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TO: House Judiciary Committee
FROM: Kansas Judicial Council – Gregory Benefiel
DATE: February 5, 2019
RE: 2019 HB 2104 - Relating to driving under the influence

The Kansas Judicial Council and its DUI Advisory Committee recommend the passage of HB 2104, which would make driving under the influence (DUI) consent advisories more accurate, remove unconstitutional portions of preliminary breath test and test refusal statutes, and replace outdated terminology with the scientifically correct term.

In June 2018, the Judicial Council accepted Rep. Blaine Finch's request to study Kansas' DUI-related statutes. The Council assigned the study to its newly created DUI Advisory Committee (the Committee). Rep. Brad Ralph chairs the Committee whose membership includes two prosecutors, an attorney from the Kansas Attorney General's office, four defense attorneys, an attorney from the Department of Revenue, a member of the Kansas Sentencing Commission, a district court judge, a municipal court judge, a law professor, and a retired police chief. A list of the members' names is included at the end of this testimony.

The Committee has just begun its review of the DUI-related statutes; however, it unanimously agrees that there are a few important statutory amendments that it recommends the legislature make in this 2019 legislative session.

K.S.A. 2018 Supp. 8-1001(c) and (d)

First, the Committee recommends amendments to the oral and written consent advisories in K.S.A. 2018 Supp. 8-1001(c) and (d). Law enforcement officers must provide these advisories when requesting the driver submit to a test, other than a preliminary screening test, of a driver's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. These advisories were amended and shortened in the 2018 legislative session (L. 2018, ch. 106, § 7); however, the advisories inaccurately describe the amount of time a driver's licenses will be

suspended if the driver refuses to submit to the test or fails the test. It is important for drivers to receive clear and accurate information before making a decision. The proposed amendments in Section 1 more clearly and accurately summarize the timeframes for the suspension of the driver's license.

K.S.A. 2018 Supp. 8-1012 and 75-712h

Second, the Committee recommends amendments to K.S.A. 2018 Supp. 8-1012 and 75-712h, which govern preliminary screening tests used in an investigation of driving under the influence. In December 2017, the Kansas Court of Appeals held that criminalizing a driver's refusal to submit to a preliminary breath test was unconstitutional under the Fourth Amendment and in violation of due process. *State v. Robinson*, 55 Kan. App. 2d 209, 410 P.3d 923 (2017). Therefore, the Committee recommends removing the unconstitutional part of K.S.A. 2018 Supp. 8-1012(d) that declares the refusal to take and complete the test as requested is a traffic infraction.

Because refusing to take a preliminary screening test is no longer a traffic infraction, the Committee agreed that it is unnecessary that K.S.A. 2018 Supp. 8-1012(a) imply that a driver has given consent to a preliminary screening test. The Committee also agreed that it is unnecessary for law enforcement officers to provide the oral implied consent advisories in K.S.A. 2018 Supp. 8-1012(c) before asking a driver to submit to a preliminary screening test. The Committee recommends subsections (a) and (c) be removed from K.S.A. 2018 Supp. 8-1012.

The Committee also recommends changing the term "saliva" to "oral fluids." "Saliva" is the name of the fluid excreted by the saliva glands in the mouth. "Oral fluids" is the scientifically correct term for the fluid collected from the mouth. Saliva is the main constituent of oral fluid; however, oral fluid may also contain a variety of specific fluids or other substances, such as, fluid from between the gums and teeth, cellular debris, bacteria, and food residue. A preliminary screening oral fluids test collects and tests the fluids from a driver's mouth without first separating saliva from the other fluid or substances. The term should also be updated in K.S.A. 2018 Supp. 75-712h, which authorizes the Kansas Bureau of Investigation to adopt rules and regulations regarding the use of oral fluid testing as a preliminary screening test.

K.S.A. 2018 Supp. 8-1025

Finally, the Committee recommends the repeal of K.S.A. 2018 Supp. 8-1025, which the Kansas Supreme Court found categorically unconstitutional in *State v. Ryce*, 303 Kan. 899, 368 P.3d 342 (2016) (*Ryce I*), *aff'd on reh'g*, 306 Kan. 682, 396 P.3d 711 (2017) (*Ryce II*). The 2018 legislature intended to repeal K.S.A. 2017 Supp. 8-1025 in 2018 H. Sub. for S.B. 374; however, due to a scrivener's error the statute as amended by 2018 H.B. 2439 was never repealed. Therefore, K.S.A. 8-1025, though unconstitutional, is still in the Kansas statutes. To effectuate the 2018 legislature's intent and correct the scrivener's error, the Committee recommends the repeal of K.S.A. 2018 Supp. 8-1025.

The current members of the DUI Advisory Committee are:

Rep. Brad Ralph, Chair; Dodge City,
Kansas
*State Representative, 119th District and
City Attorney for Dodge City*

Gregory Benefiel; McPherson, Kansas
McPherson County Attorney

Aaron Breitenbach; Wichita, Kansas
*Sedgwick County Assistant District
Attorney*

Hon. Cindi Cornwell; Overland Park,
Kansas
Overland Park Municipal Court Judge

Prof. Jeffrey Jackson; Topeka, Kansas
Washburn University School of Law

Corey Kenney; Topeka, Kansas
Assistant Kansas Attorney General

Ed Klumpp; Tecumseh, Kansas
Retired Topeka Chief of Police

Chris Mann; Lenexa, Kansas
*Mann Law Firm
Attorney and Member of the Kansas
Sentencing Commission*

Jay Norton; Overland Park, Kansas
*Norton Hare Law Firm
Defense Attorney*

Hon. William Ossmann; Topeka, Kansas
Shawnee County District Court Judge

Jeremiah Platt; Manhattan, Kansas
*Clark & Platt Law Firm
Defense Attorney*

John Rapp; Wichita, Kansas
*Hinkle Law Firm
Defense Attorney*

Ted Smith; Topeka, Kansas
*Attorney for the Kansas Department of
Revenue*

Roger Struble; Salina, Kansas
*Blackwell & Struble Law Firm
Defense Attorney*