kansas for a period of 90 days. See In re Hunsaker, 289 Kan. 828, 217 P.3d 962 (2009). Before reinstatement, the respondent was required to pay the costs of the disciplinary action. On July 18, 2013, the respondent filed a petition with the Court for reinstatement to the practice of law in Kansas. The disciplinary administrator affirmed that the respondent paid the costs of the disciplinary action.

HELD: Court, after carefully considering the record, granted the respondent’s petition for reinstatement. Court ordered that the respondent be reinstated to the practice of law in Kansas conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the Clerk of the Appellate Courts and the Kansas Continuing Legal Education Commission.

ORDER OF DISBARMENT
IN RE MICHAEL CLAY SCHNITTKER
NO. 109,712 – OCTOBER 11, 2013

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Schnittker, of Overland Park, an attorney admitted to the practice of law in Kansas in 1994. When Schnittker began having financial difficulties, he started depositing earned attorney fees paid by clients into his personal account, rather than his firm’s operating account. This went on for three years. When confronted, Schnittker liquidated his personal IRA and made full restitution.

DISCIPLINARY ADMINISTRATOR: On January 3, 2013, the Office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on January 24, 2013. At the hearing on the formal complaint, the deputy disciplinary administrator argued that disbarment is the appropriate discipline to be imposed in this case. However, the deputy disciplinary administrator recognized the significant mitigating factors presented in this case and recommended that the respondent be suspended from the practice of law for an indefinite period of time.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on March 8, 2013, when the respondent was personally present. The hearing panel determined that respondent violated KRPC 8.4(b) (2012 Kan. Ct. R. Annot. 643) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer) and 8.4(c) (engaging in conduct involving misrepresentation). The respondent argued that the hearing panel should recommend to the Supreme Court that the respondent be censured and that the censure be published in the Kansas Reports. The hearing panel stated that the respondent’s conduct warranted disbarment—he intentionally took money that did not belong to him. However,
the respondent presented persuasive mitigating evidence—the respondent admitted his wrongdoing, he repaid Mr. Sullivan within six weeks of the discovery of the theft, and [he] had taken full responsibility for his actions. The hearing panel was persuaded that a lesser level of discipline is appropriate in this case. Based upon the findings of fact, conclusions of law, the aggravating factors, and the Standards listed above, the hearing panel unanimously recommended that the respondent’s license to practice law be indefinitely suspended from the practice of law.

HELD: Court stated that it did not take the recommendation of the hearing panel lightly. Court carefully considered the sanction recommendation of the hearing panel, as well as giving due regard to those of the disciplinary administrator. However, Court held the respondent’s request of published censure demonstrated that he does not appreciate the gravity of his misconduct. While participating in the attorney diversion program for an unrelated disciplinary violation, he was engaged in the misconduct in this case. The respondent systematically stole more than $150,000 that belonged to his law firm during a period lasting more than three years and only ceased his theft upon being caught. His mitigating circumstance that he violated no duty to his clients does little to counter the injury or potential injury to the public, the legal system, or the profession. Further, by relying on his law partner’s forgiveness, the respondent seems to imply that a benevolent crime victim’s wishes should somehow suprecede the imposition of a sanction typically imposed and warranted for such serious, flagrant misconduct. The Court stated that the respondent’s conduct in and of itself warranted disbarment. Based upon the consideration of the entire record, the arguments of counsel, and statements of the respondent, the Court concluded that the appropriate discipline in this case is disbarment from the practice of law in this state. A minority of the court would follow the hearing panel’s recommendation of indefinite suspension.

CIVIL

COAL-FIRED POWER PLANT, KANSAS AIR QUALITY ACT, PERMIT, AND STANDING SIERRA CLUB V. ROBERT MOSER, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT ET AL.

FACTS: Environmental organization Sierra Club sought judicial review of the decision of the secretary of the Kansas Department of Health and Environment (KDHE) to issue an air emission source construction permit to Sunflower Electric Power Corp. (Sunflower) for the construction of an 895-megawatt coal-fired power plant, referred to as Holcomb 2, at the site of Sunflower’s existing plant in Holcomb, Holcomb 1. Sierra Club raises four issues and contends the permit fails to comply with the requirements of the federal Clean Air Act (CAA), 42 U.S.C. § 7401 et seq. (2006); implementing federal regulations; the Kansas Air Quality Act (KAQA), K.S.A. 65-3001 et seq.; and applicable Kansas Administrative Regulations, K.A.R. 28-19-1 et seq. The KDHE questions whether Sierra Club has standing to challenge the permit.

ISSUES: (1) Coal-fired power plant, (2) Kansas Air Quality Act, (3) permit, and (4) standing

HELD: Court held that Sierra Club had standing to bring this action and has established that the KDHE erroneously interpreted and applied the CAA and the KAQA when it failed to apply the regulations of the federal Environmental Protection Agency (EPA) regarding one-hour emission limits for nitrogen dioxide and sulfur dioxide during the Holcomb 2 permitting process. These EPA regulations became effective before the Holcomb 2 permit was issued, and Court held that the CAA, KAQA, and implementing regulations required the KDHE to apply the regulations during the permitting process. Court reversed the KDHE’s action of issuing the permit and remanded this matter to the KDHE. Court also held Sierra Club’s issue of whether the KDHE erred in its application of hazardous air pollution emission requirements is rendered moot by this decision to remand the Holcomb 2 permit because the EPA has adopted new regulations that must be applied on remand. Court also rejected Sierra Club’s argument that the KDHE erred in its analysis of the best available control technology (BACT) and that the procedure followed by the KDHE violated the CAA.

STATUTES: K.S.A. 65-3001, -3002(j), -3005, -3008a(b), -3012, -3018(c), -3029; and K.S.A. 77-601, -602(f)(2), -611, -618, -619, -621(c), (d)

OIL AND GAS AND UNITIZATION THOROUGHBRED ASSOCIATES LLC ET AL. V. KANSAS CITY ROYALTY CO. LLC ET AL.
COMANCHE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART NO. 102,598 – SEPTEMBER 20, 2013

FACTS: Thoroughbred Associates LLC, drilled a prolific gas well in 1985, known as the Bird Well and then began targeting other land near the Bird Well, resulting in the acquisition of leases and creation of a unit call the Thoroughbred-Rietzke Unit. OXY USA Inc. owned an undivided one-third interest in the oil, gas, and other minerals under a tract near the Bird Well. OXY entered an oil and gas lease with Thoroughbred for the land. The land was later unitized with the Rietzke Unit. Kansas City Royalty Co. LLC, later purchased OXY’s interest in the lease. Thoroughbred drilled several wells on the Rietzke Unit, which produced both oil and gas, but none of the wells were located on the land subject to the OXY lease. Kansas City Royalty began inquiring whether the Bird Well was draining the oil and gas from the Rietzke Unit. Thoroughbred began to argue that in had mistakenly unitized the OXY leased lands into the Rietzke Unit. In 2002, Thoroughbred sued Kansas City Royalty for declaratory judgment that Thoroughbred had mistakenly unitized the OXY land, that Kansas City Royalty was not entitled to payments for the Rietzke Unit and to return all royalty payments. The district court granted summary judgment to Kansas City Royalty, but did not detail its reasoning. However, the court proceeded to trial on Kansas City Royalty’s counterclaim on drainage. The
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court found Kansas City Royalty did not meet its burden and that it was not more probably true than not that any drainage occurred. The court awarded damages to Kansas City Royalty in the amount of nearly $600,000 for royalty payments, pre-judgment interest and attorney fees. The Court of Appeals upheld the district court in all respects, but held there was mutual mistake by the parties of including the condition limiting when unitization could occur and that Kansas City Royalty was entitled to revenue from oil production as an incidental by-product of the gas production.

ISSUES: (1) Oil and gas and (2) unitization

HELD: Court agreed with the district court's findings that Kansas City Royalty failed to prove its drainage claim. Court found that the OXY lease's unitization clause expressly authorized the lessee to unitize the land covered by the lease and the lease clearly and unambiguously limited the authority to unitize unless one of two alternative conditions were met: (1) when unitization is necessary to conform with spacing patterns as established by a regulatory body; or (2) when unitization is necessary to produce a full allowable as established by a regulatory body. Court held the contact was not ambiguous, the necessary conditions were not satisfied to permit unitization and Thoroughbred was entitled to summary judgment unless Kansas City Royalty could prevail on its claims that the OXY lease was an integrated contract and whether the parties could have reached another agreement. Court held it must remand the case to the district court to determine whether summary judgment is appropriate on Kansas City Royalty's claims. Court also reversed on Kansas City Royalty's claims that it is entitled to participate in the Rietzke Unit based on drilling depth and also whether Kansas City Royalty was only entitled to share in gas production, not oil production. As for Kansas City Royalty's claim for attorney fees, Court held that given Kansas City Royalty's failure to prevail in this appeal in light of its reversal and remand, the uncertainties as to Kansas City Royalty's potential success on remand, and the obvious commingling in the fee application of attorney time for issues on which Kansas City Royalty has clearly lost, Court denied the attorney fee request.

CONCURRENCE/DISSENT: Justice Johnson concurred with the majority on the drainage issue and that the claims were not adequately proven by Kansas City Royalty. Justice Johnson dissented and would find that a lessee cannot use its own breach of contract as a ground to obtain any remedy for the lessor, much less a rescission of the unitization agreement and return of a years' worth of royalties. Justice Luckert joined the concurring and dissenting opinion.

STATUTES: K.S.A. 20-3801(b); K.S.A. 55-1301, -1304, -1308, -1317, -1617; and K.S.A. 60-511, -2102(b), (c)

CRIMINAL

STATE V. CHEEKS

WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED

NO. 104,858 – OCTOBER 4, 2013

FACTS: Cheeks convicted of malicious second-degree murder. Pre-KSGA maximum sentence of 15 years to life imposed. Conviction and sentence affirmed in two separate appeals. More than 10 years later, Cheeks filed pro se motion under K.S.A. 21-2512 for DNA testing of materials collected from crime scene. District court denied the motion, finding K.S.A. 21-2512 did not permit those convicted of second-degree murder to seek testing. Cheeks appealed, arguing K.S.A. 21-2512 violates Equal Protection Clause and district court's decision violated Fifth Amendment procedural due process right to post-conviction DNA testing.

ISSUES: (1) K.S.A. 21-2512 – Equal Protection and (2) K.S.A. 21-2512 – Fifth Amendment

HELD: K.S.A. 21-2512 examined, holding statute violates Equal Protection Clause of 14th Amendment. Here, relevant trait for similarly situated analysis is the sentence imposed not the elements of the crimes, distinguishing State v. Salas, 289 Kan. 245 (2009). Individuals sentenced under pre-KSGA indeterminate sentencing provisions to maximum sentence of 15 years to life for second-degree murder are similarly situated to individuals sentenced pre-KSGA for first-degree murder. As in State v. Denney, 278 Kan. 643 (2004), severity of the crime cannot be a rational basis for including rape but omitting second-degree murder from list of crimes for which post-conviction DNA testing is available. To remedy this constitutional violation, statute is reformed to include limited class of offenders like Cheeks, rather than to strike statute altogether. District court's ruling denying Cheek's petition for DNA testing is reversed; case is remanded for district court to determine whether Cheeks satisfies remaining statutory requirements for DNA testing under K.S.A. 21-2512.

Fifth Amendment claim is not addressed.


QPWB

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post-conviction DNA testing to anyone convicted of second-degree murder is clearly contrary to legislative intent, and violates separation of powers doctrine.

DISSENT (Rosen, J.): Dissents citing three considerations. First, principles of constitutional analysis generally support the constitutionality of the statute as drafted. Second, prisoners generally have available remedies beyond the state statutory scheme. Third, policy decision within legislature's discretion to decide how to allocate judicial and scientific resources for post-conviction relief is outside scope of this court's review.

DISSENT (Beier, J.): Would hold the statute as drafted is properly within legislature's prerogative to balance the variety of legitimate public interests, and that a rational basis for the classification at issue in this case is the well-recognized government interest in promoting finality of judgments. Permitting DNA testing access and post-conviction collateral challenges based on those testing results to be driven solely by severity of the punishment imposed expands statute's expressly stated scope.


STATE V. DOBBS
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 103,820 – SEPTEMBER 20, 2013


ISSUES: (1) Request for continuance – materiality of evidence and (2) eyewitness identification instruction

HELD: Kansas Supreme Court has not previously defined "material evidence" in context of a continuance under K.S.A. 22-3402(5)(c). Evidence is “material” for this purpose when it may have a legitimate and effective bearing on the decision of the case, i.e., when the evidence has potential to inculpate or exculpate the defendant. Dobbs's position, that state must demonstrate a definitive connection between the defendant or victim and evidence being tested, is rejected. Under facts in this case, district court did not abuse its discretion in granting the continuance. No violation of Dobbs' right to speedy trial.

Trial court erred in giving eyewitness identification instruction which included the degree of certainty factor disapproved of by Kansas Supreme Court in State v. Mitchell, 294 Kan. 469 (2012). But error was harmless because other procedural safeguards in this case sufficiently counteracted that instruction. Also, through cross-examination and closing argument jury was thoroughly exposed to facts and circumstances in favor and against accuracy of witness's identification of Dobbs as the gunman, and other witnesses corroborated aspects of this eyewitness identification.

STATE V. JEFFERSON
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 98,742 – SEPTEMBER 6, 2013

FACTS: Jackson was shot and killed in her home in Kansas City, Kan., the victim of a drive-by shooting. After an investigation, the state charged Jefferson with several counts relating to Jackson's murder. Before trial, Jefferson moved to suppress incriminating statements he made to detectives during an interview, claiming his statements stemmed from the detectives' illegal seizure of his car. After an evidentiary hearing, the district court denied Jefferson's suppression motion. At trial, the state presented evidence related to the crime scene and homicide investigation, including Jefferson's videotaped statement to detectives. In that statement, Jefferson identified the

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participants in Jackson’s shooting as himself, Carson, Herron, Jones, and Coleman. According to Jefferson, on the day of the shooting, he and the other men armed themselves with guns before getting into a white van driven by Coleman. Jefferson carried a .40 caliber Smith and Wesson pistol. When they arrived at the Jackson home, Carson told everyone to “shoot the house,” and everyone in the van fired their weapons. Jefferson stated he did not know which house he was shooting at, but he fired his weapon so that the other men in the vehicle would not think that he was scared or would report the crime. At trial, Jefferson essentially reiterated the admissions he made in his videotaped interview. At the close of evidence, the district court granted Jefferson’s request to dismiss the conspiracy charge. During the jury instruction conference, the district court denied Jefferson’s request for a lesser included offense instruction on criminal discharge of a firearm. The jury found Jefferson guilty of first-degree felony murder and the underlying felony of criminal discharge of a firearm at an occupied dwelling resulting in great bodily harm.

ISSUES: (1) Motion to suppress, (2) probable cause to search vehicle, (3) multiplicity, and (4) lesser-included offense

HELD: Court held the district court erred in denying the defendant’s suppression motion. Court stated the detectives unlawfully seized Jefferson’s car because they lacked probable cause to believe it contained weapons or any other evidence relating to Jackson’s homicide. Court held the detectives then exploited the illegal seizure of Jefferson’s car to obtain his incriminating statements, and those statements were not sufficiently attenuated from the illegal seizure. Court held that viewing the evidence in the light most favorable to the state, a rational factfinder could have found beyond a reasonable doubt that Jefferson maliciously and intentionally, without authorization, discharged a firearm at an occupied dwelling. Court stated that even though his bullets did not cause great bodily harm to Jackson, a rational factfinder could have concluded beyond a reasonable doubt that Jefferson was culpable for that harm because he knowingly associated with the unlawful venture of discharging a firearm at the occupied dwelling and participated in a way that demonstrated willful furtherance of its success. Court stated that because the evidence is sufficient to sustain Jefferson’s conviction for the underlying felony of criminal discharge of a firearm at an occupied dwelling resulting in great bodily harm, and it is undisputed that Jackson was killed during the commission of that felony, the evidence also is sufficient to sustain Jefferson’s felony murder conviction. Accordingly, a second trial on the same charges will not violate Jefferson’s right to be free from double jeopardy. Court rejected Jefferson’s multiplicity claim. However, Court stated that Jefferson is entitled to a lesser-included instruction on criminal discharge of a firearm.

CONCURRENCE: Justice Beier concurred in the decision and pointed out that the Court was assuming that it is appropriate to examine all of the evidence admitted at trial rather than limiting review to the evidence admitted minus that portion that the Court decided should have been excluded as fruit of the poisonous tree.

STATUTES: K.S.A. 21-3107(2)(a), -3205(1), -3401, -3436(a)(15), -4217(a), -4219(b); and K.S.A. 22-3601(b)(1)
STATE V. NOVOTNY
SEDGWICK DISTRICT COURT—AFFIRMED
NO. 102,891—SEPTEMBER 13, 2013

FACTS: Jury convicted Novotny of first-degree felony murder and aggravated battery. On appeal he claimed district court erred in: (1) denying motion to suppress evidence seized during search of house because search warrant was not supported by probable cause; (2) denying motion to suppress one victim’s identification of him because it was unreliable product of an unnecessarily suggestive identification procedure; and (3) giving jury an improper aiding and abetting instruction. Novotny also claimed: (4) prosecutorial misconduct during closing argument; (5) that cumulative errors deprived him a fair trial; and (6) that district court unconstitutionally used criminal history in sentencing.

ISSUES: (1) Validity of search warrant, (2) eyewitness identification, (3) aiding and abetting instruction, (4) prosecutorial misconduct, (5) cumulative error, and (6) sentencing

HELD: Validity of search warrant is not considered because Novotny failed to challenge either alternative ground cited by district court in support of its suppression ruling.

District court properly admitted the eyewitness identification, allowing jury to determine weight to be given to that evidence. State did not cross-appeal district court’s finding that the identification was unnecessarily suggestive, but record supports district court’s conclusion that the identification procedure used did not lead to a substantial likelihood of misidentification in this case.

Under totality of evidence, trial court correctly instructed jury on aiding and abetting. There was no abuse of trial court’s discretion in responding to jury’s question by referring to the original instruction.

Prosecutor’s comment regarding a witness’s reluctance to testify was not improper. Although the record is insufficient to determine whether prosecutor committed misconduct by commenting that Novotny had “eye-balled” the witnesses, even assuming statements were improper the error was harmless.

Only one potential error defeats cumulative error claim.

Court’s previous decisions defeat constitutional claim regarding sentencing.

STATUTES: K.S.A. 22-3601(b)(1); and K.S.A. 60-2103(h)

COURT OF APPEALS

CIVIL

BREACH OF CONTRACT AND STATUTE OF LIMITATIONS
HEWITT ET AL. V. KIRK’S REMODELING AND CUSTOM HOMES INC.
MIAMI DISTRICT COURT—REVERSED AND REMANDED
NO. 108,159—OCTOBER 11, 2013

FACTS: This appeal involved a contractual dispute between a home builder, Kirk’s Remodeling and Custom Homes Inc. (Kirk’s), and the homeowners, George and Vicki Hewitt (the Hewitts). The Hewitts purchased their newly built home from Kirk’s. Upon completion of the construction, Kirk’s gave the Hewitts an express warranty that promised to provide a house free from defects in materials or workmanship; Kirk’s also promised that if defects arose during the one-year warranty period, Kirk’s would repair or replace the defects. Immediately prior to the expiration of the warranty period, in keeping with the contract, the Hewitts gave Kirk’s written notice of construction defects. Kirk’s failed to repair or replace the defects. More than five years after Kirk’s provided the Hewitts with the express warranty, but less than five years after the Hewitts gave Kirk’s written notice of the construction defects, the Hewitts sued Kirk’s for breach of contract. Kirk’s filed a motion for summary judgment contending the Hewitts had commenced their lawsuit beyond the five-year statute of limitations for breach of contract actions. The district court agreed with Kirk’s and granted summary judgment.

ISSUES: (1) Breach of contract and (2) statute of limitations

HELD: Court held the district court erred in finding the Hewitts did not commence their lawsuit within the statute of limitations. Court concluded, for purposes of K.S.A. 60-511(1), that a cause of action based upon a builder’s express warranty to repair or replace construction defects in a newly built house must be brought within five years of the date the builder breached the warranty by refusing or failing to repair or replace the defects. In the present case, the parties mutually entered into a contract mitigating the risks borne by each other. The Hewitts’ risk that the house had construction defects was mitigated by Kirk’s promise to repair or replace the defects provided the Hewitts gave written notice. On the other hand, Kirk’s risk of liability was mitigated by the prescribed remedies, time period, other conditions precedent, and by the total dollar limitation. The Hewitts may have had actual notice of defects, but nothing in this record proves the Hewitts also knew Kirk’s would refuse to repair or replace those defects as promised. Court stated it would not limit the enforceability of the Repair or Replace Warranty, thereby increasing the Hewitts’ risk by starting the statute of limitations clock before Kirk’s could have breached that particular warranty.

DISSENT: Judge Green dissented and stated that defects existed in the quality of the workmanship in assembling the brick work on the Hewitts’ home. The Hewitts knew about the problems. Moreover, the defects in the brick work were observable when the Hewitts took possession of the house and received the written warranty from Kirk’s on December 12, 2003. In the warranty, Kirk’s warranted that the home was free of defects. Because the Hewitts knew that Kirk’s written assertion was untrue, their cause of action would have accrued when they received the warranty or accepted possession of the
CHILD SUPPORT AND DISABILITY PAYMENTS IN RE MARRIAGE OF STEPHENSON
ATCHISON DISTRICT COURT – AFFIRMED NO. 109,121 – SEPTEMBER 13, 2013

FACTS: Papineau contends that he is entitled to reimbursement from Stephenson, his former wife, for child support payments he made on behalf of their minor children during months for which Stephenson, as representative payee for the minor children, ultimately received a retroactive lump-sum payment of Papineau’s Social Security disability benefits. The district court found that Papineau was not entitled to reimbursement of any child support payment in excess of the amount owed because the excess benefit is a gift that inures to the benefit of the children. The district court further found that any subrogation claim by Standard Insurance Co. was irrelevant because the insurance company would have no right of subrogation against benefits that belong to the minor children, who are not parties to the insurance contract.

ISSUES: (1) Child support and (2) disability payments

HELD: Court stated that as a general rule in Kansas, when a minor child receives Social Security disability benefits as part of an obligor parent’s Social Security disability award, any amount in excess of the child support owed by the obligor parent is considered a gratuity that inures solely to the benefit of the child. Court held that under the facts of this case, an obligor parent is not entitled to reimbursement for timely child support payments made during months for which the minor children ultimately receive a retroactive lump-sum payment of the obligor parent’s Social Security disability benefits.

DISSENT: Judge Acheson dissented and would find that Papineau should be given credit for the child support he paid during the period covered by the retroactive lump-sum Social Security disability payments to his sons.

STATUTES: No statutes cited.

INSTALLMENT CONTRACT, FORECLOSURE, AND DEFAULT
JAMES AND SHARON SMITH V. OLIVER HEIGHTS LLC ET AL.
ATCHISON DISTRICT COURT – REVERSED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS NO. 108,758 – SEPTEMBER 6, 2013

FACTS: Oliver Heights LLC entered into an installment contract for sale of real estate with James and Sharon Smith. Less than two years later, Oliver Heights filed for Chapter 11 bankruptcy, and a reorganization plan was confirmed by the bankruptcy court. Subsequently, the Smiths filed a foreclosure action in state court alleging that Oliver Heights defaulted under the terms of both the installment contract and the reorganization plan. After a bench trial, the district court found that Oliver Heights was in default, that the Smiths had given adequate notice of the default to Oliver Heights, and that the Smiths had not waived their rights by accepting an untimely payment. The district court ordered that possession of the real property be immediately returned to the Smiths and granted a judgment for damages against Oliver Heights in the amount of $3,000.

ISSUES: (1) Installment contract, (2) foreclosure, and (3) default

HELD: Court found substantial evidence supported the district court’s findings on the issues of default, notice, and waiver. However, court decided the confirmed reorganization plan created an equitable mortgage, which is subject to foreclosure and a right of redemption under Kansas law. Therefore, court affirmed the district court’s decision in part, reversed it in part, and remanded the case to the district court for further proceedings.

STATUTES: K.S.A. 60-2414(a), (m); and K.S.A. 79-2004(a)

LICENSING FEES AND STANDING
KANSAS BUILDING INDUSTRY ET AL. V. STATE OF KANSAS ET AL.

FACTS: In 2009, as a result of the enactment of H.B. 2373, the State Director of Accounts and Reports transferred large sums from various fee funds into the State General Fund. As a result of the transfer of funds, the Kansas Insurance Department, the Real Estate Commission, and the Office of the State Bank Commissioner, all state agencies authorized to make these fee assessments, made new assessments in order to replenish the depleted fee funds. This meant that if you wanted to do business in Kansas and the law required you to pay a licensing fee, after the enactment of H.B. 2373 you had to pay a fee in addition to what had been required before the law was signed. Several trade associations, comprised of entities and individuals required to pay the fees and assessments, filed a lawsuit contending the legislature’s “sweep” of the fee accounts was an invalid exercise of police powers. They maintained H.B. 2373 was actually an attempt to raise general revenue that was greatly out of proportion to the bill’s stated purposes of reimbursement for “accounting, auditing, budgeting, legal, payroll, personnel and purchasing services.” The district court agreed with the state and dismissed the lawsuit after concluding the plaintiffs lacked standing to raise their claims. The court explained that since historically concerns of the general public about legislation have been brought to court through legal actions taken by the attorney general, or a county or district attorney, it was up to the public prosecutors and not trade associations to pursue any public interest aspects of this controversy. Additionally, the court reasoned that the essence of the plaintiffs’ complaints was the state agency actions of raising new fees, taken in response to H.B. 2373. And according to the district court, the only way to obtain a judicial review of agency actions.
is by pursuing a legal action under the Kansas Judicial Review Act, which the plaintiffs did not do. Thus, the court dismissed the lawsuit since the plaintiffs failed to make a valid claim against the agencies under the Act.

ISSUES: (1) Licensing fees and (2) standing

HELD: Court reversed and remanded because the district court erred when it ruled the plaintiffs had no standing to bring this action. They indeed appear to be uniquely damaged by the legislative enactment in a way that the general public is not—they had to pay increased fees. Thus, this lawsuit was not one that had to be brought by the attorney general or a county or district attorney. Also, the plaintiffs were not required to bring a case under the Kansas Judicial Review Act because the state agencies cannot give the primary relief the plaintiffs sought—the declaration that H.B. 2373 is unconstitutional. Because the district court dismissed this action solely upon the grounds of standing and the plaintiffs’ failure to pursue a remedy under the Judicial Review Act, Court did not address questions that the district court has had no opportunity to answer first, namely whether the district court properly denied class certification; whether the defendants are immune from suit; whether this is a political question; or whether the plaintiffs can seek mandamus or quo warranto relief.

STATUTES: K.S.A. 9-1701, -1703; K.S.A. 40-103; K.S.A. 44-566a(b); K.S.A. 58-3063, -3074(a); K.S.A. 60-1704; K.S.A. 74-4202; K.S.A. 75-1308; and K.S.A. 77-601, -603(c), -606

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**MEDICAL COSTS OF PERSON UNDER ARREST UNIVERSITY OF KANSAS HOSPITAL AUTHORITY ET AL. V. BOARD OF COUNTY COMMISSIONERS OF THE UNIFIED GOVERNMENT OF WYANDOTTE COUNTY WYANDOTTE DISTRICT COURT – AFFIRMED NO. 108,391 – SEPTEMBER 13, 2013**

FACTS: The University of Kansas Hospital Authority and Kansas University Physicians Inc. filed a collection action against the Board of County Commissioners of the Unified Government of Wyandotte County/Kansas City, Kan., and the State of Kansas, Kansas Highway Patrol, seeking to recover the cost of medical treatment provided to an arrested person (Thomas). The district court denied the state’s motion for summary judgment and granted summary judgment in favor of KU and against the state. The district court found that the Kansas Highway Patrol had custody of Thomas when he received his treatment and therefore, pursuant to K.S.A. 22-4612, the state was liable for the costs incurred.

ISSUE: Medical costs of person under arrest

HELD: Court found that K.S.A. 22-4612 when read together with K.S.A. 22-4613, presents a clear and unambiguous legislative statement that liability for the medical expenses of persons under arrest is now to be determined on the basis of which enumerated agency has custody of the arrested individual at the time such medical expenses are incurred. As a consequence, the prior directive of Wesley, 237 Kan. 807, finding the controlling factor to be an arrest and charge for violation of state law is superseded by the more recent statute.
and is no longer determinative of the instant situation. Court concluded that, giving the term “custody” its statutory and ordinary meaning, the district court correctly determined that when Trooper Peters restrained Thomas pursuant to arrest, liability was incurred by the state under K.S.A. 22-4612. The state remained liable for expenses incurred prior to Thomas’ delivery to the county jail because the terms for release set forth in K.S.A. 22-4613 were not met.

STATUTES: K.S.A. 19-1910(b)(1); K.S.A. 22-2201, -2202, -4612, -4613; K.S.A. 2010 Supp. 74-2105(a); and K.S.A. 74-2108, -2109

OIL AND GAS

NETAHILIA V. NETAHILIA

SUMNER DISTRICT COURT – AFFIRMED

NO. 109,297 – SEPTEMBER 6, 2013

FACTS: Landowners sought a declaratory judgment that a determinable fee mineral interest scheduled to revert to them at such time as oil and/or gas was no longer produced from the land terminated under the deed provisions in 1985. However, the deed conveying the mineral interest incorporated a pre-existing oil and gas lease on the land that deemed the payment of shut-in royalties to be constructive production. Although oil and/or gas was not being produced at the end of the term of the mineral deed, shut-in royalties have been continuously paid. The district court granted summary judgment to the holders of the determinable fee mineral interest on the basis that the definition of production contained in the lease was incorporated into the mineral deed.

ISSUE: Oil and gas

HELD: Court held that when a determinable fee mineral interest was conveyed to a grantee by the landowner and holder of the reversionary interest and said grant was expressly made subject to the terms of an existing oil and/or gas lease also entered into by the landowner, the definition of production in the lease also governed the definition of production under the termination clause of the mineral deed. Court held the definition of “production” within the terms of the oil and gas lease also defined “production” under the mineral deed. So “production” can either be actual or constructive production. Because the lease remains in effect through the payment of shut-in royalties, i.e., constructive production, the determinable fee mineral interest created from the mineral deed would also extend beyond its primary term through constructive production.

STATUTES: No statutes cited.

CRIMINAL

STATE V. BIERER

JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

NO. 109,330 – SEPTEMBER 6, 2013

FACTS: The state sought interlocutory review of the district court’s suppression of evidence. The controversy surrounded a package mailed from Reno, Nev., deemed suspicious by a U.S. postal inspector and addressed to Shaun Boehm of Johnson County. A drug dog used by the Johnson County Sheriff’s Department alerted to the package, and a warrant was prepared

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for the residence to which the package was addressed. The package was placed on the front step of the residence. Bierer arrived some time later, took the package from the front step, placed it in his vehicle, and drove away. Sheriff’s deputies followed Bierer and stopped him after several miles. Bierer was arrested; the package was seized by law enforcement, opened without a warrant, and found to contain several bundles of marijuana. Bierer was charged with one count of distribution of marijuana and one count of drug tax stamp violation. Bierer filed a motion to suppress. The state raised multiple arguments including Bierer’s lack of standing. The district court granted the motion to suppress.

ISSUES: (1) Motion to suppress, (2) standing, and (3) search

HELD: Court held that Bierer exerted possession over the package by taking it from the front porch of the residence and placing it in his vehicle. When Burns approached Bierer’s vehicle, the package was visible on the back seat. Court agreed with the district court and held that Bierer had standing to challenge the search of the package. Court also held that the deputies had probable cause to believe the package contained narcotics and, thus, could conduct a warrantless search of the package. The district court indicated “officers had probable cause to search the package but did not obtain a search warrant to do so.” Lewis testified that the package was mailed from Reno; the package was taped at all exposed seams to mask the odor of drugs; the sender’s name was not connected with the return address; and the sender waived signature. A K-9 alerted to the smell of narcotics. Deputies set up a controlled delivery at the address to which the package was addressed, conducted surveillance on the residence, and watched Bierer take the package from the residence and place it in his vehicle. Burns testified that he saw the package in plain view on Bierer’s back seat. Accordingly, the deputies had probable cause to stop and search the vehicle for the package and could conduct a warrantless search of the vehicle to locate the package and search it.

STATUTES: No statutes cited.

STATE V. CURRIE
SEDGWICK DISTRICT COURT – SENTENCE VACATED AND REMANDED

FACTS: Currie was convicted of various felonies. In light of his previous theft and burglary convictions, presumed sentence of imprisonment applied pursuant to special rule under K.S.A. 2012 Supp. 21-6804(p). Defense asked for departure sentence, arguing K.S.A. 2012 Supp. 21-6804(p) did not preclude probation. District court disagreed, ruling the statute did not provide authority for granting dispositional departure. Prison sentence imposed. Currie appealed, claiming sentencing court misinterpreted K.S.A. 2012 Supp. 21-6804(p). State conceded that statute allows probation, but claimed there was no appellate jurisdiction to hear appeal from a presumptive sentence.

ISSUES: (1) Appellate jurisdiction – presumptive sentence and (2) authority to grant dispositional departure

HELD: Citing State v. Warren, 297 Kan. ___ (2013), there is jurisdiction to hear this appeal because district court misinterpreted its authority in the case by denying probation on the sole basis that it believed such action was not allowed by K.S.A. 2012 Supp. 21-6804(p).

Court of Appeals’ decisions conflict as to whether K.S.A. 2012 Supp. 21-6804(p) precludes a dispositional departure. Conflicting unpublished opinions were discussed, and the court found K.S.A. 2012 Supp. 21-6804(p) merely directs that sentence shall be presumptive prison when a defendant has prior felony theft and/or burglary convictions. It does not negate other provisions in the statute allowing for departure. Sentence vacated. Remanded for resentencing at which the district court should consider Currie's request for probation.

STATUTES: K.S.A. 2012 Supp. 21-5801(b)(3), -6804,-6804(a), -6804(d), -6804(h), -6804(j), -6804(p), -6815(a), -6820(c)(1); and K.S.A. 2010 Supp. 21-4704, -4704(d), -4704(p)

STATE V. DIAZ
RENO DISTRICT COURT – REVERSED AND VACATED

FACTS: Diaz challenged the sufficiency of the evidence to support his convictions for two counts of aggravated false impersonation. The factual basis for the criminal charges arose following a noninjury, multiple vehicle accident when Diaz signed a traffic citation and notice to appear in the Hutchinson Municipal Court using a false name, appeared in municipal court and pled no contest to the traffic charges using the same false name, and signed a promise to pay the fines also using the false name.

ISSUES: (1) Municipal court proceedings and (2) aggravated false impersonation

HELD: Court held the signing of a traffic citation and notice to appear did not constitute the execution of a bond or instrument of bail as required for a conviction of aggravated false impersonation. Court also held a plea of no contest and promise to pay fines did not result in a confession of judgment. Court reversed and vacated both of Diaz’ convictions.

STATUTES: K.S.A. 2012 Supp. 8-235(a), (e), -2110; K.S.A. 12-4101, -4102, -4103, -4113(a), (d), (e), (g), (h), (k), -4119, -4304, -4406, -4510, -4517; K.S.A. 21-5915(e); K.S.A. 21-3813(a), (b), -3825(a)(1), (2); and K.S.A. 22-2101, -3801, -3425

STATE V. MILLER
JOHNSON DISTRICT COURT –REVERSED AND REMANDED
NO. 109,354 – SEPTEMBER 13, 2013

FACTS: Officer in charge of accident scene, who believed other officers were still blocking highway entrance to keep drivers from approaching the scene, initiated traffic stop of Miller’s car for apparent violation of state law requiring drivers to comply with traffic-control directives. However, Miller had entered highway while the other officers had left their posts briefly to deal with a disturbance involving a trucker. Officer also confirmed that Miller was under influence of alcohol. District court granted Miller’s motion to suppress evidence discovered after the stop, finding officer was “honestly mistaken” and did not stop Miller in bad faith, but was none-
Nevertheless mistaken and should not have made the stop. State appealed.

ISSUES (1) Mistake of fact and reasonable suspicion and (2) Collective-Knowledge Doctrine

HELD: District court should not have suppressed the evidence based on Miller’s claim that stop was improper. Officer’s mistake of fact did not invalidate the stop. In this case, the officer had reasonable belief that facts existed to justify the stop, thus officer’s traffic stop was lawfully based upon reasonable suspicion that driver had committed a traffic infraction. Officer making a mistake of law is distinguished.

The collective-knowledge doctrine was discussed. Here, when there was no communication between officers who left the roadblock and the officer who made the traffic stop about the circumstances leading to that stop, the collective-knowledge doctrine cannot be applied to impute the knowledge that the other officers had left their post to the officer who made the traffic stop.

STATUTE: K.S.A. 8-1503

STATE V. RUCKER
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
NO. 106,803 – SEPTEMBER 13, 2013

FACTS: Rucker sent a note to court on the morning of trial stating he was too weak to come to court. The trial judge had defense attorney send a letter to Rucker advising him of his right to be present at trial. Trial judge then heard evidence from jail personnel that Rucker appeared to have read the letter and thrown it on the floor. Trial judge told jury that Rucker had voluntarily decided not to appear, and that jury was not to use his absence against him in deciding the case. Jury convicted Rucker of theft and eluding a police officer. On appeal, Rucker claimed in part that his constitutional and statutory right to be present at his own trial was violated.

ISSUE: Constitutional right to be present at trial

HELD: Record does not show that Rucker was appropriately advised by the court of his right to be present at trial, that Rucker understood the right, or that Rucker voluntarily waived his right. It was therefore improper for the district court to proceed to hold a jury trial, and error in this case was not harmless. Judgment is reversed and remanded for further proceedings.

STATUTE: K.S.A. 22-3405

STATE V. VILLA-VASQUEZ
FORD DISTRICT COURT – AFFIRMED
NO. 107965 – SEPTEMBER 13, 2013

FACTS: On appeal from drug convictions, Villa-Vasquez claimed the district court erred in: (1) admitting hearsay testimony of police officer regarding “narco saints” religious icons and their association with drug traffickers, and (2) permitting state to exercise peremptory challenges with respect to two Hispanic prospective jurors.

ISSUES: (1) Hearsay evidence and (2) jury selection

HELD: Under facts of case, background knowledge obtained from discussions with laypersons and drug traffickers about Jesus Malverde and other “narco saints,” accumulated by law enforcement officer to gain expertise regarding association between narco saints and drug traffickers, does not constitute inadmissible hearsay. Villa-Vasquez failed to object to police officer’s qualifications when officer testified at trial, but even if considered as subset of hearsay argument, officer’s research outside a purely academic setting does not undermine his qualification to provide expert opinion testimony regarding association between maintenance of shrines to narco saints and drug traffickers. Relevance of officer’s testimony, and whether officer’s testimony was unduly prejudicial, are not considered because there was no objection on those grounds during officer’s testimony.

Under facts of case, district court did not err in finding that state’s preemptory challenges were racially neutral with respect to a prospective juror who was nonresponsive during voir dire and who may have worked with the defendant, and a prospective juror who worked at night and appeared tired during voir dire.

STATUTES: K.S.A. 2012 Supp. 60-460; and K.S.A. 60-261, -401(b), -404, 456, -1205

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