

MINUTES OF THE House COMMITTEE ON Transportation

The meeting was called to order by Representative Rex Crowell at
Chairperson

1:30 a.m./p.m. on February 8, 1984 in room 519-S of the Capitol.

All members were present except: Representative Larry Erne - Excused
Representative Steve Cloud - Excused
Representative Herman Dillon - Excused

Committee staff present:

Fred Carman, Revisor of Statutes
Hank Avila, Legislative Research
Donna Mulligan, Committee Secretary

Conferees appearing before the committee:

Mr. Leo Hafner, Legislative Division of Post Audit

Chairman Rex Crowell called the meeting to order and the first order of business taken up was in reference to roadside parks. Chairman Crowell announced that he had had two bills drafted, but not yet introduced. The first one would provide for 50 per cent cost share with any local unit of government who took over one of these facilities or parks. The second bill would provide that all those which have been closed but have not been demolished would be reopened, and that any of those demolished which had historic markers in them would be rebuilt and reopened.

Chairman Crowell said the way he would propose speaking to the 5 or 6 that have been totally demolished is passage of a resolution that would provide for a committee to be formed to do a study next summer to determine the needs of the State in terms of roadside parks. The committee would include two members of the House, two members of the Senate, two members of Kansas Department of Economic Development, and two members of Kansas Department of Transportation. Chairman Crowell said that he would like to have the bills and resolution introduced by the committee.

Representative Dempsey made the motion to introduce the two bills and the resolution. The motion was seconded by Representative Guldner. Motion passed.

Chairman Crowell then turned the meeting over to Mr. Leo Hafner, Senior Auditor, Legislative Division of Post Audit, who gave a presentation in regard to the Post Audit study on driving under the influence of alcohol problems in Kansas and current Kansas statutes. (See Attachments 1 and 2)

Mr. Hafner stated that the primary objective of the Driving Under the Influence Audit was to examine statewide compliance with the mandatory sentencing provisions of the law. In addition to reviewing sentencing, he said they also reviewed other areas. For instance, once the sentence was established they tried to determine if the defendant actually fulfilled the sentence. They also reviewed the use of diversion in lieu of prosecution to make sure the diversion complied with the basic requirements of the law and to insure that the defendants were fulfilling their diversion agreements.

Mr. Hafner also told the committee that they checked to see that the convictions and diversions from the sample of arrests were accurately reported and recorded by the Division of Vehicles. Finally, they tried to determine if there appeared to be any violations in the plea bargaining provision of the law. Mr. Hafner said they reviewed 312 arrests in

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Transportation,
room 519-S, Statehouse, at 1:30 a.m./p.m. on February 8, 1984

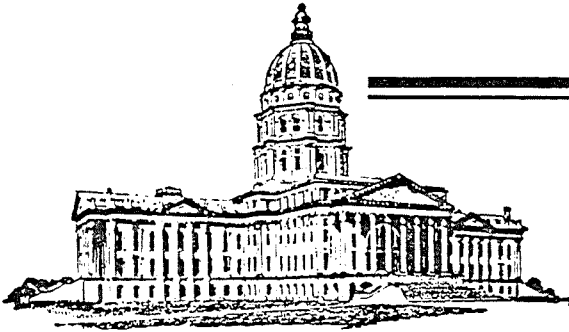
six counties from different areas of the state during the months of September, October and November 1982. These arrests resulted in 133 diversions, 124 convictions, 22 dismissals, 17 failures to appear, 10 acquittals, and 6 cases that were either still pending or referred to juvenile court.

Chairman Crowell opened the meeting to questions and discussion by the committee and announced that he would have staff draft a sheet on the various Driving Under the Influence issues and bring it to the committee for the purpose of deciding what action the committee should take.

The meeting was adjourned at 2:10.



Rex Crowell, Chairman



**DRIVING UNDER THE INFLUENCE:
A REVIEW OF PROSECUTIONS UNDER THE
NEW KANSAS LAW**

**A Presentation to the House Committee
on Transportation**

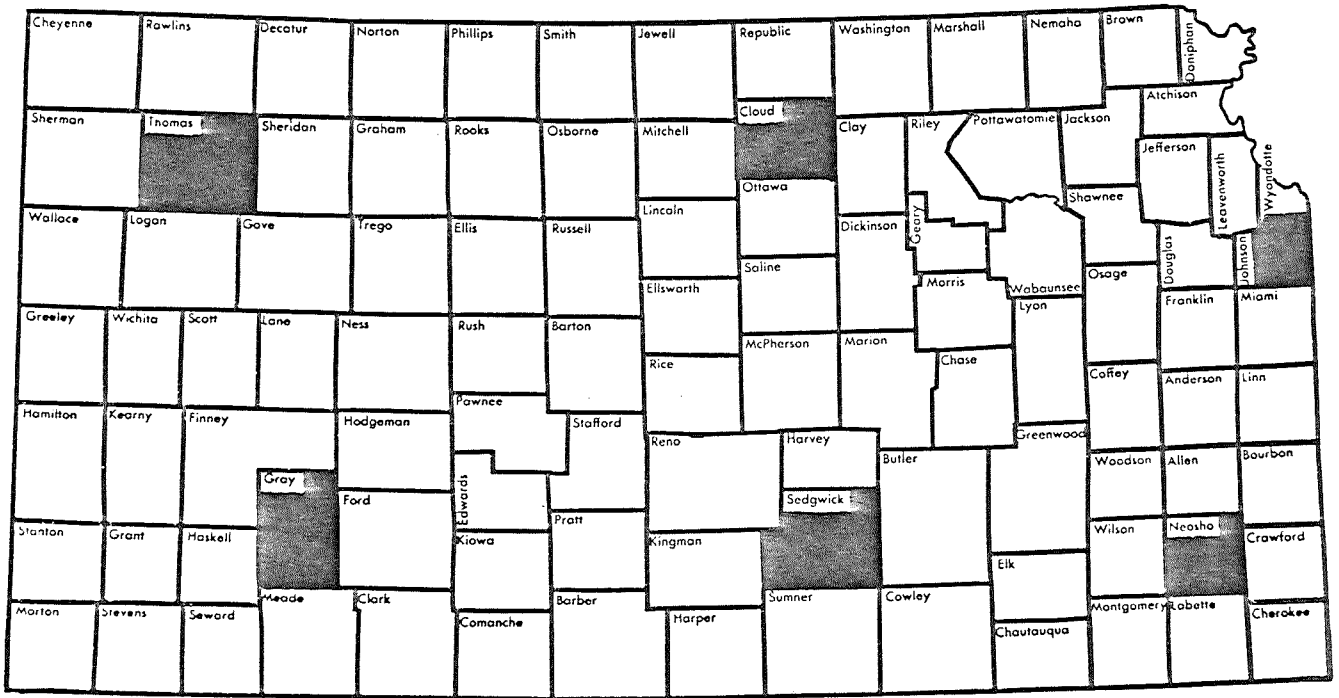
February 8, 1984

**Legislative Division of Post Audit
Leo Hafner, Senior Auditor
296-3792**

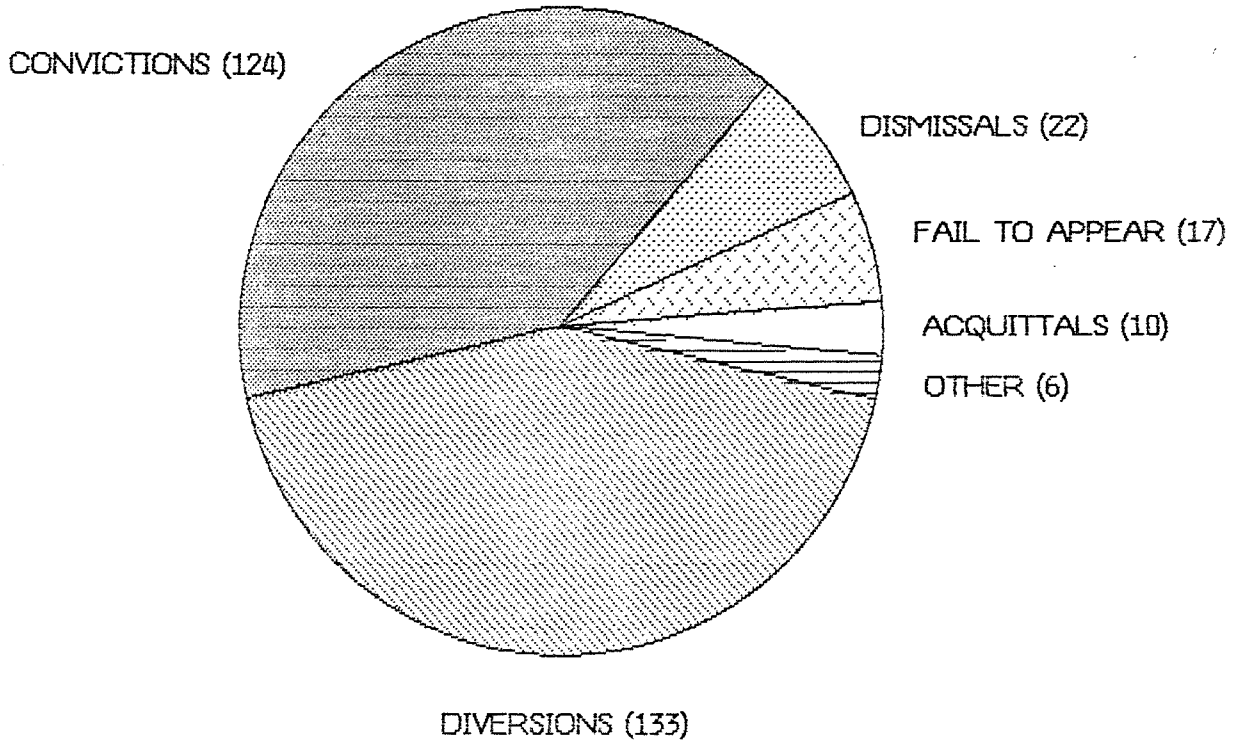
DRIVING UNDER THE INFLUENCE

- 1) **Scope of the Audit Work:**
Reviewed 312 arrests in six counties
- 2) **Convictions:** (124 cases or 40 percent of total arrests)
Compliance with sentencing provisions could be improved. However, no deliberate attempts to circumvent the law were noted. Documentation that jail time was served or that alcohol treatment was completed is often lacking.
- 3) **Diversion:** (133 cases or 42 percent of total arrests)
There is a wide variance in how frequently diversion is used. The variance appears to be largely attributable to local attitudes. A few cases were noted where diversion was misused.
- 4) **Dismissals:** (22 cases or 7 percent of total arrests)
Usually lack of evidence, unavailability of witnesses. No instances of plea bargaining could be documented.
- 5) **Reporting and Recordkeeping for Convictions and Diversions Needs to be Improved**
- 6) **Some sections of the law may need clarification**

DRIVING UNDER THE INFLUENCE
 COUNTIES WHERE ARRESTS WERE REVIEWED



OUTCOMES FOR DRIVING UNDER
THE INFLUENCE ARRESTS
SIX SELECTED COUNTIES



**DRIVING UNDER THE INFLUENCE
STATUTORY PENALTIES**

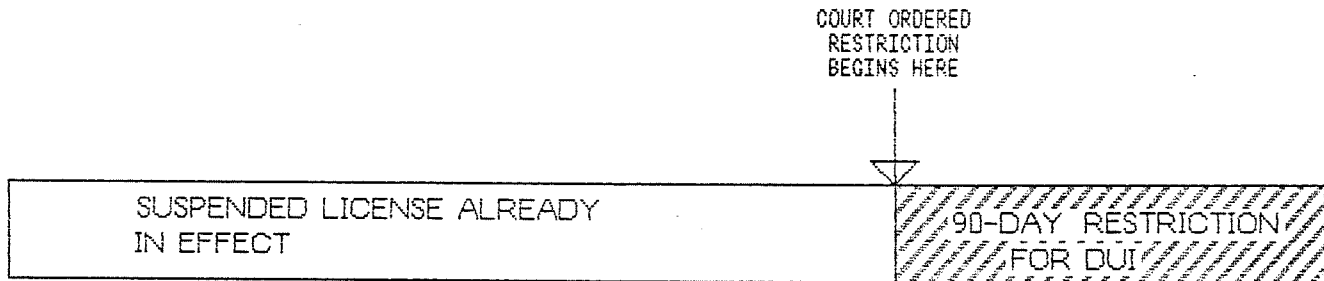
Confinement	Fine	Driving Privileges	Other	Diversion
<u>First Conviction</u>				
48 hours minimum 6 months maximum (100 hrs of approved public service work may be substituted for 48 hours of confinement)	\$200 Minimum \$500 Maximum (Approved public service work may be credited against the fine at the rate of \$5 per hour)	Restricted 90 days Minimum One year Maximum	Must Complete an Alcohol and Drug Safety Action Program	A first offender may waive his right to a speedy trial and have prosecution deferred by entering into a diversion agreement. The defendant must still pay the minimum fine, complete an Alcohol and Drug Safety Action Program, and fulfill other terms as specified in the agreement. Upon successful completion the court will dismiss the charges with prejudice. A violation of the agreement requires active prosecution of the case.
<u>Second Conviction</u>				
90 days Minimum (May be reduced to 5 days if defendant completes an alcohol and drug abuse treatment program) One Year Maximum	\$500 Minimum \$1,000 Maximum (Approved public service work may be credited against the fine at the rate of \$5 per hour)	Suspended for one year or until a treatment program is completed.		Not Allowed
<u>Third or Subsequent Conviction</u>				
90 days Minimum One Year Maximum	\$1,000 Minimum \$2,500 Maximum (Approved public service work may be credited against the fine at the rate of \$5 per hour)	Revoked for one year	As a condition of release the court may require completion of a treatment program for abuse.	Not Allowed

Persons convicted are not eligible for release on probation or suspension or reduction of sentence until the minimum sentence has been satisfied. Also, no plea bargaining agreement may be entered into or approved by a judge for the purpose of permitting a person charged with driving under the influence to avoid the mandatory penalties.

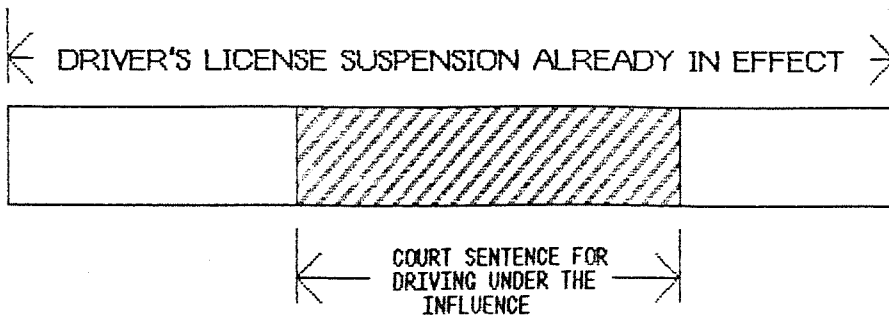
HANDOUT: 5

APPARENT INCONSISTENCY IN DRIVERS' LICENSE PENALTIES

FIRST OFFENSE : COURT SENTENCES NINETY-DAY RESTRICTED LICENSE. RESTRICTION DOES NOT TAKE EFFECT UNTIL ANY PRE-EXISTING SUSPENSION OR REVOCATION TERMINATES



SECOND OFFENSE : COURT SENTENCES SUSPENSION FOR ONE YEAR, OR , UNTIL ALCOHOL TREATMENT IS COMPLETED. DEFENDANT COMPLETES TREATMENT AFTER 60 DAYS. THE ENTIRE PENALTY FOR DRIVING UNDER THE INFLUENCE IS NEGATED BY THE PREVIOUSLY EXISTING SUSPENSION.



HANDOUT: 6

SENTENCING DRIVING UNDER THE INFLUENCE CONVICTIONS UNDER COURT INTERPRETATIONS OF THE CURRENT LAW

JANUARY

FEBRUARY

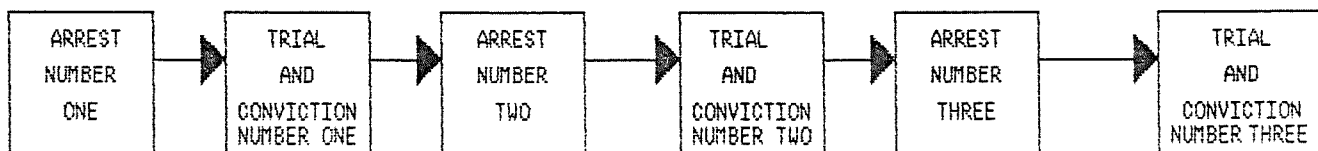
MARCH

APRIL

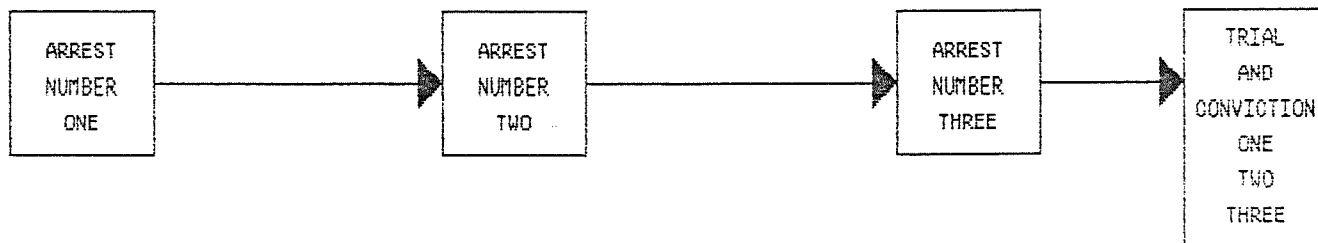
MAY

JUNE

CASE NUMBER ONE:

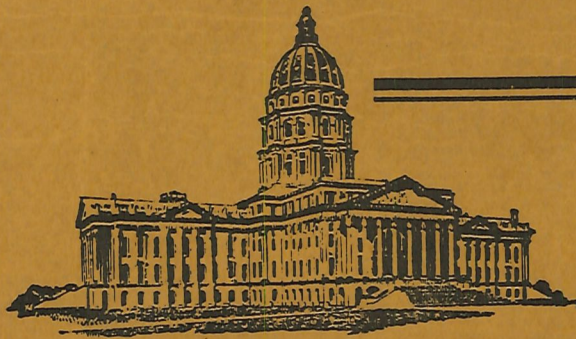


CASE NUMBER TWO:



CASE NUMBER ONE: RECEIVES THE INCREASED PENALTIES THE LAW SPECIFIES FOR EACH OFFENSE.

CASE NUMBER TWO: IS SENTENCED AS A FIRST OFFENDER ON ALL THREE OFFENSES BECAUSE HE WAS NOT CONVICTED ON THE FIRST OFFENSE PRIOR TO COMMITTING THE OTHER TWO.



PERFORMANCE AUDIT REPORT

Driving Under the Influence: A Review of Prosecutions Under The New Kansas Law

**A Report to the Legislative Post Audit Committee
By the Legislative Division of Post Audit
State of Kansas
January 1984**

Att. 2

Legislative Post Audit Committee

Legislative Division of Post Audit

THE LEGISLATIVE POST Audit Committee and its audit agency, the Legislative Division of Post Audit, are the audit arm of Kansas government. The programs and activities of State government now cost about \$3 billion a year. As legislators and administrators try increasingly to allocate tax dollars effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by Legislative Post Audit helps provide that information.

As a guide to all their work, the auditors use the audit standards set forth by the U.S. General Accounting Office and endorsed by the American Institute of Certified Public Accountants. These standards were also adopted by the Legislative Post Audit Committee.

The Legislative Post Audit Committee is a bipartisan committee comprising five senators and five representatives. Of the Senate members, three are appointed by the Minority Leader. Of the Representatives, three are appointed by the Speaker of the House and two are appointed by the Minority Leader.

Audits are performed at the direction of the Legislative Post Audit Committee.

Legislators or committees should make their requests for performance audits through the Chairman or any other member of the Committee.

LEGISLATIVE POST AUDIT COMMITTEE

Senator Paul Hess, Chairman
Senator Neil H. Arasmith
Senator Ross O. Doyen
Senator Tom Rehorn
Senator Joe Warren

Representative Robert H. Miller,
Vice-Chairman
Representative William W. Bunten
Representative Joseph Hoagland
Representative Ruth Luzzati
Representative Bill Wisdom

LEGISLATIVE DIVISION OF POST AUDIT

Suite 301, Mills Building
Topeka, Kansas 66612
(913) 296-3792

PERFORMANCE AUDIT REPORT

Driving Under the Influence: A Review of Prosecutions Under the New Kansas Law

OBTAINING AUDIT INFORMATION

This audit was conducted by three members of the Division's staff: Leo Hafner, senior auditor, Marilyn Allen, auditor, and Curt Winegarner, auditor. Mr. Hafner was the project leader. If you need any additional information about the audit's findings, please contact Mr. Hafner at the Division's offices.

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**DRIVING UNDER THE INFLUENCE:
A REVIEW OF PROSECUTIONS UNDER THE NEW KANSAS LAW**

Summary of Legislative Post Audit's Findings

Are the penalties applied for convictions of driving under the influence consistent with the provisions of the new law? The auditors reviewed 312 arrests taken from a sample of six counties throughout the State. Of those arrested, 40 percent were convicted, 42 percent entered diversion programs, and 18 percent had other dispositions such as dismissals or acquittals. Of those convicted, 78 percent received sentences conforming in all aspects to the statutory penalties. Deviations from the provisions of law in the remaining 22 percent appeared to be attributable to such factors as error, miscounting prior convictions, or miscommunication between the courts and law enforcement agencies. The auditors did not discover any documentable cases of plea bargaining or attempts to give preferential treatment to a defendant.

Do the penalties appear to be reasonably consistent on a Statewide basis? Because most of the penalties were within the minimums and maximums specified by law, sentencing of those convicted appeared relatively uniform. The sentences that did not conform to statutory requirements were not concentrated in specific jurisdictions. However, the use of diversion programs varied considerably. Some jurisdictions did not use diversions at all; others placed more than two-thirds of their first-time offenders on diversions during the months the auditors reviewed. Local attitudes, more than differences in eligibility criteria, seem to account for the variances in the use of diversion.

What other issues may need to be addressed? The auditors found several problems with the administration of the new law. Documentation and monitoring of compliance with sentences and diversions need to be improved in some jurisdictions. Also, Statewide reporting and recordkeeping for convictions and diversions need to be more accurate and complete. Most of the problems the auditors found are administrative in nature, and statutory changes do not appear needed to correct them. However, some issues may require statutory change to resolve. These issues involve the handling of penalties when a defendant is convicted of two or more driving under the influence violations in the same trial, possible inconsistencies with minimum sentences, and timing of driver's license restrictions, suspensions, and revocations.

In general, the problems and inconsistencies the auditors found do not appear to have seriously hampered the effectiveness of the current system. If they can be resolved, however, the system will work more smoothly and consistently. The report suggests some actions that might be taken by local officials, State officials, and the Legislature. It should also be noted that a number of jurisdictions have responded enthusiastically to the law. The auditors found procedures that local officials had developed on their own to make the program work more effectively. This report includes examples of these procedures in the hope that other local officials will be able to use them to improve their own program.

**DRIVING UNDER THE INFLUENCE:
A REVIEW OF PROSECUTIONS UNDER THE NEW KANSAS LAW**

At its meeting on September 13, 1983, the Legislative Post Audit Committee directed the Legislative Division of Post Audit to conduct a performance audit examining the implementation of amendments to the driving under the influence laws as passed by the 1982 Legislature. The audit was to address two main questions:

- Are the penalties applied for convictions of driving under the influence consistent with the provisions of the new law?
- Do the penalties appear to be reasonably consistent on a Statewide basis?

In 1982, the Kansas Legislature stiffened penalties for persons convicted of driving under the influence of alcohol or drugs in Kansas. The current statutory penalties for driving under the influence in Kansas are outlined below.

**DRIVING UNDER THE INFLUENCE
STATUTORY PENALTIES**

Confinement	Fine	Driving Privileges	Other	Diversion
<u>First Conviction</u>				
48 hours minimum 6 months maximum (100 hrs of approved public service work may be substituted for 48 hours of confinement)	\$200 Minimum \$500 Maximum (Approved public service work may be credited against the fine at the rate of \$5 per hour)	Restricted 90 days Minimum One year Maximum	Must Complete an Alcohol and Drug Safety Action Program	A first offender may waive his right to a speedy trial and have prosecution deferred by entering into a diversion agreement. The defendant must still pay the minimum fine, complete an Alcohol and Drug Safety Action Program, and fulfill other terms as specified in the agreement. Upon successful completion the court will dismiss the charges with prejudice. A violation of the agreement requires active prosecution of the case.
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Persons convicted are not eligible for release on probation or suspension or reduction of sentence until the minimum sentence has been satisfied. Also, no plea bargaining agreement may be entered into or approved by a judge for the purpose of permitting a person charged with driving under the influence to avoid the mandatory penalties.

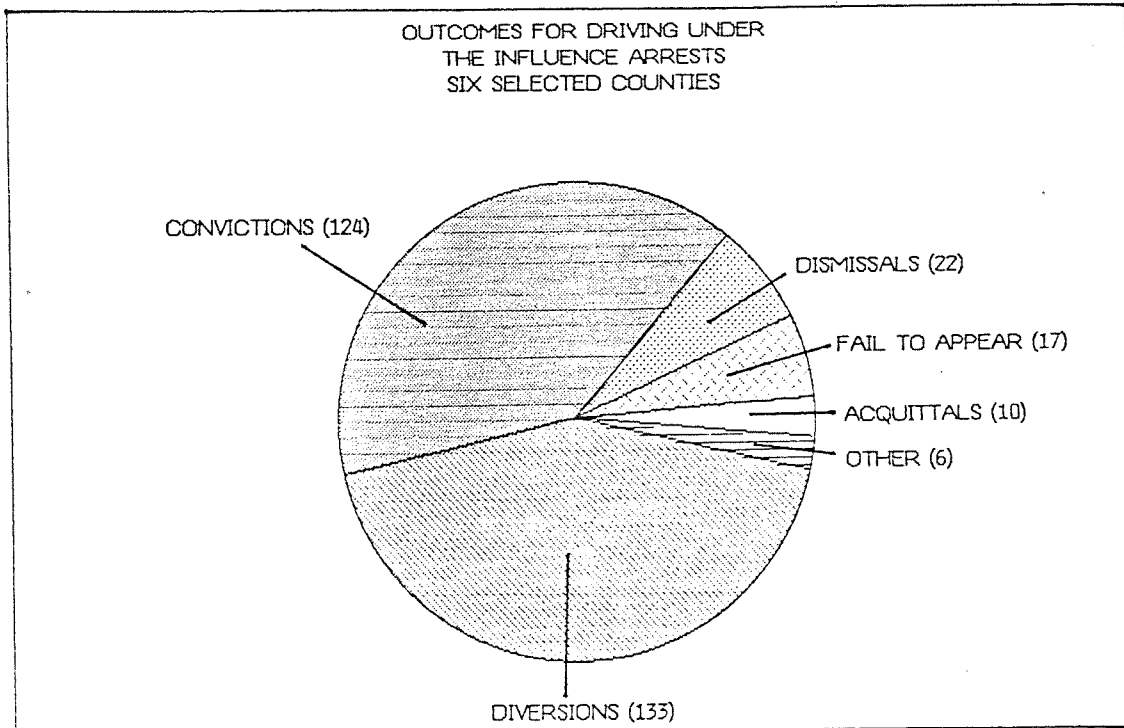
Administration of the law is complicated by the fact that so many agencies must be involved. Law enforcement officers, prosecutors, judges, probation officers, State officials, and others must cooperate to ensure the success of the system. The need for cooperation between so many agencies and individuals increases the likelihood that some problems and inconsistencies will occur when a new law is put into effect. To help gain an understanding of the difficulties that local officials were encountering, the auditors surveyed them to find out what kinds of problems they found in putting the law into effect. Appendix B of this report summarizes their comments.

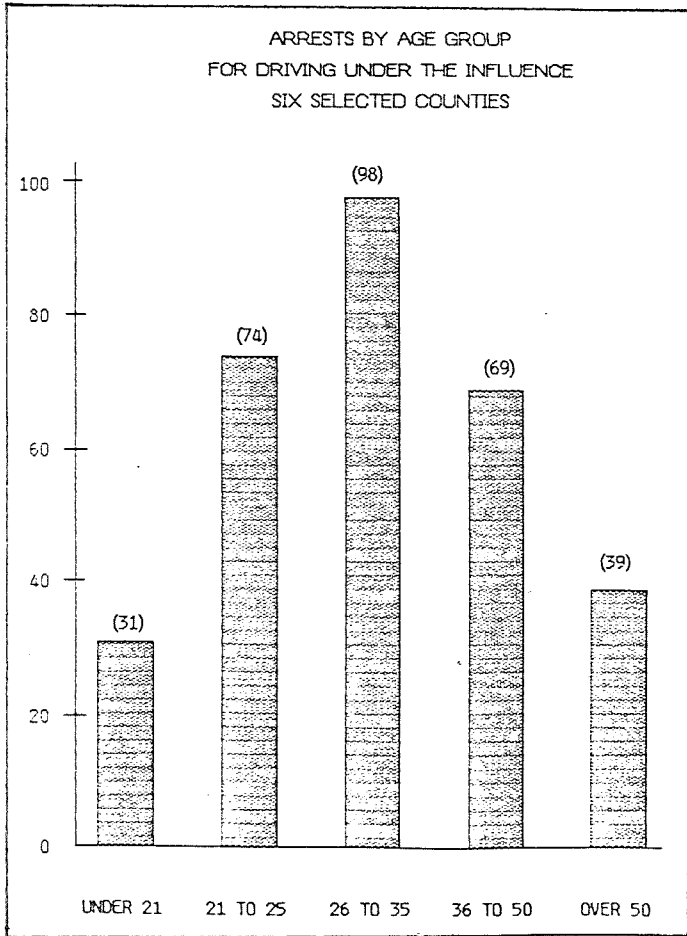
Although some of the problems will perhaps be overcome as local jurisdictions learn from each other and become more accustomed to the new law, formal attention to making the program more consistent may be necessary. At the end of this report, some suggestions are made about steps that might be taken to create more consistency.

What Penalties Are Being Applied to Persons Convicted of Driving Under the Influence, and Are These Penalties Consistently Applied?

The cases examined by the auditors were for persons arrested by the Highway Patrol and by local law enforcement agencies during September, October, and November 1982. The new law took effect in July, and the auditors chose these three months to allow time for cases to have been brought to trial and for some diversion agreements to be fulfilled. In the four less populous counties, the auditors reviewed all driving under the influence arrests for the entire three-month period. Due to the heavier caseload in Sedgwick and Johnson counties, the auditors reviewed cases tried in the district court and in two selected municipal courts in each county. At least one in every three arrests was examined in these jurisdictions.

In all, 312 arrests were reviewed. The chart below shows the dispositions for all 312. As the chart indicates, 133 cases (42 percent of the arrests





reviewed) ended in diversion agreements. The next highest number, 124 cases (40 percent of the total) ended in convictions. The remaining 18 percent of the arrests examined were comprised of 10 acquittals, 22 dismissals, 17 failures to appear at court hearings, and 6 cases classified as "other." The cases classified as "other" primarily included cases pending, juvenile court cases, and cases with amended charges.

Of the cases reviewed, 87 percent were male and 13 percent were female. The ages of persons arrested ranged from 16 to 73, with an average age of 33. The chart to the left shows the age groupings in greater detail. Records indicate that about 19 percent of the persons whose arrests were reviewed were involved in an accident at the time of arrest.

These numbers and percentages pertain only to the cases

reviewed. They cannot be projected to the State as a whole. The auditors' sample of cases was not drawn in such a way that such projections could be made.

Penalties for Convictions Generally Conform to the Provisions of Law, But Exceptions Do Occur

The auditors reviewed sentencing documents for the 124 persons from their sample who were convicted of driving under the influence. These included 78 first convictions, 30 second convictions, and 16 third or subsequent convictions. In 97 cases, or 78 percent of the convictions reviewed, the sentence imposed by the court conformed in all aspects to the statutory minimum or maximum penalties.

The remaining 27 cases deviated from the provisions of law in one or more ways. A summary of the sentencing deviations appears below. The total count of deviations adds to more than 27 cases because some had more than one deviation.

- Ordering less than the minimum required imprisonment (3 cases)
- Suspending imprisonment before the defendant had served the minimum time (6 cases)

--Ordering less than the minimum fine required or suspending it altogether (14 cases)

--Failing to order a driver's license penalty or ordering the wrong type of penalty (for example, ordering a restricted license when a suspension or revocation is called for) (15 cases)

The auditors reviewed each of these sentencing problems as thoroughly as possible. They examined the files for supporting documentation and talked with prosecutors and other officials to obtain additional information. They did not discover any obvious attempts to give preferential treatment. Instead, the problems seemed to stem from errors, miscommunication, and the like.

Some of the sentencing problems seemed to have resulted from miscounting of prior convictions. In these cases, the sentences often conformed to the requirements of a first conviction, even though records at the Division of Vehicles indicated one or more previous offenses. Other problems appeared to be attributable to poor communication between the courts and law enforcement units. In Gray County, for example, three otherwise conforming sentences provided for immediate suspension of the jail term because the judge mistakenly believed that the defendants had already served the mandatory minimum time.

Still another problem appeared to be the use of suspended sentences as an inducement to fulfill other conditions imposed by the court. The auditors noted four cases in the Sedgwick County District Court in which the judge imposed a fine that could be reduced to an amount below the statutory minimum if the defendant successfully completed conditions of parole. Additional detail on non-conforming sentences can be found in Appendix C.

A few of the cases that did not conform to all the provisions of the law involved persons whose multiple arrests for driving under the influence were consolidated into a single trial. In these cases, there were varying interpretations of what penalties should be assessed. This particular problem, which may require some statutory clarification, will be addressed in more detail later in this report.

In addition to the 124 convictions, there were other kinds of outcomes that needed to be reviewed. Of the 312 arrests reviewed by the auditors, 22 resulted in dismissals. In some cases, the charge was dropped completely, and in others, reduced charges were filed. The auditors examined these cases as closely as possible to see if they reflected plea bargaining or some kind of preferential treatment.

The new law contains a provision against plea bargaining. It states that no plea bargaining agreement may be entered into or approved for the purpose of avoiding the mandatory penalties. This provision would appear to have a very limited effect. It prohibits a formal agreement for the purpose of avoiding the mandatory penalties, but it does not preclude a prosecutor from amending or dismissing the charge on the basis of the facts presented. The auditors did not find any examples of formal plea bargaining agreements that would be prohibited under the new law.

In determining the reasons for the 22 dismissals, they were limited largely to the recollection of prosecutors and judges in the specific cases. The reasons given for most dismissals tended to be lack of evidence, unavailability of witnesses, and the like. The auditors did not find any widespread or consistent practice in any jurisdiction that would indicate a pattern of plea bargaining or preferential treatment. Abuses under the law could still occur, and they would be difficult if not impossible to detect. A relatively small number of dismissals may, however, provide some assurance that such practices are not widespread.

Diversion Programs Vary Greatly in the Amount They Are Used

Diversion provides an alternative to prosecution for defendants who have not previously participated in a diversion program and who have not been convicted of or pled no contest to driving under the influence in the five-year period immediately preceding their arrest. To participate in diversion, the defendant must waive certain legal rights and fulfill the minimum statutory conditions for a diversion agreement. Those conditions include:

- Payment of a \$200 fine or performance of 40 hours of community service work
- Successful completion of an Alcohol and Drug Safety Action Program or a treatment program or both
- Payment of an \$85 assessment for the State Alcohol and Drug Safety Action Fund (may be waived if indigent)

Additional conditions may also be included at the discretion of the prosecutor. If the defendant fulfills all of the conditions of the agreement, at the end of the diversion period the prosecutor will act to have the charge of driving under the influence dismissed. The major benefits of participating in a diversion program are that the defendant may avoid the mandatory imprisonment and driver's license restriction associated with a conviction.

Use of diversions varies significantly in the counties visited by the auditors. The chart below shows the percentage of first-time arrests that were placed in diversion during the time period reviewed by the auditors.

Diversions As A Percentage of First Offenses

District Courts	Percent	Municipal Courts	Percent
Cloud County	0	Concordia	0
Gray County	0	Mission Hills	67
Johnson County	56	Overland Park	65
Neosho County	0	Chanute	88
Sedgwick County	56	Wichita	60
Thomas County	25	Derby	46

The highest percentage of diversions was 88 percent in the Chanute

Municipal Court. Four jurisdictions had no diversions. Because such a wide variance exists in the use of diversion for first-time offenders, the auditors reviewed diversion eligibility requirements to determine why the variance may be so great.

Local attitudes, not differences in eligibility criteria, seem to account for the variances in the use of diversion. The primary statutory requirements for eligibility for a diversion program are that the defendant must not have been found guilty or pled no contest to a driving under the influence charge, and that the defendant must not have participated in a diversion program within the past five years. The statute also lists criteria to be considered by city, county, or district attorneys when considering a defendant for diversion. Those criteria are:

- The nature of the crime
- Special characteristics or circumstances of the defendant
- Whether the defendant is a first-time offender of an alcohol-related offense and if the defendant previously participated in diversion
- The probability that the defendant will cooperate with and benefit from diversion
- Whether the available diversion program is appropriate to the needs of the defendant
- The impact on the defendant and the community
- Recommendations of the law enforcement agency
- Recommendations of the victim
- Provisions for restitution
- Any mitigating circumstances

Most of the jurisdictions visited by the auditors have included these same criteria in their written guidelines for diversion programs. Some jurisdictions have added additional criteria. For instance, several jurisdictions indicated that diversion would be denied if an injury accident was involved. Other jurisdictions indicated that they reviewed past criminal or traffic records. Still others considered failure to carry liability insurance at the time of an accident as a factor.

Even though written criteria for diversion eligibility may seem reasonably consistent in most jurisdictions, local attitudes about whether or not diversion is an acceptable alternative may have a significant impact on its use. In the Neosho County District Court, the county attorney does not offer diversion. Cloud County also indicated that it did not favor diversions but did offer them.

Another factor which affects the number of diversions found in each jurisdiction is the varying effort in developing a program and notifying defendants of its existence. State law requires each county attorney and each city attorney to adopt written policies and guidelines for implementing a diversion program, and to inform each defendant in writing of the diversion program. In Neosho, Cloud, and Thomas counties, however, a systematic written notice of diversion was not provided to all defendants. Discussions with the county attorneys indicated that defendants usually learned of diversion from their defense counsel. Such systems may not ensure that all defendants are made aware of the possibility of diversion. In the three other counties, all

defendants are normally given information about diversion at their first court appearance.

The auditors also found problems with the development of written policies and guidelines for the diversion program. In Neosho County, the County Attorney does not offer diversion and therefore has developed no guidelines. In Thomas County, the County Attorney did not appear to have written policies and guidelines at the time of the auditors' visit. In his written response to the draft audit report, the County Attorney provided a set of written guidelines.

Jurisdictions also vary somewhat in their requirements for completing a diversion program. The basic diversion agreement in most jurisdictions requires that the defendant do the following:

- Pay a diversion fee
- Pay the minimum fine applicable to a first conviction of driving under the influence
- Pay the \$85 fee assessed by the State on all persons convicted of driving under the influence
- Enter and complete an Alcohol and Drug Safety Action Program or other prescribed treatment
- Pay the costs of any evaluations or treatment programs
- Report periodically to a diversion coordinator or a probation officer
- Receive no driving under the influence convictions
- Waive right to a speedy trial
- Stipulate to the facts of the case

In addition, most diversion agreements have a provision labeled "other" which allows some individual tailoring of the agreements. Requirements that were used by a few but not all jurisdictions are:

- Required attendance at a specified number of Alcoholics Anonymous meetings each week or month
- Complete abstinence from intoxicating liquor or cereal malt beverages during the diversion period
- An administrative fee to cover the cost of supervising community service work performed in lieu of paying the minimum fine
- Required submission to a breath, blood, or urine test at any time during the diversion period

The auditors also noted some variation in the length of time diversion agreements were in effect. For instance, municipal court diversions in Chanute are usually for six months. Other jurisdictions visited generally had a one-year diversion period. However, even in the jurisdictions with one-year agreements, the diversions were sometimes terminated after a shorter period for specific reasons. An example might be a defendant who needed to move out of state to take a new job.

In Mission Hills, the auditors noted one provision in the diversion policy statement that may be inappropriate. This provision states that upon successful completion of the diversion agreement, "the original complaint is either dismissed outright or dismissed upon filing of, and entry of a plea of guilty to, a new complaint charging a lesser offense." This provision may not be consistent

with K.S.A. 12-4418(b), which states that if the defendant has fulfilled the terms of the diversion agreement, the municipal court shall dismiss with prejudice the criminal charges filed against the defendant. The law makes no provision for a guilty plea to a lesser charge. The city prosecutor indicated that the provision was included to provide an additional sanction to be used in concert with a diversion program. Its intended purpose is to more appropriately punish a first-time offender who deserves more punishment than the usual conditions of diversion because of aggravated circumstances associated with his arrest.

Problems with individual diversion agreements were also observed. The auditors noted several instances in which terms of a diversion agreement had been violated, and the prosecutor filed a motion with the court to have the case placed on the active prosecution docket in accordance with the provisions of K.S.A. 12-4418 or 22-2911, but the judge denied the motion of the prosecutor. The auditors were told that sometimes a judge will not allow prosecution of a diversion case for failure to pay a fine on time, or failure to report to a probation officer as directed.

In two cases reviewed by the auditors, it appears that the prosecutor improperly placed the defendant on diversion. In the first instance, the defendant was arrested for driving under the influence while already on diversion. A motion was filed to terminate the diversion and resume prosecution. Instead, the defendant was given a new diversion agreement for an additional twelve months which, if fulfilled, would result in the original charge being reduced to reckless driving instead of being dismissed. In the second case, the defendant had originally declined diversion and was tried and convicted. The conviction was appealed. However, while the appeal was still pending the defendant decided to reconsider and accept diversion rather than risk the possibility of losing the appeal. K.S.A. 22-2907 and 12-4414 state that diversion can only be offered after the defendant has been charged and prior to conviction.

In two other cases, persons placed on diversion were allowed to apply a portion of the mandatory \$200 fine against the cost of a required alcohol or drug treatment program. The law specifically states that the cost of any alcohol and drug education, rehabilitation and treatment programs shall be paid by the person participating in such program. The minimum fine is required by K.S.A. 12-4416 and 22-2909, and these statutes make no provision for applying the fine against the cost of treatment.

Documentation and Monitoring of Compliance with Sentences and Diversions Need to be Improved in Some Jurisdictions

The auditors spot-checked a number of the convictions and diversions within their sample to determine that fines were paid and that jail sentences, community service work, and alcohol treatment requirements were fulfilled. The biggest problem they noted in this area was documentation that the defendant entered and completed an alcohol and drug safety action program as required by law. In 29 cases, either the defendant did not enter and complete the required alcohol and drug safety action program or there was not sufficient evidence to determine that it was completed. This problem seems to occur

because the courts are not requiring timely and complete documentation from alcohol counseling and treatment agencies. In one case, the diversion coordinator who was using the services of a private counseling agency received notice of non-compliance two months after the defendant had been released from his diversion agreement.

In other cases, the mandatory imprisonment, even though ordered by the court, was not always served by the defendant. The auditors noted nine cases where insufficient time was served or where community service work in lieu of imprisonment was not fulfilled. This occurred for a number of reasons. For instance, prior to November 17, 1983, defendants sentenced in Wichita Municipal Court were receiving a credit of two days on their jail sentence for every day served in city work programs. When the judge became aware of this practice he immediately issued a memorandum to terminate its use. In Gray County, poor communication between the jail and the court allowed several defendants to have their sentence suspended before serving the required time. It also appeared to the auditors that there were cases in some jurisdictions in which any portion of a day served in jail counted as a full day, even if it was only a few hours.

Finally, twelve cases were noted in which fines were not paid. The courts do issue bench warrants for people who do not serve their time or pay their fines. However, in most communities, the backlog on these warrants is large and the manpower to make arrests is limited. As a result, it appears that some persons convicted may effectively avoid fulfilling their sentences for lengthy periods of time and perhaps indefinitely. For instance, the Wichita City Attorney's office indicates that there may be as many as 25,000 to 30,000 active warrants pending at all times. Such a load creates long delays between the time a bench warrant is issued and a person is arrested.

Statewide Reporting and Recordkeeping for Convictions and Diversions Need to Be Improved

The auditors reviewed records at the Division of Vehicles to determine whether convictions and diversions were being accurately reported and recorded on drivers' records as required by law. They also determined whether license restrictions, suspensions, and revocations imposed by the courts were entered for the appropriate period of time. This review indicated several problems with recordkeeping or reporting.

Of the 257 convictions and diversions checked by the auditors, 18 were either not reported or recorded on the drivers' records. The impact of this is that subsequent convictions for these individuals could result in lighter sentences than they would normally receive under the law.

Of the cases that were recorded, 48 contained discrepancies between the dates contained in court documents and those recorded by the Division of Vehicles. The discrepancies ranged from one day to six months. Seventy-four percent of the dates were different by more than five days, and one-third were off by a month or more. In many cases, personnel at the Division of Vehicles had used the date on which the court documents had been filed, rather than the date of the court's action. In other cases, it appeared that the arrest date or

sentencing date had been used instead of the conviction date. The documents provided by the courts are often difficult to read and interpret. A standardized form for reporting the required information would help eliminate such errors. The auditors learned that the Division already has developed such a form, but has not pressed the courts to use it. As a result, the form is little used, and the errors persist.

The auditors also noted 15 cases of problems with restrictions, suspensions, or revocations of driving privileges. The majority of these problems were the result of a license restriction scheduled to run concurrently with a previous suspension or revocation. Subsection (c) of K.S.A. 1983 Supp. 8-1567 states, "If the person convicted has a suspended or revoked driver's license, the court shall not make the restricted license, provided under this subsection, applicable until the suspension or revocation is terminated."

The Division of Vehicles often receives court judgments restricting the licenses of persons convicted of driving under the influence, when those persons already have a suspension or revocation in effect. In these cases, the Division mails a letter to the court and to the driver stating that the restriction is invalid. In eleven of the cases reviewed, the auditors found no further correspondence from the court to provide for a period of restriction after the suspension or revocation had been taken off. The auditors asked officials at the Division of Vehicles if they thought they had authority to run the original court restriction after a pre-existing suspension or revocation was completed. The officials indicated that they did not have authority to apply the restriction for a period of time other than the period specified by the court. As a result, it appears that if the court takes no action to adjust the dates of a driver's license restriction to allow it to run after a pre-existing suspension or revocation, the driver receives no restriction at all.

The auditors found an additional problem that might be avoided if convictions and diversions for out-of-state drivers were kept in the Division's records. In their sample of 257 convictions and diversions, there were 33 cases in which the individual was arrested on an out-of-state license. Officials at the Division of Vehicles indicated that standard procedure for these cases is to forward the court documents to the home state of the person arrested. Kansas maintains no records of these arrests. The potential problem noted by the auditors is that some of these persons can later apply for and obtain a Kansas drivers license with no record of their previous driving under the influence conviction. The auditors found two such cases within their sample. In neither case was there any record of the prior conviction.

Some Aspects of the Current Law May Need Clarification

Most of the problems described in this report are administrative in nature, and statutory changes do not appear needed to correct them. However, the auditors did find issues that may require statutory changes to resolve. One relates to the handling of multiple driving under the influence violations on the same day, one relates to possible inconsistencies with minimum sentences, and one relates to the timing of driver's license restrictions, suspensions, and revocations.

Multiple driving under the influence violations tried on the same day. The auditors found several instances in which an individual had multiple violations of driving under the influence that were consolidated into a single trial. In these cases, there were varying interpretations of the penalties to be assessed. In recent weeks, a Kansas Supreme Court ruling has been issued that may result in a more uniform interpretation. The Legislature may wish to evaluate the effect of that decision.

Under the Kansas Habitual Criminal Act (K.S.A. 21-4504), courts have ruled that a sentence cannot be lengthened for conviction on multiple violations unless the succeeding offense was committed after conviction for the previous offense. On this basis, it appears that a person charged with several consecutive violations of driving under the influence could avoid the mandatory minimum penalties of subsequent offenses by having his or her attorney schedule the trial on all charges for the same day. The Kansas Supreme Court in a recent ruling (*State v. Osoba*, 234 Kan. 443) upheld a trial court decision stating that before a person can make himself liable to be convicted of a second offense, he must previously have been convicted of the first offense. Thus, unless the law is changed, provisions of the Habitual Criminal Act will affect sentencing under the driving under the influence law. This may or may not be what the Legislature had in mind.

New Jersey's and Louisiana's legislatures have already amended their laws to clarify this intent on this issue. In New Jersey, the law allows enhancement of the sentence as a second offender, even though the second offense occurs before conviction for the first. Language referring to "conviction" was replaced by reference to a "first offense" and a "subsequent violation." In Louisiana, the legislature changed the language "on a second conviction" to read "on a second conviction, regardless of whether the second offense occurred before or after the first conviction."

Inconsistencies with minimum sentences. Two provisions of the law appear to provide some inconsistency in handling minimum sentences. Sections dealing with first- and second-time offenders provide that the person convicted shall not be eligible for release on probation or suspension or reduction of sentence until the minimum sentence has been satisfied. The section dealing with sentencing third or subsequent violations states that the person convicted shall not be eligible for release on probation or suspension or reduction of sentence. The omission of the phrase "until the minimum sentence has been satisfied" raises questions as to whether a person convicted of a third offense and sentenced to a one-year imprisonment can be released after serving the 90 day minimum. In practice, the courts are releasing some defendants after 90 days even when longer sentences are imposed. It appears that a wording change would be appropriate to validate this practice.

Timing of driver's license restrictions, suspensions, and revocations. K.S.A. 1983 Supp. 8-1567(c), which specifies penalties for first-time convictions, requires restricted driving privileges for a specified period of time. This section also states that if the person convicted already has a suspended or revoked driver's license, the court shall not make the restricted license applicable until the suspension or revocation is terminated. Other sections of

the law which require suspended or revoked licenses for second or third offenses do not require that the court make the driving under the influence suspension or revocation applicable after a previously existing suspension or revocation is completed. The apparent intent of the Legislature in sentencing first-time offenders was to ensure that a preexisting suspension or revocation not be supplanted by a restriction. However, without similar wording in the sections relating to second and third violations a first time offender can sometimes receive a greater penalty than a second-time offender. The auditors noted a significant potential for this to occur because many of the drivers' records they reviewed already had a suspension or revocation in effect at the time they were sentenced for driving under the influence.

What Actions Might Help Bring About Better Administration of the Driving Under the Influence Law?

As the report shows, the auditors found a variety of problems with the administration of the new law. In general, these problems do not appear to have seriously hampered the effectiveness of the current system. If they can be resolved, however, the system will work more smoothly and consistently.

Actions can be taken at both the local and State levels. Although this audit was limited to six counties, the local actions suggested here can probably be beneficial if done throughout the State. The auditors would suggest consideration of the following actions:

Actions by Local Officials

1. Local officials can review their documentation, monitoring, and reporting of sentences and diversions and make improvements as necessary. Areas that could be reviewed include the following:
 - Taking formal steps to make sure that all sentences and diversions conform to the provisions of the law, or evaluating the effectiveness of existing steps if they are already in place.
 - Taking formal steps to follow up and document that the provisions of sentences and diversions have been met, or evaluating the effectiveness of existing steps if they are already in place.
 - Placing increased emphasis on accurate and timely reporting of sentences and diversions to the Division of Vehicles, using the Division's standardized form to help make the information in the system more accurate and complete.
2. Local prosecutors can take an active role in reviewing the development and use of their diversion programs as compared to programs in other jurisdictions.

Actions by State Officials

1. The Division of Vehicles can review its system for recording sentence and diversion records. Areas of action can include the following:

- Actively encouraging local jurisdictions to use the Department's standardized reporting form to help make information in the system more accurate and complete.
 - Evaluating any additional steps to enter information on the most accurate and timely basis possible.
 - Evaluating the advisability of maintaining information on out-of-state drivers convicted of driving under the influence in Kansas.
2. The Unified Judicial Department and the Division of Vehicles can take the lead in determining how problems with overlapping or contradictory restrictions, suspensions, and revocations of driver's licenses can be resolved.

Actions by the Legislature

1. The Legislature can examine the problems noted with the wording of the current law and determine whether any statutory changes need to be made.

APPENDIX A

Examples of Local Programs or Procedures Driving Under the Influence Program

In their visits to various law enforcement agencies, courts, and other local offices, the auditors found examples of programs and procedures that local officials have developed to make the driving under the influence program work more effectively. Some of these programs or procedures are noted here in the hope that other jurisdictions may also be able to use or benefit from them.

The Sedgwick County District Attorney has developed a standard form which lists the mandatory penalties required by law for first, second, and third or subsequent offenses of driving under the influence. During the review of each case, the number of prior convictions is determined for the defendant. Once this has been determined, a form spelling out the mandatory sentence for the defendant's offense is affixed to the case file. This enables the prosecuting attorney to be fully aware of the statutory penalties, so that in the event the judge imposes a sentence that does not fulfill the requirements of the law, the attorney can remind the judge of the requirements of the law. Such a system, if generally adopted by prosecuting attorneys, would help to virtually eliminate sentences that do not conform with the law.

The Colby Police Department has developed procedures for improved collection of evidence in cases of driving under the influence. Often, dismissal of charges in driving under the influence arrests is the result of a defendant's failing to submit to a breath alcohol test and a lack of sufficient additional evidence to prosecute the case. In response to this, the Police Chief developed a comprehensive set of arrest procedures and reports to better document the evidence of the case so that a breath or blood test refusal by the defendant takes away only a small part of the evidence in the case. The Police Chief requires two officers to witness the tests given in all driving under the influence arrests, and the report form requires a step-by-step set of tests to be given and questions to be asked so that nothing should be missed. The form requires signatures of both the arresting officer and the witnessing officer. Similar efforts were also noted in other law enforcement agencies.

In Concordia, the journal entries for sentencing in the Cloud County District Court are somewhat more specific than those found in the other jurisdictions the auditors reviewed. The journal entries often spelled out such things as the date a driver's license restriction was to be imposed and lifted, and the date and time that the defendant was to be committed and released from the county jail. Specifically spelling out the terms of a sentence is an important aspect of enforcement which can eliminate many questions by people such as jailers or probation officers who later have to enforce the terms of a sentence.

Both the Sedgwick County District Court and the Overland Park Municipal Court have diversion programs that other jurisdictions with less developed programs might learn from. In Sedgwick County, evidence in the diversion files indicated that offenders were monitored closely and were immediately notified if deficient in fulfilling the requirements of their agreement.

In Overland Park, efforts to notify all defendants about diversion are well developed. When copies of driving under the influence arrests are received from the police department, Overland Park automatically mails a copy of diversion policies and guidelines to each defendant and records that fact in a daily log book.

The city also monitors diverttees very closely. The fact that a defendant is on diversion is reported on the Kansas City, Missouri ALERT II computer system as well as to the Division of Vehicles. In the event an officer from any jurisdiction which utilizes ALERT stops a person for any reason, the computer is checked. If the person is on diversion, and if, in the officer's opinion, the individual has been consuming cereal malt beverage or alcohol, it will be reported to the prosecutor's office and diversion termination proceedings begun. In addition, quarterly checks of the diverttee's driving and criminal record are made to see that an individual has not been arrested for or convicted of an offense where alcohol or cereal malt beverage were involved.

Overland Park maintains its own certified in-house Alcohol and Drug Safety Action Program. This was done to improve control over class size, attendance and course content. A 16-hour aftercare course is also offered, and a special chapter of Alcoholic Anonymous meets in the Justice Center. This was done in response to concerns of area Alcoholics Anonymous chapters that attendance by persons convicted of driving under the influence was not voluntary and tended to disrupt their own meetings.

APPENDIX B

Problems Mentioned by Local Officials with Regard to the New Driving Under the Influence Law

During the fieldwork in the six counties covered by this report, the auditors spoke with a number of city and county officials. Survey documents were left with a total of 44 officials in the six counties requesting that each official outline what he or she perceived as the three biggest problems in implementing or enforcing the new driving under the influence laws. Those asked to fill out surveys included prosecutors, law enforcement officials, court clerks, and judges. Responses were received from 20 of those who received survey documents. Six of those responses indicated that no significant problems had been noted. The remaining 14 responses indicated a wide range of problems.

The problems most often mentioned concerned jail sentences, especially the cost of confinement. Gray County and most of the municipal courts only have holding facilities and must pay a per diem charge to house prisoners in county jails and in some cases pay for transportation to and from the jail for each court appearance. Jail overcrowding as a result of mandatory sentencing was also mentioned as a problem. The lack of facilities for women and the lack of female jailers were mentioned. Work-release for prisoners created a problem due to lack of adequate jail staff to check prisoners in and out.

The next most frequently mentioned area of concern was the difficulty in determining a defendant's history of convictions. Some found problems with the timeliness and accuracy of the records kept by the Division of Vehicles. Others stated there is a lack of means for tracking other charges that are pending, since a recent disposition could affect the minimum sentence required.

Repeated continuances granted to defendants was another area of concern. Delay can lead to dismissal of charges, since the witnesses may be unavailable or the time allotted for a speedy trial may be exceeded.

Another frequently mentioned problem was the lack of staff to monitor and supervise those on diversion, probation, or parole. This is especially true in the municipal courts where they often do not have access to probation departments as the district courts do.

The Wichita Police Department noted an interesting problem that may be connected with the new laws. Wichita has experienced an 8.8 percent increase in hit and run accidents. Although a direct connection is difficult to trace, they thought this increase may correlate with the experiences of other jurisdictions, where persons will leave the scene rather than stay and face stiff penalties for driving under the influence.

Specific comments included on the survey questionnaires are included or paraphrased as follows:

1. The mandatory sentences have put a tremendous burden on the jail budget.
2. The expense per day for lodging prisoners plus transportation to and from court.
3. Overcrowding county jails with no funding assistance from any source.
4. Funding for jail costs charged by the county for incarcerating defendants.
5. The mandatory jail time is putting a large dent in my budget as the city has to pay almost \$30 per day to house any prisoner booked in the county jail by the city.
6. Make it mandatory for the defendants to serve the 48 hour sentence all at one time, instead of one day now and one day a week later, etc., due to cost factors.
7. Serious overcrowding in the jail has been compounded by the surge in DUI offenders serving mandatory sentences. The court is looking into the Weekend Intervention School as a means of satisfying confinement for first offenders.
8. As our enforcement program progresses into the future we will probably have an increase in second and third time offenders. With current overcrowded conditions we may have to devise a contingency plan for another location of incarceration.
9. Cities are not carrying their fair share in small counties. Some cities are not even writing DUI tickets under the new statute putting the full load on the counties. This is overloading the county prosecution system with no additional funds or personnel.
10. Confusion about counting prior offenses, leading to inconsistency in sentencing.
11. Difficulty in obtaining adequate records concerning defendant's prior convictions and in some instances keeping track of new charges which have been filed in other jurisdictions or were pending at the time of arrest.
12. Receiving timely records from the Division of Vehicles.
13. Receiving accurate records from the Division of Vehicles. It seems that many DUI convictions never show up on DMV records.
14. Regular problems of prosecution: officers have resigned, civilian witnesses unable to appear, etc.
15. The frequent difficulty created by re-setting the hearing dates when continuances are granted.
16. CONTINUANCES -- It is not unusual for DUI violations to be continued for months and months.
17. Several times, a continuance is requested due to the attorney's need to work out a diversionary agreement before the agreement is filed.
18. The diversion case load is extremely heavy and it is hard to keep track of compliance and non-compliance and make timely responses.

19. Lack of adequate staff to monitor and supervise defendants on parole and probation.
20. DUI arrests have risen a dramatic 400%. Finding the time to do thorough follow-up reports has been difficult.
21. Performing 100 hours of community service is a difficult process for most first offenders to complete.
22. In several of the surrounding counties defendants are asking for trials and their peers are acquitting them. This is fast becoming common knowledge and everyone will soon start asking for jury trials.
23. Since the implementation of the new laws we have experienced an 8.8% increase in hit-and-run accidents. We cannot directly attribute the increase to the augmented enforcement of DUI, but correlation of our statistics is similar to the increase experienced by other cities that have implemented stringent DUI enforcement policies.
24. Ability of the prosecutor to amend or modify the complaint to a lesser offense.
25. Payment of fine and costs improves if the defendant is placed on supervised probation and payment is part of the terms of probation.
26. The time lapse between when the case is heard and the time the court clerk gets the information on the disposition of the case.
27. Increase in load for all facets of law enforcement. No increase in compensation.
28. Wide variance in diversion throughout the state and confusion over what is permitted or is not permitted.
29. Courts are too prone to impose only the minimum sentence.
30. Existence of Kansas "medical privilege" rules of evidence. Blood alcohol tests taken at hospitals are not admissible unless a consent was obtained. The police must request a test for police purposes, cannot use other tests taken for treatment.

APPENDIX C

Summary of Municipal and District Court Sentences That Did Not Conform to Statutory Mandates

First Conviction	Mandatory Sentences Established by Statute			
	Imprisonment of 48 hrs. - 6 months or 100 hrs. Community Service	\$200 to \$500 Fine	Restricted License 90 days to 1 yr.	Complete ADSAP Program
Case # 1		Suspended all but \$94 on condition of payment by 11-1-82		
Case # 2		\$500 reduced to \$100 if parole conditions completed		
Case # 3		\$500 reduced to \$100 if parole conditions completed		
Case # 4		\$500 reduced to \$100 if parole conditions completed		
Case # 5			No restriction	
Case # 6	Suspended on conviction date--served one night			
Case # 7	Suspended on conviction date--served one day or less			
Case # 8	Suspended on conviction date--served no time			
Case # 9		\$200 Fine--Suspended if parole successfully completed		
Case # 10		\$500 Fine--Suspended if parole successfully completed		
Case # 11		Journal Entry provides for no fine		
Case # 12			Suspended 1 year or until completion of Alcohol and Drug Safety Action Program (a)	
Case # 13			No restriction (a)	
Case # 14		\$350 Fine - 1/12th of fine credited for each month of successful probation		
Case # 15			No restriction	

(a) Two violations of driving under the influence were consolidated into a single trial. As a result, the penalties for both offenses were grouped together. This matter is discussed on pages 11-12 of the report. Also, see the response from the Administrative Judge for the City of Wichita (Appendix D) for a more detailed explanation of the case.

Mandatory Sentences Established by Statute

Second Conviction	Imprisonment of 90 days to 1 year Parole after 5 days if Defendant enters Alcohol Treatment	\$500 to \$1,000 Fine	License Suspended 1 yr. or until Alcohol Treatment Completed
Case # 16	48 hours	\$200 Fine	Restricted 90 days
Case # 17		\$200 Fine	Restricted 1 year
Case # 18			Restricted 1 year
Case # 19	48 hours	\$300 Fine	Restricted 6 months
Case # 20	10 Days - Paroled after 2 served	\$200 Fine	Restricted 1 year
Case # 21	90 Days - Paroled after 2 served	\$200 Fine	Restricted 1 year
Case # 22			Restricted 90 days

Mandatory Sentences Established by Statute

Third or Subsequent Convictions	Imprisonment of 90 days to 1 year	\$1,000 to \$2,500 Fine	License Revoked 1 year
Case # 23			Suspended 18 months
Case # 24			Suspended 1 year
Case # 25			No penalty imposed
Case # 26	Paroled after 5 days if Alcohol and Drug Safety Program entered		
Case # 27	48 hours	\$200 Fine	Restricted 6 months

APPENDIX D

AGENCY RESPONSES



Supreme Court of Kansas

Kansas Judicial Center

301 W. 10th

Topeka, Kansas 66612

February 2, 1984

HOWARD SCHWARTZ
Judicial Administrator

(913) 296-4873

RECEIVED
FEB 02 1984
DIVISION OF POST AUDIT

Mr. Meredith C. Williams
Acting Legislative
Post Auditor
301 Mills Building
Topeka, Kansas 66612

Dear Mr. Williams:

I have reviewed with a good deal of attention your preliminary report on the enforcement of driving-under-the-influence laws. In general, I find the information in the report to be helpful and analytical, and I believe the material will be useful to us. Assuming there are no significant changes in the final draft, I plan to circulate the report to all of our administrative judges throughout the State.

There are some specific comments and suggestions I would make for your consideration without detracting from what I otherwise believe is a report of value:

1. In the early months of administration of the law, the time period covered by the report, there were coordination and implementation problems as reflected by some of the detail in the report. But as the report itself notes, these problems are to be expected with a new law.

2. The 312 cases in the study were a mix of municipal and district court cases. Our budget request for FY '85 includes funding for training programs for municipal judges, an area not previously addressed by our in-service programs. I am of the opinion the report emphasizes this need.

3. I concur with the report observations concerning problems between the trial courts and the Division of Vehicles concerning the interchange of timely and accurate data between the two. Toward this end, I had recently established a small committee to begin work on this project. The committee, which is composed of district court clerks and court administrators, is to be chaired by a representative of my office.

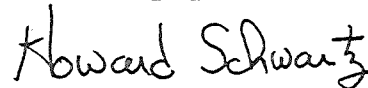
February 2, 1984

4. I note the report's comments concerning the quality of specific information and data in the journal entries. From the material made available to us, I would concur that improvement is needed in this area, and my office will follow through with this to our administrative judges.

The report also indicates certain actions that would be proposed for legislative consideration. I would make the suggestion that the responsibility for providing prior conviction information to the court and reporting of diversion agreements to the Division of Vehicles might well be more appropriate for the prosecutory function than the judiciary, and I would request your consideration of recommending a legislative change to this effect.

Thank you for the opportunity to review and comment on this draft.

Sincerely yours,



Howard Schwartz
Judicial Administrator

HS:dm



Kansas
DEPARTMENT OF REVENUE

State Office Building
Topeka, KS 66625

February 1, 1984

Mr. Meredith Williams
Legislative Division of Post Audit
Mills Building
Topeka, KS 66612

RECEIVED
FEB 3 1984
DIVISION OF POST AUDIT

Dear Mr. Williams:

This letter responds to your request for comments on the draft report entitled "Driving Under The Influence: A Review of Prosecution Under The New Kansas Law".

On page 10, the report states that certain discrepancies occurred as to conviction dates shown on Division of Vehicles records and local court records. The Department would note that it always attempts to enter the conviction date, but that this is not always possible because of the manner of reporting in certain jurisdictions. In some cases, court orders are drafted such that a conviction which may have been made on a certain date is not actually effectuated until the court order is entered. In such cases, the Division must utilize the date the order is entered. In other cases, the arrest report is the only documentation submitted. In such cases, the Division must use the conviction date shown thereon.

The Department of Revenue agrees that a standard reporting form could minimize such problems and has drafted such a form. The Department has recommended this reporting form to the Interagency Coordinating Council on Driving Under the Influence and will work through that group and the Office of the Judicial Administrator to seek adoption of the reporting form. The Department would urge the Legislature to encourage the Judicial Branch to adopt a standard reporting format.

The report also notes (pages 13 and 18) that there are concerns about the timeliness of information being recorded in the Division's files. To minimize any time delays, the Division of Vehicles has adopted a procedure in which serious violations will be entered directly into the computer files by the Driver Control Bureau rather than flowing through the normal data entry process. This should reduce any delays, particularly during income tax processing season. The Department would note, however, that some of the delay must be attributed to local reporting frequency.

On page 11, the report notes as a problem that some restrictions are not being invoked because courts are not making them effective after an existing suspension or revocation has been terminated as the law requires. Instead, the restriction is made to run simultaneously with the suspension or revocation. The report seems to imply that the Division of Vehicles should unilaterally, make the restriction apply after termination of the suspension or revocation. As noted, the Department feels such a procedure is beyond its authority under current law. We do, however, inform the courts that a suspension or revocation is in place.

Finally, the report recommends that the Department review the advisability of maintaining records on out-of-state drivers convicted of DUI under Kansas law. The Department does not feel this is possible at the current time. The computer modifications required would be substantial, and a manual system is felt to be only marginally effective.

This does not, however, mean that out-of-state drivers can necessarily obtain a Kansas license without our knowledge of the driving records. First, the Department does establish a "dummy record" for Kansas residents with an out-of-state license in an attempt to identify those persons when they attempt to obtain a Kansas license. Second, Kansas participates in the National Driver Register and Driver License Compact. Under these programs, Kansas is to receive information on the driving records of individuals applying for a Kansas license who have previously been licensed in another state.

In summary, the Department of Revenue has taken some steps to improve the timeliness and accuracy of its driver record data, and we endorse the recommendation supporting a standard reporting format. We do not feel, however, that we can unilaterally make a restriction apply for a period other than that directed by the court. We also feel that current procedures provide some means for identifying individuals applying for a Kansas license who may have been convicted of DUI in Kansas.

Thank you for the opportunity to comment on the report. You and your staff are to be commended for a fine job. Please contact me should you have any questions.

Sincerely,



Harley T. Duncan
Secretary of Revenue

HTD:p/S386

WICHITA

February 1, 1984

Leo M. Hafner, Principal Auditor
Legislative Division of Post Audit
Mills Building
Topeka, Kansas 66612

Re: Report of January 27, 1984
of Performance Audit Report

Dear Mr. Hafner:

Pursuant to a telephone conversation with your Ms. Marilyn Allen this date, the following is submitted for your consideration in the final draft of the aforesaid report.

1. It is noted that there is no page 20 to your report. I assume this is a typographical error.

2. On page 21, Case Number [REDACTED] — Case #TB-04593. I was advised at time of sentencing (which was later confirmed) that the defendant had spent from 3-8-83 to 4-6-83 in an in-patient treatment facility at St. Joseph Hospital of this town. Inasmuch as this fulfilled the requirements of the ADSAP Program, and it had been completed prior to sentencing (see Xerox copy of parole dated April 19, 1983), no further reference was needed in the parole document. That condition had already been met at the time the parole was signed.

(This case was deleted from the final report.)

3. Case Number 1, page 21. [REDACTED] — Case #TB-03102. The enclosed documents show that Miss [REDACTED] was sentenced on the first and second offense on the same date. There was no restriction on the first offense because I felt that the lesser (a restricted license) was included in the greater (a suspended license). Hence, both offenses resulted in a suspension of the license for a period of one year or until completion of a Court approved program. This is my interpretation of our DUI law.

Mr. Leo Hafner, Principal Auditor
Legislative Division of Post Audit
Page 2
February 1, 1984

4. Case Number 13, page 21. [REDACTED] —
Case #TB-02882. Again, this defendant had two DUI's and sentencing was on the same date. I am enclosing a copy of the disposition sheets, which reflect the Court's order. At the time of the sentencing his drivers license was suspended for one year in the second case. To satisfy your inquiry, I have, this date, restricted his license for ninety days on the first case. The sentencing I did at the time was my interpretation of the applicable law.

5. Case Number 26, page 22. [REDACTED] —
Case #TB-03163. This case was handled by Judge Warner Eisenbise, who has resigned. I note that Judge Sanborn did sentence the defendant in this case to a term of imprisonment of "ninety days to one year". I assume the Appeal rendered moot any question concerning Judge Eisenbise's sentence of the defendant.

The above explanations are respectfully submitted for your consideration. If you need further explanation or comment, please advise.

Cordially,


Robert A. Thiessen
Administrative Judge
Division I

RT:ckg

cc: Maurice L. Mowrey, Clerk of Municipal Court
Margie Studemine, Administrative Assistant, Probation Office
John Smith, Driver Control Bureau

SEDGWICK COUNTY DISTRICT ATTORNEY

18th Judicial District

Sedgwick County Courthouse
Annex — Second Floor
535 North Main
Wichita, Kansas 67203

CLARK V. OWENS
District Attorney

(316) 268-7281

HENRY H. BLASE
Chief Deputy

RECEIVED

February 2, 1984

FEB 02 1984

DIVISION OF POST AUDIT

Mr. Meredith Williams
Acting Legislative Post Auditor
Mills Building
Topeka, Kansas 66612

Dear Mr. Williams:

I have received and reviewed the draft report on enforcement of the driving under the influence laws in Kansas. I am quite impressed with the detail in which the enforcement and the statute itself has been analyzed.

The implementation of the new DUI legislation provided quite a shock to the criminal justice system. Previously, violations of this statute were too many times treated as just another traffic violation. The legislation provided for a systematic approach in dealing with the DUI offender in a combination of punishment, education and treatment.

As with any major piece of legislation, it has taken some time for the system to adjust to enforcement of the statute. During the first few months following the effective date of the statute there was a considerable amount of confusion over the interpretation of the statute. If the survey would have covered the first two months of enforcement, the noncompliance would probably have been even greater than twenty-five percent. Similarly, it is my opinion that the enforcement of the law at the present time in Sedgwick County has improved since the period which was the subject of the report. In January, 1983 I implemented a procedure within my office to better monitor the sentences that were being imposed by the courts. I believe that we will continue to see improvement in compliance with the statute.

The report correctly indicates that there is a need for some clarification in the statute. Perhaps the biggest loophole in the statute involves the multiple offender. In State v. Osoba, 234 Kan. 443, the Kansas Supreme Court ruled that the

Mr. Williams
February 2, 1984
Page 2

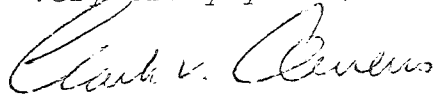
DUI statute should be interpreted similarly to the provisions of the Habitual Criminal Act regarding repeat offenders. This provides that an individual will be treated as a first time offender even though he may have a number of offenses pending before the court at one time. This only encourages delay in the proceedings and does not meet the intent of the statute.

Another significant problem with interpretation of the statute involves the term "imprisonment". Some courts have been providing a very liberal view of imprisonment to include jail work release, inpatient alcohol treatment and even the alcohol information school. If jail work release is to be permitted the question remains as to how long the inmate may be absent from the jail each day and still be in compliance with the statute.

There are some additional less serious problems with interpretation of the statute. If a legislative committee should conduct a hearing on this matter, I would like an opportunity to provide them with additional information or testimony.

Your staff should be congratulated on the thorough manner in which they have prepared their report. If my office can assist you with any further information, please contact me.

Very truly yours,



CLARK V. OWENS,
District Attorney
18th Judicial District

OFFICE OF
THOMAS COUNTY ATTORNEY

PERRY MURRAY
COUNTY ATTORNEY

P. O. BOX 554 • TELEPHONE 913-462-6321
COLBY, KANSAS 67701

February 1, 1983

Leo Hafner
Legislative Division of Post Audit
Suite 301, Mills Building
Topeka, Kansas 66612

RECEIVED
FEB 03 1984
DIVISION OF POST AUDIT

Re: Draft Performance Audit Report
Driving Under the Influence

Dear Mr. Hafner:

As discussed with you and other personnel in your office, enclosed please find samples of information regarding Diverson programs in Thomas County, Kansas. That information was not provided to your auditor when he was in Thomas County because of conflict in time and impending inclement weather.

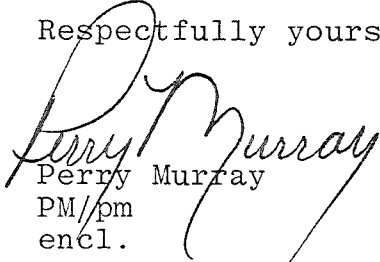
Although I have several comments about the draft report, time is limited in getting those comments to your office. I would like to say that since I have been county attorney, this office has had policies and procedures for diversion and has offered the program, on a limited basis, in criminal, traffic and juvenile proceedings. I might further add that I do not like diversion and this office has adopted other programs in lieu of diversion.

Referring to your report, one factor causes me great concern. That factor being the requirement under K.S.A. 22-2907 (c) that the prosecuting attorney must inform the defendant in writing of his policies and procedures for diversion. It appears from your report that the prosecuting attorney must, as a first step in criminal prosecution, render advise or initiate plea bargaining to all defendants. I have not and do not intend to adopt such a policy. As I deal with all defense attorneys in this area, I know those attorney are aware of my diversion program and if diversion appears appropriate in any given case, my program will

be implemented.

If your office has any further questions, please feel free to call or write.

Respectfully yours,


Perry Murray
PM/pm
encl.

P.S. Because part of our diversion is on memory, it necessitated sending an existing case with deletions.



NEOSHO COUNTY ATTORNEY'S OFFICE

Edwin H. Bideau III
County Attorney

David J. Bideau
Asst. County Attorney

123 W. Main
Chanute, Kansas 66720
Telephone 431-6230
Area Code 316

Courthouse
Erie, Kansas 66733

January 31, 1984

Legislative Division of Post Audit
Mills Building
Topeka, Kansas 66612

Attn: Curt Winegarner

Dear Mr. Winegarner:

I received the DUI report pursuant to your notice by phone last Friday. I am giving my written objection promptly as requested.

Page seven of this report makes the statement that "a systematic written notice of diversion was not provided to all Defendants". No written notice of diversion is given from our County because we do not have diversion and what's more, we do not feel according to statute that it is mandatory that we adopt a diversion program.

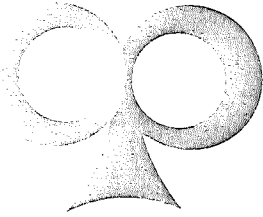
I do not feel that Neosho County should be listed with Cloud and Thomas Counties as not giving written notice when it is stated in the preceding paragraph that our County does not even offer diversion to defendants and again upon ending this topic (page 8) it is again stated that diversion is not offered and therefore no guidelines have been developed in Neosho County.

Very truly yours,

Edwin H. Bideau III,
Neosho County Attorney

EHB/dc

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FEB 01 1984
DIVISION OF POST AUDIT



January 30, 1984

Marilyn Allen
Legislative Division of Post Audit
Mills Building
109 West 9th, Suite 301
Topeka, KS 66612

Dear Marilyn:

In response to Meredith Williams' letter of January 27, 1984, asking for clarifications to the proposed draft of the post audit of DUI statute compliance, I would suggest the following minor modifications to the second to the last paragraph of page 16.

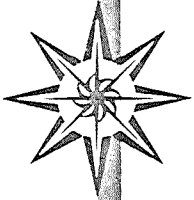
The city also monitors diverttees very closely. The fact that a defendant is on diversion is reported on the Kansas City, Missouri ALERT II computer system as well as to the Division of Vehicles. In the event an officer from any jurisdiction which utilizes ALERT, stops a person for any reason, the computer is checked. If the person is on diversion, and if, in the officer's opinion, the individual has been consuming CMB or alcohol, it will be reported to the prosecutor's office and diversion termination proceedings begun. In addition, quarterly checks of the diverttee's driving and criminal record are made to see that an individual has not been arrested for or convicted of an offense where alcohol or CMB were involved.

If Overland Park can be of any additional help, please feel free to call.

Sincerely,

Jane Neff-Brain
Assistant City Attorney

JNB:lc



THE CITY OF PRAIRIE VILLAGE *Star of Kansas*

January 31, 1984

Meredith Williams
Acting Legislative Post Auditor
Legislative Division of Post Audit
Mills Building
Topeka, Kansas 66612

RECEIVED
FEB 02 1984
DIVISION OF POST AUDIT

Dear Mrs. Williams:

Thank you for the opportunity to add my comments on the very important audit just completed by your organization. I applaud the actions of the legislature in providing an audit of how the criminal justice system has responded to the new D.U.I. laws and procedures in the State. For too long the D.U.I. laws did not have the needed "teeth" provisions to require the necessary attention of all concerned to combat this very serious problem. I would like to add the following comments on the audit itself.

The first comment would be that the audit should continue as an on-going procedure by the State. One only has to look to past history to see how poorly we all did in D.U.I. enforcement and court proceedings to know the value of this type of State control. I strongly support the laws as a step in the right direction and recognize the audit as the only way to ensure that intent of the law is uniform throughout the State.

Mention was made in the audit that some jurisdictions were allowing persons to receive full credit for a day in jail, when only a portion of the time was spent. I have noted that this has been tried by a number of defense attorneys. They attempt to get their clients committed at late evening hours and then request that this count as a full day. Release has the same problem. It would seem that if a two-day jail sentence is required, this should be 48 hours and nothing else.

Prairie Village and Mission Hills are located in a five-county metropolitan area. The Kansas-Missouri state line is our eastern boundary. There are over 40 cities located in this area. The recent ruling that cities can only serve legal process in their own jurisdiction has caused a great deal of trouble in the D.U.I. process and other violations. If a person fails to appear or fails to pay court fines, a warrant is issued by the court. Unless they live in our city, there is no present means to go and arrest them. A few have learned of this process and continually fail to appear for D.U.I. charges. A warrant is issued, they sit in jail their 12 hours, sign another notice to appear, and the process starts all over.

Meredith Williams

Page -2-

State laws allowing city officers the authority to serve warrants within the State of Kansas are badly needed. Unless these laws are changed, the problem will get worse as more people find out how simple it is to delay or beat the system.

Again, I support these laws and hope that the actions taken by the State and local governments are only the beginning of a process that will bring the terribly dangerous crime of D.U.I. under control.

Very truly yours,



Louis E. LeManske

Chief of Police

Prairie Village and Mission Hills, Kansas

LEL:mgl