



*Making the world a more just place by educating and inspiring its judiciary*

## **SEARCH & SEIZURE FOURTH AMENDMENT UPDATE**

**DIVIDER 1**

Hon. Earl G. Penrod

### **OBJECTIVES:**

After this session you will be able to:

1. Analyze circumstances police may lawfully stop a vehicle under the Fourth Amendment and Kansas Bill of Rights Sec. 15; and
2. Interpret and apply the principles from cases decided by the U.S. Supreme Court and the Kansas Supreme Court and court of Appeals regarding detaining, seizing and searching vehicle occupants.

### **REQUIRED READING:**

**PAGE**

1. Earl G. Penrod, *Search and Seizure in Traffic Courts* (April 23, 2018) [NJC PowerPoint].....1



**Search and Seizure in Traffic Courts**

Kansas Municipal Judges  
April 23, 2018  
Wichita, Kansas  
Earl G. Penrod, Senior Judge

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**As a result of this session, participants will be able to:**

1. Analyze circumstances police may lawfully stop a vehicle under the Fourth Amendment and Kansas Bill of Rights Sec. 15.
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**Fourth Amendment**

The Right of the People to be secure... against unreasonable searches and seizures shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath and affirmation...

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**Kansas Bill of Rights, Section 15**

The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.

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**Fourth Amendment Protection**

- Fourth Amendment prohibits unreasonable searches and seizures.
- Valid warrant makes search or seizure reasonable.
- Exceptions to the warrant requirement.
- Touchstone of 4<sup>th</sup> Amendment: reasonableness

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**Lines of Inquiry**

- Is there a legitimate basis to stop?
- What actions are authorized during a stop?
- What actions are authorized as stop progresses?

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### Searches and Seizures

- Seizure: restraining a person's ability to leave by means of physical force or show of authority. *Terry v. Ohio*, 392 U.S. 1 (1968)
- Search: intrusion of subjectively held expectation of privacy that society accepts as reasonable and legitimate. *Katz v. U.S.*, 389 U.S. 347 (1967)

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### Expectation of Privacy in vehicle

One has lesser expectation of privacy in motor vehicle because its function is transportation and seldom serves as residence or repository of personal effects. It travels public thoroughfares where both its occupants and its contents are in plain view. *Cardwell v. Lewis* 417 U.S. 583 (1974).

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### Vehicle Stops

- Individuals are not shorn of all 4<sup>th</sup> Amendment protection when they step from their homes onto the public sidewalk *Terry v. Ohio*, 392 U.S. 1 (1968)
- Nor are they shorn of Fourth Amendment protections when they step from sidewalks into their automobiles. *Delaware v. Prouse*, 440 U.S. 648 (1979)

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**SO....**

- Traffic stop is a seizure under Fourth Amendment and must be reasonable.
- Not only are drivers seized (*Delaware v. Prouse*, supra.), but so are passengers *Brendlin v. California*, 551 U.S. 249 (2006) and
- passengers as well as drivers may challenge constitutionality of stop.

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**What makes a stop REASONABLE?**

Whether stop is reasonable depends on the type of encounter.

1. Consensual (limited applicability for vehicle stops)
2. Investigative detention: Terry-type stop
3. Public safety/community caretaking stop
4. Arrest

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**What makes a stop reasonable?**

- Consensual encounter: no reason required.
- Investigative detention: reasonable suspicion of criminal activity.
- Community caretaking/public safety: articulable facts that citizen in need of help or is in peril.
- Arrest: probable cause crime has been or is being committed.

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**Pubic Safety/Community Caretaking**

- Objective, specific and articulable facts to suspect citizen is in need of help or in peril.
- Stop divorced from detection, investigation or acquisition of evidence relating to a crime.
- Permitting public safety rationale to be pretext for investigative detention risks emasculating 4<sup>th</sup> Amendment. See: *St. v. Vistuba*, 840 P2d 511 (Kan. 1992); *St. v. Marx*, 215 P.3d 601 (2009)

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**Scenario 1 (You Be the Judge)**

- Deputy patrolling rural area around 2:00 A.M. sees car parked on shoulder next to empty field with headlights on. When deputy pulls behind, two people get into vehicle.
- Deputy calls dispatch with plate number and then turns on emergency lights to stop car.
- Charges result and Motion to Suppress filed.

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**Your JUDGMENT: Is there a legitimate basis for STOP?**

- Assume no violation viewed by deputy.
- Assume driver was prepared to leave until officer turned on lights.
- Is this a valid Community Caretaking/Public Safety Stop?
- Abraham Lincoln provides answer.  
*St v. Morales*, 363 P.3d 1133 (Kan. App. 2015)

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**Reasonable Suspicion of Criminal Activity**

- Although an officer's reliance on a mere hunch is insufficient to justify stop...
- The likelihood of criminal activity need not arise to level require of probable cause, and fails considerably short of preponderance of the evidence standard.
- Totality of circumstances. *U.S. v. Arvizu*, 534 U.S. 266 (2002); *U.S. v. Cortez*, 449 U.S. 411 (1981)

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**Investigative Detention**

- Police may stop if reasonable, articulable suspicion based on fact that the person stopped has committed or is committing, or is about to commit a crime.
  - Police must consider ALL facts not just facts that support reasonable suspicion.
- State v. Sharp*, 390 P.3d 542 (Kan. 2017)

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**Traffic Offenses**

- Sufficient basis to stop vehicle if officer observes violation of traffic law.
- Even if officer has ulterior motive in making stop (suspicion of drug possession), and stop is pre-text to check other things, stop valid under 4<sup>th</sup> Amend. *Wren v. U.S.*, 517 U.S. 806 (1996)
- KANSAS: Biased based policing statute: *State v. Gray*, 403 P.3d. 1220 (Kan. 2017)

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**Scenario 2 (You be the JUDGE)**

- Deputy observes NO violation but 'computer plate check' shows male registered owner suspended.
- Deputy not sure of driver but makes stop and when driver rolls down window, Deputy sees female driver.
- Deputy smells alcohol, etc. and driver arrested.
- Motion to Suppress.

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**Reasonable Suspicion of Criminal Activity?**

- What is your ruling?
- Is it 'reasonable suspicion' that the registered owner is the driver of vehicle?
- Does it matter that the driver was female but registered owner with suspended license male?
- Any difference between Scenario 1 and Scenario 2?

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**Limitations on Reasonable Suspicion Stop**

- Police limited to purpose of stop.
- Once officer's suspicion satisfied, stop must end, UNLESS additional factors justify further interaction.
- The stop must be valid in the first instance before additional factors can justify further interaction... usually (more later).

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**Probable Cause and Exigent Circumstances**

- Automobile Exception: *Carroll v. U.S.*, 267 U.S. 132 (1925)
  - If police have PROBABLE CAUSE to believe vehicle contains contraband or evidence of crime, police may stop and search vehicle if...
  - Vehicle mobile or capable of being driven.
- See also *Maryland v. Dyson*, 527 U.S. 465 (1999)

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**Exigent Circumstances beyond Mobility of Vehicle?**

- Some states as matter of state constitutional law, require exigent circumstances IN ADDITION to mobility of vehicle.
  - Kansas: mobility of vehicle fulfills requirement of exigent circumstances, so that warrantless vehicle search is permitted based solely on probable cause.
- State v. Howard*, 389 P.3d 1280 (Kan. 2017)

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**Automobile Exception: Lesser Expectation of Privacy**

- Fourth Amendment protects persons and effects from *unreasonable* searches/seizures.
  - One has lesser expectation of privacy in vehicle because its function is transportation not residence or repository of personal effects. It travels public thoroughfares and occupants and contents in plain view.
- Cardwell v. Lewis*, 417 U.S. 583 (1974)

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**Automobile Exception: *Collins v. Virginia*, docket no. 16-1027 (argued January 9, 2018)**

- Whether automobile exception to Fourth Amendment permits police to enter private property, approach house, and search vehicle located within curtilage of home?
- Motorcyclist had eluded police who had evidence that led to this home where cycle found under cover.

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**Scenario 3 (You be the JUDGE)**

- Defendant pulled over for insufficient light on plate.
- Driver provides license and rental car agreement on which driver's name does NOT appear but advises girlfriend rented it and gave permission.
- Officer doesn't verify explanation but tells driver that he has no legitimate interest in vehicle and over driver's objection, searches vehicle, finding illegal drugs.
- Motion to Suppress.

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**Expectation of Privacy in Rental Car?**

- Fourth Amendment protects against intrusions/violations of subjectively held expectation of privacy that society accepts as reasonable and legitimate. *Katz v. U.S.*, 389 U.S. 347 (1967)
- Police prohibited from conducting suspicion less, warrantless, nonconsensual search of vehicle when driver has reasonable expectation of privacy.
- Reasonable expectation in rental car if name not on contract? *Byrd v. U.S.*, docket no. 16-1371 (argued January 9, 2018)

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**Why It Matters: Exclusionary Rule**

- When police violate Fourth Amendment, evidence obtained is subject to exclusion/suppression in state courts. *Weeks v. U.S.*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961); Purpose: deter future unlawful police conduct.
- Good faith exception to exclusionary rule. *State v. Powell*, 325 P.3d 1162 (Kan. 2014); *St. v. Zwicky*, 393 P.3d 621 (Kan. 2017)

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**Reasonable Suspicion based on Computer Mistakes?**

- If stop based on computer error, exclusion of evidence based on who makes mistake. If mistake by clerical personnel, no suppression. *Arizona v. Evans*, 514 U.S. 1 (1995).
- If errors by police, evidence suppressed if police conduct is deliberate, reckless, grossly negligent or circumstances indicate recurrent or systematic negligence. *Herring v. U.S.*, 555 U.S. 135 (2009)

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**Reasonable Suspicion Based on Mistakes of FACT?**

- Reasonable suspicion can be based on mistake of fact by officer if officer's mistake is objectively reasonable.
- Officer mistakenly believed road remained blocked by police meaning defendant was driving in violation of traffic control directive. *State v. Miller*, 308 P.3d 24 (Kan. App. 2013).

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**Mistakes of Law: *Heien v. North Carolina*,  
135 S.Ct. 530 (2014)**

- Officer's reliance on mistake of law to form reasonable suspicion NOT 4<sup>th</sup> Amendment violation if mistake objectively reasonable.
- Objectively reasonable to believe law required two tail lights so stop was valid.
- Fourth Amendment requires police to act reasonably not perfectly.

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***City of Atwood v. Pianalto*,  
350 P.3d 1048 (Kan. 2015)**

- Reasonable suspicion may be based on mistake of fact or mistake of law, if mistake objectively reasonable.
- Whether mistake is one of law or fact, impacts determination of whether objectively reasonable.
- Officer's mistaken belief that stop sign in place mistake of fact.

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***Navarette v. California*,  
572 U.S. \_\_\_, 134 S.Ct. 1683 (2014)**

- Reasonable suspicion for vehicle stop can be based on 9-1-1 call IF:
- Caller provides sufficient indicia of reliability.
- Based on totality of circumstances.
- Eyewitness knowledge of dangerous driving, virtually contemporaneous, details regarding vehicle such as location.

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**State v. Chapman,  
381 P.3d 458 (Kan. 2016)**

- Anonymous 9-1-1 call reporting suspicious but NOT criminal behavior insufficient to support probable cause.
- Identified citizen report to police; Anonymous report from citizen who can be identified; Anonymous tips.
- Confirmation by police?

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**Upon Making a VALID STOP**

- Police may require driver to exit vehicle based on officer safety (de minimis additional intrusion) *Penn. v. Mimms*, 434 U.S. 106 (1977)
- Police may order passengers out of vehicle, *Maryland v. Wilson*, 519 U.S. 408 (1997) and
- May require passengers to stay at scene. *Brendlin v. California*, 551 U.S. 249 (2007)

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**Frisk During Stop**

- Police may conduct weapons pat-down or occupants if:
  - 1) Reasonable suspicion of criminal activity;
  - 2) Reasonable belief person armed and dangerous. *Terry v. Ohio*, supra.; *Michigan v. Long*, 463 U.S. 1032 (1983); *Arizona v. Johnson*, 555 U.S. 323 (2009)
- Weapons frisk of passenger compartment if reasonable suspicion armed and dangerous. *Mich. v. Long*, supra.

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**State v. Bannon,  
398 P.3d 846 (Kan. 2017)**

- Reasonable suspicion that person is armed and presently dangerous: objective or subjective test?
- Does officer have to testify that he/she actually suspected person armed and presently dangerous?
- Objective reasonableness test but officer's subjective belief may be factor (totality of circumstances) when applying test.

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**Drug Dogs and Length of Stop**

- Drug dog sniff of outside vehicle permissible without reasonable suspicion of drugs so long as sniff occurs PRIOR to end of stop. *Illinois v. Caballes*, 543 U.S. 405 (2005)
- Whether drug dogs properly trained decided on 'totality of circumstances.' *Florida v. Harris*, 568 U.S. 237 (2013)
- Kansas cases: *State v. Barker*, 850 P.2d 885 (1993); *State v. Brewer*, 305 P.3d 676 (Kan. App. 2013)

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**Rodriguez v. U.S., 135 S.Ct. 1609 (2015)**

- Drug dog sniff NOT traffic related and must not extend stop; *de minimis* argument rejected.
- Not when ticket issued but whether sniff prolongs stop.
- Efficient officer doesn't earn bonus time.
- Extended about 7-8 minutes after documents returned.
- Remand to determine if reasonable suspicion existed at end of stop.

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**License, registration, insurance, please**

- Upon stop, may ask for license, registration and run computer check. *State v. Spagnola*, 289 P.3d 68 (Kan. 2012)
- Upon completion of purpose of stop, defendant free to go but Kansas precedent for permitting a seizure to become consensual encounter. See: *St. v. Thompson*, 166 P3d 1015 (Kan. 2007); *St v. Cleverly*, 385 P.3d 512 (Kan. 2016)

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**Search Incident to Arrest**

- Upon custodial arrest, police may search PERSON for weapons and evidence, regardless of likelihood of finding either. *Chimel v. California*, 395 U.S. 752 (1969); *U.S. v. Robinson*, 414 U.S. 218 (1973)
- May search personal property immediately associated with person, such as items in pocket but not trunks/luggage. *U.S. v. Chadwick*, 433 U.S. 1 (1977)

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**Searches Incident to Arrest:  
Cell Phones**

- Police must obtain a search warrant to search data from cell phone taken in search incident to arrest. *Riley v. California*, 134 S.Ct. 2473 (2014)
- Whether warrantless seizure and search of historical cell phone records revealing location and movement of user over 127 days violates Fourth Amendment. *Carpenter v. U.S.*, docket No. 16-402 (argued November 29, 2017)

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### Inventory vs. Search Incident to Arrest

- Search incident to formal arrest: full search of person for weapons and evidence but search of vehicle only if reasonable belief evidence of crime of arrest may be found in vehicle. *Arizona v. Gant*, 556 U.S. 332 (2009)
- Inventory search of vehicle part of community care-taking function-not investigatory nor evidence gathering.

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### Inventory Search

- Make sure contents harmless; Protect person's property; Protect from claims stolen property.
- Police must have lawful custody of property.
- Police must have established policy on opening containers or search insufficiently regulated.

See: *South Dakota v. Opperman* 428 U.S. 364 (1972); *Colorado v. Bertine*, 479 U.S. 367 (1987); *Florida v. Wells*, 495 U.S. 1 (1990); *St v. Cleverly*, 385 P.3d 512 (Kan. 2016)

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### Good Faith

- Good faith exception to exclusionary rule: harsh sanction of exclusion should NOT be applied to deter objectively reasonable activity.
- Weighing the costs and benefits of excluding illegally obtained evidence.

*St. v. Daniel*, 242 P.3d 1186 (Kan. 2010); *State v. Pettay*, 326 P.3d 1039 (Kan. 2014); *St. v. Zwicki*, 393 P.3d 621 (Kan. 2017)

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**Attenuation Doctrine and Inevitable Discovery**

- Attenuation Doctrine: taint of unlawful search dissipates when connection between unlawful act and challenged evidence attenuated. *Utah v. Strieff*, 136 S.Ct. 2056 (2016); *St. v. Williams*, 300 P.3d 1072 (Kan. 2013); *St. v. Talkington*, 345 P.3d 258 (Kan. 2015)
- Inevitable discovery: evidence admitted if it would have been discovered even without unconstitutional source. *State v. Barker*, 395 P.3d 422 (Kan. 2017)

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**Consent**

- Clear and Positive testimony that consent was unequivocal, specific and freely given;
- Absence of duress or coercion, express or implied. *St. v. James*, 349 P.3d 457 (Kan. 2015)
- Whether consent is voluntary based on totality of circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1971); *Ohio v. Robinette*, 519 U.S. 33 (1996)

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**Blood and Breath Tests**

- Taking blood samples and conducting breath tests are Fourth Amendment searches. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989)
- States permitted to require consent to testing as condition of privilege to drive and may punish those who refuse test. *South Dakota v. Neville*, 459 U.S. 553 (1983)

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**Blood and Breath tests are searches**

**SO....**

- Blood and breath tests require warrant or valid exception to warrant requirement.
- If statute permits, a validly issued search warrant satisfies Fourth Amendment.
- Relevant exceptions: exigent circumstances, consent, search incident to arrest.

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**Exigent Circumstances:**

***Missouri v. McNeely*, 569 U.S. 141 (2013)**

- Natural dissipation of alcohol alone is not sufficient exigency to justify warrantless blood draw.
- Whether warrantless blood draw is reasonable decided on totality of circumstances- no per se rule.

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**Search Incident to Arrest: *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016)**

- Whether state may criminalize refusal to submit to warrantless chemical test for intoxication.
- 12 states criminalized refusal, including Kansas (and Indiana).
- States may NOT criminalize refusal to submit to warrantless blood test.
- Blood test vs. breath test.

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***Birchfield, supra.***

- Breath test a search but doesn't implicate significant privacy concerns.
- No piercing of skin, minimal inconvenience and breath test only yields BrAC.
- Not likely to enhance embarrassment of arrest.
- Law enforcement has great need for results.

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***Birchfield, supra.***

- Blood tests much more intrusive than breath.
- Pierces skin and extracts part of body.
- Provides sample that can provide much more than BAC which could cause anxiety.
- Government need for blood test LESS because of availability of less intrusive breath test.

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**CONSENT: *Birchfield***

- Warrantless search reasonable if subject consents.
- Consent need not be express but may be inferred from context.
- Implied consent laws that impose civil penalties and evidentiary consequences upon refusal upheld, but...

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**Consent: *Birchfield***

- But consent obtained on threat of committing a criminal offense for refusing is NOT voluntary.
- Voluntariness of consent to a search determined from totality of circumstances.
- *Beylund* case remanded to North Dakota state court to determine if consent was voluntary in view of officer's partial inaccuracy of advisory.

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**K.S.A. 2016 Supp. 8-1025**

- *Ryce I* and *Ryce II*
- *Nece 1* and *Nece II*
- *Wilson*
- *Wycoff*
- Consent invalid when obtained as result of implied consent warning of criminal charges for refusing.

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***City of Dodge City v. Webb,*  
381 P.3d 464 (Kan. 2016)**

- Consent for breath test NOT invalid when officer advised defendant warrant WOULD be obtained upon refusal.
- Implied consent statute in effect at time did NOT prohibit additional testing upon refusal.
- Threat to obtain warrant was constitutionally justified and subsequent consent valid.

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**State v. Schmidt,  
385 P.3d 936 (Kan. App. 2016)**

- Good faith exception to Exclusionary Rule applied and results of blood test were admissible.
- Officer warning that refusal constituted a separate crime and consent was coerced.
- However, officer's reliance on implied consent statute objectively reasonable.

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**State v. Perkins,  
2018 Kan. App. LEXIS 11 (March 2, 2018)**

- In spite of invalid consent, breath test results admissible based on search incident to arrest warrant exception.
- Even if NO warrant exception applicable, breath test result admissible based on good faith exception to exclusionary rule applicable.

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**Thanks for your attention-  
QUESTIONS??**

Earl G. Penrod, Senior Judge  
Indiana Office of Court Services Education Division  
Indiana Judicial Outreach Liaison  
penrod26d01@msn.com

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