Approved: 4-6-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:05 a.m. on March 17, 1993 in Room 514-S of the Capitol.

All members were present except: Senator Feleciano (excused)

Committee staff present: Michael Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Sue Krische, Committee Secretary

Conferees appearing before the committee:

Gene Johnson, Kansas Community Alcohol Safety Action Project
Representative Jan Pauls
Wanda Stewart, Area Director for National MADD
Jim Keller, Attorney, Division of Motor Vehicles
Tuck Duncan, Kansas Wine and Spirits Wholesalers
Doug Moshier, Asst. City Attorney, Wichita
David Goronkin, Chi-Chi's Restaurants
Graham Dewsbury, Woodlands Race Track
George Puckett, Kansas Restaurant and Hospitality Association

Others attending: See attached list

SB 172 - DUI blood or breath alcohol level .08; no diversion if .20 or greater.

HB 2355 - Alcohol-related offenses, .08.

Gene Johnson, Kansas Community Alcohol Safety Action Project, testified in support of SB 172 regarding lowering blood alcohol concentration level to .08 for all DUI offenders (Attachment 1). Mr. Johnson stated he would support eliminating eligibility for diversion for those individuals who, at the time of arrest refuse to take a breath or blood test, but urged the Committee not to adopt the provision that would eliminate eligibility for diversion for a BAC of .20 or above. Mr. Johnson feels this provision would encourage individuals not to take the breath test at the time of arrest.

Mr. Johnson advised the Committee that his organizations support the .08 BAC law in HB 2355 also, as well as striking the word "motor" in existing statute to eliminate the DUI offender who presently can obtain a license to operate a moped vehicle (Attachment 2). In response to a question, Mr. Johnson indicated five states presently have the .08 law--California, Utah, Oregon, Maine and Vermont. He reviewed other provisions of HB 2355 which he supports, including the provision that state law on DUI would apply on military reservations within the state; requiring the Alcohol Safety Action Program to report to the Motor Vehicle Department only the offenders who do not complete the program; the motor boat provision requiring a boater education course if a boater refuses to take a breath test; the open container provision that would allow those arrests to be traffic offenses rather than criminal offenses; and the mandatory ignition interlock for second DUI offense when the BAC level was .15 or greater. Mr. Johnson asked the Committee to consider raising the current $110 Assessment Fee paid to the court to a maximum of $125.

Representative Pauls testified in opposition to the provision in HB 2355 on page 33, lines 30-32 which creates an affirmative defense to any prosecution that another occupant of the vehicle "was in exclusive possession of the alcoholic beverage" (Attachment 3). Representative Pauls stated this portion of the law, if passed, would encourage the drinking of alcohol and beer in vehicles.

Wanda Stewart, Area Director, National MADD, testified on SB 172 and HB 2355 that .08 BAC is a limit that is reasonable and necessary for the driving safety of all (Attachment 4). She feels diversion should be an exception and not a rule for DUI offenders. MADD supports a lower BAC level for youth and the application of .08 BAC to boat operators. Senator Vancrum questioned Ms. Stewart about some of the studies and statistics she quoted and Senator Rock commented that the California study she referred to in her testimony is very controversial.

Jim Keller, Attorney, Division of Motor Vehicles, told the Committee the Department of Revenue supports

HB 2355 but would suggest certain changes--some clarifying existing procedures in the statutory language; some involving clean up language as a result of other changes in this bill or in prior legislation; and others have been suggested by recent court decisions (Attachment 5). Chairman Moran stated a subcommittee may be needed to review the Department's proposed changes and to address the administrative issues raised by the court cases.

Senator Ranson distributed to the members an article explaining ignition interlock devices (Attachment 6). Commissioner Andrew O'Donovan, Alcohol and Drug Abuse Services, SRS, submitted written testimony in support of lowering the BAC to .08 from .10 percent (Attachment 7). Carol Lierz, State Chairperson, Kansas MADD, submitted written testimony supporting the .08 percent BAC and opposing "affirmative defense" as any part of "designated driver" (Attachment 8).

Tuck Duncan, Kansas Wine and Spirits Wholesalers, stated the loss of life due to abuse of beverage alcohol cannot be tolerated, but questioned whether reducing the BAC level to .08 is providing a solution (Attachment 9). He noted the critical issue is that the problem is not at the .08 level, but at the .15 level. Mr. Duncan emphasized that the law should provide methods to keep the hard core offender from driving, such as mandatory interlock devices for persons in second and subsequent offenses, confiscation of the license plate or car, and electronic monitoring devices.

Doug Moshier, Asst. City Attorney, Wichita, appeared in support of HB 2355 and specifically of the provision amending K.S.A. 8-1567(m) which would permit local units of government which adopt their own driving under the influence laws to establish minimum penalties which exceed those specified under state law (Attachment 10).

Dr. Roger Carlson, Kansas Department of Health and Environment, submitted written testimony in support of reducing DUI alcohol level from .10 to .08, but opposing the proposal for administrative fine under K.S.A. 8-1014(d)3 (Attachment 11).

David Goronkin, Chi-Chi's Restaurants, Shawnee, Kansas, urged the Committee to focus the law on the repeat offenders and those whose BAC's are at a .15 or above (Attachment 12). He feels lowering the BAC to .08 will divert attention from the most dangerous impaired drivers.

Graham Dewsbury, Woodlands Race Track, appeared in opposition to HB 2355 stating that having to enforce at the .08 level will divert police from focusing on the true criminals--repeat offenders (Attachment 13).

George Puckett, Kansas Restaurant and Hospitality Association, testified that there is no current federal requirement that would require Kansas or any state to pass .08 BAC legislation in order to receive federal highway funds (Attachment 14). He emphasized that the chronic abusers must be dealt with, not the average citizen.

Chairman Moran announced that he will assign a subcommittee to further pursue this issue and report back to the full Committee. The meeting was adjourned at 11:00 a.m. The next meeting is scheduled for March 18, 1993.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-17-93

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Tuck Duncan	Topeka	Farmland
Jim Keller	Topeka	Ks. Dept. of Revenue
Gene Johnson	Topeka	Ks Assn of Assn
Mark Sutherland	Topeka	KS MALDO
Wanda Stewart	El Dorado	KS MADD
Paul Shelby	Topeka	City
Doug Mosher	Wichita	City of Wichita
Cathy Holderman	Wichita	City of Wichita
Mary Shivers	Topeka	KDOT
Jim Clark	Topeka	Kansas
Neal Whitaker	Topeka	KS Beer Wholesalers
Graham Dewsbury	Merriam	Woodlands
Marsha Dewsbary	Merriam	Tomahawk Cafe
David Gorenkin	Shawnee	Cur-Chis Inc
George Puckett	Wichita/Topeka	KRHA
Ralph Tevis	Topeka	Tevis' Restaurant
J. Ron Miller	Topeka	SRS/IOILS
John W. Smith	Topeka	KDOR
Betty McBride	Topeka	KDOR
Kathy Daniels	Topeka	Ks Dept of Health & Environment Breath Alcohol
Don Linosey	Osawatomie	UTU
Vincent Wetta	Wellington	UTU
Jim Keene	Topeka	BLE
Chris G...	Caldwell	Observer
Chuck Stones	Topeka	KBA
RICHARD ROPELEWSKI	TEUDORA	TOPEKA
TIM SCHNEIDER		

Helen Pedigo — Topeka Sent. Commission

Bob Giffin	Topeka	K.H.P.
Lee Bahn	"	Anheuser-Busch
Tom Whitaker	"	KS Motor Carriers Assn
Mike Reed	"	AT+T
MIKE SANTOS	Overland Park	O.P.

TESTIMONY

SENATE BILL 172
SENATE JUDICIARY COMMITTEE
MARCH 17, 1993

TO: Senator Jerry Moran, Chairman
Senate Judiciary Committee
Statehouse, Topeka, KS 66612

Mr. Chairman and Members of the Committee:

I am Gene Johnson and I represent the Kansas Alcoholism and Drug Addiction Counselors Association, the Kansas Association of Alcohol and Drug Program Directors Association, and the Kansas Community Alcohol Safety Action Project Coordinators Association. Our organizations support Senate Bill 172 in regards to lowering the blood alcohol concentration level to .08% for all DUI offenders. Our organizations, in the past, have promoted highway safety through the elimination of the drinking driver. We are not opposed to drinking, but feel that there is a time and place for that social activity. In no way should drinking and driving be tolerated.

Since 1982 this Legislature has taken a firm stand in regards to those people who consistently drink and drive. As you well know, in 1982 a major change was made in our DUI Legislation. One might note that since this major change the alcohol related fatalities have steadily dropped to approximately one-half the total that were being identified in those early years. It is now within our grasp, through stronger legislation and stricter enforcement of DUI laws, in the near future we will reduce the alcohol related fatalities to less than 100 victims per year.

Senate Bill 172 is a positive step in achieving that goal. Any reduction in blood alcohol concentration level lowers the probability of the drinking driver having an alcohol related accident.

SJ
3-17-93
Attachment 1

We have some concern about eliminating the eligibility for Diversion for those individuals who, at the time of arrest, have a blood alcohol concentration of .20% or above. Although, philosophically it appears to be the right thing to do, when one looks at it in the practical sense, it has certain drawbacks:

1. By eliminating those people who are eligible for Diversion, whose BAC of .20% or above, tends to encourage that individual to not take a breath chemical test at the time of arrest.

2. By eliminating those people of over .20%, we would see a large number of people who would refuse to take the breath test, and set the matter for trial in hopes of being able to convince a Judge and/or jury of their innocence.

3. Another factor we must consider, by eliminating Diversion for those over .20%, could also put an additional bind on local Municipalities and Counties who are presently pushed to the limit on jail space.

We would hope the Committee would consider eliminating those individuals who fail to respond to the officer's request for a breath or blood test rather than those DUI offenders who have a .20% BAC or above for Diversion. These individuals are probably likely to have a rather high BAC, and are in fact, denying to the officer, themselves, and to the public, that they were drinking and driving, by refusing to take the test. In our opinion, these are the offenders who should be denied Diversion.

I thank you for allowing me to appear before this Committee on this most important Legislation.

Respectfully submitted,

Gene Johnson

Gene Johnson
Legislative Liaison
Kansas Alcoholism and Drug Addiction Counselors Association
Kansas Association of Alcohol and Drug Program Directors
Kansas Community Alcohol Safety Action Project Coordinators Association

TESTIMONY
SENATE JUDICIARY COMMITTEE
HOUSE BILL 2355
March 17, 1993

To: Senator Jerry Moran, Chairman
Senate Judiciary Committee
Statehouse, Topeka, KS 66612

Mr. Chairman and Members of the Committee:

I am Gene Johnson and I represent the Kansas Alcoholism and Drug Addiction Counselors Association, the Kansas Association of Alcohol and Drug Program Directors Association and the Kansas Community Alcohol Safety Action Project Coordinators Association. Our organizations support House Bill 2355 in the same manner as we support Senate Bill 172 as far as .08% is concerned.

In this particular legislation, the word "motor" has been struck in the existing Statute to eliminate the DUI offender who presently can obtain a license to operate a vehicle under 49 ccs or the so-called "moped" vehicle. Presently, individuals who have lost their license because of previous DUI convictions, approach the Motor Vehicle Department and receive a moped license, and then continue to drink and drive on their mopeds. I can relate three serious accidents in the City of Topeka in which two of the drivers were hospitalized because of serious injuries they suffered after consuming alcohol and trying to operate their mopeds. By removing the word "motor" we would eliminate this very dangerous procedure.

House Bill 2355 also places administrative sanctions against those individuals under the age of 21 who are operating a vehicle at a .04% BAC or above. On a first occurrence the driving privileges of the offender would be suspended for 30 days and on the second or subsequent occurrence, the privileges would be suspended for 6 months. In addition, there will be a $25 Administrative fine, assessed to cover the laboratory costs incurred by the State.

SJ
3-17-93
Attachment 2

Another policy of this legislative proposal is that it brings those offenders that are arrested on military reservations within our State, under full compliance to State Law. this has caused problems in the For Riley, Kansas area, and this has met with approval with the law enforcement officers in that area.

This legislation also changes the matter of the defendant who fails to complete a Drug and Alcohol Safety Action education or treatment program. Presently, the Alcohol Safety Action Program has submitted to the Motor Vehicle Department written confirmation that the defendant has completed the Alcohol Safety Action education or treatment program satisfactorily. We are suggesting under this legislation that only those offenders who fail to complete the Alcohol and Drug Safety Action education or treatment program be reported to the Motor Vehicle Department. we believe this will cut down on a considerable amount of paperwork for both the Motor Vehicle Department and the Alcohol Safety Action Project program as well. This will be consistent with the continuum of care concept and insure that we are providing ample intervention measures and treatment for those people in need of alcohol and drug services.

Our organizations have difficulties in the elimination of Diversions for those individuals with an alcohol concentration level of .15% or more. Under this legislation, as in Senate Bill 172, denying those offenders of .15% BAC or above would disqualify for diversion over 60% of those individuals who have been arrested for DUI in Shawnee County. This will create a hardship on very limited jail space in several areas in the State. In addition, it would encourage Court trials for those offenders who refuse to that the test hoping that they would have a better chance of being found not guilty. Also, this provision would tend to discourage offender's from taking the BAC test knowing that if they have a concentration of .15% BAC or above, that the Prosecutor could not offer diversion.

We would much prefer that those individuals who fail to cooperate with the officer and refuse to submit to the chemical test at the time of arrest, be deemed not a good candidate for Diversion. We feel that each local prosecutor has the responsibility to set blood alcohol concentration limits, as he/she sees best fit for his community.

House Bill 2355 has the Motor Boat provision. Under this proposed legislation, individuals who operate a vessel on our State lakes, rivers, and waterways with a breath alcohol content of .08% or above, would be subject to arrest, jail and fine and/or other penalties. In addition to any other penalties, a person who refuses a test shall be required to satisfactorily complete a boater education course of instruction approved by the Secretary, before being legal to operate or attempt to operate a vessal in our State.

Under this proposed legislation there are changes in the Open Container laws as we presently see them in the State of Kansas. On Page 30, starting on Line 13, this legislation would allow the Alcohol Beverage Control and its agents to still make arrests for violations of our liquor laws under Chapter 41. However, this legislation also combines three Open Container provisions of our Statue into one provision which allows those arrests to be placed in the Traffic Section, which gives the arresting officers the opportunity to files these as a traffic offense, rather than a criminal offense. These changes have been needed for several years and will be welcomed by our prosecutors and Court systems throughout the State. There is also a provision in this proposed legislation that will give the innocent party in the automobile, who claims no knowledge of the Open Container, the right to defend himself in Court.

We would also like to have this Committee consider raising the present $110 Assessment Fee to a maximum of $125. This is paid by the offender, to the Court, as a condition of probation or diversion. The current assessment of $110 was placed on the offender in the 1985 session. Court costs at that time were believed to be $19 on a traffic case. Court costs are now $37. Our Alcohol Safety Action Projects have not had a rate increase in evaluation fees since 1985. We realize that we are in tight times, however our organizations are also struggling to make timely evaluations to the Courts and prosecuting attorneys with the limited funds available.

Although some of these major provisions may sound severe to some people, our organizations feel we must send a message through legislation that we no longer will tolerate unsafe operation of vehicles by the drinking

driver on our streets, highways, or waterways. It is our intention that this act be construed as an act to promote public safety rather than to duly penalize the DUI offender.

Respectfully submitted,

Gene Johnson

Gene Johnson
Legislative Liaison
Kansas Alcoholism and Drug Addiction Counselors Association
Kansas Association of Alcohol and Drug Program Directors
Kansas Community Alcohol Safety Action Project Coordinators Association

STATE OF KANSAS

JANICE L. PAULS
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: JUDICIARY
LABOR AND INDUSTRY
TRANSPORTATION
JOINT SENATE AND HOUSE COMMITTEE ON
ADMINISTRATIVE RULES AND REGULATIONS

Testimony before the Senate Judiciary Committee Regarding House Bill 2355 on March 17, 1993

Thank you for the opportunity to testify before your committee on House Bill 2355 relating to the amendments to illegal transportation of liquor, KSA 41-804, and cereal malt beverages, KSA 41-2719, in open containers.

I am in the unique position of having had clients charged with illegal transportation; having prosecuted defendants on these cases; and having heard illegal transportation of alcohol cases in court as judge.

House Bill 2355 would combine the two statutes on liquor and cereal malt beverages, to one statute concerning "alcohol beverages".

Under current law, no one can transport liquor or cereal malt beverages in an open container unless the beverage is in a locked rear trunk, or in a recreational vehicle or bus, if the beverage is in the exclusive possession of a passenger who is not in the driving compartment of such vehicle or who is in a portion of such vehicle from which the driver is not directly accessible.

Under current law, any person in the car can be charged with a violation of the state statutes. Usually an officer will charge only the driver and one or more passengers, depending on the factual situation. If there is just one open beer can in a car, the officer will not charge more than one defendant unless the officer has proof that more than one person was drinking from one can. The Judge hearing the case may suspend the drivers license of a defendant (which is normally done to the driver only) and can also fine up to $200 or imprison for up to six months. Usually a passenger is given a fine, but is occasionally placed on probation. Only very rarely is a passenger's drivers license suspended. The statutes do need a technical clean-up, to provide that Judges are not required to restrict or suspend a passenger's drivers license, as passengers are normally just fined.

SJ
3-17-93
Attachment 3

The provision that I wish to draw to your attention to is on page 33 of House Bill 2355, lines 30-32. This creates an affirmative defense to any prosecution, that another occupant of the vehicle "was in exclusive possession of the alcoholic beverage". In the terms of one prosecutor I spoke with, this "creates a hole large enough to drive a truck through". I have heard of no actual situations in which this defense was necessary, as both officers and prosecutors do not prosecute those individuals who are not actively drinking. Officers routinely offer a Blood Alcohol Test to a passenger or driver who deny that they were drinking at all. If there is no alcohol registered, the person is not charged.

The present open container statute became law in 1949. There have never been any amendments to the liquor open container law. The cereal malt beverage law became law in 1982. State vs. Erbacher, 8 Kan. App. 2nd 169, 170 (1983) stated in part, regarding this law that:

> The legislative aim of this statute is clearly demonstrated by the scope of the exclusions from its coverage. K.S.A. 41-2719 is intended to indirectly prevent the intoxication of motor vehicle drivers by prohibiting the presence of open containers of beer within the reach of a driver. Thus, so long as the beer is unopened or in a place in the vehicle which is inaccessible to the driver, it may be transported or consumed.

In 1949 another statute was also passed, K.S.A. 41-719 which provides that "...no person shall drink or consume alcoholic liquor...inside vehicles while on the public streets, alleys, roads, or highways." This statute has been amended eleven times since 1949, but the prohibition against drinking or consuming alcoholic liquor in vehicles has always remained.

The Kansas Supreme Court has ruled in State vs. Bishop 14 Kan. App. 2nd 223,225 (1990) that the state must prove that the defendant knew or had reasonable cause to know that he was transporting alcoholic liquor in an open container. Thus, no defendant can be prosecuted that has no knowledge of another's possession of alcohol.

So--who wants the present open container laws changed? Law enforcement has made no request for this new defense to the open container charge. The Trial Lawyers Association has not made this request, to the best of my knowledge,no liquor dealers have requested this change. So--from whence came this request? Apparently it was first suggested last year in a conference committee on the DUI bill. No data or testimony has been presented as to existing problems with the open container law. I would suggest that a law that has been used since 1949 with no problems should not be changed absent a request from law enforcement, or trial lawyers, or judges, or defendants, or some such group.

The only justification on the House side ever presented for enacting this new affirmative defense was to protect a "designated driver", who is transporting drunks home from a party. An assumption was made that drunks will be too belligerent to give up their drinks. (A drunk that is belligerent in a car might prove to be a hazard to the driver with or without a drink.) However, this section does not require that a driver be in route home. The driver could be joy-riding with drinking passengers all night. If the passenger is already too drunk to drive, do they need additional drinks? Also this bill has no requirement or limit on how many bottles or cans can be claimed by one defendant. Do we really want to have one defendant claim possession of six

opened cans of a six pack, and be the only person prosecuted in the car? The driver further has ready access to alcohol, and is subject to the temptation to drink and drive.

The purpose of the laws prohibiting transportation of an open container of liquor or cereal malt beverage in a car is to prevent drinking and driving. Why should this portion of the law be passed that encourages the drinking of alcohol and beer in vehicles?

MADD

Mothers Against Drunk Driving

P.O. Box 332 • El Dorado, Kansas 67042 • (316) 321-9113
BUTLER COUNTY CHAPTER

Senate Judiciary Committee March 17 SB 172 HB2355
Senator Jerry Moran, Chairman

I am, Wanda Stewart, Regional Director on the National Board of Mothers Against Drunk Driving. I have been involved with MADD since 1981.

I am still concerned enough about the issue of drunk driving to stand before you today and ask for your leadership in making our state a safer place in which to live.

I want to help motivate Kansas to address the problem of drunk driving with the hopes it will protect others from the pain we endured. Stan & I had to bury a three month old baby boy because of the senseless decision of another Kansan to drink and drive.

Kansas has made tremendous gains and your leadership is needed to continue the fight against drunk driving. We must ask ourselves "What else can be done?"

In 1981, the year we lost Scott there were 206 unique and irreplaceable individuals- with names, families and dreams, forever changed- killed because of drunk driving in our state. Our fatalities and injuries are down yet I and other Kansans don't feel 112 fatalities and nearly 3500 injuries are acceptable.

The DUI legislation contained in SB 172 & HB 2355 will go far in addressing needed strategies to reduce the drunk driving tragedies in our state.

In 1991 there were 21,827 DUI arrests made in our state. The "fatality risk" for drivers with a BAC between .05-.09 in single-car crashes is 11 times higher than for a non-drinking driver. Five states currently have .08 BAC per se with 12 others addressing legislation this session. **.08 BAC per se is a limit which is reasonable and necessary for the driving safety of all.**

MOTHERS AGAINST DRUNK DRIVING
WE'RE IN IT FOR LIVES
TEN YEAR ANNIVERSARY
TM

SJ
3-17-93
Attachment 4

The BAC limit for youth should be "zero tolerance" or lower than .08 to **match** the public policy created when the minimum legal age of "21" was enacted. No youth under the age of 21 is suppose to drink let alone drink AND drive. Research has shown there is a need for a consistent "no use" message for our youth. Twelve states have lower BAC levels for youth under 21 with more states addressing legislation this session.

MADD is also in support of a felony charge for third time offenders.

There is also a need to set a limit requirement for diversions. Diversion should be an exception and not a rule for DUI offenders. Anyone with a .15 BAC or above should not be eligible for diversion.

Lowering the BAC limit for boat operators is appropriate and should be viewed with the same seriousness as vehicles.

What is a designated driver provision?
"Affirmative defense" as become an issue and clarification is needed. MADD does not support the concept of "affirmative defense" as representing any part of a "designated driver" provision. A designated driver program does not endorse any type of open container within a vehicle. Bottom line we need to communicate-Kansas does not allow the transportation of open containers.

Thank you for your time and energy.

Wanda Stewart
Regional Director
MADD National Board
609 Random Rd.
El Dorado, Ks. 67042
316-321-6576

MEMORANDUM

TO: **The Honorable Jerry Moran, Chairman**
Senate Judiciary Committee

FROM: **Jame G. Keller, Attorney**
Kansas Department of Revenue

DATE: **March 17, 1993**

SUBJECT: **House Bill No. 2355**

I appreciate the opportunity to appear before you with regard to House Bill No. 2355.

This bill amends a number of statutes administered by the Division of Vehicles. The Department of Revenue supports this bill, but would suggest certain changes. Some of the changes simply clarify existing procedures in the statutory language, some are to clean up language as a result of other changes in this bill or in prior legislation, and others have been suggested by recent court decisions.

Attached hereto is an explanation of the changes suggested by the Department of Revenue along with a copy of the bill with the proposed changes.

SJ
3-17-93
Attachment 5

EXPLANATION OF PROPOSED AMENDMENT TO HOUSE BILL NO. 2355

Section 1:

Page 3, Line 16: The words "at least" are proposed to be deleted because the suspension is for "one year."

Page 3, Line 29: The words "at least" are proposed to be deleted because the suspension is for "one year."

Page 3, Lines 36-37: The language "has the right to consult with an attorney" should be deleted. The original intention of that language was to advise that the Fifth Amendment right to counsel would still be available after the testing procedures were completed. However, recent court decisions have construed the phrase as granting a statutory right to counsel in addition to any constitutional right. There have also been arguments made that the language seems to restrict right to counsel only to those who have submitted to the test, but not those who refused. Removal of the language will simply eliminate these issues, but will have no effect upon any constitutional right to counsel which the person will still have.

Page 5, After Line 8: This language is the same as that contained in the Commercial Driver's License Act. Most prior court decisions have construed this law as a remedial law which should be liberally construed. However, some recent Kansas Court of Appeals decisions have overlooked prior precedents and stated that the act should be strictly construed. This proposed change will simply eliminate the issue and make it clear that the proper standard is that expressed in *State v. Adee*, 241 Kan. 825, 829 (1987).

Section 2:

Page 6, Lines 22-31: The proposed changes are necessary to eliminate technical issues that arise regarding who serves the copy of the certification and notice of suspension on the person and to accommodate certain police procedures regarding the handling of personal property of individuals in custody and in mailing documents.

Page 6, Lines 32-40: The proposed changes are to clarify that the person is to be suspended on the 20th calendar day after service of the notice of suspension--in other words, the 20 day period includes weekends and holidays. A recent court case ruled that the present language was unclear.

Page 7, Lines 7-17: The proposed changes are to carry out the purposes explained on the previous page and to make it clear that the direction to forward the law enforcement officer's certification and notice of suspension to the division of vehicles within five days is directory rather than mandatory. Some suspensions have been overturned because the certification was sent in after six days rather than five although there was no effect upon the proceeding.

Page 7, Lines 27-28: The proposed changes are to help make it clear that K.S.A. 60-206 does not apply to this time period. To help reduce the time period for setting administrative hearings to meet federal guidelines, the time requesting a hearing is made the same whether the certification was served by mail or in person.

Page 8, Lines 12-26: The section setting out the issues to be raised at an administrative hearing for a test failure are separated into breath test failure and blood test failure. A change in the language of the issues for a breath test failure recognizes that the Kansas department of health and environment is required to approve all breath-testing instruments in use in Kansas and has a program for periodic inspection of all such instruments and examination of all persons certified to operate such devices. The Kansas courts have repeatedly referred to the inspection and certification program of the KDHE when issues have been raised about "reliability" and "qualifications."

Page 8, After Line 30: This section sets out the issues for blood test failures.

Page 8, Lines 39-42: The proposed changes are necessary as a result of the changes proposed for paragraph (h)(2).

Page 9, Lines 13-21: The proposed language removes language that has been used as a basis for an argument that the suspension action should be dismissed if the matter is not set for hearing within 30 days, although the statute presently provides that

the only result is that the temporary license is extended until the date set for hearing. The change merely eliminates the reference to thirty days, but keeps the same procedure in effect. The additional language sets out a procedure for the service of administrative orders upon persons who have appeared at an administrative hearing.

Page 9, Line 30: The proposed language is necessary as a result of the additional language proposed in paragraph (k).

Page 9, After Line 35: Two additional paragraphs are proposed. Paragraph (n) was suggested by the result of a recent appellate decision which held that there were no procedural statutes for implied consent cases and ruled that the Act for Judicial Review should be used to supply administrative procedures. This proposed paragraph makes it clear that this section and some of the provisions in K.S.A. 8-255 constitute the administrative procedures to be used for the implied consent law. Paragraph (o) is to clarify that the time periods set out in this section are not governed by K.S.A. 60-206. A definition of the term "calendar day" as used in this section is included. This is in response to a recent court decision which held that the present statutory language is unclear without such references.

Section 8:

Page 17, Lines 27-28: New paragraph (e) in this bill eliminates the need for the language proposed to be deleted.

Page 17, Lines 35-43, Page 18, Lines 1-6: The Department of Revenue would recommend that new paragraph (d) be deleted. Since .04 to .08 BAC levels for persons under 21 years of age are included as "test failures" in K.S.A. 8-1013(h), such results would bring about suspensions under K.S.A. 8-1014(b). Also, most test failures result from breath tests rather than blood tests. The provision regarding the administrative fine is unclear.

Page 18, Line 31: The language proposed to be deleted should have been taken out when the sanction for a first occurrence refusal was changed from 180 days to one year. There is no reason for a reference to 150 days under present law.

Section 9: The restriction for using an ignition interlock device under new paragraph (4) would appear to be infinite in duration. The Department has no position on this, but merely wanted to call this to the attention of the committee.

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 1993

HOUSE BILL No. 2355

By Representatives Crowell and O'Neal, Boston, Cornfield, Flower, Goossen, Graeber, Mason, Mayans, Mays, Myers, O'Connor, Samuelson, Shallenburger, Shore, M. Smith and Wagle

2-5

AN ACT concerning alcohol-related offenses involving the driving or operating of vehicles or vessels; amending K.S.A. 8-1001, 8-1002, 8-1005, 8-1008, 8-1011, 8-1012, 8-1013, 8-1014, 8-1015, 8-1567, as amended by section 1 of chapter 298 of the 1992 Session Laws of Kansas, 8-2204, 12-4305, 12-4415, 22-2908, as amended by section 257 of chapter 239 of the 1992 Session Laws of Kansas, 41-201 and 41-804 and K.S.A. 1992 Supp. 32-1131 and 32-1132 and repealing the existing sections; also repealing K.S.A. 41-2719 and 41-2720.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 8-1001 is hereby amended to read as follows: 8-1001. (a) Any person who operates or attempts to operate a ~~motor~~ vehicle within this state is deemed to have given consent, subject to the provisions of this act, to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. The testing deemed consented to herein shall include all quantitative and qualitative tests for alcohol and drugs. A person who is dead or unconscious shall be deemed not to have withdrawn the person's consent to such test or tests, which shall be administered in the manner provided by this section.

(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a) if the officer has reasonable grounds to believe the person was operating or attempting to operate a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person was driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; and one of the following conditions exists: (1) The person has been arrested or otherwise taken into custody for any offense involving operation or attempted operation of a ~~motor~~ vehicle

while under the influence of alcohol or drugs, or both, or involving driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, in violation of a state statute or a city ordinance; or (2) the person has been involved in a ~~motor~~ vehicle accident or collision resulting in property damage, personal injury or death. The law enforcement officer directing administration of the test or tests may act on personal knowledge or on the basis of the collective information available to law enforcement officers involved in the accident investigation or arrest.

(c) If a law enforcement officer requests a person to submit to a test of blood under this section, the withdrawal of blood at the direction of the officer may be performed only by: (1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) any qualified medical technician. When presented with a written statement by a law enforcement officer directing blood to be withdrawn from a person who has tentatively agreed to allow the withdrawal of blood under this section, the person authorized herein to withdraw blood and the medical care facility where blood is withdrawn may rely on such a statement as evidence that the person has consented to the medical procedure used and shall not require the person to sign any additional consent or waiver form. In such a case, the person authorized to withdraw blood and the medical care facility shall not be liable in any action alleging lack of consent or lack of informed consent. No person authorized by this subsection to withdraw blood, nor any person assisting in the performance of a blood test nor any medical care facility where blood is withdrawn or tested that has been directed by any law enforcement officer to withdraw or test blood, shall be liable in any civil or criminal action when the act is performed in a reasonable manner according to generally accepted medical practices in the community where performed.

(d) If there are reasonable grounds to believe that there is impairment by a drug which is not subject to detection by the blood or breath test used, a urine test may be required. If a law enforcement officer requests a person to submit to a test of urine under this section, the collection of the urine sample shall be supervised by persons of the same sex as the person being tested and shall be conducted out of the view of any person other than the persons supervising the collection of the sample and the person being tested, unless the right to privacy is waived by the person being tested. The results of qualitative testing for drug presence shall be admissible

in evidence and questions of accuracy or reliability shall go to the weight rather than the admissibility of the evidence.

(e) No law enforcement officer who is acting in accordance with this section shall be liable in any civil or criminal proceeding involving the action.

(f) (1) Before a test or tests are administered under this section, the person shall be given oral and written notice that: (A) Kansas law requires the person to submit to and complete one or more tests of breath, blood or urine to determine if the person is under the influence of alcohol or drugs, or both; (B) the opportunity to consent to or refuse a test is not a constitutional right; (C) there is no constitutional right to consult with an attorney regarding whether to submit to testing; (D) if the person refuses to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer, the person's driving privileges will be suspended for ~~at least~~ one year; (E) if the person [is 21 or more years of age at the time of the test,] submits to and completes the test or tests and the test results show an alcohol concentration of ~~.10~~ *.08* or greater, the person's driving privileges will be suspended for at least 30 days; (F) [if the person is less than 21 years of age at the time of the test, submits to and completes the test or tests, and the test results show an alcohol concentration of .04 or greater, the person's driving privileges will be suspended for at least 30 days; (G)] if person refuses a test or the test results show an alcohol concentration of ~~.10~~ *.08* or greater and if, within the past five years, the person has been convicted or granted diversion on a charge of driving under the influence of alcohol or drugs, or both, or a related offense and has refused or failed a test, the person's driving privileges will be suspended for ~~at least~~ one year; ~~(G)~~ [(H)] refusal to submit to testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both; ~~(H)~~ [(I)] the results of the testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both; and ~~(I)~~ [(J)] after the completion of the testing, the person ~~has the right to consult with an attorney~~ and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians. If a law enforcement officer has reasonable grounds to believe that the person has been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, the person must also be provided the oral and

written notice pursuant to K.S.A. 8-2,145 *and amendments thereto*. Any failure to give the notices required by K.S.A. 8-2,145 *and amendments thereto* shall not invalidate any action taken as a result of the requirements of this section. After giving the foregoing information, a law enforcement officer shall request the person to submit to testing. The selection of the test or tests shall be made by the officer. If the person refuses to submit to and complete a test as requested pursuant to this section, additional testing shall not be given unless the certifying officer has probable cause to believe that the person, while under the influence of alcohol or drugs, or both, has operated a ~~motor~~ vehicle in such a manner as to have caused the death of or serious injury to another person. In such event, such test or tests may be made pursuant to a search warrant issued under the authority of K.S.A. 22-2502, and amendments thereto, or without a search warrant under the authority of K.S.A. 22-2501, and amendments thereto. If the test results show a blood or breath alcohol concentration of ~~.10~~ **[.04 or greater but less than .08, if such person is less than 21 years of age, or]** *.08* or greater **[of any person]**, the person's driving privileges shall be subject to suspension, or suspension and restriction, as provided in K.S.A. 8-1002~~, and amendments thereto, and K.S.A.~~ *and* 8-1014, and amendments thereto. The person's refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both. If a law enforcement officer had reasonable grounds to believe the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, and the test results show a blood or breath alcohol concentration of .04 or greater, the person shall be disqualified from driving a commercial motor vehicle, pursuant to K.S.A. 8-2,142, and amendments thereto. If a law enforcement officer had reasonable grounds to believe the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, and the test results show a blood or breath alcohol concentration of ~~.10~~ *.08* or greater, or the person refuses a test, the person's driving privileges shall be subject to suspension, or suspension and restriction, pursuant to this section, in addition to being disqualified from driving a commercial motor vehicle pursuant to K.S.A. 8-2,142, and amendments thereto.

(2) Failure of a person to provide an adequate breath sample or samples as directed shall constitute a refusal unless the person shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs.

(3) It shall not be a defense that the person did not understand the written or oral notice required by this section.

(g) Nothing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant.

(h) Upon the request of any person submitting to testing under this section, a report of the results of the testing shall be made available to such person.

(i) This act is remedial law and shall be liberally construed to promote public health, safety and welfare.

Sec. 2. K.S.A. 8-1002 is hereby amended to read as follows: 8-1002. (a) Whenever a test is requested pursuant to this act and results in either a test failure or test refusal, a law enforcement officer's certification shall be prepared. If the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, a separate certification pursuant to K.S.A. 8-2,145~~,~~ *and amendments thereto* shall be prepared in addition to any certification required by this section. The certification required by this section shall be signed by one or more officers to certify:

(1) With regard to a test refusal, that: (A) There existed reasonable grounds to believe the person was operating or attempting to operate a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person had been placed under arrest, was in custody or had been involved in a ~~motor~~ vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the person refused to submit to and complete a test as requested by a law enforcement officer.

(2) With regard to a test failure, that: (A) There existed reasonable grounds to believe the person was operating a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person had been placed under arrest, was in custody or had been involved in a ~~motor~~ vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the result of the test showed that the person had an alcohol concentration of ~~.10~~ **[.04 or greater but less than .08, if such person is less than 21 years of age, in such person's blood or breath or]** *.08* or greater in ~~such~~ **[any]** person's blood or breath.

(3) With regard to failure of a breath test, in addition to those matters required to be certified under subsection (a)(2), that: (A) The testing equipment used was certified by the Kansas department of health and environment; (B) the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment; and (C) the person who operated the testing equipment was certified by the Kansas department of health and environment to operate such equipment.

(b) For purposes of this section, certification shall be complete upon signing, and no additional acts of oath, affirmation, acknowledgment or proof of execution shall be required. The signed certification or a copy or photostatic reproduction thereof shall be admissible in evidence in all proceedings brought pursuant to this act, and receipt of any such certification, copy or reproduction shall accord the department authority to proceed as set forth herein. Any person who signs a certification submitted to the division knowing it contains a false statement is guilty of a class B [nonperson] misdemeanor.

(c) When the officer directing administration of the testing determines that a person has refused a test and the criteria of subsection (a)(1) have been met or determines that a person has failed a test and the criteria of subsection (a)(2) have been met, the ~~officer shall serve upon the~~ person notice of suspension of driving privileges pursuant to K.S.A. 8-1014, and amendments thereto. If the determination is made while the person is still in custody, service shall be made in person by ~~the~~ officer on behalf of the division of vehicles. In cases where a test failure is established by a subsequent analysis of a breath, blood or urine sample, ~~the~~ officer shall serve ~~notice of such~~ suspension in person ~~or by another designated officer~~ or by mailing the notice to the person at the address provided at the time of the test.

(d) ~~The~~ notice shall contain the following information: (1) The person's name, driver's license number and current address; (2) the reason and statutory grounds for the suspension; (3) the date notice is being served and the effective date of the suspension, ~~which~~ shall be the 20th day after the date of service; (4) the right of the person to request an administrative hearing; and (5) the procedure the person must follow to request an administrative hearing. The notice of suspension shall also inform the person that all correspondence will be mailed to the person at the address contained in the notice of suspension unless the person notifies the division in writing of a different address or change of address. The address provided will be considered a change of address for purposes of K.S.A. 8-248, and

shall be served with a copy of the law enforcement officer's certification and

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For purposes of this section, personal service shall include placing the copy of the law enforcement officer's certification and notice of suspension in safekeeping to be given to the person upon release from custody.

a n

the copy of the law enforcement officer's certification and notice of

Mailing of the notice by another employee of the law enforcement agency at the direction of an officer shall constitute mailing by an officer.

In addition to the information required by subsection (a) of this section, the law enforcement officer's certification and

of suspension

a statement that

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law enforcement officer's certification and

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amendments thereto, if the address furnished is different from that on file with the division.

(e) If a person refuses a test or if a person is still in custody when it is determined that the person has failed a test, the officer shall take any license in the possession of the person and, if the license is not expired, suspended, revoked or canceled, shall issue a temporary license effective until the ~~date of suspension stated in the notice~~. If the test failure is established by a subsequent analysis of a breath or blood sample, the temporary license shall be served together with the notice of suspension. A temporary license issued pursuant to this subsection shall bear the same restrictions and limitations as the license for which it was exchanged. ~~The officer shall also provide the person with a copy of the officer's certification as set forth in subsection (e).~~ Within five days after the date of ~~certification of the test refusal or test failure~~, ~~the officer who effected service shall forward~~ the officer's certification and ~~a copy of the~~ notice of suspension, along with any licenses taken, to the division.

(f) Upon receipt of the law enforcement officer's certification, the division shall review the certification to determine that it meets the requirements of subsection (a). Upon so determining, the division shall proceed to suspend the person's driving privileges in accordance with the notice of suspension previously served. If the requirements of subsection (a) are not met, the division shall dismiss the administrative proceeding and return any license surrendered by the person.

(g) If the person mails a written request which is postmarked within ~~10~~ days after service of the notice, ~~if by personal service, or 13 days after service, if by mail~~, the division shall schedule a hearing in the county where the alleged violation occurred, or in a county adjacent thereto. The licensee may request that subpoenas be issued in accordance with the notice provided pursuant to subsection (d). Any request made by the licensee to subpoena witnesses must be made in writing at the time the hearing is requested and must include the name and current address of such witnesses and, except for the law enforcement officer or officers certifying refusal or failure, a statement of how the testimony of such witness is relevant. Upon receiving a timely request for a hearing, the division shall mail to the person notice of the time, date and place of hearing in accordance with subsection (l) and extend the person's temporary driving privileges until the date set for the hearing by the division.

(h) (1) If the officer certifies that the person refused the test, the scope of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person

20th calendar day after the date of service set out in the law enforcement officer's certification and notice of suspension

copy of the law enforcement officer's certification and

service of a copy of the law enforcement officer's certification and notice of suspension

shall be forwarded

The failure to forward the law enforcement officer's certification and notice of suspension within five days after the date of service shall not be cause for dismissal of the administrative action on the person's driving privileges unless the licensee can show substantial prejudice resulting therefrom.

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whether by personal service or by mail

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a breath

certified by the Kansas department of health and environment

certified by the Kansas department of health and environment

substantially complied with procedures approved by the Kansas department of health and environment

indicated

in such person's blood or breath

was less than 21 years of age at the time of testing, or

(3) If the officer certifies that the person failed a blood test, the scope of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person was operating a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; (D) the testing procedures used were reliable; (E) the test result showed that the person had an alcohol concentration of .04 or greater but less than .08 in such person's blood or breath, if such person was less than 21 years of age at the time of the test, or .08 or greater in any person's blood or breath; and (F) the person was operating a vehicle.

certification

approved by the Kansas department of health and environment.

was operating or attempting to operate a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a ~~motor~~ vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the person refused to submit to and complete a test as requested by a law enforcement officer.

(2) If the officer certifies that the person failed ~~the~~ test, the scope of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person was operating a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a ~~motor~~ vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; (D) the testing equipment used was ~~reliable~~; (E) the person who operated the testing equipment was ~~qualified~~; (F) the testing procedures used ~~were reliable~~; (G) the test result determined that the person had an alcohol concentration of ~~.10~~ [.04 or greater but less than .08, if such person is less than 21 years of age, in such person's blood or breath or] .08 or greater in ~~such~~ [any] person's blood or breath; and (H) the person was operating a ~~motor~~ vehicle.

(i) At a hearing pursuant to this section, or upon court review of an order entered at such a hearing, an affidavit of the custodian of records at the Kansas department of health and environment stating that the breath testing device was certified and the operator of such device was certified on the date of the test shall be admissible into evidence in the same manner and with the same force and effect as if the certifying officer or employee of the Kansas department of health and environment had testified in person. Such affidavit shall be admitted to prove such ~~reliability~~ without further foundation requirement. A certified operator of a breath testing device shall be competent to testify regarding the ~~proper~~ procedures ~~to be used in conducting the test.~~

(j) At a hearing pursuant to this section, or upon court review

of an order entered at such hearing, in which the report of blood test results have been prepared by the Kansas bureau of investigation or other forensic laboratory of a state or local law enforcement agency are to be introduced as evidence, the report, or a copy of the report, of the findings of the forensic examiner shall be admissible into evidence in the same manner and with the same force and effect as if the forensic examiner who performed such examination, analysis, comparison or identification and prepared the report thereon had testified in person.

(k) If no timely request for hearing is made, the suspension period imposed pursuant to this section shall begin upon the expiration of the temporary license granted under subsection (e). If a timely request for hearing is made, the hearing ~~shall be held within 30 days of the date the request for hearing is received by the division.~~ At the hearing, the director or the representative of the director, shall either affirm the order of suspension or suspension and restriction or dismiss the administrative action. ~~If the division is unable to hold a hearing within 30 days of the date upon which the request for hearing is received, the division shall extend the person's temporary driving privileges until the date set for the hearing by the division.~~ No extension of temporary driving privileges shall be issued for continuances requested by or on behalf of the licensee. If the person whose privileges are suspended is a nonresident licensee, the license of the person shall be forwarded to the appropriate licensing authority in the person's state of residence if the result at the hearing is adverse to such person or if no timely request for a hearing is received.

(l) All notices affirming or canceling a suspension under this section, all notices of a hearing held under this section and all issuances of temporary driving privileges pursuant to subsection (k) shall be sent by first-class mail and a U.S. post office certificate of mailing shall be obtained therefor. All notices so mailed shall be deemed received three days after mailing.

(m) The division shall prepare and distribute forms for use by law enforcement officers in giving the notice required by this section.

Sec. 3. K.S.A. 8-1005 is hereby amended to read as follows: 8-1005. Except as provided by K.S.A. 8-1012 and amendments thereto, in any criminal prosecution for violation of the laws of this state relating to operating or attempting to operate a motor vehicle while under the influence of alcohol or drugs, or both, or the commission of vehicular homicide or manslaughter while under the influence of alcohol or drugs, or both, or in any prosecution for a violation of a city ordinance relating to the operation or attempted operation of a

division shall set the matter for

and extend the person's temporary driving privileges until the date set for the hearing by the division

The director or the representative of the director shall serve a copy of the administrative order affirming or dismissing the administrative action upon the person, or, if the person is represented at the hearing by an attorney, upon the person's attorney. If the director or the representative of the director takes the matter under advisement and does not decide the matter at the close of the hearing, notice of the decision shall be served upon the person or the person's attorney by mail and shall be considered effective on the third calendar day after the notice is mailed. If the person is represented at the hearing by an attorney, service of the administrative order upon the attorney shall be considered effective service on the person.

and notices of decisions of administrative hearings mailed

(n) This section and the applicable provisions contained in K.S.A. 8-255(d) and (e) constitute the administrative procedures to be used for all administrative hearings held under this act. To the extent that this section and any other provision of law conflicts, this section prevails.

(o) The provisions of K.S.A. 60-206, and amendments thereto, regarding the computation of time shall not be applicable in determining the effective date of suspension set out in subsection (d) or the time for requesting an administrative hearing set out in subsection (g). "Calendar day" when used in this section shall mean that every day shall be included in computations of time whether a week day, Saturday, Sunday or holiday.

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motor vehicle while under the influence of alcohol or drugs, or both, evidence of the concentration of alcohol or drugs in the defendant's blood, urine, breath or other bodily substance may be admitted and shall give rise to the following:

(a) If the alcohol concentration is less than ~~.10~~ .08, that fact may be considered with other competent evidence to determine if the defendant was under the influence of alcohol, or both alcohol and drugs.

(b) If the alcohol concentration is ~~.10~~ .08 or ~~more~~ *greater*, it shall be prima facie evidence that the defendant was under the influence of alcohol to a degree that renders the person incapable of driving safely.

(c) If there was present in the defendant's bodily substance any narcotic, hypnotic, somnifacient, stimulating or other drug which has the capacity to render the defendant incapable of safely driving a vehicle, that fact may be considered to determine if the defendant was under the influence of drugs, or both alcohol and drugs, to a degree that renders the defendant incapable of driving safely.

Sec. 4. K.S.A. 8-1008 is hereby amended to read as follows: 8-1008. (a) Community-based alcohol and drug safety action programs certified in accordance with subsection (b) shall provide:

(1) Presentence alcohol and drug evaluations of any person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute;

(2) supervision and monitoring of all persons who are convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, and whose sentences or terms of probation require completion of an alcohol and drug safety action program, as provided in this section, or an alcohol and drug abuse treatment program, as provided in this section;

(3) alcohol and drug evaluations of persons whom the prosecutor considers for eligibility or finds eligible to enter a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute;

(4) supervision and monitoring of persons required, under a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, to complete an alcohol and drug safety

action program, as provided in this section, or an alcohol and drug abuse treatment program, as provided in this section; or

(5) any combination of (1), (2), (3) and (4).

(b) The presentence alcohol and drug evaluation shall be conducted by a community-based alcohol and drug safety action program certified in accordance with the provisions of this subsection to provide evaluation and supervision services as described in subsections (c) and (d). A community-based alcohol and drug safety action program shall be certified either by the administrative judge of the judicial district to be served by the program or by the secretary of social and rehabilitation services for judicial districts in which the administrative judge declines to certify a program. In establishing the qualifications for programs, the administrative judge or the secretary shall give preference to those programs which have had practical experience prior to July 1, 1982, in diagnosis and referral in alcohol and drug abuse. Certification of a program by the administrative judge shall be done with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district. If within 60 days after the effective date of this act the administrative judge declines to certify any program for the judicial district, the judge shall notify the secretary of social and rehabilitation services, and the secretary of social and rehabilitation services shall certify a community-based alcohol and drug safety action program for that judicial district. The certification shall be for a four-year period. Recertification of a program or certification of a different program shall be by the administrative judge, with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district. If upon expiration of certification of a program there will be no certified program for the district and the administrative judge declines to recertify or certify any program in the district, the judge shall notify the secretary of social and rehabilitation services, at least six months prior to the expiration of certification, that the judge declines to recertify or certify a program under this subsection. Upon receipt of the notice and prior to the expiration of certification, the secretary shall recertify or certify a community-based alcohol and drug safety action program for the judicial district for the next four-year period. To be eligible for certification under this subsection, the administrative judge or the secretary of social and rehabilitation services shall determine that a community-based alcohol and drug safety action program is capable of providing, within the judicial district: (1) The evaluations, supervision and monitoring required

under subsection (a); (2) the alcohol and drug evaluation report required under subsection (c) or (d); (3) the follow-up duties specified under subsection (c) or (d) for persons who prepare the alcohol and drug evaluation report; and (4) any other functions and duties specified by law. Community-based alcohol and drug safety action programs performing services in any judicial district under this section prior to the effective date of this act may continue to perform those services until a community-based alcohol and drug safety action program is certified for that judicial district.

(c) A presentence alcohol and drug evaluation shall be conducted on any person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute. The presentence alcohol and drug evaluation report shall be made available to and shall be considered by the court prior to sentencing. The presentence alcohol and drug evaluation report shall contain a history of the defendant's prior traffic record, characteristics and alcohol or drug problems, or both, and a recommendation concerning the amenability of the defendant to education and rehabilitation. The presentence alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the defendant. The presentence alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis of alcohol and drug abuse. The duties of persons who prepare the presentence alcohol and drug evaluation report may also include appearing at sentencing and probation hearings in accordance with the orders of the court, monitoring defendants in the treatment programs, notifying the probation department and the court of any defendant failing to meet the conditions of probation or referrals to treatment, appearing at revocation hearings as may be required and providing assistance and data reporting and program evaluation. The cost of any alcohol and drug education, rehabilitation and treatment programs for any person shall be paid by such person, and such costs shall include, but not be limited to, the assessments required by subsection (e). If financial obligations are not met or cannot be met, the sentencing court shall be notified for the purpose of collection or review and further action on the defendant's sentence.

(d) An alcohol and drug evaluation shall be conducted on any person whom the prosecutor considers for eligibility or finds eligible to enter a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the

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acts prohibited by that statute. The alcohol and drug evaluation report shall be made available to the prosecuting attorney and shall be considered by the prosecuting attorney. The alcohol and drug evaluation report shall contain a history of the person's prior traffic record, characteristics and alcohol or drug problems, or both, and a recommendation concerning the amenability of the person to education and rehabilitation. The alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the person. The alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis of alcohol and drug abuse. The duties of persons who prepare the alcohol and drug evaluation report may also include monitoring persons in the treatment programs, notifying the prosecutor and the court of any person failing to meet the conditions of diversion or referrals to treatment, and providing assistance and data reporting and program evaluation. The cost of any alcohol and drug education, rehabilitation and treatment programs for any person shall be paid by such person, and such costs shall include, but not be limited to, the assessments required by subsection (e).

(e) In addition to any fines, fees, penalties or costs levied against a person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, or who enters a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of that statute or such an ordinance, $110 shall be assessed against the person by the sentencing court or under the diversion agreement. The $110 assessment may be waived by the court or, in the case of diversion of criminal proceedings, by the prosecuting attorney, if the court or prosecuting attorney finds that the defendant is an indigent person ~~*or that the defendant has completed an alcohol and drug treatment program subsequent to being charged with a violation of K.S.A. 8-1567 and amendments thereto*~~. Except as otherwise provided in this subsection, the clerk of the court shall deposit all assessments received under this section in the alcohol and drug safety action fund of the court, which fund shall be subject to the administration of the judge having administrative authority over that court. If the secretary of social and rehabilitation services certifies the community-based alcohol and drug safety action program for the judicial district in which the court is located, the clerk of the court shall remit, during the four-year period for which the program is certified, 15% of all assessments received under this section to the secretary of social and rehabilitation serv-

ices. Moneys credited to the alcohol and drug safety action fund shall be expended by the court, pursuant to vouchers signed by the judge having administrative authority over that court, only for costs of the services specified by subsection (a) or otherwise required or authorized by law and provided by community-based alcohol and drug safety action programs, except that not more than 10% of the money credited to the fund may be expended to cover the expenses of the court involved in administering the provisions of this section. In the provision of these services the court shall contract as may be necessary to carry out the provisions of this section. The district or municipal judge having administrative authority over that court shall compile a report and send such report to the office of the state judicial administrator on or before January 20 of each year, beginning January 20, 1991. Such report shall include, but not be limited to:

(1) The balance of the alcohol and drug safety action fund of the court on December 31 of each year;

(2) the assessments deposited into the fund during the 12-month period ending the preceding December 31; and

(3) the dollar amounts expended from the fund during the 12-month period ending the preceding December 31.

The office of the state judicial administrator shall compile such reports into a statewide report and submit such statewide report to the legislature on or before March 1 of each year, beginning March 1, 1991.

(f) The secretary of social and rehabilitation services shall remit all moneys received by the secretary under this section to the state treasurer at least monthly. Upon receipt of the remittance, the state treasurer shall deposit the entire amount in the state treasury and credit it to the certification of community-based alcohol and drug safety action programs fee fund, which is hereby created. All expenditures from such fund shall be made in accordance with appropriation acts upon warrants issued pursuant to vouchers approved by the secretary of social and rehabilitation services or a person designated by the secretary.

Sec. 5. K.S.A. 8-1011 is hereby amended to read as follows: 8-1011. A law enforcement officer, and the state or any political subdivision of the state that employs a law enforcement officer, arresting or taking custody of a person for any offense involving the operation of or attempt to operate a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, shall have immunity from any civil or criminal liability for the care and custody of the ~~motor~~ vehicle that was being operated by or was in the physical control of the person arrested or in custody if the law enforcement officer acts in good

faith and exercises due care.

Sec. 6. K.S.A. 8-1012 is hereby amended to read as follows: 8-1012. A law enforcement officer may request a person who is operating or attempting to operate a ~~motor~~ vehicle within this state to submit to a preliminary screening test of the person's breath to determine the alcohol concentration of the person's breath if the officer has reasonable grounds to believe that the person: (a) Has alcohol in the person's body; (b) has committed a traffic infraction; or (c) has been involved in a ~~motor~~ vehicle accident or collision. At the time the test is requested, the person shall be given oral notice that: (1) There is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to submit to testing is a traffic infraction; and (3) further testing may be required after the preliminary screening test. Failure to provide the notice shall not be an issue or defense in any action. The law enforcement officer then shall request the person to submit to the test. Refusal to take and complete the test as requested is a traffic infraction. If the person submits to the test, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request the tests authorized by K.S.A. 8-1001 and amendments thereto. A law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test. Such results shall not be admissible in any civil or criminal action except to aid the court or hearing officer in determining a challenge to the validity of the arrest or the validity of the request to submit to a test pursuant to K.S.A. 8-1001 and amendments thereto. Following the preliminary screening test, additional tests may be requested pursuant to K.S.A. 8-1001 and amendments thereto.

Sec. 7. K.S.A. 8-1013 is hereby amended to read as follows: 8-1013. As used in K.S.A. 8-1001 through 8-1010, 8-1011, 8-1012, 8-1014, 8-1015, 8-1016, 8-1017 and 8-1018, and amendments thereto, and this section:

(a) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

(b) (1) "Alcohol or drug-related conviction" means any of the following: (A) Conviction of vehicular battery or aggravated vehicular homicide, if the crime is committed while committing a violation of K.S.A. 8-1567 and amendments thereto or the ordinance of a city or resolution of a county in this state which prohibits any acts prohibited by that statute, or conviction of a violation of K.S.A. 8-1567 and amendments thereto; (B) conviction of a violation of a law of another state which would constitute a crime described in subsection

(b)(1)(A) if committed in this state; ~~or~~ (C) conviction of a violation of an ordinance of a city in this state or a resolution of a county in this state which would constitute a crime described in subsection (b)(1)(A), whether or not such conviction is in a court of record; or **(D) conviction of an act which was committed on a military reservation and which would constitute a violation of K.S.A. 8-1567, and amendments thereto, or would constitute a crime described in subsection (b)(1)(A) if committed off a military reservation in this state.**

(2) For the purpose of determining whether an occurrence is a first, second or subsequent occurrence: (A) "Alcohol or drug-related conviction" also includes entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging commission of a crime described in subsection (b)(1) which agreement was entered into during the immediately preceding five years, including prior to the effective date of this act; and (B) it is irrelevant whether an offense occurred before or after conviction or diversion for a previous offense.

(c) "Division" means the division of motor vehicles of the department of revenue.

(d) "Ignition interlock device" means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such person has consumed an alcoholic beverage.

(e) "Occurrence" means a test refusal, test failure or alcohol or drug-related conviction, or any combination thereof arising from one arrest, occurring in the immediately preceding five years, including prior to the effective day of this act.

(f) "Other competent evidence" includes: (1) Alcohol concentration tests obtained from samples taken two hours or more after the operation or attempted operation of a vehicle; and (2) readings obtained from a partial alcohol concentration test on a breath testing machine.

(g) "Samples" includes breath supplied directly for testing, which breath is not preserved.

(h) "Test failure" or "fails a test" refers to a person's having results of a test administered pursuant to this act, other than a preliminary screening test, which show an alcohol concentration of .10 **[.04 or greater but less than .08, if such person is less than 21 years of age, in such person's blood or breath or]** .08 or greater in the **[any]** person's blood or breath, **and includes failure of any such test on a military reservation.**

(i) "Test refusal" or "refuses a test" refers to a person's failure to submit to or complete any test, other than a preliminary screening

test, in accordance with this act, and includes refusal of any such test on a military reservation.

(j) "Law enforcement officer" has the meaning provided by K.S.A. 21-3110, and amendments thereto, and includes any person authorized by law to make an arrest on a military reservation for an act which would constitute a violation of K.S.A. 8-1567, and amendments thereto, if committed off a military reservation in this state.

Sec. 8. K.S.A. 8-1014 is hereby amended to read as follows: 8-1014. (a) Except as provided by subsection ~~(d)~~ *(e)* **[(f)]** and K.S.A. 8-2,142, and amendments thereto, if a person refuses a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall suspend the person's driving privileges for one year.

(b) Except as provided by subsection ~~(d)~~ *(e)* **[(f)]** and K.S.A. 8-2,142, and amendments thereto, if a person fails a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

(1) On the person's first occurrence, suspend the person's driving privileges for 30 days, then restrict the person's driving privileges as provided by K.S.A. 8-1015, and amendments thereto, for an additional 60 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year.

(c) Except as provided by subsection ~~(d)~~ *(e)* **[(f)]** and K.S.A. 8-2,142, and amendments thereto, if a person has an alcohol or drug-related conviction in this state, the division shall:

(1) On the person's first occurrence, suspend the person's driving privileges for 30 days ~~or until the person has completed educational and treatment programs required by the court, whichever is longer~~, then restrict the person's driving privileges as provided by K.S.A. 8-1015, and amendments thereto, for an additional 330 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year ~~or until the person has completed the treatment program required by the court, whichever is longer~~.

[(d) Except as provided by subsection (f), if a person less than 21 years of age shows an alcohol concentration of .04 or greater but less than .08 in such person's blood or breath, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

[(1) On the person's first occurrence, suspend the person's driving privileges for 30 days;

[(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for six months; and

[(3) assess an administrative fine of $25 to the person to cover

the Kansas bureau of investigation laboratory costs. The division shall remit all fines received under this section to the state treasurer at least monthly. Upon receipt of such remittance, the state treasurer shall deposit the entire amount thereof in the state treasury to the credit of the forensic laboratory and materials fee fund of the Kansas bureau of investigation.]

~~(d)~~ *(d)* [(e)] *Whenever the division is notified by an alcohol and drug safety action program that a person has failed to complete any alcohol and drug safety action education or treatment program ordered by a court for a conviction of a violation of K.S.A. 8-1567, and amendments thereto, the division shall suspend the person's driving privileges until the division receives notice of the person's completion of such program.*

~~(d)~~ ~~(e)~~ [(f)] Except as provided in K.S.A. 8-2,142, and amendments thereto, if a person's driving privileges are subject to suspension pursuant to this section for a test refusal, test failure or alcohol or drug-related conviction arising from the same arrest, the period of such suspension shall not exceed the longest applicable period authorized by subsection (a), (b) ~~or~~[,] (c) [or (d)], and such suspension periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of such suspension as authorized by subsection (a), (b) ~~or~~[,] (c) [or (d)], such person shall receive credit for any period of time for which such person's driving privileges were suspended while awaiting any hearing or final order authorized by this act.

If a person's driving privileges are subject to restriction pursuant to this section for a test failure or alcohol or drug-related conviction arising from the same arrest, the restriction periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of restriction, the person shall receive credit for ~~150 days of~~ any period of suspension imposed for a test refusal arising from the same arrest.

~~(e)~~ *(f)* [(g)] If the division has taken action under subsection (a) or (b) and such action is stayed pursuant to K.S.A. 8-259, and amendments thereto, or if temporary driving privileges are issued pursuant to subsection (k) of K.S.A. 8-1002, and amendments thereto, the stay or temporary driving privileges shall not prevent the division from taking the action required by subsection (c).

~~(f)~~ ~~(g)~~ [(h)] Upon restricting a person's driving privileges pursuant to this section, the division shall issue without charge a driver's license which shall indicate on the face of the license that restrictions have been imposed on the person's driving privileges and that a copy of the order imposing the restrictions is required to be carried

by the person for whom the license was issued any time the person is operating a motor vehicle on the highways of this state. If the person is a nonresident, the division shall forward a copy of the order to the motor vehicle administrator of the person's state of residence.

Sec. 9. K.S.A. 8-1015 is hereby amended to read as follows: 8-1015. (a) A driver whose violations were committed in a commercial motor vehicle is exempt from utilizing the below-stated restrictions. When subsection (b)(1) of K.S.A. 8-1014, and amendments thereto, requires the division to place restrictions on a person's driving privileges, the division shall restrict the person's driving privileges to driving only under the following circumstances: In going to and returning from the person's place of employment and in going to and returning from a mandated alcohol education or treatment program.

(b) (1) When subsection (c)(1) of K.S.A. 8-1014, and amendments thereto, requires the division to place restrictions on a person's driving privileges, the division shall restrict the person's driving privileges to driving only under the following circumstances for a period of 60 days: In going to and returning from the person's place of employment and in going to and returning from a mandated alcohol education or treatment program.

(2) Upon expiration of the 60-day period provided by subsection (b)(1), the division shall restrict the person's driving privileges as provided by K.S.A. 8-292, and amendments thereto, for an additional 270 days, unless the convicting court, in lieu of such restrictions, has ordered the restrictions set out in subsection (b)(3).

(3) Upon convicting a person of an alcohol or drug related offense, the convicting court, in lieu of the restrictions set out in subsection (b)(2), may restrict the person's driving privileges to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the person's expense. Any fine imposed by the court for the conviction shall be reduced by the court in an amount equal to the expense incurred by the person for obtaining, installing and maintaining the ignition interlock device.

(4) Upon a person's second or subsequent conviction for an alcohol related offense and the person had an alcohol concentration of .15 or more in the person's blood or breath, the convicting court shall restrict the person's driving privileges to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the person's expense. Any fine imposed by the court for the conviction ~~shall~~ [may]

be reduced by the court in an amount equal to the expense incurred by the person for obtaining, installing and maintaining the ignition interlock device.

(c) Upon expiration of the period of time for which restrictions are imposed pursuant to this section, the licensee may apply to the division for the return of any license previously surrendered by the licensee. If the license has expired, the person may apply to the division for a new license, which shall be issued by the division upon payment of the proper fee and satisfaction of the other conditions established by law, unless the person's driving privileges have been suspended or revoked prior to expiration.

(d) Violation of restrictions imposed under this section is a misdemeanor subject to punishment and suspension of driving privileges as provided by K.S.A. 8-291, and amendments thereto.

Sec. 10. K.S.A. 8-1567, as amended by section 1 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 8-1567. (a) No person shall operate or attempt to operate any vehicle within this state while:

(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence, as defined in paragraph (1) of subsection (f) of K.S.A. 8-1013, and amendments thereto, is ~~.10~~ *.08* or more;

(2) the alcohol concentration in the person's blood or breath, as measured within two hours of the time of operating or attempting to operate a vehicle, is ~~.10~~ *.08* or more;

(3) under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;

(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle.

(b) No person shall operate or attempt to operate any vehicle within this state if the person is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug.

(c) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(d) ~~Violation of this section is a misdemeanor.~~ Upon a first conviction of a violation of this section, a person shall be guilty of a class B, nonperson misdemeanor and sentenced to not less than

48 consecutive hours nor more than six months' imprisonment, or in the court's discretion 100 hours of public service, and fined not less than $200 nor more than $500. The person convicted must serve at least 48 consecutive hours' imprisonment or 100 hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole. In addition, the court shall enter an order which requires that the person enroll in and successfully complete an alcohol and drug safety action education program or treatment program as provided in K.S.A. 8-1008, and amendments thereto, or both the education and treatment programs.

(e) On a second conviction of a violation of this section, a person shall be guilty of a class A, nonperson misdemeanor and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $500 nor more than $1,000. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. Except as provided in subsection (g), the person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. As a condition of any grant of probation, suspension of sentence or parole or of any other release, the person shall be required to enter into and complete a treatment program for alcohol and drug abuse as provided in K.S.A. 8-1008, and amendments thereto.

(f) On the third or a subsequent conviction of a violation of this section, a person shall be guilty of a severity level 9, nonperson felony and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,000 nor more than $2,500. Except as provided in subsection (g), the person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The court may also require as a condition of parole that such person enter into and complete a treatment program for alcohol and drug abuse as provided by K.S.A. 8-1008, and amendments thereto. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program.

(g) On a second or subsequent conviction of a violation of this section, the court may place the person convicted under a house

and 14 ~~to 22, inclusive,~~ *through* 22 of chapter 8 of Kansas Statutes Annotated ~~and~~; K.S.A. 8-1,129, 8-1,130a, 8-1428a, 8-1742a ~~and~~ 8-2118 *and K.S.A. 41-804*, and amendments ~~to these sections~~ *thereto*.

Sec. 12. K.S.A. 12-4305 is hereby amended to read as follows: 12-4305. (a) The municipal judge shall establish a schedule of fines which shall be imposed for municipal ordinance violations that are classified as ordinance traffic infractions. Also, the municipal judge may establish a schedule of fines which shall be imposed for the violation of certain other ordinances. Any fine so established shall be within the minimum and maximum allowable fines established by ordinance for such offenses by the governing body. The following traffic violations are specifically excluded from any schedule of fines:

(1) Reckless driving;

(2) driving while under the influence of alcohol or drugs, or both, or driving with a blood or breath alcohol concentration of ~~.10~~ *.08* or more;

(3) driving without a valid license issued or on a canceled, suspended or revoked license;

(4) fleeing or attempting to elude a police officer; or

(5) offense comparable to those prescribed by K.S.A. 8-1602, 8-1603 and 8-1604 and amendments thereto.

(b) A person charged with the violation of an ordinance contained in a schedule of fines established under subsection (a) shall, except as provided in subsection (c), appear at the place and time specified in the notice to appear. If the person enters an appearance, waives right to trial, pleads guilty or no contest, the fine shall be no greater than that specified in the schedule.

(c) Prior to the time specified in the notice to appear, a person charged with the violation of an ordinance contained in a schedule of fines established under subsection (a) may enter an appearance, waive right to trial, plead guilty or no contest and pay the fine for the violation as specified in the schedule. At the election of the person charged, such appearance, waiver, plea and payment may be made by mail or in person and payment may be by personal check. The complaint shall not have been complied with if a check is not honored for any reason, or the fine is not paid in full prior to the time specified in the notice to appear. When a person charged with an ordinance traffic infraction or other ordinance violation on a schedule of fines makes payment without executing a written waiver of right to trial and plea of guilty or no contest, the payment shall be deemed such an appearance, waiver of right to trial and plea of no contest.

The municipal judge may authorize the clerk of the municipal

court or some other person to accept by mail or in person such voluntary appearance, plea of guilty or no contest and payment of the fine imposed by the schedule.

The schedule of fines and persons authorized to accept such pleas shall be conspicuously displayed in the office where such voluntary appearance, plea of guilty and payment of fine occurs.

Sec. 13. K.S.A. 12-4415 is hereby amended to read as follows: 12-4415. (a) In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the city attorney shall consider at least the following factors among all factors considered:

(1) The nature of the crime charged and the circumstances surrounding it;

(2) any special characteristics or circumstances of the defendant;

(3) whether the defendant is a first-time offender of an alcohol related offense and if the defendant has previously participated in diversion, according to the certification of the division of vehicles of the state department of revenue;

(4) whether there is a probability that the defendant will cooperate with and benefit from diversion;

(5) whether the available diversion program is appropriate to the needs of the defendant;

(6) the impact of the diversion of the defendant upon the community;

(7) recommendations, if any, of the involved law enforcement agency;

(8) recommendations, if any, of the victim;

(9) provisions for restitution; and

(10) any mitigating circumstances.

(b) A city attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint alleging an alcohol related offense if the defendant:

(1) Has previously participated in diversion of an alcohol related offense;

(2) has previously been convicted of or pleaded *nolo contendere* to an alcohol related offense in this state or has previously been convicted of or pleaded *nolo contendere* to a violation of K.S.A. 8-1567, and amendments thereto, or of a law of another state, or of a political subdivision thereof, which prohibits the acts prohibited by that statute; ~~or~~

(3) at the time of the alleged alcohol related offense had an alcohol concentration of .15 or more in the defendant's blood or breath; or

~~(3)~~ (4) during the time of the alleged alcohol related offense was involved in a motor vehicle accident or collision resulting in personal injury or death.

Sec. 14. K.S.A. 22-2908, as amended by section 257 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 22-2908. (a) In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the county or district attorney shall consider at least the following factors among all factors considered:

(1) The nature of the crime charged and the circumstances surrounding it;

(2) any special characteristics or circumstances of the defendant;

(3) whether the defendant is a first-time offender and if the defendant has previously participated in diversion, according to the certification of the Kansas bureau of investigation or the division of vehicles of the department of revenue;

(4) whether there is a probability that the defendant will cooperate with and benefit from diversion;

(5) whether the available diversion program is appropriate to the needs of the defendant;

(6) the impact of the diversion of the defendant upon the community;

(7) recommendations, if any, of the involved law enforcement agency;

(8) recommendations, if any, of the victim;

(9) provisions for restitution; and

(10) any mitigating circumstances.

(b) A county or district attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint if:

(1) The complaint alleges a violation of K.S.A. 8-1567, and amendments thereto, and the defendant: (A) Has previously participated in diversion upon a complaint alleging a violation of that statute or an ordinance of a city in this state which prohibits the acts prohibited by that statute; (B) has previously been convicted of or pleaded *nolo contendere* to a violation of that statute or a violation of a law of another state or of a political subdivision of this or any other state, which law prohibits the acts prohibited by that statute; *(C) at the time of the alleged alcohol related offense had an alcohol concentration of .15 or more in the defendant's blood or breath;* or ~~(C)~~ *(D)* during the time of the alleged violation was involved in a motor vehicle accident or collision resulting in personal injury or death; or

(2) the complaint alleges that the defendant committed a class A

or B felony or for crimes committed on or after July 1, 1993, a severity level 1, 2 or 3 felony for nondrug crimes or drug severity level 1 or 2 felony for drug crimes.

Sec. 15. K.S.A. 1992 Supp. 32-1131 is hereby amended to read as follows: 32-1131. (a) No person shall operate or attempt to operate any vessel within this state while:

(1) The alcohol concentration in the person's blood or breath, at the time or within two hours after the person operated or attempted to operate the vessel, is ~~.10~~ *.08* or more;

(2) under the influence of alcohol;

(3) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely operating a vessel; or

(4) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely operating a vessel.

(b) No person shall operate or attempt to operate any vessel within this state if the person is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug.

(c) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(d) No person shall operate or attempt to operate any vessel within this state for three months after the date of refusal of submitting to a test if such person refuses to submit to a test pursuant to K.S.A. 32-1132, and amendments thereto.

~~(d)~~ *(e)* Violation of this section is a misdemeanor punishable:

(1) On the first conviction, by imprisonment of not more than one year or a fine of not less than $100 nor more than $500, or both; and

(2) on the second or a subsequent conviction, by imprisonment for not less than 90 days nor more than one year and, in the court's discretion, a fine not exceeding $500.

(f) In addition to any other penalties prescribed by law or rule and regulation, any person convicted of a violation of this section shall be required to satisfactorily complete a boater education course of instruction approved by the secretary before such person subsequently operates or attempts to operate any vessel.

Sec. 16. K.S.A. 1992 Supp. 32-1132 is hereby amended to read as follows: 32-1132. (a) Any person who operates or attempts to operate a vessel within this state is deemed to have given consent, subject to the provisions of this act, to submit to one or more tests

of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. The testing deemed consented to herein shall include all quantitative and qualitative tests for alcohol and drugs. A person who is dead or unconscious shall be deemed not to have withdrawn the person's consent to such test or tests, which shall be administered in the manner provided by this section.

(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a) if the officer has reasonable grounds to believe the person was operating or attempting to operate a vessel while under the influence of alcohol or drugs, or both, and one of the following conditions exists: (1) The person has been arrested or otherwise taken into custody for any offense involving operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both, in violation of a state statute or a city ordinance; or (2) the person has been involved in a vessel accident or collision resulting in property damage, personal injury or death. The law enforcement officer directing administration of the test or tests may act on personal knowledge or on the basis of the collective information available to law enforcement officers involved in the accident investigation or arrest.

(c) If a law enforcement officer requests a person to submit to a test of blood under this section, the withdrawal of blood at the direction of the officer may be performed only by: (1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) any qualified medical technician. When presented with a written statement by a law enforcement officer directing blood to be withdrawn from a person who has tentatively agreed to allow the withdrawal of blood under this section, the person authorized herein to withdraw blood and the medical care facility where blood is withdrawn may rely on such a statement as evidence that the person has consented to the medical procedure used and shall not require the person to sign any additional consent or waiver form. In such a case, the person authorized to withdraw blood and the medical care facility shall not be liable in any action alleging lack of consent or lack of informed consent. No person authorized by this subsection to withdraw blood, nor any person assisting in the performance of a blood test nor any medical care facility where blood is withdrawn or tested that has been directed by any law enforcement officer to withdraw or test blood, shall be liable in any civil or criminal action when the act is performed in a reasonable manner according to generally accepted medical practices in the community where performed.

(d) If there are reasonable grounds to believe that there is impairment by a drug which is not subject to detection by the blood or breath test used, a urine test may be required. If a law enforcement officer requests a person to submit to a test of urine under this section, the collection of the urine sample shall be supervised by persons of the same sex as the person being tested and shall be conducted out of the view of any person other than the persons supervising the collection of the sample and the person being tested, unless the right to privacy is waived by the person being tested. The results of qualitative testing for drug presence shall be admissible in evidence and questions of accuracy or reliability shall go to the weight rather than the admissibility of the evidence.

(e) No law enforcement officer who is acting in accordance with this section shall be liable in any civil or criminal proceeding involving the action.

(f) (1) Before a test or tests are administered under this section, the person shall be given oral and written notice that: (A) There is no right to consult with an attorney regarding whether to submit to testing; (B) refusal to submit to testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both; (C) the results of the testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both; and (D) after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians. After giving the foregoing information, a law enforcement officer shall request the person to submit to testing. The selection of the test or tests shall be made by the officer. If the person refuses to submit to and complete a test as requested pursuant to this section, additional testing shall not be given. The person's refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both.

(2) Failure of a person to provide an adequate breath sample or samples as directed shall constitute a refusal unless the person shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs.

(3) It shall not be a defense that the person did not understand the written or oral notice required by this section.

(g) Nothing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant.

(h) Upon the request of any person submitting to testing under this section, a report of the results of the testing shall be made available to such person.

(i) In addition to any other penalties prescribed by law or rule and regulation, any person refusing to take a test or tests when requested to do so by a law enforcement officer pursuant to this section shall be required to satisfactorily complete a boater education course of instruction approved by the secretary before such person subsequently operates or attempts to operate any vessel.

Sec. 17. K.S.A. 41-201 is hereby amended to read as follows: 41-201. (a) The director of alcoholic beverage control and agents and employees of the director designated by the director, with the approval of the secretary of revenue, are hereby vested with the power and authority of peace and police officers, in the execution of the duties imposed upon the director of alcoholic beverage control by this act and in enforcing the provisions of this act *and the provisions of K.S.A. 41-804, and amendments thereto.*

(b) The director and each agent and employee designated by the director under subsection (a), with the approval of the secretary of revenue, shall have the authority to make arrests, conduct searches and seizures and carry firearms while investigating violations of this act *or violations of K.S.A. 41-804, and amendments thereto,* and during the routine conduct of their duties as determined by the director or designee. In addition to the above, the director and such agents and employees shall have the authority to make arrests, conduct searches and seizures and generally to enforce all the criminal laws of the state as violations of those laws are encountered by such employees or agents during the routine performance of their duties. In addition to or in lieu of the above, the director and the director's agents and employees shall have the authority to issue notices to appear pursuant to K.S.A. 22-2408 and amendments thereto. No agent or employee of the director shall be certified to carry firearms under the provisions of this section without having first successfully completed the firearm training course or courses prescribed for law enforcement officers under subsection (a) of K.S.A. 74-5604a and amendments thereto. The director may adopt rules and regulations prescribing other training required for such agents or employees.

(c) The attorney general shall appoint, with the approval of the secretary of revenue, an assistant attorney general who shall be the attorney for the director of alcoholic beverage control and the division of alcoholic beverage control, and who shall receive an annual salary fixed by the attorney general with the approval of the director of alcoholic beverage control and the state finance council.

Sec. 18. K.S.A. 41-804 is hereby amended to read as follows: 41-804. (a) *As used in this section, "alcoholic beverage" means any alcoholic liquor, as defined by K.S.A. 41-102 and amendments thereto, or any cereal malt beverage, as defined by K.S.A. 41-2701 and amendments thereto.*

(b) No person shall transport in any vehicle upon a highway or street any alcoholic ~~liquor~~ *beverage* unless such liquor is:

(1) In the original unopened package or container, the seal of which has not been broken and from which the original cap, cork or other means of closure has not been removed;

(2) in the locked rear trunk or rear compartment, or any locked outside compartment which is not accessible to any person in the vehicle while it is in motion; or

(3) in the exclusive possession of a passenger in a vehicle which is a recreational vehicle, as defined by K.S.A. 75-1212 *and amendments thereto,* or a bus, as defined by K.S.A. 8-1406 *and amendments thereto,* who is not in the driving compartment of such vehicle or who is in a portion of such vehicle from which the driver is not directly accessible.

~~(b)~~ *(c)* Violation of this section is a misdemeanor punishable by a fine of not more than $200 or by imprisonment for not more than six months, or both.

~~(c) Except as provided in subsection (f) upon conviction or adjudication of a violation of this section, the judge, in addition to any other penalty or disposition ordered pursuant to law, shall suspend the person's driver's license or privilege to operate a motor vehicle on the streets and highways of this state. Upon conviction or adjudication of the first violation by such person, the suspension shall be for three months. Upon adjudication of a second or subsequent violation, the suspension shall be for one year.~~

~~(d) Upon suspension of a license pursuant to this section, the court shall require the person to surrender the license to the court, which shall transmit the license to the division of motor vehicles of the department of revenue, to be retained until the period of suspension expires. At that time, the licensee may apply to the division for return of the license. If the license has expired, the person may apply for a new license, which shall be issued promptly upon payment of the proper fee and satisfaction of other conditions established by law for obtaining~~

~~a license unless another suspension or revocation of the person's privilege to operate a motor vehicle is in effect.~~

~~(e) As used in this section, "highway" and "street" have the meanings provided by K.S.A. 8-1424 and 8-1473, and amendments thereto.~~

~~(f) In lieu of suspending the driver's license or privilege to operate a motor vehicle on the highways of this state of any person convicted of violating this section, as provided in subsection (e), the judge of the court in which such person was convicted may enter an order which places conditions on such person's privilege of operating a motor vehicle on the highways of this state, a certified copy of which such person shall be required to carry any time such person is operating a motor vehicle on the highways of this state. Any such order shall prescribe the duration of the conditions imposed, which in no event shall be for a period of less than three months for a first violation nor more than one year for a second violation.~~

~~Upon entering an order restricting a person's license hereunder, the judge shall require such person to surrender such person's driver's license to the judge who shall cause it to be transmitted to the division of vehicles, together with a copy of the order. Upon receipt thereof, the division of vehicles shall issue without charge a driver's license which shall indicate on its face that conditions have been imposed on such person's privilege of operating a motor vehicle and that a certified copy of the order imposing such conditions is required to be carried by the person for whom the license was issued any time such person is operating a motor vehicle on the highways of this state. If the person convicted is a nonresident, the judge shall cause a copy of the order to be transmitted to the division and the division shall forward a copy of it to the motor vehicle administrator, of such person's state of residence. Such judge shall furnish to any person whose driver's license has had conditions imposed on it under this section a copy of the order, which shall be recognized as a valid Kansas driver's license until such time as the division shall issue the restricted license provided for in this section.~~

~~Upon expiration of the period of time for which conditions are imposed pursuant to this subsection, the licensee may apply to the division for the return of the license previously surrendered by such licensee. In the event such license has expired, such person may apply to the division for a new license, which shall be issued immediately by the division upon payment of~~

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~~the proper fee and satisfaction of the other conditions established by law, unless such person's privilege to operate a motor vehicle on the highways of this state has been suspended or revoked prior thereto. If any person shall violate any of the conditions imposed under this subsection, such person's driver's license or privilege to operate a motor vehicle on the highways of this state shall be revoked for a period of not less than 60 days nor more than one year by the judge of the court in which such person is convicted of violating such conditions.~~

(d) The court shall report to the division every conviction of a violation of this section or of a city ordinance or county resolution that prohibits the acts prohibited by this section. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(e) Subject to the provisions of subsection (f), the division, upon receiving a report under subsection (d), shall suspend the driving privileges of the convicted person pursuant to K.S.A. 8-255 and amendments thereto as follows: (1) Upon the first reported conviction of such person, a suspension for three months; and (2) upon the second or a subsequent reported conviction of such person, a suspension for one year.

(f) In lieu of suspension of a person's driving privileges as provided by subsection (e), the court may place restrictions on the person's driving privileges as provided by K.S.A. 8-292 and amendments thereto for a period of: (1) Not less than three months upon the first reported conviction of such person; and (2) not less than one year upon the second or a subsequent reported conviction.

(g) It shall be an affirmative defense to any prosecution under this section that an occupant of the vehicle other than the defendant was in exclusive possession of the alcoholic beverage.

(h) The court shall require any person who is under the age of 21 who violates this section to enter into and complete an alcohol and drug safety action program as provided by K.S.A. 8-1008, and amendments thereto.

(i) For the purpose of determining whether a conviction is a first, second or subsequent conviction in sentencing under this section:

(1) "Conviction" includes being convicted of a violation of an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits;

(2) only convictions occurring in the immediately preceding five

years, including prior to the effective date of this act, shall be taken into account, but the court may consider other prior convictions in determining the sentence to be imposed within the limits provided for a first, second or subsequent offender, whichever is applicable; and

(3) it is irrelevant whether an offense occurred before or after conviction for a previous offense.

(j) This section shall not be construed as preventing any city from enacting ordinances, or any county from adopting resolutions, declaring acts prohibited by this section as unlawful or prohibited in such city or county and prescribing penalties for violation thereof, but such ordinance or resolution shall provide for suspension or restriction of driving privileges as provided by this section and the convicting court shall be required to report convictions for violations of such ordinance or resolution as provided by subsection (d).

(k) This section shall be part of and supplemental to the uniform act regulating traffic on highways.

Sec. 19. K.S.A. 8-1001, 8-1002, 8-1005, 8-1008, 8-1011, 8-1012, 8-1013, 8-1014, 8-1015, 8-1567, as amended by section 1 of chapter 298 of the 1992 Session Laws of Kansas, 8-2204, 12-4305, 12-4415, 22-2908, as amended by section 257 of chapter 239 of the 1992 Session Laws of Kansas, 41-201, 41-804, 41-2719 and 41-2720 and K.S.A. 1992 Supp. 32-1131 and 32-1132 are hereby repealed.

Sec. 20. This act shall take effect and be in force from and after its publication in the statute book.

Ignition Devices Lock Out Drunk Drivers

Two bills introduced in California in February would expand the use of ignition interlock devices that prevent a car engine from starting if the driver is intoxicated.

Under Assemblyman Terry Friedman's legislation, a person convicted of drunk driving with an excessively high blood alcohol concentration (BAC) of .16 or more would not be allowed to operate a motor vehicle until an ignition interlock device is installed. Under present law, interlock systems are usually used in sentencing repeat offenders and are not based on BAC level. Friedman's law would open their use to first-time offenders.

A second bill, introduced by Assemblyman Sam Farr, would require a notation of such sentencing on the offender's driver's license.

Current interlock systems typically consist of a hand-held unit about the size of a radar detector, that attaches with Velcro underneath the dash and is also wired to the ignition. The driver must exhale into the unit each time the vehicle is started. If the driver's breath exceeds the pre-set BAC level, the system locks the ignition.

Repeat offenders commit up to 80 percent of all drunk driving incidents. The interlock units allow individuals to keep their driver's licenses and continue to earn a livelihood, while making sure they don't drive while intoxicated.

Sixteen states have enacted legislation that allows judges to use interlocks in sentencing drunk drivers, and 13 others have programs to use the devices despite the absence of enabling legislation, according to a study by researchers at the Safety Education Center at the University of Maryland, College Park. Counting the proposed California legislation, 27 bills have been introduced or carried over in 14 states as of March 12.

The University of Maryland researchers say studies indicate that the devices may be more useful in reducing repeat offenses than the traditional court-imposed punishments. For instance, in Ohio re-arrest rates were nearly three times lower for DWI offenders using an interlock system compared to those receiving such penalties as license suspensions, fines and retraining.

State Legislatures May 1992

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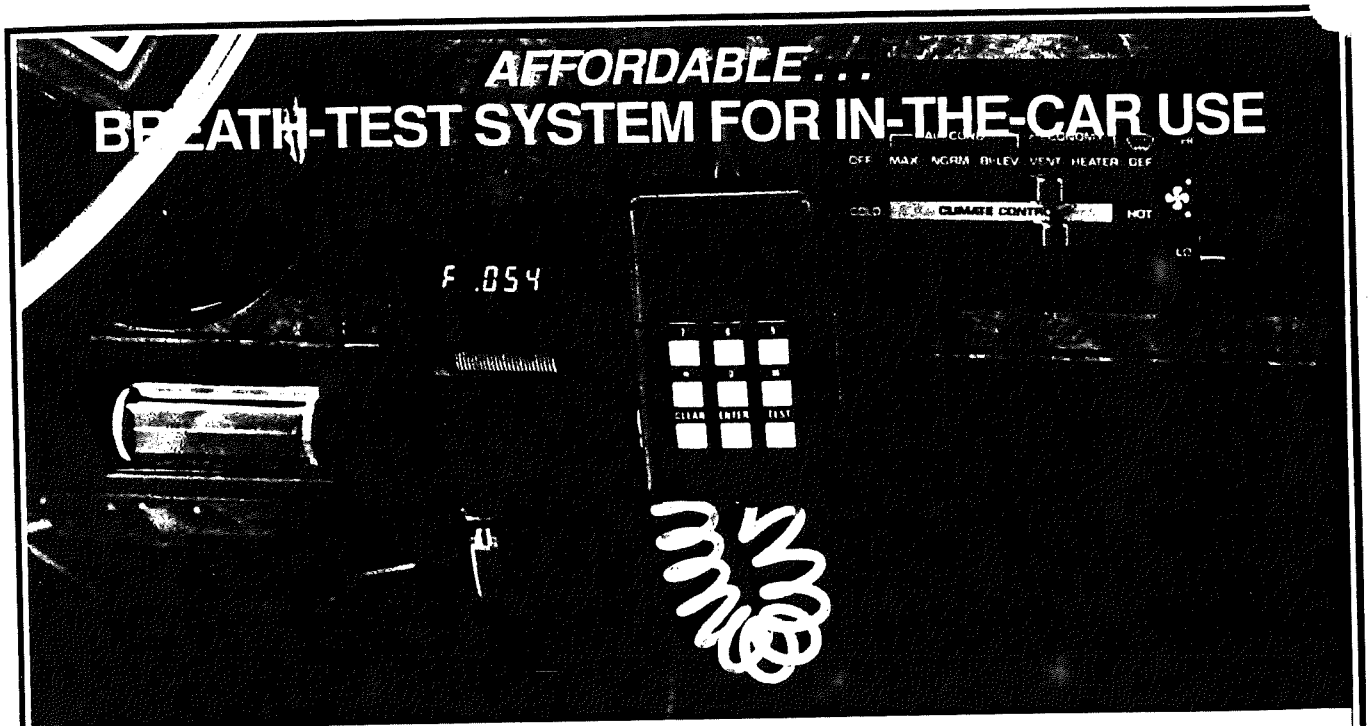
3-17-93
Attachment 6



THE ACCURATE AND CONVENIENT BREATH ALCOHOL ANALYZER TO DETER AND MONITOR DRUNK DRIVING

ACCURATE AND SECURE . . .

The AutoSense™ System is accurate and programmable with tamper-resistant vehicle ignition interlock

- Personal security code must be entered on the keyboard
- Blood Alcohol Content (BAC) accurately measured from 4-second breath sample
- 3-place Digital Display (0.000%-0.200%) shows %BAC with "Pass" or "Fail" Indicator
- If BAC is below preset safety level, normal vehicle ignition is permitted. If BAC exceeds preset level, ignition is automatically prevented
- Cheating attempts are detected and test invalidated
- Accuracy backed by In-house Alcohol Standards Laboratory

CONVENIENT . . .

The AutoSense™ System is easily installed without alteration to cosmetics, mechanics or electronics of vehicle

- Quick and simple, the complete test procedure takes less than 10 seconds
- Easy test that becomes routine

MEMORY . . .

The AutoSense™ System electronically stores test results

- Date and Time of all tests
- Percent BAC from 0.000% to 0.200%
- Record of any attempt to tamper with the System
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AutoSense Alcohol Standards Laboratory maintains quality control and calibration.

The AutoSense™ System is installed, serviced and calibrated by AutoSense Authorized Installation Facilities.

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b-2

KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
ALCOHOL AND DRUG ABUSE SERVICES
Andrew O'Donovan, Commissioner

Senate Bill 172
Before the Senate Judiciary Committee
March 17, 1993

****

SRS Mission Statement

"The Kansas Department of Social and Rehabilitation Services empowers individuals and families to achieve and sustain independence and to participate in the rights, responsibilities and benefits of full citizenship by creating conditions and opportunities for change, by advocating for human dignity and worth, and by providing care, safety and support in collaboration with others."

****

Mr. Chair and members of the committee, on behalf of the Secretary of SRS, I thank you for the opportunity to present you with this testimony. The issue that I want to address in S.B. 172 is lowering the legal blood alcohol content level at which a driver operating a vehicle is considered to be intoxicated and incapable of driving safely.

The Kansas Alcohol and Drug Safety Action Programs and groups such as Mothers Against Drunk Driving (MADD) and Students Against Driving Drunk (SADD) have been significant forces in increasing public awareness and in changing attitudes about the risks and consequences associated with "drunken driving." Even that term is outdated because the major challenge now is to change the social norms that imply any use of alcohol is acceptable when driving.

A recent national study indicated that nearly one-third of the men and 14 percent of the women surveyed occasionally drive after drinking. All tests conclude that any drinking impairs a person's judgment and coordination. It is a well-known fact that impairment can occur long before a person is intoxicated. The "one drink for the road" may seem harmless but when confronted with an emergency or unusual situtation it can be deadly. Alcohol's involved in half of all fatal auto crashes and is still the number one cause of death for 15-24 year olds.

This bill is another important step in changing behaviors and in reducing alcohol impaired crashes and fatalities. We support lowering the blood alcohol content to .08 percent from .10 percent.

AOD:jh
DG/3/16/93

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3-17-93
Attachment 1

MADD™
Mothers Against Drunk Driving

3601 SW 29th Street • Topeka, KS 66614 • (913) 271-7525 • 1 (800) 228-6233
KANSAS STATE OFFICE

3/12/93

Senator Jerry Moran, Chairman
Senate Judiciary Committee
Kansas Senate Rm. 255 E
Topeka, Kansas 66612-1565

Dear Chairman Moran and Members of the Senate Judiciary Committee:

For the past two years Kansas MADD has aggressively sought legislation lowering the legal limit for driving while intoxicated from the present level of .10 BAC to .08 BAC for drivers 21 and older and a lower threshold for drivers un-21 years of age. During the 1992 legislative session, .08 legislation passed the Senate only to be defeated in the House by one vote. Since the 1992 legislative session, Kansas MADD has provided legislators with data regarding drunk driving in Kansas and scientific evidence substantiating the need to lower the legal limit for driving while intoxicated.

During 1991, Kansas recorded 112 motor vehicle alcohol related fatalities and over 3,421 injuries as a result of drunk drivers. The human suffering experienced by survivors of drunk driving crashes and that of family and friends is is immeasurable. Societal costs based on wages lost, medical expenses, insurance administration costs, and property damage, amounted to almost 86 million dollars last year in Kansas.

Kansas MADD supports the comprehensiveness of House Bill 2355 in addressing drunk driving. We strongly support Senate Bill 172 and 2355 regarding .08 BAC.

Sincerely,

Carol Lierz

Carol Lierz
State Chairperson
Kansas MADD

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Attachment 8

KANSAS 1980 - 1991

Total alcohol related motor vehicle crash fatalities - 2,089

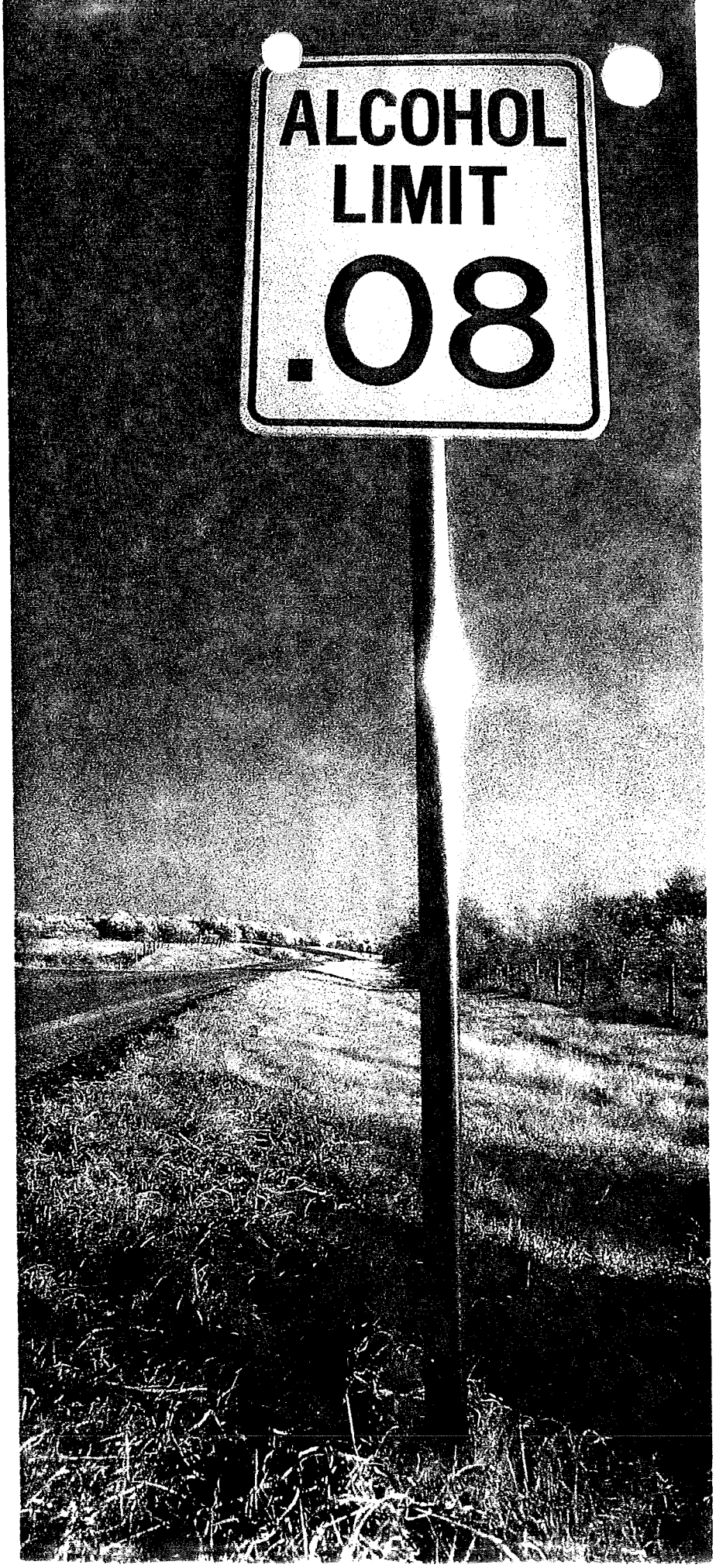
KANSAS 1980 - 1991

Total alcohol related motor vehicle crash injuries - 43,435

1991 Kansas DUI Arrests - 21,827

KANSAS 1991

Alcohol related motor vehicle crash fatalities, injuries and property damage "societal" costs - $85,700,000.



TO ALL THE SIGNS THAT MAKE DRIVING A LITTLE SAFER, WE'D LIKE TO ADD ONE MORE.

Even though your ability to drive a car is seriously impaired at a blood alcohol level of .08, most states only prosecute at .10 or higher.

We'd like every state to make .08 the blood alcohol limit. If you want to help, please call or write your state legislators.

Together we can make this a sign of life.

MADD
Mothers Against Drunk Driving
Legislative Number
1-800-432-3924

8-2

Mothers Against Drunk Driving

3601 SW 29th Street • Topeka, KS 66614 • (913) 271-7525 • 1 (800) 228-6233
KANSAS STATE OFFICE

3/12/93

Senator Jerry Moran, Chairman
Senate Judiciary Committee
Kansas Senate Rm. 255 E
Topeka, Kansas 66612-1565

Dear Chairman Moran and Committee Members:

Several news articles featuring the provisions of House Bill 2355 have labeled the "affirmative defense" provision as being a "designated driver" provision and as a result, Kansas MADD has received inquiries regarding our position as to "affirmative defense."

Kansas MADD does not recognize nor does it support the concept of "affirmative defense" as any part of/or concept of "designated driver." Kansas MADD believes the concept of "designated driver" is totally unrelated to "affirmative defense."

Kansas MADD understands that "affirmative defense", at the discretion of prosecutors and judges, has been and is presently being allowed in Kansas courts. If "affirmative defense" is presently being practiced, the inclusion of "affirmative defense" in House Bill 2355 should not weaken nor strengthen the law.

Sincerely,

Carol Lierz

Carol Lierz
State Chairperson
Kansas MADD

8-3

K · A · N · S · A · S
WINE & SPIRITS
WHOLESALERS ASSOCIATION, INC.

March 17, 1993

TO: Senate Judiciary Committee
FROM: R. E. "Tuck" Duncan
RE: DUI legislation

We appreciate this opportunity to testify and want to commend you Mr. Chairman, and your leadership, and that of your colleagues on this committee, for focusing attention on the tragedy of drunk driving. Long before the term "social responsibility" became fashionable in the lexicons of academia, our industry has urged moderation, restraint and temperate use of its products as enjoined by President Roosevelt at the time of federal repeal and Governor Carlson at the time of state repeal. State and local officials and leaders of public and private groups must continue with a systematic view of the problem recognizing the inter-relationships between legal, health, public information, educational and technological responses to the problem.

Progress has been made in the last decade, namely impressive reductions in alcohol related fatalities and significant reductions in highway fatalities involving young teenage drivers. (Reference: Drunk Driving Facts, U.S.D.O.T., Natl. Highway Traffic Safety Administration, Center for Statistics, September, 1990; and Age, Alcohol and Traffic Accident, Kansas D.O.T., June 1988, State Library Kan. T52, A265).

The vast majority of Americans and Kansan's will consume beverage alcohol responsibly. The motivation behind these bills is

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Attachment 9

honorable. The message a change in BAC levels is intended to send is commendable. However, passage of this bill is disillusioning. I appear here today in opposition to several provisions because they do not confront the true problem; that is, stopping persons who have a history of drinking and driving from continuing to drink and drive.

As true with many things in life a small percentage of persons who do abuse the use of beverage alcohol and beer, create new restrictions on the overwhelming majority of persons who are responsible consumers. They find alternative ways to continue their irresponsible behaviors.

Our association concurs with the objectives recommended by the National Highway Traffic Safety Administration to reduce the impaired driving recidivism of drivers who have already been arrested and processed through our criminal justice and/or administrative sanctioning and rehabilitation processed; plus preventing drinking and driving by such means as public information, education, more responsible serving and hosting practices, intervention by friends, designated driver programs, safe ride programs, and preventing the sale of beverage alcohol to minors.

This bill creates a whole new class of criminal: people who have had 2 or 3 drinks in 60 minutes. (f.n.1) I know that's not its purpose, but that is its effect.

---

fn.1.- 1 drink based on 1.25 oz spirits, 12 oz. beer, or 4 oz. wine, @ 120 lbs. body weight 2 drinks = .07 @ 140 lbs. 3 drinks = .09; @ 160 lbs 3 drinks = .08 (DISCUS).

9.2

Look at what has been done -- our current laws have acted as a deterrent. Spirits consumption in Kansas is down 13% over the period FY 1984 to FY 1992 (based on spirits gallonage shipments, Overview of the Kansas Liquor Industry ABC, Kansas Department of Revenue, January, 1993.) Awareness of the problem is up, through both government and private sector efforts. This association has actively participated in the educational efforts to curb drinking and driving. Please refer to the additional report regarding K.W.S.W.A. efforts to heighten the understanding of the consumer. This industry produced and distributed some of the first public education materials when the original law was passed in the early 1980s.

In a report available in the State library entitled "DWI-Are We Off Track?" by Terry M. Klein,, a consultant to the National Center for Statistics and Analysis of the National Highway Traffic Safety Administration (NHTSA), and a former chief evaluator in the planning and evaluation division NHTSA, he states:

> "Counter measures aimed at what are today considered responsible drivers can only serve to divert resources away from the larger part of the problem and potentially could have negative effects. The increased burden of 'more legally drunk drivers' could stretch the current enforcement and judicial resources beyond their means."

H. Laurence Ross, Ph.D., a professor of Sociology at the University of New Mexico, author of numerous studies dealing with the effect of law on driving while impaired by alcohol including Deterring the Drinking Driver: Legal Policy and Social Control and, Life Saving: Policy for Reducing Drunk Driving in America,

wrote in June 1991, commenting on Klein's work:

> "[T]he bulk of the problem is accounted for by drivers who have blood alcohol concentrations (BAC's) of 0.10% or more. There is a need for our society to reduce deaths due to drunk driving. A common response to this need has been to increase the severity of the punishment for drunk driving, especially by mandating jail, at least for repeat offenders. Unfortunately, this approach has not led to important progress in reducing alcohol-related fatalities..."
>
> "Because the risk of a fatality increases steeply with more alcohol in the blood, a second response has been to lower the limit of legal tolerance from 0.10% BAC to 0.08%. This is currently the law in four states. Such a concentration could be achieved by some people with three drinks in an hour. Klein's report addresses this policy. He properly argues that the heart of the drunk driving fatality problem is not at these levels--and that it is inefficient to squander resources in dealing with drivers who have relatively low BACs. Instead, policy should focus on heavier drinking drivers, who are disproportionately involved in fatal crashes."
>
> "Recent research supports Klein's assessment that 0.10% BAC is a reasonable legal limit. Drivers with BACs between 0.10% and 0.15% appear to be over four times more likely to cause a fatal crash than those who, in most states, are obeying the current law. Drivers over 0.15% BAC appear to be over 30 times more dangerous. Clearly, the heart of the problem lies in the area of extremely heavy drinking -- the drinker with a BAC of more than 0.15%, who has probably consumed more than a dozen drinks in a few hours."
>
> "Data from a national survey of drivers indicated that reducing the tolerated BAC below 0.10% would not necessarily be good public safety policy. Reducing the limit to 0.08% would increase the number of law violators by about 60% ... Unless enforcement is increased proportionately, this might result in a decrease in the probability of arrest for extreme violators. To the extent that the law's threats lack credibility (because of a low risk of apprehension), the change could greatly exacerbate enforcement difficulties and possibly reduce the existing effectiveness of the law." ***

"Finally, it can be argued that at BACs below 0.10%, the ratio of the benefits of drinking to the costs associated with it is far more favorable than at higher BACs. It is an error to allocate scarce resources to this segment of drinkers when the more dangerous segment is seldom apprehended. Further research into benefits deriving from alcohol consumption is needed, but plausible claims have been made for reductions in stress and cardio-vascular problems."

"Drunk driving is still a significant social problem in America but laws on lowering the tolerated BAC below 0.10% are unlikely to be helpful in addressing the problem. Such laws may reduce the credibility of the threat to punish the heaviest drinkers thus possibly reducing deterrence of the most dangerous drivers. At the same time, they would brand as criminal much behavior that is customary, pleasurable, and much less risky to society. I concur with Klein that reducing the BAC limit is unlikely to be either fair or effective in reducing deaths due to drunk driving."

Typically a first offender will receive a diversion and a fine. However, when you take a breath test and fail or refuse to take such a test a suspension of one's license results. As a result, pursuant to K.S.A. 40-277 an insurance company may cancel it's policy where "the named insured or any other operator, either resident in the same household, or who customarily operates an automobile insured under the policy (a) has had such persons driver's license suspended or revoked during the policy period." A .02 or .04 for a child under these bills could cause their family disastrous financial hardship in securing a new policy, most likely through KAIP.

A standard (not preferred) policy for a good student single male in his 20's in Topeka will cost approximately $275.00 for 6 months. If he has no speeding tickets, and no accidents, the

license suspension due to the first DUI will increase that policy to approximately $575.00 for six months; more than double. Add in other minor violations and the cost increases even more. For a middle aged person with a preferred rate the increase from their current rate ($1200.00 @ 6 months for 3 cars, husband, wife and student driver) could triple and most likely that individual would not be able to secure the higher coverage limits of a preferred policy.

You might say, "Well that's his problem, he shouldn't have gotten the DUI." Unfortunately, it becomes all of our problem. Current estimates provided me by the Insurance Commissioner's office indicate that uninsured motorists in Kansas comprise approximately 6-7% of all motorists. In the real world, our offender secures his new insurance, pays 1 or 2 months, buys his tags and then because the cost is prohibitive, allows his insurance to lapse. I contend these lower limits of BAC level will increase the percentage of uninsured and underinsured motorists in Kansas. I am informed that premiums for uninsured motorists rates have recently modestly increased, because of increased loss experiences. It is reasonable to project that as the number of uninsured motorists become greater, uninsured motorist losses will increase and thus premiums for the rest of us will likewise increase again. These new BAC levels will probably cause more people to become part of the Kansas Automobile Insurance Plan, and the limits of coverage will generally decrease, e.g. fewer insured and lower average coverage limits to protect the rest of us. Thus, what looks like

a minor revision with negative effects for the few and positive effects for the many, becomes a negative policy for all.

Let us now look at the justification that unless we do this we lose federal highway dollars. I am informed from discussions with the Kansas Department of Transportation that there is a two tier system for receiving certain highway funds. The first tier requires that a state meet five of six criteria: (1) Prompt drivers license suspension; (2) .10 per se DUI law; (3) Roadside check points; (4) Self-sustaining drunk driving programs; (5) Underage 21 prevention programs; and (6) Mandatory sentencing. It appears that Kansas most likely will meet five of the aforementioned six criteria to be eligible for a maximum of $635,000.00. With regard to the second tier there are seven elements for which additional funding would be provided by the federal government to the state. In that, with each of the following, for which a state complies, an additional amount of funding is available. The second tier items include (1) .02 under 21 BAC; (2) Open container law; (3) Suspension of registration and return of license plates; (4) Mandatory BAC testing; (5) Drugged driving prevention; (6) .08 per se BAC; (7) Video equipment for detection. The maximum available funds at the current time for any one item is $15,000, according to KDOT. The issue here, as reflected in the comments of Klein and Ross, supra. is whether resources should be diverted to this new class of offenders for so little monetary return.

The U.S. department of Justice in its report Jailing Drunk

Drivers: Impact on the Criminal Justice System, National Institute of Justice, May 1985, stated:

> "Increased resources, in the form of additional money, personnel, or facilities, are generally required to effectively carry out a mandatory confinement strategy. Legislators should recognize the impact that mandatory confinement of drunk drivers is likely to have on Judges, Prosecutors, and particularly the correctional system."

It is reasonable to assume that a 20% reduction in the BAC limit will result in increased arrests and pressures on the judicial system. I have heard testimony in previous years of estimates ranging from no less than 5% to most likely 10% more arrests.

The only comprehensive Kansas study, prepared by the Institute for Public Policy, University of Kansas, analyzing the Wichita Comprehensive Program to reduce DWI, in May 1986 (found at Kan. E50.1249, no. 121, State Library) states: "Indeed, the TOP [Target of Opportunity Program] has pushed to the limit the ability of the police, prosecutors and courts to handle DWI cases." What would a 10% increase do statewide? And, at these lower levels where the margins of error increase proportionally, there will be more contested and tried cases.

Another issue that must be explored in further detail is the impact these new levels will have on the employment prospects for these new offenders. Certain jobs in clubs, drinking establishments, and CMB restaurants might be unavailable. Statutory criteria for obtaining a commercial driver's license and federal regulations appear to restrict individuals who have had

suspended licenses. Do we want to eliminate eligibility for certain employment by going to .08 and .02? I suggest that the committee explore this area with the experts.

One problem that is addressed by the House bill is the repeat offender and we applaud those efforts. In my view, the current law compounds the problem rather than solves it. From a person who gets multiple DUIs, we extract large fines, incarcerate and then take away their driving privileges. Nonetheless, they drive. They drive because they must go to work, in order to pay bills, support their families and pay their fines.

The most detailed work in this area is The Hard Core Drinking Driver, 1991. An executive summary is provided herewith. The statistics show that drivers with high BACs pose the greatest threat on the highway.

A key conclusion is that the legal system must have access- and make use of - methods which effectively keep the so called "hard core" offender from driving: ignition inter-lock devices; confiscation of the license plate or car; and electronic monitoring (house arrest) devices.

The attached editorial by Candy Lightner, founder of Mothers Against Drunk Driving, confirms other independent studies. She notes that half of the drinking drivers involved in fatal crashes have a BAC of 0.17 or greater; and, that among young people aged 16 to 24 the great majority of deaths involve drinkers with a BAC of at least .15%.

> "Lowering the blood content won't make a difference to these offenders. After twelve years we should be passed the point of just raising public consciousness. We need to bring creativity into play and focus on the programs and laws that will make the most difference," she says.

Its impaired driving we should be curbing, not all driving by some offenders. The law should allow the Courts, in appropriate cases, to restore limited driving privileges provided the offender installs an inter-lock device. The law is in place to allow for such devices, see K.S.A. 8-1016 and 8-1017. The legislature must encourage its use, by allowing part of what would otherwise be the fine to be used to pay for the purchase and payment of such devices.

We must redouble our educational and treatment efforts, for as we have seen there have been dramatic reductions in the instances of alcohol related accidents and fatalities as a result of such efforts in the past decade.

Please do not misunderstand -- the loss of one life due to abuse of beverage alcohol cannot be tolerated. The question we present is whether in light of the foregoing reducing the BAC level to .08 is truly providing a solution, or is it merely a disillusioning message. Thank you for your kind attention to and consideration of these matters.

1.0 BACKGROUND

The report on "The Hard Core Drinking Driver" was released nearly a year ago. It has generated considerable attention from the media and stimulated significant discussion among the research community as well as those involved with the development and implementation of countermeasure programs and policies.

The report showed that drivers with high blood alcohol concentrations (BACs) account for a very significant portion of the drinking driving problem — such drivers account for the vast majority of fatally injured drinking drivers and a substantial portion of all drivers who are killed. They are vastly overrepresented in serious crashes.

The report contained both original analyses — primarily using data from the U.S. Fatal Accident Reporting System (FARS) — and a review of related literature.

The analyses were based on 1988 FARS data; information that is now quite dated. The purpose of this update is to provide more contemporary information and, in so doing, to determine if the magnitude of the problem of high-BAC drivers has changed in recent years.

This update replicates the principal analyses on the magnitude of the problem of high-BAC drivers. For reference purposes, in the original study these key findings were contained in Figures 3-1, 3-2 and 3-3. In this update, we have reproduced the original findings for 1988 and provided the parallel findings for 1989, 1990, and 1991 (the most recent year for which data are available).

THE HARD CORE DRINKING DRIVER

UPDATE

H.M. Simpson and D.R. Mayhew

Traffic Injury Research Foundation

December 1992

2.0 Magnitude of the Alcohol-Fatal Crash Problem

While some reductions in the incidence of alcohol in fatally injured drivers have been reported over the past decade, the problem persists at an unacceptable level. To illustrate, Figure 1 shows the percent of fatally injured drivers who were positive for alcohol from 1988 through 1991 (illustrated in the pie chart on the left of each segment of the figure) and, among those who had been drinking, the percent who had BACs above and below .10 g/dl (illustrated in the bar on the right side).

As can be seen:

- the alcohol-crash problem is still a significant one;
- from 1988 through 1990, 46% of the drivers killed in the U.S. had been drinking; this figure was slightly lower in 1991; and
- the overwhelming majority of drinking drivers have BACs in excess of what is the legal limit in most states (.10 g/dl). Over 80% of the drinking drivers were legally impaired. There has been little change in this figure over the past four years.

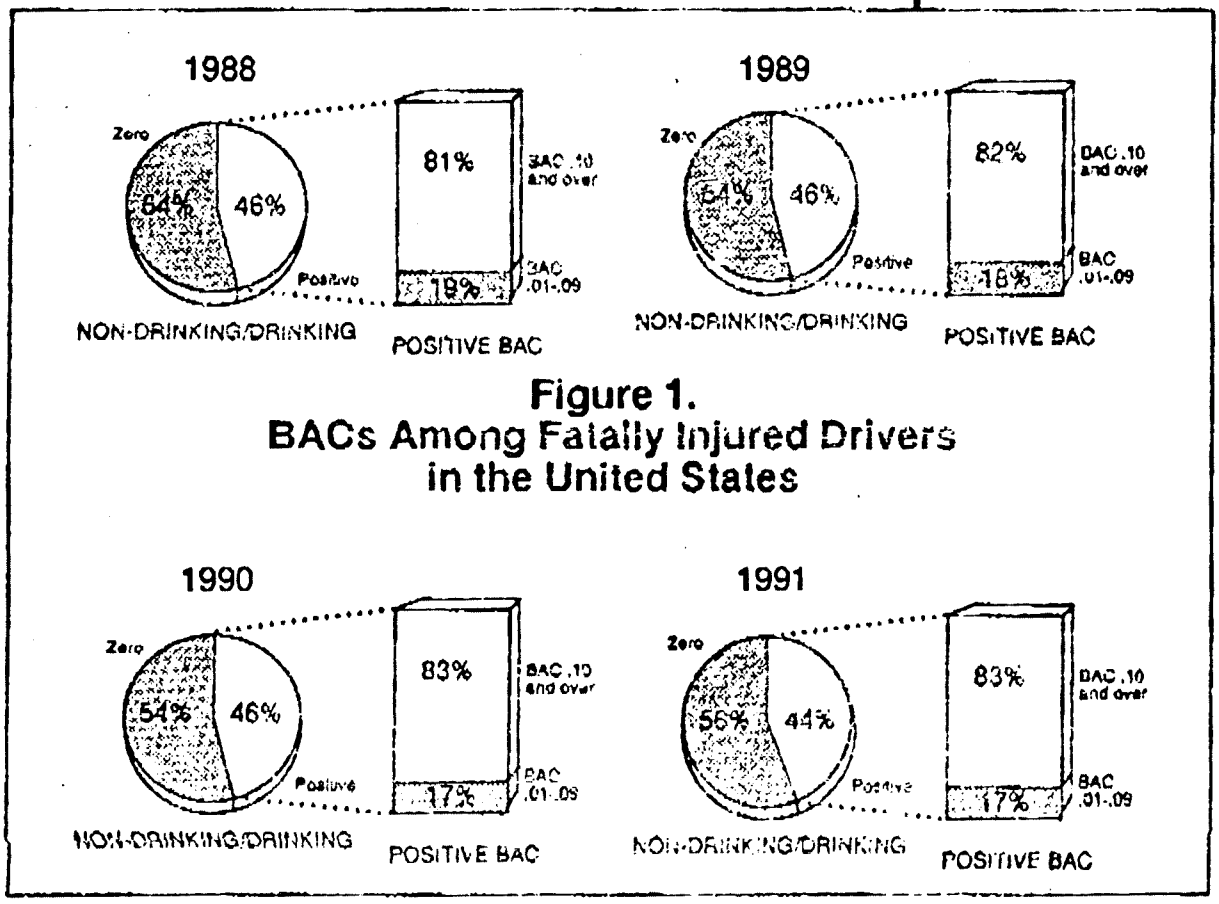

Figure 1.
BACs Among Fatally Injured Drivers in the United States

Q-12

3.0 Levels of Alcohol Detected Among Drinking Drivers

A more detailed examination of the levels of alcohol found among fatally injured drinking drivers is given in Figure 2. BACs have been aggregated into several arbitrary but convenient ranges. For each year, the bar on the left shows the levels of alcohol detected among drinking drivers and the bar on the right displays the levels detected among those drivers who were legally impaired (BAC in excess of .10).

- From 1988 through 1991, some 64-65% of the drinking drivers had BACs in excess of .15. About 40% of drinking drivers had very high BACs (.20 or greater).
- From 1988 through 1991, among drivers who were legally impaired, some 78-78% had BACs in excess of .15. About half of the legally impaired drivers had BACs of .20 or greater.

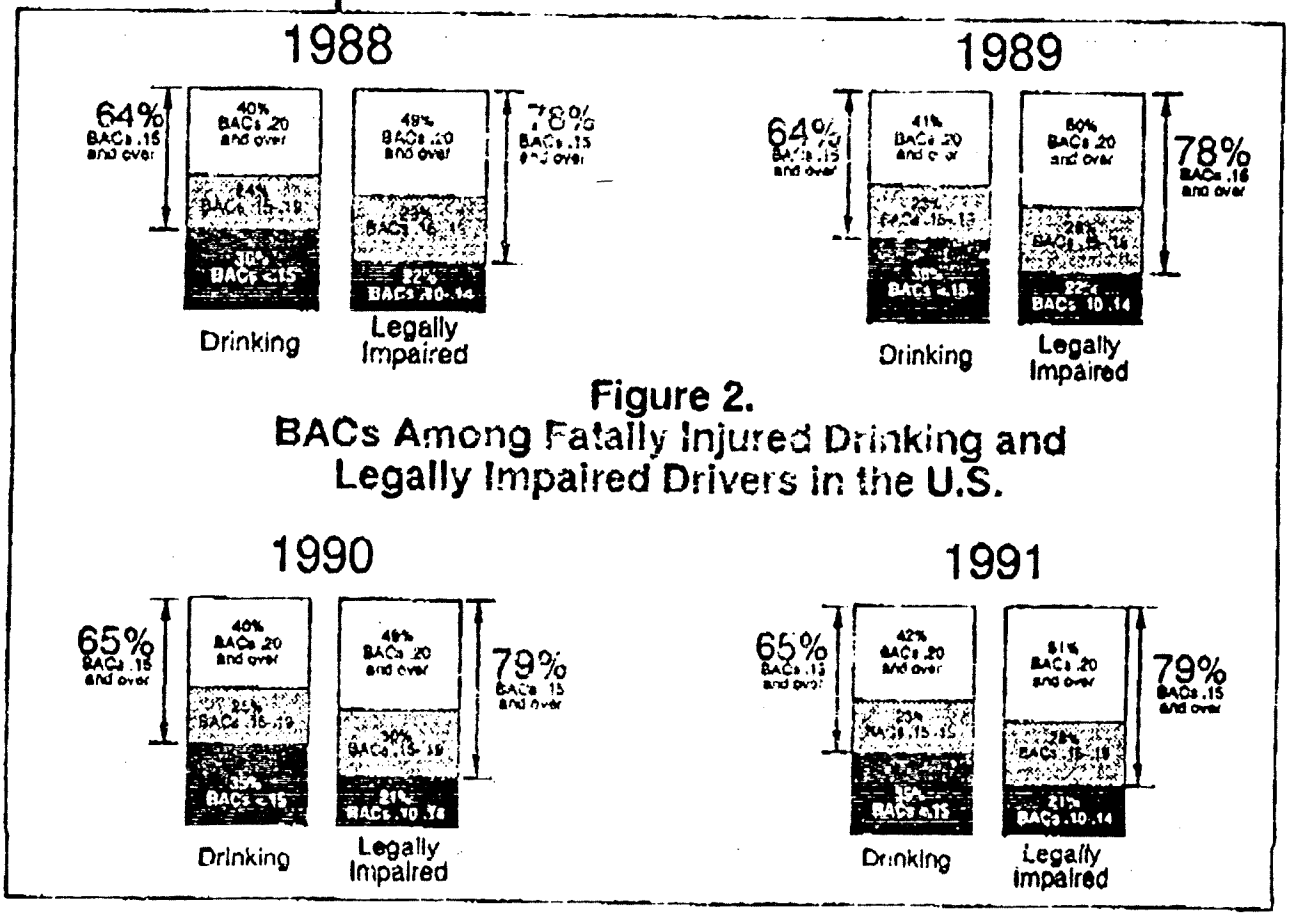

Figure 2.
BACs Among Fatally Injured Drinking and Legally Impaired Drivers in the U.S.

9-13

An even more detailed picture of the alcohol levels found among fatally injured drivers is given in Figure 3, which presents the complete distribution of BACs.[1]

- The vast majority of fatally injured drivers have BACs in excess — in many cases, well in excess — of the legal limit. Even extremely high BACs of .30 and above are not uncommon.
- The average BAC among fatally injured drinking drivers is .17 — nearly twice the legal limit. This average has not changed in four years.

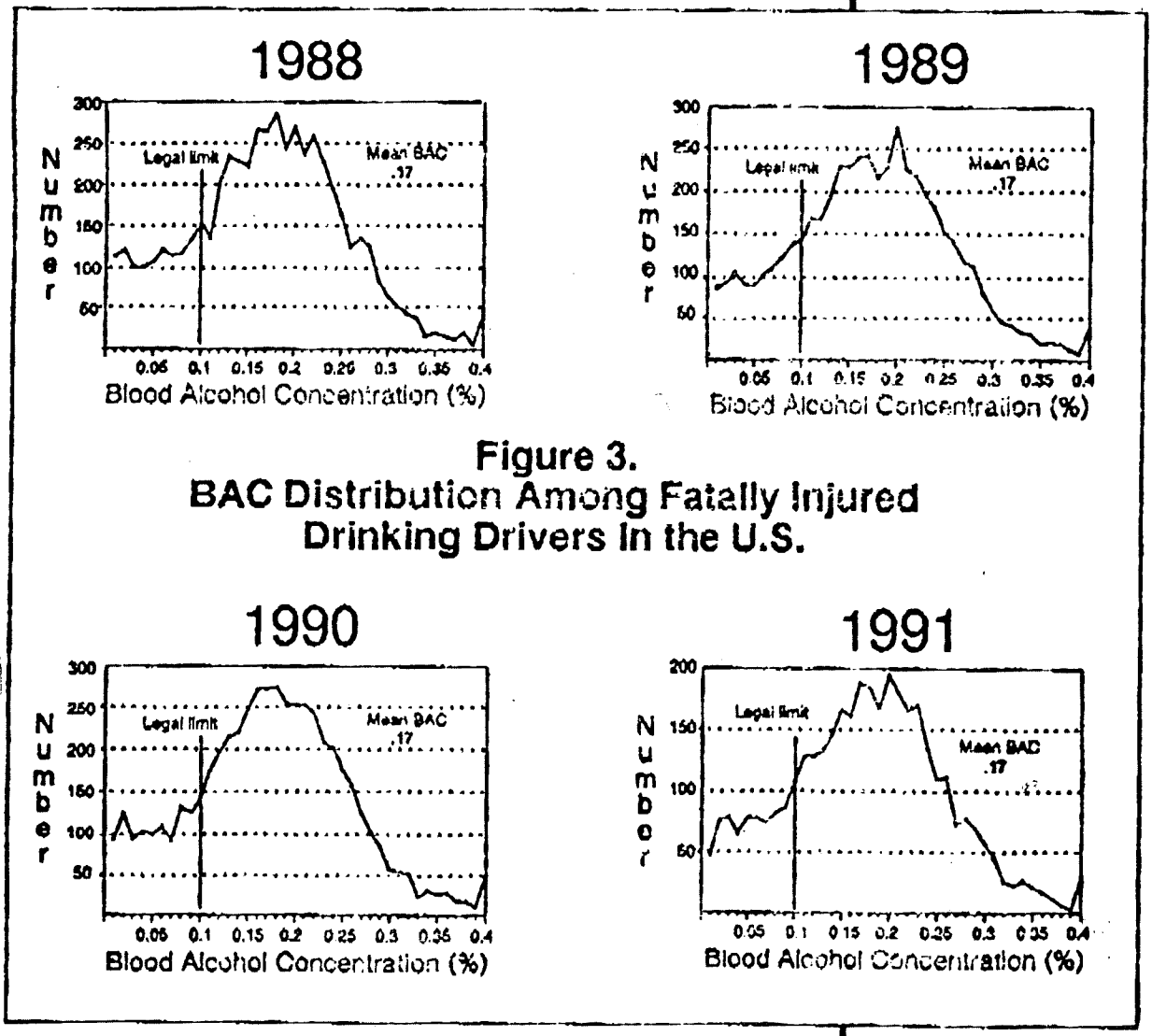

Figure 3.
BAC Distribution Among Fatally Injured Drinking Drivers in the U.S.

1. *The absolute number of cases varies somewhat from year to year as a function of the number of states included in the analysis. Consistent with the approach used by the National Highway Traffic Safety Administration, only states with an alcohol testing rate of 80% or greater are included.*

4.0 Conclusions

Slightly less than half of the drivers killed in the U.S. have been drinking. There has been remarkably little change in this situation over the past few years. The alcohol-crash problem is still a significant one.

The vast majority of drinking drivers have high BACs — over 80% have BACs in excess of .10; 64% have alcohol levels in excess of .15; and about 40% have BACs of .20 or above. This situation has shown little change over the past four years.

Among drivers who are legally impaired, almost eight out of ten have BACs of .15 or above and about half have BACs of .20 or above. This situation has shown little change over the past four years.

The high incidence of excessive amounts of alcohol is also reflected in the fact that the average BAC found among fatally injured drinking drivers is .17. This situation has shown little change over the past four years.

The problem of the high-BAC driver is still a very significant one. It demands attention and challenges program and policy makers to develop and implement effective prevention initiatives.

9.15

THE CITY OF WICHITA

GARY E. REBENSTORF, Director of Law and City Attorney
DOUGLAS J. MOSHIER, Senior Assistant City Attorney

DEPARTMENT OF LAW
OFFICE OF CITY ATTORNEY
CITY HALL — THIRTEENTH FLOOR
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March 16, 1993

Senator Jerry Moran
Chair, Senate Judiciary Committee
State Capitol
Topeka, Kansas

Re: House Bill No. 2355

Ladies and Gentlemen:

Your committee has under consideration House Bill No. 2355, as amended by House Committee and as amended by House Committee of the Whole. This bill proposes several changes to the state statutes dealing with driving or operating vehicles or vessels while under the influence of alcohol or drugs.

Of particular interest to the City Council of the City of Wichita is the proposed amendment to subsection (m) of K.S.A. 8-1567. At present, cities and counties may, by local ordinance or resolution, prohibit driving under the influence within their jurisdictions. However, the penalties for violating such ordinances or resolutions are, by state law, required to be set at the same minimum and maximum level as the penalties under K.S.A. 8-1567. The proposed amendment would allow cities and counties to establish minimum penalties for driving under the influence violations within their jurisdictions which exceed the minimum penalties established by state law (K.S.A. 8-1567).

A few statistics illustrate the magnitude of this problem locally. In Wichita in 1992, police made 2,562 arrests for driving under the influence. This represents an increase of 11.9% over 1991 arrests. Of the 2,444 persons prosecuted for driving under the influence, only 44 were acquitted after trial. Local statistics also indicate that, during the weekends, one out of every eight drivers on City streets is driving under the influence. The national statistic is one out of ten. These numbers demonstrate that driving under the influence is a very real problem in Wichita and, more to the point for the Committee's purpose, that it is a

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problem that is on the increase and which is of greater magnitude in Wichita that in many other areas of the state and country.

The City Council is very concerned about the serious threat that driving under the influence poses to each and every resident of the City of Wichita. The Council believes that this threat is not the same for each city or county in the state. As an urban area with a high incidence of such offenses, the Council would like the flexibility of being able to strengthen its minimum penalties as a means of further discouraging this activity. It believes that strong medicine is required and that local units of government need the increased flexibility of more severe minimum penalties to drive home the point that driving under the influence will not be tolerated.

At present, many offenders are able to satisfy the minimum penalties by spending only 48 consecutive hours incarcerated. The vast majority do this by going in on a Friday afternoon and getting released on Sunday afternoon. If additional jail time is required under state law, the offender may satisfy that sentence by being placed in a work release program. Given the fact that the City of Wichita has a diversion program which effectively gives most offenders one bite of the apple before the penalties of K.S.A. 8-1567 are imposed, the deterrence effect of the City's driving under the influence laws is not what it could be.

For example, if the City of Wichita had the flexibility provided by HB 2355's proposed amendment to K.S.A. 8-1567(m), it could modify the state's minimum penalties for driving under the influence violations so that offenders would be required to make arrangements to deal with their work and family obligations in order to find the time to satisfy their sentence. This could be accomplished by requiring that the sentence be served during the week or by increasing the minimum to 72 or 96 consecutive hours.

In conclusion, the City Council of the City of Wichita encourages favorable consideration of House Bill No. 2355 and specifically endorses the proposed amendment to K.S.A. 8-1567(m) which would permit local units of government which adopt their own driving under the influence laws to establish minimum penalties which exceed those specified under state law.

Very truly yours,

Douglas J. Moshier
Senior Assistant City Attorney

DJM:cdh

State of Kansas
Joan Finney, *Governor*

Department of Health and Environment

Robert C. Harder, Secretary

Reply to:

Written testimony presented to

Senate Judiciary Committee

by

The Kansas Department of Health and Environment

House Bill 2355

The Kansas Department of Health and Environment has statutory responsibility to administer a statewide breath alcohol program which ensures that court-defensible test results are available for the prosecution of 20,000 DUI subjects arrested in Kansas each year. This effort includes establishing the test protocols and standards used by 235 law enforcement agencies as well as the certification of 2,800 instrument operators and 155 evidential instruments in 115 locations throughout the state. The Kansas breath alcohol program has been operational in current form since 1973 and breath alcohol evidential test results are widely accepted throughout the judicial system.

Preventing the deaths and injuries which result from drunk drivers on Kansas highways is a significant public health priority. There is a large volume of scientific evidence which clearly supports the conclusion that all drivers with a blood alcohol level of 0.08 or greater are unable to safely operate a vehicle. A review of this evidence may be found in the monograph ("Effect of Low Doses of Alcohol on Driving Related Skills - A Review of the Evidence," Moskowitz, 1988) which draws consensus from 177 articles in the scientific literature. At an alcohol level of 0.08, impairment of reaction times, motor functions, concentration, and other essential driving skills prevent safe vehicle operation regardless of drinking experience.

In summary, drinking and driving do not mix. It is important that the enforcement level which is chosen represent national consensus on alcohol impairment and be scientifically and operationally defensible. We strongly support the reduction of "per se" DUI alcohol level from 0.10 to 0.08 to make our highways more safe for all Kansas citizens.

One technical point under K.S.A. 8-1014(d)3 in this bill is worthy of specific comment. While we would support a general cost recovery proposal which is applied to all individuals convicted of DUI, and dispersed appropriately, we do not support the proposal for administrative fine under this section.

Testimony presented by: Dr. Roger Carlson, Director
Health and Environmental Laboratory
March 17, 1993

SJ

Forbes Field • Building 740 • Topeka, Kansas 66620-0001 • (913) 296-1500

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TESTIMONY BEFORE THE KANSAS SENATE JUDICIARY COMMITTEE

March 17, 1993

Good morning ladies and gentlemen, my name is David Goronkin, and I am an Area Supervisor for Chi-Chi's Mexican Restaurants. I am responsible for restaurant operations in Kansas, Missouri, and Colorado. I reside in Shawnee, Kansas with my wife, Pam, and two daughters, Morgan and Mara. I operate two locations in Wichita and one in Overland Park, just west of the Missouri border. My point is very simple and I will get right to it. Changing the legal standard for intoxication from .10 to .08 may be well intentioned but it is the wrong idea at the wrong time. While this measure may seem like a magic bullet that will accelerate the ongoing downward trend in drunk driving deaths, it may arrest or even reverse the gains we have seen so far and hope to see in the future.

How can I say this? It is because of all of the possible countermeasures that can be used to deter drunk driving, lowering the BAC is the least effective. A nationwide survey conducted by Dr. David Moore of the University of New Hampshire, a respected pollster, found that ALR schemes, increased jail sentences or longer license suspensions all had a greater impact on those surveyed who reported that they may have driven after having too much to drink. A BAC is a concept that most people simply don't understand. They will fear getting a DWI if they have a drink or two after work or with dinner. License suspensions and incarceration are easy to comprehend and send a very strong message: Drive when you are intoxicated and you will pay a severe price.

Furthermore, when you are considering a measure to influence behavior, it only makes sense to ask whose conduct you most want to change. In this instance it is sensible to target any change in the law to those who cause the most harm.

Statistics and experience both demonstrate beyond any shadow of a doubt that the most dangerous drunk drivers are those whose BAC's are at a .15 or above. Data collected by the National Highway Traffic Safety Administration shows that this group of drivers accounts for the overwhelming majority of fatal alcohol related accidents. If the present BAC doesn't deter these people, will a lower BAC have any effect? We must also ask ourselves if it makes sense for our police officers to shift their enforcement efforts to include those who may be impaired at the expense of missing those who are truly bombed.

I am well aware of the support that this bill is getting from the law enforcement community. Making arrests and getting convictions in DWI cases is difficult and frustrating, particularly when defense lawyers have tricks and technicalities on their side. Certainly, reducing the BAC may make it easier to convict a driver who might go free under the present standard.

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To do so, however, begs my earlier question: Who do we want to get? Don't take my word for it, ask the officers who come forward to support this bill who the most dangerous drinking drivers are. They will tell you that it is the person with the high BAC, the repeat offender and the problem drinker who drives often enough that it is just a matter of time until he has an accident.

What little experience we have with a .08 limit bears this out. When California enacted the law, deaths increased in some parts of the state. Nobody seems to know why, but its a sure bet that the real drunks still continued to drink and drive.

Even Candy Lightner, the woman whose daughter's tragic death inspired her to found Mothers Against Drunk Driving, thinks .08 is a bad idea. Why? Because she knows who the dangerous drivers are. She should, because the man who killed her little girl over ten years ago was recently arrested for DWI for the seventh time. Lightner doesn't think it is wise to cast a wider net when we keep letting the big fish go. I agree, and you should too.

Those who really support this bill argue that we are making this change not just to stop drunk driving, but to prevent someone who is impaired from taking the wheel. I don't want my wife and daughters out on the highway with someone who is impaired any more than you do, but I'll take impaired over dead drunk any day of the week. I would also hate to think that we might catch an impaired driver and miss the drunk.

Examination of the behavior of those who use alcohol and then drive provides some compelling evidence against the adoption of. 08. The study circulated by the National Highway Traffic Safety Administration in support of .08 bills nationwide reveals that those researching drinking and driving behavior concludes that most drivers who drink are so prudent in their behavior that they already curb their consumption to a point well below the present BAC and 25% below the proposed .08 level.

I can tell you from my own experience that this is certainly true. My customers don't think drunk driving is a joke, and neither do any of my employees. We support designated driver programs, use responsible serving practices and keep an eye on our customers. Each employee who serves alcohol participates in an extensive Alcohol Awareness training program and is then routinely coached to insure comprehension. Watching them like we do now, we have found that almost all of our customers are careful about how much they drink.

These responsible customers are my best customers. Because they are already careful, I wonder if we really need a law that will have a greater impact on what they do than the irresponsible drinker and repeat offenders who kill.

As a server of alcohol, it is my public duty and legal obligation to run my business responsibly. I don't make money by getting people drunk. I do, however, pay my employees, my suppliers and my taxes by selling Margaritas, drinks, or beer to my customers. Since

12-2

most, if not all, of them don't drink enough now to even approach either the present or the proposed BAC, I wonder why we need a law that may stop them from having a Margarita with dinner when the real problem is someone who has ten beers for dinner!

A wise man once said that the road to hell is paved with good intentions. I ask this body not to question the end of this bill, which I heartily support, but the means toward this end. One death caused by a drunk driver is one death too many but if we don't stop the killers we won't stop the killing. I ask you to change the present laws to do this by severely punishing those who already break the law we have now rather than harming responsible businesses that make an honest dollar.

Thank you for your time.

—the—
WOODLANDS
RACING
A Facility of Sunflower Racing, Inc.

TESTIMONY OF GRAHAM M. DEWSBURY, SR.

Mr. Chairman, Senators. My name is Graham Dewsbury of Merriam. I am the Food and Beverage Director at The Woodlands Race Tracks in Kansas City and I promise not to say the word "casino" for the remainder of my testimony. I am also an independent restaurant owner. With my partners, I operate TENERIFE CAFE in Lenexa.

I belong to the National Restaurant Association, The Missouri Restaurant Association, serve as a Director of the Kansas Restaurant and Hospitality Association, serve as a Director of the Greater Kansas City Restaurant Association and am a member of the American Culinary Federation. The Educational Foundation of the National Restaurant Association has certified me as a Food Management Professional. But much, much more important than all of the preceding, I am the father of six children and as a father, I concur one hundred percent with the purported objective of House Bill No. 2355 presently before the Committee.

I say "purported" objective because we are led to believe that this Bill will get drunk drivers off the road. We are led to believe that this Bill will ensure that none of my six children or any of your children will be in any danger of being maimed, injured or worse by a drunk driver. If this Bill would Accomplish these ends, or even help to accomplish them, I would support it whole heartedly. This Bill will not accomplish these ends, it will hinder them and I oppose it adamantly.

The difference in the degree of impairment between a .10 blood alcohol content and a .08 blood alcohol content is minimal. Why? Because the degree of impairment at .10 blood alcohol content is minimal to begin with. You have heard or you will hear testimony from people far more learned than me that will confirm my contention. Driving ability will not be affected to any appreciable degree by this Bill.

There are, of course, people who should not drink at all. I remember at family gatherings when I was a child that one of my Great aunts would be given no more than a half glass of sherry. Within twenty minutes, Great Aunt Minnie couldn't walk across the living room. She certainly couldn't drive. Yet, this bill would not have affected Great Aunt Minnie. Her blood alcohol content was probably less than .02, yet we certainly would not want her to drive in this condition.

So who would this Bill affect? The drunk driver? The one we want off the road? Will this Bill affect him or her? Will this Bill save my children from the drunk maniac careening down the highway? Of course it won't. He's got a blood alcohol content of .17, .22 or .28. This Bill will not protect anyone of us from this maniac. Laws are presently on the books to

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P.O. Box 12036 • 99th and Leavenworth Road • Kansas City, Kansas 66112
(913)299-9797 • FAX (913)299-9804

protect us. They need to be enforced. OK. So this Bill will not affect Great Aunt Minnie who could be dangerous. It will not affect the drunk who is lethal. It does not in any way achieve its purported objective.

So who will this Bill affect? This Bill would affect three groups of people: 1. My customers; 2. The Police; 3. My children. A person who has a cocktail before dinner and a couple of glasses of wine with dinner represents the epitome of my customers at TENERIFE CAFE in Lenexa. Under this Bill, they are drunks treated the same way as the maniac with a .18 blood alcohol content.

A person munching on a hamburger or a bowl of nachos and who drinks two or three beers at The Woodlands between 6:30 p.m. and 10:30 p.m. is, under this Bill, a criminal to be treated in exactly the same manner as the maniac with a .22 blood alcohol content. And who treats these so called criminals in exactly the same manner as the maniac with a blood alcohol content of .25? Why, the second group of people this Bill would affect, the Police. Our undermanned, underfinanced, over stretched Police. Senators, if this Bill is enacted, you are mandating that our Police search out and arrest people who are no danger to themselves or others. And, while they are doing this, the maniac with a .25 blood alcohol content goes careening on his or her murderous way.

Put yourself in the position of a Police Officer on patrol. Who is easier to deal with, a very frightened diner with a .085 blood alcohol content or a belligerent pugnacious drunk spoiling for a fight, or a sloppy drunk stinking of vomit and excretement. Which one would you choose to work? Which one would you choose to put in your patrol car? Believe me, I am not demeaning our Police in any way, but wouldn't you, in all honesty, choose to work the placid, nervous, clean .085 blood alcohol content drinker. Of course you would. And while you are working this harmless individual, you are not stopping the drunken driver and now this Bill affects the third group of people, my children, your children and everyone's children. They are in mortal danger from a drunk driver.

This Bill will not get drunk drivers off the road. This Bill will make it more difficult for our Police to enforce the law as it is now written while they are tied up working a harmless person.

Please save my children, save all children. Get the drunk driver off the road. Assist our Police with manpower. Stop arrested drunk drivers from seeking diversion or plea bargaining. Take away drivers' licenses. Put illegal drivers in jail. Do not put more useless work on our Police. Allow them to enforce the law as it is now written.

This well meaning Bill, introduced and supported by well meaning people will not achieve its aim. Instead, it will accentuate our drunk driving problem. It will over burden our already over burdened Police. It will make criminals out of people who are not criminals, it will penalize responsible restaurant owners who, as a group, have in the last ten years, policed themselves so very well and most tragically, this Bill will put my children at a greater risk.

Please, please please kill this Bill. Save our children. Thank you.

KANSAS RESTAURANT AND HOSPITALITY ASSOCIATION

KANSAS RESTAURANT AND HOSPITALITY ASSOCIATION

359 SOUTH HYDRAULIC • P.O. BOX 235 • WICHITA, KANSAS 67201 • (316) 267-8383 • FAX (316) 267-8400

My name is George Puckett and I represent the Kansas Restaurant and Hospitality Association, a group of approximately 800 foodservice and hospitality industry businesses. I am here today on behalf of our member restaurants who have Kansas liquor licenses. This is our first testimony in regard to HB2355 and KRHA did not address HB2355 before the House committee. We are bringing our concerns to you today in opposition to HB2355.

Since the mid-1980's states have been the battlegrounds for efforts to lower legal blood-alcohol concentration (BAC) levels for drivers. Five states have adopted a .08 BAC while at least twenty others have considered the idea at length and then rejected it. Since 1991, some federal lawmakers and regulators have been trying to also get in the act by attempting to bring federal pressure to bear on states to lower BAC levels.

Last year U.S. Senator Frank Lautenberg (D-NJ), who chairs the Senate Appropriations subcommittee that doles out federal highway dollars to the states, tried to get Congress to consider withholding federal highway funds from states that wouldn't move to .08. Even though Lautenberg shelved his plans for 1992 after strong grassroots opposition from restaurateurs, bar owners, and others, his "pro-.08" stance was seconded by the National Highway Traffic Safety Administration. In late October, then Transportation Secretary Andy Card went a step further and wrote to all 50 governors asking them to take action to lower BAC's. Many individuals are confused on the issue of highway funds and I again confirmed with the NRA and the Kansas Department of Transportation (KDOT) as late as yesterday that there is no current federal requirement that would require Kansas or any state to pass .08 BAC legislation in order to receive federal highway funds as was the concern during the 1992 session.

Nancy Bogina (KDOT) 296-3461

Please consider the following additional information I acquired from the National Restaurant Association (NRA):

1) .08 is not proven to be effective. There is evidence that reducing BAC's may not be effective according to Professor H. Laurence Ross's 1975 study of Sweden's BAC law change from .08 to .05 - There was no change on fatalities. Furthermore, there appears to have been no impact on crashes upon the further lowering of Sweden's legal BAC to .02 last year.

2) .08 may even increase the fatality rate. The State of Maine is one of the five states which adopted the .08 standard. Between 1988, when the change took effect, and the end of 1990, Maine's DWI arrest rate increased by 16 percent. This is to be expected, because when you change the definition of drunk driving, more people are technically driving drunk. But at the same time that Maine's arrest rate increased, the State's alcohol-related fatality rate also increased, by more than 7 percent. In the first 6 months of 1992, Maine's alcohol-related fatalities rose by an additional 8.4 percent. This unintended result may be caused by the dilution of law enforcement activity against heavy drinkers.

3) Heavy drinkers cause most fatalities. According to the Insurance Institute for Highway Safety, 12 percent of drivers who have been drinking have BAC levels in excess of .10, yet these individuals are responsible for 86 percent of all alcohol related traffic fatalities. Heavy drinkers must be the number one priority of

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drunk driving initiatives. The Insurance Institute for Highway Safety agrees. They argue that "as long as the death and injury problem from alcohol-impaired driving is dominated by the minority of drinking drivers with very high BAC's, it makes sense to focus laws and enforcement on this group, arresting more of them rather than potentially diluting our already limited law enforcement effort by shifting the focus to include drivers with lower BAC's."

4) .08 drivers are difficult to detect. According to a NHTSA report, the results of roadside sobriety tests performed by law enforcement personnel are inaccurate as much as 50 percent of the time at the current .10 level. This percentage would increase if BAC levels were reduced, because of the lower level of impairment of suspected offenders. An example of this can be seen in the State of Maine's June, 1991 DWI arrest statistics. In June, 257 drivers with BAC's below .10 were suspected of DWI and taken in for BAC testing. Of those 257, only 31 percent actually had illegal BAC levels.

5) .08 enforcement is extremely burdensome. A 1985 study by physicians at the Centers for Disease Control found that in the State of Michigan, for example, each drunk driving arrest consumes two to six hours of police officer time. They calculated that arresting all alcohol-impaired drivers in Michigan would require at least 1,000,000 police hours per month. This is the equivalent of 6250 officers working full-time managing paperwork and other logistic problems that follow drunk driving arrests. Obviously, no state is able to arrest all drunk drivers. To reduce fatalities, states should concentrate on those drivers which most endanger public safety. Unfortunately, a change from .10 to .08 is likely to dilute enforcement against the heaviest and most dangerous drinkers.

An article is attached to my testimony entitled, "Is MADD Veering Off the Road?" (Attachment #1), by Candy Lightner, founder of MADD twelve years ago. The article is from the Plain Dealer, Ohio's largest newspaper, located in Cleveland, dated May 21, 1992. Specifically I would like to refer to that part of the article starting at the bottom of the first column which I have marked with a star. It states, "Lately, anti-drunken driving groups are working on legislation that would lower the BAC to .08.,..." and ending, " While no one can deny that the safest BAC is no BAC, this is also unrealistic given our limited resources and energies. What is realistic, is attacking the problem drinker or chronic drunken driver, the most dangerous threat to our society..."

In conclusion, I would like to refer to attachment #2, entitled "1992 Breath Alcohol Tests in Kansas." This is information I acquired recently from the Kansas Department of Health and Environment, Breath Alcohol Program. The information reflects 1) BAC ranges, 2) Total Tests given in each range, and 3) the Number of Accidents in each range. Notice how the number of tests suddenly balloons by thousands at .10 percent. Of particular significance is, of the 1,687 individuals involved in accidents, only 9.8% were in the category from .04 thru .09. An overwhelming 90.2% of those tested involved in drunk driving accidents were in the BAC categories of .10 percent and higher.

We ask you to consider what is the best use of scarce public resources in fighting drunk driving. Our strong feeling is that resources must be allocated in the most efficient manner to bring about the greatest possible reduction in the rate of alcohol-related fatalities. We urge you to oppose HB2355 and hope you will give every consideration to our viewpoint as you make a decision on this difficult issue. This type of legislation would frighten the wrong individual, our customers who are, for the vast majority, law abiding citizens that consume alcohol in a responsible manner in our restaurants.

Attachment #1

THE PLAIN DEALER

OHIO'S LARGEST NEWSPAPER CLEVELAND, THURSDAY, MAY 21, 1992

FORUM/ESSAY & COMMENT

Is MADD veering off the road?

By CANDY LIGHTNER

Rather than put our limited resources into laws that fail to address the real problem, we need better enforcement of existing laws and proven policies that have demonstrated a significant impact.

I founded Mothers Against Drunk Driving 12 years ago after my 13-year-old daughter, Cari, was killed by a hit-and-run drunken driver. Two days before he killed my daughter, the man had been arrested for another hit-and-run drunken driving with injury. His blood-alcohol content was 0.22% — more than twice the 0.10%, the current legal limit in most states.

My grief and anger made me determined to do everything in my power to stop the senseless slaughter caused by impaired drivers. Though still deeply committed to that goal, I worry that the movement I helped create has lost direction.

Our biggest obstacle was society's tolerance of drinking and driving. So we passed more than 1,000 laws, and attitudes changed. Society no longer considers impaired driving socially acceptable.

This led to significant reductions in alcohol-related fatalities: 50% in 1988 involved alcohol, as compared to 57% in 1982. But we are still nowhere near the point of eliminating this horrible tragedy from our streets and highways.

Lately, anti-drunken driving groups are working on legislation that would lower the BAC to .08. The recent federal highway bill conditions access to highway aid on implementing anti-drunken driving measures, including the suggestion that states adopt the .08 standard. Unfortunately, this ignores the real core of the problem, individuals who, despite new laws and the change in attitude, continue to drink and drive.

While no one can deny that the safest BAC is no BAC, this is also unrealistic given our limited resources and energies. What is realistic, is attacking the problem drinker or chronic drunken driver, the most dangerous threat to our safety.

In our rush to "do the right thing" let's not lose sight of the facts:

- Half of the drinking drivers involved in fatal crashes have a BAC of 0.17 or greater. Most drivers with a level this high are problem drinkers and repeat offenders.
- Even among young people aged 16 to 24, the great majority of deaths involved drinkers with a BAC of at least .15%.

Lowering the blood alcohol content won't make a difference to these offenders. After 12 years we should be past the point of just raising public consciousness. We need to bring creativity into play and focus on the programs and laws that will make the most difference.

Ohio, for example, is concentrating on measures that would reduce recidivism. In the past 10 years, 53% of all drunken driving offenses were committed by repeat offenders. The State Highway Patrol now notifies law-enforcement officers of individuals whose driving record includes five or more DUI convictions and whose licenses were suspended. The repeat offenders were also contacted directly and told they risked re-arrest if they continued to drive.

The results: 16% were arrested in the first month of the crackdown. Law-enforcement officers also use "boots" to immobilize the vehicles of repeat offenders after their licenses have been suspended.

Similarly, Oregon impounds the vehicles of those who drive with a suspended license and forfeits them to the city. I am still amazed that the man who killed my daughter is barred from ever owning a handgun, but he can own a car, even though he has been arrested six times for impaired driving and injured two other people.

In addition to measures aimed at repeat offenders, why not issue "graduated licenses" to young people instead of giving them "carte blanche" to drive at the age of 16? They can gain valuable driving experience under less hazardous circumstances, such as daytime driving only, with a limited number of passengers, at restricted speeds, and without alcohol impairment.

Where it has been tried it has worked. Crash rates among young drivers showed a dramatic reduction.

We accomplished our goal of changing attitudes. Now it's time for new direction. Rather than put our limited resources into laws that fail to address the real problem, we need better enforcement of existing laws and proven policies that have demonstrated a significant impact, such as swift and sure license suspension, sobriety checkpoints and designated-driver programs.

If we really want to save lives, let's go after the most dangerous drivers on the road. Putting our trust in new laws and regulations that attack only the tip of the iceberg will not make our highways safer.

Lightner founded MADD.

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Attachment #2

1992 BREATH ALCOHOL TESTS IN KANSAS

BAC LEVEL	TOTAL TESTS GIVEN		# IN ACCIDENTS	
.04	758		49	(6.5%)
.05-.07	536	165 (9.8%)	35	(6.5%)
.08-.09	964		81	(8.4%)
.10-.14	6,191		457	(7.4%)
.15-.19	6,290		545	(8.7%)
.20-.24	2,963	1,522 (90.2%)	362	(12.2%)
.25-.29	821		119	(14.5%)
.30+	228		39	(17.1%)
TOTALS	18,751		1,687	

Source: Kansas Department of Health and Environment, Breath Alcohol Program