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**Testimony Regarding Support of Senate Bill No. 374
Concerning DUI and related statutes**

February 12, 2018

Honorable Chairman Rick Wilborn and Members of the Senate Judiciary Committee:

Thank you for this opportunity to testify in support of Senate Bill 374. This proposal is the result of more than a year of work by various prosecutors across our state representing not only our largest counties but smaller rural counties as well. The KDOT Impaired Driving Emphasis Area Team initiated the discussions that led to this proposal with technical assistance provided by the Attorney General's Office.

This proposal is a comprehensive review of DUI and related statutes to bring them into compliance with numerous judicial decisions over the past few years from our Kansas Supreme Court and the United States Supreme Court. The DUI criminal refusal statute struck down as unconstitutional in 2016 is modified into a constitutionally acceptable to readdress the safety concerns of drivers who simply refuse to submit to constitutionally permissible testing.

Kansas courts have severely limited out-of-state DUI convictions that count towards a prior DUI conviction in Kansas. While our sister states may define a DUI in different words, a DUI conviction in one state should be a DUI conviction in our state. Section 1 of this proposal addresses this issue to make certain that drivers with prior DUI convictions in another state are treated similarly to drivers with prior Kansas DUI convictions. This is simply a matter of fairness and equal treatment of all drivers.

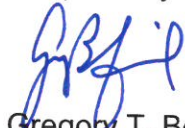
Recognition of the growing problem of drugged driving led to the proposal to make driving with measurable amounts of Schedule I and Schedule II drugs in a driver's system a DUI. Although even some therapeutic levels of Schedule II drugs can impair a driver's ability to operate a vehicle, and our current law does not excuse the operation of a vehicle while under the influence of a validly prescribed drug, a person who takes a Schedule II drug at a therapeutic level and is not impaired by that drug has nothing to worry about by this proposal; it is important to remember that a law enforcement officer must have probable cause to believe a driver is DUI before arresting the driver and requesting an evidentiary test. The officer would need to observe impairment before making such an arrest.

Attached is a thorough summary of this bill prepared by the Attorney General's Traffic Safety Resource Prosecutor and shared with law enforcement officers, prosecutors, and traffic safety advocates across the state. My hope is you will find it as useful as I did.

I urge you to support this bill. This proposal is a common sense approach to updating and revising our DUI laws in light of recent court decisions and the growing problem of drugged driving. I thank you for your careful consideration of this proposal and ask you to support this effort to improve Kansas DUI laws and improve the safety of our roadways.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,



Gregory T. Benefiel
County Attorney

Senate Bill No. 374 – What You Need to Know

- Top-to-bottom review of DUI and related statutes to bring into compliance with recent years' judicial decisions in Kansas and Washington, D.C.
- Provides KDOR, law enforcement, and prosecutors with the laws and tools needed to address the increasing prevalence of drugged drivers in our communities
- Explicitly criminalizes “drugged” driving, as that behavior threatens to overtake “drunk” driving as the more common manner of impairment through opioid abuse and widespread acceptance of medical and recreational marijuana
- Provides authority for the court to exercise discretion in helping defendants who want help and want to change
- Reinstates the criminal refusal statute, focusing on breath tests only
- Limits litigation and increasing certainty in DUI sentencings
- Provides language clarification and clean-up

Here are some of the biggest changes

New Section 1.

This creates a separate section defining what constitutes a conviction for determining whether a conviction is a first, second, third, fourth or subsequent conviction. Keeping the original language ensures consistency with the existing version while adding additional provisions to specifically address out of state convictions by listing DUI statutes from each state, as well as including “otherwise comparable” language to proactively address any gaps. This will address the opinions in State v. Stanley and State v. McClellan. Another provision specifically addresses prior convictions from the City of Wichita and will address the issues from State v. Lamone. This section will also “reset the clock” on using convictions for test refusals to July 1, 2018 to avoid any future confusion regarding whether or not prior convictions for K.S.A. 8-1025 will count going forward.

Sec. 2 K.S.A. 8-2,137

This section removes the “deemed to have given consent” language the courts found to be problematic and adds other bodily substance to the list of what may be tested which adds uniformity to this statute.

Sec. 3 K.S.A. 8-2,142

This section points to Section 1 for the determination of prior convictions.

Sec. 4 K.S.A. 8-2,144

This section points to Section 1 for the determination of prior convictions and also clarifies the court’s discretion to extend the term of supervision and requires the court to determine whether time spent on warrant status will count as time served on supervision. This section changes subsection (c) regarding convictions while a

minor is in the vehicle, changing the age of passengers to those under the age of 18 instead of those under the age of 14.

Sec. 5 K.S.A. 8-2,145

This section adds language regarding “test failure” as defined in K.S.A. 8-1013 which defines the violation for a measurable amount of Schedule I and II substances or their pharmacologically active metabolites. This section also includes the notice required advising the driver of the availability of an affirmative defense if the test result was from lawful use.

Sec. 6 K.S.A. 8-1001

This section removes the “deemed to have given consent” language the courts found to be problematic. Another change is the removal of the language permitting warrantless testing on a dead or unconscious person in order to address the constitutionality issues State v. Dawes. Another change removes the provision permitting warrantless testing when the driver involved in a crash involving serious injury or death could be charged with a traffic citation, in order to address the constitutionality issues raised by State v. Declerck. Another change is to streamline the advisories required to be provided by law enforcement and additional language clean up including clarification that failure to comply with the advisories may jeopardize the administrative DL process, but does not impact the criminal prosecution unless the substantial rights of the defendant are affected.

Sec. 7 K.S.A. 8-1002

This section adds measurable amount of Schedule I and II substances or their pharmacologically active metabolites to the definition of test failure. This section also permits establishing a test failure by oral fluid testing.

Sec. 8 K.S.A. 8-1012

This section removes the “deemed to have given consent” language the courts found to be problematic in order to address the constitutionality issues raised in State v. Robinson. Another change is to replace saliva with oral fluids for accuracy and consistency.

Sec. 9 K.S.A. 8-1013

This section adds measurable amount of Schedule I and II substances or their pharmacologically active metabolites to the definition of test failure and defines pharmacologically active metabolite.

Sec. 10 K.S.A. 8-1020

This section adds the report from the lab certifying the test result to the list of prehearing discovery in cases involving a drug test failure and allows the driver the ability to present evidence to the hearing officer that the drug test result was due to lawful use.

Sec. 11 K.S.A. 8-1024

This section insures medical professionals who assist lawful searches via search warrant, consent, etc. are protected in the same way as searches under K.S.A. 8-1001.

Sec. 12 K.S.A. 8-1025

This section revives the test refusal statute by specifically limiting it to the refusal of a breath test other than a preliminary screening test as defined in K.S.A. 8-1012 in order to address the constitutionality issues raised in State v. Ryce I and State v. Ryce II. This section also changes the penalty provisions and points to Section 1 for the determination of prior convictions. Further, it also clarifies the court's discretion to extend the term of supervision and requires the court to determine whether time spent on warrant status will count as time served on supervision. This section changes subsection (c) regarding convictions while a minor is in the vehicle, changing the age of passengers to those under the age of 18 instead of those under the age of 14. Another important change is to remove the prohibition against plea bargains if the defendant is convicted for a violation of K.S.A. 8-1567 arising from the same arrest.

Sec. 13 K.S.A. 8-1567

This section adds subsection (a)(6) providing a DUI violation for any measurable amount of Schedule I and II substances or their pharmacologically active metabolites as well as the affirmative defense language. Other changes include pointing to Section 1 for the determination of prior convictions. Further, it also clarifies the court's discretion to extend the term of supervision and requires the court to determine whether time spent on warrant status will count as time served on supervision. This section changes subsection (c) regarding convictions while a minor is in the vehicle, changing the age of passengers to those under the age of 18 instead of those under the age of 14. Another important change is to remove the prohibition against plea bargains if the defendant is convicted for a violation of K.S.A. 8-1025 arising from the same arrest.

Sec. 14 K.S.A. 65-1,107

This section clarifies the language in subsection (e) regarding preliminary screening devices

Sec. 15 K.S.A. 75-712h

Language clean up replacing saliva with oral fluid.