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March 30, 2012

ATTORNEY GENERAL OPINION NO. 2012- 8

Richard N. Raleigh  
Barber County Attorney  
P.O. Box 248  
Medicine Lodge, Kansas 67104

Re: Counties and County Officers—Sheriff—Qualifications for Office; Eligibility for Nomination, Election, or Appointment; Driving Under the Influence; Effect of Diversion

Synopsis: A person who has been charged with operating a vehicle under the influence of alcohol or drugs and thereafter completes diversion has not been convicted of or pleaded guilty to any violation of federal or state law or city ordinance relating to liquor or narcotics. The person is not disqualified under K.S.A. 19-801b(a)(3) from being a candidate for or holding the office of sheriff. Cited herein: K.S.A. 2011 Supp. 8-285; 8-1009; 8-1013; 8-1567; K.S.A. 19-801b; K.S.A. 2011 Supp. 21-5414; 21-5810; 21-6811; 21-6811a; K.S.A. 23-493; K.S.A. 2011 Supp. 50-6,112b; 72-1397; 72-5445; 72-5445a; 74-149; 74-5605; 76-11a13; L. 1972, ch. 75, § 2; L. 1982, ch. 322, § 1; L. 1997, ch. 168, § 1.

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Dear Mr. Raleigh:

As Barber County Attorney, you request our opinion regarding whether a person who was charged in September 1998 with operating a vehicle under the influence of alcohol or drugs and thereafter successfully completed diversion is precluded from being a candidate for county sheriff.

K.S.A. 19-801b provides in part:

(a) No person shall be eligible for nomination, election or appointment to the office of sheriff unless such person:

.....

(3) has never been convicted of or pleaded guilty or entered a plea of *nolo contendere* to any felony charge, a misdemeanor crime of domestic violence as defined in K.S.A. 74-5602 and amendments thereto or to any violation of any federal or state laws or city ordinances relating to gambling, liquor or narcotics.

A person who has been convicted of driving under the influence is precluded from being nominated, appointed, or elected to the office of sheriff.<sup>1</sup> Because the term "conviction" has different meanings in different statutory contexts,<sup>2</sup> it must be determined whether being charged with operating a vehicle under the influence and thereafter completing a diversion constitutes a conviction under K.S.A. 19-801b.

When courts are called upon to interpret statutes, the fundamental rule governing our interpretation is that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. For this reason, when the language of a statute is plain and unambiguous, an appellate court is bound to implement the expressed intent.<sup>3</sup>

"When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it."<sup>4</sup> "Courts presume the legislature acts with knowledge of existing statutory and case law when it enacts legislation."<sup>5</sup>

A review of diversion in Kansas law is helpful in determining the issue.

In Kansas, after a complaint charging a defendant with the commission of a crime has been filed but *before a conviction*, the State may propose a diversion agreement. K.S.A. 22-2907(1); see K.S.A. 12-4414(a).<sup>6</sup> A diversion agreement is "the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against him or her dismissed." K.S.A. 22-2906(4); see K.S.A. 12-4413(d). "No defendant shall be required to enter any plea to a criminal charge as a condition for diversion." K.S.A. 22-2910; see K.S.A. 12-4417. "[E]ntering into a diversion agreement pursuant to K.S.A. 12-4413 *et seq.* or 22-2906 *et seq.*, and amendments thereto, shall not constitute plea bargaining."

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<sup>1</sup> *Chamberlain v. Buhrman*, 250 Kan. 277, 279 (1992).

<sup>2</sup> *State v. Chamberlain*, 280 Kan. 241, 251 (2005).

<sup>3</sup> *Herrell v. Nat'l Beef Packing Co., LLC*, 292 Kan. 730, 745 (2011) (internal citations and quotation marks omitted).

<sup>4</sup> *State v. Comprehensive Health of Planned Parenthood*, 291 Kan. 322, 357 (2010).

<sup>5</sup> *Cochran v. State Dept. of Ag., Div. of Water Resources*, 291 Kan. 898, 906 (2011), quoting *Frick v. City of Salina*, 289 Kan. 1, 23 (2009).

<sup>6</sup> See also K.S.A. 2011 Supp. 8-1009.

K.S.A. 2004 Supp. 8-1567(p). *Diversion is, therefore, a means to avoid a judgment of criminal guilt. Petty v. City of El Dorado*, 270 Kan. 847, 852, 19 P.3d 167 (2001); see K.S.A. 22-2906(3) and K.S.A. 12-4413(c) and (d).<sup>7</sup>

No judgment of guilt is entered when diversion is granted.<sup>8</sup>

"Diversion has been offered as a statutory option to institutionalization only since 1978."<sup>9</sup> A person who has been convicted of violating a federal or state law or city ordinance related to gambling, liquor, or narcotics has been deemed ineligible under K.S.A. 19-801b to seek or hold the office of sheriff since its enactment in 1972.<sup>10</sup> The provision in K.S.A. 19-801b containing the disqualification has been amended twice since diversion became an option, but neither amendment addressed diversion.<sup>11</sup> While certain statutory provisions count diversions as "convictions" for the limited purpose of determining the number of offenses or criminal history,<sup>12</sup> in general Kansas statutes expressly recognize conviction and diversion separately.<sup>13</sup>

At the time the disqualification provision was enacted, diversion was not an option and the Legislature could not have intended that diversion be viewed as a conviction. When the Legislature established diversion, it included provisions that distinguish a conviction or determination of guilt from diversion. The Kansas Supreme Court recognized the distinction in its opinion in *State v. Chamberlain*. It is presumed the Legislature is aware of the current state of the law. The Legislature has shown such awareness by expressly addressing conviction and diversion in legislative enactments occurring since 1978. The Legislature has chosen, however, to leave out any references to diversion in K.S.A. 19-801b. We may not read into the statute something that is not readily found in its terms. A person who has been charged with operating a vehicle under the influence of alcohol or drugs and thereafter completes diversion has not been convicted of or

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<sup>7</sup> *State v. Chamberlain*, 280 Kan. 241, 245 (2005) (emphasis added).

<sup>8</sup> *Petty v. City of El Dorado*, 270 Kan. 847, 853 (2001).

<sup>9</sup> *State v. Clevenger*, 235 Kan. 864, 866 (1984).

<sup>10</sup> L. 1972, ch. 75, § 2.

<sup>11</sup> L. 1982, ch. 322, § 1 (added "of" after "convicted"); L. 1997, ch. 168, § 1 (added "a misdemeanor crime of domestic violence as defined in K.S.A. 74-5602 and amendments thereto")

<sup>12</sup> K.S.A. 2011 Supp. 8-285 (diversion included as conviction for determining habitual offender); 8-1013 (diversion included as conviction for determining number of offenses); 8-1567(n)(1) (diversion included as conviction for determining sentence); 21-5414 (domestic battery; diversion included in determining number of convictions); 21-5810 (criminal hunting; forfeiture of license upon first conviction or diversion); 21-6811 (determination of criminal history classification); 21-6811a (determination of criminal history classification).

<sup>13</sup> K.S.A. 23-493 (conviction and diversion included in definition of "duty of restitution"); K.S.A. 2011 Supp. 50-6,112b (scrap metal registration denied upon conviction or diversion); 72-1397 (teacher license not issued or renewed following conviction or diversion); 72-5445(b) (notice of nonrenewal or termination procedure not applicable in situations involving conviction or diversion); 72-5445a(b) (notice of nonrenewal or termination procedure not applicable in situations involving conviction or diversion); 74-149 (professional license not denied solely for conviction or diversion related to driving under the influence); 74-5605(d) (conviction or diversion disqualify person from certification as designated officers); 76-11a13(b) (schools for blind and deaf; notice of nonrenewal or termination procedure not applicable in situations involving conviction or diversion).

Richard Raleigh  
Page 4

pleaded guilty to or entered a plea of *nolo* contendere to any violation of federal or state law or city ordinance relating to liquor or narcotics. The person is not disqualified under K.S.A. 19-801b(a)(3) from being a candidate for or holding the office of sheriff.

Sincerely,

Derek Schmidt  
Attorney General

Richard D. Smith  
Assistant Attorney General

DS:AA:RDS: