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House Corrections and Juvenile Justice  
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SB 453

Chair Colloton and members of committee, thank you for letting me speak today in support of SB 453. My name is Karen Wittman. I am an Assistant Attorney General and the Traffic Safety Resource Prosecutor for the State. I appear today on behalf of Attorney General Derek Schmidt.

### CRIMINALIZE A REFUSAL

Weak penalties for refusing to take a breath or blood test have created a giant loophole in Kansas law. Drunk drivers know they have a good chance of avoiding a DUI conviction - and taking responsibility for their actions - by refusing to submit to the tests which would clearly show whether they were guilty of driving drunk and putting other people's lives at risk.

1. Kansas refusal rate in Kansas is on the rise.  
2010 – 27.6%  
  
1/1 – 6/30/2011 – 28.7%  
  
7/1 – 12/31/11 – 30.6%
2. Kansas highway deaths which are alcohol related are on the rise in Kansas.
3. Repeat offenders refuse-preliminary testing and evidentiary testing.
4. People who take the test are punished more severely ie. they are prosecuted.

#### Have other states successfully criminalized refusals?

**YES.** The United States Congress has criminalized refusal by making it a crime to refuse a blood alcohol test in the National Parks. Additionally, 16 states have made refusals a crime in some manner, including: Alaska, Arkansas, California, Florida, Indiana, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, New Jersey, Ohio, Oregon, Rhode Island, and Virginia.

Some of these laws have been on the books for over 40 years. For example, Alaska's statute was enacted in 1969, Nebraska's in 1971 and Minnesota's in 1989.

#### Have the Statutes in other states been upheld as Constitutional?

**YES.** Law criminalizing refusal have repeatedly withstood constitutional challenges. The most common challenges are based on the Fourth and Fifth Amendments to the United States Constitution and corresponding state provisions.

#### NO 5th AMENDMENT RIGHT

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As part of obtaining the privilege to drive in Kansas, a driver implicitly consents to a search, through means of a chemical test, to determine the amount of intoxicating substances in the driver's body, upon the driver's arrest for DUI. See K.S.A. 8-1001

A driver has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication. **South Dakota v. Neville**, 459 U.S. 553, 563, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)

No 5th amendment right exists for the defendant's admission to submit to a blood alcohol test. The privilege against self-incrimination "does not protect a suspect from being compelled by the State to produce 'real or physical evidence'" **Pennsylvania v. Muniz**, 496 U.S. 582, 588-89, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) See also **State v. Wahweotten**, 36 Kan. App. 2d 568, 580, 143 P.3d 58, 67 (2006) **State v. Compton**, 233 Kan. 690, 694, 664 P.2d 1370 (1983) **State v. Henderson**, No. 97,480, 192 P.3d 689, 2008 WL 4416025, unpublished opinion filed September 26, 2008; **State v. Ramirez**, No. 95,699, 169 P.3d 1147, 2007 WL 3341739, unpublished opinion filed November 9, 2007

Refusal to submit to a breath test was not a communicative statement and thus was not protected by the Fifth Amendment. **State v. Leroy**, 15 Kan.App.2d 68, 803 P.2d 577 (1990) and **Schmerber v. California**, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)

#### **NO 4TH AMENDMENT RIGHT**

The request to comply with a chemical test does not occur until after probable cause to arrest exists. Refusal to consent to a search has absolutely no constitutional significance regarding the reasonableness of the search and is not an invocation of any right at all. **State v. Bussart-Savaloja** 40 Kan.App.2d 916 (12/05/08)

In **Bussart-Savaloja**---Because there is no constitutional right to refuse to be tested, there can be no constitutional bar to the admission of testing evidence. See Melilli, *The Consequences of Refusing to Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. Cal. L.Rev. 901, 922 (2002), arguing "[t]he end result is that, without a constitutionally effective right to block a search or seizure by refusing consent, the refusal of consent is constitutionally irrelevant. There can be no derivative constitutional right to bar evidence of an invocation of something that itself is not a constitutional right."

#### **COUNTING A REFUSAL TO SUBMIT--A SEPARATE OFFENSE**

The new crime of refusing to take the blood or breath test should be counted as a prior DUI for charging purposes. If this is not implemented--again the legislature would create a benefit to the DUI offender to plea to this and not have it count in his criminal history concerning drunk driving.

It should be considered a separate charge from DUI. If the legislature enacts the Nebraska form of criminal refusing--it has different elements from DUI and should be considered separate and distinct from DUI.

### **LEAVE THE FINES AS AMENDED IN 2011**

HB 453 suggests to remove the \$250 increase of all minimum fines that was enacted in 2011. This should be removed for two reasons.

1. The increase was done to fill the gap of cuts to community correction. Although there is a new source of funding being funneled in by DMV applications. See Section 5 subsection (h) of SB 453--it is unclear if this is enough to fill the gap.

2. By Criminalizing a refusal there will be more individuals being placed in community corrections and there will be a need for this excess funding.