Approved 5-2-91
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative John M. Solbach
Chairperson at

3:30 ~~xxx~~a.m./p.m. on April 1, 1991 in room 313-S of the Capitol.

All members were present except:

Representatives Douville and Gregory, who were excused

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

Michael R. Santos, Assistant City Attorney, Overland Park, Ks.
Suzanna Vazquez, Chairman, Douglas County Mothers Against Drunk Driving (MADD)
Theresa L. Hodges, M.A. M(ASCP) representing Kansas Health and Environment Laboratory, Department of Health and Environment
Delbert Fowler, Chief of Police, Derby, Kansas
Ron Smith, Kansas Bar Association, Legislative Counsel

The Chairman called for hearing on HB 2559, DUI, telephonic driver's license revocation hearings.

Michael R. Santos, Assistant City Attorney, Overland Park, Kansas, appeared to request that HB 2559 be placed in an interim study so that some legal issues could be resolved before bringing it back next year. (No written testimony was submitted.)

There being no further testimony, the hearing on HB 2559 was closed.

The Chairman called for hearing on HB 2560, evidentiary foundation necessary for admissibility of breath tests in certain alcohol and drug related offenses.

Suzanna Vazquez, Chairman, Douglas County Mothers Against Drunk Driving, (MADD), appeared to endorse HB 2560. (See Attachment # 1).

Committee questions followed.

Theresa L. Hodges, M.A. M(ASCP) representing Kansas Health and Environment Laboratory, Department of Health and Environment, appeared in support of HB 2560. (See Attachment # 2).

There were no committee questions.

Michael R. Santos, Assistant City Attorney, Overland Park, Kansas, appeared in support of HB 2560. (See Attachment # 3).

Committee questions followed.

The Chairman suspended the hearing on HB 2560 for a few minutes in order to take action on SB 356, written policies for law enforcement officers regarding domestic violence calls.

The Chairman called for sub-committee report on SB 356. Sub-committee Chairperson, Denise Everhart, submitted a written report with balloon amendment attached. (See Attachment # 4).

Representative Rock made a motion that SB 356 be removed from the table and that the sub-committee report, including balloon amendments, be adopted. Represenative Snowbarger seconded the motion. The motion carried.

Representative Rock made a motion that a second balloon amendment, including additional language on Page 2, Line 8, be adopted. (See Attachment # 5). Representative Everhart seconded the motion. The motion carried.

Representative Everhart made a motion that on the first balloon amendment Page 1, Section 1, (b), (1), Line 20, the language "officers may" become "officers shall" and that on Page 2, Section 2 be striken. Representative Sebelius seconded the motion.

Committee discussion followed.

A committee member requested that the motion be divided.

The Chairman called for a vote on changing "may" to "shall".
The motion failed.

The Chairman called for a vote on striking Section 2.

The motion failed.

Representative Everhart made a motion that SB 356 be passed as amended. Representative Macy seconded the motion. The motion carried.

The Chairman resumed the hearing on HB 2560.

Jack C. Pearson, Legislative Coordinator, Kansas Association of Chiefs of Police, submitted written testimony in support of HB 2560. (See Attachment # 6).

Kansas County and District Attorneys Association submitted written testimony in support of HB 2560. (See Attachment # 7).

Delbert Fowler, Chief of Police, Derby, Kansas, appeared in support of HB 2560. (See Attachment # 8).

Ron Smith, Kansas Bar Association Legislative Counsel, appeared in opposition to HB 2560. (See Position Statement-Attachment # 9).

Committee questions followed.

There being no further conferees, the hearing on HB 2560 was closed.

The Chairman called for action on bills:

SB 30 service charge on worthless checks. Representative Everhart made a conceptual motion that SB 30 be amended per balloon prepared by conferee, Barkley Clark. Representative Gomez seconded the motion. The motion carried.

Representative Everhart made a motion that SB 30 be passed as amended. Representative Vancrum seconded the motion.

Representative Rock made a substitute motion that the new language regarding court costs and reasonable attorney fees be deleted, whenever it appears in SB 30. Representative Garner seconded the motion. The motion carried.

Representative Smith made a motion that SB 30 be passed as amended. Representative Everhart seconded the motion. The motion carried.

SB 259, public trust; property tax revenues. Representative Vancrum made a motion that SB 259 be passed. Representative Smith seconded the motion. The motion failed.

Representative O'Neal made a motion that SB 327 be tabled. Representative Vancrum seconded the motion.

Representative O'Neal withdrew his motion with the consent of his second.

Representative O'Neal made a motion that SB 327 be not passed. Representative Carmody seconded the motion.

Representative Parkinson made a substitute motion that SB 327 be amended on Page 2, Line 43 by striking all after the period and on Page 3, by striking all in lines 1 and 2. Representative Hamilton seconded the motion. The motion carried.

Representative Everhart made a motion that SB 327 be passed as amended. Representative Carmody seconded the motion. The motion carried.

SB 247, prohibits sellers from requiring a consumer to respond to a notice in order to avoid purchasing goods.

Representative Snowbarger made a conceptual motion to amend Statute KSA-50-617 and put a reference in the Consumer Protection Act. Representative Vancrum seconded the motion.

Representative Rock made a substitute motion to strike the word "new".

Committee discussion followed.

Representative Rock withdrew his motion.

The original motion to amend carried.

Representative Snowbarger made a motion that SB 247 be passed as amended. Representative Hamilton seconded the motion. The motion carried.

SB 328, proper court security to be provided. Representative Everhart made a motion that SB 328 be passed. Representative Sebelius seconded the motion.

Representative Snowbarger made a substitute motion that SB 328 be tabled. Representative Smith seconded the motion. The motion carried. Representatives Sebelius and O'Neal were recorded as voting "No".

SB 329, requiring collection of DNA exemplars from convicted felons. Representative Rock gave a verbal sub-committee report and noted that sub-committee would recommend two amendments; that there will be a fiscal note of approximately $80,000 the first year; that the sub-committee would have further input on 4/2/91. The chairman suspended the sub-committee report until 4-2-91.

SB 332, correctional institutions, disposition of certain abandoned property of inmates. Representative Sebelius made a motion that SB 332 be passed. Representative Everhart seconded the motion. The motion carried.

SB 373, access to records by developmental disabilities protection and advocacy agency. Representative Everhart made a motion that SB 373 be passed. Representative Macy seconded the motion.

Committee discussion followed.

Representative Everhart withdrew her motion with the consent of the second.

No action was taken on SB 373.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,

room 313-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on April 1, 1991

SB 181, procedures for correcting inaccuracies in consumer credit reports. Representative Gomez made a motion that SB 181 be tabled. Representative Garner seconded the motion. The motion carried.

HB 2539, amendments to the limited liability company act. Representative O'Neal made a motion that HB 2539 be passed.

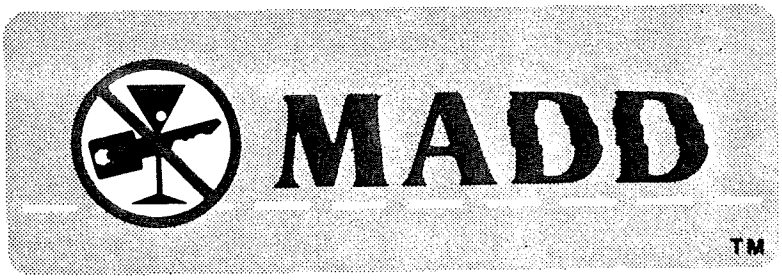
No action was taken on the bill.

The meeting adjourned at 5:20. P.M. The next meeting is scheduled on April 2, 3:30 P.M. in room 313-S.

GUEST LIST

COMMITTEE: HOUSE JUDICIARY DATE: 4/1/91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATIO
CHRIS CANFIELD	~~35~~ TOPEKA	KDOT
Suzanna Vazquez	PO Box 333 Lawrence, KS 66044	MADD - DG Co.
Mar Vuylsteke	Topeka 3601 SW 29th St	MADD STATE OFFICE
Kelly Kultala	KCKS	NOW
John Clark	City Hall, OP, KS	City of OVERLAND PK
Michael Santos	O.P. KS 8500 Antioch	OP
Jim Kaup	League of Ks Municipalities	Topeka
John W. Smith	Topeka	Dept of Revenue
Jim Keller	Topeka	Revenue
~~KPOA~~ Helen Stephens	PV	KPOA
Juliene Maclin	Topeka	AG Office
Ed Klumpp	Topeka	Kansans for Highway Safety
KEITH K. LANDIS	TOPEKA	CHRISTIAN SCIENCE COMM. ON PUBLICATION FOR KANSAS
Ron Smith	"	KBA
Jim Villaume	Topeka	KS Ins Dept



Mothers Against Drunk Driving

3601 SW 29th Street • Suite 244 • Topeka, KS 66614 • (913) 271-7525 • 1-(800) 228-6233
KANSAS STATE OFFICE

Endorsement of House Bill 2560.

Provided by Suzanna Vazquez, Chairman, Douglas County
Mothers Against Drunk Driving

On behalf of Kansas Mothers Against Drunk Driving, I wish to endorse House Bill 2560.

HJUD
Attachment #1
4-1-91

State of Kansas
Joan Finney, Governor
Department of Health and Environment
Kansas Health and Environmental Laboratory
Forbes Field, Bldg. 740, Topeka, KS 66620-0002
(913) 296-1620
FAX (913) 296-6247

Stanley C. Grant, Ph.D.,
Acting Secretary

Testimony presented to

House Judiciary Committee

by

The Kansas Department of Health and Environment

House Bill 2560

By statute, the KDHE has administrative responsibility for the statewide breath alcohol program which provides court-defensible test results used in the prosecution of more than 10,000 DUI cases in Kansas each year. These responsibilities include certification of breath alcohol instruments and the operators of such instruments. We approve the protocol to be utilized in the administration of a breath test. Currently, there are 220 law enforcement agencies participating in the breath alcohol program and approximately 2,400 certified operators.

In support of the breath alcohol program in the judicial framework, our office provides notarized certificates and standard alcohol solutions. Protocols for operation of the instruments are provided on official department letterhead. We respond to subpoenas.

This legislation would establish that testimony of the law enforcement officer pertaining to the certification of the instrument and operator and testimony that administration of the test was according to the approved protocol would be sufficient evidentiary foundation to admit the results of a breath test. KDHE supports this legislation.

Testimony presented by: Theresa L. Hodges, M.A., M(ASCP)
Senior Public Health Laboratory Scientist
Laboratory Improvement Program Office
Kansas Health and Environmental Laboratory
April 1, 1991

HJUD
Attachment # 2
4-1-91

Charles Konigsberg, Jr., M.D., M.P.H., Director of Health (913) 296-1343
Ronald Hammerschmidt, Ph.D., Acting Director of Environment (913) 296-1535
Lorne Phillips, Ph.D., Director of Information Systems (913) 296-1415
Roger Carlson, Ph.D., Director of the Kansas Health and Environmental Laboratory (913) 296-1619

The City of
Overland
Park
KANSAS

Law Department

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Overland Park, Kansas 66212
913/381-5252 • FAX 913/381-9387

April 1, 1991

TO: Chairman John Solbach and Members of the House Judiciary Committee

FROM: Myron E. Scafe, Chief of Police, Overland Park, Kansas
Michael R. Santos, Assistant City Attorney, Overland Park, Kansas

RE: HB 2560 concerning the evidentiary foundation to admit the result of breath tests in DUI cases

The attached materials were prepared in support of HB 2560. The provisions of this bill establish a clear, simple and fair evidentiary foundation for the admissibility of breath test results in DUI cases. As we have elaborated on in the attached memorandum, the need for HB 2560 arises out of the comprehensive DUI laws passed by the legislature in the past and the growth in the number of DUI trials in the state. Most DUI defenses are based on challenges to the breath test. These challenges are often specious. They include such arguments as the defendant had recently painted his house, the defendant wore false teeth and the defendant had only one lung. While these defenses seem unusual at best, they have been effective in certain courts because the evidentiary foundation for the intoxilyzer is not clearly established. In addition to our memorandum we have attached a copy of a letter from Roger Carlson, Laboratory Director at the Department of Health and Environment concerning breath testing by law enforcement officers in Kansas.

Support of HB 2560 will directly affect the effectiveness of past and future DUI legislation within the state.

Sincerely,

Myron E. Scafe
Chief of Police

Michael R. Santos
Assistant City Attorney

MRS/akb
Enclosures

HJUD
Attachment #3
4-1-91

TO: Members, Kansas House of Representatives

FROM: Myron E. Scafe, Chief of Police, Overland Park, Kansas
Michael R. Santos, Assistant City Attorney, Overland Park, Kansas

SUBJECT: HB2560 Concerning Admissibility of DUI Breath Tests

DATE: March 21, 1991

I. The Historical Perspective

The Kansas legislature has been a leader in the development of effective legislation to combat the problem of drunken driving on our highways. In 1982 it passed a comprehensive DUI law that required mandatory minimum sentencing. In 1985 it created one of the first per se .10 laws in the country. In 1989 it passed a comprehensive commercial drivers DUI statute. The adoption of these laws has resulted in the reduction of fatality and injury accidents caused by DUI. Because of the importance of the breath test to DUI prosecution, most defense attorneys focus on keeping the breath results out of evidence. Without denigrating the legitimate efforts of defense attorneys to effectively represent their clients, many of the challenges to the breath tests are specious and self-serving at best. For example, the results of breath tests have been challenged on the basis that the defendant had been painting his house, that the defendant wore false teeth, that the intoxilyzer was not certified by the Department of Agriculture and even the argument that the defendant only had one lung. The future effectiveness of the Kansas DUI laws requires that the clear purpose and intent of those laws not be subverted by the introduction of creative technical challenges to the breath tests. House Bill 2560 provides the legislative guidance to the court to insure that once a proper evidentiary foundation has been laid, the results of the test will be admitted into evidence. This bill will not prohibit the introduction of false teeth and other creative defenses, but will limit that evidence to attacking the probative value of the breath test, not it's admissibility.

II. Why is HB2560 needed?

Pursuant to state law the Director of the Department of Health and Environment is charged with the responsibility of insuring that human breath testing for law enforcement is conducted in accordance with scientific standards that will insure its reliability in court. Because many courts are not familiar with the extensive state regulation of breath testing, they permit extraordinary challenges to the admissibility of test results. In addition, some courts have an obsessive attraction to the technical aspects of the breath test that opens the door for unjustified challenges to its admissibility. Finally, the need for flexibility in the rules

of evidence and the application of case law principles does not permit a uniform and articulable set of rules to guide courts in the admissibility of breath test results.

III. **What is the existing state law concerning the testing of human breath for law enforcement purposes?**

The following law exists in Kansas today to insure the scientific reliability of breath testing by law enforcement officers.

A. **K.S.A. 65-1,107** provides that the Secretary of Health and Environment shall promulgate rules and regulations establishing...the procedures, qualifications of personnel and standards of performance in the testing of human breath for law enforcement purposes, including procedures for the periodic inspection of apparatus, equipment and devices... and the resting of persons who operate apparatus, equipment or devices for the testing of human breath for law enforcement purposes.

B. **K.S.A. 65,1,109** provides that it shall be unlawful for any person to make any test of the human breath for law enforcement purposes unless they have complied with the rules and regulations of the Secretary of Health and Environment to govern the procedures, standards of performance and qualifications, training certification and annual testing of personnel for the testing of human breath for law enforcement purposes and the apparatus, equipment or device used by such person in the testing of human breath is of a type approved by the Secretary of Health and Environment and otherwise complies with the regulations and rules of the Secretary of Health and Environment for the periodic inspection of such apparatus, equipment and devices.

In addition to the above statutory provisions, the Secretary of Health and Environment has adopted the following rules and regulations that insure the scientific reliability of human breath testing by law enforcement officers within the state.

C. **K.A.R. 28-32-1** provides that each law enforcement agency performing breath evidential testing for alcohol shall apply to the Kansas Department of Health and Environment for certification of test equipment and approval of procedures, performance standards and training and test equipment and devices. In addition,

1. testing shall be conducted in accordance with approved procedures, and using the equipment and devices certified by the department...

2. equipment shall be operated strictly according to description provided by the manufacturer and approved by the Department of Health and Environment...

3. reliability of instrument performance shall be assured by weekly testing with alcohol standards furnished by the Department of Health and

Environment. These results shall be reported monthly to the Department of Health and Environment.

D. K.A.R. 28-32-2 provides that each law enforcement agency performing evidential breath alcohol tests shall participate in a performance evaluation program conducted or approved by the Department of Health and Environment, that shall include requiring each certified operator shall test and report the number of proficiency test specimens specified by the Secretary. Failure to test and report proficiency specimens or unsatisfactory results from such testing shall constitute reason for revoking the certification of the operator.

E. K.A.R. 28-32-5 provides that in order to perform evidential breath alcohol tests for law enforcement purposes a person shall:

1. be duly appointed a Kansas law enforcement officer;

2. shall receive adequate training in breath alcohol testing;

3. shall successfully test four proficiency test specimens;

4. shall successfully complete a written examination prescribed by the Department of Health and Environment.

IV. **What is the existing case law in Kansas concerning the evidentiary foundation necessary to admit the breath test?**

While there is little case law concerning the admissibility of breath tests, the existing cases indicate that the foundation consists of the following requirements:

- That the operator be certified by the Secretary of Health and Environment to conduct human breath testing for law enforcement purposes,

- That the machine used be certified by the Secretary of Health and Environment, and

- That the machine be operated in accordance with the manufacturer's instruction of the written protocol for the machine as established by the Secretary of Health and Environment.

(See State v. McNaught, 238 Kan. 567 (1986), City of Shawnee v. Gruss,2 Kan App 2d 131 (1978), and State v. Lieurance, 14 Kan App 2d 87 (1989).

The fact the appellate courts as recently as 1989 have been presented with the issue of determining what the evidentiary foundation for the admissibility of a breath test is, indicates the issue continues to plague the trial courts.

V. How do the provisions of HB2560 relate to the existing state law and case law on the evidentiary foundation necessary to admit the results of the breath test?

The provisions of HB2560 parallel the requirements established by the Secretary of Health and Environment for the testing of human breath by law enforcement officers and complies with the evidentiary foundation requirements of the existing case law.

VI. Do other states have laws similar to the provisions of HB2560?

Many states, as part of their DUI statutes, have enacted laws establishing the evidentiary standards for the admissibility of breath tests. The following laws are examples of this type of legislation:

A. **Alaska Statutes 28.35.033(d)** ...If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods, and standards of training approved by the Department of Public Safety, **there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.**

B. **Arizona Statutes Annotated 28-692.03 Admissibility of breath test; promulgation of rules for tests; permits.** A. The results of a breath test administered for the purpose of determining a person's alcohol concentration are admissible as evidence in any trial, action or proceeding upon establishing the following foundational requirements:

1. The test was performed using a quantitative breath testing device approved by the department of health services. A properly authenticated certification by the department of health services is sufficient to establish this requirement.

2. The operator who conducted the test possessed a valid permit issued by the department of health services to operate the device used to conduct the test.

3. Duplicate tests were administered and the tests results were within 0.02 alcohol concentration of each other or an operator observed the person charged with the violation for twenty minutes immediately preceding the administration of the test.

4. The operator who conducted the test followed an operational checklist approved by the department of health services for the operation of the

device used to conduct the test. The testimony of the operator is sufficient to establish this requirement.

5. The device used to conduct the test was in proper operating condition. Records of periodic maintenance which show that the device was in proper operating condition at a time before and after the test are admissible in any proceeding as prima facie evidence that the device wa sin proper operating condition at the time of the arrest.

6. **Compliance with subsection A is the only requirement for the admission in evidence of a breath test result.**

C. **Indiana Code Annotated, Sec.9-11-4-5 certificates as prima facia evidence.** Certified copies of certificates issued in accordance with rules adopted under subsection (a):

(1) are admissible in a proceeding under this article;

(2) constitute prima facie evidence that the equipment or chemical was inspected and approved by the department of toxicology on the date specified on the certificate and was in proper working condition on the date the breath test was administered so long as the date of approval is within 180 days before the date of the breath test;

(3) constitute prima facie evidence of the approved technique for administering a breath test;

(4) constitute prima facie evidence that the breath test operator was certified by the department of toxicology on the date specified in the certificate.

In addition to the above sample legislation, the States of Colorado, Minnesota, Vermont, Pennsylvania, North Carolina and Wisconsin have passed legislation providing for the admissibility of breath test results.

VII. **HB2560 does not violate the separation of powers doctrine by establishing the minimal evidentiary foundation for breath tests?**

It is a well settled rule that the legislature of a state has the power to prescribe new, and alter existing, rules of evidence, or to prescribe methods of proof, provided they do not violate constitutional requirements. In re Estate of Ward, 176 Kan. 201 Syl. (1954), 29 Am. Jur. 2d Evidence § 9 (1964). In addition, the legislature may exercise control over the rules of evidence, and hence may pass a law declaring that upon proof of one fact another fact may be presumed, thereby creating a statutory presumption. Statutory presumptions are rebuttable. State v. Haremza, 213 Kan. 201 (1973). In an Arizona case dealing with

statutory language nearly identical to HB2560 (see Section VI above), the defendant in a DUI case challenged the Arizona statute on the basis it was an unconstitutional violation of the doctrine of separation of powers because it allegedly eliminated foundational safeguards for admitting breath test results. Arizona v. Leonard, 725 P.2d 493 (1986). The Arizona Court of Appeals upheld the constitutional validity of the statute. The Court noted, "while the Arizona Constitution gives the Arizona supreme Court the power to make court rules, courts also recognize the legislature's statutory arrangements which are reasonable and workable." Clearly, the passage of legislation that establishes methods of proof are not violations of the separation of powers doctrine. The authority to develop rules of evidence and methods of proof is mutually held by both the legislative and judicial branches of the government.

VIII. **The provisions of HB2560 creates a valid rebuttable statutory presumption.**

Like similar legislation in Alaska and Arizona, HB2560 creates a rebuttable presumption that once the prosecutor shows that the testing officer was certified, the testing machine was certified and the machine was operated in accordance with state protocol, the results of the test are valid and no further foundation is necessary for the introduction of the test result. Rebuttable statutory presumptions are common and widely used legislative tools that insure the intent of the legislature is complied with. In fact, the current state DUI statute contains the following rebuttable presumptions:

1. K.S.A. 8-1005(b) provides that if the alcohol concentration is .10 or more, it shall be prima facie evidence that the defendant was under the influence of alcohol to a degree that renders the person incapable of driving safely.

2. K.S.A. 8-1002(i) provides that an affidavit of the custodian of records at the Kansas department of health and environment stating that the breath testing device was certified and the operator of such device was certified on the date of the test shall be admissible into evidence in the same manner and with the same force and effect as if the certifying officer or employee had testified in person. Such affidavit shall be admitted to prove such reliability without further foundation requirement.

Both of these statutory presumptions are constitutionally valid because they permit the defendant to produce evidence to rebut the presumption. The presumption is a valid tool for insuring the admissibility of the state's evidence. Statutory presumptions shall be upheld as constitutional if, in accordance with the experience of mankind, there is a natural and rational evidentiary relation between the fact proved and the one presumed. Haremza at 204. In the .10 presumption, there is a natural and rational reason to believe that individuals with .10 alcohol content in their breath or blood are incapable of safely operating their motor vehicles. In the affidavit presumption of K.S.A. 8-1002(i) there is a natural and

rational reason to believe that if the custodian of the records swears to the contents of a document there is a natural and rational reason to believe that the contents are true. The Kansas legislature passed these statutory presumptions because they believed that the proof of the one fact created a natural and rational presumption that the other fact was true.

The provisions of HB2560, like all statutory presumptions are subject to the test for validity established in the Haremza case. Clearly once the prosecutor has established that the operator was certified, the testing machine was certified and the test was conducted in accordance with the written protocol established by the Secretary of Health and Environment, there is a natural and rational reason to believe that the test results are valid and admissible into evidence without any further foundation.

IX. **HB2560 does not prohibit the defendant from rebutting the results of the test.**

Statutory presumptions are rebuttable. Haremza at 203. The term prima facia evidence carries the inference that such evidence may be rebutted and overcome, and notwithstanding the rule, an accused has the opportunity to submit his evidence and make a full defense. State v Nossaman, 107 Kan. 715 (1920). Once the prosecutor has laid the evidentiary foundation requirements of HB2560 the test results are simply before the fact finder. The defendant remains free to challenge the validity and probative value of the result. For example, if the defendant argues that the test results were affected by the fact he wore false teeth, the fact finder would be free to give the test results the conclusive weight or no weight at all. The same process is true for any other attack on the test results. HB2560 simply establishes a known, simple and reliable evidentiary standard for admitting breath test results.

Myron E. Scafe
Chief of Police

Michael R. Santos
Assistant City Attorney

State of Kansas
Mike Hayden, Governor

Department of Health and Environment
Kansas Health and Environmental Laboratory
Forbes Field, Bldg. 740, Topeka, KS 66620-0002

Stanley C. Grant, Ph.D., Secretary

(913) 296-1619
FAX (913) 296-6247

January 18, 1990

The Honorable Ginger Barr, Chairperson
House Federal and State Affairs
House of Representatives
Capitol Bldg., Room 115-S
Topeka, Kansas 66612

Dear Representative Barr:

Although this agency has not taken an official position on the merits of SB296, we do very strongly believe that the House Federal and State Affairs Committee must have clear and accurate information with which to evaluate this bill. My observations at the January 16, 1990, hearing on this bill indicated that considerable confusion may remain on several technical points of discussion. I am happy to respond to your request for correct information on breath alcohol test issues.

This agency does have statutory responsibility for the approval of evidential breath test instruments and the training and certification of instrument operators. This program currently includes 144 Kansas law enforcement agencies where 1,427 certified instrument operators provide court-defensible evidence used in the prosecution of 11,000 DUI subjects in our state each year.

The following allegations were made during testimony on SB296:

1) Allegation: Kansas evidential breath test instruments are not tested for radio interference and are inaccurate because of this interference.

   THIS ALLEGATION IS FALSE.

   All instruments approved in Kansas are listed on the Federal Department of Transportation Conforming Products list which assures that they have been evaluated for radio interference which might lead to an inaccurate result. Radio interference is an old and out-dated argument which is no longer valid with modern breath test instrumentation.

3-9

Charles Konigsberg, Jr., M.D., M.P.H., Director of Health (913) 296-1343

James Power, P.E., Director of Environment (913) 296-1535

Lorne Phillips, Ph.D., Director of Information Systems (913) 296-1415

Roger Carlson, Ph.D., Director of the Kansas Health and Environmental Laboratory (913) 296-1619

2) Allegation: Kansas evidential breath alcohol test data is inaccurate because instrument operators are not well trained and/or do not follow standard protocol.

THIS ALLEGATION IS FALSE.

Kansas law requires that instrument operators be certified to perform evidential breath tests. The certification process includes rigorous training and tested ability to perform breath analyses according to standard protocols. Each certified operator is acutely aware that standard protocol requires that a certified alcohol standard must be run with each evidential test in order to validate instrument operating condition. In addition, in order to maintain certification status, each operator must also correctly analyze quarterly performance evaluation samples of unknown alcohol concentrations provided by the Kansas Department of Health and Environment.

3) Allegation: Breath alcohol tests are unreliable because they are less accurate than blood alcohol tests.

THIS ALLEGATION IS FALSE.

When standard test protocols are followed, breath alcohol measurements are a reliable indicator of blood alcohol concentration. Due to blood/breath partition effects, breath alcohol concentrations most often slightly under-read the actual blood alcohol concentration. Clearly, the subject receives the benefit of any deviation in these situations. The track record on breath alcohol measurement technology includes more than 15 million court-defensible tests performed over the past 15 years in the United States.

In summary:

Evidential breath alcohol tests have a reliable track record in Kansas and throughout the nation. Rigid Kansas certification procedures and modern instrumentation ensure that accurate court-defensible results are produced in our state.

Proponents of SB296 have argued that even the most experienced Kansas judicial systems can often be confused through the half-truths, "techno-babble," and scientific complexity of breath alcohol issues to unfairly prevent the admission of evidence. The recent House Federal and State Affairs hearing on this bill has clearly shown just how readily this can indeed occur.

Sincerely,

Roger H. Carlson

Roger H. Carlson, Ph.D.
Laboratory Director

RHC:bc

bpc: Michael Santos
City of Overland Park

3-10

SUBCOMMITTEE REPORT ON SB 356

Members present: Everhart, Chairperson, Macy, Rock, Snowbarger

Conferees present:

Julene Maska, State Victim Rights Coordinator
Dorthy Miller, Safehouse, Pittsburg
Meg Beezley, Safehouse, Pittsburg
Helen Stephens, Kansas Peace Officers Association
Marilynn Ault, Battered Womens Task Force
Jim Kaup, League of Municipalities
Terry Maple, Kansas Highway Patrol
Anne Smith, Kansas Association of Counties
Harry Craghead, Kansas Sheriff Association, Jetmore
Jim Daily, Kansas Sheriff Association, Great Bend
Arlyn Leaming, Kansas Sheriff Association, Dodge City
Gary O'Brien, Kansas Sheriff Association, Ness City

The Subcommittee met Friday, afternoon, March 29, following the Judiciary Committee meeting. The conferees had previously met and agreed on several amendments.

Many conferees were concerned with the language directing an officer to make an arrest. The balloon reflects an agreement between the parties to have the law enforcement agency policy set out "a statement describing the circumstances under which the officers may make an arrest."

Following much discussion, it was agreed that each agency would define domestic violence and not to have a state definition. There was concern that a state definition would not allow the flexability needed in the rural and urban areas of the state.

The subcommittee decided to strike subsection (b) (10) of section 1 after concern was brought up by law enforcement officers that this would mandate yearly training in domestic violence procedures. They pointed out that, pursuant to K.S.A. 1990 Supp. 74-5607a, law enforcement officers must complete 40 hours of law enforcement education/training yearly and these procedures should be covered then. (Statute attached).

The League of Kansas Municipalities requested that Section 2 be inserted in response to the Kansas Supreme Court decision in Fudge v. City of Kansas City, 239 Kansas 369. The language adopted is similar to the Tort Claims act, subsection (d) of K.S.A. 75-6104.

H JUD
Attachment # 4
3 4-1-91

(c) Members of the law enforcement training commission attending meetings of such commission, or attending a subcommittee meeting thereof authorized by such commission, shall be paid amounts provided for in subsection (e) of K.S.A. 75-3223 and amendments thereto. The director and the chairperson of the commission shall be responsible for approving all expense vouchers of members.

(d) The commission shall meet at least once each year at the training center and may hold special meetings whenever they are called by the chairperson.

History: L. 1968, ch. 81, § 7; L. 1973, ch. 331, § 4; L. 1974, ch. 348, § 80; L. 1975, ch. 416, § 13; L. 1982, ch. 322, § 11; L. 1983, ch. 256, § 5; L. 1988, ch. 306, § 1; July 1.

Attorney General's Opinions:

Training commission not entitled to funds from law enforcement training center. 86-154.

74-5607a. Certification for permanent appointment; annual training; provisional appointment. (a) No person shall receive a permanent appointment as a full-time police officer or law enforcement officer, unless such officer has been awarded a certificate attesting to satisfactory completion of a course of not less than 320 hours of accredited instruction at the training center or at a certified state or local law enforcement training school or has been awarded such a certificate for not less than the number of hours of instruction required by the Kansas law enforcement training act at the time such certificate was issued or received a permanent appointment as a full-time police officer or law enforcement officer prior to July 1, 1969, or was appointed a railroad policeman pursuant to K.S.A. 66-524 on or before January 1, 1982. No person shall receive a permanent appointment as a part-time police officer or law enforcement officer, unless such officer has been awarded a certificate attesting to the satisfactory completion of the basic course of 80 hours of accredited instruction in law enforcement at the training center or at a certified state or local law enforcement training school.

(b) Beginning the second year after certification, every full-time police officer or law enforcement officer shall complete annually 40 hours of law enforcement education or training in subjects relating directly to law enforcement. Failure to complete such training shall be grounds for suspension from work without pay until such training is completed. The associate director with the approval of the commission shall adopt rules and regulations regarding such education or training. Every city, county and state agency shall annually send to the associate director certified reports of the completion of such education or training. The associate director shall maintain a record of the reports in the central registry.

(c) Subject to the provisions of subsection (d):

(1) Any person who is appointed or elected as a police officer or law enforcement officer and who does not hold a certificate as required by subsection (a) may be elected or appointed as an officer on a provisional basis for a period of not more than one year. Any person appointed as a police officer or law enforcement officer on a provisional basis who does not receive the certificate required under subsection (a) within one year following the date of the person's original election or appointment shall forfeit such office or position at the end of such one-year period. Any person appointed as a police officer or law enforcement officer on a provisional basis who does not receive the certificate required under subsection (a) within one year following such original appointment shall not be reappointed as a police officer or law enforcement officer on a provisional basis within one year following the date on which such person last served as a police officer or law enforcement officer.

(2) Any police officer or law enforcement officer who does not complete the education or training required by subsection (b) by the date such education or training is required to have been completed shall forfeit the officer's office or position.

(d) The associate director may extend the one-year time period when it is shown that the failure to comply with the requirements of subsection (a) or (b) was not due to the intentional avoidance of the law.

History: L. 1982, ch. 322, § 4; L. 1988, ch. 306, § 2; July 1.

Attorney General's Opinions:

Sheriff; meetings and seminars; discretionary authority to send personnel. 84-53.

Motor carrier inspection stations; designation of employees with law enforcement powers; law enforcement training center; persons subject to training requirements. 85-27.

Training commission; certification for permanent appointment, annual training. 85-51.

Applicability of fair labor standards act to statute. 85-84.

Qualifications of applicant; pardoned ex-felon is not qualified to become a law enforcement officer. 85-165.

Sheriff; meeting and se
send personnel; county co
control of expenditures. 8
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74-5609a. Tuiti
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History: L. 1982
ch. 277, § 5; July 1.

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74-5611a. Cen
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its jurisdiction.

History: L. 1982
ch. 277, § 6; July 1.

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4-3

Session of 1991

SENATE BILL No. 356

By Committee on Judiciary

2-27

AN ACT concerning domestic violence; relating to written policies to be followed by law enforcement officers.

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

Section 1. [(a)] All law enforcement agencies in this state shall adopt written policies regarding domestic violence calls as provided in subsection (b). These policies shall be made available to all officers of such agency.

(b) Such written policies shall include, but not be limited to, the following:

(1) A statement ~~directing that the officers shall make an arrest when they have probable cause to believe that a crime is being committed or has been committed~~. [This statement shall include K.S.A. 22-2401 and amendments thereto, which allows an officer to make an arrest;

(2) a statement defining domestic violence;

(3) a statement describing the dispatchers' responsibilities;

(4) a statement describing the responding officers' responsibilities and procedures to follow when responding to a domestic [call and the suspect is at the scene;

(5) a statement regarding procedures when [suspect has left the scene of the crime;

(6) procedures for both misdemeanor and felony cases;

(7) procedures [to follow ~~on~~ [court orders, including protection from abuse ~~act~~ [and restraining orders;

(8) a statement that all law enforcement officers shall provide the following information:

(A) Availability of emergency and medical numbers, if needed;

(B) the police report number;

(C) the address and telephone number of the ~~prosecutors~~ [office the victim should contact to obtain information about victims' rights pursuant to K.S.A. 1990 Supp. 74-7333 and 74-7335 and amendments thereto;

(D) the name and address of the crime victims' compensation board and information about compensation benefits;

(E) advise the victim that the details of the crime may be made

[On and after January 1, 1992:

[describing the circumstances under which the officers may make an arrest.

violence

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when handling domestic violence calls involving

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public;

(F) advise the victim of such victims' rights under K.S.A. 1990 Supp. 74-7333 and 74-7335 and amendments thereto; and

(G) advise the victim of available resources which would assist the victim; and

(9) whether an arrest is made or not, a standard offense report shall be completed on all such incidents and sent to the Kansas bureau of investigation; and

~~(10) a description of the training that shall be provided yearly on the domestic violence procedures and policies.~~

~~Sec. 2.~~ This act shall take effect and be in force from and after its publication in the statute book.

Sec. 2. No law enforcement agency or employee of such agency acting within the scope of employment shall be liable for damages resulting from the adoption or enforcement of any policy adopted under this act unless a duty of care, independent of such policy, is owed to the specific individual injured.

Sec. 3.

Session of 1991

SENATE BILL No. 356

By Committee on Judiciary

2-27

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(2) a statement defining domestic violence;

(3) a statement describing the dispatchers' responsibilities;

(4) a statement describing the responding officers' responsibilities and procedures to follow when responding to a domestic call and the suspect is at the scene;

(5) a statement regarding procedures when suspect has left the scene of the crime;

(6) procedures for both misdemeanor and felony cases;

(7) procedures to follow on court orders, including protection from abuse act and restraining orders;

(8) a statement that ~~all~~ law enforcement ~~officers~~ shall provide the following information:

(A) Availability of emergency and medical numbers, if needed;

(B) the ~~police~~ report number;

(C) the address and telephone number of the prosecutors office the victim should contact to obtain information about victims' rights pursuant to K.S.A. 1990 Supp. 74-7333 and 74-7335 and amendments thereto;

(D) the name and address of the crime victims' compensation board and information about compensation benefits;

(E) advise the victim that the details of the crime may be made

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HJUD
Attachment # 5
4-1-91

5-2

public;

(F) advise the victim of such victims' rights under K.S.A. 1990 Supp. 74-7333 and 74-7335 and amendments thereto; and

(G) advise the victim of available resources which ~~would~~ assist the victim;

(9) whether an arrest is made or not, a standard offense report shall be completed on all incidents and sent to the Kansas bureau of investigation; and

(10) a description of the training that shall be provided yearly on the domestic violence procedures and policies.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

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. If an arrest was not made, such report shall include the reason or reasons why such arrest was not made

KANSAS ASSOCIATION ★★★★ K.A.C.P. CHIEFS OF POLICE

April 1, 1991

The Honorable John M. Solbach
House of Representatives
Room 115 S

Re: HB 2560

Dear Representative Solbach,

I am writing you to express the support of the Kansas Association of Chiefs of Police for the passage of House Bill No. 2560, to be heard by the Judiciary Committee this afternoon.

The Association is unable to send anyone to speak in person to the Committee, but I have attached a document which clearly articulates the need for this legislation. I understand that copies of this have already been sent to all members of the Committee, so I will not attempt to re-iterate its contents.

The Kansas Association of Chiefs of Police extends its apologies for not having a representative present at today's hearing, but it is hoped you will be willing to relay our support for this bill.

Sincerely,

Jack C. Pearson

Jack C. Pearson
Legislative Coordinator

HJUD
Attachment # 6
4-1-91

TO: Kansas Police Chiefs and Sheriffs

FROM: Myron E. Scafe, Chief of Police, Overland Park, Kansas
Michael R. Santos, Assistant City Attorney, Overland Park, Kansas

SUBJECT: HB2560 Concerning Admissibility of DUI Breath Tests

DATE: March 21, 1991

I. The Historical Perspective

The Kansas legislature has been a leader in the development of effective legislation to combat the problem of drunken driving on our highways. In 1982 it passed a comprehensive DUI law that required mandatory minimum sentencing. In 1985 it created one of the first per se .10 laws in the country. In 1989 it passed a comprehensive commercial drivers DUI statute. The adoption of these laws has resulted in the reduction of fatality and injury accidents caused by DUI. Because of the importance of the breath test to DUI prosecution, most defense attorneys focus on keeping the breath results out of evidence. Without denigrating the legitimate efforts of defense attorneys to effectively represent their clients, many of the challenges to the breath tests are specious and self-serving at best. For example, the results of breath tests have been challenged on the basis that the defendant had been painting his house, that the defendant wore false teeth, that the intoxilyzer was not certified by the Department of Agriculture and even the argument that the defendant only had one lung. The future effectiveness of the Kansas DUI laws requires that the clear purpose and intent of those laws not be subverted by the introduction of creative technical challenges to the breath tests. House Bill 2560 provides the legislative guidance to the court to insure that once a proper evidentiary foundation has been laid, the results of the test will be admitted into evidence. This bill will not prohibit the introduction of false teeth and other creative defenses, but will limit that evidence to attacking the probative value of the breath test, not it's admissibility.

II. Why is HB2560 needed?

Pursuant to state law the Director of the Department of Health and Environment is charged with the responsibility of insuring that human breath testing for law enforcement is conducted in accordance with scientific standards that will insure its reliability in court. Because many courts are not familiar with the extensive state regulation of breath testing, they permit extraordinary challenges to the admissibility of test results. In addition, some courts have an obsessive attraction to the technical aspects of the breath test that opens the door for unjustified challenges to its admissibility. Finally, the need for flexibility in the rules of evidence and the application of case law principles does not permit a uniform and articulable set of rules to guide courts in the admissibility of breath test results.

6-2

III. What is the existing state law concerning the testing of human breath for law enforcement purposes?

The following law exists in Kansas today to insure the scientific reliability of breath testing by law enforcement officers.

A. K.S.A. 65-1,107 provides that the Secretary of Health and Environment shall promulgate rules and regulations establishing...the procedures, qualifications of personnel and standards of performance in the testing of human breath for law enforcement purposes, including procedures for the periodic inspection of apparatus, equipment and devices... and the resting of persons who operate apparatus, equipment or devices for the testing of human breath for law enforcement purposes.

B. K.S.A. 65,1,109 provides that it shall be unlawful for any person to make any test of the human breath for law enforcement purposes unless they have complied with the rules and regulations of the Secretary of Health and Environment to govern the procedures, standards of performance and qualifications, training certification and annual testing of personnel for the testing of human breath for law enforcement purposes and the apparatus, equipment or device used by such person in the testing of human breath is of a type approved by the Secretary of Health and Environment and otherwise complies with the regulations and rules of the Secretary of Health and Environment for the periodic inspection of such apparatus, equipment and devices.

In addition to the above statutory provisions, the Secretary of Health and Environment has adopted the following rules and regulations that insure the scientific reliability of human breath testing by law enforcement officers within the state.

C. K.A.R. 28-32-1 provides that each law enforcement agency performing breath evidential testing for alcohol shall apply to the Kansas Department of Health and Environment for certification of test equipment and approval of procedures, performance standards and training and test equipment and devices. In addition,

1. testing shall be conducted in accordance with approved procedures, and using the equipment and devices certified by the department...

2. equipment shall be operated strictly according to description provided by the manufacturer and approved by the Department of Health and Environment...

3. reliability of instrument performance shall be assured by weekly testing with alcohol standards furnished by the Department of Health and Environment. These results shall be reported monthly to the Department of Health and Environment.

6-3

D. K.A.R. 28-32-2 provides that each law enforcement agency performing evidential breath alcohol tests shall participate in a performance evaluation program conducted or approved by the Department of Health and Environment, that shall include requiring each certified operator shall test and report the number of proficiency test specimens specified by the Secretary. Failure to test and report proficiency specimens or unsatisfactory results from such testing shall constitute reason for revoking the certification of the operator.

E. K.A.R. 28-32-5 provides that in order to perform evidential breath alcohol tests for law enforcement purposes a person shall:

1. be duly appointed a Kansas law enforcement officer;

2. shall receive adequate training in breath alcohol testing;

3. shall successfully test four proficiency test specimens;

4. shall successfully complete a written examination prescribed by the Department of Health and Environment.

IV. **What is the existing case law in Kansas concerning the evidentiary foundation necessary to admit the breath test?**

While there is little case law concerning the admissibility of breath tests, the existing cases indicate that the foundation consists of the following requirements:

- That the operator be certified by the Secretary of Health and Environment to conduct human breath testing for law enforcement purposes,

- That the machine used be certified by the Secretary of Health and Environment, and

- That the machine be operated in accordance with the manufacturer's instruction of the written protocol for the machine as established by the Secretary of Health and Environment.

(See State v. McNaught, 238 Kan. 567 (1986), City of Shawnee v. Gruss,2 Kan App 2d 131 (1978), and State v. Lieurance, 14 Kan App 2d 87 (1989).

The fact the appellate courts as recently as 1989 have been presented with the issue of determining what the evidentiary foundation for the admissibility of a breath test is, indicates the issue continues to plague the trial courts.

6-4

V. How do the provisions of HB2560 relate to the existing state law and case law on the evidentiary foundation necessary to admit the results of the breath test?

The provisions of HB2560 parallel the requirements established by the Secretary of Health and Environment for the testing of human breath by law enforcement officers and complies with the evidentiary foundation requirements of the existing case law.

VI. Do other states have laws similar to the provisions of HB2560?

Many states, as part of their DUI statutes, have enacted laws establishing the evidentiary standards for the admissibility of breath tests. The following laws are examples of this type of legislation:

A. **Alaska Statutes 28.35.033(d)** ...If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods, and standards of training approved by the Department of Public Safety, **there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.**

B. **Arizona Statutes Annotated 28-692.03 Admissibility of breath test; promulgation of rules for tests; permits.** A. The results of a breath test administered for the purpose of determining a person's alcohol concentration are admissible as evidence in any trial, action or proceeding upon establishing the following foundational requirements:

1. The test was performed using a quantitative breath testing device approved by the department of health services. A properly authenticated certification by the department of health services is sufficient to establish this requirement.

2. The operator who conducted the test possessed a valid permit issued by the department of health services to operate the device used to conduct the test.

3. Duplicate tests were administered and the tests results were within 0.02 alcohol concentration of each other or an operator observed the person charged with the violation for twenty minutes immediately preceding the administration of the test.

4. The operator who conducted the test followed an operational checklist approved by the department of health services for the operation of the device used to conduct the test. The testimony of the operator is sufficient to establish this requirement.

5. The device used to conduct the test was in proper operating condition. Records of periodic maintenance which show that the device was in proper operating condition at a time before and after the test are admissible in any proceeding as prima facie evidence that the device wa sin proper operating condition at the time of the arrest.

6. **Compliance with subsection A is the only requirement for the admission in evidence of a breath test result.**

C. **Indiana Code Annotated, Sec.9-11-4-5 certificates as prima facia evidence.** Certified copies of certificates issued in accordance with rules adopted under subsection (a):

(1) are admissible in a proceeding under this article;

(2) constitute prima facie evidence that the equipment or chemical was inspected and approved by the department of toxicology on the date specified on the certificate and was in proper working condition on the date the breath test was administered so long as the date of approval is within 180 days before the date of the breath test;

(3) constitute prima facie evidence of the approved technique for administering a breath test;

(4) constitute prima facie evidence that the breath test operator was certified by the department of toxicology on the date specified in the certificate.

In addition to the above sample legislation, the States of Colorado, Minnesota, Vermont, Pennsylvania, North Carolina and Wisconsin have passed legislation providing for the admissibility of breath test results.

VII. **HB2560 does not violate the separation of powers doctrine by establishing the minimal evidentiary foundation for breath tests?**

It is a well settled rule that the legislature of a state has the power to prescribe new, and alter existing, rules of evidence, or to prescribe methods of proof, provided they do not violate constitutional requirements. In re Estate of Ward, 176 Kan. 201 Syl. (1954), 29 Am. Jur. 2d Evidence § 9 (1964). In addition, the legislature may exercise control over the rules of evidence, and hence may pass a law declaring that upon proof of one fact another fact may be presumed, thereby creating a statutory presumption. Statutory presumptions are rebuttable. State v. Haremza, 213 Kan. 201 (1973). In an Arizona case dealing with statutory language nearly identical to HB2560 (see Section VI above), the defendant in a DUI case challenged the Arizona statute on the basis it was an unconstitutional violation of the doctrine of separation of powers because it allegedly eliminated foundational safeguards

6-6

for admitting breath test results. Arizona v. Leonard, 725 P.2d 493 (1986). The Arizona Court of Appeals upheld the constitutional validity of the statute. The Court noted, "while the Arizona Constitution gives the Arizona supreme Court the power to make court rules, courts also recognize the legislature's statutory arrangements which are reasonable and workable." Clearly, the passage of legislation that establishes methods of proof are not violations of the separation of powers doctrine. The authority to develop rules of evidence and methods of proof is mutually held by both the legislative and judicial branches of the government.

VIII. The provisions of HB2560 creates a valid rebuttable statutory presumption.

Like similar legislation in Alaska and Arizona, HB2560 creates a rebuttable presumption that once the prosecutor shows that the testing officer was certified, the testing machine was certified and the machine was operated in accordance with state protocol, the results of the test are valid and no further foundation is necessary for the introduction of the test result. Rebuttable statutory presumptions are common and widely used legislative tools that insure the intent of the legislature is complied with. In fact, the current state DUI statute contains the following rebuttable presumptions:

1. K.S.A. 8-1005(b) provides that if the alcohol concentration is .10 or more, it shall be prima facie evidence that the defendant was under the influence of alcohol to a degree that renders the person incapable of driving safely.

2. K.S.A. 8-1002(i) provides that an affidavit of the custodian of records at the Kansas department of health and environment stating that the breath testing device was certified and the operator of such device was certified on the date of the test shall be admissible into evidence in the same manner and with the same force and effect as if the certifying officer or employee had testified in person. Such affidavit shall be admitted to prove such reliability without further foundation requirement.

Both of these statutory presumptions are constitutionally valid because they permit the defendant to produce evidence to rebut the presumption. The presumption is a valid tool for insuring the admissibility of the state's evidence. Statutory presumptions shall be upheld as constitutional if, in accordance with the experience of mankind, there is a natural and rational evidentiary relation between the fact proved and the one presumed. Haremza at 204. In the .10 presumption, there is a natural and rational reason to believe that individuals with .10 alcohol content in their breath or blood are incapable of safely operating their motor vehicles. In the affidavit presumption of K.S.A. 8-1002(i) there is a natural and rational reason to believe that if the custodian of the records swears to the contents of a document there is a natural and rational reason to believe that the contents are true. The

Kansas legislature passed these statutory presumptions because they believed that the proof of the one fact created a natural and rational presumption that the other fact was true.

The provisions of HB2560, like all statutory presumptions are subject to the test for validity established in the Haremza case. Clearly once the prosecutor has established that the operator was certified, the testing machine was certified and the test was conducted in accordance with the written protocol established by the Secretary of Health and Environment, there is a natural and rational reason to believe that the test results are valid and admissible into evidence without any further foundation.

IX. **HB2560 does not prohibit the defendant from rebutting the results of the test.**

Statutory presumptions are rebuttable. Haremza at 203. The term prima facia evidence carries the inference that such evidence may be rebutted and overcome, and notwithstanding the rule, an accused has the opportunity to submit his evidence and make a full defense. State v Nossaman, 107 Kan. 715 (1920). Once the prosecutor has laid the evidentiary foundation requirements of HB2560 the test results are simply before the fact finder. The defendant remains free to challenge the validity and probative value of the result. For example, if the defendant argues that the test results were affected by the fact he wore false teeth, the fact finder would be free to give the test results the conclusive weight or no weight at all. The same process is true for any other attack on the test results. HB2560 simply establishes a known, simple and reliable evidentiary standard for admitting breath test results.

Myron E. Scafe
Chief of Police

Michael R. Santos
Assistant City Attorney

Kansas County & District Attorneys Association

827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX # (913) 357-6352
EXECUTIVE DIRECTOR • JAMES W. CLARK, CAE

Support of

HOUSE BILL NO. 2560

The Kansas County and District Attorneys Association supports House Bill No. 2560, which establishes by statute the same evidentiary foundation that is required by Kansas court decisions. The bill simply expedites the procedure for establishing a foundation for breath test results, allowing the prosecution to allocate its efforts in pursuing the rest of its case against a person charged with driving under the influence.

HJUD
Attachment # 7
4-1-91

JUDICIARY COMMITTEE

HEARING ON HOUSE BILL No. 2560

APRIL 1, 1991

Testimony of Delbert Fowler, Chief of Police, Derby, Kansas

I am Delbert Fowler, Chief of Police, Derby, Kansas. I would like to thank the committee for allowing me to address House Bill No. 2560. I feel it is extremely important that this bill be enacted into law.

All to often, the defense tries to cloud the results of the breath test through creative challenges to the breath tests.

Currently, there are no set guidelines for an evidentiary foundation necessary for admissibility of breath tests. House Bill No. 2560 would establish those guidelines. This would give a clear understanding to the court, the law enforcement officer, the prosecution, and the defendant as to the proper foundation needed for admissibility of the breath test.

I would be happy to try to answer any questions you may have.

Thank you again for your consideration of this bill.

HJUD
Attachment #8
4-1-91

POSITION STATEMENT April 1, 1991
From the Kansas Bar Association

TO: Members, House Judiciary Committee

FROM: Ron Smith, KBA Legislative Counsel

SUBJ: HB 2560; evidentiary foundations necessary for admissibility of breath tests

HB 2560 is a redraft of 1989 SB 296, as amended by the Senate Committee. That bill failed in the House Judiciary committee last session. KBA opposed SB 296. **KBA opposes HB 2560 for the following reasons:**

1. Last year, proponents argued a number of judges in Johnson County do not admit breath tests for a variety of "very technical and unusual reasons." What HB 2560 does is prevent the exercise of judicial discretion in listening to, and controlling the admission of, evidence in a DUI.

2. The legislature's historic purpose is to decide what activity constitutes a crime, and define it. Whether to admit or allow evidence in a civil or criminal trial is an inherent power of the judicial branch.[1] The judicial branch shared the power to create the codes of procedure and evidence when we recodified the criminal and civil procedure codes in the late 1960s. This was done through the Judicial Council, a statutory body composed of judges, lawyers, laymen and legislators.

HJUD
Attachment # 9
4-1-91

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[1] **Burrus v. Silhavy**, 155 Ind. App. 558, 563, 293 NE 2d 794 (1973); cited with approval in **State v. Quick**, 226 Kan. 308, 597 P.2d 1108 at 1111-1112 (1979).

3. Historically, the Court gives great deference to recommended legislation from the Judicial Council that impact the Separation of Powers doctrine.[2] While the court could defer to the evidentiary system adopted in HB 2560, it is not required to do so; and if statutes cross swords with rules of evidence and procedure laid out by the Court in carrying out its judicial function, judicial rules control.[3]

4. HB 2560 essentially delegates **Judicial** authority to pass on sufficiency of the foundation of evidence to the **executive** branch of government (KDHE and Prosecutors). That invokes Separation of Powers questions.

5. Most blood alcohol tests are admissible, but not automatically. Professor Mike Barbara has written, "The law takes nothing for granted... Authentication or identification is a prerequisite to establish the relevancy of any ... evidence."[4] All evidence must have appropriate foundations. Blood alcohol tests should not have lesser standards. Since courts have judicial power to declare what the law is and whether laws are constitutional,[5] the admissibility of evidence further judicial power is generally within the sound discretion of the trial court.[6]

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[2] **State v. Mitchell**, 234 Kan. 185, 672 P.2d. 1 (1983).

[3] Id.

[4] Barbara, "Kansas Criminal Law Handbook," 2nd Ed., Kansas Bar Association, p. 24-1 (1987).

[5] **State v. Nelson**, 210 Kan. 439, 502 P.2d 841 (1972), where the Court ruled on legislation violating constitutional provisions.

[6] **City of Wichita v. Jennings**, 199 Kan. 621, 433 P.2d 351 (1967)

9-2

6. Section 1(a) requires that the prerequisite to admissibility is simply if the "test results of a breath test were administered pursuant to K.S.A. 8-1001 et seq..." This ignores the fact that scientific evidence is not automatically accepted. The basis of an opinion must be shown to be generally accepted as reliable within a given scientific field.[7] The fact that one breath test is admitted into evidence is not grounds to admit all breath tests. Each must be separately justified, and appropriate foundations laid.[8] The reason is scientific test results carry great weight with jurors.[9]

7. Note the last sentence of subsection (b). If the officers testify to the required information in section 1(a)(1) through (a)(3), regardless whether there is later disputed testimony that the breathalizer was operated incorrectly, that fact by itself will not preclude the admissibility of the breath test under HB 2560. **This sentence transfers judicial power to rule on admissibility of evidence from the judge to the jury. We do not think that is appropriate.** The jury's function is fact-finding, not ruling on admissibility of evidence.

8. There are many reasons why a breath test result, while administered according to protocol, is not probative.[10] Yet HB 2560 requires only a

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[7] **State v. Washington**, 229 Kan. 47 (1981).

[8] **Popp v. Motor Vehicle Department**, 211 Kan. 763 (1973).

[9] **Washington**, supra.

[10] KDHE's own protocols note "some mouthwash and cough drops are 85 proof." It also indicates there be no evidence of bleeding around or in the mouth before taking the test. Asthma medication or Nyquil

(cont)

showing of certification of man and machine; not the prerequisites of testing procedures.

9. Another reason to deny admissibility is an unwillingness of the officers to give defendant a "breath test of his own," for corroborative purposes contrary to this statutory right.[11] While Kansas has no Sixth Amendment right to consult counsel prior to testing, there is a statutory right to counsel after testing. Compliance with these notice requirements in K.S.A. 8-1001 are mandatory.[12] If this right is abridged, the only way to "police the police" is the ability to suppress the first breath test results.[13] You encourage that result by statute.[14]

10. HB 2560 may override this case law. It "admits" the test results **"of a breath test"** if administered pursuant to 8-1001. We presume prosecutors would contend this means if the breath test was administered pursuant to 8-1001, regardless of

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(cont)
contain enough alcohol to render a test inaccurate. Certain chemicals inhaled by painters or carpet layers can cause a breath level above 0.10. A burp, or blood in the mouth, within 20 minutes before a breath test can throw off the test.

[11] K.S.A. 1990 Supp. 8-1001(f)(1)(I) states: "after completion of the testing the person has **the right to consult with an attorney and may secure additional testing**, which, if desired, should be done as soon as possible and it is customarily available from medical care facilities and physicians."

[12] **Barnhart v. Kansas Dept. of Revenue**, 243 Kan. 209, 212-13 (1988).

[13] **State v. Kelly**, 14 Kan.App.2d 182, 786 P.2d 623 629-630 (1990)

[14] "In case the officer refuses to allow the additional test ... e testing administered pursuant to K.S.A. 8-1001 ... shall not be ...petent evidence." K.S.A. 8-1004.

9-4

whether other requirements in 8-1001 are met. This statute is ambiguous, and may allow admission of illegally obtained or tainted evidence.

The establishment of the crime of DUI takes place at one crucial point in time: when the breathalyzer test is given to the accused. The accused has rights under this statute that when he gives a breath test, he then has the right to consult counsel and independent testing. This is to provide a defense.

This legislature is considering lowering the BAT threshold to 0.08. When you do that you will have a greater number of accused persons who have real feelings that they are not impaired. HB 2560 makes it easier to gain a conviction while at the same time the legislature makes more convictions likely.

Law enforcement personnel deserve to be armed with sophisticated technology to do their duty. But we should not let technology drive our statutory rights to fundamental due process. The defendant has a right to confront witnesses against him. One cannot cross examine a machine. Therefore, one must cross examine the machine's operators -- the breathalyzer officer, the arresting officer, and other witnesses and experts. The test and circumstances surrounding it's administration must be examined before there is admissibility. HB 2560 denies that fundamental right.

A Proposed Solution

The 1989 legislation was introduced by Johnson County, where over a dozen cities have their own traffic court and DUI cases. At the municipal level, defendants often have court-trials then appeal de novo to district court. There a jury trial is often requested. Currently to lay a proper foundation, both the arresting as well as DUI testing officers must testify. I was told each officer is having to testify twice, once in municipal court,

9-5

and again in district court. Sometimes the officers are required to appear even when DUI test results or the method of testing are not issues. HB 2560 would preclude some testimony in such instances.

If the purpose of the bill is to eliminate need for testimony from two or more officers, it fails. Nothing prevents the defendant from subpoenaing these officers.

In felony prosecutions involving drinking,[15] a preliminary hearing is held and, later, pretrial conferences. The prosecutor and court learns whether defendant intends to raise issues concerning breath testing protocols, or the results. If waived at prelim, defendant cannot later object to introduction of the test by means other than direct testimony of the officer. Felony defendants can use motions to suppress evidence as means to challenge sufficiency of the evidence.[16]

The problem is that DUI is a misdemeanor. The legislature could provide in misdemeanor prosecutions that sometime after counsel is appointed or hired, there is a pretrial conference. BAT test results and procedures could be discussed. Prosecutors can learn whether test results are an issue. If they are, they schedule the officer's testimony. If not, the pretrial order controls, and other means of introducing the evidence can be made (such as the arresting officer). The pretrial conference can be informal, and include conferencing by telephone.

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[15] e.g. vehicular homicide

[16] K.S.A. 22-3215.

KBA believes this alternative is better because it is less intrusive into the judicial power and process of controlling its evidence, yet speaks to the Johnson county problem.

To create this alternative we suggest a substitute bill as follows:

> (a) At any time at least twenty days before trial where a misdemeanor charge of is brought pursuant to K.S.A. 1990 Supp. 8-1567, or similar municipal ordinances, the court upon motion of any party or its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. Such conference may be conducted in person, or by other means convenient to the parties and defendant. At the conclusion of a conference the court shall cause to have prepared and shall file a memorandum of matters agreed upon at such conference.
>
> (b) No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and such defendant's attorney. This section shall not be invoked if a defendant is not represented by counsel and with the court's permission proceeds pro se.

This proposed statute is loosely based on K.S.A. 22-3217, allowing pretrial conferencing in felony prosecutions. Prosecutors can raise the issue of what extent defendant plans to contest blood alcohol testing. KBA suggests this alternative meets the needs of prosecutors without Separation of Powers problems.

Issue: What standards should the legislature adopt before granting immunity or privileges against testifying in court?

KBA Position: *The Kansas Bar Association OPPOSES legislation which would immunize persons from testifying, or grant privileges against testifying, in court. Since the Code of Civil Procedure was adopted after extensive involvement of the Judicial Council and examination of case law the Kansas Bar Association opposes legislation that extends, limits or interprets rules of evidence regarding admissibility of evidence or testimony from otherwise bona fide witnesses, unless (1) there is significant Judicial Council study of such extension, limitation or interpretation, (2) a lesser restrictive method of meeting the identified problem does not exist, (3) case law is unable to speak to the issue in a manner consistent with good public policy, (4) the public interest in the change is compelling, and (5) the public interest is best served by the Change.*

Rationale: Courtrooms are intended to determine the best possible version of the truth, consistent with civil liberties. To further that goal, the judiciary and juries must hear all relevant evidence. Often interest groups seek to avoid this duty by expanding privileges against testifying in court, immunizing themselves from disclosing documents under subpoena, or creating statutory "minimums" of what constitutes prima facie evidence.

The Criminal and Civil Procedure codes abolished all common law privileges against testifying. K.S.A. 60-407 states that "except as otherwise provided by statute," no person has a privilege to refuse to be a witness. That code regulates many statutory privileges. While we do not challenge the ability of the legislature to define the parameters of when a person can testify, there should be limitations.

KBA is opposed to changes in the current statutory or common law requirements of who can testify without extensive cooperative involvement of the legislative and judicial branches of government.