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IN THE SUPREME COURT OF THE STATE OF KANSAS

In the Matter of L.M.,

Respondent/Appellant.

REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

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

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TABLE OF CONTENTS

| | Page |
|---|-------------|
| ARGUMENT AND AUTHORITIES | 1 |
| K.S.A. 38-1601..... | 1, 2 |
| K.S.A. 21-4604..... | 2 |
| K.S.A. 21-4714..... | 3 |
| K.S.A. 38-1663..... | 3 |
| K.S.A. 21-4603d..... | 3 |
| K.S.A. 21-4601..... | 3 |
| K.S.A. 38-1673..... | 4 |
| K.S.A. 38-1675..... | 4 |
| K.S.A. 38-16,133..... | 4 |
| <i>McKeiver v. Pennsylvania</i> , 403 U.S. 528, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971)..... | 4 |
| <i>State v. Jones</i> , 273 Kan. 756, 47 P.3d 783 (2002)..... | 5 |
| <i>State v. Hitt</i> , 273 Kan. 224, 47 P.3d 732 (2002)..... | 5 |
| K.S.A. 38-1656..... | 6 |
| Colo. Rev. Stat. 19-2-610(3)..... | 6 |
| Mass. Ann. Laws, Ch. 119, §55A..... | 6 |
| Mich. Comp. Laws, §712A.17..... | 6 |
| Mont. Code Ann., §41—1502(1)..... | 6 |
| N. M. Stat. Ann., §32A-2-16.A..... | 6 |
| 10 Okla. Stat. §7303-4.1..... | 6 |
| Tex. Fam. Code §54.03(c)..... | 6 |

| | |
|-----------------------------------|---|
| W. Va. Code §49-5-6(a)..... | 6 |
| Wyo. Stat. Ann. §14-6-223(c)..... | 6 |
| K.S.A. 22-4902(c)..... | 6 |
| CONCLUSION..... | 6 |
| CERTIFICATE OF SERVICE..... | 7 |

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ARGUMENT AND AUTHORITIES

L.M. contends that the numerous changes in the Kansas juvenile justice system in recent years have made that system similar in most, if not all, material respects to the adult criminal system. The State acknowledges these similarities, but maintains that the differences between the two systems remain vast, and that giving accused juvenile offenders the right to a trial by jury would significantly impair the remedies currently available to the parties and the court to benefit both the juvenile and the community. These are points that the State has not developed in prior briefs. However, both of the premises of this assertion are incorrect. The differences between the two systems cited by the State are, for the most part, insignificant. And the availability of a jury trial at the adjudication stage of the proceedings will neither increase the adversary nature of the process nor limit in any way the options available to the court at the dispositional stage.

The State begins by noting that the adult criminal code contains no statement of goals similar to that found in K.S.A. 38-1601. That is certainly true, but as L.M. has previously pointed out, the changes made to that statute in 1996—elevating the promotion of public safety and holding juveniles accountable for their behavior to the

same level of importance as improving the ability of juveniles to live more productive and responsible lives in the community, and removal of the provision stating that no judgment under the Juvenile Justice Code will be held to impart a criminal act—are more illustrative of the rapid convergence of the two systems rather than their differences. The State does note that the adult criminal system has no policy or goal to strengthen families or educational institutions. This is in reference to K.S.A. 38-1601(b), which states that the Kansas Juvenile Justice Code (KJJC) shall be designed to “recognize that the ultimate solutions of juvenile crime lie in the strengthening of families and educational institutions, . . .” However, it is not clear how, or if, this aspirational statement is translated into distinctive policies in the KJJC, or whether it is simply boilerplate, and the State offers no further elucidation.

The State contends that the presentence investigation for a juvenile offender includes the juvenile’s social history, and that the court has the discretion to order psychological, physical and educational evaluations as well. It argues that such evaluations are not available to the court in sentencing a convicted adult, and that social history is not part of an adult pre-sentencing investigation. This is not true for adults convicted of misdemeanors. Cf. K.S.A. 21-4604. In fact, this latter statute appears to require the court services officer to secure the defendant’s social history, whereas K.S.A. 38-1661(b) appears to make that optional with the court. It is true that in case of adults convicted of felonies, the court has less discretion than in juvenile offender cases with respect to the information to be contained in the presentence investigation. However, the court still has the authority to order psychological and drug and alcohol reports when appropriate. Cf. K.S.A. 21-4714. And inclusion of social history information in a

presentence investigation is clearly a double edged sword and does not necessarily lead the court to kinder, gentler treatment of the juvenile.

The State asserts that K.S.A. 38-1663 gives the court far more alternatives for sentencing a juvenile offender than K.S.A. 21-4603d provides to the court for sentencing a convicted adult. But a close examination of those statutes does not support that assertion, except, as the State notes, for provisions unique to the status of juvenile offenders as minors, such as the authority of the court to order a juvenile's parents to take certain actions. Moreover, K.S.A. 21-4601 requires the court, in sentencing a convicted adult, to impose a sentence in accordance with the defendant's "individual characteristics, circumstances, needs, and potentialities as revealed by case studies."

The primary difference between the two sentencing schemes is the limited discretion of the court with respect to an adult convicted of a felony that falls within the sentencing guidelines. The court may have more options with respect to a juvenile adjudicated guilty of a felony that carries a sentence of presumptive imprisonment for adults. But the same is also true with respect to juveniles adjudicated guilty of felonies that carry sentences of presumed probation for adults. Again, this increased flexibility of the KJJC with respect to such cases is a double edged sword that does not always work in the best interests of the juvenile.

The State suggests that the Juvenile Justice Authority may place any juvenile in a juvenile correctional facility at any time that the juvenile is placed in its custody, and that this ease of placement suggests that juvenile correctional facilities are far more hospitable facilities than are adult prisons. This statement is based on an extremely dubious statutory analysis that ignores almost all of the provisions of the KJJC relating to

commitment of juveniles to juvenile correctional facilities, including the legislature's numerous references to confinement in juvenile correctional facilities as "incarceration." See K.S.A. 38-1673; 38-1675; 38-16,133. But if the State's argument is actually correct, the conclusion to be drawn from it is not that juvenile correctional facilities are benign and friendly institutions, but that juveniles caught up in the juvenile justice system, including those not yet adjudicated to be juvenile offenders, face incarceration in a juvenile correctional facility any time they are placed with the Juvenile Justice Authority.

L.M. does not contend that the juvenile justice system has now become identical with the adult criminal justice system. There are still differences, some more significant than others. He does maintain, however, that these differences have narrowed so substantially that it is no longer permissible to base the denial of a right to a jury trial to an accused juvenile offender upon the unique character of the juvenile justice system as a paternalistic and "intimate, informal protective proceeding." *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 29 L.Ed.2d 647, 91 S. Ct. 1976 (1971). Nothing in the State's supplementary brief suggests to the contrary.

Nor is there any validity to the State's assertion that giving juvenile offenders accused of serious crimes the right to a jury trial would somehow make the process more adversarial and undermine the court's ability to craft a disposition that best suits the needs of both the juvenile and the community. The trial in a juvenile offender case is already fully adversarial, and giving the juvenile the right to have the facts determined by a jury instead of the court will not make it more so. It would not affect in any way any of the dispositional alternatives currently available to the court or undermine what may be unique and worth preserving about the juvenile justice system, nor is there any reason to

think that it would make the court any less willing to utilize all of these options. If there are judges who may be more inclined to adjudicate an accused juvenile offender guilty in close cases in the belief that the juvenile may benefit from the services that can be offered through disposition, or because of prior knowledge of or experience with the juvenile in prior cases, such adjudications of guilt may diminish, but that is not a defensible practice on due process grounds in any event.

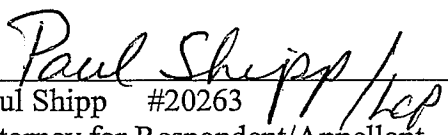
Nor is there any reason to believe that according accused juvenile offenders the right to a jury trial in cases involving serious crimes will impose any significant burden on the juvenile justice system. This Court expressed concern about that prospect in *State v. Jones*, 273 Kan. 756, 47 P.3d. 783 (2002). In that case Jones argued that the decision to certify a juvenile to stand trial as an adult under K.S.A. 38-1636 was required to be made by a jury under the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S. Ct. 2348 (2000), because trial as an adult would substantially increase the penalty for the offense. This Court rejected that argument. Among the reasons that it gave was that such a requirement would cause substantial disruption in the juvenile justice system, citing without further analysis to its prior decision in *State v. Hitt*, 273 Kan. 224, 47 P.3d 732 (2002). *State v. Jones*, 273 Kan. at 778. However, the Court misread its own decision in *Hitt*. The Court in *Hitt* was referring to the disruption that would be caused in the adult criminal system by excluding juvenile adjudications not proven to a jury beyond a reasonable doubt from a convicted adult's criminal history, requiring the resentencing of a large number of criminal defendants. *State v. Hitt*, 273 Kan. at 235. This case provides no support for the concern of the Court expressed in *Jones*.

It should be kept in mind that the court has long had the discretion to afford a juvenile accused of a felony a jury trial in juvenile cases. K.S.A. 38-1656. A number of states accord juveniles the right to a jury trial by statute in felony cases. See, e.g., Colo. Rev. Stat. 19-2-601(3); Mass Ann. Laws, Ch. 119, §55A; Mich. Comp. Laws, §712A.17; Mont. Code Ann., §41-5-1502(1); N.M. Stat. Ann., §32A-2-16.A; 10 Okla. Stat. §7303-4.1; Tex. Fam. Code §54.03(c); W. Va. Code §49-5-6(a); Wyo. Stat. Ann. §14-6-223(c). It seems apparent that the juvenile justice system can easily accommodate jury trials without major dislocations or, as noted above, without jeopardizing its unique features designed to meet the special needs of juveniles. And it must be remembered that the Court is not being asked to accord this right to all juveniles accused of serious crimes, but only to a narrow subcategory of those comprised of juveniles accused of having committed a sexually violent crime, as defined in K.S.A. 22-4902(c).

CONCLUSION

The arguments advanced by the State in its supplementary brief are not persuasive. The differences between the juvenile justice system and the adult criminal system are much narrower than portrayed by the State, and the significant differences that distinguish and define the juvenile justice system would remain unaffected by giving juveniles accused of sexually violent crimes the right to a trial by jury. And considerations of due process and fundamental fairness demand no less.

Respectfully submitted,


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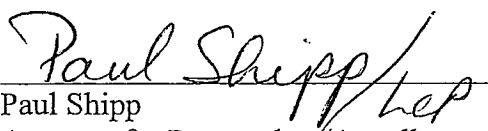
CERTIFICATE OF SERVICE

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

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