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**Testimony Regarding Opposition to Senate Bill No. 297**
**Concerning K.S.A. 2017 Supp. 8-1001(k)**

February 12, 2018

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

Thank you for this opportunity to testify in opposition to Senate Bill 297. I write in opposition not because I do not support fixing K.S.A. 2017 Supp. 8-1001, but rather because this proposed legislation mischaracterizes the law and falls far short of addressing the deficiencies in this statute resulting from numerous case law decisions.

This proposal mischaracterizes the law existing in K.S.A. 2017 Supp. 8-1001 and retained within in sections other than subsection (k), as well as under United States Supreme Court and Kansas Supreme Court decisions. This proposal would inform drivers that "Kansas law *allows* the person to *consent*" to testing. Kansas law, however, REUIRES drivers to complete testing under the conditions set forth in K.S.A. 2017 Supp. 8-1001(b). The United States Supreme Court held in Birchfield v. North Dakota[1] that a driver does not have a constitutional right to refuse a breath test and may be required to submit to a breath test as a search incident to arrest. This proposed change mischaracterizes the nature of a driver's obligations when a driver is suspected of driving under the influence.

Driving is a privilege, not a right. Nothing in Birchfield or recent decisions by our Kansas Supreme Court in State v. Ryce[2] or State v. Nece[3] impinges upon the State's right to impose restrictions on a driver's driving privileges when a driver refuses to submit to evidentiary testing set forth in K.S.A. 2017 Supp. 8-1001, regardless of whether the requested testing is for breath, blood, urine or other bodily substances. This proposal retains the notices regarding suspension and restrictions which will be confusing to an impaired driver after first being informed that Kansas law allows the person to consent.

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[1] Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160, 2167, 195 L. Ed. 2d 560 (2016).
[2] State v. Ryce, 303 Kan. 899, 368 P.3d 342 (2016) (*Ryce I*); State v. Ryce, 306 Kan. 682, 396 P.3d 711 (2017) (*Ryce II*).
[3] State v. Nece, 303 Kan. 888, 367 P.3d 1260 (2016) (*Nece I*); State v. Nece, 306 Kan. 679, 680, 396 P.3d 709, 710 (2017) (*Nece II*).

At least two sections of the current statute have been deemed to be unconstitutional by our courts, yet this proposal retains those very provisions:

- State v. Dawes[4], supported by subsequent decisions in Ryce and Birchfield, held that taking blood from an unconscious or dead person is unconstitutional. Yet the provision in K.S.A. 2017 Supp. 8-1001(a) permitting taking a sample from a dead or unconscious person remains in this proposal.
- State v. Declerck[5], held that a law enforcement officer must have probable cause of DUI to force a driver involved in collision involving serious injury or death to submit to a warrantless blood draw. Ryce and Birchfield further eroded this proposition as a blood sample may be obtained only through consent, a search warrant or exigent circumstances. Yet the pre-Declerck version of this statute, K.S.A. 2017 Supp. 8-1001(b)(2), remains in this proposal.

Finally, the new limitations set forth in proposed (k)(1) and (k)(2) of testing "for the sole purpose" and "lawfully arrested" are simply unnecessary changes that add nothing to the body of Kansas law. As a full-time prosecutor, I believe these additions will be confusing and lead to unnecessary litigation over the meaning of these provisions. "Lawfully arrested" is not even the standard set out for testing within this proposal at subsection (b). This proposal sets this as the standard notice to be given to drivers being requested to take an evidentiary test.

I would encourage this Committee to substantially rewrite and delete significant portions of this proposal if this were the only mechanism to fix our implied consent law. There is an alternative; this Committee has before it Senate Bill 374 proposing a comprehensive revision to K.S.A. 2017 Supp. 8-1001. The proposal set forth in Senate Bill 297 falls far short of the necessary revisions and is not good public policy as it fails to address all of the identified legal issues associated with this statute. For these reasons, I urge this Committee to reject this proposal.

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

Respectfully submitted,

Gregory T. Benefiel
County Attorney

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[4] State v. Dawes, No. 111,310, 2015 WL 5036690 (Kan. Ct. App. Aug. 21, 2015).
[5] State v. Declerck, 49 Kan. App. 2d 908, 911, 317 P.3d 794, 798 (2014), *rev. denied* Jun. 20, 2014.