

To: Joint House Committee on Corrections and Juvenile Justice
From: Steve Howe, Johnson County District Attorney
Date: March 9, 2012

Re: **Testimony on Senate Bill 6/453**

Committee Members:

I appreciate the opportunity to come before you to discuss the need for further changes to the DUI laws in Kansas. Last year, the DUI Commission made recommendations to you to provide fair and just penalties on DUI's. During conferencing, some of those recommendations were eliminated. Some of those eliminated provisions have a substantial impact on public safety.

One of the most important provisions dealt with the criminalizing of the refusal to submit to a breath test. You may ask why this provision is so important to public safety. Prosecutors throughout the State are facing a large volume of DUI offenders who refuse to perform field sobriety and breath, blood or urine tests. These professional drunks have numerous prior convictions and have become savvy enough to avoid cooperating with law enforcement. This leaves law enforcement and prosecutors with little evidence to convict them of their crimes. This has resulted in significant criminal justice resources being expended on these cases. For example, our jurisdiction has had 43 DUI jury trials in the last two years, 33 of which involved a defendant who refused to perform any tests.

Criminalizing the refusal to take a breath, blood, or urine test would hold the professional drunks accountable for their actions while creating a safer environment for Kansans. We are asking that you either allow for a balloon amendment or any other mechanism to adopt this type of language in the bill.

The penalties should be consistent with those for DUI offenders (as presently set forth in Senate Bill 453):

(a) Refusing to submit to a test to determine the presence of alcohol or drugs is refusing to submit to or complete a test or tests deemed consented to under subsection (a) of K.S.A. 8-1001, and amendments thereto

(b) (1) Refusing to submit to a test to determine the presence of alcohol or drugs is:

(A) On a first conviction a class B, nonperson misdemeanor. The person convicted shall be sentenced to not less than 48 consecutive hours nor more than six months' imprisonment, or in the court's discretion 100 hours of public service, and fined not less than ~~\$750~~ \$500 nor more than \$1,000. The person convicted shall serve at least 48 consecutive hours' imprisonment or 100 hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2011 Supp. 21-6609, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment;

(B) on a second conviction a class A, nonperson misdemeanor. The person convicted shall be sentenced to not less than 90 days nor more than

one year's imprisonment and fined not less than ~~\$1,250~~ \$1,000 nor more than ~~\$1,750~~ \$1,500. The person convicted shall serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 120 hours of confinement. Such 120 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2011 Supp. 21-6609, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 120 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 120 hours;

(C) on a third conviction a class A, nonperson misdemeanor, except as provided in subsection (b)(1)(D). The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than ~~\$1,750~~ \$1,500 nor more than \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of ~~240~~ 2,160 hours of confinement. Such ~~240~~ 2,160 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2011 Supp. 21-6609, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of ~~240~~ 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be

counted as part of the ~~240~~ 2,160 hours;

(D) on a third conviction a nonperson felony if the person has a prior conviction which occurred within the preceding 10 years, not including any period of incarceration. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than ~~\$1,750~~ \$1,500 nor more than \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of ~~240~~ 2,160 hours of confinement. Such ~~240~~ 2,160 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2011 Supp. 21-6609, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of ~~240~~ 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the ~~240~~ 2,160 hours; and

(E) on a fourth or subsequent conviction a nonperson felon. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The 90 days' imprisonment mandated by this paragraph may be served in a work release program only after such person has served 72 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of ~~240~~ 2,160 hours of confinement. Such ~~240~~ 2,160 hours of confinement shall be a period of at least 72 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to K.S.A. 2011 Supp. 21-6609, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 72 consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the

offender's location. The offender shall serve a minimum of ~~240~~ 2,160 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the ~~240~~ 2,160 hours.

Prior convictions for DUI and other traffic offenses should be considered when determining the appropriate sentence upon conviction for refusal to take a breath, blood, or urine test:

(m) When determining whether a conviction is a first, second, third, or fourth or subsequent conviction of a violation of this section:

(1) Convictions for a violation of K.S.A. 8-1567, and amendments thereto, or a violation of an ordinance of any city or resolution of any county which prohibits the acts that such section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging any such violations, shall be taken into account, but only convictions or diversions occurring on or after July 1, 2001. Nothing in this provision shall be construed as preventing any court from considering any convictions or diversions occurring during the person's lifetime in determining the sentence to be imposed within the limits provided for a first, second, third or subsequent offender;

(2) any convictions for a violation of the following sections occurring during a person's lifetime shall be taken into account: (A) This section; (B) K.S.A. 8-2,144, and amendments thereto; (C) K.S.A. 32-1131, and amendments thereto; (D) subsection (a)(3) of section 40 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto; (E) subsection (g) of section 48 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto; and (F) aggravated vehicular homicide, K.S.A. 21-3405a, prior to its repeal, or vehicular battery, K.S.A. 21-3405b, prior to its repeal, if the crime was committed while committing a violation of K.S.A. 8-1567, and amendments thereto;

(3) "conviction" includes: (A) Entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of a crime described in subsection (m)(2); (B) conviction of a violation of an ordinance of a city in this state, a resolution of a county in this state or any law of another state which would constitute a crime described in subsection (m)(1) or (m)(2); and (C) receiving punishment under the uniform code of military justice or Kansas code of military justice for an act which was committed on a military reservation and which would constitute a crime described in subsection (m)(1) or (m)(2) if committed off a military reservation in this state;

(4) it is irrelevant whether an offense occurred before or after conviction for a previous offense; and

(5) multiple convictions of any crime described in subsection (m)(1) or (m)(2) arising from the same arrest shall only be counted as one conviction.

In addition, convictions for refusal to take a breath, blood, or urine test should be counted as prior convictions for the purpose of DUI sentence enhancement.

A second component is to re-examine the recommendation of strengthening the penalties for repeat offenders. Imposing the same penalties for a 4th offense and as 8th offense undermines our ability to affect justice. Increasing the penalties can protect the public from habitual drunk drivers. This can be balanced with the ability of the courts to impose a variety of punishments, including jail time, work release and house arrest. A case by case determination would allow the courts to determine which alternatives are in the best interest of public safety. In 2010, Kansas had the second highest increase in DUI fatalities in the nation. There is a real need for these simple changes to our DUI laws, they can go a long way towards making our roads safer for Kansans.

Thank you for the opportunity to discuss this important issue dealing with public safety. If you need any additional information that would assist in your discussions, contact me at 913-715-3015.

Sincerely,

*Stephen M. Howe
Johnson County District Attorney*