

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:34 A.M. on March 5, 2008, in Room 123-S of the Capitol.

All members were present except:

Donald Betts arrived, 9:37 A.M.
David Haley arrived, 9:42 A.M.
Julia Lynn arrived, 9:40 A.M.

Committee staff present:

Bruce Kinzie, Office of Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the committee:

Denise Bixby
Dennis Bixby
Ed Klumpp, Kansas Chiefs of Police & Kansas Peace Officers Association
Karen Whitman, Kansas District Attorney's Association

Others attending:

See attached list.

The Chairman opened the hearing on **HB 2617– Mandatory implied consent testing for serious injury and fatality accidents.**

Representative Kenny Wilk stated his support of the bill relating details of a car accident that occurred in his district and the need for changes to the Kansas vehicular homicide statutes. He introduced Denise & Dennis Bixby, who had lost their daughter Amanda in the accident.

Dennis & Denise Bixby, testified in support, relating their personal experience following the accident in which their daughter died (Attachment 1 & 2). They related the details of the accident and the possibility that the driver of the other car had drugs in his system but was not tested.

Ed Klumpp appeared in support (Attachment 3 & 4). Mr. Klumpp distributed flowcharts depicting current and proposed processes for testing individuals and described the differences between the two (Attachments 5 & 6). He also suggested changing the language on page 2, lines 35-36 striking "in such a manner" and inserting "involved in a collision which" and striking the word "another" on line 36. The Chairman requested Mr. Klumpp work with the revisor to develop a balloon amendment.

Karen Whitman spoke in favor, stating **HB 2617** will keep Kansas' roads safer. Time is of the essence when determining if drugs or alcohol are present in a person's system (Attachment 7). Ms. Whitman provided a balloon amendment with several suggested changes aimed at satisfying any constitutional challenges (Attachment 8).

Written testimony in on **HB 2617** was submitted by:

Steve Opat, Geary County Attorney, Support (Attachment 9)
Peter Boydek, Kansas Department of Transportation, Support (Attachment 10)
Chad Austin, Kansas Hospital Association, Neutral (Attachment 11)

There being no further conferees, the hearing on **HB 2617** was closed.

Chairman Vratil appointed Senator Terry Bruce, Senator Greta Goodwin, and Senator Phil Journey to a subcommittee on **HB 2617**.

The meeting adjourned at 10:30 A.M. The next scheduled meeting is March 6, 2008.

Kansas Senate Judiciary Committee
Implied Consent Mandatory Drug Testing

HB 2617

March 6, 2008

My testimony today concerns HB 2617, Implied Consent for mandatory drug testing. February 14, 2007 brought to my attention, as well as others, the lack of drug testing at serious injury or fatality car crash scenes. On this night, our daughter Amanda Bixby was killed in a car crash that injured two others but left the driver who caused the crash uninjured. We will never know all the reasons this driver did not comply with standard driving procedures – i.e. driving the posted speed limit, stopping at a stop sign and having a valid Kansas driver's license. Also, we will never know if the driver was under the influence of illegal drugs. He was tested for alcohol but never for any other substance. As we have searched for answers to the cause of the crash, the lack of drug testing of the driver continues to be a glaring reminder that Kansas laws need to be updated.

Drug testing is prevalent in society today. Employment situations often depend on the outcome of testing. Many industries not only test as a condition of hiring, but also randomly test, as well as test in the event of serious accident. OSHA, the railroads, the airlines, the NFL, all use drug testing. One might argue that employment is voluntary and you willingly submit to the testing because you want the job. We need to remember that operating a motor vehicle is also voluntary. Driving is a privilege not a right. Per the Kansas Driver's Handbook, page 8, privileges can be suspended or revoked for driving under the influence of drugs and/or alcohol (K.S.A. – 8-1567). The Driver's Handbook also lists penalties on page 28 for driving under the influence of drugs and/or alcohol. By having these penalties and statutes in place, there is a foundation for the implied consent for drug testing.

Senate Judiciary

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Attachment 1

Every Kansan has the expectation the drivers they meet will be operating their vehicle safely. When car accidents happen, Kansans have the expectation that every possible cause be looked at and testing drivers for impairment should be one piece of evidence.

I would encourage you to support your fellow Kansans and approve of HB 2617.

Amanda's Law HB 2617
Kansas Senate Judiciary Committee
Mandatory Drug Testing following
Injury and Fatality Vehicle Accidents
March 5, 2008

Amanda Kate Bixby was born April 17, 1987 in Topeka. The only child of Denise & Dennis Bixby, she had done volunteer work in nursing homes and churches since age 5. A gifted soprano, she earned top honors and toured with the Continental Singers. February 14, 2007, she called to say she was on her way home at 9 pm. At 9:15 pm, she died at the scene of a 3 vehicle accident. She was 19.

Ricardo Flores caused the accident when he ran a stop sign at a high rate of speed, hit another SUV (injuring 4 people) and then hit our daughter's Ford Taurus and killing her. He is an illegal alien with no driver's license or formal driver's training. I believe that Flores was on drugs but we will never know as he was only tested for alcohol. Drug testing has to take place within 2 hours or the results cannot be used in court. Flores was never tested because the officer never made the call. Evidence for or against this young man was lost forever. Flores was fined \$ 170 + court costs and released.

Mandatory Drug Testing – is essential towards getting convictions. Illicit drug use has exploded in the last 50 years. Despite the “War on Drugs”, they have never been cheaper or easier to get. A PRIDE 9th annual survey questioned 12th grade students. The findings were astonishing. Teens who admitted smoking marijuana in a car equaled 20%, drinking a beer in a car 16.3%, hard liquor in a car 12.5%. Alcohol to drug preference has shifted.

Although a lot of research exists about drunk driving, very little has been done to examine **DRUGGED DRIVING!** The National Highway Transportation Safety Administration (NHTSA) reports 39% of all motor vehicle crash (MVC) victims test positive for alcohol. BAC testing is easy and common place and the statistics are well documented. Did you ever wonder what causes the other 61%?

The Walsh Group of Bethesda, Maryland is a public policy consulting firm dealing with substance abuse research. A 2004 study of an emergency room trauma center tested for both alcohol and also for marijuana, cocaine, opium, methamphetamines, and amphetamines. During the 6 month study, 322 MVC victims had their blood and urine tested. Toxicology results indicated that 59.3% tested positive for commonly abused drugs or alcohol. 33.5% tested positive for drug use only while only 15.8% tested positive for alcohol only. 9.9% tested positive for both drugs and alcohol. Of those testing positive for illicit drugs, only 45.2% of the drug users would have been detected using traditional roadside alcohol tests. The fact is in Kansas we do not know what the statistics are because we do not require hospitals to keep track.

The Solution The Kansas Highway Patrol has joined 41 other states in training veteran officers to be Drug Recognition Experts (DRE). LAPD and the NHTSA worked to develop tested standards and procedural recommendations called Drug Evaluation and Classification. The techniques developed have withstood many court challenges. In Kansas, only the KHP and Johnson County law enforcement routinely runs drug testing as part of serious or fatality accidents as a matter of policy. Pennsylvania, Ohio and Georgia have enacted stiff zero tolerance testing policies.

However under current Kansas law, drug testing is generally left up to the county or police department to set the policy. Amanda Bixby was drug tested as part of the autopsy. Kaitlyn Witt and Dawn Nichols who was also involved in the accident, was drug tested as part of their treatment. All test results came back clean.

Police see people at their very worst and their focus is often on preserving evidence for criminal matters rather than civil. Crash victims often face many months of rehabilitation and a mountain of medical bills. A civil suit is many times the only opportunity to made whole. Evidence has to be collected so that the court knows definitively whether or not defendants are was on drugs.

The Kansas Hospital Association and the Kansas Chiefs of Police have added language to this bill which will limit the liability and make it simpler for law enforcement to conduct such tests Avoidance of evidence collection due to influential drivers applying undue influence is a common temptation. Department or County pressures for funding, resources, time etc. weigh heavy in the day to day operations in law enforcement. While MDT can take extra time and money, it often simplifies the effort of law enforcement. If the law is made mandatory, roadside or jailhouse debates do not need to take place. The officer does not have to be hassled or make excuses for anything...if it is the law. Even the appearance of improper conduct needs to be avoided.

Mandatory Drug Testing is the answer.

1. It takes the politics and temptation out of the evidence collection.
2. Fine costs and license reinstatement fees to pay for the cost of testing.
3. Losses in human productivity are reduced
4. Roads become safer

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Kansas Peace Officers' Association

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TESTIMONY TO THE SENATE JUDICIARY COMMITTEE IN SUPPORT OF HB 2617 Presented by Ed Klumpp

March 5, 2008

The Kansas Peace Officers' Association supports the provisions of HB2617 as amended in the House. This bill was initiated to assure DUI testing takes place in all motor vehicle collisions resulting in serious injury or death. Such testing requirements will be good for protecting Kansans and assuring the appropriate evidence is collected in these most serious of motor vehicle collisions. But such a testing mandate will not be effective unless the ongoing problems of sample collection are also addressed. The House amendments to this bill also fix that area of the current law. Both of these areas of DUI enforcement have needed enhancing for some time.

Current law places restrictions on law enforcement officers to have "reason to believe" the person was the driver and that the person was under the influence prior to requesting submission to testing, even when an accident is involved and serious injury or death has occurred. When the suspected driver is injured, it is often difficult for the officer to have enough contact to build the reason to believe required in the current KSA 8-1001(b). Under current law, an officer may request a "forced blood draw" when the driver was involved in an accident resulting in serious injury or death and the officer has probable cause to believe the person was operating the vehicle involved and that the person is under the influence. And of course it becomes even more problematic in some cases to overcome the higher probable cause standard in KSA 8-1001(k). This bill addresses those concerns.

Another common challenge law enforcement encounters in these cases is the occasional, but not uncommon, resistance of the medical professionals to collect the sample when directed by law enforcement. The House amendments to clarify the duties of the medical professionals in collecting the sample are critical to our success in meeting the goals the legislature sets for us with this bill, as well as with current law.

It is also critical for the law to define the term "serious injury" since the actions of the officer and medical professional hinges on that determination. That definition must use factors a law enforcement officer can readily observe and determine even while the person is being treated by medical personnel.

Passage of this bill will add a long overdue tool for the officers to successfully and accurately investigate these serious accidents. Victims will be better served by an increased thoroughness of the investigation leading to accountability of those responsible. Prosecutors will be better informed and armed with better evidence as they make their prosecutorial decisions.

We strongly urge you to recommend HB2617 to pass

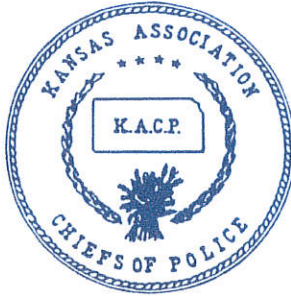
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Senate Judiciary

3-5-08

Attachment 3

In Unity There Is Strength



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**TESTIMONY TO THE SENATE JUDICIARY
COMMITTEE
IN SUPPORT OF HB2617
Presented by Ed Klumpp
On behalf of the
Kansas Association of Chiefs of Police**

March 5, 2008

This testimony is in support of the provisions of HB2617 changing the requirements for collecting samples for DUI testing in cases involving motor vehicle collisions resulting in serious or fatal injuries. With the House amendments, this bill also fixes other problems in DUI sample collection including clarifying the medical professional's role, urine sample collection for drug testing, and defines serious injury for the purposes of this statute.

This bill is the result of the Interim Joint Judiciary Committee hearing from victims of accidents in which no test for DUI was taken and later evidence supported strong indications of an intoxicated driver being involved. The current law sets law enforcement up for those results. It is our opinion the proposed bill corrects that by allowing for, in fact mandating, testing in serious injury accidents without the current restrictions on law enforcement. Many times in serious accidents, seriously injured driver(s) are being tended to by medical first responders and other EMS crews when the officer arrives. This provides a very limited opportunity for law enforcement contact with those drivers, thus a very limited opportunity to build the "reasonable grounds to believe" required for DUI testing in the existing statute. Many times by the time law enforcement gets to the hospital, medical treatment prevents or inhibits significant law enforcement contact. In many cases, medical personnel will not provide information to law enforcement due to physician-patient privilege and HIPAA laws. All of this makes it inevitable that in some alcohol or drug related accidents the tests for alcohol or drugs is not completed.

The proposals contained in this bill go a long way toward remedying those challenges faced by law enforcement to provide the answers victims and their families deserve and the information prosecutors need to determine the correct accountability and legal course of action. But law enforcement will still be unsuccessful unless the problems with the collection of samples by medical personnel and other sample collection issues are not also addressed. It is to that end that while this bill was in the House Judiciary Committee we worked very closely with prosecutors and medical associations to identify all of the related issues and

find a solution to each issue. The results are included in the House amendments to the bill.

One thing that I want to point out is the "forced draws" which are mentioned in the Supplemental Notes in a way that may appear we have created that portion of the law. Forced draws exist in the current law, and other than clarifying the medical and law enforcement procedures for the actual draw itself, the current legal standard for those draws remains unchanged. The current law, and the language of the bill, allows for forced draws only when there is an accident involving serious injury or death and the law enforcement officers meets the requirements of KSA 22-2502 for a search warrant or KSA 22-2501 for a search under exigent circumstances. Both of these require probable cause that the person was driving a motor vehicle and is under the influence of alcohol and/or drugs.

It is our belief that the amendments will further refine the law to allow law enforcement to fulfill the intent of this legislation and to clarify for medical staff their role in successfully collecting the evidence needed to provide prosecutors with accurate information to determine if the DUI laws were violated in these difficult cases.

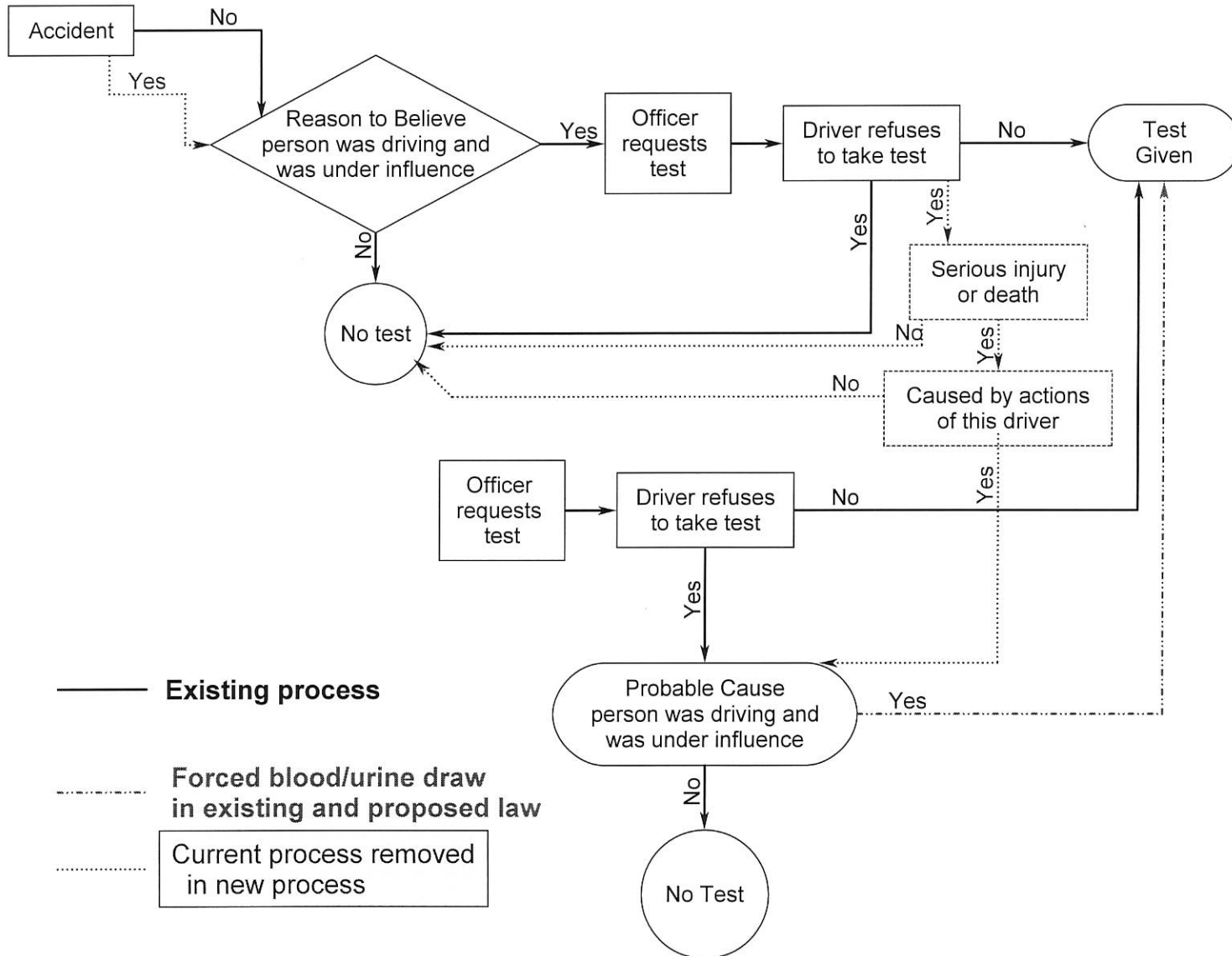
We urge you to recommend the bill favorably to pass.



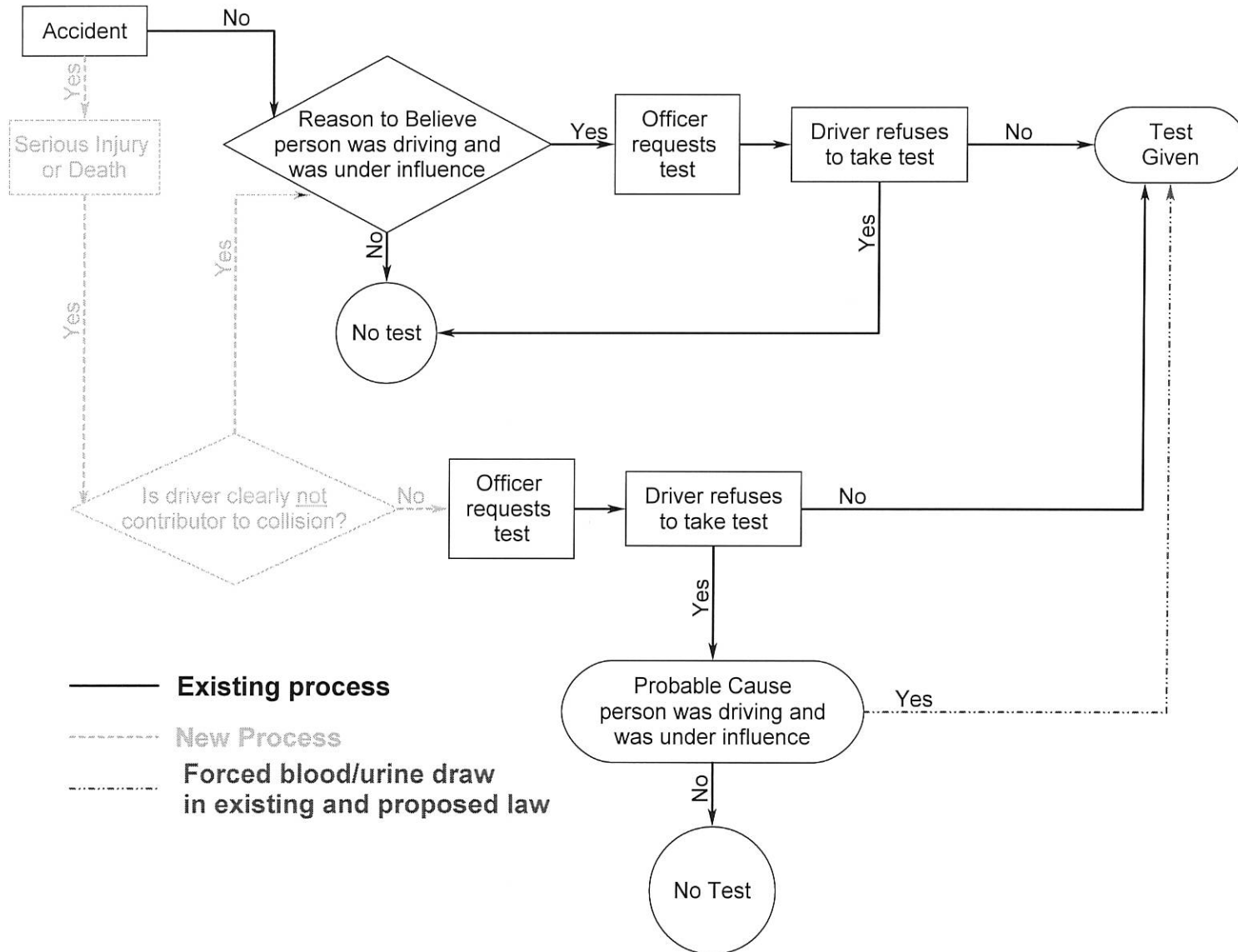
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Current DUI Process



Proposed DUI Process



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HB 2617
Amending K.S.A. 8-1001

NEED FOR CHANGE

At the present time the law in the state of Kansas is as follows:

A three-part test is to be applied in order to determine whether blood alcohol evidence can be taken from a suspect without a warrant. The three requirements are: (1) There must be exigent circumstances in which the delay necessary to obtain a warrant would threaten the destruction of the evidence; (2) the officer must have probable cause to believe that the suspect has been driving under the influence of alcohol; and (3) the procedures used to extract the blood must be reasonable. State v. Murry 271 Kan. 223, *223, 21 P.3d 528, **529 (Kan.,2001)

The officer at the scene sometimes does not have enough information at the time to determine the "probable cause" required for a blood draw. Exigent circumstances exist at the site of a fatal collision. The first law enforcement officer responding to an accident scene is typically faced with a series of immediate, possibly life saving decisions. Trying to save a potential victim, offering comfort to survivors, securing the accident scene to prevent additional tragedy and preserve evidence for accident reconstruction investigators are all issues requiring immediate attention. One of the officer's responsibilities is deciding if a fatality has occurred or is likely to occur as a result of the accident. A second priority is trying to determine if a surviving driver appears to be impaired either by alcohol or drug consumption and administering an appropriate test to make this determination. This is often not an easy determination particularly in the case of drivers impaired by drug consumption, both legal and illegal. Additionally, the surviving driver may, because of the severity of his or her injuries, be unavailable for interview for hours and perhaps days following the

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Attachment 7

accident. During this time, facts may come to light in the form of witnesses or forensic evidence that point to a driver's use of substances which may have played a contributing role in causing the accident. *State v. Cormier* 928 A.2d 753, *760 (Me.,2007)

The officer cannot always accurately assess when the driver's condition is due to alcohol ingestion or some other reason. If he/she makes the determination that it is the latter, fails to take a test and finds out later that he/she was mistaken, then it is too late to give a test. The alcohol/drugs will have been eliminated from the driver's blood.

When the entire investigation is complete it may be determined there was enough probable cause to believe a person was under the influence however it is now too late.

The Kansas Supreme Court said it best, *Lee v. State* 187 Kan. 566, *570-571, 358 P.2d 765,**769 (Kan.1961):

It is an elementary rule of law that the right to operate a motor vehicle upon a public street or highway is not a natural or unrestrained right, but a *privilege* which is subject to reasonable regulation under the police power of the state in the interest of public safety and welfare. 5A Am.Jur., Automobiles and Highway Traffic, § 127, p. 318; 60 C.J.S. Motor Vehicles § 146, p. 469. In *State v. Razey*, 129 Kan. 328, at page 330, 282 P. 755, at page 756, 66 A.L.R. 1225, where a statute requiring a person who has caused injury to another by the operation of a motor vehicle on a public highway to stop and give certain information to the injured person and to report the matter to law-enforcement officials, was under attack, it was said:

'The requirements of the statute are proper police regulations necessitated by the use of motor vehicles on the highway. The information which a motorist who causes injury to another is required to give is information pertinent to the accident, not irrelevant information. Defendant's privilege of operating an automobile on the streets of Wichita was conditioned on her obligation to stop and give the statutory information and report the injury to the public officer. This condition was binding upon defendant as upon all who accept the privilege of operating motor cars on the public highways.'

And see *McCarry v. Center Township*, 138 Kan. 624, 27 P.2d 265, and *Miller v. City of El Dorado*, 152 Kan. 379, 103 P.2d 835.

[2] The use of the public highways by motor vehicles, with its consequent*571 dangers, renders the necessity of regulation apparent. Courts may take judicial notice of the problem, both local and national, of the drunken driver on the highways with its ever increasing toll of injuries and death. In line with many other

states, Kansas, through its inherent police regulatory powers, in an effort to promote public safety and welfare, has seen fit to enact the statutes heretofore quoted or summarized-one of which, 8-1001, puts a choice to a motorist who is accused upon reasonable grounds of driving while under the influence of intoxicating liquor. In this connection see *City of Garden City v. Miller*, 181 Kan. 360, 365, 311 P.2d 306, and *State v. Barry*, 183 Kan. 792, 797, 332 P.2d 549.

In this day and age there is nothing brutal or offensive about that (*drawing blood*) when done under the protective eye of a physician or qualified medical technician, but rather is admittedly a scientifically accurate method of detecting alcoholic content in the blood. Chemical tests eliminate mistakes from objective observation alone, and they disclose the truth when a driver claims that he has drunk only a little and could not be intoxicated. They protect the person who has not been drinking to excess but has an accident and has the odor of alcohol on his breath. They save a person from a drunken driving charge when his conduct creates the appearance of intoxication but who actually is suffering from other causes over which he has no control. See *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448.

The suggestion below is a combination of Maine and Oklahoma law....both have been deemed constitutional.....

MANDATORY SUBMISSION TO TEST

If there is a reasonable belief that a death has occurred, will occur or serious injury has occurred as a result of a collision, a person operating or attempting to operate of a motor vehicle involved in the motor vehicle collision shall submit to a blood test to determine the presence of alcohol and/or drugs.

ADMISSIBILITY OF TEST RESULTS

The results of a test is admissible at trial if the court, after reviewing the evidence, whether gathered prior to, during or after the test, is satisfied that either (a)

- 1) The driver of any vehicle involved in an accident resulting in death could be cited for any traffic offense or
 - 2) There exists probable cause, independent of the test result, to believe that the driver was under the influence of alcohol and/or drugs at the time of the accident.
- (b) The traffic offense violation shall constitute probable cause for the purpose of this section.

DRIVER'S LICENSE ISSUES

As noted in 8-1001(c), if a person refuses a test there are consequences with licensing. At the present time, a person's license could be suspended for refusing to take a test. That would still be true when dealing with mandatory testing. A licensee would still have the ability to request a hearing concerning any suspension.

HOUSE BILL No. 2617

By Special Committee on Judiciary

(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a): (1) If the officer has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person was driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, or was under the age of 21 years while having alcohol or other drugs in such person's system; and one of the following conditions exists: (1) (A) The person has been arrested or otherwise taken into custody for any offense involving operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both, or for a violation of K.S.A. 8-1567a, and amendments thereto, or involving driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, in violation of a state statute or a city ordinance; or (2) (B) the person has been involved in a vehicle accident or collision resulting in property damage, or personal injury or death other than serious injury; or (2) if the person was driving a vehicle operating or attempting to operate a vehicle and such vehicle has been involved in an accident or collision resulting in serious injury or death to another person, ~~except when a law enforcement officer has reasonable grounds to believe the actions of the operator did not contribute to the accident or collision.~~ The law enforcement officer directing administration of the test or tests may act on personal knowledge or on the basis of the collective information available to law enforcement officers involved in the accident investigation or arrest.

PROPOSED March 5, 2008
KCDA

Presented by:
Karen C. Wittman
Senior Assistant District Attorney
Third Judicial District

(?) If there is a reasonable belief that a death has occurred, is likely to occur or serious injury has occurred as a result of a collision, a person operating or attempting to operate a motor vehicle involved in the motor vehicle collision shall submit to a blood test to determine the presence of alcohol and/or drugs.

8-1005. Evidence; test results admissible in prosecutions; weight to be given evidence.

Except as provided by K.S.A. 8-1012 and amendments thereto, in any criminal prosecution for violation of the laws of this state relating to operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or the commission of vehicular homicide or manslaughter while under the influence of alcohol or drugs, or both, or in any prosecution for a violation of a city ordinance relating to the operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both, evidence of the concentration of alcohol or drugs in the defendant's blood, urine, breath or other bodily substance may be admitted and shall give rise to the following:

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

(b) If the alcohol concentration is .08 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.

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

(d) The results of a test under subsection 8-1001(b)(?) is admissible at trial if the court, after reviewing the evidence, whether gathered prior to, during or after the test, is satisfied that either

(a) (1) The driver of any vehicle involved in an accident resulting in death could be cited for any traffic offense or;

(2) There exists probable cause, independent of the test result, to believe that the driver was under the influence of alcohol and/or drugs at the time of the accident.

(b) The traffic offense violation shall constitute probable cause for the purpose of this section.

(d) A law enforcement officer may direct a medical professional described in this section to draw a sample of blood from a person:

(1) If the person has given consent and meets the requirements of subsection (b);

(2) if medically unable to consent, if the person has operated or attempted to operate a vehicle in such a manner as to have caused death or serious injury to another person; or

(3) if the person refuses to submit to and complete a test, if the certifying officer has probable cause to believe that the person, while under the influence of alcohol or drugs, or both, ~~or has operated a vehicle in such a manner as to have caused the death of or serious injury to another person.~~

committed a traffic infraction

TESTIMONY REGARDING HB 2617- DUI BILL

My name is Steven L. Opat and I am the duly elected Geary County Attorney. I have been a practicing lawyer for almost 34 years, half of which has been spent as a prosecutor and the other half as a criminal defense lawyer. Like everyone, I have a horror story to tell regarding K.S.A. 8-1001 and the failure to obtain admissible evidence in DUI cases.

My particular experience deals with a fatality collision on Interstate 70 outside of Junction City in the fall of 2006. The eventual defendant was life flighted to a hospital in Topeka and the eventual victim to one in Wichita where he was ultimately pronounced dead on arrival. There were immediate observations about the intoxicated state of the eventual defendant, but due to her medical condition the drawing of blood at the scene was not deemed a priority. A KHP officer from Shawnee County was sent to the hospital for that purpose, but no blood sample was obtained; the Trooper asserted noncompliance on the part of the personnel in the emergency room and the hospital asserted a failure to communicate on the part of the Trooper. To this date the real reason a blood sample was not obtained remains a mystery. Eventually, a search warrant was issued for the samples taken by people in the ER and three tubes of blood were obtained, one of which was found to be "unsecured", causing a leakage and raising the specter of contamination.

KBI examination of the hospital samples revealed a result in excess of .08, resulting in a prosecution for involuntary manslaughter DUI. The case was eventually pled to a vehicular homicide, largely based on the problem created with the chain of custody of the blood samples (the hospital records indicated two different persons had drawn the samples, and that one of those persons was not a person authorized by statute to perform that task; the situation was further aggravated because the non-statutorily authorized person testified that he recalled drawing the blood, while the person who was authorized under the statute had no independent recollection that she had taken the

samples). Coupled with the "contamination" issue, for which the defense was prepared to offer the testimony of a forensic toxicologist/chemist, and a potential issue regarding "proximate cause", there seemed to be so much confusion that I simply determined that a plea to the lesser offense was preferable to risking how the district court and the appellate courts might resolve the issues even were I to obtain a conviction for a greater offense.

It seems to me that HB 2617 as proposed by Ed Klumpp and worked out in meetings with the Kansas Hospital Association and others, goes a long way in resolving many of the problems I encountered in this prosecution. It is my firm opinion that the taking of blood samples in a collision involving serious injury or death should be mandatory, and that the investigating agency on the scene should bear the burden of that responsibility, to be done in a timely fashion in order to collect and preserve admissible evidence of intoxication. Furthermore, there should be no excuse for any person or agency authorized to draw blood to fail to comply with the request of any law enforcement officer who is charged with this task. Frankly, I think this task should be mandatory rather than discretionary, but I think that issue is probably resolved by reference to 8-1001(b). Had a similar statute been in effect at the time of the fatality in the case I have described to you, the issues of the timely taking and preservation of the samples would have been avoided along with the attendant issues of "chain of custody", and "contamination". The facts of the case I have described are unfortunate, but I am sure these same issues have happened in other jurisdictions in other cases. The consequences are simply not acceptable. I urge you to give your whole-hearted consideration and support to HB 2617. It goes a long way in remedying problems that should not be created by the lack of action/reluctance on the part of those who should perform these essential tasks.

Respectfully,

Steven L. Opat

**TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE**

**REGARDING HOUSE BILL 2617
Related to driving under the influence**

March 5, 2008

Mr. Chairman and Committee Members:

The Kansas Department of Transportation (KDOT) is providing written testimony supporting House Bill 2617, allowing testing of drivers involved in crashes to determine if alcohol or drugs are present.

KDOT supports the concept of providing law enforcement personnel the increased ability to test drivers involved in crashes when an injury or fatality has occurred. This would provide Kansas better information as to the involvement of alcohol in fatal and injury accidents.

If there are any questions, please contact Pete Bodyk, Chief of the Bureau of Traffic Safety at 785-296-3756.



Thomas L. Bell
President

March 5, 2008

TO: Senate Judiciary Committee

FROM: Chad Austin
Vice President, Government Relations

RE: House Bill 2617

The Kansas Hospital Association appreciates the opportunity to provide comments regarding HB 2617. This legislation would require a request by law enforcement officers to test for alcohol or drugs in all accidents for a person operating or attempting to operate a vehicle and the vehicle has been involved in serious injury or death.

KHA's interest in this legislation is to provide full immunity to any medical facility or health care provider who is directed to obtain bodily samples, such as blood or urine, at the direction of a law enforcement officer. Health care providers and medical facilities should not be held liable when obtaining bodily samples from individuals who object to the procedure. The provisions outlined in New Section 3 provide those protections to the medical facility and health care provider.

Further, KHA supports the provision that requires law enforcement officers, rather than health care providers, to apply restraints on individuals who resist the collection of their bodily sample. KHA desired this language to protect the safety of health care providers. KHA also supports the provision that states all costs assessed for the evidence collection kits, procedures or tests shall be charged to and paid by the county where the alleged offense was committed.

KHA recommends an amendment in New Section 2 on page 7, lines 6-10 beginning with "shall not be considered". This amendment removes any reference to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). KHA proposes that this language be replaced with our attached balloon amendment that simply states the listed information is "required by law" to be provided to the requesting law enforcement officer or their designee after the requesting law enforcement officer complies with KSA 8-1001. This amendment clarifies and refines the reporting requirements that are required by this legislation.

Thank you for the consideration of our comments.

Senate Judiciary
3-5-08
Attachment 11

Kansas Hospital Association

215 SE 8th Ave. • P.O. Box 2308 • Topeka, KS • 66601 • 785/233-7436 • Fax: 785/233-6955 • www.kh

1 sidered to have been conducted for any medical care or treatment
 2 purpose. The results of such test, the person's name whose bodily
 3 substance is drawn or tested, the location of the test or procedure,
 4 the names of all health care providers and personnel who partic-
 5 ipated in the procedure or test, and the date and time of the test
 6 or procedure ~~shall not be considered any type of protected health~~
 7 ~~information and therefor it is not individually identifiable health~~
 8 ~~information as such term is used in the health insurance portability~~
 9 ~~and accountability act of 1996, privacy regulations, 45 C.F.R.~~
 10 ~~164.501 et seq., and amendments thereto.~~

11 (b) All costs of conducting any procedure or test authorized by
 12 K.S.A. 8-1001, and amendments thereto, including the costs of the
 13 evidence collection kits shall be charged to and paid by the county
 14 where the alleged offense was committed. Such county may charge
 15 the defendant for the costs paid herein as court costs assessed pur-
 16 suant to K.S.A. 28-172a or 28-172c, and amendments thereto.

17 (c) The cost assessed under K.S.A. 8-1001, and amendments
 18 thereto, shall be the then current medicaid rate for any such pro-
 19 cedure or test, or both.

20 (d) Notwithstanding any other law to the contrary, the collec-
 21 tion and delivery of the sample and required information to the
 22 law enforcement officer pursuant to K.S.A. 8-1001, and amend-
 23 ments thereto, shall not be subject to the physician-patient privi-
 24 lege or any other law that prohibits the transfer, release or disclo-
 25 sure of the sample or of the required information.

26 New Sec. 3. No medical care facility, clinical laboratory, med-
 27 ical clinic, other medical institution, person licensed to practice
 28 medicine or surgery, person acting under the direction of any such
 29 licensed person, licensed physician assistant, registered nurse, li-
 30 censed practical nurse, medical technician, emergency medical
 31 technician, phlebotomist, health care provider or person who par-
 32 ticipates in good faith in the obtaining, withdrawal, collection or
 33 testing of blood, breath, urine or other bodily substance at the
 34 direction of a law enforcement officer pursuant to K.S.A. 8-1001,
 35 and amendments thereto, shall incur any civil, administrative or
 36 criminal liability as a result of such participation, regardless of
 37 whether or not the patient resisted or objected to the administra-
 38 tion of the procedure or test.

39 Sec. 4. K.S.A. 2007 Supp. 8-1001 is hereby repealed.

40 Sec. 5. This act shall take effect and be in force from and after its
 41 publication in the statute book.

ARE REQUIRED BY
 LAW TO BE PROVIDED
 TO THE REQUESTING
 LAW ENFORCEMENT
 OFFICER OR THE
 LAW ENFORCEMENT
 OFFICER'S DESIGNEE
 AFTER THE
 REQUESTING LAW
 ENFORCEMENT OFFICER
 HAS COMPLIED
 WITH K.S.A. 8-1001.