

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.

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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.

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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.

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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.

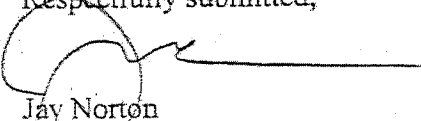
A conviction for a refusal, when the person has 2 prior DUI convictions (there is a lifetime lookback on these) would be treated as a conviction of a level 7 G felony, and there shall be no durational or dispositional departures. A 7G requires a prison sentence of 15 to 17 months in prison, (with the 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,



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On behalf of KACDL

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