

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY
STEPHEN M. HOWE, DISTRICT ATTORNEY

February 12, 2018

Senate Judiciary Committee
Attention: Rick Wilborn, Chairman

RE: Senate Bill No. 374

Chairman Wilborn and Committee Members:

Thank you for the opportunity to submit written testimony in support of SB No. 374. This bill is the results of months of work by the Kansas County and District Attorneys Association's DUI Legislative group.

My colleague and the chair of the DUI legislative group, Aaron Breitenbach, set forth in his written testimony the reasons for the changes and additions to this important group of legislation. Below is some specific information in support of the proposed changes or additions:

New Section 1:

In Johnson County the ramifications of the *State v. Stanley* decision cannot be taken lightly. From 2016 to 2017 we have seen a 9% decrease in the number of felony DUI's supervised by our probation office. On a weekly basis, our office must amend felony DUI's to misdemeanor DUI's because of the inability to use out of state convictions, in particular Missouri convictions, in light of *Stanley*. Repeat offenders are not being held accountable at the level the legislature intended them to be because the Court of Appeals ruled the Kansas statute was more stringent. In other words, because Missouri law says you are Driving While Intoxicated (DWI) if you are in an intoxicated or drugged condition and Kansas law says it is to a degree that renders the person incapable of safely operating a vehicle, the court held the degree of intoxication could be different and therefore a conviction under this MO statute cannot be used as prior conviction in Kansas.

Section 6:

Implied consent, as we have known it, is dead in Kansas. Any continued use of the "deemed to have given consent" language stands to jeopardize all DUI litigation. Such language should not remain. The courts have also clearly distinguished between breath and blood tests and what is required. The distinction of separate oral and written notice given to offenders for tests of breath or other bodily substance vs. blood or urine tests is necessary to comport with the case law. This section seeks to comply with those Court rulings to ensure admissibility of test results.

The bill sets forth that any irregularities or defects in the reading of the notices may only have administrative or driver privileges ramification and not affect the admissibility of the alcohol or drug concentration testing results in criminal prosecution. This update seeks to reduce the instances in which DUI prosecution is jeopardized by minor technical errors made by an officer when reading the lengthy required notices.

This section also clarifies and protects medical personnel who assist law enforcement in the authorized collection of blood or urine from civil liability. This aspect is proposed as a direct result of concerns shared by the medical community.

Section 8:

The Court of Appeals found the criminalization of the refusal to take a preliminary breath test (PBT) under KSA 8-1012 unconstitutional in December, 2017. (*State v. Robinson*, No. 116,872 (2017)). The proposed legislation fixes the problems set forth in *Robinson*. PBT's are an important screening tool in DUI investigation and must remain a viable tool for officer in the field

Section 9:

The addition of (k) - the definition of pharmacologically active metabolite drug was developed with the input from forensic scientists from KBI, Johnson County Crime Lab and Sedgwick County Regional Forensic Science Center.

Section 12:

The bill resurrects the criminal refusal statute with the necessary changes to conform with *State v. Ryce*. It applies only to breath tests. The punishments mirror those in the DUI statute and did away with the confusing way to count prior offenses. This update does not criminalize anything that was legal before *Ryce*; rather it seeks to remedy the concerns expressed by the Kansas Supreme Court in *Ryce*. Rather than criminalizing a person's withdrawal of consent, this new language makes it clear the withdrawal of consent is not the crime; rather the refusal to cooperate with a lawful order for a breath test pursuant to a search incident to the driver's arrest.

Section 13:

The purpose of the addition of (a)(6) in KSA 8-1567 is to address those individuals who use illegal drugs or use drugs that have no medicinal purpose and chose to get behind the wheel of a car. In other words, it addresses those individuals who use the drugs for the sole purpose of their impairing effects. Safeguards are listed in the statute for those who have lawfully ingested a controlled substance under a physician's orders.

Under the current statute, post-imprisonment supervision time continues to run even if a defendant absconds from supervision. Unlike probation, where the court has jurisdiction to revoke, reinstate and extend no matter how long an offender is gone, many courts see the current DUI law as prohibiting any tolling of PIS time while the offender is not reporting. The purpose of the addition to (b)(3) is to clarify that an offender who is not reporting during their period of

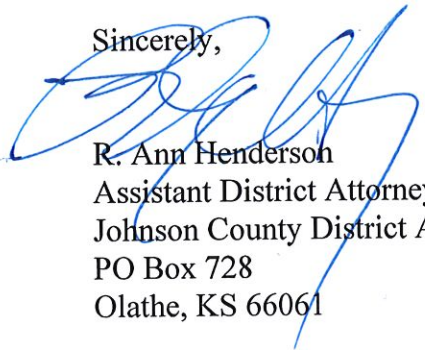
supervision does not get credit towards their 12 months of Post Imprisonment Supervision (PIS) time. Additionally, the extension of PIS can provide the time needed for an offender to complete their treatment or fully pay their fines and costs.

The change in (c) to all children under the age of 18 as opposed to only children under the age of 14 acknowledges if an offender is driving under an influence with any minor there should be additional ramifications.

Lastly, the DUI legislative group was keenly aware that any proposed legislation must be fiscally neutral. The changes and additions have been written in order to accomplish no additional expenses to the state. Tougher *penalties* on impaired driving is for another day when future budgets have more flexibility.

These changes will support our efforts to hold DUI offenders accountable and help keep our roads safe. Thank you for your consideration of this bill.

Sincerely,



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