IN THE
SUPREME COURT OF MISSOURI
No. SC97595

IN THE INTEREST OF D.C.M.,

Appellant,

vs.

JUVENILE OFFICE,

Respondent.

Appeal from the Circuit Court of Pemiscot County, Missouri
Thirty-Fourth Judicial Circuit, Pemiscot County No. 18PE-JU00022
The Honorable W. Keith Currie, Judge

SUBSTITUTE BRIEF OF APPELLANT, D.C.M.

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(1) Does a child in a delinquency proceeding have the right to the effective assistance of counsel, and if so, may the child on direct appeal raise claims attacking the effectiveness of his trial attorney?

(2) If a child, on direct appeal, may attack the effectiveness of trial counsel, what is the standard the child must prove: (a) that he was denied "a meaningful hearing," the standard used by the Southern District here; or, (b) the standard used in *Strickland v. Washington*, 466 U.S. 668 (1984), that there is a reasonable probability that the result of the proceedings would have been different?

(3) What is the appropriate action by an appellate court when a child raises a claim of ineffective trial counsel on direct appeal, but the court believes the record is inadequate to resolve the claim? Is it to: (a) deny the claim outright, as done here, leaving no clearly established remedy; or, (b) remand for a hearing so that witnesses can testify before the Juvenile Court, which would be better equipped to assess counsel's performance and its impact within the context of the case; or (c) appoint a special master as allowed by Supreme Court Rule 68.03?

(4) Is the following record adequate to establish ineffective assistance of counsel: Chris's trial attorney (Counsel) failed to call Jonathan as a witness, who was the student Chris was talking with when he allegedly made the terroristic threat; Jonathan told the police he did not hear Chris make any threat; and, after the evidence was concluded, Counsel requested a continuance to subpoena Jonathan, stating he had not

known about Jonathan and thus was not provided the opportunity to subpoena him, even though Counsel had been given access to the police reports, which named Jonathan as a witness, and thus, as noted by the Juvenile Office when opposing a continuance, counsel "had every opportunity to have those witnesses here today"?

JURISDICTIONAL STATEMENT

In the Juvenile Division of the Circuit Court of Pemiscot County, Missouri, it was alleged that Chris committed what would have been, if he were an adult, the felony of Making a Terrorist Threat in the Second Degree, § 574.120 (D2).[1] On March 2, 2018, the Honorable W. Keith Currie, found that the evidence sustained this allegation (D7). On that same day, Judge Currie committed Chris to the Division of Youth Services (DYS) (D6).

On March 7, 2018, a notice of appeal was timely filed *in forma pauperis* (D9-12). Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, Section 3, Mo. Const.; section 477.060. This Court thereafter granted Chris's application for transfer, so this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

[1]All statutory references are to RSMo (2016) unless otherwise indicated. References to the Record on Appeal are to a transcript (Tr.), and to the system-generated legal file and supplemental legal file, which will be referenced first by the document number followed by the page number (e.g., "D1 p. 1;" if the entire document is referenced, then the citation will only be to the document, "D1."). The supplemental legal file contains Documents 14 and 15 (police reports).

STATEMENT OF FACTS

Sixteen-year-old D.C.M. (Chris) was charged as a juvenile for threating to blow up a school (D2).[2] According to police reports, Tamara was in a high school cafeteria when she overheard Chris talking to Jonathan after she emptied her food tray and was walking to sit down (D14, 15).[3] Tamara was with Demario when she thought she overheard Chris say, "I feel like I want to blow up the school." *Id.* When the police interviewed Demario, however, he said he did not hear the statement. *Id.*

Jonathan – the student Chris was talking with in the cafeteria – was also interviewed by the police. *Id.* Jonathan said "he did not recall [Chris] making any threats or statements … he had not heard [Chris] make any statements." *Id.*

But neither Jonathan nor Demario testified at Chris's adjudication hearing, which was held only 12 days after the alleged threat, nor were their statements introduced into evidence by Chris's attorney (Counsel). This is, in part, because the court denied a continuance once Counsel realized that potentially exculpatory witnesses were absent after Chris testified he did not make any threats when he was talking in the cafeteria with Josh [ ], Jonathan [ ], and "[a] new guy named Marcus" (Tr. 69-70, 72):

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[2] For confidentiality purposes, Chris's brief will refer to students by their first name only. Chris was a new student; it was only his fifth day there (Tr. 26-27, 34, 52).

[3] The police reports were filed in the Juvenile Division of the Circuit Court of Pemiscot County, Missouri, and are part of the supplemental legal file (D14, 15). But they were not offered into evidence at the hearing.

> [COUNSEL]: Your Honor, Chris has provided names of a Joshua [], a Jonathan [] and a Marcus somebody that was at his table, and I wasn't provided that information and wasn't provided any opportunity, if I could, to subpoena these people to testify. I would like to have some opportunity to have them present, Your Honor, since he's denied the fact that [Zach] was -- was not at his table, but he does testify that a Joshua [], a Jonathan [], and a Marcus or Demetrius or whoever -- whatever his name was, was also at the table.

(Tr. 79).

The Juvenile Office objected that Counsel was given access to reports, "which named all of those witnesses," and that Counsel "had every opportunity to have those witnesses here today." (Tr. 79). Without giving a reason, the court denied Counsel's request to continue the court hearing, which was held only 8 days after Counsel's entry of appearance (Tr. 79). As a result, Jonathan did not testify regarding his statement saying he did not hear Chris make any threat, even though he was the student Chris was talking with at the time that Tamara thought she heard the threat (D14, 15).

Instead, the following evidence was presented at trial:

Tamara was in the school cafeteria with some friends when she heard Chris talking with Jonathan, Joshua, and Zach (Tr. 30, 38).[4] Chris said, "I feel like blowing this school up" (Tr. 30, 34). Tamara left the cafeteria and told the principal (Principal) about this (Tr. 30, 50). Tamara was scared because "we had plenty of threats about blowing our school up" (Tr. 30).

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[4] Chris testified that Zach was not sitting at his table (Tr. 69-70, 72). There was no mention of Zach in Tamara's statement to the police (D14, 15).

Principal contacted the authorities and had a teacher, who was in the classroom where Chris was attending class after lunch, keep Chris in the classroom until Principal could further investigate (Tr. 55). Chris did not leave the school campus that day until he was taken away by the police about an hour later (Tr. 55).

Principal testified it was a plausible or possible option to lock down the building or evacuate the building *if* they had a "credible threat" (Tr. 57-58). Instead, Principal did not put the school on lockdown since they kept Chris in a classroom, police arrived within five minutes after Principal contacted authorities, and only about an hour elapsed before Chris was taken "to juvenile" (Tr. 55, 57-58).

Officer Pratte interviewed Chris, who "did not make any admissions to making any statements;" Chris admitted "he was talking to some people in the cafeteria, but he stated that he was just joking with them and he denied making any threatening statements" (Tr. 46). Chris's mother told Pratte that Chris was autistic and might have been influenced by something he saw on television (Tr. 47-48).

The day following the threat, there was about an 11 to 12 percent decrease in school attendance (Tr. 51).

Zach, contacted the police the day after the alleged threat, which was after it was known throughout the school (D14, 15; Tr. 51). Zach testified at the adjudication hearing that he heard Chris say "he wanted to see how it feel like to blow up the school and wanted – shooting up the school" (Tr. 39). Zach also testified that Chris "said that he might do it tomorrow….He said he's going to do it tomorrow… he said he might do it tomorrow" (Tr. 39-40, 42).

Also at the hearing, the Juvenile Office presented evidence regarding things Chris said on the school bus on the way to school that day; these allegations also were not reported until the following day and were not the basis of the petition (D2, 14):

Richanna was on the bus when she overheard Chris talking to two boys (Tr. 10, 11). Chris said, "Do you all know what happened up in Florida school when that dude had shot them peoples (sic)? ... I wonder how it feels to shoot somebody." (Tr. 10). He also told them that his father "got a couple guns, too, that looked just like the one that the person had up on the TV, and plus the other ones that he had." (Tr. 10).[5]

David was on the bus when he overheard Chris talking about the school shooting in Florida (Tr. 21). Chris said that on Snapchat, he saw people getting shot (Tr. 21). Later in the school hallway, David again heard Chris talking about the Florida shooting (Tr. 21-22).

Based on the evidence presented, the court found beyond a reasonable doubt that the allegations of the petition were true (Tr. 86).[6] Immediately, with Chris's attorney presenting no evidence during the disposition phase, the court committed Chris to DYS for an indefinite term (Tr. 99-101). This appeal follows.

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[5] Chris testified he only lived with his mother and younger sister, and his mother did not possess any firearms (Tr. 71).

[6] Chris was charged with Making a Terrorist Threat in the Second Degree, § 574.120, in that he "recklessly disregarded the risk of causing the evacuation, quarantine or closure of the school, a place of assembly, and knowingly communicated an express or implied threat to cause an incident or condition involving danger to life. To wit: The defendant made a threat to blow up the school." (D2).

SUMMARIES OF POINTS RELIED ON

Point I: Chris's attorney was ineffective. The student Chris was talking with at the time of the alleged threat told police he did not hear Chris make a threat. The student did not testify, however, because Chris's attorney failed to subpoena him, even though the student's name, contact information, and statement were in the reports given to the attorney. A new hearing is required because the student's statement would have supported Chris's testimony that he did not make a threat.

Point II: The hearing was held only 8 days after Chris's attorney entered an appearance and 12 days after the petition was filed. Thus, it was unreasonable for the court to refuse to grant a continuance after the attorney discovered, at the hearing, the names of three students Chris was talking with when he allegedly made the threat. At least one of these students, the one most likely to have heard a threat if one had been made, told the police he did not hear Chris make any threat.

Point III: Chris's attorney was ineffective because he failed to object to, and in some cases elicited, evidence of Chris's commission of prior bad acts, and during the Juvenile Office's cross-examination of Chris, several times Chris was improperly asked to comment on the credibility of other witnesses without objection by his attorney. Chris was prejudiced because the court used Chris's comments on the credibility of other witnesses to discredit Chris's testimony.

Point IV: Evidence that Chris, an autistic, 16-year-old high school student, when talking to some classmates in a crowded school cafeteria, allegedly said "I feel like blowing this school up," and he "might do it tomorrow," does not prove he recklessly disregarded a risk of causing the evacuation or quarantine of the school when: he went directly to his next class where he remained until officers removed him; the principal took no steps to lockdown or evacuate the school because there was no imminent or credible threat; and there was no evidence that he took any steps to blow up the school.

POINTS RELIED ON

I.

The Juvenile Court erred in adjudicating Chris guilty of making a terrorist threat, because Chris was denied due process of law and the effective assistance of counsel, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, § 10 of the Missouri Constitution, in that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would render under the circumstances, and Chris was prejudiced when his attorney failed to investigate and subpoena Jonathan to testify at the hearing. Chris's attorney either knew or reasonably should have known about Jonathan's possible testimony since the Juvenile Office gave the attorney the police reports, including Jonathan's identifying information and statement he made to the police. There is a reasonable probability the outcome of the hearing would have been different since Jonathan told the police he did not hear Chris make any threat, yet he was the person Chris was talking with at the time of the alleged threat, which would verify Chris's testimony that he did not make any threat.

In re Gault, 387 U.S. 1 (1967);

In Interest of R.G., 495 S.W.2d 399 (Mo. 1973);

Grado v. State, 559 S.W.3d 888 (Mo. banc 2018);

In re Parris W., 363 Md. 717, 770 A.2d 202 (2001);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10;

Missouri Supreme Court Rules 29.15, & 68.03;

Okla. Stat. tit. 22, ch. 18, App. Rule 3.11(B)(3)(b); and

Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771 (2010).

II.

The Juvenile Court abused its discretion in overruling Chris's request for a recess or continuance to have three witnesses subpoenaed to testify, because this ruling denied Chris his rights to due process of law and to present a defense, as guaranteed by the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution, in that the adjudication hearing was held only 8 days after Chris's attorney entered his appearance and 12 days after the petition was filed, and thus it was unreasonable for the court to deny Chris's attorney's request for an opportunity to subpoena and have these witnesses testify; Chris was prejudiced because those witnesses were at Chris's table in the cafeteria when he allegedly made the threat, and thus, they could have discredited the testimony of the Juvenile Office's witnesses, and police reports show that at least one of them – the student who Chris was talking with when he allegedly made the threat – told the police that he did not hear Chris utter any threat.

State v. Blocker, 133 S.W.3d 502 (Mo. banc 2004);

United States v. Verderame, 51 F.3d 249 (11th Cir. 1995);

State v. Sanders, 126 S.W.3d 5 (Mo. App. W.D. 2003);

U.S. Const., Amend. XIV; and

Mo. Const., Art. I, § 10.

III.

The Juvenile Court erred in adjudicating Chris guilty of making a terrorist threat because he was denied due process of law and the effective assistance of counsel, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, § 10 of the Missouri Constitution, in that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would render under the circumstances, and Chris was thereby prejudiced, since the record shows that his attorney failed to object to, and in some instances elicited, testimony of Chris's commission of prior bad acts, and during the Juvenile Office's cross-examination of Chris, several times Chris was improperly asked to comment on the credibility of other witnesses without objection by his attorney. Chris was prejudiced because the Juvenile Court used Chris's comments on the credibility of other witnesses to discredit Chris's testimony and base a finding of guilt on them.

State v. McCarter, 883 S.W.2d 75 (Mo. App. S.D. 1994);

State v. Roper, 136 S.W.3d 891 (Mo. App. W.D. 2004);

In re Parris W., 363 Md. 717, 770 A.2d 202 (2001);

In Interest of R.G., 495 S.W.2d 399 (Mo. 1973);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10; and

Missouri Supreme Court Rules 68.03, 115.01 and 115.02.

IV.

The Juvenile Court erred in finding that Chris committed Making a Terrorist Threat in the Second Degree, § 574.120, and in committing Chris to DYS as a result of that adjudication, because there was insufficient evidence to support the adjudication, violating Chris's rights guaranteed by the due process clauses under the 14th Amendment to the U.S. Constitution and Art. I, § 10 of the Mo. Constitution, in that a statement made by a 16-year-old high school student, when talking to some classmates in the cafeteria, that he felt like blowing up the school and he "might do it tomorrow," when there was no evidence he did any act related to "blowing this school up," is insufficient to support that he knowingly made a threat or that he recklessly disregarded the risk of causing the evacuation, quarantine or closure of his school, especially when he went to his next class after lunch, he remained there until the police questioned him, he remained on school grounds where he was supposed to be until he was removed from the school by the police about an hour or less later, and the principal took no steps to lockdown or evacuate the school because there was no imminent, credible threat.

C.G.M., II v. Juvenile Officer, 258 S.W.3d 879 (Mo. App. W.D. 2008);

Cannon v. State, 181 A3d 615 (Del. 2018);

J.D.B. v. North Carolina, 564 U.S. 261 (2011);

State v. Metzinger, 456 S.W.3d 84 (Mo. App. E.D. 2015);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10; and

§§ 562.016 and 574.120, RSMo (2016);

§ 574.115.1(4), RSMo Cum.Supp. 2007; and

Christopher M. Northrop & Kristina R. Rozan, *Kids Will be Kids: Time for a "Reasonable Child" Standard for Proof of Objective Mens Rea Elements*, 69 Me. L.Rev. 109 (2017).

ARGUMENT

I.

The Juvenile Court erred in adjudicating Chris guilty of making a terrorist threat, because Chris was denied due process of law and the effective assistance of counsel, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, § 10 of the Missouri Constitution, in that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would render under the circumstances, and Chris was prejudiced when his attorney failed to investigate and subpoena Jonathan to testify at the hearing. Chris's attorney either knew or reasonably should have known about Jonathan's possible testimony since the Juvenile Office gave the attorney the police reports, including Jonathan's identifying information and statement he made to the police. There is a reasonable probability the outcome of the hearing would have been different since Jonathan told the police he did not hear Chris make any threat, yet he was the person Chris was talking with at the time of the alleged threat, which would verify Chris's testimony that he did not make any threat.

> *"A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."*
>
> – *In re Gault*, 387 U.S. 1, 36 (1967) (footnote omitted)

Introduction:

A child should be provided a remedy when his attorney is ineffective at a delinquency hearing. But relief has been elusive in this case since neither the Juvenile Court nor the Southern District remedied the ineffectiveness, which was evident on the record. This Court has the opportunity to correct this wrong.

Police reports disclose that a student would undermine the testimonies of the Juvenile Office's eyewitnesses. Chris was talking with this student when Chris allegedly made the terroristic threat; yet, the student told the police he did not hear any threat. This student did not testify at the hearing, however, because Counsel failed to secure his attendance, and, after Counsel discovered the oversight, the court refused to continue the court-tried case so the absent witness could testify, even though the case had been pending only 12 days.

It is apparent Counsel knew he could not provide effective assistance because he requested a continuance, believing he had not been provided the witness's name. The Juvenile Office knew that Counsel was ineffective, as evidenced by its argument to the court that Counsel had been given the reports, which named the witness and "clearly described" his account, and Counsel "had every opportunity" to have the witness at the hearing, but failed to do so. The Juvenile Court

knew that Counsel was ineffective based upon the statements made by Counsel and the Juvenile Office. Yet Chris's hearing proceeded without this crucial witness. The injustice is palpable. A new hearing is required.

Summary of Argument:

It is well-established that a child has a Due Process right to counsel at a delinquency proceeding. *In re Gault*, 387 U.S. 1, 36 (1967). It is also well-established that the right to counsel includes the right to effective assistance of counsel. *Gault*, 387 U.S. at 37; *Kent v. United States*, 383 U.S. 541, 554; *In Interest of R.G.*, 495 S.W.2d 399, 403 (Mo. 1973). What is not well-established in Missouri, however, is a mechanism for protecting children's rights to the effective assistance of counsel at delinquency hearings.

One viable mechanism is to allow children to raise claims of ineffective assistance of counsel (IAC) on direct appeal when the record is adequate, particularly since children do not have a right to proceed under Rule 29.15, or a similar rule, after a delinquency adjudication. Allowing review of IAC claims on direct appeal, when the record is adequate, is appropriate because a refusal to address the claim on direct appeal would waste judicial resources and it could lengthen a child's incarceration.

Permitting children to raise IAC claims on direct appeal is also consistent with the approach this Court has taken in termination of parental rights (TPR) cases and Sexually Violent Predator (SVP) cases. In both TPR and SVP cases, this Court has held that claims of IAC may be raised on direct appeal when the record is adequate. *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 820, n. 22 (Mo. banc 2011) (TPR); *Grado*

v. State, 559 S.W.3d 888 (Mo. banc 2018) (SVP). The rationale for allowing IAC claims to be raised on a direct appeal of a delinquency case is the same as allowing such claims to be raised on a direct appeal of an SVP case because both involve original trials that may result in a deprivation of liberty.

When reviewing IAC claims on direct appeal, this Court should at least use the *Strickland* standard,[7] which is used in criminal cases, rather than a "meaningful hearing" standard, which is used in TPR cases. Delinquency cases are closer in nature to criminal cases than they are to TPR cases. Also, *Strickland* is a well-known standard for such claims, and thus is likely to invite a more consistent application. As a result, an overwhelming amount of jurisdictions use the *Strickland* standard when determining IAC claims in delinquency cases, whereas no jurisdiction uses a "meaningful hearing" standard in delinquency cases. An argument could also be made, as discussed below, that instead of *Strickland*, a more youth-specific standard should be used when determining IAC claims in delinquency cases.

The record here is adequate to determine the claim, under any standard, because it proves that Chris was prejudiced by his attorney's ineffectiveness. It is undisputed that Chris was speaking with Jonathan at the time the alleged threat was made; but Jonathan told an officer that he did *not* hear Chris make any threat. (D14, 15). The record also shows that the attorney should have known about this witness because his name, identifying information, and statement was included in the police reports disclosed to the attorney. *Id.*

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[7] *Strickland v. Washington,* 466 U.S. 668 (1984).

Remarkably, however, trial counsel did not present Jonathan's testimony or statement because counsel said he was unware of Jonathan's existence (Tr. 79). As the Juvenile Office argued in court, Counsel "had every opportunity to have" Jonathan at the hearing, but failed to do so (Tr. 79). The ineffectiveness is evident on the record. Chris is entitled to a new hearing.

Children in delinquency cases have a firmly entrenched Due Process right to the effective assistance of counsel:

More than 50 years ago, the Supreme Court ruled that the protection of the Due Process Clause, including the right to counsel, reaches children in juvenile delinquency proceedings. *Gault*, 387 U.S. at 36. In so holding, the Court cited to its prior case in *Kent*, *supra*, wherein, in the context of a waiver proceeding by the juvenile court to adult court of jurisdiction over an offense committed by a child, the Court said "there is no place in our system of law for reaching a result of such tremendous consequences …without effective assistance of counsel …." *Gault*, 387 U.S. at 30, quoting *Kent*, 383 U.S. at 554.

The *Gault* court further noted, in the same way as *Kent* held the assistance of counsel is essential for waiver proceedings, the assistance of counsel is equally essential for the determination of delinquency, carrying with it the prospect of incarceration in a state institution. *Gault*, 387 U.S. at 37. Naturally, this would include the right to the "effective assistance of counsel," recognized by *Kent*, 383 U.S. at 554.

Following *Gault*, this Court agreed "[t]here is no question" that a child in a delinquency proceeding has "a right to effective counsel." *R.G.*, 495 S.W.2d at 403. Thus, a child's right to effective counsel in a delinquency proceeding is now firmly entrenched. What is not well-

established in Missouri, however, is a mechanism for protecting children's rights to the effective assistance of counsel at delinquency hearings. At present, none exists.

Children must be provided a remedy when their attorneys are ineffective at delinquency proceedings:

Because there is a constitutional right to counsel for children, *Gault, supra*, and an accompanying constitutional right to the effective assistance of counsel, *R.G.*, *supra*, there must be a meaningful way to challenge representation that falls below a constitutional standard.

Missouri has yet to establish any legal remedy when children are harmed by deficient representation at delinquency hearings. This Court should hold that an IAC claim may be raised on direct appeal of a delinquency case, providing it can be determined from the record. Allowing direct appellate review of IAC claims, when the record is adequate, is particularly appropriate because children do not have a right to proceed under Rule 29.15 after a delinquency adjudication.[8]

Respondent's brief in the Southern District argued that because no Missouri court "has authorized direct appellate review of such claims in a juvenile delinquency matter, nor is such review authorized by statute or by the rules adopted by the Missouri Supreme Court," "[t]he adoption of such a new right to review claims of ineffective

[8] As a result of Rule 29.15, IAC claims cannot be raised on direct appeal in criminal cases. *State v. Mitchell*, 41 S.W.3d 574, 579 (Mo. App. S.D. 2001). Chris suggests that a rule be drafted by this Court for delinquency cases because, unlike here, in most cases the existing record will be inadequate to determine the claim. Thus, allowing IAC claims on appeal will not provide meaningful relief to a large number of children harmed by deficient legal representation.

assistance of counsel on direct appeal is more appropriately addressed to the Missouri Legislature or to the Missouri Supreme Court than in the instant context." (Resp. Br. at 17).

True, there are no Missouri cases allowing direct appellate review of IAC claims in delinquency cases. But there no cases precluding such claims either.

There is no requirement that there must be a statute or rule authorizing an appellate court to address an IAC claim on direct appeal. This Court in *State v. Wheat*, 775 S.W.2d 155, 157 (Mo. banc 1989), noted that, prior to the enactment of Rule 29.15, appellate courts could review IAC claims on direct appeal in criminal cases when the "record was adequate." Cf. *State v. Harvey*, 692 S.W.2d 290 (Mo. banc 1985) (new trial granted on direct appeal on a claim of IAC based on counsel's refusal to participate in trial after *voir dire*).

Cases from other jurisdictions have allowed children to raise direct appeal claims regarding trial counsel's ineffectiveness in delinquency cases based upon the record. E.g., *In re K.J.O.*, 27 S.W.3d 340, 342 (Tex. App. 2000); *In re R.D.B.*, 20 S.W.3d 255 (Tex. App. 2000); *In re Danielle J.*, 2013 IL 110810, 376 Ill.Dec. 798, 1 N.E.3d 510 (2013); *Perkins v. State*, 718 N.E.2d 790, 793, n.6 (Ind. App. 1999). Where the critical facts are not in dispute, and the record is adequately developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal is appropriate because a refusal to address the claim on direct appeal would waste judicial resources and could lengthen a child's incarceration. *In re Parris W.*, 363 Md. 717, 726, 770 A.2d 202, 207 (2001); *Virgin Islands v. Zepp,* 748 F.2d 125, 133 (3rd Cir.1984).

This approach taken by other jurisdictions in delinquency cases is consistent with this Court's approach in TPR and SVP cases, where it already recognizes that claims of IAC may be raised on direct appeal when the record is adequate. *C.M.B.R.*, *supra* (TPR); *Grado*, *supra* (SVP).

In *Grado*, this Court recently recognized such a right in SVP cases, holding that IAC claims involving trial counsel's actions in an SVP proceeding can be raised on direct appeal if they "are evident on the record." 559 S.W.3d at 897. This Court noted, unlike a postconviction proceeding where postconviction counsel's effectiveness cannot be reviewed, an SVP proceeding is an *original* trial at which the initial determination is made whether a person can be involuntarily committed as an SVP, and is the first instance in which courts decide whether the person's liberty will be taken away. *Id*. at 895-96. "[A]n SVP's due process right to counsel in SVP proceedings would be hollow were there no accompanying requirement counsel be effective." *Id*. at 896.

The rationale for allowing IAC claims to be raised on a direct appeal of a delinquency proceeding is the same as an SVP proceeding. Like an SVP proceeding, a delinquency proceeding is an "*original* trial," which may result in a "deprivation of liberty." *Id*. at 895-96. Thus, a child's due process right to counsel "would be hollow were there no accompanying requirement counsel be effective." *Id*. at 896. Since neither delinquency statutes nor Supreme Court Rules currently provide an avenue for children to raise IAC claims, an appellate court should review those claims if the record is adequate. As noted above, and as will be further shown below, the record here is adequate.

This Court should use the *Strickland* standard or a youth-specific standard for IAC claims in delinquency cases:

If this Court agrees children are entitled to challenge on direct appeal trial counsel's effectiveness during a delinquency hearing, based upon the record, this Court should resolve what standard should be used to determine the issue.

In criminal cases, Missouri follows the standard set forth by the Supreme Court of the United States in *Strickland* when considering IAC claims. *Gill v. State*, 300 S.W.3d 225, 232 (Mo. banc 2009).

To prevail on an IAC claim, a criminal defendant must show (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* The question is whether the attorney's deficient performance undermines confidence in the outcome of the proceeding. *Kyles v. Whitley,* 514 U.S. 419, 434 (1995).

In *Grado*, this Court discussed the standard to be applied to determine counsel's effectiveness in SVP proceedings. *Grado*, 559 S.W.3d at 898-99. This Court noted that one possible standard, the standard used in TPR cases, is whether the attorney was effective in providing the client with a "meaningful hearing." *Id.* Another standard, discussed by this Court, is the one set out in *Strickland*. *Id.* This Court declined to resolve the issue, however, because Mr. Grado was not entitled to relief under either standard. *Id.*

The concurring opinion, however, believed the *Strickland* standard was the appropriate one, in part, because *Strickland* is a well-known standard for such claims in both criminal and civil contexts, and thus is likely to invite a more consistent application. *Id.* at 903-05 (Draper, J., concurring).

Other than TPR cases, Chris's appellate counsel has been unable to find a single jurisdiction applying a "meaningful hearing" standard for IAC claims at a delinquency proceeding. The only case appellate counsel found was the Southern District's opinion in the case below, *D.C.M. v. Pemiscot County Juvenile Office*, No. SD35418, Slip Op. at 6-7 (November 13, 2018).[9]

Delinquency proceedings are closer in nature to criminal cases than they are to TPR cases. *Matter of Smith*, 393 Pa. Super. 39, 47-48, 573 A.2d 1077, 1080-81 (1990). The liberty interest of children, which is at stake in a delinquency case, requires application of the same advocacy skills as those employed by counsel in criminal cases. *Id.* Also, substantive issues of law involved in delinquency adjudications and disposition originate from the criminal law. *Id.* Indeed, the Supreme Court in *Gault* noted that a "proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Gault*, 387 U.S. at 36.

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[9] It is unclear how the TPR "meaningful hearing" standard differs in practice from the *Strickland* standard. Further, because the *Strickland* standard is well-established and fairly straightforward, there is reason to apply it to delinquency hearings. *Grado*, 559 S.W.3d at 903-05 (Draper, J., concurring).

Thus, there is widespread support in other jurisdictions to apply the *Strickland* standard to gauge the effectiveness of counsel at delinquency hearings. E.g., *W.B.S. v. State*, 244 So.3d 133 (Ala. Crim. App. 2017); *Matter of Appeal in Maricopa Cty., Juvenile Action No. JV-511576*, 186 Ariz. 604, 925 P.2d 745, 747 (Ct. App. 1996); *In re Edward S.*, 173 Cal. App. 4th 387, 406-07, 92 Cal. Rptr. 3d 725, 740-41 (2009); *P.M.W. v. State*, 678 So.2d 484 (Fla. Dist. Ct. App. 1996); *In re D.M.*, 308 Ga. App. 589, 708 S.E.2d 550 (2011); *In re Danielle J.*, 376 Ill.Dec. at 806, 1 N.E.3d at 518; *S.T. v. State*, 764 N.E.2d 632, 634–35 (Ind. 2002); *In Interest of J.P.B.*, 419 N.W.2d 387, 392 (Iowa 1988); *State in Interest of J.D.*, 154 So.3d 726, 731-32, 2014-0551 (La.App. 4 Cir. 12/3/14); *In re Parris W.*, 363 Md. at 725-27, 770 A.2d at 206-07; *Com. v. Ogden O.*, 448 Mass. 798, 806, 864 N.E.2d 13, 19–20 (2007); *Matter of Welfare of L.B.*, 404 N.W.2d 341, 345 (Minn. Ct. App. 1987); *State ex rel. B.P.C.*, 421 N.J. Super. 329, 23 A.3d 937 (2011); *In re C.O.H.*, 207 N.C.App. 525, 700 S.E.2d 249 (2010); *In re A.E.*, 184 Ohio App.3d 812, 815-16, 922 N.E.2d 1017, 1019-20 (2009); *State v. J.J.-M.*, 282 Or.App. 459, 464, 387 P.3d 426, 430 (2016); *In re M.P.A.*, 364 S.W.3d 277, 290 (Tex. 2012); *State in Interest of V.L.V.-G.*, 2015 UT App 247, 362 P.3d 733 (2015); *State v. A.N.J.*, 168 Wash.2d 91, 225 P.3d 956 (2010); *In re Jennifer Z.*, 323 Wis.2d 823, 781 N.W.2d 551 (Table), 2010 WI App. 33 (2010); *State v. Megan S.*, 222 W.Va. 729, 671 S.E.2d 734 (2008); *In Interest of LDO*, 858 P.2d 553, 556 (Wyo. 1993).

At least three states, however, have found the *Strickland* prejudice standard is too burdensome even for adult defendants, and thus apply a different standard in determining the effectiveness of counsel. In Alaska, there must be a showing that the lack of

competency by counsel *contributed to the conviction*. *Nelson v. State*, 273 P.3d 608 (2012), citing *Risher v. State*, 523 P.2d 421 (1974). In Hawaii, the appellant must establish that the errors or omissions by counsel *resulted in either the withdrawal or substantial impairment of a potentially meritorious defense*. *State v. Smith*, 68 Haw. 304, 712 P.2d 496, 500 n.7 (1986), citing *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980). In Oregon, the test for prejudice is that there must be *more than a mere possibility that counsel's failure to investigate could have tended to affect the outcome*. *Richardson v. Belleque*, 362 Or. 236, 406 P.3d 1074 (2017). This Court could adopt one of these standards, instead of *Strickland*, in determining prejudice for IAC claims in delinquency cases.

Closer on point, Montana has suggested a youth-specific standard is more appropriate than *Strickland* in delinquency cases. In *Matter of K.J.R.*, 2017 MT 45, ¶¶ 28-36, 386 Mont. 381, 388–91, 391 P.3d 71, *reh'g denied* (Apr. 4, 2017), the Montana Supreme Court noted, as a matter of Due Process, a youth has the right to the assistance of counsel during delinquency proceedings when such proceedings may result in commitment to an institution or other curtailment of the youth's freedom. 391 P.3d 71 at 76. A Montana youth also has a statutory right to counsel in all youth court proceedings. *Id*. This right to counsel necessarily includes the right to effective assistance of counsel. *Id*. at 76-77.

In *K.J.R.*, the parties asked the Court to evaluate K.J.R.'s IAC claim under the two-part test announced in *Strickland*. Id. at 77. The Montana Supreme Court, however, declined because a child's right to

effective assistance of counsel derives from the federal and Montana constitutional rights to due process. *Id.*

Although similar to criminal proceedings, youth court proceedings are not identical. In contrast to a criminal proceeding, youth court proceedings are special, remedial, civil proceedings that affect the development and fundamental liberty interests of youth. *Id.* at 77. "Although analogous, youth court proceedings involve special considerations and present special challenges to effective representation not present in adult criminal proceedings." *Id.* at 78. Youth-court counsel must have specialized knowledge, skills, and experience in the areas of youth court procedure, substantive youth court law, and in communicating with and counseling the youth. *Id.* at 78, n.5.

Consequently, the *K.J.R.* court declined to adopt the *Strickland* test to evaluate youth court IAC claims. *Id.* But the court failed to adopt a particular standard for youth court IAC claims in that case, because the parties did not raise or brief the issue, and the unique facts of the case were amenable to disposition under any objective standard. *Id.*

The *K.J.R.* court did, however, indicate that something similar to its standard used in Montana's child abuse and neglect parent termination cases, which was "[m]ore demanding than the *Strickland* standard," "may ultimately be a good fit." *Id.* at 77-78. The criteria in that standard focuses on: (1) ... whether counsel has experience and training in representing [clients] in [that type of proceeding] ... and whether counsel has a verifiably competent understanding of the statutory and case law involving [the type of proceeding]; and (2) ...

whether counsel has adequately investigated the case; whether counsel has timely and sufficiently met with the client and has researched the applicable law; whether counsel has prepared for the hearing by interviewing the State's witnesses and by discovering and reviewing documentary evidence that might be introduced; and whether counsel has demonstrated that he or she possesses trial skills, including making appropriate objections, producing evidence and calling and cross-examining witnesses and experts. *Id.* at 77. As shown throughout the briefs filed in this case, Chris's attorney was deficient in several of these areas.

At a minimum, this Court should use the *Strickland* standard instead of a "meaningful hearing" one. But this Court should also consider using a more youth-specific standard, which is more appropriate than *Strickland* for delinquency cases. *K.J.R.*, *supra*. Also see, Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771, 817-18 (2010) ("A juvenile-appropriate IAC standard would eliminate or modify the prejudice requirement because the goals of juvenile court – as recognized by Gault and again in every subsequent Supreme Court case addressing the requirements of due process in delinquency proceedings – include rehabilitation, and, again as recognized in Gault, a child's ability to invest in his rehabilitation is premised on his perception that he was treated fairly. … Thus, whether or not the deficient representation affected the fact-finder's decision that the juvenile was delinquent is not the only, or even necessarily the most significant inquiry that a reviewing court should

undertake in evaluation whether the representation was ineffective.") (Footnotes omitted).

Counsel was ineffective for failing to call a witness who told the police he had not heard Chris make the threat:

Having established that children are constitutionally entitled to counsel, including the effective assistance of counsel, and that the standard to judge counsel's performance is at least the *Strickland* standard,[10] this Court must address Counsel's performance in this case.

In Chris's appeal in the Southern District, he raised the same claim raised in this point -- Counsel was ineffective for not subpoenaing Jonathan. The Southern District denied the claim, finding there was an inadequate record of Jonathan's expected testimony, and thus Chris did not demonstrate why Jonathan's absence deprived Chris of a "meaningful hearing." *D.C.M. v. Pemiscot County Juvenile Office*, No. SD35418, Slip Op. at 6-7 (November 13, 2018). This holding is erroneous. The record is adequate to resolve the claim.

A petition charging Chris with threating to blow up his school was filed the day after the alleged threat (D2). Police reports also filed on that day include:

> Sgt. Maclin interviewed Jonathan [] regarding the above case with his guardian present. Jonathan stated that he did not recall [Chris] making any threats or statements … he had not heard [Chris] make any statements.

(D14, 15).

Jonathan's identifying information, including address and phone number, are listed in that report, and Jonathan and Tamara are the only two people listed as being witnesses to the alleged threat. *Id*.

[10] Chris received ineffective assistance of counsel under any standard.

Four days later, a detention hearing was held, and Counsel appeared for Chris (D1). The court took "judicial notice of the contents of its file," and set a hearing in eight days. *Id*. No discovery motion was filed by Counsel during his representation of Chris.

Only 12 days after the petition was filed, the adjudication hearing was held. At that hearing, Tamara testified she heard Chris say, "I feel like blowing this school up," while talking to *Jonathan*, Joshua, and Zach (Tr. 30, 33-34, 38). But police reports disclose that the conversation Tamara said she overheard was between Chris *and Jonathan*, after she had emptied her food tray and was walking back to sit down; there was no mention of Zach in Tamara's statement (D14, 15).[11] Counsel did not question Tamara about this discrepancy.

Tamara also told the police she had been with Demario when she overheard Chris say, "I feel like I want to blow up the school." *Id*. But when the police interviewed Demario, he said that he had not heard the statement. *Id*. Demario did not testify and Counsel did not question any witness about Demario's statement to the police.

Chris was the only person who testified on his behalf. He denied making any threat (Tr. 69, 71). He also testified that Zach was not sitting at his table; he was talking with Josh [ ], Jonathan [ ], and "[a] new guy named Marcus" (Tr. 69-70, 72).

After Chris testified, Counsel requested the opportunity to subpoena witnesses who were at Chris's table in the cafeteria:

> [COUNSEL]: Your Honor, Chris has provided names of a Joshua [], a Jonathan [] and a Marcus somebody that was at his table, and I wasn't provided that information and wasn't provided any opportunity, if I could, to subpoena these people to testify. I

[11] As noted, Jonathan said he did not hear Chris make a threat.

> would like to have some opportunity to have them present, Your Honor, since he's denied the fact that [Zach] was -- was not at his table, but he does testify that a Joshua [], a Jonathan [], and a Marcus or Demetrius or whoever -- whatever his name was, was also at the table.

(Tr. 79).[12]

The Juvenile Office objected that Counsel had been given access to the police reports, "which named all of those witnesses," and Counsel "had every opportunity to have those witnesses here today." (Tr. 79). The Juvenile Court denied Counsel's request (Tr. 79).

Chris's mother (Mother) complained that one of the witnesses (presumably Jonathan), who was sitting with her son, would testify he did not hear her son make any threats:

> One of the people in his report even states twice in one paragraph that he did not hear [Chris] make such threats or statements, and he was sitting with him. And why isn't that person here testifying today? Because it doesn't help their case because he says my son – he did not hear my son make any such statements or threats.

(Tr. 83).

Chris's mother continued her complaint:

> And I was not notified who these people were. I was intentionally blacked out from knowing who they were so I could say -- because even when we were first talked to, we didn't even know the name of the third person….So I think it's wrong that those people that were actually sitting with [Chris] aren't even here to testify and haven't even been able to be subpoenaed to testify.

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[12] Chris believes that Counsel was ineffective for not investigating Joshua and Marcus, but the record is silent concerning what their testimonies might have been.

(Tr. 84).[13]

Contrary to the Southern District's holding, this record is adequate because it unmistakably shows Jonathan told the police he did not hear Chris make any threat, yet he was the person Chris was talking with at the time of the alleged threat (D14, 15; Tr. 30, 38).

The record also shows that Counsel did not adequately investigate since he told the court, when requesting a continuance, that it was only through Chris's testimony that Counsel was provided the names of Jonathan and the other two students, that this information was not previously provided to him, and thus he was not given any opportunity to subpoena these students (Tr. 79).

But the Juvenile Office disputed Counsel's claim, and Counsel gave no response to the Juvenile Office's assertion that all of those witnesses' names were provided to Counsel prior to the hearing and Counsel "had every opportunity" to have those witnesses testify (Tr. 79). Accordingly, the record is adequate to show Chris's trial attorney was ineffective for failing to investigate and secure the attendance of Jonathan at the hearing.[14]

Respondent's brief in the Southern District also establishes that the record is adequate. In addressing another point, regarding the

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[13] Earlier, Mother told the court that the identifying information of students was blacked out in her copy of the report (Tr. 83).

[14] Additional testimony from Chris's trial attorney is not needed because he said he was not aware of the witnesses. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such a decision could be made." *Kenley v. Armontrout*, 937 F.2d 1298, 1304, 1308 (8th Cir. 1991).

refused continuance request, Respondent virtually conceded Counsel was ineffective. Chris argued that the court should have given his attorney a continuance to allow him to subpoena the three students to testify at the adjudication hearing, but Respondent argued: "the identity of the potential witnesses was available to trial counsel for [Chris] prior to the hearing;" "the testimony that [Chris] suggests would have been helpful in his defense is clearly described in the police reports;" and, trial counsel "clearly had ample opportunity" "to secure the presence of these witnesses at the hearing" "long prior to the close of the appellant's evidence at the hearing." (Resp. Br. at 16).

This is tantamount to an admission that the record establishes that Chris's attorney was ineffective because Counsel should have known about the identity and the potentially exculpatory value of the witnesses, since their identities were "available to trial counsel … prior to the hearing," "the testimony that [Chris] suggests would have been helpful in his defense is clearly described in the police reports," and the testimony of one of these witnesses, Jonathan, "was clearly described in the police reports." *Id*.

Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy. *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990) (en banc). Counsel must make a reasonable investigation in the preparation of a case or make a reasonable decision not to conduct a particular investigation. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991) (*citing Strickland*, 466 U.S. at 691). "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not

yet obtained the facts on which such a decision could be made." *Kenley*, 937 F.2d at 1308 (*citing Chambers*, 907 F.2d at 835).

When counsel lacks information because of inadequacies in his investigation, he cannot make an informed judgment. *Clay v. State*, 954 S.W.2d 344, 349 (Mo. App. E.D. 1997). An argument based on trial strategy or tactics is appropriate only if counsel is fully informed of facts which should have been discovered by investigation. *Id.* Counsel must exercise reasonable diligence to produce exculpatory evidence, and a strategy resulting from a lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. *Kenley* 937 F.2d at 1304. Counsel's performance may be found to be ineffective if he performs little or no investigation. *Kenley*, 937 F.2d at 1304. Failure of defense counsel to pursue even a single piece of important evidence may demonstrate ineffectiveness and prejudice sufficient to warrant a new trial. *Clay*, 954 S.W.2d at 349.

Here, the record establishes beyond any doubt that Counsel's investigation and performance was constitutionally inadequate. His mid-trial request to subpoena witnesses, who had been disclosed prior to the hearing, establishes that fact without needing to go outside of the record.

That Counsel's performance was deficient, even under the highly deferential standard of *Strickland,* seems clear. Based on these undisputed facts, Counsel's serious error of failing to investigate and subpoena witnesses, particularly Jonathan, to support Chris's version of events did not constitute the exercise of reasonable professional judgment and such failure was not consistent with counsel's primary function of effectuating the adversarial testing process in this case.

The record also shows Counsel's deficient performance resulted in prejudice. It is undisputed that Chris was speaking with Jonathan at the time the alleged threats were made (D14, 15). Yet Jonathan would have testified, based upon the report, that he did *not* hear Chris make any threat. *Id*. This crucial testimony would have cast doubt on the Juvenile Office's theory of the case and it would have supported Chris's testimony that he did not utter a threat. Thus, the failure to have Jonathan testify undermines confidence in the outcome of the proceeding. *Kyles,* 514 U.S. at 434.

If the record is inadequate to resolve this issue, then this Court should remand the case instead of affirming:

If this Court holds that the record is inadequate to show Jonathan's expected testimony, or is otherwise inadequate to evaluate Counsel's ineffectiveness, it should remand the case instead of affirming.

If the record is inadequate, the remaining options, unless this Court enacts a postconviction rule for juveniles, would be for this Court to: (1) remand for further evidence; or, (2) appoint a special master under Rule 68.03; see, *C.M.B.R.*, 332 S.W.3d at 820, n. 22; or, (3) affirm, forcing Chris to file a habeas corpus petition in the county where his DYS facility is located.

The first option is preferable, because under that option, the judge who heard the evidence would be the judge hearing the additional evidence, and thus would be in a better position than a special master (unless the same judge is appointed) or a habeas judge. As this Court noted in *C.M.B.R.*, 332 S.W.3d at 820, n. 22, other states that have addressed the issue, in the context of TPR cases, have remanded the matter for hearing in the trial court, citing *In re A.L.E.*,

248 Ga.App. 213, 546 S.E.2d. 319, 325 (2001). This Court in *C.M.B.R.*, however, did not reach the issue of how factual disputes regarding effectiveness of counsel in a TPR case should be resolved because it reversed on other grounds. *C.M.B.R.*, 332 S.W.3d at 820.

For future cases, this Court could enact a rule similar to Oklahoma. Under the Oklahoma procedure, appellate review of a criminal conviction is confined to the original trial record unless that record has been supplemented through an evidentiary hearing. Rule 3.11(B)(3)(b) of the Rules of the Oklahoma Court of Criminal Appeals (OCCA), allows a defendant, on direct appeal, to offer non-record evidence in support of an IAC claim. If the OCCA finds, "by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence," the OCCA will remand to the trial court for an evidentiary hearing to be held within 30 days based on the claims raised in the application. Okla. Stat. tit. 22, ch. 18, App. Rule 3.11(B)(3)(b); *Dewberry v. State,* 954 P.2d 774, 775–76 (Okla.Crim.App.1998). Following the evidentiary hearing, the trial court makes written findings of fact and conclusions of law. *Id.* "It is the record from this evidentiary hearing which ... supplements the trial court record on appeal." *Dewberry,* 954 P.2d at 776. *Id.* The OCCA determines the ultimate issue of whether trial counsel was ineffective, however, with supplemental briefing being allowed within 20 days after the trial court's written findings and conclusions are filed with the OCCA, but the new brief only addresses issues concerning the record supplementation. Okla. Stat. tit. 22, ch. 18, App. Rule 3.11(B)(3)(b).

In *Thomas v. State*, 808 S.W.2d 364, 366-67 (Mo. banc 1991), this Court held that the civil rules regarding change of judge did not apply to Rules 24.035 and 29.15, in part because the trial judge is better equipped to assess defense counsel's performance within the context of the entire case and to measure the impact of that performance on the outcome of the trial.

The same is true here if this Court finds the record inadequate. A remand by this Court, or an appointment by this Court of the Juvenile Court judge as a special master under Rule 68.03, would avoid having a different judge review IAC claims, which is what would happen if children are forced to file habeas corpus actions to litigate IAC claims.

Other jurisdictions agree with this position and remand for hearings to allow a further record to be developed regarding IAC claims. E.g., *In re D.C.*, 307 Ga. App. 542, 705 S.E.2d 313 (2011); *In re Alonzo O.*, 2015 IL App (4th) 150308, 40 N.E.3d 1228 (2015) (remand needed because the Post-Conviction Hearing Act has never been held to apply to juveniles and dismissal of an ineffective assistance of counsel claim would leave the juvenile with no legal recourse); *State ex rel. Juvenile Department of Multnomah County v. Jones*, 177 Or. App. 32, 33 P.3d 373 (2001); and, *State ex rel. D.J.*, 2008-345 (La. App. 3 Cir. 8/28/08), 995 So. 2d 1, 9 (2008).

A habeas petition is least preferable, because the petition would have to be filed where Chris is being held in custody, which is, and for most children would be, in a different jurisdiction. Also, a habeas corpus action would be unavailable to other children who received ineffective counsel, but are no longer in custody. Such children could

receive delinquency adjudications as the result of ineffective counsel, not be able to challenge counsel's effectiveness, but later the State could use adjudications against the children in various proceedings later in life. E.g., *State v. Prince*, 534 S.W.3d 813 (Mo. banc 2017) (evidence of defendant's juvenile court records regarding his adjudication as a delinquent for lewd and lascivious conduct was admissible).

An additional problem with requiring children to use habeas corpus for IAC claims is that Missouri provides no absolute right to an attorney in state habeas corpus proceedings. *State ex rel. Marshall v. Blaeuer*, 709 S.W.2d 111 (Mo. banc 1986). Thus, indigent children, with their distinctive, immature mental capabilities, would be required to navigate through the complex nature of a habeas corpus proceeding without the guarantee of an attorney.[15]

Conclusion:

Chris did not receive a fair adjudication hearing because he did not receive the effective assistance of counsel, as required by the Due Process Clauses. U.S. Const. amend. XIV, Mo. Const. art. I, § 10. As a result, his subsequent commitment to DYS violates Due Process. *Id.* This Court must reverse and remand for a new adjudication hearing.

Alternatively, if this Court believes the record is inadequate to address this claim, this Court should remand this case to the Juvenile Court or appoint a special master so that Chris has an opportunity to

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[15] The Missouri State Public Defender System (MSPD) would have discretion to represent these children in a habeas corpus action, *State ex rel. Francis v. McElwain*, 140 S.W.3d 36 (Mo. banc 2004), but it would not be required to do so, and because courts could not appoint MSPD, often MSPD would not know about them.

present additional evidence demonstrating Counsel's deficient performance and prejudice. *C.M.B.R.*, 332 S.W.3d at 814, 820 n. 22; Rule 68.03.

II.

The Juvenile Court abused its discretion in overruling Chris's request for a recess or continuance to have three witnesses subpoenaed to testify, because this ruling denied Chris his rights to due process of law and to present a defense, as guaranteed by the 14th Amendment to the U.S. Constitution and Article I, § 10 of the Missouri Constitution, in that the adjudication hearing was held only 8 days after Chris's attorney entered his appearance and 12 days after the petition was filed, and thus it was unreasonable for the court to deny Chris's attorney's request for an opportunity to subpoena and have these witnesses testify; Chris was prejudiced because those witnesses were at Chris's table in the cafeteria when he allegedly made the threat, and thus, they could have discredited the testimony of the Juvenile Office's witnesses, and police reports show that at least one of them – the student who Chris was talking with when he allegedly made the threat – told the police that he did not hear Chris utter any threat.

"[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."

– *United States v. Verderame*, 51 F.3d 249, 251 (11th Cir. 1995), *quoting Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

Issue:

Whether a Juvenile Court abuses its discretion by not allowing a short recess or continuance so a child's attorney can subpoena three witnesses, who were the people the child was talking with at the time of the alleged threat, after it is realized by the attorney during the adjudication hearing that those witnesses exist, particularly when the hearing was held only 8 days after the attorney entered an appearance and 12 days after the petition was filed, the police reports filed with the Juvenile Court prior to the hearing reflect that one of those witnesses told the police that he did not hear the child make any threat, and the child's mother also complained to the court that those witnesses were not present at the hearing and that she had not known their names because the names of the students had been blacked out from the copy of the report given to her?

Facts and Preservation:

A petition charging Chris with threating to blow up his school was filed the day after the alleged threat (D2). Police reports also filed on that day, which are listed in Case.net entries, include:

> Sgt. Maclin interviewed Jonathan [] regarding the above case with his guardian present. Jonathan stated that he did not recall [Chris] making any threats or statements … he had not heard [Chris] make any statements.

(D14, 15).

Jonathan's identifying information, including address and phone number, are listed in that report, and Jonathan and Tamara are the only two people listed as being witnesses to the alleged threat, although other names are mentioned. *Id.*

Four days later, a detention hearing was held, and Counsel appeared for Chris (D1).[16] The court took "judicial notice of the contents of its file," and set a hearing in eight days. *Id.*[17] No discovery motion was filed by Counsel during his representation of Chris.

Only 12 days after the petition was filed, the adjudication hearing was held. At that hearing, Tamara testified she heard Chris talking to *Jonathan*, Joshua, and Zach, and heard Chris say, "I feel like blowing this school up" (Tr. 30, 33-34, 38). But the police reports relate that Tamara said she overheard the conversation between Chris *and Jonathan*, without mentioning Zach's name, after she had emptied her food tray and was walking to sit back down (D14, 15).[18] The reports also reflect that Tamara told police she had been with "Demario" when she overheard Chris say, "I feel like I want to blow up the school," but when Demario was interviewed, he told police that he had not heard the statement. *Id.*

During the adjudication part of the hearing, Chris testified that he did not make the threat (Tr. 69, 71). He also testified that Zach was

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[16] The docket sheets do not reflect either an appointment or a formal entry of appearance.

[17] Later, during the disposition phase, the court again took judicial notice of the contents of its file (Tr. 87).

[18] As noted above, Jonathan said he did not hear Chris make a threat.

not sitting at his table; Chris said that he was talking with Josh [ ], Jonathan [ ], and "[a] new guy named Marcus" (Tr. 69-70, 72).

After Chris testified, Counsel requested the opportunity to subpoena these witnesses:

> MR. COUNSEL: Your Honor, Chris has provided names of a Joshua [], a Jonathan [] and a Marcus somebody that was at his table, and I wasn't provided that information and wasn't provided any opportunity, if I could, to subpoena these people to testify. I would like to have some opportunity to have them present, Your Honor, since he's denied the fact that [Zach] was -- was not at his table, but he does testify that a Joshua [], a Jonathan [], and a Marcus or Demetrius or whoever -- whatever his name was, was also at the table.

(Tr. 79).

The Juvenile Office objected, stating that Counsel had been given access to the police reports, "which named all of those witnesses," and that Counsel "had every opportunity to have those witnesses here today." (Tr. 79). The Juvenile Court denied Counsel's request (Tr. 79).

Later at the hearing, Chris's mother (Mother) argued that at least one of the witnesses who was sitting with Chris would testify that he did not hear Chris make any threats:

> One of the people in his report even states twice in one paragraph that he did not hear [Chris] make such threats or statements, and he was sitting with him. And why isn't that person here testifying today? Because it doesn't help their case because he says my son – he did not hear my son make any such statements or threats.

(Tr. 83).

Chris's mother continued her complaint:

> And I was not notified who these people were. I was intentionally blacked out from knowing who they were so I could say -- because even when we were first talked to, we didn't even

> know the name of the third person….So I think it's wrong that those people that were actually sitting with [Chris] aren't even here to testify and haven't even been able to be subpoenaed to testify.

(Tr. 84).[19] This point is properly preserved for appeal.

Standard of Review:

The decision to grant a continuance is within the sound discretion of the court. *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004). If a continuance is not likely to result in the presence of the witness at trial, the court will not be held to have abused its discretion in denying the continuance. *Id*. Further, an accused must demonstrate that the denial of a continuance was prejudicial. *Id*. Chris can demonstrate both an abuse of discretion and prejudice.

In a case that has been pending only 12 days, it is unreasonable for a court to deny a continuance when it comes to light that three potentially exculpatory witnesses are not present:

The Juvenile Court abused its discretion in failing to grant a short recess or continuance to allow Counsel to obtain evidence to support Chris's defense. The court's urgency was unwarranted here. There was no jury and the Juvenile Office did not allege that any prejudice would result to its case if the court granted the continuance. The Juvenile Office's only argument was that the witnesses were known by Counsel and that Counsel "had every opportunity to have those witnesses here today," i.e., Counsel was ineffective (Tr. 79).

Further, the hearing was held only 12 days after the petition had been filed and 8 days after Counsel had entered an appearance by

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[19] Earlier Mother testified that identifying information of students was blacked out in the copy of the report she received (Tr. 83).

appearing in court. This is not a situation where there had been a lengthy delay or that a lengthy delay would result. This was a small community and it is likely that the attendance of the witnesses could have been obtained either later that day or soon thereafter. The court should have at least explored that possibility. It should have granted a limited continuance or recess to see if any of these witnesses could be obtained expeditiously. It was an abuse of discretion not to do so.

The Constitution guarantees an accused a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (*citing*, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)). The denial of the opportunity to present relevant and competent evidence negating an essential element of the Juvenile Officer's case may constitute denial of due process. *State v. Ray*, 945 S.W.2d 462, 469 (Mo. App. W.D. 1997). The accused also has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo. App. E.D. 1991). If the accused is deprived of the opportunity to present relevant evidence, his rights under the Fourteenth Amendment can be violated. *Id.*

Further, the child has the right to assistance of counsel. *In re Gault,* 387 U.S. 1, 41(1967). The denial of a motion for continuance may vitiate the effect of this fundamental right. *United States v. Verderame*, 51 F.3d 249, 251 (11th Cir. 1995). "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Id.*, quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Those circumstances exist here. The continuance request was reasonable, and the failure to have the witnesses attend rendered Chris's right to

counsel an empty formality since the only defense presented was Chris's testimony, and an accused's testimony is usually viewed with skepticism without some other evidentiary support.

Indeed, during the court's statement finding Chris was guilty, the court said: "Chris is the only one who says, you know, I didn't make these statements. And in all honesty, Chris is the only one who stands to gain by maybe not being more than truthful with the Court today." (Tr. 86). But unknown to the court, because the police reports were not offered into evidence or otherwise referenced by Counsel, Jonathan too had said that he did not hear Chris make a threat. The denial of a continuance was prejudicial. Chris needed to introduce this evidence in order to contradict the incriminating evidence introduced by the Juvenile Office and to support his version of the events. *State v. Sanders*, 126 S.W.3d 5, 22-23 (Mo. App. W.D. 2003). Yet he was deprived of his right to present this evidence when the court denied the continuance.

Other than "a myopic insistence upon expeditiousness," *Ungar*, 376 U.S. at 589, there was no compelling reason for the court to deny the continuance – only 12 days had elapsed since the filing of the petition. There was no need for a rush to judgment especially since the only person negatively impacted by such a continuance – Chris since he was in custody – was the party requesting it. This Court should reverse the Juvenile Court's judgment and remand for the court to hold a new adjudication hearing, which would allow Chris to obtain the presence of his witnesses.

III.

The Juvenile Court erred in adjudicating Chris guilty of making a terrorist threat because he was denied due process of law and the effective assistance of counsel, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, § 10 of the Missouri Constitution, in that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would render under the circumstances, and Chris was thereby prejudiced, since the record shows that his attorney failed to object to, and in some instances elicited, testimony of Chris's commission of prior bad acts, and during the Juvenile Office's cross-examination of Chris, several times Chris was improperly asked to comment on the credibility of other witnesses without objection by his attorney. Chris was prejudiced because the Juvenile Court used Chris's comments on the credibility of other witnesses to discredit Chris's testimony and base a finding of guilt on them.

Issue:

Did the record establish that Chris's trial attorney (Counsel) was ineffective based upon the record showing that: Counsel failed to object to, and in some cases elicited, testimony of irrelevant matters such as Chris's alleged commission of prior bad acts; and, during the Juvenile Office's cross-examination of Chris, several times Chris was improperly asked to comment on the credibility of other witnesses without objection by Counsel?

Facts:

At the adjudication hearing, on cross-examination, Chris's attorney (Counsel) asked Principal about Chris's previous school and asked her if the report from that school would have caused her to make "any telephone call to any administrative official at that school to verify some comments," and what "the topic of concern" on her part would be (Tr. 53).

In response to such a loaded, open-ended question, Principal testified that at the prior school, Chris had told a student on a bus that he was going to kill him and later at the end of the school year at the previous school he had been suspended for making a threating comment to a teacher through some sort of a computer, such as "I know who you are," "I'll find you." (Tr. 53). Chris also got in trouble at that other school for possession of Promethazine (a cough syrup) on campus (Tr. 53-54). Counsel made no objection to Principal's responses to his own question.

Also during the adjudication part of the hearing, Chad Pritchett, an assistant principal at Chris's previous school testified (Tr. 59). Without objection, Pritchett was allowed to testify to the following about Chris's disciplinary record between February 2017 and January 2018 at Kennett High School (Tr. 60-61). On March 26, 2017, Chris spent some days in in-school suspension after he told another student, "I will kill you," and then he hit the student after he got off the bus (Tr. 61). On May 9, 2017, Chris was on an unapproved website on his Chromebook, so a teacher shut him off of that website, and Chris later typed messages to the teacher, such as: "You can control my computer, but not my phone;" "You picked the wrong person to fuck with;" and, "I

can find you." (Tr. 61). As a result, Chris was suspended for the last few remaining days of the school year (Tr. 61). Pritchett also mentioned that Chris had been suspended for bringing some Promethazine to school and trying to hide it (Tr. 61).

During the Juvenile Office's cross-examination of Chris the following occurred:

> Q. Okay. So you've never made any statements about your dad having guns?
> A. No, I did not.
> Q. So any witness here today that heard that and came and said that in court is also lying?
> A. Yes.

(Tr. 76).

* * * * * * * * * * * *

> Q. So Zachary [], you said he wasn't sitting at the table with you?
> A. He was not sitting at my table.
> Q. So when he testified today that he was, that's a lie?
> A. That must be a lie.
> Q. When he testified today that you said you were going to blow up the school and you would do it tomorrow -- might do it tomorrow, that's also a lie?
> A. Yes, it is.

(Tr. 77).

* * * * * * * * * * * *

> Q. … So – But when [Tamara] came and testified today that she heard you say that you were going to blow the school up or that you wanted to blow the school up, she's lying?
> A. Yes.
> Q. Okay. All right. Is there any witness who took the stand today who's not lying?
> A. Everyone who says that I said that pretty much is lying because I know I did not say it.

Q. So you are the only one today telling the truth?
A. Yes.

(Tr. 78).

In the Juvenile Court's pronouncement of guilt, the court stated:

But the long story short is Chris said in his testimony – on his cross-examination, I mean he didn't voluntarily say it, but [Juvenile Officer] asked him – I'm trying to find my note – "are you the only one telling the truth today?" and, basically Chris said yes.

(Tr. 85).

Standard of Review:

To avoid needless repetition, Chris incorporates by reference the Standard of Review set out in the argument portion of Point I of this brief.

Chris's attorney was ineffective because he failed to object to, and also elicited, evidence of prior bad acts, and he failed to object when Chris was improperly asked to comment on the credibility of other witnesses:

The Supreme Court of the United States has held that, under the Due Process Clause of the Fourteenth Amendment, a child is entitled to representation by counsel in all delinquency proceedings that may result in commitment. *In re Gault,* 387 U.S. 1, 41(1967). Chris also had a right to counsel under Missouri Supreme Court Rules 115.01 and 115.02. This right to representation includes the right to effective assistance of counsel. *In Interest of R.G.*, 495 S.W.2d 399, 403 (Mo. 1973).

Because there is a substantive constitutional right to counsel, there must be a way to challenge representation that falls below a constitutional standard. *Grado v. State*, 559 S.W.3d 888 (Mo. banc 2018);

In re Adoption of C.M.B.R., 332 S.W.3d 793, 820, n. 22 (Mo. banc 2011). Although there are no Missouri cases on whether on direct appeal a child can raise claims that counsel was ineffective during a delinquency proceeding, numerous cases from other jurisdictions have held that children are entitled to raise on direct appeal the issue of trial counsel's effectiveness based upon the trial record. E.g., *In re K.J.O.*, 27 S.W.3d 340, 342 (Tex. App. 2000); *In re R.D.B.*, 20 S.W.3d 255 (Tex. App. 2000); *In re Danielle J.*, 2013 IL 110810, 376 Ill. Dec. 798, 806, 1 N.E.3d 510, 518 (2013); *Perkins v. State*, 718 N.E.2d 790, 793, n.6 (Ind. App. 1999).

For instance, where the critical facts are not in dispute, and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable. *In re Parris W.*, 363 Md. 717, 726, 770 A.2d 202, 207(2001); *Virgin Islands v. Zepp,* 748 F.2d 125, 133 (3rd Cir.1984) (conflict of interest was clear on the record presented at trial). Cf. *State v. Harvey*, 692 S.W.2d 290 (Mo. banc 1985) (new trial granted on direct appeal on a claim of infective assistance of counsel based on counsel's refusal to participate in trial after voir dire).[20]

The record in this case shows that Counsel was ineffective and that Chris was prejudiced. As noted in Point I, Counsel was ineffective for failing to investigate and procure the attendance of exculpatory witnesses. But that was not his only failure. He also failed to object to, and in some cases he elicited, testimony of irrelevant matters such as Chris's commission of prior bad acts.

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[20] For further discussion of whether claims of ineffective assistance of counsel can be raised on the direct appeal of a delinquency case, see Point I.

Witnesses were allowed to testify concerning Chris's prior actions at another high school that were totally unrelated to the charged offense and constituted impermissible prior bad act or bad character evidence. For instance, Principal and Pritchett testified that Chris threatened to kill another student, he hit a student, Chris made threatening comments to a teacher, and Chris was on school campus while possessing Promethazine (a cough syrup) (Tr. 53-54, 59-61). None of this evidence was legally relevant to the alleged bomb threat charge.

"The wide latitude trial counsel has in matters of trial strategy does not amount to unconstrained discretion." *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App. S.D. 1994). In *McCarter,* defendant's trial counsel introduced evidence that the defendant had previously been investigated for the sexual abuse of his grandchildren, though no charges had been filed. *Id*. at 75-76. Following the defendant's conviction, at an evidentiary hearing on McCarter's Rule 29.15 motion, trial counsel testified that the reason he introduced the document into evidence was to show that "seven years earlier ... a charge had been investigated involving ... some sexual abuse claims and that, for all practical purposes, there was nothing forthcoming as far as criminal charges against Mr. McCarter and that it was probably, in fact, a false report." *Id*. at 78.

The motion court ruled that McCarter's trial counsel had been deficient and failed to exercise customary skill and diligence based on the fact that "[t]here [was] no indication that the State had any intention to call [the grandchildren] as witnesses; and the letter would not have been received in evidence if it had been offered by the State."

Id. at 77. The motion court granted a new trial, *id*. at 76, which the appellate court affirmed. *Id*. at 79.

Similar to *McCarter*, there could not be any reasonable trial strategy for Counsel to allow, and in some cases elicit, this irrelevant, prejudicial, testimony.

Counsel was ineffective in other ways. During the Juvenile Office's cross-examination of Chris, several times Chris was improperly asked to comment on the credibility of other witnesses without objection by Counsel:

- "Q. So each of the multiple witnesses that were on the stand today that said you did, all of them are lying?" (Tr. 75);
- "Q. So any witness here today that heard that and came and said that in court is also lying?" (Tr. 76);
- "Q. So when he testified today that he was, that's a lie?" (Tr. 77);
- "Q. When he testified today that you said you were going to blow up the school and you would do it tomorrow -- might do it tomorrow, that's also a lie?" (Tr. 77);
- "Q. … So – But when [Tamara] came and testified today that she heard you say that you were going to blow the school up or that you wanted to blow the school up, she's lying?" (Tr. 78);
- "Q. Okay. All right. Is there any witness who took the stand today who's not lying?" (Tr. 78);
- "Q. So you are the only one today telling the truth?" (Tr. 78).

Missouri case law clearly establishes that, when seeking to expose contradiction between the testimonies of several witnesses, "an attorney may not directly ask one witness if another was lying." *State v. Savory*, 893 S.W.2d 408, 411 (Mo. App. W.D. 1995). The proposition

that "a witness should not be asked to opine upon the truth or veracity of another witnesses' testimony has a long history in Missouri." *State v. Roper*, 136 S.W.3d 891, 900 (Mo. App. W.D. 2004). *In accord*, *State v. Walters*, 241 S.W.3d 435, 439 (Mo. App. W.D. 2007) ("When seeking to expose contradictory testimony, a prosecutor should not directly ask a witness if another was lying."). Despite this well-established case law prohibiting such questioning, the Juvenile Officer repeatedly violated it.

Chris was prejudiced by this improper questioning because the Juvenile Court considered his responses to the improper questions in the court's determination of guilt:

> But the long story short is Chris said in his testimony – on his cross-examination, I mean he didn't voluntarily say it, but Mr. Anderson asked him – I'm trying to find my note – "are you the only one telling the truth today?" and, basically Chris said yes.

(Tr. 85).

That Counsel's performance was deficient, even under the highly deferential standard of *Strickland v. Washington,* 466 U.S. 668 (1984) is clear. Based on these undisputed facts, Counsel was ineffective for allowing into evidence, and sometimes adducing, evidence of prior bad acts, and other evidence that was not relevant to the adjudication part of the hearing. Counsel was also ineffective for failing to object when Chris was repeatedly asked to comment upon the credibility of other witnesses. Because of the ineffective assistance of counsel, Chris did not receive a fair adjudication hearing, as required by the Due Process Clauses. U.S. Const. amend. XIV, Mo. Const. art. I, § 10. Thus, this Court must reverse and remand for a new adjudication hearing.

Alternatively, if this Court believes the record is not adequate to address this claim, this Court should remand to the trial court or

appoint a special master so that Chris has an opportunity to present additional evidence demonstrating defense counsel's deficient performance and prejudice. *C.M.B.R.*, 332 S.W.3d at 814, 820 n. 22; Supreme Court Rule 68.03. Also see the argument section to Point I.

IV.

The Juvenile Court erred in finding that Chris committed Making a Terrorist Threat in the Second Degree, § 574.120, and in committing Chris to DYS as a result of that adjudication, because there was insufficient evidence to support the adjudication, violating Chris's rights guaranteed by the due process clauses under the 14th Amendment to the U.S. Constitution and Art. I, § 10 of the Mo. Constitution, in that a statement made by a 16-year-old high school student, when talking to some classmates in the cafeteria, that he felt like blowing up the school and he "might do it tomorrow," when there was no evidence he did any act related to "blowing this school up," is insufficient to support that he knowingly made a threat or that he recklessly disregarded the risk of causing the evacuation, quarantine or closure of his school, especially when he went to his next class after lunch, he remained there until the police questioned him, he remained on school grounds where he was supposed to be until he was removed from the school by the police about an hour or less later, and the principal took no steps to lockdown or evacuate the school because there was no imminent, credible threat.

Issue:

The Juvenile Office's evidence was that Chris, a 16-year-old high school student, when talking to some classmates in the school cafeteria during lunch, said either "I feel like blowing this school up," or "he want to see how it feel like to blow up the school," and that he "might

do it tomorrow." There was no evidence, however, that he did any act related to "blowing up the school."

By making these statements, did Chris knowingly make a threat, and did he recklessly disregard the risk of causing the evacuation, quarantine or closure of the school, especially when he went to his next class after lunch, he remained there until the police questioned him, he remained on school grounds where he was supposed to be until he was removed from the school by the police, and the principal took no steps to lockdown or evacuate the school because there was no imminent, credible threat?

Facts:

It was alleged that Chris committed what would have been, if he were an adult, the felony of Making a Terrorist Threat in the Second Degree, § 574.120 (D2). Specifically, it was alleged that Chris "recklessly disregarded the risk of causing the evacuation, quarantine or closure of the school, a place of assembly, and knowingly communicated an express or implied threat to cause an incident or condition involving danger to life. To wit: The defendant made a threat to blow up the school." (LF 22-23). The Juvenile Office's evidence relating to that allegation follows.

Tamara was in the high school cafeteria with some friends when she heard Chris, who was seated at a nearby table, talking to Jonathan, Joshua, and Zach (Tr. 30, 38). Chris said, "I feel like blowing this school up" (Tr. 30, 34). Tamara left the cafeteria and later told Principal what she had heard (Tr. 30). Tamara was scared because "we had plenty of threats about blowing our school up" (Tr. 30).

Zach testified that he heard Chris say that "he want to see how it feel like to blow up the school" (Tr. 39). Zach also testified that Chris "said that he might do it tomorrow… He said he's going to do it tomorrow… he said he might do it tomorrow." (Tr. 39-40, 42).

Principal contacted the authorities and she also had a teacher, who was in the classroom where Chris was attending class after lunch, keep Chris there until Principal could further investigate (Tr. 55). Chris did not leave the school campus that day until he was taken away by a police officer about an hour later (Tr. 55).

Officer Pratte interviewed Chris at school that day (Tr. 45-46). Chris "did not make any admissions to making any statements;" "[h]e did admit that he was talking to some people in the cafeteria, but he stated that he was just joking with them and he denied making any threatening statements" (Tr. 46).[21]

Principal testified it was a plausible or possible option to lock down the building or evacuate the building *if* there had been a "credible threat" (Tr. 57-58). But Principal did not do that here, because they kept Chris in a classroom, Chris said "he was going to do it tomorrow," police arrived within five minutes after Principal contacted the authorities, and only about an hour elapsed until Chris was taken "to juvenile" (Tr. 57). Thus, Principal did not put the school on lockdown, evincing that she did not believe that there was a credible threat (Tr. 55).

[21] At the adjudication hearing, Chris confirmed that he did not make any statement about blowing up anything (Tr. 71).

The Juvenile Court found beyond a reasonable doubt that the allegations of the petition were true and committed Chris to DYS for an indefinite term (Tr. 86, 99-101).

Standard of Review & Preservation:

Juvenile proceedings are reviewed under the same standard as any other court-tried case. *C.G.M., II v. Juvenile Officer*, 258 S.W.3d 879, 882 (Mo. App. W.D. 2008). This Court affirms the juvenile court's judgment unless it is against the weight of the evidence, erroneously declares the law, or erroneously applies the law. *Id.* This Court reviews questions of law *de novo*. *Id.* Furthermore, in juvenile proceedings, the Due Process Clause requires the standard of proof to be beyond a reasonable doubt in the adjudicatory stage when a child is charged with an act that would constitute a crime if committed by an adult. *Id.*; *In re Winship*, 397 U.S. 358, 364 (1970).

This Court views the evidence and reasonable inferences which may be drawn therefrom in the light most favorable to the verdict. *J.N.C.B. v. Juvenile Officer*, 403 S.W.3d 120, 124 (Mo. App. W.D. 2013). But the inferences must be *logical* inferences that may be *reasonably* drawn from the evidence. *Id.* This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable fact finder would be unable to disregard them. *Id.* This Court will not supply missing evidence or give the Juvenile Office the benefit of unreasonable, speculative or forced inferences. *Id.*

A challenge to the sufficiency of the evidence can be raised for the first time on appeal because sufficiency of the evidence is always reviewed on the merits. *State v. Claycomb*, 470 S.W.3d 358, 361-62

(Mo. banc 2015); *State v. Zetina-Torres*, 482 S.W.3d 801, 808-09 (Mo. banc 2016). This point is properly preserved for appeal.

There was insufficient evidence that Chris knowingly made a threat or that he recklessly disregarded the risk of causing the evacuation, quarantine or closure of his school:

In Missouri, criminal statutes must be construed strictly against the State and liberally in favor of the accused. *State v. Jones*, 899 S.W.2d 126, 127 (Mo. App. E.D. 1995). A criminal statute will not be interpreted as embracing any but those acts clearly described in the statute both within the letter and spirit of the law. *State v. Ide*, 933 S.W.2d 849, 851 (Mo. App. W.D. 1996). Any doubt as to whether the act charged and proved is embraced within the prohibition of a criminal statute must be resolved in favor of the accused. *Id.*

Relevant to this case, Chris committed the offense of making a terrorist threat in the second degree if he recklessly disregarded the risk of causing the evacuation, quarantine or closure of his school, and he knowingly communicated an express or implied threat to cause an incident or condition involving danger to life by threatening to blow up the school, § 574.120.1.

"A person "acts recklessly" or is reckless when he or she consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." § 562.016.4.

A person "acts knowingly" "[w]ith respect to his or her conduct or to attendant circumstances when he or she is aware of the nature of his or her conduct or that those circumstances exist; or …[w]ith respect to

a result of his conduct when he is aware that his conduct is practically certain to cause that result." § 562.016.3(2).

When deciding whether a child acts either recklessly or knowingly, however, the fact that Chris is a child should be taken into account. Christopher M. Northrop & Kristina R. Rozan, *Kids Will be Kids: Time for a "Reasonable Child" Standard for Proof of Objective Mens Rea Elements*, 69 Me. L.Rev. 109 (2017).

As noted by the Supreme Court of the United States, children have an inability to assess the full consequences of a course of action and to adjust one's conduct accordingly. *Miller v. Alabama*, 567 U.S. 460, 471-73, 491-92 (2012); *Graham v. Florida*, 560 U.S. 48, 72 (2010). Children often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011). They characteristically lack the capacity to exercise mature judgment and they possess only an incomplete ability to understand the world around them. *Id*. at 273. Characteristics associated with children "not only inhibit their ability to conform to an adult standard of care, but they also make them less blameworthy when they fall short." *Cannon v. State*, 181 A3d 615, 622 (Del. 2018). Experts in adolescent development have noted that children in their mid-to-late-teens are less likely to even consider whether something is risky, less likely to think about the harmful consequences that could come from doing something risky, and less likely to think that those consequences are going to be very negative. *Id*.

As a result, even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not

adults. *Id*. at 274. In negligence suits, for example, where liability turns on what an objectively reasonable person would do in the circumstances, all American jurisdictions accept the idea that a person's childhood is a relevant circumstance to be considered. *Id*. As a result, courts cannot "reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances." *Id*. at 276.

There is no Missouri case that can be found by appellate counsel addressing a "reasonable child" standard in a child delinquency proceeding, but cases from other jurisdictions have held that a reviewing court should use a reasonable child's standard when determining whether a child's conduct was criminally reckless or negligent. E.g., *In re Welfare of S.W.T.*, 277 N.W.2d 507, 514 (Minn. 1979) ("Further, it is anomalous to premise an adjudication of a child's delinquency on failure to conform his conduct to adult standards."); *J.R. v. State*, 62 P.3d 114, 119 (Alaska Ct. App. 2003) (child's actions must be judged against the standard of a reasonable person of the child's age, intelligence, and experience under similar circumstances); *In re William G.*, 192 Ariz. 208, 963 P.2d 287, 293 (1997).

In *C.G.M.*, a 13-year-old child was found to have committed an act, which if committed by an adult, would have constituted making a terroristic threat in violation of section 574.115.1(4), RSMo Cum.Supp. 2007.[22] *C.G.M.*, 258 S.W.3d at 880. It was alleged that he knowingly

[22] That statute provided, in pertinent part, that a person commits that crime "if such person communicates a threat to cause an incident or condition involving danger to life … (3) With reckless disregard of the risk of causing the evacuation, quarantine or closure of any portion of a

made a threat to cause destruction of his school by blowing up the school, which was an incident involving danger to human life, and that he did so with reckless disregard of the risk of causing the evacuation, quarantine, or closure of any portion of the school, and/or that he acted with criminal negligence with regard to the risk of causing the evacuation, quarantine or closure of any portion of the school. *Id*. at 880-81.

The charges were based upon statements that C.G.M. made to a classmate in the school hallway that "he may get dynamite from his dad for his birthday" and he asked the classmate if he "wanted to help him blow up the school." *Id*. C.G.M. later admitted to making the alleged threat. *Id*. at 881. The principal testified that he would not have evacuated the school if he had known about the statements at the time that they were made because the student would not have had dynamite in his possession. *Id*. at 880-81.

The Juvenile Court adjudicated the child guilty because the child's actions were done with criminal negligence regarding the risk of causing the evacuation, quarantine, or closure of the school. *Id*. at 881.

On appeal, C.G.M. asserted that insufficient evidence existed to establish that he made a threat to cause an incident involving danger to human life or that he acted with criminal negligence with regard to the risk of causing the evacuation of the school. *Id*. at 882. The Western District Court of Appeals agreed and reversed. *Id*.

… place of assembly…; or… (4) With criminal negligence with regard to the risk of causing the evacuation, quarantine or closure of any portion of a building…place of assembly ….

In reversing, the Western District questioned whether the child's asking a classmate to help blow up the school *if* the child got dynamite for his birthday constituted an expression of intent to cause an incident involving danger to human life. *Id.* at 883. The court noted that the child did not make a declaratory statement that "he was going to blow up his school;" rather, he merely inquired whether his classmate wanted to help him blow up the school *if* the child received dynamite for his birthday. *Id.*

Further, the Western District held that the evidence did not establish that the child's alleged threat would have caused a substantial and unjustifiable risk of an evacuation or closure of the school. *Id.* The court noted that even though an actual evacuation or closure of the school is not required, the fact that the school principal said that he would not have evacuated the school even if he had known of such a statement at the time that it was made was pertinent to the appellate court's determination of whether a substantial and unjustifiable risk of evacuation existed. *Id.* "Given this evidence, we fail to see how a fact finder could determine beyond a reasonable doubt that a substantial and unjustifiable risk of an evacuation or closure of the school existed or that C.G.M.'s lack of awareness of the risk constituted a gross deviation from reasonable care." *Id.*

Similar to C.G.M.'s statements that "he may get dynamite from his dad for his birthday," and if he did, he wanted a classmate "to help him blow up the school," Chris's alleged statement, "I feel like blowing this school up" (Tr. 30, 34), did not constitute an expression of intent to cause an incident or condition involving danger to human life, nor was

it a declaratory statement that he was going to blow up his school. *C.G.M.*, 258 S.W.3d at 883.

Further, Chris's statement that "he *might* do it *tomorrow*" did not establish there was an imminent (if any) threat to the school. A statement from a child that he *might* do something *tomorrow* would not justify an evacuation, quarantine, or closure of the school, particularly where Chris's whereabouts were known by school personnel after he allegedly made the statements until he was taken by the police to juvenile detention, and there was no evidence that he had done any act that would warrant such a reaction from the school. Indeed, Principal testified that if there was a "credible threat," she would lock down or evacuate the school (Tr. 57). The fact that Principal did not lock down or evacuate the school shows that she did not believe Chris's statements were a credible threat.

Thus, the evidence did not establish beyond a reasonable doubt that Chris consciously disregarded a substantial and unjustifiable risk of an evacuation, quarantine, or closure of the school, or that such disregard constituted a gross deviation from the standard of care which a reasonable child would exercise in that situation. *Contrast State v. Tanis*, 247 S.W.3d 610, 614 (Mo. App. W.D. 2008), which is distinguishable because it involved an adult defendant, the terroristic threat was when the defendant informed a police officer on a college campus that "he had explosives in his truck and that he was assuming command and taking over," and thus there was an imminent and specific threat, there was in fact a truck present, and law enforcement officers were forced to evacuate the entire campus.

Chris wants to make clear what he is *not* arguing. He is *not* arguing that the other students should not have reported the incident *if* Chris had made the statement. Their reporting what they believed they heard was responsible. He is *not* arguing that Principal had no right to make sure that school personnel knew Chris's whereabouts (in his classroom) until the police investigated the situation. The authorities acted properly in immediately investigating the allegations and questioning Chris. Finally, he is *not* arguing that the school had no right to take some disciplinary action as a result of the statements, such as a short suspension from school until things settled down and were fully investigated.

Rather, Chris is arguing that he should not have been adjudicated for making a terroristic threat and committed to DYS for an indefinite time for allegedly making unwise, insensitive statements to other students while in the school cafeteria. It is true that what happened here is not a matter that schools, courts, or society should take lightly. *C.G.M., II*, 258 S.W.3d at 884. But not all insensitive or disturbing remarks are terroristic threats. *Id.*

Given the circumstances in this case, the evidence did not establish proof beyond a reasonable doubt that Chris recklessly disregarded the risk of causing the evacuation, quarantine or closure of his school. The evidence also failed to support a finding that Chris's statements constituted a knowing threat.[23] Thus, he is not in need of the care and treatment of the Juvenile Court for this offense. *Id.*

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[23] Statements that are not "true threats" are constitutionally protected. *C.G.M., II*, 258 S.W.3d at 883; *State v. Metzinger*, 456 S.W.3d 84 (Mo. App. E.D. 2015). Chris's alleged statement, "I feel like blowing this school up" (Tr. 30, 34) was not a true threat.

Because Chris's adjudication of guilt for making a terroristic threat was not supported by sufficient evidence, he was deprived of his right to Due Process guaranteed under the United States and Missouri Constitutions.[24] This Court should reverse the Juvenile Court's judgment and remand for the Juvenile Court to release Chris from the jurisdiction of the juvenile court. *Id*.

[24]U.S. Const., Amend. XIV; Mo. Const., Art. I, Sec. 10.

CONCLUSION

Because Chris was deprived the effective assistance of counsel, this Court should reverse and remand for a new adjudication hearing. Alternatively, if this Court believes the record is not adequate to address these claims, this Court should appoint a special master or remand to the Juvenile Court so that Chris has an opportunity to present additional evidence demonstrating trial counsel's deficient performance and prejudice (Points I and III).

Because there was no compelling reason for the Juvenile Court to deny Chris's request for a recess or continuance to attempt to secure the attendance of potentially exculpatory witnesses, this Court should reverse the judgment and remand for the court to hold a new adjudication hearing (Point II).

Because Chris's adjudication of guilt for making a terroristic threat was not supported by sufficient evidence, he was deprived of his right to Due Process guaranteed under the United States and Missouri Constitutions. This Court should reverse the judgment and remand for the Juvenile Court to release Chris from the jurisdiction of the Juvenile Court (Point IV).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 18,817 words as counted by Microsoft Word, excluding the cover page, the signature block, this certificate of compliance, and the appendix, which does not exceed the 31,000 words allowed for an appellant's brief.

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