Senate Judiciary Committee
Senate Bill 6
Testimony of the Kansas Association of Criminal Defense Lawyers
Proponent
January 18, 2011

The Kansas Association of Criminal Defense Lawyers is a 300-member organization dedicated to justice and due process for people accused of crimes. KACDL is strongly in favor of SB 6.

Last year, when this bill existed as SB 435, it was characterized as a "technical correction . . . with no fiscal effect" (to quote the 2010 Fiscal Note). At that time, a number of opponents asked for K.S.A. 22-2501 to be repealed in its entirety. While I do not know if this is the case this year, I nevertheless dedicate this testimony to responding to this suggestion. KACDL opposes the repeal of K.S.A. 22-2501.

K.S.A. 22-2501 has been around for 40 years. For the first 36 years, it read:

> When a lawful arrest is effected a law enforcement 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;
> (b) Preventing the person from escaping; or
> (c) Discovering the fruits, instrumentalities, or evidence of **the** crime.

In 2004 and 2005, there was a movement by law enforcement and prosecutors to change "**the** crime" to "**a** crime" to expand the scope of searches incident to arrest. In part, they were reacting to a holding ten years earlier in *State v. Anderson*, 259 Kan. 16 (1996) and using as support a ruling 23 years prior in *New York v. Belton*, 453 U.S. 454 (1981). (The legislative history of this movement to amend and/or repeal K.S.A. 22-2501 is set forth in *State v. Henning*, 289 Kan. 136 (2009).) While efforts to amend or repeal initially failed, the Legislature did repeal K.S.A. 22-2501 in 2006 (Senate Bill 366) only to revive and amend the statute that same year to read "**a** crime" (House Substitute for Senate Bill 431). I could not find legislative history behind the 2006 actions, and *Henning* also notes that the legislative record is silent on this issue.

In 2009, the United States Supreme Court decided *Arizona v. Gant*, 129 S.Ct. 1710 (2009) and the Kansas Supreme Court subsequently decided *Henning*. Under these decisions, the "**a** crime" language is unconstitutional.

Last year, opponents argued for the Legislature to abdicate its responsibility as lawmaker and leave that role to the courts:

> "The ebb and flow of court controlled decisions is best suited for training rather than statutory rules." (KS Peace Officers and Chiefs of Police – written testimony to Senate Judiciary, 3/3/10)

> ". . . [K.S.A. 22-2501] cannot anticipate the changing shape of Fourth Amendment search and seizure law" (KS Attorney General's Office – written testimony to Senate Judiciary, 3/3/10)

Senate Judiciary
1-18-11
Attachment 8

> "We propose that it would be best to rely on the rulings of the courts as they are handed down . . ." (KCDAA – written testimony to Senate Judiciary, 3/3/10)

The Legislature crafted K.S.A. 22-2501 four decades ago. It made one change to it in 40 years and it spent three years deliberating that move. As *Henning* said of that change, "[a]lthough the language appears to move toward *Belton*, **the legislature's rejection of outright repeal in favor of amendment may indicate that it wished to retain some restrictions in excess of those demanded by the United States Supreme Court case law.**" The Legislature thinks and acts for itself and does not need to rely exclusively on the courts.

Our next point is framed by this excerpt:

> [K.S.A. 22-2501] also gives criminals an additional avenue to protract litigation, leaving courts and law enforcement to struggle with the application of K.S.A. 22-2501 when they could be spending those resources on other cases and fighting crime.
> (Kansas Attorney General's Office – written testimony to Senate Judiciary, 3/3/10)

What is going to happen when a 40-year-old statute is eliminated? Less "protracted" litigation? Less "struggle" to apply case law? The point of a statute is clear guidance – for law enforcement, prosecutors, defendants and so on. Instead, we will have 105 counties (more entities if you count cities/towns, etc.) interpreting federal and state court rulings and making policies and procedures based on those interpretations, etc. Will that result in fewer "avenues" for "criminals" to assert their constitutional rights?

State v. Daniel, 242 P.3d 1186 (KSC 11/19/10), gives us insight into what might happen if K.S.A. 22-2501 is eliminated. In that case, the district court found a warrantless search lawful because of the "a crime" language in K.S.A. 22-2501. However, during the pendency of Ms. Daniel's appeal, that language was found unconstitutional in *Henning*. Therefore, the State asked the Kansas Supreme Court to "salvage Daniel's conviction by applying a good-faith exception to the exclusionary rule." *Daniel*, 242 P.3d at 1188. In the end, the Court did affirm Ms. Daniel's conviction : "The officer's objectively reasonable reliance on K.S.A. 22-2501(c) is demonstrated by (a) the substantial case law precedent across the country upholding similar searches; (b) an appellate court decision directly on point that was valid at the time of Daniel's search; and (c) the statute's legislative history." *Daniel*, 242 P.3d at 1195.

If this issue had arisen and K.S.A. 22-2501 had not existed, then the outcome could have been different -- Ms. Daniel could have had her conviction reversed. In the absence of a statute with case law and legislative history behind it, the State could have ended up losing *Daniel*.

Thank you for your consideration,

Jennifer C. Roth
on behalf of the Kansas Association of Criminal Defense Lawyers
rothjennifer@yahoo.com
785.550.5365.