

**House Judiciary Committee
February 16, 2021**

**House Bill 2377
Neutral Testimony
Kansas Association of Criminal Defense Lawyers**

Dear Chairperson Fred Patton and Members of the Committee:

House Bill 2377 proposes numerous changes related to Driving Under the Influence (DUI) and related laws following the completion of the report from the Judicial Council DUI Advisory Committee. Although the bill proposes several amendments, my testimony will be limited to certain sections, specifically those related to DUI sentencing. Unless otherwise specified, this testimony is for those sentencing changes to both K.S.A. 8-2,144 for commercial drivers and 8-1567 for other drivers, as the sentencing changes are largely identical.

The work of this committee has resulted in several positive steps for people convicted of DUI offenses and the collateral consequences that stem from those convictions. However, portions of this bill take large steps backward from the design of Kansas DUI laws to maintain flexibility for district courts for those who receive multiple convictions. For this reason, I testify neutrally for this bill and encourage this committee to pursue the positive steps forward without unnecessarily increasing the punitive nature of the current DUI laws and depriving courts of the flexibility in sentencing.

House Bill 2377 Makes Several Positive Changes

As introduced, HB2377 makes several positive changes for individuals convicted of DUI offenses that ensure that they are not punished simply for lack of monetary resources. The graduated payment changes for Ignition Interlock Devices provided in section 6 through amendments to K.S.A. 8-1016 will ensure that this program is available for more people and provides more opportunities for people to obtain the administrative reinstatement benefits that the program provides. This is a positive step forward.

Additionally, HB2377 removes the mandatory fine structure that currently exists in the DUI framework under K.S.A. 8-1567 and K.S.A. 8-2,144. The current mandatory fine requirements provide no discretion for district court judges to impose the fines that they believe best fit the individual circumstances of the person convicted, especially in light of the myriad other financial costs that will be endured, including court costs, attorney fees, administrative fees, probation fees, costs of treatment, and potential house arrest costs.

The mandatory fine has served only to punish those who lack resources and does not benefit the system overall. Maintaining the \$250 for the community corrections fund while allowing for waiver of the fine upon completion of treatment provides incentive for individuals to pursue treatment and mitigates the imposition of punishment on those simply because they are poor.

For DUI diversions, HB2377 cleans up language that previously caused discrepancies between jurisdictions for disqualifications, defining a prior “alcohol related offense” to be limited to prior DUI.

HB2377 also removes the requirement that individuals spend a minimum amount of time imprisoned or otherwise confined before beginning probation, and instead makes the mandatory minimum times a condition of probation for those individuals convicted of a DUI misdemeanor. It also reduces the required confinement time for a third conviction misdemeanor under K.S.A. 8-1567. These are positive steps in the right direction, as there has been much confusion between jurisdictions regarding the timing of probation relative to the mandatory minimum confinement times. Further, not allowing individuals to begin probation while serving house arrest or work release has just unnecessarily lengthened sentences.

Finally, the inclusion in HB2377 of a requirement that individuals receive “hour-for-hour” or “day-for-day” credit on work release or house arrest is a change that has been long overdue. The DUI laws have long allowed flexibility for those convicted to serve their sentences in a home confinement or work release setting, and those individuals often serve much of their sentence in these circumstances. However, in the event that they later have their probation revoked, these individuals are not provided any credit toward the underlying sentence for time served in work release or house arrest.

Given the unique nature of DUI sentencing, the long prohibition on credit for house arrest or work release time in these cases has made little sense and only resulted in individuals serving lengthy time in custody. Providing for credit for time served in these circumstances would allow for courts to still allow for flexibility in sentencing, while not unnecessarily lengthening a person’s sentence if they ultimately face revocation.

House Bill 2377 Does Not Advance Sentencing Options that Ensure Success

Misdemeanor Sentencing

HB2377 proposes to not specifically provide any opportunity for probation for a first conviction, while specifically indicating probation for a second or subsequent conviction. This may lead to circumstances where courts may not believe they have the discretion to give a person with a first conviction an opportunity to serve a term of probation and only allow a court to impose jail time or community service.

While HB2377 makes great strides in allowing for probation to begin earlier and providing credit for time served on house arrest and work release, it still contains requirements of mandatory minimum sentencing. For those practicing, it does not seem these mandatory minimums for DUI convictions serve any real purpose for those convicted a first or second time. Aside from offgrid offenses, there are few crimes for which a person is *required* to serve certain number of days in jail or prison. This deprives judges from fashioning sentences that will benefit the individual specifically.

An individual with a first DUI whose BAC is .09 is treated the same as an individual whose BAC is .29, though the individual cases are clearly different. An individual with a second DUI conviction whose first conviction occurred 10 or more years ago is treated the same as an individual whose first conviction occurred 10 days prior. The maintenance of mandatory minimums for misdemeanor DUI convictions serves little purpose and removes the full discretion of the court and lawyers to work to find the best sentencing option that will fulfill goals of both punishment and rehabilitation.

Felony Sentencing

HB2377 proposes to move all felony DUI sentences to the sentencing guidelines grid. I stand in strong opposition to this change. Since the creating of DUI laws, the sentencing has been structured to allow for flexibility in the district courts. We have long recognized that DUI convictions and those who are convicted of them are different than those crimes which have been placed in the sentencing grid. When the grid was created in 1993, felony DUIs were briefly classified as severity level nine nonperson felonies, before the legislature quickly amended the statute in 1994 to allow DUI offenses to remain nongrid offenses.

Moving felony DUI convictions to the grid makes little sense and creates an extreme sentence increase without providing for the treatment needs of those with these convictions. Currently, for a felony DUI conviction, individuals are capped at year-long sentences, with a multi-disciplinary approach to treatment provided during a period of post-imprisonment supervision. This approach recognizes that DUI convictions are different and those individuals require different interventions than what is provided for on the sentencing guidelines grid.

To move DUI felonies to the sentencing grid, and to make them a severity level six offense, undermines the clear philosophy that undergirds the DUI sentencing scheme as it stands. While anyone with no prior felonies will face a presumptive probation sentence, the minimum prison term for someone convicted of a third DUI felony is nineteen months. For a fourth DUI conviction, the grid places individuals in a border box, for which they could be sent to prison immediately for a minimum twenty-two

months. For a fifth or subsequent DUI conviction, even if the only criminal history an individual has is the prior DUI convictions, this change would make these individuals presumptive prison for a mandatory twenty-five month sentence. This is more than double the current sentence without also providing for any of the individualized approaches for treatment and rehabilitation.

While it is not my place to testify about bed impact, this would likely increase the number of people in the custody of the Department of Corrections. However, there remains some confusion about where these individuals could serve their sentences, as HB2377 leaves in place that those sentenced for felonies could serve their sentences in DOC “in a facility designed by the secretary for the provision of substance abuse treatment.” There is no provision for what to do in those cases when those facilities are full or unavailable.

There also remains confusion regarding whether those convicted of felony DUI offenses will be placed on postimprisonment supervision as contemplated by K.S.A. 8-1567 and 8-2,144 after completing their sentences, or if they would be subject to the postrelease provisions of the KSGA. As written, those individuals convicted of a third DUI would be required to serve the postimprisonment supervision term in which they are required to participate in services for individuals with substance use disorders.

However, for a fourth or subsequent conviction, it appears individuals would be subject to postrelease requirements of the KSGA. This would involve no postrelease supervision for those who successfully complete any term of probation, but a required twenty-four-month term for those who are ordered to serve a prison sentence. This difference in treatment and sentence is incredible and without any explanation.

I believe a better course of action would be to adopt the amended language for misdemeanor convictions to apply to felony convictions, to allow those convicted of felonies to begin probation immediately, receive credit for time served on house arrest or work release, and to maintain individualized sentencing that has underlain our DUI laws for decades.

Thank you for the opportunity to provide testimony on HB2387.

Sincerely,

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