

No. 06-96197-A

---

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

---

IN THE MATTER OF L.M.,

APPELLANT,

DOB: 08-14-1988

vs.

STATE OF KANSAS,

APPELLEE.

---

**BRIEF OF APPELLANT**

---

Appeal from the District Court of Finney County, Kansas  
Honorable Philip C. Vieux, Judge of the District Court  
District Court Case No. 05JV197

---

Paul Shipp, #20263  
KANSAS LEGAL SERVICES  
120 Grant Ave  
Garden City, KS 678845  
Office: 620-275-0238  
FAX: 620-275-4999  
Attorney For Appellant - Respondent

**TABLE OF CONTENTS**

***TABLE OF CONTENTS***..... *i*

***TABLE OF AUTHORITIES***..... *ii*

***PROCEDURAL POSTURE OF THE CASE*** ..... *1*

***STATEMENT OF FACTS***..... *2*

***ISSUES ON APPEAL***..... *5*

***ARGUMENT AND AUTHORITIES***..... *5*

**I. L.M. WAS ENTITLED TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTION AND FAILURE TO GRANT RESPONDENT’S REQUEST VIOLATED THE RESPONDENT’S CONSTITUTIONAL RIGHTS** ..... *5*

    A. Standard of Review..... *5*

    B. Due process under the federal constitution requires a trial by jury under the current juvenile code ..... *6*

    C. The Kansas Constitution also provides for a right to trial by jury to Juveniles ..... *30*

**II. L.M.’S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED** ..... *34*

    A. Standard of Review..... *34*

    B. Argument and Authorities ..... *35*

**III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT L.M. OF AGGRAVATED SEXUAL BATTERY** ..... *37*

    A. Standard of Review..... *37*

    B. Argument and Authorities ..... *37*

***CONCLUSION*** ..... *39*

***CERTIFICATE OF SERVICE*** ..... *39*

## TABLE OF AUTHORITIES

### **Cases**

<u>Baldwin v. New York</u> , 399 U.S. 66, 90 S.Ct. 1886 (1970).....	33
<u>Blanton v. City of North Las Vegas</u> , 489 U.S. 538, 109 S.Ct. 1289 (1989) .....	33
<u>City of Fort Scott v. Arbuckle</u> , 165 Kan. 374, 196 P.2d 217 (1948).....	32
<u>Commonwealth v. Olaf O.</u> , 57 Mass. App. Ct. 918, 919, 786 N.E.2d 400 (Mass App. 2003) .....	26
<u>Gallegos v. Colorado</u> , 370 U.S. 49 (1962) .....	36
<u>Haley v. Ohio</u> , 332 U.S. 596, 599, 92 L.Ed. 224, 68 S.Ct. 302 (1948) .....	35
<u>Hall v. Brown</u> , 129 Kan. 859, 284 Pac. 396 (1930).....	32
<u>In re C.D.N.</u> , 559 N.W.2d 431 .....	27, 28
<u>In re Findlay</u> , 235 Kan. 462, 681 P.2d 20 (1984) .....	passim
<u>In re Gault</u> , 387 U.S. 1, 45 (1967) .....	35, 36
<u>In re Jeremy P.</u> , 278 Wis.2d 366, 379, 692 N.W.2d 311 (Wis. App. 2004).....	25, 26
<u>In re Turner</u> , 94 Kan. 115, 145 Pac. 871 (1915).....	32, 33
<u>In re W.H.</u> , 274 Kan. 813, 822-23, 57 P.3d 1 (2002).....	16
<u>McKeiver v. Pennsylvania</u> , 403 U.S. 528, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971) .....	passim
<u>Opinion of the Justices</u> , 423 Mass. 1201, 668 N.E.2d 738 (1996) .....	26, 27
<u>People v. J.T.</u> , 13 P.3d 321, 323 (Colo. App. 2000).....	27
<u>People v. Montaine</u> , 7 P.3d 1065, 1067 (Colo. App. 1999) .....	27
<u>RLR v. State Alaska</u> , 487 P.2d 2 (1971).....	28
<u>Smith v. Doe</u> , 538 U.S. 84, 155 L.Ed.2d 164, 123 S. Ct. 1140 (2003).....	28, 29
<u>State v. Bollig</u> , 232 Wis.2d 561, 605 N.W.2d 199 (Wis. 2000) .....	26
<u>State v. Cooper</u> , 275 Kan. 823, 69 P.3d 559 (2003) .....	5
<u>State v. DeMarco</u> , 263 Kan. 727, 732, 952 P.2d 1276 (1998).....	34
<u>State v. DeMarco</u> , 263 Kan. 727, 952 P.2d 1276 (1998) .....	34
<u>State v. Hill</u> , 271 Kan. 929, Syl. p1, 26 P.3d 1267 (2001).....	6
<u>State v. Hitt</u> , 273 Kan. 224, 227, 42 P.3d 732 (2002).....	14
<u>State v. Irving</u> 216 Kan. 588 (1975).....	34
<u>State v. J.H.</u> , 96 Wash. App. 167, 182, 978 P.2d 1121 (Wash. App. 1999).....	27
<u>State v. LaMunyon</u> , 259 Kan. 54, 911 P.2d 44 (1996) .....	17

<u>State v. Manning</u> , 532 N.W.2d 244 (Minn. App. 1995),.....	27, 28
<u>State v. McDonald</u> , 250 Kan. 73, 824 P.2d 941, Syl. P 7, 824 P.2d 941 (1992).....	37
<u>State v. Myers</u> , 260 Kan. 669, 923 P.2d 1024 (1996).....	passim
<u>State v. Plunkett</u> , 261 Kan. 1024, 1036 (1997).....	38
<u>State v. Schneider</u> , 32 Kan.App.2d 258, 80 P.3d 1184 (2003).....	34
<u>State v. Scott</u> , 265 Kan. 1, 9-10, 961 P.2d 667 (1998).....	19, 20
<u>State v. Ward</u> , 123 Wash.2d 488, 502, 869 P.2d 1062 (1994) .....	27
<u>State v. Wilkinson</u> , 269 Kan. 603, 609, 9 P.3d 1 (2000).....	19, 21

**Statutes**

21-3518(a)(1).....	37
22-4906.....	17, 19
22-4907.....	18
22-4909.....	18
Alaska Stat. §12.63.100(3) .....	28
Juvenile Justice Reform Act of 1996 .....	14
K.S.A. 1983 Supp. 38-1601.....	13
K.S.A. 21-3518 .....	1, 18, 24
K.S.A. 21-4601 .....	24
K.S.A. 21-4704 .....	25
K.S.A. 21-4710 .....	17
K.S.A. 22-3215(4).....	35
K.S.A. 22-4902 .....	18
K.S.A. 22-4902(b).....	17, 18
K.S.A. 22-4902(c).....	24
K.S.A. 22-4902(c)(10) .....	18
K.S.A. 22-4904 .....	17
K.S.A. 22-4904(a).....	18
K.S.A. 22-4906(g).....	24
K.S.A. 22-4907(a)(b) .....	18
K.S.A. 22-4908 .....	23
K.S.A. 22-4909(a).....	19

K.S.A. 38-16,129 .....	33
K.S.A. 38-16,129(a)(2) .....	25
K.S.A. 38-16,129-16,133 .....	16
K.S.A. 38-1601 .....	14
K.S.A. 38-1602(g).....	15
K.S.A. 38-1605 .....	15
K.S.A. 38-1607 .....	15
K.S.A. 38-1610(b).....	24
K.S.A. 38-1624(c)(3)(A) and (B) .....	35
K.S.A. 38-1633(b).....	15
K.S.A. 38-1635(a).....	15
K.S.A. 38-1636 .....	6
K.S.A. 38-1652 .....	15
K.S.A. 38-1656 .....	7
K.S.A. 38-1663 .....	15
K.S.A. 41-727 .....	1
Kansas Offender Registration Act (KORA).....	18
Sixth Amendment .....	8
United States Constitution, Fourteenth Amendment .....	7, 8
United States Constitution, Sixth Amendment .....	7

**Other Authorities**

16A Am.Jur.2d, Constitutional Law §563 .....	21
Kittel, <i>K.S.A. 22-4901 et seq.—Offender Registration in Kansas</i> , 69 K.B.A.J. No. 6, 28 (2000).18	
Stovall, <i>Justice and Juveniles in Kansas: Where We Have Been and Where We Are Headed</i> , 47 Kan. L. Rev. 1021 (1999); Note, <i>The Worst of Both Worlds: How the Kansas Sentencing      Guidelines Have Abandoned Juveniles in the Name of "Justice,"</i> 35 Wash. L. J. 308 (1996)..14	
<i>The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and      Unintended Results Associated with the Scarlet Letter Laws of the 1990s</i> , 90 Nw. U. L. Rev. 788, 855-56 (1996).....	22

Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. Marshall L. Rev. 73, 116-18 (2003); Comment, *Coming of Age in America; The Misapplication of Sex-Offender Registration and Community*.....23

## **PROCEDURAL POSTURE OF THE CASE**

This case was filed in Finney County, Kansas with the Respondent being charged with two counts; I) Aggravated Sexual Battery (violation of K.S.A. 21-3518) a level five, person felony and II) Minor in Possession or Consumption of Alcohol (an unclassified misdemeanor, and a violation of K.S.A. 41-727). (V. I, pp. 1-3).

Respondent was detained because of this case beginning August 11, 2005 after a detention hearing was held. On August 25, 2005 defense counsel filed a Motion to Suppress and Motion for Trial by Jury; which were heard on November 29, 2005. Both Motions were denied and a trial was set for February 7, 2006, in front of a District Magistrate Judge. Soon thereafter respondent filed a Motion for an Earlier Adjudicatory Date, as the trial setting would have required Respondent to have been in detention for more than six months. (V. I, pp. 1-10; some information stated is not obvious from the record, but is provided to assist the Court in understanding how this case unfolded). The Respondent was held in detention throughout the process, and repeated requests for modification of detention were denied. (Id.). Respondent's motion for an Earlier Adjudicatory Date was granted and the case was removed to a District Court Judge. (Id.). Respondent remained in detention and was held until his first trial date arrived, January 5, 2006. The State then requested a continuance due to the victim not being present for trial, which was granted over defense counsel's objection. (Id.).

Upon a new motion from defense counsel, Respondent was released from detention for the first time since August 2005, and trial was reset for the very next week, January 12, 2006, it being a trial to the bench. (Id.). When the new trial date came Respondent timely objected to a trial to the bench and renewed all previous motions. (V.

III, pp. 3-5). During the trial Respondent timely objected to any admissions made by him and renewed his Motion to Suppress. (V. III, p. 26). During the trial Respondent moved the Court for a Judgment of Acquittal, and was denied. (V. III, p. 38, 40). The Respondent was convicted of both counts and again ordered detained until final Disposition. (V. I, pp. 11-12).

Disposition was held on February 7, 2006 and Respondent was found to be a Serious Offender I and was given a Juvenile Correctional Facility Placement of eighteen (18) months with an aftercare term of 12 months, however, that placement was stayed and the Respondent was ordered placed on probation until the age of twenty (20). (V. I, pp. 15-17). During the final disposition Respondent lodged other objections regarding the requirement that he register as a sex offender. (V. IV, p. 3). Respondent appealed. (V. I, p. 25). Because both Trial and Disposition were heard by a District Court Judge appeal was taken directly to the Court of Appeals for the State of Kansas. K.S.A. 38-1683.

### **STATEMENT OF FACTS**

The Respondent in this case was born on August 14, 1988. On the date of the alleged incident the Respondent was sixteen years of age. (V. I, pp. 13-17). Prior to this incident the Respondent had no previous experience with law enforcement. Respondent's primary language is Spanish and he routinely uses an interpreter to communicate with his attorneys and for all Court hearings. (V. II, p. 3).

Respondent came in contact with the victim (dob 5-12-1978; age 27; a decade older than Respondent), while he was intoxicated, late at night on August 10, 2005. (V. II, p. 24; V. III, pp. 25, 26, 33; however, the State's theory is that the Respondent may not

have been drinking before he met the victim, V. III, p. 46). The victim had been drinking that night and had just left a bar where she had been in a fight/argument with her boyfriend. (V. III, p. 12). When the victim made contact with the Respondent she gave him a cigarette. (Id.). Eventually the Respondent asked for a kiss and she declined. (V. III, p. 8). Later he made a pass at her and ultimately held on to her and attempted to kiss her, but instead of kissing her he licked her on the face. (V. III, pp. 8-9).

The victim did not feel it necessary to hit the Respondent as she was “just trying to push him away from me.” (V. III, p. 14, lines 3-6). The victim agreed that the Respondent was making a “pass” at her (V. III, p. 14); and sometime during the incident the Respondent asked her if she liked to “fuck” (V. III, p. 9).

When asked whether the Respondent grabbed any part of her body in a sexual way the victim stated, “He *just* had his arms around me.” (V. III, p. 14: lines 9-10, emphasis added). The Respondent did not touch her breasts, butt, or genitals. (V. III, p. 14). The Respondent did not touch any part of his own body in any way, which was sexual in nature, during the encounter. (Id.). The Respondent did not appear to have an erection. (Id.).

After the victim rebuffed the Respondent’s advances, he let go of her, and she sat on the porch of her home, being locked out, and waited for her boyfriend to arrive. (V. III, p. 10, 16). The victim stated that the last thing the Respondent said to her was “Bye, baby.” (V. III, p. 9). During the entire incident, the victim never fell down. (V. III, p. 16). Also, the victim sustained no injury of any kind. (Id.). When her boyfriend arrived the victim apparently told him about the incident, and he decided to call the police; she didn’t feel it necessary and stated that she didn’t want to call the police “because these

people were my neighbors and I didn't want to have problems with my neighbors.” (V. III, p. 15-16).

When the police arrived an investigation began and the Respondent was taken without incident. (V. III, p. 25). After being processed the Respondent was taken to the hospital for evaluation because he had been consuming alcohol. (Id.). It was at the hospital that Respondent was interrogated by Officer Flores. (V. 2, pp. 5-6).

Officer Flores spoke Spanish with the Respondent, as that is the Respondent's primary language. (V. II, p. 7). They met at approximately 2:00-2:30 A.M. or 3:30 A.M. with the interrogation ending about 3:50 A.M. (V. II, p. 13,16, 24, 27, 28). Officer Flores was fully uniformed and armed with another officer, also fully uniformed and armed, in the room. (V. II, p. 17). The Respondent was laying down during the interrogation and his eyes were watering. (V. II, p. 18-19). The Officer used a standard rights form, written in Spanish, to go over the rights the Respondent had. The Officer had the Respondent initial each of his rights as he *read* them to him. (V. II, p. 7). The officer observed the Respondent initial each of his rights. (Id.). The officer described the Respondent as being “drunk” when he talked with him. (V. II, p. 11, lines 23-25). There was no indication that the Respondent was not “drunk” from any of the testimony offered. The Officer opined that the Respondent would not have been safe to drive an automobile. (V. II, p. 22). The Officer had this opinion because the Respondent would “stagger” when he walked. (V. II, p. 23).

The Respondent testified at the suppression hearing, using a court interpreter. He testified that he had drunk at least seven beers (V. II, p. 30), and that he had not slept since at least nine or ten in the morning the previous day (V. II, p. 32). The Respondent

was in and out of handcuffs throughout the early morning hours. (V. II, pp. 32-33). He believed that at the time he was interrogated he was “real drunk.” (V. II. p. 31). Many of the facts of the case are foggy to the Respondent. He couldn’t remember a blood sample being taken (V. II, p. 33, 17). He couldn’t remember initialing the rights sheet presented by the officer (V. II, pp 33-34, 7). In fact the Respondent couldn’t remember most of the things the officer said. (V. II, pp. 34-36). During the suppression hearing itself the Respondent had a difficult time being consistent with whether or not he understood the questions of his own attorney. (V. II, pp. 34-36, 37-39). The Respondent has never been arrested, besides this incident, in his life. (V. II, p. 35).

The Respondent was detained and charged with and convicted of Aggravated Sexual Battery and Minor in Consumption of Alcohol. (V. I, pp. 13-14).

### **ISSUES ON APPEAL**

- I. Was L.M. entitled to a jury trial?
- II. Should L.M.’s Motion to Suppress have been granted?
- III. Was there sufficient evidence to convict L.M. of Aggravated Sexual Battery?

### **ARGUMENT AND AUTHORITIES**

#### **I. L.M. WAS ENTITLED TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTION AND FAILURE TO GRANT RESPONDENT’S REQUEST VIOLATED THE RESPONDENT’S CONSTITUTIONAL RIGHTS**

##### **A. STANDARD OF REVIEW**

Whether L.M. was entitled to a jury trial is a question of law that must be examined under the facts of the case. When the Court examines a constitutional question based upon given facts, it is a question of law, and the standard of review is unlimited. State v. Cooper, 275 Kan. 823, 825, 69 P.3d 559 (2003); State v. Hill, 271 Kan. 929, Syl.

P1, 26 P.3d 1267 (2001). Prior to the trial of this matter to a district judge, the respondent renewed his motion for a trial by jury, arguing that he had a right to a jury trial under the United States and Kansas Constitution. The trial court denied the motion. (V. III, pp. 3-5).

**B. DUE PROCESS UNDER THE FEDERAL CONSTITUTION  
REQUIRES A TRIAL BY JURY UNDER THE CURRENT JUVENILE  
CODE**

The Kansas Juvenile Justice Code does not grant respondents being prosecuted under its provisions the right to a jury trial, except in the case of prosecution of a juvenile as an adult, or in an extended jurisdiction juvenile prosecution under K.S.A. 38-1636. Rather, K.S.A. 38-1656 provides that, in cases where a juvenile is being prosecuted for an offense that would constitute a felony, if he were an adult, the judge *may* order that the juvenile be given a jury trial. In In re Findlay, 235 Kan. 462, 464-66, 681 P.2d 20 (1984), the Kansas Supreme Court held that this provision does not give a juvenile the right even to request, let alone demand, a jury trial. Rather, it found that it simply gives the district court the option of having a jury determine the facts, that the court is under no obligation to give any reason for explanation of its decision to exercise, or decline to exercise this option, and that its decision is not subject to appellate review. In essence, it held that the district court's discretion under this statute is unbridled, and that the respondent has no recourse even when it is exercised in an openly arbitrary and capricious manner, e.g., pursuant to a policy whereby jury trials are granted only to persons born on February 29 or only to females, or even not at all (which seems apparent in most, if not all jurisdictions in Kansas). This decision is somewhat troubling as it goes

unchecked, and the lower courts are given the opportunity to be as arbitrary and capricious as they so desire.

The Findlay Court never articulated any factors for consideration as to whether or not to grant a trial by jury. The Court also never articulated the longstanding standard of review of discretionary decisions of judges, other than to state that the issue was not appealable. It is the contention of the Respondent that the ruling of the Supreme Court in the Findlay case is not complete, and fails to articulate the standard of review on discretionary rulings of judges. In other words, there is no insight from the Courts as to when it is, or is not appropriate to have a trial by jury in a juvenile offender case.

In this case the respondent's demand for a jury trial is based only in part on K.S.A. 38-1656, but it is also based upon the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment to the United States Constitution reads:

In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis added).

The portion of the Fourteenth Amendment to the United States Constitution relevant to the Court's current inquiry states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Kansas Supreme Court in Findlay analyzed the Respondent's request under the Federal Constitution and held that, at that time, the provisions did not accord a juvenile a right to trial by jury in all juvenile court proceedings. It based its ruling/analysis upon the

holding of the United States Supreme Court in McKeiver v. Pennsylvania, 403 U.S. 528, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971).

In McKeiver the court considered two consolidated cases from Pennsylvania and North Carolina presenting the issue of whether the Due Process Clause of the Fourteenth Amendment guarantees the right to a jury trial in the adjudicative portion of a delinquency trial in state juvenile court. The case generated five opinions, no one of which garnered more than four votes.

In a plurality opinion joined by three other justices, Justice Blackmun noted that, although juvenile delinquency adjudications were not deemed to be "criminal proceedings," the court's prior decisions had determined that several of the constitutional requirements applicable to state criminal trials are also required for delinquency adjudications, including the standard of proof beyond a reasonable doubt, the privilege against self-incrimination, and the right to appropriate notice, to counsel, to confrontation, and to cross-examination of witnesses. Id. at 533. Although Justice Blackmun observed that the Sixth Amendment guarantees the right to a jury in all criminal prosecutions under federal law, and that this requirement is made applicable to the states by the Fourteenth Amendment in all cases to which the Sixth Amendment would apply if brought in federal court, he chose to analyze the issue under the Due Process clause because state juvenile court proceedings have not been held to be "criminal prosecutions" within the purview of the Sixth Amendment. Therefore, the question became whether a jury trial is required in juvenile delinquency adjudications as a matter of fundamental fairness. Id. at 540-43.

The primary argument of the juveniles in the Pennsylvania case was that delinquency adjudications in that state were substantially similar to a criminal trial. The North Carolina juveniles emphasized that the requirements of a jury trial at the adjudicative stage would not undercut the alleged benefits of the juvenile court system, which inhere primarily in the intake and dispositional phases of the proceedings. The plurality did not really address either of these arguments. It acknowledged that there is a significant gap between the theory and the reality of juvenile courts, and that often there is far less difference between juvenile courts and criminal courts than is intended. Nonetheless, it found that the U.S. Constitution does not require a jury trial in a juvenile court adjudication. *Id.* at 543-45.

The plurality opinion sets out the reasons for its decisions in thirteen separately numbered paragraphs. It is somewhat difficult to summarize, but its basic conclusion appears to be that requiring that a jury trial be available in juvenile court proceedings would not greatly enhance the factfinding function, would not remedy the problems that plague the juvenile courts, and *might possibly reduce or even end the ability of juvenile courts to function in the unique informal, protective manner for which they were designed.* (Emphasis added). It stated that there is "a possibility, at least," that mandatory jury trials would convert juvenile proceedings into a fully adversary process and effectively end the ideal of an "intimate, informal protective proceeding," (p. 545), that it would provide "an attrition of the juvenile court's assumed ability to function in a unique manner," (p. 547), would impede the ability of the states to experiment with different ways to best address the problems of juveniles (p. 547), and would bring into the juvenile system "the traditional delay, the formality, and the clamor of the adversary

system and, possibly, the public trial." Id. at. 550. It noted that the arguments for making jury trials a matter of right in juvenile proceedings are the same as those relating to criminal trials, but that they ignore "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." Id. It concluded:

If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.

Id. at 551.

Somewhat surprisingly and uncharacteristically, the court cited very little, if any, evidence to support its concerns. It seems clear, as the North Carolina juveniles argued, that the unique features of the juvenile court system are to be found primarily in the intake and dispositional phases, and that whatever elements of intimacy, informality and protectiveness that may have been a part of the adjudicative process have largely been eliminated by the court's prior decisions with respect to burden of proof, self-incrimination, right to counsel, notice, confrontation and cross-examination of witnesses. Indeed, as the court acknowledged a few years later in Breed v. Jones, 421 U.S. 519, 528-29, 44 L.Ed.2d 346, 95 S. Ct. 1779 (1975), with the exception of McKeiver, the court's response to the gap between the concept underlying the juvenile court system and the reality of its operation has been to make the constitutional guarantees associated with criminal prosecutions applicable in juvenile proceedings. It is not at all clear what aspects of "fairness, concern, sympathy and paternal attention" the juvenile court system contemplates in the factfinding process, or how transferring that responsibility from a judge to a jury would adversely affect that process, particularly since no juvenile would

be compelled to request a jury trial, even though a matter of constitutional right, if it were not perceived to be in the juvenile's best interests.

Justice White, who was one of the four justices to join the plurality opinion, also wrote a separate concurrence to further explain his position. He agreed that a jury does not necessarily do a better job of factfinding than a conscientious judge. He observed that the consequences of criminal guilt are so severe that the Constitution requires that a jury trial be available to criminal defendants who demand it to prevent abuses of official power and biased or political justice by invoking community participation in the adjudicatory process. However, he concluded that the Due Process clause does not require a jury trial in juvenile cases because of the differences between the juvenile and criminal justice systems. McKeiver v. Pennsylvania, 403 U.S. at 551.

Justice White noted that criminal defendants are considered as blameworthy and are labeled and treated as such, even though the system might also attempt to rehabilitate convicted defendants. On the other hand, the juvenile justice system does not deem the acts of juveniles so blameworthy that it is labeled as criminal and merits punishment for purpose of deterrence. Coercive measures, such as confinement or supervision, have rehabilitation as their goal, not retribution or punishment or deterrence. In Justice White's view, a system that does not impose blameworthiness and punishment for "evil choice" is itself a deterrent against biased justice, and it is less likely that the courts will be used for political purposes since juveniles are involved. In addition, the Justice went on to explain that the consequences of adjudication are *less severe* than those ensuing from criminal convictions. He found these differences to be sufficient to support a conclusion that jury trials are not required in juvenile adjudicatory proceedings. He

concluded by noting that the juvenile courts are free to adopt imposition of blame, punishment and deterrence as attributes or purposes of the juvenile justice system if they extend criminal court safeguards to juvenile court adjudications. Id. at 551-53.

Justice Harlan also concurred. He stated that if the premise, apparently accepted by the plurality opinion, that juvenile delinquency proceedings have actually become criminal trials in most, if not all, respects, is correct, he would have great difficulty accepting the plurality's conclusion, since he believed the court's prior decisions would entitle juveniles to jury trials under such circumstances. However, he concurred in the decision in this case. Id. at 553.

The final concurrence was written by Justice Brennan, who concurred in the judgment with respect to the Pennsylvania juveniles. In his view the question was whether there is some aspect of a particular state's juvenile delinquency proceedings that adequately protects the interests that Sixth Amendment jury trials are intended to serve. He found that the protective nature of a jury trial is its character as an appeal to the community conscience as embodied in the jury, and that a state could legitimately determine that the same effect could be achieved in juvenile delinquency proceedings by focusing community attention upon the trial. Since the juvenile adjudications in Pennsylvania were open to the public, he found that a jury trial was not constitutionally required. He reached the opposite conclusion with respect to the juveniles from North Carolina, where the public was excluded from the trials. Id. at 553-57. Ironically, the public nature of the trial which Justice Brennan found to render jury trials constitutionally unnecessary in Pennsylvania was one of the evils that the plurality feared might result in other states if jury trials were required in juvenile proceedings.

Finally, three justices dissented, holding that where a state prosecutes a juvenile in juvenile court proceedings for a criminal act which may result in the juvenile's confinement for a substantial period, the juvenile is entitled to the same protections available to an adult in a criminal proceeding. Id. at 557-63.

The result is a decision with no clear rationale that is shared by a majority of justices. However, a majority, indeed probably all, of the justices did appear to agree that if a juvenile delinquency proceeding is similar in many, if not all, respects to an adult criminal trial, in terms of its consequences and/or its imposition of blame and punishment upon the juvenile, the Constitution, as interpreted by the court's prior decisions, would require that jury trials be made available in such proceedings, as a matter of due process. The question becomes whether or not the juvenile case at bar is similar in many respects to an adult criminal trial in terms of its consequences and/or its imposition of punishment upon the juvenile? It is respondent's contention that the consequences and the punishment (potential jeopardy) experienced in this case is at least potentially equal or greater and that he is entitled to the additional protections afforded adults.

In its decision in Findlay, the Kansas Supreme Court, after quoting liberally from McKeiver, noted that the appellant's argument was based on the position that juvenile delinquency proceedings are essentially criminal trials under Kansas law. It summarily rejected this contention, finding it to be diametrically opposed to the intent of the Kansas Juvenile Offenders Code set out in K.S.A. 1983 Supp. 38-1601, which provided that the Code should be liberally construed so that each juvenile coming within its provisions would receive such care, custody and guidance, preferably in its own home, as would best serve the juvenile's rehabilitation and the protection of society, and which expressly

stated that no order or judgment in any proceedings under the Code would be held to import a criminal act on the part of any juvenile, and that all proceedings under the Code were deemed to be undertaken by the state in its *parens patriae* capacity. The court concluded that there is no federal or state constitutional right to a jury trial in proceedings under the Kansas Juvenile Offenders Code. State v. Findlay, 235 Kan. at 463.

However, there have been numerous and significant changes in the Kansas Juvenile Offenders Code since the Findlay decision was rendered in 1984, including its name (it is now known as the Kansas Juvenile Justice Code (KJJC)). See generally Stovall, *Justice and Juveniles in Kansas: Where We Have Been and Where We Are Headed*, 47 Kan. L. Rev. 1021 (1999); Note, *The Worst of Both Worlds: How the Kansas Sentencing Guidelines Have Abandoned Juveniles in the Name of "Justice,"* 35 Wash. L. J. 308 (1996).

Many of these changes were made in the Juvenile Justice Reform Act of 1996. L. 1996, Ch. 229. K.S.A. 38-1601 has been substantially amended and now provides that the primary goal of the KJJC is "to promote public safety, hold juvenile offenders accountable for such juvenile's behavior and improve the ability of juveniles to live more productively and responsibly in the community." Public safety and juvenile accountability are now goals that are of greater importance, in cases such as this one, to what might be termed rehabilitation, although the statute no longer uses that term. The provision stating that no judgment under the Code will be held to import a criminal act and that proceedings under its provisions are pursuant to the state's parental power has been removed, and the statute now specifically talks in terms of "the ultimate solutions to juvenile crime." See State v. Hitt, 273 Kan. 224, 227, 42 P.3d 732 (2002).

Some of the terminology of the KJJC has been changed to conform to that used in the adult criminal system. What was formerly a "disposition" is now a "sentencing." K.S.A. 38-1605; K.S.A. 38-1663. "State youth centers" are now "juvenile correctional facilities." K.S.A. 38-1602(g). A juvenile is now required to "plead guilty or not guilty" to the allegations of the petition instead of "admitting or denying" them. K.S.A. 38-1633(b). A juvenile is now "prosecuted" as a juvenile offender. K.S.A. 38-1635(a). While these linguistic changes, in and of themselves, may not effect any substantive changes in the provisions of the KJJC, they are clearly intended to reinforce the perception of both participants in the system and the public that proceedings under the KJJC are in many ways synonymous with criminal trials.

Other changes are clearly substantive. The official court files of proceedings under the KJJC are no longer confidential, but are now open for public inspection unless the judge makes a specific finding that this is not in the best interests of a particular juvenile, and such findings may be made only with respect to juveniles under the age of 14 at the time of the alleged offense. K.S.A. 38-1607. Similarly, trials in juvenile offender cases are now open to the public unless the judge makes a specific finding that a public trial is not in the best interests of a particular juvenile, and such findings may be made only with respect to juveniles under the age of 16 at the time the alleged offense was committed. K.S.A. 38-1652. In this particular case the Juvenile was sixteen years of age and is/was not afforded that additional protection. The confidentiality (at least for Juveniles over the age of 16) that has previously been a defining characteristic of the juvenile court system is a thing of the past and for younger juvenile offenders severely restricted.

The KJJC now contains a detailed placement matrix which is used to govern placement in juvenile correctional facilities. K.S.A. 38-16,129-16,133. This matrix is based on the juvenile's past offenses, and is divided into various categories based on the severity of these offenses. It establishes minimum and maximum terms of commitment for any juvenile placed in a juvenile correctional facility, and a judge has no authority to reduce the minimum term of commitment for any juvenile, even if it were to be determined that the juvenile had been fully rehabilitated. This matrix was adopted after the Kansas Sentencing Guidelines for adults were enacted, and some of the same philosophy with respect to classification and definite terms of confinement which led the legislature to adopt those guidelines is incorporated into the KJJC matrix. In re W.H., 274 Kan. 813, 822-23, 57 P.3d 1 (2002).

Under the KJJC as it now reads a Juvenile is more likely to be subject to the jeopardy of incarceration than an adult with similar crimes. For example, if a Juvenile commits two misdemeanor thefts (say a pack of gum and later a radio), and then goes on to commit a felony theft (say a \$1,000 piece of jewelry, a level 9 non-person felony) the Juvenile would be found to be a chronic offender II, escalating felon and be subject to a maximum term of eighteen (18) months in a juvenile correctional facility, whereas an adult in the same situation (with the same history), would have presumptive probation and an underlying prison term of up to eight (8) months maximum. Another, even more eye opening example deals with a Juvenile having two prior non-person misdemeanors and then commits a status offense (Unlawful Voluntary Sexual Relations), faces the same finding and same juvenile prison term, and only because he is a juvenile.

In this particular case the Respondent's maximum jeopardy, under the Juvenile Code was thirty-six (36) months of incarceration, however, under the adult code his maximum jeopardy was thirty-four (34) months.

It is important to note that under the Kansas Sentencing Guidelines, past juvenile adjudications can now be used to enhance sentences in adult criminal cases, even though such adjudications were obtained without the full panoply of due process rights provided to adults in criminal cases. K.S.A. 21-4710; State v. LaMunyon, 259 Kan. 54, 911 P.2d 44 (1996).

There are still differences in the treatment of juveniles under the KJJC and of adults accused of crimes, but it is clear that those difference have narrowed significantly since the Findlay decision was handed down in 1984, and that its brief rationale no longer adequately addresses the issue of whether a juvenile has a constitutional right to a jury trial in proceedings under the KJJC.

As the KJJC now is it appears compelling that the Courts reconsider the question of whether a right to a jury trial exists in a case such as this one. It is necessary to preserve confidence in the integrity of the trial (fact-finding) process, which now seems and is clearly intended to be identical to the adult criminal process in so many ways. But the respondent is not asking this Court to decide that issue generally. Rather, the issue before the Court is much narrower and is whether the charges in this case, along with the potential consequences, and prescribed procedure require a trial by jury.

In this case the Juvenile (age 16) is charged with a level five person felony and will be required to be labeled as a "sex offender" as defined by K.S.A. 22-4902(b) and subjected to the registration and publication provisions of K.S.A. 22-4904, 22-4906, 22-

4907 and 22-4909. In this particular case it is Respondent's contention that he has the right to demand a trial by jury.

The provisions cited above are part of the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, which was first enacted in 1993 and has been amended several times since. For a good discussion of the history and application of this Act, see Kittel, *K.S.A. 22-4901 et seq.—Offender Registration in Kansas*, 69 K.B.A.J. No. 6, 28 (2000). An "offender" under this Act includes persons determined to be sex offenders, violent offenders, sexually violent predators, and persons convicted of certain crimes when the victim is less than 18 years of age, all as more particularly defined by K.S.A. 22-4902. It includes persons adjudicated as a juvenile offender for an act which would constitute the commission of a sexually violent crime if committed by an adult. K.S.A. 22-4902(b). The crime of aggravated sexual battery, K.S.A. 21-3518, with which the respondent was charged and of which he was convicted in this case, is such a crime. K.S.A. 22-4902(c)(10).

A person adjudicated as a juvenile offender for the commission of a sexually violent crime is required to register with the sheriff of any county in which he resides for more than 10 days. K.S.A. 22-4904(a). Information required to be disclosed on the registration form includes the offender's name, current address, date and place of birth, social security number, occupation, name of employer and place of employment, school attended, driver's license and vehicle information, the offense(s) committed and the date of conviction(s) obtained, the age and sex of the victim, identifying characteristics of the offender, such as race, skin tone, sex, age, hair and eye color scars, tattoos and blood type, and a photograph, fingerprints and a DNA sample. K.S.A. 22-4907(a)(b).

A juvenile offender who is required to register under this Act must register until the person reaches 18 years of age, or until the expiration of five years from the date of adjudication or release from confinement, whichever date occurs later. The five year period does not run while the juvenile is incarcerated in any jail, juvenile facility or correctional facility. If the juvenile again becomes required to register during this five year period, liability for registration does not terminate. K.S.A. 22-4906.

All of the information required to be furnished upon registration is open to inspection by any member of the public at the sheriff's office, the KBI headquarters, or any internet site sponsored by the sheriff or KBI. K.S.A. 22-4909(a). There is no special provision for Juveniles that protects the convicted juvenile in the future from ostracism or prejudice.

The legislative purpose underlying the KORA is to protect public safety, specifically from sex offenders—a class of criminals deemed likely to reoffend. State v. Wilkinson, 269 Kan. 603, 609, 9 P.3d 1 (2000); State v. Scott, 265 Kan. 1, 9-10, 961 P.2d 667 (1998). In State v. Myers, 260 Kan. 669, 923 P.2d 1024 (1996), the Kansas Supreme Court considered whether the registration and community notification provisions of this Act constitute punishment for purposes of determining whether they violate the Ex Post Facto Clause of the United States Constitution. In a thorough and well-reasoned opinion, the Court determined that the legislative intent in enacting the KORA was to protect the public safety and was nonpunitive in nature. State v. Myers, 260 Kan. at 1032-33.

The court then proceeded to examine whether the legislation, although nonpunitive in intent, was nevertheless so punitive in effect as to undermine that intention. Id. It concluded that the registration provisions have no punitive effect. Id. at

695-96. However, it found that *the public disclosure provision of the Act does have a punitive effect* because it provides for unlimited public access to all of the information in the registry. It imposes no restrictions upon who may obtain access to the information or what may be done with it. The information could be routinely published by the print or broadcast media, or distributed in leaflets or fliers at any time and in any place. The Court found that this unrestricted public access leaves open the probability that a registered sex offender will be subjected to public stigma and ostracism. *Id.* at 695-97.

The Court found that the public disclosure requirement of the KORA may have both a deterrent and a retributive effect, and that if the statute had been drawn to limit public disclosure to that necessary to protect the public, its punitive effect might be viewed as incidental to its nonpunitive purpose. However, it determined that making unlimited public access to the information available causes the statute to have a deterrent or retributive effect that exceeds its nonpunitive purpose. *Id.* at 696. It stated that to avoid characterization as punishment for purposes of ex post facto analysis, the statute should limit public access to those with a need to know the information for public safety purposes, and that the information should be used only for those purposes. *Id.* at 700.

In State v. Scott, 265 Kan. 1, 961 P.2d 667 (1998), the court considered whether the public disclosure provision of the KORA, which had been found to have a punitive effect in Myers, constitutes cruel and unusual punishment. The court held that it does not. Although indicating that it found it troubling that the statute does not provide for differentiation among various sex offenses, it found that it is clearly the role of the legislature to specify punishment, and that it could determine that sex offenders pose a unique threat to society and impose registration and public disclosure requirements on

this class of offenders not required of other types of offenders. State v. Scott, 265 Kan. at 10-11.

In State v. Wilkinson, 269 Kan. 603, 9 P.3d 1 (2000), the appellant, a convicted sex offender, argued that he had a constitutional right to a due process hearing to determine the degree of threat he posed to the public before he could be required to register, and the public given access to his registration information. The court rejected this argument. It concluded that the appellant had received all the due process to which he was entitled in the proceeding required to convict him of the underlying offenses that triggered the registration and public disclosure provisions. To the extent that the public disclosure provisions of the KORA are viewed as part of the punishment for these underlying offenses, the court noted, citing 16A Am.Jur.2d, Constitutional Law §563:

Every person has a fundamental right to liberty in the sense that the government may not punish him or her unless and until it proves his or her guilt beyond a reasonable doubt at a criminal trial conducted in accordance with relevant constitutional guarantees; however, a person who has been so convicted is eligible for, and a court may impose, whatever punishment is authorized by statute for his or her offense, . . .

State v. Wilkinson, 269 Kan. at 613-14.

These cases demonstrate that the applicability of the KORA to juveniles has significant implications for juveniles charged with a sexually violent crime under the KJJC. Conviction of such a crime will now require the juvenile to register as a sex offender for a minimum of five years, and will give the public unlimited access to all of the required registration information. This is a punishment that is imposed upon the juvenile by the adult criminal statutes which the juvenile court judge has no discretion to alter in any way, and it is based upon a legislative determination that every juvenile is likely to reoffend, i.e., that rehabilitation is unlikely to be successful or effective, and it is

imposed without according the juvenile a criminal trial in accordance with all relevant constitutional guarantees, specifically the right to a jury trial, in adult cases. In other words, the Juvenile is compelled to comply with adult, criminal punishments, but is not given the same level of due process protections. The net result is juveniles are treated unequally.

Superimposition of the KORA upon the KJJC is fundamentally inconsistent with many of the underlying principles that have characterized the juvenile justice system, e.g., the past notion (pre 1996) that the goal of the juvenile court system is rehabilitation and not punishment is essentially done away with. The reality is that many of the factors that used to distinguish the juvenile system from the adult system is a thing of the past.

Not only is the unlimited public access to the juvenile's registration information punitive and not rehabilitative, the research (and common sense) suggests that it may actually impede the juvenile's rehabilitation. The stigma and ostracism that results will impede the juvenile from developing normal social and interpersonal skills, the lack of which has been found to contribute to future sexual offenses. Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 Nw. U. L. Rev. 788, 855-56 (1996). By constantly reminding the juvenile of the offense, it may make it difficult to develop a normal and positive self image, as well as cause difficulties in finding employment, housing and friends, and therefore impair integration into society. Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. Marshall L. Rev. 73, 116-18 (2003); Comment, *Coming of Age in America; The*

*Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 Calif. L. Rev. 163, 195 (2003).

Moreover, even if the juvenile court were to determine that a juvenile convicted of a sexually violent offense had been completely rehabilitated, the court would have no power to relieve the juvenile of further registration under the KORA. (K.S.A. 22-4908 originally permitted the court to do so, but that provision was repealed in 2001. L. 2001, ch. 208, §15.) The juvenile would continue to be labeled as a sex offender, and the public to have unlimited access to his registration information, for the duration of the registration period of five years, or for the rest of the juvenile's life if it was a second offense requiring registration, a fact which seems far more likely to undermine rather than to foster or support the juvenile's rehabilitation.

In this case the State requested that the trial court sentence the respondent to 36 months in a juvenile correctional facility, with an aftercare period of 24 months. The trial court declined to do so, finding that the respondent's principal problems are alcohol, and perhaps drugs, and the lack of a strong structural living environment. Instead, it ordered that the respondent be placed in the custody of the Juvenile Justice Authority for a period of not less than 20 months, and that he be required to complete sex abuse and drug and alcohol counseling and treatment. The respondent was put on probation until age 20, unless terminated earlier upon motion of the parties. (V. IV, pp. 21-22; V. I, pp. 15-17). The court clearly believed that the respondent possesses strong potential for rehabilitation, especially under the facts as they came out during trial. Yet even if he completes all of the counseling requirements successfully and is discharged by the court at age 20, he will continue to be publicly labeled as a sex offender and the public will

have unlimited access to all of his registration information for between two and four years, depending upon whether his placement with the Juvenile Justice Authority constitutes "confinement" within the meaning of K.S.A. 22-4906(g), a future point of contention. Further, it is noteworthy that sex offenses are seemingly excepted out of the KJJC, and have consequences that extend beyond the normal termination of the jurisdiction of the Juvenile Court at age 23.

In short, juveniles such as the respondent, who are charged in juvenile court with a sexually violent crime, face a very different situation than that which existed in 1971 when McKeiver was decided or in 1984 when Findlay followed its lead. Changes in the KJJC have brought the juvenile justice system significantly closer to the adult criminal system, both in form and underlying philosophy. The goals of public safety and juvenile accountability are now seemingly more important than rehabilitation, and the statement that no judgment of the juvenile court will be deemed to import a crime has been specifically deleted.

Indeed, K.S.A. 38-1601 now reads similarly in many respects to K.S.A. 21-4601, which sets out the purposes for sentencing in adult criminal cases. Trials are now virtually indistinguishable from adult criminal trials, both procedurally and in the terminology used, with the notable exception of the right to a jury trial.

Juveniles charged with "sexually violent crimes" as defined by K.S.A. 22-4902(c) face even sterner treatment. These crimes are not subject to expungement. K.S.A. 38-1610(b). (The crime of "aggravated sexual battery," K.S.A. 21-3518, with which the respondent was charged in this case, was added to this statute in 2005.) Conviction for all higher level sexual crimes (and person felonies) often makes the juvenile eligible for

incarceration in a juvenile correctional facility for a substantial period of time, sometimes longer than adults in the same situation with the same criminal history.

In this case the respondent could have been sentenced to a maximum period of 36 months in a juvenile correctional facility as a Serious Offender. K.S.A. 38-16,129(a)(2). (Had he been convicted of the same crime as an adult, his maximum period of incarceration, with no criminal history, would have been 34 months. K.S.A. 21-4704.) In other words, the level of jeopardy was greater for the Respondent in this case with it being tried in the Juvenile system. In addition, the juvenile is subject to the registration and public disclosure requirements of the KORA for a period of five years from the date of release of any confinement, which has consequences that are clearly punitive in nature. It seems clear that, at least with respect to juveniles charged with sexually violent offenses, Kansas has adopted the imposition of "condemnation, punishment and deterrence," in the words of Justice White, as attributes of its juvenile justice system, and that it must also extend criminal court safeguards, namely the right to a jury trial, to those juveniles as well.

The respondent has found no other case addressing this issue. Courts in a number of other states have held that a requirement that a juvenile register as a sex offender as a result of a juvenile court adjudication does not entitle the juvenile to a jury trial in juvenile court, typically on the grounds that the registration requirement is regulatory and not punitive. None, however, has dealt with a statute which provides for unlimited public access to the registration information, as does the Kansas statute.

In In re Jeremy P., 278 Wis.2d 366, 379, 692 N.W.2d 311 (Wis. App. 2004), the court held that a requirement that a juvenile delinquent register as a sex offender was not

constitutionally infirm because the juvenile had not been provided a jury trial at the delinquency adjudication. Relying on State v. Bollig, 232 Wis.2d 561, 605 N.W.2d 199 (Wis. 2000), the court found that requiring a person to register as a sexual offender is not punishment. However, in reaching this conclusion, the court in Bollig specifically noted that the Wisconsin statute does not provide for indiscriminate public access to the registration information. Instead, public access to the information requires compliance with conditions set out in the statute and is limited to situations where disclosure is necessary to protect the public safety. State v. Bollig, 232 Wis.2d at 575-76. Moreover, the court in Jeremy P. noted that even if the registration requirement were deemed to constitute punishment, a Wisconsin trial court has the discretion to stay that part of the dispositional order, a safeguard that is not available to adult sexual offenders, and is also not available to Juvenile Offenders in Kansas. In re Jeremy P., 278 Wis.2d at 380-81.

In Commonwealth v. Olaf O., 57 Mass. App. Ct. 918, 919, 786 N.E.2d 400 (Mass App. 2003), a juvenile adjudicated to be delinquent on the basis of statutory rape argued that he was entitled to be tried by a jury of twelve members instead of six because the adjudication would require that his name be listed in the sex offender registry. The court rejected this position, noting that registration and community notification were deemed to be regulatory and not punishment, citing Opinion of the Justices, 423 Mass. 1201, 668 N.E.2d 738 (1996). But the court in Opinion of the Justices was careful to point out that the community notification provisions of the proposed legislation before it required the state to promulgate regulations for determining the risk that a sexual offender would reoffend and for assigning each one to one of three risk levels, with the access of the public to the information varying depending on the level of risk involved. It also

provided for a presumption that a juvenile required to register should be assigned to the lowest level of risk of reoffense, again a protection not afforded juvenile offenders in Kansas. Opinion of the Justices, 423 Mass. at 1206-08.

In People v. J.T., 13 P.3d 321, 323 (Colo. App. 2000), the court rejected the argument that a juvenile is constitutionally entitled to a jury trial whenever the adjudication will result in a requirement that the juvenile register as a sex offender, on the basis that the registration requirement is not a criminal punishment. It based this decision on its prior decision in People v. Montaine, 7 P.3d 1065, 1067 (Colo. App. 1999). However, community notification or public access to the registration information is not even mentioned in either of these decisions.

In State v. J.H., 96 Wash. App. 167, 182, 978 P.2d 1121 (Wash. App. 1999), the court held that since the adult sex offender registration statute is a regulatory measure and does not constitute punishment, it follows that community notification requirements for juvenile offenders are likewise not punitive and do not create any right to a jury trial. It based this holding on the decision in State v. Ward, 123 Wash.2d 488, 502, 869 P.2d 1062 (1994). But in Ward the court specifically found that because the legislature had placed significant limitations on disclosure of the registration information to the public, the registration requirement did not impose additional punishment on the offender. However, in Kansas there are no limitations.

In In re C.D.N., 559 N.W.2d 431, the court rejected a claim that the mandatory registration as sex offenders of two juveniles adjudicated delinquent violated their due process rights because they were not accorded a jury trial. The court relied on its prior decision in State v. Manning, 532 N.W.2d 244 (Minn. App. 1995), in which it had held

that the sex offender registration requirements for adults is regulatory and not punitive. It noted that in Manning it had found that the registration requirement does not create an affirmative disability or restraint because the information is kept private and used only for law enforcement purposes, again a protection not afforded juveniles in Kansas. In re C.D.N. at 433. It found that the registration requirement is consistent with the confidentiality of juvenile proceedings because the information remains private, and that it is therefore nonpunitive, but this is not a protection available in Kansas. Id.

Finally, it may be noted that in Smith v. Doe, 538 U.S. 84, 155 L.Ed.2d 164, 123 S. Ct. 1140 (2003), the U.S. Supreme Court decided that Alaska's sex offender registration and community notification requirements did not impose a punishment in violation of the Ex Post Facto Clause. The Alaska statute before the court was similar in many respects to the Kansas statute, although its registration requirements are not quite as broad and it provides that some of the information shall remain confidential. The Kansas Supreme Court did not have the benefit of this decision when it decided Myers, and it is unclear how it might have influenced the decision in Myers, if at all. But even if it were to be determined that the court should have reached a different result in light of Smith, that should not affect the court's decision in this case. Also, the Alaska courts have granted Juvenile's the right to trial by jury. RLR v. State Alaska, 487 P.2d 2 (1971).

Neither Myers nor Smith specifically considered whether the sex offender registration and community notification requirements constitute punishment when applied to persons adjudicated to be juvenile offenders, and it appears that the Alaska statute does not even apply to juveniles who are not tried as adults. Alaska Stat. §12.63.100(3). In Myers the court considered the key element in its analysis to be the

excessive nature of the unlimited public access to the registration information, leaving open the probability that a registered sex offender could experience public stigma and ostracism. State v. Myers, 260 Kan. at 696-700. In finding the Alaska statute not to be excessive, the court in Smith simply stated that the state could conclude that a conviction of a sex offense constitutes evidence of a substantial risk of recurrence, and that, instead of making individual determinations of dangerousness, the state can just provide the information to the public and allow it to make that determination itself. Smith v. Doe, 538 U.S. at 103-04. But whatever the validity of this position with respect to Ex Post Facto Clause analysis, it would seem to be fundamentally at odds with the characteristics of confidentiality, and the emphasis upon rehabilitation as well as the needs of the individual juvenile—the "intimate, informal protective proceeding"—that have distinguished the juvenile justice system from its adult counterpart, and have justified less due process protections. Moreover, even if it were determined that Myers should have been decided differently after Smith, that would not change the court's findings with respect to the actual harm that unlimited public access to registration information can and probably does cause and the counterproductive impact it may have on the rehabilitation of the juvenile.

In short, the situation faced by juveniles charged with a sexually violent offense in juvenile court is now so similar to that of adults charged with similar offenses, both in terms of the functioning of the adjudicative process and the consequences of conviction, that such juveniles should now be accorded the right to a jury trial as a matter of fundamental fairness under the Fourteenth Amendment to the United States Constitution.

### C. THE KANSAS CONSTITUTION ALSO PROVIDES FOR A RIGHT TO TRIAL BY JURY TO JUVENILES

The relevant portions of the Kansas Bill of Rights guarantees to all equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness; with the right to a trial by jury (being inviolate) in all prosecutions.

§ 1. **Equal rights.** All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

•••  
§ 5. **Trial by jury.** The right of trial by jury shall be inviolate.

•••  
§ 10. **Trial; defense of accused.** In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense.

The Kansas Bill of Rights, sections 1, 5, and 10. A review of the historical record of arguments presented to the Kansas Courts on the issue of whether juveniles are entitled to a jury illustrates that this is a case of first impression with regard to the argument that The Kansas Bill of Rights guarantees the right to a trial by Jury in Juvenile Offender cases. It appears that no attorney has ventured to offer this particular argument to the appellate courts of Kansas in the past. The Kansas Bill of Rights is couched in much the same language as the Federal Constitution.

Alaska appears to be the first state to articulate that under its own state constitution that juveniles have a right to a trial by jury. RLR v. State Alaska, 487 P.2d 27 (1971). The conclusions drawn by the Alaska Courts could easily be drawn by the Kansas Courts, provided Kansas agrees with Alaska that the right to a jury trial in any criminal prosecution depends not on the name of the proceeding or the nature of the

alleged offense but upon the possibility of a loss of liberty for a substantial period of time.

The Fourth Amendment to the Federal Constitution provides that in all “criminal prosecutions,” the accused shall enjoy the right to a speedy and public trial, by an impartial jury. The Kansas Bill of Rights states that the right to a trial by jury is inviolate, and that the accused, in all “prosecutions” (purposely not using the terms “criminal prosecutions”) shall enjoy a right to speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed. There is no case law directly on point drawing the conclusion that because the Kansas Constitution fails to articulate “criminal prosecution” but instead articulates that in all “prosecutions” the accused shall enjoy a right to a trial by an impartial jury, but that doesn’t mean the Kansas Courts shouldn’t look into the matter, especially in light of the changes in the KJJC. The Constitution of Kansas is the supreme law of the land and the Court has the power to grant additional protections not specifically afforded by the Federal Constitution.

Even though there are no cases directly on point interpreting the meaning of “in all prosecutions” for juvenile cases, the Kansas Courts have analyzed the stated clause with respect to Municipal Courts and have concluded that in all serious criminal prosecutions the right to trial by jury attaches. In State, ex rel., v. City of Topeka, 36 Kan. 76, 12 Pac. 310 (1886), the appellate Court stated:

In our opinion, the words 'all prosecutions,' as used in section 10 of the bill of rights, were intended to mean only all criminal prosecutions for violations of the laws of the state, and were not intended to mean or to include prosecutions for the violation of ordinary city ordinances which have relation only to the local affairs of the city.

Id. at 87. The issue was further discussed in City of Fort Scott v. Arbuckle, 165 Kan. 374, 196 P.2d 217 (1948), wherein the court noted that the record of the Wyandotte constitutional convention contains nothing to indicate the intent of the members of the convention in adopting the provisions of the Bill of Rights guaranteeing the right to a jury trial. It rested its decision in that case on the fact that when the constitution was adopted, the right of trial by jury was not extended or given any wider meaning than it had at common law. Id. at 388-89.

The Court would later apply this principle in a juvenile delinquency case in Hall v. Brown, 129 Kan. 859, 284 Pac. 396 (1930), where the issue was whether a juvenile adjudicated to be a delinquent in juvenile court was entitled to a jury trial on appeal to district court. The court noted that the proceeding to determine a child to be delinquent and neglected and to place the child under the care of the state was a statutory proceeding not found at common law, and that it had previously held that a jury trial is not a matter of right in purely statutory proceedings. It noted further that this proceeding was not a criminal proceeding, and that it was undertaken in the child's best interests, not for purposes of punishing the child for the commission of a crime. It concluded that the child had no right to a jury trial under such circumstances. Id. at 861-62.

It is Respondent's contention, however, that a lot has changed since 1930 and that back then putting a child in a correctional (lock down facility) institution for a period of 36 months (as is the potential in cases like this one) was not on anyone's radar screen. The 1930 decision was consistent with the Kansas Appellate Court's prior decision in In re Turner, 94 Kan. 115, 145 Pac. 871 (1915); therein the court noted that the authorities are nearly unanimous in holding that statutes dealing with juvenile

delinquency and neglect are parental rather than criminal, so that a jury may not be demanded as a matter of constitutional right. Id. at 121-22. Again, Respondent incorporates by reference the previous arguments illustrating the substantial changes in the KJJC obliterating everything that makes a juvenile offender case of this type anything but parental in nature, but are instead the bastard child of the criminal code. At this juncture the Courts of today need to truly compare what was handled by the juvenile courts (delinquency) 1915 through 1930, and the only conclusion that can be drawn is that what existed then looks nothing like what we have now.

In the adult system, the U.S. Supreme Court has articulated that the right to trial by jury attaches when an offense is serious in nature, meaning it is not petty. Whether a crime is “petty” or “serious” depends solely on the maximum authorized penalty, a reflection of the legislature’s judgment about the seriousness of the offense. Blanton v. City of North Las Vegas, 489 U.S. 538, 109 S.Ct. 1289 (1989). “[T]he maximum authorized period of incarceration” is the primary criterion because it is the “the most powerful indication of whether an offense is ‘serious.’” Id. An offense with a maximum authorized period of incarceration of more than six months is serious. Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886 (1970). In this case the maximum authorized period of incarceration is three years. K.S.A. 38-16,129. Respondent is charged with a serious offense. This is a serious case that has already imposed serious and severe, life changing consequences.

There is no justification under state and federal law to deny a juvenile a jury trial in a case such as this one. To deny the request does not square with our Country’s fundamental belief in due process and equal protection under law. State v. Irving 216

Kan. 588 (1975). As outlined above, there is a potential for a sentence that is worse than that imposed on adults, as outlined in the arguments made above. It is fundamental to our Country's history that the right to trial by jury safeguards against arbitrary and oppressive law enforcement. Id.

In the Alaska case mentioned above, the Court concluded that it could reach the conclusion under the facts of the case before it that juveniles were entitled to equal protection under the law where the juvenile faced incarceration. The Alaska Court came to this conclusion utilizing a due process analysis under the Fourteenth Amendment of the Federal Constitution reasoning that Juveniles facing incarceration were entitled to equal treatment under law, including the protections of a jury trial.

Incorporating by reference all of the arguments made above regarding the changes in the Kansas Juvenile Code, basically making it into a fully adversarial system, as opposed to an intimate, informal protective proceeding, as juvenile courts used to be, further strengthens the analysis and conclusions made by the Alaska Court, which conclusions can easily be drawn by the Kansas Courts with similar analysis.

## **II. L.M.'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED**

### **A. STANDARD OF REVIEW**

An appellate court reviews the facts underlying a trial court's decision on a motion to suppress evidence by a substantial competent evidence standard. It does not reweigh the evidence. However, the ultimate determination of the suppression of evidence is a legal question and is reviewed by the appellate court under a *de novo* standard. State v. Schneider, 32 Kan.App.2d 258, Syl. ¶ 1, 80 P.3d 1184 (2003); State v. DeMarco, 263 Kan. 727, 732, 952 P.2d 1276 (1998).

## B. ARGUMENT AND AUTHORITIES

K.S.A. 22-3215(4) shifts the burden of proving that a confession is admissible to the prosecutor. It is the state's burden to prove, by a preponderance of the evidence, that any admission obtained from a Respondent was legally obtained, and admissible pursuant to Kansas and Federal law. The Courts have routinely held that when considering whether a Juvenile's statements are admissible the Courts should be extra careful. In Kansas, for example, when a child under fourteen is questioned special rules apply. K.S.A. 38-1624(c)(3)(A) and (B). This case is not one that deals with a child who is less than fourteen, however, it deals with one who had very limited experience with law enforcement as well as additional mitigating factors, including intoxication.

In the United States Supreme Court case of In re Gault, 387 U.S. 1, 45 (1967), the Court held that the courts must take

the greatest care. . . to assure that the [juvenile's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.

Id. At 55. In a much older case, cited by the Court in Gault, involving a fifteen (15) year old boy, the Court noted:

. . . when, as here, a mere child – an easy victim of the law – is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.

Gault, 387 U.S. at 45 (citing Haley v. Ohio, 332 U.S. 596, 599, 92 L.Ed. 224, 68 S.Ct. 302 (1948)). The defendant in this case should not be judged by the same standards of maturity as an adult and it is necessary for law enforcement not only to inform the child of his/her rights but to insure the child understands those rights. From the record it

appears that little or no attempt was made by the officer conducting the interrogation to insure the Juvenile understood his rights. The Respondent was in a very intimidating environment. It is true that the Officer did go over at least one of the rights, three times before he thought the juvenile understood, but under the circumstances of this case how could anyone say that the Respondent actually understood his rights and made a knowing and voluntary waiver of those rights.

The Respondent was lying down, having been in and out of handcuffs with fully uniformed, armed police officers asking him questions. Further, the Respondent was drunk and couldn't remember fairly significant events that had occurred that very night, including a blood test being done. (V. II, pp. 30-39).

In Gallegos v. Colorado, 370 U.S. 49 (1962), the Court stressed the inherent vulnerability of Juveniles:

[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police . . . He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.

Id. at 54. In this case the Juvenile was sixteen (16) years old and he had never before had any contact with law enforcement. Also, it is undisputed that he was drunk, even staggering, and that he had not slept for almost eighteen hours and was in and out of handcuffs throughout the night.

In the Gault case the Court clearly indicated that the age and sophistication of the child should be considered. In this case the Miranda warnings were not only necessary, but it was incumbent on the officer to be extra careful that the child understood those rights. Under the circumstances of this case there is no way that the Respondent understood what his rights were.

### **III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT L.M. OF AGGRAVATED SEXUAL BATTERY**

#### **A. STANDARD OF REVIEW**

When the sufficiency of the evidence is challenged in a criminal case, the standard of review on appeal is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. State v. McDonald, 250 Kan. 73, 824 P.2d 941, Syl. P 7, 824 P.2d 941 (1992).

#### **B. ARGUMENT AND AUTHORITIES**

The Respondent is charged with violating 21-3518(a)(1). The statute itself defines the crime as:

(a) Aggravated sexual battery is the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another under any of the following circumstances:

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

The issue before the Court is whether the prosecution put on sufficient evidence to prove beyond a reasonable doubt that the Respondent in this case intentionally touched the victim (a person over 16), without consent, with the intent to arouse or satisfy the sexual desires of himself or the victim, with the victim being overcome by “force or fear.”

During the course of the trial the State of Kansas failed to present one iota of evidence that the victim was actually overcome by force or fear. The reality is that the evidence is contrary to the elements of the crime.

The facts of the encounter between the Respondent and victim seem to be undisputed, see Statement of Facts, *supra*. Basically, when the victim made contact with the Respondent she gave him a cigarette (after he requested it), and he made a pass at her

(attempting to kiss her, but ended up licking her on the side of the face). She tried pushed him away and said no, and informed him that her boyfriend was inside the residence, after which he let go and said, "Bye, baby." During the incident the victim did not fall down, and did not feel it necessary to hit the Respondent, as she was only pushing him away because he "*just* had his arms around me." (V. III, p. 14). The victim sustained no injuries of any kind. (V. III, p. 16).

In a concurring opinion by Justice J. Abott, he stated that measuring whether a victim is overcome by force or fear is a measurement from the victim's viewpoint, meaning it is subjective in nature. State v. Plunkett, 261 Kan. 1024, 1036 (1997). He reasoned that the way he saw it that the Court should provide a standard to determine if the victim is overcome by "force or fear," and by not giving some sort of standard the Court is inviting appeals. Id.

In the case at bar Respondent contends that the victim was not overcome by force or fear as she never said that she was. The reality is that she sat on her steps and watched the Respondent walk away; she did not run to her neighbors, or scream for help; she didn't even feel the need to fight back, but only said "no" and was "just trying to push him away" (V. III, p. 14). Even though the victim testified that she was afraid (V. III, p. 10) it is not the same thing as evidence that proves that she was "overcome by force or fear," as being afraid and actually being "overcome" are different things entirely. In her testimony the victim minimized the acts of the Respondent by using the word "just" over and over again.

The victim agreed on cross-examination, very readily, that the Respondent merely made a pass at her (V. III, p. 14); by finding a defendant guilty under this set of facts the

Court has now made a Level Five (5) person felony out something that probably happens routinely in bars across the State and Country. It is the contention of the Respondent that these facts do not rise to the level of Aggravated Sexual Battery and that the Court needs to provide the lower Courts with some sort of standard in determining the meaning of “overcome by force or fear,” else prosecutors have a blank check where there is an allegation of a misdemeanor sexual battery to ratchet up the charge by simply getting the victim to say the touch made them afraid, creating a situation where there is a possibility for abuse.

### **CONCLUSION**

WHEREFORE, for the above reasons the Trial Court should be reversed and the matter remanded for a new trial, but with a Jury and the Respondent’s statements to the police excluded. In the alternative the case should be reversed because the State failed to put on sufficient evidence to convict the Respondent of the crime charged.

Respectfully Submitted,

---

Paul Shipp, Supreme Court No. 20263  
120 Grant Avenue  
Garden City, KS 67846  
(620) 275-0238

### **CERTIFICATE OF SERVICE**

Pursuant to Supreme Court Rule 6.09 and 6.10, I hereby certify that I caused to be hand-delivered the original and sixteen (16) copies of above and foregoing BRIEF OF APPELLANT to:

Carol Green

Clerk of the Appellate Court  
Kansas Judicial Center  
301 SW 10th Avenue  
Topeka, KS 66612  
Original and 16 copies

with five copies of the said BRIEF OF APPELLANT to each of the following individuals, via first class mail, postage prepaid, and addressed as follows:

Ms. Lara Blake Bors  
Assistant Finney County Attorney  
409 N. 9<sup>th</sup> Street  
Garden City, KS 67846  
5 Copies

Office of Attorney General Phill Kline  
120 SW 10th Ave., 2nd Floor  
Topeka, KS 66612  
5 Copies

This \_\_\_\_\_ day of \_\_\_\_\_, 2006.

---

Paul Shipp, Supreme Court No. 20263  
120 Grant Avenue  
Garden City, KS 67846  
(620) 275-0238