Approved: 3-18-09
Date

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairperson Pat Colloton at 1:30 p.m. on February 11, 2009, in Room 535-N of the Capitol.

All members were present except:
Representative Lance Kinzer- excused

Committee staff present:
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jackie Lunn, Committee Assistant

Conferees appearing before the Committee:
State Representative Joe Patton
Deputy Desiree Wright, Shawnee County Sheriff's Office
Sally Zeller, PARS and Safe Streets Coalition
Michelle Cutrer, Private Citizen
Ron Hein, Kansas Restaurant and Hospitality Association
Melissa Johnson, Assistant Seward County Attorney
Steve McAllister, Solicitor General of Kansas, Attorney General's Office
Richard Saminengo, Kansas District Attorneys Association

Others attending:
See attached list.

HB 2233 - Criminal procedure, tolling speedy trial time during appeal by the prosecution.

Chairperson Colloton opened the hearing on **HB 2233** and recognized Steve McAllister, Solicitor General of Kansas, to give his testimony as a proponent of the bill. Solicitor General McAllister provided a copy of his testimony. (Attachment 1) He explained the bill would amend current law by defining "an appeal by the prosecution" which would include appeals, interlocutory appeals, and appeals that seek discretionary review in the Kansas Supreme Court or the U.S. Supreme Court. Appeals would be considered pending until the court that handles the final appeal issues a resolution.

Questions and answers followed.

Chairperson Colloton called for anyone else wishing to testify, there being none, she closed the hearing on **HB 2233.**

HB 2165 - Establishing recklessness as a standard in unlawfully hosting minors in a person's residence.

Chairperson Colloton opened the hearing on **HB 2165** and introduced State Representative Joe Patton to give his testimony as a proponent of the bill. Representative Patton provided a copy of his written testimony. (Attachment 2) He stated the bill would amend the definition of unlawfully hosting minors to include intentionally "or recklessly permitting" a person's property to be used by minors for the purposes of possessing or consuming alcoholic beverages. He explained why they added the word "reckless" to address concerns of the opponents of the bill.

Chairperson Colloton recognized Deputy Desiree Wright, Shawnee County Sheriff's Office, to give her testimony as a proponent of the bill. Deputy Wright provided a coy of her written testimony. (Attachment 3) She stated as a deputy assigned to two high schools, she knows how devastating underage drinking can be. She stated she has seen the devastation and the many tears shed at the loss of a youngster in an alcohol related accident. It is a major problem for law enforcement that there are adults who think it is no big deal to provide alcohol to minors. She has heard some parents say if their child is going to drink at a party, they would rather they just drink at home where they will be safe. In closing, she asked for support adding the wording "or reckless" to **HB 2165.**

Chairperson Collation introduced Sally Zeller, PARS and Safe Streets Coalition, to give her testimony as a proponent of **HB 2165.** Ms. Zeller provided a written copy of her testimony. (Attachment 4) She stated they have concerns at how young underage drinking starts. They support the addition of the words "or recklessly" to the sentence on lines 15 and 16 which according to many of our law enforcement partners will help make this law more enforceable. The effective enforcement of this "social host" law is an important tool which will help reduce the rates of underage drinking by Kansas children and teens. In closing, she called the Committee's attention to another handout *Inside the Adolescent Brain* (Attachment 5) and gave a brief review.

Chairperson Collation stated she would hold all questions until all the proponents have given their testimony and introduced Michelle Cutrer, a private citizen, to give her testimony as a proponent of **HB 2165.** Ms. Cutrer provided a written copy of her testimony. (Attachment 6) She stated she is a parent of teens and a professional who works with at risk teens and their families. She told of an incident involving her teenage son and underage drinking. They picked up their son at an underage drinking party at a residence. The father of the young man having the party told police officers he knew there were kids in his basement, but he had no idea they were drinking. After she returned home she spoke with her son and learned that this residence is a frequent party destination for him and his friends. They learned that there were no tickets issued or charges filed in this instance because the police officers stated the case would just be dismissed because of the present laws. In closing, she strongly encouraged the Committee to pass **HB 2165** in an effort to reduce the amount of underage drinking that occurs in our community.

Chairperson Collation opened the floor for questions of the proponents. A discussion followed.

Chairperson Collation introduced Ron Hein, Kansas Restaurant and Hospitality Association, to give his testimony as an opponent of **HB 2165.** Mr. Hein provided a written copy of his testimony. (Attachment 7) He stated they have concerns with the lessening of the standard of conduct prohibited from intentionally to reckless raises liability issues for proprietors of lodging establishments. He stated when the bill was originally being drafted, they had requested an exemption for lodging establishments. In closing, he stated they are opposed to this bill unless the lodging establishments can be exempted from the provisions of this criminal statute entirely.

Chairperson Collation called for any more questions, there being none she called the Committee's attention to the "written only" opponent testimony of Melissa Johnson, Assistant Seward County Attorney. (Attachment 8)

There being no others to testify she closed the hearing on **HB 2165**

Chairperson Collation introduced Richard E. Levy, J.B. Smith Distinguished Professor of Constitutional Law at the University of Kansas, School of Law, to give a presentation on *Constitutional Issues Surrounding Jury Trials in Juvenile Offender Cases.* Dr. Levy presented a written copy of his presentation (Attachment 9) He opened by stating the Judicial System has served two purposes. Society recognizes that juveniles have not yet reached the age of adulthood and may act unlawfully because of immaturity, the lack of appropriate parental supervision, and problematic family situations or emotional and other problems. The system is designed in part to implement the state's "parental" rule, serving a rehabilitative function to help troubled young people by providing appropriate interventions and services. As a matter of social justice and to deter criminal behavior, the system also seeks to impose appropriate consequences.

He referred to the case, *In re L.M.,* and highlighted on the following:

- Purposes of the Code:
- Terminology and Operation of the Code
- Sentencing under the Code
- Confidentiality and Other Protections

He stated there will be implications of the *In re L.M.* case and highlighted on the following:

- Scope of the Right to a Jury Trial
- The Impact on the Juvenile Justice System

- Other Constitutional Criminal Procedure Rights
- Possible Responses

In closing, Dr. Levy stated while *In re L.M* may seem surprising, it is in many respects the inevitable product of the changing trend in responding to the problem of crime in general and juvenile crime in particular. As demands to "get tough" on crime have increased, the juvenile justice system has gotten tougher. He stated when he joined the Juvenile Offender/Child in Need of Care Advisory Committee of the Kansas Judicial Counsel, he was a relative newcomer to the Kansas Juvenile Justice System. One of his first reactions upon becoming more familiar with the Code was that it would only be a matter of time before the court somewhere held that juvenile offenders were entitled to a jury as a matter of constitutional right. The time came with the *In re L.M.* decision. It is now up to the Legislature to decide how best to address the implications of that decision.

Chairperson Collation opened the floor for questions and discussion.

HB 2099 - Withdrawal of guilty plea, time limitation.

Upon the conclusion of the questions and discussion, Chairperson Collation thanked Dr. Levy for his excellent presentation and moved the Committee's attention to **HB 2099.** She stated this was the bill that was tabled in an earlier meeting waiting on new language. Chairperson Collation called on Jason Thompson, Revisor's Office, to review the bill along with the amendment the Committee had approved in an earlier meeting. Chairperson called for the Committee's wishes.

Representative Frownfelter made a motion to lift the bill from the table. Representative McCray-Miller seconded. Motion carried.

Representative Collation recognized Richard Saminengo, Kansas Association of District Attorneys to explain his amendment. (Attachment 10) He stated he was not offering an additional amendment, the documentation was clarification to address the issues of the Committee. Chairperson Collation addressed Mr. Saminengo stating the Committee had asked for him to bring back language and he had not. A discussion followed with the Committee.

Representative Pauls was recognized by Chairperson Collation. Representative Pauls made a suggestion on Page 2 of the balloon to say "time limitation here may be extended by the Court only upon additional affirmative showing excusable neglect by the defendant". The discussion continued and not all the Committee members agreed with the suggestion.

Representative Pauls made the motion to amend the amended bill adding on Page 2, line 38 of the balloon "Time limitation herein may be extended by the Court only upon additional affirmative showing excusable neglect by the defendant" and pass it out favorably. Representative Brookens seconded.

A discussion followed.

Chairperson Collation called for a vote. Motion carried.

Chairperson Collation adjourned the meeting at 3:05 p.m. with the next scheduled meeting being February 12, 2009, in room 535N.

CORRECTIONS & JUVENILE JUSTICE
GUEST LIST

DATE: 2/11/09

NAME	REPRESENTING
Chris Mechler	OJA
LYNN KEEZER	Observing
Jay Simecka	Shawnee County Sheriff's Office
Desiree Wright	Shawnee County Sheriff's Office
Ed Klumpp	KACP & KPOA
Richard Levy	Self

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEVE SIX
ATTORNEY GENERAL

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(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

House Corrections & Juvenile Justice Committee
House Bill 2233
Solicitor General Steve McAllister
February 11, 2009

Madam Chairperson and members of the committee, thank you for allowing me to provide testimony in support of House Bill 2233. I am the Solictor General of Kansas, and am responsible for some of the appellate case work in the office of Attorney General Steve Six.

A problem that we encountered in several recent appeals, such as in Kansas v. Ventris, Kansas v. Smith, and Kansas v. Morton, is that if the State chooses to appeal an adverse decision by our state supreme court in a criminal case to the Supreme Court of the United States, it may not be clear whether the time for the running of the speedy trial clock under the Kansas Speedy Trial Act is tolled while Kansas pursues such an appeal. Similarly, it may not be clear if the time is tolled when the Attorney General pursues a petition for review in the Kansas Supreme Court, seeking review of a decision of the Kansas Court of Appeals. HB 2233 would make clear that the filing of a petition for review in our state supreme court or a petition for a writ of certiorari in the Supreme Court of the United States tolls the running of the speedy trial clock until the relevant court has finally resolved the case, either by (1) denying review or (2) granting review and then hearing and deciding the case on the merits.

Without automatic tolling, when the state files a petition in the Supreme Court of the United States, there may be undesirable consequences, including the possibility that a criminal defendant will go free not because a jury acquitted him, but because the courts conclude that the state violated the speedy trial act.

Another consequence is that, if the mandate issues from the Kansas Supreme Court and starts the speedy trial clock (90 days), the State has no option but to try and persuade the trial court to which the case is returned to stop the clock, or ask the Supreme Court of the United States to stop the clock while our petition in that court is pending. Either way, the State and the courts are forced to act on a case-by-case basis, and the State's ability to appeal will not be certain unless and until such courts agree to toll the clock or grant a stay in a particular case.

Yet another undesirable situation arises even if the State is able to act before the mandate issues, which generally occurs about 30 days after an appellate court's decision. If the

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mandate has not issued, the Attorney General can ask the Kansas Supreme Court to stay the mandate in order for the Attorney General to appeal that court's decision. But there are two negative consequences to the State relying on a stay of the mandate to protect its appeal rights. First, the State has to make a decision about appealing to the Supreme Court of the United States in 30 days or less, a short time for an important decision that may require consultation with various government entities and agencies. Second, it is awkward at best to have to seek relief from the very entity whose decision the Attorney General wants to appeal. Such a procedure is far from optimal or efficient for all parties involved.

So long as uncertainty remains regarding whether the State's filing of a petition seeking review in either the Supreme Court of the United States or the Kansas Supreme Court automatically tolls the speedy trial act clock, the State is left with only ad hoc options to appeal erroneous decisions without risking a speedy trial act violation that could preclude further prosecution of a defendant. Those ad hoc options – seeking a ruling from the trial judge or seeking a stay of the mandate from the Kansas Supreme Court – are not sufficient.

Finally, even if the State can persuade trial judges to toll the clock in particular cases, the State has no assurance — without a Kansas Supreme Court decision on point in our favor or clarity in K.S.A. 22-3604 — that the Kansas Supreme Court ultimately would conclude that the Attorney General's pursuit of an appeal tolled the running of the speedy trial act clock. In other words, a trial judge might conclude that the speedy trial clock was tolled, but the Kansas Supreme Court could later decide that K.S.A. 22-3604 actually does not toll the clock, which then could bar the State from continuing that particular prosecution, as well as any other similarly situated prosecutions. It would be far better and easier for everyone involved, including defendants and trial judges, if K.S.A. 22-3604(2) made clear that the filing of a petition for a writ of certiorari in the Supreme Court of the United States or a petition for review in our state supreme court automatically tolls the running of the statutory speedy trial clock.

HB 2233 would amend 22-3604(2) to clearly cover everything already provided for by statute as tolling the speedy trial clock (the references to K.S.A. 22-3602(b) and 22-3603) as well as efforts by the Attorney General to obtain discretionary review of an adverse ruling such as the reversal of a conviction, whether in our own supreme court or in the Supreme Court of the U.S.

As the chief prosecutorial agency responsible for appeals in the state of Kansas, the Attorney General's office strongly supports HB 2233 and believes that it is both necessary and important to amend the existing provisions of K.S.A. 22-3604(2) to make clear that the Kansas Speedy Trial Act clock is tolled while the State pursues a petition for a writ of certiorari in the Supreme Court of the United States or review in the Kansas Supreme Court.

Thank you for your consideration. I would be happy to answer any questions.

STATE OF KANSAS

JOE PATTON
REPRESENTATIVE, 54TH DISTRICT
800 S.W. JACKSON #1414
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: CORRECTIONS AND JUVENILE JUSTICE
MEMBER: JUDICIARY
ADMINISTRATIVE RULES AND REGULATIONS

Testimony in Support of HB 2165

Representative Joe Patton

February 11, 2009

Madam Chair and Members of the Committee:

1. I support HB 2165.

Underage drinking is a very serious problem. The National Institute of Health indicated that "…underage drinking is a leading public health problem in this country. Each year, approximately 5,000 young people under the age of 21 die as a result of underage drinking; this includes about 1,900 deaths from motor vehicle crashes, 1,600 as a result of homicides, 300 from suicide, as well as hundreds from other injuries such as falls, burns, and drownings ." "Research also shows that many adolescents start to drink at very young ages. Other research shows that the younger children and adolescents are when they start to drink, the more likely they will be to engage in behaviors that harm themselves and others."

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Shawnee County
Sheriff's Office
Sheriff Richard W. Barta
Law Enforcement Center

320 South Kansas Ave., Suite 200
Topeka, KS 66603-3641
785-368-2200

MEMORANDUM

February 9, 2009

To: House Committee on Corrections and Juvenile Justice

From: Deputy Desiree Wright

Ref: House Bill 2165

Chairman Colloton and Members of the Committee:

Thank you for this opportunity to provide input concerning House Bill 2165. I am a Deputy Sheriff currently assigned as a School Resource Officer at Rossville and Silver Lake High Schools. I am here today on behalf of the Shawnee County Sheriff's Office.

In July 2008, I attended the annual School Based Policing Conference held at the Ramada Inn, Topeka, Kansas. One of the training breakout sessions at the conference was regarding underage drinking, which is an area of great concern for me and many other law enforcement officers. In this breakout session we were provided information that a law enforcement office in Kansas has been utilizing a letter to notify parents that their child was found to be in attendance at a party where alcohol was present. This letter was designed to inform those parents of children who were not charged with any crime resulting from the party that their child had been in attendance. As a parent of a teenager I thought this letter was a great idea. If my son was at a party where alcohol was present and law enforcement was called to respond to this activity, I would definitely want to know where my child had been.

As a deputy assigned to two high schools I know how devastating underage drinking can be. I have spoken to teenagers after they have received a Minor In Possession citation (MIP) or a Driving Under the Influence (DUI) citation. I have heard about the devastation and seen many tears shed at the loss of a youngster in an alcohol related accident. I decided that day that I would begin pursuing the implementation of a policy in my own agency.

It is a major problem for law enforcement that we have adults who think it is no big deal to provide alcohol to minors. I have heard it said that, "Well, if my child is going to drink at a party, I would rather they just be at home where I can keep them safe." I have also heard about adults who have said that they took the keys to the juveniles' vehicles so they could not leave the house. The tolerance for alcohol consumption differs from person to person and I assume those adults are not aware of alcohol poisoning.

There are times when juveniles don't exactly tell their parents the truth as to where they will be during an evening. The child may say they are going to a friend's house, the movies, the library, the mall, etc., but in actuality they are going to a party with their friends. That juvenile may make a good choice and choose to not partake in drinking alcohol if it were provided. Perhaps by the time law enforcement arrives to break up the party, the juvenile just hasn't had time to begin drinking. It is the parents of these children the Agency hopes to reach to educate them about the law.

I wrote a proposal and drafted a letter I thought was appropriate for my agency. In my proposal I explained what I hoped to gain from sending out a letter addressed to the parents of those juveniles who did not receive a charge of an MIP. There will likely be those parents who will take the attitude that it's no big deal their child was at a party. However, perhaps the child forgot to mention to their parent that there was alcohol present and available to underage persons. It is my hope for a parent who receives this letter that the information could be valuable for that parent in helping their child to make good choices about being around underage drinkers, even if that juvenile had not been drinking. Also, that adult or parent will read the statutes and understand that it is not okay to provide alcohol or a party location to minors.

On August 22, 2008, the Shawnee County Sheriff's Office implemented a new policy in regards to underage drinking. When our Patrol Division responds to a report of a party where underage drinking is happening, the information is forwarded to me. The information includes the case number and the address of the party. I then contact our Records Division and have all the reports regarding the party forwarded to me. I review the reports to determine how many MIP's were issued and if a Social Host charge was given. But more importantly I look to see how many names were provided in the report of those juveniles who did not receive an MIP but were present at the event. After compiling this list, I mail a letter addressed to the parent or guardian of that juvenile. I have attached the letter to this testimony. In addition, I attach to the letter portions of K.S.A. 41-727, regarding the purchase or consumption of alcoholic beverage by a minor, and portions of K.S.A. 21-3610c, regarding unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage.

Since the implementation of this policy our deputies have currently responded to four parties (2 in December 2008, 1 in January and 1 in February 2009) where there was underage drinking. Two of those parties resulted in a Social Host charge and there was a total of 42 MIP's issued. A shocking number. However, those are just the ones that got caught. Usually when law enforcement arrives at a party, the kids run in an attempt to elude an MIP or consumption charge. I sent out eight letters to parents letting them know of their juvenile's attendance at these parties. To date my agency has received no feedback from the letter but it is my hope that the parent took the time to talk to their child about the importance of not drinking alcohol until they are of legal age to do so.

The School Resource Officers of the Shawnee County Sheriff's Office do what we can to educate the youth in our schools. We have mock crashes, use Fatal Vision Goggles and tell them the consequences of receiving an MIP or DUI. The effort to reduce underage drinking needs the support of the adults in the community. In order for that to happen the adults in the community need to be

educated as to the consequences of providing a location to underage persons to drink and/or providing the alcohol to them.

Our agency does not have an abundance of manpower to respond to these types of calls. This is why it is so profoundly important to educate all parents and adults before it happens. For those parents and adults who choose to provide a location and/or alcohol to minors, a strong Social Host statute is necessary.

I would ask for your support in adding the wording "or Recklessly" to House Bill 2165.

Thank you for you time,

Desiree Wright 0211

Deputy Desiree Wright,

Shawnee County Sheriff's Office

Shawnee County
Sheriff's Office
Sheriff Richard W. Barta
Law Enforcement Center

320 South Kansas Ave., Suite 200
Topeka, KS 66603-3641
785-368-2200

(Date)

To the Parent/Guardian of:
Name of child
Street Address (or addresses if there's another parent/guardian)
City, State, Zip

This letter is to inform you that your child was in attendance at a party in which alcohol was present. The party occurred on (day), (date), (time) in Shawnee County.

Your child does not have any criminal charges filed in reference to their attendance at this party. This is just for your information.

The Shawnee County Sheriff's Office takes pride in advocating for the reduction in underage drinking, the consequences of which can be devastating to friends and family. Hopefully by working together, we can prevent any potential alcohol abuse or serious consequences for our youth of Shawnee County. I have attached a copy of Kansas State statute K.S.A. 41-727 and K.S.A. 21-3610c which both pertain to underage drinking.

If you have any questions or concerns, please contact the Shawnee County Sheriff's Office.

Sincerely,

Sheriff Richard W. Barta

41-727

Chapter 41.--INTOXICATING LIQUORS AND BEVERAGES
Article 7.--CERTAIN PROHIBITED ACTS AND PENALTIES

41-727. Purchase or consumption of alcoholic beverage by minor; penalty; exceptions; tests. (a) Except with regard to serving of alcoholic liquor or cereal malt beverage as permitted by K.S.A. 41-308a, 41-308b, 41-727a, 41-2610, 41-2652, 41-2704 and 41-2727, and amendments thereto, and subject to any rules and regulations adopted pursuant to such statutes, no person under 21 years of age shall possess, consume, obtain, purchase or attempt to obtain or purchase alcoholic liquor or cereal malt beverage except as authorized by law.

(b) Violation of this section by a person 18 or more years of age but less than 21 years of age is a class C misdemeanor for which the minimum fine is $200.

(c) Any person less than 18 years of age who violates this section is a juvenile offender under the revised Kansas juvenile justice code. Upon adjudication thereof and as a condition of disposition, the court shall require the offender to pay a fine of not less than $200 nor more than $500.

(g) A law enforcement officer may request a person under 21 years of age to submit to a preliminary screening test of the person's breath to determine if alcohol has been consumed by such person if the officer has reasonable grounds to believe that the person has alcohol in the person's body except that, if the officer has reasonable grounds to believe the person has been operating or attempting to operate a vehicle under the influence of alcohol, the provisions of K.S.A. 8-1012, and amendments thereto, shall apply. No waiting period shall apply to the use of a preliminary breath test under this subsection. If the person submits to the test, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made for violation of this section. A law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test. Such results or a refusal to submit to a preliminary breath test shall be admissible in court in any criminal action, but are not *per se* proof that the person has violated this section. The person may present to the court evidence to establish the positive preliminary screening test was not the result of a violation of this section.

21-3610c

Chapter 21.--CRIMES AND PUNISHMENTS
PART II.--PROHIBITED CONDUCT
Article 36.--CRIMES AFFECTING FAMILY RELATIONSHIPS AND CHILDREN

21-3610c. Unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage. (a) Unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage is intentionally permitting a person's residence or any land, building, structure or room owned, occupied or procured by such person to be used by an invitee of such person or an invitee of such person's child or ward, in a manner that results in the possession or consumption therein of alcoholic liquor or cereal malt beverages by a minor.

(b) Unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage is a class A person misdemeanor, for which the minimum fine is $1,000. If the court sentences the offender to perform community or public service work as a condition of probation, as described in subsection (c)(10) of K.S.A. 21-4610, and amendments thereto, the court shall consider ordering the offender to serve the community or public service at an alcohol treatment facility.

Shawnee Regional Prevention and Recovery Services, Inc. (PARS) and Safe Streets Coalition
2209 SW 29th Street
Topeka, KS 66611
785.266.8666 (PARS) 785.266.4606 Safe Streets Coalition
Email: szellers@safestreets.org

Testimony in support of HB 2165 before the House Committee on Corrections and Juvenile Justice

Sally Zellers, Director, Safe Streets Coalition
February 10, 2009

Chairman Colloton and member of the committee,

Good afternoon. I'm Sally Zellers, Director of Safe Streets Coalition. I'm presenting this testimony on behalf of Safe Streets Coalition and its parent agency, Shawnee Regional Prevention and Recovery Services of Topeka and Shawnee County in support of House Bill 2165.

We support the addition of the words, "or recklessly", to the sentence on lines 15 and 16 which according to many of our law enforcement partners will help make this law more enforceable.

The effective enforcement of this "social host" law is an important tool which will help reduce the rates of underage drinking by Kansas children and teens.

Underage drinking continues to be a problem among Kansas youth as indicated in the Communities that Care Youth Survey. During 2008, the following percentages of youth reported drinking alcohol at least once in the past 30 days: 50.4% of 12th graders, 37.3% of 10th graders, 21.1% of 8th graders, and 7.9% of 6th graders. Binge drinking rates are also very high. Those reporting binge drinking (5 or more drinks in a row) during the past two weeks included: 33.1% of 12th graders, 21.6% of 10th graders, 9.4% of 8th graders, and 2.8% of 6th graders.

The following percentages of youth reported that it would it is very easy to get alcohol: 43.4% of 12th graders, 30% of 10th graders, 16.5% of 8th graders, and 7.5% of 6th graders.

Most of these youth gain access to alcoholic drinks from their own homes, their friends' homes or from older friends who can purchase alcoholic drinks legally and who either share it or sell it to them. According to reports from youth, parents, and law enforcement, this social host law has already made some differences in limiting accessibility of alcohol to youth.

Please help us by adding the words, "or recklessly", which will increase law enforcement's ability to more effectively enforce this important prevention and early intervention tool.

Thank you.

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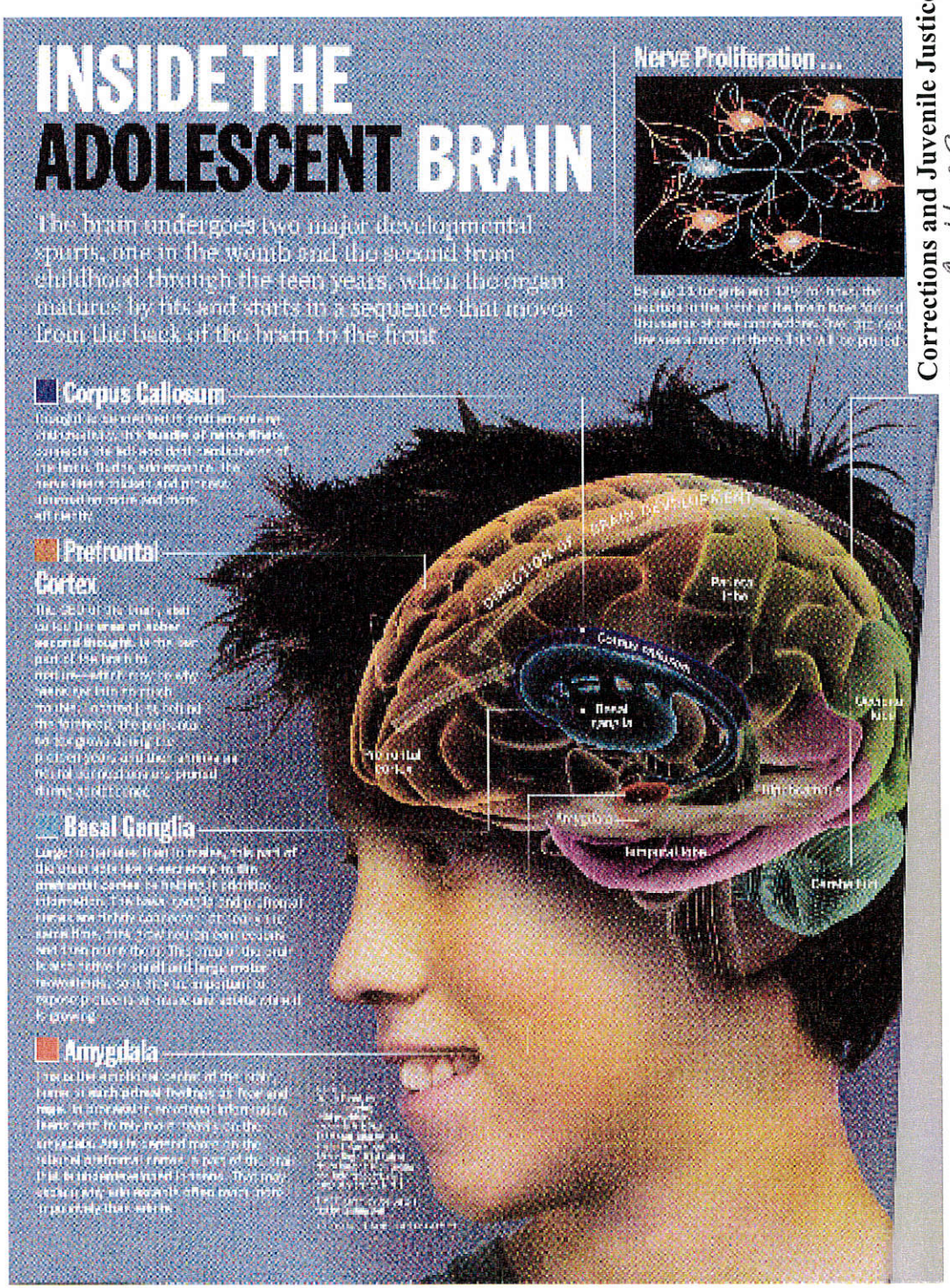
- Adolescence is a period of profound brain maturation.

- We *thought* brain development was complete by adolescence.

- We now know... maturation is not complete until about *age 24!!!*

Source: Dr. Ken Winters



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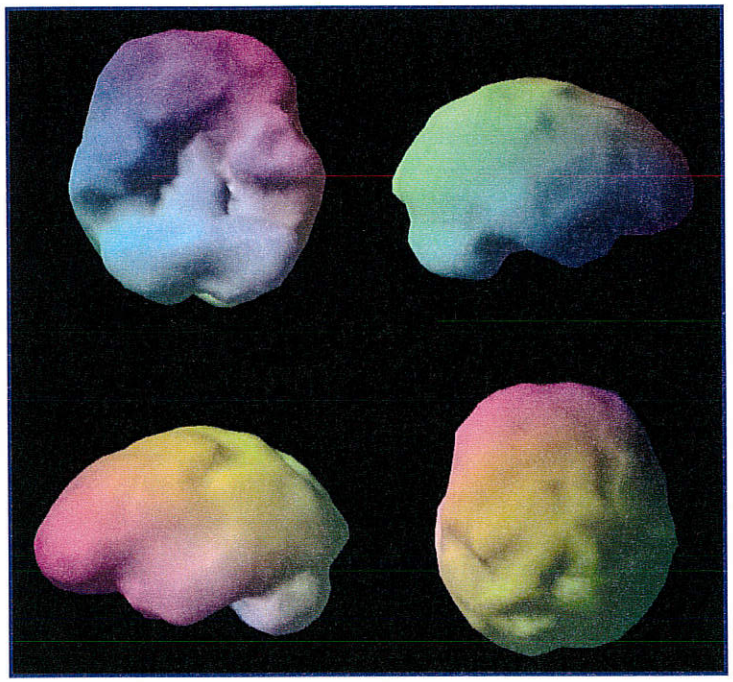
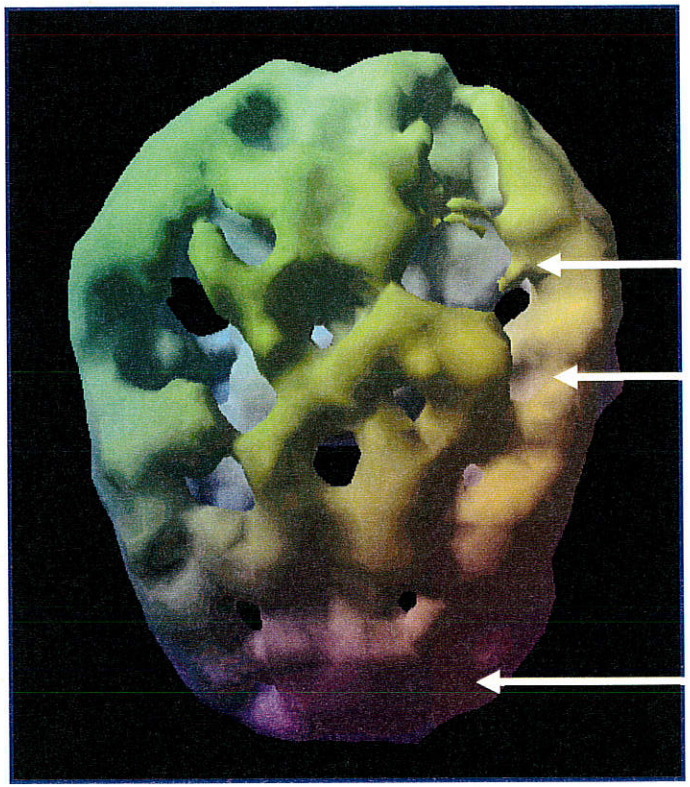
ALCOHOL AND THE BRAIN



Healthy brain image.



38 year old w/ 17 years of heavy weekend use.

Written Testimony

Of

Michelle Cutrer

for

HB 2165

As both a parent of teens and a professional who works with at risk teens and their families, I am acutely aware of the need to be a proactive parent. As such, I have always made it a point to talk with my children about the risks of alcohol consumption. Because I am also aware of the powers of peer influence, I have made it a point to require my teens to always provide me with specific information whenever they make plans with their friends, including where they are going and with whom, what they plan on doing while they are out, and the name and home phone numbers of an adult who will be present if they are going to be at someone else's house. Additionally, I frequently follow up with this information, and have made numerous phone calls to other parents to verify the location of my children as well as driving to addresses given to me by my teens to make sure that they are where they have told me they will be.

Unfortunately, I have also become aware that these actions are not always enough, and that my children, just like hundreds of others, will occasionally make errors in judgment and participate in activities that put them at risk. At these times, I am forced to rely on the local law enforcement agencies and the laws that govern them to assist me in protecting my family. Sadly, I am also learning that these are not enough.

On the weekend of August 30th, 2008, I learned through a series of phone calls that I initiated that my 16 year old son was not where he had told me he would be. After several hours of detective work, my husband and I located him at the residence of an 18 year old friend who lived with his parents. When we arrived at this location, we were greeted by the sight of three Topeka Police vehicles parked in the road at various locations on the block. We learned while speaking with one of the officers that they had been called to the location by a report of a vehicle that had struck a parked car along the side of the road. The officer informed us that the driver of the vehicle was a 16 year old friend of my son who was being charged with DUI after leaving a party at the residence I was en route to. The officer requested that we not go to the residence to make contact with my son until after he and another officer were able to make contact, so that we would not alert the other teens known to be there of the presence of the police before they were prepared to intervene. We agreed, and waited patiently outside in our car.

After waiting approximately half an hour, we watched while two Topeka Police officers knocked on the door of the residence and spoke with the parents of the household. We overheard the father of my son's friend tell the police that he knew that there were kids in his basement, but that he had no idea that they were drinking. While the officer was conversing with this gentleman, the second officer removed several cases of beer and a three foot tall glass bong from the basement of the home and placed them on the front porch. As we continued to wait outside, I was approached by two other parents who had received calls to come and retrieve their minor children from the home. My husband then asked one of the TPD officers if any charges were going to be filed or tickets issued, and he was told that there were no plans to do so at this time. He was also told that the parents of all of the minors still in the home would be called to pick up their youth.

Once we returned home, I learned from my son that this home is a frequent party destination for him and his friends. He stated that his friend's parents have always told the teens that they don't care if they drink at their house, but that they expect that if the kids are drinking, they need to plan on spending the night so that they aren't driving while intoxicated.

In October of 2008, I learned while speaking with another officer from the Topeka Police Department that there was no record that he could find of any of these events on that evening. Furthermore, I was advised that there is very often no follow up action taken in these situations due to a combination of difficulty in prosecution and understaffing of the police department, which is compounded by the overwhelming amount of time and paperwork it requires an officer to invest. In short, I was told that as a parent, I should not expect the police to enforce what few laws there are already in place because they have more important things to do.

I find this response to be overwhelmingly sad and discouraging, and can't help but wonder how I would respond to it if I were to lose my child to alcohol poisoning brought on by binge drinking or a drunken driving accident. I strongly encourage the passage of HB 2165 in an effort to reduce the amount of underage drinking that occurs in our community. I feel that as a parent, I can instill as many safeguards as possible for my children, but when those safeguards are being knowingly undermined by others, I need to know that there are consequences that are both severe enough and likely enough to happen to discourage these individuals from allowing my child to drink in their homes.

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Testimony Re: HB 2165
House Corrections and Juvenile Justice Committee
Presented by Ronald R. Hein
on behalf of
Kansas Restaurant and Hospitality Association
February 11, 2009

Madam Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Restaurant and Hospitality Association. The KRHA is the Kansas professional association for restaurant, hotel, lodging and hospitality businesses in Kansas.

KRHA opposes HB 2165 solely because we are concerned that the lessening of the standard of conduct prohibited from intentionally to recklessly raises liability issues for proprietors of lodging establishments. That standard is more appropriately defensible when used in a situation of a private residence. When this legislation was originally introduced, we had requested an exemption for lodging establishments, where, as a practical matter, the lodging proprietor is either unable to be knowledgeable about the conduct occurring in private rooms which are leased by the public or, at the very least, where it is more difficult for the proprietor to be aware of such unlawful activities.

Since lodging establishments were not ultimately exempted from the legislation, we felt some comfort in the fact that the standard for enforcement of the act required an intentional act on the proprietor of the lodging establishment.

As a practical matter, owners of lodging establishments are not concerned about criminal law enforcement prosecution, because if proprietors are aware of inappropriate activity, whether involving minors or not, they will intervene for other reasons, including protection of their own property and protection of the rights of the other residents at the facility. However, the concern arises for our industry in the event of a tragic situation, where a litigious party might seek to make the lodging establishment liable for harm to either the offending minor, or a third party, in the event of a minor being unlawfully served alcohol on the premises of the lodging establishment.

The intentional requirement absolved the lodging establishment of such liability except where they knew that the unlawful activity was occurring, and intentionally permitted it to continue or to occur in the first place. Reducing that standard increases the likelihood of a litigious party arguing that the proprietor had constructive knowledge of the unlawful

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activity occurring even if not able to prove actual knowledge. This argument is especially appropriate in light of situations involving the doctrine of *respondeat superior*, and whether or not the owner of the premises is going to be charged with constructive knowledge of observations made by staff at the lodging facility. For example, if an employee witnesses activity sufficient to constitute knowledge by the owner of the lodging facility, regardless of the owner's actual knowledge, that liability might attach to the lodging establishment, which might be the only deep pocket available to the plaintiff. This would be even more true if the employee doesn't pass on the information to the owner and the owner has no actual knowledge.

In light of those concerns, the KRHA would request defeat of HB 2165, or would renew our request that lodging establishments be exempted from the provisions of this criminal statute entirely.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

Seward County Attorney's Office

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February 9, 2009

Representative Pat Colloton
House Judiciary Committee
Kansas State House of Representatives
Topeka, Kansas

In Re: House Bill 2165

Thank you for the opportunity to address the House Judiciary Committee regarding House Bill 2165. On behalf of the Kansas County and District Attorneys Association, I am submitting this written testimony in opposition of this bill.

While prosecutors across the state clearly agree that unlawfully providing alcohol to minors is something that should be deterred, in our opinion, the proposed amendment would create an unworkable standard and one that could clearly cause parents to be prosecuted when they were not in any way actively involved in providing alcohol to minors. For example, if parents had beer in their refrigerator at home and their seventeen year old child arrived home from school while the parents were out of the house, the child could provide beer to his friends without his parents' knowledge, but could still subject the parents to potential criminal charges for that act. In effect, this legislation would create a standard that all alcohol would have to be locked away to avoid potential prosecution.

We believe that the current language in K.S.A. 21-3610c is adequate to punish criminal conduct and the addition of the element of recklessness could lead to many unintended results.

Sincerely,

Melissa G. Johnson,
Assistant Seward County Attorney

MGJ/nrk

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Committee on Corrections and Juvenile Justice
Kansas House of Representatives

Constitutional Issues Surrounding Jury Trials in Juvenile Offender Cases

Testimony of Richard E. Levy[1]
February 11, 2009

I appreciate the invitation to speak with the Committee on the issues surrounding the recognition of a constitutional right to jury trials in juvenile offender cases. My goal in providing this testimony is not to advocate for any particular outcome or approach to these matters, but rather to help the Committee understand the reasoning and implications of *In re* L.M., 286 Kan. 460, 186 P.3d 164 (Kan. 2008), in which the Kansas Supreme Court held that alleged juvenile offenders have a constitutional right to a jury trial.

General Background

The juvenile justice system has long served dual purposes. On the one hand, society recognizes that juveniles have not yet reached the age of adulthood and may act unlawfully because of immaturity, the lack of appropriate parental supervision and problematic family situations, or emotional and other problems. Thus, the system is designed in part to implement the state's "parental" role, serving a rehabilitative function to help troubled young people by providing appropriate interventions and services. On the other hand, as a matter of social justice and to deter criminal behavior, the system also seeks to impose appropriate consequences for juveniles who violate the law. Such punishment may include lengthy confinement in a correctional institution.

The dual character of the juvenile justice system has raised some difficult issues of constitutional law, because the protections required for criminal prosecutions in the adult system create a formal adversarial process that are inconsistent with a "parental" approach to juvenile justice issues. Notwithstanding the parental approach, however, juveniles charged with criminal offenses face the possibility of significant punishment with long-term implications (such as enhancement of penalties for future crimes), which would entitle adult criminal defendants to a number of constitutional protections. Thus, in the landmark case of *In re Gault*, 387 U.S. 1 (1967), the United States Supreme Court held that in view of the nature of juvenile proceedings and possible punishment of juveniles accused of criminal offenses, due process entitles them to

[1] J.B. Smith Distinguished Professor of Constitutional Law, University of Kansas School of Law. This title is provided for identification purposes only. I do not represent or appear on behalf of either the Law School or the University, and the views expressed in this testimony are solely my own. Likewise, while I am a long time member of the Kansas Judicial Council's Advisory Committee on the Juvenile Offender and Child in Need of Care Codes, I do not testify on behalf of the Committee or the Judicial Council, and my testimony should not be taken as a representation of their views.

adequate notice of charges, the right to counsel, the right to confront and cross examine witnesses, and the privilege against self-incrimination.

While *Gault* held that juvenile offender cases had sufficient attributes of criminal prosecutions to warrant application of many due process safeguards, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (plurality opinion), the United States Supreme Court held that due process did not require states to provide a jury trial in juvenile offender cases. The Court reasoned that "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner." *Id.* at 547. In *Findlay v. State*, 235 Kan. 462, 681 P.2d 20 (Kan. 1984), the Kansas Supreme Court followed *McKeiver*, holding that neither the state not federal constitution required a jury in proceedings pursuant to the Kansas Juvenile Offender Code.

The *In re L.M.* Decision

In the *In re L.M.* decision, however, the Kansas Supreme Court reached a contrary conclusion, reasoning that "[b]ecause the juvenile justice system is now patterned after the adult criminal system," the rationale of *McKeiver* and *Findlay* had been eroded, and "those decisions are no longer binding precedent for us to follow." 286 Kan. at 469-70, 186 P.3d at 170. Moreover, the court held that because "the Kansas juvenile justice system has become more akin to an adult criminal prosecution, . . . juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments." *Id.* In view of the court's analysis, the key to understanding the *In re L.M.* decision is its discussion of the changes to the juvenile offender code that made the juvenile justice system "more akin" to the adult criminal system. The Court identified four key changes: (1) the stated purposes of the code; (2) the terminology and operation of the code; (3) sentencing under the code; and (4) the loss of protections for juveniles, especially confidentiality.

Purposes of the Code: The first key change cited by the court was to the stated purposes of the code. While the juvenile offender code as considered in *Findlay* "focused on rehabilitation and the State's parental role in providing guidance, control, and discipline," 286 Kan. at 466, 186 P.3d at 168, the revised code considered in *L.M.* states that its "primary goals . . . are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community." K.S.A. 38-2301. The court observed that these purposes were similar to the stated purposes of the adult criminal code. *See* K.S.A. 21-4601. Thus, the court concluded, "the focus has shifted to protecting the public, holding juveniles accountable for their behavior and choices, and making juveniles more productive and responsible members of society," a focus that is "more aligned with the legislative intent for the adult sentencing statutes." 286 Kan. at 466, 186 P.3d at 168.

Terminology and Operation of the Code: The Court also noted that the revised juvenile offender code includes terminology that parallels the justice system for adults, including pleading options, use of the terms "sentencing hearings" (rather than dispositional hearings) and "juvenile correctional facility" (rather than State youth center), and references to a "term of incarceration" in a correctional facility. *See* 286 Kan. at 466-67, 186 P.3d at 168-69. In the

court's view, these changes in language reflected a convergence between the juvenile justice system and the criminal justice system for adults. While the court focused on the terminology of the code, it is likely that the principal importance of this language was what it says about how the system operates: For many juvenile offenders, the process includes charges, pleas, trials, and sentencing that closely resembles the adult criminal justice system.

Sentencing under the Code: This convergence was further reflected in the sentencing process for juveniles. First, in juvenile cases there is a sentencing matrix that resembles the sentencing guidelines for adults. The matrix specifies sentences for juvenile offenders based on the seriousness of the offense and their history of past juvenile offenses, much as the sentencing guidelines do for adults, and requires an explanation for any departure. Sentences imposed under the matrix, moreover, function much like adult sentences under the guidelines, with good time credits and a period of supervised release. Second, the court noted that the sentencing options available to the court more closely resemble those involving adults, including probation, community-based programs, house arrest, short-term behavior-modification programs, placement in an out-of-home facility, or incarceration in a correctional facility. While interventions and treatment options are also available, similar options are available for adults.

Confidentiality and Other Protections: A final change emphasized by the court was the removal of "some of the protective provisions that made the juvenile system more child-cognizant and confidential." 286 Kan. at 469, 186 P.3d at 169-70. In this regard, the court focused on the loss of confidentiality, which had previously extended to all juvenile proceedings and records for juveniles under the age of 16. Under the revised code, juvenile proceedings are presumed to be public hearings and are only confidential if the alleged offender is under the age of 16 and the judge rules that it is in the best interest of the juvenile. Likewise, the official file and juvenile records are confidential only if the juvenile is under the age of 14 and the judge orders them to be confidential.

Implications of the *In re L.M.* Decision

In re L.M. has important implications for the future of the juvenile justice system that require a legislative response. In assessing the appropriate response it is important to consider various implications of the *In re L.M.* decisions. This part of my testimony is intended to highlight some of those implications.

Scope of the Right to a Jury Trial: One question on which *In re L.M.* is not entirely clear relates to the scope of the right to a jury trial, that is, the kinds of juvenile offenses to which the right to a jury attaches. The key question is the potential punishments to which an accused juvenile offender is exposed (not the actual sentence, but the maximum possible sentence). Under the federal due process doctrine, for example, due process requires a right to a jury in criminal prosecutions whenever the maximum possible incarceration upon conviction exceeds six months. *See Baldwin v. New York*, 399 U.S. 66 (1970).

The right to a jury under the Kansas Constitution appears to be broader than the right as required by the United States Constitution. Section 5 of the Kansas Bill of Rights declares that "[t]he right of trial by jury shall be inviolate" and section 10 extends the right to an impartial jury

to "all prosecutions," regardless of the maximum penalty. *See In re Rolfs*, 30 Kan. 758, 1 P. 523 (Kan. 1883). Kansas statutes provide for juries in all adult criminal prosecutions under state law, but differentiate between felonies and misdemeanors in terms of the size of the jury. *See* K.S.A. 22-3403 (12 member jury in felony cases) and 22-3404 (6 member jury in misdemeanor cases). The Judicial Council's proposed amendments to the Revised Juvenile Offender Code would follow the adult model, with some minor variations. *See* 2009 SB 88, § 10.

It is not entirely clear, however, that *In re L.M.* would require a jury trial in all juvenile offender cases, especially minor offenses in which the parental and rehabilitative elements of the system might be more dominant. The offense in *L.M.* itself was a serious one (sexual battery) and the sentence was eighteen months in a correctional facility, which was suspended with the sixteen year old defendant placed on probation until he turned twenty. More significantly, perhaps, the defendant was required to undergo treatment and register as a sex offender. Given the severity of the offense and potential punishment in *L.M.*, it is possible that a case involving a less serious offence with limited exposure to punishment might be treated differently. On the other hand, the reasoning of *L.M.* would likely support the application the right to a jury trial in all juvenile offender cases, and the failure to provide for it would almost certainly be challenged.

Impact on the Juvenile Justice System: A practical question raised by *In re L.M.* is the likely impact of the right to a jury trial on the juvenile justice system. Most immediately, concerns have been expressed about the cost of providing such trials. It is difficult to predict the future, of course, but I suspect that over time the number of jury trials is likely to be fairly small (just as it is in the modern adult system). The impact is more likely to be felt in the plea bargaining stage, as the right to a jury trial gives alleged juvenile offenders an additional "chip" in plea negotiations (the ability to impose a more costly trial if a plea agreement is not reached), which could mean more favorable plea agreements for juveniles. A second kind of impact that will be more difficult to assess is the further erosion of the parental elements of the juvenile justice system because of the increased formality and adversarial character of jury trials. For attorneys representing juveniles, this concern may actually lead to less insistence on juries, especially in cases involving minor offenses.

Other Constitutional Criminal Procedure Rights: To the extent that *In re L.M.* concludes the juvenile justice system has converged with the adult criminal justice system, it may have implications that extend to other constitutional rights beyond the right to a jury. For example, juveniles may be held in pretrial detention on a preventive basis that would likely violate the due process rights of adults. *See Schall v. Martin*, 467 U.S. 253 (1984). Similarly, closing juvenile offender proceedings to the public also arguably violates the right to a "speedy and public" trial. If the juvenile justice system is sufficiently close to the adult criminal justice system to require jury trials, it may be that other differences in treatment of alleged juvenile defenders and adult criminal defendants violate the constitutional rights of alleged juvenile offenders. A full assessment of these issues is beyond the scope of this testimony, but it is important to recognize that the implications of *In re L.M.* are not limited to jury trials.

Possible Responses: In view of these implications, there are a number of possible legislative responses to the *In re L.M.* decision. At a minimum, the Legislature should act promptly to regulate the procedure for jury trials in juvenile offender cases, as proposed in SB

88. On a longer term basis, the Legislature might consider the juvenile justice system in a broader perspective to determine whether it wishes to modify the juvenile offender procedures and sentences so as to reinforce the parental and protective elements that provide the foundation for *Findlay*. Of course, the changes in the juvenile justice system described in the *In re L.M.* decision reflect real problems and concerns surrounding increased levels and severity of juvenile crime. Those concerns, as well, must be weighed in making any changes to the system.

One possible approach might be to allow prosecutors to make an initial choice between two modes of procedure – a "parental" mode for juveniles with respect to whom the focus is on providing appropriate interventions and rehabilitations, and a "criminal" mode in which the focus is on punishment and deterrence of serious crimes. If the "parental" mode took the most prosecutorial and punitive elements of the process off the table, it may be that a jury trial would not be required (or perhaps waiver of the right to a jury trial could be a condition of this mode of procedure). Such an option could provide a means of preserving the parental elements of the system when it is warranted and preserving the constitutional rights of alleged juvenile offenders when it is not. Let me emphasize that this is just an idea and not a formal proposal or recommendation (which I am not sure I would support).

Conclusion

While the *In re L.M.* decision may seem surprising, it is in many respects the inevitable product of the ways in which our response to the problem of crime in general and juvenile crime in particular has changed the system. As demands to "get tough" on crime have increased, the juvenile justice system has gotten tougher. When I joined the Juvenile Offender/Child in Need of Care Advisory Committee of the Kansas Judicial Counsel, I was a relative newcomer to the Kansas juvenile justice system. One of my first reactions upon becoming familiar with the code was that it would only be a matter of time before a court somewhere held that juvenile offenders were entitled to a jury as a matter of constitutional right. The time came with the *In re L.M.* decision. It is now up to the Legislature to decide how best to address the implications of that decision. I hope that my testimony will prove helpful as you go about that important and difficult task.

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TO: Representative Colloton, Chair
House Corrections and Juvenile Justice Committee

FROM: Richard Samaniego on behalf of the Kansas County and District Attorneys Association

RE: Supplemental Information regarding House Bill 2099

This letter is intended to convey clarification I received from KCDAA members in regard to committee questions regarding the KCDAA proposed amendment to K.S.A. 22-3210 as follows:

(e) Time limitations.

(A) any action under this statute must be brought within one year of: (i) the final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or termination of such appellate jurisdiction; or (ii) the denial of a petition for writ of certiorari to the United States Supreme Court or issuance of such court's final order following the granting of such petition.

(B) The time limitation herein may be extended by the court only upon an additional, affirmative showing of excusable neglect by the defendant, as related to the discovery of the defendant's claim.

10-Days after if no appeal

Section (e)(A)

The starting point for the running of the 1 year statute of limitation in regards to the withdrawal of a guilty plea is most likely from the "termination of appellate jurisdiction". "Termination of appellate jurisdiction" is a common term of practice and in relation to an entry of a plea where no appeal follows means 10 days after sentencing.

The remainder of the language in section (e)(A) is included as a protection to the defendant because if the defendant appeals the sentence (which can be done even if a plea is entered in

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some circumstances) the defendant would most likely need to wait until the ruling on the appeal is over before trying to proceed in the district court on the same case regarding a motion to withdraw the plea.

Section (e)(B):

The "discovery of the defendant's claim" language was included to address the committee concerns of the defendant that later discovers that evidence was tainted when the plea was made. Much like the ability to attack a conviction ends at a certain point after a trial and appeal, this section links the time period to attack the guilty plea to the termination of appellate rights with the exception of the circumstances where the defendant can show that they did not know or could not have reasonably known of the claim (excusable neglect).

I am hopeful this information provides some clarity to your questions and I am happy to provide additional information upon request. The KCDAA respectfully requests your favorable recommendation of HB 2099.