

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:35 A.M. on January 27, 2011, in Room 548-S of the Capitol.

All members were present, except Senator Donovan, who was excused

Committee staff present:

Lauren Douglass, Kansas Legislative Research Department  
Robert Allison-Gallimore, Kansas Legislative Research Department  
Jason Thompson, Office of Revisor of Statutes  
Tamera Lawrence, Office of Revisor of Statutes  
Theresa Kiernan, Committee Assistant

Conferees appearing before the committee:

Doug Wells, Attorney, Topeka, Kansas  
Jay Norton, Kansas Association of Criminal Defense Lawyers  
Sky Westerlund, Ex. Director of Kansas Chapter of the Nat'l Assn. of Social Workers  
Phil Bradley, Kansas Licensed Beverage Association

Others attending:

See attached list.

Bill Introductions:

Megan Pinegar, Office of the Attorney General, requested introduction of two bills:

- A bill concerning child pornography
- A bill relating to the forfeiture of assets in crimes relating to the exploitation of a child

The Chairman opened the hearings on **SB 7 — Driving under the influence.**

Doug Wells stated he was speaking for himself and not as a member of the Commission. In his testimony in opposition to **SB 7**, he stated he is concerned with the cost of implementing the bill (Attachment 1). He opposes:

- The change in current law relating to the ignition interlock for the first-time offender
- The criminalization of a DUI test refusal
- The creation of the aggravated DUI battery
- The special sentencing rules for felony DUI offenses
- The term of the three-hour look back provision
- The term of the decay (look back) for sentence enhancement
- The modification of the physician-patient privilege

He expressed support for the expungement provision in **SB 7**. He stated that the bill should provide for the ability to plea bargain.

Jay Norton testified in opposition to the provision in **SB 7** which would criminalize the refusal to submit to a DUI test; it would be a strict liability crime (Attachment 2). He expressed concern for the extensive costs associated with the bill; he believes the bill will result in increased litigation and costs to the taxpayers.

Sky Westerlund testified in opposition to a provision in Section 12 of **SB 7** which would create a new license of a provider with a DUI Specialty who would be licensed by the Secretary of SRS. This provision conflicts with the licensure practice act of social workers and others licensed by the Behavioral Sciences Regulatory Board. She suggested an amendment to correct the conflict (Attachment 3).

Phil Bradley testified in opposition to the provision in **SB 7**, which criminalizes the DUI test refusal. He expressed his concern that the current law is not evenly enforced. He drew the committee's attention to letters, attached to his testimony, which express concern with the mandatory ignition interlock device (Attachment 4). He also said he would make available a copy of a pamphlet titled Effective Traffic Safety Solutions to Stop Drunk Driving –An ABL Toolbox.

## CONTINUATION SHEET

The minutes of the Judiciary Committee at 10:30 a.m. on January 27, 2011, in Room 548-S of the Capitol.

Written testimony in opposition to SB 7 was submitted by Karl Peterjohn, Sedgwick County, (Attachment 5) and Paul Burmaster, Kansas Association of Criminal Defense Lawyers (Attachment 6).

Senator King asked, "If a breath test is refused or cannot be completed, may the person opt to take a blood test?"

Jason Thompson, staff revisor, responded that it still constitutes a refusal.

Mr. Thompson explained the look back provision refers to the time period within which a blood test may be conducted.

The Chairman noted that the look back period had been extended from two to three hours for areas of the state in which it takes a longer period of time to travel to a test site.

Senator King asked whether or not the criminalization of DUI test refusal has been upheld in other states? No answer was offered.

Senator Bruce asked if there were other methods (other than breath or blood tests) to determine the incapability of a person to operate a vehicle?

No answer was offered.

Senator Bruce asked Ms. Wunderland if her opposition to the bill was limited to the conflict in licensure of the treatment provider?

She responded, "Yes."

Meeting adjourned at 10:29 A.M. The next meeting is scheduled for January 28, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1/27/11

NAME	REPRESENTING
Eric Montgomery	AG
Megan Pinegar	AG
Jeff Bothenberg	Polsinelli Shydel
<del>BRADY</del>	<del>SELF</del>
Joe McIn	KS BAR ASSN
SEAN MILLER	CAPITOL STRATEGIES
ERIK SARTORMS	City of Overland Park
Matt Coffey	BBT
Mandy Miller	SCOKS
Gene Orr	Legis
Marla Rhoden	KDHE
ROBERT BAKER	KHP
Timothy McCool	KHP
Paje Routhier	Hein Law Firm
Caleb Reid	Sen Pyle
Shannon Little	Little Government Relations
John Peterson	Capitol Strategies
Phil Bradley	KLBA

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: January 27, 2011

NAME	REPRESENTING
Sandy Jacquot	LKM
Jay Norton	KACDL
Sarah Fertig	Sentencing Commission
Ron Boone	KIIA
Gord Hansen	KARP
MATT SIKHUS	PZIA
MIKE LINDBLAD	KICA
Brenna Doffy	Intern
Marcy Baksta	KDOR
Kelley Bellett	KDOR
Ed Kumpf	KACP/KPOA/KSA
Sty Westerland	KNASCO
Tommy Humphrey	KNASCO
Sub Judge	Judicial Branch
Tim Madden	KDOC
Jennifer Roth	KACDL
PATRICK M Lewis	KACDL
Patrick Vogelburg	KCDAA

DOUGLAS E. WELLS

*Attorney at Law*

January 18, 2011

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Honorable Senator Thomas C. "Tim" Owens  
Chairman, Senate Judiciary Committee  
Capitol Building  
10<sup>th</sup> and Jackson St.  
Topeka KS 66612

Re: SB 7, DUI Commission Bill

Dear Mr. Chairman and Committee,

The following will constitute written testimony in opposition to the DUI Bill that was generated through the Kansas DUI Commission, which I was a member of. I was appointed to the DUI Commission by the Kansas Bar Association and I am the President of the Kansas Association of Criminal Defense Lawyers.

I oppose much of the proposed bill, however there are certain aspects that I support which I will identify. Because the text of the bills is so voluminous, I will provide this testimony in an outline form rather than in a sentence and paragraph format.

Before addressing specific aspects off the bill, I want to identify what I believe the goals should be in passing DUI legislation. If these goals are not met in a manner that justifies the expenditure of public funds to make the changes suggested, the suggested changes should not be implemented.

The **goals** should be as follows:

1. **Protect public safety.**
2. Full, fair, and constitutional determinations of guilt or responsibility.
3. Efficient administration.
4. Protect public and individual from alcohol use or abuse.
5. Rehabilitation/treatment to create personal success - job, driving, expungement.
6. Protection of individual rights from the government intervention.

Senate Judiciary

1-27-11

Attachment 1

The following is my analysis of the DUI Bill:

1. **THE COST TO TAXPAYERS WILL BE INCREASED DURING THESE BUDGET CRISIS TIMES:**
  - a. Current law does not mandate prison incarceration for DUI conviction.
  - b. More trials would result because of increased mandatory prison time. Under current law, many trials are avoided because incarceration is less severe. There would be nothing to loose by going to trial when mandatory prison time is at risk.
  - c. 4<sup>th</sup> offense or greater lifetime DUI would be level 7 mandatory prison felony - 15 to 34 months.
  - d. 3<sup>rd</sup> or greater refusal of test would be mandatory prison felony of 15 to 34 months.
  - e. Prior refusals or convictions count as priors for sentence enhancement for test refusal or failure.
  - f. Refusal is a new crime, which would generate greater incarceration expenses.
  - g. More prison felony convictions would result because many test refusal cases are not currently filed according to prosecutors on commission.
  - h. Costs of trial would increase as penalties increase resulting in:
    1. More law enforcement time expended.
    2. More jury trial time expended.
    3. More probation and parole and post=release time expended.
    4. Board of Indigent Defense Services (BIDS) expenditures for appointed attorneys to represent indigent would increase.
  - i. Bed impact in prison will substantially increase.
  - j. **We cannot afford these changes.**
2. **TEST REFUSAL IS A NEW CRIME (\$2) - THIS PROVISION IS OPPOSED.**
  - a. Increased cost of litigation and incarceration for this new crime.
  - b. **Big government is taking away our individual right to choose.**
  - c. This infringes on a person's right to privacy of their own body - deep lung air.
  - d. Person with medical condition may not be able to complete test for reasons unrelated to alcohol consumption.

- e. Innocent people refuse for reasons unrelated to DUI, Including the following:
  - 1. No confidence in machine.
  - 2. Felt stop was invalid.
  - 3. Distrust of officer or officer attitude.
  - 4. Does not know how machine works.
  - 5. Heard from other people not to take it.
  - 6. Wants to talk to attorney first.
  - 7. Machines are not accurate.
  - 8. No warrant.
- f. If refusal is criminalized, which is opposed, the bill should be changed as follows:
  - 1. The refusal must be unreasonable rather than strict liability offense.
  - 2. If criminalized, should be prima facia proof of DUI rather than separate, new per se crime.
  - 3. This should be traffic infraction, like refusing preliminary breath test (PBT).
  - 4. If person refuses breath test, they should be offered blood test before refusal can be charged.
  - 5. Before refusal, person should be permitted to contact attorney.
    - A. Can now contact attorney only if fail test.
- g. Breath test refusal printouts may not really be refusals as follows (Remember a refusal is a refusal to take or complete a test):
  - 1. Some people are not capable of giving appropriate volume and pressure (incomplete sample) to complete test.
  - 2. Persons with medical conditions (asthma, emphysema, COPD, or other infirmities (one lung)) cannot give a complete sample.
  - 3. Older people and women have lower lung capacity and cannot give a complete sample.
  - 4. Machines malfunction and misjudge whether complete sample is given.
  - 5. The Intoxilyzer 8000 used in Kansas, unlike the Draeger machine not used in Kansas, does not report pressure or volume.
  - 6. The volume of air required to complete a test is arbitrary.

7. Results of a machine vary based on the way the breath sample is provided (how hard, how long, and other factors).
- h. Public safety is not enhanced because person may refuse who is not DUI.
  1. Person can still be prosecuted for DUI, a legitimate public safety purpose. Accordingly, refusal statute is unnecessary to protect public.
  2. Purpose of law is to facilitate law enforcement rather than to protect safety.
- i. Warrantless seizure of deep lung air violates constitution.
  1. Warrant can be obtained under existing law upon officer request.
- j. Punishment for refusal is unfairly greater than for DUI.
- k. Unfair to consider DUIs that occurred before refusal was criminalized as prior offenses for enhancement purposes.
- l. Driver's license suspension will still occur if refusal is not criminalized.
- m. If convicted of DUI and criminal refusal, penalties would be double for same driving incident. This is unfair and disproportionate.
- n. There is no right to consult an attorney under the proposal before or after a refusal is made. This is unconstitutional. If permitted to talk to an attorney, the refusal could be rescinded thereby assisting law enforcement and protecting public safety, if the person was DUI.
- o. Refusal conviction proposed to occur on private property (§24) even when not DUI. This is another invasion of privacy and the individual rights of us all.
3. **AGGRAVATED BATTERY DUI - NEW CRIME IS CREATED (§47). THIS IS OPPOSED.**
  - a. This new crime would increase costs as mandatory prison offense.
    1. Any harm conviction is 8PF. Great bodily harm is 5PF.
  - b. Any "harm" will result in felony conviction. For instance, a torn fingernail or a bruise would be an aggravated battery DUI.



- c. Person would already be punished for DUI as separate crime. Accordingly, there is no reason to eliminate knowledge or recklessness as an element to the crime of aggravated battery.
- 4. **SPECIAL SENTENCING RULES FOR FELONY DUI (§49) - THIS IS OPPOSED.**
  - a. Use regular history or DUI history - this becomes confusing.
    - 1. Presentence report preparation and review will be unnecessarily complicated.
    - 2. Special sentencing rules should not be favored because they make an already complicated subject matter more complicated.
  - b. Court should be permitted to exercise discretion based upon factors - not mandatory penalty.
  - c. DUI history under proposed Bill - 4<sup>th</sup> is 7-g, 5<sup>th</sup> is 7-f, 6<sup>th</sup> is 7-e, 7<sup>th</sup> is 7-d, 8<sup>th</sup> is 7-c, 9<sup>th</sup> is 7-b, 10<sup>th</sup> or subsequent is 7-a.
  - d. Criminal test refusal under proposed Bill: 3<sup>rd</sup> is 7-g, 4<sup>th</sup> is 7-f, 5<sup>th</sup> is 7-e, 6<sup>th</sup> is 7-d, 7<sup>th</sup> is 7-c, 8<sup>th</sup> is 7-b, 9<sup>th</sup> or greater is 7-a.
  - e. Mandatory prison, not merely presumed, under proposed Bill.
  - f. No departure permitted (§51) under proposed legislation.
  - g. Proposed penalties are disproportionate to other more severe crimes.
- 5. **DECAY (LOOK BACK) FOR SENTENCE ENHANCEMENT (§25) - THE CONCEPT IS SUPPORTED BUT THE TERM IS NOT.**
  - a. Decay of record before sentencing should occur after 10 years.
  - b. Decay 07-01-96 for DUI is proposed by the Commission for the following reasons:
    - 1. 5 year decay changed to lifetime decay 07-01-2001 (5 years before proposed decay period).
      - A. People relied upon decay period in making decisions concerning older cases.
    - 2. Kansas Department of Revenue (KDR) does not maintain records of convictions before 07-01-96.
    - 3. Journal entries to prove convictions before 07-01-96 are difficult to obtain - equal protection violation?

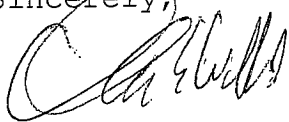
- c. No decay period is applied in SB 7 for refusal conviction.
  - 1. Why should new crime of refusal be penalized more than DUI?
- d. Decay period does not apply to CDL DUI (§10). It should apply for the same reasons it applies to a regular driver's license.
- 6. **INTERLOCK MODIFICATIONS (§17) - SUPPORTED.**
  - a. May apply for interlock 45 days after suspension commences. Why?
    - 1. People drive anyway. With interlock, at least they will not drive drunk.
    - 2. Good way to monitor probation terms.
    - 3. Daily reminder not to drink and drive - create habit.
    - 4. People able to drive selves to work and support self and family.
    - 5. People able to drive self to treatment - enhance sobriety.
    - 6. People able to drive to interlock maintenance - enhance sobriety.
    - 7. If suspended - no mass transit available.
  - b. Interlock provisions retroactive - fair for all and accomplishes goals. Equal protection enhanced.
  - c. Change interlock requirement to all cars operated, not cars owned or rented that not operated. These interlock changes are compliant with federal highway fund mandates.
  - d. 45 day interlock sanction not available to CDL or lifetime revocation.
  - e. Interlock during suspension time has more limited permitted uses than normal interlock time after suspension.
- 7. **EXPUNGEMENT AFTER 10 YEARS (§32 & §48) - SUPPORTED.**
  - a. Judicial discretion to determine if expungement appropriate.
  - b. Person rewarded for rehabilitation.
  - c. People not punished for lifetime when mistake of youth.
  - d. Courts can still use expunged offenses to punish subsequent crime.

8. **3<sup>RD</sup> OFFENSE CLASSIFICATION CHANGES - SUPPORTED.**
- a. If no prior within 10 years - Class A misdemeanor. Reasons:
    - 1. Greater access to community corrections.
    - 2. Court may revoke probation multiple times to encourage rehabilitation.
    - 3. Goal for rehabilitation when can receive early release to community corrections.
    - 4. Real world choices during community corrections will promote positive real life changes that cannot occur in prison if revocation.
    - 5. Under current law, if parole revoked - prison with no chance for rehabilitation/treatment and not chance to change "real life" decision making.
  - b. Access to SCRAM, interlock, house arrest encourages "real life" changes.
  - c. Access to employment helps support self, family, and creditors.
9. **PLEA BARGAINING SHOULD BE PERMITTED - NOT PROPOSED IN BILL.**
- a. All other Kansas crimes permit plea bargaining.
  - b. Would save cost of litigation.
  - c. Could still mandate treatment as condition of plea bargain.
  - d. Judicial discretion for more severe penalties still available. The Court does not have to follow plea bargain sentencing agreements.
  - e. Big government is taking away our individual rights by criminalizing a test refusal when public protection is not enhanced and when an innocent person may choose to refuse.
  - f. People with old crimes committed while young would not be treated same as frequent fliers with multiple recent violations.
10. **3 HOUR LOOK BACK RATHER THAN 2 HOUR - OPPOSED.**
- a. This is more remote from the time of driving.
    - 1. The purpose of DUI is to protect safety. More remote measurement does not protect safety while operating.

11. **ADMINISTRATIVE ISSUES BEFORE DRIVER'S LICENSE SANCTION SHOULD BE MODIFIED (§20) - NOT PROPOSED.**
  - a. Should be able to assert issue of lawful stop.
  - b. Should be able to challenge reliability of breath test, not just substantial compliance.
  - c. Driver's license sanction should be removed if criminal acquittal or dismissal.
12. **VIDEO/DVD TAPING SHOULD BE REQUIRED OF ARREST SCENE, BREATH TEST, BLOOD COLLECTION - NOT PROPOSED.**
  - a. This will reduce cost of litigation because recording is preserved.
  - b. Funding for equipment can be obtained from KDHE breath test fund and additional costs assessed at conviction.
  - c. 2 year implementation term to permit equipment acquisition.
  - d. Fair determination can be made when facts independently preserved.
13. **WEEKEND INTERVENTION SHOULD BE AUTHORIZED.**
  - a. This encourages prompt alcohol education in custodial situation.
14. **PROFESSIONAL LICENSES NOT SANCTIONED FOR 1<sup>ST</sup> OCCURRENCE (§1) - SUPPORTED.**
15. **MODIFICATION OF PHYSICIAN PATIENT PRIVILEGE FOR REFUSAL TO TAKE TEST (§43) - OPPOSED.**
  - a. There is no nexus between treatment and a refusal to take a test since no test is being conducted.

Thank you for your consideration of this outline. I am concerned that the state simply cannot afford the punitive enhancements of the increased penalties of the proposed DUI legislation.

Sincerely,



Douglas E. Wells

DEW/teb

**House Judiciary Committee**  
**January 27, 2011**  
**Testimony of the Kansas Association of Criminal Defense Lawyers**  
**in opposition to SB 7**  
**(criminalization of refusals)**

The Kansas Association of Criminal Defense Lawyers is a 300-person organization dedicated to justice and due process for those accused of crimes. For the reasons set forth below, **KACDL is opposed to that portion of Senate Bill 7 which would criminalize the refusal to submit to a breath, blood or urine test when requested by law enforcement.**

**I. NEEDLESSLY INCREASING THE SIZE OF GOVERNMENT**

**In a time when many Kansans are concerned about the size of government and its intrusion on the lives and liberty of citizens, it seems odd to create a whole new crime and a whole new class of people now branded as criminals in our state.** The option to refuse to consent to testing by government agents has a long history in Kansas, and has been recognized by the legislature and Kansas courts for many years. *See, State v. Compton*, 233 Kan. 690, 694 (1983) (“The taking or refusing of a breath test is an option provided by the legislature.”). Kansans generally believe in individual liberty and the dignity of an individual’s right to determine whether or not to volunteer for a warrantless search of his or her person.

The government already has an enormous amount of power in the situation in which an individual is under arrest for DUI. **Currently there are fairly drastic consequences to a driver if he or she refuses testing, including the suspension of the driver’s license to operate a vehicle and the use of the refusal against the person at a trial.** “The purpose of the implied consent law is to coerce submission to chemical testing through the threat of the statutory penalties of license revocation and the admission into evidence in a DUI proceeding of the fact of refusal.” *Furthmyer v. Kansas Dept. of Revenue*, 256 Kan. 825, Syl. ¶ 1, 888 P.2d 832 (1994). The legislature has already treated refusals differently than completed breath, blood or urine tests. KSA 8-1001(k)(4) & (5). These harsher penalties for refusals are not just administrative, but are imposed as a result of criminal convictions, as well. K.S.A. 8-1014. An individual who is convicted of a DUI in a criminal case generally will be suspended for longer if he or she refused a test than if he or she submitted to and completed a test. Thus, a driver is already under considerable coercive governmental pressure to submit to test when requested. **The threat of charging a person with a separate crime carrying more drastic consequences than those for a DUI is not necessary. It seems clear that creating the new crime of refusing to submit to testing is solely for the purpose of facilitating law enforcement and prosecutors - to make a conviction easier to obtain – not for the purpose of insuring the safety of the motoring public.** There is no relationship between the criminalizing of refusals and safe driving.

Testimony of Kansas Association of Criminal Defense Lawyers  
in Opposition to Senate Bill 7

SB 7 would amend KSA 8-1501 to add test refusal to the list of crimes that apply on private property. So, if a person was arrested for a DUI which occurred on his private land, say while mowing the lawn, despite there being no actual threat to the safety of the public on the public highways, he would still be convicted of this new law if he later refused a test. **This is government overreaching and implicates governmental intrusion into the homes and private property of individuals.**

## II. MAKING REFUSING A "STRICT LIABILITY" CRIME IS UNFAIR

The proposed legislation would make the refusal of a test a "strict liability" offense. *See*, Section 28 of DUI Commission Conclusions and Recommendations, amending Sec. 14 of 2010 SL Ch. 136. Thus, there is no "*mens rea*" requirement. **The law would require no intention to refuse, nor that the refusal be unreasonable in any way.**

### *a. Persons with Medical Conditions*

A person who in good faith attempts to take a test but cannot complete it due to a medical condition like asthma or emphysema would be guilty of this crime. There is no exception or defense to this crime for a medical condition not related to the ingestion of alcohol. A person who was not able to urinate on command could be liable for this offense despite a desire to comply.

### *b. Persons with Disabilities or Language Barriers*

A person who is deaf or speaks a foreign language and is not able to understand the Implied Consent Advisories, including the new advisories concerning a test refusal being a crime carrying harsher penalties than a DUI charge (Section 11 of DUI Commission Recommendation to amend K.S.A. 8-1001), will still be convicted of the crime of refusing even if he or she truly did not understand the advisories and ramifications of taking or refusing a test, or is unable to articulate his or her consent to a test. Previous Kansas cases have held that the Implied Consent Advisories need only be provided to the deaf or a foreign language speaker, regardless of his or her ability to hear or understand the same, in order to make a breath test admissible or to suspend the driver's license. *See*, State v. Bishop, 264 Kan. 717, 957 P.2d 369 (1998) (deaf-mute), and Kim v. Kansas Dept. of Revenue, 22 Kan.App.2d 319, 916 P.2d 47 (1996) (Korean-speaking immigrant). However, neither one of these cases dealt with the Constitutional implications of convicting a person of a crime when he or she clearly cannot understand the Implied Consent Advisories. There is a big difference between making evidence admissible, or suspending the privilege to drive, and convicting an individual of a crime for refusing a breath test. Clearly, broader legal protections should apply to these individuals before they are made convicted criminals. Many attorneys cannot understand the Implied Consent Advisories nor are aware of all of the nuances in the DUI laws concerning test failures, test refusals, deficient samples and the right to obtain independent testing in some situations and not others. Expecting persons suffering under a disability or who are not fluent in English to do so is not reasonable.

Testimony of Kansas Association of Criminal Defense Lawyers  
in Opposition to Senate Bill 7

*c. Religious Objections and Other Innocent Reasons*

There are certain religions that prohibit or discourage consenting to procedures involving blood. For instance, Jehovah's Witnesses believe that "blood represents life and is sacred to God. It is reserved for only one special use, the atonement for sins." That is why Jehovah's Witnesses will not permit blood transfusions. A Jehovah's Witness who violates this prohibition is automatically disassociated from the church. Christian Scientists also have a prohibition on medical intervention in the body, including blood products or blood transfusion. Under the proposed law, persons who refuse a blood test due to a religious belief, even if they agreed to a breath or urine test in the alternative, would be guilty of a crime.

There are other innocent reasons that a person might refuse a test, including:

- a. General confusion as to rights or responsibilities with respect to testing;
- b. Lack confidence in the machine used for testing, or lack of understanding as to how it works;
- c. The mistaken belief that one has a right to an attorney, or the desire to speak to an attorney;
- d. Prior advice from an attorney, law enforcement officer or other person not submit to a test;
- e. The belief that the government cannot force a person to submit to a test, or that a warrant is required;
- f. Distrust of the officer or issues related to an officer's attitude;
- g. A belief that the stop or his or her arrest was not valid.

Of course, it is possible that a test may not be completed because the breath testing device was broken or malfunctioned. Incomplete tests are considered to be refusals under Kansas law. State v. Herrman, 33 Kan.App.2d 46 (2004); *See also*, Call v. Kansas Department of Revenue, 17 Kan.App.2d 79, 831 P.2d 970 *rev. denied* 251 Kan. 937 (1992). Thus, a person could be convicted of refusing a test when the "refusal" was due in no part to his or her attempt to frustrate the testing procedure.

Again, this law creates **strict liability** for refusing a test, regardless as to whether that refusal was unavoidable (i.e., medical condition), innocent (i.e., due to disability or lack of fluency), or arguably reasonable (i.e., religious belief). **This is patently unfair and possibly unconstitutional.** Criminalizing the actions of the disabled, the deaf, religious people, or those who are simply confused, wrong or unable to read or understand English is not consistent with Kansans' values.

### III. INCREASED LITIGATION AND COSTS TO TAXPAYERS

Criminalizing refusals will likely mean more drivers will submit to breath tests. This means an increase in litigation concerning the admissibility of breath tests in the form of pre-trial motions. It also means more bench and jury trials in which breath test results will be admitted, requiring both the defense and State of Kansas to hire expert witnesses to testify as to the reliability of the breath test result in a particular case. This, of course, means longer trials. It will be much more expensive for the State of Kansas to litigate a DUI case with a test result, and more expensive for the courts to conduct these longer trials. In test refusal cases, the defendant will be charged with both the DUI and the separate crime of refusing a test. This also means longer trials in which the State will have to prove the separate offense and the defense will have to attack the alleged refusal.

A defendant may be acquitted of the DUI but still get convicted of the refusal, or vice-versa. The incarceration penalties for a refusal are longer than the penalties for a DUI. Since the aim of this proposed new crime seems to be to insure that there is a conviction for something in the situation where a person refuses a test, there will be more defendants in jail, and for longer periods. If a person gets convicted of both crimes, the sentences could be run consecutively and may, in fact, have to be run consecutively since each different crime has mandatory minimums. Most courts are likely to require that a person serve each mandatory minimum consecutively as opposed to concurrently.

Although the proposed law would allow a prosecutor to "plea bargain" away the refusal if the person pled to DUI, there is nothing that would *require* a prosecutor to dismiss a refusal in exchange for a plea to the DUI. A prosecutor could insist on a plea to both. More likely, since a conviction for a refusal will be easier to get than a conviction for a DUI in some cases, a prosecutor may be likely to require a plea to the refusal as opposed to the DUI in order to get a longer jail sentence. Or, plea bargain away the refusal in exchange for a plea to the DUI, but require the increased jail sentence that a refusal would have carried. The Johnson County District Attorney's Office already requires, as a matter of policy, a sentence of 5 times the minimum jail sentence on a 3rd time DUI (10 days in jail rather than the minimum 2, followed by house arrest) for those who elect to plead guilty. It is likely that some prosecutors will be holding out for even more jail time having the hammer of the refusal, with its increased jail penalties and fines, to hang over the heads of defendants. Again, this leads to increased costs of incarceration.

A conviction for a refusal, when the person has 2 prior DUI convictions (there is a lifetime lookback on these) would be treated as a conviction of a level 7 G felony, and there shall be no durational or dispositional departures. A 7G requires a prison sentence of 15 to 17 months in prison, (with the sentence lengths increasing based on additional prior convictions and criminal history). This alone will require a lot of prison bed space. Felony refusal convictions will result

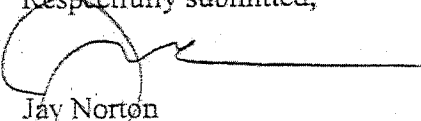


in a phenomenal increase in people in prison. This also means putting DUI offenders in prison with violent offenders and career criminals, which may likely lead to diminishing returns which cost our society more in the long run.

### CONCLUSION

The criminalization of refusals is primarily to facilitate law enforcement and make convictions easier to obtain. However, it also exponentially increases the odds that innocent persons get convicted of a test refusal because of a misunderstanding, medical condition, disability, language barrier, religious belief or some other reason unrelated to intoxication by alcohol or drugs. This is an enormous expansion in the size and power of the government over the individual and his or her personal freedom. There are already harsher consequences in place for refusing a test of breath, blood or urine, and the State of Kansas has had little difficulty obtaining convictions in DUI cases, including those cases in which a person refuses a test, given that the same is admissible and may be used to infer a person's guilt. This law is unnecessary and will be expensive.

Respectfully submitted,



Jay Norton  
[jay@nortonhare.com](mailto:jay@nortonhare.com)  
(913) 906-9633  
On behalf of KACDL

Testimony of Kansas Association of Criminal Defense Lawyers  
in Opposition to Senate Bill 7

**Senate Judiciary Committee  
Thursday, January 27, 2011  
Testimony on SB 7**

Good morning Chairman Owens and Members of the Senate Judiciary Committee. I am Sky Westerlund, Executive Director of the Kansas Chapter, National Association of Social Workers. Thank you for the opportunity to share our opposition to a narrow provision in Section 12 of SB 7.

Overall, KNASW supports the goal of SB 7 and commends the DUI Commission and Judiciary Committee for its work to reduce drunk driving. However, Section 12 of the bill is problematic because it creates a new license of a provider with a "DUI Specialty" and who is licensed by the Secretary of Social and Rehabilitation Services (SRS). These persons are then designated, under the bill, to perform alcohol and drug evaluations for the court. The new license conflicts with the licensure practice acts of Social Workers and others licensed by the Behavioral Sciences Regulatory Board (BSRB). When I discovered this conflict, I contacted the Revisor and two members of the DUI Commission who had studied the issue of who should be performing the required alcohol and drug evaluations. I suggested that, to correct the problem, the bill should be amended to reference the licensed providers who are licensed by the BSRB and who could demonstrate an expertise in the field of addictions treatment. The two members of the DUI Commission agreed.

To fix this conflict, KNASW recommends that any place in the bill where it says, "licensed provider with a DUI specialty" it should be replaced with the following language:

*A licensed provider is an individual licensed by the behavioral sciences regulatory board to diagnose and treat mental disorders at the independent level or an individual who is licensed by the behavioral sciences regulatory board under the supervision of a licensed provider who is licensed by the behavioral sciences regulatory board at the independent level and who can demonstrate an expertise in the field of addictions through either addictions licensure, professional credential, or continuing education.*

I am happy to work with the members of the DUI Commission and the Revisor's office to amend the language and correct the problem. Thank you.



*Kansas  
Licensed  
Beverage  
Association*

**CEO  
Philip Bradley**

**P.O. Box 442066  
Lawrence, KS  
66044**

**785.766.7492  
[www.klba.org](http://www.klba.org)  
[info@klba.org](mailto:info@klba.org)**



Testimony on SB 7  
Senate Judiciary Committee on January 27, 2011

Mr. Chairman, and Senators of the Committee,

I am Philip Bradley representing the Kansas Licensed Beverage Association. The KLBA represents the interests of the men and women in the hospitality industry, who own, manage and work in Kansas bars, breweries, clubs, caterers, hotels, and restaurants. These are the places you frequent and enjoy with the tens of thousands of employees that are glad to serve you. Thank you for the opportunity to speak today and I will be brief.

We are here to ask for modification of this measure. My appearance does NOT indicate that we support drunk driving nor does it indicate that we oppose DUI laws. I have testified before this committee in the past for our members in favor of reasonable statutes and penalties and we still hold those positions.

In fact, there is a model bill, supported by law enforcement agencies, the judiciary and others in many states. It has been adopted as the model, by ALEC. Even the industry supports it. We support that model bill and urge its adoption.

Failing that we ask the committee several questions and ask you to make changes to address these issues.

First, what is the definition of "professional"? And why only those licenses and permits protected in this measure. There are many livelihoods, jobs and businesses dependent upon KS granted licenses and permits. Why a distinction? Who are you trying to punish while protecting others? Does indicate some persons or businesses are privileged?

We oppose creating a crime of refusal. I am not an attorney, but it seems this raises issues of self incrimination and challenges other rights? I am certain others will address this further.

Oppose taking out all judicial discretion in a time that we are trying to keep folks at work we need give the judiciary to use their ability of the to make the choices that are best in the many varying situations. We support the inclusion of DUI Courts and Judicial Discretion and there expansion as the best tool to reduce, retrain and return citizens to a safe law-abiding life.

We believe that even current law is not being evenly enforced and that sentences of interlocks are not being adhered to now. National statistics show that, under current law, only 9-10% of those sentenced to IID's actually comply. The new language will throw thousands (if not 10s of thousands) of new cases into the KS judicial pot putting those in charge of compliance into a situation where they will be unable to assure compliance of even those who are multiple offenders and over .15 let alone all those newly proposed.

**Drink Responsibly.  
Drive Responsibly.**

Senate Judiciary  
1-27-11  
Attachment 4

It will create a real headache for probation officers and others who are responsible for such matters. Shouldn't we require an accurate report of current conditions and then if you still feel expansion necessary the include language requiring reporting and a minimum percent (ideally 100%) compliance? And it should require an explanation of failure. We would ask and urge you to do so, putting measureable performance standards in place.

And what is the cost. Especially what is the cost to the local counties and cities? What is the fiscal note? Many of your local officials -Mayors, County & City Commissioners, budget officers, and judges are not aware of the fiscal problems that, if enacted, this policy would create.

Proponents of this language nationally have been informing Congressional lawmakers that the proposal is revenue neutral due to the fact that DUI offenders would pay for the IIDs, as well as installation and maintenance costs for the duration of their use. That simply is not accurate. Please reference the letter attached from the American Parole and Probation Association (APPA) written when federal legislation proposed expanding interlocks on all offenders.

Please note, beginning with the third paragraph, the compliance/enforcement difficulties currently faced by probation officers due to "...excessive caseloads and unmanageable workloads". Page two begins with the statement that, "States and localities will bear the burden of the cost of an adequate workforce to ensure compliance." Following that statement is an analysis showing the overall financial burden nationally to be conservatively \$432,165,306. And the proposals in SB 7 are even more extreme. This "unfunded mandate" of almost a half-billion dollars is not something local officials are going to sit-by quietly and accept from Congress nor should local governments and judiciaries accept these without being fully funded by the state imposing these mandates.

This caused such concerns that prominent during the last session US Senator Feingold member of Senate Ways and Means Committee wrote the attached letter asking the Congressional Budget Office (CBO) to report on the cost of such mandates. Believe you will find his concerns compelling.

And speaking of costs, there has been much made of the costs of the indigent being paid by the industry and yet I haven't found that language in the bill. If that is what we are depending on then these "scholarship" funds should be put forth in advance and the Judiciary should determine those that qualify and make appropriate allocations.

We also ask the committee to consider the attached causes of accidents as compiled by KDOT. We do not minimize the role of illegal and inappropriate alcohol use we condemn it. We also recognize that there are other causes that are involved it exponentially greater number of accidents and ask the committee to consider if the same penalties and resources should be applied to those that account for so many more accidents injuries and fatalities.

**The issue of drunk driving is important to all of us. So too, is finding the right mix of prevention, technology and policies to stop it.**

Thank you for your time.

Philip Bradley



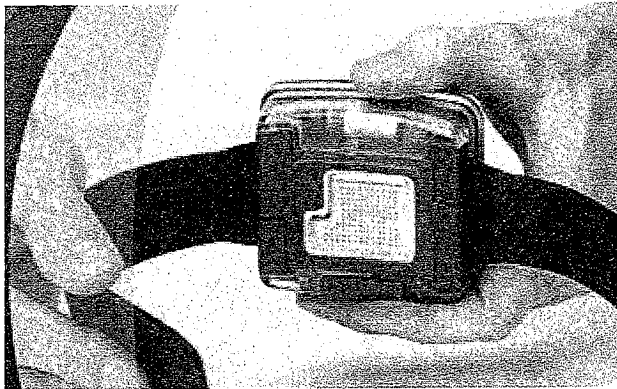
**Drink Responsibly.**  
**Drive Responsibly.**

4-2

## **What's Wrong With Ignition Interlocks**

**We spent yesterday with about 50 officials – criminal justice, treatment and industry – who gathered to talk about how technology can change the way the criminal justice system deals with alcohol misuse.**

*The Beverage News Daily*  
November 11, 2009



Public officials are excited by technology like SCRAM alcohol monitors, which detect alcohol use continuously through the skin, because they offer the prospect of being able to avoid putting many nonviolent offenders in prison, thereby greatly reducing costs to the taxpayers as well as offering the hope of changing behaviors.

National Partnership on Alcohol Misuse & Crime. Council and Beam Global Spirits & Wine.

But there are problems, speakers told the Sponsors of the Partnership include Century

Industry participants in its meetings, in addition to the sponsors, include Anheuser-Busch, American Beverage Licensees, Distilled Spirits Council and National Beer Wholesalers Association.

One problem is that that many offenders do a cost-benefit analysis – in essence, “If I drink, even though I’m not supposed to, what are the odds I’ll get caught and what additional punishment will I get?” – Brad Kilmer, co-director of the RAND Drug Policy Research Center, said direct surveillance technology “can make alcohol use by offenders prohibitively expensive” because it can pick up every infraction.

Robyn Robertson, CEO Traffic Injury Research Foundation, said:

“We pay lip service to behavior change, but don’t practice it well. At the end of the day, we always sacrifice rehabilitation for punishment.”

Offenders that abuse alcohol often suffer from neuro-cognitive deficits, which makes it difficult for them to change their behavior, she said. The main problem: They aren’t able to delay reward gratification. “It’s easier for them to drink today, to drive today, and if they don’t have a license, too bad.”

Most ignition interlocks are “simply aimed at separating drinking and driving, not at changing behavior,” she said.

Partly that's because officials simply don't have enough money or people to monitor abstinence. And if they do monitor abstinence, they get a lot more "fails," which means the workload goes up even more.

In a study of 7000 offenders that when monitored for abstinence with appropriate follow-up, the failure rate went down but the BAC level also went down."

"Technology is a supervision tool, not a substitute for supervision," Robertson said. "There's the perception that if you just stick the interlock in the car you're done."

Illinois has adopted a strategy of putting ignition interlocks in vehicles of first offenders rather than just repeat offenders. Given inadequate resources, there's no follow-up.

"All the offender learns is that if I'm noncompliant, there's no consequence other than I can't start the car," she said.

**Officials need to figure out who should get interlocks. "We just can't afford to do everybody," she said.**

Officials need to integrate technology and treatment, she said. "All the data collected by technology can be of greatest value to the treatment community.

"If we continue on the same path, we can expect continued poor outcomes," Robertson said, citing a New York State study that found DWI offenders were drinking and driving every day. "Fees and licenses suspensions aren't much of a deterrent," she said.

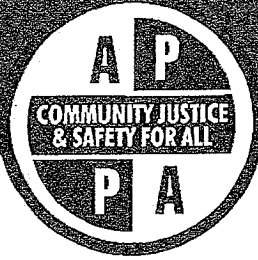
"We need changes to current practices," she said. "If we keep doing what we're doing, we're not going to make progress."

Strategy: As jurisdictions adopt interlock technology, the industry needs a good strategy, other than just saying "no." We think that strategy ought to be based on two principles:

First, interlocks should be installed only if there is a comprehensive treatment strategy attached to it.

Second, because governments can't afford to monitor every DWI offender, interlocks should be installed only in the cars of repeat offenders.

# American Probation and Parole Association



July 20, 2009

**APPA HEADQUARTERS**  
c/o The Council of State Governments  
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E-mail address: [appa@csg.org](mailto:appa@csg.org)

The Honorable Jim Oberstar  
The Honorable John Mica  
The Honorable Peter DeFazio  
The Honorable John Duncan  
The Honorable Charles Rangel  
The Honorable Dave Camp

**PRESIDENT**

Gary Hinzman  
Iowa

Dear Representatives:

**PRESIDENT-ELECT**

Barbara Broderick  
Arizona

The American Probation and Parole Association would like to express its concern with the early intention to include penalties for states that do not have laws requiring ignition interlocks for all driving while intoxicated (DWI) offenders. This potential requirement is problematic and troubling on several levels.

**VICE-PRESIDENT**

Carmen Rodriguez  
Illinois

Ignition interlock is indeed a promising technological tool that can aid in reducing drunk driving behavior. However, it is only a *tool*. There is no credible evidence that ignition interlocks by themselves can have a positive impact on long-term recidivism. In short, ignition interlocks are not a program but one tool in a necessary comprehensive response that may be used to produce behavior change in DWI offenders. There are evidence-based responses that are shown to change substance abusing behaviors. Additionally, R. Gail Kerlikowske, Director of the Office of National Drug Control Policy recently stated that his office would be, "working to ensure drug abuse treatment services are incorporated into our national health care reform process", indicating his understanding that treatment of substance abuse is needed and vitally important to the health and safety of our nation. These responses require a balance of monitoring, intervention and treatment. Ignition interlocks are only one potential tool in the monitoring aspect of an evidence-based response. Pushing states to put an inordinate amount of the focus on such a limited aspect may result in some minor short-term success, but is not likely to have a lasting impact on public safety.

**SECRETARY**

Julie Howe  
Ohio

**TREASURER**

James Birrell  
New York

**AT-LARGE REGIONAL  
REPRESENTATIVES**

Linda Layton  
Georgia

Tom Roy  
Minnesota

Enforcement of court-ordered ignition interlocks has been spotty at best. Simply ordering offenders to have an interlock system installed is no guarantee that they will comply. Compliance has been a problem in nearly every area where the technology has been introduced. A workforce of probation officers is needed to ensure compliance with court-ordered ignition interlocks. Probation officers nationally already have excessive caseloads and unmanageable workloads.

**AT-LARGE AFFILIATE  
REPRESENTATIVE**

Carl Fox  
Arizona

**EXECUTIVE DIRECTOR**

Carl Wicklund

States and localities will bear the burden of the cost of an adequate workforce to ensure compliance.

Furthermore, requiring ignition interlocks for all DWI offenders is an unnecessary and costly response. The FBI 2007 Uniform Crime Report arrest data shows 1,114,805 people were arrested for DWI and a Fell/MADD symposium reports a conviction rate of 71-86%. Adding ignition interlock devices to all these convictions, above the cost of community supervision, has the potential to create skyrocketing costs. Estimating very conservative costs of \$3/day for the supervision of an individual on probation for a DWI, results in estimated expenditures to states and localities of \$432,165,306 (71% of 1,114,805 X \$3 at a conservative average of 182 days or six months supervision). Certainly, we would not argue against the use of ignition interlock devices for the hardcore DWI offender – those with high blood alcohol content or a repeat offender. However, many first time DWI offenders will not recidivate. Allowing the justice system to respond in an efficacious and discretionary manner by assessing the risk of re-offending and tailoring sentencing conditions to an individual's unique circumstances and propensity to drive drunk is a much wiser use of tax payer monies. Demanding the use of ignition interlocks for all DWI offenders will effectively drain resources from and distract the judicial systems' and probation departments' efforts to deal with other high risk offenders – e.g. domestic violence, sex offenders, gang members.

No state – including New Mexico which requires the use of ignition interlocks for all DWI offenders – has the infrastructure in place or the resources currently (or in the foreseeable future) to implement such a far-reaching requirement. Also, there is a lack of certified and available instrument installers and people able to regularly recalibrate the alcohol sensors.

Not all offenders will have the ability to pay for ignition interlocks and the cost will have to be borne by either state or local government entities for those that do not have the means to pay. Further, the myriad costs realized by DWI offenders through fines, fees, surcharges, treatment and increased insurance can create a financial hopelessness or further damage one's ability to meet everyday financial obligations and needs – e.g. child support, rent, food. A recent survey by Open Society/Lake Research Partners reveals that nearly half of U.S. adults say they cannot afford alcohol or drug treatment if they need it<sup>1</sup>. Additional fees for ignition interlocks may force many to never seek treatment for a substance addiction potentially leading to recidivism. To this end, further burdening DWI offenders with additional financial burdens related to ignition interlocks should be reserved for the most serious offenders or hardcore drunk drivers.

Sincerely,



Carl Wicklund  
Executive Director

<sup>1</sup> CESAR FAX, Vol. 18, Issue 27, July 13, 2009. Center for Substance Abuse Research, University of Maryland.

<sup>11</sup> [http://www.soros.org/initiatives/treatmentgap/research/poll\\_20090616](http://www.soros.org/initiatives/treatmentgap/research/poll_20090616)



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COMMITTEE ON THE BUDGET  
COMMITTEE ON FOREIGN RELATIONS  
COMMITTEE ON THE JUDICIARY  
SELECT COMMITTEE ON INTELLIGENCE  
DEMOCRATIC POLICY COMMITTEE

## United States Senate

WASHINGTON, DC 20510-4904

July 14, 2010

Douglas W. Elmendorf  
Director  
Congressional Budget Office  
Ford House Office Building, 4th Floor  
Second and D Streets, SW  
Washington, DC 20515

Dear Director Elmendorf:

Several of my constituents have expressed concern about the impact that an interlock ignition federal mandate may have on states, local governments and private citizens.

Attached is a letter from the American Probation and Parole Association that describes my constituents' concerns about the potential ramifications of requiring states to implement mandatory ignition interlock requirements by tying highway funding to whether a state has such a state law. While I understand that this condition on federal funding may not technically meet the unfunded mandate definition that you use for reviewing legislation, I would appreciate any estimate of the impact that implementing such a requirement would have, as well as an analysis of which states would be in jeopardy of losing highway funding without a change in state law so that I can share this information with my constituents. Similarly, if you have information on other previously enacted mandates tied to highway funding that resulted in reduced funding for particular states – such as those dealing with helmets for motorcyclists and criteria relating to driving under the influence infractions -- it would be of interest as well.

Thank you for considering this request. Should you have further questions feel free to contact Mike Schmidt (ph. 202-224-5323; [mike\\_schmidt@feingold.senate.gov](mailto:mike_schmidt@feingold.senate.gov)) in my office.

Sincerely,



Russell D. Feingold

47

## Contributing Circumstances

	Category	Contributing Circumstance (top 40)	Frequency*	% Total
1	DRIVER	Inattention	20,129	26.3%
2	DRIVER	Failed to yield right of way	7,846	10.2%
3	DRIVER	Too fast for conditions	7,397	9.7%
4	ENVIRONMENT	Animal	6,764	8.8%
5	DRIVER	Followed too closely	4,272	5.6%
6	DRIVER	Disregard traffic signs, signals, markings	3,262	4.3%
7	DRIVER	Under the influence of alcohol	2,893	3.8%
8	ONROAD	Icy or slushy	2,646	3.5%
9	DRIVER	Improper lane change	1,843	2.4%
10	DRIVER	Made improper turn	1,763	2.3%
11	DRIVER	Avoidance or evasive action	1,750	2.3%
12	DRIVER	Reckless/Careless driving	1,704	2.2%
13	DRIVER	Improper backing	1,617	2.1%
14	ENVIRONMENT	Rain, mist, or drizzle	1,299	1.7%
15	ONROAD	Wet	1,173	1.5%
16	ENVIRONMENT	Falling snow	945	1.2%
17	DRIVER	Exceeded posted speed limit	856	1.1%
18	DRIVER	Other Distraction in or on vehicle	832	1.1%
19	DRIVER	Fell asleep	672	0.9%
20	DRIVER	Wrong side or wrong way	663	0.9%
21	ONROAD	Snowpacked	654	0.9%
22	ENVIRONMENT	Sleet, hail, or freezing rain	529	0.7%
23	DRIVER	Did not comply - license restrictions	461	0.6%
24	DRIVER	Ill or medical condition	457	0.6%
25	DRIVER	Improper passing	443	0.6%
26	DRIVER	Distraction - mobile (cell) phone	394	0.5%
27	ENVIRONMENT	Strong winds	373	0.5%
28	ENVIRONMENT	Vision obstruction: glare from sun or headlights	350	0.5%
29	DRIVER	Aggressive/Antagonistic driving	302	0.4%
30	DRIVER	Under the influence of illegal drugs	290	0.4%
31	ONROAD	Debris or obstruction	277	0.4%
32	VEHICLE	Brakes	272	0.4%
33	VEHICLE	Tires	271	0.4%
34	ENVIRONMENT	Vision obstruction: building, vehicle, objects made by humans	244	0.3%
35	DRIVER	Unknown	202	0.3%
36	ATROAD	Icy or slushy	192	0.3%
37	VEHICLE	Wheel(s)	150	0.2%
38	VEHICLE	Cargo	140	0.2%
39	PEDESTRIAN/CYCLIST	Inattention	132	0.2%
40	DRIVER	Improper or no signal	128	0.2%

\*More than one Contributing Circumstance may be recorded per accident

January 27, 2011

Testimony Opposing SB 7  
By Karl Peterjohn, Sedgwick County Commissioner  
District 3

Kansas citizens need to be protected from law breakers and SB 7 is an effort to address one aspect of the crime problem in this state involving DUIs. Sadly, this effort is flawed since this bill expands the use of county jails for housing felons.

Legislation like SB 7 should be revised so it will not impose additional costs onto counties. SB 7 continues to weaken or may even eliminate the division between convicted felons that are serving their sentences in the KS Dept. of Corrections and convicted misdemeanants who are incarcerated in county jails.

The fact that a sizable number of people have been convicted of felony crimes and are serving their sentences in county detention facilities is common today. This is a factor in raising property taxes in Kansas. The most recent figures I have indicate that in 2010 there were 175 people serving felony sentences in Sedgwick County.

The cost of housing an inmate in the Sedgwick County jail that includes all costs is approximately \$66 a day. The annual cost for 175 people is over \$4.2 million. Statewide, the property tax cost could be close to an order of magnitude higher.

There are a number of felons who have been convicted of other charges besides DUI convictions who are serving their sentences in the Sedgwick County jail. I have been told by other county commissioners that their jails are also housing felons assigned there under Kansas law.

This raises an equal protection problem. The Secretary of Corrections can waive a significant portion of felony sentences for "good time," behavior by inmates. I believe that is as much as 20% of the sentence. There is no good time for felons serving sentences in county jails. This creates a significant inequity for felons sentences and raises basic fairness questions that are often litigated in federal courts under violations of the equal protection provisions of the 14<sup>th</sup> Amendment.

The state has already started turning county jails into a subsidiary of the Kansas Department of Corrections and does so without paying for this cost. This is transforming justice in Kansas at several different levels and is creating significant problems for county government as well as everyone who pays local property taxes for detention in this state.

If the state wishes to continue or expand the practice of housing felons in county jails under legislation like SB 7, then there should be a payment to the local government housing these felons that covers the full cost of their incarceration. This would improve SB 7 and eliminate this primary objection.

Senate Judiciary

1-27-11 ~~1-12-11~~

Attachment 5

A jail fee is common for municipalities to pay to counties in Kansas. This is imposed for convicted misdemeanants of municipal charges. The state should do the same when it houses its felons outside the Kansas Department of Corrections.

The state tracks the number of felons in the Department of Corrections. The state needs to track and make public the total number of felons who are incarcerated and serving sentences in Kansas regardless of their location inside or outside of the direct control of the Kansas Department of Corrections. These numbers need to be regularly compiled and made available to Kansas taxpayers.

This testimony is solely my own comments, but this problem with felons being housed in county jails has been included in both the Sedgwick County legislative platform for 2011 as well as the current Kansas Association of Counties legislative platform.

**House Judiciary Committee**  
**January 27, 2011**

**Testimony of the Kansas Association of Criminal Defense Lawyers**  
**in Opposition to SB 7**  
**(cost assessment/alternatives)**

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**This testimony focuses on the need for a cost assessment for this bill. There are extensive costs associated with some provisions of this bill, while cheaper and more effective ways to reach the desired goals exist. Some of the more obvious additional expenses include:**

- 1) Shifting the burden of responsibility for Breath Test Refusal from the Driver to the Taxpayer
  - 2) Shifting the financial burden of housing DUI offenders from the locality of the offense to Kansas as a whole (i.e. Taxpayers in Wakeeney, Ellsworth, and Scott City will now have to pay to house DUI offenders from Johnson, Wyandotte, and Sedgwick Counties)
  - 3) Significantly increasing indigent defendant costs through the BIDS system
  - 4) Longer and more expensive jury trials for DUI
  - 5) Additional jury trials for Criminalizing Refusal
  - 6) The need for additional and expensive jail space at both the local and state level for Criminalizing Refusal and for DUI
  - 7) Contentious and expensive civil litigation for discrimination
  - 8) Cities Defaulting DUIs to the counties for inability to meet new evaluation criteria
- 

**1. Shifting the Burden to the Taxpayers**

- a. Under the current law refusal is a civil penalty. SB 7 would criminalize refusals, which would have a greater penalty than DUI.
- b. In Jan.-Oct. 2010, there were 4,291 refusals and in 2009, there were 5,590 refusals, according to the Sentencing Commission's bed impact statement. The statement projects that felony refusals will generate 707 new prison admissions in FY 2012 (with a minimum of 353 and a maximum of 570 additional prison beds required). According to the DOC's FY 2010 Annual Report (pg. 18), the per capita operating cost – not counting medical care or mental health services – was a minimum of \$17,463/inmate.
- c. Placing Felony Refusals on the Sentencing Grid will create no incentive to plea as judges will have very little sentencing discretion (15-17 months for 7G, with sentences increasing as severity level increases) and prosecutors will have little to offer.

- d. **Cost: a minimum of \$12.3 million (not including the cost of building/opening 353-570 additional prison beds and the cost of DOC programming under SB 7) in the first year alone, shifted to Taxpayers (but likely much higher)**

2. More jail space required at the local level, thus further shifting costs to Taxpayers

- a. Adding Refusal as an additional crime – even as a misdemeanor – with its accompanying minimum mandatory sentence, will create the need for a phenomenal increase in jail space.
- b. There were 10,965 DUIs in the Municipal Courts in 2010.
- c. The cost for jail space varies in each county. Overland Park is charged \$38 per day. However, some cities in Kansas are charged \$78 or \$100 or more per day.
- d. If only 25% of first offenders refuse, then 2,741 people will have to be housed for additional time in county jails for misdemeanors.
- e. **Cost: for 5 days each at \$78 would be \$1,068,990 in the first year alone (but likely much higher)** (considering second offenders, sentences can be more than the minimums and varying jail costs)

3. Additional Jury Trials for Criminalizing Refusal.

- a. Threatened with Criminal Refusal, Defendants will be incentivized to fight DUI test results.
- b. Attacking the science and the machine directly (Kansas very lax compared to most states) will result more time in court – longer trials with more witnesses and experts.
- c. The State will need to produce its own experts on a more frequent basis creating far more expense.
- d. **Cost: Unknown, but preventable**

4. Contentious and expensive civil litigation for discrimination.

- a. The Deaf, intellectually disabled, and those who don't speak English as a primary language will be incarcerated for not understanding – this will likely lead to contentious and costly litigation for discrimination. This cost will be to the Taxpayers.
- b. Making refusal a Strict Liability crime will further discriminate against these groups.
- c. **Cost: Unknown, but preventable.**

5. Significantly increasing indigent defendant costs through the BIDS system

- a. Many in the BIDS system have mental health or other cognitive problems and will not understand the ramifications of refusing.
- b. The number of indigent defendants will increase with more charged with Criminal Refusal.
- c. BIDS will need additional funding for experts and attorneys.
- d. **Cost: Estimate is additional \$1.2 Million first year.**

6. Shifting the burden of housing away from the locality of offense

- a. Currently, offenders serve time locally with some sentencing discretion by the Court.
- b. DUI arrests are much more numerous in the eastern part of the State. However, Taxpayers in the western part of the State will also now bear the burden of housing eastern state offenders in state institutions. Currently housing occurs and is paid for where the arrest occurs.
- c. DUIs housed in the penitentiary will require significantly more space (855 new admissions in the first year, according to the Sentencing Commission's bed impact statement, with additional prison beds needed being between 422-687) and cost the Taxpayers significantly more money. Again, the per capita operating costs – not counting medical care or mental health services – were a minimum of \$17,463/inmate.
- d. **Cost: no less than \$15 Million (not including the cost of building/opening 422-687 additional prison beds and the cost of DOC programming under SB 7) in the first year alone, shifted to Taxpayers (but likely much higher)**

7. Longer and more expensive jury trials for DUI.

- a. 4<sup>th</sup> and higher felony DUIs would be on the grid with only a few months difference between maximum and minimum penalty.
- b. There will be little or no incentive to plea as judges and prosecutors will have very little discretion as to sentence offered or imposed.
- c. More and longer trials with experts will occur with significant cost to the Taxpayer.
- d. Even 3<sup>rd</sup> offense cases will be much more likely to go to trial to prevent a conviction that placed the defendant in the doorway of a future trip to the Penitentiary.
- e. **Cost: Unknown, but preventable**

## 8. Many Cities Will Default on DUIs

- a. SB7 requires that cities must use a standardized risk assessment tool which must be approved by SRS and Kansas Sentencing Commission.
- b. The only such tool is the LSIR, which takes about 2 hours to administer.
- c. Many cities will be unable to meet the criteria because of the July 1 deadline and the expense. This will necessitate more DUI cases in the county courts. As a result, many cities will lose revenue and many counties will need additional prosecutors and court time to handle a greatly expanded caseload.
- d. **Cost: Unknown, but preventable**

## 9. Better and Cheaper Alternatives

- a. Criminalizing Refusal is unnecessarily expensive.
  - (1) Under the current system, the vast majority of accused drivers cooperates and takes a breath test.
  - (2) Of those who refuse, relatively few are acquitted.
  - (3) None are acquitted just for refusing. They must still drive well, look good on a video, sound good on a video, and otherwise appear capable of driving.
  - (4) The overwhelming majority of refusal cases are still resolved through a guilty plea.
- b. There are cheaper ways for the State to decrease refusals, including:
  - (1) fines;
  - (2) expanded use of the interlock - - which has immediate preventative effect (and carries an inherent stigma);
  - (3) additional jail time at the Court's discretion upon conviction.
- c. **The Burden for Breath Test Refusal can and should be placed entirely on the accused and cost the Taxpayers nothing.**

Respectfully Submitted:

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