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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?

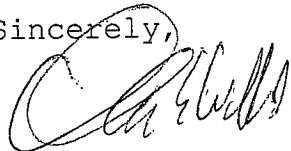
- c. No decay period is applied in SB 7 for refusal conviction.
    - 1. Why should new crime of refusal be penalized more than DUI?
  - d. Decay period does not apply to CDL DUI (§10). It should apply for the same reasons it applies to a regular driver's license.
6. **INTERLOCK MODIFICATIONS (§17) - 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