Approved on: February 12, 2001
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. On January 30, 2001 in Room 313-S of the Capitol.

All members were present except:
Representative Jan Pauls - Excused
Representative Clark Shultz - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jennifer Strait, Intern for Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Kyle Smith, Kansas Bureau of Investigations
Sgt. Lance Royer, Shawnee County Sheriff's Department
Denny Hamblin, Johnson County Sheriff's Department
Tammy Rider, YMCA Battered Women's Task Force
Pattie Yates-Belden, Hutchinson's Sexual Assault & Domestic Violence Center
Sandy Barnett, Kansas Coalition Against Domestic Violence & Abuse
Brent Venneman, Kansas County & District Attorneys Association
Professor Michael Kaye, Washburn School of Law
Ron Wurtz, Kansas Bar Association
Randall Hodgkinson, Topeka

Representative Morrison requested a bill which would allow a parent, attorney or guardian to be present at the time of juvenile intake & assessment center. She made the motion to have the request introduced as a committee bill. Representative Ruff seconded the motion. The motion carried.

Chairman O'Neal requested a bill drafted by Uniform Law Commission that is a rewrite of the Enforcement of Domestic Violence Protection Act. He made the motion to have the request introduced as a committee bill. Representative Patterson seconded the motion. The motion carried.

Chairman O'Neal requested amendments substantive in nature to Article 9. He made the motion to have the request introduced as a committee bill. Representative Loyd seconded the motion. The motion carried.

Representative Rehorn requested a bill which would amend circulation notices in the four largest counties in the state. He made the motion to have the request introduced as a committee bill. Representative Shriver seconded the motion. The motion carried.

Chairman O'Neal received a request from Representative Sloan which could clarify that courts have the authority to grant divorces but continue to have the authority over other issues in the case, such as child custody & support. He made the motion to have the request introduced as a committee bill. Representative Loyd seconded the motion. The motion carried.

Hearings on **HB 2075 - fingerprinting juveniles who commit assault,** were opened.

Kyle Smith, Kansas Bureau of Investigations, the current fingerprinting statutes applies to adults who commit assault and the KBI would like to include juveniles for criminal history purposes. (Attachment 1)

Hearings on **HB 2075** were closed.

Hearings on **HB 2077 - protection from abuse orders entered into the national crime information center protection order file**, were opened.

Kyle Smith, Kansas Bureau of Investigations, appeared in support of the proposed bill. He commented that all protection from abuse (PFA) orders would be entered into the National Crime Information Center (NCIC) so that any law enforcement organization could check on it at any time to see if there was an existing PFA

or if there has been updates to the order. It would apply to both foreign orders and expand PFA orders to apply to stalking cases and instances where the parties have not lived together. (Attachment 2)

Members of the committee were concerned with PFA's being expanded to include stalking, since there usually isn't a charge pending.

Sgt. Lance Royer, Shawnee County Sheriff's Department, he explained that PFA's have been entered in by Shawnee County for several years and have found that it is very helpful in determining which PFA order is in affect. (Attachment 3)

Denny Hamblin, Johnson County Sheriff's Department, had concerns with foreign PFA orders as to whether the notification would be received in a timely manner and whether they would have adequate identifiers to enter into the NCIC. (Attachment 4)

Tammy Rider, YMCA Battered Women's Task Force, supported the effort to broaden who PFA orders can cover to make the community a safer place to live. (Attachment 5)

Pattie Yates-Belden, Hutchinson's Sexual Assault & Domestic Violence Center, also supported the bill and believes that there are times when probable cause exists when two people do not have a link, such as living together, they need a recourse and filing a PFA gives them peace of mind. (Attachment 6)

Sandy Barnett, Kansas Coalition Against Domestic Violence & Abuse, appeared as a proponent of the bill. She suggested that if the committee couldn't see their way to include stalking as a reason for a PFA then at least recognize those who have a dating relationship. (Attachment 7)

Hearings on **HB 2077** were closed.

Hearings on **HB 2076 - search incident to lawful arrest includes evidence of any crime**, were opened.

Kyle Smith, Kansas Bureau of Investigations, appeared in support of the proposed bill. It is logical that when law enforcement arrest someone they are allowed to search the person, and his wing span to make sure there are no weapons and possible evidence. The Supreme Court in New York v. Belton expanded the bright-line rule to apply to automobiles.

The proposed bill would change "the" to "a" to being the statute in accordance with laws elsewhere in the United States so that any criminal items found during a search could be held as evidence and the alleged offender could be prosecuted for that crime. (Attachment8)

Brent Venneman, Kansas County & District Attorneys Association, appeared as a proponent of the bill. He commented that Kansas' statute is out of date with the United States Supreme Court. He believes that the bright-line rule works and that people know what to expect. Once the lawful arrest has been made then a search can be conducted. (Attachment 9)

Professor Michael Kaye, Washburn School of Law, appeared as an opponent to the bill. He believes that searches should be limited to legitimate purposes or consent. *State v. Tygart* upholds this belief that searches can be extended to automobiles but it limits where & when the search can be done. He stated that the only time a search of the whole vehicle can be done is when there is probable cause as sited in *California v. Acevedo*. (Attachment 10)

Ron Wurtz, Kansas Bar Association, commented that the proposed bill would violate Supreme Court interpretation of the Fourth Amendment. If the bill passes it would allow officer to go on a fishing expedition to look for any crime in both his home and automobile. He questioned the need for the change when current law is satisfactory in that it allows officers to look around the immediate area to see if there are any weapons or fruits of the crime.(Attachment 11)

Randall Hodgkinson, Topeka, has had cases where warrants are served when the person is in their vehicle so that the officer can search it. He doesn't believe this is right and that the passage of the proposed bill would cause potential problems. (Attachments 12)

Hearings on **HB 2076** were closed.
The committee meeting adjourned at 5:45. The next meeting is scheduled for January 31, 2001.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
KYLE G. SMITH, DIRECTOR OF PUBLIC & GOVERNMENTAL AFFAIRS
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF HB 2075
JANUARY 30, 2001

Mr. Chairman and Members of the Committee:

I appear today in support of HB 2075, which corrects a conflict within the Kansas laws on criminal history record information. I believe this committee has heard a presentation by Barb Tombs, Executive Director of the Kansas Sentencing Commission, and as such, is somewhat familiar with how the sentencing procedure works. Essentially one of the two criteria in determining a sentence is a defendant's prior criminal history. To avoid confusion and subterfuge, criminal history record information is based solely on fingerprints. Names, dates of birth and appearances can be altered. Fingerprints remain the same.

The sentencing guidelines require courts to consider any prior person offenses on the sentencing grid a person's current offense would fall. However, when implementing the sentencing grid into the existing juvenile code, only covered felonies and A and B person offenses were included. Assault, a person crime that is to be tracked, was left out, as it is a class C misdemeanor.

Therefore, we have a situation where a person's prior conviction for assault as a juvenile is, by law, to be considered in setting penalties for future offenses. However, we cannot report such a conviction since it is not tied to fingerprints within our database. HB 2075 would correct this oversight by adding assault to K.S.A. 38-1611, the statute controlling fingerprints of juveniles.

Thank you for your consideration. I would be happy to answer your questions.

House Judiciary
1-30-01
Attachment 1

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
KYLE G. SMITH, DIRECTOR OF PUBLIC & GOVERNMENTAL AFFAIRS
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF HB 2077
JANUARY 30, 2001

Mr. Chairman and Members of the Committee:

I am pleased to be here on behalf of and in support of HB 2077. This legislation will add important improvements in the effectiveness of protecting children and adults from abuse.

Under current law, individuals who have no other legal option, such as a restraining order, may get a protection from abuse (PFA) order. This can be on a temporary basis until a hearing and then on a more permanent basis after both sides have been heard. Typically, the court orders an abuser to stay away from the victim. These orders are then given to the local police department. If another incident occurs, in theory, the police are aware of the order and the offender can be arrested for trespass or violating a protective order.

A problem arises when the perpetrator may claim that there has been an amendment or recall of such an order or where the incident occurs in a different jurisdiction. It is late at night, the courts are closed and the officers can't verify the PFA order. Fortunately, there is a solution to this problem already in existence. The National Crime Information Center (NCIC) is a database run by the FBI, which is available 24/7 to law enforcement officers through their dispatch. You have probably heard of NCIC where officers will check to see if there is an outstanding warrant for an individual or if a car is stolen during traffic stop. Within the NCIC there is a field for entry of protection from abuse orders. By having these PFA orders entered into NCIC, the ability to prove that a valid order is in existence would be immediately available to every law enforcement officer in the country.

House Judiciary
1-30-01
Attachment 2

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

Using NCIC has further importance in that under the Brady Law (when a person has a record check run prior to purchasing a firearm), the NCIC file is checked to see if there are outstanding restraining orders on the person. In Maryland, an unfortunate situation occurred where a woman was assaulted and obtained a PFA order. However, the local department put it into a state database rather than NCIC. The perpetrator applied to purchase a handgun and an NCIC check failed to show the existence of the PFA order. The purchase was approved and the woman was killed using that handgun. The heirs are now suing the department and the State of Maryland for failure to utilize the NCIC database.

Many law enforcement agencies and counties are currently putting the PFA orders into the NCIC. HB 2077 expands that to make it a uniform practice throughout the state. This legislation would not only make the officer's job easier, it will, in fact, save lives. I urge your passage of HB 2077.

Thank you for your consideration. I would be happy to answer your questions.

Shawnee County
Sheriff's Department
Sheriff Richard W. Barta
Law Enforcement Center

320 S. KANSAS, SUITE 200
TOPEKA, KANSAS 66603-3641
785-368-2200

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE

Sgt. Lance W.T. Royer, Shawnee County Sheriff's Office
In Support of HB 2077, January 30, 2001

Mr. Chairman and Members of the Committee:

I am Sgt. Lance W.T. Royer with the Shawnee County Sheriff's Office and appear today in support of HB 2077.

My Current duties include, NCIC Terminal Agency Coordinator, and Supervisor for our Records and Process Divisions. As part of those duties I have been providing training across Kansas to law enforcement agencies on Protection from Abuse Orders and the need to have them entered into the NCIC system.

Here in Shawnee County, we have been entering PFA's into NCIC for almost 2 years (we started April 1999) and I believe it is an invaluable aid to both victims and law enforcement. Having the data readily available gives officers important information, which not only enables officers to make the right decisions, but could literally save lives.

While HB 2077 does entail a certain amount of work, dispatchers and officers are already trained in using NCIC, which is why this NCIC File works so easy. The additional effort is easily out-weighed by the need to verify the information quickly. I know there are other conferees, but I would be happy to answer any technical questions about the process in Kansas.

Thank you for your time and consideration.

Testimony of:

Captain Dan Hamblin
Johnson County Sheriff's Office
Olathe, Kansas

House Bill 2077

January 30, 2001

Mr. O'Neal, Chairman and Members of the Committee on Judiciary:

My name is Dan Hamblin and I am representing the Johnson County Sheriff's Office. I am appearing in opposition of House Bill 2077.

For those who are not familiar with the way Protection From Abuse Orders are received and served in Johnson County, Kansas I will attempt to explain. When the person filing the Protection From Abuse Order has filed the paper with the Clerk of the District Court they will immediately proceed to the Sheriff's Office where a deputy will talk with the plaintiff and will fill out a Service Instruction Form. The Service Instruction Form will capture information such as date of birth, social security number, best time for service, if the person to be served is known to carry weapons or has access to weapons, is known to be a drug or alcohol user or any other information that may be helpful to serve the party of record or protect the plaintiff.

When the Johnson County Sheriff's Office receives the Protection From Abuse Order from the Clerk of the District Court we will process the order for service. Each Protection From Abuse Order will have a police agency to serve. In Johnson County the Sheriff's Office will serve the police agency by providing them with a copy of the Protection From Abuse Order and with a copy of our Service Instruction Form. Most of the cities will then enter this information into their own computer or CAD system. This information has been very helpful to the cities when they are responding to a call for assistance because they have knowledge of the Protection From Abuse Order they are able to react and take the appropriate action. Also by having this information of the Protection From Abuse Order the city police department will be able to better protect the plaintiff by keeping a closer watch on the residence.

House Bill 2077 section 1 (a) states in part "If the order is a foreign protective order, the sheriff's office shall verify with the issuing jurisdiction that the order is currently in effect prior to entering it into the databases."

The concern of the Johnson County Sheriff's Office is that we would not have adequate identifiers to enter this order into the National Crime Information Center database. Last year the Johnson County Sheriff's Office received 475 foreign Protection From Abuse Orders. Usually the only information we received with these orders was the name of the party of record and an address for service. National Crime Information Center requirements state that this is not enough information to make an entry into the National Crime Information Center database.

House Bill 2077 section 1 (a) also states in part "Any modification of an order shall be forwarded immediately by the clerk of the court to the sheriff's office with jurisdiction to enforce the modified order. The sheriff's office and the court shall ensure the validity and accuracy of the entries of the orders." We agree with this, however, the concern of the Johnson County Sheriff's Office is that we would not receive updated information in a timely manner and this would not allow us to keep our entries valid. There have been many times within our own jurisdiction that a modification has been made and the information will not get to our office for several days. The Johnson County Sheriff's Office believes that the sheriff of the issuing agency would receive the modifications and updates more timely than a foreign agency and therefore the sheriff of the issuing agency should be the agency that makes the entry into the National Crime Information Center database.

House Bill 2077 Section 4 states "K.S.A. 60-3108 is hereby amended to read as follows: 60-3108. A copy of any order under this act shall be issued to the plaintiff, the defendant and the sheriff of the county where the order is issued or registered."

Johnson County has 21 cities located within its boundaries. Out of those 21 cities 14 cities have a police department and that police department will respond to calls for police assistance within its city limits. Presently under K.S.A. 60-3108 the sheriff is to serve a copy of the Protection From Abuse Order to the police department of the city where the plaintiff resides.

Last year the Johnson County Sheriff's Office was issued a total of 3097 Protection From Abuse Orders of those 2622 were filed and served in Johnson County Kansas. 2552 Protection From Abuse Orders were to be served to a city police agency in Johnson County Kansas because of the plaintiff living within the city limits.

I would submit to this committee that there are a number of valid reasons why the city police departments should still receive a copy of the Protection From Abuse Order. Those reasons are:

a. The city police department will enter the information into their own computer systems or CAD and have that information available to them while responding to a call.

b. The city police department will be the agency responding to a call for police assistance.

c. City police departments must know that a Protection Order has been issued in their jurisdiction to better protect the plaintiff.

The Johnson County Sheriff's Office believes the city police department should still be served with a copy of the Protection From Abuse Orders.

Thank you for the opportunity to address our concerns about House Bill 2077. I will be happy to answer any questions.

Member Agency
United Way of
Greater Topeka

225 SW 12th Street
Topeka, KS 66612-1345
913-233-1750

House Judiciary Committee
1/30/01

Chairman O'Neal and members of the House Judiciary Committee,

I thank you for the opportunity to address you today. My name is Tammy Rider and I currently work for the YWCA Battered Women Task Force here in Topeka, Kansas, as the PFA Coordinator. In my work, I assist victims in obtaining Protection from Abuse Orders at the Shawnee County Courthouse.

One of the most difficult aspects of my job is the fact that many victims who clearly need protection under the law cannot obtain it due to the current requirements for filing a PFA. It is difficult to hear the stories of women and men who have suffered physical abuse in the past and who recognize the signs of escalating violence in their current situation, and then I have to send them away empty-handed because they have not experienced immediate past abuse and have not heard a direct, explicit threat to their safety by the same person who has abused them in the past. Broadening the criteria for obtaining a PFA to include incidents of stalking would give victims more latitude in proving the expectation for harm. One of the women I worked with at the courthouse was frightened for her safety, and the safety of her young children, because of her ex-husband's behaviors. He would follow them in his car, driving up close enough behind and beside her car that she was afraid she would have to pull off into a ditch. She had no cell phone, and drove to a nearby convenience store to telephone for help. He then drove away.

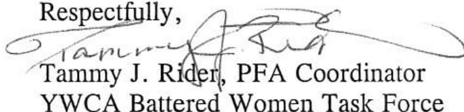
Another woman telephoned my office for help, afraid to leave her house. Her ex-husband had been sitting in his car outside the house for the better part of four days. He had threatened to leave the state with their children in the past, and she was afraid to let her children leave the house for school or to play, for fear that he would snatch them. She was afraid of what he would do if she went outside; again, because he had threatened her life in the past. She called to request a restraining order because they were running out of groceries.

Others have come in to request restraining orders at the request of their employers. Former spouses and boyfriends/girlfriends will harass the victim at work, phoning ten to twenty times a day, or showing up at the workplace demanding to see them. Employers will threaten to terminate employment if these incidents do not cease.

Another part of my work is helping people to recognize the signs of imminent harm to them and helping them to make safety plans to respond to potentially dangerous situations. It is troubling to me to meet with a victim who has learned to recognize the warning signs and then be unable to assist that victim with an order of protection. Should the PFA statute be broadened to cover more of these dangerous incidents, our whole community would be a safer place to live.

Thank you for your time and attention. I would be happy to try to answer any questions you might have.

Respectfully,



Tammy J. Rider, PFA Coordinator
YWCA Battered Women Task Force

House Judiciary
1-30-01
Attachment 5

January 30, 2001

Pattie M Yates Belden
429 N Broadway
Sterling, KS 67579

House Judiciary Committee

My name is Pattie M. Yates Belden and I am an Advocate for the Sexual Assault/Domestic Violence Center in Hutchinson, Kansas.

About three months ago I received a crisis call from a victim that had been beaten by her boyfriend. Both her eyes were black and she had numerous bruises on her face. She was very afraid he would come back and hurt her again but since she did not live with him and they did not have a child together, she was not eligible for a protection from abuse order.

We had one client whose boyfriend constantly called and came by and harassed her at her workplace. Her employer said if the boyfriend continued this behavior, her job was in jeopardy. She decided to move and she found another job but the harassment continued. She took another position in a bank where she was told they could not prevent him from coming there because it was a public business, although the young man did not have an account there. This stalking and harassment continued for about four years, after the young man allegedly raped her when she was 18 years old.

A third client made a report to the police that she was being stalked. The man would come by her home and come to her work. He threatened to rape her but the police said they couldn't do anything. This young woman went to visit her sister in another county; He followed her there and raped her in front of her 3yr old child. Unfortunately, the law enforcement officer in charge said the victim "must have changed her mind" about having a sexual relationship, and the victim was so upset about way she was treated she was unable to testify in court about the rape.

We ask your assistance to prevent these victims of broken dating relationships, and other victims of stalking to avoid falling through the cracks and to provide them with the protection from abuse available to others.

UNITED AGAINST VIOLENCE

KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE

220 SW 33rd Street, Suite 100 Topeka, Kansas 66611
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org

House Judiciary Committee
HB 2077

Dear Chairman O'Neal and Members of the Committee:

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is an association of the twenty-seven Kansas programs serving victims of domestic and sexual violence. Our goal is to provide technical assistance to those programs, their communities, and ally groups who are interested in ending these crimes.

KCSDV supports HB 2077.

HB 2077 addresses a critical issue to many primary and secondary victims in Kansas. Extending the availability of the protection afforded by the Protection From Abuse Act may be one of the most critical resources available to victims of stalking. Please consider the following experiences of several young women and their families:

A 15 year old girl was sexually assaulted by her 16 year old high school boyfriend. Her parents made repeated attempts to stop him harassing and stalking her at home and school, including filing police reports, but to no avail. This family wanted a protection order but were not eligible because the victim had not lived with the boyfriend nor did they have a child in common. Another student in a similar situation dropped out of high school because she could not stop the harassment at school and at her home.

Another 15 year old girl was harassed and stalked by the 20 year old school bus driver who contacted her at home and school. Reports to the school and police resulted in his being fired from his bus driving job, but no criminal charges. Yet, he persisted even after loosing his job. Again, her parents were unable to apply for a protection order.

A 14 year old girl was sexually assaulted by her mom's boyfriend, she went to live with her Dad, but the harassment continued. Reports to the police were fruitless. A protection order may have helped but they were not eligible.

These three girls all live in or near Emporia. In each case a protection order would not have provided a shield, but if the stalker had violated the PFA law enforcement may have been able to act immediately and the courts able to hold him accountable.

Attached are stories from Wichita and Dodge City, again illustrating the experiences of victims for whom a protection order is the only legal remedy that might help but they are currently not eligible to apply for the protection.

HB 2077 also addresses the entry of all protection orders filed or registered in Kansas to be entered into NCIC. Protection From Abuse Orders are only effective if they are enforceable. If all orders are easily accessible to law enforcement through the NCIC, then an officer would be able to quickly ascertain the order's validity and enforceability. Attached is a story from Dodge City that illustrates how well having that information can work – in this case a potential problem cleared up quickly.

WICHITA AREA SEXUAL ASSAULT CENTER

BOARD OF DIRECTORS

Marty Bryan
Evies Cranford
Judy Fowler
Ivonne Goldstein
Ann Harrell
Robert Hinshaw
Dan Hogan
Jean Hogan
Margarita Hunt
Fred Irvin
Arneatha Martin
Ron Matson
Lou Miller
Terri Moses
Jennifer Reid
Philip Ross
Sally Salguero
Diana Schunn
Todd Tedesco

Executive Director

Kathy Williams

January 29, 2001

Dear House Judiciary Committee Members:

I am writing in support of House Bill 2077, which outlines changes regarding protection from abuse. The proposed bill demonstrates sensitivity and legal protection for people who are victimized but currently may not have another means of recourse. This type of legislation is particularly important in cases of sexual assault.

To Illustrate the need for this type of legislation, please consider the following actual events. A male coworker began stalking a female coworker over twelve years ago. He has sent inappropriate "gifts," called her at work and at home and has even threatened to kidnap her. Police reports were made, but no criminal action resulted. This woman was very vulnerable to the actions of this man but because she had not lived with the perpetrator, she could not seek protection from abuse. This type of legislation could provide protection for this woman and subject this man to legal consequences when this order is violated.

In other cases, people victimized by sexual assault have been victimized again when the perpetrator continues to make contact. In some cases, the perpetrator has stalked the person victimized and her family. This type of behavior can be extremely intimidating and threatening to a person who has witnessed first hand the level of violence the perpetrator is capable. A remedy such as a PFA could be made available to these people.

I urge you to work toward making this proposed legislation a reality. Thank you for recognizing that the citizens of Kansas should not be continually subjected to victimization at the hands of perpetrators.

Sincerely,

Kathy Williams

Kathy Williams
Executive Director

MISSION STATEMENT The Wichita Area Sexual Assault Center, a non-profit organization, provides leadership in delivering comprehensive services to the community, targeting the needs of persons affected by sexual assault and reducing the incidence of sexual assault

355 North Waco, Suite 100, Wichita, Kansas 67202-1116 Office (316) 263-0185 Fax (316) 263-0563 Crisis Line (316) 263-3002

Office: (620) 225-6987

Serving Ford, Gray, Hodgeman, Meade, Clark, Edwards, and Ness Counties

Date: 1/29/2001

To: Sandy Barnett, KCSDV

From: Marg Yaroslaski, Executive Director

RE: PFA requirements

Your fax is especially timely. Just this morning I had to tell a young single mom I couldn't get her a PFA. If she were the exception to the rule I wouldn't be so frustrated, but we face this dilema weekly in our rural service area. I would like you to understand how the current laws tie our hands by sharing Rose's story with you.

Rose (not her real name) is a single mom – her daughter is seven. She works two jobs to make ends meet. Last July she dated a guy who became violent so she broke up with him. Since that time she has done nothing to stay in contact with him. He calls her, but she got caller ID and doesn't answer his calls. Now he calls from a phone that blocks his number, so she won't answer calls that don't show a number. He came to her work place Saturday night and she walked away from him. Later that night she was home in bed only to be awakened by a man breaking into her front door – it was her boyfriend angry that she wouldn't talk to him. Today in my office she said that until this happened she thought she was al least safe in her own home – now she is not sure she is safe anywhere. She wanted a PFA because she thought then he might finally take her seriously and stay away from her. They had never lived together and don't share a child together. Yet she is afraid to spend the night in her own home. I asked her if we could help her fix her door, but her landlord was already taking care of that. I offered a cell phone to call 911 and we are getting her a personal alarm to carry and use at home. But these things don't offer the same legal protection a PFA would. She has done everything she could to keep herself and her daughter safe and was now asking for help – but our hands are tied.

The Ford County Sheriff mandated several months ago that all PFA's be entered in NCIC. This became very important one weekend when a man was stopped in Oklahoma for speeding. A routine check revealed the presence of a PFA that awarded his wife custody of the children. The patrolman became concerned because the children were with this man, as was his wife's purse. He held the man until he contacted this jurisdiction to confirm that the suspect had permission to to have the children and that our client was safe.

Please contact me if you need more information.

P.O. Box 1173, Dodge City, Kansas 67801

U.S. Dep[illegible]ent of Justice
Office o[illegible] Programs
National Institute of Justice

National Institute of Justice

Research Preview

Jeremy Travis, Director

November 1997

The Crime of Stalking: How Big Is the Problem?

Summary of a Presentation by Patricia Tjaden, Ph.D., Center for Policy Research

Scientific information on stalking in the United States has been limited, despite unprecedented media, legal, and legislative attention to the subject over the past decade. To better understand the broader context of violence in which stalking occurs, the National Institute of Justice (NIJ) and the Centers for Disease Control and Prevention (CDC) collaborated in a comprehensive survey of violence against women. The National Violence Against Women Survey, conducted by the Center for Policy Research, collected data from 8,000 women and 8,000 men 18 years of age or older on a broad range of issues related to violence.

This Research Preview discusses the stalking aspects of the study. Further findings from the survey are anticipated by spring 1998. With regard to stalking, the survey collected data on:

- The prevalence of stalking.
- The characteristics of offenders, victims, and stalking behaviors.
- Victims' perceptions of why they are stalked.
- The co-occurrence of stalking and domestic violence.
- Victims' responses to stalking, including their involvement with the justice system.
- The psychological and social consequences of stalking.

Survey findings indicated that stalking is a bigger problem than previously thought, affecting about 1.4 million victims annually. The survey showed that stalking was strongly linked to the controlling behavior and physical, emotional, and sexual abuse perpetrated against women by intimate partners. About half of all female stalking victims reported their victimization to the police and about 25 percent obtained a restraining order.

To screen for stalking victimization, the survey asked about specific harassing and threatening behaviors respondents had experienced repeatedly from marital and cohabitating partners, friends, acquaintances, relatives, and strangers. The word "stalking" was not used in the survey. Researchers defined stalking conservatively—as "a course of conduct directed at a specific person that involves repeated physical or visual proximity, nonconsensual communication, or verbal, written, or implied threats" sufficient to cause fear in a reasonable person.[1]

The survey was fielded between November 1995 and May 1996. The national sample of households was generated through random-digit dialing; interviews averaged 25 minutes and were conducted using a computer-assisted telephone interviewing system. Of those who started the interview, 97 percent of women and 98 percent of men completed it.

Survey results

Incidence and prevalence. Of those surveyed, 8 percent of women and 2 percent of men said they had been stalked at some point in their lives. When the raw figures were extrapolated to 1995 estimates of the adult population, the results projected 8.2 million female and 2 million male lifetime stalking victims, most of whom were stalked by only one stalker. In most cases, stalking episodes lasted 1 year or less, but, in a few cases, stalking continued for 5 or more years. Researchers estimate that approximately 1 million women and 400,000 men are stalked each year in the United States.

Offender characteristics. Most victims knew their stalker. Women were significantly more likely to be stalked by an intimate partner—whether that partner was a current spouse, a former spouse or cohabiting partner, or a date. Only 21 percent of stalkers identified by female victims were strangers. On the other hand, men were

Information taken from

The National Institute of Justice and Centers for Disease Control

Research in Brief, U.S. Department of Justice, Office of Justice Programs (April, 1998)

Exhibit 1. ***Percentage and Estimated Number of Men and Women Stalked in Lifetime***

	Persons Stalked in Lifetime	
Group	**Percentage[a]**	**Estimated Number[b]**
Men (N = 8,000)	2.2	2,040,460
Women (N = 8,000)	8.1	8,156,460

a. Differences between men and women are significant at ≤ .001.

b. Based on estimates of men and women aged 18 years and older, U.S. Bureau of the Census, Current Population Survey, 1995.

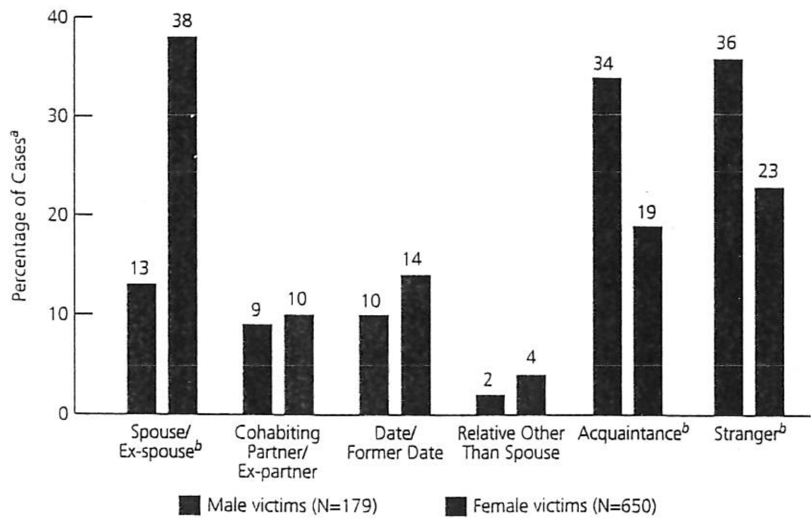
Exhibit 2. ***Percentage and Estimated Number of Men and Women Stalked in Previous 12 Months***

	Persons Stalked in Previous 12 Months	
Group	**Percentage[a]**	**Estimated Number[b]**
Men (N = 8,000)	0.4	370,990
Women (N = 8,000)	1.0	1,006,970

a. Differences between men and women are significant at ≤ .001.

b. Based on estimates of men and women aged 18 years and older, U.S. Bureau of the Census, Current Population Survey, 1995.

Exhibit 7. ***Relationship Between Victim and Offender***



a. Percentages exceed 100% because some victims had more than one stalker.

b. Differences between males and females are significant at ≤.05.

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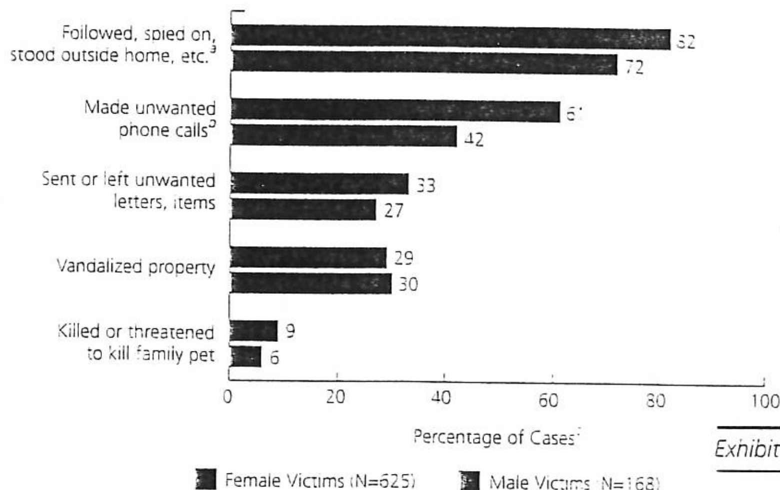
Information taken from

The National Institute of Justice and Centers for Disease Control

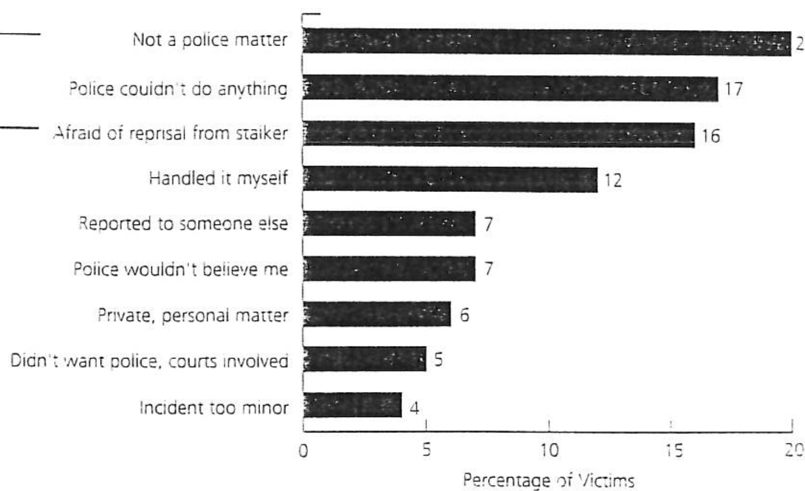
Research in Brief, U.S. Department of Justice, Office of Justice Programs (April, 1998)

Exhibit 11. ***Stalking Activities Engaged in by Stalkers***



a. Differences between males and females are significant at ≤.05.
b. Differences between males and females are significant at ≤.001.
c. Percentages exceed 100% because the question had multiple responses.

Exhibit 16. ***Victims' Reasons for Not Reporting Stalking to Police***[a]



a. N=348 male and female victims.

Exhibit 19. ***Percentage and Outcomes of Criminal Prosecutions in Cases, by Sex of Victim***

	Stalking Victims (%)		
Outcome	**Male**	**Female**	**Total**
Was perpetrator prosecuted?	(N=178)	(N=645)	(N=823)
Yes	9.0	13.1	12.1
No	91.0	86.9	87.9
Was perpetrator convicted?[a]	(N=15)	(N=72)	(N=87)
Yes	60.0	52.8	54.0
No	40.0	47.2	46.0
Was perpetrator sentenced to jail or prison?[b]	(N=9)	(N=37)	(N=46)
Yes	77.8	59.5	63.0
No	22.2[c]	40.5	37.0

a. Based on responses from victims whose perpetrator was prosecuted.
b. Based on responses from victims whose perpetrator was convicted.
c. Based on five or fewer sample cases.

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Information taken from

The National Institute of Justice and Centers for Disease Control

Research in Brief, U.S. Department of Justice, Office of Justice Programs (April, 1998)

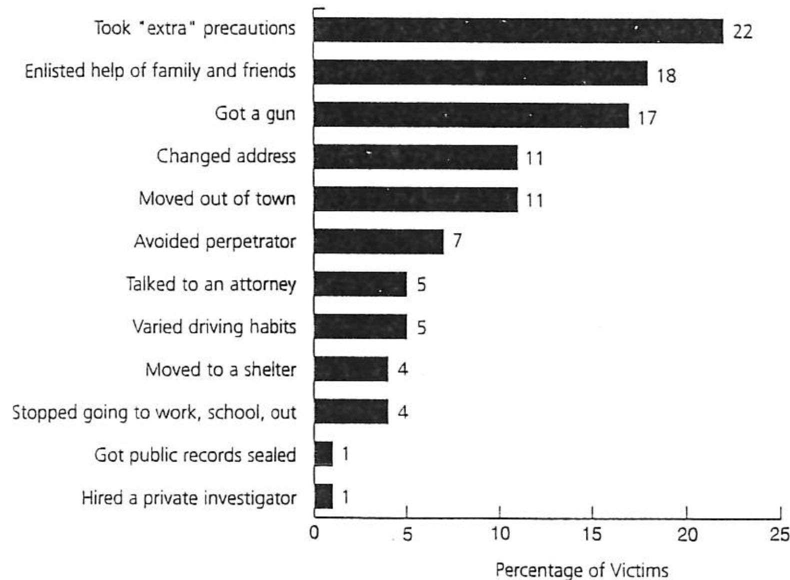
Exhibit 20. ***Percentage and Outcomes of Protective Orders in Stalking Cases, by Sex of Victim***

	Stalking Victims (%)		
Outcome	**Male**	**Female**	**Total**
Did victim obtain a protective or restraining order?[a]	(N=175)	(N=597)	(N=772)
Yes	9.7	28.0	23.8
No	90.3	72.0	76.2
Was the order violated?[a,b]	(N=16)	(N=166)	(N=182)
Yes	81.3	68.7	69.8
No	18.7	31.3	30.2

a. Differences between males and females are significant at ≤ .05.

b. Based on responses from victims who obtained a restraining order.

Exhibit 22. ***Self-Protective Measures Undertaken by Stalking Victims***[a]



a. N=440 male and female victims who took self-protective measures.

Provided by Kansas Coalition Against Sexual and Domestic Violence, Topeka, KS 66611
(785)232-9784

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
KYLE G. SMITH, DIRECTOR OF PUBLIC & GOVERNMENTAL AFFAIRS
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF HB 2076
JANUARY 30, 2001

Mr. Chairman and Members of the Committee:

I appear today not only on behalf of the Kansas Bureau of Investigation, but also on behalf of Kansas law enforcement officers through their association with either the Kansas Peace Officers Association or Kansas Sheriffs Association. For brevity's sake, and frankly given my background, it was agreed that I would be the speaker to address the committee rather than have a number of officers coming here and say "me too".

This legislation deals with what is commonly called "search incident to an arrest". I will try not to bore you, but as a prosecutor for 20 years, as a law enforcement officer and court certified expert witness in search and seizure, I feel a little history would be helpful.

When a law enforcement officer arrests a person there are legitimate concerns for both the safety of the officer and the loss and possible destruction of evidence. As such, the U.S. Supreme Court has agreed to a "bright-line" rule as to how such searches should be done. The bright-line rule states that when an arrest is made, it is constitutional as well as prudent, for the officer to search, not just the individual arrested, but the area immediately surrounding that person.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize ***any*** evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items

House Judiciary
1-30-01
Attachment 8

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must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). (*Emphasis added).*

In *Chimel v. California*, that ruling was expanded by the Supreme Court to include arrests occurring inside automobiles in the case of *New York v. Belton.*

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. *New York v. Belton*, 453 U.S. 454, 460-61 (1981).

That is still the law of the United States Constitution as interpreted by the highest court in the land, the United States Supreme Court. The Kansas Supreme Court has always held that constitutional rights under the Kansas Constitution are the same as those under the Federal Constitution. *State v. Bishop*, 242 Kan. 647, 656 (1987). Every law enforcement agency, every sheriff's department, every police department, every state law enforcement agency have all trained their officers since 1969 on these basic premises so they can use this "bright-line" rule in rapidly determining how far they may search in an arrest situation.

What we refer to as "bright-line" rules are set up by the courts to make it easy to apply constitutional law, an admittedly complex subject, under the pressures of actual police work. As one court put it:

> The underlying rationale of *Belton* was to provide a bright-line rule while balancing privacy and law enforcement interests: The protection of the Fourth . . . Amendment can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement . . . . Such rules are necessary because police officers engaged in an arrest on the highway have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront . . . . Because it is a bright-line rule that may be invoked regardless

> of whether the arresting officer has an actual concern for safety or evidence, we have held that the applicability of the *Belton* rule does not depend upon a defendant's ability to grab items in a car but rather upon whether the search is roughly contemporaneous with the arrest. *United States v. McLaughlin*, 170 F.3d 889, 891-92 (9th Cir. 1999).

In 1970, the Kansas Criminal Code was codified and a well-intentioned effort was made to reduce into statute all the Supreme Court rulings. This rule of searches being conducted incident to arrest was incorporated in the Kansas statute K.S.A. 22-2501. However, sometimes bills are drafted with slight variances from court cases. Sometimes that matters and sometimes it doesn't. From 1970 to 1996, it didn't matter. But, in 1996, the Kansas Supreme Court made a ruling in a case called *State v. Anderson*, 259 Kan. 16 (1996), that because of one word in K.S.A. 22-2501(c) officers can search for fruits, instrumentalities or evidence of "the" crime, not "any" crime. That was a more narrow interpretation based on Kansas statutory law, not the Constitution. So, in *Anderson*, the meth lab that was discovered during a search conducted pursuant to an arrest for a different offense was suppressed. The ruling in *Anderson* not only lets criminals go free, but also caused training problems for every city, county and state officer. This suppression of evidence is not because of any violation of constitutional rights, but because some revisor in 1970 picked the word "a" instead of "the".

HB 2076 would change the word to the broader "a" from the narrower "the". This is not any reduction in anyone's constitutional rights. It is merely bringing our statute into accord with law elsewhere in the United States as well as the law in Kansas prior to this statute being construed in 1996. I would note that there was no problem with abuses prior to 1996, when the *Belton* rule was the law. The only thing this *State v. Anderson* case has done is it has allowed certain criminals who are already under arrest to escape punishment for other crimes they have committed, as well as confuse the training of law enforcement officers throughout the state.

Director Larry Welch of the KBI was formerly the Director of the Kansas Law Enforcement Training Center near Hutchinson, Kansas. This topic is near and dear to his heart as well as all of the officers in this state who risk their lives everyday. We would appreciate it if this change could be made so we could be brought back into alignment with the rest of the United States.

Thank you for your consideration. I would be happy to answer any questions.

Testimony to the House Judiciary Committee

Regarding House Bill 2076

Brent Venneman,
Assistant District Attorney - Tenth Judicial District

K.S.A. 22-2501, in its current form, overly restricts police searches of persons lawfully placed under arrest and is inconsistent with decisions by the United States Supreme Court.

KCDAA respectfully requests that the Committee change one word of the statute in its present form. By changing "the" to "a" in subsection (c) the statute will more accurately reflect the nationally recognized standards of constitutional law set forth by the United States Supreme Court. When a law enforcement officer has made a lawful custodial arrest he should be able to conduct a full search of that person and the area within that person's immediate control, incident to that arrest. The Supreme Court has recognized this is a legitimate exercise of police power. This is true even where the area being searched could hold neither a weapon nor evidence of the crime for which the person is being arrested. A custodial arrest based on probable cause is a reasonable intrusion under the Fourth Amendment, a search incident to that arrest should require no additional justification.

Changing the language will more effectively promote law enforcement efforts to recover evidence of illegal activities. In its current form, K.S.A. 22-2501 provides a loophole for persons found in possession of contraband even if lawfully arrested for a separate offense.

It will likewise provide a bright line rule which will assist law enforcement officers. Fourth Amendment doctrine is intended to regulate the day to day activities of police officers and is enforced by application of the exclusionary rule. This should be expressed in terms which are readily applicable to police and should not require a highly sophisticated set of rules with hairline distinctions. A single familiar standard is essential to guide police officers in the every day performance of their duties.

Testimony of Prof. Michael Kaye

AMENDMENT OF K.S.A. 22-2501

Presented on January 30, 2001, before the Kansas House of Representatives Judiciary Committee

I oppose the amendment of K.S.A. 22-2501 by changing the word *the* to the word *a* because such change would create a sweeping revision of settled Kansas case law which presently requires a factual showing of "immediate control" in order to justify search of a vehicle incident to the arrest of a driver or recent occupant. See *State v. Tygart*, 215 Kan. 409 (1974), reaffirmed in *State v. McLain*, 258 Kan. 176 (1995). The repeated efforts to amend this statute based, I believe on the Supreme Court holding in *State v. Anderson*, 259 Kan. 16 (1996), is misguided and would greatly enlarge the unsupervised authority of police officers to make searches of autos and their contents without probable cause. The amendment would permit unlawful exploratory searches.

K.S.A. 22-2501 restricts the scope of a police officer's search of a vehicle incident to an arrest of an occupant or the driver for the purpose of discovering the fruits, instrumentalities, or evidence of the crime for which the person was arrested. This does not prevent the officer from searching the car pursuant to the automobile exception which permits search of the entire vehicle limited only by probable cause. *United States v. Ross*, 456 U.S. 798 (1982), *California v. Acevedo*, 500 U.S. 565 (1991). A police officer is also entitled to frisk the car for self-protection under *Michigan v. Long*, 463 U.S. 1032 (1983), and can order the driver from the car without having any level of suspicion whatsoever. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). A police officer can also search the vehicle without probable cause or suspicion if the possessor or

person of authority consents to that search. Finally, the officer has the right to seize any objects found in plain view.

It is now accepted that persons in autos have lesser privacy than persons in homes and the automobile exception is based on this reduced interest and privacy, rather than the mobility of the vehicle.

In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court of the United State chose not to apply the automobile exception to the search of a motorist's car on the New York throughway but in a 5-4 decision decided that a state trooper who had stopped a vehicle and had probable cause to believe it contained marijuana was entitled to search a jacket incident to an arrest as long as the search was limited to the grabbable space or lunging area and the immediate vicinity of the arrest. In the *Belton* case, the officer had probable cause to believe the car contained marijuana. At the time *Belton* was decided, the Supreme Court had not yet clearly ruled that containers in a car for which there was probable cause could be searched without a warrant. As a result, the Supreme Court chose not to decide this case based on the auto exception but based on the application of *Chimel v. California* as applied to vehicles.

Application of the *Chimel* case to an automobile would not be difficult. In *Chimel*, an officer was entitled to search the immediate area of an arrestee and any interior spaces into which the arrestee could reach in order to get a weapon or destroy evidence. Thus, the court overruled a prior line of cases that allowed the complete top to bottom search of a room or a house in which an arrest had taken place. The *Chimel* case has never been overruled nor modified. In the case of an automobile, the concerns in *Chimel* would be lessened since ordinarily a person who has been arrested by an officer will no longer remain in their vehicle. They would be handcuffed,

removed, and placed in a squad car or in the custody of other officers. The necessity under *Chimel* to search the area of the car in order to prevent the obstruction of evidence or to prevent the arrestee from grabbing a weapon would be greatly diminished. By comparison, under *U.S. v. Robinson*, when a suspect has been arrested and is now in custody, a thorough search of the person is permitted without probable cause or reasonable suspicion on the ground that a person going into custody could have on their person a weapon, albeit a small one, with which they can harm the officer. So the concerns involving a car search in connection with an arrest are different than those involving a person search in connection with an arrest.

Even though the Kansas Supreme Court has said that it interprets the Kansas Bill of Rights in the same manner as the United States Supreme Court interprets the U.S. Bill of Rights, there is no need to accord the U.S. Supreme decision such supremacy over the legislature. The Supreme Court of Kansas has on occasion not followed the U.S. Supreme Court doctrines; for example, in the case of inventory searches where in Kansas (see *State v. Teeter*) an officer who seizes a vehicle for safekeeping purposes must offer the owner of the car the opportunity to make other arrangements for the vehicle and give them an opportunity to avoid impoundment of the vehicle. This is not required under the current decisions of the United States Supreme Court.

The *Belton* rule is not a bright line rule and courts dealing with *Belton* have had to answer questions relating to the scope of the search; e.g., whether it permits dismantling portions of the car or opening locked containers; they have had to address the issue of how much time can elapse after arrest before a *Belton* incident to arrest search can take place and they have also had to address the issue of whether the rule applies to any container.

The Supreme Court of the United States has shown it is concerned with the extent of police officer discretion and the potential for abusive discretion. They have held unconstitutional an effort to extend *Belton* in the state of Iowa to searches incident to the giving of traffic citations where the officer exercised the discretion not to arrest. *Knowles v. Iowa*, 119 S. Ct. 484 (1998). The court has two cases that will be decided soon: one case concerns whether or not an officer can arrest in connection with a fine only offense. The other case is *Florida v. Thomas*. The United States Supreme Court on January 10, 2001, granted review in this case to decide whether or not the right to conduct search incident to arrest of a recent occupant of a motor vehicle is conditioned upon a law enforcement officer initiating contact with the defendant. At the time of the contact in this case, the defendant was not in the vehicle. The Supreme Court of Florida had held that the entire passenger compartment of the automobile may be searched incident to arrest of a recent occupant only if the arrestee was in the vehicle at the time the law enforcement officer initiated contact and emerged as a result of the officer's presence or directive. The Florida Supreme Court held that *Belton* was inapplicable because the defendant voluntarily exited the vehicle and was walking away when the officer initiated contact with him.

Amending Section 2501 is unnecessary and would grant police officers the power to search at will throughout a car as long as a person was arrested. The well thought out rules that Kansas courts have elaborated to limit officer discretion and balance the rights of citizens and police in connection with searches incident to arrest in motor vehicles would certainly be harmed by such a move. As Justice Stevens observed, concurring in *Belton*:

> After today, the driver of a vehicle stopped for a minor traffic violation must look to state law for protection from unreasonable searches. Such protection may come from two sources. Statutory

law may provide some protection. Legislatures in some states permit officers to take traffic violators into custody only for certain violations. In some states, however, the police officer has the discretion to make a "custodial arrest" for violation of any motor vehicle law. Additionally, the failure to produce a satisfactory bond will often justify "detention and custodial arrest." Given the incomplete protection afforded by statutory law, drivers in many States will have to persuade state constitution's equivalent to the Fourth Amendment to prohibit the unreasonable searches permitted by the Court here.

I urge you not to amend this section.

APPENDIX

SEARCH INCIDENT TO ARREST

1. Lawful arrest.

2. Arrest must precede search.

3. Scope of search limited by necessity.

4. Search limited to person of arrestee.

5. Search limited to "grabbable space" or lunging area (where arrestee could obtain weapons or destroy evidence).

6. Search must be substantially contemporaneous with arrest.

7. Search is confined to immediate vicinity of arrest.

ANDERSON HOLDING

Under K.S.A. 22-2501, a search incident to an arrest permits search of the area within a person's immediate presence only for the purpose of protecting the officer from attack, preventing the suspect's escape, or discovering the fruits, instrumentalities, or evidence of the crime. Belton expands the scope of the permissible search, not the permissible purpose. Belton did not modify Chimel, but applied it to a car search.

State v. Anderson, et al. No. 71,404
1/26/96 71,994

1. Officer sees H's car make unsafe lane change.

2. Officer stops car.

3. Officer asks permission to inspect film canister in car seen during stop.

4. Canister inspected: empty.

5. License check shows H had warrant for driving with "no child restraint" and license suspended.

6. Back-up arrives.

7. Officer arrests H, handcuffs her, puts her in patrol car.

8. Officers search car: glove box has contraband.

9. Officers open trunk and find contraband (ingredients for drug lab).

10. Officers arrest passenger A.

11. Officers find motel key on A.

12. Officers obtain SW for motel room.

13. Officers find "cornucopia" of drug-related items.

State v. Tygart
215 Kan. 409 (1974)
re'aff'd in State v. McLain
258 Kan. 176 (1995)

SEARCH INCIDENT TO ARREST (FACTORS)

1. Proximity of vehicle to place of arrest.

2. Probability vehicle contains seizable items related to the crime.

3. Amount of time elapsed between arrest and search.

4. Recent departure of arrestee from vehicle.

5. Fact that vehicle had been employed in some way in connection with the crime

6. Character of place of arrest.

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Testimony before the House Judiciary Committee
House Bill 2076
Ron Wurtz

My name is Ron Wurtz and I here on behalf of the Kansas Bar Association Criminal Law Section. The current version of K.S.A. 22-2501 correctly states current Constitutional law. The proposed change would run afoul of the Fourth Amendment; it is unnecessary; and it erodes citizens' protections against unwarranted government intrusion into their private effects.

K.S.A. 22-2501 is a short-hand summary of the "search incident to arrest" exception to the Fourth Amendment's warrant requirement. If a policeman makes a lawful arrest, he may search the arrestee's person and the area around the arrestee without a warrant. The goal of such a search is, however, limited to (1) the protection of the officer and (2) to preserve evidence for trial.

The proposed change to K.S.A. 22-2501 expands the scope of the search incident to arrest to permit the officer to look for evidence of any crime, when the law limits that search to evidence of the crime for which the arrest was made. In *Knowles v. Iowa*, 525 U.S. 113 (1998), Chief Justice Rehnquist, writing for a unanimous court, struck down an Iowa statute that permitted police to search citizens' vehicles upon issuing a traffic ticket. In explaining the Court's rationale for stopping this practice, the Chief Justice noted, "Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained." Thus it is clear that the "search incident" exception to the warrant requirement is limited to a search for evidence of "the crime," as is provided in the current Kansas statute. The change would expand the scope beyond that permitted by the United States Supreme Court.

On a more practical note, the change is not needed by law enforcement. Current law and practice suggest that police enjoy sufficient legal and constitutional authority to safely enforce the law of the land.

For example, when an officer stops a vehicle he may assure his safety by ordering the driver to get out of the car, *Pennsylvania v. Mims*, 434 U.S. 106 (1977), ordering passengers out of the car, *Maryland v. Wilson*, 519 U.S. 408 (1997), perform a "patdown" of the driver and passengers upon reasonable suspicion they may be armed or dangerous, *Terry v. Ohio*, 392 U.S. 1 (1968); conduct a "Terry patdown" of the interior of the car upon reasonable suspicion of danger that the occupant could obtain a weapon, *Michigan v. Long*, 463 U.S. 1032 (1983), and even conduct a full search of the passenger compartment including any containers therein, *New York v. Belton*, 453 U.S. 454 (1981). [The *Belton* case is in question with the recent grant of certiorari in *Florida v. Thomas*, 2001 WL 12414, case below 761 So.2d 1010.]

In the case of investigations involving buildings, officers may make protective sweeps of those buildings where there is "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene," *Maryland v. Buie*, 494 U.S. 325, 337 (1990). And of course, the "plain view doctrine," *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), would permit officers to seize any contraband of evidence of a crime they observe during any legal action.

The proposed amendment not only violates Supreme Court interpretation of the Fourth Amendment, it poses a threat to citizens who may be targeted by officers of the law. The current statute (and Constitutional law) requires officers to have probable cause to arrest a citizen. If the arrest is for a crime for which one would expect to find evidence of the crime, the officers may conduct the search incident to arrest to preserve that evidence for trial. However, general exploratory search or "fishing expedition" is encouraged if the officer only needs to arrest one for any crime and then search his home, car and person for evidence of some other crime. For example, officers may go to a citizen's home to arrest them on a warrant for failing to appear on a traffic citation. Under current law they could make themselves safe by a patdown of the arrestee, and with some reason, could even walk through the person's home to assure there is no one there who would be a threat to their safety–but the could not search the home: they could not look in drawers, closets, behind dressers, under beds, etc. With the change, however, reading it literally, officers could conduct a full search of a citizen's residence upon an arrest for any minor violation even though there is no evidence of that violation to be found.

This change is also a tool that those officers who engage in pretextual and profile stops of vehicles traveling on our roads will welcome. It is an expansion of their authority to hold citizens to search their persons and vehicles.

For these reasons, the I urge you to not pass House Bill 2076 out of committee.

700 Jackson, Suite 900
Topeka, KS 66603

Testimony of

Randall L. Hodgkinson, Assistant Appellate Defender[1]

Before the House Judiciary Committee

RE: HB 2076

January 30, 2001

Chairperson O'Neal and Members of the Committee:

Thank you for the opportunity to appear today in opposition to House Bill 2076. ("HB 2076") My name is Randall Hodgkinson and I am an Assistant Appellate Defender here in Topeka. I am not testifying in my capacity as an Assistant Appellate Defender, but my background is relevant to my opinions about this bill. I have worked as an attorney for the Board of Indigent Defense Services for over four years, both at the trial and appellate level, and, in that capacity, have had many occasions to be involved in litigation over searches and seizures. This experience has led me to have substantial concerns over the potential effects of HB 2076, both practical and legal.

On its face, the proposed amendment seems slight–expanding the permissible purpose of a search incident to arrest from "Discovering the fruits and instrumentalities, or evidence of *the* crime" to "Discovering the fruits and instrumentalities of *any* crime." This one-word change significantly expands the powers of law-enforcement officers.

We would all agree that detection of crime is an important law-enforcement function. But we should also agree that citizen privacy and protection from invasive law-enforcement action is also important. It is this latter interest that K.S.A. 22-2501 is designed to protect. It is easy to imagine various measures that would enhance the ability of law-enforcement agencies to detect crime: indiscriminate wiretapping, searching through private mail, and so on. But our society places value on our privacy that prohibits such invasive measures. Any time law-enforcement seeks additional powers to invade a citizen's private life, the Legislature should proceed with great caution and require a clear showing that the invasive nature of such powers is justified.

I am concerned with practical problems associated with HB 2076 that fall into two areas: biased application of such searches and improper use of judicial process.

---

[1]This testimony is not necessarily the position of the Kansas Appellate Defender's Office or the Board of Indigent Services. This testimony reflects the personal opinions and conclusions of the witness.

I am not an authority on racial profiling and cannot speak with authority about its prevalence in Kansas. Based on my own anecdotal experience, I certainly believe that it does take place, particularly in certain communities in our state. And to the extent that racial profiling is a problem, HB 2076 would simply add another tool to the racial profiler's belt. Not only could officers target persons based on the color of their skin, when they arrested those persons on some unrelated matter, this amendment would purport to allow officers a much broader search. If racial profiling is of any concern to the members of this Committee, expanding police powers to search on matters unrelated to the lawful arrest should be avoided at all costs.

On a subject with which I am more familiar, I am concerned that this amendment will increase police motivation to abuse the judicial process, specifically to misuse warrants. In this regard, I have seen two examples in my own work.

In one case, State v. Tomas Granado, Lyon County Case No. 95 CR 159, Mr. Granado was subject to a civil arrest warrant for failure to comply with court orders in a divorce action. Law enforcement officers stopped Mr. Granado's vehicle and arrested him based upon this warrant and took him to the police station. Officers then proceeded to search Mr. Granado's vehicle "incident to his arrest" on the civil arrest warrant, and found some drugs. Obviously, there were no crime for which officers could have searching for "fruits or instrumentalities." The police simply used an unrelated arrest warrant as a tool for an otherwise unauthorized search. The Kansas Court of Appeals reversed Mr. Granado's conviction pursuant to K.S.A. 22-2501.

In another case, State v. Ronald Graham, Geary County Case No. 86 CR 717, Mr. Graham was in court on unrelated matters and a sheriff's officer was in the courtroom with an arrest warrant for alleged probation violations. But the officer did not serve Mr. Graham with the warrant until he had left the courthouse and gotten into his vehicle to leave. Upon search, officers allegedly found some marijuana. When confronted with this situation, District Judge George F. Scott commented that "the purpose of a warrant is to deliver the person before the Court. And when the person is standing in front of the Court, the Court will consider holding you in contempt for not announcing to the Court that – that there are additional, uh – uh, warrants. . . . To let him walk out and then have him arrested, the Court finds, uh – uh, it particularly offense." Transcript of proceedings entered of record on April 15, 1999. Mr. Graham's case is pending on appeal.

These are two examples that I have run across in my practice in which officers use an arrest warrant in order to justify a search that would otherwise be illegal. I agree with Judge Scott that such use of an arrest warrant is an abuse of judicial process. An arrest warrant is a judicial command to bring a person before a judge, not a tool for law enforcement officers to make an otherwise illegal search. K.S.A. 22-2501 currently reflects that policy; if an officer makes an arrest, he or she is limited to a search that is related to that arrest (if the arrest is even criminal in the first place). Removing that limitation will certainly encourage police to use arrest warrants in this improper manner even more.

Finally, it is not clear that the proposed amendment would even survive constitutional scrutiny. In State v. Anderson, 259 Kan. 16, 910 P.2d 180 (1996), the Kansas Supreme Court reviewed K.S.A. 22-2501 and its relationship to the Fourth Amendment. In that case, prosecutors argued that, in New York v. Belton, 453 U.S. 454 (1981), the United States Supreme Court allowed broad searches incident to arrest. But the Kansas Supreme Court noted that "Belton may expand the scope of the constitutionally permissible search of a vehicle but not the permissible purpose of the search." 259 Kan. at 23 (emphasis added). In fact, the Belton court re-emphasized that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation." 453 U.S. at 457 (citing Terry v. Ohio, 392 U.S. 1 (1968)). HB 2076 appears to do exactly what the Kansas Supreme Court indicates was not authorized by Belton, expand the permissible purpose of a search incident to arrest.

In summary, there appear to be several practical and legal problems with HB 2076. Currently, K.S.A. 22-2501 gives law enforcement officers the ability to protect themselves, prevent escape, and investigate the crime for which a person is arrested (if arrested for a crime). These powers, in addition to other police investigatory powers, (i.e. obtaining a search warrant, consent searches, etc.) allow law enforcement to investigate and detect crime. HB 2076 is simply not justified in view of its potential problems.

I urge you to carefully consider the full ramifications of this bill and appreciate the opportunity to voice my opposition. I would be happy to answer questions of the Chair or any member of the Committee.