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 *McLoud* decision forbade the filing of a criminal charge against a police officer for exercising excessive force in the execution of a warrant, but the *McLoud* 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

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[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.") Dauffembach, 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

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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 y 2014 Senate Substitute for House Bill 2389). Inquires 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 assumptions. 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 statue 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.