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Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ks.gov
www.kansasjudicialcouncil.org

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TO: House Judiciary Committee

FROM: Kansas Judicial Council – Aaron Brietenbach, Chief Attorney in the Sedgwick County District Attorney Office, & Jay Norton, Attorney at Norton Hare Law Firm

DATE: February 16, 2021

Re: Testimony in Support of 2021 H.B. 2377 Relating to Driving Under the Influence

The Kansas Judicial Council supports the passage of 2021 H.B. 2377. Due to a request from then-House Judiciary Chairman, Representative Blaine Finch to study topics related to driving under the influence, the Judicial Council formed the DUI Advisory Committee (the Committee). The Committee began meeting in December 2018 and continued to meet through 2020. A list of the Committee's members is included at the end of this testimony. A copy of the Committee's full report and recommendations to the Judicial Council can be found on the Judicial Council's website, kansasjudicialcouncil.org/studies-and-reports. This written testimony only provides the Committee's explanation of the specific amendments contained in H.B. 2377.

DUI law has two different penalty types – criminal and administrative. The criminal penalties involve the prosecution of the crime of driving under the influence. The sentence for the crime of DUI is ordered by the court and is independent from any administrative penalty imposed by the Kansas Department of Revenue Division of Motor Vehicles against a person's driver's license. A driver may be stopped by a law enforcement officer, fail a preliminary breath test, be arrested for DUI, and fail the evidentiary breath test. The local prosecutor will evaluate whether to charge the driver with the crime of DUI and the case will be handed through the court. At the same time, based on the driver's failure of the evidentiary breath test, the division will take administrative action against the person's driver's license. The

administrative actions are not dependent on the criminal proceeding or whether the person is ever convicted of DUI. This bill contains amendments to both the criminal and administrative penalty systems.

ADMINISTRATIVE PENALTIES

MOTORIZED BICYCLE LICENSES - SECTION 2

K.S.A. 2020 Supp. 8-235(d)(3) allows a first-time DUI offender the opportunity to receive a license to drive a motorized bicycle.¹ According to the Kansas Department of Transportation, because first-time DUI offenders can receive this license, Kansas is ineligible to receive \$250,000 in federal funding for the KDOT State Highway Safety Office to support the state's ignition interlock program. The Kansas Department of Revenue Division of Vehicles reports that there are only 29 motorized bicycle licenses currently issued in Kansas, which has over 2,300,000 active driver's licenses and identification cards. H.B. 2377 deletes K.S.A. 2020 Supp. 8-235(d)(3) and (e) to eliminate motorized bicycle licenses for first-time DUI offenders in order to allow the state to qualify for the additional federal funding.

IGNITION INTERLOCK RESTRICTED DRIVERS

Current Law

If a law enforcement officer requests a driver take a breath, blood, urine or other bodily substance test to determine the presence of drugs or alcohol, and the driver refuses to submit to the test, the Kansas Department of Revenue's Division of Vehicles (the division) will take administrative action against the person's driving privileges. The division will suspend the person's driving privileges for one year. At the end of the suspension, the division then restricts the person's driving privileges for two to ten years depending on the driver's history of test refusal. During the restricted period, the driver may only drive a motor vehicle equipped with an ignition interlock device (IID).

A similar process applies when a driver fails a breath, blood, or bodily fluid test, or is convicted of an alcohol or drug-related conviction.² The driver is suspended for a period of time and then restricted to using an IID for another period. The required IID restricted period can range from 6 months to 10 years depending on the type of offense.³

An IID is a tool that separates drinking from driving and allows impaired driving offenders to maintain conditional driving privileges. The purpose of the IID is to prevent drivers, who have consumed alcohol, from operating a motor vehicle if their breath alcohol content exceeds a set point (typically 0.02). Drivers must provide a breath sample by blowing into the IID and if the driver's breath alcohol level is over the set point, the vehicle will not start. If the driver's breath alcohol level is below the set point, the vehicle will start; however,

¹ Motorized bicycle is defined in K.S.A. 8-126.

² "Alcohol or drug-related conviction" is defined in K.S.A. 8-1013(b).

³ K.S.A. 8-1014.

while the vehicle is in operation, the IID will prompt the driver to provide additional breath samples (rolling retest).

Compliance-Based Removal – Section 5

Under current law, a licensee who installs an IID in his or her vehicle and maintains the IID for the required timeframe may remove the IID and have unrestricted driving privileges at the end of the IID period. The IID may show that the licensee drank alcohol and then tried to start his car every day for the last month of the IID required period; however, as long as the IID has been installed for the required number of months, the licensee may have the device removed and unrestricted driving privileges restored. The IID program is to prevent people from driving while impaired, and to help drivers modify their behavior. Continuing to drink alcohol and then attempting to start a vehicle despite having and using the IID for months, demonstrates that the driver has not yet learned not to drink and drive.

Kansas should adopt the compliance-based removal system set out in H.B. 2377. Before the IID can be removed and the person’s unrestricted driving privileges restored, the person must show that (1) he or she has had the IID installed for the required length of time, and (2) the driver has not had more than three standard violations and no serious violations in the 90 consecutive days prior to the driver’s application for reinstatement of unrestricted driving privileges. Standard and serious violations are defined in Section 5 of the bill.

At the end of the required IID period, the driver would request a certification from the IID provider certifying that the driver has not had more than three standard and no serious violations in the last 90 days. The driver would then provide the IID provider’s certification to the division along with the driver’s application for reinstatement of the person’s driving privileges. This system would put the burden on the driver to show a successful completion of the program, rather than requiring the division to develop a program to continually monitor the driver’s performance. This system also allows for the automatic extension of the driver’s IID period without intervention by the division. Even if the driver’s IID period is over, the IID restriction will remain on the driver’s licenses until the driver can show a period of 90 days without more than three standard violations and no serious violations.

The legislature considered the Committee’s compliance-based removal proposal during the 2020 legislative session. The compliance-based removal proposal did not receive any opposition nor was it amended by the House Judiciary Committee. However, due to the COVID-19 pandemic, the bill did not pass.

Removal of Waiting Period & Route Restrictions – Section 5

Under K.S.A. 2020 Supp. 8-1015, when the division administratively suspends a person’s driving privileges for either 30 days or a year after a test refusal, test failure, or DUI conviction, the statute provides a way for the person to regain limited driving privileges while serving the required suspension time. After serving either 45 or 90 days of the suspension, as specified by the statute, the person may apply to the division for a license allowing the person

to drive a vehicle with an ignition interlock device installed to a limited number of locations. The statute generally limits the person to driving to work, school, alcohol treatment programs, and to the ignition interlock provider. This is commonly referred to as “route restrictions.” Imposing route restrictions is an unenforceable restriction that is unnecessary if the driver is driving a vehicle with an ignition interlock device.

Serving a period of suspension can be very hard for Kansans, especially those in rural communities or those without access to public transportation. In order to decrease the burden on Kansans and reduce the complexity of the administrative driver’s licenses sanctions, H.B. 2377 removes the 45- or 90-day waiting period and eliminates the route restrictions in K.S.A. 2020 Supp. 8-1015(a). Drivers are still subject to the 30-day or one-year suspension period followed by the ignition interlock restricted period. However, at any time during the suspension period, including right at the beginning, the person could apply to the division for the privilege of driving with an ignition interlock device during the suspension period. While some people may choose to serve the suspension period without driving, for those who need to continue driving, eliminating the 45- or 90-day waiting period will allow people to meet their needs while safely driving with the assistance of an ignition interlock device.

Affordability Program – Section 6

The goal of Section 6 of H.B. 2377 is to enable as many people as possible to use and successfully complete the IID program. According to the Kansas Department of Revenue’s Division of Vehicles only about half of all Kansas drivers required to complete a period with an IID restricted license will successfully complete the IID program requirements and have their driver’s license privileges reinstated. The other half of drivers will remain either suspended or restricted indefinitely. The Committee reviewed the compliance data for drivers whose licenses were suspended or restricted due to an alcohol or drug related offense in 2014. Forty-eight percent of the drivers failed to install the IID as required. Of the drivers who failed to install the IID, 75% received a subsequent driving offense, indicating that they were continuing to drive without the required IID. The division estimated that about half of the drivers who fail to complete the IID program do so because of the financial cost of the IID. Depending on the IID provider, the annual cost of an IID ranges from \$950 to \$1,215. The annual cost does not include any fees incurred due to non-compliance, including a lockout, tampering, or circumvention of the device.

Currently, K.S.A. 2020 Supp. 8-1016(a)(5) requires the division adopt rules and regulations requiring all IID providers operating in Kansas to provide a credit of at least 2% of the gross program revenues in the state as a credit for those who are required to have an IID and who are indigent as evidenced by qualification for the federal food stamp program. In 2018, there were eight IID providers operating IID programs in Kansas. Each provider sets its own fees and manages its own indigency program. In 2018, there were 10,206 IID devices in operation in Kansas. The eight IID providers reported that only 290 people participated in the providers’ indigency programs. Each IID provider administered its indigency program differently. Some waived one-time fees (such as installation or removal fees) while others merely reduced the one-time fees. All providers reduced the monthly leasing and monitoring

fee. None waived it completely. Therefore, even for those who qualified for the indigency program, the set annual cost of the IID ranged from \$494 to \$915.⁴

In order to enable more people to use and complete the IID program, Kansas should move from an indigency-based program, one which only helps individuals who qualify for the food assistance program, to an affordability-based program, one which utilizes a sliding scale of payment based on the IID user’s household income. The Committee reviewed other states’ IID affordability program structures and received input from the Coalition of Ignition Interlock Manufacturers (CIIM). CIIM explained that in states with affordability programs where all IID related costs are waived, people are more likely to damage the IID, not take the program seriously, and fail to follow program requirements. Therefore, the affordability program should offer a sliding scale of discounts based on a user’s household income rather than waive fees entirely.

H.B. 2377 expands who qualifies for the program to persons whose household income is up to 300% of the federal poverty level. People with a household income between 200% and 300% of the federal poverty level would receive a mere 10% discount from the ignition interlock provider. However, the Committee agreed that even a small discount might serve to allow a hard-working single parent of three making \$53,000 a year to successfully complete the IID program; thereby enabling that parent to internalize the separation between drinking and driving, as well as obtain fully restored driving privileges.

Proposed IID Affordability Program Sliding Scale

Household Income	Percentage of Program Costs User Must Pay
Less than or equal to 300% but greater than 200% of the federal poverty level	90% of the program costs <i>(i.e. a 10% discount)</i>
Less than or equal to 200% but greater than 150% of the federal poverty level	75% of the program costs <i>(i.e. a 25% discount)</i>
Less than or equal to 150% but greater than 100% of the federal poverty level	50% of the program costs <i>(i.e. a 50% discount)</i>
Less than or equal to 100% of the federal poverty level	25% of the program costs <i>(i.e. a 75% discount)</i>
Persons enrolled in the food assistance, childcare subsidy or cash assistance program pursuant to K.S.A. 39-709	25% of the program costs <i>(i.e. a 75% discount)</i>
Persons eligible for the low-income energy assistance program.	25% of the program costs <i>(i.e. a 75% discount)</i>

The legislature considered this proposal during the 2020 legislative session.⁵ CIIM opposed the Committee’s recommendation to provide a discount to users up to 300% of the federal poverty level. Due to the COVID-19 pandemic, the 2020 legislative session ended early

⁴ All information regarding the 2018 IID usage and indigency programs provided by the Kansas Highway Patrol.
⁵ 2020 S.B. 405.

and the bill did not pass. After the legislative session ended, the Committee invited CIIM to present its objections to the Committee; however, the Committee decided to maintain its proposal because the Committee sees this program as a way to increase the number of IID users. The Committee unanimously agreed that it does not want to put Kansas IID providers out of business; however, if providing a 10% or 25% discount to more users reduced revenue, the Committee anticipates the reduction will be offset by an increase in the total number of overall users due to the reduction of the financial barrier.

The current IID affordability program is based on a person's eligibility for the food assistance program. H.B. 2377 expands that category to include individuals who are enrolled in the food assistance program, the childcare subsidy program, cash assistance (TANF), or are eligible for the low-income energy assistance program (LIHEAP). These are programs that often benefit the working poor. In the interest of expanding the program to serve the working poor, H.B. 2377 allows anyone enrolled in these programs to pay 25% of the IID program costs.

H.B. 2377 avoids defining the term "program costs" in its statutory recommendations. The Committee thought that the specific definition regarding what costs should be included in the term "program costs" should be left to the division to work out through regulations in order to allow greater input from stakeholders, including the ignition interlock companies.

Currently, the IID providers receive the IID affordability program application and determine whether an individual qualifies for the program. In order to centralize management of the program, H.B. 2377 requires the division, not the IID providers, to determine eligibility for the program and the individual's household income for the purposes of the sliding scale.

Ignition Interlock Period for Drivers Under 21 – Section 8

There is an odd discrepancy with how the current statutes treat persons under 21 years old who drive with a blood or breath alcohol content (BAC) between 0.02 and 0.0799. On a first offense, if a person under 21 years old drinks and drives, the person will have a shorter ignition interlock period if the person is *more* intoxicated (BAC of 0.08 to 0.1499). If an under-21 driver's BAC is between 0.02 and 0.0799, the required ignition interlock period is 330 days. If the person consumed more alcohol and the person's BAC is higher, 0.08 to 0.1499, the required ignition interlock period is only 180 days.⁶ H.B. 2377 corrects this error and makes the ignition interlock period for a driver under the age of 21 with a lower BAC (0.02-0.0799) match the length of the ignition interlock period for the same driver with a higher BAC (0.08 – 0.1499).

Driver's License Reinstatement – New Section 1

If a person's driver's license is administratively suspended and then restricted under K.S.A. 2020 Supp. 8-1014, the person's license will remain in a suspended or IID restricted

⁶ K.S.A. 8-1567a.

status until the person can complete the IID program. Under the compliance-based removal program, if a person continues to drink and drive and fail the IID tests, the person's license could remain under the IID restriction indefinitely. However, there are also people remain under the IID restriction indefinitely because they are unable to fulfill the IID restriction period requirements for other reasons, such as not having consistent access to a vehicle.

IIDs play an important role in helping people disconnect drinking alcohol from driving. In the compliance-based removal program, the IID is the main tool used to show that a driver is not drinking and driving and is no longer a threat to public safety. Because people are sometimes unable to complete the IID program due to the financial burden or lack of a vehicle, H.B. 2377 provides an alternative way for people to demonstrate they are no longer driving under the influence and not a threat to public safety.

Under New Section 1, a person whose license is restricted to operating only a motor vehicle with an ignition interlock device installed may apply to the division of motor vehicles for reinstatement of his or her driver's licenses if (1) the person has served the length of time of the original IID restriction period, plus an additional five years, excluding any period of incarceration; (2) during the IID restriction period and the additional five years, the person has not had any alcohol or drug related convictions, occurrences, or pending proceedings; and (3) during the IID restriction period and the additional five years, the person has not been convicted of, or has a pending charge or proceeding related to: transportation of liquor in opened containers, buying or consuming alcohol by a minor, vehicular homicide, DUI, driving while suspended, perjury, fraudulent registration of a vehicle, any felony if a motor vehicle was used in the perpetration of the crime, failing to stop at the scene of an accident, failure to maintain motor vehicle liability insurance, two or more moving traffic violations, or revocation, suspension, cancellation or withdrawal of driving privileges due to another action.

New Section 1 sets a high bar for individuals that will neither allow nor encourage people to choose to avoid installing the IID in order to utilize this new option while continuing to drive unlawfully. The requirements for reinstatement are designed to demonstrate that the individual has not been driving illegally during the IID restricted period and for at least five additional years. If someone can satisfy these requirements, it is important that the individual be allowed to restore his or her driver's license status.

COMMERCIAL DRIVER'S LICENSE (CDL) DISQUALIFICATION

Lookback Period for Determining Lifetime Disqualification – Section 3

If a commercial driver's license (CDL) holder commits certain offenses,⁷ including alcohol and drug related offenses while operating a vehicle, the driver may be disqualified from driving a commercial motor vehicle for a specified period of time. If the driver commits two or more of these offenses arising from two or more separate incidents, the driver shall be

⁷ Offense listed in K.S.A. 8-2,142 include a conviction for driving under the influence, failing or refusing to submit to a test, causing a fatality through the negligent operation of a commercial motor vehicle, a conviction for leaving the scene of a crime, and a felony conviction.

disqualified for life from holding a CDL.⁸ K.S.A. 2020 Supp. 8-2,142 does not limit the lookback period. Disqualifying offenses committed anytime in the driver's life are reviewed. The federal regulation⁹ governing disqualifications for commercial motor vehicle drivers took effect July 1, 2003; however, because Kansas' statute does not specify the time period for when the CDL holder's offenses must have occurred, Kansas disqualifies drivers based on conduct that occurred prior to July 1, 2003. H.B. 2377 limits the lookback period to offenses occurring on or after July 1, 2003.

H.B. 2377 amends K.S.A. 2020 Supp. 8-2,142 to authorize the department of revenue to create a system to allow currently disqualified drivers to request a review and possible modification of a lifetime disqualification when at least one of the disqualifying offenses occurred before July 1, 2003.

Removal of Lifetime Disqualification – Section 3

Currently, K.S.A. 2020 Supp. 8-2,142(d) authorizes the secretary of revenue to adopt rules and regulations establishing guidelines under which a lifetime disqualification may be reduced to a period of 10 years. About 30 other states have such a process in place. To date, the Kansas secretary of revenue has not adopted such rules and regulations. The Committee reviewed other states' programs¹⁰ and the federal regulations governing CDL disqualifications.

Kansas should provide a way for former CDL drivers who are disqualified for life to request the removal of that disqualification if the driver has been disqualified for at least 10 years, and the department of revenue determines that the driver meets very specific requirements. Those requirements include having no pending alcohol or drug related criminal charges, having successfully completed an alcohol or drug treatment program if one of the disqualifying offenses was alcohol or drug related, having no alcohol or drug related convictions during the 10-year disqualification period, no longer being a threat to public safety, being otherwise eligible for CDL licensure, and not previously have had a disqualification removed. Drivers who were disqualified for life due to being convicted of driving under the influence in either a commercial or noncommercial vehicle would not qualify for the removal of the lifetime disqualification. If the driver's disqualified status is removed, the driver could then reapply and must satisfy all the normal requirements for obtaining a CDL.

Disqualification for Trafficking in Persons – Section 3

While reviewing the federal regulations addressing commercial driver's license disqualification, the Committee discovered that the federal Department of Transportation updated 49 C.F.R. 383.51 in 2019 and now requires that a commercial driver who uses a commercial motor vehicle in the commission of a felony involving an act or practice of severe forms of trafficking in persons must be disqualified for life and cannot be eligible for the

⁸ K.S.A. 2020 Supp. 8-2,142(c).

⁹ 49 CFR § 383.51

¹⁰ The Committee used the Missouri regulation, 12 CST 10-24.444, as a model for its proposal.

removal of the disqualification after 10 years. H.B. 2377 updates K.S.A. 2020 Supp. 8-2,142(e) to mirror the changes in the federal regulation.

CRIMINAL PENALTIES

SENTENCING

DUI in a Non-Commercial Vehicle – Section 7

Misdemeanor and felony DUI convictions are different from many other criminal convictions. DUI convictions are governed by specific statutes in Chapter 8 rather than Chapter 21 of the Kansas statutes. K.S.A. 2020 Supp. 8-1567(b) contains the statutory minimum and maximum sentence based on whether the DUI conviction is the person’s first, second, third, fourth or subsequent DUI offense. Some of the DUI sentencing requirements are in place due to federal funding requirements.¹¹ The Committee carefully reviewed the federal funding requirements with the goal of maintaining Kansas’ compliance with federal funding requirements. The Committee’s goals also included, simplifying the sentencing scheme, bringing the sentencing scheme more in line with the sentence requirements for comparable level offenses, allowing more discretion to courts and offenders on how the sentence would be fulfilled, encouraging enrollment and participation in treatment, and minimizing the need to count individual hours of confinement.

For first, second, and third time offenses, H.B. 2377 allows the court to place the offender on probation immediately, rather than mandating the offender serve a specific amount of time imprisoned before probation begins. Allowing immediate probation will provide courts and offenders with flexibility that will benefit the courts, jail, and the offender. If the offender shows successful completion of court-ordered education or treatment, H.B. 2377 allows the court to waive any portion of a fine imposed, except the \$250 required to be remitted to the state treasurer. Such a provision will help incentivize enrollment and participation in treatment programs.

For first time offenders, H.B. 2377 removes the requirement to serve the 48 consecutive hours imprisonment prior to being placed on probation. The court should be allowed to place the offender on probation under terms dictated by the court.

For a second time offender, federal funding regulations require the offender serve at least 120 hours (5 days) confinement. The 120 hours confinement can be served through a combination of time imprisoned, on a work release program, or under a house arrest program.¹² K.S.A. 2020 Supp. 8-1567(b)(1)(B) currently requires the offender serve the minimum 120 hours confinement consecutively. Serving the 120 hours consecutively is not required by federal funding regulations; therefore, H.B. 2377 provides flexibility for the offender to serve the ordered confinement as best serves the court, jail, and offender. If an

¹¹ See 23 U.S.C. 164 (minimum penalties for repeat offenders for driving under the influence), and 23 C.F.R. 1275.4 (compliance criteria for repeat intoxicated drivers).

¹² 23 C.F.R. 1275.3 & 1275.4.

offender is placed on probation, K.S.A. 2020 Supp. 8-1567(b)(1)(B) requires the offender serve at least 48 consecutive hours imprisonment before the offender is allowed to participate in a work release or house arrest program. This requirement places an unnecessarily restrictive requirement on jails and offenders. An offender on probation should be required to serve at least 48 hours of the minimum 120 hour confinement imprisoned, but the offender should be eligible to participate in a work release or house arrest program regardless of whether the offender has yet served any time imprisoned.

For a third time offender, H.B. 2377 maintains the distinction between a third-time misdemeanor and a third-time felony. The third offense is a felony if the person has had a prior conviction which occurred within the preceding 10 years.¹³ Federal funding requirements require a third time offender to serve at least 240 hours (10 days) confinement.¹⁴ K.S.A. 2020 Supp. 8-1567(b)(1)(C) exceeds the federal minimum by requiring at least 90 days confinement. If the offender is eligible and is placed on probation, H.B. 2377 requires probation to include at least 30 days confinement, rather than 90 days confinement, because 30 days is comparable to the confinement requirements that are commonly required for other Class A misdemeanors. Due to the escalated nature of being a third-time offender, H.B. 2377 maintains the requirement that the offender serve 48 consecutive hours imprisonment before becoming eligible to serve the remaining term of confinement through a work release or house arrest program.

The federal funding regulations require the federally required minimum number of hours of confinement be satisfied by counting hour-for-hour credit for time confined. The current practice is to require counting hour-for-hour credit for the entire length of confinement ordered, even if it exceeds the federally required minimum. To ease the burden of counting thousands of hours, H.B. 2377 requires that an offender receive hour-for-hour credit for time confined up to the federally required minimum (120 hours for a second time offender and 240 hours for a third time offender), but for any time served beyond the federal minimum, the offender would receive day-for-day credit. Therefore, for a third time misdemeanor offender who is placed on probation and ordered to serve 30 days confinement, the offender would receive hour-for-hour credit for the first 240 hours, but then receive day-for-day credit for the remaining 20 days of confinement.

For third offense felony offenders, as well as fourth and subsequent offenders, H.B. 2377 designates the offense as severity level 6 nonperson felonies and the offender would be sentenced according to the criminal sentencing guidelines. If the offender had no other criminal history beside the two misdemeanor DUI convictions and the third offense felony DUI conviction, the sentence for the third offense level 6 felony DUI conviction would be presumptive probation.¹⁵ For a fourth offense felony DUI conviction, if the offender had no other criminal history besides the DUI convictions, the sentence for the fourth offense DUI

¹³ K.S.A. 2020 Supp. 8-1567(b)(1)(D).

¹⁴ 23 C.F.R. 1275.4.

¹⁵ See K.S.A. 2020 Supp. 21-6804 (sentencing grid for nondrug crimes).

conviction would be a border box, meaning the court would have the option to grant probation or order the offender to spend time in prison.

Though it is not part of H.B. 2377, the Committee strongly supports the creation and implementation of DUI treatment courts in Kansas. DUI treatment courts could allow participation in lieu of a mandatory minimum prison sentence and help reduce the prison population by assisting offenders to successfully complete treatment.

DUI in a Commercial Vehicle – Section 4

The penalties for DUI offenses committed in a commercial motor vehicle are governed by K.S.A. 2020 Supp. 8-2,144. The penalties are the same as a DUI committed in a non-commercial vehicle under K.S.A. 2020 Supp. 8-1567, except a third offense in a commercial vehicle is always a felony. The amendments to K.S.A. 2020 Supp. 8-1567 in H.B. 2377, also apply to DUIs in commercial vehicles in K.S.A. 2020 Supp. 8-2,144.

DIVERSION – Sections 9 & 10

K.S.A. 2020 Supp. 12-4415(b) and 22-2908(b)(1) prohibit city, county, or district attorneys from entering into diversion agreements in lieu of further criminal proceedings on a complaint alleging a DUI if the defendant has (1) previously participated in diversion of an alcohol related offenses; (2) has been previously convicted of driving a commercial or non-commercial vehicle under the influence; or (3) if the alcohol related offense involved a motor vehicle accident or collision that resulted in personal injury or death. K.S.A. 2020 Supp. 12-4415(b) uses the language “an alcohol related offense” rather than directly citing to K.S.A. 2020 Supp. 8-1567; however, the term “alcohol related offense” is defined in K.S.A. 2020 Supp. 12-4413(e) to mean a DUI offense as described in K.S.A. 2020 Supp. 8-1567. H.B. 2377 amends K.S.A. 2020 Supp. 12-4415(b) to include a direct reference to the definition in K.S.A. 2020 Supp. 12-4413(e) in order to point practitioners to the definition and remind city attorneys that K.S.A. 2020 Supp. 12-4415(b) does not prohibit diversion agreements in a wider range of offenses that could be alcohol related in the generic use of the term.

Currently, both K.S.A. 2020 Supp. 12-4415(b)(3) and 22-2908(b)(2) prohibit a diversion agreement if the DUI incident involving a motor vehicle accident or collision results in any personal injury or death. H.B. 2377 allows a diversion agreement if a DUI incident involving a motor vehicle accident or collision results in personal injury to only the driver committing the DUI.

Finally, H.B. 2377 adds subsections to K.S.A. 2020 Supp. 12-4415 and 22-2908 specifying that the prosecutor may not enter into a diversion agreement on a complaint or traffic citation alleging a violation of acts prohibited under Chapter 8 of the Kansas Statutes Annotated if the defendant was a commercial driver’s licenses holder at the time the violation was committed or any subsequent time prior to being considered for diversion. This is the current law for CDL holders under K.S.A. 2020 Supp. 8-2,150; however, in order to prevent prosecutors from mistakenly entering into diversion agreements with CDL holders, H.B. 2377

amends K.S.A. 2020 Supp. 12-4415 and 22-2908 to reiterate the rule. The Committee recommends the State continue to comply with 49 C.F.R. 384.226 and prohibit the masking of convictions associated with commercial motor vehicle license holders.

PLEA BARGAINING – Sections 4 & 7

K.S.A. 2020 Supp. 8-2,144(l) and 8-1567(n) prohibits plea bargaining agreements for the purpose of permitting a person charged with a DUI to avoid the mandatory DUI penalties. The Committee reviewed the history of this provision and agreed that this prohibition is important to ensure that an impaired driver is held accountable for his or her behavior and is not allowed to avoid the DUI penalties. However, sometimes prosecutors interpret this prohibition to mean that the prosecutor cannot amend a DUI charge to a different crime or dismiss the charge if the evidence is insufficient to support a DUI conviction beyond a reasonable doubt. Also, in many jurisdictions, DUI charges are filed by law enforcement, without an opportunity for a full review of the facts by a prosecutor. Prosecutors have an ethical obligation not to pursue criminal charges that are not supported by the evidence.¹⁶ If someone is charged with a DUI but the court finds the law enforcement's initial traffic stop and search were unconstitutional and suppresses the evidence of the law enforcement's observations, field sobriety tests, and preliminary screening tests, then the prosecutor should not continue to charge the person with DUI unless there is other evidence supporting the charge. H.B. 2377 clarifies K.S.A. 2020 Supp. 8-2,144(l) and 8-1567(n) so a prosecutor does not mistakenly think the prosecutor is prohibited from amending or dismissing an unsupported DUI charge.

¹⁶ 2020 Kan. S. Ct. R. 363 (Rule 3.8 Special Responsibilities of a Prosecutor).

The members of the Judicial Council DUI Advisory Committee are:

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

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