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TO: Senator Thomas C. Owens,  
Chair, Senate Judiciary Committee

From: Professor Richard E. Levy, Juvenile Offender and Child in Need of Care  
Committee, Kansas Judicial Council

Re: Testimony in support of 2011 Senate Bill 23

Date: January 25, 2011

### TESTIMONY OF THE JUDICIAL COUNCIL JUVENILE OFFENDER/CHILD IN NEED OF CARE ADVISORY COMMITTEE ON 2011 SENATE BILL 23

This proposed legislation addresses the procedure for conducting jury trials in cases under the Kansas Juvenile Offender Code. The proposed legislation responds to *In re L.M.* 186 P.3d 164 (Kan. 2008), a Kansas Supreme Court decision which held that juveniles have a right to jury trials. The court reasoned that the juvenile justice system had taken on many of the attributes of the adult criminal justice system, such that the denial of the right to a jury trial could no longer be justified by the *parens patriae* character of the proceedings. In the 2010 legislative session, the Juvenile Offender / Child in Need of Care Advisory Committee (JO/CINC committee or committee) proposed legislation, SB 459, to address various issues that had arisen

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Attachment 1

under the Code. Sections 1 and 2 of SB 459 addressed the issue of jury trials. Because of concerns expressed in the Kansas County District Attorney Association's written testimony opposing those sections of the bill, in June, 2010, the JO/CINC committee was formally asked to study the issue.

In its initial discussion of the issue, the committee considered the scope of its charge. There was some support on the committee to consider a more fundamental change to the structure of the juvenile offender process so as to restore the *parens patriae* elements of the juvenile justice system, perhaps creating a bifurcated structure in which some cases could proceed under a *parens patriae* model in which the rationale of *In re L.M.* would not apply. But the committee determined that its charge was a more limited one—to develop provisions implementing the right to a jury in adjudications under the Code. Given its understanding of its charge, the committee did not consider a fundamental restructuring of the code. For similar reasons, the committee did not address other aspects of the juvenile offender process that implicate other constitutional rights that might apply in juvenile offender adjudications under the logic of *In re L.M.*

The committee then assigned several members to develop a draft that would address the concerns expressed during the legislative process. Those concerns were twofold. First, the proposed legislation had included language indicating that trial was to the court, and required the juvenile to request a jury trial, which the KCDAA considered to be inconsistent with *In re L.M.* Second, the proposed legislation did not address the procedures for conducting jury trials, giving judges insufficient guidance as to how to conduct a jury trial when one was requested in a juvenile offender proceeding.

The subcommittee debated on the best method to address these concerns. It considered that, in view of *In re L.M.*, the procedures for jury trials in juvenile offender cases should generally parallel the procedures for adult jury trials, except where the special character of the juvenile justice system warranted a difference in treatment. The subcommittee then discussed the best way to implement that principle. It considered various means of incorporating the relevant provisions of the adult criminal procedure code by reference, but determined that such an approach would not work. In order to avoid uncertainty about what provisions were incorporated (and prevent the wholesale adoption of the adult criminal procedure code), it would be necessary to specify those provisions that were incorporated (or those that were not). Such a series of statutory cross-references would be unwieldy and difficult to work with, in part because many provisions of the adult code reference both matters relevant to jury trials and other issues, which would need to be sorted out. In addition, many of the relevant provisions would require changes to adapt them to the Juvenile Offender Code.

Thus, the subcommittee determined that the better approach would be to identify the relevant provisions from the adult criminal code, incorporate them into the Juvenile Offender Code, and then work with the full committee to modify them as appropriate to the juvenile justice system. Using this approach, the subcommittee produced a working draft that combined the relevant provisions from the adult code into a new version of K.S.A. 38-2357 (which currently is a short provision giving the court discretion to order a jury trial upon motion). The subcommittee organized the provisions into subsections, removed language addressing matters relating to other procedural issues, and adjusted the terminology to conform the terminology of the Juvenile Offender Code.

This draft provided the basis for further discussion by the committee as a whole. To obtain input for this discussion, the draft was sent to the KCDA and all District Court Judges for comment. A few comments were received from district court judges but no response was received from the KCDA. The comments from judges expressed concern that juvenile jury trials were undesirable because they (further) undermined the *parens patriae* elements of the juvenile justice system. Some comments objected to the working draft's retention of the rule from the adult criminal procedure code under which jury trials would be automatically provided in felony cases unless it was waived. The comments encouraged the committee to look at the issue more fundamentally in order to minimize the formalization of the juvenile offender process. The committee was sympathetic to these views, but constrained by both *In re L.M.* and the nature of its charge. Nonetheless, in reviewing the working draft, the committee was especially cognizant of the differences between the adult criminal justice system and the juvenile justice system, and made some modifications to the adult procedures accordingly. The final product and a copy of the comments are attached.

The legislation proposes amendments to two provisions affected by *In re L.M.*, K.S.A. 38-2344(b) and K.S.A. 38-2357, and attempts to provide procedural direction for handling juvenile jury trials. The proposed amendments to K.S.A. 38-2344(b) are minor and simply include the right to a jury among those rights of which the juvenile is informed. The proposed amendments to K.S.A. 38-2357 are the core of the committee's proposals, and include provisions addressing (1) the scope and invocation of the right to a jury trial; (2) the size, composition, and selection of a jury panel; (3) the conduct of jurors and their opportunity to view the scene; and (4) the jury's decision, including submission of the case to the jury, deliberations, and the jury verdict. The legislation does not address many issues related to other constitutional rights that the

holding *In re L.M.* case raises, such as the right to speedy trial or preliminary hearings. The committee considered these issues to be beyond the scope of its charge and also concluded that it was premature to address these issues without further direction or clarification from the Kansas Supreme Court or further direction or assignment from the Judicial Council. Thus, in drafting the proposed legislation, the committee endeavored to avoid taking any action that would have implications beyond the right to a jury trial.

The committee's original recommendation in SB 249 was to provide for a right to a jury trial *on request* in both felony and misdemeanor cases, departing from the rule in adult criminal cases, in which a jury must be requested in misdemeanor cases, but is provided automatically in felony cases unless waived. One objection raised by the KCDAAs was that requiring a juvenile to request a jury trial in felony cases is not in line with the holding in *In re L.M.* After careful consideration of this issue and with respect to the KCDAAs, the committee disagrees, and renews its recommendation that juveniles be required to request a jury in all cases. The committee does not believe that requiring a juvenile to request a jury impairs the right to a jury trial in any way if the jury is provided as a matter of right when it is requested. The adult criminal procedure code follows this approach for misdemeanor cases, and there is no question of its validity. *In re L.M.* requires the state to comply with the juvenile's constitutional right to a jury trial; it does not require the state to apply identical rules in adult and juvenile cases.

The committee strongly believes that it is in keeping with the nature of juvenile offender adjudications that jury trials should be the exception and not the rule, in order to retain the traditional *parens patriae* dimension of juvenile offender proceedings when that is possible. Furthermore, providing that every juvenile automatically has a jury trial unless it is waived could result in an unnecessary burden on the courts, since jury trials are much more costly than bench

trials. So long as the right to a jury trial is clear and can be easily asserted, it is not an unreasonable or unconstitutional burden on that right to require that the juvenile request a jury in felony cases.

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