

District Attorney Nola Foulston
18th Judicial District of Kansas
Office of the District Attorney
535 North Main
Wichita, Kansas 67203
Supreme Court Number 09175

**In the District Court of the
Eighteenth Judicial District of Kansas
Criminal Division**

**State of Kansas,
Plaintiff**

v.

CASE NUMBER 06 CR 2961

**George R. Tiller
Defendant**

**Supporting Legal Authority in Connection
With the State of Kansas Journal Entry of Dismissal
EXHIBIT A**

On the Twenty First day of December, 2006, Phill Kline, Kansas Attorney General, caused to be filed a Complaint and Information against the above-named Defendant in the Eighteenth Judicial District, District Court, Sedgwick County, Kansas.

Statutorily, the Attorney General of the State of Kansas was without statewide authority or jurisdiction to unilaterally file said complaint in the Eighteenth Judicial District of Kansas.

The District Attorney for the Eighteenth Judicial District of Kansas presents the following information in support of her action to dismiss said complaint for lack of authority and jurisdiction.

Relevant Facts

The statutes and case law are clear. While the Attorney General is the chief law enforcement official of the State of Kansas, that office does not have statewide authority

to unilaterally pursue criminal charges in jurisdictions where the Attorney General has not been “invited” or where the County or District Attorney has not “acquiesced” in the Attorney General’s prosecution efforts. The statutory authority, set forth below, further limits the powers of the Attorney General to appear in civil or criminal actions in the Supreme Court, however, said Attorney General has no statutory authority to enter a complaint and information in counties in the state of Kansas without direction or at the behest of the legislature or governor.

The District Attorney for the Eighteenth Judicial District of Kansas has received no notification from Governor Sebelius that she has requested that the Attorney General to pursue a criminal action in the 18th Judicial District, nor has notification been received of any legislative mandate regarding the pursuing of criminal charges by the Attorney General in the Eighteenth Judicial District.

The District Attorney has not invited or requested, consented or acquiesced, or failed to object to the filing of the Complaint. The District Attorney does in fact object to any such filing by the Attorney General as he lacks the legal authority to file such complaint in this jurisdiction.

Relevant Kansas Statutes

75-702

Chapter 75.--STATE DEPARTMENTS; PUBLIC OFFICERS AND EMPLOYEES Article 7.--ATTORNEY GENERAL

75-702. Duties and responsibilities; authority to prosecute. The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in any other court or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested or when the constitutionality of any law of this state is at issue and when so directed shall seek final resolution of such issue in the supreme court of the state of Kansas. The attorney general shall have authority to prosecute any matter related to a violation of K.S.A. 12-189 or 75-5133, and amendment thereto, related to unlawful acts when the offender is an officer or employee of a city or county.

History: L. 1879, ch. 166, § 71; R.S. 1923, 75-702; L. 1975, ch. 431, § 1; L. 2005, ch. 110, § 9; July 1.

The Kansas statutory framework does permit a county or district attorney to request the assistance of the Attorney General.

75-704

Chapter 75.--STATE DEPARTMENTS; PUBLIC OFFICERS AND EMPLOYEES Article 7.--ATTORNEY GENERAL

75-704. Aid to county attorneys; opinions. The attorney general shall consult with and advise county attorneys, when requested by them, in all matters pertaining to their official duties. The attorney general shall also, when required, give his or her opinion in writing, without fee, upon all questions of law submitted to him or her by the legislature, or either branch thereof, or by the governor, secretary of state, state treasurer, state board of education, or commissioner of insurance.

History: L. 1879, ch. 166, § 73; R.S. 1923, 75-704; L. 1968, ch. 14, § 2; L. 1974, ch. 364, § 15

The District Attorney of the Eighteenth Judicial District of Kansas has not requested that the Attorney General advise this office, or pursue criminal charges in this jurisdiction.

RELEVANT KANSAS CASE LAW

In the case of **State of Kansas v. Abu Isba**, 235 Kan. 851; 685 P.2d 856; 1984, the issue was whether the attorney general properly appeared as the prosecutor in a criminal action before the district court. The court reviewed the powers of the attorney general:

Abu Isba, *supra*. explains: The constitution and statutes of this state are helpful, but the specific authority of the attorney general to prosecute cases in the trial courts is not spelled out in detail. Likewise, our earlier decisions do not reach the question before us. Article 1, § 1 of the Constitution of Kansas designates the attorney general as one of the executive officers of this state. The constitution is silent as to the attorney general's powers and duties. K.S.A. 75-702 makes it incumbent upon the attorney general to appear for the State and prosecute or defend, *in any court*, any civil or criminal matter in which the State may be interested, when the attorney general is 'required by the governor or either branch of the legislature' to do so. Absent gubernatorial or legislative direction, that statute requires the attorney general to appear and defend only those cases which are before the Kansas Supreme Court. K.S.A. 75-108 also imposes upon the attorney general the duty to protect the interests of the State in any action when informed of such action by the governor.

K.S.A. 19-702 imposes a duty upon the county attorneys to appear in the several courts of their respective counties and prosecute or defend on behalf of the state all suits, civil or criminal, arising under the laws of this state, in which the state or the respective county is interested. K.S.A. 19-711 provides that when the county attorney is disabled, any court before whom it is his duty to appear may appoint an attorney to act as county

attorney. K.S.A. 19-723 authorizes the board of county commissioners to employ an additional attorney to assist the county attorney.

K.S.A. 75-704 imposes a duty upon the attorney general to consult with and advise county attorneys, when requested by them, in all matters pertaining to their official duties. K.S.A. 41-1107 imposes a duty upon the county attorneys to enforce the intoxicating liquor laws, and when the county attorney neglects or refuses to do so, imposes that duty upon the attorney general." 234 Kan. at 576.

Unlike the County Attorney in the *Abu-Isba* case who did not object to the presence of the Attorney General in that jurisdiction, this District Attorney clearly voices objection to the Attorney General's usurpation of the power of the duly elected state-representative and chief law enforcement official of this jurisdiction. Failure to object to this unauthorized practice would set an illegal precedent, contrary to statute and case law, as to the singular power and authority of the District or County Attorney to prosecute violations of the law in their jurisdiction without interference.

Also citing: State of Kansas v. Jay Don Reynolds, 234 Kan. 574, 673 P.2d 1188 (1984) attached; State of Kansas v. Charles M. Bowles 70 Kan. 821, 79 P. 726 (1905) attached; State of Kansas v. Berg, 236 Kan. 562, 694 P. 2d 427 (1985)

Wherefore, the District Attorney for the Eighteenth Judicial District of Kansas takes the following action: Dismissal of State of Kansas v. George R. Tiller, Case No. 06 CR 2961 on this 22nd day of December, 2006.

Submitted

ss/Nola Tedesco Foulston_____
District Attorney Nola Tedesco Foulston
18th Judicial District of Kansas
Supreme Court Number 09175