

STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88-162

The Honorable Edwin H. Bideau III
State Representative, Fifth District
14 South Rutter
Chanute, Kansas 66720-1442

Re: Crimes and Punishments--Sex Offenses--Rape;
Aggravated Criminal Sodomy; Rape Shield Statute

Synopsis: K.S.A. 1987 Supp. 21-3525, known as the rape shield law, applies where the crime of rape, K.S.A. 1987 Supp. 21-3502, has occurred. Due to the sexual neutrality of the language used in the rape statute, the definition of "sexual intercourse" found in K.S.A. 1987 Supp. 21-3501(1), and due to the rule that criminal statutes are to be strictly construed, it is possible for a male to be the victim of rape. K.S.A. 1987 Supp. 21-3525 also applies when the crime of aggravated criminal sodomy, K.S.A. 1987 Supp. 21-3506, has occurred. Therefore, the rape shield law does indeed apply to forceable rapes committed against male victims, as well as applying to cases of aggravated criminal sodomy when the victim is a male. Cited herein: K.S.A. 1987 Supp. 21-3501; 21-3502; 21-3506; 21-3525.

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Dear Representative Bideau:

As State Representative for the Fifth District, you request our opinion regarding the scope and application of the Kansas rape shield law, K.S.A. 1987 Supp. 21-3525. Specifically, you

inquire as to whether the Kansas rape shield law applies to a forceable rape committed against a male victim.

Essentially, the Kansas rape shield law, with certain exceptions, serves to protect the victims of certain enumerated sex offenses by excluding from admission into evidence the victim's previous sexual conduct or history. K.S.A. 1987 Supp. 21-3525(2) provides in part:

"Except as provided in subsection (3), in any prosecution to which this section applies, evidence of the complaining witness' previous sexual conduct with any person including the defendant shall not be admissible, and no reference shall be made thereto in the presence of the jury, except under the following conditions. . . ."
(Emphasis added.)

The crime of rape is one of the enumerated sex offenses that triggers the application of the Kansas rape shield law. K.S.A. 1987 Supp. 21-3525(1)(a). This in turn requires an inquiry as to what constitutes the crime of rape. K.S.A. 1987 Supp. 21-3502 defines rape as follows:

"(1) Rape is sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances:

"(a) When the victim is overcome by force or fear;

"(b) when the victim is unconscious or physically powerless;

"(c) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or

"(d) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender's knowledge, unless the

victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.

"(2) Rape is a class B felony. . . ."
(Emphasis added.)

Furthermore, K.S.A. 1987 Supp. 21-3501(1) defines "sexual intercourse" as

"[A]ny penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse. . . ."

It has long been the rule in Kansas that criminal statutes, like K.S.A. 1987 Supp. 21-3501(1) and 3502, are to be strictly construed. State v. Kearns, 229 Kan. 207, 208 (1981), quoted in State v. Clothier, 243 Kan. 81, 85 (1988). Also, in State v. Bishop, 215 Kan. 481, 483 (1974), the Court discussed the rules of strict construction and stated:

"The rule of strict construction simply means that ordinary words are to be given their ordinary meaning. Such a statute should not be so read as to add that which is not readily found there or to read out what as matter of ordinary English language is in it. . . ." [Quoting State, ex rel., v. American Savings Stamp Co., 194 Kan. 297, 300 (1965)].

The Kansas rape statute, K.S.A. 1987 Supp. 21-3502, is gender neutral as it uses the words "person" and "victim." Based upon this neutrality, it logically follows that the "person" who does not consent to the "sexual intercourse" could be either male or female. However, due to the definition of "sexual intercourse" in K.S.A. 1987 Supp. 21-3501(1), which requires "penetration of the female sex organ," it becomes necessary that either the victim or the offender be a female. This conclusion is also supported by the rules of strict construction mentioned previously which require words to be given their ordinary meaning. Based upon all of this, it is indeed possible for a male to be the victim of a rape, but if that is the case, then the offender must necessarily be a female in order to satisfy the definition of "sexual intercourse" found in K.S.A. 1987 Supp. 21-3501(1).

After reaching the conclusion that a male can be the victim of a rape, the question of whether the rape shield law, K.S.A. 1987 Supp. 21-3525, applies to protect the victim becomes elementary. K.S.A. 1987 Supp. 21-3525(1)(a) provides for the application of the rape shield law to cases of "rape, as defined by K.S.A. 21-3502 and amendments thereto." Therefore, if a male is the victim of a rape pursuant to K.S.A. 1987 Supp. 21-3502, the rape shield law will be applied to protect the male victim.

As mentioned earlier, if a male is the victim of a rape then the offender must be a female in order to satisfy the definition of "sexual intercourse" found in K.S.A. 1987 Supp. 21-3501(1). This means that if the victim and the offender are both males then statutorily no rape has occurred. Depending upon the particular facts involved the occurrence of this type of offense would be classified as sodomy. K.S.A. 1987 Supp. 21-3501(2) defines sodomy as follows:

"'Sodomy' means oral or anal copulation; oral or anal copulation or sexual intercourse between a person and an animal; or any penetration of the anal opening by any body part or object. Any penetration, however slight, is sufficient to constitute sodomy. . . ."

Forcible, or nonconsensual sodomy, is classified as aggravated criminal sodomy and proscribed by K.S.A. 1987 Supp. 21-3506. Aggravated criminal sodomy is classified as a class B felony. K.S.A. 1987 Supp. 21-3506(b)(2). The crime of aggravated criminal sodomy is also one of the enumerated sex offenses which triggers the application of the rape shield law. K.S.A. 1987 Supp. 21-3525(1)(d). Therefore, for purposes of the application of the rape shield law, both rape and aggravated criminal sodomy are treated the same. Both crimes are also class B felonies which in turn subjects them to the same sentencing guidelines.

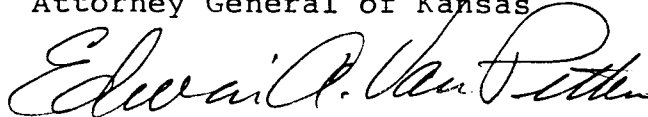
In conclusion, the Kansas rape shield law, K.S.A. 1987 Supp. 21-3525, serves to protect victims of certain enumerated sex offenses by disallowing evidence of the victim's previous sexual conduct from being admitted into evidence during the prosecutions for those offenses. The crime of rape is one of the sex offenses which activates the rape shield law. K.S.A. 1987 Supp. 21-3525(1)(a). Based upon the sexual neutrality of the rape statute, K.S.A. 1987 Supp. 21-3502, the definition of "sexual intercourse" found in K.S.A. 21-3501(1), and upon the

long established rule that criminal statutes are to be strictly construed, it appears to be possible for a male to be the victim of rape. However, the above mentioned reasons also support the position that if a male is the victim of a rape, then the offender must necessarily be a female. If both the victim and the offender are males, and there is no consent, then this would constitute aggravated criminal sodomy pursuant to K.S.A. 1987 Supp. 21-3506. The rape shield law applies to both offenses, rape and aggravated criminal sodomy, and will protect the victims in both offenses. K.S.A. 1987 Supp. 21-3525(1)(a) and (d). Thus, it is our opinion that the Kansas rape shield law, K.S.A. 1987 Supp. 21-3525, does indeed apply to forcible rapes committed against male victims, and it also applies to cases of aggravated criminal sodomy when the victim is a male.

Very truly yours,



ROBERT T. STEPHAN
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Edwin A. Van Petten
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RTS:EAVP:jm