No. 09-102241-A

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IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

IN THE MATTER OF:

D M-T, Juvenile
Date of Birth: January 30, 1991

Case # 04 JV 1646

BRIEF OF APPELLANT

Appeal from the District Court of Wyandotte County, Kansas
Juvenile Division
Honorable Wes Griffin, Judge
District Court Case Number 04JV1646

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Respondent-Appellant

ORAL ARGUMENT REQUESTED

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NATURE OF CASE

This is a post-conviction juvenile court appeal.

At 15, DM-T was convicted of felony rape. This court denied his direct appeal on November 30, 2007. The Kansas Supreme Court review issued the mandate denying his petition for review on May 28, 2008.

Instead of applying to the United States Supreme Court for a writ of *certiorari*, DM-T filed a post-conviction motion with the Wyandotte County district court. DM-T applied for a retrial by jury to the Hon. Wes Griffin as allowed by *In Re L.M.*, decided June 20, 2008. On February 13, 2009, the district court overruled DM-T's motion to set aside the conviction and for a trial by jury. DM-T appeals from this order.

Because the time had not yet run to file a petition for writ of *certiorari* from the Kansas Supreme Court decision mandate, DM-T states that his case was not yet final, for purposes of post-conviction relief.

DM-T requests this Court to reverse the trial court denial of his motion for a trial by jury, and remand it for a jury trial on his rape charges.

ISSUES

I. The district court erred by ruling juvenile DM-T waived his opportunity for a jury trial when there was no expressed waiver.

A. Courts' *in loco parentis* treatment of juveniles has almost completely disappeared.

B. An adult defendant must expressly waive constitutional rights.

C. Juveniles should not be required to ask for constitutional rights.

D. The trial court should have asked if DM-T wanted a jury trial, since it was the custom in Wyandotte County to allow it.

II. The district court erred in denying juvenile DM-T a post-*In Re L.M.* jury trial while his state appeal was not final.

A. D M-T's direct appeal was not yet final when the Kansas Supreme Court decided *In Re L.M.*

B. Only when the last date expires is the mandate date the final decision date.

C. *In Re L.M.* should have applied to afford D M-T a new trial, by jury.

STATEMENT OF FACTS

At age 13, DM-T was charged in the Wyandotte County District Court, Juvenile Division, with the rape of TNW by force or fear under K.S.A. 21-3502, a severity level 1 person felony. (ROA, Vol. I, p. 11). TNW was 15 years of age. (ROA, Vol. I, p. 11). Instead of a district court judge, judge *Pro Tem* Jeffrey M. Goodwin presided over D M-T's bench trial on January 30, 2006, and found D M-T guilty on March 21, 2006. (ROA, Vol. I, pp. 14-15). On November 15, 2006, district court judge David W. Boal sentenced DM-T to be held in the Juvenile Correctional Facility for thirty (30) months and complete his directed course of treatment. (ROA, Vol. I, pp. 16-20).

DM-T filed notice of his direct appeal on November 17, 2006. (ROA, Vol. I, pp. 21-22). The Kansas Supreme Court refused to hear DM-T's Petition for Review from this Court's November 30, 2007 affirmation of his conviction on May 28, 2008, filed June 3, 2008. (ROA, Vol. I, pp. 23-28). DM-T was remanded to the Juvenile Correctional Facility in Topeka, Kansas on June 24, 2008. (ROA, Vol. I, p. 29).

The United States Supreme Court allows ninety (90) days from the date of a state court decision mandate to file a writ of *certiorari* for high court review. (Rule 13.1, Rules of the Supreme Court of the United States, adopted March 14, 2005; effective May 2, 2005). For DM-T, that deadline would have been August 26, 2008. Prior to the ninetieth day on August 26, 2008, the Kansas Supreme Court decided juvenile offenders have the right to a trial by jury. [*In Re L.M.*, 286 Kan. 460 (2008)]. On July 15,

2008, DM-T filed a post-trial motion to set aside his sentence and request a new trial, by jury, as allowed by *In Re L.M.* (ROA, Vol. I, pp. 30-31).

The district court, per the Hon. Wes Griffin, overruled DM-T's motion on February 13, 2009. (ROA, Vol. I, pp. 45-48). D M-T filed notice of his appeal from the district court's order denying him post-conviction relief on February 18, 2009. (ROA, Vol. I, p. 49).

ARGUMENT, CITATIONS and AUTHORITIES

I. The district court erred by ruling juvenile DM-T waived his opportunity for a jury trial when there was no expressed waiver.

> "*Unlike the argument* [raised by DM-T in his 2008 motion to set aside the conviction], *Respondents* [sic] *request for a jury trial would not have been futile; the procedure within the Juvenile Division at the time of his case was that a jury trial would have been ordered." In the Matter of DM-T*, Memorandum Opinion, February 10, 2009, p. 3 (ROA, Vol. 1, p. 48).
>
> **Standard of review:** "The interpretation of a statute is a question of law, and our review on appeal of questions of law is unlimited." *Cooper v. Werholtz*, 277 Kan. 250, 252 (2004); *accord, State v. $6,618.00 U. S. Currency*, 35 K.A.2d 54; 128 P.3d 413, 414 (Kan. 2006).

A. Courts'* in loco parentis *treatment of juveniles has almost completely disappeared.

In 1984, the Kansas Supreme Court invoked the specter of public trials, "the traditional delay, the formality and the clamor of the adversary system" to disallow conducting juvenile proceedings as if they were adult criminal trials. *Findlay v. State*, 235 Kan. 462 (1984) at Syl. ¶ 12, citing to *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

In the intervening twenty-four years, the idea of the benevolent judicial hand helping a young person return to the good and decent life has been all but rejected. In 2008, our Supreme Court recognized this judicial and social evolution.

> These changes to the juvenile justice system have eroded the benevolent parens patriae character that distinguished it from the adult criminal system. The United States Supreme Court relied on the juvenile justice system's characteristics of fairness, concern, sympathy, and paternal attention in concluding that juveniles were not entitled to a jury trial. *McKeiver*, 403 U.S. at 550. Likewise, this court relied on that parens patriae character in reaching its decision in *Findlay*. However, because the juvenile

> justice system is now patterned after the adult criminal system, we conclude that the changes have superseded the *McKeiver* and *Findlay* courts' reasoning and those decisions are no longer binding precedent for us to follow. *State v. Fischer, slip op.* #100,334 (Kan., March 27, 2009) at p. 2.

In *Fischer*, the Kansas Supreme Court was unwilling to find all pre-*L.M.* juvenile adjudications unconstitutional and therefore, exempt from *Apprendi v. New Jersey*, 530 U.S. 466 (2000) consideration at sentencing. *See also, State v. Hitt*, 42 P.3d 732 (Ks.Ct.App. 2002).

DM-T does not suggest continued gerrymandering of the juvenile offender code. The Constitution has no age limit. Rather, juvenile offenders must be accorded those constitutional rights, while substantive punishment is given with fairness, concern, sympathy, as courts have always done with other legal disabilities. Procedurally, as *In Re L.M.*, 286 Kan. 460 (2008) recognized, juveniles need the same constitutional protections afforded adult defendants as a matter of right.

This case presents the narrower issue of whether to take *In Re L.M.* one step further. All constitutional rights and protections should be presumed to exist for juveniles. Each juvenile must expressly waive constitutional rights rather than have to haphazardly claim them, depending on each juvenile's criminal or chronological sophistication or zealousness of counsel.

B. An adult defendant must expressly waive constitutional rights.

"In addition to the statutory right to a jury trial, the [adult] defendant in a misdemeanor case also has a constitutional right to a jury trial found in the Sixth and

Fourteenth Amendments to the United States Constitution and §5 of the Kansas Constitution Bill of Rights. The constitutional right to a jury trial is triggered when the [adult] defendant is facing potential imprisonment for the offense exceeding 6 months." *State v. Sykes*, 35 K.A.2d 517, 132 P.3d 485, 491-492 (Ks.Ct.App. 2006). (Emphasis added). "[S]ince the right to trial by jury is constitutionally preserved, waiver of the right should be strictly construed to afford a defendant every possible opportunity to receive a fair and impartial trial by jury." *Sykes* at 492 quoting *State v. Irving*, 216 Kan. 588, 590 (1975). The *Irving* court concluded:

> In accord with this position we hold that in order for a criminal defendant to effectively waive his right to a trial by jury, the defendant must first be advised by the court of his right to a jury trial, and he must personally waive this right in writing or in open court for the record.

Sykes' failure to timely exercise his statutory right to request a jury trial on the misdemeanor theft charge did not abrogate his constitutional right to a jury trial. He was facing incarceration in a county jail, which qualified as 'imprisonment'. This Court stated that the district court "should have obtained a knowing waiver from Sykes, either in writing or in open court, of his constitutional right to a jury trial". *Id.*

C. Juveniles should not be required to ask for constitutional rights.

> "*The record in this case clearly establishes that* [DM-T] *did not advise the Court of a desire for a jury trial and did not include that issue in his direct appeal. While this Court is aware of the line of cases that had previously ruled that K.S.A. 38-1656* [now repealed] *did not grant a juvenile the right to demand or request a jury trial, merely alerting this Court of his desire for a jury trial would have*

resulted in a jury trial setting for this Respondent." In the Matter of DM-T, Memorandum Opinion, February 10, 2009, p. 3 (ROA, Vol. I, p. 48).

The primary goal of the Kansas Juvenile Justice Code is "to promote public safety, hold juvenile offenders accountable for such juvenile's behavior ...", K.S.A. 38-1601 *et seq.*, as is one of the primary goals in the adult criminal justice system. *Findlay v. State*, 235 Kan. 462 (1984). Perhaps the only remaining difference between adult and juvenile offender adjudications is how and where the punishment is meted.

Adult offenders must expressly waive their constitutional rights as in *Sykes, supra.* The Constitution does not differentiate between adults and juveniles in its guarantee of certain rights as inviolate. Therefore, juvenile defendants should not be held to jump a higher bar by being forced to actively request rights they may not be aware they have. Were DM-T only a few years older at the time of the criminal charge against him, the district court's inquiry would have been to ask whether he wanted to waive his right to a trial by jury in open court. The trial record is silent as to whether trial counsel advised DM-T about requesting a jury trial. Subsequently, the post-conviction district court castigated him for not speaking up.

Were DM-T an adult, waiting for him to speak up and assert his right to a trial by jury would have been plain error. The better safeguard is to assume all rights are on the table for a juvenile defendant, rather than to store them away and make him beg for their protection. Or worse: promoting a system of juvenile justice that relies on counsel acting *in loco parentis* to protect a juvenile's rights since the courts have stepped away from that role.

As *In Re L.M.* decided, "[b]ased on our conclusion that the Kansas juvenile justice system has become more akin to an adult criminal prosecution, we hold that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments. As a result, K.S.A. 2006 Supp. 38-2344(d), which provides that a juvenile who pleads not guilty is entitled to a 'trial to the court,' and K.S.A. 2006 Supp. 38-2357, which gives the district court discretion in determining whether a juvenile should be granted a jury trial, are unconstitutional." *In Re L.M.*, 286 Kan. at 469-70 as quoted in *State v. Fischer, slip op.* #100,334 (Kan., March 27, 2009).

As with an adult offender, the constitutional right to a jury trial should be triggered when a juvenile is facing potential incarceration for the offense exceeding six months, as has DM-T. For an adult charged with rape, a trial court would have ascertained through colloquy if a defendant attempted to waive his right to a jury trial. No less for a juvenile is rape a serious crime with tough penalties. DM-T was sentenced to thirty (30) months in a juvenile institution. Since an adult offender would have had to convince a court he waived the right to a jury trial, so, too, should this be required for a juvenile. Juveniles are less likely to know their constitutional rights than adults.

In *Reno v. Flores*, 507 U.S. 292 (1993), Justice O'Connor presaged the trend toward granting constitutional rights to juveniles begun in *In Re Gault*, 387 U.S. 1 (1967). "[A] child's constitutional 'freedom from bodily restraint' is no narrower than an adult's. *Gault* held that a child in delinquency proceedings must be provided various procedural due process protections ...". *Id.* at 316. A child's constitutional right to be free from bodily

restraint until shown otherwise must no less exist in the full panoply of constitutional rights in a criminal matter.

So far, only Alabama has interpreted its juvenile code in serious criminal matters such as rape to mean that juveniles shall be "charged, arrested, and tried as an adult". *State of Alabama v. Nelson*, 893 S.2d 1245 (Ala.Crim.Ct.App. 2003). North Carolina, Texas and Ohio have extended the Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel to juveniles but have stopped short of extending the Sixth Amendment right to a jury trial. *See, State v. Oglesby*, 648 S.E.2d 819 (N.C. 2007); *In Re Scott W.*, 2008-Ohio-6688 (OhioCt.App. 2008); and *Hill v. State*, 78 S.W.3d 374 (Tx.Ct.App. 2001).

Yet, it is *In Re L.M.* which most fully complies with the United States Supreme Court *Gault* decree. Extending that right to DM-T and to all juveniles whether or not they know enough to ask for that right will also fulfill that mandate.

D. The trial court should have asked if DM-T wanted a jury trial to protect his rights.

The bench trial for the original charge was held before a judge *pro tem*, one of the select few attorneys in Wyandotte County who is routinely appointed in other juvenile cases. He did not offer the possibility of a jury to DM-T, nor did DM-T's attorney ask. The record is silent as to whether DM-T even knew the possibility for a jury trial existed. The district court's statement aside that "the procedure within the [Wyandotte County] Juvenile Division at the time of his case was that a jury trial would have been ordered", such request might not necessarily have been granted by a *pro tem*.

Neither claim nor issue preclusion applies here. "Issue preclusion (collateral estoppel) precludes relitigation of issues previously determined. Claim preclusion precludes relitigation of a claim that has been finally adjudicated in a court of competent jurisdiction. [Citation omitted.]" *In re Marriage of Ormsbee*, 39 K.A.2d 715 (2008), as quoted in *Knowles v. Fleetwood Motorhomes of California, Inc.*, 194 P.3d 38, 42 (Ks.Ct.App. 2008).

DM-T, in his direct appeal, has not already litigated the issue of his right to a jury trial, nor has the issue been previously determined in his case. The trial record is silent as to whether or not he wanted a jury trial; his attorney did not state his wishes. Whether he is entitled to a jury trial is a claim that has not already been litigated, either.

"It is founded on the principle that the party, or some other party in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. [Citations omitted.]" (Emphasis added.) *Jackson Trak Group, Inc. v. Mid States Port Authority*, 242 Kan. 683 (1988), as cited in *Knowles* at 42. DM-T did not litigate nor have the opportunity to request a jury trial because the Supreme Court had not yet decided this procedure was available in juvenile court proceedings.

Juvenile offender proceedings are essentially criminal trials when the juvenile is charged with an offense that would constitute a felony if committed by an adult. DM-T was charged with rape under K.S.A. 21-3502, a severity level 1 person felony. Since an adult charged with rape would have the right to a trial by jury, DM-T's failure to ask for what he was not then allowed to claim cannot be a determinative factor. The post-trial

court stated that DM-T's failure to advise the trial court of his wish and to include the issue in his direct appeal precluded him from requesting the relief in his post-trial motion. Like the cases dealing with moot issues, his dispute is "capable of repetition, yet evading review". *Davis v. Federal Election Commission, slip op.* #07-320 (2008). DM-T could not fully litigate not receiving a right to a procedure he did not know he could request, and collateral estoppel and double jeopardy prevent his being subject to the same action again.

The district court noted that the defendant did not request a jury trial, and therefore, the Court did not have the opportunity to grant or deny his request, and should not do so post-conviction. To deny defendant a fundamental right such as a trial by jury, as recognized by *In Re L.M.* while defendant's case was not yet final, because the state of the law at the time of his trial would have made his request futile, and now substantially prejudices him. Preservation of constitutional rights cannot depend on whether one is aware of them or not.

II. The district court erred in denying juvenile DM-T a post-*In Re L.M.* jury trial while his state appeal was not final.

> *"The case of State v. Neer (247 Kan. at page 140) is an oft cited ruling that where a claim has not been raised at trial or on direct appeal, that failure prevents a party from raising the claim in a collateral proceeding. ... Prater states that once the appellate court decision is final, the mandate is to be issued and it is determinative of the action and shall control all further proceedings. As the mandate was issued before the L.M. ruling, the Respondent's conviction was formalized." In the Matter of DM-T,* Memorandum Opinion, February 10, 2009, p. 2 (ROA, Vol. I, p. 47).

Standard of review: " ... [A] de novo standard of review applies to the interpretation of case law." [Internal citations omitted]. *Wurtz v. Cedar Ridge Apartments*, 28 K.A.2d 609 (2001) at Syl. ¶ 22.

A. D M-T's direct appeal was not yet final when the Kansas Supreme Court decided In Re L.M.

DM-T's appeal, denied by the Kansas Supreme Court on May 28, 2008, was not yet final for purposes of an appeal to the United States Supreme Court. A conviction is not final until all avenues for appeal have been exhausted and the time past for all such judicial action. *State v. Heath*, 222 Kan. 50, 54 (1977); *State v. Boggs, slip op.* #96,921 (Kan. 2008). The United States Supreme Court allows ninety (90) days from the mandate of the highest state court to file a writ of *certiorari*. "... [A] writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort ... is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." Rule 13.1, Rules of the Supreme Court of the United States (adopted March 14, 2005; effective May 2, 2005); *accord, Bowles v. Russell*, 127 S.Ct. 2360 (2007).

What controls whether a conviction is not yet final is the passage of time for appeal, not whether the defendant actually appeals. "[A] conviction is generally not considered 'final' until (1) the judgment of conviction has been rendered, (2) the availability of an appeal has been exhausted, and (3) the time for any rehearing or final review has passed." *State v. Boggs, slip op.* #96,821 (Kan. 2008). (Emphasis added). The decision's finality is held in abeyance until the time expires for further appeal. Once the appeal time passes, the decision becomes final as of the date of last judicial action.

Therefore, as of July 15, 2008 when DM-T filed for post-conviction relief in light of *In Re L.M.*, his conviction was "not yet final" because the time for final review by the United States Supreme Court had not passed and was still available. The district court's

interpretation of *State v. Neer*, 247 Kan. 137 (1990), *State v. Gunby*,282 Kan. 39 (2006) and *Boggs, supra* to determine that the defendants had raised the issue below should not control. In *Boggs*, the issue was evidence relating to drug use - a matter which has been interpreted by this Court and others - and so presented a substantive base from which to deny or reverse Boggs' conviction if, procedurally, it were not yet final or still pending. The DM-T court only considered the "still pending" language of *Neer*.

Whether a juvenile had a right to a trial by jury had already been adversely determined in *State v. Findlay*, 2235 Kan. 462 (1984) so could not have been raised as a legitimate avenue of appeal by DM-T until *In Re L.M.* was decided - after his bench trial, but while his case was still active. "The law does not require the doing of a useless thing." *State v. Yost*, 232 Kan. 370 (1982) at Syl. ¶ 47. Had *In Re L.M.* been decided after the time for DM-T to have appealed the Kansas Supreme Court denial of his petition for review, his requesting such relief in a post-conviction motion, as with *Conley*, would have been rightfully rejected. But, his request was timely, as he still was within the time to appeal the Kansas Supreme Court denial to the United States Supreme Court.

The State cited *State v. Prater*, 31 K.A.2d 388 (2003) and *Wilson v. State*, 192 P.3d 1121 (Kan. 2008) to support its position that the defendant's case was no longer pending when *In Re L.M.* was decided. Its position was that defendant is collaterally estopped from raising an *In Re L.M.* claim because the May 28, 2008 Petition for Review denial foreclosed any further action (*Prater*), and DM-T's post-mandate motion was untimely (*Wilson*). Both cases are inapposite. Even if the *Prater* time line on determining whether the defendant's

appeal was "final", the mandate gave DM-T another thirty days in which to request further district court action or ninety days in which to prepare a writ of *certiorari.* The *Prater* facts do not parallel this matter, either, with its two separate cases, two appeals, and confusion over a plea withdrawal. *Wilson* involved an inmate direct appeal and K.S.A. 60-1507 motion the timely filing of which was gauged by the finality of Wilson's prior conviction. Wilson's K.S.A. 60-1507 motion was timely filed, but the later amendment was not.

B. Only when the last date expires is the mandate date the final decision date.

Were the state court mandate completely final, appeal to the United States Supreme Court would have been foreclosed. On the ninety-first date, it was. The Kansas Supreme Court mandate was May 28, 2008, giving DM-T until August 26, 2008 in which to file a writ of *certiorari.* Between May 28, 2008 and August 26, 2008, instead, he filed a post-conviction motion with the district court to set aside his conviction and to request a jury trial. Because he filed it before his appeal time expired, his post-trial district court motion was timely. Since DM-T was still within the procedural rule time limit to file a K.S.A. 60-1507 post-conviction motion or a motion to correct an illegal sentence at the time he filed his motion for a jury trial, the district court had the authority to grant his request for a new trial. *In Re L.M.*, decided during that ninety-day window, should have applied to guarantee him the right to a trial by jury of the rape charges.

C.* In Re L.M. *should have applied to afford D M-T a new trial, by jury.

The district court erred in applying the *Neer* line of cases to deny DM-T's motion for a new jury trial based on *In Re L.M.* These cases all involve the doctrine of *res judicata* in

asking an appellate court to apply existing law to the trial court facts. All involve cases where a court is asked to "breathe new life into an appellate issue previously adversely determined" or which could have been raised. *State v. Conley*, 2008-KS-1223.168 at 4 (Kan. 2008).

In *In Re E.F.*, 205 P.3d 787 (Ks.Ct.App. 2009), this Court rejected an argument of equal protection under the Constitution and did not apply *In Re L.M.* to sentencing procedure. "Age is not a suspect classification for equal-protection analysis, so all that's required for a statutory distinction on the basis of a juvenile's age is a rational basis. *Christopher v. State*, 36 K.A.2d 697, Syl. ¶ 12, (2006). The State has established a system for juveniles in extended-jurisdiction proceedings under which the juvenile may gain the benefit of juvenile sentencing statutes rather than being waived to adult court. In return for that benefit, the juvenile must comply with the juvenile sentence or end up serving an adult sentence." *Id.* at 907. However, up until the time of sentencing, Kansas appellate courts most recently have been amenable to granting adult constitutional rights to juveniles.

The State may argue that the right to a jury trial always existed in K.S.A. 38-2347(f)(4), although it was discretionary with the trial court. This was not available to DM-T at his bench trial in 2006. A more enlightened view is that a juvenile's having to rely on counsel requesting his rights is an artifact left over from the *parens patriae* days.

DM-T does not ask this court nor the district court to redetermine the facts. In his post-conviction motion, he merely requested the district court to allow him to assert the

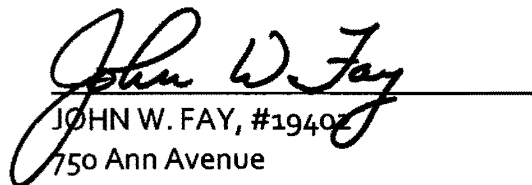
right to a trial by jury, which only became available through *L.M.* He asks that a jury be allowed to determine the facts.

CONCLUSION

Having some rights but not others as a juvenile impairs a fair defense against charges on which conviction will result in bodily restraint. In fairness, a juvenile should be granted all of the constitutional rights extended an adult offender and be required to knowingly and voluntarily waive them to be assured a fair trial rather than have to ask for vital rights such as the Sixth Amendment right to a jury trial.

For all the above reasons, appellant DM-T requests this Court to reverse the district court's denial of his request for a trial by jury.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the Brief of Appellant were mailed, postage prepaid and properly addressed on the 14 day of Aug., 2009, to the following persons, pursuant to Sup.Ct.R. 6.09 and 6.10:

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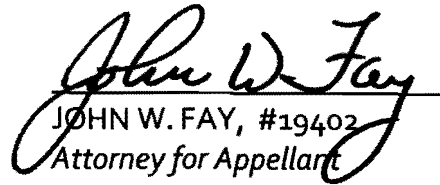

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