

## FINAL RECOMMENDATIONS OF THE JUDICIAL COUNCIL DUI ADVISORY COMMITTEE

December 11, 2020

In May 2018, Representative Blaine Finch asked the Judicial Council to study the topics related to driving under the influence (DUI) in 2018 House Substitute for SB 374, as well as review the DUI statutes in response to recent Kansas and federal court decisions. The Judicial Council accepted the request and formed the DUI Advisory Committee (Committee). In addition to the issues identified in the study request, the Council asked the Committee to complete as comprehensive of a review of the Kansas DUI statutes, case law, and issues as deemed necessary by the Committee.

### COMMITTEE MEMBERSHIP

The members of the Judicial Council DUI Advisory Committee are:

Rep. Brad Ralph, Chair; Dodge City, Kansas  
*State Representative, 119<sup>th</sup> 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*

The Committee is grateful for the assistance of Jason Thompson, Senior Assistant Revisor of Statutes.

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## Recommendations

### Administrative Penalties

#### Ignition Interlock

##### *Affordability Program*

- In order to enable more people to use and complete the ignition interlock device (IID) program, the Committee recommends that Kansas 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 recommends expanding who qualifies for the program to persons whose household income is up to 300% of the federal poverty level. In order to centralize management of the program, the Committee recommends the division, not the IID providers, determine eligibility for the program and the individual's household income for the purposes of the sliding scale.
- The current IID affordability program is based on a person's eligibility for the food assistance program. The Committee recommends expanding 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).

##### *Compliance-Based Removal*

- The Committee recommends Kansas adopt a compliance-based removal system. It recommends that before the IID can be removed and the person's unrestricted driving privileges restored, the person must show (1) the IID has been installed for the required length of time, and (2) the person has not had more than three standard violations and no serious violations in the 90 consecutive days prior to the person's application for reinstatement of unrestricted driving privileges.

##### *Driver Under 21*

- The Committee agreed that the ignition interlock period for a driver under the age of 21 with a lower BAC (0.02-0.0799) should not be greater than the ignition interlock period required if the driver's BAC had been higher (0.08-0.1499). Therefore, the Committee recommends the ignition interlock period for a driver under the age of 21 with a BAC of 0.02-0.0799 should be 180 days.

### *Removal of Waiting Period & Route Restrictions*

- In order to decrease the burden on Kansans and reduce the complexity of the administrative driver's licenses sanctions, the Committee recommends the removal of the 45 or 90 day waiting period and the elimination of the route restrictions in K.S.A. 2019 Supp. 8-1015(a).

### *Driver's License Reinstatement*

- The Committee recommends 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.

## Motorized Bicycle License

- The Committee recommends deletion of K.S.A. 2019 Supp. 8-235(d)(3) and (e) to eliminate the seldom used motorized bicycle licenses for first-time DUI offenders in order to allow the state to qualify for the additional federal funding.

## CDL Disqualification

### *Lookback Period for Determining Lifetime Disqualification*

- The Committee recommends the lookback period for determining whether a commercial driver's license (CDL) holder receives a lifetime disqualification be limited to offenses occurring on or after July 1, 2003. The Committee also recommends amending K.S.A. 2019 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*

- The Committee recommends that Kansas 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.

### *Disqualification for Trafficking in Persons*

- In 2019, federal regulations were update to require 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 removal of the disqualification after 10 years. The Committee recommends K.S.A. 8-2,142(e) be updated to mirror the changes in the federal regulation.

## Criminal Penalties

### Diversion

- The Committee recommends K.S.A. 2019 Supp. 12-4415(b) be amended to include a direct reference to the definition of “an alcohol related offense” in K.S.A. 12-4413(e) in order to point practitioners to the definition and remind city attorneys that K.S.A. 2019 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.
- The Committee also recommends amendments that would allow 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, the Committee recommends sections be added to K.S.A. 2019 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. 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

- The Committee recommends K.S.A. 2019 Supp. 8-2,144(l) and 8-1567(n) be clarified so a prosecutor does not mistakenly think the prosecutor is prohibited from amending or dismissing an unsupported DUI charge.

## Sentencing

### *DUI in a Non-Commercial Vehicle*

- For first, second, and third time offenses, the Committee recommends allowing the court to place the offender on probation immediately, rather than mandating the offender serve a specific amount of time imprisoned before probation begins.
- The Committee also recommends allowing the court to waive any portion of a fine imposed, except the \$250 required to be remitted to the state treasurer, if the offender shows successful completion of court-ordered education or treatment.
- For first time offenders, the Committee recommends removing the requirement to serve the 48 consecutive hours imprisonment prior to being placed on probation. The Committee recommends the court be allowed to place the offender on probation under terms dictated by the court.
- For a second time offender, serving the minimum 120 hours of confinement all at once is not required by federal funding regulations; therefore, the Committee recommends the offender be given the flexibility to serve the ordered confinement as best serves the court, jail, and offender. The Committee agreed that an offender on probation should be required to serve at least 48 hours imprisoned, but recommends the offender 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, the Committee recommends maintaining the distinction between a third-time misdemeanor and a third-time felony.
- For a third-time misdemeanor, if the offender is eligible and is placed on probation, the Committee recommends the statute require probation to include at least 30 days confinement, rather than 90 days confinement. The Committee recommends maintaining 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.
- To ease the burden of counting thousands of hours, the Committee recommends the statute require 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.

- For third offense felony offenders, as well as fourth and subsequent offenders, the Committee recommends the offense be designated as severity level 6 nonperson felonies and the offender be sentenced according to the criminal sentencing guidelines.
- The Committee strongly supports the creation and implementation of DUI treatment courts in Kansas. The Committee urges the creation of a Kansas Supreme Court Taskforce to evaluate and make recommendations about future implementation of DUI treatment court programs in Kansas.

#### *DUI in a Commercial Vehicle*

- The Committee recommends the proposed changes to DUI in a non-commercial vehicle also apply to DUIs in commercial vehicles under K.S.A. 2019 Supp. 8-2,144.

### Drugged Driving

- The Committee acknowledges drugged driving is an area of growing concern and recommends immediate and in-depth consideration by the legislature. The Committee discussed differing approaches governing drugged driving, including the approach set out in 2018 H. Sub for SB 374, but was unable to form a consensus on what approach would be best for Kansas.

### Operating an Aircraft Under the Influence

- Because Kansas' statutes governing the crime of operating an aircraft under the influence have never been updated, the Committee recommends the statutes be updated.

### Legislation

- The Committee requests the Judicial Council introduce the Committee's proposed statutory amendments in the 2021 legislative session.

## Background

The Committee began meeting in December 2018 and continued to meet through 2020. The Committee was chaired by a legislator and included prosecutors, defense attorneys, a municipal court judge, a district court judge, an attorney from the Kansas Department of Revenue Motor Vehicles Division, the Kansas Attorney General's Traffic Safety Resource Prosecutor, a constitutional law professor, a representative from the Kansas Sentencing Commission, and a law enforcement representative.

The Committee began its work by identifying as many DUI-related issues as possible and discussed whether to work on redefining Kansas DUI and rewriting Kansas' DUI code. Ultimately, the Committee agreed to do neither. Instead, it agreed to work within the existing statutory framework to recommend improvements as needed.

At its first meeting, the Committee unanimously agreed to recommend time sensitive statutory amendments regarding the oral and written notice provided by law enforcement when requesting a driver submit to an evidentiary test of the driver's blood, breath, urine, or other bodily substance to determine the presence of alcohol or drugs, and the removal of unconstitutional statutory language remaining in the statutes. In January 2019, the Judicial Council approved the Committee's recommendations which became 2019 HB 2104. The bill passed and went into effect April 18, 2019.

Many of the Committee's 2019 meetings focused on the subject of ignition interlock. At the end of 2019, the Committee finalized its recommendations regarding affordability and compliance-based removal of ignition interlock devices and the availability of a driver's license for a motorized bicycle. In December 2019, the Judicial Council approved the Committee's recommendations which became 2020 SB 405. Due to the COVID-19 pandemic, the 2020 legislative session ended early and the bill did not pass.

Throughout 2019 and 2020, the Committee considered a wide variety of topics, including: the criminalization of test refusal, the administrative process, criminal sentencing provisions, drug impaired driving, plea bargaining, treatment courts, out-of-state residence who receive a Kansas DUI, classification of prior offenses, diversions, DUI offenders who do not own a vehicle, flying under the influence, ignition interlock, and preliminary screening tests. The Committee's final recommendations and discussion of topics is included in this report.

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 (the division) 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 KDOR 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.

The Committee reviewed and addressed topics in both the criminal and administrative penalty systems. To assist in understanding the different penalties associated with the criminal and the administrative systems, a chart of the penalties begins on page 37.

## Administrative Penalties

### Ignition Interlock

*What is an ignition interlock device?*

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

### *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 division will take administrative action against the person's driving privileges. This administrative process is completely separate from the criminal DUI case or sentence. Through the administrative process, 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 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.<sup>1</sup> The driver is suspended for a period of time and then restricted to using an IID for another period. A chart showing the timeframes for the

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<sup>1</sup> "Alcohol or drug-related conviction" is defined in K.S.A. 8-1013(b) as including any of the following: "(A) Conviction of vehicular battery or aggravated vehicular homicide, prior to their repeal, if the crime is committed while committing a violation of K.S.A. 8-1567, and amendments thereto, or the ordinance of a city or resolution of a county in this state which prohibits any acts prohibited by that statute, or conviction of a violation of K.S.A. 8-2,144 or 8-1567, and amendments thereto, conviction of a violation of aggravated battery as described in K.S.A. 21-5413(b)(3) or (b)(4), and amendments thereto, or conviction of a violation of involuntary manslaughter as described in K.S.A. 21-5405(a)(3) or (a)(5), and amendments thereto; (B) conviction of a violation of a law of another state which would constitute a crime described in subsection (b)(1)(A) if committed in this state; (C) conviction of a violation of an ordinance of a city in this state or a resolution of a county in this state which would constitute a crime described in subsection (b)(1)(A), whether or not such conviction is in a court of record; or (D) conviction of an act which was committed on a military reservation and which would constitute a violation of K.S.A. 8-2,144 or 8-1567, and amendments thereto, or would constitute a crime described in subsection (b)(1)(A) if committed off a military reservation in this state."

suspension and restricted ignition interlock periods begins on page 37. The required IID restricted period can range from 6 months to 10 years depending on the type of offense.<sup>2</sup>

#### *Affordability Program*

According to the division, 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's goal was to identify and reduce barriers to participation in the IID program and increase the number IID users in Kansas.

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.

K.S.A. 2019 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 qualify for the federal food assistance program. In 2019, there were eight IID providers operating IID programs and 10,504 IID devices in operation in Kansas. The eight IID providers reported that only 224 people or around 2% of users participated in the provider's affordability programs. Each IID provider sets its own fees and manages its 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 program, the set annual cost of the IID ranged from \$494 to \$915.<sup>3</sup>

The Committee agreed the IID affordability program is essential to allowing all drivers required to use an IID to participate and complete the IID program. The Committee's overall goal was to have as many people as possible use and successfully complete the IID program. The division estimates that about half of the drivers who fail to complete the required IID program do so because of the financial cost of the IID.

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<sup>2</sup> K.S.A. 8-1014.

<sup>3</sup> All information regarding the 2018 IID usage and indigency programs provided by the Kansas Highway Patrol.

In order to enable more people to use and complete the IID program, the Committee recommends that Kansas 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 Committee agreed that the affordability program should offer a sliding scale of discounts based on a user’s household income rather than waive fees entirely.

The Committee recommends expanding 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 obtaining fully restored driving privileges.

The Committee recommends the following sliding scale.

**Proposed IID Affordability Program Sliding Scale**

<b>Household Income</b>	<b>Percentage of Program Costs User Must Pay</b>
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.<sup>4</sup> CIIM opposed the Committee's recommendation to provide a discount to users up to 300% of the federal poverty level. The House Judiciary Committee amended the bill to provide a discount up to only 150% of the federal poverty level. Due to the COVID-19 pandemic, the 2020 legislative session ended early and the bill did not pass. After the legislative session ended, the Committee invited CIIM to present its objections to the Committee. CIIM argued that the cost of an IID is not prohibitive to a user and only households with a household income up to 150% of the federal poverty level should receive a discount through the affordability program. The Committee acknowledged that offering a 10% and 25% discount to users with a household income between 150% and 300% of the federal poverty level would reduce the ignition interlock profit margin on those devices. The Committee asked CIIM for information about whether the discount for users with a household income between 150% and 300% of the federal poverty level would make it impossible for ignition interlock manufacturers or installers to continue operating in Kansas. CIIM did not have that information available.

The Committee unanimously agreed that it did 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 Committee decided not to modify its recommendation and continue to recommend the affordability program include users with household incomes up to 300% of the federal poverty level.

The current IID affordability program is based on a person's eligibility for the food assistance program. The Committee recommends expanding 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 serve the working poor, the Committee recommends that anyone enrolled in these programs only be required to pay 25% of the IID program costs.

The Committee purposefully avoided 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

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<sup>4</sup> 2020 S.B. 405.

of the program, the Committee recommends the division, not the IID providers, determine eligibility for the program and the individual's household income for the purposes of the sliding scale.

The Committee's recommended amendments to K.S.A. 2019 Supp. 8-1016 begin on page 80.

#### *Compliance-Based Removal*

Under the current statutes, 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 the 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 Committee agreed that the IID program is to prevent people from driving while impaired, but also 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.

The Committee recommends Kansas adopt a compliance-based removal system. The Committee reviewed and discussed many different compliance-based removal models. It recommends that before the IID can be removed and the person's unrestricted driving privileges restored, the person must show (1) the IID has been installed for the required length of time, and (2) the person has not had more than three standard violations and no serious violations in the 90 consecutive days prior to the person's application for reinstatement of unrestricted driving privileges. Standard and serious violations are defined below.

At the end of the required IID period, the person would request a certification from the IID provider certifying that the person has not had more than three standard and zero serious violations in the last 90 days. The person would then provide the IID provider's certification to the division along with the person'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 license until the driver can show a period of 90 days without more than three standard violations and no serious violations. The Committee's proposed amendments to K.S.A. 2019 Supp. 8-1015 begin on page 76.

The Committee recommends the following definitions.

"Standard violation" means any of the following, as reported by the approved service provider:

- (i) The driver has blown a BrAC fail when attempting an initial engine start-up breath test;
- (ii) the driver has blown a BrAC fail when attempting a required rolling retest;
- (iii) the driver fails to execute a valid rolling retest;
- (iv) the driver fails to submit to a requested rolling retest by turning the vehicle off to avoid submitting to the rolling retest; or
- (v) the driver has blown a high BrAC during an initial engine start-up breath test;

"Serious violation" means any of the following, as reported by the approved service provider:

- (i) Tampering with the ignition interlock device;
- (ii) circumventing the ignition interlock device; or
- (iii) the driver has blown a high BrAC during a rolling retest;

"BrAC" means the breath alcohol concentration expressed as weight divided by volume, based upon grams of alcohol per 210 liters of breath;

"BrAC fail" means the ignition interlock device registers a BrAC value equal to or greater than the alcohol setpoint, as defined in rules and regulations adopted by the secretary of revenue, when the intended driver conducts an initial test or retest;

"High BrAC" means a BrAC fail result that registers an alcohol setpoint of 0.08 or greater;

"Rolling retest" means a breath test that is required after the initial engine start-up breath test and while the engine is running.

The Committee discussed creating a system to allow a driver to request early release from the IID restrictions based on the driver's IID record without violations. The Committee especially liked this idea for first-time DUI offenders; however, first-time DUI offenders without any other alcohol related traffic offenses are only required to use the IID for six months. In order to qualify for certain federal funding, Kansas must require all DUI offenders to use the IID for at least six

months;<sup>5</sup> therefore, the first-time offender IID period can not be reduced without jeopardizing Kansas’ federal funding.

The legislature considered the Committee’s compliance-based removal proposal during the 2020 legislative session.<sup>6</sup> 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 2020 legislative session ended early and the bill did not pass.

*Driver Under 21*

The Committee identified an issue with how the current statutes treat drivers under 21 years old who drive with a blood or breath alcohol content (BAC) between 0.02 and 0.079. If a driver’s BAC is between 0.02 and 0.0799, the required ignition interlock period is 330 days. If the person’s BAC is higher, 0.08 to 0.1499, the required ignition interlock period is only 180 days.<sup>7</sup> 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). The Committee unanimously agreed that the ignition interlock period for a driver under the age of 21 with a lower BAC (0.02-0.0799) should not be greater than the ignition interlock period required if the driver’s BAC had been higher (0.08-0.1499).

***Driver Under 21 – 1<sup>st</sup> Occurrence***

	<b>Current Statute</b>	<b>Proposal</b>
<b><i>Test Result BAC .02-.0799</i></b>	30 Day Suspension 330 Days Interlock	30 Day Suspension 180 Days Interlock
<b><i>Test result BAC .08 to .1499 (without previous violations as listed in K.S.A. 8-1015(b)(2))</i></b>	30 Day Suspension 180 days	No change

The Committee’s proposed amendments to K.S.A. 2019 Supp. 8-1567a(f) begin on page 93. The legislature considered this proposal during the 2020 legislative session<sup>8</sup> and it did not receive any opposition nor was it amended by the House Judiciary Committee. However, due to the COVID-19 pandemic, the 2020 legislative session ended early and the bill did not pass.

*Removal of Waiting Period & Route Restrictions*

Under K.S.A. 2019 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

<sup>5</sup> See 23 CFR 1300.23(g)(1) and 23 USC 405(d)(6)(A).

<sup>6</sup> 2020 S.B. 405.

<sup>7</sup> K.S.A. 8-1567a.

<sup>8</sup> 2020 S.B. 405.

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.”

The Committee recognized that 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, the Committee recommends the removal of the 45- or 90-day waiting period and the elimination of the route restrictions in K.S.A. 2019 Supp. 8-1015(a). Under the Committee’s recommendation, drivers would still be subject to the 30-day or one-year suspension period followed by the ignition interlock restricted period. However, at the very beginning of the suspension period, 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. The Committee also agreed that imposing route restrictions is an unenforceable restriction that is unnecessary if the driver is driving a vehicle with an ignition interlock device.

The Committee’s proposed amendments to K.S.A. 2019 Supp. 8-1015 begin on page 76.

#### *Driver’s License Reinstatement*

If a person’s driver’s license is administratively suspended and then restricted under K.S.A. 2019 Supp. 8-1014, the person’s license will remain in a suspended or IID restricted status until the person can show they have had the ignition interlock device installed for the required number of months. Under the Committee’s compliance-based removal recommendation, the person’s license would remain under the IID restriction until the person could show the required time period of compliance. Hypothetically, 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 who are unable to fulfill the IID restriction period requirements for other reasons, such as not having consistent access to a vehicle.

The Committee recognized the important role using an IID plays in helping people disconnect drinking alcohol from driving. In the Committee’s compliance-based removal recommendation, 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, the Committee recommends Kansas provide an alternative way for people to demonstrate they are no longer driving under the influence and not a threat to public safety.

The Committee recommends 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.

The Committee agreed that its recommendation 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 Committee designed the requirements for reinstatement to demonstrate that the individual has not been driving illegally during the IID restricted period and for at least five additional years. The Committee agreed that if someone can satisfy these requirements, it is important that the individual be allowed to restore his or her driver's license status.

The Committee's proposed statutory language begins on page 94.

## Motorized Bicycle License

K.S.A. 2019 Supp. 8-235(d)(3) allows a first-time DUI offender the opportunity to receive a license to drive a motorized bicycle.<sup>9</sup> 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 2,300,00 active driver's licenses and identification cards. The Committee recommends deletion of K.S.A. 2019 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. The Committee's proposed amendments to K.S.A. 2019 Supp. 8-235 begin on page 62.

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<sup>9</sup> Motorized bicycle is defined in K.S.A. 8-126.

## Commercial Driver's License (CDL) Disqualification

### *Lookback Period for Determining Lifetime Disqualification*

If a commercial driver's license (CDL) holder commits certain offenses,<sup>10</sup> 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 disqualified for life from holding a CDL.<sup>11</sup> K.S.A. 2019 Supp. 8-2,142 does not limit the lookback period. Disqualifying offenses committed anytime in the driver's life are reviewed. The federal regulation<sup>12</sup> governing disqualifications for commercial motor vehicle drivers went into 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. The Committee recommends the lookback period be limited to offenses occurring on or after July 1, 2003.

The Committee also recommends amending K.S.A. 2019 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.

The Committee's recommended amendments to K.S.A. 2019 Supp. 8-2,142 begin on page 64.

### *Removal of Lifetime Disqualification*

Currently, K.S.A. 2019 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 chosen not to adopt such rules and regulations. The Committee reviewed other states' programs<sup>13</sup> and the federal regulations governing CDL disqualifications.

The Committee agreed that 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 would include having no pending alcohol or drug related criminal charges, having successfully completed an alcohol or drug treatment

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<sup>10</sup> 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.

<sup>11</sup> K.S.A. 2019 Supp. 8-2,142(c).

<sup>12</sup> 49 CFR § 383.51

<sup>13</sup> The Committee used the Missouri regulation, 12 CST 10-24.444, as a model for its proposal.

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. If the driver's disqualified status is removed, the driver could then reapply and must satisfy all the normal requirements for obtaining a CDL. The Committee agreed that drivers who were disqualified for life due to being convicted of driving under the influence in either a commercial or noncommercial vehicle should not qualify for the removal of the lifetime disqualification.

The Committee's recommended amendments to K.S.A. 2019 Supp. 8-2,142 begin on page 64.

#### *Disqualification for Trafficking in Persons*

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 removal of the disqualification after 10 years. The Committee recommends K.S.A. 2019 Supp. 8-2,142(e) be updated to mirror the changes in the federal regulation.

## Criminal Penalties

### Diversion

K.S.A. 2019 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. 2019 Supp. 12-4415(b) uses the language “an alcohol related offense” rather than directly citing to K.S.A. 2019 Supp. 8-1567; however, the term “alcohol related offense” is defined in K.S.A. 2019 Supp. 12-4413(e) to mean a DUI offense as described in K.S.A. 2019 Supp. 8-1567. The Committee recommends K.S.A. 2019 Supp. 12-4415(b) be amended to include a direct reference to the definition in K.S.A. 2019 Supp. 12-4413(e) in order to point practitioners to the definition and remind city attorneys that K.S.A. 2019 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.

The Committee also recommends amendments that would allow 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. Currently, both K.S.A. 2019 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.

Finally, the Committee recommends sections be added to K.S.A. 2019 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. 2019 Supp. 8-2,150; however, in order to prevent prosecutors from mistakenly entering into diversion agreements with CDL holders, the Committee recommends K.S.A. 2019 Supp. 12-4415 and 22-2908 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.

The Committee recommended amendments to K.S.A. 2019 Supp. 12-4415 and 22-2908 begin on pages 95 and 97.

## Plea Bargaining

K.S.A. 2019 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.<sup>14</sup> 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. The Committee recommends K.S.A. 2019 Supp. 8-2,144(l) and 8-1567(n) be clarified so a prosecutor does not mistakenly think the prosecutor is prohibited from amending or dismissing an unsupported DUI charge.

The Committee's recommended amendments to K.S.A. 2019 Supp. 8-2,144(l) and 8-1567(n) begin on pages 73 and 91.

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<sup>14</sup> 2020 Kan. S. Ct. R. 363 (Rule 3.8 Special Responsibilities of a Prosecutor).

## Sentencing

### *DUI in a Non-Commercial Vehicle*

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. 2019 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.<sup>15</sup> 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. A chart showing the Committee's proposed changes to the sentencing requirements begins on page 40.

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

For first time offenders, the Committee recommends removing the requirement to serve the 48 consecutive hours imprisonment prior to being placed on probation. The Committee recommends the court 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.<sup>16</sup> K.S.A. 2019 Supp. 8-1567(b)(1)(B) currently requires the offender serve the minimum 120 hours

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<sup>15</sup> 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).

<sup>16</sup> 23 C.F.R. 1275.3 & 1275.4.

confinement consecutively. Serving the 120 hours consecutively is not required by federal funding regulations; therefore, the Committee recommends the offender be given the flexibility to serve the ordered confinement as best serves the court, jail, and offender. If an offender is placed on probation, K.S.A. 2019 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. The Committee agreed that an offender on probation should be required to serve at least 48 hours of the minimum 120 hour confinement imprisoned, but recommends the offender 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, the Committee recommends maintaining 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.<sup>17</sup> Federal funding requirements require a third time offender to serve at least 240 hours (10 days) confinement.<sup>18</sup> K.S.A. 2019 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, the Committee recommends the statute require probation to include at least 30 days confinement, rather than 90 days confinement, because, in the Committee's experience, 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, the Committee recommends maintaining 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, the Committee recommends the statute require 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,

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<sup>17</sup> K.S.A. 2019 Supp. 8-1567(b)(1)(D).

<sup>18</sup> 23 C.F.R. 1275.4.

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, the Committee recommends the offense be designated as severity level 6 nonperson felonies and the offender 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.<sup>19</sup> 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 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.

As part of the Committee's sentencing recommendations, 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. The task of evaluating the feasibility of such courts and how such courts should work was beyond the scope and time restraints of this Committee. However, the Committee urges the creation of a Kansas Supreme Court Taskforce to evaluate and make recommendations about future implementation of DUI treatment court programs in Kansas.

The Committee's recommended amendments to K.S.A. 2019 Supp. 8-1567 begin on page 83.

#### *DUI in a Commercial Vehicle*

The penalties for DUI offenses committed in a commercial motor vehicle are governed by K.S.A. 2019 Supp. 8-2,144. The penalties are the same as a DUI committed in a non-commercial vehicle under K.S.A. 2019 Supp. 8-1567, except a third offense in a commercial vehicle is always a felony. The Committee recommends that the proposed changes to K.S.A. 2019 Supp. 8-1567 as described above, also apply to DUIs in commercial vehicles under K.S.A. 2019 Supp. 8-2,144. The Committee's recommended amendments to K.S.A. 2019 Supp. 8-2,144 begin on page 69.

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<sup>19</sup> See K.S.A. 2019 Supp. 21-6804 (sentencing grid for nondrug crimes).

## Horizontal Gaze Nystagmus (HGN) Test

The Horizontal Gaze Nystagmus (HGN) test is a field sobriety test law enforcement officers use to gauge whether a DUI suspect is under the influence of alcohol. The officer performing the test looks for involuntary jerking of the eye which is associated with a high blood alcohol concentration. The Committee questioned whether it would be constitutional for Kansas to mandate by statute the admissibility of the HGN test in DUI cases. One of the Committee members, Jeffrey D. Jackson, Professor of Law at Washburn University School of Law, provided the Committee with an analysis of the issue. The memorandum to the Committee is included for reference beginning on page 43. The Committee makes no endorsement or recommendations regarding the use or admissibility of HGN tests.

## Classification of Prior Offenses

K.S.A. 2019 Supp. 8-1567(i) sets out the requirements for determining whether a DUI conviction is a first, second, third, fourth or subsequent conviction. It defines “conviction” to include a diversion agreement for various alcohol related crimes, and “a conviction of a violation of an ordinance of a city in this state, a resolution of a county in this state, or any law of another jurisdiction that would constitute an offense that is comparable” to the Kansas state statute of DUI or one of the other listed alcohol related offenses.<sup>20</sup>

The issue of how a defendant’s past DUI criminal convictions from other jurisdictions (other state or municipal convictions) can be used to determine whether a DUI conviction is a first, second, third, fourth or subsequent conviction continues to be litigated in the Kansas appellate courts. In 2016, a panel of the Kansas Court of Appeals determined that a Missouri driving while intoxicated (DWI) conviction could not be classified as a prior DUI offense for the purpose of enhancing the defendant’s Kansas DUI conviction because the Missouri DWI statute was broader than the Kansas DUI statute, criminalizing conduct that is not criminalized under the Kansas DUI statute.<sup>21</sup> In 2016 and 2017, various panels of the Court of Appeals ruled that a Wichita municipal DUI ordinance conviction could not be counted for purposes of enhancing a subsequent state statute DUI conviction because the city ordinance was broader than the state law.<sup>22</sup> In response to Kansas Supreme Court and Kansas Court of Appeals cases, in 2018, the legislature amended K.S.A. 2017 Supp. 8-1567 and created a subsection defining what can be considered when determining whether an offense is “comparable” to the Kansas state DUI statutory elements.

Since the legislature’s 2018 amendment, three different Kansas Court of Appeals cases have analyzed whether the legislature’s actions changed whether a DUI-type conviction from another jurisdiction can be used to enhance a Kansas state DUI conviction. Two different panels of the Kansas Court of Appeals found the legislature’s amendments to K.S.A. 2017 Supp. 8-1567 changed the statutory analysis and now allows DUI convictions from other jurisdictions with broader statutes or ordinances to count as prior DUI offenses to a Kansas DUI.<sup>23</sup> A different panel of the Kansas Court of Appeals, disagreed and found that the legislature’s amendments did not allow DUI convictions from other jurisdictions with broader statutes or ordinances to count as

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<sup>20</sup> K.S.A. 2019 Supp. 8-1567(i)(3).

<sup>21</sup> *State v. Stanley*, 53 Kan. App. 2d 698, 390 P.3d 40 (2016).

<sup>22</sup> *State v. Fisher*, No. 115,277, 2017 WL 2021526, at \*5 (Kan. App. 2017) (unpublished opinion), *affirmed in State v. Fisher*, 308 Kan. 715, 423 P.3d 528 (2018); *State v. Mears*, No. 115,278, 2017 WL 1534748, at \*6 (Kan. App. 2017) (unpublished opinion), *affirmed in State v. Mears*, 308 Kan. 719, 423 P.3d 467 (2018); but see *State v. Gensler*, No. 112,523, 2016 WL 2610262, at \*5 (Kan. App. 2016) (unpublished opinion), *reversed by State v. Gensler*, 308 Kan. 674, 423 P.3d 488 (2018).

<sup>23</sup> *State v. Mejia*, No. 121,475, \_\_\_ Kan. App. 2d \_\_\_, 466 P.3d 1217 (Kan. App. 2020), *pet. for rev. denied* September 20, 2020; and *State v. Patton*, No. 120,434, \_\_\_ Kan. App. 2d \_\_\_, \_\_\_ P.3d \_\_\_, 2020 WL 5491848, (Kan. App. 2020), *pet. for rev. filed* October 13, 2020.

prior DUI offenses to a Kansas DUI.<sup>24</sup> There are petitions for review pending before the Kansas Supreme Court for two of the conflicting cases.<sup>25</sup>

Because the issue is being litigated and practitioners are waiting to see if the Kansas Supreme Court will grant the petitions for review and resolve the split in the Court of Appeals decisions, the Committee decided it would not make any recommendations for further statutory amendments at this time.

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<sup>24</sup> *State v. Myers*, No. 122,046, \_\_\_ Kan. App. 2d \_\_\_, \_\_\_ P.3d. \_\_\_, 2020 WL 5849370, (Kan. App. 2020), *pet. for rev. filed* October 20, 2020.

<sup>25</sup> *State v. Patton*, No. 120434, \_\_\_ Kan. App. 2d \_\_\_, \_\_\_ P.3d. \_\_\_, 2020 WL 5491848, (Kan. App. 2020), *pet. for rev. filed* October 13, 2020; and *State v. Myers*, No. 122,046, \_\_\_ Kan. App. 2d \_\_\_, \_\_\_ P.3d. \_\_\_, 2020 WL 5849370, (Kan. App. 2020), *pet. for rev. filed* October 20, 2020.

## Criminalization of Test Refusals

In 2012, under K.S.A. 2011 Supp. 8-1001(a), “Any person who operates or attempts to operate a vehicle within this state is deemed to have given consent, subject to the provisions of this act, to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs.” During the 2012 legislative session, the Kansas legislature enacted K.S.A. 8-1025(a), making it a crime to refuse “to submit to or complete a test or tests deemed consented to under subsection (a) of K.S.A. 8-1001[.]” In 2017, the Kansas Supreme Court found K.S.A. 2016 Supp. 8-1025 unconstitutional because by punishing an individual for withdrawing his or her consent to a search, it violated the individual’s fundamental right to be free from an unreasonable search.<sup>26</sup> K.S.A. 2018 Supp. 8-1025 was repealed in 2019.<sup>27</sup>

The Committee reviewed a proposal similar to language previously submitted in 2018 H. Sub for SB 374 that proposed to criminalize a driver’s refusal to take a breath test (not blood or urine) after being arrested for DUI. The Committee also reviewed a memo drafted by committee member, Jeffrey D. Jackson, Professor of Law at Washburn University, regarding Fourth Amendment issues raised by the use of warrantless testing of oral fluids. The memorandum to the Committee is included for reference beginning on page 47. Ultimately, the Committee could not reach a consensus on the issue. Therefore, the Committee makes no endorsement or recommendations regarding the subject of criminalization of test refusals.

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<sup>26</sup> *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*).

<sup>27</sup> L. 2019, ch 13, § 5, eff. April 18, 2019.

## Drugged Driving

K.S.A. 2019 Supp. 8-1567(a)(4) criminalizes driving under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle. Recognizing, identifying, and testing for drugs is very different from recognizing, identifying, and testing for alcohol. There are hundreds of different types of drugs, some of which are illegal to use, some of which are legal to use in certain situations, and some of which are always legal to use. Each drug is processed differently by different people's bodies making it more difficult for law enforcement to recognize and detect drug impairment during a roadside stop than alcohol impairment.

There are three main approaches state legislatures have taken to criminalize driving under the influence of drugs:

- “(1) Driving Under the Influence of Drugs (DUID): illegal to drive while impaired;
- (2) Zero Tolerance: illegal to drive with any amount of specified drugs in the body; and
- (3) Per Se: illegal to drive with amounts of specified drugs in the body exceeding set limits.”<sup>28</sup>

### *DUID*

Kansas already criminalizes driving under the influence of drugs. Under K.S.A. 2019 Supp. 8-1567(a)(4) and (5) the state must show someone was driving (1) while under the influence of any drug, combination of drugs, or combination of alcohol and drugs; and (2) the drugs or combination of drugs and alcohol made the person “incapable of safely driving a vehicle.” While this approach seems very straight forward, it is difficult to enforce and prosecute.

“First, a law enforcement officer must observe and identify the driver's impairment. Then the officer must attempt to obtain chemical evidence of a drug, usually through a blood test, and must be able to link drug presence to the observed impairment. If the driver refuses a chemical test, the officer must rely on his or her observations. Both steps are more complicated and take longer than the equivalent steps for alcohol, where the signs and symptoms of alcohol impairment are well-understood, the Standardized Field Sobriety Tests (SFSTs) provide a quick roadside screen, admissible evidence of a driver's BAC level can be obtained quickly and easily with evidentiary breath test equipment that's widely available to law enforcement, and the link between alcohol and impairment is well-understood by prosecutors, judges, and juries.

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<sup>28</sup> Drug Impaired Driving: A Guide for States, Governors Highway Safety Administration (September 2015, updated April 2017).

Many officers are not trained to identify the signs and symptoms of drivers impaired by drugs other than alcohol. Delays in drawing blood for a test may allow drugs to metabolize, so that test results do not accurately measure a driver's drug concentration at the time of arrest. Drug testing is expensive. Some testing laboratories have substantial backlogs, so that test results may not be available when a case comes to trial. Linking a driver's impairment to a drug may be difficult if judges and juries do not understand how some drugs can impair driving."<sup>29</sup>

### *Zero Tolerance*

Some states, such as Arizona, Delaware, Iowa, and Oklahoma, have adopted a zero tolerance approach. Under such law, it is illegal to drive with any amount of a measurable controlled substance in the body. In 2018, the legislature considered 2018 H. Sub for SB 374 that proposed legislative amendments applying this approach. Courts that have addressed the issue have concluded that a statute criminalizing "driving with any amount of an illegal drug in the blood or urine does not violate due process or equal protection."<sup>30</sup>

"Zero tolerance laws are easy to justify for illegal drugs: if it's illegal to possess or use a drug, then it's reasonable to prohibit driving after the drug has been possessed and used. A logical extension would be an 'internal possession' law, prohibiting a person from having an illegal drug in his or her bloodstream independent of any driving. Most states do not have internal possession laws. Zero tolerance laws also may help DUID prosecution.

However, zero tolerance laws have their limitations. They are difficult to justify for legal drugs because there is no evidence that the small concentrations that can be detected in the laboratory will produce any impairment in a driver. In the same vein, without a link to driver impairment, zero tolerance laws for illegal drugs may appear to be directed more to controlling drug use than to improving traffic safety. In particular, several states include metabolites of illegal drugs in their zero tolerance laws. Metabolites of some drugs can remain in the body for days or weeks, long after any impairment has ended. Zero tolerance laws do not stand on their own: because an officer cannot request a drug test without some indication of a driver's impairment, zero tolerance laws are linked directly to DUID

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<sup>29</sup> *Id at 21.*

<sup>30</sup> *See State v. Phillips*, 873 P.2d 706, 709-10 (Ariz. Ct. App. 1994); *Love v. State*, 517 S.E.2d 53, 55-57 (Ga. 1999); *State v. Fate*, 636 N.E.2d 549, 550 (Ill. 1994); *Shepler v. State*, 758 N.E.2d 966, 969-71 (Ind. Ct. App. 2001); *State v. Childs*, 898 N.W.2d 177, 184-85 (Iowa 2015); *Williams v. State*, 50 P.3d 1116, 1120-22 (Nev. 2002); *State v. Smet*, 709 N.W.2d 474, 480-82 (Wis. Ct. App. 2005).

laws, though they may be used for drivers injured in a crash when there is no opportunity to observe impairment.”<sup>31</sup>

#### *Per Se*

The drug *per se* approach is similar to the alcohol *per se* law. K.S.A. 2019 Supp. 8-1567(a)(1) & (2) criminalize driving with an alcohol concentration in the person’s blood or breath of 0.08 or more. If the state can prove a person’s blood or breath alcohol concentration was 0.08 or more, the state does not have to prove the person was incapable of safely driving a vehicle. “[*Per se* laws] are apparently straightforward but conceal some thorny issues. The most fundamental is that setting a positive *per se* limit, such as 5 ng for THC, implies that the limit is related to impairment and that all, or most, drivers have their abilities impaired at concentrations above the limit.”<sup>32</sup> As of the time of this report, science has not demonstrated drugs have as predictable of an impairment effect on people based on a certain level in the person’s body as alcohol.

The Committee acknowledges drugged driving is an area of growing concern and recommends immediate and in-depth consideration by the legislature. The Committee discussed the three main approaches noted above and the approach set out in 2018 H. Sub for SB 374 but was unable to form a consensus on what approach would be best for Kansas. The Committee makes no recommendations regarding which approach Kansas should adopt regarding the issue of drugged driving.

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<sup>31</sup> Drug Impaired Driving: A Guide for States, Governors Highway Safety Administration at 22 (September 2015, updated April 2017) (citations omitted).

<sup>32</sup> *Id.*

## Operating an Aircraft Under the Influence

Kansas' current statutes governing the crime of operating an aircraft under the influence of drugs or alcohol<sup>33</sup> were enacted in 1981 and have never been updated. The Committee conferred with the federal aviation administration and others with expertise in this area. When someone suspects an aircraft is being operated under the influence, the person is to contact the local law enforcement agency. Having comprehensive and updated state statutes are critical for local law enforcement to properly conduct an investigation of the allegations, as well as collect evidence. The work of the local law enforcement agency is necessary for any future criminal charges and administrative action taken by the federal aviation administration.

The Committee presumed that if the alcohol or drug testing procedures for operating an aircraft under the influence were challenged in court, the courts would look to the DUI case law for guidance. The Committee also agreed that in order to provide consistency for law enforcement officers and to protect people's constitutional rights, it is important that the process and penalties for operating an aircraft under the influence closely resemble the DUI process and penalties. The Committee agreed the statutes should be updated because the statutes may be applied to drone operators in the future.

The Committee recommends the amendments to the statutes governing the crime of operating an aircraft under the influence beginning on page 52.

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<sup>33</sup> K.S.A. 3-1001 *et seq.*

## Criminal and Administrative Penalties related to violations of K.S.A. 8-1567

Criminal <i>Non-Commercial Vehicle DUI</i>	Administrative		
	Test Refusal	Test Failure or DUI Conviction*	
		BAC 0.08 – 0.1499	BAC 0.15+
<b>1<sup>st</sup> Offense</b> <ul style="list-style-type: none"> <li>• Class B Misdemeanor</li> <li>• Diversion allowed</li> <li>• <b>Fine:</b> \$750-\$1000</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 48 consecutive hours up to 6 months imprisonment; or 100 hours of public service</li> <li>○ Probation may be granted immediately or after offender serves at least 48 consecutive hours' imprisonment.</li> <li>○ If probation is granted immediately, a condition of probation must require the offender serve at least 48 consecutive hours' imprisonment                             <ul style="list-style-type: none"> <li>▪ After serving 48 consecutive hours imprisonment, house arrest allowed.</li> </ul> </li> </ul> </li> </ul>	<b>1<sup>st</sup> Occurrence</b> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 90 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 2 years</li> </ul>	<b>1<sup>st</sup> Occurrence</b> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 30 days</li> <li>• <b>Ignition interlock:</b> 180 days or 1 year (<i>depends on person's past driving record</i>)</li> </ul>	<b>1<sup>st</sup> Occurrence</b> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 1 year</li> </ul>
<b>2<sup>nd</sup> Offense</b> <ul style="list-style-type: none"> <li>• Class A Misdemeanor</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$1,250 - \$1,750</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year;</li> <li>○ No probation until offender serves at least 5 consecutive days' (120 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 72 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> <li style="text-align: center;">OR</li> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 72 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul> </li> </ul> </li> </ul>	<b>2<sup>nd</sup> Occurrence</b> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 90 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 3 years</li> </ul>	<b>2<sup>nd</sup> Occurrence</b> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 1 year</li> </ul>	<b>2<sup>nd</sup> Occurrence</b> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 2 years</li> </ul>

## Criminal and Administrative Penalties related to violations of K.S.A. 8-1567

Criminal <i>Non-Commercial Vehicle DUI</i>	Administrative		
	Test Refusal	Test Failure or DUI Conviction*	
		BAC 0.08 – 0.1499	BAC 0.15+
<p><b>3<sup>rd</sup> Offense – Misdemeanor</b></p> <ul style="list-style-type: none"> <li>• Class A Misdemeanor</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$1,750 - \$2,500</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year;</li> <li>○ No probation until the offender serves at least 90 days' (2,160 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> <li style="text-align: center;">OR</li> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul> </li> </ul> </li> </ul>	<p><b>3<sup>rd</sup> Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 90 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 4 years</li> </ul>	<p><b>3<sup>rd</sup> Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 2 years</li> </ul>	<p><b>3<sup>rd</sup> Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 3 years</li> </ul>
<p><b>3<sup>rd</sup> Offense – Felony</b></p> <ul style="list-style-type: none"> <li>• Nonperson Felony (no severity level, not sentenced according to sentencing grid)</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$1,750 - \$2,500</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year</li> <li>○ No probation until the offender serves at least 90 days' (2,160 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> <li style="text-align: center;">OR</li> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul> </li> </ul> </li> </ul>			

## Criminal and Administrative Penalties related to violations of K.S.A. 8-1567

Criminal <i>Non-Commercial Vehicle DUI</i>	Administrative		
	Test Refusal	Test Failure or DUI Conviction*	
		BAC 0.08 – 0.1499	BAC 0.15+
<p><b>4<sup>th</sup> or Subsequent Offense</b></p> <ul style="list-style-type: none"> <li>• Nonperson Felony (no severity level, not sentenced according to sentencing grid)</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$2,500</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year</li> <li>○ No probation until the offender serves at least 90 days' (2,160 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> <li>OR</li> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul> </li> </ul> </li> </ul>	<p><b>4<sup>th</sup> Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 90 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 5 years</li> </ul>	<p><b>4<sup>th</sup> Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 3 years</li> </ul>	<p><b>4<sup>th</sup> Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 4 years</li> </ul>
	<p><b>5<sup>th</sup> or Subsequent Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 90 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 10 years</li> </ul>	<p><b>5<sup>th</sup> or Subsequent Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 10 years</li> </ul>	<p><b>5<sup>th</sup> or Subsequent Occurrence</b></p> <ul style="list-style-type: none"> <li>• <b>Suspension:</b> 1 year                             <ul style="list-style-type: none"> <li>○ After 45 days, can drive to limited places (route restrictions) with IID</li> </ul> </li> <li>• <b>Ignition interlock:</b> 10 years</li> </ul>

*\*Pursuant to K.S.A. 2019 Supp. 8-1014(e), if the person's test refusal, test failure, and/or alcohol or drug related conviction arise from the same arrest, the person will serve the longest applicable suspension and ignition interlock period authorized. The sanction for a test refusal or failure shall not be added together or otherwise imposed consecutively to the sanction for the DUI conviction that arose out of same arrest as the test refusal or failure.*

## Proposed Changes to Non-Commercial Vehicle DUI Criminal Penalties

Current Law	Proposed Law
<p><b>1<sup>st</sup> Offense</b></p> <ul style="list-style-type: none"> <li>• Class B Misdemeanor</li> <li>• Diversion allowed</li> <li>• <b>Fine:</b> \$750-\$1000</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 48 consecutive hours up to 6 months imprisonment; or 100 hours of public service</li> <li>○ Probation may be granted immediately or after offender serves at least 48 consecutive hours' imprisonment.</li> <li>○ If probation is granted immediately, a condition of probation must require the offender serve at least 48 consecutive hours' imprisonment                             <ul style="list-style-type: none"> <li>▪ After serving 48 consecutive hours imprisonment, house arrest allowed.</li> </ul> </li> </ul> </li> </ul>	<p><b>1<sup>st</sup> Offense</b></p> <ul style="list-style-type: none"> <li>• Class B Misdemeanor</li> <li>• Diversion allowed</li> <li>• <b>Fine:</b> \$750-\$1000</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 48 <del>consecutive</del> hours up to 6 months imprisonment; or 100 hours of public service</li> <li>○ Probation may be granted immediately <del>or after offender serves at least 48 consecutive hours' imprisonment.</del></li> <li>○ <del>If probation is granted immediately, a condition of probation must require the offender serve at least 48 consecutive hours' imprisonment</del> <ul style="list-style-type: none"> <li>▪ <del>After serving 48 consecutive hours imprisonment, house arrest allowed.</del></li> </ul> </li> </ul> </li> </ul>
<p><b>2<sup>nd</sup> Offense</b></p> <ul style="list-style-type: none"> <li>• Class A Misdemeanor</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$1,250 - \$1,750</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year;</li> <li>○ No probation until offender serves at least 5 consecutive days' (120 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 72 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> </ul> </li> <li>OR                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 72 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul> </li> </ul> </li> </ul>	<p><b>2<sup>nd</sup> Offense</b></p> <ul style="list-style-type: none"> <li>• Class A Misdemeanor</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$1,250 - \$1,750</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year;</li> <li>○ <del>No probation until offender serves</del> Probation may be granted immediately but must require offender serve at least 5 <del>consecutive</del> days' (120 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ <del>After 120 hours must include a period of at least 48 consecutive</del> hours imprisonment, work release allowed to serve <del>remaining hours at least the remaining 72 hours.</del> <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> </ul> </li> <li>OR                             <ul style="list-style-type: none"> <li>▪ <del>After 120 hours must include a period of at least 48 consecutive</del> hours imprisonment, house arrest allowed to serve <del>remaining hours at least the remaining 72 hours.</del> <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul> </li> <li>○ <u>Work release or house arrest credit must be calculated by hours imprisonment or at residence until defendant has satisfied the minimum requirement of 120 hours. After the 120 hours is complete, the defendant will receive day-for-day credit towards satisfying any remaining imprisonment period.</u></li> </ul> </li> </ul>

## Proposed Changes to Non-Commercial Vehicle DUI Criminal Penalties

Current Law	Proposed Law
<p><b>3<sup>rd</sup> Offense – Misdemeanor</b></p> <ul style="list-style-type: none"> <li>• Class A Misdemeanor</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$1,750 - \$2,500</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year;</li> <li>○ No probation until the offender serves at least 90 days' (2,160 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> </ul> </li> </ul> </li> </ul> <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 2,112 hours.                             <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul>	<p><b>3<sup>rd</sup> Offense – Misdemeanor</b></p> <ul style="list-style-type: none"> <li>• Class A Misdemeanor</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$1,750 - \$2,500</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year;</li> <li>○ <del>No probation until the offender serves at least 90 days' (2,160 hours)</del> <u>Probation may be granted immediately but must require offender serve at least 30 days'</u> imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve <del>at least</del> the remaining <del>2,112</del> hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> </ul> </li> </ul> </li> </ul> <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve <del>at least</del> the remaining <del>2,112</del> hours.                             <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> <li>○ <u>Work release or house arrest credit must be calculated by hour imprisonment or at residence until defendant has satisfied 240 hours. After the 240 hours is complete, the defendant will receive day-for-day credit towards satisfying the remaining imprisonment period.</u></li> </ul>

## Proposed Changes to Non-Commercial Vehicle DUI Criminal Penalties

Current Law	Proposed Law
<p><b>3<sup>rd</sup> Offense – Felony</b></p> <ul style="list-style-type: none"> <li>• Nonperson Felony (no severity level, not sentenced according to sentencing grid)</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$1,750 - \$2,500</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year</li> <li>○ No probation until the offender serves at least 90 days' (2,160 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> </ul> </li> </ul> </li> </ul> <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 2,112 hours.             <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul>	<p><b>3<sup>rd</sup> Offense – Felony</b></p> <ul style="list-style-type: none"> <li>• <u>Severity Level 6, nonperson felony</u></li> <li>• <u>Sentenced according to the sentencing grid</u></li> <li><del>• Nonperson Felony (no severity level, not sentenced according to sentencing grid)</del></li> <li><del>• Diversion not allowed</del></li> <li><del>• Fine: \$1,750–\$2,500</del></li> <li><del>• Imprisonment:</del> <ul style="list-style-type: none"> <li><del>○ 90 days up to 1 year</del></li> <li><del>○ No probation until the offender serves at least 90 days' (2,160 hours) imprisonment</del> <ul style="list-style-type: none"> <li><del>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 2,112 hours.</del> <ul style="list-style-type: none"> <li><del>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</del></li> </ul> </li> </ul> </li> <li><del>—OR</del></li> <li><del>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 2,112 hours.</del> <ul style="list-style-type: none"> <li><del>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</del></li> </ul> </li> </ul> </li> </ul>
<p><b>4<sup>th</sup> or Subsequent Offense</b></p> <ul style="list-style-type: none"> <li>• Nonperson Felony (no severity level, not sentenced according to sentencing grid)</li> <li>• Diversion not allowed</li> <li>• <b>Fine:</b> \$2,500</li> <li>• <b>Imprisonment:</b> <ul style="list-style-type: none"> <li>○ 90 days up to 1 year</li> <li>○ No probation until the offender serves at least 90 days' (2,160 hours) imprisonment                             <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 2,112 hours.                                     <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</li> </ul> </li> </ul> </li> </ul> </li> </ul> <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> <li>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 2,112 hours.             <ul style="list-style-type: none"> <li>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</li> </ul> </li> </ul>	<p><b>4<sup>th</sup> or Subsequent Offense</b></p> <ul style="list-style-type: none"> <li>• <u>Severity Level 6, nonperson felony</u></li> <li>• <u>Sentenced according to the sentencing grid</u></li> <li><del>• Nonperson Felony (no severity level, not sentenced according to sentencing grid)</del></li> <li><del>• Diversion not allowed</del></li> <li><del>• Fine: \$2,500</del></li> <li><del>• Imprisonment:</del> <ul style="list-style-type: none"> <li><del>○ 90 days up to 1 year</del></li> <li><del>○ No probation until the offender serves at least 90 days' (2,160 hours) imprisonment</del> <ul style="list-style-type: none"> <li><del>▪ After 48 consecutive hours imprisonment, work release allowed to serve at least the remaining 2,112 hours.</del> <ul style="list-style-type: none"> <li><del>• The offender receives credit for each hour of confinement at the end of and continuing to the beginning of the offender's work day.</del></li> </ul> </li> <li><del>—OR</del></li> <li><del>▪ After 48 consecutive hours imprisonment, house arrest allowed to serve at least the remaining 2,112 hours.</del> <ul style="list-style-type: none"> <li><del>• The offender receives credit for each hour of confinement served within the boundaries of the offender's residence.</del></li> </ul> </li> </ul> </li> </ul> </li> </ul>

## MEMORANDUM

TO: Members of the Kansas Judicial Council DUI Advisory Committee

FROM: Professor Jeffrey D. Jackson

RE: Legislative Action Mandating the Admissibility of HGN Testing

DATE: June 18, 2019

This memo addresses the question of whether it would be constitutional for Kansas to mandate the admissibility of Horizontal Gaze Nystagmus testing in DUI cases by statute, as at least two states have done.

### A. Current Status of HGN Testing in Kansas

Under binding Kansas precedent, the HGN Test is scientific evidence, and thus its reliability must be established before it may be admitted as evidence for any purpose. *City of Wichita v. Molitor*, 301 Kan. 251, 263, 341 P.3d 1275 (2015) (holding that even using HGN as evidence to support reasonable suspicion requires proving scientific reliability); *State v. Chastain*, 265 Kan. 16, 22-23, 960 P.2d 756 (1998) (holding that proof of scientific reliability was necessary and State failed to prove it); *State v. Witte*, 251 Kan. 313, 329-30, 836 P.2d 1110 (1992) (holding court must determine reliability for test to be admissible for any purpose). To date, no prosecutor in Kansas has done so, and the results of an HGN test are not admissible in Kansas. See *Molitor*, 301 Kan. at 263 (noting that “at this point in the state of Kansas, the HGN test has no more credibility than a Ouija Board or a Magic 8 Ball”).

One important distinction is that these cases were decided under the *Frye* standard for admissibility of scientific evidence. The *Frye* test asks whether the technique used has gained general acceptance as reliable within the scientific community. *State v. Shadden*, 290 Kan. 803, 819, 235 P.3d 436 (2010). Kansas has now adopted the *Daubert* standard for admissibility of scientific evidence. See K.S.A. 60-456(b) (adopting the language of Federal Rule of Evidence 702). Under that standard, the admissibility of scientific evidence hinges on factors such as (1) whether the theory has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error associated with the theory; and (4) whether the theory has attained widespread or general acceptance. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-94 (1993).

However, although the *Daubert* test is different than the *Frye* test, there is no difference in their definitions of what constitutes scientific evidence that requires application of the test. Further, the overwhelming majority of jurisdictions that apply *Daubert* have held that HGN

testing is “scientific evidence” whose validity must be established under that test. *See, e.g. State v. Russo*, 773 A.2d 965, 969-70 (Conn. Ct. App. 2001); *State v. Ito*, 978 P.2d 191, 209 (Haw. Ct. App. 1999); *Comm. v. Sands*, 675 N.E.2d 370, 373 (Mass. 1997); *State v. Casillas*, 782 N.W.2d 882, 885 (Neb. 2010); *State v. Dahood*, 814 A.2d 159, 165 (N.H. 2002); *State v. Torres*, 976 P.2d 20, 33 (N.M. 1999); *State v. O’Key*, 899 P.2d 663, 675 (Or. 1995) (en banc). Therefore, it does not appear that Kansas would treat HGN any differently under the current version of K.S.A. 60-456(b).

B. Would a Statute Mandating Admissibility of HGN Testing be Constitutional under Separation of Powers Doctrine?

At least two states, North Carolina and Oklahoma, have passed statutes that purport to allow the admission of HGN testimony without an underlying court inquiry into its reliability. *See* N.C. Gen. Stat § 8C-1, Rule 702; Okla. Stat. 8C-1, § 11-902 (both stating that “results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered in accordance with the person's training by a person who has successfully completed training in HGN” are admissible to show impairment and not on specific concentration of alcohol). The question about whether such a statute would be constitutional in Kansas depends on an analysis of 1) the Kansas Constitution’s provision relating to separation of powers, and 2) due process.

The important thing to remember is that different states have different constitutional language regarding the separation of powers, and their courts have interpreted these provisions in different ways. This is especially true with regard to changes to the rules of evidence. At the federal level, the United States Supreme Court has held that “Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.” *Dickerson v. United States*, 530 U.S. 428, 438 (2000). States, however, have reached different conclusions, based on their particular constitutions, regarding the ability of their legislatures to modify evidentiary standards or prescribe the admissibility of evidence. *Compare, e.g. State ex rel. Collins v. Seidel*, 691 P.2d 678, 682 (Ariz. 1984) (holding that “The legislature cannot repeal the Rules of Evidence or the Rules of Civil Procedure made pursuant to the power provided” the Arizona Supreme Court in the Arizona Constitution); *Ammerman v. Hubbard Broadcasting*, 551 P.2d 1354, 1359 (N.M. 1976) (holding that “under our Constitution the Legislature lacks power to prescribe by statute rules of evidence and procedure, this constitutional power is vested exclusively in this court, and statutes purporting to regulate practice and procedure in the courts cannot be binding”) *with Williams v. State*, 707 S.W.2d 40, 45 (Tex. Ct. Crim. App. 1986) (holding that “the Legislature may define certain parameters within the operation of the judicial branch, whether it be to mandate certain penalties . . . certain procedures . . . or even rules of evidence”); *Lee v. Bueno*, 381 P.3d 736, 750 (Okla. 2016) (holding that, under the Oklahoma Constitution, the legislature has the prerogative to determine the rules of evidence).

Regarding the admissibility of HGN evidence by statute, only North Carolina has addressed this issue, and they have only done so briefly. In *State v. Goodwin*, 800 S.E.2d 47, 53 (2017), the North Carolina Supreme Court stated that “with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State.” Although *Goodwin* did not deal directly with the reliability issue, lower courts in North Carolina have interpreted *Goodwin* as signaling that this legislative determination of reliability does away with the need for the court to determine reliability. See *State v. Younts*, 803 S.E.2d 641, 648 (N.C. Ct. App. 2017); *State v. Barker*, 809 S.E.2d 171, 175 (N.C. Ct. App. 2017).

None of the North Carolina cases explicitly looked at whether the statute violated separation of powers. However, North Carolina has held that, under its constitution, “the Legislature has virtually untrammelled authority to codify and change the rules of evidence so long as due process is accorded and no other constitutional provisions are infringed. *State v. Taylor*, 304 S.E.2d 767, 769 (N.C. Ct. App. 1983).

Kansas appears to have a fairly expansive view with regard to the power of the Legislature to change the rules of evidence. The Kansas Supreme Court has held that “[i]t is well settled that the legislature has some power over the rules of evidence and it has power to prescribe new and alter existing rules, or to prescribe methods of proof.” *Ward’s Estate v. State Dept. of Social Welfare*, 176 Kan. 614, 616, 272 P.2d 737 (1954). See *State v. Haremza*, 213 Kan. 201, Syl. ¶ 1, 515 P.2d 1217 (1973) (stating in Official Syllabus, although not in text of the case, that “[t]he legislature may exercise control over the rules of evidence”). Thus, it appears probable that Kansas would also hold that a statute mandating admissibility of HGN testing did not violate the separation of powers.

### C. Would a Statute Mandating Admissibility of HGN Testing Violate Due Process?

Even if a Statute Mandating Admissibility of HGN does not violate separation of powers, there is a question regarding whether it would violate due process. Even those states that hold the legislature has the ability to change the rules of evidence require that the change not infringe upon due process. See, e.g. *State v. Taylor*, 304 S.E.2d at 769.

Neither North Carolina nor Oklahoma have addressed the due process implications of their statutes regarding HGN testing. Only one state has in fact directly addressed the due process implications of a statute mandating the admissibility of scientific evidence. In *Armstead v. State*, 673 A.2d 221, 244-45 (Md. Ct. App. 1996), the Maryland Court of Appeals looked at the due process implications of a statute mandating the admissibility of certain DNA matches. The court recognized that “a part of the due process guarantee is that an individual not suffer punitive action as a result of an inaccurate scientific procedure.” *Id.* at 244. However, the court then noted that due process is only implicated when the evidence is so extremely unfair that its

admission violates fundamental concepts of justice and is so unreliable as to prevent a fair trial. *Id.*; see *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012) (holding that “the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair”). The Maryland Court of Appeals concluded that, because the defendant was allowed to challenge the reliability of the evidence, and because the jury was allowed to weigh the evidence, merely doing away with the State’s burden to prove reliability prior to introduction was not so unfair as to prevent a fair trial. *Armstead*, 673 A.2d at 245.

Maryland’s determination in *Armstead* seems sound. The *Daubert* standard requiring the State to demonstrate sufficient reliability before the introduction of evidence is not a constitutional one; rather it is a rule of evidence. See *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir. 1994); *Wilson v. Sirmons*, 536 F.3d 1064, 1101-02 (10th Cir. 2008) (recognizing that neither *Frye* nor *Daubert* sets a constitutional floor on the admission of evidence). It can thus be changed by statute, so long as the change itself is consistent with due process. It is important to note that the Kansas Supreme Court has not ruled that HGN is unreliable, but rather that its reliability has not been sufficiently proven as of yet. Therefore, it seems that the legislature would have the power to mandate its admissibility, so long as the defendant is allowed to introduce evidence rebutting reliability.

## MEMORANDUM

TO: Members of the Kansas Judicial Council DUI Advisory Committee

FROM: Professor Jeffrey D. Jackson

RE: Fourth Amendment issues raised by the use of Warrantless Oral Fluid Testing

DATE: January 17, 2019

This memorandum addresses the constitutionality of warrantless oral fluid testing for the presence of drugs under the Fourth Amendment in light of the United States Supreme Court's decision in *Birchfield v. North Dakota*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2160 (2016) and subsequent opinions interpreting that decision. It attempts to predict how a Kansas court would rule on the question of whether warrantless oral fluid testing would violate the Fourth Amendment under those decisions. Although there is no clear answer, I hope this will at least provide some guidance for the committee.

The constitutionality of warrantless roadside testing of oral fluids to establish the presence of drugs has not been litigated in the post-*Birchfield* era. Programs to conduct these tests are fairly new in the United States. Nevertheless, some critics have argued that the tests violate the Fourth Amendment under the *Birchfield* standard. See Chloe White, *Roadside Saliva Testing is Probably Unconstitutional*, <https://www.aclu.org/blog/criminal-law-reform/drug-testing/roadside-saliva-testing-probably-unconstitutional>.

### A. The *Birchfield* Standard

As this committee knows, any discussion of roadside testing and the Fourth Amendment now begins with the *Birchfield* decision. In that case, the United States Supreme Court held that breath tests did not “implicat[e] significant privacy concerns” under the Fourth Amendment and could therefore be performed incident to arrest without a warrant. 136 S.Ct. at 2176-78. In so holding, the Court stated that the test for assessing whether a particular category of search was exempt from the warrant requirement was a balancing one between the degree of intrusion upon the individual's privacy and the degree to which it is needed for the promotion of legitimate governmental interests. 136 S. Ct. at 2176; See *Riley v. California*, 573 U.S. \_\_\_, 134 S. Ct. 2473, 2484 (2014).

With regard to breath testing, the Court resolved this balancing test in favor of the government based on three factors: 1) the physical intrusion of breath testing is almost negligible, because it does not require the pricking of the skin; 2) breath tests are capable of revealing only the amount of alcohol in the breath, and do not leave samples in the possession

of law enforcement by which additional highly personal information could be obtained; and 3) breath tests are not likely to cause additional embarrassment because they are normally administered in private at a police station, in a patrol car, or in a mobile testing facility out of public view. *Birchfield*, 136 S.Ct. at 2177-78. The Court therefore held that warrantless breath testing incident to a lawful arrest did not violate the Fourth Amendment. *Id.* at 2185.

However, the Court reached the opposite result with regard to warrantless blood draws. The Court stated that, unlike breath testing, blood testing: 1) requires the piercing of the skin and the extraction of a part of the subject's body, which is a significant bodily intrusion; and 2) places a sample in the hands of law enforcement that can be used to gain other information, even when applicable law prohibits law enforcement from doing so. 136 S.Ct. at 2178. Further, the Court noted that the government's interest in the results of the blood test were diminished because of the availability of the less-intrusive breath test. *Id.* at 2184. Therefore, the Court ruled that such testing could not be administered incident to a lawful arrest for drunk driving, and instead required a warrant. *Id.* at 2185.

#### B. Cases Employing the *Birchfield* Standard to Other Tests: The Urine Tests

As noted above, there is no case law applying the *Birchfield* standard to the warrantless collection of bodily fluids incident to a lawful arrest. However, there are cases that have applied the *Birchfield* standard to roadside urine testing. In *State v. Thompson*, 886 N.W.2d 224, 233 (Minn. 2016), the Minnesota Supreme Court held that, under *Birchfield's* standard, a warrantless roadside urine test violated the Fourth Amendment. The court recognized that urine tests resembled breath tests in terms of physical intrusiveness. *Id.* at 230. However, the court stated that urine tests were like blood tests in that the test placed a sample in the hands of law enforcement that could be used to gain a wide range of other information. *Id.* at 231. Finally, the court held that the embarrassing nature of the process, with the subject often being forced to urinate on command in full view of the arresting officer, caused "a substantial invasion beyond the arrest itself". *Id.* at 231-32. The court held that in light of this invasion and, given the availability of a less-intrusive breath test, the degree of intrusion outweighed the government's need, and a warrant was required. *Id.* at 233.

In a similar case post-*Birchfield*, the Supreme Court of North Dakota also held that a warrantless urine test was not permissible incident to a lawful arrest for driving under the influence of drugs. *State v. Helm*, 901 N.W.2d 57, 62 (N.D. 2017). In *Helm*, the North Dakota Supreme Court agreed with Minnesota's Supreme Court regarding the intrusiveness of the process. *Id.* at 60. However, in performing the balancing between that intrusiveness and the governmental interest, *Helm* presented a different wrinkle. Unlike the situation in *Thompson*, where a less-intrusive breath test was available, there was no less-intrusive test for the presence

of drugs, and the State argued that this fact should tip the balance in its favor. *See id.* at 61. The court, however, held that while the lack of a less-intrusive test was a consideration, it was still not sufficient to outweigh the intrusive nature of the test. *Id.* at 62.

To date, these cases are the only ones post-*Birchfield* to address roadside tests other than breath or blood.

### C. *Birchfield* and the Warrantless Bodily Fluid Test

In order to predict how a court might apply the *Birchfield* standard to the test of bodily fluid, it is necessary to balance the degree of intrusion upon the individual's privacy against the degree to which the information is needed for the promotion of legitimate governmental interests. *Birchfield*, 136 S. Ct. at 2176; *Riley v. California*, 134 S. Ct. at 2484. In assessing the first part of the balancing test, courts consider: 1) the physical intrusion of the test; 2) the extent to which the test has the potential to place information in the hands of law enforcement that could be used to uncover additional highly personal information; and 3) the degree to which the test has the potential to embarrass the subject or otherwise cause a "substantial invasion beyond the arrest itself." *Riley*, 134 S. Ct. at 2488. The first part of the test is then weighed against the need of the government to obtain the information, which may include consideration of the availability of a less-intrusive test. *See Birchfield*, 136 S. Ct. 2184 (noting the availability of a less-intrusive breath test as a factor in its calculus.)

#### 1. Degree of Intrusiveness

In an article on its website arguing against the constitutionality of bodily fluid tests, the American Civil Liberties Union contends that such testing is "much more invasive of privacy and bodily integrity than a breathalyzer test due to the physical removal of oral fluids and DNA." White, *Roadside Saliva Testing is Probably Unconstitutional*. However, this assertion is not borne out in the case law. Testing of bodily fluids in the mouth does not require any physical penetration of the skin or extraction of blood. Instead, such testing appears similar to a buccal swab of a person's cheek for DNA evidence, which the Supreme Court has already said poses a negligible intrusion. *See Maryland v. King*, 569 U.S. 435, 446 (2013). In fact, the Court in *Birchfield* cited such DNA testing, along with fingernail scraping, in its determination regarding breath tests when it stated that "[a] breath test is no more intrusive than either of those procedures." *Birchfield*, 136 S. Ct. at 2177. Absent evidence showing that the particular test to be applied is more intrusive than a DNA test, this factor would seem to weigh in favor of constitutionality.

#### 2. Nature of the Information Retained

However, the second factor of the test regarding the extent to which the test has the potential to place information in the hands of law enforcement that could be used to uncover

additional highly personal information weighs in the other direction. Depending on the nature of the oral fluid test administered, the testing process has the potential to produce a sample that will be retained in the hands of law enforcement. One of the major reasons that the *Birchfield* court determined that breath tests did not require a warrant was because “breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject’s breath. In this respect they contrast sharply with the sample of cells collected by the swab in *Maryland v. King*.” 136 S.Ct. at 2177. In contrast, at least some methods of oral fluid testing provide a sample that has the same characteristics as the DNA swab in *King*, the blood test in *Birchfield*, and the urine tests in *Thompson* and *Helm*. Further, it does not matter whether the law requires that the law enforcement officials not use the sample for other purposes; rather, the mere fact that it exists and could be used is the issue. See *Birchfield*, 136 S.Ct. at 2177-78. Therefore, this factor weighs significantly against constitutionality.

### 3. Potential of Embarrassment

The third consideration is the potential of embarrassment or intrusion greater than that of the arrest itself. This was a large factor in the decision of the state supreme courts in *Thompson* and *Helm* that the urine tests at issue there required a warrant. *Thompson*, 886 N.W.2d at 231-32; *Helm*, 901 N.W. 2d at 60.

In contrast to the urine test in those cases, the test here is no more potentially embarrassing or intrusive than was the breath test in *Birchfield*. As a result, this factor weighs in favor of constitutionality.

### 4. The Calculus of the State’s Interest

In calculating the extent to which the governmental interest can offset the intrusiveness, we begin with the settled principle that “The States and the Federal Government have a ‘paramount interest . . . in preserving the safety of . . . public highways.” *Birchfield*, 136 S. Ct. at 2178. However, there is little guidance as to how much this principle adds to the calculus. The Court in *Birchfield* held that this interest was not sufficient to counteract the physical intrusiveness of a blood test, but that calculus was based on the fact that the blood test was more physically intrusive than a bodily fluid test would be, as well as the fact that there was a less intrusive test availability to accomplish substantially the same purpose.

With regard to bodily fluid tests for the presence of drugs, there is not a less-intrusive test available, which does provide some support for constitutionality. This argument was not enough to sway the North Dakota Supreme Court in *Helm* with regard to urine tests, but the test in *Helm* had a significantly greater potential for embarrassment than does a bodily fluid test. Therefore, it is possible that a court would hold differently with regard to bodily fluid.

One potential problem with the current bodily fluid tests is that they do not establish a level of current impairment in the same manner that a test for alcohol does. Thus, as the ACLU argues, they are significantly less probative of whether someone is an impaired driver. A driver may test positive for the presence of a drug even though the drug was ingested some time before and even though the drug concentration is not sufficient to impair his or her ability to operate a vehicle. However, the suggested change to the Kansas law in SB 374 would make it a crime to drive with *any* amount of a controlled substance in the bloodstream. See SB 374, § 13. Eighteen other states have enacted such a regulation, and so far, every court that has addressed the question has found that statutes of this type are constitutional. See, e.g. *State v. Childs*, 898 N.W.2d 177, 185-86 (Iowa 2017). Therefore, the evidence would be probative to establish this violation. Thus, it appears the State's interest would be at least as strong as in *Helm*. Whether this would be enough to outweigh the invasion of privacy in our case is something that is difficult to predict.

#### Conclusion

Unfortunately, it is simply not clear how a court would resolve this calculus. But for the fact that the bodily fluids test has the potential to place a substance in the hands of law enforcement that could be used for other purposes, it seems clear that a warrantless test of bodily fluids would be constitutional. However, the fact that it does so throws the constitutionality in doubt. If the testing were done in such a manner that no sample could be preserved, this would solve the problem. In the absence of such a test, however, there are questions.

## Proposed Statutory Amendments

### K.S.A 3-1001

~~It is unlawful and punishable as provided in K.S.A. 3-1003 for any person who is under the influence of intoxicating liquor or when any person has .10% or more by weight of alcohol in such person's body fluid as shown by chemical analysis of blood, breath or urine to operate or be in physical control of any aircraft within this state.~~

(a) Operating an aircraft under the influence is operating or attempting to operate any aircraft within this state while:

(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence, is 0.04 or more;

(2) the alcohol concentration in the person's blood or breath, as measured within four hours of the time of operating or attempting to operate an aircraft, is 0.04 or more;

(3) under the influence of alcohol to a degree that renders the person incapable of safely operating an aircraft;

(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely operating an aircraft; or

(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely operating an aircraft.

(b)(1) Operating an aircraft under the influence is class A nonperson misdemeanor, except as provided in subsection (b)(2).

(A) On a first conviction the person convicted shall be sentenced to not less than 48 consecutive hours nor more than six months' imprisonment, or in the court's discretion 100 hours of public service, and fined not less than \$750;

(B) On second or subsequent conviction the person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,250.

(i) As a condition of any probation granted under this subsection, the person shall serve at least 120 hours of confinement. The hours of confinement shall include at least 48 hours imprisonment and otherwise may be served by a combination of: imprisonment; a work release program, provided such work release program requires such person to return to the confinement at the end of each day in the work release program; or a house arrest program

pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto.

(ii) (a) If the person is placed into a work release program or placed under a house arrest program for the minimum 120 hours confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program until the minimum sentence is met. If the person is placed into a work release program or placed under a house arrest program for more than the minimum 120 hours confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program and thereafter the person shall receive day-for-day credit for time served in such program unless otherwise ordered by the court;

(b) When in a work release program, the person shall only be given credit for the time served in confinement at the end of and continuing to the beginning of the person's work day. When under a house arrest program, the person shall be monitored by an electronic monitoring device that verifies the person's location and shall only be given credit for the time served within the boundaries of the person's residence.

(2) Operating an aircraft under the influence is a severity level 6, nonperson felony if the offense occurred while the person convicted did not hold a valid pilot license issued by the federal aviation administration.

(A) The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment.

(B) The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 72 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 2,160 hours of confinement. Such 2,160 hours of confinement shall be a period of at least 72 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day.

(C) The court may place the person convicted under a house arrest program pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto, to serve the 90 days' imprisonment mandated by this subsection only after such person has served 72 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 2,160 hours.

(3) As part of the judgment of conviction, the court shall order the person convicted not to operate an aircraft for any purpose for a period of six months from the date of final discharge from the county jail, or the date of payment or satisfaction of such fine, whichever is later or one year from such date on a second conviction. If the court suspends the sentence and places the person on probation as provided by law, the court shall order as one of the conditions of probation that such person not operate an aircraft for any purpose for a period of 30 days from the date of the order on a first conviction or 60 days from the date of the order on a second conviction.

(4) For the purpose of determining whether an occurrence is a first, second or subsequent occurrence: (A) "Conviction" also includes entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging commission of a crime described in subsection (a); and (B) it is irrelevant whether an offense occurred before or after conviction or diversion for a previous offense.

(c) If a person is charged with a violation of subsection (a)(4) or (a)(5), the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

## K.S.A. 3-1002

~~It is unlawful and punishable as provided in K.S.A. 3-1003 for any person who is under the influence of any narcotic, hypnotic, somnifacient or stimulating drug or who is under the influence of any other drug to a degree which renders such person incapable of safely operating an aircraft to operate an aircraft within this state. The fact that any person charged with a violation of this section is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this section.~~

(a) Any person who operates or attempts to operate an aircraft within this state may be requested, subject to the provisions of this article, to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. The testing shall include all quantitative and qualitative tests for alcohol and drugs. The test must be administered at the direction of a law enforcement officer, and the law enforcement officer shall determine which type of test is to be conducted or requested.

(b)(1) One or more tests may be required of a person when, at the time of the request, a law enforcement officer has probable cause to believe the person has committed a violation of K.S.A. 3-1001(a), and amendments thereto, while having alcohol or other drugs in such person's system; and one of the following conditions exists: (A) The person has been arrested or otherwise taken into custody for any offense violation of any state statute, county resolution or city ordinance; or (B) the person has been involved in an aircraft accident or crash resulting in property damage personal injury or death.

(2) 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 investigation or arrest.

(c) Nothing in this section shall be construed to limit the right of a law enforcement officer to conduct any search of a person's breath or other bodily substance, other than blood or urine, incident to a lawful arrest pursuant to the constitution of the United States, nor limit the admissibility at any trial or hearing of alcohol or drug concentration testing results obtained pursuant to such a search.

(d) Nothing in this section shall be construed to limit the right of a law enforcement officer to conduct or obtain a blood or urine test of a person pursuant to a warrant under K.S.A. 22-2502, and amendments thereto, the constitution of the United States or a judicially recognized exception to the search warrant requirement, nor limit the admissibility at any trial or hearing of alcohol or drug concentration testing results obtained pursuant to such a search.

(e) A law enforcement officer may direct a medical professional, as described in subsection (f), to draw one or more samples of blood from a person to determine the blood's alcohol or drug concentration:

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

(2) if law enforcement has obtained a search warrant authorizing the collection of blood from the person; or

(3) if the person refuses or is unable to consent to submit to and complete a test, and another judicially recognized exception to the warrant requirement applies.

(f) If a law enforcement officer is authorized to collect one or more tests of blood under this section, the withdrawal of blood at the direction of the officer may be performed only by: (1) A person licensed to practice medicine and surgery, licensed as a physician assistant, or a person acting under the direction of any such licensed person; (2) a registered nurse or a licensed practical nurse; (3) any qualified medical technician, including, but not limited to, an advanced emergency medical technician or a paramedic, as those terms are defined in K.S.A. 65-6112, and amendments thereto, authorized by medical protocol or (4) a phlebotomist.

(g) When so directed by a law enforcement officer through a written statement, the medical professional shall withdraw the sample of blood as soon as practical and shall deliver the sample to the law enforcement officer or another law enforcement officer as directed by the requesting law enforcement officer as soon as practical, provided the collection of the sample does not jeopardize the person's life, cause serious injury to the person or seriously impede the person's medical assessment, care or treatment. The medical professional authorized herein to withdraw the blood and the medical care facility where the blood is drawn may act on good faith that the requirements have been met for directing the withdrawing of blood once presented with the written statement provided for under this subsection. The medical professional shall not require the person that is the subject of the test or tests to provide any additional consent or sign any waiver form. In such a case, the person authorized to withdraw blood and the medical care facility shall not be liable in any action alleging lack of consent or lack of informed consent.

Such sample or samples shall be an independent sample and not be a portion of a sample collected for medical purposes. The person collecting the blood sample shall complete the collection portion of a document if provided by law enforcement.

(h) If a person must be restrained to collect the sample pursuant to this section, law enforcement shall be responsible for applying any such restraint utilizing acceptable law enforcement restraint practices. The restraint shall be effective in controlling the person in a manner not to jeopardize

the person's safety or that of the medical professional or attending medical or health care staff during the drawing of the sample and without interfering with medical treatment.

(i) If a law enforcement officer is authorized to collect one or more tests of urine, the collection of the urine sample shall be supervised by (1) A person licensed to practice medicine and surgery, licensed as a physician's assistant, or a person acting under the direction of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) a law enforcement officer of the same sex as the person being tested. The collection of the urine sample shall be conducted out of the view of any person other than the persons supervising the collection of the sample and the person being tested, unless the right to privacy is waived by the person being tested. When possible, the supervising person shall be a law enforcement officer. The results of qualitative testing for drug presence shall be admissible in evidence and questions of accuracy or reliability shall go to the weight rather than the admissibility of the evidence. If the person is medically unable to provide a urine sample in such manner due to the injuries or treatment of the injuries, the same authorization and procedure as used for the collection of blood in subsections (g) and (i) shall apply to the collection of a urine sample.

(j) No law enforcement officer who is acting in accordance with this section shall be liable in any civil or criminal proceeding involving the action.

(k) The person's refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of aircraft while under the influence of alcohol or drugs, or both.

(l) No test shall be suppressed because of irregularities not affecting the substantial rights of the accused in the consent or notice authorized pursuant to this article.

(s) Nothing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant or other judicially recognized exception to the warrant requirement.

(t) Upon the request of any person submitting to testing under this section, a report of the results of the testing shall be made available to such person when available.

(u) The person tested shall have a reasonable opportunity to have an additional chemical test by a physician of such person's own choosing. If the law enforcement officer refuses to permit such additional chemical test to be taken, the original test shall not be competent evidence.

(u) This article is remedial law and shall be liberally construed to promote public health, safety and welfare.

### K.S.A. 3-1003

~~(a) Every person who is convicted of a violation of either K.S.A. 3-1001 or 3-1002 shall be punished by imprisonment of not more than one year, or by a fine of not less than \$100 nor more than \$500, or by both such fine and imprisonment. On a second or subsequent conviction, every person shall be punished by imprisonment for not less than 30 days nor more than one year, and, in the discretion of the court, a fine of not more than \$500. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division of vehicles a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.~~

~~(b) The court shall as part of the judgment of conviction, order every such person not to operate an aircraft for any purpose for a period of six months from the date of final discharge from the county jail, or the date of payment or satisfaction of such fine, whichever is the later or one year from such time on a second conviction. Except in the event that the court suspends the sentence and places the person on probation as provided by law, the court as one of the conditions of probation shall order such person not to operate an aircraft for any purpose for a period of 30 days from the date of the order on a first conviction or 60 days from the date of the order on a second conviction.~~

(a) A law enforcement officer may request a person who is operating or attempting to operate an aircraft within this state to submit to a preliminary screening test of the person's breath or oral fluid, or both, if the officer has reasonable suspicion to believe the person has been operating or attempting to operate an aircraft while under the influence of alcohol or drugs or both alcohol and drugs.

(b) If the person submits to the test, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request the tests authorized by K.S.A. 3-1002, and amendments thereto. A law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test. Such results shall not be admissible in any civil or criminal action concerning the operation of or attempted operation of aircraft except to aid the court in determining a challenge to the validity of the arrest or the validity of the request to submit to a test pursuant to K.S.A. 8-1002, and amendments thereto. Following the preliminary screening test, additional tests may be requested pursuant to K.S.A. 8-1002, and amendments thereto.

(c) Any preliminary screening of a person's breath shall be conducted with a device approved pursuant to K.S.A. 65-1,107, and amendments thereto. Any preliminary screening of a person's oral fluid shall be conducted in accordance with rules and regulations, if any, approved pursuant to K.S.A. 75-712h, and amendments thereto.

## K.S.A. 3-1004

~~Any person who operates or has actual physical control of an aircraft within this state shall be deemed to have given consent to submit to a chemical test of blood, urine or breath, for the purpose of determining the amount of alcoholic content in such person's body fluid, if such person is arrested or otherwise taken into custody for any offense involving operating an aircraft under the influence of intoxicating liquor in violation of a state statute or a city ordinance and the arresting officer has reasonable grounds to believe that prior to arrest the person was operating an aircraft under the influence of intoxicating liquor. The test shall be administered at the direction of a law enforcement officer. If a law enforcement officer requests the arrested person to submit to a chemical test of blood, the withdrawal of blood at the direction of the officer may be performed only by: (1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) any qualified medical technician. No person authorized by this section to withdraw blood, nor any person assisting in the performance of a blood alcohol test or any hospital wherein such blood is withdrawn or tested that has been directed by any law enforcement officer to withdraw or test blood shall be liable in any civil or criminal action when such act is performed in a reasonable manner according to generally accepted medical practices in the community where performed. No law enforcement officer who is acting pursuant to this section shall be liable for such action in any civil or criminal proceeding involving such action. If the person refuses a request to submit to a test of breath or blood, it shall not be given and the law enforcement officer shall arrest such person for refusal to submit to a blood alcohol test. Unreasonable refusal to submit to a blood alcohol test under this section is a class C misdemeanor.~~

### As used in this article:

(a) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

(b) "Law enforcement officer" has the meaning provided by K.S.A. 21-5111, and amendments thereto, and includes any person authorized by law to make an arrest on a military reservation for an act which would constitute a violation of K.S.A. 3-1001, and amendments thereto, if committed off a military reservation in this state.

(c) "Other competent evidence" includes: (1) Alcohol concentration tests obtained from samples taken four hours or more after the operation or attempted operation of an aircraft; and (2) readings obtained from a partial alcohol concentration test on a breath testing machine.

(d) "Test refusal" refers to a person's failure to submit to or complete any test of the person's blood, breath, urine or other bodily substance, other than a preliminary screening test, in accordance with this act, and includes refusal of any such test on a military reservation.

## K.S.A. 3-1005

~~(a) Without limiting or affecting the provisions of K.S.A. 3-1004, the person tested shall have a reasonable opportunity to have an additional chemical test by a physician of such person's own choosing. If the law enforcement officer refuses to permit such additional chemical test to be taken, the original test shall not be competent evidence.~~

~~(b) In any criminal prosecution for violation of K.S.A. 3-1001 or 3-1002, evidence of the amount of alcohol in the defendant's blood at the time alleged, as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance may be admitted and shall give rise to the following presumptions:~~

~~(1) If there was at that time less than .10% by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor;~~

~~(2) if there was at the time .10% or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor.~~

~~(c) For the purpose of this act, percent by weight of alcohol shall be based upon grams of alcohol per 100 milliliters of blood.~~

~~(d) Upon the request of any person submitting to a chemical test under this act, a report of the test shall be delivered to such person.~~

~~(e) Subsection (b) shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor.~~

(a) No person, except those expressly exempted, shall drive any motor vehicle upon a highway in this state unless such person has a valid driver's license. No person shall receive a driver's license unless and until such person surrenders or with the approval of the division, lists to the division all valid licenses in such person's possession issued to such person by any other jurisdiction. All surrendered licenses or the information listed on foreign licenses shall be returned by the division to the issuing department, together with information that the licensee is now licensed in a new jurisdiction. No person shall be permitted to have more than one valid license at any time.

(b) Any person licensed under the motor vehicle drivers' license act may exercise the privilege granted upon all streets and highways in this state and shall not be required to obtain any other license to exercise such privilege by any local authority. Nothing herein shall prevent cities from requiring licenses of persons who drive taxicabs or municipally franchised transit systems for hire upon city streets, to protect the public from drivers whose character or habits make them unfit to transport the public. If a license is denied, the applicant may appeal such decision to the district court of the county in which such city is located by filing within 14 days after such denial, a notice of appeal with the clerk of the district court and by filing a copy of such notice with the city clerk of the involved city. The city clerk shall certify a copy of such decision of the city governing body to the clerk of the district court and the matter shall be docketed as any other cause and the applicant shall be granted a trial of such person's character and habits. The matter shall be heard by the court de novo in accordance with the code of civil procedure. The cost of such appeal shall be assessed in such manner as the court may direct.

(c) Any person operating in this state a motor vehicle shall be the holder of a driver's license that is classified for the operation of such motor vehicle, and any person operating in this state a motorcycle that is registered in this state shall be the holder of a class M driver's license.

(d) No person shall drive any motorized bicycle upon a highway of this state unless such person: (1) Has a valid driver's license that entitles the licensee to drive a motor vehicle in any class or classes; (2) is at least 15 years of age and has passed the written and visual examinations required for obtaining a class C driver's license, in which case the division shall issue to such person a class C license, which shall clearly indicate that such license is valid only for the operation of motorized bicycles; ~~or (3) has had their driving privileges suspended, for a violation other than a violation of K.S.A. 8-2,144, and amendments thereto, or a second or subsequent violation of K.S.A. 8-1567 or 8-1567a, and amendments thereto, and such person: (A) Has completed the mandatory period of suspension as provided in K.S.A. 8-1014, and amendments thereto; and (B) has made application and submitted a \$40 nonrefundable application fee to the division for the issuance of a class C license for the operation of motorized bicycles, in accordance with paragraph~~

~~(2), in which case the division shall issue to such person a class C license, which shall clearly indicate that such license is valid only for the operation of motorized bicycles; or (4)~~ has had their driving privileges revoked under K.S.A. 8-286, and amendments thereto, has not had a test refusal or test failure or alcohol or drug-related conviction, as those terms are defined in K.S.A. 8-1013, and amendments thereto, in the last five years, has not been convicted of a violation of K.S.A. 8-1568(b), and amendments thereto, in the last five years and has made application to the division for issuance of a class C license for the operation of motorized bicycles, in accordance with paragraph (2), in which case the division shall issue such person a class C license, which shall clearly indicate that such license is valid only for the operation of motorized bicycles. As used in this subsection, "motorized bicycle" shall have the meaning ascribed to it in K.S.A. 8-126, and amendments thereto.

~~(e) All moneys received under subsection (d) from the nonrefundable application fee shall be applied by the division of vehicles for the additional administrative costs to implement restricted driving privileges. The division shall remit all restricted driving privilege application fees to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the division of vehicles operating fund.~~

~~(f)~~ Violation of this section shall constitute a class B misdemeanor.

K.S.A 2019 Supp. 8-2,142

(a) A person is disqualified from driving a commercial motor vehicle for a period of not less than one year upon a first occurrence of any one of the following:

(1) While operating a commercial motor vehicle:

- (A) The person is convicted of violating K.S.A. 8-2,144, and amendments thereto;
- (B) the person is convicted of violating K.S.A. 8-2,132(b), and amendments

thereto;

(C) the person is convicted of causing a fatality through the negligent operation of a commercial motor vehicle;

(D) the person's test refusal or test failure, as defined in subsection (m); or

(E) the person is convicted of a violation identified in subsection (a)(2)(A); or

(2) while operating a noncommercial motor vehicle:

(A) The person is convicted of a violation of K.S.A. 8-1567, and amendments thereto, or of a violation of an ordinance of any city in this state, a resolution of any county in this state or any law of another state, which ordinance or law declares to be unlawful the acts prohibited by that statute; or

(B) the person's test refusal or test failure, as defined in K.S.A. 8-1013, and amendments thereto; or

(3) while operating any motor vehicle:

(A) The person is convicted of leaving the scene of an accident; or

(B) the person is convicted of a felony, other than a felony described in subsection (e), while using a motor vehicle to commit such felony.

(b) If any offenses, test refusal or test failure specified in subsection (a) occurred in a commercial motor vehicle while transporting a hazardous material required to be placarded, the person is disqualified for a period of not less than three years.

(c) A person shall be disqualified for life upon the second or a subsequent occurrence of any offense, test refusal or test failure specified in subsection (a), or any combination thereof, arising from two or more separate incidents occurring on or after July 1, 2003.

~~(d) The secretary of revenue may adopt rules and regulations establishing guidelines, including conditions, under which a disqualification for life under subsection (c) may be reduced to a period of not less than 10 years.~~

(d)(1) Any person disqualified for life under subsection (c) who wishes to have commercial driving privileges restored after such person has been disqualified for at least 10 years, shall apply in writing to the division.

(2) The division shall restore a person's commercial driving privileges if it determines:

(A) None of the occurrences that led to the person's lifetime disqualification under subsection (c) included violations under subsection (a)(1)(A) or (a)(1)(E);

(B) The person has had no occurrence of any offense, test refusal or test failure specified in subsection (a) during the 10 year period preceding the application;

(C) The person has had no alcohol or drug related convictions as defined in K.S.A. 8-2,128, and amendments thereto, in Kansas or any other jurisdiction during the 10 year period preceding the application;

(D) The person has no pending alcohol or drug related criminal charges in Kansas or any other jurisdiction;

(E) The person has had no commercial motor vehicle convictions in Kansas or any other jurisdiction during the 10 year period preceding the application;

(F) The person has successfully completed an alcohol or drug treatment program, or a comparable program, which meets or exceeds the minimum standards approved by the Kansas department for aging and disability services if any of the disqualifying offenses were drug or alcohol related;

(G) The person is no longer a threat to the public safety of this state. The division may request, and the person must provide, any additional information or documentation which the division deems necessary to determine the person's fitness for relicensure;

(H) The person is otherwise eligible for licensure; and

(I) The person has not previously been restored to commercial motor vehicle privileges following a prior 10 year minimum disqualification.

(3) For purposes of verifying a person's prior 10 year alcohol and drug history, the person shall provide a copy of the person's closed criminal history from any jurisdiction to the division.

(4) If the division finds the person is eligible for restoration to commercial driving status, the written and driving skills examinations as specified in K.S.A. 8-2,133, and amendments thereto, shall be successfully completed before a commercial driver license is issued.

(5) If the person is found ineligible for restoration of commercial driving privileges, the division shall notify the person of such findings by certified mail and continue the denial of commercial driving privilege until such ineligibility has been disproven to the division's satisfaction.

(6) Any person who previously had his or her commercial motor vehicle privileges restored pursuant to this statute, shall not be able to apply for restoration of another lifetime disqualification.

(7) Any person who is aggrieved by the decision of the division may appeal for review in accordance with the Kansas judicial review act, K.S.A. 77-601 et seq., and amendments thereto.

(8) The secretary of revenue shall adopt rules and regulations necessary to administer the provisions of this subsection.

(e)(1) A person is disqualified from driving a commercial motor vehicle for life who uses a commercial motor vehicle or noncommercial motor vehicle in the commission of any felony involving the manufacture, distribution or dispensing of a controlled substance, or possession with intent to manufacture, distribute or dispense a controlled substance.

(2) A person is disqualified from driving a commercial motor vehicle for life who uses a commercial motor vehicle in the commission of a felony involving an act or practice of severe forms of trafficking in persons. The term “severe forms of trafficking in persons” means:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age;  
or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

(f) A person is disqualified from driving a commercial motor vehicle for a period of not less than 60 days if convicted of two serious traffic violations, or 120 days if convicted of three or more serious traffic violations, committed in a commercial motor vehicle arising from separate incidents occurring within a three-year period. Any disqualification period under this paragraph shall be in addition to any other previous period of disqualification. The beginning date for any three-year period within a ten-year period, required by this subsection, shall be the issuance date of the citation which resulted in a conviction.

(g) A person is disqualified from driving a commercial motor vehicle for a period of not less than 60 days if convicted of two serious traffic violations, or 120 days if convicted of three or more serious traffic violations, committed in a noncommercial motor vehicle arising from separate incidents occurring within a three-year period, if such convictions result in the revocation, cancellation or suspension of the person's driving privileges.

(h)(1) A person who is convicted of operating a commercial motor vehicle in violation of an out-of-service order shall be disqualified from driving a commercial motor vehicle for a period of not less than:

(A) Ninety days nor more than one year, if the driver is convicted of a first violation of an out-of-service order;

(B) one year nor more than five years if the person has one prior conviction for violating an out-of-service order in a separate incident and such prior offense was committed within the 10 years immediately preceding the date of the present violation; or

(C) three years nor more than five years if the person has two or more prior convictions for violating out-of-service orders in separate incidents and such prior offenses were committed within the 10 years immediately preceding the date of the present violation.

(2) A person who is convicted of operating a commercial motor vehicle in violation of an out-of-service order while transporting a hazardous material required to be placarded under 49 U.S.C. § 5101 et seq. or while operating a motor vehicle designed to transport more than 15 passengers, including the driver, shall be disqualified from driving a commercial motor vehicle for a period of not less than:

(A) One hundred and eighty days nor more than two years if the driver is convicted of a first violation of an out-of-service order; or

(B) three years nor more than five years if the person has a prior conviction for violating an out-of-service order in a separate incident and such prior offense was committed within the 10 years immediately preceding the date of the present violation.

(i)(1) A person who is convicted of operating a commercial motor vehicle in violation of a federal, state or local law or regulation pertaining to one of the following six offenses at a railroad-highway grade crossing shall be disqualified from driving a commercial motor vehicle for the period of time specified in paragraph (2):

(A) For persons who are not required to always stop, failing to slow down and check that the tracks are clear of an approaching train;

(B) for persons who are not required to always stop, failing to stop before reaching the crossing, if the tracks are not clear;

(C) for persons who are always required to stop, failing to stop before driving onto the crossing;

(D) for all persons failing to have sufficient space to drive completely through the crossing without stopping;

(E) for all persons failing to obey a traffic control device or the directions of an enforcement official at the crossing; or

(F) for all persons failing to negotiate a crossing because of insufficient undercarriage clearance.

(2) A driver shall be disqualified from driving a commercial motor vehicle for not less than:

(A) Sixty days if the driver is convicted of a first violation of a railroad-highway grade crossing violation;

(B) one hundred and twenty days if, during any three-year period, the driver is convicted of a second railroad-highway grade crossing violation in separate incidents; or

(C) one year if, during any three-year period, the driver is convicted of a third or subsequent railroad-highway grade crossing violation in separate incidents.

(j) After suspending, revoking or canceling a commercial driver's license, the division shall update its records to reflect that action within 10 days. After suspending, revoking or canceling a nonresident commercial driver's privileges, the division shall notify the licensing authority of the state which issued the commercial driver's license or nonresident commercial driver's license

within 10 days. The notification shall include both the disqualification and the violation that resulted in the disqualification, suspension, revocation or cancellation.

(k) Upon receiving notification from the licensing authority of another state, that it has disqualified a commercial driver's license holder licensed by this state, or has suspended, revoked or canceled such commercial driver's license holder's commercial driver's license, the division shall record such notification and the information such notification provides on the driver's record.

(l) Upon suspension, revocation, cancellation or disqualification of a commercial driver's license under this act, the license shall be immediately surrendered to the division if still in the licensee's possession. If otherwise eligible, and upon payment of the required fees, the licensee may be issued a noncommercial driver's license for the period of suspension, revocation, cancellation or disqualification of the commercial driver's license under the same identifier number.

(m) As used in this section, "test refusal" means a person's refusal to submit to and complete a test requested pursuant to K.S.A. 8-2,145, and amendments thereto; "test failure" means a person's submission to and completion of a test which determines that the person's alcohol concentration is .04 or greater, pursuant to K.S.A. 8-2,145, and amendments thereto.

(n) If a person is disqualified for life under on subsection (c), and at least one of the disqualifying incidents occurred before July 1, 2003, the person may apply to the secretary of revenue for review of the incidents and modification of the disqualification. The secretary shall adopt rules and regulations establishing guidelines, including conditions, to administer this section.

K.S.A. 2019 Supp. 8-2,144

(a) Driving a commercial motor vehicle under the influence is operating or attempting to operate any commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, within this state while:

(1) The alcohol concentration in the person's blood or breath, as shown by any competent evidence, including other competent evidence, as defined in K.S.A. 8-1013(f)(1), and amendments thereto, is 0.04 or more;

(2) the alcohol concentration in the person's blood or breath, as measured within three hours of the time of driving a commercial motor vehicle, is 0.04 or more; or

(3) committing a violation of K.S.A. 8-1567(a), and amendments thereto, or the ordinance of a city or resolution of a county which prohibits any of the acts prohibited thereunder or is otherwise comparable.

(b)(1) Driving a commercial motor vehicle under the influence is:

(A) On a first conviction a class B, nonperson misdemeanor. The person convicted shall be sentenced to not less than 48 consecutive hours nor more than six months' imprisonment, or in the court's discretion, 100 hours of public service, and fined not less than \$750 nor more than \$1,000. ~~The person convicted shall serve at least 48 consecutive hours' imprisonment or 100 hours of public service either before or as a condition of any grant of probation, suspension or reduction of sentence or parole or other release;~~

(B) on a second conviction a class A, nonperson misdemeanor. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,250 nor more than \$1,750. ~~The person convicted shall serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 120 hours of confinement. Such 120 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 21-6609, and amendments thereto, to serve the five days' imprisonment mandated by this subsection only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 120 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries~~

~~of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 120 hours;~~

(i) As a condition of any probation granted under this subsection, the person shall serve at least 120 hours of confinement. The hours of confinement shall include at least 48 hours imprisonment and otherwise may be served by a combination of: imprisonment; a work release program, provided such work release program requires such person to return to the confinement at the end of each day in the work release program; or a house arrest program pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto.

(ii) (a) If the person is placed into a work release program or placed under a house arrest program for any portion of the minimum 120 hours confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program until the minimum sentence is met. If the person is placed into a work release program or placed under a house arrest program for more than the minimum 120 hours confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program until the minimum 120 hours confinement is completed and thereafter the person shall receive day-for-day credit for time served in such program unless otherwise ordered by the court;

(b) When in a work release program, the person shall only be given credit for the time served in confinement at the end of and continuing to the beginning of the person's work day. When under a house arrest program, the person shall be monitored by an electronic monitoring device that verifies the person's location and shall only be given credit for the time served within the boundaries of the person's residence; and

~~(C) on a third or subsequent conviction a severity level 6, nonperson felony. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,750 nor more than \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 2,160 hours of confinement. Such 2,160 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 21-6609, and amendments thereto, to serve the 90 days' imprisonment mandated by this subsection only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies~~

~~the offender's location. The offender shall serve a minimum of 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 2,160 hours.~~

(2) In addition, for any conviction pursuant to subsection (b)(1)(C), at the time of the filing of the judgment form or journal entry as required by K.S.A. 22-3426 or K.S.A. 21-6711, and amendments thereto, the court shall cause a certified copy to be sent to the officer having the offender in charge. The court shall determine whether the offender, upon release from imprisonment, shall be supervised by community correctional services or court services based upon the risk and needs of the offender. The risk and needs of the offender shall be determined by use of a risk assessment tool specified by the Kansas sentencing commission. The law enforcement agency maintaining custody and control of a defendant for imprisonment shall cause a certified copy of the judgment form or journal entry to be sent to the supervision office designated by the court and upon expiration of the term of imprisonment shall deliver the defendant to a location designated by the supervision office designated by the court. After the term of imprisonment imposed by the court, the person shall be placed on supervision to community correctional services or court services, as determined by the court, for a mandatory one-year period of supervision, which such period of supervision shall not be reduced. During such supervision, the person shall be required to participate in a multidisciplinary model of services for substance use disorders facilitated by a Kansas department for aging and disability services designated care coordination agency to include assessment and, if appropriate, referral to a community based substance use disorder treatment including recovery management and mental health counseling as needed. The multidisciplinary team shall include the designated care coordination agency, the supervision officer, the aging and disability services department designated treatment provider and the offender. An offender for whom a warrant has been issued by the court alleging a violation of such supervision shall be considered a fugitive from justice if it is found that the warrant cannot be served. If it is found the offender has violated the provisions of this supervision, the court shall determine whether the time from the issuing of the warrant to the date of the court's determination of an alleged violation, or any part of it, shall be counted as time served on supervision. Any violation of the conditions of such supervision may subject such person to revocation of supervision and imprisonment in jail for the remainder of the period of imprisonment, the remainder of the supervision period, or any combination or portion thereof. The term of supervision may be extended at the court's discretion beyond one year, and any violation of the conditions of such extended term of supervision may subject such person to the revocation of supervision and imprisonment in jail of up to the remainder of the original sentence, not the term of the extended supervision.

(3) In addition, prior to sentencing for any conviction pursuant to subsection (b)(1)(A) or (b)(1)(B), the court shall order the person to participate in an alcohol and drug evaluation conducted by a provider in accordance with K.S.A. 8-1008, and amendments thereto. The person shall be required to follow any recommendation made by the provider after such evaluation, unless otherwise ordered by the court.

(c) Any person 18 years of age or older convicted of a violation of this section, or a violation of a city ordinance or county resolution prohibiting the acts prohibited by this section, who had one or more children under the age of 18 years in the vehicle at the time of the offense shall have such person's punishment enhanced by one month of imprisonment. This imprisonment shall be served consecutively to any other minimum mandatory penalty imposed for a violation of this section, or a violation of a city ordinance or county resolution prohibiting the acts prohibited by this section. Any enhanced penalty imposed shall not exceed the maximum sentence allowable by law. During the service of the enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.

(d) If a person is charged with a violation of K.S.A. 8-1567(a)(4) or (a)(5), and amendments thereto, as incorporated in this section, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(e) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than 90 days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(f) (1) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to \$5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.

(2) The court may, in its discretion, waive any portion of a fine imposed pursuant to this section, except the \$250 required to be remitted to the state treasurer pursuant to subsection (g), upon a showing that the person successfully completed court-ordered education or treatment.

(g) Prior to filing a complaint alleging a violation of this section, a prosecutor shall request and shall receive from the: (1) Division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and (2) Kansas bureau of investigation central repository all criminal history record information concerning such person.

(h) The court shall electronically report every conviction of a violation of this section to the division. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the: (1) Division a record of all prior convictions obtained against such person for any violation of any of the motor vehicle laws of this state; and (2) Kansas bureau of investigation central repository all criminal history record information concerning such person.

(i) Upon conviction of a person of a violation of this section or a violation of a city ordinance or county resolution prohibiting the acts prohibited by this section, the division, upon receiving a report of conviction, shall: (1) Disqualify the person from driving a commercial motor vehicle under K.S.A. 8-2,142, and amendments thereto; and (2) suspend, restrict or suspend and restrict the person's driving privileges as provided by K.S.A. 8-1014, and amendments thereto.

(j)(1) Nothing contained in this section shall be construed as preventing any city from enacting ordinances, or any county from adopting resolutions, declaring acts prohibited or made unlawful by this section as unlawful or prohibited in such city or county and prescribing penalties for violation thereof.

(2) The minimum penalty prescribed by any such ordinance or resolution shall not be less than the minimum penalty prescribed by this section for the same violation, and the maximum penalty in any such ordinance or resolution shall not exceed the maximum penalty prescribed for the same violation.

(3) Any such ordinance or resolution shall authorize the court to order that the convicted person pay restitution to any victim who suffered loss due to the violation for which the person was convicted.

(k)(1) Upon the filing of a complaint, citation or notice to appear alleging a person has violated a city ordinance prohibiting the acts prohibited by this section, and prior to conviction thereof, a city attorney shall request and shall receive from the: (A) Division of vehicles a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and (B) Kansas bureau of investigation central repository all criminal history record information concerning such person.

(2) If the elements of such ordinance violation are the same as the elements of a violation of this section that would constitute, and be punished as, a felony, the city attorney shall refer the violation to the appropriate county or district attorney for prosecution. The county or district attorney shall accept such referral and pursue a disposition of such violation, and shall not refer any such violation back to the city attorney.

(l) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this section or by the ordinance or resolution. [This subsection shall not be](#)

construed to prohibit an amendment or dismissal of any charge where the admissible evidence is not sufficient to support a conviction beyond a reasonable doubt on such charge.

(m) The alternatives set out in subsection (a) may be pleaded in the alternative, and the state, city or county may, but shall not be required to, elect one or more of such alternatives prior to submission of the case to the fact finder.

(n) For the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing under this section:

(1) Convictions for a violation of K.S.A. 8-1567, and amendments thereto, or a violation of an ordinance of any city or resolution of any county that prohibits the acts that such section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations, shall be taken into account, but only convictions or diversions occurring on or after July 1, 2001. Nothing in this provision shall be construed as preventing any court from considering any convictions or diversions occurring during the person's lifetime in determining the sentence to be imposed within the limits provided for a first, second, third, fourth or subsequent offense;

(2) any convictions for a violation of the following sections occurring during a person's lifetime shall be taken into account: (A) This section; (B) operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131, and amendments thereto; (C) involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or K.S.A. 21-5405(a)(3) or (a)(5), and amendments thereto; (D) aggravated battery as described in K.S.A. 21-5413(b)(3) or (b)(4), and amendments thereto; and (E) aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and amendments thereto;

(3) "conviction" includes: (A) Entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of a crime described in subsection (n)(2); and (B) conviction of a violation of an ordinance of a city in this state, a resolution of a county in this state or any law of another jurisdiction that would constitute an offense that is comparable to the offense described in subsection (n)(1) or (n)(2);

(4) it is irrelevant whether an offense occurred before or after conviction for a previous offense; and

(5) multiple convictions of any crime described in subsection (n)(1) or (n)(2) arising from the same arrest shall only be counted as one conviction.

(o) For the purposes of determining whether an offense is comparable, the following shall be considered:

- (1) The name of the out-of-jurisdiction offense;
- (2) the elements of the out-of-jurisdiction offense; and

(3) whether the out-of-jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense.

(p) For the purpose of this section:

(1) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath;

(2) "imprisonment" shall include any restrained environment in which the court and law enforcement agency intend to retain custody and control of a defendant and such environment has been approved by the board of county commissioners or the governing body of a city; and

(3) "drug" includes toxic vapors as such term is defined in K.S.A. 21-5712, and amendments thereto.

(q) On and after July 1, 2011, the amount of \$250 from each fine imposed pursuant to this section shall be remitted by the clerk of the district court to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall credit the entire amount to the community corrections supervision fund established by K.S.A. 75-52,113, and amendments thereto.

~~(a)(1) Except as provided in subsection (a)(2), w~~Whenever a person's driving privileges have been suspended ~~for one year~~ as provided in K.S.A. 8-1014(a), and amendments thereto, ~~after 90 days of such suspension,~~ such person may apply to the division for such person's driving privileges to be restricted for the ~~remainder of the one year~~ suspension period to driving only a motor vehicle equipped with an ignition interlock device, ~~and only for the purposes of getting to and from: Work, school or an alcohol treatment program; and the ignition interlock provider for maintenance and downloading of data from the device.~~

~~(2) Whenever a person's driving privileges have been suspended for one year as provided in K.S.A. 8-1014(a)(1), and amendments thereto, after 90 days of such suspension, such person may apply to the division for such person's driving privileges to be restricted for the remainder of the one year suspension period to driving only a motor vehicle equipped with an ignition interlock device and only: Under the circumstances provided by K.S.A. 8-292(a)(1), (2), (3) and (4), and amendments thereto; and for the purpose of getting to and from the ignition interlock provider for maintenance and downloading of data from the device.~~

~~(3) Except as provided in subsection (a)(4), whenever a person's driving privileges have been suspended for one year as provided in K.S.A. 8-1014(b), and amendments thereto, after 45 days of such suspension, such person may apply to the division for such person's driving privileges to be restricted for the remainder of the one year suspension period to driving only a motor vehicle equipped with an ignition interlock device and only for the purposes of getting to and from: Work, school or an alcohol treatment program; and the ignition interlock provider for maintenance and downloading of data from the device.~~

~~(4) Whenever a person's driving privileges have been suspended for one year as provided in K.S.A. 8-1014(b)(2)(A), and amendments thereto, after 45 days of such suspension, such person may apply to the division for such person's driving privileges to be restricted for the remainder of the one year suspension period to driving only a motor vehicle equipped with an ignition interlock device and only: Under the circumstances provided by K.S.A. 8-292(a)(1), (2), (3) and (4), and amendments thereto; and for the purpose of getting to and from the ignition interlock provider for maintenance and downloading of data from the device.~~

~~(5)~~ (2) The division shall assess an application fee of \$100 for a person to apply to modify the suspension to restricted ignition interlock status.

~~(6)~~ (3) The division shall approve the request for such restricted license unless such person's driving privileges have been restricted, suspended, revoked or disqualified pursuant to another action by the division or a court. If the request is approved, upon receipt of proof of the installation of such device, the division shall issue a copy of the order imposing such restrictions on the person's driving privileges and such order shall be carried by the person at any time the

person is operating a motor vehicle on the highways of this state. Except as provided in K.S.A. 8-1017, and amendments thereto, if such person is convicted of a violation of the restrictions, such person's driving privileges shall be suspended for an additional year, in addition to any term of suspension or restriction as provided in K.S.A. 8-1014(a) or (b), and amendments thereto.

(b)(1) Except as provided in subsection (b)(2), when a person has completed the suspension pursuant to K.S.A. 8-1014(b)(1)(A), and amendments thereto, the division shall restrict the person's driving privileges for 180 days to driving only a motor vehicle equipped with an ignition interlock device.

(2) When a person has completed the suspension pursuant to K.S.A. 8-1014(b)(1)(A), and amendments thereto, the division shall restrict the person's driving privileges for one year to driving only a motor vehicle equipped with an ignition interlock device if the records maintained by the division indicate that such person has previously: (A) Been convicted of a violation of K.S.A. 8-1599, and amendments thereto; (B) been convicted of a violation of K.S.A. 41-727, and amendments thereto; (C) been convicted of any violations listed in K.S.A. 8-285(a), and amendments thereto; (D) been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period; or (E) had such person's driving privileges revoked, suspended, canceled or withdrawn.

(c) Except as provided in subsection (b), when a person has completed the suspension pursuant to K.S.A. 8-1014(a) or (b), and amendments thereto, the division shall restrict the person's driving privileges pursuant to K.S.A. 8-1014(a) or (b), and amendments thereto, to driving only a motor vehicle equipped with an ignition interlock device. Upon restricting a person's driving privileges pursuant to this subsection, the division shall issue a copy of the order imposing the restrictions which is required to be carried by the person at any time the person is operating a motor vehicle on the highways of this state.

(d)(1) Whenever an ignition interlock device is required by law, such ignition interlock device shall be approved by the division and maintained at the person's expense. Proof of the installation of such ignition interlock device, for the entire period required by the applicable law, shall be provided to the division before the person's driving privileges are fully reinstated.

(2) Every person who has an ignition interlock device installed as required by law shall be required to complete the ignition interlock device program pursuant to [this section and rules and regulations adopted by the secretary of revenue](#) ~~and proof of completion shall be provided to the division by~~ [A person may only complete the ignition interlock device program if the person has no more than three standard violations and no serious violation in the 90 consecutive days prior to application for reinstatement and the application occurs upon or after expiration of the applicable ignition interlock period required by law.](#) The approved service provider [shall provide proof of completion to the division](#) before the person's driving privileges are fully reinstated.

(3) As used in this subsection:

(A) "Standard violation" means any of the following, as reported by the approved service provider:

(i) The driver has blown a BrAC fail when attempting an initial engine start-up breath test;

(ii) the driver has blown a BrAC fail when attempting a required rolling retest;

(iii) the driver fails to execute a valid rolling retest;

(iv) the driver fails to submit to a requested rolling retest by turning the vehicle off to avoid submitting to the rolling retest; or

(v) the driver has blown a high BrAC during an initial engine start-up breath test;

(B) "serious violation" means any of the following, as reported by the approved service provider:

(i) Tampering with the ignition interlock device;

(ii) circumventing the ignition interlock device; or

(iii) the driver has blown a high BrAC during a rolling retest;

(C) "BrAC" means the breath alcohol concentration expressed as weight divided by volume, based upon grams of alcohol per 210 liters of breath;

(D) "BrAC fail" means the ignition interlock device registers a BrAC value equal to or greater than the alcohol setpoint, as defined in rules and regulations adopted by the secretary of revenue, when the intended driver conducts an initial test or retest;

(E) "high BrAC" means a BrAC fail result that registers an alcohol setpoint of 0.08 or greater; and

(F) "rolling retest" means a breath test that is required after the initial engine start-up breath test and while the engine is running.

(e) Except as provided further, any person whose license is restricted to operating only a motor vehicle with an ignition interlock device installed may operate an employer's vehicle without an ignition interlock device installed during normal business activities, provided that the person does not partly or entirely own or control the employer's vehicle or business. The provisions of this subsection shall not apply to any person whose driving privileges have been restricted for the remainder of the one-year suspension period as provided in subsection (a)(1) ~~or (a)(3)~~.

(f) Upon expiration of the ~~period of time for which restrictions are imposed pursuant to this section~~ applicable ignition interlock period required by law and completion of the ignition interlock device program as described in subsection (d), the licensee may apply to the division for the return of any license previously surrendered by the licensee. If the license has expired, the person may apply to the division for a new license, which shall be issued by the division upon

payment of the proper fee and satisfaction of the other conditions established by law, unless the person's driving privileges have been suspended or revoked prior to expiration.

(g) Any person who has had the person's driving privileges suspended, restricted or revoked pursuant to K.S.A. 8-1014(a), (b) or (c), prior to the amendments by section 16 of chapter 172 of the 2012 Session Laws of Kansas and section 14 of chapter 105 of the 2011 Session Laws of Kansas, may apply to the division to have the suspension, restriction or revocation penalties modified in conformity with the provisions of K.S.A. 8-1014(a), (b) or (c), and amendments thereto. The division shall assess an application fee of \$100 for a person to apply to modify the suspension, restriction or revocation penalties previously issued. The division shall modify the suspension, restriction or revocation penalties, unless such person's driving privileges have been restricted, suspended, revoked or disqualified pursuant to another action by the division or a court.

(h) The division shall remit all application fees collected pursuant to subsections (a) and (g) to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury and shall credit such moneys to the division of vehicles operating fund until an aggregate amount of \$100,000 is credited to the division of vehicles operating fund each fiscal year. On and after an aggregate amount of \$100,000 is credited to such fund each fiscal year, the entire amount of such remittance shall be credited to the community corrections supervision fund created by K.S.A. 75-52,113, and amendments thereto. The application fee established in this section shall be the only fee collected or moneys in the nature of a fee collected for such application. Such fee shall only be established by an act of the legislature and no other authority is established by law or otherwise to collect a fee.

K.S.A. 2019 Supp. 8-1016

(a) The secretary of revenue ~~may~~shall adopt rules and regulations for:

(1) The approval by the division of models and classes of ignition interlock devices suitable for use by persons whose driving privileges have been restricted to driving a vehicle equipped with such a device;

(2) the calibration and maintenance of such devices, which shall be the responsibility of the manufacturer; ~~and~~

(3) ensuring that each manufacturer ~~approved~~ provides a reasonable statewide service network where such devices may be obtained, repaired, replaced or serviced and such service network can be accessed 24 hours per day through a toll-free phone service;

(4) the requirements for proper use and maintenance of a certified ignition interlock device by a person during any time period the person's license is restricted by the division to only operating a motor vehicle with an ignition interlock device installed;

(5) the reporting requirements for the manufacturer to the division relating to a person's proper use and maintenance of a certified ignition interlock device; and

(6) the requirements and guidelines for receiving reduced ignition interlock device program costs pursuant to subsection (e).

(b) In adopting rules and regulations for approval of ignition interlock devices under this section, the secretary of revenue shall require that the manufacturer or the manufacturer's representatives calibrate and maintain the devices at intervals not to exceed 60 days. Calibration and maintenance shall include, but not be limited to: Physical inspection of the device, the vehicle and wiring of the device to the vehicle for signs of tampering; calibration of the device and downloading of all data contained within the device's memory; and reporting of any violation or noncompliance to the division.

~~(4) The division shall adopt by rules and regulations participant requirements for proper use and maintenance of a certified ignition interlock device during any time period the person's license is restricted by the division to only operating a motor vehicle with an ignition interlock device installed and by rules and regulations the reporting requirements of the approved manufacturer to the division relating to the person's proper use and maintenance of a certified ignition interlock device.~~

~~(5) The division shall require that each manufacturer provide a credit of at least 2% of the gross program revenues in the state as a credit for those persons who have otherwise qualified to obtain an ignition interlock restricted license under this act who are indigent as evidenced by qualification and eligibility for the federal food stamp program.~~

(b)(c)(1) If the division approves an ignition interlock device in accordance with rules and regulations adopted under this section, the division shall give written notice of the approval to

the manufacturer of the device. Such notice shall be admissible in any civil or criminal proceeding in this state.

~~(e)~~(2) The manufacturer of an ignition interlock device shall reimburse the division for any cost incurred in approving or disapproving such device under this section.

(d) Neither the state nor any agency, officer or employee thereof shall be liable in any civil or criminal proceeding arising out of the use of an ignition interlock device approved under this section.

(e) (1) Any person whose license is restricted to operating only a motor vehicle with an ignition interlock device installed may request reduced ignition interlock device program costs by submitting a request to the division, in a form and manner prescribed by the division. The division shall review each request submitted pursuant to this subsection to determine whether the person is eligible for reduced ignition interlock device program costs. A person shall be eligible for reduced ignition interlock device program costs if:

(A) The person's annual household income is less than or equal to 300% of the federal poverty level;

(B) the person is enrolled in the food assistance, child care subsidy or cash assistance program pursuant to K.S.A. 39-709, and amendments thereto; or

(C) the person is currently eligible for the low income energy assistance program as determined by the department for children and families.

(2) If the division determines that the person is eligible for reduced ignition interlock device program costs, the person shall be responsible for paying the following amounts and the manufacturer providing the person's device shall adjust the manufacturer's charge for services accordingly:

(A) Except as provided in subsection (e)(2)(B), for a person whose household income is less than or equal to:

(i) 300% but greater than 200% of the federal poverty level, 90% of the program costs;

(ii) 200% but greater than 150% of the federal poverty level, 75% of the program costs;

(iii) 150% but greater than 100% of the federal poverty level, 50% of the program costs; and

(iv) 100% of the federal poverty level, 25% of the program costs; and

(B) for a person who is enrolled in the food assistance, child care subsidy or cash assistance program pursuant to K.S.A. 39-709, and amendments thereto, or currently eligible for the low income energy assistance program as determined by the department for children and families, 25% of the program costs.

(f) As used in this section, "federal poverty level" means the most recent poverty income guidelines published in the calendar year by the United States department of health and human services.

K.S.A. 2019 Supp. 8-1567

(a) Driving under the influence is operating or attempting to operate any vehicle within this state while:

(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence, as defined in K.S.A. 8-1013(f)(1), and amendments thereto, is 0.08 or more;

(2) the alcohol concentration in the person's blood or breath, as measured within three hours of the time of operating or attempting to operate a vehicle, is 0.08 or more;

(3) under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;

(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle.

(b) (1) Driving under the influence is:

(A) On a first conviction a class B, nonperson misdemeanor. The person convicted shall be sentenced to not less than 48 consecutive hours nor more than six months' imprisonment, or in the court's discretion 100 hours of public service, and fined not less than \$750 nor more than \$1,000. ~~The person convicted shall serve at least 48 consecutive hours' imprisonment or 100 hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto, to serve the remainder of the sentence only after such person has served 48 consecutive hours' imprisonment;~~

(B) on a second conviction a class A, nonperson misdemeanor. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,250 nor more than \$1,750. ~~The person convicted shall serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 120 hours of confinement. Such 120 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to~~

~~K.S.A. 2019 Supp. 21-6609, and amendments thereto, to serve the five days' imprisonment mandated by this subsection only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 120 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 120 hours;~~

(i) As a condition of any probation granted under this subsection, the person shall serve at least 120 hours of confinement. The hours of confinement shall include at least 48 hours imprisonment and otherwise may be served by a combination of: imprisonment; a work release program, provided such work release program requires such person to return to the confinement at the end of each day in the work release program; or a house arrest program pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto.

(ii) (a) If the person is placed into a work release program or placed under a house arrest program for any portion of the minimum 120 hours confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program until the minimum sentence is met. If the person is placed into a work release program or placed under a house arrest program for more than the minimum 120 hours confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program until the minimum 120 hours is complete and thereafter the person shall receive day-for-day credit for time served in such program unless otherwise ordered by the court;

(b) When in a work release program, the person shall only be given credit for the time served in confinement at the end of and continuing to the beginning of the person's work day. When under a house arrest program, the person shall be monitored by an electronic monitoring device that verifies the person's location and shall only be given credit for the time served within the boundaries of the person's residence.

(C) on a third conviction a class A, nonperson misdemeanor, except as provided in subsection (b)(1)(D). The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,750 nor more than \$2,500. ~~The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 2,160 hours of confinement. Such 2,160 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing~~

~~to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto, to serve the 90 days' imprisonment mandated by this subsection only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 2,160 hours;~~

(i) As a condition of any probation granted under this subsection, the person shall serve at least 30 days of confinement. After at least 48 consecutive hours imprisonment the remainder of the period of confinement may be served by a combination of: imprisonment; a work release program, provided such work release program requires such person to return to the confinement at the end of each day in the work release program; or a house arrest program pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto;

(ii) (a) If the person is placed into a work release program or placed under a house arrest program for any portion of the minimum 30 days confinement mandated by this subsection, the person shall receive hour-for-hour credit for time served in such program for the first 240 hours. Thereafter the person shall receive day-for-day-credit for time served in such program unless otherwise ordered by the court.

(b) When in a work release program, the person shall only be given credit for the time served in confinement at the end of and continuing to the beginning of the person's work day. When under a house arrest program, the person shall be monitored by an electronic monitoring device that verifies the person's location and shall only be given credit for the time served within the boundaries of the person's residence.

~~(D) on a third conviction a severity level 6, nonperson felony if the person has a prior conviction which occurred within the preceding 10 years, not including any period of incarceration. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,750 nor more than \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 2,160 hours of confinement. Such 2,160 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning~~

~~of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto, to serve the 90 days' imprisonment mandated by this subsection only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 2,160 hours; and~~

(E) on a fourth or subsequent conviction a [severity level 6](#), nonperson felony. ~~The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 72 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 2,160 hours of confinement. Such 2,160 hours of confinement shall be a period of at least 72 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2019 Supp. 21-6609, and amendments thereto, to serve the 90 days' imprisonment mandated by this subsection only after such person has served 72 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 2,160 hours.~~

(2) The court may order that the term of imprisonment imposed pursuant to subsection (b)(1)(D) or (b)(1)(E) be served in a state facility in the custody of the secretary of corrections in a facility designated by the secretary for the provision of substance abuse treatment pursuant to the provisions of K.S.A. 2019 Supp. 21-6804, and amendments thereto. ~~The person shall remain imprisoned at the state facility only while participating in the substance abuse treatment program designated by the secretary and shall be returned to the custody of the sheriff for execution of the balance of the term of imprisonment upon completion of or the person's discharge from the substance abuse treatment program. Custody of the person shall be returned to the sheriff for execution of the sentence imposed in the event the~~ [The](#) secretary of corrections [may refuse to admit the person to the designated facility and place the person in a](#)

different state facility, or admit the person and subsequently transfer the person to a different state facility, if the secretary determines: (A) That substance abuse treatment resources or the capacity of the facility designated by the secretary for the incarceration and treatment of the person is not available; (B) the person ~~fails~~ has failed to meaningfully participate in the treatment program of the designated facility; (C) the person is disruptive to the security or operation of the designated facility; or (D) the medical or mental health condition of the person renders the person unsuitable for confinement at the designated facility. The determination by the secretary that the person either is not to be admitted into the designated facility or is to be transferred from the designated facility is not subject to review. ~~The sheriff shall be responsible for all transportation expenses to and from the state correctional facility.~~

(3) In addition, for any conviction pursuant to subsection (b)(1)(C); or (b)(1)(D) ~~or (b)(1)(E)~~, at the time of the filing of the judgment form or journal entry as required by K.S.A. 22-3426 or K.S.A. 2019 Supp. 21-6711, and amendments thereto, the court shall cause a certified copy to be sent to the officer having the offender in charge. The court shall determine whether the offender, upon release from imprisonment, shall be supervised by community correctional services or court services based upon the risk and needs of the offender. The risk and needs of the offender shall be determined by use of a risk assessment tool specified by the Kansas sentencing commission. The law enforcement agency maintaining custody and control of a defendant for imprisonment shall cause a certified copy of the judgment form or journal entry to be sent to the supervision office designated by the court and upon expiration of the term of imprisonment shall deliver the defendant to a location designated by the supervision office designated by the court. After the term of imprisonment imposed by the court, the person shall be placed on supervision to community correctional services or court services, as determined by the court, for a mandatory one-year period of supervision, which such period of supervision shall not be reduced. During such supervision, the person shall be required to participate in a multidisciplinary model of services for substance use disorders facilitated by a Kansas department for aging and disability services designated care coordination agency to include assessment and, if appropriate, referral to a community based substance use disorder treatment including recovery management and mental health counseling as needed. The multidisciplinary team shall include the designated care coordination agency, the supervision officer, the Kansas department for aging and disability services designated treatment provider and the offender. An offender for whom a warrant has been issued by the court alleging a violation of this supervision shall be considered a fugitive from justice if it is found that the warrant cannot be served. If it is found the offender has violated the provisions of this supervision, the court shall determine whether the time from the issuing of the warrant to the date of the court's determination of an alleged violation, or any part of it, shall be counted as time served on supervision. Any violation of the conditions of such supervision may subject such person to revocation of supervision and

imprisonment in jail for the remainder of the period of imprisonment, the remainder of the supervision period, or any combination or portion thereof. The term of supervision may be extended at the court's discretion beyond one year, and any violation of the conditions of such extended term of supervision may subject such person to the revocation of supervision and imprisonment in jail of up to the remainder of the original sentence, not the term of the extended supervision.

(4) In addition, prior to sentencing for any conviction pursuant to subsection (b)(1)(A) or (b)(1)(B), the court shall order the person to participate in an alcohol and drug evaluation conducted by a provider in accordance with K.S.A. 8-1008, and amendments thereto. The person shall be required to follow any recommendation made by the provider after such evaluation, unless otherwise ordered by the court.

(c) Any person 18 years of age or older convicted of violating this section or an ordinance which prohibits the acts that this section prohibits who had one or more children under the age of 18 years in the vehicle at the time of the offense shall have such person's punishment enhanced by one month of imprisonment. This imprisonment must be served consecutively to any other minimum mandatory penalty imposed for a violation of this section or an ordinance which prohibits the acts that this section prohibits. Any enhanced penalty imposed shall not exceed the maximum sentence allowable by law. During the service of the enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.

(d) If a person is charged with a violation of subsection (a)(4) or (a)(5), the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(e) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than 90 days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(f) (1) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to \$5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.

(2) The court may, in its discretion, waive any portion of a fine imposed pursuant to this section, except the \$250 required to be remitted to the state treasurer pursuant to subsection

(g)(2), upon a showing that the person successfully completed court-ordered education or treatment.

(g) Prior to filing a complaint alleging a violation of this section, a prosecutor shall request and shall receive from the:

(1) Division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and

(2) Kansas bureau of investigation central repository all criminal history record information concerning such person.

(h) The court shall electronically report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of this section to the division including any finding regarding the alcohol concentration in the offender's blood or breath. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(i) For the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under this section:

(1) Convictions for a violation of this section, or a violation of an ordinance of any city or resolution of any county that prohibits the acts that this section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations, shall be taken into account, but only convictions or diversions occurring on or after July 1, 2001. Nothing in this provision shall be construed as preventing any court from considering any convictions or diversions occurring during the person's lifetime in determining the sentence to be imposed within the limits provided for a first, second, third, fourth or subsequent offense;

(2) any convictions for a violation of the following sections occurring during a person's lifetime shall be taken into account: (A) Driving a commercial motor vehicle under the influence, K.S.A. 8-2,144, and amendments thereto; (B) operating a vessel under the influence of alcohol or drugs, K.S.A. 32-1131, and amendments thereto; (C) involuntary manslaughter while driving under the influence of alcohol or drugs, K.S.A. 21-3442, prior to its repeal, or K.S.A. 2019 Supp. 21-5405(a)(3) or (a)(5), and amendments thereto; (D) aggravated battery as described in K.S.A. 2019 Supp. 21-5413(b)(3) or (b)(4), and amendments thereto; and (E) aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and amendments thereto;

(3) "conviction" includes: (A) Entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging an offense described in subsection (i)(2); and (B) conviction of a violation of an ordinance of a city in this state, a resolution of a county in this state

or any law of another jurisdiction that would constitute an offense that is comparable to the offense described in subsection (i)(1) or (i)(2);

(4) multiple convictions of any crime described in subsection (i)(1) or (i)(2) arising from the same arrest shall only be counted as one conviction;

(5) it is irrelevant whether an offense occurred before or after conviction for a previous offense; and

(6) a person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section, and amendments thereto, or an ordinance which prohibits the acts of this section, and amendments thereto, only once during the person's lifetime.

(j) For the purposes of determining whether an offense is comparable, the following shall be considered:

(1) The name of the out-of-jurisdiction offense;

(2) the elements of the out-of-jurisdiction offense; and

(3) whether the out-of-jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense.

(k) Upon conviction of a person of a violation of this section or a violation of a city ordinance or county resolution prohibiting the acts prohibited by this section, the division, upon receiving a report of conviction, shall suspend, restrict or suspend and restrict the person's driving privileges as provided by K.S.A. 8-1014, and amendments thereto.

(l) (1) Nothing contained in this section shall be construed as preventing any city from enacting ordinances, or any county from adopting resolutions, declaring acts prohibited or made unlawful by this act as unlawful or prohibited in such city or county and prescribing penalties for violation thereof.

(2) The minimum penalty prescribed by any such ordinance or resolution shall not be less than the minimum penalty prescribed by this section for the same violation, and the maximum penalty in any such ordinance or resolution shall not exceed the maximum penalty prescribed for the same violation.

(3) On and after July 1, 2007, and retroactive for ordinance violations committed on or after July 1, 2006, an ordinance may grant to a municipal court jurisdiction over a violation of such ordinance which is concurrent with the jurisdiction of the district court over a violation of this section, notwithstanding that the elements of such ordinance violation are the same as the elements of a violation of this section that would constitute, and be punished as, a felony.

(4) Any such ordinance or resolution shall authorize the court to order that the convicted person pay restitution to any victim who suffered loss due to the violation for which the person was convicted.

(m) (1) Upon the filing of a complaint, citation or notice to appear alleging a person has violated a city ordinance prohibiting the acts prohibited by this section, and prior to conviction thereof, a city attorney shall request and shall receive from the:

(A) Division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and

(B) Kansas bureau of investigation central repository all criminal history record information concerning such person.

(2) If the elements of such ordinance violation are the same as the elements of a violation of this section that would constitute, and be punished as, a felony, the city attorney shall refer the violation to the appropriate county or district attorney for prosecution.

(n) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this section or by the ordinance. For the purpose of this subsection, entering into a diversion agreement pursuant to K.S.A. 12-4413 et seq. or 22-2906 et seq., and amendments thereto, shall not constitute plea bargaining. [This subsection shall not be construed to prohibit an amendment or dismissal of any charge where the admissible evidence is not sufficient to support a conviction beyond a reasonable doubt on such charge.](#)

(o) The alternatives set out in subsection (a) may be pleaded in the alternative, and the state, city or county may, but shall not be required to, elect one or more of such alternatives prior to submission of the case to the fact finder.

(p) As used in this section: (1) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath;

(2) "imprisonment" shall include any restrained environment in which the court and law enforcement agency intend to retain custody and control of a defendant and such environment has been approved by the board of county commissioners or the governing body of a city; and

(3) "drug" includes toxic vapors as such term is defined in K.S.A. 2019 Supp. 21-5712, and amendments thereto.

(q) (1) The amount of the increase in fines as specified in this section shall be remitted by the clerk of the district court to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of remittance of the increase provided in this act, the state treasurer shall deposit the entire amount in the state treasury and the state treasurer shall credit 50% to the community alcoholism and intoxication programs fund and 50% to the department of corrections alcohol and drug abuse treatment fund, which is hereby created in the state treasury.

(2) On and after July 1, 2011, the amount of \$250 from each fine imposed pursuant to this section shall be remitted by the clerk of the district court to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall credit the entire amount to the community corrections supervision fund established by K.S.A. 75-52,113, and amendments thereto.

K.S.A. 2019 Supp. 8-1567a(f)

(f) If a person less than 21 years of age submits to a breath or blood alcohol test requested pursuant to K.S.A. 8-1001 or K.S.A. 8-2,142, and amendments thereto, and produces a test result of .02 or greater, but less than .08, on the person's first occurrence, the person's driving privileges shall be suspended for 30 days and then restricted as provided by K.S.A. 8-1015, and amendments thereto, for an additional ~~330~~180 days, and on the person's second or subsequent occurrence, the person's driving privileges shall be suspended for one year.

## Reinstatement of Driver's License

(a) Any person whose license is restricted to operating only a motor vehicle with an ignition interlock device installed and who meets the requirements of subsection (b) may request reinstatement of such person's driver's license by submitting a request to the division in a form and manner prescribed by the division.

(b) The division shall approve the request for reinstatement of the person's driver's license if the division determines all the following conditions are met:

(1) The person's ignition interlock device restriction period has been extended at least five years, not including any period of incarceration, beyond the initial ignition interlock device restriction period required by law due to the person's failure to provide the division with proof of completion of the ignition interlock device program as required by K.S.A. 8-1015, and amendments thereto.

(2) During the person's ignition interlock device restriction period and any extension thereof, the person has not had an alcohol or drug-related conviction or occurrence, as those terms are defined by K.S.A. 8-1013 and amendments thereto, a conviction of a violation of K.S.A. 8-1017, and amendments thereto, or of a law of another state, or of a political subdivision thereof, that prohibits the acts prohibited by that statute.

(3) During the person's ignition interlock device restriction period and any extension thereof, the person has not had any of the following:

(A) Conviction of a violation of K.S.A. 8-1599, and amendments thereto;

(B) conviction of a violation of K.S.A. 41-727, and amendments thereto;

(C) conviction of any violation listed in K.S.A. 8-285(a), and amendments thereto;

(D) conviction of two or more moving traffic violations committed on separate occasions; or

(E) revocation, suspension, cancellation or withdrawal of the person's driving privileges due to another action by the division or a court.

(4) At the time of submitting the request to the division, the person does not have any pending charges or proceedings involving any violation listed in subsections (b)(2) or (3).

### K.S.A. 2019 Supp. 12-4415

(a) In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the city attorney shall consider at least the following factors among all factors considered:

- (1) The nature of the crime charged and the circumstances surrounding it;
- (2) any special characteristics or circumstances of the defendant;
- (3) whether the defendant is a first-time offender of an alcohol related offense [as defined in K.S.A. 12-4413, and amendments thereto](#), and if the defendant has previously participated in diversion, according to the certification of the division of vehicles of the state department of revenue;
- (4) whether there is a probability that the defendant will cooperate with and benefit from diversion;
- (5) whether there is a probability that the defendant committed such crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder or traumatic brain injury, connected to service in a combat zone, as defined in section 112 of the federal internal revenue code of 1986, in the armed forces of the United States of America;
- (6) if subsection (a)(5) applies to the defendant, whether there is a probability that the defendant will cooperate with and benefit from inpatient or outpatient treatment from any treatment facility or program operated by the United States department of defense, the United States department of veterans affairs or the Kansas national guard with the consent of the defendant, as a condition of diversion;
- (7) whether the available diversion program is appropriate to the needs of the defendant;
- (8) the impact of the diversion of the defendant upon the community;
- (9) recommendations, if any, of the involved law enforcement agency;
- (10) recommendations, if any, of the victim;
- (11) provisions for restitution; and
- (12) any mitigating circumstances.

(b) A city attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint alleging an alcohol related offense [as defined in K.S.A. 12-4413, and amendments thereto](#), if the defendant:

- (1) Has previously participated in diversion of an alcohol related offense;
- (2) has previously been convicted of or pleaded nolo contendere to an alcohol related offense in this state or has previously been convicted of or pleaded nolo contendere to a violation of K.S.A. 8-2,144 or 8-1567, and amendments thereto, or of a law of another state, or of a political subdivision thereof, ~~which~~ [that](#) prohibits the acts prohibited by those statutes; or
- (3) during the time of the alleged alcohol related offense was involved in a motor vehicle accident or collision resulting in personal injury [to another person](#) or death.

(c) A city attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint or traffic citation alleging a violation of an ordinance of any city or resolution of any county that prohibits the acts prohibited under chapter 8 of the Kansas Statutes Annotated, and amendments thereto, if the defendant was a commercial driver's license holder at the time the violation was committed or at any subsequent time prior to being considered for diversion.

(d) As used in this section, "major depressive disorder," "polytrauma," "post-traumatic stress disorder" and "traumatic brain injury" shall mean the same as such terms are defined in K.S.A. 2019 Supp. 21-6630, and amendments thereto.

[K.S.A. 2019 Supp. 22-2908](#)

(a) In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the county or district attorney shall consider at least the following factors among all factors considered:

- (1) The nature of the crime charged and the circumstances surrounding it;
- (2) any special characteristics or circumstances of the defendant;
- (3) whether the defendant is a first-time offender and if the defendant has previously participated in diversion, according to the certification of the Kansas bureau of investigation or the division of vehicles of the department of revenue;
- (4) whether there is a probability that the defendant will cooperate with and benefit from diversion;
- (5) whether the available diversion program is appropriate to the needs of the defendant;
- (6) whether there is a probability that the defendant committed such crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder or traumatic brain injury, connected to service in a combat zone, as defined in section 112 of the federal internal revenue code of 1986, in the armed forces of the United States of America;
- (7) if subsection (a)(6) applies to the defendant, whether there is a probability that the defendant will cooperate with and benefit from inpatient or outpatient treatment from any treatment facility or program operated by the United States department of defense, the United States department of veterans affairs or the Kansas national guard with the consent of the defendant, as a condition of diversion;
- (8) the impact of the diversion of the defendant upon the community;
- (9) recommendations, if any, of the involved law enforcement agency;
- (10) recommendations, if any, of the victim;
- (11) provisions for restitution; and
- (12) any mitigating circumstances.

(b) A county or district attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint if [the complaint alleges that the defendant committed a](#):

- (1) ~~The complaint alleges a~~ violation of K.S.A. 8-1567, and amendments thereto, and the defendant: (A) Has previously participated in diversion upon a complaint alleging a violation of that statute or an ordinance of a city in this state which prohibits the acts prohibited by that statute; (B) has previously been convicted of or pleaded nolo contendere to a violation of that statute or a violation of a law of another state or of a political subdivision of this or any other state, which law prohibits the acts prohibited by that statute; or (C) during the time of the alleged violation was involved in a motor vehicle accident or collision resulting in personal injury [to another person](#) or death;

(2) violation under chapter 8 of the Kansas Statutes Annotated, and amendments thereto, and the defendant was a commercial driver's license holder at the time the violation was committed or at any subsequent time prior to being considered for diversion;

(3) ~~the complaint alleges that the defendant committed a~~ class A or B felony or for crimes committed on or after July 1, 1993, an off-grid crime, a severity level 1, 2 or 3 felony for nondrug crimes, a drug severity level 1 or 2 felony for drug crimes committed on or after July 1, 1993, but prior to July 1, 2012, or a drug severity level 1, 2 or 3 felony committed on or after July 1, 2012; or

(4) ~~(3) the complaint alleges a~~ domestic violence offense, as defined in K.S.A. 2019 Supp. 21-5111, and amendments thereto, and the defendant has participated in two or more diversions in the previous five year period upon complaints alleging a domestic violence offense. (c) A county or district attorney may enter into a diversion agreement in lieu of further criminal proceedings on a complaint for violations of article 10 of chapter 32 of the Kansas Statutes Annotated, and amendments thereto, if such diversion carries the same penalties as the conviction for the corresponding violations. If the defendant has previously participated in one or more diversions for violations of article 10 of chapter 32 of the Kansas Statutes Annotated, and amendments thereto, then each subsequent diversion shall carry the same penalties as the conviction for the corresponding violations.

(d) As used in this section, "major depressive disorder," "polytrauma," "post-traumatic stress disorder" and "traumatic brain injury" shall mean the same as such terms are defined in K.S.A. 2019 Supp. 21-6630, and amendments thereto.