Approved:
Date 4-29-04

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 p.m. on February 2, 2004 in Room 241-N of the Capitol.

All members were present except:
Representative Dale Swenson - absent

Committee staff present:
Jill Wolters, Revisor of Statutes Office
Jerry Ann Donaldson, Legislative Research Department

Conferees appearing before the committee:
Kyle Smith, KBI
Randall Hodgkinson

Others attending:
See Attached List.

Kyle Smith, Kansas Bureau of Investigation, appeared before the committee to request bill introduction. (Attachment 1)

1. Request a fix to a Kansas Supreme Court ruling in State v McAdam, by strike the word 'compounding' from the manufacture definition in KSA 65-4104 (n) "Manufacture" means the production, preparation, propagation, ~~compounding~~, conversion or process of a controlled substance either directly or indirectly or by extraction ....

Vice Chair Owens made the motion that this request should be introduced as a committee bill. Representative Pauls seconded the motion. The motion carried.

HB 2542- Collection of specimens by KBI when convicted of certain crimes

Chairman Loyd opened the hearings on **HB 2542**.

Kyle Smith, KBI appeared before the committee as a proponent of the bill. This bill would correct an oversight needed in the DNA databank statute KSA 21-2511, to order a person into custody. The sentencing guidelines passed in 1992 required that there be two versions of the sentencing statute KSA 21-4603, one for persons committing crimes before the guidelines went into effect July 1, 1993 (KSA 21-4603) and another for those persons committing crimes after that date (KSA 21-4603d) this would correct an oversight in not catching a change in the listing of statutes. (Attachment 2)

Chairman Loyd closed the hearing on **HB 2542**.

HB 2541 - Search incident to lawful arrest includes evidence of any crime.

Chairman Loyd opened the hearings on **HB 2541**.

Kyle Smith, KBI appeared before the committee in favor of the bill. This legislation deals with what is commonly called "search incident to an arrest". The Kansas Supreme Court has always held that constitutional rights under the Kansas Constitution are the same as those under the Federal Constitution. (Attachment 3)

HB 2541 would change the word to the broader "a" from the narrower "the". This is not any reduction in anyone's constitutional rights. 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".

Randall Hodgkinson appeared in opposition on the bill. There are several practical and legal problems with the bill. Currently KSA 22-2501 gives law enforcement officers the ability to protect themselves, prevent escape, and investigate the crime for which a person is arrested. These powers, in addition to other police investigator powers, (i.e. obtaining a search warrant, consent searches, plain view, etc.) allow law enforcement to investigate and detect crime. The bill is not justified in view of its potential problems. He urged the committee to carefully consider the full ramifications of the bill. (Attachment 4)

Chairman Loyd closed the hearing on **HB 2541**.

The meeting was adjourned at 3:05 pm. The next meeting is schedule for February 3, 2004.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
GUEST LIST

DATE 2-2-04

NAME	REPRESENTING
Randall Hodgkinson	N/A

Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

BILL REQUEST
BEFORE THE HOUSE COMMITTEE ON
CORRECTIONS AND JUVENILE JUSTICE
KYLE G. SMITH, DIRECTOR OF PUBLIC & GOVERNMENTAL AFFAIRS
KANSAS BUREAU OF INVESTIGATION
February 2, 2004

Mr. Chairman and Members of the Committee:

I appear today not only on behalf of the Kansas Bureau of Investigation to request a quick fix to a Kansas Supreme Court ruling that came out just last Friday. In *State v. McAdam*, No. 88,139 the court found that our statute that penalizes methamphetamine manufacturing has a flaw in the definition. The result was that the court felt it had to negate the enhanced penalty for meth production in K.S.A. 65-4159 and only impose the lower penalty in K.S.A. 65-4161. The problem appears to be the use of the word "compounding' in both the manufacture definition in K.S.A. 65-4101and in K.S.A. 65-4161. While it is possible that better testimony explaining the difference between compounding and manufacturing might correct this problem, the release of large numbers of meth cooks back on our streets is serious enough that legislative action should be immediately enacted. All that is required is to simply strike the word 'compounding' from the manufacture definition:

> **65-4101. Definitions.** As used in this act: (a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion

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

House Corr & JJ
Attachment 1
2-2-04

or any other means, to the body of a patient or research subject by: (1) A practitioner or pursuant to the lawful direction of a practitioner; or
(2) the patient or research subject at the direction and in the presence of the practitioner.
(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor or dispenser. It does not include a common carrier, public warehouseman or employee of the carrier or warehouseman.
(c) "Board" means the state board of pharmacy.

# # # # #

(n) "Manufacture" means the production, preparation, propagation, ~~compounding,~~ conversion or processing of a controlled substance either directly or indirectly or by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or re-labeling of its container, except that this term does not include the preparation or compounding of a controlled substance by an individual for the individual's own lawful use or the preparation, compounding, packaging or labeling of a controlled substance: (1) By a practitioner or the practitioner's agent pursuant to a lawful order of a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

Thank you for your time and consideration. I'd be happy to answer any questions.

Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

TESTIMONY
BEFORE THE HOUSE COMMITTEE ON CORRECTIONS AND JUVENILE JUSTICE
KYLE G. SMITH, DIRECTOR OF PUBLIC & GOVERNMENTAL AFFAIRS
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF HB 2542
February 2, 2004

Mr. Chairman and Members of the Committee:

I appear today on a small, but important change needed in out DNA databank statue, K.S.A. 21-2511. As you know, since 1991 criminals convicted of certain specified crimes are required to provide biological samples to the KBI so that their DNA can be placed in a databank and searched by law enforcement for matches to other cases. Persons who were already in custody on those crimes when the law went into effect were also required to provide biological exemplars. However, there was an oversight in not catching a change in the listing of statutes, which order a person into custody.

The sentencing guidelines passed in 1992 required that there be two versions of the sentencing statute 21-4603, one for persons committing crimes before the guidelines went into effect July 1, 1993 (K.S.A. 21-4603), and another for those persons committing crimes after that date (K.S.A. 21-4603d). When the DNA databank law was written in 1991, there was only one version of 21-4603 and we never caught the oversight until it was raised in court this year. While the appellate courts are still wrestling with the issue, it seems only prudent that we correct the oversight since there is no logical reason for a rapist who committed his crime in July 1993 to not be in the databank while another who committed it in June of 1993 would be included.

I'm sorry that this is a bit technical and confusing, particularly since I should have caught the omission in 1992. I'd be happy to try and answer any questions.

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Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

TESTIMONY
BEFORE THE HOUSE COMMITTEE ON CORRECTIONS AND JUVENILE JUSTICE
KYLE G. SMITH, DIRECTOR OF PUBLIC & GOVERNMENTAL AFFAIRS
KANSAS BUREAU OF INVESTIGATION
IN SUPPORT OF HB 2541
February 2, 2004

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 the Kansas Peace Officers Association. This legislation deals with what is commonly called "search incident to an arrest". I will try not to bore you with more than you want to know about search and seizure law, 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. These concerns for officer safety and loss of evidence, coupled with reduced expectations of privacy in an arrested person has resulted in the U.S. Supreme Court creating 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 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 those variances in word choice matter and sometimes they don'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 one word being different in the Kansas statute, 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".

In a 1996 case, US v Kennedy, attached, another defendant tried to argue that *St. v Anderson's* holding should apply and suppress the evidence in his felon in possession of a handgun federal charge. The judge in that case noted this Kansas quirk from prevailing case law and concluded **"Bound to apply the Fourth Amendment as construed by the Supreme Court first, and the Tenth Circuit next, this court not only has no reason to follow the *Anderson* decision but considers it error to do so."** Footnote 2.

HB 2542 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 with 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.

1996 WL 772608
(Cite as: 1996 WL 772608 (D.Kan.))

United States District Court, D. Kansas.

UNITED STATES Of America, Plaintiff,
v.
Douglas Alan KENNEDY, a/k/a Douglass A. Kennedy, Defendant.

No. 96-40066-01-SAC.

Dec. 11, 1996.

Robert L. Farmer, Nuss & Farmer, Fort Scott, KS, for defendant.

James E. Flory, Office of U.S. Atty, Topeka, KS, for U.S.

MEMORANDUM AND ORDER

CROW, Senior District Judge.

***1** This criminal case comes before the court on the defendant Douglas Alan Kennedy's ("Kennedy's") motion to suppress (Dk. 14) the Jennings J-22, .22 caliber pistol, that was seized during the search of the pickup that he had been driving on June 1, 1996. The defendant argues the warrantless search of his pickup was in violation of K.S.A. 22-2501 as it has been interpreted by *State v. Anderson,* 259 Kan. 16, 910 P.2d 180 (1996). The government opposes the suppression motion arguing the search was properly conducted incident to Kennedy's lawful arrest and, alternatively, was supported by probable cause. The evidentiary hearing on Kennedy's motion was held on December 6, 1996. After considering the witness's testimony, the counsels' arguments and the parties' submissions, the court is ready to rule.

INDICTMENT

The grand jury returned a single count indictment on October 9, 1996, charging Kennedy with the unlawful possession of a firearm in violation of 18 U.S.C. § 922(g) and 924(c)(2). The indictment specifically alleges that Kennedy, having been convicted of crimes punishable by imprisonment for a term exceeding one year, possessed on June 1, 1996, a Jennings J-22, .22 caliber pistol.

FACTS

At the hearing, the parties agreed to submit the matter to the court on the facts as recorded in the "Arrest/Detention Probable Cause Affidavit" of Deputy Sheriff Richard Gehlbach of Linn County, Kansas. The court accepted Deputy Gehlbach's affidavit as the facts on which to decide the defendant's motion to suppress.

While on routine patrol, Deputy Sheriff Richard Gehlbach observed an approaching pickup travelling at a high rate of speed. After the pickup passed him, Deputy Gehlbach looked in his rear view mirror and saw an inoperable right tail lamp on the pickup. Deputy Gehlbach turned around and began pursuit of the pickup. Gehlbach observed that he was having difficulty catching up with the pickup. After engaging his emergency lights and travelling at speeds up to 120 miles per hour, Deputy Gehlbach finally caught up with the pickup. As he continued his pursuit of the pickup, Gehlbach noticed that his speedometer showed he was travelling 85 miles per hour around a curve marked at 40 miles per hour.

Deputy Gehlbach observed the pickup driver lean over the seat on the passenger side. After another curve, the driver applied the brakes heavily and pulled to the side of the road. Gehlbach drew his weapon and ordered the driver to exit the pickup. The driver followed these directions. The deputy approached and smelled the odor of an alcoholic beverage coming from the driver. The deputy patted down the driver and found in the front right pocket a loaded magazine for a small caliber pistol. The deputy handcuffed the driver and placed him in the back seat of the patrol car.

Other officers arrived on the scene, and they watched the driver while Gehlbach searched the pickup for what the driver apparently had stuffed under the passenger seat during the chase. Gehlbach found a cooler sitting on the passenger floorboard containing seven beer cans. Gehlbach also found a Jennings .22 caliber pistol between the passenger door and the seat. Gehlbach observed that the pistol was situated so that it would have fallen out of the pickup upon opening the passenger door. Another officer completed the inventory on the pickup, and the pickup was towed.

APPLICABLE LAW AND ANALYSIS

*2 In a federal case, the reasonableness of a state search is governed by the Fourth Amendment to the United States Constitution. *United States v. Price,* 75 F.3d 1440, 1443 (10th Cir.), *cert. denied,* 116 S.Ct. 1889 (1996). Federal law applies and state law may be considered so long as it does "not enlarge nor diminish federal law." *United States v. Richardson,* 86 F.3d 1537, 1544 (10th Cir.1996) (citing *Elkins v. United States,* 364 U.S. 206, 224 (1960)), *petition for cert. filed,* --- U.S.L.W. ---- (U.S. Sep. 3, 1996) (No. 96-5881). "A violation of state law may or may not form the basis for suppression on Fourth Amendment grounds." *Id.* at 1443-44.

"[U]nder the Fourth and Fourteenth Amendments ... a search conducted without a warrant issued upon probable cause is '*per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions.' " *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973) (citations omitted). Both Supreme Court and Tenth Circuit precedent make quite plain that "a warrantless search is reasonable only when it falls within one of the clearly defined exceptions to the warrant requirement." *United States v. Bute,* 43 F.3d 531, 534 (10th Cir.1994). " '[W]hen the defendant challenges a warrantless search or seizure the government carries the burden of justifying the agents' actions.' " *United States v. Bute,* 43 F.3d at 534 (quoting *United States v. Maestas,* 2 F.3d 1485, 1491 (10th Cir.1993)). The two "well-delineated" exceptions ostensibly applicable here are an automobile search based on probable cause and a search incident to an arrest.

Automobile Exception

A warrantless search of a vehicle based on probable cause that it contains contraband or evidence of a crime is reasonable under the Fourth Amendment. *United States v. Nicholson,* 17 F.3d 1294, 1297 (10th Cir.1994); *United States v. Arzaga,* 9 F.3d 91, 94 (10th Cir.1993). "The Supreme Court has explained that the warrantless search of an automobile is justified by the vehicle's inherent mobility and the diminished expectation of privacy which surrounds the automobile." *Arzaga,* 9 F.3d at 94 (citation omitted). "Probable cause to search a vehicle is established if, under the '*totality of the circumstances* ' there is a 'fair probability' that the car contains contraband or evidence." *United States v. Nielsen,* 9 F.3d 1487, 1490 (10th Cir.1993) (quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983)). The odor of burnt marijuana satisfies the probable cause requirement for searching the passenger compartment of the vehicle. *United States v. Nielsen,* 9 F.3d at 1490-91; *see United States v. Parker,* 72 F.3d 1444, 1450-51 (10th Cir.1995).

Prior to searching the pickup, Deputy Gehlbach had accumulated the following information. The defendant had been driving the pickup at a high rate of speed in an apparent effort to elude the deputy. During the high-speed chase, Gehlbach had observed the defendant lean over the passenger seat as one would do to stuff something under the passenger seat. The smell of alcoholic beverages had been detected as coming from the defendant. Transporting an open container of alcoholic beverage is a misdemeanor in Kansas. K.S.A. 8-1599. Finally, Gehlbach had found a loaded magazine for a small caliber pistol in the defendant's pocket.

*3 The fair inferences to be drawn from these circumstances are that alcohol and a firearm were probably present in the vehicle and that the defendant apparently considered his possession of either or both to be unlawful as evidenced by his attempt to elude the deputy and by his stuffing something under the passenger seat during the chase. The court finds that based on the totality of the circumstances, there was a fair probability that the automobile contained evidence of a crime or contraband. [FN1]

FN1. The defendant simply cannot argue that *State v. Anderson,* 259 Kan. 16, 910 P.2d 180 (1996), has any relevance to the automobile exception. The Kansas Supreme Court in *Anderson* said: "In the case before us, an extremely narrow issue is involved. The search of the vehicle was *purely and solely* a search incident to arrest. There is no evidence of or claim made that probable cause was present for the search." 259 Kan. at 19. In the instant case, the government does claim there is probable cause to search the pickup for contraband or evidence of criminal conduct.

Search Incident to Arrest Exception

There also is no Fourth Amendment violation when a search is conducted incident to an arrest, "because the search prevents the arrestee from reaching weapons or destructible evidence." *United States v. Franco,* 981 F.2d 470, 472 (10th Cir.1992) (citations omitted). The scope of such a search extends to the arrestee and to the area within the arrestee's immediate control. *New York v. Belton,* 453 U.S. 454, 459-60 (1981). In *Belton,* the Court held that an officer's "lawful custodial arrest of the occupant of an automobile" constitutionally empowers the officer, "as a contemporaneous incident of the arrest, [to] search the passenger compartment of that automobile." 453 U.S. at 460. The Court accepted "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite [m].' " *Belton,* 453 U.S. at 460 (quoting *Chimel v. California,* 395 U.S. 752, 763 (1969)).

Kennedy argues this exception is inapplicable as he had been handcuffed and placed in the patrol car prior to the search. The defendant can find no support for his argument in this circuit:

> We have previously held that where an officer has made a lawful arrest of a suspect in an automobile, the officer may seize items of evidence found within the passenger compartment of the vehicle as part of a search incident to a lawful arrest, even when the suspect is outside of the vehicle and handcuffed. *United States v. McKinnell,* 888 F.2d 669, 672-73 (10th Cir.1989) ; *United States v. Cotton,* 751 F.2d 1146, 1148 (10th Cir.1985).

United States v. Lacey, 86 F.3d 956, 971 (10th Cir.), *cert. denied,* 117 S.Ct. 331 (1996); *see United States v. Franco,* 981 F.2d 470, 472-73 (10th Cir.1992). Kennedy was a recent occupant of his pickup and had exercised control over it and its contents prior to his lawful arrest. These circumstances justify Deputy Gehlbach's subsequent search of the pickup:

> "[I]t is not by any means inconceivable under those various possibilities that an arrestee could gain control of some item within the automobile. The law simply does not require the arresting officer to mentally sift through all these possibilities during an arrest, before deciding whether he may lawfully search within the vehicle."

***4** *Franco,* 981 F.2d at 473 (quoting *Cotton,* 751 F.2d at 1148). [FN2]

> FN2. In this federal forum, the defendant's reliance on *State v. Anderson* is misplaced. While the Kansas Supreme Court in *Anderson* said that K.S.A. 22-2501 was intended to codify *Chimel v. California,* 395 U.S. 752 (1969), the court eventually acknowledged that the Kansas statute "may possibly be more restrictive than prevailing case law on the Fourth Amendment." 259 Kan. at 22. This court would not use such tentative language to describe the apparent differences between the Kansas statute and Fourth Amendment case law. Bound to apply the Fourth Amendment as construed by the Supreme Court first and the Tenth Circuit next, this court not only has no reason to follow the *Anderson* decision, but considers it error to do so.

The court denies the defendant Kennedy's motion to suppress as the warrantless search of his pickup was permissible under the automobile exception and the search incident to arrest exception.

IT IS THEREFORE ORDERED that the defendant Kennedy's motion to suppress (Dk. 14) is denied.

1996 WL 772608, 1996 WL 772608 (D.Kan.)

END OF DOCUMENT

700 Jackson, Suite 900
Topeka, KS 66603

Testimony of

Randall L. Hodgkinson, Deputy Appellate Defender[1]

Before the House Corrections and Juvenile Justice Committee

RE: HB 2541

February 2, 2004

Chairperson Loyd and Members of the Committee:

Thank you for the opportunity to appear today in opposition to House Bill 2541. ("HB 2541") My name is Randall Hodgkinson and I am a Deputy Appellate Defender here in Topeka. I am not testifying in my capacity as a Deputy 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 six 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 2541, 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 *a* 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.

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[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 2541 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 and engage in otherwise illegal searches. In this regard, I can provide two examples from my own cases.

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 was 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.

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 2541 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 2541. 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, plain view, etc.) allow law enforcement to investigate and detect crime. HB 2541 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.