



**For Immediate Release
August 5, 2024**

Sedgwick County District Attorney Marc Bennett and Riley County Attorney Barry Wilkerson agreed to serve as special prosecutors at the request of the elected Marion County Attorney, Joel Ensey, in order to review the events that led to the issuance and execution of search warrants in Marion, Kansas on Friday, August 11, 2023. The investigation was initially begun by the Kansas Bureau of Investigation before being turned over to the Colorado Bureau of Investigation in November of 2023.

SCOPE OF REPORT

This report details the findings and conclusions of the special prosecutors and is limited specifically to the assessment of criminal liability of various individuals regarding the issuance of the warrants in question, the execution of the signed warrants and actions taken thereafter.

Neither Mr. Bennett nor Mr. Wilkerson possess, nor do they seek to impose, any administrative or civil authority as to any of the persons or agencies listed herein. This report does not address possible violations of federal criminal law, as the special prosecutors are authorized to assess violations of Kansas law only.

Additionally, this report does not address any administrative review that may be conducted or may have been conducted by or concerning the Marion County, Sheriff's Department; the Marion Police Department; the Kansas Bureau of Investigation; or agencies that hold licensing authority over any of the parties acting under authority of their respective professions, including The Kansas Commission on Peace Officer's

Standards and Training (CPOST); The Kansas Bar Association, or the Kansas Commission on Judicial Conduct.

This report offers no commentary as to any collateral assessment of any agency's policy considerations, nor does this report attempt to address questions of civil liability where a lesser burden of proof would apply.

Pursuant to Kansas Supreme Court Rule 3.6, this report offers no commentary on any pending adjudicative proceeding(s).

Pursuant to Kansas Supreme Court Rule 3.8, the above and foregoing report is intended solely to "inform the public of the nature and extent of the [special] prosecutor's action and . . . serve a legitimate law enforcement purpose."

Relevant Kansas Statutes, Case Law & Constitutional Principles

The issuance and execution of search warrants in Marion, Kansas on August 11, 2023, has received broad attention regionally, nationally and internationally. For the edification of the public who may be unfamiliar with Kansas laws and legal principles, the Kansas statutes and legal authority which were evaluated by the special prosecutors in this matter are included herein in their entirety. Constitutional principles that control the analysis are also included below with explanation.

Where applicable, emphasis is added on words or phrases that are specifically germane to the analysis of the instant investigation.

I

General principles of criminal liability under Kansas law

K.S.A. 21-5202. Culpable mental state; definition of intentionally, knowingly, recklessly. (a) Except as otherwise provided, *a culpable mental state is an essential element of every crime defined by this code* (emphasis added). A culpable mental state may be established by proof that the conduct of the accused person was committed "intentionally," "knowingly" or "recklessly."

(b) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:

- (1) Intentionally;
- (2) knowingly;
- (3) recklessly.

(c) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

(d) If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(e) If the definition of a crime does not prescribe a culpable mental state, but one is nevertheless required under subsection (d), "intent," "knowledge" or "recklessness" suffices to establish criminal responsibility.

(f) If the definition of a crime prescribes a culpable mental state that is sufficient for the commission of a crime, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the crime, unless a contrary purpose plainly appears.

(g) If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided.

(h) A person acts "intentionally," or "with intent," with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are specific intent crimes. A crime may provide that any other culpability requirement is a specific intent.

(i) A person acts "knowingly," or "with knowledge," with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts "knowingly," or "with knowledge," with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "knowingly," "known," or "with knowledge" are general intent crimes.

(j) A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

In *State v. Dinkel*, 314 Kan. 146, 156 (2021), the Kansas Supreme Court explained that, for behavior to constitute a crime, the actor must possess the requisite criminal intent:

“Generally, ‘conduct, to be criminal, must consist of something more than mere action (or non-action where there is a legal duty to act); some sort of bad state of mind is required as well.’ 1 LaFave, *Substantive Criminal Law, Nature of criminal law—Basic premises* § 1.2(b) (3d ed. 2020).

Kansas codifies this legal principle at K.S.A. 2020 Supp. 21-5202(a), which provides that ‘a culpable mental state is an essential element of every crime ...’ and that ‘[a] culpable mental state may be established by proof that the conduct of the accused person was committed ‘intentionally,’ ‘knowingly,’ or ‘recklessly.’ ”

K.S.A. 21-5207. Ignorance or mistake. (a) *A person's ignorance or mistake as to a matter of either fact or law, except as provided in K.S.A. 21-5204, and amendments thereto, is a defense if it negates the existence of the culpable mental state which the statute prescribes with respect to an element of the crime.* (emphasis added).

(b) A person's reasonable belief that such person's conduct does not constitute a crime is a defense if:

(1) The crime is defined by an administrative regulation or order which is not known to such person and has not been published in the Kansas administrative regulations or an annual supplement thereto, as provided by law; and such person could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to such person;

(2) such person acts in reliance upon a statute which later is determined to be invalid;

(3) such person acts in reliance upon an order or opinion of the supreme court of Kansas or a United States appellate court later overruled or reversed; or

(4) such person acts in reliance upon an official interpretation of the statute, regulation or order defining the crime made by a public officer or agency legally authorized to interpret such statute.

(c) Although a person's ignorance or mistake of fact or law, or reasonable belief, as described in subsection (b), is a defense to the crime charged, such person may be convicted of an included crime of which such person would be guilty if the fact or law were as such person believed it to be.

“ . . . the mistake of fact doctrine merely reflects the State's burden to prove every element of the offense: the State cannot convict the defendant if it fails to show that the defendant had the required mental state when committing the crime.” *State v. Diaz*, 44 Kan. App. 2d 870, Syl. 1 (2010).”
State v. Blackmon, unpublished, 2023WL 176649 (2023)

II

Regarding the parties who obtained the driving record of Kari Newell directly from the Kansas Department of Review or later shared the same

K.S.A. 21-5839 Unlawful Acts Concerning Computers (a) It is unlawful for any person to:

(1) *Knowingly and without authorization access* (emphasis added) and damage, modify, alter, destroy, copy, disclose or take possession of a computer, computer system, computer network or any other property (emphasis added);

(2) use a computer, computer system, computer network or any other property for the purpose of devising or executing a scheme or artifice with the intent to defraud or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation;

(3) knowingly exceed the limits of authorization and damage, modify, alter, destroy, copy, disclose or take possession of a computer, computer system, computer network or any other property;

(4) knowingly and without authorization, disclose a number, code, password or other means of access to a computer, computer network, social networking website or personal electronic content; or

(5) knowingly and without authorization, access or attempt to access any computer, computer system, social networking website, computer network or computer software, program, documentation, data or property contained in any computer, computer system or computer network.

(b) (1) Except as provided in (b)(2), violation of subsections (a)(1), (a)(2) or (a)(3) is a severity level 8, nonperson felony.

(2) Violation of subsections (a)(1), (a)(2) or (a)(3) is a severity level 5, nonperson felony if the monetary loss to the victim or victims is more than \$100,000.

(3) Violation of subsections (a)(4) or (a)(5) is a class A nonperson misdemeanor.

(c) In any prosecution for a violation of subsections (a)(1), (a)(2) or (a)(3), it shall be a defense that the property or services were appropriated openly and avowedly under a claim of title made in good faith.

(d) As used in this section:

(1) "Access" means to instruct, communicate with, store data in, retrieve data from or otherwise make use of any resources of a computer, computer system or computer network;

(2) "computer" means an electronic device which performs work using programmed instruction and which has one or more of the capabilities of storage, logic, arithmetic or communication and includes all input, output, processing, storage, software or communication facilities which are connected or related to such a device in a system or network;

(3) "computer network" means the interconnection of communication lines, including microwave or other means of electronic communication, with a computer through remote terminals, or a complex consisting of two or more interconnected computers;

(4) "computer program" means a series of instructions or statements in a form acceptable to a computer which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system;

- (5) "computer software" means computer programs, procedures and associated documentation concerned with the operation of a computer system;
- (6) "computer system" means a set of related computer equipment or devices and computer software which may be connected or unconnected;
- (7) "financial instrument" means any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card, debit card or marketable security;
- (8) "personal electronic content" means the electronically stored content of an individual including, but not limited to, pictures, videos, emails and other data files;
- (9) "property" includes, but is not limited to, financial instruments, information, electronically produced or stored data, supporting documentation and computer software in either machine or human readable form;
- (10) "services" includes, but is not limited to, computer time, data processing and storage functions and other uses of a computer, computer system or computer network to perform useful work;
- (11) "social networking website" means a privacy-protected internet website which allows individuals to construct a public or semi-public profile within a bounded system created by the service, create a list of other users with whom the individual shares a connection within the system and view and navigate the list of users with whom the individual shares a connection and those lists of users made by others within the system; and
- (12) "supporting documentation" includes, but is not limited to, all documentation used in the construction, classification, implementation, use or modification of computer software, computer programs or data.

K.S.A. 21-6101. Breach of privacy. (a) Breach of privacy is knowingly and without lawful authority:

- (1) Intercepting, without the consent of the sender or receiver, a message by telephone, telegraph, letter or other means of private communication;
- (2) *divulging, without the consent of the sender or receiver, the existence or contents of such message if such person knows that the message was illegally intercepted, or if such person illegally learned of the message in the course of employment with an agency in transmitting it* (emphasis added);
- (3) entering with intent to listen surreptitiously to private conversations in a private place or to observe the personal conduct of any other person or persons entitled to privacy therein;
- (4) installing or using outside or inside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place, which sounds would not ordinarily be audible or comprehensible without the use of such device, without the consent of the person or persons entitled to privacy therein;
- (5) installing or using any device or equipment for the interception of any telephone, telegraph or other wire or wireless communication without the consent of the person in possession or control of the facilities for such communication;
- (6) installing or using a concealed camcorder, motion picture camera or photographic camera of any type to secretly videotape, film, photograph or record, by electronic or other means, another identifiable person under or through the clothing being worn by that other person or another identifiable

person who is nude or in a state of undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to invade the privacy of that other person, under circumstances in which that other person has a reasonable expectation of privacy;

(7) disseminating or permitting the dissemination of any videotape, photograph, film or image obtained in violation of subsection (a)(6); or

(8) disseminating any videotape, photograph, film or image of another identifiable person 18 years of age or older who is nude or engaged in sexual activity and under circumstances in which such identifiable person had a reasonable expectation of privacy, with the intent to harass, threaten or intimidate such identifiable person, and such identifiable person did not consent to such dissemination.

(b) Breach of privacy as defined in:

(1) Subsection (a)(1) through (a)(5) is a class A nonperson misdemeanor;

(2) subsection (a)(6) or (a)(8) is a:

(A) Severity level 8, person felony, except as provided in subsection (b)(2)(B); and

(B) severity level 5, person felony upon a second or subsequent conviction within the previous five years; and

(3) subsection (a)(7) is a severity level 5, person felony.

(c) Subsection (a)(1) shall not apply to messages overheard through a regularly installed instrument on a telephone party line or on an extension.

(d) The provisions of this section shall not apply to: (1) An operator of a switchboard, or any officer, employee or agent of any public utility providing telephone communications service, whose facilities are used in the transmission of a communication, to intercept, disclose or use that communication in the normal course of employment while engaged in any activity which is incident to the rendition of public utility service or to the protection of the rights of property of such public utility; (2) a provider of an interactive computer service, as defined in 47 U.S.C. § 230, for content provided by another person; (3) a radio common carrier, as defined in K.S.A. 66-1,143, and amendments thereto; and (4) a local exchange carrier or telecommunications carrier as defined in K.S.A. 66-1,187, and amendments thereto.

(e) The provisions of subsection (a)(8) shall not apply to a person acting with a bona fide and lawful scientific, educational, governmental, news or other similar public purpose.

(f) As used in this section, "private place" means a place where one may reasonably expect to be safe from uninvited intrusion or surveillance.

K.S.A. 21-6103. Criminal false communication. (a) Criminal false communication is:

(1) Communicating to any person, by any means, information that the person communicating such *information knows to be false* and will tend to (emphasis added):

(A) Expose another living person to public hatred, contempt or ridicule;

(B) deprive such person of the benefits of public confidence and social acceptance;

or

(C) degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends; or
(2) recklessly making, circulating or causing to be circulated any false report, statement or rumor with intent to injure the financial standing or reputation of any bank, financial or business institution or the financial standing of any individual in this state.

(b) Criminal false communication is a class A nonperson misdemeanor.

(c) In all prosecutions under this section the truth of the information communicated shall be admitted as evidence. It shall be a defense to a charge of criminal false communication if it is found that such matter was true.

K.S.A. 21-6105. Unjustifiably exposing a convicted or charged person. (a) Unjustifiably exposing a convicted or charged person is unjustifiably communicating or threatening to communicate to another any oral or written statement that any person has been charged with or convicted *of a felony*, with intent to interfere with the employment or business of the person so charged or convicted.

(b) Unjustifiably exposing a convicted or charged person is a class B nonperson misdemeanor.

(c) This section shall not apply to any person or organization who furnishes information about a person to another person or organization requesting the same.

K.S.A. (2023 Supp.) 21-6107. Identity theft; identity fraud. (a) Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, *with the intent to:*

(1) *Defraud that person, or anyone else, in order to receive any benefit; or (emphasis added)*

(2) misrepresent that person in order to subject that person to economic or bodily harm.

(b) Identity fraud is:

(1) Using or supplying information the person knows to be false in order to obtain a document containing any personal identifying information; or

(2) altering, amending, counterfeiting, making, manufacturing or otherwise replicating any document containing personal identifying information with the intent to deceive;

(c) (1) Identity theft is a:

(A) Severity level 8, nonperson felony, except as provided in subsection (c)(1)(B); and

(B) severity level 5, nonperson felony if the monetary loss to the victim or victims is more than \$100,000.

(2) Identity fraud is a severity level 8, nonperson felony.

(d) It is not a defense that the person did not know that such personal identifying information belongs to another person, or that the person to whom such personal identifying information belongs or was issued is deceased.

(e) As used in this section:

- (1) "Personal electronic content" means the electronically stored content of an individual including, but not limited to, pictures, videos, emails and other data files;
- (2) "personal identifying information" includes, but is not limited to, the following:
 - (A) Name;
 - (B) birth date;
 - (C) address;
 - (D) telephone number;
 - (E) driver's license number or card or nondriver's identification number or card;
 - (F) social security number or card;
 - (G) place of employment;
 - (H) employee identification numbers or other personal identification numbers or cards;
 - (I) mother's maiden name;
 - (J) birth, death or marriage certificates;
 - (K) electronic identification numbers;
 - (L) electronic signatures;
 - (M) any financial number, or password that can be used to access a person's financial resources, including, but not limited to, checking or savings accounts, credit or debit card information, demand deposit or medical information; and
 - (N) passwords, usernames or other log-in information that can be used to access a person's personal electronic content, including, but not limited to, content stored on a social networking website; and
- (3) "social networking website" means a privacy-protected internet website which allows individuals to construct a public or semi-public profile within a bounded system created by the service, create a list of other users with whom the individual shares a connection within the system and view and navigate the list of users with whom the individual shares a connection and those lists of users made by others within the system.

Kansas appellate courts have wrestled with the definition of the phrase "*in order to receive any benefit*" (emphasis added) in K.S.A. 21-6107(a)(1):

- (a) obtaining, . . . transferring, using . . . any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to:
 - (1) Defraud that person, or anyone else, *in order to receive any benefit*.

In *State v. Rivera-Rodriguez*, No. 122,840, WL 2386063, 488 P.3d 527 (2021), (unpublished opinion), the Kansas Court of Appeals reviewed cases which addressed the previous version of Identity Theft. When the statute was amended in 2005, the legislature

replaced the phrase “*with intent to defraud for economic benefit,*” with “*in order to receive any benefit.*” (emphasis added)

“In doing so, ‘the legislature expanded the definition of ‘identity theft’ to criminalize *every* conceivable motive for stealing another’s identity. ... In short, the deletion of the phrase ‘for economic benefit’ and the insertion of the phrase ‘for any benefit’ significantly changed and expanded the context of the identity theft statute.’ *State v. Capps*, No. 105,653, 2012 WL 5973917, at 3 (Kan. App. 2012) (unpublished opinion).

In *State v. Martinez-Perez*, No. 109,383, 2014 WL 2401660, at 1-2 (Kan.App.2014) (unpublished opinion), the Kansas Court of Appeals assessed the defendant’s arguments against the updated version of the statute:

Relying on [State v.] *Johnson*, [40 Kan.App. 2d 196, (2008)] Martinez–Perez argues that mere possession of another’s personal information did not demonstrate an intent to defraud. But [Martinez-Perez] ignores the fact that he did not merely possess the fake driver’s license. To the contrary, he offered it to the officer and claimed it was his. He explicitly misidentified himself as Francisco Sotelo. *The State presented sufficient evidence that Martinez–Perez intended to defraud the officer by leading him to believe that he was Francisco Sotelo so that he would not suffer the consequences of being found to have a previous DUI conviction and being found to be in this country illegally.* [Citations omitted.]” 2014 WL 2401660, at *2.

Since the statute was amended, Kansas appellate courts have held that the motive does have to be merely economic to satisfy the statute, so long as “any benefit” is actually derived by the actor.

K.S.A. 21-5917. False impersonation; aggravated false

impersonation. (a) False impersonation is representing oneself to be a *public officer* (emphasis added), public employee or a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas, with knowledge that such representation is false.

(b) Aggravated false impersonation is falsely representing or impersonating another and in such falsely assumed character:

(1) Becoming bail or security, or acknowledging any recognizance, or executing any bond or other instrument as bail or security, for any party in any proceeding, civil or criminal, before any court or officer authorized to take such bail or security;

(2) confessing any judgment;

(3) acknowledging the execution of any conveyance of property, or any other instrument which by law may be recorded; or

(4) doing any other act in the course of a suit, proceeding or prosecution whereby the person who is represented or impersonated may be made liable to the payment of any debt, damages, costs or sum of money, or such person's rights or interests may be in any manner affected.

(c) (1) False impersonation is a class B nonperson misdemeanor.

(2) Aggravated false impersonation is a severity level 9, nonperson felony.

III

Regarding the conduct of law enforcement officers/ agents

K.S.A. 21-5824. Making false information. (a) Making false information is making, generating, distributing or drawing, or causing to be made, generated, distributed or drawn, any written instrument, electronic data or entry in a book of account with knowledge *that such information falsely states or represents some material matter* (emphasis added) or is not what it purports to be, and with intent to defraud, obstruct the detection of a theft or felony offense or induce official action.

See *State v. Gotti*, 273 Kan. 459, 461, 43 P.3d 812 (2002) (later abrogated on other grounds by *State v. Ward*, 307 Kan. 245, Syl. 2 [2018], regarding the distinction between the crimes of making a false information and forgery).

K.S.A. 21-5905. Interference with the judicial process. (a) Interference with the judicial process is:

(1) Communicating with any judicial officer in relation to any matter which is or may be brought before such judge, magistrate, master or juror with intent to improperly influence such officer;

(2) committing any of the following acts, with intent to influence, impede or obstruct the finding, decision, ruling, order, judgment or decree of such judicial officer or prosecutor on any matter then pending before the officer or prosecutor:

(A) Communicating in any manner a threat of violence to any judicial officer or any prosecutor;

(B) harassing a judicial officer or a prosecutor by repeated vituperative communication; or

(C) picketing, parading or demonstrating near such officer's or prosecutor's residence or place of abode;

(3) picketing, parading or demonstrating in or near a building housing a judicial officer or a prosecutor with intent to impede or obstruct the finding, decision, ruling, order, judgment or decree of such judicial officer or prosecutor on any matter then pending before the officer or prosecutor;

(4) knowingly accepting or agreeing to accept anything of value as consideration for a promise:

(A) Not to initiate or aid in the prosecution of a person who has committed a crime; or

(B) to conceal or destroy evidence of a crime;

(5) *knowingly or intentionally in any criminal proceeding or investigation (emphasis added):*

(A) *Inducing a witness or informant to withhold or unreasonably delay in producing any testimony, information, document or thing;*

(B) *withholding or unreasonably delaying in producing any testimony, information, document or thing after a court orders the production of such testimony, information, document or thing;*

(C) *altering, damaging, removing or destroying any record, document or thing, with the intent to prevent it from being produced or used as evidence; or (emphasis added).*

(D) *making, presenting or using a false record, document or thing with the intent that the record, document or thing, material to such criminal proceeding or investigation, appear in evidence to mislead a justice, judge, magistrate, master or law enforcement officer;*

(6) *when performed by a person summoned or sworn as a juror in any case:*

(A) *Intentionally soliciting, accepting or agreeing to accept from another any benefit as consideration to wrongfully give a verdict for or against any party in any proceeding, civil or criminal;*

(B) *intentionally promising or agreeing to wrongfully give a verdict for or against any party in any proceeding, civil or criminal; or*

(C) *knowingly receiving any evidence or information from anyone in relation to any matter or cause for the trial of which such juror has been or will be sworn, without the authority of the court or officer before whom such juror has been summoned, and without immediately disclosing the same to such court or officer;*
or

(7) *knowingly making available by any means personal information about a judge or the judge's immediate family member, if the dissemination of the personal information poses an imminent and serious threat to the judge's safety or the safety of such judge's immediate family member, and the person making the information available knows or reasonably should know of the imminent and serious threat.*

(b) *Interference with the judicial process as defined in:*

(1) *Subsection (a)(1) is a severity level 9, nonperson felony;*

(2) *subsection (a)(2) and (a)(3) is a class A nonperson misdemeanor;*

(3) *subsection (a)(4) is a:*

(A) *Severity level 8, nonperson felony if the crime is a felony; or*

(B) *class A nonperson misdemeanor if the crime is a misdemeanor;*

(4) *subsection (a)(5) is a:*

(A) *Severity level 8, nonperson felony if the matter or case involves a felony; or*

(B) *class A nonperson misdemeanor if the matter or case involves a misdemeanor;*

(5) *subsection (a)(6)(A) is a severity level 7, nonperson felony;*

(6) *subsection (a)(6)(B) or (a)(6)(C) is a severity level 9, nonperson felony; and*

(7) *subsection (a)(7) is a:*

(A) *Class A person misdemeanor, except as provided in subsection (b)(7)(B); and*

(B) *severity level 9, person felony upon a second or subsequent conviction.*

(c) *Nothing in this section shall limit or prevent the exercise by any court of this state of its power to punish for contempt.*

(d) *As used in this section:*

- (1) "Immediate family member" means a judge's spouse, child, parent or any other blood relative who lives in the same residence as such judge.
- (2) "Judge" means any duly elected or appointed justice of the supreme court, judge of the court of appeals, judge of any district court of Kansas, district magistrate judge or municipal court judge.
- (3) "Personal information" means a judge's home address, home telephone number, personal mobile telephone number, pager number, personal e-mail address, personal photograph, immediate family member photograph, photograph of the judge's home, and information about the judge's motor vehicle, any immediate family member's motor vehicle, any immediate family member's place of employment, any immediate family member's child care or day care facility and any immediate family member's public or private school that offers instruction in any or all of the grades kindergarten through 12.

The case law regarding violations of K.S.A. 21-5905, *Abuse of Judicial Process*, is very limited in Kansas. In *State v. Lessman*, 2021 WL 2385816, 487 P.3d 382 (2021) (unpublished), the Kansas Court of Appeals considered the sufficiency of the evidence offered by the state to secure the conviction of Mr. Lessman under §(a)(1) of the statute.

The *Lessman* court offered the following analysis,

Under the relevant subsection, interference with the judicial process is “[c]ommunicating with any judicial officer in relation to any matter which is or may be brought before such judge, magistrate, master or juror with intent to improperly influence such officer.” K.S.A. 2020 Supp. 21-5905(a)(1). The phrase “with intent to improperly influence a judicial officer” covers a broad range of conduct “*but is limited to conduct affecting a governmental function, the administration of justice by a judicial officer in relation to any matter which is or may be brought before him as a judicial officer.*” (emphasis added) *State v. Torline*, 215 Kan. 539, 542, 527 P.2d 994 (1974). “The common meaning of ‘improperly influence’ is to impermissibly change someone's behavior or thinking. See American Heritage Dictionary 884 (5th ed. 2011) (defining ‘improper’ as ‘[n]ot consistent with established ... rule’); American Heritage Dictionary 901 (5th ed. 2011) (defining ‘influence’ as ‘to change the behavior or thinking of someone; sway’).” *State v. Matei*, No. 110,003, 2015 WL 249680, at *12 (Kan. App. 2015) (unpublished opinion). But, when the attempted influence directed against a judicial officer comes after the final termination of the proceedings, there is no attempt to improperly influence a judicial officer. *Torline*, 215 Kan. at 543.

K.S.A. 21-5903. Perjury. (a) Perjury is *intentionally and falsely*:

(1) Swearing, testifying, affirming, declaring or subscribing to any material fact *upon any oath or affirmation legally administered in any cause*, (emphasis added) matter or proceeding before any court, tribunal, public body, notary public or other officer authorized to administer oaths;

(2) subscribing as true and correct under penalty of perjury any material matter in any declaration, verification, certificate or statement as permitted by K.S.A. 53-601, and amendments thereto; or

(3) subscribing as true and correct under the penalty of perjury the affidavit as provided in K.S.A. 25-1121(c), and amendments thereto.

(b) Perjury is a:

(1) Severity level 9, nonperson felony, except as provided in subsection (b)(2); and

(2) severity level 7, nonperson felony if the false statement is made upon the trial of a felony charge.

K.S.A. 21-6002. Official misconduct. (a) Official misconduct is any of the following acts committed by a public officer or employee in the officer or employee's public capacity or under color of the officer or employee's office or employment:

(1) Knowingly using or authorizing the use of any aircraft, as defined by K.S.A. 3-201, and amendments thereto, vehicle, as defined by K.S.A. 8-1485, and amendments thereto, or vessel, as defined by K.S.A. 32-1102, and amendments thereto, under the officer's or employee's control or direction, or in the officer's or employee's custody, exclusively for the private benefit or gain of the officer or employee or another;

(2) knowingly failing to serve civil process when required by law;

(3) *using confidential information acquired in the course of and related to the officer's or employee's office or employment for the private benefit or gain of the officer or employee or another or to intentionally cause harm to another*;

(4) except as authorized by law, with the intent to reduce or eliminate competition among bidders or prospective bidders on any contract or proposed contract:

(A) Disclosing confidential information regarding proposals or communications from bidders or prospective bidders on any contract or proposed contract;

(B) accepting any bid or proposal on a contract or proposed contract after the deadline for acceptance of such bid or proposal; or

(C) altering any bid or proposal submitted by a bidder on a contract or proposed contract;

(5) except as authorized by law, knowingly destroying, tampering with or concealing evidence of a crime; or

(6) knowingly submitting to a governmental entity a claim for expenses which is false or duplicates expenses for which a claim is submitted to such governmental entity, another governmental or private entity.

(b) (1) Official misconduct as defined in:

(A) Subsections (a)(1) through (a)(4) is a class A nonperson misdemeanor;

(B) subsection (a)(5) is a:

(i) Severity level 8, nonperson felony if the evidence is evidence of a crime which is a felony; and

- (ii) class A nonperson misdemeanor if the evidence is evidence of a crime which is a misdemeanor; and
- (C) subsection (a)(6) if the claim is:
 - (i) \$25,000 or more is a severity level 7, nonperson felony;
 - (ii) at least \$1,000 but less than \$25,000 is a severity level 9, nonperson felony; and
 - (iii) less than \$1,000 is a class A nonperson misdemeanor.
- (2) Upon conviction of official misconduct a public officer or employee shall forfeit such officer or employee's office or employment.
- (c) The provisions of subsection (a)(1) shall not apply to any use of persons or property which:
 - (1) At the time of the use, is authorized by law or by formal written policy of the governmental entity; or
 - (2) constitutes misuse of public funds, as defined in K.S.A. 21-6005, and amendments thereto.
- (d) As used in this section, "confidential" means any information that is not subject to mandatory disclosure pursuant to K.S.A. 45-221, and amendments thereto.

21-5413. Battery; aggravated battery; battery against certain persons; aggravated battery against certain persons. (a) Battery is:

- (1) Knowingly or recklessly causing bodily harm to another person; or
- (2) knowingly causing physical contact with another person when done in a rude, insulting or angry manner.

IV

Re: Search Warrants and the Warrant Requirement

The 4th Amendment to the US Constitution: protects the “*right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*”

Note: Kansas courts interpret § 15 of the Kansas Constitution Bill of Rights to provide the same protection from unlawful government searches and seizures as the Fourth Amendment to the United States Constitution. See *State v. Neighbors*, 299 Kan. 234, 239 (2014).

A search occurs under the *Fourth Amendment* when: (1) the government obtains

information by physically intruding on a constitutionally protected area, *i.e.*, persons, houses, papers, or effects [citation omitted] *or* (2) invades ‘a subjective expectation of privacy that society recognizes as reasonable.’ See *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. [United States]*, 389 U.S., [347,] 361 [1967]).” *State v. Talkington*, 301 Kan. 453 (2015).

An officer’s conclusory assertions in a search warrant application are insufficient to support probable cause:

Because a search warrant requires an evidentiary foundation, law enforcement officers may not rely on conclusory assertions or opinions unmoored from specific factual representations. The facts need not be in a form admissible at trial—hearsay and other secondhand information may suffice, if the overall circumstances demonstrate reliability. But judicial officers cannot provide the independent check contemplated in the Fourth Amendment if they are asked to review conclusions rather than facts.

State v. Althaus, 49 Kan. App. 2d 210, Syl. 9 (2013).

A defendant has the ability to challenge the accuracy of the information contained within a search warrant application or information left out of said application. See *Franks v. Delaware*, 438 U.S. 154 (1978). A successful challenge can lead to the suppression of some or all of the evidence collected.

As a general matter, the remedy for an invalid search warrant is the suppression of evidence pursuant to the “exclusionary rule.” In situations where the search warrant application was “invalid on its face,” the remedy may also include the determination that the law enforcement officer(s) responsible for preparing the application are not entitled to qualified immunity. See *Groh v. Ramirez*, 540 U.S. 551 Syl. 3, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

While the United States Supreme Court has permitted exceptions to the exclusionary rule (ex: good faith) when determining whether to exclude evidence,

appellate treatment will turn on the following issue:

[w]ould a reasonable law enforcement officer have recognized the affidavit to be so lacking in indicators of probable cause that he or she could not have held a good-faith belief in the validity of the warrant, notwithstanding the issuing judge's decision to sign it?

State v. Hoeck, 284 Kan. 441, 465, Syl. 1 (2007).

Summarized, poorly drafted applications (affidavits) presented for a search warrant or warrant applications that are based on an incomplete investigation do not, standing alone, carry criminal liability. The remedy in these situations is suppression through the exclusionary rule of any evidence wrongfully obtained.

Conversely, where the law enforcement agent who sought a warrant intentionally, knowingly or recklessly provided misleading information to the court or swore to facts known to be untrue, those actions may constitute one or more crimes defined by state statute.

V

Search Warrant and the Role of the Prosecutor

K.S.A. 22-2502, **Search Warrants; issuance; proceedings authorized . . .**

(a) A search warrant shall be issued only upon the oral or written statement, including those conveyed or received by electronic communication, of any person under oath or affirmation which states facts sufficient to show probable cause that a crime has been, is being or is about to be committed and which particularly describes a person, place or means of conveyance to be searched and things to be seized. Any statement which is made orally shall be either taken down by a certified shorthand reporter, sworn to under oath and made part of the application for a search warrant, or recorded before the magistrate from whom the search warrant is requested and sworn to under oath. Any statement orally made shall be reduced to writing as soon thereafter as possible. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the magistrate may issue a search warrant for . . .

K.S.A. 22-2502 makes no reference to the role, if any, for the local prosecutor in the preparation, review or execution of search warrants. The American Bar Association promulgates non-binding standards of practice as recommendations to practitioners. Those standards—see 26-2.8 (d)(f)(g) (h) and (i)—suggest that a prosecutor should review

warrant applications before they go to the judge.

VI Jurisdiction/ Authority of Law Enforcement Agencies

K.S.A. 22-2401a, Jurisdiction of certain law enforcement officers . . .

(a)(1) Law enforcement officers employed by consolidated county law enforcement agencies or departments and sheriffs and their deputies may exercise the powers and authority of law enforcement officers anywhere within their county.

(2) Law enforcement officers employed by any city may exercise the powers and authority of law enforcement officers anywhere within the city limits of the city employing them and outside of such city when on property owned or under the control of such city.

...

(h) All law enforcement officers not otherwise provided statewide jurisdiction may exercise the powers and authority of law enforcement officers anywhere when:

(1) A request for assistance has been made by law enforcement officers from the area for which assistance is requested;

(2) in fresh pursuit of a person;

(3) transporting persons in custody to an appropriate facility, wherever such facility may be located; and

(4) investigating a crime that occurred within the law enforcement officer's jurisdiction, with appropriate notification to and coordination with a local law enforcement agency with jurisdiction where the investigation is to be conducted.

K.S.A. 74-5602, provides definitions within the Kansas Law Enforcement Training Act, including,

...

(f) "Law enforcement" means the prevention or detection of crime and the enforcement of the criminal or traffic laws of this state or of any municipality thereof.

(g)(1) "Police officer" or "law enforcement officer" means a full-time or part-time salaried officer or employee of the state, a county or a city, whose duties include the prevention or detection of crime and the enforcement of the criminal or traffic laws of this state or of any municipality thereof.

(2) "Police officer" or "law enforcement officer" includes, but is not limited to: The sheriff, undersheriff and full-time or part-time salaried deputies in the sheriff's office in each county; deputy sheriffs deputized pursuant to K.S.A. 19-2858, and amendments thereto; conservation officers of the Kansas department of wildlife and parks; university police officers, as defined in K.S.A. 22-2401a, and amendments thereto; campus police officers, as defined in K.S.A. 22-2401a, and amendments thereto; law enforcement agents of the director of alcoholic beverage

control; law enforcement agents designated by the secretary of revenue pursuant to K.S.A. 75-5157, and amendments thereto; law enforcement agents of the Kansas lottery; law enforcement agents of the Kansas racing commission; deputies and assistants of the state fire marshal having law enforcement authority; capitol police, existing under the authority of K.S.A. 75-4503, and amendments thereto; special agents of the department of corrections; special investigators designated by the secretary of labor; and law enforcement officers appointed by the adjutant general pursuant to K.S.A. 48-204, and amendments thereto; railroad policemen appointed pursuant to K.S.A. 66-524, and amendments thereto; school security officers designated as school law enforcement officers pursuant to K.S.A. 72-6146, and amendments thereto; the manager and employees of the horsethief reservoir benefit district pursuant to K.S.A. 82a-2212, and amendments thereto; and the director of the Kansas commission on peace officers' standards and training and any other employee of such commission designated by the director pursuant to K.S.A. 74-5603, and amendments thereto, as a law enforcement officer. "Police officer" or "law enforcement officer" includes any officer appointed or elected on a provisional basis.

VII

District Judges and District Magistrate Judges

Kansas state courts are divided into 31 separate "judicial districts." These districts have a combination of District Court Judges, see K.S.A. 20-334, and District Magistrate Judges, see K.S.A. 20-302b, for authority.

K.S.A. 20-334. Qualifications of judges of the district court. (a) Subject to the provisions of K.S.A. 20-2909, and amendments thereto, any person who is elected, retained in office or appointed as a district judge shall:

- (1) Have been regularly admitted to practice law in the state of Kansas;
- (2) be a resident of the judicial district for which elected or appointed to serve at the time of taking the oath of office and shall maintain residency in the judicial district while holding office; and
- (3) for a period of at least five years, have engaged in the active practice of law as a lawyer, judge of a court of record or any court in this state, full-time teacher of law in an accredited law school or any combination thereof.

(b) Any person who is elected, retained in office or appointed as a district magistrate judge shall:

- (1) Be a graduate of a high school or secondary school or the equivalent thereof;
- (2) be a resident of the county for which elected or appointed to serve at the time of taking the oath of office and shall maintain residency in the county while holding office; and
- (3) if not regularly admitted to practice law in Kansas, be certified by the supreme court, in the manner prescribed by K.S.A. 20-337, and amendments thereto, as qualified to serve as a district magistrate judge.

K.S.A. 20-302b. District magistrate judges; jurisdiction, powers and duties; appeals.

(a) Subject to assignment pursuant to K.S.A. 20-329, and amendments thereto, a district magistrate judge shall have the jurisdiction and power, in any case in which a violation of the laws of the state is charged, to conduct the trial of traffic infractions, violations of the wildlife and parks laws of this state or rules and regulations adopted thereunder, cigarette or tobacco infractions or misdemeanor charges, to conduct felony first appearance hearings and the preliminary examination of felony charges and to hear misdemeanor or felony arraignments. A district magistrate judge shall have jurisdiction over uncontested actions for divorce. Except as otherwise specifically provided in this section, a district magistrate judge shall have jurisdiction over actions filed under the code of civil procedure for limited actions, K.S.A. 61-2801 et seq., and amendments thereto, and all other civil cases, and shall have concurrent jurisdiction, powers and duties with a district judge.

K.S.A. 20-302b further delineates specific restrictions to a Magistrate Judge's authority (ex: habeas corpus, mandamus, *quo warranto*, et cetera).

District Court Judges must be lawyers and members of the bar. District Court Judges have statewide jurisdiction. The position of Magistrate Judge does not require a law degree. A Magistrate Judge's authority is proscribed by statute, as set forth above.

PERSONS REFERENCED IN THE INVESTIGATION

The following list includes the names and titles (where appropriate) of individuals interviewed as part of this investigation and/or mentioned in the above and foregoing report.

1. Officer John Benavidez - Marion Police Department
2. Brian Bina - Attorney for the City of Marion
3. Kevin Burkholder - City council, Marion
4. Chad Burr - Kansas Department of Revenue
5. Chief Gideon Cody - Chief of Marion Police Department in August of 2023
6. Cheryl Christensen - Support staff, Marion County Attorney's Office
7. Det. Aaron Christner - Marion Co. Sheriff's Office
8. Zach Collette - City council, Marion
9. Lloyd Davies - IT for the City and County of Marion
10. Joel Ensey - Marion County Attorney
11. Deb Gruver - Journalist, Marion County Record
12. Joby Harrison - ASAC, Kansas Bureau of Investigation

13. Ruth Herbel- Marion city council member
14. Zach Hudlin - Marion Police Department, current acting chief
15. Karen Hurt - Support staff, Marion County Attorney's office
16. Robert Jacobs - Assistant Director of the Kansas Bureau of Investigations
17. Deputy Steven Janzen - Marion County S.O.
18. Brogan Jones - Marion City Administrator
19. Jerry Kline - City council, Marion
20. Rep. Jake LaTurner - U.S. House of Representatives, Kansas 2nd Congressional District
21. Todd Leeds - Agent, Kansas Bureau of Investigation
22. Laura Legg - Support staff, Marion County Courts
23. Pam Maag - resident of Marion, Kansas
24. Roger Maag - Husband of Pam Maag
25. David Mayfield - Mayor City of Marion
26. Tony Mattivi - Director of the Kansas Bureau of Investigation
27. Eric Meyer - Editor, Marion County Record
28. Joanne Meyer - Former newspaper editor Marion County Record
29. Chris Mercer - Part-time Marion Police Officer/ Fire Investigator
30. Laura Meyers - Wife or girlfriend of Officer Jonathan Benavidez
31. Kari Newell - owner/operator of Karla's Kitchen, Marion, Kansas
32. Ryan Newell - Kari Newell's ex-husband
33. Bethanie Popejoy - Special Agent in Charge (SAC) Kansas Bureau of Investigation
34. Susan Robson - District Court Judge, 8th Judicial District
35. Ben Sexton - Chief Administrative District Judge, 8th Judicial District
36. Ted Smith - KDOR General Counsel / Legal Services Bureau
37. Jeff Soyez - MNSO Sheriff
38. Larry Starkey - MNSO Undersheriff
39. Michael Struwe - Agent Colorado Bureau of Investigation
40. Anita Svoboda - Support staff, Marion County Courts
41. Laura Viar - District Magistrate Judge, 8th Judicial District
42. John Zamora - Agent Colorado Bureau of Investigation
43. Phyllis Zorn - journalist, Marion County Record

FACTUAL SUMMARY/ TIMELINE

The facts set forth below are meant to summarize the contents of interviews, body camera videos, emails, forensic reports, and investigator's reports. Where statements are placed in quotes, the content came directly from transcripts of interviews or directly from reports, as indicated.

Tuesday, August 1, 2023

On August 1, 2023, Chief Gideon Cody of the Marion, Kansas, Police Department

attended a “meet-and-greet” with Kansas Representative Jake LaTurner at a restaurant in Marion, Kansas, *Karla’s Kitchen*, 301 E. Santa Fe Marion. The editor of the Marion County Record, Eric Meyer, and a reporter employed by the paper, Phyllis Zorn, were present. The owner of the restaurant, Kari Newell, wanted Mr. Meyer and Ms. Zorn to leave. Ms. Newell ultimately asked Marion Chief of Police Gideon Cody to remove the two reporters from her restaurant. Mr. Meyer and Ms. Zorn left the establishment after being asked to leave.

Mr. Meyer was later interviewed by CBI investigators. He recalled that when Chief Cody asked him and Ms. Zorn to leave, it was the first time he had met Chief Cody.

Mr. Meyer explained to the investigators that when Marion Police Chief Gideon Cody was first offered the job in Marion in the spring of 2023, the newspaper received anonymous complaints from people who had worked with Chief Cody during his previous employment with the Kansas City, Missouri, Police Department. The Marion Record was unable to get on-the-record confirmation of these complaints, so their reporter, Deb Gruver, approached Chief Cody for comment. He in turn threatened to sue for libel. Without on-the-record confirmation of the allegations, Mr. Meyer chose to share the concerns with the city council, rather than publish a story. Mr. Meyer recalled that councilmember, Zach Collett, “basically told us to mind our own business.”

Ms. Gruver was subsequently interviewed by CBI agents. She told the agents that the newspaper had raised concerns regarding Chief Cody’s background around April 21st after he was interviewed for the position. Ms. Gruver called candidate Cody and he responded, “I’m a private person,” and the phone went dead. Ms. Gruver said she then contacted Zach Collett, Marion city council member, to relay some of the concerns she had been told about Chief Cody. Ms. Gruver mirrored Mr. Meyer’s memory of the interaction,

saying that Mr. Collett told the paper “to mind our own business.”

Chief Cody was law enforcement certified through Kansas City, Missouri, but had not yet undergone certification in Kansas through CPOST. Law enforcement officers in Kansas can be hired on a temporary basis on the condition that they take the next available test or training (depending on their employment history). Email communication on August 1, 2023, from the Kansas Law Enforcement Training Center (KLETC) advised “all testing for Reciprocity and Challenge exam [had] been suspended until September...”

Wednesday, August 2, 2023

In August of 2023, Ms. Newell and her estranged husband, Ryan Newell, were in the process of divorce. Mr. Newell utilized the web site of the Kansas Department of Revenue (“KDOR”) to obtain a copy of Ms. Newell’s driving record. Mr. Newell knew his estranged wife’s personal identifying information which he entered to access KDOR data and print a copy of her driving record. Mr. Newell told CBI investigators that he accessed the image of the driving record without having to pay a fee, affirming who he was or stating a reason for accessing the record.

Mr. Newell said he had been checking the status of his ex-wife’s driver’s license for several months because he was upset that he had to pay her car insurance, tags and taxes from the temporary court order in the divorce proceeding despite knowing she did not have a valid driver’s license.

Mr. Newell subsequently texted an image of Ms. Newell’s driving record to a friend, Pamela Maag. According to Mr. Newell, Mrs. Maag later shared the image with the reporter from the Marion Record, Phyllis Zorn. Mr. Newell believed that Mrs. Maag also shared the record with Marion city council member, Ruth Herbel.

Ryan Newell told investigators that he was never contacted by local Marion law

enforcement prior to the execution of the warrants on August 11, 2023. His first interaction with a law enforcement agent was when he later spoke to KBI Agent Todd Leeds in what Mr. Newell believed was “almost October.”

Pamela Maag was subsequently interviewed by CBI agents. She told them that Ms. Newell had previously told her that she (Ms. Newell) intended to apply for a liquor license for her place of business in Marion, Kansas. When Mrs. Maag informed Ms. Newell that she could not obtain the license without a valid driver’s license, it led to a disagreement. Ryan Newell later sent Mrs. Maag the documentary record of Ms. Newell’s driving record, obtained from KDOR. Mrs. Maag told the agents, she knew “their website is public record.” Mrs. Maag sent a screen shot of the document to city councilwoman, Ruth Herbel, and to Phyllis Zorn at the newspaper. Mrs. Herbel later told investigators that she (Mrs. Herbel) asked Mrs. Maag for a copy, after seeing some discussion about the document on Facebook. Mrs. Maag said she sent Mrs. Herbel the image by Facebook Messenger.

Ms. Newell was aware of the Facebook exchange between Ruth Herbel, Pam Maag and Phyllis Zorn. Ms. Newell made screen shots of the Facebook exchange and later forwarded them by text to Chief Cody on August 9, 2023.

Mrs. Maag explained that she sent the image “because of the fact of, um, Kari was applying or asking the city for their permission.” She added,

“All of a sudden, it kinda hit me, and I thought, you know what, I’m just gonna send this. Cause the council meeting was gonna be on Monday, and I thought, you know, this is kind of an FYI.”

Mrs. Maag, later told CBI agents that no one in local law enforcement spoke to her prior to the execution of warrants on August 11, 2023. She said, if they had, she would have told them she sent the document, because she “knew” it was a publicly accessible

document.

As has now been widely reported, the printed record of Ms. Newell's driving record contained an entry that Ms. Newell had been convicted of a misdemeanor traffic offense in violation of chapter 8 of the Kansas Statutes Annotated more than ten years prior and that her driving privileges had been suspended as a result.

Mr. Meyer told investigators that when Ms. Zorn received the image from Mrs. Maag, his initial thought was that someone had either stolen Ms. Newell's mail or that it had mistakenly gone to Ryan Newell, as he knew Ryan and Kari Newell were going through a divorce. He instructed Ms. Zorn to inquire of Mrs. Maag where she obtained the image. Mrs. Maag told Ms. Zorn that it was readily available on the website.

Mr. Meyer said that on August 4, 2023, Ms. Zorn contacted the KDOR and "said this is what we got, where do you find it on the website?" The KDOR employee explained to Ms. Zorn how to find the information on its site. After contacting an attorney for the Kansas Press Association, Mr. Meyer said they decided the newspaper was in legal possession of the document.

Ms. Zorn was subsequently interviewed by CBI agents and confirmed Mr. Meyer's account. She received the driving record from Mrs. Maag and then contacted the KDOR by phone when Mr. Meyer told her to confirm the document's authenticity. Ms. Zorn contacted the KDOR representative who explained to her how to access the information. Ms. Zorn looked at the document by way of the free (no cost) access on the KDOR website, which was one of two options the KDOR representative had shown her. Ms. Zorn signed in under her own name then entered the information contained on the document sent to her by Mrs. Maag. She was required to confirm the following:

I will use the information requested in a manner that is specifically authorized by Kansas law and is related to the operation of a motor vehicle or public safety. (See section VI on the front of this form).

After that, the KDOR website revealed a copy of Ms. Newell's driving record. Ms. Zorn then closed out of the site. She explained that she then decided she should have printed a copy for the newspaper's records so she went back into the site. When she did, she said the site auto-filled the form including the name, Kari Newell. The site then took her again to Ms. Newell's driving record, which Ms. Zorn printed for her records.

Ultimately, Ms. Zorn and Mr. Meyer decided not to run a story about Ms. Newell's driving record. Ms. Zorn said they were suspicious that Ryan Newell may have been behind the sharing of the document in "an attempt to draw us into the contentious divorce."

Friday August 4, 2023

After receiving a copy of Ms. Newell's driving record from Pam Maag, Ruth Herbel, emailed a copy of the image to Brogan Jones, the Marion City Administrator on August 4, 2023.

Mrs. Herbel was interviewed by CBI agents on December 7, 2023. She told investigators that after receiving the image of Ms. Newell's driving record from Pam Maag, she (Mrs. Herbel) forwarded the image to Mr. Jones because Ms. Newell's pending application for a "caterer and liquor license" was on the agenda for the Marion city council meeting set the evening of August 7, 2023. Mrs. Herbel believed the driving record was potentially relevant to the issuance of the license, though she acknowledged she later came to understand that the State of Kansas actually controlled the issuance of liquor licenses. Thinking in the moment that the city was solely responsible for the issuance of the license, Mrs. Herbel explained her rationale to CBI investigators:

“ . . . when I got the screenshot, which was on August 4th, I sent it to Brogan on, at 5:17 August the 4th, and said maybe should have Cody, check this out. Because there is a state statute that says if you’ve had a DUI within 10 years, you cannot get a liquor license. And so I was concerned on our part that we would be issuing her one without knowing the facts. And I think I said in one of the emails, I said, uh, we’ll need to approach this very cautiously. But nowhere will you find that I said deny, deny, deny that [Chief] Cody has in all of the warrants, the affidavits, and everything else, that I said I wanted to deny her liquor license or renewal of her liquor license. She never had a liquor license to start with. And so I couldn’t say deny a renewal of her liquor license. It’s just a total mess to start with.”

Mrs. Herbel sent several follow up emails to Mr. Jones in which she identified state statutes that she believed would prohibit Ms. Newell from obtaining the liquor license, including an email at 4:27 p.m. on the 4th day of August in which she cited K.S.A. 41-330.

Mrs. Herbel was not contacted by local law enforcement prior to the issuance and execution of the warrants on August 11, 2023. She said that if they had asked her how she obtained the driving record she would have “told em.” She explained her only interaction with local law enforcement was on August 11, 2023, when the warrant for her house was executed. Chief Cody’s body worn camera did record their interaction. Mrs. Herbel did agree to speak to Chief Cody and she did explain how she obtained the document.

At 4:44 p.m., on August 4, 2023, Brogan Jones sent an email to Mayor David Mayfield to tell him he had received email from Ruth Herbel containing an image of Ms. Newell’s driving record. Mr. Jones wrote,

“First I want to state that Chief/PD will not be looking into this. Secondly the State is the oversight for this and will conduct all this type of research. We as a city need to stay out of this ‘hear say’ or whatever else you want to call it. We will go forward like any other individual and or business and let the State handle their business.”

At 5:17 p.m., Mrs. Herbel emails Brogan Jones a copy of Ms. Newell’s KDOR

driving record.

At 6:52 p.m. on August 4, 2023, Eric Meyer, the Editor of the Marion County Record, sent an email to Chief Cody and Marion County Sheriff, Jeff Soyez. In the email, Mr. Meyer explained that his newspaper had received a copy of Kari Newell's department of revenue driving record from a "source" but, after taking steps to verify the authenticity of the document, had elected not to publicize the document or the facts therein. Mr. Meyer's email did not contain a copy or image of Ms. Newell's driving record. As detailed above, Mrs. Maag later acknowledged she was the "source" that provided the document to the newspaper.

Mr. Meyer's email also stated that he was notifying the Chief and Sheriff because the newspaper's source "implied that she obtained the document because of 'connections'" and Mr. Meyer thought it might have been obtained illegally—though he added he was fairly certain it was obtained by Mr. Newell. Finally, Mr. Meyer raised the question as to why Ms. Newell had never been stopped by local law enforcement for driving without a valid license.

Mr. Meyer explained to CBI investigators his rationale for sending the email to Sheriff Soyez and Chief Cody:

"Phyllis [Zorn] figured out from KDOR, uh, how to get the document and, and went in and looked at it. She didn't even print the version that she looked at, just looked at it and compared it with the printout that she'd gotten from, from, uh, from Pam Maag. Uh, and at that point, I decided okay, we think this is how she got it. We think there's an allega,[tion], but the person who gave it to us was very sketchy about how she had gotten it, un, and it might have been that she got it another way and then there was her allegation that the cops were aware of this and not doing anything about it, I'm gonna let the sheriff and the police chief know. So I wrote a letter to the sheriff and the police chief. I did not disclose Pam Maag's identity. I did not disclose Kari Newell's identity."

Marion County Sheriff, Jeff Soyez, who also received the email from Mr. Meyers, later discussed his reaction to the email with CBI investigators. Sheriff Soyez said he had not planned on taking any action in response to the email. He knew that Ms. Newell lived in Marion but he could not recall ever having seen her drive. Sheriff Soyez explained that Mr. Meyer's suggestion in the email that local law enforcement had been looking the other way with respect to Ms. Newell's driving privileges did not concern him as he knew law enforcement did not run driving records randomly on citizens.

The email from Mr. Meyer to Chief Cody and Sheriff Soyez sent on Friday, August 4, 2023, at 6:52 p.m., reads,

Gentlemen,

This note is to alert you to a document the newspaper officer received this week from a source.

The document purports to be a letter, sent by the Department of Motor Vehicle and dated Aug. 1, 2023, to a Marion businesswoman who recently has been in the news. It lists her current address and contains information about her needing to complete additional steps before DMV can reactive her driver's license . . .

We initially were concerned whether the letter was accurate and, if so, whether it was obtained legally. Our lawyer's advice was that the information most likely would be available as public records and, there, it would not be illegal for us to possess the document, depending on how our source obtained it.

Our checks with DMV reveal that anyone could obtained the document if he or she possessed the recipient's Kansas Identification card number, name and date of birth. Our source, who has persona and family history with law enforcement, implied that she obtained the document because of "connections." If it had been provided by someone in law enforcement or obtained by intercepting mail, the document might have been obtained illegally—which is why I am notifying you. We believe, however, that the document was provided by the soon-to-be-former spouse of the businesswoman, who apparently has been contesting awarding of vehicles to her during their ongoing divorce.

We obviously are concerned how someone could escape detection as having an expired or suspended license for nearly a quarter of a century and might pursue a news story in that regard. However, we have no desire to invade the privacy of any individual, especially if this is merely squabbling during a divorce, and probably will pass on writing that story.

Still, there is one other reason why I mention all of this to you. Our source contends that local law enforcement officers are fully aware of that she – and, perhaps, [another family member] --have been driving for some time without active, valid licenses. This is the sort of unsubstantiated rumor we routinely hear but typically do not follow up on unless there is a higher degree of credibility behind it. However, given the remote possibility that the document might have come from someone in the law enforcement community who might have passed it on to our source, I wanted to make sure you were aware of the situation.

Because of the confidential nature of our source and privacy expectations of the individual targeted, I am not comfortable sharing additional information unless you inform me that you have cause to believe some crime or misbehavior might have occurred and additional information we might be able to provide could assist in any investigation.”

Monday August 7, 2023

At 6:10 a.m. on Monday August 7, 2023, Chief Cody read the email sent to him by Eric Meyer the previous Friday. In response, Chief Cody contacted Brogan Jones, Marion City Administrator.

Mr. Jones was interviewed by CBI agents, Zamora and Struwe. According to Mr. Jones, Chief Cody came into his office first thing on August 7, 2023 to discuss a copy of a driving record that he had been sent by Eric Meyer of the Marion County Record. Chief Cody told Mr. Jones he intended to conduct an internal investigation to see if one of his officers ran the driving record.

At 10:29 a.m., Kari Newell, received a text from by Marion council member, Zach Collett, that her driving record had been shared to the city council and that “Ruth Herbel is trying to say that we should not issue you a liquor license due to this.”

At 11:35 a.m. Ruth Herbel emails Brogan Jones to express concern about the issuance of a liquor license to Ms. Newell. The email cites to city codes and Kansas Statutes.

Mr. Jones told CBI Agent Zamora that he subsequently forwarded the email to the other city council members because Mayor Mayfield had previously told him that if Mrs.

Herbel “sends you anything you need to forward it to the entire council.” Mr. Jones told investigators he did not think the city council or the city had the final authority to disapprove a liquor license, but he thought that Mrs. Herbel thought the city had a legitimate interest in reviewing Ms. Newell’s driving record as part of her application for the liquor/caterer’s license. Mrs. Herbel has added in an email to Mr. Jones at 12:11 p.m. on August 5, 2024, that she felt “we probably should approach this with caution.”

Mr. Jones also informed Chief Cody he had received the e-mail from Mrs. Herbel, Chief Cody told Mr. Jones he would need all the e-mails—a request with which Mr. Jones later complied. Mr. Jones stated that Chief Cody’s investigation moved fairly quickly from a suspected mail theft to illegal access by way of a computer.

Phyllis Zorn told CBI Agents that on Monday, August 7th, she was at the courthouse covering a county commission session when she was approached by Chief Cody. She described the interaction as follows,

“Cody comes in the door and rushes over to me, looking very flustered and he tells me that someone in my office, he doesn’t think it was me, he suspects either Deb Gruver or Eric [Meyer] had sent that document to Ruth Herbel who was trying to use it to hurt Kari Newell. I looked, I’m sure very confused, I said, I’m sure no one in my office would do that and he said, well someone did, cause she’s trying to hurt Kari with it . . . He said, now I’m ‘gonna have to investigate.”

Kari Newell was interviewed by the KBI on September 6, 2023 and September 26, 2023 and again by CBI agents on December 7, 2023. She told investigators that she was in divorce court when she received a call from Chief Cody. She could not answer the call because she was in court, but she received a text message from Chief Cody that said “call me.” Ms. Newell stepped out of court and called Chief Cody. He told her that he thought someone had stolen her mail because the newspaper is in possession of a document that had been mailed to her. Ms. Newell had also been contacted by someone at her work who

told her the police had come by looking for her because they believed she had been the victim of a crime.

Ms. Newell was able to locate her driving record that KDOR had sent her. She informed Chief Cody that she had the original document. Chief Cody later told her that he had done a KDOR “drop” (she did not know what that phrase meant) to see who had been accessing her information. He told her Phyllis Zorn had searched her driving record and three minutes later someone else had as well.

Marion Police Officer Zach Hudlin was interviewed by CBI investigators. Officer Hudlin told them that Chief Cody asked him to assist in the investigation, because, according to Officer Hudlin, Chief Cody “didn’t a hundred percent know Kansas Law, so he was relying on me to figure out what the crimes were involved potentially . . .”

At approximately 2:30 p.m. on August 7, 2023, Officer Hudlin called the Kansas Department of Revenue (KDOR) to inquire as to how access had been gained to Ms. Newell’s driving record. A representative from KDOR spoke to Officer Hudlin. The call was recorded. The representative explained to Officer Hudlin that the system had an issue that KDOR was “trying to fix.” The issue, she explained, was that “anybody can pull it up.” She added, “We didn’t realize how unsecure it was.”

Officer Hudlin told CBI investigators that he believed Ms. Newell’s driving record “was not a public record, that um, basically, the public was able to access it but it was a loophole in their system, that all you had to do was input the correct address for the, um, so they, they just had to put in my correct address and they can get my driving record.”

The KDOR employee explained to Officer Hudlin that someone used the name Phyllis Zorn to access the KDOR web page on August 4, 2023. The KDOR representative was also able to determine that three minutes later, someone using the name Kari Newell

accessed the KDOR web page and again accessed Ms. Newell's driving record. Chief Cody later learned from Ms. Newell that she denied having entered her own name in the KDOR website recently, "so then we had just assumed, basically, that it, where that led to is that someone put in Kari's information," according to Officer Hudlin.

A transcript of Officer Hudlin's phone call with the KDOR representative is as follows:

KDOR Representative: . . . So, um, so how did you get the testing letter?

Officer Zach Hudlin: Um, so we received a copy of it from our local newspaper –

KDOR Representative: Okay.

Officer Zach Hudlin: – who got it from what they're saying is a confidential source. Um, so since that time, while I was on hold with him, um, I mean, I can get a copy of the letter. I just put the boxes thing. I'm doing it for, you know, legal reasons, and it will spit out a copy of that letter.

KDOR Representative: Right.

Officer Zach Hudlin: Um, so, uh, I guess really what I'm asking is I want to know if somebody else has done what I just did and asked for a copy of that letter. They just had all of her personal information.

KDOR Representative: It would appear that way. Um, 'cause, yeah, I have, 'cause what happen is, so when you, so if you just requested to view the documents, I will actually be able to see that in the morning as you put your name on there. Um, even if you put it as her name, it still comes through. Um, but it looks, does, uh, Phyllis ring a bell to you?

Officer Zach Hudlin: Yeah, what's the last name?

KDOR Representative: It's . . . Zorn.

Officer Zach Hudlin: Yep, okay. And so that person filled out this same form that I just did –

KDOR Representative: Yep.

Officer Zach Hudlin: – and clicked I'm doing this legally, and they were able to get a copy of this letter?

KDOR Representative: Yes.

Officer Zach Hudlin: Okay, and that, do you know the date when that was done?

KDOR Representative: Um, let's see. It shows up in the morning, so it would have been done Friday.

Officer Zach Hudlin: Okay.

KDOR Representative: Um, I don't know about what time on Friday 'cause it's just a batch that hits at 7:00 in the morning, and it throws all of the, um, throws all those kinds of documents that I can check into, well, everybody can check on our end, but it just throws those over there so we can see who's accessing the records, but if Phyllis does not work for PD, um, I –

Officer Zach Hudlin: No.

KDOR Representative: – would imagine she probably works for the newspaper.

Officer Zach Hudlin: Probably.

KDOR Representative: Um, so that's –

Officer Zach Hudlin: So –

KDOR Representative: – a little –

Officer Zach Hudlin: – but she is the only one other than me, which I guess you'll know about tomorrow morning?

KDOR Representative: Mm hmm.

Officer Zach Hudlin: Um, that has filled that out and, and requested those documents?

KDOR Representative: Well, uh, and the weird thing is, is I have that name on there on August 4th, and then the driver herself did it, it looks like 3 minutes after on August 4th.

Officer Zach Hudlin: Okay.

KDOR Representative: So –

Officer Zach Hudlin: And so where, wh, where are you getting, uh, I mean, uh, how do, how are you getting the name that actually ran it versus who they're running it as?

KDOR Representative: So when you –

Officer Zach Hudlin: So, like –

KDOR Representative: – go –

Officer Zach Hudlin: – tomorrow morning, it will tell you that, I, I'm guessing, that Zach Hudlin ran it? But, uh, wh, wh, where is, where is that information coming from?

KDOR Representative: Um –

Officer Zach Hudlin: Sorry –

KDOR Representative: – as long as –

Officer Zach Hudlin: – just a second. Dispatch is –

A Marion Dispatch interrupts Officer Hudlin

Officer Zach Hudlin: 10-4. Okay. Sorry about that.

KDOR Representative: That's okay. Um, so when you are on the page that asks for the address –

Officer Zach Hudlin: Yes.

KDOR Representative: – and you go down, down to the bottom, and it says signature or whatever it is, if you type in your name, then it will come through that you were the one requested it, requesting it. However, if someone has her information, and they sign it as her, it shows up as her being the one who ran it, so I guess, I guess what I'm saying is on the 3 minutes after this Phyllis lady ran it, I don't actually know if it was Kari or not that ran her own record.

Officer Zach Hudlin: Okay.

KDOR Representative: Um, I'm –

Officer Zach Hudlin: Okay, so –

KDOR Representative: – actually, we're currently working on this because, um, yeah, there's, I mean, honestly, if anybody has your address as it appears on your driver's license, they can access all of your documents in your file, um, which we don't, we don't want. Um –

Officer Zach Hudlin: Yeah.

KDOR Representative: so -

Officer Zach Hudlin: Okay, so I misunderstood then when I filled, uh, that part of

that, uh, um, the requester's information.

KDOR Representative: Mm hmm.

Officer Zach Hudlin: I, I breezed past that, and so I put in Kari's information there and then clicked okay, and that's what spit out this document, so the person, so you're saying that someone put in that other name –

KDOR Representative: Mm hmm.

Officer Zach Hudlin: – and requested this information, and it still spit it out –

KDOR Representative: Mm hmm.

Officer Zach Hudlin: – because she had all the right answers?

KDOR Representative: Yep.

Officer Zach Hudlin: Okay.

KDOR Representative: So yeah, we are, I'm, uh, actually, uh, I think it's next week I have a meeting on this whole driver's license status check because it's, um, I guess until we started diving into it, we didn't really realize how unsecure it was. Um –

Officer Zach Hudlin: Yeah.

KDOR Representative: – being, being that, I mean, like I said, if you have her address, which if you guys got the letter, you have her address, name, and all of the answers, so anybody can pull it up. Um, so yeah, we actually have meetings coming up on that do make it a little bit more secure, um, so not everybody can access someone's documents, 'cause yeah.

Officer Zach Hudlin: Yeah. Okay.

KDOR Representative: So that is the name that shows up under the requester's name on the one that happened on 8/4. Um, and –

Officer Zach Hudlin: Okay.

KDOR Representative: – yeah, actually doesn't work for PD. I would assume that she probably works for the newspaper.

Officer Zach Hudlin: Correct. Um, and so my last question.

KDOR Representative: Mm hmm.

Officer Zach Hudlin: Um, so that's what was filled out in that form. Do you have any records of, like, it's in the IP address that requested it? It's just whatever they chose to put in there?

KDOR Representative: Correct.

Officer Zach Hudlin: Okay.

KDOR Representative: As of right now, yes.

Officer Zach Hudlin: Yeah. All right. That, uh, that answers everything. That, that gives me lots to go on.

KDOR Representative: Perfect. I'm so sorry if that, uh, I'm so sorry if it's not a, not, not what, not a good answer.

Officer Zach Hudlin: No, thi, uh, I mean, uh, it, uh, definitely an answer that will create work. So I, I'm a little happy, a little sad that I recognized the name 'cause it's gonna, yeah, it, it's definitely gonna make more work.

KDOR Representative: Yeah.

Officer Zach Hudlin: But that's all right. We got an answer, and that's what I was looking for.

KDOR Representative: Good deal. All right, well –

Officer Zach Hudlin: All right.

KDOR Representative: – yeah.

Officer Zach Hudlin: Thank you very much.

From this conversation, Officer Hudlin said he concluded, “that it’s not a public record, here’s who accessed it and then, uh, went from there.” Officer Hudlin also sent Chief Cody a series of emails memorializing his conclusion(s):

1. Email sent at 2:02 p.m. – listing potential criminal statutes: 21-5909, witness intimidation; 21-6101, Breach of Privacy; 21-6107 Identity Theft; 21-6424 Unlawful use of Communication Facility; and 21-6002 Official Misconduct.
2. Email sent at 2:07 p.m. – containing link to KDOR.
3. Email sent at 2:07 p.m. - containing details of Ms. Newell’s driving record.

Two days later, Officer Hudlin followed up with an additional email to Chief Cody on August 9, 2023, at 8:31 a.m. in which he cited additional criminal statutes:

“Eric: 21-5904, interference with law enforcement; 21-5302 Conspiracy;
Ruth: 21-5919, Performance of an unauthorized official act.”

Officer Hudlin also captured an image of 13 options – “A” through “M” – from the KDOR website (see below). Note that §(c) appeared to be checked in the image Officer Hudlin sent to Chief Cody. This image was provided to Chief Cody by Officer Hudlin at 2:07 p.m. on August 7, 2023:

Verification of your eligibility to receive the requested records.

Please review the exceptions listed below and select the code that corresponds with your request(s)

- A. I am requesting my own record
- B. I have written consent from the individual to whom the requested information pertains to obtain records on their behalf
- C. I work for or am acting on the behalf of a government agency and am requesting this information to fulfill the functions of that agency
- D. I am requesting this information in connection with matters of: motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles; motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers
- E. I am an employee, agent or contractor of a legitimate business. I am requesting record information in order to verify the accuracy of personal information submitted by the individual in question. If the information I have is incorrect, I am requesting to obtain corrected information. This information will be used to pursue legal remedies against or recover on a debt or security interest against the individual in question.
- F. I am going to use this information in connection with a civil, criminal, administrative, or arbitral proceeding in a Federal, State, or local court or agency or before a self-regulatory body. This may include the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.
- G. I am involved in a research project to produce statistical reports. The personal information obtained will not be published, redisclosed or used to contact the individual in question.
- H. I am an agent, employee or contractor for an insurer, an insurance support organization or I am self-insured. The information requested will be used in connection with a claims investigation, antifraud activities, rating or underwriting.
- I. I am requesting record information to provide notice to owners of towed or impounded vehicles.
- J. I work for a licensed private investigative agency or a licensed security service.
- K. I am an employer or an agent or insurer working on the behalf of an employer of licensed commercial drivers. I am requesting records information in order to obtain or verify information relating to a holder of a commercial driver's license.
- L. I am requesting records of individuals who have given the state the express consent to release personal information by "opting in" their records.
- M. I will use the information requested in a manner that is specifically authorized by Kansas law and is related to the operation of a motor vehicle or public safety.

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Officer Hudlin told the CBI Agents that after his phone call to KDOR, he explained to Chief Cody that anyone could have used any name and been able to access the KDOR site. Officer Hudlin told the CBI Agents at that point he felt, “Um, yeah, so at that point, we knew then that, um, we had a council member involved, we had, potentially, the newspaper or what, we potentially had the council member, a newspaper, um, and so it was something way bigger than somebody grabbing a letter out of the mail.” Chief Cody then contacted the Kansas Bureau of Investigation (KBI).

Chief Cody later told Ms. Newell that her ex-husband Ryan Newell, Pam Maag, Phyllis Zorn and potentially Ruth Herbel had accessed her driving record.

According to Ms. Newell, Chief Cody told her he had contacted KDOR and they were able to get him “a list of anybody that had accessed my file.” Ms. Newell asked Chief Cody how they would have been able to access her file. Chief Cody responded that they would have utilized her full name, address, driver’s license number and date of birth, which led her to believe her ex-husband was “behind it.” Chief Cody told her she had been the victim of “identity theft, abuse of power and computer crimes, because it had been sent out to various people.”

The night of Monday, August 7, 2023, the Marion City Council’s regularly scheduled meeting was held. The meeting was video and audio recorded. Ms. Newell spoke during the public comment portion of the evening and accused both Ruth Herbel and the Marion County Record of illegally accessing her driving record.

Eric Meyer, Editor of the Marion County Record, also addressed the council. He acknowledged having been sent a copy of Ms. Newell’s driving record but did not provide the name of the source.

The Pending Liquor License

The issue of the pending liquor license bears specific explanation.

In Kansas, the decision to grant or deny an application for a liquor license is controlled by the Kansas Liquor Control Act, K.S.A. 41-101, et seq. K.S.A. 41-311 defines the conditions under which an applicant is prohibited from obtaining a license to sell or distribute alcoholic beverages.

The Kansas Liquor Control Act, K.S.A. 41-101 *et seq.*, prohibits a person from manufacturing, distributing or selling alcoholic liquor or cereal malt beverages without a

state license.

K.S.A. 41-208 provides, as follows:

“The power to regulate all phases of the control of the manufacture, distribution, sale, possession, transportation and traffic in alcoholic liquor and the manufacture of beer regardless of its alcoholic content, except as specifically delegated in this act, is hereby vested exclusively in the state and shall be exercised as provided in this act. *No city shall enact any ordinance in conflict with or contrary to the provisions of this act . . .*

The Club and Drinking Establishment Act, K.S.A. 41-2601 et seq., uniformly applies to all cities in counties which elect to come under the Act.

The validity of a city license can be a requisite for State-issued licenses and renewals under K.A.R. 14-13-2(d)(1) and K.A.R. 14-13-4.

The city of Marion had several relevant city ordinances, including:

3-501. License Required

It shall be unlawful for any person granted a drinking establishment license by the State of Kansas to sell or serve any alcoholic authorized by such license within the city without first obtaining a city license from the city clerk.

• (Ord. 1248; Code 2014)

3-502. License fee.

There is hereby levied an biennial licensing fee in the amount of \$500.00 on each drinking establishment located in the city which was a drinking establishment license issued by the state director of alcoholic beverage control.

Liquor and Beer control statutes and regulations make it explicit that, to receive a state license, the necessary city/municipal occupation or license taxes must be paid. K.S.A. 41-310(j)(1). Additionally, a city’s authority to approve and issue a license goes beyond the authority to require payment of fees and includes issues like zoning. See also K.S.A. 41-318 (advisory).

The State is the primary licensing authority for alcoholic liquor/beer manufacturing, distributing, or retail selling. K.S.A. 41-208. A municipality may regulate

the manufacture, distribution, sale (license) in alcoholic liquor and beer if the city's regulation does not conflict with the State. See K.S.A. 4-310; See *Leavenworth Club Owner's Association v. City of Atchison*, 208 Kan. 318 (1971), "[W]here a municipal ordinance merely enlarges on the provisions of the statute by requiring more than is required by the statute, there is no conflict between the two unless the legislature has limited the requirements for all cases to its own prescription."; and Kan. Atty. Gen. Op. No. 96-55).

Given this legal framework, the city of Marion had the power to vote on Ms. Newell's application for a liquor license within the parameters of the city of Marion's ordinances regarding fees and zoning.

The balance of factual synopsis of Monday, August 7, 2023

Councilman Zach Collet made a motion to approve Ms. Newell's request for the liquor/caterer's license. Mrs. Herbel opposed. The motion carried 4-1.

Mr. Meyer told CBI investigators that after the city council meeting, he received a phone call from Kari Newell. Mr. Meyer said that Ms. Newell said that Chief Cody had called her to tell her she had been the victim of a crime:

“. . . what he [Chief Cody] told her was somebody from the Record had gone over and stolen her email, or stolen her postal mail out of her mailbox and taken that mail and given it to Ruth Herbel and that Ruth Herbel then posted it all over the internet.”

Mr. Meyers added that during this phone call, Ms. Newell also told him that she believed the Marion County Record received the information from Pam Maag, and that Mrs. Maag had “probably” gotten it from her ex-husband, Ryan Newell. Ms. Newell shared with him her belief that Mrs. Maag had also provided a copy to Ruth Herbel.

Ms. Newell threatened to sue Mr. Meyer. Mr. Meyer said he responded that she would lose and he'd end up owning her restaurant. Mr. Meyer told Ms. Newell that he did

not intend to run a story about her driving record as it was “personal crap” and he did not care about 10-year-old information. However, the allegations she made at the city council meeting would be run as a story. Mr. Meyer said he did not hear anything further about the issue until the execution of the warrants on August 11, 2023.

Ms. Newell told investigators that Chief Cody told her that he had confirmed with the KDOR that Ryan Newell, Pam Maag, Ruth Herbal and Phyllis Zorn had each accessed Ms. Newell’s driving record through the KDOR website. In fact, there is no evidence that Ruth Herbel attempted to access the KDOR website.

At 6:49 p.m., Chief Cody texted County Attorney Ensey that Ms. Newell wanted to pursue “misuse of office through the AG’s Office considering what happened at the council meeting.”

Tuesday, August 8, 2023

Chief Cody generated an “incident report” dated August 8, 2023, detailing the maturation of the investigation. This report provides insight into the rationale and conclusions Chief Cody had reached four days before the warrants were executed.

According to that report, Chief Cody read Mr. Meyer’s email on August 7th. The balance of Cody’s report reads as follows:

After reading the email on Monday August 7, 2023 at or around 0610 hours, I then contacted Marion City Administrator, Brogan Jones, and told him that an internal investigation should be conducted. Brogan stated he was aware of the Department of Revenue Record (DOR record) because City Council member, Ruth Herbel, sent him a screenshot via email (Suspect Email 2a) of the DOR record belonging to Kari Newell. Ruth states in the email that she received the DOR record from Pam Maag. Brogan stated Ruth wanted to deny the renewal of Kari's liquor/caterers' license based on the DOR record and that the license was on the City Council Agenda for a meeting the same afternoon. I asked that he forward those emails so that I can continue my investigation.

Later that morning I received the emails, I saw that it contained a screenshot (Suspect Email 2b) with a DOR record addressed to the victim, Kari Newell. I then contacted Kari, she stated she did not know how someone was able to access her mail and she gave no one permission to obtain, access, or open her private mail.

My investigation revealed the letter was not stolen from her mailbox, rather it was downloaded directly from the Department of Revenue. The Department of Revenue advised the individuals who downloaded the information were Phyllis Zorn and Kari Newell (three minutes after Phyllis Zorn downloaded the information). Downloading the document involved either impersonating the victim or lying about the reasons why the record was being sought.

I again contacted the victim, she stated that she did not download or authorize anyone to download any information from the Department of Revenue and someone obviously stole her identity.

On Wednesday August 9, 2023 Kari provided me with a written statement of the events since we last spoke (Victim Statement 1a). In the statement she says that on a phone call from 08/07/2023 at or around 1901 hours Eric Meyer admitted to her that his employee downloaded the private DOR record information and he knew it to be illegal. She stated Eric then threatened her "if you pursue anything I will print the story and will continue to use anything I can to come at you. I will own your restaurant". She further stated this was contrary to what he announced at the City Council Meeting on 08/07/2023 (Suspect Video 1a).

Phyllis Zorn obtained and possessed personal identifying information and document containing the same belonging to another person with the intent to to subject that person to economic or bodily harm. KSA 21-6107

Phyllis Zorn supplied information that she knows to be false in order to obtain a document containing the victim's personal identifying information. KSA 21-6107

Phyllis Zorn Intercepted, without the consent of the sender or receiver, a message by telephone, telegraph, letter or other means of private communication; KSA 21-6101

Phyllis Zorn knowingly or intentionally used a communication facility facilitating the commission of a felony and facilitated a conspiracy to commit, a felony KSA 21-6424

Phyllis Zorn aquired property under false pretenses by using the electronic communication of the internet and knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses and representations. Federal Statute 18 U.S.C. 1343

Phyllis Zorn knowingly obtained and disclosed personal information, from a motor vehicle record. 18 U. S Code 2722 A

Phyllis Zorn made false representation to obtain personal information from an individual's motor vehicle record. 18 U.S. Code 2722 B

Eric Meyer obtained and possessed personal identifying information and document containing the same belonging to another person with the intent to to subject that person to economic or bodily harm. KSA 21-6107

Eric Meyer intimidated a victim with an intent to vex, annoy, harm or injure her and to prevent her from making a report to law enforcement or causing a civil action to be filed. KSA 21-5909 a.A.

Eric Meyer knowingly supplied such information that is false and intending to influence, impede or obstruct such officer's or agency's duty; KSA 21-5904

Eric Meyer conspired and assisted in committing of a crime. KSA 21-5302

Eric Meyer knowingly obtained and disclosed personal information, from a motor vehicle record. 18 U. S Code 2722 A

At 8:37 a.m. on Tuesday, August 8, 2023, the morning after the city council meeting, Chief Cody sent an email to Joel Ensey, Marion County Attorney, titled, "Crimes?" in which he explained his conclusion that certain crimes had been committed regarding the possession and dissemination of Ms. Newell's driving record. Chief Cody then forwarded the same email to Det. Christner at 9:54 a.m.

In his email to Mr. Ensey, Chief Cody included an image of Ms. Newell's driving record in the second of three pages of the email, which is redacted herein:

Joel,

Driver's license information in Kansas, like in many other states, is generally considered private and confidential. Access to such information is typically restricted and not available to the general public or the press without proper authorization or a legitimate reason. The Driver Privacy Protection Act (DPPA) is a federal law that regulates the release of personal information from driver's license and motor vehicle records.

The Driver Privacy Protection Act (DPPA) is a federal law enacted in 1994 in the United States to protect the personal and private information of individuals held in state Department of Motor Vehicles (DMV) records. The DPPA establishes guidelines and restrictions on the release, use, and disclosure of personal information collected by DMVs, including driver's license and motor vehicle records. Its primary aim is to prevent the unauthorized access and misuse of this sensitive information.

Key points and provisions of the DPPA include:

- **Protected Information:** The DPPA covers a wide range of personal information, including an individual's name, address, phone number, Social Security number, driver's license number, photograph, and other identifying details.
- **Permissible Uses:** The DPPA outlines specific permissible uses for driver's license and motor vehicle records. These include uses related to law enforcement, government agencies, private investigators, insurance companies, employment verification, and certain legal proceedings.
- **Prohibited Uses:** The DPPA restricts the use of personal information for marketing or solicitation purposes without the individual's explicit consent. It also prohibits the sale of personal information for commercial purposes.
- **Penalties:** Violations of the DPPA can result in civil penalties, including monetary fines. Individuals who are found to have willfully obtained, disclosed, or used personal information in violation of the DPPA may be subject to legal action.
- **Exemptions:** There are certain exemptions to the DPPA, allowing for the release of personal information for legitimate purposes such as law enforcement investigations, court proceedings, and government functions.
- **State Implementation:** While the DPPA is a federal law, states have the flexibility to implement their own laws and regulations that provide additional privacy protections or restrictions on the release of personal information from DMV records.
- **Enforcement and Oversight:** The enforcement of the DPPA is carried out by federal and state authorities. Individuals who believe their privacy rights under the DPPA have been violated can seek legal remedies.

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The issues I run into are as follows:

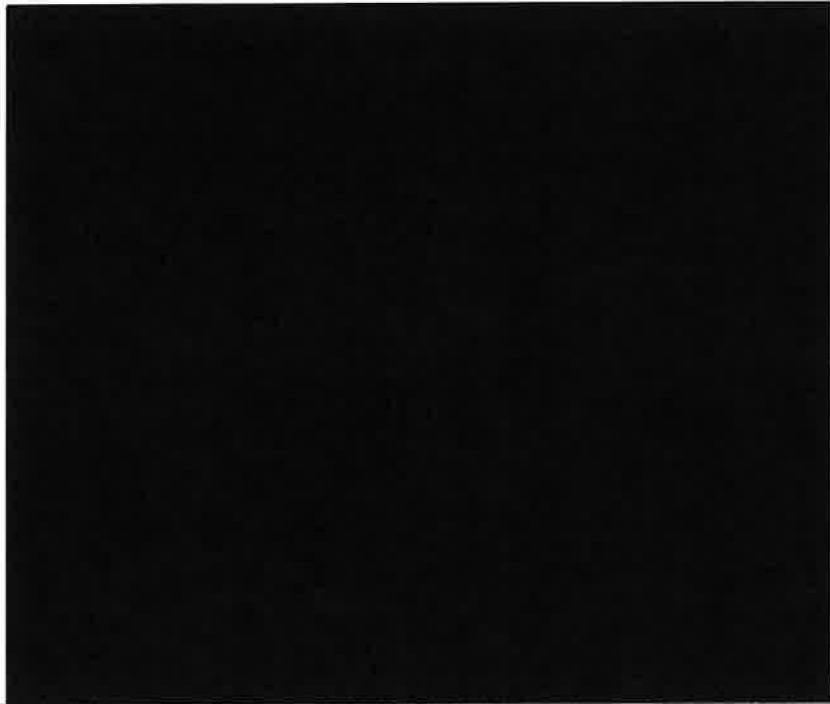
A City Council Member shared the following through social media and then sent a copy by email to the City Administrator to deny the person on the letter a liquor license based upon being a suspended driver.

08/01/2023

NEWELL KARI ANNE

DL Number [REDACTED]

Date of Birth [REDACTED]



The City Administrator sent it to me to investigate whether a crime occurred.

Sharing a DPPA (Driver Privacy Protection Act) protected document, such as a DMV record, by email or social media without proper authorization or a legitimate reason could potentially constitute a violation

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of the DPPA itself. This could potentially lead to charges related to unauthorized disclosure of private information, privacy breaches, identity theft, or other cybercrime-related offenses.

I understand the DPPA is a federal law in the United States that governs the release and use of personal information obtained from DMV records. Violating the DPPA by sharing protected information without proper authorization could have serious legal consequences, including fines and penalties.

The Police Department initially believed this to be a mail theft situation. After further investigation it was revealed the DOR record could be obtained online due to "a hole in the system, we are currently working on". DOR confirms this was only downloaded by a reporter working for the Marion Record. This would require falsely clicking on the reason for download on the DOR website. The reasoning for downloading another person's DOR record are as follows

Verification of your eligibility to receive the requested records:

Please review the exceptions listed below and select the code that corresponds with your request(s):

- A I am requesting my own record
- B I have written consent from the individual to whom the requested information pertains, to obtain records on their behalf
- C I work for or am acting on the behalf of a government agency and am requesting this information to fulfill the functions of that agency
- D I am requesting this information in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls or advisory motor vehicle market research activities including survey research and removal of non-owner records from the original owner records of motor vehicle manufacturers
- E I am an employee, agent or contractor of a legitimate business. I am requesting record information in order to verify the accuracy of personal information submitted by the individual in question. This information will be used to pursue legal remedies against or recover on a debt or security interest against the individual in question.
- F I am going to use this information in connection with a civil, criminal, administrative, or arbitral proceeding in a Federal, State, or local court or agency or before a self-regulatory body, litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.
- G I am involved in a research project to produce statistical reports. The personal information obtained will not be published, redisclosed or used to contact the individual in question.
- H I am an agent, employee or contractor for an insurer, an insurance support organization or I am self-insured. The information requested will be used in connection with a claims investigation.
- I I am requesting record information to provide notice to owners of towed or impounded vehicles.
- J I work for a licensed private investigative agency or a licensed security service.
- K I am an employer or an agent or insurer working on the behalf of an employer of licensed commercial drivers. I am requesting records information in order to obtain or verify information.
- L I am requesting records of individuals who have given the state the express consent to release personal information by "opting in" their records.
- M I will use the information requested in a manner that is specifically authorized by Kansas law and is related to the operation of a motor vehicle or public safety.

Obtaining a DMV (Department of Motor Vehicles) report by falsely clicking on a reason for download, especially if done with the intent to deceive or defraud, could potentially be considered a form of wire fraud. Wire fraud involves the use of electronic communication, such as the internet or email, to intentionally deceive someone for financial gain or to cause harm. Falsely obtaining sensitive information, including DMV records, through deceptive means could fall under the definition of wire fraud.

Utilizing a DPPA (Driver Privacy Protection Act) protected document, such as a DMV record, to attempt to deny a liquor license by a councilperson could potentially be seen as an abuse of office or abuse of power. The DPPA is designed to protect individuals' private and sensitive information, and using such information for purposes beyond its intended scope, especially for personal or inappropriate reasons, could be considered an abuse of power.

Abuse of office generally refers to the misuse of one's position or authority for personal gain, to inflict harm, or to act against the public interest. In this context, if a councilperson is using protected information from a DMV record to unfairly deny a liquor license without a legitimate or justifiable reason, it could raise ethical and legal concerns.

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The third page of Chief Cody's email to Mr. Ensey contains the following conclusions:

"The Police Department initially believed this to be a mail theft situation. After further investigation it was revealed the DOR record could be obtained online due to 'a hole in the system, we are currently working on'. KDOR confirms this was only downloaded by a reporter working for the Marion Record. This would require falsely clicking on the reason for download on the DOR website. The reasoning for downloading another person's KDOR record are as follows."

The KDOR employee did tell Officer Hudlin that a person identifying themselves as "Phyllis Zorn" downloaded Ms. Newell's driving record, followed three minutes later by someone identified as "Kari Newell." The KDOR representative did not, however, offer a definitive conclusion that the same person signed in as both names.

Attached to Chief Cody's email to Mr. Ensey was a list of the 13 verification options on the KDOR website that Chief Cody had been provided by Officer Hudlin. Chief Cody's email to Mr. Ensey continued:

"Obtaining DMV (Department of Motor Vehicles) report by falsely clicking on a reason for download, especially if done with the intent to deceive or defraud, could potentially be considered a form of wire fraud.¹" In fact, there is no "wire fraud" statute under Kansas law.

The email continued,

"Utilizing a DPPA (Driver Privacy Protection Act) protected document, such as a DMV record, to attempt to deny a liquor license by a council person could potentially be seen as an abuse of office or abuse of power. DPAA is designed to protect individuals private and sensitive information and using such information for purposes beyond its intended scope, especially for personal or inappropriate reasons, could be considered an abuse of power."

¹ On Chief Cody's Body worn camera the allegation of "wire fraud" was something that Chief Cody repeated to Ruth Herbel when he interviewed her in her home on August 11, 2023 at 10:52 a.m., during the execution of the search warrant on her home.

Finally the next paragraph, Chief Cody ends his analysis with the following,

“Abuse of office generally refers to the misuse of one’s position or authority for person gain, to inflict harm, or to act against the public interest. In this context, if a councilperson is using protected information from a DMV record to unfairly deny a liquor license without a legitimate or justifiable reason, it could raise ethical and legal concerns.”

As set forth above, K.S.A. 22-2502, the Kansas statute controlling the issuance of search warrants, states:

“(a) A search warrant shall be issued only upon the oral or written statement, including those conveyed or received by electronic communication, of any person under oath or affirmation which states facts sufficient to show *probable cause* (emphasis added) that a crime has been, is being or is about to be committed and which particularly describes a person, place or means of conveyance to be searched and things to be seized.”

The probable cause standard has long been defined by the appellate courts of Kansas as follows:

“Probable cause is the reasonable belief that a specific crime has been committed and that the defendant committed the crime. Probable cause exists where the facts and circumstances within the arresting officers’ knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

When determining whether probable cause exists, an appellate court considers the totality of the circumstances, including all of the information in the officer’s possession, fair inferences therefrom, and any other relevant facts, even if they may not be admissible on the issue of guilt. *State v. Abbott*, 277 Kan. 161, Syl. ¶¶ 2–3, 83 P.3d 794 (2004).”

State v. Ramirez, 278 Kan. 402, 408 (2004).

Later, during the morning of August 8, 2023, Chief Cody forwarded the email he had sent to County Attorney Ensey, on to KBI Agent Todd Leeds, at 9:12 a.m. Agent Leeds, responded to Chief Cody’s request for assistance at 10:03 a.m., writing that his supervisor, Special Agent in Charge (SAC) Bethany Popejoy, was out of the office this morning but he expected her back that afternoon. Agent Leeds cc’d SAC Popejoy in this response.

At 11:19 a.m., Chief Cody forwarded to SAC Popejoy the document he had sent to Mr. Ensey.

SAC Popejoy told investigators that she later spoke to Chief Cody. SAC Popejoy described that conversation to investigators,

“...and I said we'll work this together, and this is on the 8th that, that he's telling me this. I said okay and, um, you know, he, very insistent. I said okay, well, I'll send Todd [Leeds], I'll send Todd, I'll send Todd; we'll go from there.”

SAC Popejoy then contacted KBI Agent Todd Leeds, who was stationed in Wichita, Kansas, approximately 60 miles south of Marion, and instructed him to check out the allegation, “because on the surface it looked bad.”

At 3:51 p.m. on August 8, 2023, Marion County Sheriff's Department Detective Aaron Christner sent Chief Cody the following email:

Chief Cody,

I was able to get a preservation made on Ms. Herbel's email account. However on the Marion record domain is hosted by a small hosing company out of Wisconsin. I can send a preservation request letter, but there is no legal authority behind such request and they may notify the Marion Record if I do so. My advice is if you have the PC for a search warrant is that we just write that and skip a preservation. I am unable to do a yahoo preservation as of yet, as I do not have the token with me to sign in. As for the city of Marion, do you believe the Mr. Jones will delete the email?

Let me know if you have any questions. Thank you.

Wednesday, August 9, 2023

Marion County Attorney Joel Ensey later told investigators that on August 9, 2023, Chief Cody sent him,

“a message at 5:21 in the morning. ‘Good morning. Call me when you can this morning. KBI will be lead in the investigation. I sent them a brief, and they are sending out investigators. Other charges are coming with this as well. I want to keep you in the loop.’ Um ‘it appears larger than when I looked at it first.’ So that was on, on the 9th.”

At 8:31 a.m., Officer Hudlin sent an email to Chief Cody in which he references criminal statutes and identified suspects:

“Eric: 21-5904, interference with law enforcement; 21-5302 Conspiracy;
Ruth: 21-5919, Performance of an unauthorized official act.”

The Marion County Record published an article entitled “Restauranteur accuses paper, councilwoman,” detailing the allegations made by Ms. Newell at the council meeting held Monday, August 7, 2023. The article repeated the claims Ms. Newell had made that the Marion County Record had illegally obtained her driving record. In the article, written by Eric Meyer, he explained that the paper had been sent the driving record by “a source.” Mr. Meyer wrote, “After verifying that the information was accurate and had been obtained, as the source claimed, from a public website, the Record decided not to publish it.”

Officer Hudlin informed CBI agents that on August 9th, there was a meeting of Marion law enforcement officers and Special Agent Todd Leeds of the Kansas Bureau of Investigation during which Agent Leeds was provided paper copies of documents pertaining to the investigation. At that point, Officer Hudlin recalled that the warrants had been prepared for the home of Ruth Herbel, Pam Maag and the Marion County Record. The warrant for Eric Meyer’s house had not yet been finalized. Officer Hudlin described his involvement in the preparation of the search warrants as reviewing the drafts prepared by Officer Aaron Christner and Chief Cody for grammatical errors and to review the facts for potential criminal acts.

Agent Leeds’s typed report detailing the meeting on the 9th reads as follows:

SA LEEDS told CODY he would review this information, speak with the county attorney regarding this case, and get back with him once he understood the case better.

SA LEEDS told CODY he didn't see any issues with sending out preservation letters to Facebook messenger, and the involved internet service providers in order

to secure the data for this investigation.

SA LEEDS told CODY he would need to speak with members of the KBI Computer Crimes Unit (CCU) on exactly how to proceed with this investigation. SA LEEDS told CODY he would be in touch with him the following week. CODY thanked SA LEEDS for his assistance in this investigation, and gave SA LEEDS one of his MPD business cards.

Agent Leeds produced a document entitled “Memorandum of Record,” dated September 19, 2023. In this document, Agent Leeds described his meeting in Marion on Wednesday August 9, 2023, with Marion law enforcement. After Chief Cody had provided an overview of the status of the investigation, Agent Leeds wrote that he told Chief Cody he (Agent Leeds) “would review this information and speak with the county attorney regarding this case. [Agent Leeds] told Cody he would get back with him the following week once he understood the case better.”

Agent Leeds’s memorandum report also contained the following:

“[A]t no point during this meeting, or in any subsequent meeting or contact, with MPD Chief of Police Chief Gideon Cody did SA Leeds recommend or allude to in any way that any law enforcement officer should apply for any search warrants to further this investigation.”

Agent Leeds told CBI investigators in November of 2023 that he had specifically told Chief Cody and Sheriff Soyez that he,

“. . . would review the information Chief Cody had provided him in this case, and that he would get back with Cody the following week once he had spoken to the KBI Computer Crimes Unit to discuss the best course of action for this investigation.”

When interviewed by CBI investigators in November of 2023, Agent Leeds was specifically asked whether he and Chief Cody had discussed search warrants at the meeting on the 9th. Agent Leeds’s response was as follows:

“No. The only thing they talked about, you should definitely interview Jeff Soyez, being the office. But he’s like, wait the best course of action is you should probably do some preservation letters. I’m like, yeah, preservation letters sound good. Uh, do some preservation letters m and um, yeah, and

that was it. We did not talk at all about search warrants. I told him I was 'gonna have to get back with him the following week, um about the case."

Similarly, KBI SAC Popejoy told investigators that after the meeting on the 9th (which she did not attend), she had spoken to Agent Leeds and Agent Leeds told her, "I think we've got a problem." However, Agent Leeds was scheduled to be out of the office on funeral leave, so he "made arrangements" and told SAC Popejoy, "I'm 'gonna go back next week and, um, you know, we'll, we'll dig into this a little bit further."

Marion County Sheriff Soyez, was interviewed by CBI agents on November 16, 2023. He recalled first becoming aware of the investigation when Chief Cody told him that he (Chief Cody) was investigating the illegal possession of a driving record. Sheriff Soyez recalled that Chief Cody initially assumed the records had been stolen from Ms. Newell's mail, then later concluded the records had been accessed by the Marion newspaper using the "the protected part of" the KDOR website. Chief Cody also shared with Sheriff Soyez his belief that a city council member had engaged in what Chief Cody referred to as "city corruption" as well.

Sheriff Soyez told the CBI agents that during the meeting of law enforcement officers in Marion on August 9th, Chief Cody "presented his entire case" to KBI Agent Leeds. Sheriff Soyez said that Agent Leeds "looked it over, um and said I think, he, he said, well, give me the entire case. I'll let you, uh, um basically run with it, but I wanna review, you know."

Detective Christner told CBI investigators that Agent Leeds said "something about once its online, it's there forever, and I wasn't gonna argue with him at that point although I disagreed. After he left, I'd I made that clear that I didn't agree with what he said, based on my experience, um, and training in digital evidence."

At 1:10 p.m. on August 9, 2023, Detective Christner sent a “preservation letter” to internet provider, Cyberlink, for Eric Meyer’s and Phyllis Zorn’s email accounts, which read,

“The below listed accounts are the subject of an ongoing criminal investigation at this agency, and it is requested pursuant to 18 U.S.C. § 2703(f) that records associated with said accounts be preserved pending the issuance of a search warrant or other legal process seeking disclosure of such information.”

Preservation letters are routinely sent by law enforcement agents to internet providers, communications companies and web sites to preserve material associated with a specific date, time or user. The letters are sent to request that the company maintain the requested material and ensure it is not deleted as part of the company’s normal retention or archiving deadlines or by the intentional act of a third party. Companies typically honor these requests for up to 30 days in order to give law enforcement agencies time to continue their investigation and pursue the issuance of search warrants or subpoenas for the requested information.

After the meeting of local officers on the 9th, Sheriff Soyez said he stopped by County Attorney Joel Ensey’s office the same day. Sheriff Soyez told the Agents, “I told Joel Ensey, I said, here’s the deal. You’re getting ready to get a big, old, nasty, hairy case dropped in your lap. I would suggest you hire a special prosecutor and just stay away from this entire case.” Sheriff Soyez said Mr. Ensey responded that he would look into it.

Marion County Attorney Joel Ensey was also interviewed by CBI Agents on November 16th, 2023. Mr. Ensey told investigators that he normally reviews all search warrants before they go to a judge. However, in this situation, he did not review the applications (affidavits) and warrants that he first learned about from either Sheriff Soyez or Chief Cody. According to Mr. Ensey, on Wednesday, August 9th, 2023, around 4:00 p.m., he ran into Agent Leeds after court. According to Mr. Ensey, when he learned there

had been a meeting that day, he and Agent Leeds had the following brief discussion,

“I don’t know what we’ve what exactly we’ve got, . . . what exactly crime we’ve got going on here. And Todd was like, ‘yeah, I’ll get, I’ll get this to the computer people.’ He’s like, ‘I’m not a, I don’t do paper crimes.’ He’s like, ‘that’s not my forte, but you know, we’ll get it to our people,’ and he’s like, ‘We’ll bring you something,’ it’s like, ‘all right.’”

Mr. Ensey left the conversation with the understanding that the K.B.I. was taking the case, and they would be looking into the matter. Mr. Ensey was out of the office on Thursday, August 10th on a personal matter.

Sometime after the Wednesday morning law enforcement meeting, Ms. Newell recalled that Chief Cody told her, he was “launching an investigation.” He told her,

“then he, you know let me know now KBI’s involved, this is going places, this is a bigger deal than you realize, um, in the beginning it was kind of one of those you know, I can’t, I can’t force you to file charges if you don’t want to, and I was like I’m not really wanting to get in all that stink, and then it came back, well now that we’ve determined a crime was committed, um, we’re pursuing it, we’re investigating it, whether, you know, it’s, I don’t need your police report and then within days it was I need an account of what happened.”

(Former) Marion Police Officer Johnathan Benavidez was interviewed in November of 2023. He had been hired by the Marion Police Department in late July of 2023 on a “provisional” certificate in anticipation of attending and completing the next law enforcement training course at the Kansas Law Enforcement Training Center. At the time of the execution of the warrants on August 11, 2023, Officer Benavidez had not been to law enforcement training.

Officer Benavidez was directed by Officer Hudlin to collect a handwritten statement from Kari Newell on August 9, 2023. He was provided a manila envelope in which to place the statement. He watched Ms. Newell place her handwritten statement into the envelope and seal it shut. He said he took the envelope back to Officer Hudlin.

CBI Investigators asked Officer Hudlin about Ms. Newell's written statement. Officer Hudlin confirmed that he gave Officer Benavidez a manila envelope and that, after going to Ms. Newell's shop, Officer Benavidez returned with the envelope and handed it to Officer Hudlin. Officer Hudlin said he made photocopies of Ms. Newell's letter before turning it in as evidence. A PDF of the letter was created when it was scanned into evidence on August 9, 2023, at 9:05 a.m.

Ms. Newell told CBI investigators that she prepared the written statement which she placed in a manila envelope for Officer Benavidez.

Ms. Newell later called Chief Cody to ask for a copy of the statement. He told her he could not provide one explaining, "Once you've turned it in, it's evidence." Later, when the copies of the investigation were released publicly, she told CBI investigators she believed the first portion of her statement was missing, "all the way from [Chief Cody] calling me when I was at the courthouse with times, the exact time the call was received, the exact time [the person from work] messaged me, I mean all the details. I'm very, very detailed in that stuff, all the way up until, about the council meeting."

When Officer Hudlin was later made aware that Ms. Newell alleged the first two pages of her report (the front and back of the cover page) were missing, Officer Hudlin said they tore the office apart looking for the alleged additional page and found nothing.

At 3:56 p.m. on August 9, 2023, Detective Christner sent an email to Chief Cody with a draft for the search warrant application for the Marion Record as an attachment. Detective Christner wrote in the body of the email,

"I attached a draft for a SW. I am not comfortable swearing to an affidavit that I did not do the investigation on. I left my training and experience in red so you can change it to yours. Let me know what you think."

Thursday August 10, 2023

At 7:31 a.m., Chief Cody sent a draft of a search warrant affidavit for “Eric Meyer’s Place of Business” to Detective Christner.

Sheriff Soyez told CBI investigators that on August 10th, Chief Cody informed him he planned to apply for the warrants and wanted support. Sheriff Soyez contacted three of his deputies, Sergeant Matt Regier, Aaron Christner and Steven Janzen, and told them they could help or they were free to decline the request. The deputies agreed to assist. However, Sheriff Soyez said he gave them strict instructions that they were to stand by only, as he did not want any of his employees collecting evidence or participating actively in the execution of the search warrants. Sheriff Soyez clarified that Sheriff’s Det. Christner was specifically allowed to assist the Marion County Police Department with the warrants because of his specialized training in computer forensics.

Sheriff Soyez told investigators that Chief Cody said he had spoken to KBI SAC Popejoy and she had told Chief Cody, “that uh, everything looked good, um, to keep going forward. And, didn’t say like keep going forward with the search warrant. They just said keep on with the investigation.”

Several e-mail communications between KBI Agent Leeds, Chief Cody and Officer Hudlin occurred on August 10, 2024. Emails were also sent by Chief Cody to Marion County Attorney, Joel Ensey, who was out of town. Detective Christner and Officer Hudlin also exchanged texts messages and emails throughout the morning.

At 10:08 a.m., August 10, 2024, Agent Leeds emailed Chief Cody asking Chief Cody to send him the “cell phone numbers, Facebook account names, and any email addresses” for Ms. Newell, Mr. Meyer, Mrs. Herbel, Ms. Zorn, and Mrs. Maag. There was no responsive email from Chief Cody.

At 10:28 a.m. Officer Hudlin texted Detective Christner, “I just sent you the completed search warrants. Detective Christner responded, “Got it.” At 10:36, Officer Hudlin texted, “Just sent the one for Maag.”

At 10:31 a.m., August 10, 2024, Agent Leeds requested Chief Cody email him a copy of Kari Newell’s witness statement, as well as information relating to emails between Ruth Herbel and Brogan Jones. There was no responsive email from Chief Cody.

At 11:24 a.m., August 10, 2024, Chief Cody sent an email to County Attorney Ensey. The email was entitled, “Karie Newell Identity Theft Case Search Warrant Application [the address of the Marion County Record].” An attachment contained a search warrant application for the Marion County Record signed “Chief Gideon Cody.”

At 11:26 a.m., August 10, 2024, Chief Cody sent a second email to County Attorney Ensey. The email was entitled, “Karie Newell Identity Theft Search Warrant Application [the address of Pamela Maag].” An attachment contained a search warrant application signed by Chief Cody. The signatures are difficult to discern.

At 11:27 a.m. Chief Cody sent a third email to County Attorney Ensey. The email was entitled, “Karie Newell Identity Theft Search Warrant Application [the address of Ruth Herbel].” An attachment contained a search warrant application signed “Chief Gideon Cody.”

At 11:28 a.m. Agent Leeds emailed Chief Cody the following: “*Chief Cody, I have opened up case number for KBI 23-533 for the State.*” There was no response from Chief Cody to Agent Leeds.

At 11:35 a.m. Chief Cody forwarded to Officer Hudlin the email Agent Leeds had sent to Chief Cody regarding Agent Leeds having opened case number KBI 23-533. There was no response from Officer Hudlin to Agent Leeds.

At 11:48 a.m. Officer Hudlin emailed Agent Leeds and Cc'd Chief Cody.

The title of the email was Case File Documents KBI 23-533. Attachment: 23-108. The email read,

“this is everything we have currently for our case. I've reached out to KDOR Office of Special Investigations but haven't been able to get ahold of anyone yet. If you have a contact with KDOR OSI that you could either share with me or give them our information that would be helpful. Please let us know if there is anything else you need from us or would like to see us do so that we can build the best case possible. My cell number is 316-██████████, feel free to call or text and I will help in any way possible.”

According to legal representation for the KBI, Agent Todd Leeds did not receive this email due to the formatting of the attachments.

At 1:45 p.m. Officer Hudlin sent Agent Leeds emails captioned, “Additional SW for Eric Meyer's Residence.” The search warrant generated for Mr. Meyer's residence was attached. There was no text communicated in the body of the email.

Officer Hudlin sent Chief Cody the following text at 3:18 p.m. on the 10th:

Me, Cody - 8/10/2023



Me
3:18 PM

8/10/2023,

I sent the search warrants for Eric and Ruth to Aaron. Both look good. I added the property description for Ruth.

At 5:27 p.m. Agent Leeds responded to Officer Hudlin's earlier email, “Thank you, Did you guys execute this today? – Todd.”

At 5:57 p.m. Officer Hudlin responded, “No. My understanding is that the county attorney wasn't in the office today. Do you know anyone with the DOR that may be able to help us out? I've called multiple times but can't get anyone with investigations on the phone, Zach.”

The next day, on August 11, at 9:09 a.m., Officer Hudlin sent the following email to Agent Leeds: “All 4 search warrants are in the judges’ hands. Should be signed any minute.”

According to Agent Leeds, when he saw the email from Officer Hudlin the night of Thursday, August 10th, 2023, with search warrants attached, the email had no text, commentary or explanation in the body of the email. Agent Leeds was not sure why Officer Hudlin had sent him the search warrants. He acknowledged that, with the funeral he was to attend the next day and family members arriving from out of town, he did not read the search warrants in depth. Agent Leeds did send a response asking only if the warrants had been served.

When asked by CBI Agents why he did not follow up to ask anyone in Marion why the warrant had been prepared, Agent Leeds acknowledged, “I should have.”

Friday, August 11, 2023

On Friday, August 11th at approximately 7:00 a.m., Marion County Attorney Ensey arrived back at work. He had roughly 20 cases scheduled on the criminal docket that day and between six and eight preliminary hearings scheduled. Mr. Ensey is the only prosecutor employed by the Marion County Attorney’s office.

He opened his e-mails and glanced at the search warrants submitted by Chief Cody, but did not have time to review the warrants as he said he needed to devote his attention to preparing for his preliminary hearings that day. Karen Hurt, Mr. Ensey’s assistant, received a call from Chief Cody saying that he had a team ready to go and wanted to know where the search warrants were. Mr. Ensey responded that he was not aware that Chief Cody intended to serve the warrants that morning. Mr. Ensey recalled making a brash comment, which he said was out of character for him to make in the office, “I don’t know

why the f--- we're in such a f--- hurry for this thing." According to Mr. Ensey, Ms. Hurt responded by asking "Well, do you want me to just take it up to the judge." Mr. Ensey responded, "that's fine' I go, 'She. You can let her make the determination.' So I, don't remember if I gave the search warrant to Karen or Karen printed it off or how, how it went, but she ended up taking it up to the judge and judge reviewed them."

According to Ms. Hurt, who was interviewed December 7, 2023, by CBI agents, the morning the warrants were signed, Chief Cody called and was "kind of forceful."

"He said I need to talk to Joel. I said, well, he's getting ready for court, okay. And he said, 'Well I need the search warrants,' and so I said 'Well, I don't know what search warrants you're talking about,' and he goes 'Well, I have men that are standing by waiting,' and I go, okay, . . . Obviously it's something that's very important to him. I'm not privy to it, so I'm, not, okay. I said, hang on a minute. I go into Joel, Joel is very flustered, . . . so I said Joel, Cody is on the phone. Chief Cody. He wants some search warrant, and Joel flails his arms up like this. He goes, well, ugh I didn't know it was a f--n hurry, you know, and he starts-and said I don't, I don't know."

Ms. Hurt said she asked Mr. Ensey if he wanted her to take the documents to the judge to which Mr. Ensey responded, "I guess" and handed the documents to her. Ms. Hurt did not look at the warrants but got back on the phone with Chief Cody and told him she was taking the warrants over to the judge. Ms. Hurt did not see Cody in person or talk to him again.

Four warrants were submitted to District Magistrate Judge, Laura Viar, at the Marion County Courthouse regarding the following locations in Marion, Kansas:

1. The Marion County Record Newspaper offices;
2. The home of Eric Meyer and his mother, Joanne Meyer;
3. The home of Ruth Herbel;
4. The home of Pam Maag.

On December 12, 2023, Anita Svoboda, the Administrative Aide to District Judge Susan C. Robson, responded by email to CBI Agent Zamora's questions regarding when the warrants were presented to the Judge. Ms. Svoboda responded,

“I have reviewed the courtroom notes and Zoom recording from August 11, 2023. From the recording, it would appear the majority of the incident took place prior to Court beginning, in the Chambers/Robing Room area. When Court did begin at approximately 9:15 a.m., at approximately 9:40 a.m., the zoom recording you will hear Judge Viar asking the courtroom clerk, ‘is the chief back there?’”

The warrants themselves show that from 8:57 a.m. to 9:05 a.m., the four warrants were brought to Judge Robson’s chambers by staff from the county attorney’s office.

Judge Robson communicated that she had a conflict and referred the warrants to Judge Viar. Judge Viar did not sign the warrant for the home of Pam Maag. Judge Viar signed the remaining three warrants at the times indicated:

1. The home of Eric Meyer and his mother, Joanne Meyer at 8:57 a.m.;
2. The Marion County Record Newspaper offices at 9:00 a.m.;
3. The home of Ruth Herbel at 9:05 a.m.;

On May 30, 2024, Chief Cody offered the following explanation to the CBI agents, through counsel, to questions posed by the CBI Agent regarding the circumstances at the time the search warrants were signed.

- Counsel said that Chief Cody thought he had signed the warrants and then turned them around and then Judge Viar signed them. It was described as “a brief meeting” but it was clear to Chief Cody that Judge Viar had reviewed the documents prior to the warrants being signed.
- While Cody remembers signing them in judge’s chambers in front of her, counsel relayed that “he also recognizes his memory isn’t perfect because of the multiple drafts and versions that the law enforcement team was circulating.”
- Chief Cody also recalled that he initially signed the warrants before emailing them. He remembered a couple of “technical issues on the warrants, for example one of them had the wrong address.” Chief Cody said they had to

correct these issues. He remembered having to print the warrants several times and ultimately shredding the drafts that had errors.

- According to counsel, Chief Cody “knows that he signed them on August 10 when the law enforcement team was done editing and circulating the warrants. He remembered signing them again in front of Judge Viar.” But again, “he admits he isn’t perfect on remembering all the details of if he specifically signed them again on the judge’s desk in chambers.”
- Finally, counsel added, “His memory is that he did sign them in front of the judge. He has a clear memory of answering a few questions from the judge before she signed them and he thought he signed them in front of her at that time.”

Mr. Ensey told investigators that he recalled seeing Chief Cody coming down the courthouse stairs as Mr. Ensey was walking up the stairs for one of the hearings on the 11th. Chief Cody informed Mr. Ensey that he got three of the four warrants signed. Mr. Ensey was not aware why the judge, District Magistrate Judge Viar, did not sign the search warrant for Mrs. Maag’s residence. Mr. Ensey clarified that he never spoke to Judge Viar about the matter. Mr. Ensey acknowledged that he later heard that District Judge Susan Robson had recused herself from reviewing or signing the warrants. Mr. Ensey did not know why and did not recall who told him that.

On July 9, 2024, Judge Viar was interviewed by the specially appointed prosecutors in the presence of her attorney. Judge Viar is a magistrate judge in the 8th Judicial District (Dickinson, Geary, Marion, and Morris counties) having been appointed in 2022. She recalled that on August 11, 2023, she was in the visiting judge’s chambers in the Marion County Courthouse when she heard the voice of Judge Susan Robson, a District

Court Judge in Marion. Judge Robson walked into Judge Viar's chambers with a man that Judge Viar did not recall having ever met, Marion Chief of Police, Gideon Cody.

Judge Robson said Chief Cody had a number of warrants that needed reviewed and handed the documents to Judge Viar. Judge Robson told Judge Viar that she (Judge Robson) had a conflict, so she was asking Judge Viar to review the matter. Judge Viar specifically recalled Judge Robson also made the statement, "the KBI is involved." Judge Viar interpreted the comment as having been directed at Chief Cody, which Judge Viar took to have been Judge Robson's effort to confirm this understanding. Judge Viar did not recall exactly how Chief Cody reacted (by words or gesture), but it was clear to her that Chief Cody confirmed the KBI was involved.

Judge Viar asked if the warrants were "timely," meaning whether there was any urgency to the warrants. Chief Cody responded that he had officers standing by to serve the warrants. She told him she would need some time to review them and excused the Chief so she could read alone. She ultimately signed three of the four warrants.

Judge Viar recalled that a staff member pointed out that Chief Cody had signed the warrant applications but that his signature had not been notarized. Because Judge Viar had already signed the three search warrants, she held on to all the documents and told staff to alert her when Chief Cody returned for the warrants. At some point later that morning while she was in court, she recalled being notified that Chief Cody had returned to her chambers. She recalled stepping off the bench and approaching Chief Cody in chambers. She told him she signed three of the four warrants. As to the warrant she did not sign, regarding Pamela Maag's residence, Chief Cody asked her if she saw the reference to the email in the affidavit. She responded that she did not recall a reference to email. She said he began to read the document and could not find the reference either.

Chief Cody said he might come back.

Judge Viar swore Chief Cody to the search warrant applications he had already signed. She asked him if the signature on each application was his and he acknowledged that he signed each of the applications documents. She then swore him to each, indicating with her own signature.

At 10:01 a.m., Officer Hudlin sent a copy of the 3 signed search warrants to Agent Leeds, Detective Christner, and an employee of the KDOR, Chad Burr.

At 10:50 a.m., Chief Cody is recorded on his body-worn camera entering the residence of Ruth Herbel, where officers were already present executing the search warrant. At 10:54 a.m., Chief Cody told Mrs. Herbel, "I actually have KBI who is assisting us with this, and their computer forensics division is going to do most of the downloads. And I'm not saying nothing bad about the KBI but you know how slow they can be."

At 10:57 a.m., Chief Cody told Mrs. Herbel, "I explain it to people like this, especially the KBI guy, is uh, it is a felony. . ."

Later that morning, Chief Cody and several officers arrived at the Marion County Record where they found journalists Deb Gruver and Phyllis Zorn seated at the back door of the business. Ms. Gruver later explained to CBI investigators, that she initially assumed there may have been a bomb threat until Chief Cody handed her,

". . . the piece of paper. I barely can read it. When he, I saw a search warrant, and I said well I need to call Eric, and so I start to try to call Eric [Meyer], and he tells me I can't call anyone which I was like what, and then he, I kept trying' cause I'm very stubborn and I know my rights, and he,- um he reached over, um, and very aggressively yanked the phone out of my hand so much so that I filed a report that day about, you know, what happened to my hand. I filed, filed a report with Zach."

The "Report of Property and Money Recovered" from the Marion County Record, dated August 11, 2023, at 10:56 a.m. and signed by Officer Hudlin, lists the following items as having been seized as evidence:

1. Deb Gruver Cell phone
2. Phyllis Tower Thermaltake Case
4. Phyllis Phone
5. Eric Tower Coolermaster
6. Server Tower Antel case
7. KDOR Record
8. Deb Gruver Thermaltake Tower
9. Western Digital External Hard drive

On August 11th, 2023, Officer Hudlin assisted in the execution of the search warrant at Ruth Herbel residence. The "Report of Property and Money Recovered" from the home of Ruth Herbel dated August 11, 2023, at 12:10 p.m. and signed by Officer Hudlin, lists the following items as having been seized as evidence:

1. Ruth Iphone
2. HP G71
3. HP G71 charger

At 1:20 pm Officer Hudlin assisted in the execution of the search warrant at Eric and Joan Meyer's residence. The "Report of Property and Money Recovered" from the home of Eric Meyer dated August 11, 2023, signed by Officer Hudlin, lists the following items as having been seized as evidence:

1. Eric Phone
2. Eric Laptop
3. Living room desk top
4. Router
5. External hard drive
6. KDOR Record "Kari Newell"

Between 2:01 p.m. and 2:24 pm, Chad Burr, with KDOR exchanged e-mails with Chief Cody and Officer Hudlin in which Agent Leeds was cc'd. This series of e-mails concerned inbound IP information with the KDOR website.

11th: It appears this was in response to a voicemail left for Mr. Burr by Chief Cody on the

“Hey Chad this is uh Chief Gideon Cody I work out of Marion Kansas, call me back at 816-██████████, 816-██████████, this is pertaining to a DPPA violation, I guess there's a hole if you guys' system and people are able to access, um...I'll give you more details on it, and it's, it's, it's grown into a monster, thank you.”

CBI Agent Zamora also asked Officer Hudlin about Chief Cody's seizure of journalist Deb Gruver's cellphone as he entered the Marion County Record to execute the warrant. Officer Hudlin was asked specifically under what authority law enforcement was authorized to seize her phone. CBI Agent Zamora pointed out first, that there was no reference to Ms. Gruver or her cell phone in either the warrant application or the search warrant issued for the Marion County Record, and, second, that Ms. Gruver was sitting outside the Marion County Record building at the time Chief Cody seized her phone, preparing to “call Eric.” Officer Hudlin believed the warrant allowed for the collection of “all media.” Officer Hudlin did acknowledge there was no officer safety issue that would justify taking Ms. Gruver's phone.

Saturday, August 12, 2023

On August 12, 2023, Chief Cody sent an e-mail to SAC Popejoy. The email contains statements regarding items seized. Chief Cody then thanked the KBI for “standing behind” him. In an e-mail to Joel Ensey the county attorney, sent the same day, Chief Cody wrote that the KBI was coming Monday to assume the case.

At 1:59 pm, Chief Cody sent the following email to County Attorney Ensey, “Joel, KBI just called. They told me the[y] are 100 percent behind me and we did things exactly as it should have been done. They reached out to me. I didn't call. Their number 2 will be calling me.”

A text message Chief Cody sent to Mr. Ensey on August 12, 2023, at 2:40 p.m., repeated much of what he put in the earlier email to Mr. Ensey, “Joel, KBI just called. They told me the[y] are 100 percent behind me and we did things exactly as it should have been done. They reached out to me. I didn’t call. Their number 2 will be calling me.”

At 2:40 PM, Mr. Ensey responded, “Okay thank you.” Chief Cody then responded, “They want to use an independent lab not affiliated with government for forensic and they appear to be taking this case over. I will let you know.”

At 3:18 p.m., on August 12, 2023, Chief Cody sent a lengthy email to SAC Popejoy in which he described what he and the officers in Marion had done on the 11th. Contained in the email was the following statement regarding Eric Meyer: “It also should be noted, Eric made spontaneous utterances numerous times that he is guilty of the charges on the search warrant (possess but he never disseminated it).” As will be discussed below, the body camera video of Mr. Meyer’s conduct during the execution of the warrants did not in fact reflect any admissions of guilt on the part of Mr. Meyer.

When interviewed by CBI Investigators, SAC Popejoy denied having made any comment about the KBI “standing behind” Chief Cody.

“I probably called him and said what, what’s going on, but at no point did I say everything that you did is, uh, okay, and I called Todd that day as well, uh, and said what in the world is going on, so, no, that is not an accurate representation.”

SAC Popejoy added, “When I found out that . . . they ran off and did the search warrants, without us even able to open the initial investigation, no. There is, there is not anything that I’m gonna say that we’re a hundred percent behind you.” SAC Popejoy said, “he had to live in fantasy land to get that picture.”

Agent Leeds described having received a call from Robert Jacobs, the Assistant Director of the Kansas Bureau of Investigations, who informed Agent Leeds of the growing

public interest in the execution of the search warrants on Friday, August 11th. Because Agent Leeds was off work at the funeral Friday, he had not seen any news coverage. Agent Leeds asked for direction and was told to stop everything.

At 5:56p.m., Chief Cody had the following text exchange with Officer Hudlin:

G Gideon

8/12/2023, 5:56 PM

Don t delete any messages. We need them for our files. Even the hateful ones

ZH Zach Hudlin

8/12/2023, 5:57 PM

Ok.

At 6:19 p.m., County Attorney Ensey responded to Chief Cody's earlier emails informing Chief Cody he would need additional warrants signed by a District Court Judge to search any electronic items he had already seized.

Sunday, August 13, 2023

At 9:12 a.m., Chief Cody responded to Attorney Ensey's email:

"Good advice . . . KBI is coming out Monday and I believe (hopefully) they will rescue me from this case. I will pass this on."

SAC Popejoy told CBI investigators that on Sunday the 13th, Chief Cody called her. She stepped outside and spoke to him.

"Sunday, [Chief Cody] calls me, and I had to step out of the church service, and he said well, I really wish you--this is a mess—I really wish you guys would take this over, and . . . and I said well, it's a little f---n' late for that now."

She said that Chief Cody told her, "Todd [Leeds] knew I was doing this" to which she remembered responding, "I don't think [so] because I didn't know what was going on."

Later that afternoon, Chief Cody sent a short series of texts to SAC Popejoy listing the email address to which he had sent information. In the final exchange at 4:31 p.m.,

SAC Popejoy told Chief Cody, “I know you feel like you’re out in a limb, but there are amazing minds working behind the scenes to help you and support you. We’re here with you, so hang in there with us.”

Monday, August 14, 2023

Mr. Ensey spent the weekend preparing for a jury trial that had been scheduled to begin on Monday the 14th. He had several conversations with other Kansas prosecutors Saturday August 12th and Sunday August 13th. When his trial resolved Monday, August 14, Mr. Ensey told CBI he then read the warrants in detail. He said his reaction was, “it’s not good.”

Monday the 14th was also the first time SAC Popejoy read the warrants in detail. When asked by investigators of her impression of the warrants, SAC Popejoy said she was “shocked, angry, disappointed, [in] disbelief.”

According to a press release emailed by the Marion County Sheriff Soyez on Monday, August 14, at 11:27 a.m., the Kansas Bureau of Investigations was to take over the investigation and all communications were to be directed to the KBI:



8/14/2023

The Kansas Bureau of Investigation is leading the investigation regarding the Marion County Record case.

Any questions regarding the case need to be forwarded to Melissa Underwood, with the Kansas Bureau of Investigations.

Jeffrey T. Soyez Sheriff

The e-mailed press release makes it clear that from the standpoint of the Marion County Sheriff, the investigation had been turned over to the KBI.

For his part, Chief Cody issued his own release that morning, which read,

Jeff Soyez

From: Jeff Soyez
Sent: Thursday, August 17, 2023 3:28 PM
To: 'jkuhlman@wcrf.com'
Subject: FW: Public Statement

Email from Chief Cody that I requested showing me his press release.

Jeffrey T. Soyez
Marion County Sheriff
202 South 4th
Marion, KS. 66861
Office# (620) 382-2144
Cell# (620) 381-4027

From: Gideon Cody <GCody@marionks.net>
Sent: Monday, August 14, 2023 7:23 AM
To: Jeff Soyez <JSoyez@marioncoks.net>
Subject: Public Statement

As much as I would like to give everyone details on a criminal investigation I cannot. I believe when the rest of the story is available to the public, the judicial system that is being questioned will be vindicated.

I appreciate all the assistance from all the State and Local investigators along with the entire judicial process thus far.

Speaking in generalities, the federal Privacy Protection Act, 42 U.S.C. §§ 2000aa-2000aa-12, does protect journalists from most searches of newsrooms by federal and state law enforcement officials. It is true that in most cases, it requires police to use subpoenas, rather than search warrants, to search the premises of journalists unless they themselves are suspects in the offense that is the subject of the search.

The Act requires criminal investigators to get a subpoena instead of a search warrant when seeking "work product materials" and "documentary materials" from the press, **except** in certain limited circumstances, including: **(1) when there is reason to believe the journalist is taking part in the underlying wrongdoing.**

The Marion Kansas Police Department believes it is the fundamental duty of the police is to ensure the safety, security, and well-being of all members of the public. This commitment must remain steadfast and unbiased, unaffected by **political or media influences**, in order to uphold the principles of justice, equal protection, and the rule of law for everyone in the community. The victim asks that we do all the law allows to ensure justice is served. The Marion Kansas Police Department will nothing less.

Mr. Ensey later shared with CBI Agents personal notes he had emailed to himself. These included a conversation he had with SAC Popejoy on August 14th. According to Mr. Ensey, both he and SAC Popejoy had understood the KBI was going to have taken the lead role in the investigation, but for Chief Cody “jumping the gun” (Mr. Ensey’s phrase). SAC Popejoy had told Mr. Ensey that she had understood the KBI would get warrants for IP addresses of any devices that accessed the KDOR website to get access to Ms. Newell’s record, and this would be accomplished before any other steps would be taken. Mr. Ensey said that he had arrived at the same conclusion based on his conversation on Wednesday the 9th with Agent Leeds.

On Monday, August 14th, Special Agent in Charge (SAC) Bethanie Popejoy inquired and received messages and e-mails from Agent Leeds. Agent Leeds explained to her why he had responded the way he did when Officer Hudlin’s sent him the email with the warrant for the Meyer’s residence attached on August 10, 2023:

“On Thursday night at 5:27 p.m. I emailed him back ‘thank you, Did you guys execute this today?’ because I was confused as to why he was sending me an unsigned SW with no words in the email.”

Tuesday, August 15, 2023

Chief Cody sent e-mails to KBI SAC Popejoy on August 15, 2023, at 12:59 p.m. asserting that Mr. Meyer had “confessed” to certain acts. This assertion appears to have been based on information provided by Officer Eric Mercer, a part time Marion Police Officer and fire investigator, who was working as an agency assist, in his capacity as a State Fire Marshall.

Officer Mercer was present in the Meyer residence during the execution of the warrant. He generated a report that attributed certain statements to Mr. Meyer who was in the residence on the phone speaking to who Officer Mercer believed to be his (Mr.

Meyer's) lawyer while officers were serving the warrant. In his report, Officer Mercer wrote that Mr. Meyer named Phyllis Zorn as the person who accessed the KDOR website to obtain Ms. Newell's driving record.

On June 5, 2024, CBI Agent Zamora contacted Officer Mercer. Agent Zamora read Officer Mercer his (Mercer's) report in which he wrote that during the execution of the search warrant on his house, Eric Meyer was on the phone and said, "We admit to KSA 21-6107 Identity Theft and 21-5839 Unlawful acts with Computers, we signed into state web site, Phyllis Zorn registered under her own name." Agent Zamora had watched Officer Mercer's body worn camera video and told Officer Mercer that Mr. Myer never said those words. Agent Zamora told Officer Mercer that Mr. Meyer actually said, "The allegation is that we violated, KSA 21-6107 Identity theft and 21-5839 Unlawful acts concerning computers..." Investigator Chris Mercer acknowledged that he did not review his body camera video to double check the quote prior to writing his report.

At 3:32 p.m., on August 15th, Detective Christner emailed Chief Cody a draft of a probable cause affidavit regarding Eric Meyer.

By Tuesday August 15th, Joel Ensey had determined that law enforcement needed to return the items seized: "Because at that point in time I had made the determination that all this stuff has got to go back and, [SAC Popejoy] was going to be coming down doing that after-action, kind of who, who, what, when, where kind of thing." Mr. Ensey prepared motions to return the items seized from the search warrants on August 11th. Judge Ben Sexton, the Chief District Judge for the Eighth Judicial District, called Mr. Ensey and told Mr. Ensey to send the release of property to him for review.

On Tuesday, August 15th, Mr. Ensey issued the following press release,

On Monday, August 14, 2023, I reviewed in detail the warrant applications made Friday August 11, 2023 to search various locations in Marion County including

the office of the Marion County Record. The affidavits, which I am asking the court to release, established probable cause to believe that an employee of the newspaper may have committed the crime of K.S.A. 21-5839, Unlawful acts concerning computers. Upon further review however, I have come to the conclusion that insufficient evidence exists to establish a legally sufficient nexus between this alleged crime and the places searched and the items seized. As a result, I have submitted a proposed order asking the court to release the evidence seized warrants. I have asked local law enforcement to return the material seized to the owners of the property.

On Tuesday August 15th, 2023, four days after the search warrants were executed, Det. Christner of the Marion County Sheriff's Office sent an e-mail to Chief Cody at 5:11 pm in which he acknowledged,

"I have a [sic] pc for herbel attached. With the information I have, I am not sure it fits any of the crimes we have discussed except the US fed code. Maybe there is something I am missing."

This is an ostensible reference to the search warrant executed at Marion city council member, Ruth Herbel's residence.

SAC Popejoy told investigators that the interaction between her agency and Chief Cody declined over this period of time:

"Well, so then it became, um, getting Cody being victimized. His character was being assassinated, so on Monday, in the middle of all of the other, um, turmoil that was falling out from all of this, he's, he's calling, and he's sending, um, uh, sending me emails and sending things, and he wants, he wants us to speak to his character . . . I'm in constant contact, at this point, with the PIO [KBI's Public Information Officer], who is just drowning in media outrage, and I said, I, I call her, and I said Melissa, this is what this guy's wanting to do, and she said we're not doing that . . . so I sent him back some correspondence and said look, we are just, this is just, this doesn't have anything to do with the investigation, . . . Um, ev, everything I asked him or told him to do he, just, uh, he was just a rabid squirrel in a cage and just off doing his own thing, and then, well I really feel like you guys are abandoning me. I said I don't know what else to do for you. I, I don't know. You, you haven't done anything that I've asked you to do, and you've run off without us. [Chief Cody said] Well, Todd knew. I said Todd did not know. Todd had a funeral. The county attorney was gone the day that you prepared this, and wasn't in a place where he could approve this. I, I don't know what else we're 'gonna be able to do for you."

Wednesday August 16, 2023

Chief Cody sent proposed charging affidavits to Mr. Ensey. At 10:30 a.m., he sent the affidavits to SAC Popejoy and Agent Leeds, and cc'd Detective Christner. These affidavits explained the facts that he believed supported probable cause to charge Ruth Herbel, Eric Meyer and Phyllis Zorn with various felonies including alleged violations of federal law². SAC Popejoy confirmed the email she received was addressed to her, Agent Todd Leeds and Marion County Sheriff's Detective Christner.

SAC Popejoy called Chief Cody to find why he had sent these documents, and Chief Cody responded that he had sent the documents to the County Attorney's office.

There was no explanation as to why Chief Cody prepared charging affidavits for an investigation that had been turned over to the K.B.I.

At a meeting later that morning, Sheriff Soyez and Chief Cody learned that County Attorney Ensey intended to rescind the warrants and release the items seized back to Ruth Herbel, Eric Meyer and the Marion County Record (Meyer, Gruver, Zorn, et.al.,)

August 21, 2023

KBI Special Agent Todd Leeds emailed Ted Smith, legal counsel for the KDOR, at 10:50 a.m. Agent Leeds identified himself and asked the following,

"My legal question is actually very straight forward:

1. Is it a violation of the law for someone to access another's Kansas driver's license information via the States KDOR public access website (yes or no)
2. If this is in fact a violation of a Kansas State Statute, could you please tell me what it is (i.e., this would be a violation of K.S.A. 21-???? (a)(1)???"

² Chief Cody specifically referenced 18 US code 2722(a), Procurement For Unlawful Purposes.² 18 U.S. code 2722 is a federal statute. Violations of federal law are prosecuted by the United States Attorney's Office in federal district court. Federal Rules allow for application for a federal warrant by a "federal law enforcement officer" or "attorney for the government." There are no provisions for enforcement of federal laws by a local state law enforcement agency. The United States Attorney's Office for the District of Kansas does not intake "direct adoptions" by state law enforcement agencies. Meaning, local police do not file cases in federal district court.

Thirty-nine minutes later, at 11:29 a.m., Mr. Smith responded to Agent Leeds' inquiry as follows (identifying himself as "TES" in his answer):

1. Your Question: Is it a violation of the law for someone to access another's Kansas driver's license information via the States KDOR public access website. (yes or no): TES Answer: no – if the requestor has name, date of birth, address, and driver's license number information from a difference source, KDOR will provide non-confidential information regarding driving accidents, driving record history, and driver driving status. The information provided by the requestor must match the KDOR system, in order for the service to output the driver status information..
 - a. There are different types of record requests that can be made from KDOR's public access website. There is a free service that requires the requestor know required data fields, associated with personal information, that will result in KDOR providing non-personal information.
 - b. There is another service for requesting driver record information when the requestor does not have the required name, date of birth, dl number, current address information, that requires further certifications (and payment of a fee) by the requestor that he or she is requesting the information in manner that conforms with K.S.A. 45-215 et seq., K.S.A. 74-2012(c), and 18 U.S.C. Sections. 2721(b) and 2725(3).
 - c. I have attached a pdf with test dummy information that you can use to explore the scope and utility of the KDOR free driver's license status check service. Please do not distribute this test data to the public or media, it is provided to assist you in your investigation.
2. Your Question: If this is in fact a violation of a Kansas State Statue, could you please tell me what it is. (i.e. this would be a violation of K.S.A. 21-???? (a) (1)?? TES Answer: See Response to 1, I don't have sufficient information about the nature of the request of KDOR to answer your question.

August 29, 2023

On August 29, 2023, the 8th Judicial District's Chief Administrative Judge Ben Sexton, signed a document entitled "Order re Disposition of Seized Data and Photos," which ordered the Marion County Sheriff to provide counsel for the Marion County Record a forensic copy of all data seized from the Record's computers and then to physically destroy all backup copies of the material in the possession of the Marion County Sheriff.

September 29, 2023

On September 29th, 2023, Marion City Administrator, Brogan Jones attended a conference in Wichita, Kansas. During the conference he received several calls from attorneys for the city. It was brought to his attention that after the execution of the

search warrants, Chief Cody had instructed Kari Newell to delete text messages sent between Chief Cody and Ms. Newell. Chief Cody was put on administrative leave that day, September 29th, 2023, by the Mayor. Chief Cody subsequently resigned on October 2, 2023.

November 8, 2023

On November 8, 2023, Kansas Bureau of Investigations Director Tony Mattivi, directed correspondence to the Colorado Bureau of Investigations (CBI) seeking their assistance in the investigation of the search warrants that were sought and served in Marion County on August 11th, 2023. In doing so, he stated:

There are allegations of Chief Cody misrepresenting facts that led to receiving a search warrant for 117 South 3rd Street (Marion County Record), [REDACTED] Eric Meyer and Joana Meyers's Residence). And [REDACTED] (Ruth Herbel's Residence).

Additionally, Debbie Gruver complained Chief Cody took her phone forcefully enough from her to hurt her finger(s). Compounding that allegation from Gruver is the question of whether Chief Cody had legal grounds to seize the electronic device given the premise and scope for the search warrant at 117 S. 3rd St. (she was outside the business). Also, there are further allegation of MPD destroying evidence related to missing pages of a written statement provided by Kari Newell.

November 15, 2023

On November 15, 2023, Colorado Bureau of Investigations (CBI) Agents John Zamora and Michael Struwe were sworn in by Kansas Attorney General, Kris Kobach, as temporary KBI agents to perform their investigation.

November 16, 2023

November 16th, 2023, CBI Agents Zamora and Struwe first travelled to Marion County, Kansas to begin in-person interviews with relevant parties.

LEGAL ANALYSIS OF THE SEACRH WARRANTS

The applications for the three warrants signed on the morning of August 11, 2023 were made public in August of 2023.

Mr. Ensey's decision to return the items seized during the execution of the warrants was influenced by analysis provided to Mr. Ensey by a group of Kansas Prosecutors, including the two special prosecutors herein, which was emailed to Mr. Ensey on the morning of Tuesday, August 15, 2023. That analysis is summarized below:

The office of the Marion County Record

The affidavit/application alleged violations of identity theft and computer crime. The affidavit set forth facts to suggest that Phyllis Zorn accessed the KDOR document by asserting false information on the KDOR website. As has been discussed and will be explored in more detail below, subsequent investigation revealed that this conclusion was not accurate. Setting aside for the moment what would later be learned about the manner in which the KDOR web site functioned and how Ms. Zorn actually accessed Ms. Newell's driving record. On its face, the affidavit could support a colorable claim that Phyllis Zorn committed the crime commonly referred to as Computer Crime, in violation of KSA 21-5839 (to wit: "knowingly and without authorization access . . . a computer, computer system, computer network or any other property.") However, there was no information in the warrant application to establish whether Ms. Zorn utilized a computer located in her home, at the newspaper offices, or used her cell phone or perhaps, some other device in some other location to access the KDOR website. No inquisition subpoena was issued to establish the specific IP address utilized for the ostensible download from the KDOR

webpage.³ First learning the IP (Internet Protocol) address may have helped identify the device or location for a device used to access the KDOR website.

Case law demands that law enforcement establish a “nexus” in their warrant application to explain the link between the facts presented to establish evidence of a crime and the facts presented regarding the location of the evidence. See, e.g., *State v. Bottom*, 40 Kan. App. 2d 155, 165 (2008) (“[T]he trial court must ultimately find a nexus between the place to be searched, the property to be seized, and the criminal conduct.”); *United States v. Skarda*, 845 F.3d 370, 376 (8th Cir. 2016) (“[P]robable cause requires ‘evidence of a nexus between the contraband and the place to be searched.’”) (quoting *United States v. Tellez*, 217 F.3d 547, 550 [8th Cir. 2000]; *United States v. Abernathy*, 843 F.3d 243, 252-53 (6th Cir. 2016).

The home of Eric and Joanne Meyer

The application alleged violations of identity theft and computer crime. The application attributed a statement to Mr. Meyer that he allegedly confessed that Phyllis Zorn had obtained the KDOR record. This assertion was based on a story published by Mr. Meyer in the Marion Record on August 9, 2023: “*Restaurateur accuses paper, councilwoman.*”⁴ Even if Mr. Meyer’s explanation in the article were tantamount to an implicit acknowledgment that Ms. Zorn had accessed the information from the KDOR, the warrant application offered no probable cause to suggest that the fruits or instrumentalities of any crime would be located within the residence of Ms. Zorn’s

³ As will be discussed below, the information relied upon was based on an incomplete understanding of the manner in which the KDOR website worked. Further analysis revealed that the “colorable” violation of the law did not in fact occur.

⁴ Mr. Meyer’s article read as follows: “After verifying that the information was accurate and had been obtained, as the source claimed, from a public website, the Record decided not to publish it.”

employer, Mr. Meyer. The only effort made to establish a nexus to Mr. Meyer's home was the affiant's conclusory statement that Mr. Meyer "is known to work from home."

The Fourth Amendment to the US Constitution protects the "*right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*" The phrase "is known to work from home" was insufficient to establish with particularity that the fruits or instrumentalities of a crime would be in the Meyer residence.

The home of Ruth Herbel

The affidavit/application alleged violations of identity theft and official misconduct. First, no effort was made to establish in the application that Mrs. Herbel downloaded the material in her capacity as a council member. As such, any reliance on the crime of official misconduct was unsupported by factual basis. As to identity theft, a colorable effort is made to establish that *someone* illegally obtained the KDOR records, but the only facts set forth in this application are that Phyllis Zorn may have done so. The only suggestion that Mrs. Herbel committed a crime was that she shared the document. No effort was made in the application to establish that Mrs. Herbel herself obtained the document from KDOR. The search warrant lacked probable cause as to Mrs. Herbel and established no nexus to suggest why law enforcement thought the fruits or instrumentalities of a crime would be found in her home.

The home of Pam Maag

Though this warrant was not signed, the following analysis is offered. The application alleged a violation of identity theft. This warrant was based solely on

innuendo, namely that Mrs. Maag, who was married to a former highway patrolman, forwarded the KDOR document to another. No effort was made in the warrant application to establish that Mrs. Maag downloaded the document, where she might have done this or by what means. No effort was made to explain why the affiant believed the fruits or instrumentalities of a crime would be found within her home or in digital devices in her home. The affidavit was silent as to issues of venue.

Each of the warrants contained the following language:

“Having evidence under oath before me from which I find there is probable cause to believe that an offense against the laws of the State of Kansas, including but not limited to violations of [various crimes listed] has been committed and that certain contraband, fruits, instrumentalities and evidence of such offenses, to wit:”

After which, the warrants set forth a list of evidence or descriptions of types of evidence that law enforcement is permitted to seize, including #2:

“Digital communication devices allowing access to the Internet or to cellular digital networks which were or have been used to access the Kansas Department of Revenue website.”

This broad language – “digital communication devices” – may have provided the colorable basis for law enforcement to seize any “digital communication device,” but the warrants would not have withstood appellate review due to their lack of particularity and the inability to establish a sufficient nexus.

In addition, the warrant for the Marion County Record and, arguably, the home of Eric Meyer, were insufficient to overcome additional protections afforded to the press by virtue of the Kansas Shield law, K.S.A. 60-485, and, under federal law, the Privacy protection Act, 42 USC §§ 2000aa-2000aa-12.

ANALYSIS OF POTENTIAL CRIMES

I. Was it a crime for someone other than Kari Newell to obtain of copy of her driving record from the KDOR website?

Facts:

A. KDOR's Website

In August of 2023, the Kansas Department of Revenue (KDOR) maintained a website through which members of the public were able to access their personal driving record. Subsequent investigation established that there were two methods of accessing the information by way of the KDOR website.

The first method was for a person who did not possess the requisite information – driver's license number, full name, and date of birth—of the driver in question. In such a situation, the system would not provide the information without assurances (communicated by marking one of 13 options, "A" through "M") that the person seeking the information needed the information for official reasons. For example, the "C" box states, *"I work for or am acting on behalf of a government agency and am requesting this information to fulfill the functions of that agency."* This means of access also required the payment of a small fee.

The second way that driver's records were accessible was for situations in which an individual was already in possession of the driver's required identifying information: the driver's full name, driver's license number, and date of birth. The person seeking the records (requestor) with this information would enter the information, then agree to the following:

I will use the information requested in a manner that is specifically authorized by Kansas law and is related to the operation of a motor vehicle or public safety. (See section VI on the front of this form).

In April of 2024, the attorney for KDOR, Ted Smith, clarified that there is no

section VI on the front of the form. A “requestor may see the reference to section VI and checkbox, but the requestor will not have an explanation of what section VI represents, if using the online, free status check process. The Section VI language is left over from earlier versions of the service and is a tool to discourage bots from web scraping the DL status check service.” The requestor accessing the KDOR website using this method in August of 2023 would then have been allowed access to the driving record of the driver whose information was entered, free of charge.

Summarized—what the subsequent investigation clarified was that in its effort to make driver’s records more easily accessible to the public, the KDOR’s website did not distinguish between drivers who sought their own driving records, from the actions of a third party who possessed (for any reason) that driver’s personal information. As such, driver John Doe could access his own driving record, but so could Jane Doe if she knew the personal information of driver John Doe. In the latter situation, Jane Doe could access the driving record of John Doe without being required to first (falsely) identify herself as John Doe, or falsely identifying her motives, or paying a fee.

B. Marion Police Department’s Investigation

On August 7, 2023 Officer Zach Hudlin, called the KDOR during the Marion Police Department’s investigation. A representative from the KDOR spoke to Officer Hudlin on a recorded call that day. The representative explained to Officer Hudlin the KDOR system had an issue that “we don’t want.” She said the KDOR was “trying to fix” this issue because, “anybody can pull it up.” She added, “We didn’t realize how insecure it was.”

The KDOR employee explained to Officer Hudlin that someone used the name Phyllis Zorn to access the KDOR web page to obtain the driving record of Kari Newell. The employee was also able to determine that three minutes later, someone using the

name Kari Newell accessed the KDOR web page and again accessed Ms. Newell's driving record.

In response to this information, Officer Hudlin told her that her answers would "create work." Taken in the context of what then unfolded over the next several days, it is clear that Officer Hudlin reached the erroneous conclusion from his conversation with the KDOR representative that Ms. Zorn had to have falsified her identity and motives in order to access Ms. Newell's driving record. It is difficult to ascertain whether Officer Hudlin's conclusions were the product of confirmation bias, a hurried investigation or simply a misunderstanding of what the KDOR representative was trying to explain. What is clear is that Officer Hudlin reacted to this conversation as though the KDOR representative had provided the investigation with dispositive factual confirmation that Ms. Zorn had committed a crime. Officer Hudlin's interview with CBI Agents confirms he held that misunderstanding. That Officer Hudlin then shared his perception with Chief Cody, is equally clear.

The August 8, 2023, email sent by Chief Cody to County Attorney Ensey provides contemporaneous insight into the conclusions that Officer Hudlin and Chief Cody had apparently reached:

"The Police Department initially believed this to be a mail theft situation. After further investigation it was revealed the DOR record could be obtained online due to 'a hole in the system, we are currently working on.' DOR confirms this was only downloaded by a reporter working for the Marion Record. This would require falsely clicking on the reason for [sic] download on the DOR website. The reasoning for downloading another person's DOR record are as follows." The email then contains what appears to be a screen shot of the KDOR website with items "A" through "M" which respectively provide separate justifications (ex: A: I am requesting my own record; B: I have written consent from the individual to whom the requested information pertains, to obtain records on their behalf.") Item "C" is marked (a fill-in-the-blank was filled in): "I work for or am acting on behalf of a government agency and am requesting this information to fulfill the functions of that agency."

Prior to the issuance of the warrant, Ms. Zorn was not interviewed by Chief Cody or any member of the Marion Police Department. No effort was made to open an inquisition pursuant to K.S.A. 22-3101⁵ in order to issue subpoenas to either KDOR or the internet provider utilized by Ms. Zorn personally, or at the Marion County Record, to better ascertain the circumstances through which Ms. Zorn interacted with the KDOR website.

When Ms. Zorn was interviewed by agents with the Colorado Bureau of Investigations, she explained the following:

- First, that a copy of Ms. Newell's driving record had been provided to the Marion County Record on or about August 2, 2023, by Pam Maag. Mrs. Maag ostensibly sent the document in an effort to publicize Ms. Newell's driving record prior to the Marion city council's Monday, August 7, 2023, vote regarding Ms. Newell's liquor/catering license.
- Second, that Eric Meyer, the editor of the Marion County Record, directed Ms. Zorn to confirm the validity of the document that Mrs. Maag had sent to the newspaper. On August 4, 2023, Ms. Zorn did as instructed by going to KDOR's public website. She entered her own name, Phyllis Zorn, as was later confirmed by KDOR personnel. Then, because Ms. Newell's personal identifying information was contained in the driving record sent to the newspaper, Ms. Zorn had the requisite information necessary to input and then view Ms. Newell's driving record.

⁵ K.S.A. 22-3101 (a) reads, "If the attorney general, an assistant attorney general, the county attorney or the district attorney of any county is informed or has knowledge of any alleged violation of the laws of Kansas, such person may apply to a district judge to conduct an inquisition. An application for an inquisition shall be in writing, verified under oath, setting forth the alleged violation of law. Upon the filing of the application, the judge with whom it is filed, on the written praecipe of such attorney, shall issue a subpoena for the witnesses named in such praecipe commanding them to appear and testify concerning the matters under investigation. Such subpoenas shall be served and returned as subpoenas for witnesses in criminal cases in the district court.

- Third, Ms. Zorn relayed that after closing out of the KDOR website, it occurred to her that she ought to have printed a copy of the record for her editor, Mr. Meyer. She quickly logged back on to the KDOR website. When the dialog box/search box opened, the name “Kari Newell” auto-populated with the personal information. On April 26, 2024, CBI Agent Zamora contacted KDOR to inquire whether a dialog box/ search box on their website would have auto-populate the last name searched from a given computer in August of 2023. The KDOR confirmed that in August of 2023, this would in fact occur, verifying Ms. Zorn’s account.

The Marion Police Department did recognize the need for outside assistance early on in this investigation, as evidenced by their decision to contact the Kansas Bureau of Investigation. Agent Todd Leeds arrived in Marion, Kansas on August 9, 2023, to meet with Chief Cody, Sheriff Soyez and others. Chief Cody relayed the information gathered at that point, including their conclusion that Ms. Zorn had illegally accessed KDOR website to obtain Ms. Newell’s driving record.

As set forth in the factual summary above, Agent Leeds told Chief Cody he was to go on bereavement leave to attend a family funeral Friday, August 11, and that he would “review the information Chief Cody had provided him in this case, and that he would get back with Cody the following week once he had spoken to the KBI Computer Crimes Unit to discuss the best course of action for this investigation.”

Agent Leeds sent an email to Chief Cody on August 10, 2023, at 11:28 a.m. which read: “Chief Cody, I have opened up case number for KBI 23-533 for the State.”

During his subsequent interview, Detective Christner told CBI Agents that KBI Agent Leeds made the comment during the August 9, 2023, law enforcement meeting in

Marion that, once something is on the internet, “it’s there forever” or words to that effect. Det. Christner disagreed with Agent Leeds’s statement based upon his own understanding of the volatility of digital evidence. Det. Christner did not believe Agent Leeds adequately grasped the impermanent nature of the digital evidence and communicated his concerns verbally to Chief Cody.

For his part, Chief Cody appeared to have understood the KBI would be involved, but perceived the KBI’s response as slow. The morning of August 11, 2023, during the execution of the warrant on the home of Ruth Herbel, Chief Cody told Mrs. Herbel, “I actually have KBI who is assisting us with this, and their computer forensics division is going to do most of the downloads. And I’m not saying nothing bad about the KBI but you know how slow they can be.” While explaining to Mrs. Herbel why he believed she had committed a felony by possessing and then sharing Ms. Newell’s driving record with Brogan Jones, Chief Cody told her, “I explain it to people like this, especially the KBI guy ...”

Det. Christner also recalled Sheriff Soyez saying Ms. Newell would likely “go after” law enforcement in a civil suit if law enforcement did nothing about the people who shared her driving record.

Whether the decision not to wait on the KBI, or to conduct any additional investigation prior to submitting the warrants to Judge Viar on August 11, 2023, was based on a lack of confidence in Agent Leeds’s appreciation for the perceived volatile nature of the digital evidence, a perception that the KBI moved too slow, or simply a desire to move forward without delay is not clear. No written communication has been provided that details the line of thought inside the Marion Police Department in this regard. What is clear, however, is that the Marion Police Department chose not to wait on

additional work by the KBI’s “computer team” and chose instead to move forward with the preparation of search warrant applications and, ultimately, with the execution of the warrants on August 11, 2023.

Conclusion: As will be addressed with respect to each person who possessed or shared Ms. Newell’s driving record, the facts do not support the finding that crimes were committed as defined by Kansas law.

1. Was it a crime for Ryan Newell to (a) obtain Kari Newell’s driving record from KDOR or to share it with Pam Maag?

Mr. Newell knew his ex-wife’s personal information from their time together. With that information, he was able to obtain her record using the KDOR website without misstating his identity, or his motives.

A violation of K.S.A. 21-5839, **Unlawful Acts Concerning Computers**, requires the following:

- (a) (1) *knowingly and without authorization* (emphasis added), . . . copy . . . a computer, computer system, computer network, or any other property.
- (2) use a computer . . . for the purpose of devising or executing a scheme or artifice *with the intent to defraud* (emphasis added) or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation;
- (3) *knowingly exceed the limits of authorization* (emphasis added) and . . . copy a computer, computer system, computer network or other property.
-
- (5) *knowingly and without authorization* (emphasis added), access . . . any computer system.

Whether the KDOR website should have allowed unfettered access to a driver’s record to anyone with the requisite information is immaterial to this analysis—even if that level of access was beyond what the KDOR intended. Ted Smith, counsel for KDOR later confirmed with CBI investigators that KDOR did not consider accessing the information a crime “because it’s status information.”

Put another way, Mr. Smith's explanation unravels the central argument that buttressed Chief Cody's conclusion that crimes had been committed by people whom he assumed must have illegally obtained Kari Newell's personal identifying information from the KDOR website or somewhere else. Ryan Newell already had Ms. Newell's personal information. After he shared the KDOR record with Mrs. Maag, who in turn shared it with Mrs. Herbel (who shared it with Brogan Jones) and Ms. Zorn, any one of them could have used that information to access to Ms. Newell's driving record from the free portal, which only showed the status of Ms. Newell's driving privileges. No new personal identifying information was obtained by Ryan Newell via the KDOR site that he did not already possess.

There is nothing in the investigation to suggest that Mr. Newell knew, or had reason to believe, that he was acting beyond the scope of what the KDOR website authorized. Through the free portion of the site, he did not have to falsify his name or motives to access Ms. Newell's driving record.

A violation of K.S.A. 21-6101, **Breach of Privacy**, is knowingly and without lawful authority:

- (1) *Intercepting*, without the consent of the sender or receiver, a message by telephone, telegraph, letter or other means of private communication;
- (2) *divulging, without the consent of the sender or receiver, the existence or contents of such message if such person knows that the message was illegally intercepted, or if such person illegally learned of the message in the course of employment with an agency in transmitting it* (emphasis added).

Similarly, since Mr. Newell (or others discussed below) did not illegally intercept or obtain the message from KDOR, his choice to divulge the driving record to others did not constitute breach of privacy. Had Mr. Newell (or others discussed below) physically intercepted mail containing the driving record KDOR sent to Ms. Newell, a violation of the

Breach of Privacy Statute could exist. Downloading a copy of the letter from the KDOR's free website is not covered by the Breach of Privacy statute.

K.S.A. 21-6103, **Criminal False Communication**, is the communication of "information [the sender] knows to be false, . . ." There is no suggestion that Ms. Newell's driving record was inaccurate or in any way contained false information, nor is there any evidence Mr. Newell should have had reason to believe it to be false. This statute has no application to these facts.

K.S.A. 21-6105, **Unjustifiably Exposing A Convicted or Charged Person**, pertains to a person "*charged or convicted of a felony.*" Ms. Newell's driving record contained evidence of a misdemeanor traffic violation, not a felony. As such, this statute has no application to these facts.

K.S.A. 21-6107, **Identity Theft**, is defined as follows:

- (a) Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, *with the intent to:*
 - (1) Defraud that person, or anyone else, in order to receive any benefit; or

The phrase, "intent to defraud" is defined in K.S.A. 21-5111(o) as, "*an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.*"

Mr. Newell knew his ex-wife's personal identifying information and used it to obtain a copy of her driving record. There is no evidence that he utilized this information in order to deceive anyone, or induce someone to "assume, create, transfer, alter or terminate a right, obligation or power with reference to property."

Receiving "any benefit" alone is insufficient to trigger the statute. Evidence would be required to establish that Mr. Newell intended to receive the benefit as a result of

having defrauded another. Mr. Newell did not have to defraud (deceive) anyone to obtain Ms. Newell's driving record because he already possessed the necessary information to access the record by virtue of his relationship with his ex-wife.

Conclusion: there is insufficient evidence to establish that Ryan Newell committed a violation of a Kansas criminal statute when he obtained Kari Newell's driver's record from the KDOR website. He used information he already possessed to get a copy of her driver's record which showed the status of her driving privileges, as was permitted by the KDOR.

Similarly, there is insufficient evidence to establish that Ryan Newell committed a crime under the laws of the state of Kansas by sharing Kari Newell's driver's record with Pam Maag. There is no evidence that he defrauded anyone by misrepresenting the facts or details of Ms. Newell's driving record or that he shared it with the intent to defraud his ex-wife or to misrepresent her.

2. **Was it a crime for Pam Maag to send Kari Newell's driving record to Phyllis Zorn or Ruth Herbel?**

There is no evidence to establish that Mrs. Maag committed a violation of any of the following statutes: Breach of privacy, in violation of K.S.A. 21-6101 (which applies to intercepted communication or knowingly divulging illegally obtained information); criminal false communication in violation of K.S.A. 21-6103 (which concerns information the sender knows to be false); or Unjustifiably Exposing a Convicted Person or Charged person (which concerns felonies).

Mrs. Maag was sent a copy of Ms. Newell's driving record by someone she could reasonably expect to have lawful access to such record. She did not access the KDOR website to obtain a copy, or falsify her identity or her motives to any entity to obtain the document. Likewise, Mrs. Maag did not alter or in some way falsify Ms. Newell's driving

record, nor did she attempt to defraud Ms. Newell or others when she forwarded the records to Ms. Zorn.

Mrs. Maag sent Ms. Newell's driving record to the newspaper to point out that Ms. Newell had been driving without a license since she moved to Marion.

Conclusion: Unless Mrs. Maag shared Ms. Newell's driving record (and the personal identifying information it contained), knowing it had been illegally obtained or with the intent to defraud Ms. Newell or others or with the intent to "misrepresent" her in order to subject her to "economic or bodily harm," there is no crime defined by Kansas statute that criminalizes that behavior. Pam Maag committed no crime under the laws of the state of Kansas by sending Phyllis Zorn or Ruth Herbel a copy (obtained from Ryan Newell) of Kari Newell's driver's record.

3. **Was it a crime for Ruth Herbel to send Kari Newell's driving record to Brogan Jones?**

Consistent with the analysis of Pam Maag's conduct set forth above, Mrs. Herbel obtained the driving record when it was emailed to her by a third party (Pam Maag). Mrs. Herbel committed no crime by receiving the driving record. Mrs. Herbel then sent it to Marion City Administrator, Brogan Jones, with the observation, "We need to look at this." Over the course of the next several days, she followed up with multiple emails to Mr. Jones containing her ongoing assessment as to which possible state statutes might serve as the basis for the city council to deny Ms. Newell's application for a liquor license.

The fact that she forwarded the driving record within the context of her role as a city council member could implicate K.S.A. 21-6002, **Official Misconduct**, which states in relevant part,

(a) Official misconduct is any of the following acts committed by a public officer or employee in the officer or employee's public capacity or under color of the officer or employee's office or employment: [...]

(3) using confidential information acquired in the course of and related to the officer's or employee's office or employment for the private benefit or gain of the officer or employee or another or to intentionally cause harm to another (emphasis added);

However, the investigation has established Ms. Newell's driving record was not confidential (it was publicly available "status" information, as discussed above) and Mrs. Herbel did not obtain the record in the course of her city council position (she received it from Ms. Maag). Her further distribution to Mr. Jones indicates her interest in sharing it with him was consistent with her obligations as a city council member contemporaneous with a topic on their upcoming agenda.

Conclusion: Contemporaneous emails sent by Mrs. Herbel to Mr. Jones make it clear that Mrs. Herbel believed Ms. Newell's driving record was relevant to the vote pending before the city council. Kansas statutes, case law and administrative regulations all support the conclusion that the subject of zoning related to Ms. Newell's liquor license was properly before the city council. Mrs. Herbel committed no crime under the laws of the state of Kansas by sending Brogan Jones a copy (obtained from Pam Maag) of Kari Newell's driver's record.

4. **Was it a crime for Brogan Jones to send Kari Newell's driving record to members of the city council in anticipation of their vote on the liquor license?**

Mr. Jones was provided a copy of Ms. Newell's driving record by Ruth Herbel on August 4, 2023. His initial reaction to the matter was to tell the Mayor that "We as a city need to stay out of this 'hear say' or whatever else you want to call it." When the matter was later brought to his attention on August 7, 2023, by Chief Cody, he shared the document with the city council, ahead of the council taking up the issue of Ms. Newell's application for a caterer/ liquor license.

Conclusion: Mr. Jones legally came into possession of the driving record and then had a legitimate reason to share the information with members of the Marion City Council. There is no evidence he thought the information was false or that he harbored an intent to defraud Ms. Newell. As city administrator, it was appropriate under the Kansas Open Records Act (KORA) for him to share with the entire council a document relevant to a topic on the meeting agenda. Mr. Jones committed no crime under the laws of the state of Kansas by sharing a copy of Ms. Newell's driver's record with the city council.

5. **Was it a crime for Phyllis Zorn To Obtain Ms. Newell's Driver's License Record From The KDOR?**

Ms. Zorn had been provided a copy of Ms. Newell's driving record by Pam Maag. Ms. Zorn did not access the KDOR website to obtain the copy Mrs. Maag sent to her, she did not falsify either her identity or her motivation to any entity in order to obtain the confirmatory documentation, and there is no allegation that the information contained in the driving record of Ms. Newell was inaccurate or false in any way.

Once in possession of the KDOR driving record sent by Mrs. Maag, as has been explained in detail above, Ms. Newell's driving records would then have been accessible to Ms. Zorn—as they would to anyone in possession of any driver's personal identifying information—through the KDOR website, free of charge. That Ms. Zorn accessed the website in order to confirm the accuracy of the document before her editor, Mr. Meyer, decided whether to proceed with a story based on said records, did not constitute a crime.

As has been explained above, what seems to have been the driving factor in the decision by Chief Cody to pursue a search warrant, was a mistaken conclusion gleaned from three phone calls totaling 27:57 minutes (with 11:55 in hold time) between Officer Hudlin and the representative from KDOR. His conclusion that, because the name "Kari Newell" was entered into the KDOR website three minutes after Phyllis Zorn's name, the

only explanation was Ms. Zorn must have falsely identified herself as Kari Newell. This conclusion was based on a misunderstanding of how the KDOR website functioned.

Because a search warrant requires an evidentiary foundation, law enforcement officers may not rely on conclusory assertions or opinions unmoored from specific factual representations. The facts need not be in a form admissible at trial—hearsay and other secondhand information may suffice, if the overall circumstances demonstrate reliability. But judicial officers cannot provide the independent check contemplated in the Fourth Amendment if they are asked to review conclusions rather than facts.

State v. Althaus, 49 Kan. App. 2d 210, Syl. 9 (2013).

Other than this single phone call, no additional investigation was done. Marion law enforcement officials made no effort to open an inquisition under K.S.A. 22-3101 to seek information regarding the IP address of any parties who allegedly used their respective internet provider to access the KDOR's website.

Likewise, no effort was made to speak to Mr. Newell, Mrs. Maag, Mrs. Herbel, Mr. Meyer or Ms. Zorn before seeking and executing the warrants. While law enforcement may have held concerns as to the volatility of the digital information, KDOR had the information in their own database—as had been expressed to Officer Hudlin by the KDOR representative on August 7, 2023.

On August 8, 2023, at 3:51 p.m., Detective Christner had sent Chief Cody an email regarding the potential effectiveness of sending a preservation letter to the Marion Record's internet provider:

Chief Cody,

I was able to get a preservation made on Ms. Herbel's email account. However on the Marion record domain is hosted by a small hosing company out of Wisconsin. I can send a preservation request letter, but there is no legal authority behind such request and they may notify the Marion Record if I do so. My advice is if you have the PC for a search warrant is that we just write that and skip a preservation. I am unable to do a yahoo preservation as of yet, as I do not have the token with me to sign in. As for the city of Marion, do you believe the Mr. Jones will delete the email?

Let me know if you have any questions. Thank you.

The next day Detective Christner sent a “preservation letter” to internet provider, Cyberlink at 1:10 p.m. on August 9, 2023, for Eric Meyer’s and Phyllis Zorn’s email addresses:

“The below listed account) are the subject of an ongoing criminal investigation at this agency, and it is requested pursuant to 18 U.S.C. § 2703(f) that records associated with said accounts be preserved pending the issuance of a search warrant or other legal process seeking disclosure of such information.”

Ms. Zorn explained to CBI investigators, who were the first law enforcement investigators to ask, that she was able to access the KDOR website with the information provided by the document supplied by Mrs. Maag and confirmed the accuracy of the document. After logging off and deciding she should have obtained a printed copy for her editor, she attempted to log back in and Ms. Newell’s name auto-filled in the dialog box.

As set forth above, the Agent with the Colorado Bureau of Investigation recently confirmed with the KDOR that Ms. Zorn’s explanation is consistent with the manner in which the website functioned in August of 2023—further eliminating any suggestion of the requisite culpable mental state necessary to support criminal charges for Ms. Zorn under Kansas law.

Conclusion: Phyllis Zorn committed no crime under Kansas law when she obtained the driving record of Kari Newell. This is consistent with the conclusion expressed by KDOR Attorney, Ted Smith, to Agent Leeds on September 11, 2023.

6. **Was it a crime for Eric Meyer to direct Phyllis Zorn to use of Ms. Newell’s Personal Identifying Information to obtain Ms. Newell’s driver’s license record from the KDOR?**

As set forth directly above, Ms. Zorn did not commit a crime by accessing the KDOR website to view and later print a copy of Ms. Newell’s driving record.

Ms. Zorn readily acknowledged that she looked up Ms. Newell's driving record (detailed explanation set forth above) on the KDOR website. While Mr. Meyer asked her to do so, Ms. Zorn was the principal to the act. Any criminal liability for Mr. Meyer would have to rest on either criminal solicitation, as defined in K.S.A. 21-5303(a): "Criminal solicitation is commanding, encouraging or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating the felony," or simply as an aider and abettor, as defined by K.S.A. 21-5210:

(a) A person is criminally responsible *for a crime committed by another* (emphasis added) if such person, acting with the mental culpability required for the commission thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime.

(b) A person liable under subsection (a) is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by such person as a probable consequence of committing or attempting to commit the crime intended.

(c) A person liable under this section may be charged with and convicted of the crime although the person alleged to have directly committed the act constituting the crime:

- (1) Lacked criminal or legal capacity;
- (2) has not been convicted;
- (3) has been acquitted; or
- (4) has been convicted of some other degree of the crime or of some other crime based on the same act.

Conclusion: As set forth in detail above, Ms. Zorn committed no crime. Mr. Meyer cannot face criminal liability for either having solicited Ms. Zorn to commit a non-criminal act or for having aided and abetted Ms. Zorn's non-criminal act by asking her to confirm that the driving record they had been sent was in fact Ms. Newell's actual record. Mr. Meyer committed no criminal act.

7. **Was it a crime for Eric Meyer to email Chief Cody regarding Newell's driver's information?**

The analysis to this question is simple because in his August 4, 2023, email to Chief Cody and Sheriff Soyez, Mr. Meyer did not include either an image of Ms. Newell's driving record or any details regarding her personal identifying information. He shared only the fact that his newspaper had been provided a copy of the document, had confirmed its authenticity and clarified that he did not intend to run a story about the matter.

Conclusion: Eric Meyer committed no crime under the laws of the state of Kansas by sending Chief Cody an email that contained none of Ms. Newell's personal identifying information nor any images of Ms. Newell's driver's record.

II. Regarding the presentation of the warrants/ applications

A. Was it a crime for Chief Cody to swear to the applications to Judge Viar? Put another way, should he have known the applications contained inaccurate information, and if so is that a crime?

All the potential crimes with which Chief Cody could be charged for his role in the application and execution of the search warrants depend upon the existence of evidence sufficient to establish that Chief Cody knew the information to which he was swearing in support of the warrant was false.

K.S.A. 21-5824 defines the crime of **Making a False Information:**

- (a) Making false information is making, generating, distributing or drawing, or causing to be made, generated, distributed or drawn, any written instrument, electronic data or entry in a book of account *with knowledge that such information falsely states or represents some material matter* (emphasis added) or is not what it purports to be, and with intent to defraud, obstruct the detection of a theft or felony offense or induce official action.

K.S.A. 21-5903, **Perjury**, is defined as follows:

Perjury is *intentionally and falsely* (emphasis added):

(1) Swearing, testifying, affirming, declaring or subscribing to any material fact upon any oath or affirmation legally administered in any cause, matter or proceeding before any court, tribunal, public body, notary public or other officer authorized to administer oaths;

K.S.A. 21-5905, **Interference with the Judicial Process** is defined as follows:

(a) Interference with the judicial process is:

...
(5) *knowingly or intentionally* in any criminal proceeding or investigation (emphasis added):

...
(D) making, presenting or using a false record, document or thing with the intent that the record, document or thing, material to such criminal proceeding or investigation, appear in evidence to mislead a justice, judge, magistrate, master or law enforcement officer;

If evidence had been uncovered in the investigation that Chief Cody knew how the KDOR web site worked, and that he understood that Ms. Zorn (and others) did not have to falsely identify either herself, her reasons for seeking the record or the authority under which she sought the records, and he still swore to facts known to be untrue, the analysis and conclusions reached as to this issue would be very different. Because if Chief Cody knew the truth and chose to provide intentional misstatements in the search warrant application to Judge Viar he could be charged with any number of crimes set forth above.

The following nonexclusive list of contemporaneous emails and comments made in the presence of others, make it clear that all available evidence establishes that Chief Cody spoke and conducted himself as if he truly believed that Mr. Meyer, Ms. Zorn, Mrs. Maag and Mrs. Herbel had committed violations of state law in order to obtain and/or share Ms. Newell's driving record from the KDOR web site. Examples include, the following:

1. On Monday August 7, 2023, Chief Cody contacted Brogan Jones, Marion City Administrator to tell him he believed Kari Newell had been the victim of theft.
2. On August 7, 2023, Chief Cody told Kari Newell that he thought she had

- been the victim of a crime. She remembered him showing her the DPPA.
3. At 8:37 a.m. on Tuesday, August 8, 2023, Chief Cody sent an email to Joel Ensey, Marion County Attorney, in which he explained his conclusion that certain crimes had been committed regarding the possession and dissemination of Ms. Newell's driving record.
 4. In an incident report dated August 8, 2023, Chief Cody detailed the manner in which the investigation had developed as well as the basis for his conclusion that Ms. Newell was the victim of a crime.
 5. On August 9, 2023, during the meeting Chief Cody called with local law enforcement officers and KBI Agent Leeds, Chief Cody informed the gathering that he believed he had a situation involving identity theft and possible "public corruption" on the part of a city council member.
 6. On August 11, 2023 during the execution of the warrant on the home of Ruth Herbel, Chief Cody told her that the possession and sharing of Ms. Newell's driving record constituted "wire fraud" and "identity theft."
 7. On August 16, 2023, Chief Cody prepared charging affidavits for Eric Meyer, and others, which he sent the KBI.

The first indication that anyone in Marion law enforcement expressed doubt as to the sufficiency of evidence to establish a crime under Kansas criminal statutes was in an email sent by Det. Christner on August 15, 2023, – four days after the execution of the warrants: "I am not sure it fits any of the crimes we have discussed except the US fed code. Maybe there is something I am missing."

It has been widely suggested in coverage of these events that Chief Cody's motive for obtaining and then executing the search warrants was retaliation for a story the Marion County Record was investigating regarding the circumstances under which Chief Cody left his previous employment in Kansas City.

This perception is not without a factual basis. Chief Cody was contacted by journalist Deb Gruver of the Marion County Record in early August seeking comment in response to concerns raised by anonymous sources as to the circumstances under which Chief Cody left his last employment. Ms. Gruver told investigators that Chief Cody responded by threatening to sue the paper for libel.

Additionally, the following anecdote from Phyllis Zorn's interview with CBI agents

speaks to the same perception. She told the agents that sometime in July of 2023, she had been at the Marion police station to pick up accident reports when Chief Cody invited her into his office. She recalled that Chief Cody told her that Eric Meyer and Deb Gruver “are ruining the paper.” Ms. Zorn said that he then suggested that she, “should start my own paper. And I just said, I can’t afford to do that. He said well, I know there are people who will invest, I’ll invest.” She added, that she had previously “heard those same words from the mayor many times . . . [A]nd I thought [Mayor] Mayfield has already infected Cody.”

While it is impossible to know exactly what Chief Cody’s subjective motives may have been, two interactions recorded during the execution of the search warrant are telling.

First, body worn camera video recorded Chief Cody speaking to Detective Christner regarding items that would need to be forensically examined. Chief Cody mentions reporter, Ms. Gruver, whose phone had already been seized and says, “I guess my question is Deb Gruver, cause I’m not trying to inconvenience her either.”

Second, body worn camera recorded officers inside the office of the Marion County Record during the execution of the warrant on August 11, 2023. Officer Hudlin is seen opening a file drawer at the desk of reporter Deb Gruver. In a series of hanging files within the drawer, Officer Hudlin looks at a particular file. Later, Officer Hudlin’s body camera captures Chief Cody coming into view. Chief Cody appears to look at Ms. Gruver’s desk when Officer Hudlin says words to the effect, “do you want to look through this desk,” then adds, you will understand. Chief Cody looked at the files in Ms. Gruver’s cabinet and responds, “What’s in this? Hmm, a file on me? Keep a personal file on me, I don’t care,” before shutting the cabinet drawer and moving on from the area of Ms. Gruver’s desk. CBI investigators confirmed with Mr. Meyer that the file Deb Gruver had

amassed regarding Chief Cody's time at his previous employment was not removed during the execution of the warrant and remained in the offices of the Marion County Record.

If Chief Cody's ulterior motive for seeking and then executing the warrants was the paper's ongoing investigation into his own employment history, he convincingly feigned disinterest in the moment he was faced with Ms. Gruver's working notes on the potential story.

Conclusion: The analysis of this potential crime starts with *mens rea*; i.e., the requirement for all crimes in Kansas that the alleged perpetrator possess "the requisite mental state" pursuant to K.S.A. 21-5202. See *State v. Dinkel*, 314 Kan. 146, 156 (2021).

Injected into this analysis is the specter of K.S.A. 21-5207, **Ignorance or mistake of fact**, defined as,

"(a) A person's ignorance or mistake as to a matter of either fact or law, except as provided in K.S.A. 21-5204, and amendments thereto, is a defense if it negates the existence of the culpable mental state which the statute prescribes with respect to an element of the crime."

If Chief Cody harbored ill-motives toward the Marion County Record, he managed to keep them hidden in personal communications with other officers both verbal and electronic. The investigation uncovered no evidence to establish that Chief Cody actually knew that Ms. Newell's driving record was accessible through the free public portal on the KDOR's website, nor is there an explanation as to why he would choose to expose himself to the consequences of a fabrication that was so easily disproven.

The more plausible explanation, as evidenced by Chief Cody's repeated statements in contemporaneous emails, reports and statements to others, is that he and the officers working with him genuinely reached the conclusion that they had uncovered a crime, and that the only way for Mrs. Maag, Mrs. Herbel, Ms. Zorn and Mr. Meyer to have obtained

copies of Ms. Newell's driving record was for them to have falsified their identities and/or their motives on the KDOR website.

The consequence of Chief Cody's conclusion was compounded by his decision to seek the warrants and execute the same on the 11th rather than waiting for KBI Agent Leeds to forward the investigation to the KBI's "computer team" and follow up the next week. Chief Cody's dissatisfaction with the KBI response and Det. Christner's comments that digital evidence could be easily corrupted appear to have contributed to this decision to, "jump the gun," as SAC Popejoy later put it.

Without evidence to establish that Chief Cody knew his conclusions were inaccurate and, therefore, that he knew the sworn statements in the warrant applications were not accurate, there is insufficient evidence to establish that Chief Cody committed a violation of the criminal laws of the state of Kansas by applying for the search warrant applications and swearing to them before Judge Viar.

Put another way, it is not a crime under Kansas law for a law enforcement officer to conduct a poor investigation and reach erroneous conclusions. The remedy is the suppression of evidence (see discussion above regarding the "Exclusionary Rule") and/ or civil litigation (see *State v. McCloud*, 257 Kan. 1 [1995], discussed below).

III. Regarding the execution of the Warrants on August 11, 2023

A. Did Chief Cody commit a misdemeanor battery against journalist Deb Gruver when he took her cell phone outside of the side door of the Marion County record?

K.S.A. 22–2508 states that “[a]ll necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.”⁶

In *State v. Cline*, 63 Kan.App.2d 167, 182 (2023), the Kansas Court of Appeals, discussed the history of appellate court’s application of the exclusionary rule to claims of excessive force in the execution of search warrants:

Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. See *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (recognizing exclusionary rule in criminal prosecutions in federal court) [overruled on other grounds by *Elkins v. U.S.*, 80 S.Ct. 1437, 364 U.S. 206 (1960)]); see also *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (applying exclusionary rule in state court prosecution through the Fourteenth Amendment).

On August 11, 2023, Chief Gideon Cody is recorded on Detective Christner’s body worn camera entering the back door of the Marion County Record. Reporters Deb Gruver and Phyllis Zorn are seated outside on the concrete landing at the door. Ms. Gruver is holding her cell phone in her left hand. She is handed a copy of the search warrant. She begins to look at the documents, then brings her right hand up, holding her cell phone, and says, “I’m calling Eric.” At 10:55:42 on another officer’s body camera, Chief Cody is

⁶ Note that federal law goes so far as to say “The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. 18 U.S.C.A. 3109,

seen reaching down and taking the phone from Ms. Gruver's hand. Ms. Gruver later told investigators that Chief Cody "aggressively yanked the phone out of my hand." Ms. Zorn described Chief Cody as having "ripped the phone out of [Ms. Gruver's] hand."

In the body worn camera, Ms. Gruver can be heard responding, "Why did you take my phone, my personal cell phone?" Chief Cody says, "All electronic devices are part of the search warrant." He then looks at another officer, who confirms that cell phones were covered by the warrant. On that point, as set forth above, the warrant did authorize the seizure of,

"Digital communication devices allowing access to the Internet or to cellular digital networks which were or have been used to access the Kansas Department of Revenue website."

While that language is fairly broad, "[t]he test to determine whether a search warrant meets the constitutional requirement of specificity is one of practical accuracy rather than one of technical sufficiency, and absolute precision in the search warrant is not required in identifying the place to be searched or the property to be seized." *State v. LeFort*, 248 Kan. 332, §2 (1991).

That Ms. Gruver was seated on the cement landing outside the Marion County Record at the time of the seizure of her phone, rather than inside the building, does not change the analysis under Kansas case law:

"The term premises in a search warrant includes all property necessarily a part of and appearing so inseparable as to be considered a portion thereof. The term premises, therefore, describes a single unit of ownership—*i.e.*, the whole of the property." *State v. Patterson*, 304 Kan. 272, Syl. 1 (2016).

In *State v. McCloud*, 257 Kan. 1 (1995), the Kansas Supreme Court addressed an allegation of excessive force in the execution of a search warrant. In *McCloud*, the police used an unauthorized "flash bang" diversionary "explosive device which makes a bright flash and a loud noise and is designed to startle a building's occupants." *McCloud* 257

Kan., at 12. The Kansas Supreme Court did not suppress the evidence seized in the warrant finding instead,

“We conclude that the exclusionary rule should not apply in this case. We believe that the right to bring a civil action against an officer is usually a sufficient deterrent to an officer's use of unreasonable force.”
See *Dauffenbach v. City of Wichita*,⁷ 233 Kan. 1028, 667 P.2d 380 (1983) (party has the right to bring a civil action against law enforcement officers who use unreasonable force in making an arrest).
McCloud, 257 Kan. 14.

This is not to suggest that the *McCloud* decision forbade the filing of a criminal charge against a police officer for exercising excessive force in the execution of a warrant, but the *McCloud* decision strongly suggests that the appropriate remedy is to be found in the civil courts.

Conclusion: As has been discussed at great length above, the warrant executed on August 11, 2023, would not have survived appellate review. Evidence seized as a result of the execution of the warrants would have been suppressed under the exclusionary rule. That said, in the moment the warrants were served, the appellate process had not yet begun. Chief Cody went to the Marion County Record with a warrant signed by a judge. K.S.A. 22–2508 authorized “[a]ll necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.”⁸ Taking

⁷ Later disapproved in *Unrugh v. City of Wichita*, 318 Kan. 12, 22-23 (2024): “Broadly speaking, police officers have a general duty to prevent crime and enforce laws. *Hopkins v. State*, 237 Kan. 601, 611, 702 P.2d 311 (1985) (“[T]he duty of a law enforcement officer to preserve the peace is a duty owed to the public at large. Absent some special relationship with or specific duty owed an individual, liability will not lie for damages.”) *Dauffenbach*, 233 Kan., at 1033; *Montgomery v. Saleh*, 311 Kan. 649, 653, 466 P.3d 902 (2020). And when acting within the scope of their general duty, officers have immunity. K.S.A. 75-6104(c). . . . But, despite this, liability in negligence may arise when an officer breaches a specific or special duty owed to an individual. The challenge is determining when an officer's general duty to the public narrows to a special duty to the individual . . . should not be literally read to mean a special duty cognizable in negligence is owed *anytime* a police officer affirmatively acts and causes injury. The case law the *Dauffenbach* court cites contextualizes its language to require something more is necessary to constitute an actionable negligence claim. Otherwise, a claim for negligent excessive force, without a special duty independent of the force itself, simply transforms civil battery into negligence, merging distinct legal concepts into one.)

⁸ Note that federal law goes so far as to say “The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he

an item of evidence authorized by that warrant—a “[d]igital communication device allowing access to the Internet or to cellular digital networks”—was allowed in that moment.

This conclusion is expressly limited to potential criminal liability. This report explicitly offers no commentary on the viability of a civil law suit brought under the same facts.

B. Do law enforcement officers bear criminal culpability for the death of Joan Meyer?

On August 11, 2023, after the search warrants were served on the Marion County Record and the home where Eric Meyer resided with his mother, Joan Meyer (98), Mr. Meyer reported that his mother was very upset by the officers’ actions, especially in the service of the warrant at their personal residence.

On the afternoon of August 12, 2023, Ms. Meyer lost consciousness. EMS was called and, despite life saving measures, resuscitative efforts were terminated at 2:53 p.m.

No autopsy was requested but a “Report of Death” was provided by the office of the Coroner, Marion County, Kansas. In the report, the “final diagnosis” was listed as “sudden cardiac arrest,” and the manner of death was listed as “natural.”

Homicides in Kansas require the state to prove one of the *three* following mental states (*mens rea*): (1) intentional, (2) knowing or (3) reckless. Notably, there is no negligent homicide in Kansas.

There has been no suggestion raised in the investigation that any of the officers at the Meyer residence during the execution of the warrant intended to kill Mrs. Meyer or that they “knowingly” killed her. The question centers solely on the definition of the

is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant. 18 U.S.C.A. 3109,

“reckless” mental state.

The legal definition of “recklessly” is found at K.S.A. 21-5202(j):

(j) A person acts “recklessly” or is “reckless,” when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, *and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.*

The degree to which the person “consciously disregards” the risk in question is paramount to the analysis. In *State v. Huser*, 265 Kan. 228, 234 (1998), the Kansas Supreme Court held, “evidence of driving under the influence does not, standing alone, amount to reckless behavior. One’s behavior is only reckless if he or she realizes that his or her conduct creates imminent danger to another person but consciously and unjustifiably disregards the danger.” In other words, according to Kansas law, driving drunk by itself is not reckless—driving drunk while knowing that one’s level of intoxication puts all other driver’s or pedestrians at risk, would be.

In *State v. Deal*, 293 Kan. 872, 884-85 (2012), the court addressed the issue of recklessness under, K.S.A. 21-3201(c), later re-codified as K.S.A. 21-5202(j), as follows:

The legislature did not define “recklessly” but did define “reckless conduct” as “conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger.” K.S.A. 21-3201(c). Citing this definition, we recently explained that for a defendant’s conduct to be reckless the defendant “must know that he or she is putting others in imminent danger ... but need not foresee the particular injury that results from his or her conduct” for the conduct to be reckless. *State v. Gatlin*, 292 Kan. 372, 377, 253 P.3d 357 (2011); see also *State v. Bolton*, 274 Kan. 1, 8, 49 P.3d 468 (2002) (reckless second-degree murder is an unintentional killing that requires reckless behavior). Substituting these definitions for the defined terms, an unintentional but reckless second-degree murder in violation of K.S.A. 21-3402(b) is a killing of a human that is not purposeful, willful, or knowing but which results from an act performed with knowledge the victim is in imminent danger, although death is not foreseen. See, e.g., See *State v. Tahah*, 293 Kan. 267, 272, 262 P.3d 1045 (2011) (defendant stated he was lowering rifle when “ ‘a round went off’ ” and “ ‘I didn’t want to kill her’ ”); *State v. Cordray*, 277 Kan. 43, 56, 82 P.3d 503 (2004) (evidence

sufficient to support jury verdict of unintentional but reckless second-degree murder where the defendant fired a gun in the general direction of a vehicle at night, striking an occupant); see also *State v. Jones*, 27 Kan. App. 2d 910, 915, 8 P.3d 1282 (2000) (held jury could have found evidence supporting recklessness where witnesses testified defendant shot gun randomly over crowd of people with eyes closed).

In addition to the requirement that the alleged perpetrator of a crime possess the requisite *mens rea*, in order to establish criminal culpability, the state must also establish that the criminal behavior was the proximate cause of the resulting crime.

To establish that one thing proximately caused another, a party must prove two elements: cause-in-fact and legal causation. Generally, causation-in-fact requires proof that it is more likely than not that, but for the defendant's conduct, the result would not have occurred. Legal cause limits the defendant's liability even when his or her conduct was the cause-in-fact of a result by requiring that the defendant is only liable when it was foreseeable that the defendant's conduct might have created a risk of the harm and the result of that conduct and any contributing causes were foreseeable). *State v. Arnett*, 307 Kan. 648 (2018).

The coroner noted that Ms. Meyers found the situation “extremely upsetting.” His final diagnosis was the manner of death was “natural.” One could assume that, but for the execution of the warrant and the consequent extreme upset this caused to Mrs. Meyer, that she would not or might not have died on August 12, 2023. That said, “[p]resumptions and inferences may be drawn only from facts established.” *State v. Gobin*, 216 Kan. 278 (1975). A conviction cannot be sustained by “a presumption based upon other presumptions,” i.e. by the stacking of inferences. *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017).

Conclusion: Despite the coroner’s finding that the cause of Mrs. Meyer’s death was natural, the death of the 98-year-old matriarch of the Meyer family and the Marion County Record the day after the execution of search warrants in her home presents a situation where “a prosecutor may feel the need to vindicate the wrong.” *State v. Cummings*, 297, Kan. 716, 726 (2012). The *Cummings* court focused on the risk of

“hindsight bias” in emotionally volatile situations and overturned the involuntary manslaughter conviction of an infant victim based, in part, on the risk the jury was misled by hindsight bias as a result of the instructions given to the jury.

In this case, the officers were serving a warrant that would not have withstood appellate review, due to a lack of particularity and the lack of a sufficient nexus to the Meyers’s residence. However, the manner in which the officers served the warrant—providing Mrs. Meyer a copy, and entering the residence to look for the items listed in the warrant—did not constitute a gross deviation from the normal manner in which search warrants are executed.

There is no evidence to suggest that the officers intended to cause Mrs. Meyer’s death, or that they knew that executing the warrant would cause her death. Under the Kansas definition of “recklessness,” there is no evidence to establish that the officers realized their “conduct create[d] imminent danger to another person” and “consciously and unjustifiably disregard[ed] the danger.” Unlike a person who shoots a firearm into a crowd or drives a motor vehicle onto a crowded sidewalk aware of the risk to which they are exposing others, there is no evidence the officers believed they were posing a risk to Mrs. Meyer’s life.

Questions as to the relative negligence of the officers in this situation are outside of consideration of criminal conduct in Kansas, as Kansas criminal statutes do not contain a negligence *mens rea*.

IV. After The Execution Of The Warrants

A. Did Chief Cody Commit Any Crimes In His Internal Communications and/or Public Statements After the Execution of the Warrants?

The public condemnation that followed the execution of the search warrants on

August 11, 2023, was immediate and well documented. Within 24 hours, Chief Cody made several internal communications and public comments.

On August 12, 2023, at 12:40 p.m. Chief Cody sent a text to Mr. Ensey that read,

“Joel, KBI just called. They told me the[y] are 100 percent behind me and we did things exactly as it should have been done. They reached out to me. I didn’t call. Their number 2 will be calling me.”

To the contrary, SAC Popejoy denied using this language in her communications with Chief Cody.

On Monday, August 14, 2023, at 13:16 hours, Chief Cody emailed his former employer, the Kansas City Police Department, saying “I give my permission” to the department to “send the necessary information that refutes the allegations” regarding his departure from that department to KBI SAC Popejoy. He stated that he would like to make the material public but that he did not “want to hurt the integrity of [sic] case. He added that the KBI “are the lead investigators on this case. Please forward all request to [the KBI Public Information officer] for dissemination as she sees fit.” He wrote that SAC “Popejoy has graciously offered to have combined statement whereby their PIO and Kansas City Missouri Police Department’s PIO work together for a statement.”

Again, SAC Popejoy made it clear in her interview with the CBI agents that the KBI never agreed to coordinate a response on Chief Cody’s behalf with the KCPD.

Chief Cody posted on the Marion Police Department’s Facebook page, the following comments;

“I believe when the rest of the story is available to the public, the judicial system that is being questioned will be vindicated. I appreciate all the assistance from all the State and Local investigators along with the entire judicial process thus far.”

He then went on to quote portions of the federal Privacy Protection Act, 42 U.S.C. §§ 2000aa-2000aa-12, which generally protects journalists from searches by law enforcement.

The suggestion that state investigators (presumably, the KBI) assisted the Marion Police Department “along with the entire judicial process” is not supported by the investigation. KBI Agent Leeds said he told Chief Cody he would forward the investigation to the computer team and get back with Marion Police the following week. Based on his comments to Ruth Herbel the morning of August 11, 2023 during the execution of the warrant in her home, it could be argued that Chief Cody believed the KBI computer experts would only assist by subsequently downloading computers. What is clear is that Chief Cody elected to move forward without the KBI I’s assistance on August 11, 2023. His staff emailed the warrants to Agent Leeds, but no further communication was completed between Chief Cody and the KBI until after the warrants were executed and the negative public reaction ensued.

Under K.S.A. 21-5905, Interference with the judicial process is defined as follows:

(a) Interference with the judicial process is:

(1) Communicating with any judicial officer in relation to any matter which is or may be brought before such judge, magistrate, master or juror with intent to improperly influence such officer;

...

(5) knowingly or intentionally in any criminal proceeding or investigation:

(C) altering, damaging, removing or destroying any record, document or thing, with the intent to prevent it from being produced or used as evidence;

A text sent to the county attorney, an email sent to the KCPD or a commentary posted on Facebook do not constitute interference with judicial process. Whether these statements were the product of an effort to shift blame, or evidence of the Chief’s misunderstanding of the situation, is nearly immaterial. The fact is the statements were

made well after the warrants had been applied for and executed. These communications induced no official, judicial reaction.

Conclusion: Chief Cody's statements to the County Attorney, the KCPD, and posts on Facebook did not constitute the crime of Interference with Judicial process.

B. Did Chief Cody Commit Any Crime With Regard to His Interaction With Kari Newell, After The Execution Of The Warrants On August 11, 2023?

1. Handwritten letter

Ms. Newell alleged that the front page was missing from a written statement that she generated after the warrants were executed. According to Ms. Newell, she produced a handwritten statement three to four pages in length at the request of Chief Cody. Ms. Newell reported the statement was then picked up personally by Marion Police Officer Jonathon Benavidez. Ms. Newell said she had written the document because Chief Cody told her that the K.B.I. was in town and needed her statement that day.

Ms. Newell later requested a copy of her statement and said that Chief Cody told her that she could not have it because it was now evidence. Ms. Newell, however, was subsequently contacted by a journalist from Kansas City, who had a copy of the statement. The journalist sent Ms. Newell a copy of the handwritten statement. It was at this point that Ms. Newell said she realized the first two pages (front and back of page 1) of her handwritten statement were missing. She said these pages concerned her interaction with Chief Cody.

Ms. Newell told KBI ASAC Joby Harrison that on September 26, 2023, she received a call from Chief Cody at 6:30 a.m. She said he was "in a panic about potential missing pages of her written statement." She was sure her handwritten statement had started with a recitation of the moment Chief Cody reached out to her to tell her she had been the

victim of a crime when she was in the divorce proceeding.

The next morning, September 27, 2023, Ms. Newell followed up with a text to Chief Cody at 8:51 a.m. Portions of the ensuing text messages exchanged between them read as follows:

KARI [starting @ 8:51am]:

" . . . And now with half my statement missing I'm flipping out a bit. Did you even get to read it before kbi collected it? I'm sorry, I don't mean to get you worried or worked up but my anxiety is back to crazy levels."

...

"There's so much conflicting information flying around and so many inconsistencies. It's just wild to me."

Chief CODY:

"I don't think John picked up more than what we have for your notes. Or I would have used them in the report. You keep good notes. KBI is stepping out so you are being paranoid . . .

The CBI investigation requested all documents from the investigative agencies involved. The documents produced by the Marion Police Department contain only the final pages of Ms. Newell's document, not the first page (front or back) that she maintains she wrote and provided to Officer Benavidez.

Under K.S.A. 21-5904, Interference with Law Enforcement (formerly referred to as "obstruction of justice") is defined as follows:

(a) Interference with law enforcement is:

...

(2) concealing, destroying or materially altering evidence with the intent to prevent or hinder the apprehension or prosecution of any person; or

Conclusion: re the handwritten letter: Ms. Newell is adamant that her handwritten statement was "three or four" pages in length and contained another page (front and back) with additional information. Officer Benavidez, to whom she handed the document, and Officer Hudlin, the officer to whom Officer Benavidez then handed the

document, both deny having removed a page. Chief Cody has made no admissions in this regard.

The suggestion that Chief Cody removed a page from a material witness's statement is troubling, but the witness, Ms. Newell, did not maintain a copy and is not sure whether the statement was three or four pages in length. If in fact the front page was handed to Benavidez, there is insufficient evidence to determine beyond a reasonable doubt what happened to that page or the responsible party.

2. Text Messages

The legal analysis of this issue is not included in the public release of this report. The findings will be incorporated into charges which will be sought in Marion, County District Court. The proposed charging document will allege that Gideon Cody committed the crime of Obstruction of Judicial Process, in violation of K.S.S. 21-5905 (a)(5)(A).

Pursuant to Supreme Court Rule 3.6, no further comment regarding this allegation or the facts in support thereof will be included in the above and foregoing report.

Once a case is filed, the process for obtaining a copy of that charging affidavit is found at K.S.A. 22-2302 (as amended by 2014 Senate Substitute for House Bill 2389). Inquiries can be directed to the Marion County Clerk of the Criminal Court.

CONCLUSION

A. Factual Summary

Given the volume of the factual assessment in this report, the factual synopsis of this event is as follows:

1. On August 7, 2023, Chief Cody read the email Eric Meyer had sent him the previous Friday, explaining that the paper had received Ms. Newell's driving record from a "source." Chief Cody immediately reached the assumption that someone had stolen the

document from Ms. Newell's mail. He also concluded from this email that perhaps one of his own officers had inappropriately run her driving record.

2. Chief Cody asked Officer Hudlin to investigate. On August 7, 2023, Officer Hudlin spoke to a representative at the KDOR. During three audio calls totaling 27:57 minutes (with 11:55 minutes of hold time with KDOR), Officer Hudlin reached what appears to have been an honest but mistaken conclusion that journalist Phyllis Zorn had falsified her name and motives to gain access to the KDOR records.

3. That this misunderstanding was shared with and then adopted by Chief Cody is evident by the text Chief Cody sent Marion County Attorney, Joel Ensey, on August 9, 2023, at 5:21 a.m. that read,

“Good morning. Call me when you can this morning. KBI will be lead in the investigation. I sent them a brief, and they are sending out investigators. Other charges are coming with this as well. I want to keep you in the loop. It appears larger than when I looked at it first.”

4. Marion County law enforcement officials met with KBI Agent Leeds on Wednesday, August 9, 2023. Sheriff Soyez left that meeting with the understanding that Agent Leeds “said I think, he, he said, well, give me the entire case. I’ll let you, uh, um basically run with it, but I wanna review, you know.” For his part, Agent Leeds left the meeting with the understanding that he would forward the investigation to the KBI to be evaluated by the “computer team,” and then get back with the Marion County Officials the following week.

5. Perhaps, based upon concerns expressed by Detective Christner that digital evidence was highly volatile and might not wait a week, or perhaps because Detective Hudlin told Chief Cody that the preservation letter sent to the internet provider for the Marion Record might not be honored due to the company being from out of state, or perhaps because Chief Cody found the KBI's response too slow—it appears Chief Cody was

dissatisfied with the response from Agent Leeds and elected instead to proceed with search warrant applications without the KBI or, indeed, further confirmatory investigation. No civilian witnesses were interviewed in Marion, Kansas prior to the application for the search warrants. An inquisition was not sought in order to issue investigatory subpoenas.

6. Chief Cody did direct copies of the warrants be sent to Agent Leeds on August 10. The timeline set forth above makes clear that emails were sent to Agent Leeds which went unanswered and when Agent Leeds did later respond, he in turn received no answer. The final email from Marion County to the KBI that might have clarified what was about to happen the next day did not go through as a result of a formatting issue.

7. County Attorney Ensey was away from his office on a personal matter on Thursday August 10th and returned to work the morning of Friday, August 11th to a full docket (a full day of court appearances) and a message from Chief Cody that a team of officers was standing by ready to execute the warrants. County Attorney Ensey expressed his frustration about what he perceived to be the unnecessary urgency but, rather than reading the warrants in detail, elected instead to send his staff member to deliver the warrant applications to the judge.

8. Three of the four warrants were signed by Judge Viar. Marion City Police and Marion County Sheriff's Deputies then executed the warrants.

9. The specter of ulterior motives, personal animus and conclusions based not on investigation but rather on assumptions permeates much of this case. These factors arguably colored the perceptions of Marion law enforcement and civilian actors alike. The following quote from Officer Hudlin's interview with the CBI summarizes the manner in which these issues appear to have impacted this investigation:

“Um, so I think it, it was all assumption s. Um, because again we're a small town. Um, I knew that there was a connection. I, I knew that there were, that, um, Roger and Pam [Maag] and Kari and Ryan [Newell], when Kari and Ryan were together, I knew they were friends and they hung out. And I, I knew there was that connection there . . . And so, um, there was that and, then, uh, um, in Eric's email he said something about a source close to law enforcement or something. And then at one point referenced a “she” and so, again, it was all assumption. We just, that's where I got was, it's got to be Pam [Maag]. Because Ryan and Kari are going through this contention [sic] divorce. They're throw, they're slinging mud both ways. Um, I had known already that Pam and, um, Pam and Roger had sided with Ryan that they were, Kari is a piece of shit. Ryan is the good guy that, that that's the side we picked. So again, Kari lives right back here. Ryan lives that side of town. So, um, they had picked Ryan and so and I mean, Pam is still slinging mud all over the place. But um, so I just figured, I, I mean again we, there were no accusations made, um, but that's where my, where I got to. Um, and I think in one of Ruth's emails she said what she got from Pam or something like that.”

Small town familiarity explains but does not excuse the inadequate investigation that gave rise to the search warrant applications in this matter. A few minutes on the phone with KDOR was, functionally, the entirety of this investigation. It would have taken longer to draft (and re-draft) the warrant applications than the time spent to investigate.

That said, there is no evidence that Marion law enforcement agents recognized the inadequacy of the investigation or intentionally or knowingly misled either other law enforcement agents or the court. The evidence strongly suggests they genuinely believed they were investigating criminal acts.

B. Legal Conclusions

The specially appointed prosecutors were tasked with the review of this matter to assess the potential criminal liability of any persons involved.

With respect to Ryan Newell, Pam Maag, Ruth Herbel, and Brogan Jones, the specially appointed prosecutors find insufficient evidence to establish the requisite *mens rea* necessary to establish the commission of crimes defined by Kansas statute.

With respect to the journalists at the Marion Record, Eric Meyer and Phyllis Zorn,

the specially appointed prosecutors find no evidence to establish the requisite *mens rea* necessary to establish the commission of any crime defined by Kansas statute.

With respect to the conduct of Marion Police Chief Gideon Cody, Marion Police Officer Zach Hudlin, part-time Marion Police Officer Eric Mercer, Marion Police Officer John Benavidez, Marion County Sheriff Jeff Soyez, Marion County Undersheriff Larry Starkey, and Marion County Sheriff's Detective Aaron Christner, and Deputy Janzen during the investigation that led to the issuance of search warrants for the residences of Ruth Herbel, and Eric and Joanne Meyer as well as the offices of The Marion Record, the special prosecutors find insufficient evidence to establish the requisite *mens rea* to establish the commission of any crime defined by Kansas statute.

With respect to the same law enforcement officers' conduct during the execution of the warrants on the residences of Ruth Herbel, and Eric and Joanne Meyer, as well as the offices of The Marion Record, the special prosecutors find insufficient *mens rea* necessary to establish the commission of any crime defined by Kansas statute.

With respect to Mr. Ensey and Judge Viar, the special prosecutors in this matter assessed the facts for criminal liability only. There is no evidence to establish the commission of any crime defined by Kansas statute by either Judge Viar or County Attorney Ensey.

The special prosecutors also reviewed the behavior of Chief Gideon Cody after the execution of the search warrants. The special prosecutors do find probable cause to believe Gideon Cody committed the crime of Obstruction of Judicial Process, in violation of K.S.S. 21-5905 (a)(5)(A). The charging documents will be sought in a separate proceeding in Marion District Court. Pursuant to Supreme Court Rule 3.6, no further comment regarding the allegation or the facts in support thereof will be set forth in the

above and foregoing report.

Finally, with respect to the involvement of the Kansas Bureau of Investigations' Agent Todd Leeds and SAC Bethanie Popejoy, as will be explained immediately below, there is no evidence they were responsible for the issuance or execution of the search warrants.

C. Findings re KBI

The Colorado Bureau of Investigations was brought in to investigate this matter following comments made by Chief Cody that the Kansas Bureau of Investigations was involved in and approved of the investigation and execution of the search warrants. The evidence establishes that KBI Agent Leeds was briefed by Chief Cody on August 9, 2023. Agent Leeds left the meeting with the understanding that he would run the case by the KBI's "computer team," and then get back with Marion County Officers the following week. Agent Leeds' comments to County Attorney Ensey in the moments after the meeting as well as his conversation with SAC Popejoy after the meeting make it clear this was Leeds' understanding at the time.

On Thursday, August 10th, Agent Leeds received unsigned search warrants in an email without explanation. Agent Leeds acknowledged that he did not read them in detail and only responded with the question, "did you serve these?" A subsequent email sent to Agent Leeds on the 11th was followed by the comment that they were with the judge waiting to be signed.

When asked why he did not make a formal effort to determine why the search warrants were sent to him or why Chief Cody appeared to be moving forward with warrants when Agent Leeds had expressed his intent to seek a review from the KBI computer team, Agents Leeds acknowledged that he should have. That his attention was

focused on personal matters—family members that had arrived at his home in anticipation of a family funeral on the 11th—offers a reasonable explanation for what could be described as his inattentiveness. That said, Agent Leeds’ lack of a formal, insistent response arguably led Chief Cody to construe Agent Leeds’ silence as acquiescence.

For her part, there is no evidence that SAC Popejoy was aware of Chief Cody’s intent to apply for or execute the search warrants on August 11, 2023, until the subsequent media response. SAC Popejoy had communicated with Chief Cody early in the week, which precipitated her sending Agent Leeds to Marion, but she understood from Agent Leeds that nothing formal would occur until Agent Leeds returned from funeral leave and the KBI computer team had been consulted.

When the public condemnation of the Marion Police Department and Chief Cody in particular began to swell in the days following August 11, 2023, Chief Cody made comments both publicly and in private (ex: in a text to County Attorney Ensey) that the KBI had approved of and remained supportive of his agency’s actions on the 11th. Whether Chief Cody believed this to be true as a result of the lack of formal protestations to the contrary from Agent Leeds on the 10th or 11th, the objective evidence does not support this assertion.

D. Final

Journalists, attorneys, mental health professional and members of the clergy each have long-recognized privileges in our law rooted in the freedom of religion, freedom of the press and right to legal representation. When a member of one of these professions becomes a suspect in a crime, law enforcement has the ability to investigate. However, in these situations, it is incumbent on law enforcement to take precautions to limit the scope of their investigation. Before a search warrant is sought for a press room, a law office,

church or the office of a mental health professional, inquisition subpoenas or other available forms of investigation should be utilized. Search warrants for law offices, press rooms and churches should be sought only in extraordinary circumstances and with extreme caution.



Marc Bennett
Specially Appointed Prosecutor



Barry Wilkerson
Specially Appointed Prosecutor

Addendum

On Saturday, August 12, 2023, Marc Bennett, District Attorney, Sedgwick County, contacted Marion County Attorney, Joel Ensey, regarding news reports of the execution of search warrants in Marion County the day before. According to Mr. Ensey, Mr. Bennett expressed concern about the situation in Marion and drew Mr. Ensey's attention to relevant case law. Bennett and Ensey were not acquainted with one another prior to the 12th of August.

Thereafter, on Monday, August 14, 2023, Mr. Ensey asked Mr. Bennett to review the three search warrants that had been executed in Marion County on August 11, 2023. Mr. Bennett, with the assistance of other Kansas prosecutors, including Mr. Wilkerson, read the warrants and offered their collective opinion as to the viability and sufficiency of the warrants—an opinion which was consistent with the assessment Mr. Ensey had already reached.

Mr. Bennett and Mr. Wilkerson had no additional contact with the case until they were asked to review the entirety of the investigation gathered by the CBI Agents.