

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
2017 H.B. 2352**

OCTOBER 17, 2017

On May 10, 2017, Representative J. Russell Jennings asked the Judicial Council to study 2017 H.B. 2352, which proposed to limit the admissibility of certain misdemeanor juvenile adjudications for the purpose of impeachment of a witness. The Judicial Council referred the study to the Criminal Law Advisory Committee in June, 2017.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Criminal Law Advisory Committee are:

Stephen E. Robison, Chair, Member of Fleeson, Gooing, Coulson, & Kitch, LLC and Member of the Kansas Judicial Council; Wichita

Natalie Chalmers, Assistant Solicitor General; Topeka

Sal Intagliata, Member, Monnat & Spurrier, Chartered; Wichita

Ed Klumpp, Chief of Police-Retired, Topeka Police Department; Tecumseh

Patrick M. Lewis, Criminal Defense Attorney; Olathe

Steven L. Opat, Geary County Counselor; Junction City

Hon. Cheryl A. Rios, District Court Judge in the Third Judicial District; Topeka

John Settle, Senior Assistant District Attorney, Reno County; Hutchinson

Ann Swegle, Sedgwick County Deputy District Attorney; Wichita

Kirk Thompson, Director of Kansas Bureau of Investigation; Topeka

Rep. John Wheeler, District 123; Garden City

Ronald Wurtz, Retired Public Defender (Federal and Kansas); Topeka

Prof. Corey Rayburn Yung, KU School of Law Professor; Lawrence

Ad Hoc Members:

Prof. Melanie DeRousse, KU School of Law Professor; Lawrence

Don Hymer, Johnson County Assistant District Attorney; Olathe

Prof. Richard Levy, KU School of Law Professor; Lawrence

BACKGROUND

H.B. 2352 was introduced in the Kansas House of Representatives on February 10, 2017 and was referred to the House Committee on Corrections and Juvenile Justice. The bill amended K.S.A. 60-421 to prohibit the admission of a juvenile adjudication for certain misdemeanors for the purpose of impeaching a witness. Proponents of the bill testified during a hearing before the House Committee on February 20, 2017. No opponents testified. The proponents' testimony revealed that the bill's goal was to prohibit a law enforcement officer testifying in court from being impeached based on the officer's juvenile adjudication for a misdemeanor involving dishonesty or false statement. The proponents indicated that individuals with certain misdemeanor juvenile adjudications in their backgrounds are unable to become law enforcement officers because prosecutors are required to disclose the officer's juvenile adjudication to the defense, and such juvenile adjudications may be used to impeach the officer's credibility as a witness. The proponents argued that a mistake made as a juvenile should not prevent an otherwise qualified individual from being able to serve as a law enforcement officer later in life. During the legislative committee's discussion of the bill, it became clear that there were complications regarding the practical application of the bill and probable constitutional issues.

On May 10, 2017, Representative J. Russell Jennings asked the Judicial Council to study H.B. 2352 as originally proposed and as amended. Representative Jennings also asked the Judicial Council to specifically address the following questions and issues:

- Would the language of the bill be effective in overriding current disclosure requirements for the specified adjudications, or would the constitutional underpinnings (regarding cross-examination and impeachment) of the disclosure requirements undercut the bill's efficacy? (Discussion on pages 5-6.)
- Do the current disclosure requirements also include a diversion for a juvenile offense, as suggested by the testimony of Wichita Police Chief Gordon Ramsay? (Discussion on pages 5-6.)
- Even if the bill's provisions would override the disclosure requirement, would additional language be needed to prevent a defense attorney from questioning an officer about the specified adjudications? (Discussion on pages 5-6.)

- Would the statutes governing law enforcement training also need to be amended to achieve the goal of the bill? (Discussion on pages 6-8.)
- Are there other areas of the law where juvenile adjudications may be impacting employment opportunities that the Committee should consider addressing in conjunction with this legislation? (Discussion on pages 8-9.)

On June 2, 2017, the Judicial Council referred the study to the Criminal Law Advisory Committee with the addition of three ad hoc members who are experts in constitutional law and juvenile offender law (“the Committee”).

EXECUTIVE SUMMARY

The Committee recommends against the passage of H.B. 2352 in its original form or as amended. The bill’s goal was to eliminate a barrier to the employment of certain law enforcement officers; however, the witness impeachment statute is not the major barrier to the employment of law enforcement officers with misdemeanor juvenile adjudications. The first barrier is in the regulations governing the certification of law enforcement officers. Amending K.S.A. 60-421 would do nothing to change these regulations.

The second barrier is prosecutors’ policies limiting certain law enforcement officers from signing charging affidavits to begin a case or from testifying in court. Even if this bill passed, the due process clause and the confrontation clause of the U.S. Constitution would still require prosecutors to disclose a witness’s misdemeanor juvenile adjudication record to the defendant, and the adjudications would still be admissible to impeach the witness’s credibility by revealing possible biases, prejudice, or ulterior motives. Eliminating the ability to use a juvenile adjudication to impeach the general credibility of a witness through this amendment may reduce, but would not completely alleviate prosecutors’ concerns about the possible impeachment of law enforcement officers. Additionally, amending the statute would affect *all* witnesses for the prosecution and the defense, not just witnesses who are law enforcement officers. The Committee recommends against such a wide-reaching change.

METHOD OF STUDY

During its study of H.B. 2352, the Committee read the original study request and associated materials such as the bill (copy of bill on pages 11-12) and related testimony from the House Committee's February 20, 2017 hearing. The Committee reviewed the case law discussing the disclosure requirements for prosecutors and the right for a party to use a witness's juvenile adjudication under the Confrontation Clause of the United States' Constitution. The Committee studied how using juvenile adjudications for impeachment is addressed in the federal rules of evidence and by other states' rules of evidence. The Committee reviewed Kansas' statutory requirements for law enforcement officers, and the statutes, rules, and regulations governing the certification of Kansas law enforcement officers. It also researched the laws in Kansas and various states regarding the expungement or decay of juvenile adjudications.

The Committee met four times in person between July 2017 and September 2017.

COMMITTEE DISCUSSION

If K.S.A. 60-421 were amended as recommended by H.B. 2352, the statute would limit the use of misdemeanor juvenile adjudications for the impeachment of *all* witnesses, not just law enforcement officers. The Committee was very critical of such a broad change. Impeaching a witness's credibility by showing the witness had misdemeanor juvenile adjudications for crimes involving dishonest or false statement could be vitally important to either the prosecution or the defense.

The Committee considered an example of the situation the proponents of this bill were trying to address. An individual has a misdemeanor juvenile adjudication for theft when she was 15 years old, but goes on to graduate from high school with good grades, completes four years of military service, and has no additional legal troubles, applies to become a law enforcement officer but is not hired because of her adjudication for theft when she was 15. The Committee agreed that an individual's single misdemeanor juvenile adjudication for theft should not automatically disqualify her from becoming a law enforcement officer.

After reviewing the statutes and pertinent regulations, the Committee concluded that the proponent's supposition that an individual's misdemeanor juvenile adjudication prevents an

individual from becoming a law enforcement officer because such individuals would be subject to impeachment as witnesses is incorrect. The Committee was aware that some county or district attorneys choose to implement policies prohibiting a law enforcement officer with a misdemeanor juvenile adjudication from signing a charging affidavit to begin a criminal case or from testifying as a witness. The implementation of such a policy is within the county or district attorney's discretion but is not required by law. There is nothing in the statutes to prohibit a law enforcement officer with a misdemeanor juvenile adjudication from testifying in court.

There is still the possibility that the witness's misdemeanor juvenile adjudication will subject that witness to attempts to impeach the witness's credibility, but the Committee unanimously agreed with the statement in Sedgwick County District Attorney Marc Bennett's testimony that "any defendant whose case rests on pointing out the prior misdemeanor shoplift of the arresting officer when the officer was 16 – doesn't have much of a defense." Defense attorneys on the Committee admitted that if they had a 35-year-old officer testifying who had a misdemeanor juvenile adjudication, they would not attempt to impeach the officer's credibility with that charge because it would probably harm the defense's credibility with the jury.

Constitutional Requirements

The Committee considered the constitutional issues brought up during the legislature's consideration of the bill. The first issue involved the requirement that prosecutors disclose a witness's juvenile adjudication record to the defense. A line of U.S. Supreme Court cases starting with *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), have interpreted the due process clause of the Fourteenth Amendment of the U.S. Constitution as requiring prosecutors to disclose all evidence or information favorable to the accused when the evidence is material to guilt or punishment. Such evidence includes both exculpatory and impeachment evidence. See *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) and *State v. Warrior*, 294 Kan. 484, 277 P.3d 1111 (2012); see also *United State v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) and *United State v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). The disclosures pursuant to this line of cases are referred to as "Brady disclosures." Some prosecutors believe *Brady* disclosures should include a witness's

prior juvenile adjudications. *See Warrior*, 294 Kan. at 504. A question remains whether disclosure should also include any information about a witness’s prior participation in juvenile immediate intervention programs (IIP), which was formerly known as diversion. There is no Kansas case law on this question.

Just because information is required to be disclosed by the prosecutor does not mean the information is admissible in court. K.S.A. 60-421 prohibits the admission of evidence of a prior conviction of a witness for a crime not involving dishonesty or false statement for the purpose of “impairing,” i.e. impeaching, the witness’s credibility. A state statute may prohibit a juvenile adjudication from being used to generally attack a witness’s credibility, but the Confrontation Clause in the Sixth Amendment to the U.S. Constitution requires that the defendant still be allowed to use a juvenile adjudication during cross-examination of the prosecution’s witness to reveal “possible biases, prejudice, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The Kansas Supreme Court has ruled that the same rule applies to defense witnesses. The prosecution may use a defense witness’s juvenile adjudications to reveal possible biases, prejudice, or ulterior motives of the witness. *State v. Wilkins*, 215 Kan. 145, 149-150, 523 P.2d 728 (1975).

Statutory changes cannot overrule constitutional requirements. If K.S.A. 60-421 were amended as proposed in the bill, prosecutors would still be required to disclose the misdemeanor juvenile adjudications of all witnesses, and the defendant would still be able to use the misdemeanor juvenile adjudications to impeach the witness’s credibility if the adjudication would reveal possible biases, prejudice, or ulterior motives.

Law Enforcement Training Act and CPOST Regulations

Mandatory Minimum Qualifications – K.S.A. 74-5605

All law enforcement officers in Kansas are required to be certified by the Kansas Commission on Peace Officers’ Standards and Training (CPOST). Two of the statutory minimum qualifications for certification are that the applicant be at least 21 years of age and has not “been convicted of a crime that would constitute a felony under the laws of this state, a

misdemeanor crime of domestic violence or a misdemeanor offense that the commission determines reflects on the honesty, trustworthiness, integrity or competence of the applicant as defined by rules and regulations of the commission[.]” K.S.A. 74-5605(b)(3) & (8). The statute goes on to define “conviction” to include “any diversion or deferred judgment agreement entered into for . . . a misdemeanor offense that the commission determines reflects on the honesty, trustworthiness, integrity or competence of the applicant as defined by the rules and regulations by the commission[.]” K.S.A. 74-5605(d). In response to this statute, CPOST promulgated K.A.R. 106-2-2, which prohibits an applicant for certification from having a conviction for misdemeanor theft, as defined in K.S.A. 21-5801, that occurred within the 12 months before the date of application for certification.

The definition of “conviction” includes diversion or deferred judgment agreements but fails to include juvenile adjudications or an IIP in the definition. Juvenile adjudications are civil in nature and are not criminal convictions. *State v. Kelly*, 298 Kan. 965, 976, 318 P.3d 987 (2014); *see also State v. Muhammad*, 237 Kan. 850, 854, 703 P.2d 835 (1985). It is the opinion of the Committee that “conviction” as defined and used in K.S.A. 74-5605 and K.A.R. 106-2-2 does not include juvenile adjudications. Even if CPOST interpreted K.A.R. 106-2-2 to include juvenile adjudications and immediate intervention programs, the regulation only applies to misdemeanor theft convictions occurring within the 12 months before the date of application for certification. Since an applicant must be at least 21 years old to apply for certification, the earliest misdemeanor theft convictions that would automatically disqualify the applicant from certification would be those committed while the applicant was 20 years old. Any misdemeanor theft juvenile adjudications could not have occurred during the relevant 12 month timeframe.

Discretionary Qualifications – K.S.A. 74-5616

K.S.A. 74-5616(b)(5) provides that the commission *may* deny the certification of an officer who “engaged in conduct, which, if charged as a crime, would constitute . . . a misdemeanor crime that the commission determines reflects on the honesty, trustworthiness, integrity or competence of the applicant as defined by rules and regulations of the commission.” In response to K.S.A. 74-5616, CPOST published K.A.R. 106-2-2a. It says an applicant cannot engage in conduct, whether or not charged as a crime or resulting in a conviction, which would

constitute any of the listed misdemeanor offenses. The list includes 58 misdemeanors and includes: vehicular homicide; interference with parental custody; criminal restraint; assault; battery; stalking; endangering a child; unlawful cultivation, distribution, or possession of controlled substances, prescription-only drugs, and drug paraphernalia; theft; criminal trespass; criminal damage to property; counterfeiting; interference with law enforcement; obstructing apprehension or prosecution; false impersonation; disorderly conduct; prostitution; and a second or subsequent driving under the influence. K.A.R. 106-2-2a(a).

The list of 58 misdemeanors in K.A.R. 106-2-2a includes juvenile adjudications and IIPs because the regulation encompasses the applicant's conduct, regardless of whether or not it was charged as a crime or resulted in a conviction. The failure to meet the minimum requirements in K.S.A. 74-5605 mandates denial of certification, but K.S.A. 74-5616(b) allows CPOST discretion. CPOST may decide whether or not it will approve or deny an applicant's certification if the applicant has a misdemeanor juvenile adjudication.

An applicant with a misdemeanor juvenile adjudication or IIP may meet the minimum requirements for certification under K.S.A. 74-5605, but CPOST may still choose to deny the applicant's certification based on K.S.A. 74-5616(b)(5) and K.A.R. 106-2-2a(a). Therefore, even if K.S.A. 60-421 were amended as proposed by the bill, law enforcement agencies may still be unable to hire applicants with a misdemeanor juvenile adjudication because CPOST may prohibit that individual from being certified as a law enforcement officer.

Impact of Juvenile Adjudications on Employment Opportunities in Kansas

The legislature asked the Committee about other areas of law that impact an individual's employment opportunities if the individual has a juvenile adjudication. The Committee is unaware of any pressing issues with other areas of law; however, the Committee noted the following categories of employers or licensing boards that are allowed by law to consider an applicant's juvenile adjudication record:

- Home health agencies - K.S.A. 65-5117(a)(1);

- Programs administered by the secretary for children and families or the secretary for aging and disability services for the placement, safety, protection, or treatment of vulnerable children or adults - K.S.A. 75-53,105;
- Licensed provider of disability services offering such services or operating a center, facility, or hospital - K.S.A. 39-2009;
- License to practice law in Kansas - Kansas Supreme Court Rule 715; and
- Child care facilities - K.S.A. 65-516.

Some statutes bar an individual from working in a certain area if the applicant committed certain offenses, while other statutes give the employer or licensing board discretion to evaluate the offense and decide whether or not it disqualifies the applicant.

Even juvenile adjudications that have been expunged may be disclosed to and considered by certain employers. The juvenile adjudication expungement statute (K.S.A. 38-2313) requires the custodian of the records or files relating to the juvenile adjudication to not disclose the existence of an expunged juvenile adjudication unless requested for a specific list of purposes, including if the individual is applying to work at:

- A private detective agency or a private patrol operator;
- Osawatomie state hospital, Rainbow mental health facility, Larned state hospital, Parsons state hospital and training center, and Kansas neurological institute;
- The Kansas lottery;
- The Kansas racing commission; or
- The Kansas sentencing commission.

If the legislature is interested in learning more about the collateral consequences of juvenile adjudications, the Committee encourages the legislature to contact the National Juvenile Defender Center who specialize in and conduct research on this topic.

Conclusion

The Committee was supportive of the general policy that misdemeanor juvenile adjudications should not haunt an individual throughout adulthood. However, the Committee acknowledged that there are some professions, such as law enforcement, where past conduct that

would reflect on a person's honesty, trustworthiness, or integrity should be reviewed by an employer or licensing entity. The witness impeachment statute, K.S.A. 60-421, does not present a legal barrier to individuals with misdemeanor juvenile adjudications being hired as law enforcement officers. The real barriers are (1) whether the misdemeanor juvenile adjudication prevents the individual from becoming a certified law enforcement officer under the CPOST regulations, and (2) if an individual prosecutor or prosecutor's office makes a policy decision that an officer with a misdemeanor juvenile adjudication cannot sign a charging affidavit to begin a criminal case or cannot testify as a witness. The prosecutor's policy placing restrictions on officers with misdemeanor juvenile adjudications is within a prosecutor's discretion but is not required by Kansas law.

The Committee unanimously opposed attempting to address the issue of hiring law enforcement officers with misdemeanor adjudications through a change in K.S.A. 60-421. The proposed amendment would not actually prevent misdemeanor juvenile adjudications from being used to impeach a witness since the constitution requires that the juvenile adjudication can be used to impeach the witness if the adjudication reveals possible biases, prejudice, or ulterior motives. Amending K.S.A. 60-421 as proposed would do little to address the proponent's issue while having far-reaching effects on both the defense and prosecution's abilities to impeach *any* witness.

RECOMMENDATION

For the reasons discussed above, the Committee recommends against the passage of H.B. 2352 in its original form or as amended.

HOUSE BILL No. 2352

By Committee on Corrections and Juvenile Justice

2-10

1 AN ACT concerning civil procedure; relating to evidence; impeachment
2 evidence; amending K.S.A. 60-421 and repealing the existing section.
3

4 *Be it enacted by the Legislature of the State of Kansas:*

5 Section 1. K.S.A. 60-421 is hereby amended to read as follows: 60-
6 421. Evidence of the conviction of a witness for a crime not involving
7 dishonesty or false statement shall be inadmissible for the purpose of
8 impairing ~~his or her~~ *such witness'* credibility. *Evidence of an adjudication*
9 *for a crime, which, if committed by an adult, would constitute a*
10 *misdemeanor involving dishonesty or false statement, shall not be*
11 *admissible for impeachment of a witness.* If the witness ~~be~~ *is* the accused
12 in a criminal proceeding, no evidence of ~~his or her~~ *such witness'*
13 conviction of a crime shall be admissible for the sole purpose of impairing
14 ~~his or her~~ *such witness'* credibility unless the witness has first introduced
15 evidence admissible solely for the purpose of supporting ~~his or her~~ *such*
16 *witness'* credibility.

17 Sec. 2. K.S.A. 60-421 is hereby repealed.

18 Sec. 3. This act shall take effect and be in force from and after its
19 publication in the statute book.

HOUSE BILL No. 2352

By Committee on Corrections and Juvenile Justice

2-10

Proposed Amendments to HB 2352 - Jennings
House Corrections and Juvenile Justice
Prepared by: Natalie Scott
Office of Revisor of Statutes
February 20, 2017

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