

**Testimony in Regards to HB 1302**  
**by**  
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Good morning Chairman Hogue and members of the Interim Judiciary Committee. My name is Dawn Deitz, I am an Assistant State's Attorney for Burleigh County here in Bismarck. I am here to testify regarding issues the Burleigh County State's Attorney's Office has experienced to DUI prosecution with the implementation of HB 1302.

The first concern I want to address is the ramifications HB 1302 has on drug court admissions. With the new minimum mandatories, felony level DUI defendants are forced to serve their jail time before they can even begin drug court, which eliminates much of the incentive to enter the program. While it shouldn't matter if these individuals truly want to obtain sobriety, realizing they have the drug court opportunity may be exactly what they need to make that epiphany. For being a state known for binge drinking, the Drug Court component is necessary to treat the underlying problem and attempt to slow the revolving door of addiction.

Our second concern pertains to refusal under the new law. When the legislation was first implemented, there was confusion concerning the refusal portion of the statute. Was refusing the on-site test or chemical test a completely separate crime from Driving Under the Influence? While an attempt has been made intra-office concerning how to charge, I believe clearer language in the statute, indicating whether refusal is a "subsection" of the crime of DUI or if an individual can be DUI and also charged with refusal, would ensure cohesiveness in prosecution across the state.

A third concern is in the actual prosecution of repeat offenders. One of the biggest changes with the new legislation was the number of people who fell into the felony DUI statute as a 4<sup>th</sup> or subsequent offender. While it may be an easy task to verify convictions on the public access page, getting certified judgments for proof purposes has proven to be much more difficult. The Courts are requiring more than a mere print out from the public records page. Courts often require certified judgments indicating advisement of rights and the status of counsel for each prior conviction. With Administrative Rule 19, Court Clerk Offices may dispose of misdemeanor cases after 7 years, causing documentation retrieval for a majority of cases pre-2007 nearly impossible.

Subsection 3 of 39-08-01 states “the court shall take judicial notice of the fact that an offense would be a subsequent offense if indicated by the records of the director or may make a subsequent offense finding based on other evidence.” Evidence Rule 201 allows for judicial notice only over adjudicative facts. The rule further states the fact “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Again, looking at the last sentence in subsection 3 of 39-08-01, acquiring certified documentation from DOT to prove prior offenses may have similar results as seeking them from Court Clerks. Recent contact I have had with DOT indicates that their record retention policy is only for 7 years, thus certified documents from DOT will not contain all prior DUI offenses.

The Burleigh County State's Attorney's Office is exploring judicial notice of prior offenses through motions to the Court. However, an issue I believe will be argued by defense attorneys will be that the court cannot take judicial notice of an essential element. Thus, prosecutors are pushed back to where we started with only verification from the public records system stating there are priors with minimal ways to provide proof to the trial courts. While testimony could be provided at trial concerning the priors, the best witness for priors would be the law enforcement officer involved with the stop. A whole new set of issues would arise from this to include locating the witness to spending 3 days on a DUI trial to prove the basics of each prior DUI. Burleigh County tries more than its fair share of jury cases. If the prosecutor's hands are tied concerning its ability to prove priors, nearly every single DUI will proceed to trial with the off chance a witness won't show or a technicality will come up somewhere. These are issues that have arisen for prior in-state offenses. The difficulty in proving predicate in-state DUIs is difficult; however, proving predicate out-of-state DUIs will be incredibly difficult.

In closing, I would like to take a moment and thank the members of the committee who understand the seriousness of this issue and take efforts to refine the law. I am confident that with continued efforts, we can make comprehensive DUI legislation the standard not only here in North Dakota, but a model for other states to follow.

I would stand for any questions the committee may have.