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February 8, 2018

Senate Judiciary Committee
Attention: Senator Richard E. Wilborn
State Capitol, Ste. 541-E
Topeka KS 66612

Re: SB 374

Dear Chairman Wilborn and Senate Judiciary Committee,

I am unable to attend the hearing but am interested in presenting written testimony concerning SB 374 as a member of the Kansas Association of Criminal Defense Lawyers, KACDL and on behalf of myself. I expect that Jay Norton will present oral testimony on behalf of KACDL and that he may address my written testimony as appropriate. We oppose this Bill. If some form of this Bill is passed, we will recommend some changes to the Bill.

I will first introduce myself to the Committee. I have been continuously licensed to practice law in Kansas since 1979. My law practice consists principally of DUI defense and driver's license matters. I was a member of the Kansas DUI Commission during its existence.

This Bill is lengthy and comprehensive, making the organization of my written testimony difficult. Many of the issues that I will itemize are contained in multiple statutes, so I will organize my presentation by subject matter rather than by statute. When citing a statute, I will refer to the sections of the statute in SB 374.

<u>"Per Se" DUI drug crime and driver's license sanction.</u>

For the first time in Kansas history, this Bill proposes to make a "per se" crime in possessing a drug in a person's body while also causing a driver's license to be sanctioned for this "per se" internal bodily drug possession. Under this proposal, if any amount of a controlled substance is found in the body, a crime is committed regardless of whether the compound affects the person's ability to safely drive. Alternatively, a metabolite of the controlled substance may also lead to

conviction and loss of driver's license if it is a pharmacologically active metabolite, which is defined to continue to produce effects in the body similar to the parent drug. This definition does not require the person to be affected or impaired by the drug or metabolite because this definition presumably would permit a theoretical analysis of the chemical structure regardless of how it affected the person's ability to safely drive. Accordingly, internal bodily possession of a controlled substance or a metabolite becomes a crime even if it did not impair driving.

Furthermore, this expansion of the "per se" DUI law to include a drug or metabolite regardless of its effect on the specific human being is otherwise appropriately handled in the existing criminal DUI and driver's license statutes. Current law prohibits use of a drug if it causes a person to be incapable of safe driving. This proposed "per se" amendment is unnecessary. This is merely an attempt to criminalize internal possession of a drug within a human body.

Interestingly, this proposed criminalization of bodily possession of a drug or its metabolite fails to recognize that possession and use of some actual controlled substances, including marijuana, are legal in many states and countries. A person could then perform the legal act of smoking marijuana in Colorado, for example, and be criminally charged with having done that legal act because it was not authorized by Kansas or United States law and the drug or metabolite remains in the body when returning to Kansas. This is unjust and violates the interstate commerce clause of the Constitution. Again, there is no nexus to safety for this per se internal bodily possession.

Parts of the amendments describe an ambiguous "measureable amount" of a controlled substance while other proposed changes criminalize possession of "any amount" of the drug or metabolite. For these sections that criminalize and sanction "any amount" of drug, medical treatment would not be a defense. In today's society, every person who takes a prescription drug would become a criminal and would lose their driving rights. This goes too far and is already satisfactorily handled by existing statutes to protect safety.

Consent must be voluntary, not involuntary.

K.S.A. 8-1001 proposes to be changed to make consent to take a blood, breath, urine, or bodily substance mandatory rather than revocable. Use of the word "consent" is an illusion because this "consent" cannot be withdrawn under this statute. The term "consent" Constitutionally requires that it be voluntary. Involuntary consent is unconstitutional as an illegal search without a warrant for blood, urine, and bodily substances other than breath. It further violates Constitutional protections of due process, violates a person's right to consult with an attorney, violates self-incrimination rights, violates double jeopardy and violates the Doctrine of Unconstitutional Conditions.

Not only is there an illusion of consent, this legislation proposes to authorize the law enforcement officer to "determine which manner of test is to be conducted." Does this mean that an officer can disregard all scientific and medical principals collecting and testing blood, breath, urine, or other bodily substances in his or her determination of the manner in conducting the test? This legislation is at best unclear and would enable unintended results.

Implied consent advisories should be mandatory.

In the area of implied consent advisories, there are glaring inconsistencies. The proposed amendment to K.S.A. 8-1001(c)&(d) would seem to require an implied consent advisory yet proposed subsections (e), (m) & (r) say it doesn't matter whether the advisory is given. Apparently an officer does not have to follow the law in giving the advisory that the statute says "shall" be given. This enables a law enforcement officer to abuse his or her power by intentionally not giving an implied consent advisory, which advises an accused, because there are no consequences to even an intentional failure to give this legislatively mandated advisory. 8-1020(h) preserves the giving and reading of the implied consent advisory as an issue, yet

apparently this makes no difference because the officer does not have to give or read an advisory as proposed in SB 374. Officers should be held to a higher standard of complying with the law.

Before a person can be adjudged to be a criminal by violating the proposed refusal law or the DUI law, a person should be advised of the consequences for their decision to not take a test. The purpose of the advisory is to inform a person of consequences and rights to enable compliance with the request for testing. By permitting negligent or willful noncompliance in the giving and reading of the advisory, this purpose is compromised. By statutorily condoning the failure to accurately advise a person of the consequence of their decision, this statue would create criminals and would cause many driver's licenses to be suspended without knowing the consequences of their decision.

This is precisely what Standish v. Kansas Dept. of Revenue, 235 Kan. 900, addressed. This Court properly discussed that this test decision "invokes serious consequences for the person arrested" while concluding an advisory was necessary. When Standish was decided, a person's refusal could be deemed to be reasonable without loss of a driver's license and there was no criminal refusal statute. If we are going to do away with mandatory verbal and written advisories, we should modify the law to make the reasonableness of a refusal an issue for driver's license hearing and we should not criminalize refusal. This legislation will lead to injustice to many citizens of Kansas who will become criminals and will lose driving privileges without this advisory while enabling law enforcement officers to abuse their power negligently or purposefully.

The Attorney General should not be given permission to create law.

Proposed K.S.A. 8-1001(r) authorizes the attorney general to amend notices and advisories without legislative approval. This violates of the separation of powers principals. Not only is the implied consent advisory not mandatory under the proposed changes but it can be changed at the whim of the attorney general, the state's chief prosecutor and chief law enforcement officer, without

legislative consent and without legislative guidelines. This should not be approved.

K.S.A. 8-1025 should be repealed.

The criminalization of refusal to take even a breath test is unnecessary because driver's license sanctions of suspension and ignition interlock continue as a form of punishment. The criminalization of refusals constitutes "double dipping" by seeking to convict a person of the criminal act of refusing and the criminal act of DUI based upon the same facts and same driving incident.

While restricting a criminal refusal to a breath test may comply with the ruling in Birchfield v. North Dakota, 136 S.Ct. 2160, on the theory that a breath test does not require a warrant in violation of the Fourth Amendment to the Constitution, the criminalization of refusal is unconstitutional based upon the violation of self-incrimination rights of an accused who answers the officer's question of whether he/she will take a breath test after arrest, based on a violation of the rights of the accused to counsel which is statutorily prohibited at the critical time of a breath test that forms the exclusive basis of a "per se" conviction, based on a violation of double jeopardy as driver's license penalties have become more punitive, based upon the denial of due process and based upon the Doctrine of Unconstitutional Conditions.

Under the existing criminal statute, a person is charged only if there was a prior DUI when the alleged offender was 18 years and older. This new proposal eliminates the requirement of prior conviction after July 1, 2001 by a person who is 18 years of age or older. The theory of the existing law was that a person should know their obligations to take a test if they have been through the process before. In seeking to criminalize refusals in 2011, the prosecution sector sought to justify their request for criminalization to discourage repeat offenders. This proposed legislation eliminates these justifications.

New section 1 should not be enacted and is unnecessary.

This section deals with the enhancement of penalties based upon prior convictions or diversions. The rules for enhancement are already clearly described in the existing statutes.

Proposed paragraph (e) appears to incorporate the DUI statutes from all of the rest of the states in addition to the United States Code. The problem with this is that these states all have different definitions of what driving under the influence is. It is unjust to enhance the penalty of a Kansas offender based upon a statute from another state that criminalizes behavior that would not be a crime in Kansas. The current statute requires that a conviction in another state is not considered unless the prior conviction occurred on or after July 1 of 2001 and unless the other state's statute prohibits the same act that Kansas prohibits. The 2001 date was selected because that is the date when the enhancement look back period changed from 5 years to a lifetime in Kansas. That limitation is eliminated by the proposed changes even though people relied on the 5 year enhancement look back limitation in resolving their old case.

There should be a cutoff on how far back we can look back before enhancing a crime. Under the proposed changes, a person can have a DUI at the age of 18 as a college student and have their penalty enhanced 50 years or more later. This is simply not equitable. Prosecutors should be and are able to advocate for enhancement when appropriate. Courts should be permitted to determine the relevance of prior activity. If there is an automatic enhancement, it should be limited to convictions or diversion that occurred within the last 10 years.

Furthermore, in the proposed changes to both the criminal refusal and DUI statutes, new section 1 (c) is not included in the language that multiple convictions arising from the same arrest are not both considered prior convictions. If we enhance penalties, the multiple convictions from the same arrest should never count duplicatively.

Enhancement should not be retained, leaving the decision to the judge who heard the trial and is otherwise vested with the responsibility to impose a fair and just sentence based upon those facts.

Some changes in these statutes are necessary.

If changes are made to the statutes that are the subject of this Bill, the following additional changes should be made.

1. K.S.A. 8-1567(m) prohibits plea bargaining for the purpose of avoiding the mandatory penalties of the DUI law. The same prohibition is found in the criminal refusal statute. This is the only category of crimes in Kansas that prohibit plea bargaining, including crimes involving homicide, sex abuse, child abuse, kidnapping and other violent and nonviolent crimes. The original purpose of this prohibition was presumably to draw attention to DUI laws. While violations of DUI laws still exist, they are at a decreased rate now through education, publicity, and ignition interlock. Prosecutors are fully able to represent the interests of the public and to evaluate the facts of each case in reaching an agreement. This plea bargaining prohibition should be repealed.

2. The 3 hour grace period after driving for a test result to justify a "per se" conviction in K.S.A. 8-1567(a)(2) should be repealed. The prosecutor should be required to prove that a person committed a crime of driving or attempting to drive under the influence, not have a test result 3 hours after driving. Evidence of a test taken after driving can be used to show the effect of alcohol or drugs at the time of driving but a person's blood or breath level of alcohol or drugs 3 hours after driving in no way affects the health or welfare of the public.

3. K.S.A. 8-1020(h)(2)(F) should be modified to require compliance with KDHE procedures for breath test, not merely substantial compliance. The officer has full control over whether there is compliance with the KDHE procedure. Requiring only substantial compliance with KDHE procedures can affect the accuracy of the test. The officer should be held to a higher standard to follow the

procedures he or she is trained on. The licensee already has the burden of proof in these license hearings.

4. K.S.A. 8-1020(t) should be modified to provide that if a person is found not guilty of DUI or if the DUI is dismissed, the administrative driver's license sanction should be vacated.

5. K.S.A. 8-2,142(d), which says that the Secretary of Revenue "may" adopt rules and regulations, guidelines and conditions for a commercial driver's license permanent disqualification to be modified to a period of 10 years should be amended to require that the Secretary adopt rules and regulations guidelines and conditions. For instance, if a licensee has completed treatment, is sober and is otherwise qualified, he or she should be eligible for modification. The Secretary has refused to adopt these rules and regulations, guidelines and conditions. The word "shall" should be substituted for the word "may".

6. K.S.A. 8-1001(b)(2) should be changed to eliminate the "collective information" justification for license suspension. Before something as valuable as a driver's license is taken away, the person who is seeking to take that license away should be responsible to provide the factual basis for that based on their personal observations. The collective information exception violates the right to cross examine the actual witness concerning the accuracy of facts.

7. K.S.A. 8-1020(o) should be clarified to provide for the continuation of a temporary license when a timely appeal to the appellate courts of a judicial review is pending. A person can appeal judicial review successfully and still not be relieved of what became an improper suspension and ignition interlock restriction if it is determined that appeal did not stay enforcement of the driver's license sanction. The penalty would already be served by the time the appeal determine is was inappropriate.

8. K.S.A. 8-1567(n) permits alternative pleadings of DUI offenses "prior to submission for the case to the fact finder." Due process requires notice and an opportunity for a meaningful hearing. Due process is violated if the

proposed alternative pleading is not made substantial before submission to the fact finder. A time limitation should be specified for alternative pleading. 20 days after arraignment is reasonable. Furthermore, this section of this statute should require that the prosecutor have a factual basis for the alternative pleading so that "a shot gun approach" is not implemented by the prosecutor on every case. For instance, it is common for a prosecutor to charge failing a breath test when there is no breath test. Likewise, when there is no suspicion of drug use, the statute should require a factual basis for this alternative charge.

Conclusion

Senate Bill 374 should not be approved. If some version of the Bill is approved, substantial modifications should be made. If the legislature is going to delve into these DUI areas again, it should make changes that I have recommended.

Sincerely,

Douglas E. Wells

DEW/teb