

House Judiciary Committee
January 27, 2011

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

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 Wakeeny, 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
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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. 4th 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 3rd 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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