

**House Judiciary Committee
January 28, 2020**

**House Bill 2468
Testimony of the Kansas Association of Criminal Defense Lawyers
Presented by Clayton J. Perkins
Opponent**

Dear Chairman Patton and Members of the Committee:

My name is Clayton Perkins. I am an attorney in Kansas practicing in the field of criminal defense appeals. I appear on behalf of the Kansas Association of Criminal Defense Lawyers (KACDL). The KACDL a 350-member, non-profit organization of criminal defense lawyers and related professionals. The KACDL's mission includes ensuring justice and due process for persons accused of crime or other misconduct, and promoting public awareness of citizen's rights, the criminal justice process, and the role of the criminal defense practice.

We oppose HB 2468 because it creates four new crimes that are grossly disproportionate to Kansas' current sentencing scheme, and have a troubling impact far beyond what is normally thought of when discussing child abuse. This becomes apparent once you spend a few moments looking at the proposed language.

The first two new crimes would create a severity level 9 and 7 person felonies labeled "child abuse" and consist of:

"(1) Knowingly causing physical contact with any child less than 18 years of age that results in or could reasonably be expected to result in physical injury to the child; or

"(2) recklessly causing bodily harm to any child less than 18 years of age"

Subsection (a)(2) is taken straight from the current crime of battery pursuant to K.S.A. 21-5413(a)(1), a class B person misdemeanor, with the addition of the under 18 requirement. Subsection (a)(1) appears to be a further modification of battery pursuant to K.S.A. 21-5413(a)(2), again a misdemeanor, with the new "physical injury" or being negligent to the risk of physical injury, and the under 18 requirement.

So, just to start off, we are taking conduct that is normally a misdemeanor under Kansas law and increasing the sentence up to a severity level 7 person felony that can result in a sentence of 11 to 34 months' imprisonment solely because it happens to

someone under the age of 18. That is a drastic jump to begin with and becomes even more startling when you look at the conduct that would be covered because terms like “bodily harm” and “physical injury” cover the lowest threshold of injury in Kansas law. See *State v. Sanders*, 223 Kan. 550, 552 (1978) (defining bodily harm).

One example of conduct covered would be two high school students who shove each other, resulting in them falling down and getting a bruise. If they are both under the age of 18, they are now both guilty of “child abuse” a severity level 7 person felony for causing each other bodily harm pursuant to subsection (a)(2). Likewise, even if they do not get a bruise they would still be guilty of a severity level 9 person felony, which extends to physical contact that “could reasonably be expected” to cause a bruise.

As concerning as that example is, the scope is even broader than that because this applies to “reckless” acts, which is the lowest level of mental culpability recognized in Kansas law K.S.A 21-5202. Recklessness is essentially an extreme form of negligence, relying on the person disregarding the risk that a result follows rather than actually trying to cause that result. An example would be that the high school student wouldn’t need to intentionally shove someone over, instead, they could recklessly knock someone over while running through the hallways at school, resulting in a bruise. They would be guilty of “child abuse” a severity level 7 person felony.

These examples illustrate the problem with HB 2468. It creates new crimes with a terrifying scope, out of proportion with Kansas’ existing criminal law. Much of the behavior that would be prosecuted as felony “child abuse” is appropriately covered by the misdemeanor battery law that exists today.

The next new crime that would be created is subsection (b)(4)’s crime of aggravated child abuse, a severity level 5 person felony consisting of:

“knowingly using unreasonable physical restraint against a child less than 18 years of age through means including, but not limited to, caging or confining the child in any space not designed for human habitation or binding the child in a way that is not medically necessary[.]”

The problem with this crime is not the two examples of conduct at the end, which are both terrible, but the actual crime itself which is “knowingly using unreasonable physical restraint.” The problem is that I am just not sure what “unreasonable physical restraint” encompasses. After a searching Westlaw, I cannot find any state that uses that term, so there are no definite examples of where the limits are. I wonder what impact it would have on law enforcement who have to sometimes arrest 17-year-olds. I wonder

whether we will see a case of a parent locking a child's bedroom door at night resulting in a charge. Criminal law functions best when crimes are clear and capable of putting ordinary people on notice of what conduct is criminalized. Subjection (b)(4) does not do that.

The last new crime is subsection (b)(5)'s crime of aggravated child abuse, a severity level 3 person felony consisting of "recklessly causing great bodily harm, permanent disability or disfigurement to any child less than 18 years of age."

The problem with this crime is that making it a severity level 3 felony puts it out of scale with the sentencing grid. Particularly, the crime of recklessly causing great bodily harm to another person is already the crime of aggravated battery, a severity level 5 person felony, pursuant to K.S.A. 21-5413(b)(2)(A). Likewise, the crime of involuntary manslaughter criminalizes recklessly killing a person, and makes it a severity level 3 person felony if the victim is under the age of 6. K.S.A. 21-5405. It would seem more appropriate for subsection (b)(5), if it is necessary at all, to fall between recklessly causing great bodily harm to anyone and recklessly killing a child under the age of six, which would put it at severity level 4. However, that could also be better handled by amending the battery statute, rather than this one.

Child abuse is a serious problem, but our current laws, particularly the battery and kidnapping statutes, are well equipped to handle the problem. We do not need to add new crimes, disproportionate to our existing sentencing system, simply to fill up K.S.A 21-5602.

Thank you for your time and consideration.

Sincerely,

Clayton J. Perkins
Legislative Committee, on behalf of the
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