Approved: 10-09-05
Date

MINUTES OF THE HOUSE CORRECTIONS & JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 P.M. on February 14, 2005 in Room 241-N of the Capitol.

All members were present except:
Kathe Decker- excused

Committee staff present:
Jill Wolters, Revisor of Statutes Office
Diana Lee, Revisor of Statutes Office
Jerry Ann Donaldson, Kansas Legislative Research
Reagan Cussimanio, Kansas Legislative Research
Connie Burns, Committee Secretary

Conferees appearing before the committee:
Kyle Smith, KBI
Commissioner Denise Everhart
Jared Maag, Deputy Attorney General

Others attending:
See attached list.

**HB 2314 – Timing of offender registration**

Chairman Loyd opened the hearing on **HB 2314**.

Kyle Smith, KBI, testified in support of the bill. (Attachment 1) The bill makes two changes to the existing act covering the registration of persons convicted of certain crimes. Language taken from Nebraska's approach, defines the 10 years to start from the offenders last release from custody. The second correction is almost technical, utilizing the same approach as for adults, exempting from registration the time juveniles are confined, and not from the time of adjudication. The intent of the bill is to eliminate present questions of whether the 10 years registration requirement continues to run during a registrants incarceration for any subsequent crime.

Chairman Loyd closed the hearing on **HB 2314.**

**HB 2327 – Authority for Juvenile Justice Authority to test offenders for infectious diseases.**

Chairman Loyd opened the hearing on **HB 2327.**

Commissioner Denise Everhart, JJA, appeared in support of the bill. (Attachment 2) This bill provides the Commissioner of JJA with the statutory authority to obtain a court order to have an offender's blood tested for infectious diseases when staff at a juvenile correctional facility has been exposed to that offender's body fluids.

Chairman Loyd closed the hearing on **HB 2327.**

**HB 2151 – Search warrants issued in violation of health, safety, building or animal cruelty laws/resolutions/ordinances**

Chairman Loyd opened the hearing on **HB 2151.**

Ed Jaskinia, The Associated Landlords of Kansas (TALK), spoke in favor of the bill. (Attachment 3) The conferee stated that no uniform rules currently exist for a municipality to acquire an Administrative Search Warrant, this bill would set the minimum standards, allowing cities to use this tool in a fair and consistent way. .

Sandy Jacquot, League of Kansas Municipalities, testified in support of the bill. (Attachment 4) The bill would grant authority to district courts to issue search warrants in cases where there is probable cause to believe that a state, county or city law relating to health, safety, building or animal cruelty has been violated. Typically referred to as administrative search warrants to provide access to a yard or dwelling to obtain evidence of a violation.

Chairman Loyd closed the hearing on **HB 2151.**

**HB 2261 – Search incident to lawful arrest included evidence of any crime**

Chairman Loyd closed the hearing on **HB 2261.**

Jared Maag, Deputy Attorney General, spoke in favor of the bill. (Attachment 5) This bill would reverse the present language of KSA 22-2501. Codifying this area of search and seizure law only breeds conflict with prevailing case law. The conferee recommends that if any legislative action be taken, KSA 22-2501 be repealed.

Kyle Smith, KBI, testified in support of the bill. (Attachment 6) This bill deals with what is commonly called "search incident to an arrest" and would urge the committee to simply repeal KSA 22-2501 and avoid having inappropriate suppression of evidence, criminals wrongfully going free and let law enforcement be guided by the constitutional restraints set down by the United State's supreme court.

Mike Jennings, Kansas County & District Attorneys Association, submitted written testimony in support of the bill. (Attachment 7)

Randall Hodgkinson, provided written testimony in opposition of the bill. (Attachment 8) Concerns with the bill in two areas are biased application of a search and improper use of judicial process.

Chairman Loyd closed the hearing on **HB 2261.**

The Chairman appointed Representative Horst as chairperson of the subcommittee on **HB 2038**.

Representative Pauls made the motion to move **HB 2206** out favorably and be placed on the consent calendar. Representative Huntington seconded the motion. The motion carried.

Representative Davis made the motion to move **HB 2314** out favorably. Representative Pauls seconded the motion.

Representative Pauls moved to amend to add a semicolon and the number (2) in line 26. Representative Sharp seconded the motion. The motion carried.

Representative Pauls made the motion to move **HB 2314** out favorably as amended. Representative Horst seconded the motion. The motion carried.

Representative Davis made the motion to move **HB 2327** out favorably. Representative Peterson seconded the motion. The motion carried.

The meeting was adjourned at 2:50 pm. The next meeting is February 15, 2005.

**HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE**
**GUEST LIST**

**DATE** 2-14-05

| NAME | REPRESENTING |
|---|---|
| Tim Madden | KDOC |
| Rick Fischli | " |
| Farzona Noyobshoeva | 4-H FLEX |
| Olesia Shatmanberova | 4-H FLEX |
| Kamila Gucbaliyeva | 4-H FLEX |
| Jane Rutherford | Little Gov't Rel. |
| Gary W. Gerhardt | 4-H KSU |
| Sadbek M. Mirzakhalmolamov | 4-H FLEX |
| Aliaksandr V. Krasko | |
| ED JASKINIA | THE ASSOCIATED LANDLORDS OF KANSAS |
| Sandy Jacquot | LKM |
| Eberhart | JJA |
| Wade H. Bowlf | JJA |
| BILL MISKELL | JJA |
| Jim CLARK | KBA |
| Joe Aistrup | K-State |
| Walter Gray | K-State |
| Scott Grier | KSU |
| Travis McBurney | KSU |
| AARON DAYBROAD | KSU |
| KEVIN GRAHAM | AG |
| Jane Nohr | KBI |
| Kyle Smith | KBI |
| Mike Hurst | KCDAA |

# Kansas Bureau of Investigation

Larry Welch
*Director*

Phill Kline
*Attorney General*

**Testimony in Support of HB 2314**
Before the House Corrections and Juvenile Justice Committee
Kyle G. Smith
On behalf of the Kansas Bureau of Investigation
February 14, 2005

Chairman Loyd and Members of the Committee,

HB 2314 makes two basic changes to our existing act covering the registration of persons convicted of certain crimes. Basically, in addition to any criminal sanction, persons convicted of sex offenses, murder and kidnapping are required to register for 10 years, or life if the victim was a child or for subsequent offenses.

Since the law has been on the books for 10 years now, several registrants are due to be removed from the databank. However, several interpretation issues have arisen regarding the current staturory language, i.e., 'ten years from when?'. For example, the law says they have to register for 10 years from going on parole. But what happens if their parole is revoked? Several times? Do they get credit towards the 10 years while in prison and so be rewarded for violating parole?

HB 2314, in language taken from Nebraska's approach, defines the 10 years to start from their last release from custody.

The second correction is almost technical. When juvenile offenders were added to those that have to register, the act says their duty to register starts from date of adjudication. But if the juvenile is placed in an institution, say the next 5 years at YCAT, they present no public risk and it would be a waste of time to require them to register. The amendment simply utilizes the same approach used for adults, exempting from registration the time juveniles are confined.

If there are any questions, I'd be happy to respond.

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

# KANSAS

JUVENILE JUSTICE AUTHORITY
DENISE L. EVERHART, COMMISSIONER

KATHLEEN SEBELIUS, GOVERNOR

## MEMORANDUM

**TO:** Representative Ward Loyd, Chair
House Committee on Corrections and Juvenile Justice Oversight

**FROM:** Denise L. Everhart, Commissioner

**DATE:** February 14, 2005

**SUBJECT:** Testimony on HB 2327

Mr. Chairman and members of the Committee, I appear before you today to request your favorable consideration of House Bill 2327. JJA has requested introduction of HB 2327 in an effort to provide the Commissioner of JJA with the statutory authority to obtain a court order to have an offender's blood tested for infectious diseases when staff at a juvenile correctional facility has been exposed to that offender's body fluids.

HB 2327 brings juvenile corrections employees and juvenile offenders under the purview of both K.S.A. 65-6015 *et seq.*, and K.S.A. 65-6017 *et seq.* HB 2327 would authorize the results of a juvenile offender's blood test to be disclosed to the court that ordered the test, to the juvenile offender who was tested, and to either the health case provider or counselor designated by the employee who was exposed to the body fluids. In addition, the results would be disclosed to JJA for inclusion in the offender's medical record. Disclosure of those test results beyond those specifically identified in the legislation would not be authorized.

Juvenile corrections employees are not frequently exposed to the body fluids of a juvenile offender. However, when such exposure does occur, the authority to request a court to order that a juvenile offender be tested and the results of that test to be disclosed to the exposed employee provides that employee with information that is important in helping to make informed health care decisions.

Your favorable consideration of HB 2327 as amended is appreciated. I appreciate the opportunity to address you today, and would be pleased to respond to any questions from the Committee.

JAYHAWK WALK, 714 SW JACKSON ST, STE 300, TOPEKA, KANSAS 66603
VOICE: 785-296-4213 FAX: 785-296-1412 HTTP://JJA.STATE.KS.US

House C & JJ
2-14-05
Attachment 2

**Ed Jaskinia**
*President*
(913) 207-0567

**James Dunn**
*Vice President (Zone 1)*
(785) 843-5272

# *The Associated Landlords of Kansas*


**Dr. Alex ett**
*Vice President (Zone 2)*
(785) 238-3760

**Gary Hefley**
*Vice President (Zone 3)*
(316) 722-7107

P.O. Box 4221 • Topeka, Kansas 66604-0221

The Associated Landlords of Kansas (TALK) was created in 1981 by a group of people from across Kansas to "Promote a strong voice in the legislature, a high standard of ethics, and provide educational opportunities for landlords." Some of our members helped create The Residential Landlord-Tenant Act of 1975, a model of fair law for both landlords and tenants. Our organization consists of members in 19 chapters across the state, and new chapters are in the process of being formed.

In this 2005 legislative session, we continue to work for fair and decent housing for all. We have listed below some of the issues that are of interest to us in this legislative session.

## S.B. 63 SUB-METERING OF WATER UTILITIES

Many buildings have only one (1) water meter, with multiple users of the water. Each tenant pays an equal amount of that bill. Fairness requires that those who use less should pay less. This bill allows landlords (at their own expense) to put separate meters between the master meter and the tenant. The bill can then be divided fairly by the landlord. The landlord is not allowed to make a profit on this arrangement.

The EPA has written articles supporting this, and believes that it is a water conservation tool.

## H.B. 2151 ADMINISTRATIVE SEARCH WARRANTS

In Kansas, no uniform rules currently exist for a municipality to acquire an Administrative Search Warrant. This bill will set the minimum standards, allowing cities to use this tool in a fair and consistent way. Citizen rights are also protected, creating a bill that should make everyone happy.

## GARNISHMENT

We would like to work with the Banking industry to find a mutually acceptable way to allow banks to hold garnishment orders for more than one (1) day.

We understand that this will create a problem for the banks. However, we believe that the hardships of people who have a legal judgement against a debtor should require that additional time be given for holding the garnishment.

If we can be of help to you in these or any other areas concerning property, tenants, or landlords, please feel free to contact us.

Ed Jaskinia, President

ZONE 1
Landlords of Lawrence Inc.
Landlords of Johnson County, KS Inc.
K.C.KS. Landlords Inc., serving Wyandotte Co.
Eastern Kansas Landlords Assc., serving Miami Co.
Franklin Co. Landlords Assc.

ZONE 2
Landlords of Manhattan Inc.
Geary County Landlords Inc.
Jackson County Landlords Assc.
Shawnee County Landlords Assc.
Salina Rental Property Providers Inc.
South Central Kansas Landlord Assc.
Serving Sumner County

ZONE 3
Central Kansas Landlords Assc.
Bourbon County Landlords Assc.
Cherokee County Landlords Assc.
Crawford
Montgomery
Allen
Rental Owner Inc.,
Labett

House C & JJ
2-14-05
Attachment 3

LKM
League of Kansas Municipalities

300 SW 8th Avenue
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

TO: House Corrections and Juvenile Justice Committee

FROM: Sandy Jacquot, Director of Law/General Counsel

DATE: February 14, 2005

RE: Support for HB 2151

I would like to thank the committee on behalf of the League of Kansas Municipalities for the opportunity to testify in support of HB 2151. This bill would grant authority to district courts to issue search warrants in cases where there is probable cause to believe that a state, county or city law relating to health, safety, building or animal cruelty has been violated. These are typically referred to as administrative search warrants to provide access to a yard or dwelling to obtain evidence of a violation.

Currently, cities are able to obtain administrative search warrants, but in some counties the practice is not widespread and there is not a process for cities to access the magistrate to receive the search warrant. Adding this language to the existing criminal procedure act is probably helpful, but the League would suggest a couple of changes to the procedure. First, this bill would require that the county or district attorney approve the request. This is an unnecessary step and would be burdensome in larger jurisdictions. Further, it would allow district and county attorneys to have control over whether or not a local ordinance could be enforced. This is a significant change in policy and does not promote local control. In one city, the city attorney gets administrative search warrants on every property on which the city issues weed violations in order to mow the property. To require that the county or district attorney approve each of these would tremendously slow the process and perhaps even grind it to a halt. In cases where the request is by a municipality, it would make more sense to require the city attorney to approve the application for the warrant.

In addition, I have been involved in discussions with district court judges from time to time about the feasability of municipal judges being able to issue administrative search warrants for the limited purpose of gathering evidence of a violation of a nuisance ordinance when the resident has refused consent for the search. In cities of the first class, municipal judges are required to be attorneys. Most search warrants issue from the larger jurisdictions and granting law trained municipal judges this additional authority would ease the burden on the district courts and allow cities to more efficiently enforce their local ordinances.

Thank you again for allowing the League to testify in support of SB 2151, to the extent that it codifies the circumstances under which cities can obtain an administrative search warrant. The League, however, does oppose the language requiring approval by the county or district attorney before such warrant can issue and would suggest the addition of the city attorney in the language. In addition, the League welcomes a discussion of granting certain municipal court judges the authority to issue search warrants in cases of nuisance ordinance enforcement.



House C & JJ
2-14-05
Attachment 4

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

PHILL KLINE
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

February 14, 2005

TESTIMONY
BEFORE THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

JARED S. MAAG
DEPUTY ATTORNEY GENERAL
CRIMINAL LITIGATION DIVISION

CONCERNING HB 2261

Chairman Loyd and Members of the Committee:

Thank you for the opportunity in allowing the Office of the Attorney General to give brief testimony related to HB 2261.

Codification of procedures involving searches incident to arrest are rare. Apart from Kansas, only five other states (Florida, Georgia, Illinois, Montana, and Wisconsin) statutorily prescribe the limits of an officer's right to search subsequent to the arrest of a suspect. I have attached each state's law for your review. Though the six laws have minor differences, each is drafted in a consistent fashion allowing for searches to occur in order to (1) protect the officer from attack, (2) prevent the detained person from escaping, and (3) discover the fruits of the crime. It is the latter of these three purposes that HB 2261 seeks to amend. The Office of the Attorney General, however, respectfully submits that K.S.A. 22-2501 should be repealed rather than amended.

In the criminal justice arena, search and seizure law is seemingly in a state of flux. To be sure, in virtually every term the United States Supreme Court will address an issue related to the Fourth Amendment. In the Court's last term alone a decision was reached involving an

officer's right to search the passenger compartment of a vehicle as a contemporaneous incident of arrest. In *Thornton v. United States*, 541 U.S. 615 (2004), the Court expanded the reasoning of its prior decision in *New York v. Belton*, 453 U.S. 454 (1981) to include the right of an officer to search the passenger compartment of a vehicle as an incident to arrest even when an officer does not make contact until the person arrested has left the vehicle. It is important to note that in this decision, Justice Scalia, in a concurring opinion, argues that "*Belton* searches" should be limited to instances where it is reasonable to believe that evidence relevant to *the* crime of arrest might be found in the vehicle. The majority, however, found that *Thornton* was the wrong case to decide that particular issue.

This exchange amongst the Justices is important if only to demonstrate that in the area of search incident to arrest there is an apparent concern over the extent to which *Belton* applies. *Thornton* certainly indicates that the issue of whether an officer may search for evidence of *the* crime of arrest versus what Justice Scalia refers to as "general rummaging" is one that is yet unanswered by the Court.

Scalia & Ginsburg

Our own Supreme Court has questioned the very reach of K.S.A. 22-2501 finding that the statute "may possibly be more restrictive than prevailing case law on the Fourth Amendment would permit." *State v. Anderson*, 259 Kan. 16 (1996).

In short, codifying this area of search and seizure law only breeds conflict with prevailing case law. Law enforcement officers around the State of Kansas are routinely updated on recent changes involving the Fourth Amendment and apply those changes accordingly. Allowing K.S.A. 22-2501 to remain on the books will simply add confusion to an area of law that continues to evolve. Consequently, it must be repealed.

Again, I thank you for the opportunity in presenting this brief testimony concerning HB 2261. Our office stands ready to answer any questions that this committee and other legislators might have concerning this bill.

Jared S. Maag
Deputy Attorney General
Criminal Litigation Division

**Select Year:** 2004 Go

# The 2004 Florida Statutes

Title XLVII Chapter 901 View Entire Chapter

CRIMINAL PROCEDURE AND CORRECTIONS ARRESTS

**901.21 Search of person arrested.--**

(1) When a lawful arrest is effected, a peace officer may search the person arrested and the area within the person's immediate presence for the purpose of:

(a) Protecting the officer from attack;

(b) Preventing the person from escaping; or

(c) Discovering the fruits of a crime.

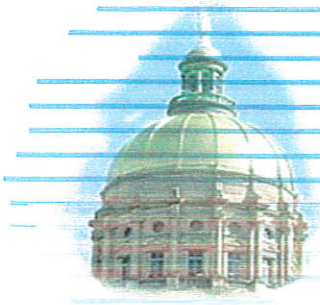
(2) A peace officer making a lawful search without a warrant may seize all instruments, articles, or things discovered on the person arrested or within the person's immediate control, the seizure of which is reasonably necessary for the purpose of:

(a) Protecting the officer from attack;

(b) Preventing the escape of the arrested person; or

(c) Assuring subsequent lawful custody of the fruits of a crime or of the articles used in the commission of a crime.

**History.**--s. 21, ch. 19554, 1939; CGL 1940 Supp. 8663(21); s. 10, ch. 70-339.



Georgia General Assembly

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## Georgia Code Title List

Current through 2004 Regular Session of the General Assembly

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17-5-1.
(a) When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within the person´s immediate presence for the purpose of:
(1) Protecting the officer from attack;
(2) Preventing the person from escaping;
(3) Discovering or seizing the fruits of the crime for which the person has been arrested; or
(4) Discovering or seizing any instruments, articles, or things which are being used or which may have been used in the commission of the crime for which the person has been arrested.
(b) When the peace officer is in the process of effecting a lawful search, nothing in this Code section shall be construed to preclude him from discovering or seizing any stolen or embezzled property, any item, substance, object, thing, or matter, the possession of which is unlawful, or any item, substance, object, thing, or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of this state.

(725 ILCS 5/108-1) (from Ch. 38, par. 108-1)

Sec. 108-1. Search without warrant.

(1) When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

(a) protecting the officer from attack; or

(b) preventing the person from escaping; or

(c) discovering the fruits of the crime; or

(d) discovering any instruments, articles, or things which may have been used in the commission of, or which may constitute evidence of, an offense.

(2) (Blank).

(3) A law enforcement officer may not search or inspect a motor vehicle, its contents, the driver, or a passenger solely because of a violation of Section 12-603.1 of the Illinois Vehicle Code.

(Source: P.A. 93-99, eff. 7-3-03.)

# Montana Code Annotated 2003

Previous Section · MCA Contents · Part Contents · Search · Help · Next Section

**46-5-102. Scope of search incident to arrest.** When a lawful arrest is effected, a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

(1) protecting the officer from attack;

(2) preventing the person from escaping;

(3) discovering and seizing the fruits of the crime; or

(4) discovering and seizing any persons, instruments, articles, or things which may have been used in the commission of or which may constitute evidence of the offense.

**History:** En. 95-702 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-702.

(c) The accused appears to represent a danger of harm to himself or herself, another person or property.

(d) The accused can show sufficient evidence of ties to the community.

(e) The accused has previously failed to appear or failed to respond to a citation.

(f) Arrest or further detention appears necessary to carry out legitimate investigative action in accordance with law enforcement agency policies.

**(3)** CONTENTS. The citation shall do all of the following:

(a) Identify the offense and section which the person is alleged to have violated, including the date, and if material, identify the property and other persons involved.

(b) Contain the name and address of the person cited, or other identification if that cannot be ascertained.

(c) Identify the officer issuing the citation.

(d) Direct the person cited to appear for his or her initial appearance in a designated court, at a designated time and date.

**(4)** SERVICE. A copy of the citation shall be delivered to the person cited, and the original must be filed with the district attorney.

**(5)** REVIEW BY DISTRICT ATTORNEY. If the district attorney declines to prosecute, he or she shall notify the law enforcement agency which issued the citation. The law enforcement agency shall attempt to notify the person cited that he or she will not be charged and is not required to appear as directed in the citation.

**(6)** CITATION NO BAR TO CRIMINAL SUMMONS OR WARRANT. The prior issuance of a citation does not bar the issuance of a summons or a warrant for the same offense.

**(7)** PREPARATION OF FORM. The judicial conference shall prescribe the form and content of the citation under s. 758.171.

**History:** 1983 a. 433.

**968.09 Warrant on failure to appear. (1)** When a defendant or a witness fails to appear before the court as required, or violates a term of the defendant's or witness's bond or the defendant's or witness's probation, if any, the court may issue a bench warrant for the defendant's or witness's arrest which shall direct that the defendant or witness be brought before the court without unreasonable delay. The court shall state on the record at the time of issuance of the bench warrant the reason therefor.

**(2)** Prior to the defendant's appearance in court after the defendant's arrest under sub. (1), ch. 969 shall not apply.

**History:** 1971 c. 298; 1993 a. 486.

A bench warrant may be directed to all law enforcement officers in the state without regard to whether the defendant is charged with a violation of a state statute or county ordinance. The form of the warrant should be as suggested by s. 968.04 (3) (a) 7. 62 Atty. Gen. 208.

**968.10 Searches and seizures; when authorized.** A search of a person, object or place may be made and things may be seized when the search is made:

**(1)** Incident to a lawful arrest;

**(2)** With consent;

**(3)** Pursuant to a valid search warrant;

**(4)** With the authority and within the scope of a right of lawful inspection;

**(5)** Pursuant to a search during an authorized temporary questioning as provided in s. 968.25; or

**(6)** As otherwise authorized by law.

**NOTE: See the notes to Article I, section 11 of the Wisconsin constitution.**

**968.11 Scope of search incident to lawful arrest.** When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:

**(1)** Protecting the officer from attack;

**(2)** Preventing the person from escaping;

**(3)** Discovering and seizing the fruits of the crime; or

**(4)** Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

An automobile search consistent with *Belton* does not violate this section. This section does not require proof of an officer's subjective intent when conducting a search incident to an arrest. State v. Fry, 131 Wis. 2d 153, 388 N.W.2d 565 (1986).

**NOTE: See also the notes to Article I, section 11 of the Wisconsin constitution.**

**968.12 Search warrant. (1)** DESCRIPTION AND ISSUANCE. A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property. A judge shall issue a search warrant if probable cause is shown.

**(2)** WARRANT UPON AFFIDAVIT. A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3) (d), showing probable cause therefor. The complaint, affidavit or testimony may be upon information and belief.

**(3)** WARRANT UPON ORAL TESTIMONY. (a) *General rule.* A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection.

(b) *Application.* The person who is requesting the warrant shall prepare a duplicate original warrant and read the duplicate original warrant, verbatim, to the judge. The judge shall enter, verbatim, what is read on the original warrant. The judge may direct that the warrant be modified.

(c) *Issuance.* If the judge determines that there is probable cause for the warrant, the judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's name on the duplicate original warrant. In addition, the person shall sign his or her own name on the duplicate original warrant. The judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony shall be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(d) *Recording and certification of testimony.* When a caller informs the judge that the purpose of the call is to request a warrant, the judge shall place under oath each person whose testimony forms a basis of the application and each person applying for the warrant. The judge or requesting person shall arrange for all sworn testimony to be recorded either by a stenographic reporter or by means of a voice recording device. The judge shall have the record transcribed. The transcript, certified as accurate by the judge or reporter, as appropriate, shall be filed with the court. If the testimony was recorded by means of a voice recording device, the judge shall also file the original recording with the court.

(e) *Contents.* The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(f) *Entry of time of execution.* The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

**(4)** LOCATION OF SEARCH. A search warrant may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state.

**History:** 1971 c. 298; 1983 a. 443; Sup. Ct. Order, 141 Wis. 2d xiii (1987).

**Judicial Council Note, 1988:** Sub. (2) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (a) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (c) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (d) is amended to authorize that the testimony be recorded either by a stenographic reporter or a voice recording device. [Re Order effective Jan. 1, 1988]

**NOTE: See the notes to Article I, section 11 of the Wisconsin constitution.**

(6)

# Kansas Bureau of Investigation

Larry Welch
*Director*

Phill Kline
*Attorney General*

**Testimony in Support of HB 2261**
Before the House Corrections and Juvenile Justice Committee
Kyle G. Smith
On behalf of the Kansas Bureau of Investigation
And the Kansas Peace Officers Association
February 14, 2005

Chairman Loyd and Members of the Committee,

On behalf of the Kansas Bureau of Investigation and the Kansas Peace Officers Association, I appear in support of HB 2261 or, more accurately, the repeal of K.S.A. 22-2501.

A Kansas court decision, *State v* Anderson, 259 Kan. 16, (1996) caused Kansas law enforcement officers to be unduly restricted in searching suspects after their arrest, merely due to one unintentional word choice in the statue. As a result, evidence of crimes other than the one for which the person was arrested, is being suppressed.

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

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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..

On behalf of the KBI and the peace officers of Kansas, I would suggest the committee simply repeal K.S.A. 22-2501 and avoid having innapropriate suppression of evidence, criminals wrongfully going free and let law enforcement be guided by the constitutional restraints set down by the United State's supreme court. And we won't have to keep coming back here tweaking this unnecessary statute each year.

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

(7)



# Kansas County & District Attorneys Association

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February 14, 2005

Rep. Ward Loyd, Chair
House Corrections and
Juvenile Justice Committee
Statehouse, Topeka

Dear Representative Loyd and Members of the Committee:

I am writing in support of the amendment to K.S.A. 22-2501. The Amendment would allow the State to use in evidence anything possessed by an arrested person which was found at the time of their arrest on their person or in the passenger compartment of their car. At the present time, the only thing which the State can use is any item which is evidence of the crime for which the arrest is made. Thus, if there is a meth lab in the car of a person arrested for Driving While Suspended, it will be suppressed and they will go free; not because the constable has blundered, but because K.S.A. 22-2501 has been incorrectly interpreted by our Supreme Court since State v. Anderson.

The U.S. Supreme Court has ruled that the lab would be admissible and the lower Federal Courts have specifically rejected the limitation to evidence of the only the crime of arrest, ruling instead that the scope of a search incident to arrest includes evidence of any crime. As a result, whether the evidence seized during a search incident to arrest will be admissible depends on whether the case is prosecuted in state or federal court.

The Federal Rule was adopted to provide a bright line rule for law enforcement. State v. Anderson seriously blurs the line and creates unnecessary confusion and uncertainty.

Sincerely,

R. Michael Jennings, ADA
KCDAA Legislative Chair

House C & JJ
2-14-05
Attachment 7

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 2261

February 14, 2005

Chairperson Loyd and Members of the Committee:

Thank you for the opportunity to appear today in opposition to House Bill 2261. ("HB 2261") 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 2261, both practical and legal. In fact, this is the third time I have testified against this exact bill. *See* Testimony against 2001 HB 2076, 2004 HB 2541.

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 2261 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 2261 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 2261. 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 2261 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.