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HB2021 amendments to SB367

Chair and Honorable Senators, I am Judge Kevin Smith of the 18th Judicial District. I appear in my individual capacity and not as a representative of the 18th Judicial District. Thank you for the opportunity to testify about the need to amend SB367 to preserve its underlying purpose while addressing its flaws.

Governor Sam Brownback appointed me to the bench December 2015 and I was sworn in January 2016. I served my first four years in juvenile court where I presided over juvenile offender and child in need of care (CINC) cases. I had the opportunity to adjudicate and sentence juveniles under the pre-SB367 juvenile code as well as under SB367. I have served in the criminal department for the last two years so am seeing some of the fallout of SB367.

Most of my testimony is identical to last year's. Sadly, if anything, my experience in 2022 as a criminal department judge has revealed the listed problems to be more apparent than before thanks to the Covid-19 cloud lifting.

First, a very brief history of SB367 is in order. This legislation is the result of the bipartisan, interbranch Juvenile Justice work group recommendations. Among the members of this work group were prosecutors from counties that have a handful of juvenile offender cases and none from Sedgwick County. Sedgwick County has the highest volume of juvenile offender cases in the state. It is also one of a few jurisdictions that assign district court judges to handle only juvenile offender and CINC cases. In Sedgwick, each judge carries a pending juvenile offender caseload of between 100 and 200 cases. Yet, the work group did not invite any Sedgwick County judge to participate in this exploration of a top-down rewrite of the juvenile justice code.

It seems to me that if you want to consider the potential for unintended consequences arising from a total rewrite of the juvenile justice code, including a judge and district attorney from the highest volume county in Kansas would have provided valuable insight.

The goals and objectives of SB367 are good. Children's minds aren't fully formed and their criminal behavior must be dealt with differently than adults. Studies show this. They also show that incarceration doesn't necessarily diminish recidivism. However, SB367's primary goal of reducing incarceration and increasing use of community based resources doesn't factor in a critical characteristic of many of these cases. These kids often lack a functional family structure to ensure they complete treatment programs. In the ten years before SB367, Kansas experienced a 50% reduction in juvenile crime rates, a notable achievement. One of the reasons for this

reduction was the ability of juvenile court judges to retain jurisdiction over juveniles until the age of majority. These kids need structure and direction, especially when they engage in criminal behavior. In broken families where generational foster care and criminal behavior are endemic, maintaining the authority of the court over juveniles is essential to keeping these kids on a productive path. Judges had the ability all the way to natural case termination due to juveniles becoming adults to give kids a choice between incarceration or completing treatment/behavior modification programs. More often than not they chose the latter. In broken homes or fractured families, these kids often lack the pressure from parents and extended family to finish essential programs.

Incomplete treatment/behavior modification programs is often worse than no programs at all.

SB367 imposed maximum incarceration limits (45 days) and case lengths (12, 15, or 18 months) on all juveniles except for Level 1-4 felonies, or Extended Jurisdiction Juvenile Prosecution cases. When either the case length or incarceration limit is hit, the case is closed with no supervision thereafter. SB367 also capped probation terms at 6-12 months depending on severity, which can be extended up to the case length limit and subject to the incarceration limit so juveniles have more time to complete behavior modification programs. Case length limits begin to run at adjudication, which is typically 6-8 weeks prior to sentencing thus providing just 10, 13, or 16 months to complete behavior modification programs. Almost all cases need more time than the limits allow. But when a juvenile has served his incarceration limit, or hits the case length limit, the court loses jurisdiction over the juvenile regardless of whether he has completed terms and conditions of probation, to include treatment/behavior modification programs.

I warned my colleagues when SB367 was signed into law that when district or county attorneys reviewed cases for charging and discovered some of the challenges in serious cases, they would take steps to give courts more time to modify juveniles' behavior. DAs would file more Level 1-4 person felonies against juveniles, which are except from most limits, and Motions for Adult Prosecution (MAP) far more often than before SB367. They would also be more reluctant to offer plea deals to lesser charges that invoke SB367's limits. I defer to Sedgwick County DA Marc Bennet for the actual numbers for these scenarios in our county, but it is accurate to say that all these unintended consequences have happened. Our DA filed 17 MAPS in 2017, 20 in 2018, 26 in 2019, 11 in 2020, 43 in 2021, and 11 in 2022, compared to the annual average before SB367 of less than half dozen per year. That's 92 more "children" (at least) prosecuted as adults as a direct consequence of SB367 in one county! When juveniles face more serious person felonies and even adult prosecution, it's impossible to claim that SB367 has improved their case outcomes.

These unintended consequences have erected far higher barriers to these juveniles' future success than before SB367.

As a criminal judge I can attest that 2021 and 2022 were banner years for prosecution of juveniles for violent offenses in Sedgwick County. I have several pending cases involving former

juveniles that were prosecuted under SB367 and its deficiencies, as well as a few juveniles MAPed up for adult prosecution. I believe our other criminal department judges are facing the same increase. I contend that taking away juvenile judges' ability to at least impose the equivalent of adult case graduated sanctions for probation violations may be a cause of juveniles' escalated criminal behavior following disposition of their juvenile offender cases.

To preserve the spirit of SB367 while protecting the community, we need to eliminate case length limits with judicial discretion on early termination, and increase the maximum incarceration limit. Judges should also have more discretion to impose incarceration sanctions for all probation violations without the need for offender or community safety findings. Conversely, judges should be constrained to graduated sanctions similar to adult cases, such as 48 hours incarceration for a first probation violation, 72 hours for a second, and 30 days for each subsequent violation up to the incarceration limit, whatever that may be but certainly longer than the current 45 day limit. These tweaks will give judges the time they need to make sure juvenile offenders complete treatment/behavior modification programs, and even compel them to earn GEDs or high school diplomas, but will not allow judges to impose sanctions of such lengths as to cause more harm than good.

Ignore those who brag about reducing juvenile incarceration as proof that SB367 works. This just means that judges are following the law and not incarcerating juveniles even when they should. Instead, consider what's happening with violent juvenile offenders. Sedgwick County Detention Facility's beds for juveniles being prosecuted for murder as adults have been maxed out for much of 2021 and 2022. We also have more than a dozen pending juvenile offender murder cases in the adult courts, with other juveniles or former juvenile offenders often the victims. This didn't happen to this degree before SB367. It's happening now. While some will claim this is due to Covid, the fact is we saw these upward trends shortly after SB367 went into full effect, and we have seen them in 2022, post-Covid. It is not working. If we fail to tweak it to address these deficiencies, things will get worse not better.

This august body has been informed about SB367's weaknesses many times yet has failed to implement amendments to preserve the good while extricating the bad. It's time to address the weaknesses so we can preserve the strengths, and save children's lives in the process.

Proposed changes in a nutshell:

- * Increase the 45-day incarceration limit.
- * Eliminate case-length limits.
- * Give courts discretion to retain jurisdiction in all cases to the age of majority.
- * Give judges discretion to extend probation up to the age of majority so juveniles can complete behavior modification programs.
- * Permit judges to sanction juveniles to 48 days incarceration for 1st probation violation, 72 hours for a 2nd, and up to 30 days for all subsequent violations up to the maximum incarceration limit without the need to make offender or community safety findings for ALL probation violations, including technical, and for contempt of court.