Senate Judiciary Committee
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Testimony on Senate Bill 6

Submitted by Patrick Vogelsberg
On behalf of the
Kansas County and District Attorney Association

It is the pleasure of the Kansas County and District Attorney Association (KCDAA) to be able to testify in regards to Senate Bill 6. The purpose of this bill is to codify the holdings in *Arizona v. Gant*, 129 S. Ct. 1710, 556 U.S. ___(April 21, 2009), and *State v. Henning*, 289 Kan. 136, 209 P.3d 711 (2009). The statutory result of SB 6 would simply change K.S.A. 22-2501(c) from, "discovering the fruits, instrumentalities, or evidence of **a** crime," to "discovering the fruits, instrumentalities or evidence of **the** crime. This is a return to the pre-2006 language of K.S.A. 22-2501(c), which contained "the" from its enactment in 1970 until legislation amended the statute in 2006. Though the above change may comply with *Gant* and *Henning*, it is the position of the KCDAA that a better approach would be to repeal K.S.A. 22-2501 and let law enforcement operate under a case law rubric of search incident to arrest rather than a rigid statutory framework that runs the risk of being declared unconstitutional.

The change of one word may seem as a simple enough solution to the recent court holdings. However, the perspective that history can give us regarding K.S.A. 22-2501(c) lends itself to the notion that repeal is the better course of action.

Approximately four decades ago the United States Supreme Court, in *Chimel v. California*, 395 U.S. 752 (1969), provided boundaries to the search incident to arrest exception to the Fourth Amendment warrant requirement.

> 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.

Id. at 762-63. This limitation, as the U.S. Supreme Court explained forty years later in *Gant*, "continues to define the boundaries of the exception, ensures that the scope of a search incident

to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." 129 S.Ct. at 1716.

With *Chimel* as its guide, the Kansas legislature first took to codifying its holding one-year after its publication in 1970. From 1970 until 2006, K.S.A. 22-2501 stated,

> 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 attacks;
> (b) Preventing the person from escaping; or
> (c) Discovering the fruits, instrumentalities, or evidence of *the* crime. (Emphasis added.)

Since its enactment in 1970, two cases provided the underpinning for attempted legislation in 2004 and 2005 and then successful legislation in 2006 that changed "the" to "a" in K.S.A. 22-2501(c). The first was the U.S. Supreme Court case *New York v. Belton*, 453 U.S. 454 (1981) and the second was our own Kansas Supreme Court case, *State v. Anderson*, 259 Kan. 16, 910 P.2d 180 (1996).

In *Belton*, the Supreme Court held that,

> [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. 453 U.S. at 460. The *Belton* court explained, "[t]he jacket [wherein cocaine was found] was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we have concluded was "within the arrestee's immediate control" within the meaning of the *Chimel* case. The search of the jacket, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments.

Id. at 462-63.

In 1996 the Kansas Supreme Court examined a vehicle search incident to arrest and directly considered the implications of the use of "the" in the then language of K.S.A. 22-2501(c) in *Anderson.* The *Anderson* court held that K.S.A. 22-2501(c) permitted a police officer to search a car or truck incident to an occupant's or a recent occupant's arrest, for the purpose of uncovering evidence to support *only* the crime of arrest. 259 Kan. at 24. Since the driver in *Anderson* was arrested for driving on a suspended license and a warrant for her arrest was in connection with a charge of operating a vehicle with no child restraint, the search of the vehicle could only be done for the purpose of unveiling evidence in connection with these crimes of arrest. With these two crimes in mind, there was no evidence that would be in the vehicle that would have a connection with the crimes of arrest. The result in *Anderson* was that a search of the vehicle's glove compartment, which revealed a crack pipe was impermissible under the K.S.A. 22-2501(c) and

all subsequent evidence found was suppressed. At the time it was thought that K.S.A. 22-2501(c) placed more restrictive boundaries than what were allowable under *Belton.*

In 2004 and 2005 there were attempts to change "the" to "a" in K.S.A. 25-2501(c). Neither of the years resulted in the statute being amended. However, the 2006 legislative session resulted in successful legislation. Therefore, K.S.A. 25-2501(c) currently reads:

> 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 *a* crime. (Emphasis added).

In analyzing the legislative history of K.S.A. 25-2501(c), the court in *Henning* stated:

> [W]e believe we can safely say that the legislature at least intended to undercut our holding in *Anderson.* We thus rule here that K.S.A. 22-2501(c)'s current wording would permit a search of a space, including a vehicle, incident to an occupant's or a recent occupant's arrest, even if the search was not focused on uncovering evidence only of the crime of arrest.

289 Kan. at 718. One could assume that if the present language was in place in 1996 when the Kansas Supreme Court was applying K.S.A. 25-2501 to the facts in *Anderson* the search incident to arrest that revealed the drug evidence would have been permitted. Regardless, the *Henning* court ruled that K.S.A. 25-2501(c) was facially unconstitutional under the Fourth Amendment and Section 15 of the Kansas Constitution Bill of Rights by applying the recent U.S. Supreme Court ruling of *Arizona v. Gant.*

In *Gant*, the Supreme Court held that

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

129 S.Ct. at 1724. In striking down the current language of K.S.A. 25-2501(c), the Kansas Supreme Court stated that the U.S. Supreme Court's

> return to the first principles of *Chimel* [was] also significant because it set up without compelling reinforcement of [the Kansas Supreme] [C]ourt's *Anderson* interpretation of the pre-2006 version of K.S.A. 22-2501(c). *Gant 's* equation of purpose and scope deviated somewhat from the *Anderson* discussion, but it

> arrived at the same ultimate destination: To have a valid search incident to arrest, when there is no purpose to protect law enforcement present, the search must seek evidence to support the crime of arrest, not some other crime, be it actual, suspected, or imagined. In the vehicle context, " in many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains ... evidence [relevant to the crime of arrest.]" (Citations omitted).

Therefore, K.S.A. 25-2501(c) as it stands now is unconstitutional under the holdings of *Gant*, which was applied in Kansas by *Henning*. The suggestion is that by going back to the pre-2006 language with "the" instead of "a" would make the statute compliant with *Gant* and *Henning*. However, the main point of this testimony is that there is no need to have a statute that codifies case law regarding search incident to arrest. As the KCDAA's former president, Thomas Stanton provided in past testimony regarding this same subject matter:

> There are many other aspects of constitutional search and seizure law that do not rely on statutory codification that work well. Examples are inventory searches, searches based on emergency circumstances, and probable cause searches. None of these areas of the law are codified, yet law enforcement officers are well trained on the parameters of such searches. When changes occur in these areas of the law, officers are immediately trained on those searches, and the law, as handed down by the appellate courts, is followed. We believe this is the best approach to guiding the actions of law enforcement officers in the field. The KCDAA recommends the repeal of K.S.A. 22-2501 for these reasons.

Testimony given to Senate Judiciary Committee on March 3, 2010. The KCDAA has not changed its position regarding K.S.A. 22-2501. Repeal is the most appropriate action to be taken.

What this testimony has endeavored to convey by the chronological account of K.S.A. 25-2501(c) and search incident to arrest case law over the past 40 years is that at no point was a statutory framework for search incident to arrest necessary. Law enforcement remains capable of following court holdings as well as anyone, and as Mr. Stanton explained, law enforcement is capable of quickly conforming practices to the latest court rulings. If anything, having a statue has required duplication of analysis in search incident to arrest cases: one based on case law and one based on statute. Repeal is the best action.

Nonetheless, should this body determine not to repeal K.S.A. 25-2501; the KCDAA believes SB 6 as written should be passed to accurately reflect the decisions in *Gant* and *Henning*.