Approved: 3/5/09
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 16, 2009, in Room 143-N of the Capitol.

All members were present except:
Representative Jason Watkins-excused

Committee staff present:
Melissa Doeblin, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the committee:
Greg Benefiel, Douglas County District Court
Doug Wells, Attorney

Others attending:
See attached list.

The hearing on **HB 2226 - Allowing the attorney general or the county or district attorney to request of the district court the convening of a grand jury to investigate alleged violations of serious felonies** was opened.

Chairman Kinzer spoke as the sponsor of this bill and provided the committee with the background information leading to this bill. This bill was originally requested by Greg and Missy Smith, whose daughter Kelsey, was the victim of a horrific abduction from a local Target Department Store parking lot and subsequently raped and strangled. At the time the murder was apprehended, the Prosecutor was able to use a grand jury that was in place. Since grand jury proceedings are sealed, this move by the Prosecutor sheltered the family from having to sit thru a preliminary hearing and spared re-living the crime all over again, viewing horrific pictures and reduced the exposure to the media with such details. This bill would give the Prosecutors the right to call a grand jury in certain instances of horrific crimes.

Keith Schroeder, Reno County District Attorney provided written testimony in support of the bill. (Attachment 1)

Greg and Missy Smith, Surviving Parents, provided written testimony as proponents of the bill. (Attachment 2)

There were no opponents.

The hearing on **HB 2226** was closed.

The hearing on **HB 2263 - Establishing aggravated driving under the influence, modifying existing DUI statutes** was opened.

Jill Ann Wolters, Staff Revisor, provided the committee with an overview of the bill which creates the crime of aggravated driving under the influence and revises penalties for certain driving under the influence (DUI) violations. (Attachment 3)

Greg Benefiel, Douglas County District Attorney, spoke as a proponent of the bill. The current DUI statute provides two distinct standards defining a driver who is legally impaired. The first being a driver who submits to alcohol testing as required and is in violation if that driver's blood or breath alcohol is .080 or greater. Second, the driver who refuses testing, however, faces a less stringent standard that requires the State to prove the driver was under the influence of alcohol and/or drugs to a degree that renders the person incapable of

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safely driving a vehicle. Many have learned to work the system by refusing testing. This new bill would address these issues. (Attachment 4)

Doug Wells, Attorney, Topeka, Kansas, testified in opposition of the bill. He stated the bill makes massive changes in the area of DUI law without the benefit of an interim committee to study the impact of these changes. He addressed the following issues:

1. The cost of the bill is too great
2. "Impaired to the slightest degree"
3. Creation of per se drug offenses
4. The unnecessary creation of new crimes and penalties
5. Increased terms of the confinement
6. Increased terms of driver's license suspension
7. Prima facia changes
8. Determination of "serious injury"
9. Preliminary breath test
10. Lifetime look back
11. Criminalization of under 21 breath test result

In conclusion he said many of the changes proposed are too costly, already covered in existing law to a substantial degree, are not scientifically supported and are unfair. At the same time he did agree that some of the changes are appropriate. He stated changes in K.S.A. 8-1020 should be made as outlined in paragraph 6b; further discovery in driver's license hearings should be permitted as enumerated in paragraph 6b. The lifetime look back period should be eliminated and the advisory for a preliminary breath test should be made mandatory. (Attachment 5)

Mark Schultz, Attorney provided written testimony in opposition of the bill. (Attachment 6)

The hearing on HB **2263** was closed.

HB 2201 - Conditions on licensee if delinquent in child support.

Melissa Doeblin provided the committee with a review of the bill.

Representative Goyle made the motion to report **HB 2201** for passage. Representative Kuether seconded the motion.

Representative Brookens made the motion to amend Section 1(b)(1) from "The support debtor owes past due child support equal to or greater than $1000 to read " The support debtor owes past due child support equal to or greater than three months support. Representative Crow seconded the motion. Motion carried.

Representative Brookens made a motion to amend Paragraph Line 22 "to create notice" if Items (1), (2) and (3) had incurred. Representative Goyle seconded the motion. Motion carried.

Representative Goyle made a motion to report **HB 2201** favorably for passage as amended. Representative Whitham seconded the motion. Motion carried.

HB 2210 - Child in need of care; jurisdiction in CINC

After a brief discussion regarding the cost savings and the possible cost in the long run, the Committee chose "No Action."

HB 2164 - Judges and justices, mandatory retirement at 75, may elect to serve until end of current term.

Representative Whitham made the motion to report **HB 2164** favorably for passage. Representative Kleeb seconded the motion.

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Representative Brookens proposed an amendment that would require retirement upon reaching the age of 75. Representative Colloton seconded the motion.
Motion failed.

In answer to a question, the staff advised that Highway Patrol do not have a mandatory retirement age.

Representative King made a substitute motion to amend the bill to lift the age restriction altogether.
Motion failed.

Representative Crow made the motion to report **HB 2164** favorably for passage.
Representative Pauls seconded.
Motion carried.

The next meeting is scheduled for February 17, 2009.

The meeting was adjourned at 5:40 p.m.

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JUDICIARY COMMITTEE GUEST LIST

DATE: 2-16-09

NAME	REPRESENTING
Lane Welsh	Judicial Branch
Tim Madden	KDOC
Pete Brodyk	KDOT
KAREN WITTMAN	KS TSRP - AG's office
ROBERT BAKER	KHP
Alicia Jones	Rep Crows Intern
Shannon Bell	LGR
Kathy Bell	SRS
BRIAN DEMPSEY	SRS
TANYA KEYES	SRS
Richard Samaniego	Kansas Assoc.
TOM STANTON	KCDAA
David R. Cockrum	KDOR
Marcia Baldt	KDOR
Kelly Bellett	KDOR
Greg Penefiel	—
Jean Seeber	—
RICHARD T. GILES	—
Douglas E Wells	Self & KACDL

JUDICIARY COMMITTEE GUEST LIST

DATE: 2-16-09

NAME	REPRESENTING
Ed Klumpp	KACP & KPOA
Kevin Barone	KIIA
Matt Strauss	KIIA
Kathy Porter	Judicial Branch
Sean Miller	Capitol Strategies

DISTRICT ATTORNEY
Keith E. Schroeder

DEPUTY DISTRICT ATTORNEY
Thomas R. Stanton

SENIOR ASSISTANT DISTRICT ATTORNEYS
Benjamin J. Fisher
Stephen D. Maxwell

ASSISTANT DISTRICT ATTORNEYS
Richard A. Buck
Amanda G. Voth

OFFICE OF THE RENO COUNTY DISTRICT ATTORNEY

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TELEPHONE: (620) 694-2715
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Victim-Witness Service
(620) 694-2773

Investigator John R. Tracy
(620) 694-2765

TP: The Honorable Representatives of the House Judiciary Committee

FROM: Keith Schroeder
Reno County District Attorney

RE: House Bill 2226

DATE: February 16, 2009

Chairman Kinzer and Members of the Committee:

Thank you for giving me the opportunity to submit written testimony regarding House Bill 2226. I support the purpose of the legislation, and suggest an amendment must be made to make the legislation workable.

HB 2226 would allow a county or district attorney to convene a grand jury to return indictments on crimes falling within severity levels 1 through 4 on the non-drug grid, and levels 1 and 2 on the drug grid. This power would be limited only by the review of the district judges within the particular jurisdiction to insure the request is in "proper form." Herein lies the issue needing clarification. The statute does not dictate the proper form of the petition. The only "form" suggested in the legislation is that for a citizen-driven petition for the empaneling of a grand jury, and this form will not be sufficient for a petition presented by the county or district attorney. The bill must either define the form required for the petition, or do away with the requirement of judicial approval of the petition.

I have long supported the idea that prosecutors should be able to use grand juries to obtain indictments in criminal cases. Grand juries are used on the federal level, and appear to operate very well. Kansas uses preliminary hearings to establish a basis for felony prosecutions. These hearings are created by statute, and are not required by constitutional law. In fact, the constitution prescribes grand juries as the vehicle to insure probable cause exists for a felony prosecution. Therefore, the

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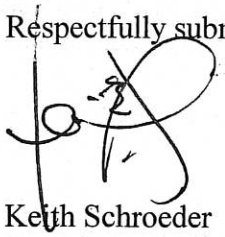
use of grand juries is a valuable alternative to the use of preliminary hearings. Grand juries are also valuable investigative tools, especially in larger cases where the right to subpoena witnesses would be extremely valuable in reaching just prosecutions.

In a time of financial crisis, I believe grand juries would be an economical solution for a crowded felony docket. The grand jury could hear numerous cases, and could save time the district court judges would have to expend in conducting individual preliminary hearings. This would free judges to conduct jury trials, insuring that those persons being prosecuted by the State receive speedy trials. Additionally, local jurisdictions would save significant costs from those currently expended paying overtime to officers called in for multiple preliminary hearings. The grand jury proceedings would be efficient in using the officers' time wisely.

It is possible that not all jurisdictions will take advantage of the use of grand juries, depending on the size of the jurisdictions and the criminal activity present. However, many of the jurisdictions in this state would, I believe, make use of grand juries under the proper circumstances. This legislation would give prosecutors the ability to convene grand juries to investigate criminal activity, and issue indictments for crimes committed in this state.

Respectfully submitted,



Keith Schroeder
Reno County District Attorney

Thank you for allowing me to provide testimony on behalf of the grand jury bill. I apologize for not being here in person. My wife, Missey, and I are with the Surviving Parents Coalition meeting with US Justice Department officials today and could not be here in person. However, we feel so strongly about this bill that we wanted to provide testimony by way of written statement.

The provisions of this bill will provide a modicum of compassion to the survivors of the victim of a horrific crime. The criminal justice system in Kansas and the United States carefully guards the rights of the accused, as it should. As a former police officer I always strove to protect those rights. As the survivor of the horrific abduction, rape, sodomization and strangulation of my daughter, Kelsey, I experienced how cold and uncaring the system is toward the victim and the victim's family.

Our U.S. Constitution provides for the use of grand juries. In fact the fourth amendment mandates it. It states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury..." This procedure is a matter of course with our federal system, and should be for Kansas as well.

The adversarial system of justice is necessary at trial, where the Constitution guarantees the right to be confronted by accusers, but it is not necessary to make a determination of probable cause. Warrants for arrest and search are issued routinely by judges who do not hear evidence for both the state and the accused. The decision to go to trial, whether determined by a grand jury or a judge carries no greater weight than that decision. The purpose of a

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preliminary hearing or a grand jury is to decide if there is probable cause to go to trial. The defendant is has a presumptive right of innocence, regardless of which method is used.

The major difference between a preliminary hearing and a grand jury is the way the proceeding is conducted. In a preliminary hearing the state must air its evidence and be subject to cross examination by the defense. It is a public hearing and, in high profile crimes, such as Kelsey's murder, the media attention is at a high level. The media, as necessary as they are and protected by the first amendment, often misstates facts, or offers speculation. Sometimes this is the product of human error and other times it is driven by the need to sell newspapers or increase ratings. Regardless of the motive, the coverage casts doubt on the defendant's right to presumptive innocence.

Media coverage of the preliminary hearing also taints the potential jury pool for the defendant as well as the victim's family. Every potential jury is exposed to the media blitz of coverage and could easily form an opinion as to the defendant's guilt or innocence prior to every taking a seat in the jury box.

A grand jury proceeding is sealed. The media is not allowed access and the even the family is not allowed to be present. We were fortunate that a grand jury was in place at the time of Kelsey's murder, and that the Johnson County Prosecutor had the initiative to place her case in front of a grand jury. No media was present, so there was no speculation in the press as to what the evidence was in the case. We were not present so we were not exposed to the assault of seeing crime scene photos of Kelsey's nude body that had been left exposed to the elements for four days. We did not have to see autopsy photos or hear the gruesome details of

her last moments on this earth. In short, we were spared the re-living of the crime all over again. In speaking with other families who have experienced a similar tragedy they all comment on how fortunate we were to have not had to experience a preliminary hearing. The Sanderholm family described how painful it was for them to attend the preliminary hearing for their daughter's murderer. It was a horrible experience for them.

If the case had gone to trial, we would have seen all this, as would the jury and the media. However, since the trial would have been ongoing, the jury would have been seated and sequestered from media exposure. No tainting of the jurors would have taken place. The media would have had access and could have reported everything that took place.

Since the man who murdered Kelsey pled guilty and took a plea agreement to avoid the death penalty, we did not have a trial. The crime scene photos, autopsy photos and the like were never presented in court, and we did not have to suffer the assault of seeing pictures of our daughter discarded like garbage by her killer.

I am strongly in support of this bill as is my wife. We feel this bill would provide only positive outcomes for the victim, victim's family and friends, and for the defendant. The positive outcome for the victim and victim's family are:

1. A grand jury provides for a closed hearing that does not subject the victim or victim's family to yet another assault by crime scene photos and painful details.
2. The potential jury pool is not contaminated or influenced by pre-trial publicity.

The positive outcomes for the defendant are:

1. The potential jury pool is not contaminated or influenced by pre-trial publicity.
2. The defendant does not lose his right to presumptive innocence through media exposure.

The positive outcomes for the State of Kansas are:

1. The grand jury process streamlines the process and could help ease backlog in the court system.
2. The reduction of pre-trial publicity could reduce the number of motions for change of venue and evidentiary hearings.
3. Fewer motions mean that the trial could be shorter which should result in savings to the state for prosecution of high-profile crimes.

In conclusion, my family and I are strong supporters of this bill. We are grateful to Representative Kinzer for authoring the bill and grateful to this committee for giving the bill a hearing. I ask that committee view the bill favorably and allow it to move to the full house for debate and vote.

Thank you for your time and for allowing me to offer testimony on the grand jury bill.

Respectfully Submitted,

Greg Smith
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Overland Park, KS 66212

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MEMORANDUM

To: Chairman Kinzer and members of the House Judiciary Committee
From: Jill Ann Wolters, Senior Assistant Revisor
Date: February 16, 2009
Subject: HB 2263, driving under the influence **CORRECTED**

House Bill No. 2263 creates the crime of aggravated driving under the influence (agg. DUI) and revises penalties for certain driving under the influence violations.

Agg. DUI is driving under the influence as defined in K.S.A. 8-1567 and:

1. Alcohol concentration is .24 or more.
2. Violating K.S.A. 8-235, driving without a valid license.
3. Violating K.S.A. 8-262, driving while license cancelled, suspended or revoked.
4. Violating K.S.A. 8-286, habitual violator.
5. At a time when such person's driving privileges are restricted to operation of a vehicle equipped with an interlock ignition device.
6. Violating K.S.A. 8-1605, duties of the driver upon damaging an unattended vehicle or other property, stop and notify.
7. Violating K.S.A. 8-1606, duties of the driver to give notice of an accident to police.
8. Having one or more children under the age of 18 years in the vehicle at the time of the offense.
9. Such person's actions result in the unintentional injury of a human being.
10. Recklessly, causing bodily harm to another person.
11. Such person's actions result in the unintentional injury of a human being resulting in great bodily harm.
12. Such person's actions result in the unintentional killing of a human being.

Conviction of 1 through 6:

FIRST: Class A nonperson misdemeanor; 180 days minimum to one year imprisonment; mandatory 10 consecutive days county jail; fine minimum $1,000 maximum $1,500; drug and alcohol abuse treatment program required.

SECOND: Nonperson felony; one year imprisonment; mandatory 90 consecutive days county jail, work release after 30 days; fine minimum $1,500 maximum $2,500; mandatory one year postrelease supervision term with department of corrections (DOC); during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

THIRD OR SUBSEQUENT: Nonperson felony; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required; mandatory DOC custody:

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3rd – 12 to 18 months
4th and sub – 24 to 60 months.

Conviction of 7 through 9:

FIRST: Class A nonperson misdemeanor; one year imprisonment; mandatory 30 consecutive days county jail, work release or house arrest after 15 days; fine minimum $1,000 maximum $1,500; drug and alcohol abuse treatment program required.

SECOND: Person felony; 18 months imprisonment in DOC custody; mandatory 180 consecutive days county jail, work release after 90 days; fine minimum $1,500 maximum $2,500; mandatory one year postrelease supervision term with DOC; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

THIRD OR SUBSEQUENT: Person felony; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required; mandatory DOC custody:

3rd – 18 to 36 months
4th and sub – 30 to 60 months.

Conviction of 10:

FIRST: Severity level 8, person felony; mandatory 60 consecutive days imprisonment; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

SECOND: Severity level 7, person felony; mandatory 180 consecutive days imprisonment; for criminal history purposes, all felonies considered person felonies; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

THIRD OR SUBSEQUENT: Severity level 6, person felony; mandatory 365 consecutive days imprisonment; for criminal history purposes, all felonies considered person felonies ; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

Conviction of 11:

FIRST: Severity level 5, person felony; mandatory 90 consecutive days imprisonment; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

SECOND: Severity level 4, person felony; mandatory 60 consecutive days imprisonment; for criminal history purposes, all felonies considered person felonies; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

THIRD OR SUBSEQUENT: Severity level 3, person felony; mandatory 180 consecutive days imprisonment; for criminal history purposes, all felonies considered person felonies ; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

Conviction of 12:

FIRST: Severity level 4, person felony; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

SECOND: Severity level 3, person felony; for criminal history purposes, all felonies considered person felonies; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

THIRD OR SUBSEQUENT: Severity level 3, person felony; all felonies considered person felonies ; during postrelease, inpatient or outpatient alcohol and drug abuse program, including an approved aftercare plan or mental health counseling required.

The Court shall establish payment schedules for fines and shall allow the offender to pay off the fine by performing community service work. Further, the Court shall order interlock or impoundment on the offender's vehicles. No diversion agreements are allowed if violating agg. DUI. Every offender is required to submit to a pre-sentence drug and alcohol abuse evaluation.

The bill further provides that if the alcohol concentration is less than .04, it is presumed that the defendant was not under the influence of alcohol to a degree that impaired the defendant's ability to operate a vehicle, except that this fact may be considered with other competent evidence to determine if the defendant was under the influence of both alcohol and drugs to a degree that impaired the defendant's ability to safely operate a vehicle.

When the alcohol concentration is .08 or more, the standard is being amended from "renders the person incapable of driving safely" to " impaired the defendant's ability to safely operate a vehicle."

Further, the bill adds new language that if there was present in the defendant's blood any drug or any metabolite of such drug, it is *prima facie* evidence that the defendant was under the influence of drugs to a degree that impaired the defendant's ability to safely operate a vehicle.

The bill adds a mandatory fine for refusing to take the preliminary screening test, $250, and states such refusal may be used against such person in court.

K.S.A. 8-1014 is amended to increase the administrative penalties for test refusal and failure.

Test refusal:

FIRST: Suspend drivers license for 2 years (currently 1 year)

SECOND: Suspend drivers license for 5 years (currently 2 years)

THIRD OR SUBSEQUENT: Drivers license permanently revoked (currently, 3rd 3 years, 4th 10 years, 5th and sub permanently)

Test failure or conviction:

FIRST: Suspend drivers license for 30 days, restrict for an additional 330 days (this is current law)

SECOND: Suspend drivers license for 1 year, restrict for an additional 1 year to ignition interlock (this is current law)

THIRD: Suspend drivers license for 3 years, restrict for an additional 2 years to ignition interlock (current law is same as second)

FOURTH OR SUBSEQUENT: Drivers license permanently revoked (currently, 4th same as second and 5th and sub permanently)

Test failure or conviction if .15 or greater:

FIRST: Suspend drivers license for 1 year, restrict for an additional 1 year(this is current law)

SECOND: Suspend drivers license for 1 year, restrict for an additional 2 years to ignition interlock (this is current law)

THIRD: Suspend drivers license for 3 years, restrict for an additional 3 years to ignition interlock (current law is 1 year suspension, 3 years interlock)

FOURTH OR SUBSEQUENT: Drivers license permanently revoked (currently, 4th is 1 year suspension, 4 years interlock and 5th and sub permanently)

Further, the provision in law that currently allows an offender to drive an employer's vehicle during normal business hours is repealed.

The penalties for tampering with ignition interlock have been increased, K.S.A 8-1017. (See page 23, beginning on Line 20.)

The penalties for DUI, K.S.A. 8-1567, have been increased as follows:

FIRST: The minimum 48 consecutive hours has been increased to 30 days; no public service is allowed.

SECOND: The minimum 90 day imprisonment has been increased to 180 days; mandatory county jail time increased from 5 to 10 consecutive days; 5 days must be served before work release (currently 48 hours).

THIRD: Mandatory 1 year imprisonment (current law 90 days); mandatory county jail time 90 consecutive days (current law); 10 days must be served before work release (currently 48 hours).

FOURTH AND SUBSEQUENT: Nonperson felony; DOC custody

4th – 6 to 18 months

5th – 12 to 24 months

6th – 18 to 36 months

7th or sub – 24 to 60 months' imprisonment.

Greg Benes
Douglas County
Dist. Attorney

REASON FOR PROPOSAL

House Bill No. 2263

Evidentiary Standard

The current D.U.I. statute provides two distinct standards defining a driver who is legally impaired. A driver who submits to alcohol testing as required by the implied consent statute, K.S.A. 8-1001, faces a per se violation if that driver's blood or breath alcohol is 0.080 or greater. The driver who refuses testing, however, faces a less stringent standard that requires the State to prove the driver was under the influence of alcohol and/or drugs to a degree that renders the person incapable of safely driving a vehicle.

This dual standard penalizes the driver who follows the statutory requirements and completes testing and rewards the driver who refuses testing. Most drivers who have a blood or breath alcohol level of 0.080 grams of alcohol are not necessarily incapable of safely driving a car, they are IMPAIRED by alcohol. The D.U.I. per se statute removes these impaired drivers from Kansas roadways BEFORE they become intoxicated to a degree that renders them incapable of safely driving a vehicle. Those drivers who refuse testing are allowed to continue to drive on Kansas roadways even after they become impaired by alcohol because the statute requires they become incapable of safely driving before they are legally D.U.I.

State, county, and local law enforcement officers and prosecutors all report the same trend among repeat impaired drivers: they refuse testing because they know it is difficult to prove they were "incapable of safely driving." Repeat offenders are less likely, therefore, to be prosecuted and face the consequences associated with driving impaired. Although these drivers

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face an administrative sanction for refusing a test, their privilege to drive a vehicle is not revoked until they have refused five times. These drivers often ignore suspensions and revocations and continue to drive without valid licenses.

The proposed revised D.U.I. statute, and related statutes, would address these issues. It reverses the advantage a driver gains by refusing testing. It continues to draw a bright-line rule that 0.080 is the legal standard in Kansas for those drivers who obey the law and submit to testing. Those drivers who choose to refuse to submit to testing in violation of implied consent would face a more stringent legal standard of impairment: If the State were able to show that the driver was under the influence of alcohol and/or drugs and impaired to the slightest degree, the driver would be guilty of D.U.I.

This proposed standard of impairment to the slightest degree is taken from Arizona Revised Statutes 28-1381. There are various other ways states deal with this complex issue of drivers violating implied consent laws and refusing to submit to chemical testing. Minnesota makes a chemical test refusal a criminal violation of the D.U.I. statute: a refusal carries the same weight and penalty as having a blood alcohol of 0.080. Florida does not permit test refusals and allows restraint of drivers if necessary to obtain testing. Colorado creates a sub-category of D.U.I. that makes impairment to the slightest degree or a blood alcohol of 0.040 to 0.080 a lesser violation referred to as "Driving While Impaired."

While any of these alternatives would be a vast improvement over the current Kansas D.U.I. statute, borrowing Arizona's statute is the best alternative. Criminalizing a refusal may

seem the easiest manner to reduce chemical test refusals, but it also implicates making a decision in the absence of legal counsel that could result in a per se criminal violation. Minnesota deals with this issue by providing a window of opportunity to allow suspected impaired drivers to contact an attorney. Kansas could provide the same opportunity, but the issue becomes whether an attorney is available or a suspect has never had contact with the criminal justice system and does not have an attorney. This could be addressed by providing an on-call attorney through the Board of Indigent Defense Services and a toll-free telephone number to access this service. This is an unnecessary additional expense that the proposed "impairment to the slightest degree" does not require.

Kansas recently enacted a modified version of Florida's no refusal law for drivers involved in an accident resulting in serious personal injury. This restriction reduces the number of drivers exposed to mandatory testing which would allow restraint if necessary. Florida has reported injuries to drivers who struggle during legal blood draws done while restrained as result of refusing and not cooperating. While certain circumstances justify such invasive actions, including drivers involved in serious accidents, the risk of injury to uncooperative drivers makes this application less desirable than the proposed "impairment to the slightest degree" standard.

Colorado and Arizona both utilize the "impairment to the slightest degree" language, but Colorado reduces the penalty for drivers impaired to the slightest degree. Colorado also sets per se limits that define 'driving while impaired' but rewards drivers who refuse chemical testing that impairment to the slightest degree will result in only potential conviction for the minimum impaired statute and associated penalties.

States have uniformly adopted a 0.080 standard for D.U.I., but no uniform standard exists to prosecute drivers who refuse chemical testing. Recognizing that impairment occurs at even low levels of alcohol, many countries have lowered the legal blood alcohol to less than 0.080. Sweden has adopted a standard of 0.02 while most European nations have adopted a 0.05 standard. The evidence that impairment occurs at even levels below 0.080 supports the proposed "impairment to the slightest degree" standard.

Aggravated D.U.I. – Enhanced Penalties & Unification of D.U.I. Laws

The proposed new statute, Aggravated D.U.I., would recognize that in certain circumstances a person should receive enhanced penalties for impaired driving because that person could not lawfully operate any vehicle or that person's actions caused a greater harm than simply operating a vehicle impaired. The new statute would also combine other D.U.I.-related offenses that occur, aggravated battery and involuntary manslaughter while driving under the influence, into a unified impaired driving statute.

Increasing the penalty for an individual with a blood alcohol content (BAC) three-times the legal limit recognizes that a driver with a BAC of 0.240 or more should realize that he or she poses a great risk to other drivers by choosing to operate a vehicle on Kansas roadways.

Drivers operating a motor vehicle without a driver's license, or with a suspended or revoked driver's license, or having been declared a habitual violator have no lawful right to drive a vehicle on Kansas roadways at any time. When someone with no right to drive chooses to drive while impaired, that person should face enhanced penalties.

The final class of enhanced penalties deal with situations in which an impaired driver causes harm to another, through a simple traffic collision and leaving the scene up to causing the death of another human being. While the range of harm is great, the various penalty enhancements seek to appropriately escalate the penalties for the harm caused by impaired drivers.

DOUGLAS E. WELLS

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February 16, 2009

To: House Judiciary Committee

From: Douglas E. Wells

Re: HB 2263

Dear Committee,

The following letter is submitted as written testimony pertaining to the above referenced bill. This bill makes massive changes in the area of DUI law without the benefit of an interim committee to study the impact of these changes. I will address some significant problems that I have with the proposed legislation. I am the vice president for the Kansas Association of Criminal Defense Lawyers (KACDL). We are opposed to House Bill 2263. My analysis includes the following:

1. **The cost of the bill is too great:**

   Increasing mandatory terms of minimum incarceration, increasing the maximum term of incarceration, increasing the severity of the crime, and creating new crimes will substantially increase the cost of incarceration for county jails and the state correction system. During a time of this budget crisis, we cannot increase the mandatory cost of incarceration in the creation of new crimes or in the upgrading of penalties for modified or existing crimes.

2. **Impaired to the slightest degree standard:**

   This proposal changes the long standing DUI law from under the influence to a degree that renders a person incapable of safely driving a vehicle, to a standard of under the influence to a degree that impairs a person's ability to safely operate a vehicle to the slightest degree. This change of the philosophy applies to driving under the influence of alcohol, drugs, or the combination of alcohol and drugs. This

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change is inappropriate for a number of reasons, including the following:

a. Impairment to the slightest degree sets the standard too low, particularly when there is no requirement for proof of actual unsafe driving. The current standard of incapability of safe driving properly requires a demonstrable effect on a person's ability to safely drive. Merely requiring impairment to the slightest degree does not show a meaningful or significant enough effect on driving to justify incarceration, loss of driving privileges, expensive litigation, and classification of our citizens as a criminals.

b. Impaired to the slightest degree is vague, is capable of objective definition, and does not provide sufficient notice to the public as to the unlawfulness of activity. To the contrary, existing law that requires incapability of safe driving, does provide the public with notice of what illegal conduct is.

c. Prescribed and over-the-counter drugs affect the human body or they would not be prescribed or taken. Coffee contains a drug, caffeine, that can affect the human body. If you establish a standard that makes even the slightest effect of a drug a criminal act while driving, the courts and penal institutions will be over run with our citizens being classified as criminals while otherwise doing what is perfectly legal. A higher standard of misconduct is necessary, incapability of safe driving, rather than impairment to the slightest degree.

d. This bill provides that the mere presence of a drug or metabolite in the body is not a per se violation if it is prescribed by a doctor. (This will be discussed more later) Even though the presence of a drug or

metabolite in the body does not make it a per se violation if prescribed by a doctor, this does not eliminate the ability of a person to violate the law when a drug or metabolite causes them to be impaired to the slightest degree. Even though the proposed legislation creates a defense for a per se violation when the medication is prescribed by authorized drug prescribers, the prima facia evidence provisions provide that a prima facia case that a person is under the influence to the slightest degree is provided if there is any evidence of a controlled substance or the metabolite. The defense of a prescribed medication being a legal defense should be provided across the board for all DUI offenses rather than making a person a criminal for taking a prescribed drug that has some slight effect on them.

e. This bill appears designed to promote alcohol and drug prohibition of the traveling public. If prohibition is desired, it should be confronted directly rather than indirectly in the guise of establishing the illegality of impairment to the slightest degree.

f. Kansas is a substantially rural and agricultural state. Taxi cab service and public transportation are not available throughout a majority of the state and is not readily accessible through many other parts of the state. A bill designed to eliminate impairment to the slightest degree would disproportionately punish people who do not have access to public transportation or taxi cab service.

3. **Creation of per se drug offenses:**

Under the DUI statute, a new category of crime of driving under the influence of drugs or any metabolite thereof in the person's body is created. There are no

numerical requirements for the amount of the drug or metabolite that are required to be found in the body. There is no requirement that the drug or metabolite have an active effect on a person's physical or mental abilities. There is no requirement that the existence of this drug affect the safe operation of the vehicle. The mere existence of the drug or its metabolite while driving becomes illegal. Problems include the following:

a. There is no scientific evidence that existence of a drug metabolite impairs a person physically or mentally. There is no scientific evidence that existence of a metabolite has any effect on the ability of a person to safely drive. Proper exercise of the police powers of the state require that the proposed illegal act have some negative effect on the public safety.

b. Existence of a drug at low levels has no effect on a person's ability to safely operate a vehicle or on a person's abilities physically or mentally. No levels are established for this per se drug offense. Before a per se drug offense should be created, pharmacological and forensic studies should be required to show levels of impairment and their effect on abilities to safely drive.

c. Metabolites of some drugs can be in the body for extended periods of time even though they have no impairing effects on the body. For instance, marijuana metabolites can stay in the body for more than 30 days. These metabolites do not affect the human body. They merely show prior use of marijuana. The purpose of the DUI statutes, to keep the roads safe, is not accomplished by measurement of metabolites.

d. The personnel and financial cost for this newly created crime of drugs or their metabolites becoming a per se crime is

substantial during these difficult financial governmental times. Forensic laboratories are already overworked and understaffed. Their services will be more required upon the establishment of this per se drug offense. Substantial new criminals will be created even without a showing of the effect of a drug or its metabolite on the safe operation of a vehicle. This will increase the cost of incarceration, probation monitoring, post-release supervision, and treatment.

e. The preclusion of a per se violation for drugs or metabolites in the body if the drug is prescribed by a person licensed to practice medicine, surgery, dentistry, and podiatry is incomplete. An osteopath can prescribe medication but that profession is not included within the definition of permitted prescribing entities. Various emergency, nurse, and hospital personnel administer drugs that may not be covered by this exclusion from responsibility from the per se drug and metabolite offense. This exception to criminal responsibility should be applied to all of the drug subsections of the DUI statutes.

f. Over-the-counter drugs and compounds which contains drugs, such as coffee, soda pop, and other foods or beverages, are not excluded as a substance for which criminal liability can be established by this per se drug section. These legal compounds produce metabolites as the body metabolizes these substances. For instance, amoxicillin and tonic water can cause false positive tests for cocaine. Many other legal substances can be unwittingly taken by our driving public that will cause them to become criminals after being subjected to laboratory analysis of their bodily fluids.

4. **The creation of new crimes and penalties is unnecessary.**

a. Crimes already exist to punish persons convicted of activity described under the proposed aggravated DUI provisions of this bill, section 1. The crimes of involuntary manslaughter-DUI and vehicular homicide address the situation of a person who dies following an accident with a person under the influence. Aggravated battery, being injured by the deadly weapon of an automobile by a person who is DUI, already exists. Enhanced punishment for a person transporting a child already exists in the current DUI law. Naturally, all of the DUI penalties under K.S.A. 8-1567 still exist. Penalties exist for the other statutes referred to in the aggravated DUI statute. The aggravated DUI statute is unnecessary.

b. If aggravating conditions or facts arise during the commission of a DUI or other crime that already exists, the court has the authority to impose more than the minimum sentence for crimes that already exist. Under existing laws, the court has discretion to address factors that include the harm to other people, damage to property, criminal history, and unsuitability for rehabilitation in assessing the penalty. If enhanced penalties are sought, penalties should be adjusted under existing laws rather than creating duplicities and confusing new laws that have already been addressed.

c. Diversion is eliminated as a possibility for an aggravated DUI. A prosecutor should be permitted to extend the offer of a diversion under appropriate circumstances. A legislature cannot anticipate all circumstances that could arise.

d. House arrest should be permitted when appropriate circumstances exist. It is prohibited for many of the newly formed crimes described as aggravated DUI. The court should be able to consider the circumstances of the offense, the rehabilitation of the offender, the family needs of the offender, the job of the offender, and other considerations that make house arrest appropriate for specific individuals. House arrest permits a person to work in situations where work release is not viable or available. The cost is typically paid by the defendant. House arrest is less costly than work release. House arrest permits a person to remain involved with their family and to provide family support, both economically and through the care of the family members.

5. **Increased terms of the confinement:**

a. Increased terms of mandatory minimum confinement are financially disadvantagous to the government during lean budgetary times.

b. Mandatory minimum terms of incarceration deny the judiciary to exercise its discretion in crafting punishment that is appropriate for the situation. A judge has greater knowledge of the facts, circumstances, treatment, likelihood for success, and likelihood for failure, and the family needs of the person convicted. Presumptive minimum sentences can be established but there should be flexibility to deviate from the presumptive sentence.

6. **Increased terms of driver's license suspension:**

a. Greater driver's license suspension creates a greater unemployed population of our

state. An unemployed society creates a bigger financial drain on our public assets and promotes a less productive society. Many people who cannot drive, cannot work. Less suspension followed by interlock requirements makes more sense. (see HB 2315.)

b. K.S.A. 8-1020 should also be modified, especially if driver's license penalties are increased. K.S.A. 8-1020(h) should be modified to require that an arrest or custodial taking be lawful so that people are not taken into custody or arrested improperly, unconstitutionally, or based upon discriminatory practices. See Martin v. Kansas Department of Revenue, 285 Kan. 625 (2008). K.S.A. 8-1020(h)(2) should be modified to permit the raising of issues that the breath test equipment was not properly working and should be changed to provide that testing procedures did not comply with the KDHE requirements. The licensee should be permitted discovery of law enforcement officer reports that include the alcohol drug influence report, narrative reports, accident reports, and test machine repair and maintenance documents in addition to discovery that is already permitted by K.S.A. 8-1020(e) and (f). These changes are necessary in light of the substantial effect that the prolonged loss of a driver's license can have on a person, whether driving is a privilege or a right.

7. **Prima facia changes:**

a. Existence of any controlled substance or metabolite of a controlled substance now will be considered prima facia evidence that a person is under the influence of drugs to a degree that they could not safely operate. I refer you to paragraph 3 of the written testimony and incorporate these statements herein.

b. Changes in the prima facia evidence section, K.S.A. 8-1005, are not supported by scientific evidence. A person's ability to safely drive is not impaired at .04. The effect of these changes is to create a new level of intoxication of .04 rather than the .08 level that is currently established. This limit of .04 is too low to have legal significance. This limit of .04 is not described in any other location of our DUI law other than for commercial drivers driving a commercial vehicle.

8. **Determination of "serious injury":**

Section 2 (w) permits a law enforcement officer to define what "serious injury" is. This would violate the administrative procedures act, which places that responsibility in the hands of an administrative hearing officer and later in the hands of a judge, if judicial review is sought.

9. **Preliminary breath test:**

Refusing to take a preliminary breath test is now admissible at trial. Mandatory minimum fines are established. If these changes are made, the legislatively enacted advisory should be mandatory. It makes no sense to require an advisory and to say that the failure to give the notice is not a defense.

10. **Lifetime look back:**

a. The legislature should impose a non-lifetime look back period. Prior occurrences should be permitted to decay. It is unfair to punish someone for activities that are too old so that they do not indicate a pattern or practice of conduct.

b. It is unfair to enhance penalties based upon activities that occurred before the enhancements were made for a lifetime look back period. A prior offense enhances a

current conviction even when the elements of the prior offense are different than the elements for the current offense. The look back period should be affected only to the commencement of the legislative change that required a lifetime look back if a lifetime look back is retained.

11. **Criminalization of under 21 breath test result:**

Possession or consumption of alcohol is already a crime. Criminalizing a breath test result is duplicitous.

12. **Conclusion:**

The changes proposed herein are too costly, already covered in existing law to a substantial degree, are not scientifically supported and are unfair. This bill is opposed by me.

Some changes are appropriate, however. Changes in K.S.A. 8-1020 should be made as outlined in paragraph 6b. Further discovery in driver's license hearings should be permitted as enumerated in paragraph 6b. The lifetime look back period should be eliminated. The advisory for a preliminary breath test should be made mandatory.

Sincerely,

Douglas E. Wells

DEW/teb

Ladies and Gentlemen of this Committee,

You have before you a paragraph buried in HB 2263 that is less of a legitimate law enforcement tool than a dragnet to snare citizens who oppose the war on drugs and may, on occasion, consume currently illegal substances. For the prohibitionists and those who think that all of society's ills are the result of consumption of illegal drugs, this is a panacea. For the majority of Kansans, this bill will mean that even prescription drugs, including Marinol, will subject them to prosecution for driving under the influence if their metabolites are found in the blood. The proposed addition is as follows:

(e) If there was present in the defendant's blood any drug defined in K.S.A. 65-4105, 65-4107, 65-4109 and 65-4111, and amendments thereto, or any metabolite of such drug, it shall be prima facie evidence that the defendant was under the influence of drugs to a degree that impaired the defendant's ability to safely operate a vehicle.

It is undisputed that driving while intoxicated is very dangerous and should be deterred. This bill, however, asks you to cast aside notions of danger and asks you to punish the content of one's blood, without any evidence that the content actually caused the driving the state would allege was dangerous. Codeine, hydrocodone, testosterone, and other prescription medications could produce metabolites that subject the driver to prosecution under this bill. It makes no sense. Thirteen states have legalized medical use of marijuana. Should any medical marijuana patient driving on our highways, in violation of this provision, be prosecuted just for the content of his blood? Since the metabolites can remain in one's system for up to 72 days, long after the psychoactive effects of marijuana have been exhausted, a law presuming one to be impaired within the meaning of the proposed statute is absurd.

The proponents of this bill are interested in ferreting out consumers of controlled substances, punishing them for a presumption of impairment that justifies a conviction for driving under the influence rather than protecting the community from the intoxicated driver. If the proponents have proof of impairment, let them show it. Indeed, the law already provides the proof necessary, that is proof beyond a reasonable doubt that one's driving was impaired to a point that he could not operate a vehicle in a safe manner. There is no evidence that the mere presence of metabolites of controlled substances renders one incapable of safely operating a vehicle.

This section, if passed, will result in needless litigation regarding the chemical composition of one's blood. The expense to the taxpayers for such prosecution is not warranted by the potential deterrent effect of such a draconian law. Reactive legislation never serves the citizens in the manner intended. Last year, this congress banned a substance known as *Salvia divinorum*. Can any one of you recall what the urgency was for such a ban? It is sage. A common landscaping plant. Why? Because it can cause hallucinations if smoked. Most people did not know of the substance before the ban. Next you will be asked to ban banana peels, because if smoked, it can get one high. But alcohol remains socially acceptable. This War on Drugs has to stop.

Thank you for your time, Marc A. Schultz.

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