No. 00-85898-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

MATTHEW R. LIMON
Defendant-Appellant

DEFENDANT-APPELLANT'S RESPONSE TO STATE'S SUPPLEMENTAL BRIEF ON REVIEW

On Review from the Court of Appeals
of the State of Kansas
Memorandum Opinion No. 85,898
District Court Case No. 00 CR 36
District Court of Miami County, Kansas
Honorable Richard M. Smith

Paige A. Nichols, Kansas Bar No. #16400
Attorney at Law
P.O. Box 582
Lawrence, KS 66044
(785) 832-8024
Attorney for Appellant Matthew Limon

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I. INTRODUCTION

Matthew Limon respectfully submits this response to issues raised in the State's supplemental brief.

II. ARGUMENT

A. A MISPERCEPTION THAT TEENAGERS WILL BECOME GAY DOES NOT JUSTIFY THE DISPARITY IN PUNISHMENT

The State has suggested that the gross disparity in sentences between heterosexual and gay teenagers, and between Matthew's sentence and that of a teenage girl in the same situation, can be justified by the State's desire to prevent teenagers from becoming gay, something the State views as harmful. That justification fails for four reasons: First, sexual attractions for one sex or the other emerge early in adolescence, before the age of 14, when the Romeo & Juliet law and its exception first apply, so the classification does not rationally further any interest in preventing teenagers from becoming gay. Second, decades of social science research confirm that being gay or lesbian is not inherently harmful, so the State's hypothesized interest in avoiding harm is not based in reality. Third, courts in other jurisdictions have rejected these very same justifications. Fourth, because even teenagers have a basic constitutional right to form intimate relationships, the State cannot use the criminal law to influence whether a teenager's intimate relationships will be gay or heterosexual unless it has a compelling reason to do so, which it does not.

1. The Exclusion in the Romeo & Juliet Law Is Not Rationally Related to Preventing Kansas Youth from Becoming Lesbian or Gay

The exclusion in the Romeo & Juliet law does not rationally advance the State's asserted interest in preventing teenagers from becoming gay both because sexual

attractions emerge in early adolescence and because later sexual experiences do not determine an individual's sexual orientation.

The State's argument proceeds from the premise that, "during early adolescence, children are in the process of trying to figure out who they are. A part of that process is learning and developing their sexual identity." *State v. Limon*, 32 Kan. App. 2d 369, 377 (2004) (Opinion of Green, J.). But that premise is factually incorrect: social scientists agree that people's sexual attractions develop well before age 14, when the disparate penalties in the Romeo & Juliet law first apply. *See* K.S.A. § 21-3522.

While there is no consensus about the exact reasons why a person develops a heterosexual, bisexual, or homosexual orientation,[1] it is clear that the core feelings and attractions that form the basis for adult sexual orientation emerge between middle childhood and early adolescence, usually by about age 10.[2] While children do not

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[1] Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. *See generally Sexual Orientation*, in Am. Psychol. Ass'n, 7 *Encyclopedia of Psychology* 260-63 (A.E. Kazdin ed. 2000).

[2] *See* R.C. Savin-Williams & L.M. Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 Archives of Sexual Behavior 607, 618 (2000) (first same-sex attractions appear at an average age of 7.7 for males and 9.0 for females); G. Herdt & A.M. Boxer, *Children of Horizons: How Gay and Lesbian Teens Are Leading a New Way Out of the Closet* (1993) (age of first same-sex attractions averaged 9.6 for males and 10.1 for females); A.R. D'Augelli & S.L. Hershberger, *Lesbian, Gay and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems*, 21 Am. J. Comm. Psych. 421 (1993) (9.8 for males and 11.1 for females); M. Rosario, M.J. Rotheram-Borus, & H. Reid, *Gay-Related Stress and its Correlates among Gay and Bisexual Male Adolescents of Predominantly Black and Hispanic Background*, 24 J. Community Psych. 136 (1996) (10.8 for males and 10.5 for females); A.R. D'Augelli, *Victimization History and Mental Health among Lesbian, Gay, and Bisexual Youths*, paper presented at meeting of the Society for Research on Adolescence, San Diego, Ca. 1998 (9.8 for males and 10.4 for females) (cited in Savin-Williams & Diamond, *supra*, at 610); A.M.L. Pattatucci & D.H. Hammer, *Development*

identify as gay at such young ages, they nevertheless experience same-sex attraction.[3] So 14 and 15 year-olds are not "trying to figure out" their sexual attractions, as Judge Green surmised; rather, their attractions for one sex or another (or both) develop several years earlier.

In addition, an individual's sexual orientation is not determined by his sexual experiences. Same-sex sexual attractions generally arise before adolescents have any sexual contact with a person of the same sex,[4] which means that sexual contact cannot be the determinant that the State suggests it is. In addition, most gay adults in fact had heterosexual sexual encounters as teenagers but still identify as gay.[5] Those sexual

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and Famliality of Sexual Orientation in Females, 25 Behavior Genetics 407 (1995) (first same-sex and opposite-sex sexual attraction at age 10); D.H. Hammer, S. Hu, V.L. Magnuson, N. Hu & A.M.L. Pattatucci, *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 Science 321 (1993) (first same-sex and opposite-sex sexual attraction at age 10).

[3] R. Savin-Williams, And Then I Became Gay 21, 27, 49-50 (1998); S. Maguen, F.J. Floyd, R. Bakeman, L. Armistead, *Developmental Milestones and Disclosure of Sexual Orientation Among Gay, Lesbian and Bisexual Youths*, 23 Applied Developmental Psychol. 219, 229 (2002) (hereinafter "Maguen, *Developmental Milestones*").

[4] *See* R.C. Savin-Williams & L.M. Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 Archives of Sexual Behavior 419 (2000) (reporting data from a sample of 164 sexual-minority young adults, aged 17-25 years, and finding that first recognizing same-sex attractions preceded first same-sex sexual experience by, on average, approximately 6 years for males and 7 years for females); Maguen, *Developmental Milestones* 226 (awareness of same-sex attraction preceded first same-sex encounter by, on average, 5.5 years for males and 6.5 years for females).

[5] *See* M. Rosario & H.F.L. Meyer-Bahlburg, *the Psychosexual Development of Urban Lesbian, Gay and Bisexual Youths*, 33 J. Sex Res. 113, n.2 (1996) (56% of self-identified gay/bisexual males studied had a history of sexual activities with females and 80% of self-identified lesbian/bisexual females had a history of sexual activities with males); F.J. Floyd & T.S. Stein, *Sexual Orientation Identity Formation among Gay, Lesbian and Bisexual Youths: Multiple Patterns of Milestone Experiences*, 12 J. Res. on Adolescence 167, 178 n.2 (2002) (71% of lesbian and gay individuals studied reported having a heterosexual sexual encounter at a mean age of 15.47 years).

experiences did not determine their sexual orientation any more than same-sex encounters will determine it for others.

When the exclusion in the Romeo & Juliet law is examined in light of these real-world facts, rather than based on the mere supposition of the Court of Appeals, *see* Defendant's Supplemental Brief on Review ("Def. Supp. Br.") at 3-4 (connection must be based in factual reality), there is no rational connection between the exclusion and preventing teenagers from becoming gay. By 14, teenagers' sexual attractions have already developed, and teenagers' sexual encounters simply manifest those attractions rather than determining them.

Thus, the exclusion in the Romeo & Juliet law is not rationally related to preventing teenagers from becoming gay both because it only applies to teenagers who are old enough that their sexual attractions have already been formed and because sexual experience does not determine an individual's sexual orientation in the first place. Where there is such a profound lack of logical connection between a law's classification and its purported purpose, the courts repeatedly have struck down such laws as a violation of equal protection. *See* Def. Suppl. Br. at 3-5. For example, in *Hooper* v. *Bernadillo County Assessor*, 472 U.S. 612 (1985), a veteran challenged a tax exemption for veterans that was created in 1981, but that only applied to veterans living in New Mexico before May 8, 1976. The state argued that restricting the exemption to veterans who arrived before 1976 rationally furthered the state's interest in encouraging people to move to New Mexico. But the Court rejected New Mexico's argument, concluding that the law could hardly have encouraged anyone to move to New Mexico in 1981 since the deadline had

long passed when the law took effect. *Id*. at 619-20. The exclusion here similarly lacks any logical connection to the State's purported goal.

2. The State's Assumption That Being Gay Is Harmful for Teenagers Is Without Foundation and Based Solely on Negative Stereotypes

The State has vaguely suggested that being gay is harmful to teenagers, but that is nothing more than an assumption based on stereotype and prejudice, which cannot provide even a legitimate state interest. The State's supposition finds no support in factual reality, as required by even the lowest level of equal protection review. *See* Def. Supp. Br. at 3-4. More than 30 years ago, after empirical research showed that homosexuality was not related to psychopathology or social maladjustment,[6] homosexuality was removed from the American Psychiatric Association's list of mental disorders.[7] Today, all the mainstream professional associations in the mental health field have agreed that there is nothing abnormal about being gay,[8] and over four decades of research has established that "homosexuality in and of itself bears no necessary relationship to psychological adjustment."[9]

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[6] *See* J.C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *Homosexuality: Research Implications for Public Policy* 115 (J.C. Gonsiorek & J.D. Weinrich eds. 1991) (hereinafter "Gonsiorek, *Empirical Demise*")

[7] The American Psychiatric Association removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), the comprehensive list of mental disorders relied upon by the entire mental health profession, in 1973. Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (Dec. 15, 1973), *printed in* 131 Am. J. Psychiatry 497 (1974).

[8] In addition to the position of the American Psychiatric Association set forth in the DSM, see American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975); National Association of Social Workers, *Policy Statement on Lesbian and Gay Issues* (Aug. 1993), *reprinted in* NASW, *Social Work Speaks: NASW Policy Statements* 162 (3d ed. 1994).

[9] Gonsiorek, *Empirical Basis*, *supra*, n. 6 at 135.

Thus, being gay is not inherently harmful. While it is true that gay people, including gay teenagers, will likely face some degree of social stigma and discrimination, the State cannot constitutionally defer to the prejudice of the populace at large when determining its own actions. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding that the state may not "defer[] to the wishes or objections of some fraction of the body politic" and reiterating that "'[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'") (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1985)).

Because being gay is not harmful, the State's effort to justify the exclusion in the Romeo & Juliet law as a means of coercing teenagers into avoiding harm is simply irrational.[10]

3. Other Courts Have Rejected the Same Baseless Justifications

Two cases decided by the European Court of Human Rights address facts strikingly similar to those here and reject the very arguments advanced by the State.[11]

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[10] The State insinuates that the sodomy at issue here was not consensual, State Suppl. Br. at 10-11, but it is "precluded from disputing [its] stipulation" to the contrary, because "stipulations as to evidence in criminal cases are binding upon the parties represented." *State v. Downey*, 27 Kan. App. 2d 350, 359 (2000). Furthermore, the State offers no reference to the record to support its implication of nonconsent, and "[a]ny material statement made without such a reference may be presumed to be without support in the record." Kan. Sup. Ct. R. 6.02, 6.03.

[11] In *Lawrence v. Texas,* the Supreme Court expressly relied on rulings by the European Court of Human Rights to guide its decision on a matter of United States constitutional law. 123 S. Ct. 2472, 2481, 2483 (2003) (citing, *inter alia*, *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (1981) (holding law that criminalized "consensual homosexual conduct" was invalid under European Convention on Human Rights)). On reconsideration in light of *Lawrence,* this Court should likewise consider both the reasoning and outcome of decisions by the European Court of Human Rights in similar cases.

In *S.L. v. Austria,* No. 45330/99 (Eur. Ct. H.R. Sept. 4, 2003) (attached as Exhibit A), a gay teenager challenged an Austrian law "aimed at consensual homosexual acts" that made it a crime for a male over the age of 19 to have consensual sex with another male between the ages of 14 and 19, even though consensual sex between heterosexuals or lesbians over the age of 14 was not a crime. Exh. A at ¶¶ 12-13. In considering whether international law required "equal ages of consent for heterosexual and homosexual relations," the European Court of Human Rights rejected Austria's assertion that the differences in criminal penalties could be justified by a need to protect teenagers from homosexual encounters. The court relied on scientific evidence that "sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were 'recruited' into homosexuality had thus been disproved." Exh. A at ¶¶ 43. The court also concluded that society's negative attitudes about homosexuality could not justify differences in criminal penalties. *Id.* at ¶¶ 41, 44. The *S.L.* court held that Austria's law violated the right to non-discrimination protected by Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). *Id.* at ¶¶ 49-52.[12]

Similarly, in *Sutherland v. United Kingdom*, No. 25186/94, Report of the Commission (Eur. Ct. H.R. July 1, 1997) (attached as Exhibit B), *appeal stricken*, 22 Eur. H.R. Rep. CD182 (2001) (attached as Exhibit C), the European Commission on Human

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[12] The standard under Article 14 of the Convention, on which the decisions in *S.L.* and *Sutherland, infra*, were based, is similar to the rational basis test under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Under Article 14, "a difference in treatment is discriminatory . . . if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be realized." *S. L.* at ¶ 36 (citation and internal quotations omitted).

Rights[13] rejected the United Kingdom's position that criminal penalties were needed to protect teenagers from homosexual sexual encounters. *Sutherland* concerned a challenge to a United Kingdom law that set the age of consent for sexual activity between members of the same sex at 21 (and later at 18), while the age of consent for sexual activity between members of the opposite sex was 16. Exh. B at ¶ 3. The United Kingdom asserted that the difference in treatment was justified by a need to protect teenagers from sexual activity with members of the same sex because teenagers "do not have a settled sexual orientation." Exh. B at ¶ 63. Based on the fact that "'most researchers now believe that sexual orientation is usually established before the age of puberty in both boys and girls,'" *id.* at ¶ 24 (quoting 1994 study by the British Medical Association), the Commission found no need to provide teenagers extra protection from same-sex activity, *id.* at ¶ 64. The Commission also rejected the government's "morality" argument, concluding that "society's claimed entitlement to indicate disapproval of homosexual conduct and its preference for a heterosexual lifestyle" could not "constitute an objective or reasonable justification for inequality of treatment under the criminal law." *Id*. at ¶ 65.

In light of the similarity in the facts, reasoning, and applicable legal tests, these decisions provide persuasive additional support for rejecting the State's suggestion that the discriminatory penalties in the Romeo & Juliet law can be justified as a way to

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[13] The European Commission on Human Rights was a quasi-judicial tribunal that, until 1998, screened complaints by human rights petitioners under the Convention and determined whether they could be appealed to the European Court of Human Rights. Beginning in 1998, the Commission was merged into the Court, which took up these screening functions. In *Sutherland*, the United Kingdom declined to appeal the Commission's decision holding that unequal age of consent laws violated the Convention, electing instead to change its domestic criminal law. *See* Exh. C.

prevent teenagers from becoming gay or to express the State's moral disapproval of homosexuality.

4. The State Cannot Use Criminal Penalties to Force Anyone, Even a Teenager, to Form Intimate Relationships in One Way Rather than Another Unless It Has a Compelling Justification

Because even teenagers have a protected constitutional right to form intimate relationships, *see* Def. Supp. Br. at 16-18,[14] the State must have either a compelling state interest, or a "significant state interest . . . that is not present in the case of an adult," before it can permissibly interfere with that right. *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977). And, because the Constitution protects both same-sex and different-sex sexual intimacy equally, *Lawrence v. Texas*, 123 S. Ct. 2472, 2481-82, 2484 (2003), the State cannot have either a significant or a compelling interest in using the criminal law to penalize sex between members of the same sex more than sex between members of the opposite sex. While the State certainly has a compelling interest in protecting teenagers from *all* sexual encounters at a young age, it cannot have such an interest in punishing them severely when they have a same-sex encounter, and less severely when they have an opposite-sex one, in light of the fact that both same-sex and heterosexual intimacy are protected equally under the Constitution. *Id*.

While the State may have its own moral view of the merits of same-sex versus different-sex sexual encounters, that moral perspective cannot justify using the criminal law to punish teenagers *differentially* when they exercise this protected right. Neither the State's moral disapproval of one kind of intimacy, nor its deference to the disapproval of

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[14] *See also* Laurence H. Tribe, Lawrence v. Texas: *The 'Fundamental Right' That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (April 2004).

others, is even a legitimate state interest, *see* Def. Supp. Br. at 5-8; *Cleburne*, 473 U.S. at 448; therefore, such moral disapproval cannot justify the exclusion under rational basis review, much less under the higher level of review required here.[15]

Furthermore, because teenagers aged 14 to 19, like adults, have already developed sexual attractions to one sex or the other (or to both), there is no interest "that is not present in the case of an adult" that could justify the differential penalties in the Romeo & Juliet law. *Carey*, 431 U.S. at 693.

B. STRIKING DOWN THE EXCLUSION IN THE ROMEO & JULIET LAW IS THE ONLY POSSIBLE REMEDY HERE

Striking down the limitation in the Romeo & Juliet law to "members of the opposite sex," rather than the entire law, is fully consistent with the purpose behind the law. As the Court of Appeals explained in its original Opinion, the purpose of the Romeo & Juliet law is "to recognize the judgment that consensual sexual activity between a young adult and a not-quite adult, although wrong, is not as criminal as sexual activity between persons farther apart in age." *State v. Limon*, No. 85,898 at 6 (Kan. Ct. App. Feb. 1, 2002). Given that purpose, it is quite clear that "the act would have been passed without the objectionable portion [here, the requirement that the teenagers be 'members of the opposite sex']," and that "the statute would operate effectively to carry out the intention of the legislature with such portion stricken," *State ex rel. Tomasic v. Unified Cov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 339 (1998), so that "the remainder of the valid law [should] stand," *id.* The legislature's adoption of a severability clause for

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[15] For example, New York's moral objections to sexual promiscuity among minors were not enough to justify that state's ban on the sale of contraceptives to individuals under 16 years old. *Carey*, 431 U.S. at 692-97.

all sex offenses confirms that it intended for the Romeo & Juliet law to survive the invalidation of any unconstitutional portion. *See* K.S.A. § 21-3521.

Furthermore, striking down the discriminatory exclusion in the Romeo & Juliet law will remedy the equal protection violation here, whereas striking down the entire Romeo & Juliet law, as the State prefers, will not.

Matthew Limon's sentence is almost 16 years longer than it would have been if he had been heterosexual or female. In theory, the discrimination inherent in that extra penalty could be remedied either by striking the exclusion in the Romeo & Juliet law and giving Matthew the lesser sentence, or by striking down the entire Romeo & Juliet law and re-sentencing all existing Romeo & Juliet offenders to the longer terms of imprisonment that would then apply. But while the Court might be able to strike down the entire Romeo & Juliet law *prospectively*, it cannot retroactively re-sentence other individuals already serving time under the lesser penalties of the Romeo & Juliet law. *See, e.g.*, *Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (punishment for a crime may not be increased retroactively). Thus, the only way to achieve equality for *Matthew* vis-a-vis teenagers who had sex with teens of the opposite sex is to recharge him under the Romeo & Juliet law, even if its lesser sentence were abolished prospectively for everyone else. *See State v. Limon*, 32 Kan. App. 2d 369, 400 (2004) (Pierron, J., dissenting).

III. CONCLUSION

Matthew Limon prays that this Court reverse his conviction and sentence with instructions that the State initiate any proceedings under the Romeo & Juliet law within 30 days.

Respectfully submitted by attorneys for Defendant-Appellant Matthew Limon:

Paige A. Nichols, # 16400	Tamara Lange	James D. Esseks
Attorney at Law	California Bar # 177949	California Bar # 159360
P.O. Box 582	ACLU Foundation	ACLU Foundation
Lawrence, KS 66044	1663 Mission St., Ste. 460	125 Broad St., 18th Fl.
(785) 832-8024	San Francisco, CA 94103	New York, NY 10004
(785) 832-8024 (fax)	(415) 293-6361	(212) 549-2627

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I hereby certify that true and correct copies of the foregoing were placed in the United States mail, first class postage prepaid, on this 19th day of July, 2004, addressed to:

Jared Maag (5 copies)
Assistant Attorney General
120 SW 10th, 2nd Floor
Topeka, KS 66612-1597

Matthew Limon, # 70713 (1 copy)
Ellsworth Correctional Facility
P.O. Box 107
Ellsworth, KS 67439

Paige A. Nichols, Kansas Bar # 16400