

No. 06-96197-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

In the Matter of L.M.,

Respondent/Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

**Appeal from the District Court of Finney County, Kansas
Honorable Philip C. Vieux, Judge
District Court Case No. 05-JV-197**

**Paul Shipp #20263
Attorney for Respondent/Appellant
Kansas Legal Services
120 Grant Ave.
Garden City, Kansas 67846
Tel.: (620) 275-0238
Fax: (620) 275-4999**

TABLE OF CONTENTS

	Page
NATURE OF THE CASE.....	1
STATEMENT OF THE ISSUE.....	1
SUPPLEMENTAL ARGUMENT AND AUTHORITIES.....	1
I. L.M. WAS ENTITLED TO A JURY TRIAL UNDER THE PROVISIONS OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.....	1
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971).....	1
<i>In re Findlay</i> , 235 Kan. 462, 681 P.2d 20 (1984).....	1, 4
<i>State v. Myers</i> , 260 Kan. 669, 923 P.2d 1024.....	2
K.S.A. 22-4902.....	2
K.S.A. 22-4906.....	2, 3
K.S.A. 22-4907.....	2
K.S.A. 22-4909.....	2
K.S.A. 21-4704.....	2
25 Kan. Reg., p. 762 (June 1, 2006).....	3
<i>State v. Reider</i> , 31 Kan.App.2d 509, 67 P.3d 161 (2003).....	3
K.S.A. 22-4908.....	3
<i>Blanton v. City of North Las Vegas</i> , 489 U.S. 538, 103 L.Ed.2d 550, 109 S. Ct. 1289 (1989).....	4
K.S.A. 38-2357.....	4
II. L.M. WAS ALSO ENTITLED TO A JURY TRIAL UNDER THE PROVISIONS OF THE BILL OF RIGHTS OF THE KANSAS CONSTITUTION.....	4

Kansas Bill of Rights, Section 1.....	4
Kansas Bill of Rights, Section 2.....	4
Kansas Bill of Rights, Section 5.....	4
Kansas Bill of Rights, Section 10.....	4, 5, 6
<i>In re Findlay</i> , 235 Kan. 462, 681 P.2d 20 (1984).....	5, 8
<i>Hall v. Brown</i> , 129 Kan. 859, 284 Pac. 396 (1930).....	5
<i>In re Turner</i> , 94 Kan. 115, 145 Pac. 871 (1915).....	5
Sixth Amendment, United States Constitution.....	5, 6
<i>Samsel v. Wheeler Transport Services</i> , 246 Kan. 336, 789 P.2d 541 (1990)	5
<i>State v. Smith</i> , 155 Kan. 588, 127 P.2d 518 (1942).....	5
<i>State v. Schoonover</i> , 281 Kan. 453, 133 P.3d 48 (2006).....	6
<i>State v. Morris</i> , 255 Kan. 964, 880 P.2d 1244 (1994).....	6
Fourteenth Amendment, United States Constitution.....	6
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971).....	6, 7, 8
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 20 L.Ed.2d 491, 88 S. Ct. 1444 (1968)	7
<i>Marks v. United States</i> , 430 U.S. 188, 51 L.Ed.2d 260, 97 S. Ct. 990 (1977).....	7
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	9

No. 06-96197-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

In the Matter of L.M.,

Respondent/Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from the District Court of Finney County, Kansas
Honorable Philip C. Vieux, Judge
District Court Case No. 05-JV-197

NATURE OF THE CASE

On December 22, 2006, the Court of Appeals affirmed the appellant L.M.'s adjudication as a juvenile offender for the sexually violent crime of aggravated sexual battery. In its decision the Court of Appeals held that the trial court did not err in denying L.M.'s request for a jury trial. On March 27, 2007, this Court granted L.M.'s petition for review of the Court of Appeals' decision on this issue.

STATEMENT OF THE ISSUE

Did the trial court err in denying L.M.'s request for a jury trial?

SUPPLEMENTAL ARGUMENT AND AUTHORITIES

I. L.M. WAS ENTITLED TO A JURY TRIAL UNDER THE PROVISIONS OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his brief L.M. has noted that the numerous changes in the Kansas juvenile justice system that have occurred since the decisions in *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971), and *In re Findlay*, 235 Kan. 462, 681 P.2d 20 (1984), were rendered have made that system similar in most, if not all, material respects to the adult criminal system. In addition, a juvenile convicted of a sexually

violent crime is required to register as a sexual offender, and the general public has unlimited access to the registration information required to be provided by the juvenile—a fact that this Court has explicitly characterized as punitive. *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996). The respondent has argued that these facts have rendered juvenile offender adjudications for sexually violent crimes so similar to adult criminal proceedings that the provisions of the Sixth Amendment are applicable and require that all juveniles charged with an offense which, upon conviction, would result in categorization of the juvenile as a “sex offender” as defined by K.S.A. 22-4902(b) and cause the juvenile to be subjected to the registration and publication provisions of K.S.A. 22-4902, 22-4906, 22-4907, and 22-4909 be afforded the right to a jury trial.

In the 2006 session of the Kansas legislature, K.S.A. 22-4906 was amended to give the judge in a juvenile offender proceeding some discretion with respect to the imposition of the registration and public access requirements for juveniles convicted of sexually violent crimes in certain cases. The statutory provisions remain unchanged for juveniles convicted of sexually violent crimes which are off-grid felonies or felonies ranked in severity level 1 of the non-drug grid set out in K.S.A. 21-4704. K.S.A. 2006 Supp. 22-4906(h)(1). However, with respect to juveniles convicted of sexually violent crimes that do not fall into these categories, the court now has three options. It may: (1) require the juvenile to register under the same conditions as those juveniles convicted of the offenses set out above, including unlimited public access to the registration information; (2) it may direct that the juvenile not be required to register, if it finds, on the record, substantial and compelling reasons for relieving the juvenile of this requirement; or (3) it may require the juvenile to register, but direct that the registration

information not be open to inspection by the public or posted on any internet website. K.S.A. 2006 Supp. 22-4906(h)(2).

These statutory changes raise the possibility that some juvenile offenders convicted of sexually violent crimes may not be required to register as sex offenders, or may not be subject to unlimited public access to their registration information even if they are required to register. L.M. submits, however, that these amendments should have no impact upon the Court's decision in this case. In the first place, they are not even applicable to this case. They became effective upon publication in the Kansas Register, which took place on June 1, 2006. 25 Kan. Reg., p. 762 (June 1, 2006). Criminal penalties in effect at the time the crimes were committed are controlling. *State v. Reider*, 31 Kan.App.2d 509, Syl. ¶ 5, 67 P.3d 161 (2003) (applying this principle to provisions of the Kansas Offender Registration Act). There is nothing in the legislation to indicate that it was intended to have retroactive effect. And K.S.A. 22-4908 would appear to preclude that in any case. Consequently, these statutory amendments have no bearing upon L.M.'s claim that he was entitled to a jury trial in this case.

Moreover, even if these changes were found to have retroactive effect, it is difficult to see how they will have any significant impact upon the right of a juvenile charged with a sexually violent crime to a jury trial. Such a juvenile will, upon conviction, be in jeopardy in every case of being required to register as a sex offender and of having that registration information be open to unlimited public access. Registration is still the rule rather than the exception, requiring substantial and compelling reasons to dispense with its imposition. Even if the punitive consequence of unlimited public access to registration information were to be deemed a critical element

of the juvenile's right to a jury trial, the mere fact that the trial court now has the discretion not to require it would not support a denial of a jury trial request as long as the juvenile continues to be exposed to that sanction. It seems clear that the decision not to require registration or to prohibit public access to registration information is intended to and will be made only after conviction, when fact-finding is completed and the court has all of the evidence before it. But the decision regarding the juvenile's right to a jury trial must be based upon the severity of the punishment that the respondent faces, not on speculation as to what he might actually receive. Cf. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541, 103 L.Ed.2d 550, 109 S. Ct. 1289 (1989). In addition, the trial court's discretion with respect to whether to prohibit public access to a juvenile's registration information appears to be completely unfettered. The statute sets out no factors for the court to consider or otherwise provides any guidance for the court in the exercise of this discretion. A trial court may summarily decline to prohibit public access to registration information in every case without even giving a reason, as many courts currently do with respect to the authority conferred upon them by K.S.A. 38-2357 to grant juveniles a jury trial in felony cases, and it is not clear that this decision would even be reviewable. Cf. *In re Findlay*, 235 Kan. 462, 681 P.2d 20 (1984). Consequently, these statutory amendments should have no impact upon L.M.'s right to a jury trial in this case.

II. L.M. WAS ALSO ENTITLED TO A JURY TRIAL UNDER THE PROVISIONS OF THE BILL OF RIGHTS OF THE KANSAS CONSTITUTION.

L.M. maintains that he is entitled to a jury trial pursuant to the provisions of Sections 1, 2, 5 and 10 of the Bill of Rights of the Kansas Constitution. In *In re Findlay*,

235 Kan. 462, 681 P.2d 20 (1984), this Court summarily concluded that there is no state constitutional right to a jury trial in juvenile offender proceedings. It offered no rationale for this decision, except to say that it was consistent with its earlier decisions in *Hall v. Brown*, 129 Kan. 859, 861-62, 284 Pac. 396 (1930), and *In re Turner*, 94 Kan. 115, 121-22, 145 Pac. 871 (1915). Both of these decisions held that juvenile delinquency and neglect proceedings are parental and not criminal, undertaken in the child's best interests and not for the purpose of punishing the juvenile. In addition, the Court in *Hall* noted that such proceedings are statutory proceedings not found at common law, and that a jury trial is not a matter of right in purely statutory proceedings. However, this distinction must be based on more than mere labels, and will no longer hold up if, as in this case, the differences between juvenile offender proceedings and a criminal trial are no longer sufficient to warrant the denial to juveniles of the constitutional rights that attach to criminal proceedings.

In his brief L.M. has suggested that the provisions of Section 10 of the Kansas Bill of Rights guaranteeing the right to a trial by jury in "all prosecutions" are worded more broadly than the jury trial provisions of the Sixth Amendment to the United States Constitution and may be interpreted more broadly as well. This Court has previously found that certain provisions of the Kansas Constitution grant broader rights to the citizens of this state than do corresponding provisions of the United States Constitution. *Samsel v. Wheeler Transport Services*, 246 Kan. 336, 351, 789 P.2d 541 (1990); *State v. Smith*, 155 Kan. 588, 593-95, 127 P.2d 518 (1942). On the other hand, this Court has also held on more than one occasion that provisions of the Kansas Bill of Rights extend the same or similar protections as corresponding provisions of the United States

Constitution. It has specifically reached this conclusion with respect to provisions of Section 10 of the Kansas Bill of Rights other than those dealing with the right to a jury trial. *State v. Schoonover*, 281 Kan. 453, 493, 133 P.3d 48 (2006) (double jeopardy); *State v. Morris*, 255 Kan. 964. Syl. ¶ 3, 880 P.2d 1244 (1994) (self-incrimination).

L.M. submits, however, that even if this Court were to determine that the provisions of the Kansas Bill of Rights grant no greater rights to a trial by jury than do the provisions of the Sixth and Fourteenth Amendments to the United States Constitution, that should not deter the Court from ruling in his favor on state constitutional grounds. The issue presented by this case is simply not resolved by the Supreme Court's decision in *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971). But even if this Court is hesitant to base its decision directly upon the provisions of the United States Constitution in the absence of more definitive guidance from the Supreme Court, it should have no such reluctance to interpret the corresponding provisions of its own constitution. This Court cannot simply put those provisions on hold while it waits for the U.S. Supreme Court to speak.

In this connection, it is well to remember that *McKeiver* is a decision without a majority opinion, and there appears to be no common rationale articulated by any combination of five justices who supported the Court's decision. The opinion of Justice Blackmon announcing the judgments of the Court was subscribed to by only four justices. Justices Harlan and Brennan wrote concurring opinions. Justice Harlan stated that if it is true that juvenile delinquency proceedings have become essentially criminal trials in many respects—a premise which Justice Blackmon's plurality opinion seemed to accept—he could see no reason why juveniles would not be entitled by the Sixth

Amendment to jury trials under the Court's holding in *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S. Ct. 1444 (1968). However, he concurred in the decision of the Court on the basis that *Duncan* was wrongly decided, and that the Sixth Amendment did not require the states to provide jury trials to either adults or juveniles. *McKeiver*, 403 U.S. at 553. Justice Brennan concurred in one of the two consolidated cases and dissented in the other, on the basis that the availability of a public trial sufficiently serves the same interests that the right to a jury trial protects, and therefore satisfies the requirements of due process and fundamental fairness. *McKeiver*, 403 U.S. at 553-57.

In *Marks v. United States*, 430 U.S. 188, 193-94, 51 L.Ed.2d 260, 97 S. Ct. 990 (1977), the Court stated that when a case is decided with multiple opinions and no single rationale for the Court's decision commands the support of at least five justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)) In *McKeiver*, however, no such rationale emerges. Justice Harlan's concurrence was based on a position shared by no other member of the Court except for Justice Stewart, who also dissented in *Duncan*, and he stated explicitly that in all likelihood he would not have reached the same conclusion as the plurality opinion had he begun from the same premises. And Justice Brennan's concurrence was premised on the availability of a public trial, which the plurality opinion specifically cited as one of the evils that might result if jury trials were required in juvenile proceedings. Consequently, it would seem that the only common ground shared by a majority of justices in *McKeiver* is the ultimate conclusion that neither the Sixth nor the Fourteenth

Amendment requires that a jury trial be available in juvenile proceedings under the facts before the Court.

The holding in *McKeiver* is controlling with respect to the facts of that case, and it may be that the facts in *Findlay* were sufficiently similar to warrant the Court's uncritical reliance on that decision, although it is not possible to tell that from the opinion. But it cannot control the decision in this case, where the provisions and goals of the Kansas Juvenile Justice Code are now substantially similar or identical to those of the adult criminal system in most significant respects, particularly at the pre-adjudicative and adjudicative stages, and where the respondent faces not only multi-year incarceration, but also punishment by public registration as a sex offender, upon conviction of the offenses with which he is charged. For all of the reasons set forth in L.M.'s brief arguing that he is entitled to a trial by jury in this case, the Court should reach the same conclusion under the corresponding provisions of the Kansas constitution.

CONCLUSION

For these reasons, and for all of the reasons set forth in L.M.'s primary brief, this Court should find that L.M. was entitled to a trial by jury in this case under the provisions of the constitutions of Kansas and the United States.

Respectfully submitted,

Paul Shipp #20263
Attorney for Respondent/Appellant
Kansas Legal Services
120 Grant Ave.
Garden City, Kansas 67846
Tel.: (620) 275-0238
Fax: (620) 275-4999

CERTIFICATE OF SERVICE

I hereby certify that I deposited in the United States mail, postage prepaid, two
(2) copies of the foregoing Supplemental Brief of Appellant, addressed to:

Lara Blake Bors
John P. Wheeler, Jr.
409 North Ninth Street
Garden City, Kansas 67846

Paul Morrison
Kansas Attorney General
120 S.W. 10th Street, 2nd Floor
Topeka, Kansas 66612-1597

on this 26th day of April, 2007.

Paul Shipp
Attorney for Respondent/Appellant