Changing Juvenile Courts, Expanding Constitutional Rights of Children;

With case law update

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A BRIEF HISTORY OF THE JUVENILE COURTS IN KANSAS AND ACROSS THE COUNTRY

To fully appreciate the Kansas Supreme Court's recent ruling, *In Re L.M.*, 186 P.3d 164 (2008), it is essential to examine the juvenile justice system and its historic development. The history reveals how the juvenile system has come full circle, with it being almost essentially no different than the adult criminal system, and that the extension of the right to trial by jury to youth in Kansas was essential.

In the 1800's, prior to Kansas even being created, juveniles and adults charged with crimes had the same rights, and were subject to the same punishments. Like an adult, a child who had reached the common age of criminal responsibility (as young as seven in some states), could be arrested, indicted, tried, and, if found guilty, imprisoned with adults. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909). As criminal law evolved, and attorneys began questioning the constitutionality of how adults were treated, similar questions arose about how children were treated. As a direct result more attention was focused on the distinct problems of juvenile crime, and cognizance of the need to address juvenile crimes differently than adult crimes was sought.

Professionals began to question the propriety of why children as young as eight could be given prison sentences, and be sent to jail with adult criminals. With increasing industrialization thousands of people flooded into the cities causing

overcrowding, an increase in crime and the creation of larger jails and prisons. This in turn created special problems in the arena of dealing with children in jail. Debate began, and one commentator during the period made the following comment about the problem of treating children like adults:

> If acquitted, they [children] were returned destitute, to the same haunts of vice from which they had been taken, more emboldened to the commission of crime, by their escape from present punishment. If convicted, they were cast into a common prison with older culprits to mingle in conversation and intercourse with them, acquire their habits, and by their instruction to be made acquainted with the most artful methods of perpetrating crime.

New York Society for the Reformation of Juvenile Delinquents, 1826 Annual Report 4 (1827), cited in 1 Children and Youth in America 671 (Robert H. Bremmer ed. 1970). It would not be long before reformers would make moves to change how children committing crimes were handled. In 1825 New York established the New York House of Refuge in which children convicted of crimes were separated from their adult counterparts. Following New York's lead, Massachusetts in 1847 opened a state reform school aimed at teaching trades to wayward youths. Later, Massachusetts created a special government representative to investigate criminal charges against juveniles, attend trials, and act to protect children's interests wherever possible. This was followed in 1872 by the legislative creation of a system of separate sessions, dockets, and court records for juveniles.

The goal was to treat children differently than adults, since they were obviously less culpable than their adult counterparts.

In 1899, the state of Illinois followed New York and extended the concept of an entirely separate system for the treatment of juveniles by enacting the Illinois Juvenile Court Act. This act created a statewide court authorized to assume jurisdiction over juveniles on the basis of "pre-delinquent" statuses, such as ignorance and poverty, as well as on the basis of criminal acts. To accomplish this goal, juvenile courts were given the power to commit children who were without "proper parental care," wandering about the streets, committing mischief, and growing up unsupervised. For the first time, instead of seeking punishment the courts sought to actually address the behavior to prevent future delinquent behavior. The evolving system sought to use principles of medical and social science to actually *reform* the child, and give the child a chance that the child did not otherwise have.

The evolutionary process of legislatures seeking to appropriately address juvenile crime began, and in the process, each state would borrow from others. This led to various statutory schemes being created to address juvenile crime. By 1925 similar tribunals to that of Illinois were created across the country, and in a relatively short period of time society's view of how to deal with delinquent children changed dramatically.

Courts were no longer to seek a finding of guilt or innocence. Instead, the proper inquiry concerning a juvenile involved in criminal activity became a question of how to eliminate the cause of the behavior. States moved away from punishment, and moved toward the need to rehabilitate the child, and find real solutions.

One commentator wrote in 1909 the following about how the court and judges should view the accused delinquents brought before it:

> The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

This gave birth to the concept that the State should, as much as possible, act as a good parent would act. Because Judges were encouraged to evoke the "proper sympathetic spirit' the informal, flexible process replaced the rigidity of the adult criminal court. Criminal procedures were viewed as obstacles and so were done away with entirely. Punishment quickly became foreign to juvenile court philosophy, there was simply no longer a need for procedural protections designed to shield an "innocent defendant" from the state because the purpose of the process was to give the child "proper parental oversight," which was usually exactly what

the child lacked in the first place. The reality was the child was not to be considered guilty or innocent of anything. The legal question was whether the child should be defined as "delinquent." An example of this can be illustrated in the early Kansas case of *Brown v. Hall*, 129 Kan. 859 (1930).

Brown v. Hall clearly articulated the goals of the juvenile system, as they then existed, and outlined the need to address juvenile crime through a process that was in no way remotely close to its adult, criminal system counter-part. In the case the attorney had argued that the child deserved the same constitutional rights as those afforded adults in criminal proceedings. The basis for the attorney's argument for the child, then fifteen (15) years of age, was that his client was being subjected to a criminal proceeding. In the case the Kansas Supreme Court pointed out that the child was using intoxicating liquor, that she was out late and associating herself with thieves, vicious and immoral people. Basically, the Court surmised that she was growing up in the streets. It was noted that the child was patronizing pool rooms and places where gambling was conducted. Even though the child's attorney accurately pointed out the proceeding was "quasi criminal" and that his client's liberty was at stake, the Court succinctly pointed out that, "The complaint did not charge the commission of any crime." Instead the Court explained *parens patriae*.

The Court made the very conspicuous observation that at the time nothing the child did was actually unlawful, including the use of intoxicating liquor. The Court went to point out that using liquor may have moral implications, but it was indeed not a crime at the time. This allowed the Court to explain the beauty of the juvenile system as it then existed. The juvenile system was there to "address the behavior" of the child, and do what the parents were not doing. The court articulated the following:

> A proceeding against a delinquent and neglected child **is not a criminal one.** It is an inquiry to ascertain whether the child shall be placed under the direct and immediate control of the state for the good of the child, in securing for it proper nurture, training and education, not for the purpose of punishing it for any acts that it ought not to have committed. (*State v. Dunn*, 75 Kan. 799, 90 P. 231; *State v. Dubray*, 121 Kan. 886, 250 P. 316.) The judgment of the district court is not a punishment for crime committed; **it is a finding of fact on which action for the good of the child is based.** (*In re Turner*, 94 Kan. 115, 116, 145 P. 871.). Emphasis added.

It is fair to say that the articulation of the court likely deflated counsel in the case. The reality was the finding of delinquency that would come from the Court was merely a means to accomplish reformation, and that no lifelong/life altering label would come from it. In fact, the court pointed out, that this was the essence of the juvenile delinquency system. The term "*parens patriae*" wasn't even articulated in the case, however, that is what the Court was outlining.

A review of the statutes that would come later illustrates that the legislature codified what the Court was outlining:

> This act shall be liberally construed, to the end that its purposes may be carried out, to wit, that the care, custody and discipline of a child shall approximate, as nearly as may be, proper parental care; and in all cases where the same can be properly done, that a child may be placed in an approved family home, by legal adoption or otherwise. And **in no case shall any proceedings, order or judgment of the juvenile court, in cases coming within the purview of this act, be deemed or held to import a criminal act on the part of any child** but all proceedings, orders and judgments shall be deemed to have been taken and done in the exercise of the parental power of the state. G.S. 1949, 38-415. (Emphasis added).

The reality was that children who committed crimes were viewed as "delinquents" who needed proper parental care, control, and discipline. The juvenile in the system as it existed was not labeled as a criminal, but merely as a "delinquent" in need of "reformation." The reforming part, the part that required the restraining of the child, was done for the child's own good, and not for the purpose of necessarily "punishing" the child.

On a national level there were other challenges to what the courts were attempting to do, conduct more informal hearings suited to ascertain the facts so that the child could actually be rehabilitated. In *Commonwealth v. Fisher,* 213 Pa. 48 (1905), for example, a juvenile committed to the Philadelphia House of Refuge following an "informal" juvenile hearing claimed that he was denied due process of law as well as the right to trial by jury. In answer to his challenge, the Supreme Court of Pennsylvania rightfully explained that:

> [T]he natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it

> from the consequences of persistence in a career of waywardness, nor is the state, when compelled, as parens patriae, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there, and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there. The act simply provides how children who ought to be saved may reach the court to be saved.

Id. at 53. Three years later in Ex *parte Sharp,* 15 Idaho 120 (1908), the father of a fourteen-year-old girl applied for a writ of habeas corpus to secure his daughter's discharge from the Idaho Industrial Training School, where she had been committed for delinquency. He charged that the Idaho Juvenile Court Act violated several constitutional guarantees applicable to criminal procedure. The court, however, ruled:

> [this] statute is clearly not a criminal or penal statute in its nature. Its purpose is rather to prevent minors under the age of sixteen from prosecution and conviction on charges of misdemeanors, and in that respect to relieve them from the odium of criminal prosecutions and punishments. Its object is to confer a benefit both upon the child and the community in the way of surrounding the child with better and more elevating influences and of educating and training him in the direction of good citizenship, and thereby saving him to society and adding a good and useful citizen to the community.

Thus, in decisions such as *Hall, Sharp* and *Fisher* the theoretical framework for the juvenile court system was laid, and constitutional challenges were seemingly put to rest. Due process was brushed aside. The approach was to utilize and solidify the common law doctrine of *parens patriae* to dismiss all notions that children deserved constitutional protections. Based on the practices of English chancery

courts (which protected juvenile property rights) the state should act as a protective guardian and intervene if parents were unable (or unwilling) to care for the child. Juvenile court was labeled as civil, rather than criminal, so that the rules of criminal procedure were deemed entirely inappropriate. The framework was idealic and it appeared that the state was doing all it could to be a good parent.

THE CONTROVERSY WOULD BE REVIVED

After the 1930's the juvenile justice system did not receive a great deal of attention, likely because of world turmoil, and many social changes occurring across the country. It wasn't until the 50's when juvenile delinquency was again reviewed.

The earlier ideals of juvenile court reformers were not really reexamined. Instead, Attorneys began to point out that the rehabilitative institutions established to treat juveniles were not very different from adult prisons. The courts even noted that despite the rhetoric of *parens patriae*, and the distinctions made between civil and criminal proceedings, juveniles were being deprived of their liberty with very little attention to their rights as United States citizens. At this point the pendulum began to swing back to the old ways of how things used to be done, instead of a real debate ensuing on how to reform the way the system was reforming the delinquent, scholars and attorneys became overly critical and sought change. The change sought was to extend rights to the child.

A CHANGE IN FOCUS

And so in 1952 a California court committed violence against the earlier ideals of the early juvenile court reformers by finding that while juvenile courts held that the adjudication of a minor was not a conviction of crime, such a finding was still "a legal fiction, presenting a challenge to credulity and doing violence to reason." *In Re Contreras*, 109 Cal.App.2d 787, 241 P.2d 631 (1952). Elaborating on this theme, the court explained that when a child is labeled as a law breaker, especially in cases of felonies that the allegation of such a nature is a "blight upon the character of and is a serious impediment to the future. . ." of any child. The California court went on to articulate that the minor is sometimes taken from his family, deprived of his liberty and confined in a state institution and concluded that the true design of the Juvenile Court Act may be to be parental in nature, but the reality is it does actually deny the minor his constitutional rights. The debate changed from "how to get youth on the right track" to "do kids deserve constitutional rights?" and "do children deserve the same protections as adults?" There was no longer an attempt to differentiate the adult criminal system from the juvenile system, but then began a move to assert rights for the child where it was inappropriate. Unfortunately, the Courts lent an ear to this argument and what resulted was the beginning of expansion of rights to children, which was laudable, but the result would eventually send the system back to exactly where it began.

In another decision in a case out of Washington D.C., in *Shioutakon v. District of Columbia*, 114 A.2d 896 (1955), the Municipal Court of Appeals of the District of Columbia followed the spirit of the law articulated in cases like *Fisher* and *Sharp* and concluded that a juvenile was guaranteed a right to counsel in a delinquency proceeding. The D.C. court seemingly took the position that to hold that a juvenile had no such right to an attorney solely because it is to promote the welfare of the child is a farce. What basically happened was the court extended due process to children, and required that the child have a 'right to be heard' because the child's personal liberty is at stake, and this necessitated the effective assistance of counsel.

What then would occur is further reform of the Juvenile Codes across the country. As the Courts began extending rights to the child, the relative legislatures reacted by making the juvenile courts more and more penal in nature. Tensions would very gradually alter how legislatures would approach the handling of juvenile crime. This is only speculation, but it appears that legislatures would evolve their approach, after all, if the Courts were going to extend rights to the child that were not otherwise necessary, then why shouldn't a more penal approach be taken?

Some courts would continue to emphasize the juvenile's need for court protection over his or her constitutional rights, but this set the tone for creating the

environment where the child would be subject to the worst of both worlds. Up until this point there were no U.S. Supreme Court decisions on the issue. Then in 1966 the Supremes entered the debate and considered the case of *Kent v. United States*, 383 U.S. 541 (1966).

In *Kent*, procedures by which juvenile courts in the District of Columbia waived jurisdiction in favor of criminal prosecution were examined. The Supreme Court held the procedures to be defective because they failed to provide for a hearing where the juvenile was represented by counsel, access by the juvenile to social investigation reports, or a statement of reasons by the juvenile court judge. Essentially, there was a failure to allow the child to confront his accusers. While the court's decision in this case was based on statutory construction and, therefore, was somewhat narrow in scope, constitutional implications were clearly enunciated. Justice Fortas, writing for the majority in *Kent*, stated:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities, and techniques to perform adequately as representatives of the state in a parens patriae capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds. That **he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.** (Emphasis added).

In other words the Supreme Court accused the juvenile system of playing lip service to *parens patriae* and articulated, essentially, that the state as a good parent is not possible.

Later, the concerns of the *Kent* Court were addressed in the case of In *re Gault*, 387 U.S. 1 (1966).

In *Gault* a fifteen-year-old child had been adjudicated delinquent under the Arizona Juvenile Code for making lewd phone calls. For this reason, he was committed to the state industrial school. His parents applied for a writ of habeas corpus for their son's release, arguing that he had been unconstitutionally deprived of his rights to adequate notice, to counsel, to confront witnesses, to a transcript of the hearing, and to an appeal. When the writ was denied by the Arizona Supreme Court it upheld the adjudication based on the *parens patriae* doctrine and the traditional distinction made between juvenile and criminal proceedings.

The U.S. Supreme Court was not willing to allow the invocation of *parens patriae* to justify a wholesale denial of all constitutional rights. It was not persuaded by the usual arguments in favor of procedural informality. The Court was critical of the concept of *parens patriae* and shockingly articulated that its meaning was "murky," and that "its historic credentials are of dubious relevance." Basically, this indicted further the ideals of the early reformers, by saying in so many words, that it's not possible for the State to be like a parent.

The Court noted that although "the highest motives and most enlightened impulses led to a peculiar system for juveniles," that the "the constitutional and theoretical basis for this peculiar system" was "to say the least—debatable." Even though the *Gault* case basically attacked the idea of *parens patriae* it still did not go so far as to hold that all procedural guarantees granted adults were also due juveniles. Instead, it simply stated that juvenile delinquency hearings "must measure up to the essentials of due process and fair treatment." These essentials were held to include the right to notice of the charges, adequate time to prepare a defense, counsel (appointed or privately retained), confrontation and cross-examination of witnesses, and the privilege against self-incrimination. The constitutional basis for these rights, however, was left somewhat unclear, as the majority opinion cited different theories in different parts of its decision. Even though the *Gault* Court performed a thorough review of juvenile court history and expressed the need for constitutional protection for juveniles, it left the constitutional standards required of juvenile courts up in the air.

When the *In Re L.M.*, 186 P.3d 164 (2008) case, was argued the first argument presented was that due process required a jury trial. After *Gault*, came *In re Winship*, 397 U.S 398 (1970), the U.S. Supreme Court was asked to state the appropriate standard of proof required in a juvenile proceeding where a juvenile is charged with an act that would constitute a crime if committed by an adult. In the

case a twelve-year-old boy stood charged with stealing $112 from a woman's pocketbook. If he were an adult, he would have been charged with larceny and a finding of guilt beyond a reasonable doubt would have been required for his conviction. The New York Family Court Act, however, only required proof based on a preponderance of the evidence for an adjudication of delinquency. Relying on this standard, the juvenile was found to be delinquent, and was placed in a state training school for eighteen months, with the possibility of his commitment being extended to six years in total. The attorneys in the case argued that because his liberty was at stake a higher burden of proof was appropriate.

On appeal, the New York Court of Appeals affirmed, basing its decision on the familiar distinction between juvenile proceedings and criminal matters, one would assume this was a sound basis for the court's ruling because the delinquency hearing was a civil matter and that adult criminal court standards were, therefore, irrelevant. The Supreme Court disagreed. Strengthening the position taken in *Gault*, the Court stated that "civil labels and good intentions do not obviate the need for criminal due process safeguards in juvenile courts" and found that proof beyond a reasonable doubt was mandated in all delinquency cases.

Following *Gault* and *Winship*, it appeared that children just might be given the same rights provided to adults in the context of criminal proceedings. In 1971 the U.S. Supreme Court heard *McKeiver v. Pennsylvania, 403 U.S. 528 (1971)* and

was asked to determine whether a juvenile accused of an act that would be a crime if committed by an adult had a right to trial by jury. The argument was couched under the due process clause of the fourteenth amendment. Amazingly, the Court answered the question in the negative. The decision was a close one though, five-four (5-4). The could have gone either way, and many saw this as a setback, but seemingly failed to recognize the general agreement of all the justices that the juvenile systems across the country had evolved in the wrong direction, the way it originally began, more penal than rehabilitative. The majority of the court basically articulated that the juvenile court systems had almost come full swing; that a system was developing into something exactly like the adult criminal system. The court explained that if the juvenile systems were to ever come full swing then it would have no choice but to extend additional constitutional rights to children, including the right to trial by jury. Even though the right to jury trial was not granted the Court was careful to explain that due process was still essential. The Court further stated that the insertion of juries into juvenile proceedings would only serve to disrupt what it termed "the prospect of an intimate, informal, protective proceeding." Overall, the *McKeiver* holding represented a philosophical retreat in the arena of exdending constitutional rights. The Court concluded that to move forward (granting jury trials as a matter of right) would only make it (coming full circle) happen more quickly. Once again, it was pointed out that juvenile court

proceedings were not criminal in nature, and that to equate a juvenile delinquency hearing to a criminal trial ignored "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court contemplates."

Since *McKeiver* the Supreme Court has not had an opportunity to address the question of whether some states have come full circle or not, but some state supreme courts have concluded that their state's juvenile justice systems have come full circle.

The most striking example is Alaska. It made the determination that it had come full circle in RLR v. State Alaska, 487 P.2d 2 (1971). In the case the Alaska Court focused on the liberty interest of the child, and outlined that it is important that we do not get caught up in the realm of discussion of the terms used in the juvenile code to say that things we are doing, aren't what they are, when they (the things we are doing) are no different than what is done in the adult system:

> An adjudication of delinquency could result in RLR's [the child's] incarceration. *Gault* holds that regardless of benevolent-sounding labels, incarceration, when applied to children, is a taking of liberty under the Fourteenth Amendment. Our society uses incarceration for rehabilitative purposes with adult criminals as well as juvenile delinquents, yet none suggest that our benevolent purposes justify deprivation of rights applicable to adult prosecutions.

In other words, it was a farce to say that the juvenile system was different just because we call it different. As a direct result the Alaska Court did extend additional rights to the child, including trial by jury.

JUVENILE COURTS IN KANSAS AFTER MCKEIVER

In Kansas and across the country moves would be made to further reform the Juvenile Justice System. After *McKeiver*, Kansas would soon make moves that created a system that was more penal in nature, and would also make moves that would essentially destroy the entire notion of *parens patriae*.

As changes were made to the juvenile system the legislatures sought to separate the abused and neglected children, from those who were committing crimes, In the early 1980's the two systems were split, and for the first time in Kansas the delinquent was afforded the right to an attorney, and not given a *guardian ad litem*. Reynolds, Changes Made by the New Juvenile Codes, 51 J.B.A.K 181 (Fall 1982). The ethical obligations of the delinquent's attorney changed drastically, and the beginning of the creation of a fully adversarial system in juvenile court was kicked into high gear. It was in 1984 (just after the split of the two systems) that the Kansas Supreme Court heard *In re Findlay*, 235 Kan. 462, 681 P.2d 20 (1984). After *Findlay* the juvenile code would be revised again in 1996 (removing the parens patriae doctrine), and about that same time the Kansas Supreme Court would rule that juvenile convictions (a new concept created by

changes made to the code in the early 1980's and post 1996, a concept that was for all intensive purposes nonexistent) could be used against them as adults in *State v. LaMunyon*, 259 Kan. 54, 911 P.2d 44 (1996), and was further solidified by *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002). No real discussion/debate was made in the courts regarding the evolution that was occurring in the Juvenile Courts. It just happened, and the reality was that Kansas was doing exactly what the *McKeiver* court warned about, coming full circle.

Today, the approach is drastically different from *parens patriae*. Today the Courts view the delinquent child as one who needs to be punished, and put through the rigors of a system that first determines "guilt or innocence" of a crime, and in the event "guilt" is established labels the child as a "juvenile offender" (a criminal), creating a criminal record that the child will have to carry, in some instances, for the rest of his/her natural life. In Kansas we no longer seek a "finding of delinquency" but of guilt!

The only true difference between the adult and juvenile systems is where the "little criminals" are housed. The system we have today in Kansas looks very different than how it used to look. The judge no longer sits "next to the child" with the "proper sympathetic" spirit where he/she can, on occasion "put his arm around his shoulder" and truly mentor him. Instead the Judge now sits in true judgment of

the child, and has no obligation under any circumstances to do anything paternal in nature.

The reality is that the entire concept of *parens patriae* was removed entirely from the Kansas Statutes, when the law in Kansas was reformed in 1996. The reality is that the ideals of the early reformers have been lost *almost* entirely. The history was placed front and center in the arguments in the *L.M.* case and the Court was asked to revisit the original arguments in the Findley case. The Court was asked to now grant jury trials because the system had indeed changed and was now essentially a criminal prosecution.

One approach could have been a further retreat, with a curbing of the constitutional rights given children, essentially a going back to a more paternalistic system where juvenile convictions are not used like a true criminal conviction, meaning the Court could have overruled cases like *LaMunyon* and *Hitt.* It was reality that the Kansas Supreme Court could not redraft the entire juvenile offender code. As a result, the Court essentially acknowledged that the juvenile offender system in Kansas had indeed come full circle, and that it would only be appropriate under these circumstances to fully extend constitutional rights to children charged with crime.

> . . . we are undaunted in our belief that juveniles are entitled to the right to a jury trial guaranteed to all citizens under the *Sixth* and *Fourteenth Amendments to the United States Constitution*.

L.M., 186 P.3d 164, 171 (2008). It was quite shocking that the Court fully extended the right to trial by jury, without limitation, in all cases, whether the charges are felony or misdemeanor. It will be interesting to see if other jurisdictions across the country, where jury trials have not been given to juveniles, will come to the same conclusion.

JUVENILE OFFENDER CASE LAW UPDATE

In Re L.M., 186 P.3d 164, 2008 Kan. Lexis 328 (Kan. 2008). In the case The Supreme Court of Kansas concluded that a juvenile's right to jury trial is constitutionally protected, holding that the Kansas statute allowing the district court complete discretion in determining whether a juvenile should be granted a jury trial was unconstitutional. The case basically puts Kansas among a pioneering group of states that give this right for juveniles via legislation. The reasoning behind the court's ruling was that "[c]hanges to the Kansas Juvenile Justice Code since 1984 have eroded the benevolent, childcognizant, rehabilitative, and parens patriae character that distinguished it from the adult criminal system." *In re L.M.*, 186 P.3d 164, 165 (2008). The Kansas Supreme Court found that the Revised Kansas Juvenile Justice Code "applied adult standards of criminal procedure and removed paternalistic protections, yet denied juveniles the constitutional right to a jury trial." 186 P.3d at 171. In the opinion, the justices noted that the Juvenile Code incorporated language found in the Kansas Criminal Code, such as "sentencing proceeding" to replace "dispositional proceeding," and "juvenile correctional facility" to replace "state youth center."

The case stemmed from the situation where a sixteen year old male was charged and prosecuted with one count of aggravated sexual battery, and one count of minor in possession of alcohol. He requested a jury trial but the trial court denied his request. He was then found guilty and sentenced as a Serious Offender to 18 months in a juvenile correctional facility. However, the court then stayed his sentence and placed him on probation until he was 20 years old, and required him to register as a sex offender and complete sex offender treatment. L.M. appealed to the Court of Appeals, claiming that he had a constitutional right to a jury trial, that his statements to police should have been suppressed, and that the evidence was not sufficient to support his convictions. The Court of Appeals affirmed the district court's decision. L.M. then petitioned the Kansas Supreme Court on the sole issue of whether he had a constitutional right to a jury trial as a juvenile offender.

The Kansas Supreme Court found that L.M. did have a U.S. and State Constitutional right to a jury trial. It reconsidered the U.S. Supreme Court's decision 37 years ago in *McKeiver v. Pennsylvania*, 403, U.S. 528 (1971) (where a plurality of the Court held that juveniles are not entitled to a jury trial under the Sixth and Fourteenth Amendments to the Constitution), and its own decision 24 years ago in *In Re Findlay*, 235 Kan. 462 (1984), in which it held that juvenile justice proceedings were not criminal trials due to the protective and rehabilitative character of the juvenile justice system. However, because the Kansas juvenile

justice system is now patterned after the adult criminal system, the Kansas Supreme Court concluded that the changes had superseded the *McKiever* and *Findlay* Courts' reasoning and those decisions were no longer binding precedent. Based on its conclusion that the Kansas juvenile justice system had become more akin to an adult criminal prosecution, the Court held that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments. *In re L.M.*, 186 P.3d at 170. Although L.M. argued that he should also receive a jury trial because he was subject to the adult sanction of registering as a sex offender, the court declined to analyze this argument since it ruled that all juveniles have a constitutionally protected right to a jury trial. L.M.'s argument is worth noting however, because he was convicted as a Serious Offender by the District Court. The U.S. Supreme Court held in *Duncan v. Louisiana*, 391 U.S. 145 (1968) that the Sixth Amendment requires a jury trial to be provided in cases of serious offenses. It will be interesting to see how this type of argument and other arguments regarding a juvenile's right to trial by jury fare in different states that follow Kansas' lead in the coming years.

If you are interested in reading all of the briefs in the L.M. case you can download them from http://inrelm.blogspot.com.

In the Interest of P.L.B., 190 P.3d 274; 2008 Kan.App. Lexis 125 (2008). In this case the Kansas Court of Appeals found that before a trial court may accept a juvenile offender's plea, the provisions of K.S.A. 2007 Supp. 38-2344(b) require that the trial court inform the juvenile offender of the following: (1) the nature of the charge; (2) the presumption of innocence; (3) the right to a speedy trial; (4) the right to subpoena witnesses; (5) the right to testify or not to testify, and (6) the sentencing alternatives the trial court may impose. Failure to do what is required in K.S.A. 38-2344 basically opens the door for the juvenile to challenge the validity of the plea.

In the case a juvenile entered a plea pursuant to a plea agreement, and later when the sentencing went really bad, the juvenile moved to withdraw his plea asserting that when he entered the plea he did so without the trial court informing him of the presumption of innocence, or the sentencing alternatives available to the court. P.L.B. argued that this failure prevented him from entering a knowing, voluntary, and intelligent plea, thereby depriving him of his constitutional rights. Request for reversal was made.

The Court sided with the juvenile. The Court's analysis centered on the fact that the district court abused its discretion. The court used this standard by looking

for guidance in the adult criminal code under K.S.A. 22.3210(d)(3) by asking whether the plea was fairly and understandingly made. After a great deal of analysis the court concluded that because the trial court did not tell P.L.B about the sentencing alternatives that the court could impose upon the acceptance of his plea, that he could not have made a knowing and voluntary plea. The court further found that this created a manifest injustice and so allowed the withdrawal of the plea. The plea was vacated, the juvenile adjudication reversed, and the case was remanded.

In Re Z.C., 2007 Utah 54, 165 P.3d 1206 (2007). This case should really cause pause by some prosecutors who prosecute every sex crime involving children that crosses their desk. In this case juvenile delinquency petitions were filed against two children, a 13-year-old girl and a 12-year-old boy for sexual abuse of a child under Utah Code § 76-5-404.1 (2003) stemming from their sexual activity with each other. Petitioner entered an admission to the delinquency petition. The district juvenile court adjudicated petitioner delinquent for sexual abuse of a child. The Utah Court of Appeals affirmed. Petitioner appealed her delinquency adjudication. The issue was not the facts of the case, but whether or not the facts of the case were appropriately prosecuted, and whether or not the actions of the prosecutor were constitutionally sound.

The petitioner argued that it was not the legislature's intent that a child be charged with sexual abuse of a child, especially when engaging in consensual sexual activity with another child. The Court found that although the plain language of the Utah statute allowed her to be adjudicated delinquent for child sex abuse, applying the statute to treat her as both a victim and a perpetrator of child sex abuse for the same act lead to an absurd result not intended by the legislature. The reasoning stemmed from the common sense notion that no amount of judicial leniency could ever compensate for the absurd application of the law because the mere prosecution of such a situation was absurd to begin with. The court reasoned that labeling the petitioner a "child abuser," could have serious unintended consequences. The attorney argued that the statute presupposed a perpetrator and a victim and that when there is no clear perpetrator there could neither be a clear victim, and so the net result was a ridiculous and absurd result. The Court, even though concise in its reasoning, narrowly confined the ruling to only apply to situations where no true victim or perpetrator is identifiable.

The court made some very interesting comments about prosecutorial discretion and explained in dicta that the primary fail-safe against the absurd application of criminal law is the wise employment of prosecutorial discretion, which the court noted was “a quality that is starkly absent” in the case. This

particular case brings to mind the Kansas case of *In Re B.M.B.* 264 Kan. 417, 955 P.2d 1302 (1998). In the said Kansas case the Kansas Supreme Court made a remark that is also relevant/related and notable, that ". . . charging a 10-year old boy with 'statutory rape' is arguably unacceptable." Kansas attorneys need to also be aware of overzealous prosecutors and take the necessary steps to make bold arguments such as the ones made in the Z.C. case.

In re J.R.A., 38 Kan. App. 2d 86 (2007). This case has since been overturned by a an amendment to the statute to correct the hole that was created by the Juvenile Sentencing Matrix, however, it is still good law in that it illustrates how strict the Courts are in interpreting the statutes in juvenile offender cases. In the case the Johnson County District Court (Kansas) revoked the juvenile's probation, classified him as a "chronic offender II, escalating felon" on the juvenile matrix under the former K.S.A. 38-16,129(a)(3)(B)(i) (repealed), and sentenced him to 12 months' custody and 12 months of aftercare.

In the case the juvenile had been on probation after prior adjudications for a misdemeanor and a felony. He violated probation by committing a felony. According to the district court, under the now old statute, K.S.A. 38-16,129(a)(3)(B)(i) the juvenile was classified as a "chronic offender II, escalating felon" because he was adjudicated as a juvenile offender for an offense which, if committed by an adult, would constitute one present felony adjudication and two prior misdemeanor adjudications. The juvenile contended that the trial court improperly considered his prior felony in meeting the chronic offender II requirement because a felony is not a misdemeanor. The argument was very mechanical. The State, however, argued that the second prong requirement of two prior misdemeanor adjudications could be met with one prior misdemeanor and one prior felony. What makes the case interesting is the fact that the appellate court held that the clear statutory language of § 38-16,129(a)(3)(B)(i) required two prior misdemeanor adjudications and mentions nothing about felonies being equivalent to a misdemeanor. During the pendency of the case the the legislature amended the second prong by adding the phrase "or one prior person or nonperson felony adjudication," thus closing the hole that was created. The court basically found that the clear statutory language of the statute in question required two prior misdemeanor adjudications. It iterated a long standing Kansas rule that the courts follow the "plain meaning rule" and that if a statute is clear and unambiguous, the statute should be construed according to its plain and ordinary meaning. The court went on to state that when a statute is plain and unambiguous, the appellate courts will neither speculate as to legislative intent, nor read a statute so as to add something not readily found in it. The legislature is presumed to have expressed its

intent through the language of the statutory scheme it enacted. The court clearly stated that it will not add to that which is not readily found in the statute, nor read out what, as a matter of ordinary language, is in it. The finding that the juvenile was a Chronic Offender was reversed.

CONSTITUTIONAL ISSUES IN JUVENILE OFFENDER COURT

With the advent of the *L.M.* case there are many unanswered questions about what juveniles are entitled to. In his motion for rehearing the State's attorney general had the following questions:

1. Does the jury trial right apply only in juvenile cases that are comparable by analogy to the adult cases in which a jury trial right exists (i.e., misdemeanors and felonies that involve the possibility of six months or more of incarceration as a sentence)? For example, not all felonies will subject a juvenile to incarceration. See K.S.A. 38-2369 (placement matrix) and K.S.A. 38-2361 (general sentencing provisions). Or does the trial right established in L.M. apply to all juvenile cases?
2. Do any other constitutional or statutory rules of adult criminal procedure also now apply in juvenile cases? If so, which rules? *See*, *e.g.*, K.S.A. 38-2354 ("In all hearings pursuant to this code, the rules of evidence of the code of *civil procedure* shall apply.").
3. Does the Court intend that any statutory requirements for adult jury trials also now apply to juveniles, such as speedy trial rights, K.S.A. 22-3402, or preliminary appearance proceedings, K.S.A. 22-2902?

4. Do any other statutory requirements for juvenile proceedings no longer apply, for example restrictions on public access to such proceedings? *See* K.S.A. 38-2353.
5. Does the Legislature retain discretion to legislate regarding juvenile jury trials? For example, could the Legislature authorize less than a 12-person jury for such cases?

After the solicitor general filed his Motion for Rehearing opposing counsel objected and basically asserted that to answer the questions presented would be nothing more than issuing an advisory opinion. The motion was subsequently denied. The real question then becomes what will counsel for juveniles involved in the system now do to clarify the issues. It is the duty of defense counsel in juvenile cases to ask these same questions, and when necessary, to file the relevant appeals to get the needed clarification.

The meat of the *L.M.* decision is that the Supreme Court basically held that the Juvenile Offender Courts are "Criminal Prosecutions" under the Federal Constitution, and "prosecutions" under the Kansas Constitution. It is important to note that this has now made fertile the soil of appeal in Juvenile Offender Court. It is prudent for counsel for Juvenile Offenders to now recognize the fact that the complexity, and level of competence for the attorney representing juveniles has seemingly risen. Representing juvenile's was already a fairly complex area of law,

but now it has become more complex, and as more appellate litigation occurs, the more complex the area of law will become. The hypothetical questions presented herein are meant only to be rhetorical, because some of the questions are untested.

Jury Trials? They are currently granted, however, the state's Solicitor General had articulated that in the adult system, the U.S. Supreme Court has said that the right to trial by jury attaches when an offense is serious in nature, meaning it is not petty. The Solicitor went on to state that 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). The Solicitor's question was basically whether or not in juvenile cases the court can deny a right a jury trial if the child is not facing potential incarceration. The question raised by the Solicitor General is very interesting, but it confuses the issue, because remember that whether one gets a jury does not depend on the severity of the charge, a person can have a jury trial, even on petty charges (reckless driving or theft or disorderly

conduct), however, the right to counsel attaches if incarceration is more than six months. . . Do not allow your local court to confuse this issue.

Do any other constitutional or statutory rules of adult criminal procedure also now apply in juvenile cases? This is a tough question. Some prosecutors are interpreting the *L.M.* ruling to mean that the statutory rules for speedy trial do actually apply, while others are not even bringing the issue up even while functioning under the Juvenile code. One position is that the Juvenile Code has clear case law on the topic, *In the Matter of S.A.J.* 29 Kan.App.2d 789 (2001). In the *S.A.J.* case the Court of appeals articulated that the juvenile does not have the same right to a speedy trial as adults do, per K.S.A. 38-1651, which is now K.S.A. 38-2352. Under the law all juvenile cases must be heard without unnecessary delay. It is very reasonable to argue that the rule articulated under K.S.A. 38-2352 does pass constitutional muster, however, it doesn't hurt to use this as a picking point that can be preserved as an appeal issue in future cases. It doesn't hurt anything to set up the issue if you have a particularly difficult case.

Other statutory rules that may now be applicable are motions pursuant to K.S.A. 60-1507. Since juveniles are now recognized as true prisoners, seemingly, under the holding of the *L.M.* decision, why can't juveniles assert rights that are now similar to adults? There is no watershed of these types of cases out there, but

it is a very interesting question. The *P.L.B.* case is something akin to that. Is anyone interested in bringing such a claim?

The state is not going to just hand out the rights enumerated in the constitution. It behooves the attorneys representing these kids to seek those rights. It is sad, but things like suppression hearings, motions to quash, and challenges of the authority of the state to do what it does to kids charged with crime are rarely heard of. The juvenile court system really needs more attorneys to cherry pick issues and force the state to better treat the kids who are involved in it. It is also noteworthy that attorneys need to read the juvenile code and use the constitution to force the courts to interpret it in a manner that is constitutionally appropriate, just like attorneys do in the adult criminal court system.

Preliminary Hearings & Probable Cause. The Kansas preliminary hearing, as it is ordinarily conducted, has been held not to be a critical stage in the criminal proceeding, why would it be any different in juvenile court? The other more interesting question is why it is okay for a prosecutor to just file a complaint in juvenile court, without any judicial oversight. The fourth amendment requires that, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In spite of the warrant requirement the Juvenile Court procedure requires no judicial review before the case can proceed. In cases where

there really isn't any reason to believe that the case should proceed because there is no probable cause the defense attorney should simply file a motion to dismiss for lack of probable cause, and assert that the court must review the complaint before the juvenile can be held or arrested. This would essentially require a preliminary hearing to be held. It is a motion, and due process requires that the moving party have an opportunity to be heard. It is possible that the motion could be filed in every case and that attorneys could simply force the state to have what is essentially a preliminary hearing in every case. If you want a preliminary hearing in every case then file a motion asserting the fourth amendment requirement that the court not allow any person to be held without an appropriate probable cause determination. What is the court going to do? Is the court going to say to the attorney that the prosecutor has the right to hold any person it accuses without any judicial oversight? Doubtful. . . and if it does that would be a great appeal.

Right to Bond. Does a juvenile have the right to be presumed to be innocent until proven guilty? In juvenile courts it is not usual to have a younger child involved with young adults, 18 and over, where the adult is able to bond out of jail and be free, where the juvenile is detained, or placed into the immediate custody of the Juvenile Justice Authority for placement outside of the home. Is this not a violation of the Juvenile's right to be presumed innocent until proven guilty? Is this not also a direct infringement on the juvenile's right to a reasonable bail? No

objections have been made to whether the juvenile has this right, but should it be made?

Miranda/Interrogation. It is well understood that children enjoy the right against self incrimination just as adults do per *In Re Gault*, 87 U.S. 1, 45 (1967), however, motions to suppress confessions or admissions of children is rarely seen in the juvenile courts.

When filing a motion to suppress a confession or an admission I usually begin with K.S.A. 22-3215(4) because it is the state's burden to show that the confession or admission was voluntarily given. The mere filing of the motion 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 juvenile was legally obtained, and admissible pursuant to Kansas and Federal law.

Kansas also has special rules when a child under fourteen is questioned. K.S.A. 38-2333.

> K**.S.A. 38-2333**. **Juvenile less than 14, admission or confession from interrogation.**
> (a) When the juvenile is less than 14 years of age, no admission or confession resulting from interrogation while in custody or under arrest may be admitted into evidence unless the confession or admission was made following a consultation between the juvenile's parent or attorney as to whether the juvenile will waive the right to an attorney and the right against self-incrimination. It shall be the duty of the facility where the juvenile has been delivered to make a reasonable effort to contact the parent immediately upon the

> juvenile's arrival unless the parent is the alleged victim or alleged codefendant of the crime under investigation.
> (b) When a parent is the alleged victim or alleged codefendant of the crime under investigation and the juvenile is less than 14 years of age, no admission or confession may be admitted into evidence unless the confession or admission resulting from interrogation while in custody or under arrest was made following a consultation between the juvenile and an attorney, or a parent who is not involved in the investigation of the crime, as to whether the juvenile will waive the right to an attorney and the right against self-incrimination. It shall be the duty of the facility where the juvenile has been delivered to make reasonable effort to contact a parent who is not involved in the investigation of the crime immediately upon such juvenile's arrival.
> (c) After an attorney has been appointed for the juvenile in the case, the parent may notwaive the juvenile's rights.

The above rule is a codification of the Kansas case, *In Re B.M.B.* 264 Kan 417, 955 P.2d 1302 (1998). It is a bright line rule. 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 question in every juvenile case as to whether or not a child has been taken advantage of should be asked more often in juvenile court. The fact is juveniles should not be judged by the same standards of maturity as an adult. The law requires that law enforcement not only to inform the child of his/her rights but to insure the child understands those rights. Most cops treat children the same way they treat adults and sometimes they employ additional coercive tactics on the child, but nobody does anything about it. 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 any case where the Juvenile has a police encounter and makes admissions it becomes important to ask whether the juvenile was sophisticated enough to deal with a cop. The *Gault* case clearly indicates that the age and sophistication of the child should be considered. In all juvenile cases the Miranda warnings are not only necessary, but it is also incumbent on the police to be extra careful, and that the cop take extra steps to insure that the child understands his/her rights.

In cases where the juvenile is older than fourteen years of age it becomes important for the attorney to not only do the analysis required above, but to also analyze the situation through the filter of. *State v. Donesay*, 265 Kan. 60, 959 P.2d 862 (1998) and *State v. Young, 220 Kan. 541* (1976). The courts in Kansas require the following factors to be considered when determining whether the confession of a juvenile is voluntary: (1) the age of the minor, (2) the length of the questioning, (3) the minor's education, (4) the minor's prior experience with the police, and (5) the minor's mental state. The state must show that under the totality of the circumstances, the juvenile's confession/admissions were voluntary.

Search & Seizure. The best case to read on this issue is *In Re L.A., 270 Kan. 879*; *21 P.3d 952* (2001). The last section of the case that deals with the juvenile's right to jury trial is now bad law, but the rest of the case is full of excellent analysis. There are so many treatises out there on the Fourth Amendment that an analysis of those issues is not going to be attempted here. The most important issue here is whether the attorneys representing children are actually analyzing cases and apply this most important constitutional principle.

Use of Juvenile Adjudications to enhance adult sentences. The Kansas Supreme Court has held in the past that 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). In *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002) the Kansas Supreme Court seemingly solidified the constitutionality of allowing this to occur, but now that we have *L.M.* should the court revisit the question?

As a direct result of the ruling in the *L.M.* case the Kansas Appellate Defender's office has recently filed a Petition for Writ of Certiorari questioning the fairness/validity of using juvenile convictions to enhance sentences on adults. The Kansas Appellate defender is using the *L.M.* case to argue that convictions in juvenile court, prior to *L.M.*, that were not submitted to a jury and proved beyond a reasonable doubt, should not be used to enhance a sentence. In the *Apprendi* case the U.S. Supreme Court held that before a prior conviction can be used to increase the penalty for a crime beyond the prescribed statutory maximum the prior crime must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The question now is whether or not all the "convictions" stemming from juvenile cases (convictions) are now being appropriately used, especially since the Kansas Court has now found that juvenile court is a criminal court. As for future use of juvenile convictions, with the advent of the jury trial it seems logical that nobody has any reason to complain about using those convictions in the future for all cases after *L.M.*

The Court's duty to fully inform the juvenile. Using K.S.A. 38-2344, the *P.L.B.* case along with *L.M.* it appears clear that the district courts need to be very careful in its approach when taking pleas from juveniles. K.S.A. 38-2344 requires that prior to taking a plea the court must. . .

> inform the juvenile of the following:
> (1) The nature of the charges in the complaint;
> (2) the right of the juvenile to be presumed innocent of each charge;
> (3) the right to trial without unnecessary delay and to confront and cross-examine witnesses appearing in support of the allegations of the complaint;
> (4) the right to subpoena witnesses;
> (5) the right of the juvenile to testify or to decline to testify; and
> (6) the sentencing alternatives the court may select as the result of the juvenile being adjudicated a juvenile offender.
> (c) If the juvenile pleads guilty to the allegations contained in a complaint or pleads *nolo contendere*, the court shall determine, before accepting the plea and entering a sentence:
> (1) That there has been a voluntary waiver of the rights enumerated in subsections b)(2), (3), (4) and (5); and
> (2) that there is a factual basis for the plea.

If all the above is not occurring in your district objections should be made. In the alternative, if it is not being done, something similar to what was done in the *P.L.B.* case should be considered.

NOTES