

No. 09-102241-A

IN THE COURT OF APPEALS  
OF THE STATE OF KANSAS

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IN THE MATTER OF D.M-T., RESPONDENT

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS  
THE HONORABLE WESLEY K. GRIFFIN, JUDGE  
DISTRICT COURT CASE NUMBER: 04JV1646

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**INDEX**

Nature of Case .....	1
Statement of Issues .....	2
Statement of Facts .....	2-9
Arguments and Authorities .....	3-9
<b>I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT D.M-T. WAIVED HIS RIGHT TO A JURY TRIAL BY FAILING TO REQUEST IT AT THE DISTRICT COURT LEVEL AND IN HIS FIRST APPEAL.....</b>	<b>3</b>
<b>II. THE DISTRICT COURT DID NOT ERR IN DENYING D.M-T.'S REQUEST FOR A POST-L.M. JURY TRIAL AFTER HIS APPEAL WAS FINAL.....</b>	<b>6</b>
<u>In the Matter of L.M.</u> , 286 Kan. 460 (2008).....	2, 6
<u>State v. Bland</u> , 33 Kan. App.2d 412, 415, 103 P. 3d 492 (2004) .....	3
<u>State v. Luna</u> , 28 Kan. App.2d 148, 12 P.3d 911,.....	3, 8
<u>271 Kan. 573, 24 P.3d 125 (2001)</u> .....	3, 8
<u>State v. Neer</u> , 247 Kan. 137, 140, 795 P.2d 362 (1990).....	3
(citing <u>State v. Newman</u> , 235 Kan. 29, 31, 680P.2d 257).....	3
<u>State v. Flores</u> , 283 Kan. 380, 384, 153 P.3d 506 (2007).....	4
<u>State v. Neer</u> , 247 Kan. 137, 795 P.2d 362 (1990).....	5
<u>State v. Neer</u> , 247 Kan. 137, 140-41, 795 P.2d 362 (1990).....	5, 7
<u>State v. Hitt</u> , 273 Kan. 224, 232, 42 P.3d 732b (2002).....	6
<u>In the Matter of L.M.</u> 286 Kan 460, 186 P.3d 164.....	6
<u>State v. Fischer</u> , 288 Kan. 470, 474, 203 P.3d 1269 (2009).....	6
<u>Wurtz v. Cedar Ridge Apartments</u> , 28 Kan.App.2d 609, 611, 18 P.3d 299 (2001).....	6
<u>State v. Boggs</u> , 287 Kan. 298, 306 (2008).....	8
<u>State v. Gunby</u> , 282 Kan. 39, 144 P.3d 647 (2006).....	8
<u>State v. Luna</u> , 271 Kan. 573, 577, 24 P.3d 125 (2001).....	8
citing <u>State v. Mason</u> , 268 Kan. 37, 39, 986 P.2d 387 (1999).....	8
<u>In the Matter of N.J.</u> , 203 P.3d 739, 2009 WL 793115 (2009).....	8
<u>State v. Prater</u> , 31 Kan. App. 2d 388, 65 P.3d 1048 (2003).....	8
<u>In the Matter of L.M.</u> 286 Kan 460, 473-4, 186 P.3d 164 (2008).....	8

K.S.A. 38-2380(a).....	3
K.S.A. 38-2380(b).....	3
K.S.A. 22-3608(c).....	4
K.S.A. 38-1656.....	5
K.S.A. 60-455.....	7
K.S.A. 60-1507.....	8
Conclusion.....	9

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DISTRICT COURT CASE NUMBER: 04JV1646

**NATURE OF THE CASE**

This is an appeal brought by the Juvenile, D.M-T. after the District Court denied his Post Trial Motion to Set aside Judgment and Sentencing.

## STATEMENT OF ISSUES

- I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT D.M-T. WAIVED HIS RIGHT TO A JURY TRIAL BY FAILING TO REQUEST IT AT THE DISTRICT COURT LEVEL AND IN HIS FIRST APPEAL.
- II. THE DISTRICT COURT DID NOT ERR IN DENYING D.M-T.'S REQUEST FOR A POST-L.M. JURY TRIAL AFTER HIS APPEAL WAS FINAL.

## STATEMENT OF FACTS

D.M-T. was adjudicated after a trial to the court of one count of Rape, a Severity Level 1 Person Felony. He appealed this ruling. The issues in the first appeal were sufficiency of the evidence and whether the trial Judge applied the correct burden of proof. The Court of Appeals affirmed the District Court on November 30, 2007. (R.I, 24-28). D.M-T. filed a Petition for Review to the Supreme Court of the State of Kansas on December 31, 2007. This petition was denied on May 28, 2008. The Mandate was issued on May 30, 2008 and received by the Wyandotte County District Court on June 3, 2008. (R.I, 23). On June 20, 2008, the Supreme Court of the State of Kansas ruled that juveniles have a right to a jury trial. In the Matter of L.M., 286 Kan. 460 (2008). On July 15, 2008, D.M-T. filed a Post Trial Motion to Set Aside Judgment and Sentencing. This motion was heard on February 10, 2009 and denied in a Memorandum opinion on February 13, 2009. (R.I, 45-48). On February 18, 2009, D.M-T. filed a Notice of Appeal. (R.I, 49)

## ARGUMENTS AND AUTHORITIES

### I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT D.M-T. WAIVED HIS RIGHT TO A JURY TRIAL BY FAILING TO REQUEST IT AT THE DISTRICT COURT LEVEL AND IN HIS FIRST APPEAL.

“The question of whether a criminal defendant voluntarily waived his right to a jury trial is a question of fact, and, on appeal, this court reviews the record to determine whether substantial competent evidence supported the district court's finding.” State v. Bland, 33 Kan. App.2d 412, 415, 103 P. 3d 492 (2004) quoting State v. Luna, 28 Kan.App.2d 148, 12 P.3d 911, aff'd on other grounds 271 Kan. 573, 24 P.3d 125 (2001).

The State first argues that D.M-T. lacks statutory authority to bring this appeal. K.S.A. 32-2380 in The Revised Kansas Juvenile Justice Code sets forth the orders that are appealable by juveniles. These include Orders authorizing adult or extended jurisdiction juvenile prosecutions (K.S.A. 38-2380(a)) and Orders of adjudgment and sentencing (K.S.A. 38-2380(b)). D.M-T. previously appealed his adjudication pursuant to K.S.A. 38-2380(b). K.S.A. 38-2380 (a) is not applicable in this case. D.M-T did not request a jury trial in the District Court nor in his prior appeal and should not be permitted to raise the issue in a second appeal. “In Kansas, ‘piecemeal appeals are frowned upon.’” State v. Neer, 247 Kan. 137, 140, 795 P.2d 362 (1990) (citing State v. Newman, 235 Kan. 29, 31, 680 P.2d 257).

Under Kansas law, where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived. Where a defendant's claim has not been raised at trial or on direct appeal, such a

default prevents the defendant from raising the claim in a second appeal or a collateral proceeding.

State v. Neer, 247 Kan. 137, 140-41, 795 P.2d 362 (1990).

State v. Flores sets forth the rationale for requiring defendants to timely raising all issues in their first appeal:

Our general rule that defendants must raise all available issues on direct appeal comports with the statutory framework of an appeal. See State v. Neer, 247 Kan. 137, 795 P.2d 362 (1990) (right to appeal entirely statutory and not a right vested in the United States or Kansas Constitutions). K.S.A. 22-3608(c) requires a defendant to appeal within 10 days of the district court's judgment. If an appeal is not taken within that time frame, the appellate court does not acquire jurisdiction to review the district court's judgment. See Neer, 247 Kan. 137, 795 P.2d 362. In like fashion, it makes sense to preclude a defendant from obtaining review of a particular issue when that review is not requested within the statutory 10-day period, notwithstanding the defendant's timely appeal of other issues. State v. Flores, 283 Kan. 380, 384, 153 P.3d 506 (2007).

Since D.M-T. had ample opportunity to request a jury trial at both the trial court level and during his first appeal, he should not be allowed to appeal this issue at this late date and the appeal should be dismissed. However, the issue will be addressed in the event the Court chooses to consider this claim.

At the time D.M-T.'s case was pending and tried in district court, K.S.A. 38-1656 was in effect. This statute stated "In all cases involving offenses committed by a juvenile which, if done by an adult, would make the person liable to be arrested and prosecuted for the commission of a felony, the judge may upon motion, order that the juvenile be afforded a trial by jury." The practice in place in Wyandotte County District Court at the time D.M-T.'s case was pending was to grant a jury trial upon request to any

juvenile charged with a person felony. (R.I, 46). This policy was not a secret and juveniles regularly requested and received jury trials under the policy. D.M-T. was represented by a defense attorney who contracts with the county to regularly represent juvenile offenders. All that was required was an oral request for a jury trial. D.M-T. never requested a jury trial, thus a bench trial was conducted. (R.I, 47). After adjudication and sentencing, D.M-T. appealed. On appeal, D.M-T. did not argue that he should have had a jury trial. The only issues raised on appeal were sufficiency of the evidence and whether the trial Judge applied the correct burden of proof. After the Court of Appeals affirmed the decision of the District Court, D.M-T. filed a Petition for Review to the Kansas Supreme Court which was denied on May 28, 2008 and the Mandate issued on May 30, 2008.

D.M-T. argues that it would have been futile for him to request a jury trial because of the state of the law. However, K.S.A. 38-1656 clearly allowed juveniles to request jury trials in felony cases and the local policy was to grant a jury trial in a case of this nature. Further, L.M.'s request and persistent pursuit of a jury trial did not prove futile, so it is difficult to see how D.M-T. can claim his request would have been an effort in futility.

D.M-T.'s failure to request a jury trial from the trial court and in his direct appeal bars him from raising that issue now. He had ample opportunity to raise the issue before and failed to do so. State v. Neer, 247 Kan. 137, 140-41, 795 P.2d 362 (1990).

D.M-T. argues that he should have been advised of a right to jury trial and asked to waive it on the record. However, at the time his case was pending, Kansas law stated that juveniles did not have a state or federal Constitutional right to a jury trial, but could request

one in felony cases. State v. Hitt provided that juveniles did not have a right to a jury trial, the decision to grant a jury trial was entirely up to the court and was not appealable. 273 Kan. 224, 232, 42 P.3d 732b (2002). This was the state of the law until June 20, 2008 when the Kansas Supreme Court decided In the Matter of L.M. 286 Kan 460, 186 P.3d 164. While D.M-T. did not have a legal right to receive a jury trial prior to the L.M. decision, he could have requested one pursuant to K.S.A. 38-1656 and would have received one. (R., I, 46-47). Instead he opted not to take advantage of the opportunities available to him pursuant to statute and local policy. “The right to a jury trial in juvenile offender proceedings is a new rule of procedure; it does not operate retroactively....This right will apply only to cases pending on direct review or not yet final on the date of filing of this opinion.” In the Matter of L.M. 286 Kan 460, 473-4, 186 P.3d 164 (2008). Since D.M-T.’s case was decided and final prior to June 20, 2008, he did not have a state or federal constitutional jury trial right to waive. As the Kansas Supreme Court stated in State v. Fischer, at the time of his adjudication, D.M-T. “received all of the process [ ]he was due and was afforded all of the constitutional protections then required in such proceedings.” 288 Kan. 470, 474, 203 P.3d 1269 (2009).

**II. THE DISTRICT COURT DID NOT ERR IN DENYING D.M-T.’S REQUEST FOR A POST-L.M. JURY TRIAL AFTER HIS APPEAL WAS FINAL.**

“[A] de novo standard of review applies to the interpretation of case law.” Wurtz v. Cedar Ridge Apartments, 28 Kan.App.2d 609, 611, 18 P.3d 299 (2001).

D.M-T. argues that his appeal was not final at the time the Kansas Supreme Court decided In the Matter of L.M. D.M-T. cites State v. Boggs, as precedent for applying a change in the law to pending cases. 287 Kan. 298, 306 (2008). In Boggs, the Kansas Supreme Court applied the holding in State v. Gunby, which concerned the admissibility of evidence pursuant to K.S.A. 60-455, because Boggs' case was under direct appeal at the time of the Gunby decision. 282 Kan. 39, 144 P.3d 647 (2006). Boggs is distinguishable, however, for two reasons. First, in Boggs, the defendant objected to the K.S.A. 60-455 evidence at trial and raised the issue in his original appeal. The Boggs decision cites seven other cases which were pending on direct appeal at the time of the Gunby decision and to which the Court applied the new rules set forth in Gunby. Boggs, 287 Kan. at 306. As noted in the District Court's memorandum opinion, in all of those cases, the defendant objected to the K.S.A. 60-455 evidence at trial and addressed it in their direct appeal. (R. I, 47). D.M-T. never asked for a jury trial at the trial court level, nor did he raise the issue in his first appeal, thus he waived the right to raise it in a later proceeding. State v. Neer, 247 Kan. 137, 140-41, 795 P.2d 362 (1990).

The second distinction between Boggs and D.M-T.'s case, is that Boggs' appeal was still undecided at the time of the Gunby decision. The Court stated "Although Boggs' trial concluded months before we filed our decision in Gunby, we are currently considering his direct appeal." Boggs, 287 Kan. at 306. D.M-T.'s appeal, on the other hand, had been decided by the Kansas Court of Appeals and affirmed by the Kansas Supreme Court.

In State v. Luna, the defendant sought to withdraw his waiver of jury trial for the first time on appeal. “Where constitutional grounds are asserted for the first time on appeal, they are not properly before the appellate court for review.” State v. Luna, 271 Kan. 573, 577, 24 P.3d 125 (2001) (citing State v. Mason, 268 Kan. 37, 39, 986 P.2d 387 (1999)). The exceptions set forth in Mason do not apply here, thus this matter is not properly before the Court.

D.M-T.’s failure to raise the issue prior to the second appeal also distinguishes this case from In the Matter of N.J., where the court applied the L.M. decision. Unlike D.M-T., N.J. requested and was denied a jury trial by the trial court. N.J.’s appeal was also still pending and undecided at the time of the L.M. decision. 203 P.3d 739, 2009 WL 793115 (2009) (unpublished decision cited for persuasive authority only).

In State v. Prater, the Court held that the defendant’s prior conviction was final once the mandate became part of the judgment of the district court. 31 Kan. App. 2d 388, 65 P.3d 1048 (2003). The mandate in D.M-T.’s case was issued on May 30, 2008 and received by Wyandotte County on June 3, 2008. While Prater dealt with a K.S.A. 60-1507 issue, D.M-T.’s appeal had been decided and should be considered final prior to the decision In the Matter of L.M. on June 20, 2008.

“The right to a jury trial in juvenile offender proceedings is a new rule of procedure; it does not operate retroactively. It does not create a new class of convicted persons.... This right will apply only to cases pending on direct review or not yet final on the date of filing of this opinion.” In the Matter of L.M. 286 Kan 460, 473-4, 186 P.3d 164 (2008). The L.M.

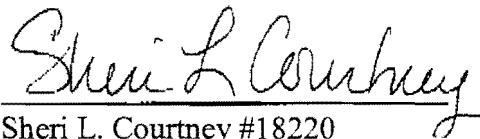
court did not intend its decision to become a remedy for juveniles like D.M-T., who never requested a jury trial and opted for a bench trial but were dissatisfied with the results.

**CONCLUSION**

The State of Kansas respectfully requests that the trial court's findings be affirmed and that all relief be denied.

Respectfully submitted,

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State of Kansas            )  
  )  
County of Leavenworth    )

ss.

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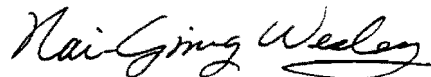
**Brief of Appellee:                No. 09-102241-A  
  In the Interest of: D.M-T.**

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