

KANSAS LEGAL SERVICES

104 South Fourth Street
Manhattan, Kansas 66502
Telephone (785) 537-2943
Fax (785) 537-2927

Paul Shipp
Managing Attorney

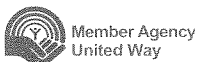
October 29, 2007

Hon. Kay McFarland, Chief Justice
Kansas Supreme Court
Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612

Re: **In re L.M.—Case No. 06-96197-A**
Letter Brief

Dear Chief Justice McFarland and Associate Justices:

At the oral argument of this case on October 25, 2007, Mr. McAllister, arguing for the State of Kansas, discussed the case of *Smith v. Doe*, 538 U.S. 84, 155 L.Ed.2d 164, 123 S. Ct. 1140 (2003), and indicated that this case had not been mentioned in any of the briefs. Unfortunately, I failed to recognize from Mr. McAllister's comments that I had in fact cited and briefly discussed this case in my initial brief, and I informed the Court on rebuttal that I had not read the case. Consequently, the Court generously offered me the opportunity to furnish the Court with a response to Mr. McAllister's remarks on *Smith* by Wednesday, October 31, 2007, clearly under the impression that Mr. McAllister had raised this case for the first time on oral argument. This was a misunderstanding that I created, although inadvertently, with my statement, and for that I apologize. I should also add that although it is apparent that both the Court and I understood Mr. McAllister's statement to mean that this case had not been raised in any of the briefs in this action, I believe this statement was inadvertent at worst, and may have been intended to refer only to the briefs submitted on behalf of the State's position, which Mr. McAllister apparently had no role in preparing.



Because of the short amount of time that I have to submit a response to Mr. McAllister's comments, I do not feel that I should wait for the Court to determine whether it still wishes to permit me to do so under these circumstances. Consequently, I am offering the following brief response, which the Court may consider or disregard as it deems appropriate. In light of the circumstances, I intend to restrict my comments primarily to information and arguments already contained in the briefs previously submitted on behalf of L.M. in this matter.

L.M., the appellant in this case, was convicted of aggravated sexual battery in a proceeding under the Kansas Juvenile Justice Code (KJJC). As a consequence, he was required to register as a sex offender, and all of his registration information is subject to unlimited public access on the Internet. In *State v. Myers*, 260 Kan. 603, 923 P.2d 1024 (1996), this Court held that this unrestricted public access to this information, together with the lack of any individualized determination of the appropriateness and scope of required disclosure, is excessive in relation to the law's purpose of protecting public safety and is therefore punitive for purposes of determining whether its retroactive application was a violation of the *Ex Post Facto* Clause of the United States Constitution. *Id.* at 702. L.M. argued that the fact that his juvenile conviction caused him to be subjected to requirements that this Court had expressly labeled as punitive is a compelling indication that the treatment of juvenile offenders under the KJJC, at least with respect to those offenses categorized as "sexually violent crimes" under K.S.A. 22-4902(c), has changed to the point where it is insufficiently different from the adult criminal justice system to support denying juveniles charged with such offenses the constitutional right to a trial by jury. Appellant's Brief, pp. 17-25.

In *Smith v. Doe*, 538 U.S. 84, 155 L.Ed.2d 164, 123 S. Ct. 1140 (2003), the U.S. Supreme Court reached the opposite conclusion with respect to a statute from the state of Alaska that is

similar in many respects to that of Kansas, finding that it did not impose a punishment in violation of the *Ex Post Facto* Clause. In oral argument Mr. McAllister maintained that this decision effectively undermines the basis for the *Myers* decision and establishes that it was wrongly decided. This is an argument that L.M. expressly anticipated in his brief. Appellant's Brief at pp. 28-29. However, the real question for this case is not whether mandatory registration as a sex offender and unlimited public access to that information constitutes punishment for adults, but whether it constitutes punishment for juveniles. This is an issue that was considered in neither *Myers* nor *Smith*, and it appears that the Alaska sex offender registration requirement is not even applicable to juveniles. Alaska Stat. §12.63.100(3). L.M. submits that *Smith* is not determinative of this issue.

Although *Myers* found the Kansas statute to be excessive and therefore punitive when considering the factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L.Ed.2d 644 (1963), the court in *Smith*, utilizing the same factors, reached a different conclusion with respect to the Alaska statute. But the analysis of this issue is different for children than for adults. A key factor in the Supreme Court's conclusion that the Alaska' statute's applicability to all convicted sex offender without consideration of future dangerousness is not excessive was its determination that Alaska could conclude that convicted sex offenders pose a substantial risk of recidivism, citing evidence of high recidivism rates among sex offenders. *Smith v. Doe*, 538 U.S. at 103. But the evidence is very different for juveniles, particularly with treatment, as the amicus brief submitted on L.M.'s behalf by the Juvenile Law Center convincingly points out. Amicus Brief of Juvenile Law Center, p. 9. This Court itself raised that issue in *Myers* by asking rhetorically whether every 18 year old or younger juvenile tried as an adult who is convicted of a crime requiring registration as a sex offender because of a

voluntary sexual relationship with a 15 year old poses a risk of reoffense sufficient to justify unlimited public access to the registration information. *Myers*, 260 Kan. at 699. Interestingly, that question appears to be based on an assumption that the sex offender registration requirements do not even apply to juveniles tried under the KJJC, although that issue was not before the Court. Not only is that not the case, but these requirements are being applied to children of a very young age. A random examination of the KBI Registered Offender Website (<http://www.kansas.gov/kbi/ro.shtml>.) for only two of Kansas' 105 counties shows that the registry for Finney County, where this case originated, contains information on children as young as 13 years, 5 months, at the time they were required to register. The registry for Shawnee County, where this case was heard, contains information on children as young as 11 years, 3 months, on the date of registry. Obviously the children were younger when the acts for which they were convicted were committed.

Moreover, allowing unrestricted public access to sex offender registration is particularly harmful for juveniles, especially when made available over the Internet, as the Juvenile Law Center amicus brief also demonstrates. Amicus Brief of Juvenile Law Center, pp. 3-9. And as noted both by L.M. in his initial brief (p. 29) and the Juvenile Law Center amicus brief (p. 4), it is entirely inconsistent with those paternalistic features which have historically characterized the juvenile justice system as "different" and which have traditionally been cited in support of a holding that juveniles have no constitutional right to a trial by jury.

In short, the holding in *Smith* that mandatory sex offender registration and unlimited public access to that information does not constitute punishment for adults should not be determinative of that issue for juveniles, with respect to whom the evidence is quite different. But if the question of whether mandatory sex offender registration and unlimited public access to

the registration information constitutes punishment for juveniles is to be resolved without consideration of the significant differences between juveniles and adults, and if juveniles are to be subjected to these requirements in spite of the fact that they are contrary to the *parens patriae* philosophy and goals which have formed the traditional basis for the juvenile justice system, then there is no reason why juveniles should receive fewer due process protections than do adults before such requirements are imposed upon them. These requirements are imposed upon adults only after conviction of a sexually violent crime after a trial that affords the defendant the right to trial by jury. Therefore, the outcome of this case should not change even if this Court were to agree with the State's position on *Smith*.

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 Letter Brief of Appellant, addressed to:

Steven R. McAllister
Solicitor General
120 SW 10th Avenue, Room 200
Topeka, KS 666

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

David Lowden
18th Judicial District
Sedgwick County Courthouse
535 N. Main
Wichita, KS 67203

Nola Foulston
District Attorney
18th Judicial District
Sedgwick County Courthouse
535 N. Main
Wichita, KS 67203

on this 29th day of October 2007.

Paul Shipp
Attorney for Respondent/Appellant