IN THE
MISSOURI SUPREME COURT

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| STATE OF MISSOURI<br>ex rel. DARNELL CLEMONS,<br>Relator. | ) | |
| v. | ) | Cause No. SC85555 |
| THE HON. MAURA McSHANE<br>CIRCUIT JUDGE FOR THE 21st<br>JUDICIAL CIRCUIT,<br>Respondent. | ) | |

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ORIGINAL PETITION FOR WRIT OF PROHIBITION IN THE MISSOURI SUPREME COURT
FROM THE JUVENILE DIVISION OF
THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, MISSOURI
THE HONORABLE MAURA McSHANE, JUDGE

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# 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, ***In the Interest of Darnell Clemons***, Cause No. 114007, St. Louis County Family Court, on the grounds that he is not mentally competent to proceed with the pending juvenile certification hearing, 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 Eastern District Court of Appeals for the State of Missouri, in Cause No. ED 83377, on September 3, 2003.

## STATEMENT OF FACTS

Relator is a juvenile, born March 8, 1986, and is under the jurisdiction St. Louis County Family Court. Relator is charged with the Class A felony of Robbery First Degree, the Class B felony of Assault in the First Degree, the Class B felony of Robbery in the Second Degree and the Class C felony of Stealing a Motor Vehicle. These referrals are pending before St. Louis County Family Court. (Ex. A, p. A1-A2, A5-A6).

The Juvenile Office of St. Louis County has filed motions pursuant to Section 211.071, Revised Statues of Missouri, requesting a hearing before St. Louis County Family Court to determine whether or not Relator is a proper subject to be dealt with under the provisions of the Juvenile Code. The State would then seek to have Relator prosecuted under the general law, as an adult, upon dismissal of the proceedings in Family Court ("certification"). (Ex. A, p. A3-4, A11-12).

The certification hearing was set before the Honorable Maura McShane, Division 2, St. Louis County Family Court, on April 25, 2003.

Counsel for Relator obtained the services of Dr. Jefferies Caul, to evaluate Relator for his competency to proceed, based on his history of moderate mental retardation. This evaluation was performed in May, 2003, with the knowledge of the Court and counsel for the State. The scheduled certification hearing of April 25, 2003, was continued to June 19, 2003, to permit this psychological evaluation of Relator. (Ex. A, p. A13).

Dr. Caul completed his evaluation of Relator; copies of all reports were provided to the State and the Court. It is Dr. Caul's opinion, to a reasonable degree of

psychological certainty, that Relator is not competent to proceed in the certification proceedings pending against him. (Ex. A, p. A26 and A69-70).

The certification hearing was again continued at defense counsel's request and by consent of the parties, as Dr. Caul was not available on June 19, 2003; the new date set was July 18, 2003. (Ex. A, p. A13). Also on June 19, 2003, the State requested and the Court ordered another psychological evaluation of Relator to determine his competency to proceed in this cause, pursuant to Section 211.161 RSMo. (Ex. A, p. A13). The Court ordered this evaluation to be done by St. Louis County Family and Clinical Services, who were to come to court at the next setting and testify about their findings. (Ex. A, p. A13).

This court-ordered evaluation was performed by Dr. Margo Layton. Dr. Layton had previously tested Relator, and prepared her report about her findings. (Ex. A, p. A58). This first report was dated February 19, 2003. (Ex. A, p. A58). Dr. Layton re-interviewed and re-examined Relator, pursuant to court order, and prepared a second report (Ex. A, p. A54-57). This report was dated July 14, 2003 (Ex. A, p. A54-57).

While Dr. Layton felt that the final decision on Relator's competency to proceed was the Court's function, not hers, (Ex. A, p. A96), in Dr. Layton's written conclusions she believes that "interview and testing raise significant questions about Darnell's capacity to fully participate in the juvenile proceedings." (Ex. A, p. A60). She felt that Relator's "abilities to work collaboratively with his attorney could be compromised by his difficulties with verbal comprehension and expression and complex processing." (Ex. A, p. A60).

The Court held an evidentiary hearing on this issue of Relator's competency to proceed in this underlying cause on July 18, 2003. Dr. Caul testified as a witness for Relator, (Ex. A, p. A6-34), as did Dr. Layton. (Ex. A, p. A34-44). Deputy Juvenile Officer Helena O'Reilly testified on behalf of the Juvenile Officer. (Ex. A, p. A44-53). The transcript relates the full evidence adduced (Ex. A, p. A14-53). *Inter alia*, both experts agreed that:

1. Relator is classified as "moderately mentally retarded" under the criteria established the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition" (DSM IV - TR). (Ex. A., p. A16, A 17, A36-37).

2. Relator's full scale IQ is consistently measured at 46, according to Dr. Layton's findings in February, 2003, and in July, 2003, and Dr. Caul's findings in May, 2003. (Ex. A, p.35 and pp. A16, A17, A18).

3. Relator's IQ and other functioning tests places him at less than .1% relative to his age level peers; more than 99 out of 100 peers will achieve a higher score. (Ex. A, pp. A36, A55 and A64).

4. Relator is severely and uniformly developmentally delayed. (Ex. A, p. A55 and pp A65-69). Relator has deficits in acquiring and retaining information, in an academic setting as well as in everyday experience. (Ex. A, p. A18, A35-36, A65). Relator has no ability to think in abstract terms or understand abstract ideas (Ex. A, pp. A19, A27, A34, A38, A44, A55, A59 and A68)

Specifically, Dr. Caul testified that the DSM IV discusses multiple levels of mental retardation. "Mild Mental Retardation" is the largest segment of the mentally retarded population, comprising about 80 or 85% of those with this disorder. (Ex. A, p. A17). The next lowest segment is the "Moderately Mentally Retarded," comprising about 10% of the mentally retarded population (Ex. A, p. A17)). It is this lower segment in which Relator finds himself (Ex. A, p. A17). Although Darnell had apparently reached the ninth grade at Beaumont High School, as discussed in an earlier evaluation by Dr. Rosso, Darnell's condition of moderate mental retardation was long-standing and not a new condition (Ex. A, pp. A226-27).

Most individuals with this level of moderate mental retardation acquire their communication skills during early childhood (Ex. A, p. A17). They are unlikely to progress beyond the second grade in academic subjects (Ex. A, p. A17). They may learn to travel independently in familiar places (Ex. A, p. A17). In their adult years, the majority of the moderately mentally retarded may adapt well to life in the community, usually in supervised settings such as a group home (Ex. A, p. A17).

When tested by Dr. Caul, Darnell's language was very simple, immature and concrete for his age (Ex. A, p. A17). He had difficulties finding the right words (Ex. A, p. A17). He made verb tense errors (Ex. A, p. A17). Darnell's skills were uniformly depressed (Ex. A, p. A18). His fund of information was poor; for example, Relator told Dr. Caul that the shape of a ball was a square, that Monday followed Saturday and that there were twelve weeks in a year (Ex. A, p. A18). Darnell did not know why we wash clothes or why it is important to cook certain foods (Ex. A, p. A19). Darnell had

problems with abstract reasoning skills, such as perceiving meaningful relationships between objects; he was unable to see a relationship between socks and shoes, or the colors yellow and green (Ex. A, p. A19).

To measure Darnell's receptive language skills (his ability to understand words spoken to him), he was given the Peabody Picture Vocabulary test (Ex. A, p. A19). When asked to pick out the picture of a cow, amongst four pictures, he could not do that. (Ex. A, p. A19). He also could not pick out the picture of the drum or the cage when prompted with the name of the item sought. (Ex. A, p. A19). Darnell's age equivalent for that test was below one year, nine months. (Ex. A, p. A20)

Dr. Caul administered the Expressive Vocabulary Test (EVT) to Darnell, which is meant to test how well a person can express themselves; how well they can put their thoughts into words (Ex. A, p. A20). Darnell identified the elephant as a "lion" and a bunny rabbit as a "cat" (Ex. A, pp. A20-21). Darnell's age equivalency on the EVT was two years, six months (Ex. A, p. A21).

Darnell's short term memory skills are extremely limited (Ex. A, p. A21). He was unable to listen to a string of three digits forward, remember them, and repeat them back (Ex. A, p. A21). For example, Darnell could not remember and repeat "five, eight, two" or "six, nine, four" (Ex. A, p. A21). He was inconsistent at repeating two digits forward, placing him below a three-year-old level (Ex. A, p. A22).

Darnell has not mastered basic additional and subtraction skills; he can only count blocks placed before him on a one-to-one correspondence (Ex. A, p. A21).

Dr. Caul could not even test Darnell's psychomotor processing speed, because Darnell could not even master the task for the test (Ex. A, p. A22). His score was zero (Ex. A, p. A22). One might expect an average 17 year old, of average intelligence, to be able to answer 35 to 40 of these test items (Ex. A, p. A22).

Dr. Caul examined Darnell's visual-perceptual-motor integration processing skills and found them to be markedly delayed (Ex. A, p. A22). Darnell was asked to replicate drawings; he was able to do some items up to about a five-year-old level, but started refusing to do them because it was too challenging (Ex. A, p. A23). Dr. Caul also administered the Bender-Gestalt drawing test to Darnell, which is another test designed to test this aspect of Darnell's development (Ex. A, p. A23). His age equivalence on this test ranged between seven years to seven years, five months old (Ex. A, p. A23).

Dr. Caul discussed Darnell's academic skills, which he measured using the Woodcock-Johnson Tests of Achievement, Third Edition (Ex. A, p. A 24). Darnell was only able to read a few isolated words, such as "in, can, was, have, when and about" (Ex. A, p. A 24). He does not consistently know his letters (Ex. A, p. A 24). For example, he pointed to "B" when asked to match the letter "P" at the top of the card (Ex. A, p. A 24). Darnell was not able to identify the letter "B" or "C" (Ex. A, p. A 24). He was unable to identify "K" and "R" (Ex. A, p. A 24-25). These are skills we would ordinarily see emerging the preschool age level, such as three and one-half or four years old (Ex. A, p. A 25). He could not correctly read the phrase "One Book" and point to the picture of the book (Ex. A, p. A 25). He could not read any two-word phrases or sentences in the test (Ex. A, p. A 25).

The Broad Reading Scales generated a standard score of "2" which falls well below a five year, six month age level of development (Ex. A, p. A 25). Spelling skills fell at a four year, nine month level (Ex. A, p. A 25). Reading comprehension fell at a four year, seven month level (Ex. A, p. A 25).

With regards to his competency to proceed, Darnell was able to say that a lawyer was to "help you, try to get you out of here" (Tr. 48). When asked about the Judge's role, he responded "Judge send you away" (Tr. 48). Darnell could identify the role of his lawyer as “try to help you, get you out of here.” (Ex. A, p. A 29). He was also able to identify his Deputy Juvenile Office (Ex. A, p. A 26). He described her function as “Try to help you change your life.” (Ex. A, p. A 26). When asked about the difference between right and wrong, Darnell said that he “did not know.” (Ex. A, p. A 26). Darnell's ability to communicate his own thoughts is severely limited (Ex. A, p. A 26), falling at a two year, six month level (Ex. A, p. A 26). His abilities to receive and understand language and are also severely limited (Ex. A, p. A 26). These language skills fall into a one year, nine month level (Ex. A, p. A 26). His short-term memory skills are so limited that he is not able to follow any complex interactions at all, especially in a legal setting (Ex. A, p. A 26).

On cross-examination, Dr. Caul noted that Darnell did his best to comply with testing directions (Ex. A, p. A 27). Darnell understood some of the directions, but not all (Ex. A, p. A 27). Dr. Caul explained that he could not re-phrase certain testing directions, or explain them further to Darnell, because some directions are standardized and re-phrasing would spoil the standardization (Ex. A, p. A 27). It is possible to

communicate with Darnell using concrete activities, thoughts or behaviors (Ex. A, p. A 27). If one uses any complex words, language structures or content, however, it will result in Darnell's inability to understand and communicate back (Ex. A, p. A 27-28). Dr. Caul pointed out that, while one does not need to have good math or reading skills in order to be competent, one would still need to have a basic understanding of what words mean and how to process them in order to make intelligent decisions about one's case (Ex. A, p. A32).

Dr. Caul was questioned about whether he had asked Relator to write any words or letters (Ex. A, p. A31). Dr. Caul testified that he had; Relator was able to write his own name, although he could not spell out most dictated words or none of the words Dr. Caul had chosen (Ex. A, p. A31). The Juvenile Office showed Dr. Caul a grievance form, later admitted over counsel's objection as JO's Exhibit #1 (Ex. A, p. A31, A71). While Dr. Caul would agree that this grievance form appeared to be written in the same handwriting, he found the contents of that form to be "absolutely inconsistent" with his test results for Relator (Ex. A, p. A32). If Relator had written JO's Exhibit #1 independently, Dr. Caul would be "shocked" (Ex. A, p. A32).

Dr. Caul acknowledged that his review of previous reports reflect that Relator left the Fort Bellefountaine facility in November, 2002, and was gone from that facility for approximately one month (Ex. A, p. A 28). Dr. Caul noted, however, that the fact one is on the streets for one month does not make that person competent to proceed (Ex. A, p. A32). In fact, that person may have survival skills or, more likely, are with someone who is taking care of them (Ex. A, p. A32).

In his initial interviews, Relator was able to tell Dr. Caul his birth order, and that he had been in a serious car accident when he was 12 or 13 (Ex. A, p. A 29). Darnell is able to recall things that happen to him (Ex. A, p. A 29). Dr. Caul agreed that Darnell has behaved himself in the detention center, following directions on a daily basis, because Darnell has only six minor incident reports in seven months (Ex. A, p. A30-31). Dr. Caul pointed out, however, that moderately mentally retarded people such as Darnell function best in a highly structured environment, such as detention, where they do not have to make any independent decisions (Ex. A, p. A33). Thus, Darnell's good behavior in detention corroborated the diagnosis of moderate mental retardation. Further, Dr. Caul agreed that Darnell had behaved well in court that day, but pointed out that one is not competent to proceed just because one sits quietly in court and does not cause a disturbance (Ex. A, p. A32). Finally, Dr. Caul agreed that most adults may not have a flawless understanding of the trial process, or have a flawless ability to assist their counsel (Ex. A, p. A29). Nevertheless, most adults can learn from their experiences (Ex. A, p. A34). They can develop a clear understanding, or ask questions until they do understand (Ex. A, p. A34). They have the ability to think and plan, compare and contrast, and project into the future (Ex. A, p. A34). People, such as Relator, in the moderately retarded range do not have that capacity (Ex. A, p. A34). One cannot make an abstract issue concrete enough for the moderately retarded individual to understand, and the courtroom is a complex place (Ex. A, p. A34.

Dr. Layton testified for Relator. Specifically, she testified that she had been employed as a psychologist with the Family Court of St. Louis County for twenty-five

years (Ex. A, p. A34). She conducted her first evaluation of Relator in February, 2003, at the request of the Court (Ex. A, p. A34). Dr. Layton conducted several tests on Relator (Ex. A, p. A34). She had concerns about his reading level; Relator obtained low scores on the Wechsler Intelligence Scale and had to have some tests read aloud to him (Ex. A, p. A34).

Dr. Layton tested Relator's IQ; she found his full scale IQ to be 46, his verbal IQ was 46 and the performance IQ was 50 (Ex. A, p. A35). Those results place Relator in the moderately mentally retarded range (Ex. A, p. A35). This full scale IQ results places Relator slightly below the first percentile; more than 99 percent of his peers will score better than Relator (Ex. A, p. A35). Dr. Layton had reviewed Dr. Rosso's reports from 2001 and 2002, as well as Dr. Caul's report from 2003 (Ex. A, p. A37). Her test results were consistent overall with those of Dr. Rosso and Dr. Caul (Ex. A, p. A37).

Dr. Layton did testing calculated to measure how well Relator acquires and retains verbal information in the academic setting (Ex. A, p. A36). Relator obtained a scaled score of 1, which is very significantly below the average score of 10 and puts Relator below the first percentile relative to his peer group (Ex. A, p. A36). Relator also had scores of 1 when tested for arithmetic knowledge and vocabulary (Ex. A, p. A36). These are all basic informational skills which would be obtained from the school experience (Ex. A, p. A36).

Dr. Layton did testing to measure how well Relator acquires and processes information acquired from everyday experience (Ex. A, p. A36). Relator also scored a 1 on this subtest, which was the lowest scalable score (Ex. A, p. A36). Relator's best test

results, on the block design, obtained a score of 4; this is equivalent to a chronological mental age of ten and one-half years old (Ex. A, p. A36).

Dr. Layton diagnosed Relator as moderately mentally retarded (Ex. A, p. A36). She described moderately mentally retarded individuals as being able to function in society in a limited way (Ex. A, p. A37). They can perform unskilled or semi-skilled labor (Ex. A, p. A37). They can travel in the community if it is familiar; they need to be familiar with where they are going and how to get there (Ex. A, p. A37). Generally, they live in a supervised living situation because they have difficulty processing more complex kinds of interaction (Ex. A, p. A37).

Dr. Layton found Relator to be one of the five (or less) most delayed individuals she has ever tested in her twenty-six years of practice working with St. Louis County Courts (Ex. A, p. A37).

She has been trained to detect malingering (Ex. A, p. A37); she did not believe Relator to be malingering (Ex. A, p. A37).

Dr. Layton viewed the decision on competency to be that of the Court's, so she did not specifically make a finding on that issue (Ex. A, p. A37). Dr. Layton believes, however, that it could be difficult for Darnell to completely follow the proceedings which would occur in a courtroom during a trial or hearing (Ex. A, p. A38). If the vocabulary in the courtroom goes above a third or fourth grade level, then Darnell might not understand it (Ex. A, p. A38). There are a number of issues where verbal comprehension comes into play when considering a defendant's competency to proceed (Ex. A, p. A38). Dr.

Layton's testing results raised significant questions about Darnell's capacity to fully participate in the juvenile proceedings (Ex. A, p. A38).

Darnell has a compromised ability to work collaboratively with his attorney and to make informed decisions about his case (Ex. A, p. A38). This could be a significant impact on Darnell's ability to make informed decisions about his case (Ex. A, p. A38). Even though she believes that she is not able to render an opinion on Darnell's competency to proceed, Dr. Layton cannot rule out the possibility that Darnell is not competent to proceed (Ex. A, p. A38). If, during the certification proceeding, the vocabulary in the courtroom becomes complex and goes over a third or fourth grade level, then it is possible that Relator won't understand what is happening around him (Ex. A, p. A44).

On cross-examination, Dr. Layton acknowledged that Relator was able to answer some historical questions about himself; based on his answers and within that context, she found his speech was coherent and thought process logical (Ex. A, p. A38). Relator was able to describe thoughts of depression, an attempted suicide and the fact that he had taken Ritalin in the past (Ex. A, p. A39). Dr. Layton testified that Relator was able to understand test directions and follow them (Ex. A, p. A39). He was able to behave well in court (Ex. A, p. A40). He understood that he had a female attorney who would speak for him in court (Ex. A, p. A40). He had some understanding of some of the charges against him (Ex. A, p. A40). She agreed that detention is a very structured setting (Ex. A, p. A41). She also agreed that Relator's violations in detention were minor (Ex. A, p. A41), so he must have a good understanding of the rules (Ex. A, p. A41). Dr. Layton

pointed out, however, that there is usually quite a bit of re-direction and instruction that can go on, which relates to the diagnosis of moderate mental retardation (Ex. A, p. A41). That is why moderately mentally retarded people do well in structured, supervised, predictable setting, such as detention, with prompts and redirection (Ex. A, p. A42).

When she asked Relator about the certification process, he was able to express that this was a decision about where his case would be heard (Ex. A, p. A39). He understood that he would have a record if he went to adult court (Ex. A, p. A39), but he felt he could start over if he stayed in juvenile court (Ex. A, p. A39). Dr. Layton explained that, while Relator understands what a certification hearing is all about to the extent that he understands that he may or may not be retained in the juvenile system, she is not prepared to say that Relator can weigh and evaluate the long-term impact of the decisions that might be made (Ex. A, p. A40). While Relator understood that he may or may not be retained in the juvenile court, he only understood that fact, along with the idea that he might have to go up the street and live in the County Jail (Ex. A, p. A43). That was the outside boundary of Relator's understanding (Ex. A, p. A43).

The Legal Officer questioned Dr. Layton about the process for writing grievance forms while confined in detention (Ex. A, p. A41). Dr. Layton has some knowledge of it, but is not completely familiar with it (Ex. A, p. A41). The Legal Officer showed Dr. Layton JO's Exhibit #1 and asked Dr. Layton if this purported to be a grievance; Dr. Layton agreed that it did (Ex. A, p. A42). She did not ask Relator to write his name, so she did not recognize any handwriting (Ex. A, p. A42).

When discussing this grievance form, Dr. Layton agreed that there were only three possibilities regarding its authorship; first, that Relator had written it and had been malingering for three separate psychological professionals since at least 2001, second, that someone else had written it for Relator and third, that he had been coached (Ex. A, p. A43). Based on her testing and evaluation, it would surprise Dr. Layton that Relator was capable of writing JO's Exhibit 1 although she did not ask him to write anything for her (Ex. A, p. A42). With regard to her confidence in her test results, Dr. Layton felt that her tests results of Relator are probably accurately reflecting Relator's intellectual abilities when considered with their consistency to other test data (Ex. A, p. A43).

The State called one witness, the Deputy Juvenile Officer (DJO) Helena O'Reilly. Ms. O'Reilly testified that she was Relator's DJO and that he had been in detention since December 25, 2002 (Ex. A, p. A44). Ms. O'Reilly explained that the Court had instituted a policy of having the DJOs review outgoing letters, in order to make certain that juveniles did not attempt to dissuade witnesses from coming to court (Ex. A, p. A44). She has reviewed letters which purport to be written by Relator (Ex. A, p. A45). She estimated to have reviewed perhaps ten of these letters, although she did not have an exact count (Ex. A, p. A45). The letters were placed in her mailbox by detention staff, after they were written, for her review (Ex. A, p. A45).

At one point in February or March, 2002, DJO O'Reilly asked Relator whether he was the author of those letters (Ex. A, p. A45). Ms. O'Reilly asked because her supervisor was curious, because the first psychological evaluation had just come in from Dr. Layton (Ex. A, p. A45). The DJO testified that she complimented Relator on his handwriting

and he commented that he does have nice handwriting (Ex. A, p. A45). She had no further conversation with Relator regarding the author of those letters (Ex. A, p. A45).

The DJO testified that the resident is supposed to write the grievance form personally, but that she is aware of a situation where someone else has written a grievance report for the juvenile (Ex. A, p. A46).

The DJO testified that the handwriting in JO's Exhibit #1 was Relator's, based on the fact that she had seen other letters purported to be written by him and that the handwriting was similar (Ex. A, p. A46). The DJO noted that the handwriting in the letters was more cursive than that of JO's Exhibit #1; that this is sloppier, to put it bluntly, than the handwriting in the letters (Ex. A, p. A46).

On cross-examination, Ms. O'Reilly testified that she had not personally observe Relator write any letters or grievance forms (Ex. A, p. A51). She heard the testimony from Drs. Caul and Layton (Ex. A, p. A51). She understood that the test results are highly inconsistent with the letters about which she is testifying (Ex. A, p. A51, A52). Ms. O'Reilly testified that she is certainly not qualified to discuss the psychological aspects of Relator's case (Ex. A, p. A52).

She took Relator's admission as fact (Ex. A, p. A51). She acknowledged that Relator could have lied to her about writing those letters (Ex. A, p. A51). She acknowledged that Relator could have misunderstood her questions to him (Ex. A, p. A51). She acknowledged it might be embarrassing to Relator, to be seventeen and not be able to write his own letters (Ex. A, p. A51). She agreed that another explanation for those letters is that Relator could have asked a friend to write them for him (Ex. A, p.

A52). Ms. O'Reilly did not keep copies of any letters; she looked at them and mailed them off over a period of six months (Ex. A, p. A51).

Finally, the Legal Officer asked Ms. O'Reilly if she knew how many juveniles had been in detention for the past seven months (Ex. A, p. A52). Although Ms. O'Reilly testified that she didn't know of any other juveniles who had been in detention since Christmas, 2002, she also testified that she did not have an answer at this point, that it was unusual for a juvenile to be in detention for that long and that she didn't know (Ex. A, p. A52).

After this hearing, the Court took the matter under submission. On July 21, 2003, the Court issued its order finding Relator competent to proceed, stating as grounds only that: "The issue before the Court is the juvenile's competency only for a certification hearing. During the hearing, the Court heard the evidence and had the opportunity to observe the juvenile. At one point during the hearing juvenile's attorney showed him a document (later marked JO's Exhibit 1) and had a conversation with the juvenile regarding the document. The Court finds that although the juvenile may be in the moderately retardation range, he is competent to understand the certification hearing and to consult with his attorney." (Ex. A, p. A72).

Relator filed a petition for writ of prohibition to the Missouri Court of Appeals, Eastern District, Case Number ED 83377, on August 29, 2003. The Court of Appeals denied the petition on September 3, 2003.

Relator filed his petition for writ of prohibition to the Missouri Supreme Court on September 11, 2003.

On September 17, 2003, the Missouri Supreme Court issued its preliminary Order in Prohibition and ordering Respondent's reply on or before October 17, 2003.

On October 3, 2003, Respondent filed her Return to the preliminary writ in Prohibition. This brief follows.

## POINTS RELIED ON

**I. Relator is entitled to an order prohibiting Respondent from finding him competent to proceed, because such a finding is an abuse of discretion in that there is no substantial evidence to support it, is based on the Court's speculation about a single observed communication between Relator and his counsel, and does not take into consideration Relator's abilities to understand or appreciate the nature of the proceedings against him.**

***State ex rel. Chassaing v. Mummert***, 887 S.W.2d 573, 577 (Mo. banc 1994)

***Kent v. United States***, 86 S.Ct. 1045 (1966)

***Drope v. United States***, 95 S.Ct. 896 (1975)

***State ex rel. Reed v. Frawley***, 59 S.W.3d. 496 (Mo. S. Ct. 2001)

**II. Relator is entitled to an order prohibiting Respondent from finding him competent to proceed, because the Court's order finding him competent is insufficient as a matter of law, because that there is no legal basis to find that Relator is competent to understand the courtroom proceedings, which is a very different and separate issue from being able to communicate meaningfully with this counsel.**

***Pate v. Robinson***, 86 S.Ct. 836 (1966)

***Hinnah v. Director of Revenue***, 77 S.W.3d 616, 620 (Mo. banc 2002)

**III. Relator is entitled to an order prohibiting Respondent from finding him competent to proceed, because the Court's ruling causes irreparable harm to Relator, in that it forces him to proceed while mentally incompetent in the above-described certification hearing.**

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

***State v. Petty***, 856 S.W.2d 351, 353 (Mo. App. SD 1993)

***U.S. Const., Amend 14***

## ARGUMENT

**I. Relator is entitled to an order prohibiting Respondent from finding him competent to proceed, because such a finding is an abuse of discretion in that there is no substantial evidence to support it, is based on the Court's speculation about a single observed communication between Relator and his counsel, and does not take into consideration Relator's abilities to understand or appreciate the nature of the proceedings against him.**

"Prohibition is a discretionary writ that lies only to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judical power." ***State ex rel Linthicum v. Calvin***, 57 S.W.3d 855, 857 (Mo. banc 2001). "The general rule is that, if a court is 'entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court.'" ***State ex rel Kinder v. McShane***, 87 S.W.3d 256 (Mo. banc 2002). But "[p]rohibition will lie when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision." ***State ex rel. Chassaing v. Mummert***, 887 S.W.2d 573, 577 (Mo. banc 1994).

The issue is whether the Court had any evidence before it upon which it could base its ruling. The Court's decision, finding Relator competent to proceed, is against the overwhelming weight of the evidence, is arbitrary, and violates the logic of the

circumstances; the Court's order violates Darnell Clemons's right to be competent to assist his counsel and to understand the proceedings against him.

Waiver of jurisdiction by the juvenile court is a critically important stage that requires procedures that "satisfy the basic requirements of due process and fairness". ***Wilkins v. Bowersox***, 933 F.Supp 1496, (W.D, 1996), ***Kent v. United States***, 86 S.Ct. 1045 (1966), 1053-1055; See also ***State ex. rel. D V v. Cook***, 495 S.W.2d 127 (Mo. App. 1973). Specifically, the Court noted that due process requires effective assistance of counsel when the result is one of "such tremendous consequences" (emphasis added). ***Id***. at 1053; ***In re Gault***, 87 S.Ct. 1428 (1967). This right to counsel is codified in Section 211.211 of the Missouri Revised Statutes and in Supreme Court Rule 116.01(a), which state that juveniles have a right to counsel in all proceedings.

"A right to counsel is an 'empty formality' if it is not also assumed that the assistance of counsel must be effective. ***In the Interest of J.C., Jr***., 781 S.W.2d 226, 228 (Mo. App. 1989).

The right to effective assistance of counsel is meaningless if the client is not competent to understand the nature of the proceeding or to consult with counsel. ***Pate v. Robinson***, 86 S.Ct. 836 (1966); ***Vaughn v. Morgett***, 526 S.W.2d 434 (Mo. Ct. App. 1975), 436. The United States Supreme Court has held, therefore, that an incompetent person cannot be subjected to trial. ***Drope v. United States***, 95 S.Ct. 896 (1975), 903. The United States Constitution prohibits the prosecution of a defendant who is not competent to stand trial. **U.S. Const., Amend. 14**, ***State v. Johns***, 34 S.W.3d 96 (Mo., 2000). The United States Supreme Court has also held that the standard for competency

to stand trial must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him. ***Dusky v. United States***, 80 S.Ct. 788 (1960), 788-789. Similarly, "such a right becomes meaningless 'as the sound of tinkling brass' if an accused lacks mental capacity to knowingly and intelligently confer with counsel respecting the charges or issues brought against him and to assist counsel by means of supplying information pertinent to those issues. ***State ex rel. Vaughn v. Morgett***, 526 S.W.2d 434, 436 (Mo. App. 1975)." ***State ex rel. Reed v. Frawley***, 59 S.W.3d. 496 (Mo. S. Ct. 2001).

In this case, the Court's order simply ignores the testimony and unanimous testing results of two psychological professionals, both of whom agree about the very low level of Relator's intellectual functioning in this case. The testimony from both experts is unanimous; the level of Relator's intellectual functioning is such that he will certainly have serious difficulties in conferring with counsel, or understanding the nature of the proceedings against him.

"A trial court's determination of competency is one of fact that must stand unless there is no substantial evidence to support it." ***State v. Frezzell***, 958 S.W.2d 101 (Mo. App. WD 1998). In reviewing the sufficiency of a trial court's determination of competency, a reviewing court does not weigh the evidence but accepts as true all the evidence and reasonable inferences that tend to support the finding. ***Id***. A reviewing court must determine "whether a reasonable judge, in the same situation as the trial court, should have experienced doubt about the accused's competency to stand trial." ***Frezzell,***

quoting ***State v. Tokar***, 918 S.W.2d 753, 762-63 (Mo. banc 1996), ((quoting ***Branscomb v. Norris***, 47 F.3d 258, 261 (8th Cir. 1995), cert. denied, 515 U.S. 1109 (1995)). "If a ruling clearly violates the logic of the circumstances or is arbitrary or unreasonable, it is an abuse of discretion." ***Wibberg v. State***, 957 S.W.2d 504, 506 (Mo. App.1997).

While it is fitting and proper that any reviewing court would hesitate to disturb the trial court's findings from an evidentiary hearing, the reviewing court should not ignore a situation where the lower court order is contradicted by the overwhelming majority of the evidence. It may be helpful to contrast the Court's ruling and the scant basis therefore, with some of the evidence adduced at the hearing which relates to the Relator's mental status, laid out at length in the Relator's Statement of Facts and in the transcript of the hearing.

In this case, there is simply no substantial evidence or reasonable inferences to support the Court's decision. The Court bases its ruling on one perceived, privileged, private, and *soto voce* communication between Relator and counsel. Although the record is silent on this point, counsel can attest that this was the single and only time that counsel directed any remark to Relator while court was in session during the course of the entire four hour hearing. Counsel spoke four words; Relator responded with one. The Court's ruling assumes as true, without evidence or other basis, that Relator understood the communication, and was able to give meaningful information back to counsel in response. In fact, both expert witnesses testified that Relator is not able to understand abstract ideas, but could communicate in a concrete fashion. The Court could

have no idea whether the nature of any words spoken privately to Relator, by counsel, would have been abstract or concrete in nature.

The Court could not possibly know what was being discussed or whether meaningful information was being exchanged, as she was observing from a short distance a privileged, private communication between attorney and client at counsel table. In fact, the testimony of both expert witnesses makes it very likely that Relator was *not* understanding the nature of the proceedings or able to communicate meaningfully with counsel. The Court's ruling does not articulate what, if anything, counsel for Relator was able to do in response after Relator spoke with her.

Further, even assuming *arguendo* that the Court's assumptions are accurate, as a reviewing court is required to do, the Court's ruling still does not address the requirement that Relator be able to understand the proceedings against him. The Court's ruling finds that Relator can understand the proceedings, without having any basis for that conclusion in the evidence, testimony or record before her. The Court's order merely draws that conclusion, without explaining why the Court believes this to be true. While it can be permissible for the Court to consider the demeanor of a defendant in deciding competency to proceed, in this matter the Court based its conclusions on assumptions only, ignoring the weight of the evidence. Other than speaking one word in response to his counsel, Relator sat quietly in court the entire time and did nothing. The Court could have no idea whether he understood the proceedings or not. The Court's conclusions and order violate the logic of the circumstances.

Finally, if the Court was somehow considering the testimony of the DJO that Relator was capable of writing a grievance form, together with JO's Exhibit 1, or other letters to young ladies, as a deciding factor in its decision (which the Court does not mention), then the Court's conclusions also fly in the face of the undisputed psychological testimony. Both doctors were clear that Relator's mental condition would render it extremely unlikely, if not impossible, for him to have authored the grievance form. He simply does not possess the skills or capacities. It flies in the face of logic to say that Relator authored the grievance form by himself, spelling many words correctly, including the word "deodorant" when, according to two expert witnesses, he is not able to even read that word or words half that length. To argue that Relator authored that grievance by himself must result in the impossible conclusion that Relator has successfully bamboozled the Special School District and three trained psychologists, for several years in a row, without being detected as a malingerer.

For these reasons, the ruling cannot stand.

**II. Relator is entitled to an order prohibiting Respondent from finding him competent to proceed, because the Court's order finding him competent is insufficient as a matter of law, because that there is no legal basis to find that Relator is competent to understand the courtroom proceedings, which is a very different and separate issue from being able to communicate meaningfully with this counsel.**

The Court, in its order, found two-fold; the Court found that Relator was competent to consult with his attorney and competent to understand the certification hearing. The factual basis for this ruling is based only on Relator's ability to consult with counsel, which the Court believed it had observed. This factual basis (communication with counsel) does not address the second finding, that Relator was competent to understand courtroom procedure. Competency to proceed requires that a defendant be competent as to both aspects: "The right to effective assistance of counsel is meaningless if the client is not competent to understand the nature of the proceeding *or* to consult with counsel." (emphasis added) ***Pate v. Robinson***, 86 S.Ct. 836 (1966).

Relator presented two expert witnesses who agreed that, at a minimum, Relator is seriously impaired in his abilities to understand the courtroom procedures and other legal matters that will occur in court during a certification hearing. This testimony was uncontradicted by any affirmative evidence on the part of the State; since there is the evidence is uncontroverted, a reviewing court is not bound to give the trial court's findings the same deference as necessary in a finding based on credibility of witnesses. The issue becomes a matter of law, not an issue of trial court discretion. "We note that

we defer to the determination of the trial court as to credibility of witnesses. ***Hinnah v. Director of Revenue***, 77 S.W.3d 616, 620 (Mo. banc 2002). However, if the evidence is uncontroverted, there is no need for such deference. ***Id.***, (citing ***Hampton v. Director of Revenue***, 22 S.W.3d 217, 220 (Mo. App. 2000))." ***Bucher v. Director of Revenue***, 98 S.W.3d 79 (Mo. App. ED 2003).

The only evidence presented in court as to Relator's ability to understand courtroom proceedings and legal matters came from Relator. All of that evidence points to the fact that Relator is not competent to proceed in that he cannot understand what is happening around him in the courtroom, notwithstanding the Court's findings on his ability (or lack thereof) to communicate with counsel. As an issue of law, the Court's order is not supported by any affirmative evidence at all and, thus, cannot stand.

**III. The Court's ruling causes irreparable harm to Relator, in that it forces him to proceed while mentally incompetent in the above-described certification hearing.**

As discussed above, due process and effective assistance of counsel considerations require that Relator be competent to proceed in the certification proceedings against him. If the requested writ does not issue, Relator will be forced to proceed in his certification hearing without any remedy available to him. The decision to certify a juvenile is not a final order, subject to appeal, in that it is a dismissal to allow prosecution under the general law. ***In re T.J.H.***, 497 S.W.2d 433 (Mo. banc 1972). Once certified, he can file a motion to dismiss in Circuit Court, but the bell will already be rung. For a discussion of why this request for relief by way of dismissal in Circuit Court is a hollow remedy, see Judge Seiler's dissent in ***In re T.J.H.***, 497 S.W.2d 433 (Mo. banc 1972). The damage will be done; the dismissal will be in effect, and there is no going back to juvenile court unless Relator is ultimately found not guilty after further court proceedings, during which he must proceed as an adult. ***Section 211.071, RSMo***. In the meantime, while awaiting any further proceedings, Relator will be held at an adult jail with adult prisoners. Even in the unlikely event that the state chooses not proceed with felony charges in this case, Relator will still be forever barred from juvenile court and their services, without remedy, as a result of being forced to participate in a certification hearing wherein he is not competent to proceed. For a discussion of this general problem, see ***State v. K.J***, 97 S.W.3d 543 (Mo. App. WD 2003).

Further, the courts have an obligation to ensure that Relator is not forced into court without the requisite mental capacity to comprehend the proceedings. "The principle

which will not tolerate conviction of an accused who lacks capacity to consult with counsel and to understand the proceedings rests on values of public conscience - quite apart from considerations of guilt or innocence." ***State v. Petty***, 856 S.W.2d 351, 353 (Mo. App. SD 1993) (quoting ***State v. Clark***, 546 S.W.2d 455 (Mo. App. 1976)).

Should Relator be forced to proceed with the pending certification hearing while incompetent, it will be in violation under his constitutionally protected right to effective assistance of counsel and due process of law. ***U.S. Const., Amend 14, U.S. Const., Amend 5, U.S. Const., Amend 6***, ***Mo. Const., Article I, Sections 10 and 18(a)***.

## III. CONCLUSION

WHEREFORE, for the reasons set forth in Points I, II and III of this brief, both cumulatively and individually, Relator, Darnell Clemons, prays this Honorable Court make permanent its preliminary writ of prohibition, staying any further proceedings in the underlying cause, In the Interest of Darnell Clemons, Cause No. 114007, St. Louis County Family Court.

Respectfully submitted,

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**Certificate of Service**

I certify that a true copy of the above and foregoing was personally served on all of the following parties this _____ day of November, 2003.

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**Certificate of Counsel Pursuant to Special Rule 1(b)**

Pursuant to Special Rule No. 1, counsel certifies that this brief complies with the limitations contained in Special Rule No. 1(b). Based upon the information provided by undersigned counsel's word processing program, Microsoft Word 2000, this brief contains 765 lines of text and 8,344 words. Further, a copy of Relator's brief on floppy disk accompanies his written brief and that disk has been scanned for viruses and is virus-free as required by Special Rule 1(f).

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