Joint Committee on Corrections and Juvenile Justice Oversight
November 2, 2017
RE: Discussion of "Romeo and Juliet" Laws

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Dear Chairman Jennings and Members of the Committee:

Thank you for having this discussion in your valuable interim time. We firmly believe laws need to change in order to address the draconian penalties that youths suffer for consensual acts with other youths. Last year, we supported HB 2290 — which would have made a change to the age range in K.S.A. 21-5507 — because young people should not be branded and punished as sex offenders for consensual acts. Frankly, we think more should be done beyond this one change; however, we welcomed and supported this start. In addition, we supported the deletion of language that makes it a crime to engage in consensual sexual conduct between people (including teens) of the same sex. It is time to take unconstitutional laws out of Kansas statute books.

This testimony discusses 1) current law; 2) what HB 2290 would have done; 3) what HB 2290 would not have done; and 4) areas of the law we encourage you to discuss.

What happens under current law

K.S.A. 21-5507, the crime of unlawful voluntary sexual relations, is commonly referred to as the Romeo and Juliet Law. (In the Shakespeare play by the same name, Juliet is 13 and Romeo is "a young man" whose age is not stated.) K.S.A. 21-5507 criminalizes voluntary sexual relations between teens aged 14-18 when one of the teens is under 16. 16 is the "age of consent" in Kansas. For reference, generally speaking the following happens (of course, this assumes that the teens involved are in school. There is a procedure by which a teen aged 16-18 can "drop out" of high school):

Turn 13 in 7th grade (or the summer after)
Turn 14 in 8th grade (or the summer after)
Turn 15 in 9th grade (or the summer after)
Turn 16 in 10th grade (or the summer after)
Turn 17 in 11th grade (or the summer after)
Turn 18 in 12th grade (or the summer after)

For all of the crimes discussed below (even the most serious), it is not a defense if the two teens involved did not know the age of the other teen. It is not a defense if one teen lied about their age. See K.S.A. 21-5204 ("Proof of a culpable mental state does not require proof: (b) that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which the accused is charged.").

Also, whether they are juvenile adjudications or adult convictions, these consensual yet criminal offenses are all person felonies and will count accordingly in calculating a person's criminal history in the future, if necessary.

If a 14, 15, 16, or 17-year-old gets together with someone who is 14 or 15, then under K.S.A. 21-5507 (i.e. Romeo and Juliet law) either or both teen(s) could face:

Severity level 8 person felony for voluntary sexual intercourse
Severity level 9 person felony for voluntary sodomy
Severity level 10 person felony for voluntary lewd fondling or touching

Convictions and adjudications for unlawful voluntary sexual relations are not registrable offenses. See K.S.A. 22-4902(b) [this crime is not included in the definition of "sex offender" in the Kansas Offender Registration Act, and there is a Romeo and Juliet-type provision in (b)(2) and (17)].

If a 14-year-old gets together with an 18-year-old, then K.S.A. 21-5507 (i.e. Romeo and Juliet) does not apply because the age range is not "less than four years," so the teen who is 18 could face:

Severity level 3 person felony for consensual sexual intercourse (i.e. aggravated indecent liberties)
Severity level 3 person felony for consensual sodomy (i.e. criminal sodomy)
Severity level 5 person felony for consensual lewd fondling or touching (i.e. indecent liberties)

These convictions require sex offender registration for life for intercourse or sodomy, and 25 years for indecent liberties. See K.S.A. 22-4902(b)-(c); K.S.A. 22-4906(b)(1)(E), (d)(3)-(4).

If a 14, 15, 16, or 17-year-old gets together with someone who is 13, then the teen who is over 13 could face:

Severity level 1 person felony for consensual sexual intercourse (i.e. rape)
Severity level 1 person felony for consensual sodomy (i.e. aggravated criminal sodomy)
Severity level 3 person felony for consensual lewd fondling or touching (i.e. aggravated indecent liberties)

These are registrable sex offenses, even though the teen over 13 is a juvenile. The teen could be tried as an adult or as a juvenile. In the event the teen is transferred to adult court, then the registration would be for life for all offenses. If the teen stays in juvenile court, for the severity level 1s, it is lifetime registration. See K.S.A. 22-4906(h). For the aggravated indecent liberties, the court has some discretion in making the registration until age 18, making it nonpublic, or not requiring it at all. See K.S.A. 22-4906(g).

If a 13-year-old gets together with someone who is 18, then the 18-year-old would face an off-grid offense with a presumptive life sentence for all acts (i.e. touching, fondling, sodomy, or sexual intercourse). If the 18-year-old gets a departure (or is ever released on the life sentence - the minimum amount of time that must be served is 25 years), that teen-later-adult will be on lifetime parole, lifetime electronic monitoring, and lifetime registration.

What HB 2290 would have done

HB 2290 would have amended K.S.A. 21-5507 (i.e. Romeo and Juliet) to cover 13-year-olds. This means if a 14, 15, or 16-year-old gets together with someone who is 13, then either or both teen(s) could face:

Severity level 8 person felony for voluntary sexual intercourse
Severity level 9 person felony for voluntary sodomy
Severity level 10 person felony for voluntary lewd fondling or touching

All of the other examples and applicable penalties set out above under "current law" would remain the same.

It is relevant to note that the Legislature recently made clear that 13-year-olds can and will be held criminally responsible for certain conduct that may be sexual in nature. In 2016, the Legislature created the new crimes of unlawful transmission of a visual depiction, aggravated unlawful transmission of a visual depiction, and possession of a visual depiction. These crimes were created in response to the prevalent issue of "sexting" by middle school and high school students. See testimony regarding SB 391 to the Senate Corrections and Juvenile Justice Committee on February 9-10, 2016 from Sen. Molly Baumgardner and Captain Kirk Vernon.

Many proponents pointed out that juveniles distributing inappropriate images are seldom prosecuted because of the heavy penalties. See testimony from Sen. Baumgardner and Cpt. Vernon. In order for youth to be prosecuted, these crimes were created. They cover youth aged 12 to 18 who knowingly transmit or possess a visual depiction of someone aged 12-15 or 12-17 (depending on the crime). As explained in one proponent's testimony, the ages were chosen on purpose: 12 is the average age of puberty for girls (13 for boys). The age range is 12-18 in order to include youth up to high school seniors. See testimony regarding HB 2018 to the Senate Corrections and Juvenile Justice Committee on March 9, 2016 from Ed Klumpp.

These new offenses show that the Legislature recognizes that youth aged 12-13 make decisions about sexually related conduct and will be held accountable if the facts warrant it. This is relevant to this discussion because while a 13-year-old could be prosecuted for encouraging his/her slightly older love interest to send a photo (or distributing a photo of said love interest to the basketball team, for example), under current law, the love interest would face a life sentence for sexually related contact with the same 13-year-old.

Other things HB 2290 would have done

HB 2290 would have eliminated unconstitutional language in K.S.A. 21-5507 (i.e. Romeo and Juliet law) by striking "when the child and the offender are members of the opposite sex." The Kansas Supreme Court found this phrase in the statute unconstitutional almost 12 years ago, yet it remains. See *State v. Limon*, 280 Kan. 275 (2005) (finding the unlawful voluntary sexual relations statute violated the equal protection provisions of the Fourteenth Amendment to the United States Constitution and § 1 of the Kansas Constitution Bill of Rights; violation is "cured by severance of the words 'and are members of the opposite sex' from the statute").

In years past, we have heard the argument that if it stays on the books, then it is there if the appellate courts ever reverse themselves. Keep in mind that if K.S.A. 21-5507 does not include same-sex teens someday, then if a 14, 15, 16, or 17-year-old gets together with someone who is 14 or 15, then either or both teen(s) could face:

Severity level 3 person felony for consensual sexual intercourse (i.e. aggravated indecent liberties) (as compared to an 8 under Romeo and Juliet)
Severity level 3 person felony for consensual sodomy (i.e. criminal sodomy) (as opposed to a 9 under Romeo and Juliet)
Severity level 5 person felony for consensual lewd fondling or touching (i.e. indecent liberties) (as opposed to a 10 under Romeo and Juliet)

Again, these can be registrable offenses for juveniles - the court has some discretion in making the registration until age 18 or five years from adjudication (whichever is longer), making it nonpublic, or not requiring it at all. See K.S.A. 22-4906(g).

HB 2290 would have also officially decriminalized consensual sodomy between members of the same sex who are 16 years of age and older. K.S.A. 21-5504 has contained this unconstitutional language for almost 14 years. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *State v. Franco*, 49 Kan. App. 2d 924 (2014).

What HB 2290 would not have done

<u>HB 2290 did not change penalties/severity levels for nonconsensual acts</u> between people of any ages. For example, a 14-year-old who forcibly has sex with a 13-year-old could still be prosecuted for rape.

<u>HB 2290 did not change the age of consent.</u>

<u>HB 2290 did not change penalties/severity levels for sex offenses under K.S.A. 21-6627</u> (commonly referred to as Jessica's Law).

Areas of policy this Legislature should consider revisiting

HB 2290 did not decriminalize sexual relations between teens where one or both of the teens is/are under 16. As explained above, K.S.A. 21-5507 (i.e. Romeo and Juliet) still makes sexual contact between teens a crime, just a lesser severity level one. This is something the Legislature should consider.

HB 2290 did not change anything in K.S.A. 21-6627 (i.e. Jessica's Law) and did not change the "gap" in K.S.A. 21-5507 from the current "no less than four years of age older". Therefore, it would still be a presumptive life sentence for a 13-year-old and an 18-year-old to have sexual contact of any kind. For the 18-year-old to face a life sentence (or, even with a departure, a prison sentence of no less than 50% of the applicable grid box), lifetime registration, and lifetime parole is a draconian punishment.

K.S.A. 21-6627 was intended to address "sexual predators" and "violent, sexual crimes." See testimony regarding SB 334 (and HB 2576) to the Senate Judiciary Committee on January 17, 2006 from Representative Patricia Kilpatrick. Jessica Lunsford, for whom the law is named, was 9 years old when she was abducted from her home by a 46-year-old man who was a convicted sex offender, who then sexually assaulted and murdered her. This horrific case spurred K.S.A. 21-6627 into being.

Yet K.S.A. 21-6627 treats youth and young adults who have consensual contact with a 13-year-old the same way it treats people like Jessica's murderer. Interestingly, the first Jessica's Law was in Florida (where she lived) and covered children under 12 (not under 14, like Kansas). In fact, in 38 states, their versions of Jessica's Law do not cover 13-year-olds engaged in consensual activity with an 18-19 year old. It appears only seven states have a provision for "under 14" like Kansas.

HB 2290 did not address any crimes other than the ones mentioned. For example, it does not deal with juveniles and pornography or electronic solicitation. (An example of the latter being a 16-year-old sending a text to her 15-year-old boyfriend, enticing him to come over and make out, which would be unlawful since she is 16 and he is 15 - that would be a severity level 3 electronic solicitation, even though under K.S.A. 21-5507 it would be a severity level 10 for them to actually make out.)

Conclusion

Our in-person testimony will further address why changing K.S.A. 21-5507 is appropriate. Furthermore, we think there needs to be discussion about the other draconian penalties that young people face.

Thank you for your consideration,
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