No. 06-96197-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF L.M.,
Respondent-Appellant

BRIEF OF AMICUS CURIAE, JUVENILE LAW CENTER IN SUPPORT OF L.M., RESPONDENT-APPELLANT

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

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INTEREST OF *AMICI*

Amici[1] Juvenile Law Center,[2] *et al*. represent nine organizations and individuals throughout the country who work on issues of juvenile justice and children's rights generally. *Amici* have a unique perspective on minors who come into contact with the juvenile justice system because of allegations of delinquent behavior. Collectively, *Amici* share a deep concern that the Kansas Court's holding in this case misapplied Kansas law allowing for judicial discretion when granting a jury trial to a minor in juvenile court. *Amici* argue that the consequences of sex offender registration are so severe that United States Constitutional and Kansas state law required a jury trial for L.M.

[1] A list and brief description of all *Amici* appears at Appendix A. *Amici* file this brief with the express permission of the Kansas Supreme Court with a written order dated 6/18/2007. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The authors would like to extend their special thanks to Erin Argueta, Melissa Carleton, and Karen Smith for their assistance on this brief.

ARGUMENT

I. BOTH THE UNITED STATES CONSTITUTION AND KANSAS STATE LAW REQUIRE JURIES IN CRIMINAL TRIALS IN WHICH DEFENDANTS FACE SERIOUS PUNISHMENTS.

The United States Constitution requires that procedural protections be provided to criminal defendants who face serious punishments. In *Duncan v. Louisiana*, the United States Supreme Court held that the Fourteenth Amendment extended the right to a trial by jury to defendants facing prosecutions under state law if they faced a punishment that was "serious." 391 U.S. 145, 154 (1968). The Court declared that fundamental fairness in adult criminal proceedings requires both factual accuracy and a buffer against arbitrary government action. *Id*. at 155-56. The Court stated:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. The Court concluded that "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.* at 157-58. According to *Duncan*, "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not." *Id.* at 159. The Court has further held that an offense carrying a maximum prison term of more than six months is deemed serious such that the right to a jury trial attaches. *Lewis v. United States*, 518 U.S. 322, 326 (1996). Crimes with such penalties are "deemed by the community's social and ethical judgments to be serious. . . . Opprobrium attaches to conviction of those crimes regardless of the length of the actual

sentence imposed, and the stigma itself is enough to entitle the defendant to a jury." *Id.* at 334 (Kennedy, J., concurring). *See also Duncan*, 391 U.S. at 160 ("The penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments.") (internal quotations omitted).

When juveniles face serious punishment, they – like adults – are entitled to jury trials. In fact, ten states -- Alaska, Massachusetts, Michigan, Montana, New Mexico, Oklahoma, South Dakota, Texas, West Virginia, and Wyoming -- provide jury trials for allegedly delinquent juveniles as a matter of state law. *See RLR v. State*, 487 P.2d 27 (Alaska 1971); Mass. Gen. Laws ch. 119, § 55A (2007); Mich. Comp. Laws § 712A.17 (2007): Mont. Code Ann. § 41-5-1502 (2007); N.M. Stat. § 32A-2-16 (2007); Okla. Stat. tit. 10, § 7303-4.1 (2007); S.D. Codified Laws § 26-7A-34 (2007); Tex. Fam. Code Ann. § 54.03 (2007); W.Va. Code § 49-5-6 (2007); Wyo. Stat. Ann. § 14-6-223 (2007). Kansas, like many other states,[3] provides a jury trial in situations where the juvenile may be subjected to an adult sentence, such as under an Extended Juvenile Jurisdiction Prosecution or a blended sentencing law.

II. THE DISCLOSURE PROVISIONS OF THE KANSAS OFFENDER REGISTRATION ACT CONSTITUTE SERIOUS PUNISHMENT ENTITLING THE DEFENDANT TO TRIAL BY JURY.

A. The Public Disclosure Provisions are Punitive in Effect.

[3] *See* Ark. Code Ann. § 9-27-325 (2007) (jury trials for EJJ offenders); Colo. Rev. Stat. § 19-2-107 (2007) (aggravated juvenile offenders and juveniles who have committed a crime of violence have a right to a jury trial); Conn. Gen. Stat. §§ 46b-133c and 46b-133d (2007) (serious juvenile repeat offenders or serious sexual offenders get a jury trial in adult court); Idaho Code Ann. § 20-509 (2007) (juveniles aged 14 years and older accused of certain serious crimes get jury trials); 704 Ill. Comp. Stat. §§ 405/5-810, 5-815, and 5-820 (2007) (EJJ offenders, habitual juvenile offenders, and violent juvenile offenders have right to jury trial); K.S.A. §§ 38-2347 and 38-2357 (2007) (EJJ juveniles have right to a jury trial); Minn. Stat. § 260B.130 (2007) (EJJ juveniles have right to jury trial); N.H. Rev. Stat. Ann. § 169-B:19 (2007) (right to jury trial if juvenile may be sentenced to an adult criminal facility or sentenced past the age of majority); Ohio Rev. Code Ann. § 2151.35 (2007) (jury trial for serious youthful offenders); R.I. Gen. Laws § 14-1-7.3 (2007) (certified juveniles have jury trial right); Va. Code Ann. § 16.1-241 (2007) (juveniles 14 years or older who have committed a felony are given a jury trial in adult court, which can then impose a juvenile or adult penalty).

This Court has held that the public disclosure provisions of Kansas's sex offender registration requirements are punitive in effect and should be considered punishment for purposes of *ex post facto* analysis. *State v. Myers*, 260 Kan. 669, 696-701 (1996). While recognizing that the legislative history indicated the Act's intended purpose was to protect the public, and that the registration requirement itself did not impose punishment, this Court concluded that the law was punitive in effect due to the unlimited public access to the registered information and the excessive scope of this disclosure relative to that necessary to promote public safety. *Id.* at 695, 699. Although the then-Kansas Sex Offender Registration Act imposed no affirmative notification obligations on authorities, this Court was particularly concerned with the lack of restrictions on who could inspect the registered offender information and what that person would be able to do with the information. *Id*. at 695-96. In reaching the determination that the Act's disclosure provision must be considered punishment, this Court considered that "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment" and would therefore "impose an affirmative disability or restraint" on the offender.[4] *Myers*, 260 Kan. at 695. This Court further concluded that such "[u]nrestricted public access to the registered information leaves open the possibility that the registered offender will be subjected to public stigma and ostracism," and that "[t]he stigma that will accompany public exposure of the registered information could be viewed as a form of retribution." *Id* at 695-96.

[4]The court was correct to foresee negative consequences. *See e.g.,* Daniel Golden, *Sex-Cons*, *Boston Globe Mag*., April 4, 1993, at 13 (describing case of 18 year old registered sex offender who was evicted with his mother from their apartment, then faced eviction with his grandmother and was forced to leave and stay at a shelter); *Miami Sex Offenders Forced to Live Under Bridge*, April 5, 2007, http://www.iht.com/articles/ap/2007/04/05/america/NA-GEN-US-Sex-Offenders-Bridge.php (describing sex offenders being restricted to live under bridges in Florida); Preston Rudie, *New Policy Bans Sex Offenders From Hurricane Shelters,* 10 *News*, July 7, 2005, http://nacdl.org/public.nsf/mediasources/20050707c (explaining policy banning sex offenders from hurricane shelters).

B. Sex Offender Notification is Particularly Harmful and Inappropriate for Juveniles.

1. Publication is particularly harmful for juveniles, especially when the internet is used.

Sex offender registration and notification laws "may have a negative impact on the normal development of the youthful offender. This is contrary to the fundamental underpinnings of the juvenile justice system and 'parens patriae,' which seeks to correct the course of juvenile offenders by rehabilitation and oversight." Timothy E. Wind, *The Quandary of Megan's Law: When the Child Sex Offender is a Child*, 37 J. Marshall L. Rev. 73, 116 (2003). "[C]ommunity notification can deny a child the opportunity to grow up normally by subjecting him or her to false labels of sexual dysfunction, ostracism, reduced life chances, and harassment." Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 Cal. L. Rev. 163, 204 (2003). Rehabilitation is facilitated by "interpersonal development through positive interaction with family members, school personnel, peers, and the community." Stacey Hiller, Note, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. Pub. Int. L.J. 271, 292 (1998). However, notification inhibits positive interactions. "Disclosure of a juvenile sex offender's past to his community may only serve to increase his or her alienation, possibly encouraging re-offending, because of the negative attitudes the public will emit toward the youth." *Id*.

Public notification obstructs juveniles' normal development by hurting their ability to form new friendships and damaging their self-esteem, as well as causing "unnecessary stress to the juvenile offenders by exposing them to scrutiny and ridicule in

the community, further harming their efforts at rehabilitation and increasing the likelihood of recidivism." Wind, *supra*, at 116. "Community notification may particularly hamper the rehabilitation of juvenile offenders because the public stigma and rejection they suffer will prevent them from developing normal social and interpersonal skills -- the lack of these traits have been found to contribute to future sexual offenses." Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 Nw. U. L. Rev. 788, 855-56 (1996) (citing J.V. Becker, *Adolescent Sex Offender*, 11 Behav. Therapist 185-87 (1988)). "To function in the community, the offender has to feel a part of the community like anyone else. Sex offender registration and public notification laws compromise the sex offender's ability to do so in a healthy and safe way." Robert E. Freeman-Longo, American Probation and Parole Ass'n, *Revisiting Megan's Law Sex Offender Registration: Prevention or Problem* at 12, *available at* http://www.appa-net.org/resources/pubs/docs/ revisitingmegan.pdf.

Rehabilitation is further hampered by the consequences public notification can have on a juvenile offender's education, job search, and treatment. "Rehabilitation is about restoring a child to a healthy stature in society. However, a child cannot restore himself in his own eyes when social stigma may inhibit his ability to get a job or even walk into a store without neighbors casting doubtful looks in his direction." Hiller, *supra*, at 293. Juveniles also suffer when their schools are notified of their status as sex offenders. "Juveniles are ostracized and banned from attending classes with their peers . . . [and] refused admittance to certain colleges." Patricia Coffey, *The Public Registration of Juvenile Sex Offenders*, ATSA Forum (Ass'n for the Treatment of Sexual Abusers),

Winter 2007 at 5; *See also* Lisa C. Trivits and N. Dickon Reppucci, *Application of Megan's Laws to Juveniles*, 57 Am. Psychologist 690, 694 (2002) ("Notifying schools . . . may increase the social ostracism . . . with peers likely targeting the juvenile for ridicule and possible physical assault and parents protesting the presence of a sex offender in the school."). This could severely impede the juvenile's education options. The requirements may also prevent sex offenders from seeking treatment because their fear of public humiliation will force them "to 'go underground' and hide their tendencies from others, including their therapists." Earl-Hubbard, *supra*, at 855. Indeed, notification laws "subject children to the exact sort of debilitating consequences that the juvenile justice system was designed to eliminate. [They] mark children as sexual predators, subjecting them to stigma, prejudice, and denied opportunities." Garfinkle, *supra*, at 194.

Internet publication is a particularly harmful type of notification. As one commentator explained,

> Having one's address put on the Internet will allow a whole bunch of people who do not need to know what you have done, to know what you have done. Those who are deemed 'need to know' . . . are already informed and protected. The Internet . . . contributes to the pressures that we put on these sex offenders that makes them unable to move forward with their lives, thereby continuing, and increasing, the danger to our children and other potential victims.

Symposium, *Megan's Law in Cyberspace: Privacy vs. Public Safety*, 25 Seton Hall Legis. J. 301, 316 (2001). The stigma and pain caused by internet publication is hard enough for adult offenders, but it can be even more detrimental to youth offenders trying to reintegrate into their communities. "There is even the concern that publishing youths' names on the registry may provide a public database for offenders wanting to prey sexually on juveniles." Coffey, *supra*, at 5.

Having Respondent's picture up on the internet unnecessarily inhibits his rehabilitation. Respondent is not the type of person for whom publication laws were designed and he is not likely to reoffend. Important factors to predict the likelihood of reoffense include sexual interest in young children and being a multiple offender. James R. Worling & Niklas Långström, *Assessment of Criminal Recidivism Risk With Adolescents Who Have Offended Sexually*, 4 (4) Trauma, Violence, & Abuse 341, 345-46 (2003). Respondent has never posed any danger to children. He had no previous contact with law enforcement and his conviction was based on a single incident with a 27 year old woman. Internet posting is overbroad in this case not only because it can be accessed by people all over the world who would never come into contact with Respondent but also because it is not necessary by the need-to-know standard in his community.

Notifying the community that Respondent is a sex offender subjects him to the same shame, restrictions, and fear of reprisals as any person who did hurt children. He is currently listed, and has been listed since he was 17, as an offender who committed "aggravated sexual battery" in Kansas's online sex offender registry. His personal information, including his picture, date of birth, address, race, gender, and a link to a map indicating where he lives, are available online publicly to all individuals. The fact that Respondent may only be forced to register for five years is rendered irrelevant when anyone can look him up on the internet today and store that information either electronically or in memory forever.[5] Such "unrestricted public access" to Respondent's

[5] Since Respondent's adjudication, the Kansas legislature has revised the relevant portion of the Kansas Offender Registration Act (KORA), giving judges more discretion in how to apply the registration requirements to juveniles. K.S.A. §22-4906(h) (2006). Under the new provision, for juveniles who would be subject to the act due to the commission of a crime which is not an off-grid felony or a felony ranked in severity level 1, the court has the discretion to (1) require the juvenile to register for a period of five years from the date of adjudication, until he reaches the age of eighteen, or until he is released from confinement, whichever occurs last, (2) not be required to register at all if the judge "finds substantial and compelling

personal information is "punishment" under this Court's analysis in *Myers* and goes against the alleged purposes of his juvenile adjudication to rehabilitate and treat youthful offenders. The ideals of protecting juvenile confidentiality should outweigh the minimal threat Respondent poses; otherwise a statute designed to protect children from dangerous individuals who target children is being misapplied to harm young Respondent.

2. Research on adolescent development makes clear that for juveniles, notification inflicts a harm significantly disproportionate to the offense.

Supreme Court case law recognizes that adolescents are both less culpable than adults, and deserve more legal protection than adults. *See Roper v. Simmons*, 543 U.S. 551 (2005). Research on adolescent sex offenders underscores these differences: teenage sex offenders may have different mechanisms triggering their behavior and they are much less likely to re-offend than adults. "The notion that public labeling will be productive in reducing risk for further sexual offending is inconsistent with decades of theoretical and research-based understanding of child development, delinquency, and social psychology." Coffey, *supra*, at 7.

Studies suggest that some juvenile sex offenses "result more from a lack of appropriate channels for sexual expression than from the kind of psychological disorder attributed to most adult offenders," Garfinkle, *supra*, at 190, and "poor social competency skills and deficits in self-esteem can best explain sexual deviance in juveniles, rather than the paraphilic interests and psychopathic characteristics that are more common in adult offenders." *Id*. at 191, *citing* Ass'n for the Treatment of Sexual Abusers, *Position on the*

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reasons therefor [sic]" or (3) require the juvenile to register with the sheriff, but not allow such information to be open to public inspection, in person or on the internet. Effective July 1, 2007, the legislature further amended the Act to make the 2006 provisions apply retroactively. K.S.A. §22-4906(h)(3) (2007). The legislature's revision of the statute indicates its recognition that the automatic notification provisions of the KORA, to which Respondent was subject, conflicted with the aims and procedures of the Kansas juvenile justice system.

Effective Legal Management of Juvenile Sexual Offenders (1997). Research shows that some differences can be explained by adolescents having a less developed frontal lobe—the part of the brain that controls judgment and impulse. "During this stage of development, adolescents have deficits in interpreting social cues, tend to focus on immediate reward without considering the consequences, and generally lack the capacity to manage fully negative impulses." Coffey, *supra*, at 4. These developmental differences should caution against labeling juveniles as sex offenders when their offense could better be explained by lack of maturity and impulse control.

Juvenile sex offenders have lower recidivism rates than adult offenders. "Reviews of juvenile sex offender recidivism rates have found the mean sexual recidivism rate to be 7.6%. The range of sexual recidivism in studies has varied from 0.4% to 18%." Coffey, *supra*, at 3. Moreover, treatment for juvenile sex offenders is extremely promising. "Studies of juvenile child sex offenders who receive treatment show success rates ranging from 97.5 percent to 66 percent for more serious offenders." Earl-Hubbard, *supra*, at 855. For example, a 2000 study reported that only 5% of 58 adolescents who received treatment recidivated compared to 18% of 90 adolescents who did not receive treatment and a 2001 study "reported that 15% of 220 adolescents who had offended sexually received subsequent criminal charges for sexual assaults following community-based treatment." Worling & Långström, *supra*, at 343. Thus treatment, not public ostracism and humiliation, should be sought wherever possible to prevent juvenile offenders from committing future sexual assaults.

III. ***FINDLAY v. STATE*** SHOULD BE RECONSIDERED IN LIGHT OF CHANGING CONDITIONS AND STATUTORY INTENT.

Under Kansas state law, if the juvenile is being tried in a manner by which he or she may be subject to an adult sentence, such as pursuant to K.S.A. § 38-1636(a)[6] through extended jurisdiction juvenile ("EJJ") prosecution or by being tried as an adult, the juvenile has a right to a jury trial under the Sixth Amendment to the U.S. Constitution and K.S.A. § 38-1636(f)(2). In contrast, juveniles tried in juvenile court for an offense not equivalent to a felony have no right or option for a jury trial, regardless of the possible sanctions they face.

Kansas law also allows that where a juvenile is charged with the equivalent of a felony, as in this case, a judge "may" order that the juvenile be afforded a trial by jury. K.S.A. § 38-1656. In *Findlay v. State*, 235 Kan. 462 (1984), the juvenile defendant alleged that the trial court had abused its discretion under this statute when it refused to grant him a jury trial. This Court, relying heavily on *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) and the then-current version of the Kansas Juvenile Offenders Code, held that there is no federal or state constitutional right to a jury trial in proceedings held under the juvenile code. *Findlay*, 235 Kan. at 463-64. The Court then determined that the allowance of or failure to allow a jury trial under this statute "(1) is entirely at the district court's option; (2) involves no rights of either the State or the respondent; and (3) is not subject to appellate review." *Id.* at 466. Additionally, this Court held that the district court is not required to make findings of fact or state its reasons for granting or denying the request. *Id*. at 464.

Findlay thus grants an astonishing amount of judicial discretion which would typically imply an abuse of discretion standard on review. However, *Findlay* foreclosed

[6] K.S.A. Chapter 38, Article 16, previously known as the Kansas Juvenile Justice Code, was repealed effective January 1, 2007 and replaced by the Revised Kansas Juvenile Justice Code at K.S.A. Chapter 38, Article 23. All statutes herein cited refer to the law in effect at the time of the offense.

the opportunity for a juvenile to seek redress for an improperly denied jury trial. After *Findlay*, a judge may grant or refuse jury trials to juveniles, without having to explain reasoning or consider the severity of the possible sentence. The *Findlay* Court's refusal to provide standards for judges to follow when considering whether to grant a jury trial to a juvenile allows for arbitrary decision-making on the part of the trial judge that cannot be challenged.

In the twenty-three years since the *Findlay* decision, much has changed. *Findlay* relied upon statutory language, which has long since been removed from the juvenile justice code, showing the Legislature's intent to keep juveniles from suffering criminal consequences for their actions. Similarly, the paternalistic system *McKeiver's* plurality opinion envisioned has fallen by the wayside in favor of the imposition of criminal sanctions on children. Moreover, the *McKeiver* decision itself was a plurality decision lacking a unifying rationale. Thus, it is appropriate for this Court to reconsider its findings in *Findlay* in light of the juvenile justice system as it stands today in Kansas.

A. The Changed Purpose And Nature Of Kansas's Juvenile Justice System No Longer Support The Conclusions Drawn By The *Findlay* or *McKeiver* Courts.

In holding that Kansas juveniles were not entitled to jury trials, the *Findlay* Court relied on the intent of the Kansas Juvenile Offenders Code, as expressed in then-current K.S.A. § 38-1601 (Supp. 1983), which stated that,

> In no case shall any order, judgment or decree of the district court, in any proceedings under the provisions of this code, be deemed or held to import a criminal act on the part of any juvenile; but all proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state.

Findlay, 235 Kan. at 463. In citing this provision, this Court stated that a finding that a juvenile's right to trial by jury would be in "diametric conflict with the intent of the

Kansas Juvenile Offenders Code" and thus denied the defendant's argument. *Id*. The court in *Findlay* quoted extensively from *McKeiver's* assertions that the Fourteenth Amendment did not require jury trials in juvenile court, arguing that jury trials would contravene the rehabilitative purposes of the juvenile system and would "tend once again to place the juvenile squarely in the routine of the criminal process," would "bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial," and that the "arguments necessarily equate the juvenile proceeding – or at least the adjudicative phase of it – with the criminal trial." *Id*.

The juvenile justice system, however, has changed significantly since both *McKeiver* and *Findlay* were decided. The Kansas Statute, for example, has been revised and the specific language cited by *Findlay* determining that juveniles could not be held guilty of crimes was removed. K.S.A. § 38-1601. In the new version, the statute explicitly characterizes the system as dealing with "juvenile *crime*" (emphasis added), in direct contradiction to the previous language. K.S.A. § 38-1601(b). It also refocuses the primary goals of the juvenile justice code on public safety and accountability in addition to rehabilitation. K.S.A. § 38-1601. Thus, the intent of the Kansas Juvenile Justice Code is no longer in diametric conflict with the provision of jury trial to juveniles.

Moreover, in the decades since both *McKeiver* and *Findlay* were decided, Kansas has incorporated principles of punishment and accountability – the two basic hallmarks of the adult criminal justice system – throughout the juvenile system. It has, for example, discarded many of the confidential and protective features of the historic juvenile court and opened juvenile court proceedings to the general public under a broad array of circumstances. The court's official file is available for public inspection unless the

juvenile is under 14 years of age and a judge rules that to open the file would not be in the best interest of the juvenile. K.S.A. § 38-1607. Law enforcement files on juveniles at least 14 years of age are subject to the same disclosure restrictions as those of adults. K.S.A. § 38-1608(c). Juvenile records may be examined and used for purposes of impeachment in other trials. *State v. Wilkins*, 215 Kan. 145 (1974). Hearings regarding juvenile defendants at least 16 years old are open to the public, and hearings regarding younger juvenile defendants are open unless the judge determines that closing the hearing would be in the best interest of the juvenile or of the victim. K.S.A. § 38-1652. When a juvenile offender is released, the school district is not only involved with creating a discharge plan but is also notified of the juvenile's offenses. K.S.A. § 38-1673(b). Additionally, the Kansas Legislature explicitly permits a juvenile's delinquency adjudication to be used against him in adult criminal proceedings for the purpose of sentencing enhancement. K.S.A. § 21-4710; *State v. Hitt*, 273 Kan. 224 (2002). Thus, the juvenile justice system has moved away from the rehabilitative goal of the past towards the more punitive adult criminal system, rendering the *Findlay* Court's reliance on *McKeiver* unsupported today. Overwhelmingly, juvenile justice experts suggest that a finding of delinquency today is not substantially different – as measured by the degree of stigma and punishment it confers – from a finding of guilt in a criminal court. *See, e.g.*, Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 4 (1997); *see generally*, Linda E. Frost & Robert E. Shepherd, Jr., *Mental Health Issues in Juvenile Delinquency Proceedings*, 11 Crim. Just. 52, 59 (1996). Indeed, this Court has already determined that sex offender registry publication is punitive.

Myers, 260 Kan. at 696-701. As discussed above, it inhibits rehabilitation. *See* discussion *supra* Part II.B.1.

B. ***McKeiver* Was A Plurality Opinion With No Unifying Rationale And Thus Did Not Conclusively Determine The Right Of A Juvenile To A Jury Trial.**

In addition to relying on an outdated vision of juvenile justice, *McKeiver* lacked a majority rationale and cannot stand as the definite resolution of the constitutionality of denying juveniles the right to a jury trial. A plurality opinion is the narrowest ground as to which an agreement among five justices can be inferred. *Marks v. United States*, 430 U.S. 188, 193 (1977). In the opinion announcing the judgment of the Court, Justice Blackmun, joined by Chief Justice Burger and Justices White and Stewart, found that extension of the jury trial right to juveniles was not required unless the Court were to equate the adjudicative phase of the juvenile proceeding with the criminal trial. *McKeiver,* 403 U.S. at 550. Justice Blackmun declined to do so, asserting it would ignore "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." *Id.* at 550. As described above, this reasoning does not apply to the current Kansas juvenile justice system.

The other Justices' opinions do not share Justice Blackmun's rationale. Justice Brennan concluded that juveniles who are afforded the right to a public trial also have the right to a jury trial. Pursuant to Kansas law, Respondent's delinquency proceedings were open to the public. K.S.A. § 38-1652. Thus, under Justice Brennan's reasoning, Respondent would have a constitutional right to a jury trial. Justices Douglas, Black and Marshall, who concluded in dissent that the right to jury trial applies to juveniles, would agree, as would Justice Harlan, who in his concurrence stated that if he were to accept

Duncan as good law, which he did not, then he "did not see why . . . juveniles . . . would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose." *McKeiver*, 403 U.S. at 553. Thus, the opinions of five Justices would support granting Respondent a jury trial. This discrepancy indicates that the time has come for this Court to reexamine its reliance on *McKeiver* and resolve this critical constitutional issue.

CONCLUSION

For the foregoing reasons, this Court should reconsider its holding in *Findlay* and find that the Fourteenth Amendment's concept of fundamental fairness requires the extension of the constitutional right to a jury trial to juveniles charged with delinquent acts that may be required to register as a sex offender.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Marsha L. Levick, Esq., do hereby certify this ____ day of July, pursuant to Kansas Supreme Court Rule 6.07, that a copy of this Brief of *Amicus Curiae* on Behalf of Respondent-Appellant has been served, via overnight class mail, on all counsel of record in this appeal as follows:

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