Case No. 00 - 85898 - AS

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff / Appellee

v.

MATTHEW A. LIMON
Defendant / Appellant

SUPPLEMENTAL BRIEF OF APPELLEE

On review granted May 25, 2004
State v. Limon, 32 Kan.App.2d 369, 83 P.3d 229 (Kan.App. 2004)

On appeal from the District Court of Miami County
The Honorable Richard M. Smith
District Court Case No. 00 CR 36

Jared S. Maag
Kansas Bar No. 17222
Deputy Attorney General
Criminal Litigation Division
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612-1597
(785) 296-2215
maagj@ksag.org

Attorney for the State of Kansas

Table of Contents

Case No. 00 - 85898 - AS

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff / Appellee

v.

MATTHEW A. LIMON
Defendant / Appellant

SUPPLEMENTAL BRIEF OF APPELLEE

Nature of the Case

Appellant Matthew Limon ("Defendant") was convicted on one count of criminal sodomy in violation of K.S.A. 21-3505(a)(2), a severity level 3 person felony. He was sentenced to a controlling term of 206 months in the Kansas Department of Corrections with a 60 month supervised release period. Defendant's conviction and sentence were upheld on direct appeal. *State v. Limon*, ____ Kan.App.2d _____, 41 P.3d 303 (Kan.App. 2002) (Table) (85,898). Review was

denied by this Court on June 13, 2002. *State v. Limon*, 274 Kan. VIII (Kan. 2002).

On June 27, 2003 the United States Supreme Court granted certiorari, vacating and remanding Defendant's case to the Kansas Court of Appeals in light of *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). *Limon v. Kansas*, ___ U.S. ___, 123 S.Ct. 2638, 156 L.Ed.2d 652 (2003). On remand, the Kansas Court of Appeals again affirmed Defendant's conviction and sentence. *State v. Limon*, 32 Kan.App.2d 369, 83 P.3d 229 (2004). Review was subsequently granted by this Court on May 25, 2004.

Statement of the Issues

Issue I. **K.S.A. 2002 Supp. 21-3522(a)(2) does not violate the Equal Protection Clause of the United States Constitution, nor does it run afoul of sections 1 and 18 of the Kansas Bill of Rights.**

Issue II. **Defendant's sentence is neither cruel nor unusual.**

Issue III. **Use of prior juvenile adjudications in establishing Defendant's sentence was proper.**

Issue IV. **This Court cannot rewrite K.S.A. 2002 Supp. 21-3522(a) to suit the Defendant's desired remedy.**

Statement of Facts

The State would refer the Court to the brief filed on rehearing with respect to the factual background in this matter. See Appellee's Brief on Rehearing at 1-4.

Arguments and Authorities

Standard of Review

The determination of whether a statute violates the Constitution is a question of law over which this Court has plenary review. *Mudd v. Neosho Memorial Regional Medical Center*, 275 Kan. 187, 197, 62 P.3d 236 (Kan. 2003).

Defendant carries a monumental burden in asserting a statute's unconstitutionality. *Barrett v. U.S.D. 259*, 272 Kan. 250, 255, 32 P.3d 1156 (Kan. 2001). That this is so is based on the fact that an enacted statute is adopted through the legislative process, which ultimately expresses the will of the electorate in a democratic society. *Blue Cross and Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 276, 75 P.3d 226 (Kan. 2003).

This is also true because a statute is presumed constitutional, and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, this Court must do so. A statute must clearly violate the Constitution before this Court may strike it down. *State v. Durrant*, 244 Kan. 522, 534, 769 P.2d 1174, *cert. denied*, 492 U.S. 923, 109 S.Ct. 3254, 106 L.Ed.2d 600 (1989) (Internal citations omitted).

Argument

Issue I. K.S.A. 2002 Supp. 21-3522(a)(2) does not violate the Equal Protection Clause of the United States Constitution, nor does it run afoul of sections 1 and 18 of the Kansas Bill of Rights.

Defendant's primary argument before this Court is that K.S.A. 2002 Supp. 21-3522(a), commonly known as the Romeo and Juliet law, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and sections 1 and 18 of the Kansas Bill of Rights. Defendant, having been convicted of criminal sodomy in violation of K.S.A. 21-3505(a)(2), maintains that K.S.A. 2002 Supp. 21-3522(a)(2) discriminates based upon sex and sexual orientation by criminalizing heterosexual sodomy less severely than homosexual sodomy. *State v. Limon*, 32 Kan.App.2d 369, 83 P.3d 229, 232 (Kan.App. 2003). He seeks relief in the form of a decision from this Court that would reverse his conviction and sentence and require the State to re-initiate a prosecution pursuant to K.S.A. 2002 Supp. 21-3522(a)(2). The State argues that such a remedy is unavailable as the challenged law falls short of offending any notion of equal protection under either the United States or Kansas Constitutions.

Equal Protection Analysis

To date, Defendant asserts that "heightened scrutiny should apply to the exclusion in the Romeo and Juliet law because sexual orientation classifications are suspect or quasi-suspect, and because the exclusion differentially penalizes gay

teenagers for exercise of a fundamental right." (See Petition for Review, 13.) Defendant weaves an argument of due process liberty interests and equal protection analysis in order to reach the conclusion that the highest form of scrutiny is warranted. Such a conclusion is inappropriate in the face of existing law.

Heightened judicial scrutiny is appropriate in only a limited number of cases where a statute classifies along inherently suspect lines or burdens the exercise of a fundamental constitutional right. *Heller v. Doe*, 509 U.S. 312, 318-319, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Very few classifications trigger heightened scrutiny. *See e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967) (race); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944) (national ancestry and ethnic origin); *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988) (illegitimacy). The Supreme Court has also made it clear that the judiciary should be hesitant in establishing a new suspect class. *Cleburne*, 473 U.S. at 441, 105 S.Ct. at 3255; *see also Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (holding that extending strict scrutiny analysis to the elderly inappropriate).

Simply put, homosexuals do not constitute a constitutionally recognizable suspect class because they are not distinguishable from the rest of society by certain

immutable characteristics such as race, gender, or national origin. *See e.g., Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527 (1986). A recognizable class cannot be established when it is premised on nothing more than shared sexual preferences; preferences that are subject to change. In simpler terms, this classification is one in which an individual could move in and out of as freely as he or she wishes. None of the established classifications that warrant application of strict scrutiny analysis are afforded such a privilege.

This is particularly true in the present case, where the record is devoid of any factual support that would show the Defendant to be a homosexual. Indeed, as the lower court noted, "the record does not show that M.A.R. was either homosexual or bisexual." *Limon*, 83 P.3d at 236. Defendant can hardly avail himself of a classification when there is no evidence – and no claim – that he in fact belongs to that class.

Similarly, there is no fundamental constitutional right of a male adult to engage in acts of sodomy with a male child, and there is certainly a legitimate state interest in preventing such crimes. Because the Defendant has failed to assert that he is a member of a suspect class, and because homosexuality in general is not a suspect class, rational basis applies and is the appropriate level of review.

Rational Basis Review

It is well-settled that in applying the rational basis test to any challenged

statutory scheme, the issue turns not on whether the Kansas Legislature's rationale behind that scheme is persuasive to this Court, but only whether it satisfies a minimal threshold of rationality. The United States Supreme Court in *Heller v. Doe* established the judicial parameters for rational basis review by stating in relevant part that rational basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor should the judiciary attempt to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. Classifications neither involving fundamental rights nor proceeding along suspect lines are accorded a strong presumption of validity and, such classifications cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

In addition, a State has no obligation to produce evidence to sustain the rationality of a statutory classification. Legislative choices are not subject to courtroom factfinding and may be based on rational speculation unsupported by

evidence or empirical data. In short, a statute is presumed constitutional, and the burden is on the Defendant to negative every conceivable basis which might support the legislative arrangement, whether or not the basis has a foundation in the record. Finally, this Court is compelled under rational-basis review to accept the legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review simply because it is not made with mathematical nicety or because in practice it results in some inequality. As the Supreme Court noted, the problems of government are practical ones and may justify, if they do not require, rough accommodations despite the legislation being illogical and / or unscientific. 509 U.S. at 319-321, 113 S.Ct. at 2642-2643. (Internal citations omitted).

Applying this analysis to the present challenge reveals that K.S.A. 2002 Supp. 21-3522(a)(2) does not violate the equal protection guarantee. Instead, it reflects a legitimate legislative choice.

The statute observes the delicate nature of child sexual orientation and appreciates the fact that children will gravitate toward the traditional sexual relationships throughout their teen years. To that end, these traditional relationships are promoted by and through peers, mentors and role models. The Legislature's classification underscores the realization that non-traditional sexual relationships can, in many instances, such as here, be more damaging to a child.

The coercive and predatory nature of the Defendant's acts in this case highlight the potential harm that can be caused when an adult male preys on a male child. Children are vulnerable and should not be the target of sexual predators. One way to minimize the chance of such predatory acts is to separate children based upon both age and gender.

In short, a rational basis exists for the Legislature to continue to limit the Romeo and Juliet provisions to heterosexual teens as the law furthers the legitimate purpose of recognizing and, in part, promoting traditional sexual relationships between teenagers.

Taking into account the amount of information that the Legislature would have had available regarding the adverse effects of non-traditional relationships and their impact on society, it could rationally conclude that recognizing non-traditional sexual relations amongst children would be detrimental. This recognition, in turn, was lawfully enacted into the Romeo and Juliet law through the State's own police powers.

Indeed, society recognizes and promotes a social structure for its children. Society routinely segregates the sexes during the formidable years. States just as routinely establish age of consent laws in order to protect children from those adults who satisfy their prurient interests by preying upon young children. It was, therefore, rational for our State legislature to punish those who violate the institutional norm by

engaging in sexually predatory acts in a same sex setting.

As the Defendant himself admits, he engaged in indecent liberties with a disabled child in a group home setting — he knowingly and purposefully sexually abused a minor in a setting that was crafted to minimize such an incident.

K.S.A. 2002 Supp. 21-3522(a)(2) further serves a significant state interest in regulating the sexual activity on the part of its children. This state interest has been recognized by the United States Supreme Court. *See Carey v. Population Services International*, 431 U.S. 678, 695, n. 17, 97 S.Ct. 2010, 2021, n. 17, 52 L.Ed.2d 675 (1977) (". . . in the area of sexual mores, as in other areas, the scope of permissible state regulation is broader as to minors than as to adults."); *see also Cleburne,* 473 U.S. at 440, 105 S.Ct. at 3254 ("When social . . . legislation is at issue, the Equal Protection Clause allows the States wide latitude.").

Similarly, the state has a strong interest in the ethical and moral development of its children. Kansas, like many states, has a long tradition of honoring its obligation to protect its children from others and from themselves. K.S.A. 2002 Supp. 21-3522 recognizes, among other things, that children are vulnerable to physical and psychological harm and that they lack mature judgment.

As he continues to do before this Court, the Defendant conveniently ignores the fact that there exists a victim in this case. The Defendant was given the benefit of the doubt in that the State agreed to the consensual nature of his predatory sexual

act. That decision is at best questionable and at worst ignores the realization that this act, given the functioning level of the victim, was less than consensual and more likely coercive. That this is so, is evident by the fact that this was not the first instance where the Defendant preyed upon a vulnerable child.

The Kansas legislature, like all other 49 state legislatures, has the prerogative to deem some acts more egregious than others. It is certainly understandable that a governing body would reach the conclusion that deviant sexual acts, when performed by an adult on a child of the same sex, is an act different from or more offensive than any such conduct performed by members of the opposite sex.

This is particularly true when dealing with children who are just beginning to discover, and in some cases confused about, their sexual identity. Given the ages of those at issue here, these minors often lack the ability to make a fully informed choice or take into account any immediate or long range consequences. As Judge Malone stated in the opinion below, "[i]f the only rational basis justifying the statute is the legislature's intention to protect children from increased heath risks associated with homosexual activity until they are old enough to be more certain of their choice, it is within the legislature's prerogative to make that determination." *Limon*, 83 P.2d at 242.

It is certainly arguable that the State has a heightened interest in allowing greater proscription of homosexual conduct in light of the potential, and routinely

deadly, consequences of engaging in such a relationship. It is here that the State has a paramount interest in protecting its most innocent citizens. However misguided the Defendant thinks that this might be, the fact remains that K.S.A. 2002 Supp. 21-3522(a)(2) is rationally related to the State's legitimate power to protect not only its children, but to protect its inherent view of public morality.

This concept is certainly not foreign to this or any other court. To be sure, the United States Supreme Court in *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954) recognized the fact that it is the legislative body, and not the judiciary, that acts as the main guardian of the public needs to be served by social legislation. Indeed, state legislatures routinely regulate sexual behavior based upon the identity of the partner, ranging from adultery to incest to prostitution.

Through his arguments, the Defendant intends to direct the judiciary into ignoring this well-established right, and simply supplant with its own judicial judgment the heretofore unrecognized right of an adult to engage in deviant sexual behavior with a child of the same sex.

The Defendant's efforts must fail if for no other reason than the fact that states have a greater latitude in regulating the conduct of its children. It is surely not an insignificant fact that states have such latitude. *See Carey, supra.*

Consequently, Kansas should not be condemned for refusing to recognize non-traditional sexual relationships within K.S.A. 2002 Supp. 21-3522(a), particularly

when the state has an overriding interest in not only protecting its children from unlawful sexual relations, but particularly those relationships that pose a higher risk of contracting a deadly disease. The contemporary plague of AIDS alone supports the legitimate exercise of governmental police power to not extend this benefit to homosexual teens.

Simply put, the state has a significant interest in proscribing sexual conduct between adults and minors. Equally significant is the State's interest in the ethical and moral development of its children. Courts have long recognized the states' strong interest in prosecuting those engaging in sexual activity with a minor notwithstanding the minor's consent. Children need the protection of the state because they are deemed too unsophisticated to protect themselves or to consent to sexual activity.

Neither the United States Constitution nor the Kansas Constitution entitles the Defendant to engage in sexual contact with a person under the age of 16. The Defendant cannot realistically argue that his "right" to have sex with a male child outweighs any interest the State has in protecting its children from unlawful sexual relations.

The "right" that the Defendant seeks has not been recognized through political consensus. Accordingly, this Court should not award him through judicial decree that which he could not successfully attain from the legislative branch. To do so would seemingly disenfranchise those who successfully employed the democratic process

in establishing this very legislation.

Despite that fact, there is no evidence, and the Defendant presents none, that legislative processes are inadequate to effectuate legal changes in response to evolving social values on the subject of non-traditional sexual relations amongst teens. Indeed, the United States Supreme Court fully recognized this fact when it stated that "[t]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254.

For these reasons, and pursuant to the standards of rational-basis review, K.S.A. 2002 Supp. 21-3522(a)(2) does not violate the equal protection guarantees. The Romeo and Juliet law reflects a legitimate legislative choice that should not be nullified by this Court.

Application of Lawrence v. Texas

The Defendant contends that this matter is fully controlled by the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and that because the present case was remanded in light of *Lawrence* our state courts must blindly accept the grant of certioriari as a mandate to award him relief. The Defendant's continued assertion is without merit.

The legal and factual distinctions between *Lawrence* and this case are readily apparent. In the decision below, Judge Malone explained these distinctions in a

succinct and correct fashion:

> The argument that K.S.A. 2002 Supp. 21-3522 is unconstitutional focuses on [Defendant's] rights at the expense of the victim's. *Lawrence* holds that homosexual activity between consenting adults in the privacy of the home cannot be prosecuted as a crime. It is one thing to recognize that the government should have no interest in private sexual activity between consenting *adults*. It is another thing to argue that the government has no rational basis to distinguish between heterosexual activity and homosexual activity when it comes to protecting the rights of 14-and 15-year-old children.

Limon, 83 P.3d at 242. (Malone concurring) (Emphasis in original).

No reasonable reading of the *Lawrence* opinion can extrapolate a holding that would in any way proscribe a state's ability to regulate sexual conduct involving children. The majority opinion alone makes it very clear that "The present case does not involve minors." *Lawrence*, 123 S.Ct. at 2484.

The Defendant crafts an argument from the concurring opinion in *Lawrence* in an effort to persuade this Court that some new level of equal protection analysis has been established to apply in the context of homosexual activity. Such an argument is in error as the holding in *Lawrence* plainly rested on grounds of substantive due process. Justice O'Connor wrote separately only to express her views on the application of the Equal Protection Clause to the Texas statute. No other justice joined that opinion, and the majority specifically refrained from approaching the issue on equal protection grounds. *Id.* at 2482. ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be

valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.").

Interestingly enough, in an equal protection context, Justice O'Connor herself recognized that though the Texas law as it applied to private consensual conduct amongst adults was unconstitutional it did not mean that all other laws that might distinguish between heterosexual and homosexual conduct would be similarly invalidated. *Lawrence*, 123 S.Ct. at 2487 (O'Connor concurring). Such invalidation is not warranted here as the State of Kansas has, beyond a moral basis for upholding the statute, other legitimate governmental interests in constructing the law in the manner that it did.

Here, Defendant cannot rely on substantive due process grounds to support the argument that his conduct should not be punished. To that end, *Lawrence*, as the lower court correctly held, is legally distinguishable. Equally true is the fact that Defendant's conduct was not the type of private, consensual, adult conduct protected by the decision in *Lawrence*. The Defendant's act involved a child, and that factual distinction alone more than substantiates the argument that *Lawrence v. Texas*, while establishing a liberty interest for adults, does not apply in the context of Kansas' ability to regulate sexual conduct between an adult and a child.

Romer v. Evans

The Defendant suggests that *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620,

134 L.Ed.2d 855 (1996) also controls the outcome of this matter despite failing to argue that K.S.A. 2002 Supp. 21-3522(a) encumbers his right to seek legislative protection from discriminatory practices, the central finding of the *Romer* decision. *Romer* fails to provide any level of support to Defendant's cause despite his repeated references to the case.

Romer did not overturn the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). It did not elevate homosexuals to a suspect class. It did not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause. And, it did not challenge the concept that the preservation and protection of morality is a legitimate state interest.

Romer simply involved one's condition, not one's conduct. Here, the Court is reviewing the sexual *conduct* of a male adult against a male child in the context of two criminal statutes, K.S.A. 21-3505(a)(2) and K.S.A. 2002 Supp. 21-3522(a)(2). As the Court below held, neither statute is disadvantageous to gay teenagers burdened by the law and, thus *Romer* is inapplicable to the present case. *Limon*, 83 P.3d at 239-240. The decision by the lower court in finding the inapplicability of *Romer* was correct and its reasoning must stand.

Gender Discrimination

The Defendant couples his homosexuality argument with a challenge to the statute on grounds of gender discrimination. He submits that because K.S.A. 2002

Supp. 21-3522(a) discriminates on the basis of gender heightened judicial scrutiny is necessary. His position is without merit.

Judge Green's reasoning is correct when he stated that:

> There has been no evidence that limiting the applicability of K.S.A. 2002 Supp. 21-3522 to members of the opposite sex was motivated by a gender bias. Although K.S.A. 2002 Supp. 21-3522 is gender specific, it creates no discernible difference between the sexes. For instance, K.S.A. 2002 Supp. 21-3522 neither disadvantages nor advantages men or women. The statute places both men and women under the same restrictions and similarly excludes them from the statutes applicability when they engage in same-sex sex acts.

Limon, 83 P.3d at 239.

A claim of gender discrimination will lie only where it is shown that differential treatment disadvantages one sex over the other. That simply is not the case here. The statute is equally applicable to those teenagers who would constitute themselves as lesbian. In simpler terms, a gender discrimination challenge would work only in the context of a state statute that treated gay men differently than gay women.

The Defendant's gender discrimination argument is legally flawed and should be rejected by this Court.

Issue II. Defendant's sentence is neither cruel nor unusual.

Defendant argues that his sentence of 206 months violates the Eighth Amendment to the United States Constitution and sections 1 and 9 of the Kansas Bill of Rights. As the Court below found, "To insist that [Defendant's] sentence, based

on his two prior adjudications for aggravated criminal sodomy, is cruel and unusual flies in the face of reason." *State v. Limon*, 32 Kan.App.2d 229, 83 P.3d 229, 238 (Kan.App. 2003).

Notwithstanding the absence of merit in Defendant's claim, this Court lacks jurisdiction to review the argument. K.S.A. 21-4721(c)(1). A claim that a presumptive guidelines sentence is cruel and unusual is statutorily barred from review on direct appeal and can only be raised in a collateral attack pursuant K.S.A. 60-1507. *State v. Lewis*, 27 Kan.App.2d 134, Syl. ¶ 6, 998 P.2d 1141, *rev. denied* 269 Kan. 938 (2000). For this reason, this Court cannot address whether the Defendant's sentence is cruel and unusual, because to do so would nullify the statute barring appeals of presumptive guidelines sentences. *State v. Blackshire*, 29 Kan.App.2d 493, 499, 28 P.3d 440, 445 (Kan.App. 2001).

Issue III. Use of prior juvenile adjudications in establishing Defendant's sentence was proper.

Though acknowledging the governing case law in this area, Defendant contends that the use of prior juvenile adjudications to establish his sentence of 206 months violated the state and federal constitutional rights recognized in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (Kan. 2001).

There is no reason, either legally or factually, to cause this Court to revisit its decision in *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (Kan. 2002), *cert. denied* 537

U.S. 1104, 123 S.Ct. 962, 154 L.Ed.2d 772 (2003), or to overrule that case.

Issue IV. This Court cannot rewrite K.S.A. 2002 Supp. 21-3522(a) to suit the Defendant's desired remedy.

As a suggested outcome to these proceedings, the Defendant asks this Court to "[r]everse his conviction and sentence with instructions that the State initiate any proceedings under the Romeo and Juliet law within 30 days." (See Petition for Review, 2). This suggestion fails to consider relevant case law on statutory construction.

The Court below was very clear in holding that "even if the statute were declared unconstitutional, the proper remedy would be to strike down the entire statute." *State v. Limon*, 32 Kan.App.2d 369, 83 P.3d 229, 240 (Kan.App. 2004). In reaching that conclusion, the lower Court relied on this Court's decision in *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./ Kansas City*, 264 Kan. 293, 955 P.2d 1136 (Kan. 1998) wherein it was held that:

> Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that the act would have been passed without the objectional portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand.

Id. at Syl. ¶ 16.

In relying on this language, the lower Court ultimately held that:

Upon examination of K.S.A. 2002 Supp. 21-3522, we cannot say that

> the statute would have passed without the language "and are members of the opposite sex." The history of the statute, coupled with its clear wording, reveals that the legislature intended to impose this penalty only on young couples of the opposite sex. The striking of the language "and are members of the opposite sex" would alter the statute from gender specific, which clearly was the intent of the legislature, to gender neutral. Moreover, the striking of the previously mentioned language would enlarge the statute beyond its obvious statutory limits or boundaries. As a result, the remedy suggested by [Defendant] would require us to make a statutory revision that would replace the intent of the legislature, which we cannot do. See *State v. Patterson*, 25 Kan.App.2d 245, 248, 963 P.2d 436, *rev. denied* 265 Kan. 888 (1998).

Limon, 83 P.3d at 240.

The lower Court was correct. Severing the language "and are members of the opposite sex" would clearly alter the legislative intent of the Romeo and Juliet statute. Acquiescing to the Defendant's suggestion would place this Court in the undeniable position of rewriting K.S.A. 2002 Supp. 21-3522(a) in a manner inconsistent with that of the Legislature. This Court would simply be substituting its decision for that of the Kansas Legislature, a function that it simply cannot perform. *See e.g., Aptheker v. Secretary of State*, 378 U.S. 500, 515, 84 S.Ct. 1659, 1668, 12 L.Ed.2d 992 (1964) (Though courts may strain to construe legislation in a manner so as to save it against constitutional attack, they may not carry this to the point of perverting the purpose of the statute or judicially rewriting it).

For these reasons, even if this Court should determine that K.S.A. 2002 Supp. 21-3522(a) violates the Equal Protection Clause, the statute must be abolished in whole.

Conclusion

K.S.A. 2002 Supp. 21-3522(a)(2) falls short of impinging the Defendant's right to equal protection. Should this Court determine that the Romeo and Juliet law violates equal protection, however, abrogation of the statute must be total. Accordingly, the Defendant's conviction pursuant to K.S.A. 21-3505(a)(2) must stand either way.

Further, this Court is without jurisdiction to review an Eighth Amendment challenge involving the Defendant's sentence. Relief there must be sought on post-conviction appeal. Nor should this Court seek to revisit its decision in *State v. Hitt, supra*.

For the foregoing reasons, the State respectfully submits that the decision by the Kansas Court of Appeals should be affirmed.

Respectfully submitted

OFFICE OF THE ATTORNEY GENERAL
PHILL KLINE

Jared S. Maag
Kansas Bar No. 17222
Deputy Attorney General
120 SW 10th Avenue
Topeka, KS 66612-1597
Phone: 785/296-2215
Fax: 785/291-3875
maagj@ksag.org
Attorney for State of Kansas

Certificate of Service

I hereby certify that on this 18th day of June, 2004, five (5) true and correct copies of the foregoing Supplemental Brief of Appellee were deposited in the U.S. Mail, first-class, postage prepaid and properly addressed to each of the following:

James Esseks
ACLU Foundation
Lesbian & Gay Rights Project
125 Broad St., 18th Floor
New York, NY 10004

Tamara Lange
ACLU Foundation
Lesbian & Gay Rights Project
1663 Mission St., Ste. 460
San Francisco, CA 94103

Paige A. Nichols
PO Box 582
Lawrence, KS 66044

and the original and fifteen (15) copies were filed by hand-delivering the same to:

Carol G. Green
Clerk of the Appellate Courts
Kansas Judicial Center, Room 373
301 SW 10th Avenue
Topeka, KS 66612-1507

Jared S. Maag
Kansas Bar No. 17222
Deputy Attorney General
120 SW 10th Avenue
Topeka, KS 66612-1597
Phone: 785/296-2215
Fax: 785/291-3875
maagj@ksag.org
Attorney for State of Kansas