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Testimony Regarding SB 374, Concerning Driving Under the Influence
Submitted by Aaron Breitenbach, Assistant District Attorney
On Behalf of Marc Bennett, District Attorney, Eighteenth Judicial District,

Honorable Chairman Rick Wilborn and Members of the Senate Judiciary Committee:

Thank you for the opportunity to testify in favor of Senate Bill 374. On behalf of Marc Bennett, District Attorney, Eighteenth Judicial District, I have had the privilege of working with the Kansas County and District Attorneys Association and prosecutors across the State over the past two years to develop this legislation to address a series of judicial decisions and the growing trend of drug-impaired driving, which have combined to make our current administrative and criminal DUI laws confusing and ineffective.

As a result of these circumstances and limited local law enforcement resources, fewer impaired drivers are being detected and prosecuted in Kansas (23% drop in DUI arrests between 2016 and 2013), while the number of traffic fatalities and injuries in our State continue to rise (31% increase in traffic fatalities between 2013 and 2017).

To provide context to the scope of the need for legislative action to address the effects of judicial interpretations of existing DUI law, the following are a few of the noteworthy cases since the last significant modification to DUI-related statutes in 2011 and 2012:
Missouri v. McNeely, 133 S.Ct. 1552 (2013)—U.S. Supreme Court says warrantless blood draws impermissible in routine DUI cases (need consent or special circumstances);
State v. DeClerck, 49 Kan.App.2d 908 (2014)—KS Court of Appeals holds 8-1001(b)(2) unconstitutional to the extent it authorizes warrantless blood draws without probable cause of DUI and exigent circumstances;
State v. Dawes, No. 111,310 (unpub. 2015)—KS Court of Appeals holds 8-1001(a) and (b)(2) unconstitutional to the extent they authorize warrantless blood draws of dead or unresponsive people;
City of Dodge City v. Webb, 305 Kan. 351 (2016)—KS Supreme Court resolved split in prior Court of Appeals decisions to clarify search warrants are permissible in DUI cases;
State v. Ryce, 303 Kan. 899 (2016, re-affirmed 2017)—KS Supreme Court held 8-1025 unconstitutional, as it assigned criminal penalties to the act of withdrawing implied consent for any test requested under 8-1001;

State v. Nece, 303 Kan. 888 (2016, re-affirmed 2017)—KS Supreme Court held advisories in 8-1001(k) were improperly coercive as they referenced potential criminal penalties in 8-1025, jeopardizing every DUI arrest between July 2012 and February 26, 2016 (current advisories in 8-1001(k) no longer used, despite statutory imperative);
Birchfield v. ND, 136 S.Ct. 2160 (2016)—US Supreme Court finds criminal penalties for failure to submit to blood tests impermissible but upholds criminal penalties for refusal to submit to breath testing (administrative penalties permissible for both);
State v. Stanley, 53 Kan.App.2d 698 (2016)—KS Court of Appeals finds Missouri's version of 8-1567(a)(3) is broader than Kansas', which means prior convictions from that state may not be used to enhance repeat offenders' sentences [one of a number of cases reaching similar conclusions about other states' DUI statutes]; and
State v. Lamone, 54 Kan.App.2d 180 (2017)—a KS Court of Appeals panel noted Wichita's Municipal Ordinance definition of a "vehicle" is not consistent with the State DUI statute (as it could include a bicycle), which means all convictions for DUI in Wichita Municipal Court for cases prior to September 2016 may not be used to enhance repeat offender's sentences [issue is currently before the Supreme Court in other cases].

SB374 is a comprehensive response to these cases. The breadth of the judiciary's opinions in this area requires more than tinkering with a few advisories or subsections. The history of piecemeal amendments to these laws has led to contradictory or unenforceable laws ripe for judicial scrutiny. Further, the work of the 2010 DUI Commission was never fully implemented, and many portions that were enacted need refinement from experience to be effective. SB374 addresses the issues already decided by appellate courts and provides flexibility for law enforcement to adapt to future judicial action without jeopardizing ongoing investigations or prosecutions.

In addition, the spread of opioid abuse across the country and the presence of legalized recreational marijuana at our western border have worked to demonstrably increase the number of drivers who are impaired by substances other than alcohol. For example, 2015 was the first year where the percentage of fatally injured drivers who tested positive for drugs exceeded the percentage of those who tested positive for alcohol.

This bill reflects these changes in our society by empowering the use of new tools to identify and punish drug impairment. We are all familiar with the .08 standard for alcohol concentration in one's breath or blood. The public knows that standard and prosecutions for its violations are relatively straightforward. For legal and ethical reasons, no equivalent per se standard for all drugs exists or is forthcoming. This bill recognizes, unlike alcohol, it is unlawful to possess any Schedule I or II drug without a prescription. Accordingly, driving with any amount of these active intoxicants in one's blood system should be unlawful. This approach has been adopted elsewhere and would send the appropriate message that compounding the harm of illegal possession of these substances by driving further jeopardizes our communities and will not be tolerated.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Aaron Breitenbach
Chief Attorney, Traffic Division
Eighteenth Judicial District