IN THE

MISSOURI SUPREME COURT

STATE EX REL. T.W.,	)	
	)	
Relator,	)	
	)	Cause No. SC88773
vs.	)	
	)	
THE HONORABLE DAVID MOUTON, CIRCUIT JUDGE, 29TH JUDICIAL CIRCUIT,	)	
	)	
Respondent	)	

ORIGINAL PETITION FOR WRIT OF PROHIBITION IN THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
THE HONORABLE DAVID B. MOUTON, JUDGE

RELATOR'S STATEMENT, BRIEF, AND ARGUMENT IN SUPPORT OF HIS PERMANENT WRIT OF PROHIBITION

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JURISDICTIONAL STATEMENT

The action is one involving Relator's request for an original writ of prohibition, staying proceedings in the underlying cause, *State v. Thomas G. White,* Case No. 06AO-CR02770-01, Circuit Court of Jasper County, on the grounds that Respondent does not have jurisdiction since the proceedings in Juvenile Court are a nullity, due to the fact that Relator received ineffective assistance of counsel, hence jurisdiction lies with this Court pursuant to Missouri Supreme Court Rules 84.22 and 97.01.

No petition for the relief requested has been made to any higher court.

Relief was sought from, and denied by, the Missouri Court of Appeals, Southern District, in Case No. SD28654, on August 22, 2007.

STATEMENT OF FACTS

The underlying charges in this case are Assault in the First Degree (2 counts), Armed Criminal Action, Unlawful Use of a Weapon, and Attempted Escape. (Exhibit W, pp. A679-A682) Relator, who was 13 years old at the time, is alleged to have taken a gun to Memorial Middle School on October 9, 2006. It has further been alleged that Relator fired a bullet into the ceiling of the school and attempted to shoot the school principal, Stephen Gilbreth. (Exhibit W, p. A679) Relator is also charged with attempting to shoot school superintendent Steve Doerr. (Exhibit W, p. A680) Finally, Relator has been charged with attempted escape from the Jasper County Juvenile Detention Center on October 11, 2006. (Exhibit W, p. A679)

Relator's parents retained the services of Attorney at Law, Charles Lonardo that same day. (Exhibit A, p. A5)[1] Although no formal Entry of Appearance was filed, Lonardo formally began representing Relator immediately. (Exhibit a, p. A5)

The juvenile office filed three petitions: 1st Degree Assault; Armed Criminal Action; and, Making a Terrorist Threat. (Exhibit P, pp. A572, A574, A576) On October 11, 2006, the juvenile office filed an additional petition for Attempted Escape. (Exhibit

1 Mr. Lonardo goes through his qualifications and experience in his deposition. (Exhibit A, pp. A3-A5)

P, p. A578) On November 28, April Foulks, a juvenile officer for Jasper County, filed a motion to dismiss the juvenile petition and allow prosecution under general law. (Exhibit V, pp. A668-A675) On that same day, a certification hearing was scheduled for December 6, 2006. (Exhibit P, pp. A573, A574, A576, A578)

Before the hearing, the police interrogated Relator twice. (Exhibit L, pp. A488-A521; Exhibit M, pp. A522-A551) Relator stated that part of his rationale was his low self-esteem and poor grades. (Exhibit L, p. A494, A506, A520-A521; Exhibit M, p. A535, A543-A544, A548, A551) Relator stated he could not improve his grades and got into trouble at home. (Exhibit L, p. A494) Relator was failing four out of six classes. (Exhibit L, p. A507) Relator told the police that he thought about bringing a gun to school a week prior to the alleged incident. (Exhibit L, p. A495, A513, A520) Relator told the police that after he fired the gun he attempted to leave the building. (Exhibit L, p. A498) He added that he also planned to run away after. (Exhibit L, p. A513) The police asked Relator who he was going after and Relator said he wasn't going after anyone. (Exhibit L, p. A499, A506-A507, A514; Exhibit M, p. A535-A536, A538, A539, A548) He said that he just wanted to scare people. (Exhibit L, p. A507, A513, A514, A515; Exhibit M, p. A536, A538, A548) Relator denied that he tried to pull the trigger after the initial shot. (Exhibit L, p. A510; Exhibit M, pp. A533-A534) Other times, Relator insisted he did not remember trying to pull the trigger a second time. (Exhibit M, p.A534, A545-A546) The police continued to question Relator and Relator told them he was telling them what he could remember. (Exhibit L, p. A503; Exhibit M,

p. A530-A532) When asked who he was trying to scare, Relator answered all the teachers. (Exhibit L, p. A514)

Norman Rouse, an assistant prosecutor from the Jasper County Prosecutor's office began participating in the interrogation and, told Relator that Relator was not being honest, stating: "I know I'm being bullshitted. You're bulshitting me and let me tell you something, you won't win." (Exhibit M, p. A538)

Eventually, with the assistance of Relator's attorney, the police got Relator to "admit" to firing the gun more than once. (Exhibit M, pp. A545-A546) However, when asked again if he tried to pull the trigger again, Relator stated he didn't know. (Exhibit M, p. A546)

During the first interrogation, Lonardo simply sat and allowed the police to interrogate Relator. In the second interview, Lonardo actively participated with the police. For example, when Relator told the police it was hard to think about, the police told him he needed to think about it. (Exhibit M, p. A531) Lonardo said, "[d]o so" immediately after. (Exhibit M, p.A531) Later, Relator's attorney questioned Relator if he tried to fire the gun a second time. (Exhibit M, p. A534) Relator said no. (Exhibit M, p. A534) Relator's attorney responded by saying, "[y]ou're telling me you never tried to pull the trigger on that gun, be truthful with me." (Exhibit M, p. A534) Later, the police were asking Relator who he was looking for and Lonardo joined in and asked, "[w]ho

were you gunning for kid?" Still later, Lonardo is strongly advising Relator to be completely candid and adds, "[i]f you think this was cool, get it the hell out of your mind now."

On December 6, 2006, a hearing was held before the Honorable William C. Crawford. (Exhibit E, pp. A47-A224) Charles Lonardo, an attorney in Joplin, Missouri, continued to represent Relator at the hearing. (Exhibit E, pp. A47-A224)

At the hearing, the Juvenile Office presented testimony from the Juvenile Officer, April Foulks (Exhibit E, pp. A53-A90), the school Principal, Steve Gilbreth (Exhibit E, pp. A90-A112), Detective Brady Stuart of the Joplin Police Department, (Exhibit E, pp. A112-A132), Detective Mike Gayman of the Joplin Police Department (Exhibit E, pp. A133-A137), Kimberly Comstock, an employee at the Jasper County Detention Center (Exhibit E, pp. A137-A144), and Jhoseli Pedraza, a friend of Relator (Exhibit E, pp. A145-A152).

Relator presented evidence from Dr. Kevin Whisman, a licensed psychologist, (Exhibit E, pp. A153-A209; A214-A21), Alisha Rodriguez, a fellow church member of Relator's family (Exhibit E, pp. A209-A212), and Phyllis Sanders, another fellow church member of Relator's family. (Exhibit E, pp. A212-A213)

April Foulks testified that Relator brought a gun to school and fired a "warning shot" into the ceiling, damaging the school's cooling system. (Exhibit E, p. A57) She testified that Relator had the intention of actually killing the principal of the school, Steve Gilbreth. (Exhibit E, p. A56) She testified that Relator has no prior experience with the Juvenile Court and that there is no repetitive pattern of delinquent behavior. (Exhibit E, p. A57) She did add that the plan to bring the gun to school was made at least a week prior to the alleged incident. (Exhibit E, p. A58) She testified that that the results of Relator's psychological tests showed Relator to be "age appropriate" and that there was concern regarding his sophistication due to the fact that he liked to play video games with an "M" (Mature) rating. (Exhibit E, p. A59) She added that Relator liked to play with explosives and that he admitted to playing with gun powder "which is not what generally 13 year-old boys do." (Exhibit E, p. A59)

Foulks then testified as to the availability of options in the juvenile system, particularly with regards to the Missouri Division of Youth Services (DYS). (Exhibit E, pp. A61-A63) She testified that if Relator was committed to DYS, he would "probably" be sent to Mt. Vernon. (Exhibit E, p. A62) She testified that she had concerns that Relator would be back in the community within a short period of time. (Exhibit E, p. A63) She states that in other serious offenses involving children with weapons, the children have been back into the community within six months. (Exhibit E, p. A63)

Foulks then testified that within 48 hours of the alleged incident, she was able to meet with the Jasper County Prosecutor and they came across the dual jurisdiction program.[2] (Exhibit E, p. A63) This is a secure facility in Montgomery City where Relator would be housed with other juveniles. (Exhibit E, p. A64) The attorney for the juvenile office, Joe Hensley, then asked the Juvenile Court to admit the juvenile officer's report into evidence. (Exhibit E, p. A67) The report was admitted with no objection. (Exhibit E, p. A67) Foulks' report gives a timeline of events that starts in May, 2006 and ends with the alleged events of October 9, 2006. (Exhibit E, pp. A676-A678) In particular, the report states that the principal, Steve Gilbreth, stated that Relator "tried many times to pull the trigger." (Exhibit V, p. A677) The report also states that Relator tried to escape from the juvenile detention center. (Exhibit V, p. A677) The report does not discuss any efforts made to find a suitable placement for Relator in the juvenile system. (Exhibit V, pp. A676-A678)

On cross-examination, Relator's attorney asked the juvenile officer if it was true that Relator could be committed to DYS until he was 18. (Exhibit E, p. A69) The juvenile officer testified that this was a possibility. (Exhibit E, p. A69) She added that once a juvenile is committed to DYS, only DYS has a say as to when a juvenile is released into the community. (Exhibit E, p. A69) Even the judge does not have any say. (Exhibit E, p. A69) Foulks then testified, *without objection*, about a juvenile who had been committed to DYS until the age of 18, but was released into the community despite the

2 § 211.073 RSMo.

request of the Sheriff's department. (Exhibit E, pp. A69-70) Ms. Foulks added that the programs of DYS last only a year. (Exhibit E, p. A71)

Later on in the cross examination, Lonardo questioned Foulks regarding the alleged attempted escape and after confirming that Relator did not escape, asked if he realistically could have escaped. (Exhibit E, pp. A76-A78) Foulks agreed that Relator did not escape but testified that she believed it was possible for Relator to have escaped. (Exhibit E, p. A78)

Later in the cross-examination, Lonardo questioned Foulks about Relator's "fascination" with war (video) games and explosives and how this fascination is more similar to that of an adult. (Exhibit E, p. A79) Foulks testified that the games, because of their rating, are not appropriate for his age. (Exhibit E, p. A79) She also testified that, based on her experience as a juvenile officer, former police officer, and parent, Relator's fascination with gun powder was not typical for a juvenile his age. (Exhibit E, pp. A79-A80) All of this testimony was given without any objection from Lonardo.

Foulks also testified that she consulted with Dr. Whisman about these issues before she put the information about video games and gun powder in her motion. (Exhibit E, p. A82) Finally, Lonardo questioned Foulks about Relator's sophistication. (Exhibit E, p. A86) She testified that she sees Relator as an average boy – a 13 year old boy who is about to turn 14. (Exhibit E, p. A86)

The next witness that testified for the juvenile office was the school principal, Steve Gilbreth. (Exhibit E, pp. A90-A112) On direct examination, he testified as to the chronology of events. (Exhibit E, pp. A91-A94; A96-A102) Also, he testified that although he knew Relator was a student, he had had no significant interactions with Relator. (Exhibit E, p. A95) Mr. Gilbreth testified that when he confronted Relator, his hand was on the trigger and he was making forward motions with the gun. (Exhibit E, pp. A96-A97) When asked if he was pulling the trigger, Mr. Gilbreth testified "I'm assuming that he was." (Exhibit E, p. A98) Mr. Gilbreth then testified that he continued to encourage Relator to leave the school as he (Gilbreth) followed him around. (Exhibit E, pp. A98-A101) Again, Mr. Gilbreth was asked if Relator was pulling the trigger at this point. (Exhibit E, p. A102) He testified, "He was making a gesture like that's what he was doing. I mean he was, yeah." (Exhibit E, p. A102) Mr. Gilbreth then went on to testify, without objection, about the impact the incident had on other teachers, including one account of a teacher who stated she would retire at the end of the year and how one became very upset when another student mimicked the sound of a gun firing. (Exhibit E, pp. A102-A103)

Upon cross-examination, Mr. Gilbreth was asked, "Did you notice at all that he was trying to pull the trigger on the gun?" (Exhibit E, p. A104) Mr. Gilbreth responded, "In my mind I knew that –I mean I wouldn't state that I knew absolutely that he was trying to discharge the weapon, but he was making gestures." (Exhibit E, p. A104)

Later on in the hearing, Detective Michael Gayman[3] testified that Relator told him in the walkthrough he was trying to pull the trigger when the gun was pointed at the principal, Steve Gilbreth. (Exhibit E, p. A134) He also testified that his belief that Relator was trying to pull the trigger is solely based on what Relator told him during the walk-through. (Exhibit E, p. A135)

The next witness was Kimberly Comstock, a staff worker at the Jasper County Juvenile Detention Center. (Exhibit E, p. A138) She testified that she heard Relator make the comment, "I would have shot him in the head but my fuckin' gun wouldn't shoot." (Exhibit E, p. A140)

The last witness to testify for the juvenile office was a classmate of Relator named Jhoseli Pedraza. (Exhibit E, pp. A145-A152)

Relator's attorney also presented evidence. The main witness was Dr. Kevin Whisman, a licensed psychologist. (Exhibit E, p. A153) Dr. Whisman testified to a number of issues, though he never specifically states that Relator was not dangerous, that he could be rehabilitated, and that he did not appreciate the nature of his actions. (See Exhibit S, p. A462) He did testify that he believed Relator's motivation for the alleged incident to be that he wanted to be expelled from school. (Exhibit E, p. A197) He also testified that Relator's comment regarding wanting to shoot the principal and would have

3 The transcript spells his name Gammon. This is a misspelling.

but for the gun jamming was likely made to "establish his order. To fit in." (Exhibit E, p. A215)

Regarding Relator's cognitive abilities, Dr. Whisman testified that Relator's score on the processing speed scale was in the retarded range. (Exhibit E, p. A174) Dr. Whisman testified that Relator's reading fluency was at the seventh percentile. (Exhibit E, p. A178) He did state that he felt Thomas did not have the same level of maturity as he has seen in other juveniles, particularly in regard to his cognitive abilities. (Exhibit E, p. A166)

Dr. Whisman testified he never had a conversation with Relator regarding explosives but did about video games. (Exhibit E, p. A171) When asked if his fascination with 'M' rated video games was similar to that of an adult, Dr. Whisman testified, "I don't know if I could say that." (Exhibit E, p. A171) Dr. Whisman also testified that he never talked with Relator about gun powder and that he does not recall discussing explosives with Foulks. (Exhibit E, p. A172)

At the end of the hearing, Judge Crawford announced that he was going to certify Relator. (Exhibit E, p. A223) In particular, Judge Crawford pointed out that the Juvenile Court is not required to give equal weight to each of the listed factors and also that the Juvenile Court is not required to make an express finding on each one. (Exhibit E, pp. A218-A219) Further, Judge Crawford pointed out that the case law specifically indicates that the serious nature of the offense is the dominant criterion. (Exhibit E, p. A219)

Judge Crawford went on to say that the evidence showed that Relator did attempt to kill the principal Steve Gilbreth, and did make several attempts to pull the trigger. (Exhibit E, p. A221) Judge Crawford also stated he had probable cause to believe that Relator had the intention of harming other students. (Exhibit E, p. A221)

He later added that there are not tools within the juvenile justice system to deal with the violence demonstrated in this case. (Exhibit E, p. A222) Next, he stated that the evidence showed the incident had traumatized other students and faculty. (Exhibit E, p. A221) Finally, Judge Crawford states that Relator could not benefit from any programs available to Relator in the juvenile justice system. (Exhibit E, p. A223) Judge Crawford, concluded that, based on the evidence presented, rehabilitation seemed impossible and that certification was necessary to protect the community. He dismissed the four juvenile petitions and certified Relator to be prosecuted under the general law. (Exhibit K, pp. A480-A487) On the same day, the Jasper County Prosecutor filed a complaint on three charges: 1st Degree Assault; Armed Criminal Action; and, Attempted Escape. (Exhibit N, p. A556) Relator made his initial appearance in adult court on December 14, 2006. (Exhibit N, p. A555) On January 3, 2007, the Honorable Richard Copeland set a preliminary hearing for January 17, 2007. (Exhibit N, p. A555)

Two days later, Relator, now represented by the Public Defender's Office, filed a motion for change of judge pursuant to rule 32.06, and the case was transferred to the Honorable Joseph Schoeberl. (Exhibit N, pp. A554-A555) On January 9, 2007, the

Prosecutor also filed for a change of judge and the case was transferred to the Honorable Stephen Carlton on January 10, 2007. (Exhibit N, p. A554)

On January 10, 2007, Relator filed a Motion to Declare § 211.071 RSMo. Unconstitutional and Remand Case to Juvenile Court. (Exhibit N, p. A554) On January 11, 2007, Relator filed a Motion to Disqualify the Jasper County Prosecutor's office and appoint a Special Prosecutor. (Exhibit N, p. A554)

On January 30, 2007, a hearing was set for January 31, 2007 in front of Judge Carlton. (Exhibit N, p. A554) At this hearing, Judge Carlton set a preliminary hearing for February 26, 2007. (Exhibit N, p. A554) [4]

On February 26, 2007, the State filed two additional charges: 1st Degree Assault and Unlawful Use of a Weapon, counts four and five respectively. (Exhibit N, p. A553; A556) and the preliminary hearing was rescheduled for March 5, 2007. (Exhibit N, p. A553) On February 26, 2007, the Missouri Court of Appeals, Southern District, denied Relator's petition for a Writ of Prohibition in case SD28298. (Exhibit N, p. A553) On March 5, 2007, this Court declined Relator's petition for a Writ of Prohibition in case SC88350. (Exhibit N, p. A552) These petitions focused primarily on the constitutionality

4 The record is silent on this part, but counsel can attest that Judge Carlton did not feel he had the authority to rule on the motion to remand or to disqualify the prosecutor.

of certification per se and the constitutionality of § 211.071 RSMo. In addition, the preliminary hearing was held and Relator was bound over on all five counts and his case was assigned to Respondent. (Exhibit N, p. A552)

On March 9, Relator was arraigned in front of Respondent. (Exhibit O, p. A570) Relator filed an objection to the information filed by the Jasper County Prosecuting Attorney's office. (Exhibit O, p. A570) A motion hearing was set for March 23, 2007 and was then rescheduled for April 20, 2007. (Exhibit O, pp. A569-A570) On April 20, 2007 a hearing to remand the case to Juvenile Court was set for June 15, 2007. On June 8, 2007, Relator filed a Second Amended Objection to the Information. (Exhibit F, pp. A225-A292) On June 14, 2007, the State filed a response to the objection to the information. (Exhibit Y, pp. A684-A685) On June 15, 2007, a hearing was held on the issue to remand. (Exhibit G, pp. A293-A386) Respondent allowed Relator to present testimony from Vince Hillyer, the President of Boys and Girls Town of Missouri (BGTM). (Exhibit G, pp. A305-A322) In addition to being the President of BGTM, Mr. Hillyer is a licensed clinical therapist with a Masters Degree in Social Work. (Exhibit G, p. A307) In both his capacity as a social worker and as the President of BGTM, Mr. Hillyer testified that he had reviewed Relator's application and had met with Relator, and decided to accept him. (Exhibit G, pp. A308-A309) Relator can stay at BGTM until he

is 21.[5] (Exhibit G, p. A313) Mr. Hillyer also testified that he "didn't see Relator as child beyond reproach" and is "extremely amenable to treatment." (Exhibit G, p. A311) Mr. Hillyer testified that BGTM is a suitable facility for Relator. (Exhibit G, pp. A311-312) He did testify that it wasn't a secured facility but it was in a rural area. (Exhibit G, p. A312) He also testified that the buildings are locked. (Exhibit G, p. A312)

Mr. Hillyer then testified that BGTM is accredited by the Missouri Division of Youth Services (DYS) and that BGTM has the only contract with DYS for juveniles adjudicated in Juvenile Court. (Exhibit G, p. A312) He testified that at any given time, there are 20 to 30 juveniles at BGTM who are in the custody of DYS. (Exhibit G, p. A313) He also testified that Relator could attend DYS first and then attend BGTM. (Exhibit G, p. A313) Mr. Hillyer testified that BGTM has successfully treated juveniles who have brought guns to school. (Exhibit G, p. A314) Mr. Hillyer then gave a specific example in which someone was actually hurt and how this juvenile has been successful. (Exhibit G, p. A316) Mr. Hillyer lives on the BGTM campus and does not believe Relator to have a violent nature that would put his own children at risk. (Exhibit G, p. A314) Mr. Hillyer testified that juveniles can be held accountable for their actions without being given a criminal record. (Exhibit G, p. A315)

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5 § 211.041 RSMo. allows a juvenile under the juvenile court's jurisdiction to remain there until he reaches the age of 21.

The State then questioned Mr. Hillyer. (Exhibit G, pp. A316-321) It asked if Mr. Hillyer was aware of the allegation of attempted escape. (Exhibit G, pp. A317-318) Mr. Hillyer said he was. (Exhibit G, p. A318) The State then asked if he was aware that Relator was not asserting that he had a mental disease or defect that affected his mental state. (Exhibit G, p. A318) Mr. Hillyer said that he was not. (Exhibit G, p. A318) The State asked if that had any bearing on his decision. (Exhibit G, p. A318) Mr. Hillyer said that it did not. (Exhibit G, p. A318) The Court then asked Relator's attorney to ask Mr. Hillyer about whether Relator could attend BGTM if he had a felony. (Exhibit G, p. A321) Mr. Hillyer said he could with a court order. (Exhibit A, pp. 321-322) The hearing was then deferred until the afternoon. (Exhibit G, p. A322)

In the afternoon, Respondent stated that he did not feel that Mr. Hillyer's testimony was relevant and required Relator to argue the Second Amended Objection to the Information and to make an offer of proof as to what Relator's other witnesses would say, so the Court could determine if the testimony of any further witnesses was relevant. (Exhibit G, pp. A324-A325)

Relator then made his offer of proof by paraphrasing from the Second Amended Objection to the Information. (Exhibit F, pp. A225-A292.; (Exhibit G, pp. A325-370) Included were the allegations of Mr. Lonardo's ineffective assistance of counsel. (Exhibit, pp. A354-A360) He also paraphrased what he believed Dr. Whisman, Dr. Stephen Peterson, and Sue Kidd what have testified to. (Exhibit G, pp. A329-A330;

A334-A335; A356-A358) At the end of this hearing, Respondent gave Relator three more weeks to come up with any additional arguments. (Exhibit G, p. A385)

On July 6, 2007, Relator filed these additional arguments (Exhibit H, pp. A387-A407) and requested a continuance to depose certain witnesses he had intended to present on June 15, 2007. (Exhibit I, pp. A437-A438) This was granted (Exhibit O, A438). Relator deposed three witnesses: 1) Charles Lonardo, Relator's attorney in Juvenile Court; (Exhibit A, pp. A1-A23) 2) Sue Kidd, the Service Coordinator Supervisor for DYS; (Exhibit B, pp. A24-A32); and 3) Kimberly Comstock, a staff member in the Jasper County Juvenile Detention Center. (Exhibit C, pp. A33-A44).

During his deposition, Charles Lonardo, whose practice typically focuses on bankruptcy, family law – divorce, adoption, juvenile status - admits that this was his first certification hearing but that he did little, if any, research on the case law, nor did he review all of the relevant statutes. (Exhibit A, p. A5) He stated that he was not familiar with *Kent v. United States*, 383 U.S. 541 (1966) and though he had read *In re Gault*, 387 U.S. 1 (1967), in law school, he did not review it while representing Relator. (Exhibit A, P. A5) He believed that all of the statutory factors had to be considered by the Juvenile Court judge and that they all had equal weight. (Exhibit A, p. A12) He also stated that he thought all that was necessary was to show, by a preponderance of the factors, that certification was not appropriate. (Exhibit A, p. A6 & A12) In addition, he focused on Relator's lack of sophistication and maturity. (Exhibit A, p. A9) Also, he stated that he

wanted to show the Court that Relator was not a danger, was likely to not reoffend, and could be rehabilitated. (Exhibit A, p. A10)

He stated that he thought that since this was a juvenile hearing, all evidence was admissible. (Exhibit A, p. A14) He also stated that he believed that a certification order was a final order for purposes of appeal. (Exhibit A, p. A6) He also acknowledged that he did not investigate alternatives to certification and never thought about it. (Exhibit A, p. A9) He stated he did call a DYS representative to testify regarding its programs since he did not think of it and that he had a "hunch" as to what a DYS representative would have said. (Exhibit A, p. A14) In addition, he stated it was his experience that juveniles committed to DYS were back in the community within a year. (Exhibit A, p. A8) Mr. Lonardo stated that he was not aware if Relator's case was a case where it would be possible for him to remain in DYS custody until he is 21. (Exhibit A, p. A8) Mr. Lonardo also stated that the facts of this case have never been in dispute and that he allowed his client to make statements about the incident without any kind of agreement in place. (Exhibit A, pp. A7-8; p. A14) He stated that he did not think Norman Rouse's treatment of Relator was inappropriate and that is what he would have done. (Exhibit A, p. A14) Mr. Lonardo also stated that he was a product of his upbringing and that he believed you have to confront kids when they are in trouble, and that is what he felt Norman Rouse was doing. (Exhibit A, p. A14) Mr. Lonardo also reiterated that the facts were not in dispute. (Exhibit A, p. A14) Finally, Mr. Lonardo stated he did not believe the interrogation led to a false confession. (Exhibit A, p. A15)

The next person to be deposed was Sue Kidd, a Service Coordinator Supervisor for DYS. (Exhibit B, pp. A24-A32) She has worked for DYS for over nine years. (Exhibit B, p. A26) Her position involves overseeing the treatment plan for juveniles committed to DYS. (Exhibit B, p. A27) Ms. Kidd stated that a juvenile can remain in DYS until his 18th birthday and if DYS petitions the Court, and the Court agrees, DYS may keep a juvenile in its custody until his 21st birthday. (Exhibit B, p. A27) Ms. Kidd stated that the safety of the community is a high priority for DYS. (Exhibit B, p. A27) DYS will not allow a juvenile it considers dangerous to be released into the community. (Exhibit B, p. A27) If a juvenile is approaching his 18th birthday and DYS considers him to be dangerous, DYS (through its legal services) will petition the Court to allow the juvenile to remain in its custody for a specific period of time. (Exhibit B, p. A27) Ms. Kidd stated that if a judge orders a juvenile whom he commits to DYS to be held in residential placement until he is 18, then DYS is obligated to follow the order. (Exhibit B, p. A27) If the judge, who has ordered a juvenile to be committed to DYS, states in that order that a hearing be held before a juvenile is released into the community, DYS would be obligated to follow that order. (Exhibit B, p. A27) She also stated that there is no set period for how long a juvenile is kept in residential placement. (Exhibit B, pp. A27-A28) He is there for however long he needs to be, whether it's three months or three years. (Exhibit B, p. A28) Ms. Kidd was specifically asked, "[s]o it isn't accurate to say your residential programs last a year? " (Exhibit B, p. A28) Her answer was, "[t]hat's not accurate, no." (Exhibit B, p. A28) Ms. Kidd also stated that DYS contracts out to other facilities such as BGTM. (Exhibit B, p. A28) Finally, Ms. Kidd stated that DYS has

successfully handled cases of juveniles who have committed serious offenses against people that have caused concern in the community. (Exhibit B, p. A28)

On July 20, 2007, a hearing was held where Relator argued he had received ineffective assistance of counsel from his attorney in Juvenile Court. (Exhibit J, pp. A440-A479)[6] On July 23, 2007, Respondent overruled Relator's Second Amended Objection to the Information. (Docket Entry, pp. A754-A756) On August 15, 2007, Relator filed a Petition for a Writ of Prohibition with the Missouri Court of Appeals, Southern District, which they denied on August 22, 2007. (Exhibit X, p. A683) A petition was filed with this Court and was granted on November 7, 2007.

6 The transcript gives the date of July 22, 2007. This is a typo.

POINTS RELIED ON

I. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that Respondent, the Honorable David B. Mouton, take no further action in Jasper County Case No. 06AO-CR02770-01 or that he sustain Relator's *Second Amended Objection to the Information* because Respondent would act in excess of his jurisdiction if he were to allow the State to prosecute Relator under the general law in that, jurisdiction was not transferred from Juvenile Court because Relator received ineffective assistance of counsel in the Juvenile Court proceedings.

Kent v. United States, **383 U.S. 541, 553-554 (1966)**

State ex rel. T.J.H. v. Bills, **504 S.W.2d 76, 79-81 (Mo. banc 1974)**

Strickland v. Washington, **466 U.S. 668, 687-688 (1984)**

Hufford v. State, **201 S.W.3d 533, 537-538 (Mo. App. S.D. 2006)**

Section 211.071, RSMo. (2000)

Section 219.021, RSMo. (2000)

Section 211.211, RSMo. (2000)

U.S. Const. Amendment 6

U.S. Const. Amendment 14

Mo. Const. Article I, § 18(a)

Missouri Supreme Court Rule 4-1.1

Missouri Supreme Court Rule 116

II. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that Respondent, the Honorable David B. Mouton, take no further action in Jasper County Case No. 06AO-CR02770-01 or that he sustain Relator's *Second Amended Objection to the Information* in that even if jurisdiction was appropriately transferred, Respondent abused his discretion to such an extent that he lacked the authority to overrule Relator's motion because (1) his ruling that Relator received due process, as required by the United States Supreme Court in *Kent v. United States,* 383 U.S. 541 (1966) is refuted by overwhelming and uncontroverted evidence; (2) his ruling that he is not convinced the result in juvenile court would be any different with all of Relator's evidence misapplies the law; and, (3) public policy and fundamental fairness requires remand.

***Kent v. United States,* 383 U.S. 541, 554 (1966)**

***McKeiver v. Pennsylvania,* 403 U.S. 528, 543 (1971)**

***State ex rel. T.J.H v. Bills,* 504 S.W.2d 76 (Mo. banc 1974)**

***Wibberg v. State,* 957 S.W.2d 504, 506 (Mo. App. W.D. 1997)**

III. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that Respondent, the Honorable David B. Mouton, take no further action in Jasper County Case No. 06AO-CR02770-01 or that he sustain Relator's *Second Amended Objection to the Information* in that Relator will be caused irreparable harm not capable of remedy by appeal in that he will: (1) be deprived of the services of the Juvenile Court for two or three years; (2) have limited access to the services of the Juvenile Court due to the fact that he will be 17 or 18 by the time the appeal process runs its course; and, (3) have endured unwarranted delay and expense as he will have already gone through the adult proceedings and been incarcerated in prison.

***In re T.J.H.*, 497 S.W.2d 433, 434 (Mo. banc 1972)**

***Kent v. United States,* 383 U.S. 541, 554 (1966)**

***State ex rel. D.C. v. Mcshane,* 136 S.W.3d 67, 71 (Mo. banc. 2004)**

***State ex rel. T.J.H. v. Bills,* 504 S.W.2d 76, 79-81 (Mo. banc 1974)**

Section 211.073, RSMo. (2000)

U.S. Const. Amendment 5

U.S. Const. Amendment 14

Mo. Const. Article I, § 10

Missouri Supreme Court Rule 29.15

IV. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Honorable David. B. Mouton, take no further action in Count III of the Information, or that he dismiss Count III, because he lacks jurisdiction over the charge in that under the specific facts of this case, Attempted Escape can only be charged as a misdemeanor.

Brown v. State, **33 S.W.3d 676, 678 (Mo. App. S.D. 2000)**

In the Interest of J.S., **648 S.W2d 634, 635 (Mo. App. E.D. 1983)**

State v. Graham, **204 S.W.3d 655, 656 (Mo. banc 2006)**

State v. Lewis, **188 S.W.3d 483, 486 (Mo. App. W.D. 2006)**

Section 575.200, RSMo. (2000)

Section 211.071, RSMo. (2000)

Mo. Const., Article I, Section 10

U.S. Const., Amendment 5

U.S. Const., Amendment 14

V. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Honorable David. B. Mouton, take no further action in Counts IV and V of the Information, or that he dismiss Counts IV and V, because he has no jurisdiction over the charges in that Relator was not specifically certified on these charges.

Richardson v. State, **555 S.W.2d 83, 85-87 (Mo. App. KC District 1977)**

State ex rel. D—V—v. Cook, **495 S.W.2d 127, 129 (Mo. App. KC District 1973)**

State v. K.J., **97 S.W.3d 543, 544-547 (Mo. App. W.D. 2003)**

State v. Thompson, **502 S.W.2d 359, 363 (Mo. 1973)**

Mo. Const., Article I, Section 10

U.S. Const., Amendment 5

U.S. Const., Amendment 14

ARGUMENT

I. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that Respondent, the Honorable David B. Mouton, take no further action in Jasper County Case No. 06AO-CR02770-01 or that he sustain Relator's *Second Amended Objection to the Information* because Respondent would act in excess of his jurisdiction if he were to allow the State to prosecute Relator under the general law in that, jurisdiction was not transferred from Juvenile Court because Relator received ineffective assistance of counsel in the Juvenile Court proceedings.

A writ of prohibition is appropriately granted when: " 1) the trial court exceeds its personal or subject matter jurisdiction; 2) the trial court exceeds its jurisdiction or abuses its discretion to such an extent that it lacks the power to act as it did; or 3) there is no adequate remedy by appeal for the party seeking the writ and the 'aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision [of the lower court].'" *State ex rel. D.C. v. McShane,* 136 S.W.3d 67, 71 (Mo. banc 2004) (quoting *State ex rel. Chassaing v. Mummert,* 887 S.W.2d 573, 577 (Mo. banc 1994). Similarly, a writ of mandamus is appropriate if the Relator has a clear and specific right to the relief requested and there is no adequate remedy at law. *State ex rel. Westfall v. Crandall,* 610 S.W.2d 45, 45 (Mo. App. E.D. 1980). The writ will lie "to compel a court to do that which it is obligated by law to do...." *State ex rel. Svejda v. Roldan,* 88 S.W.3d

531, 532 (Mo. App. W.D. 2002); *State ex rel. Schnuck Markets Inc. v. Koehr,* 859 S.W.2d 696, 698 (Mo. banc 1993).

The primary issue before this Court is whether jurisdiction was properly transferred from the Juvenile Court to one of general jurisdiction. Both the United States Supreme Court and this Court have held that certification proceedings are "critically important" and, for jurisdiction to be properly transferred, a certification hearing must "satisfy the basic requirements of due process and fairness." *Kent v. United States,* 383 US 541, 553 (1966); *State ex rel. D.C. v. McShane,* 136 S.W.3d at 71 (Mo. banc 2004). Due process is satisfied only if the juvenile receives: (1) a hearing; (2) representation by effective counsel; and, (3) a statement of reasons explaining why he has been certified. *Id.* at 561; *Id.;*[7] *State ex rel. T.J.H. v. Bills,* 504 S.W.2d 76, 80 (Mo. banc 1974). All three *must* be met or the transfer will be held invalid. The transfer in *Kent* was held invalid because there was no hearing and no statement of reasons. *Id.* at 554. The transfer in *Bills* was held invalid because there was no statement of reasons. *Id.* at 79. This case, in which Relator maintains that the transfer is invalid because his Juvenile Court attorney's representation was ineffective, is a logical corollary to the rules established in *Kent* and *Bills.*

7 The Court in *D.C.* did not specifically use the word "effective;" nevertheless, this Court has specifically ruled that the right to counsel includes the right to effective counsel. *Ervin v. State,* 80 S.W.3d 817, 821 (Mo. banc 2002).

Relator respectfully submits that the ineffectiveness of his Juvenile counsel is a more significant constitutional violation of due process and fundamental fairness than the absence of a statement of reasons on a certification order. Thus, if the absence of a statement of reasons is a due process violation such that it prevents the transfer of jurisdiction from the Juvenile Court to one of general jurisdiction, then the ineffective assistance of counsel demonstrated by Relator's counsel in the Juvenile Court proceedings is one as well.

Juveniles are entitled to counsel during certification hearings. § 211.211 RSMo; Missouri Supreme Court Rule 116. That right of necessity encompasses the right to *effective assistance* of counsel. *Ervin v. State,* 80 S.W.3d 817, 821 (Mo. banc 2002). U.S. Const., Amends VI, XIV; Mo. Const., Art. I, §18(a). In *Kent, supra* at 544, and in *Bills, supra* at 80, it has been clearly established that there is "no place in our system of law" for certifying a juvenile who has been denied the effective assistance of counsel. If the attorney representing the juvenile at a certification hearing is not required to provide effective assistance, the right to counsel is an "empty formality." *State ex rel. Reed v. Frawley,* 59 S.W.3d 496, 499 (Mo. banc 2001). Thus, Relator respectfully submits that if this Court does not grant Relator the requested relief, a juvenile's right to effective assistance of counsel is meaningless.

In *State v. Hall*, 982 S.W.2d 675, 680 (Mo. banc 1998) (citing *Strickland v. Washington*, 466 US 668, 687-688 (1984)), this Court held that, to establish ineffective assistance of counsel, a litigant had to show that: (1) counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney; and, (2) the litigant was prejudiced by this representation. The litigant must satisfy both prongs. *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997).

To show deficient performance, courts are to assess performance based on "objective standards of reasonableness." *Strickland v. Washington*, 466 U.S. at 688. This standard is based on "prevailing professional norms." *Id.* "'Prevailing norms of practice as reflected in American Bar Association standards and the like…are guides to determining what is reasonable.'" *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)(quoting *Strickland v. Washington*, 466 U.S. at 688-689).

In order to show prejudice, the litigant must show that, but for counsel's poor performance, a reasonable probability exists that the result would have been different. *State v. Hall*, 982 S.W.2d at 680. The litigant, however, "'need not establish that the attorney's deficient performance more likely than not altered the outcome to establish prejudice.'" *Glass v. State*, 227 S.W.3d 463, 468 (Mo. banc 2007)(quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)). Instead, a reasonable probability is one that undermines confidence in the outcome. *Id.*

The issue in a certification hearing, however, is different from a criminal trial. It is not whether the juvenile is innocent or guilty. Rather, it is whether the juvenile can be rehabilitated. See *State v. Simpson*, 836 S.W.2d 75, 82 (Mo. App. S.D. 1992). § 211.071.4 RSMo. A juvenile is certified "to protect the public in those cases where rehabilitation appears impossible." *In the Interest of R.L.C., Jr.*, 967 S.W.2d 674, 678 (Mo. App. S.D. 1998). The Juvenile Court is to consider all evidence, whether it supports certification or supports keeping the juvenile in the juvenile system. *State v. Perry*, 954 S.W.2d 554, 567 (Mo. App. S.D. 1997). Thus, the issue is not whether there is "enough" evidence to certify him. Instead, the issue is whether the Juvenile Court should, *given the totality of the circumstances*, remove a child from the protections of the juvenile system and allow him to be prosecuted under the general law.

Relator acknowledges the presumption that he received effective assistance of counsel and that reasonable trial strategies are not grounds for a claim of ineffective assistance of counsel. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006). This presumption, however, can be overcome by showing counsel's performance fell below an objective standard. *Id.* To do this, Relator must identify counsel's specific acts or omissions. *Id.*

A. Relator's Juvenile Court Attorney's Performance Did not Conform to the Degree of Skill, Care and Diligence of a Reasonably Competent Attorney

Rule 4-1.1 of the Missouri Rules of Professional Conduct requires an attorney to provide competent representation. "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Id.*

Relator's Juvenile Court attorney, Lonardo, admitted that, although Relator's was his first certification hearing, he did little, if any, case law research. (Exhibit A, p. A5) Further, he did not review any of the relevant statutes regarding DYS placement and thus was not aware that it is possible for DYS to keep Relator in its custody until he is 21. §219.021 RSMo. (Exhibit A, p. A5 & p. A8) As a result, he thought that the judge had to consider all of the statutory factors and that they all had equal weight. (Exhibit A, p. A12) He therefore did not know that the seriousness of the offense is the dominant criterion. *State v. Thomas,* 70 S.W.3d 496, 504 (Mo. App. E.D. 2002)(citing *State v. Seidel,* 764 S.W.2d 517, 519 (Mo. App. S.D. 1989)). Further, he did not know the legal standard for certifying a juvenile was protecting the community where rehabilitation seems impossible. *R.L.C., Jr.*, 967 S.W.2d at 678. Instead, he believed that he only had to show, by a preponderance of the factors, that certification was not appropriate. (Exhibit A, p. A6 & A12) He was either unaware of or ignored the plain language of §211.071

RSMo.[8] Moreover, he thought that since this was a juvenile hearing, all evidence was admissible. (Exhibit A, p. A14) As will be discussed, *infra*, this resulted in the Juvenile Court hearing testimony that was irrelevant, hearsay, lacked foundation, and violated Relator's right to confrontation.

Finally, Relator's Juvenile Court attorney failed to investigate any alternatives to certification (Exhibit A, p. A9), and failed to call a DYS representative because he did not think of it since he had a "hunch" as to what a representative would say. (Exhibit A, p. A14)

Relator's Juvenile Court attorney's performance was objectively unreasonable. He did no research, little investigation, and relied upon his own faulty belief of the state of the law. By showing that Relator's Juvenile Court attorney did not know the law, Relator has rebutted the presumption that his attorney was competent. By showing that he did not research the law, Relator has shown that his attorney's performance did not conform to the degree of skill, care and diligence of a reasonably competent attorney. Relator respectfully submits that he has met the first prong for an ineffective assistance of counsel claim; and, while Relator does discuss how he was prejudiced by his Juvenile Court counsel's ineffective assistance, *infra*, Relator respectfully submits that in his case, meeting the first prong is sufficient.

8 "[t]hese criteria shall include, but not be limited to…." § 211.071.6 RSMo.

The due process standard for juveniles is fundamental fairness. *McKeiver v. Pennsylvania,* 403 U.S. 528, 543 (1971). In *Williams v. Taylor,* 529 U.S. 362, 391 (2000), the United States Supreme Court, held that "there are situations in which the overriding focus on fundamental fairness may affect the analysis" of an ineffective assistance of counsel claim. As a result, "there are a few situations in which the prejudice may be presumed." *Id.* (quoting *Strickland v. Washington,* 466 U.S. at 692). Relator respectfully submits that being represented by counsel who neither knows the law nor researches the law is one of those situations. A 13 year old boy, who, because of being certified, now faces the possibility of spending the rest of his life in prison, who has been represented by an attorney who did not know the law and did little, if any, research of the law, has not been afforded due process and fundamental fairness. Prejudice can be presumed.[9]

9 Many of the cases Relator has cited – *Glass, Williams, Wiggins,* and *Strickland* are death penalty cases, where the ineffectiveness asserted regards the attorney's performance in the sentencing phase of the trial. Relator respectfully submits that these cases are applicable since a sentencing phase of a death penalty case and a certification hearing are similar in nature. At both, all relevant evidence is considered.

B. Relator was Prejudiced Since the Juvenile Court Attorney's Strategy was Based on an Inaccurate Understanding of the Law

If an attorney thoroughly investigates the facts and the law, any reasonable strategy based on this investigation will withstand a claim of ineffective assistance of counsel. *Wiggins v. Smith*, 539 U.S. at 521; *Anderson v. State*, 196 S.W.3d at 33. But, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id;* (quoting *Strickland v. Washington*, 466 U.S. at 690-691). If an attorney "lacks the information to make an informed judgment, because of inadequate investigation, any argument as to trial strategy is inappropriate." *Hufford v. State*, 201 S.W.3d 533, 537-538 (Mo. App. S.D. 2006).

When Lonardo was asked if he reviewed any case law, he responded by saying he did not recall but "it wasn't much." (Exhibit A, p. A5) If Relator's Juvenile Court attorney had engaged in an adequate review of the case law, his strategy would not have been to show the Juvenile Court that a preponderance of the factors weighted against certification since that is not the standard for certifying a juvenile. Instead, he would have known that the specific standard for certifying a juvenile was to protect the community when rehabilitation seems impossible. *R.L.C., Jr.*, 967 S.W.2d at 678. Also, he would have known that in making that decision, the judge was not required to consider

all of the factors or give equal weight to the factors he did consider. *State v. Thomas,* 70 S.W.3d at 504. Further, he would have known that the seriousness of the offense is the dominant criterion. [10] *Id.* Thus, he would have known he needed a strategy to address this and would have presented case law that specifically states the seriousness of the offense is not, in itself, enough to certify a juvenile, *State v. Kemper*, 535 S.W.2d 241, 248 (Mo. App. Kansas City District, 1975); see also *Bills,* 504 S.W.2d at 81 ("the fact that a charge is serious does not mean it cannot or should not be handled in juvenile court.")

With an accurate understanding of the law, the attorney would then have elicited specific, available testimony from Dr. Whisman that despite the seriousness of the offense, Relator is not dangerous, does not need to be certified, and can be rehabilitated.[11] (Exhibit S, p. A642) Further, he would have been able to cross-examine April Foulks, the juvenile officer, regarding Relator's dangerousness, particularly now that he no longer

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10 The record shows that Judge Crawford gave significant weight to this factor. (Exhibit E, pp. A219-A220)

11 The attorney stated that he wanted Dr. Whisman to inform the Court that Relator is not dangerous and can be rehabilitated. (Exhibit A, p. A10) The record, however, as well as Dr. Whisman's Affidavit, (Exhibit S, p. A642) show that these specific questions were never asked of any witness. Had Lonardo known the law and the standard, these specific questions would have been asked because he would have known that this is what the Court would focus on.

had access to weapons and that he would not have access to them if he was placed in a juvenile facility. He could have argued to the Court that Dr. Whisman was more qualified than April Foulks to assess just how dangerous Relator actually is. He could have also cross-examined Foulks regarding Relator's ability to be rehabilitated and about what options, if any, she investigated to see if keeping Relator in the juvenile system was practical.

Relator's Juvenile Court attorney's strategy was not reasonable. It was based on an inaccurate and materially incomplete understanding of the law. This, in turn, was due to his failure to research the law. Lonardo provided Relator with ineffective assistance of counsel.

C. Relator was Prejudiced because his Juvenile Court Attorney's Inaccurate Understanding of the Law Resulted in the Juvenile Court Hearing Inadmissible Testimony

Lonardo's ignorance of the law and his failure to research the law caused him to think all evidence was admissible in the certification hearing. (Exhibit A, p. A14) This Court, in *In re N.D.C.,* 229 S.W.3d 602, 605 (Mo. banc 2007), reaffirmed the principles established by the United States Supreme Court in *In re Gault,* 387 U.S. 1 (1967). A juvenile has the same protections in juvenile proceedings that defendants have in criminal proceedings, including the right to confront and cross-examine witnesses. *Id.* Lonardo's

misunderstanding of the law resulted in the juvenile court hearing testimony that was hearsay, lacked a foundation, and was irrelevant and prejudicial.

This Court has stated that, to show counsel was ineffective for failing to object, the defendant must show that his objection would have been upheld and that counsel's failure to object resulted in a substantial deprivation in his right to a fair trial. *Glass v. State*, 227 S.W.3d at 473. Allowing the state to present evidence that supported the state's case "can be a significant factor in finding ineffective assistance of counsel." *Gant v. State*, 211 S.W.3d 655, 659 (Mo. App. W.D. 2007).

Lonardo did not object when the juvenile officer testified, with no foundation, that Relator would be back in the community within one year. (Exhibit E, p. A65, A71) Allowing her to testify, without objection, that the programs available in DYS last from six months to one year, constitutes ineffective assistance of counsel. April Foulks is a Juvenile Officer; she does not work for DYS and is not in a position to say when Relator would be released back into the community since her involvement with a juvenile ends when he is committed to DYS. Also, she is not part of the placement process of determining where juveniles are placed in DYS. She acknowledges this herself. (Exhibit E, p. A69) Thus, there was no foundation established for her to testify how long Relator would be in DYS, and no foundation for her testimony about when Relator would be released. Her testimony was simply her opinion. Further, if Lonardo had taken the time

to speak with someone from DYS, he would have known that Foulks' opinion is not accurate. *See Point D, infra.*

Lonardo did not object to the testimony regarding DYS placement because he did not know the law. This testimony prejudiced Relator by giving the Juvenile Court the erroneous impression that Relator would be back in the community within a year regardless of how dangerous he was. Judge Crawford's order specifically states that no evidence was presented to show a facility existed that could guarantee Relator's confinement and that certification was necessary to protect the community. (Exhibit K, p. A481, A483, A485, A487)

Lonardo also did not object to, or move to strike, Foulks' testimony about the disposition of another juvenile during cross-examination. (Exhibit E, pp. A69-A70) Allowing April Foulks to testify, without objection, or making a motion to strike, about the disposition of the other juvenile to show that since this juvenile, who apparently had committed a serious offense, was released back into the community within 9 months, it was likely that this would happen with Relator as well, also constitutes ineffective assistance of counsel. Relator's Juvenile Court attorney should have objected to this testimony as irrelevant and prejudicial and should have also made a motion to strike that testimony from the record. Further, he should not have asked her *any* questions regarding this other juvenile. (Exhibit E, p. A70) Another juvenile's case is absolutely irrelevant. No foundation was laid that Ms. Foulks knew why they let him out or that she

had information demonstrating that allowing the other juvenile back into the community was not the right thing to do. His case is unrelated to Relator's case. The facts and circumstances of that juvenile's case are completely different. Inherent in Foulks' testimony was not only the assumption that the other juvenile she referred to was still dangerous, but also that DYS knew he was dangerous and still released him back into the community. Also, it implied that Relator and he were similar. She was in no position to imply this, nor was she in a position to imply that this juvenile and Relator were similar. The state had adduced no evidence upon which she could render such an opinion.

Lonardo did not object to, or move to strike, the testimony regarding another juvenile's disposition because he did not know the law. This testimony prejudiced Relator in the same way the testimony regarding DYS placement did by giving the Juvenile Court the erroneous impression that Relator would be back in the community within a year, regardless of how dangerous he was. Judge Crawford's order specifically states that no evidence was presented to show a facility existed that could guarantee Relator's confinement and that certification was necessary to protect the community. (Exhibit K, p. A481, A483, A485, A487)

The Juvenile Court heard other testimony prejudicial to Relator due to Lonardo's failure to object. Steve Gilbreth's testimony regarding how this incident impacted other faculty members (Exhibit E, pp. A102-A103) was inadmissible hearsay and violated Relator's right to confrontation. Lonardo, however, failed to object to it on either ground.

Judge Crawford clearly took this testimony into account when he decided to certify Relator. (Exhibit E, p. A221) Had Lonardo objected, the court would not have heard about the impact this incident had on other people. Also, all of the testimony (Exhibit E, pp. A75-A78) and much of the juvenile officer's report (Exhibit V, p. A677) and motion (Exhibit, p. A674) regarding the alleged attempted escape was inadmissible hearsay as well and violated Relator's right to confrontation.

While strategic decisions not to object are shielded from claims of ineffective assistance of counsel, *Goudeau v. State*, 152 S.W.3d 411, 418 (Mo. App. S.D. 2005), not objecting in this case was not due to any strategic considerations; rather, it was due to not knowing the law. (Exhibit A, p. A14) And not knowing the law was due to not researching it. Had Lonardo known the law, he would have objected, and Judge Crawford would not have heard the speculative, irrelevant, prejudicial, and, as will be shown *infra*, inaccurate testimony. Lonardo provided Relator with ineffective assistance of counsel.

D. Relator's Juvenile Court Attorney's Inadequate Investigation Resulted in the Court Not Hearing About Viable Options

Lonardo's poor performance denied Relator the effective assistance of counsel in the Juvenile Court proceedings. This deficient performance, however, was compounded by his failure to present any evidence to illustrate that an appropriate disposition in the juvenile system was available. The only evidence regarding juvenile dispositions was what Judge Crawford heard from April Foulks. (Exhibit E, pp. A60-A65; A68-A71)

To show that counsel was ineffective for not calling a witness, the litigant must show: '1) [t]rial counsel knew or should have known of the existence of the witness, 2) the witness could be located through reasonable investigation, 3) the witness would testify, 4) the witness's testimony would have produced a viable defense.' *Glass v. State*, 227 S.W.3d at 468. (quoting *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004)).

Lonardo failed to call a DYS representative to testify regarding its programs since he did not think of it and had a "hunch" as to what a DYS representative would have testified to. (Exhibit A, p. A14) Consequently, all Judge Crawford heard was that Relator, who had committed a very serious offense, would be back in the community within a year. This testimony could have (and should have) been refuted by calling a representative from DYS to the stand. That representative could have testified to several things. First, there is no set period of time a juvenile would stay in residential placement.

(Exhibit B, p. A27) Rather, the time a juvenile stays in residential treatment depends on the needs of the juvenile. (Exhibit B, p. A27) Second, DYS would not let a juvenile back into the community if they believed him to be dangerous. (Exhibit B, p. A27) Third, under the law (§ 219.021 RSMo.), DYS could petition the Court to keep Relator in their custody past his 18th birthday up to age 21. (Exhibit B, p. A27) Finally, the DYS representative would have testified that DYS has successfully worked with juveniles who have committed serious offenses against people; and, whose cases have caused concern in the community. (Exhibit B, pp. A28-A29)

Since Lonardo did not call a DYS representative to the stand, Judge Crawford only had the inaccurate testimony of April Foulks to consider regarding available placements within the juvenile system. As a result, he concluded there was no available placement for Relator in the juvenile system. This was a crucial factor in determining Relator needed to be certified. Judge Crawford specifically stated in his certification order that *no* evidence was put before the Juvenile Court to show that Relator could be confined long enough to provide protection for the community. (Exhibit K, p. A481, A483, A485, A487) Also, Judge Crawford specifically stated that there was *no evidence* to suggest that Relator would benefit from treatment in a juvenile facility. (Exhibit K, p. A481, A483, A485, A487)The DYS representative's testimony would have specifically addressed these concerns. (Exhibit B, pp. A24-A29)

Applying the law to this case illustrates Lonardo's ineffective representation. He should have known to call a witness from DYS. His testimony in his deposition showed that he knows about DYS and that DYS handles juveniles who commit offenses that would be crimes if committed by an adult. (Exhibit A, p. A8) The witness could have been located easily since DYS workers are in Jasper County and they could easily be subpoenaed. Finally, since a key to preventing certification was that an option did exist in the juvenile system, this testimony would have produced a viable option for Judge Crawford to consider in making the certification decision. Again, Judge Crawford's order stated there was *no* evidence presented at the hearing. (Exhibit K, p. A481, A483, A485, A487) The testimony of a DYS representative would have presented the court with at least *some* evidence regarding viable options. Further, the testimony of the DYS representative, by specifically refuting the juvenile officer's testimony about DYS placements, may very well have reduced the weight the Juvenile Court gave to her testimony. Relator respectfully submits that by showing that Foulks was absolutely wrong on the issue of DYS, there is a reasonable probability that the Juvenile Court would have discounted her testimony regarding Relator, particularly his maturity and sophistication, which in turn calls into question the Court's finding that Relator is a mature and sophisticated 13 year old. (Exhibit K, p. A481, A483, A485, A487) Further, at the end of the certification hearing, Lonardo argued that it was presumptuous for the juvenile officer and the attorney for the juvenile office to say that Relator would be back in the community within six months. (Exhibit E, p. A218) Had he put on a DYS

representative, this argument would have been much more persuasive since it would have been supported by evidence, not merely argument.

Moreover, if the Juvenile Court attorney had bothered to even *talk* to someone from DYS, he could have found out about Boys & Girls Town of Missouri (BGTM).[12] BGTM is accredited by DYS and DYS specifically contracts out juveniles to other treatment centers. (Exhibit B, p. A28; Exhibit G, pp. A312-A313) An inquiry as to BGTM's facilities would have provided yet another option for Relator and another option for the Juvenile Court to have considered. In his deposition, Lonardo states that he did not even know about Boys & Girls Town. (Exhibit A, p. A9) By exercising a minimum level of diligence, Relator's attorney could have found out about BGTM, if not through an independent investigation of potential options, then through an investigation of DYS policies. (Exhibit B, p. A28; Exhibit G, pp. A312-A313)

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12 The option of BGTM was presented as new evidence in the Second Amended Objection to the Information. (Exhibit F, pp. A225-A292) Relator has found no case law that discusses what the specific responsibilities of an attorney are regarding finding suitable placements. While Relator maintains that finding suitable placements is not the responsibility of the attorney, he does believe that the attorney has a duty to investigate so that the juvenile officer and the Juvenile Court can consider all possible options. Further, the facts here do demonstrate that with due diligence, the attorney could have found out about BGTM.

Had Lonardo done minimal investigation, he would have learned that BGTM is a facility with many campuses that services juveniles with psychiatric diagnoses, and that BGTM provides juveniles with educational services. (Exhibit AA, pp. A745-A747; www.bgtm.org/programs) He would have learned that juveniles can stay until they are 21 and that Relator has specifically been admitted to stay until he is 21. (Exhibit AA, p. A748; www.bgtm.org/admissions; Exhibit G, p. A312-A313) He would have learned that BGTM has successfully handled other juveniles who have committed offenses with weapons. (Exhibit G, p. A314) He would have had another witness with a background in the mental health profession testify that Relator is not dangerous, is amenable to treatment, and can be held accountable for his actions without giving him a criminal record. (Exhibit G, p. A315).

This evidence would have addressed Judge Crawford's finding that no evidence was presented to show that the juvenile would benefit from placement in a juvenile facility. (Exhibit K, p. A481, A483, A485, A487) Further, it addresses his statements in court that there are not tools within the juvenile program to deal with this type of violence and that there is no place to guarantee the juvenile's confinement. (Exhibit K, p. A481, A483, A485, A487) Finally, it would have addressed Judge Crawford's concern that Relator is beyond rehabilitation. (Exhibit K, p. A481, A483, A485, A487)

Lonardo's conduct fell far below an objective standard. Relator was prejudiced because the court was not presented with any viable options to certification. A thorough

investigation would have resulted in at least one witness testifying and one viable alternative for the Juvenile Court to consider. Relator received ineffective assistance of counsel.

E. Relator's Juvenile Court Attorney Abandoned his Role as Relator's Advocate and Assisted the Police into Coercing Relator to Make Incriminating Statements

The attorney's role in a juvenile proceeding is of critical importance. *In re Gault,* 387 U.S. at 36 (1967). "A 14 year old boy…is unable to know how to protest his own interests or how to get the benefits of his constitutional rights." *Gallegos v. State of Colorado,* 370 U.S. 49, 54 (1962). He "requires the guiding hand of counsel at every step in the proceedings against him." *In re Gault,* 387 U.S. at 36 (1967) (quoting *Powell v. State of Alabama,* 287 U.S. 45, 69 (1932). Unfortunately, this did not happen. A reading of the interrogation transcripts (Exhibit L, pp. A488-A521; Exhibit M, pp. A522-A556), and the attorney's deposition (Exhibit A, p. A14), shows that Lonardo essentially relinquished his role as Relator's advocate and helped the police coerce Relator into making incriminating statements, violating Relator's right against self-incrimination guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 19 of the Missouri Constitution.

Lonardo made a decision to allow the police to interrogate Relator. (Exhibit A, p. A8) He stated that the facts were not in dispute and that, by cooperating, he hoped to get a better deal for Relator. (Exhibit A, pp. A7-A8)

As the record shows, however, whether Relator was in fact trying to pull the trigger when he was pointing the gun at the principal *is* a disputed fact. The record shows that the principal was not sure that Relator was trying to pull the trigger. According to the juvenile officer's report, the school principal stated Relator tried several times to pull the trigger. (Exhibit V, p. A677) At the certification hearing, however, the principal testified that he *assumed* Relator was trying to pull the trigger. (Exhibit E, p. A98) Then, at the preliminary hearing, the principal conceded that he was not sure whether Relator was trying to pull the trigger. (Exhibit Z, p. A724)

Lonardo did not conduct an adequate investigation into the facts. Instead, he *assumed* the facts were not in dispute. His decision to let the police interrogate Relator was made before he conducted any investigation. The interrogations led to a walk-through where Relator stated he tried to pull the trigger and shoot the principal. (Exhibit E, p. A134) The Juvenile Court heard this statement at the certification hearing. (Exhibit E, p. A134) This statement greatly influenced the Court in its decision to certify Relator. (Exhibit E, pp. A219-A223) Since the decision to allow the police to interrogate Relator was made before a thorough investigation into the facts, any argument as to strategy will not withstand an ineffective assistance of counsel claim here. *Hufford v. State*, 201

S.W.3d at 537-538. Unfortunately, it was not simply ineffective assistance of counsel that led to the incriminating statements.

During the interrogations, Relator tried to explain that he was not trying to hurt anyone. (Exhibit L, p. A506; Exhibit M, p. A536; A548) He was angry and frustrated and extremely unhappy with himself. (Exhibit L, p. A494; A506; A520; A543) He simply wanted to scare people. (Exhibit L, p. A507; A513; A514; A515; Exhibit M; A536; A538; A548) There was no particular person he was targeting. (Exhibit L, p. A499; A507; A514; A536; A538; A539; A548) Relator also denied a number of times that he tried to pull the trigger after the initial shot. (Exhibit L, p. A510; Exhibit M, p. A533;A534) Yet, despite Relator's repeated attempts to answer their questions, the police kept berating him, insisting that he was not being honest with them. (Exhibit M, p. A531; A533; A534; A535; A538; A543) At one point, an assistant prosecutor berated Relator, telling Relator that he could not beat him, that he won't win. (Exhibit M, p. A538) The prosecutor also made a thinly veiled threat that he was going to throw Relator in prison for the rest of his life. (Exhibit M, p. A538) As the interrogations progressed, Relator realized the police were not interested in what he had to say. (Exhibit Q, p. A596) As a result, Relator felt that he had to say what the police wanted to hear. (Exhibit Q, p. A596)

Lonardo not only allowed this to go on, but he actually joined in, "coming at him [Relator] in stereo." (See Exhibit A, p. A14) The most egregious examples are in the

second interrogation transcript. (Exhibit M, pp. A522-A551) Relator states that he remembers a teacher but that he did not know where, and that it was kind of hard to think about. (Exhibit M, p. A531) This was met by Detective Gayman's order that he needed to think about it. (Exhibit M, p. A531) Rather than coming to his defense and advocating for his client, the Juvenile Court attorney reinforces Detective Gayman's order by saying, "Do So." (Exhibit M, p. A531) Later on in the interrogation, Relator's Juvenile Court attorney asks if Relator tried to fire the gun at the principal. (Exhibit M, p. A534) Relator says no. (Exhibit M, p. A534) The Juvenile Court attorney responds by saying, "You're telling me you never tried to pull the trigger on the gun, be truthful with me." (Exhibit M, p. A534) The police already were browbeating Relator accusing him of lying; but then his own attorney joins in. Still later, the police are berating Relator, insisting he was trying to shoot a particular person. (Exhibit M, p. A535) Lonardo, again assisting the police, said, "Who were you gunning for kid?" (Exhibit M, p. A535) Still later in the hearing, Lonardo stated: "If you think this was cool, get it the hell out of your mind right now." (Exhibit M, p. A547)

When asked about why he allowed this and why he joined in, Lonardo cited his own upbringing and that sometimes you have to be firm with children to get them to talk. (Exhibit A, p. A14) The transcripts of the interrogations and his deposition demonstrate that it never occurred to Lonardo that Relator was telling the truth. Further, Lonardo did not consider is that children are very impressionable and want to please adults. (Exhibit U, p. A664) This increases the likelihood of a juvenile making a false confession.

(Exhibit U, pp. A664-A665) Despite the fact that the Juvenile Court attorney did not feel Relator understood his Miranda rights except one, (Exhibit A, p. A8) and despite the fact that he considered Relator to be "13 going on 10 or 11," (Exhibit A, p. A6) it never crossed the attorney's mind that berating him might lead to false statements. (Exhibit A, p. A15) A review of the case law would have alerted Relator's Juvenile Court attorney to this. In his deposition, the Juvenile Court attorney states he read *In re Gault* back in law school but not to prepare for this case. Had he bothered to re-read it, he would have recalled the Court's concerns regarding juvenile statements, including the concern that there is a risk statements are made out of fear and the importance of counsel's support at these hearings. *In re Gault*, 387 US at 47 & 55. See also *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 412 (Mo. banc 2003), where the court acknowledges a higher risk of false confessions for juveniles.

Lonardo failed to investigate the factual issues on whether Relator was trying to pull the trigger. He also failed to investigate another important issue: if Relator was trying to pull the trigger, *why* he was trying to do so. [13] The record shows that Relator

13 Aside from the statement made during the walk-through, the only other statement that was allegedly made by Relator is the statement made in the detention center where he claimed that he would have killed the principal had his gun not jammed. The deposition of Kimberly Comstock (Exhibit C, pp. A33-A44) indicates that this statement, if even

and the principal had had hardly any interaction. (Exhibit E, p. A95) Further, Dr. Whisman believes that Relator did not appreciate the nature of his actions and testified that he believes Relator brought the gun to school to get expelled. (Exhibit S, p. A642; Exhibit A, p. A197) Thus, if in fact Relator was pulling the trigger, it is just as plausible that Relator was pulling the trigger because he was terrified and in a state of panic as it is that he was deliberately trying to kill the principal. One of the statutory factors in § 211.071 RSMo. is whether or not the alleged incident involved viciousness. If Relator was trying to scare people, or get expelled from school, his actions, while very serious, are much less vicious than if he was trying to kill someone. If Relator was pulling the trigger because he was terrified and in a state of panic, his actions, while extremely serious and dangerous, are not vicious. Judge Crawford's order specifically stated that the offense was vicious and that the viciousness of the offense was evidence that Relator could not be rehabilitated. (Exhibit K, p. A481, A483, A485, A487)

Lonardo made a decision to allow the police to interrogate Relator. (Exhibit A, p. A14) These interrogations led to the walk-through where Relator made very incriminating statements as to his intent. (Exhibit E, p. A134) He made this decision without investigating the facts. Further, he abandoned Relator at a time where Relator needed him the most and essentially became an advocate for the state. These actions

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made by Relator, (See Exhibit Q, p. A600) was made in a situation where Relator's peers were trying to get him to say something. (Exhibit C, p. A43)

violated his right against self-incrimination guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 19 of the Missouri Constitution. They also prejudiced him because they resulted in Relator making incriminating statements, which were then used against him at the certification hearing. These in turn gave the court the impression he could not be rehabilitated. Relator's Juvenile Court attorney provided him with ineffective assistance of counsel.

The law as stated in *Kent, Bills,* and *McShane,* clearly states three requirements must be met before jurisdiction can properly be transferred from the Juvenile Court to one of general jurisdiction. There *must* be: (1) a hearing; (2) representation by effective counsel; and, (3) a statement of reasons for the order. In this case, there was no representation by effective counsel. Relator has presented several examples of his Juvenile Court attorney's ineffective assistance and how he was prejudiced by it. Further, the due process standard of fundamental fairness cannot be met when a juvenile is represented by an attorney who neither knows nor researches the law. Therefore, the proceedings in Juvenile Court are a nullity and the Juvenile Court never relinquished jurisdiction. Thus, Respondent has no jurisdiction and this Court should make its preliminary writ of prohibition absolute.

II. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that Respondent, the Honorable David B. Mouton, take no further action in Jasper County Case No. 06AO-CR02770-01 or that he sustain Relator's *Second Amended Objection to the Information* in that, even if jurisdiction was appropriately transferred, Respondent abused his discretion to such an extent that he lacked the authority to overrule Relator's motion because (1) his ruling that Relator received due process, as required by the United States Supreme Court in *Kent v. United States,* 383 U.S. 541 (1966) is refuted by overwhelming and uncontroverted evidence; (2) his ruling that he is not convinced the result in juvenile court would be any different with all of Relator's evidence misapplies the law; and, (3) public policy and fundamental fairness require remand.

Assuming *arguendo* that Respondent does have jurisdiction, Relator respectfully submits that he abused his discretion when he overruled Relator's Second Amended Objection to the Information and refused to remand the case to Juvenile Court. Respondent's order (Docket Entry, pp. A754-A756) stating that Relator has been afforded due process as required by *Kent v. United States* is against the overwhelming weight of the evidence, is arbitrary, and violates the logic of the circumstances. As such, it is an abuse of discretion. *Wibberg v. State*, 957 S.W.2d 504, 506 (Mo. App. W.D. 1997) The United States Supreme Court, in *Kent v. United States*, 383 US 541 (1966) clearly stated that there is "no place in our system of law" for certifying a juvenile without effective

assistance of counsel. *Id.* at 554. Respondent has ignored the overwhelming and uncontroverted evidence regarding Relator's counsel and the fact that counsel neither knew nor researched the law. Since the evidence presented to Respondent was uncontroverted, this Court is not obligated to give the trial court's findings the same deference as necessary in a finding based on credibility of witnesses. *Hinnah v. Director of Revenue,* 77 S.W.3d 616, 620 (Mo. banc 2002). The issue becomes a matter of law, not an issue of trial court discretion. *Id.*

Further, Respondent was presented with overwhelming and uncontroverted evidence of what the Juvenile Court would have heard had Relator been represented by effective counsel. Judge Crawford's order states that no evidence was presented that showed (1) Relator would benefit in a juvenile facility; (2) Relator could be confined; and, (3) Relator could be rehabilitated. (Exhibit K, p. A481, A483, A485, A487) Further, protection of the community required certification. (Exhibit K, p. A481, A483, A485, A487) These points are all addressed in the motions and hearings. Sue Kidd's testimony presents evidence that DYS can help juveniles like Relator. (Exhibit B, p. A28) Vince Hillyer's testimony and Dr. Peterson's report specifically state that Relator could benefit from treatment at BGTM. (Exhibit G, pp. A307-A316; Exhibit Q, p. A625) The testimony of Sue Kidd and Vince Hillyer, as well as Dr. Peterson's report, also address Judge Crawford's concern about Relator being able to be confined for a sufficient period of time. (Exhibit B, pp. A27-A28; Exhibit G, p. A313; Exhibit Q, pp. A625-

A627) Vince Hillyer's testimony, Dr. Peterson's report, and Dr. Whisman's affidavit all address Judge Crawford's concern about Relator being able to be rehabilitated. (Exhibit G, pp. A309-A312; Exhibit Q, pp. A624 -A627; Exhibit S, p. A642) Finally, the testimony of Sue Kidd and Vince Hillyer, along with Dr. Peterson's report and Dr. Whisman's affidavit, address the concern of Judge Crawford that the community's protection requires Relator's certification. (Exhibit B, pp. A 27-A28.; Exhibit G, pp. A307-A316; Exhibit Q, pp. A625-A627; Exhibit S, p. A642) Moreover, the affidavit of Dr. Donna Bishop shows that certification doesn't protect the community, and thus invalidates Judge Crawford's assertion that certification is necessary to protect the community. (Exhibit T, pp. A644-A656) Also, the testimony of Sue Kidd casts significant doubt on the accuracy of the Juvenile Officer's testimony. (Exhibit B, pp. A24-A32)

Respondent misapplied the law when he stated that he is not convinced that the result would be different. That is not the standard. Relator is not even required to show that the result is more likely than not to be different. *Glass v. State,* 227 S.W.3d at 468. Relator needs to show that there is a reasonable probability the result would be different. *Id.* The evidence, which Respondent claims he considered, addresses the main concerns in Judge Crawford's certification order. Further, some of the evidence specifically refutes the juvenile officer's testimony, creating a reasonable probability that her testimony would not have as much weight as it did.

The public policy in Missouri for children is the "best interest of the child." (See § 211.011 RSMo.) This, along with the case law previously cited, show that certification should be a last resort. In other words, it should only be done if necessary. Relator acknowledges that the law gives the Juvenile Court Judge the discretion to make this decision. However, the law also gives the trial judge the authority to send a case back to juvenile court. *In re T.J.H.*, 479 S.W.2d 433 (Mo. banc 1972). Relator has presented overwhelming and uncontroverted evidence that not only shows he has not been afforded due process required by the United States Supreme Court in *Kent v. United States,* 383 U.S. 541 (1966); and this Court in *State ex rel. T.J.H. v. Bills,* 504 S.W.2d 76 (Mo. banc. 1974); but also that there *is* a reasonable probability the result would be different. Further, the evidence shows that it is not necessary to certify Relator. At the very least, the evidence demonstrates that it may not be necessary to certify Relator.

The logic of the circumstances shows that Relator can only receive fundamental fairness as required by the United States Supreme Court in *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), if his case is remanded to Juvenile Court. Since Respondent failed to do this, he has abused his discretion.

III. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that Respondent, the Honorable David B. Mouton, take no further action in Jasper County Case No. 06AO-CR02770-01 or that he sustain Relator's *Second Amended Objection to the Information* because Relator will be caused irreparable harm not capable of remedy by appeal in that he will: (1) have been deprived of the services of the Juvenile Court for two or three years; (2) have limited access to the services of the Juvenile Court due to the fact that he will be 17 or 18 by the time the appeal process runs its course; and, (3) have endured unwarranted delay and expense as he will have already gone through the adult proceedings and been incarcerated in prison.

Relator respectfully submits that a Writ of Prohibition is appropriate because there is no adequate remedy by appeal and Relator will be forced to endure irreparable harm as a result of both his Juvenile Court attorney's deficient performance and by Respondent's abuse of discretion.

As discussed, *supra,* Respondent does not have jurisdiction due to Relator's Juvenile Court attorney's ineffective representation. When a court does not have jurisdiction an "appeal is not an adequate remedy because any action by the court is without authority

and causes unwarranted expense and delay to the parties involved." *State ex rel. T.J.H. v. Bills*, 504 S.W.2d at 79.

Further, a certification order is not considered a final order for purposes of appeal. *In re T.J.H.*, 497 S.W.2d 433, 434 (Mo. banc 1972). The way to review the decision is to file a motion to dismiss in the trial court. *Id.* For a discussion of why this method of relief is a hollow remedy, see Justice Seiler's dissent. *Id.* at 437. Even if this method is not a hollow remedy, this relief was not granted and a judge's ruling on a motion to remand to juvenile court is not a final order for purposes of appeal. If this court does not grant Relator such requested relief herein, and Relator is prosecuted in the matter presently pending in the Circuit Court of the 29th Judicial Circuit, he will not be able to obtain appellate relief until *after* a conviction. Any claim for ineffective assistance of counsel would not be considered until a post conviction motion was brought before the court. Either way, Relator could lose the opportunity to receive any meaningful help from the juvenile system for the foreseeable future. Further, Relator is now 15 and will be at least 17 by the time he receives any relief from the appeals process. Thus, the services available to him will be more limited than the services are to him now at the age of 15. For example, once Relator turns 17, he will no longer be eligible for the dual jurisdiction program under § 211.073 RSMo.[14] This program would allow Relator the

14 Section 211.073.1 specifically states, "in a case when the offender is under seventeen years of age…"

opportunity to be sent to a facility with other juveniles and, upon successful completion of the program, have his sentence suspended and be placed on probation and stay out of prison with adult criminals. § 211.073.4(2) RSMo.

Relator respectfully submits that his case is analogous to the juvenile's case from *State ex rel. D.C. v. McShane*, 136 S.W.3d 67 (Mo. banc 2004). In that case, the juvenile was found to be competent to proceed with a certification hearing. *Id.* at 71. While the issue of that juvenile's competency could have been addressed on appeal had he been convicted of the alleged offenses, this Court ruled the decision finding him competent would escape appellate review and that he would have suffered irreparable harm. *Id.* Presumably, this is because had he been found incompetent on appeal, he would already have gone through the adult proceedings, been incarcerated in prison, and would have been deprived of services available in the juvenile system for a significant period of time. If this Court does not grant Relator the requested relief and his counsel from Juvenile Court is found to have rendered ineffective assistance of counsel on appeal or in a post-conviction proceeding, Relator will also have gone through the adult proceedings, been incarcerated in prison, and been deprived of services available in the juvenile system for a significant period of time.

Relator respectfully submits that because an appeal is not an adequate remedy, making the preliminary writ absolute is necessary for Relator to receive due process and

fundamental fairness guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution.

IV. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Honorable David. B. Mouton, take no further action in Count III of the Information, or that he dismiss Count III, due to the fact that he has no jurisdiction over the charge since, regardless of statutory interpretation, Attempted Escape can only be charged as a misdemeanor in these circumstances.

Count Three of the information is the charge of attempted escape in violation of § 575.200 RSMo.[15] This statute clearly states that attempted escape is a *misdemeanor* unless it is committed with a dangerous instrument or weapon, or if the defendant is in custody for a felony. There is no evidence in the record suggesting that Relator used a dangerous weapon or dangerous instrument in his alleged attempt to escape. The basis for the charge is that Relator had been arrested for a number of felonies. Relator, however, submits that he was not arrested for a felony; rather, he was arrested for what would be a felony if committed by an adult. Section 211.071.1 RSMo. There is very little case law regarding this issue. The Missouri Court of Appeals, Eastern District, in *In the Interest of J.S.*, 648 S.W.2d 634, 635 (Mo. App. E.D. 1983) (overruled on other grounds), stated that the offense of attempted escape did apply to juveniles. However, it

15 The argument regarding Count Three has not yet been put before Respondent. However, the question of jurisdiction is one that cannot be waived. *Brown v. State*, 33 S.W.3d 676, 678 (Mo. App. S.D. 2000).

also stated that just because they can be arrested for a crime does not mean that they can be treated in the same manner. *Id.* Furthermore, the juvenile's case was disposed of in juvenile court, so the issue of whether the attempted escape charge was a misdemeanor or a felony was irrelevant. Relator respectfully submits that the rules of statutory interpretation require this charge to be viewed as a misdemeanor and thus Respondent has no jurisdiction.

The primary rule of statutory interpretation is to effectuate the legislative intent through reference to the plain and ordinary meaning of the statutory language. *State v. Graham,* 204 S.W.3d 655, 656 (Mo. banc 2006). When interpreting a statute, a court is to "ascertain the intent of the legislature and give effect to that intent, if possible." *State v. Lewis,* 188 S.W.3d 483, 486 (Mo. App. W.D. 2006). In determining the legislature's intent, the language used is given its plain and ordinary meaning. *Id.* at 486-487. If the language is plain and clear to a person of ordinary intelligence, then the statute is clear and unambiguous. *Id.* at 487. But if the language is subject to more than one possible interpretation, then the statute is considered ambiguous. *State v. Graham,* 204 S.W.3d at 656. The rule of lenity requires that a statute be construed against the state when the statute is ambiguous. Whether this statute is ambiguous or not does not change the fact that this charge can only be filed as a misdemeanor. If the statute is given its plain and ordinary meaning, then the charge of attempted escape cannot be a felony when a juvenile is not arrested for a felony but *what would be a felony if committed by an adult.*

If there is ambiguity in the statute, then it must be construed against the state and thus be filed as a misdemeanor. Either way, Respondent has no jurisdiction over Count three. Therefore, Count Three of the Information must be dismissed.

Granting this relief is necessary to ensure that Relator receives due process of law under the 5th and 14th Amendments to the United States Constitution, and Article I, § 10 of the Missouri Constitution.

V. Relator is entitled to a writ of prohibition or, alternatively, a writ of mandamus, ordering that the Respondent, the Honorable David. B. Mouton, take no further action in Counts IV and V of the Information, or that he dismiss Counts IV and V, due to the fact that he has no jurisdiction over the charge since Relator was not specifically certified on these charges.

Counts Four and Five of the Information contain an additional charge of 1st Degree Assault and a charge of Unlawful Use of a Weapon. (Exhibit W, p. A680) Relator was not certified on these two charges and respectfully submits that due process will be violated if the court allows him to be prosecuted for these charges without first remanding the case to Juvenile Court. In *State ex rel. D--V--v. Cook,* 495 S.W.2d 127, 129 (Mo. App. KC District 1973), the Missouri Court of Appeals, Kansas City District, granted a juvenile's request for a writ of prohibition on the grounds that the juvenile petition did not adequately state that he had committed what would be a felony if committed by an adult. The Court did state that a petition did not have to be as precise as an Information but did need to be sufficient enough for him to know what he was being charged with. *Id.* Thus, Relator was entitled to know that he was being charged with 1st Degree Assault for allegedly attempting to kill or seriously injure Steve Doerr and for the offense of Unlawful Use of a Weapon in connection with that assault. Relator further submits that if the circuit court in *Cook* did not have jurisdiction in an attempted rape case because the allegations in the juvenile petition were not adequate, then Respondent

cannot have jurisdiction to prosecute Relator for these two new charges when there were no allegations at all.

A similar argument was made by a certified juvenile in *State v. Thompson*, 502 S.W.2d 359 (Mo. 1973). In this case, the juvenile argued that the trial court erred in overruling his motion to dismiss because the information was not identical to the juvenile petition. *Id.* at 363. The court ruled against the juvenile because the record did not support the argument. *Id.* The validity of the *argument itself* was not rejected. In this case, the record does support Relator's arguments because there was no juvenile petition at all on the charges of 1st Degree Assault of Steve Doerr or Unlawful Use of a Weapon regarding that assault.

At the hearing on June 15, 2007, Relator provided the Court with a case that arguably contradicted the case law submitted in the original motion. (Exhibit G, p. A363) This case is *Richardson v. State*, 555 S.W.2d 83 (Mo. App. Kansas City District 1977). In *Richardson*, the Court discusses the purpose of the juvenile petition and that its purpose is to confer exclusive jurisdiction on the juvenile court. *Id.* at 86.

The State has interpreted this to mean that a petition gives the juvenile court jurisdiction over the juvenile; then, the juvenile court can dismiss the petition and the

juvenile can be prosecuted like anyone else. Thus, a juvenile can be certified for more than just what he is certified for. Relator disagrees for several reasons.

First, the facts in the *Richardson* case are not analogous. There, a juvenile was certified on what was essentially 2nd degree murder. *Richardson,* 555 S.W.2d at 85. The Court ruled that charging him with first degree murder in circuit court did not violate due process since he had put on notice that he was being certified for a homicide. *Id.* at 86. Thus, the petition in juvenile court was not as precise as the information but was sufficient to put him on notice that he was being certified for killing someone. *Id.* In Relator's case, there was no juvenile petition for either Unlawful Use of a Weapon, or 1st Degree Assault with Steve Doerr as the victim. Second, the Court specifically states that the juvenile waived any defects when his attorney, *in circuit court,* specifically stated that there would be no objections to the certification. *Id.* at 87. As a result, the court was reviewing the issue on a plain error standard. Third, the juvenile was actually convicted of second degree murder, so there was no manifest injustice. *Id.* Fourth, at the end of the certification hearing Judge Crawford specifically states that Relator can be tried *for the felonies described in the petitions.* (Exhibit E, p. 223)

Fifth, the logic the State takes cannot be reconciled with the Court's reasoning in *State v. K.J.*, 97 S.W.3d 543 (Mo. App. W.D. 2003). In this case, the juvenile was certified on certain charges but then those charges were never filed. *Id.* at 544. Later, the

State filed new charges. *Id.* The trial court remanded to juvenile court on the grounds that since charges were never filed in the original offenses, the juvenile had no means of appealing the certification order. *Id.* at 546. The *K.J.* court agreed and upheld the trial court's decision. *Id.* at 547. If the State's interpretation of *Richardson* is correct, then it would have been irrelevant that the juvenile was never charged. Once the juvenile had been certified, he would always be certified and the trial court would have had jurisdiction. However, as the Court in *K.J.* made clear, it was relevant, and the trial court did not have jurisdiction. Further, the court's reasoning in *K.J.* on appealing the certification is applicable here as well. The trial court is the place to request review of the certification hearing, but the trial court cannot review the certification of Relator on the charges of Unlawful Use of a Weapon and 1st Degree Assault (with Steve Doerr as the victim) since he was never certified on these charges to begin with.

Applying the law to the facts of this case, Relator's case must either be remanded to juvenile court and a petition filed on these two charges, or counts 4 & 5 of the Information must be dismissed. Granting this relief is necessary to ensure that Relator receives due process of law under the 5th and 14th Amendments to the United States Constitution, and Article I, § 10 of the Missouri Constitution.

CONCLUSION

Both the United States Supreme Court, in *Kent v. United States*, 383 US 541, 554 (1966); and this Court, in *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 80 (Mo. banc 1974), have emphasized the importance of having effective assistance of counsel at a certification hearing. Further, the United States Supreme Court has specifically held that the due process standard for juveniles is fundamental fairness. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). Relator has provided this Court with several examples of how his performance fell below that of a reasonably competent attorney in similar circumstances and how this prejudiced him while he was in Juvenile Court. This standard, plus the state policy of doing what is in the best interest of the child, clearly has not been met. Relator respectfully submits that if this Court allows his certification order to stand, does not remand this case to afford him the opportunity to have a certification hearing where he is represented by counsel that knows the law and is willing to research it, and makes him wait until a Rule 29.15 hearing to obtain relief, the right for juveniles to have effective assistance of counsel is absolutely meaningless. *State ex rel. Reed v. Frawley*, 59 S.W.3d 496, 499 (Mo. banc 2001); *State ex rel. D.C. v. McShane*, 136 S.W.3d 67, 71 (Mo. banc 2004). The decision to certify a juvenile is based on a totality of evidence presented to the court. The issue is not guilt or innocence; rather, the issue is whether or not it is appropriate for the juvenile to have his case disposed of in the juvenile system. Relator submits that because of the egregious demonstration of ineffective assistance of counsel by his Juvenile Court attorney, he was not afforded due

process at his certification hearing, making the proceedings a nullity, which in turn makes Judge Crawford's order void as a matter of law. As such Respondent does not have jurisdiction.

Relator emphasizes again that the due process standard for juveniles is fundamental fairness. This simply cannot be met without allowing Relator to go back to juvenile court for a certification hearing represented by counsel who not only knows the law, but also is willing to make the effort to research it. Relator respectfully submits that his right to effective assistance of counsel guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, § 18(a) of the Missouri Constitution, and his right to due process guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution.

WHEREFORE, Relator, T.W., by and through counsel, respectfully requests that this Court make absolute its Preliminary Order in Prohibition.

Respectfully submitted,

_____

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Certificate of Service

I certify that a true copy of Relator's Brief, the Appendix (all six volumes), and a virus-free CD with a true copy of the brief, was mailed to the office of the Honorable David B. Mouton at the Jasper County Courthouse in Joplin at 601 S. Pearl in Joplin, Missouri 64801 (telephone number 417-625-4325; Fax - 417-625-4326) and the office of John Nicholas, Assistant Prosecutor for Jasper County at the Jasper County Courthouse at 601 S. Pearl, Joplin, Missouri 64801 (telephone number 417-625-4314; Fax - 417-625-4315) this 12th day of January, 2008.

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James Egan

CERTIFICATE OF COMPLIANCE

I, James Egan, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 16, 613 words, which does not exceed the 31,000 words allowed for a Relator's brief.

The CD filed with this brief contains a copy of this brief saved in Microsoft Word Format. The disk has been scanned for viruses using a McAfee VirusScan Program. According to that program, the disk is virus-free.

_____
James C. Egan

IN THE

MISSOURI SUPREME COURT

STATE EX REL. T.W.,	)	
	)	
Relator,	)	**No. SC88773**
	)	**Circuit Court No. 06AO-CR02770-01**
vs.	)	
	)	
THE HONORABLE DAVID MOUTON, CIRCUIT JUDGE, 29TH JUDICIAL CIRCUIT,	)	
	)	
Respondent	)	

APPENDIX TO RELATOR'S BRIEF

VOLUME I

VOLUME II

VOLUME III

VOLUME IV

VOLUME V

VOLUME VI

Respectfully submitted,

_____

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