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 REPLY BRIEF OF APPELLANT, D.C.M.

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REPLY ARGUMENTS[1]

I.

Chris received ineffective assistance of counsel and he was prejudiced by defense counsel's failure to investigate witnesses.

Summary of reply argument:

Respondent concedes that children in delinquency proceedings have the right to effective assistance of counsel and Missouri should provide an avenue for challenging ineffective counsel. In comparable situations, this Court has held that claims of ineffective assistance of counsel (IAC) may be raised on direct appeal when the record is adequate. This Court should apply the reasoning of those cases to direct appeals in delinquency cases.

When reviewing such claims, this Court should at least use the *Strickland*[2] standard to gauge the effectiveness of counsel at delinquency hearings. *Strickland* is the standard used by an overwhelming majority of jurisdictions, and Respondent has failed to cite even one jurisdiction using a "meaningful hearing" standard in delinquency cases.

The record in the instant case is adequate to resolve the issue because it was undisputed that Chris's trial counsel failed to investigate any of the students who Chris was talking with at the time he allegedly made the threat, trial counsel had access to the police reports which listed the witnesses' names, and the police reports

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[1] Chris believes that it is unnecessary to reply to all of the points, but he is not waiving any point raised in his opening brief.

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

indicate that at least one of those witnesses said that he did not hear Chris make a threat, and the reports do not indicate that the other two students heard the threat either.

If this court believes the record is inadequate, however, this Court should remand the case for the hearing of additional testimony, and instruct the Juvenile Court to file with this Court, a copy of its findings and conclusions of law on the IAC issues so that this Court can rule on the IAC claims.

Children in delinquency proceedings have the right to effective assistance of counsel and Missouri should provide an avenue for challenging ineffective counsel:

Respondent concedes that juveniles in delinquency proceedings, including Chris, "have the right to effective assistance of counsel" (Resp. Br. at 13-14), citing *In the Interest of R.G.*, 495 S.W.2d 399, 403 (Mo. 1973). Respondent also concedes that "Missouri law clearly should provide an avenue for challenging representation that falls below a constitutional standard." (Resp. Br. at 14).

Respondent argues that if the Missouri legislature does not adopt a statutory procedure for consideration of claims of ineffective assistance of counsel (IAC) in delinquency cases (there is no reason to believe it will do so soon), then "this Court will need to identify the proper procedure for consideration of IAC claims in the future … [b]ut that precise issue need not be decided here." (Resp. Br. at 15).

Contrary to Respondent's argument, which would leave children in limbo as to where and what manner IAC claims can be raised, this

Court should address whether children, like Chris, can raise such claims on direct appeal, and if not, what mechanism can be used.

Children can raise IAC claims on direct appeal after delinquency proceedings:

Respondent argues that IAC claims are not cognizable on direct appeal, and direct appeal is not the "best avenue" for bringing such claims (Resp. Br. at 15-18). Respondent argues that direct appeals are "an ill-suited path for bringing such claims" (Resp. Br. at 15). But in comparable situations, this Court has essentially already rejected Respondent's argument. A direct appeal is appropriate, because it is expeditious and collateral attacks are not presently authorized either by statute or rule for IAC claims in delinquency cases.

This Court in termination of parental rights (TPR) cases and Sexually Violent Predator (SVP) cases, already recognizes that IAC claims 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 a SVP and TPR cases. Thus, there is no reason why children cannot raise IAC claims on direct appeal, assuming the record is adequate to resolve the claims.

This conclusion is supported by this Court's opinion in *State v. Wheat*, 775 S.W.2d 155, 157 (Mo. banc 1989), which 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." Also see, *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*).

In fact, Respondent admits that this Court has permitted IAC claims on direct appeal in different contexts where claims of IAC involve counsel's actions at trial, but argues that "this is a stopgap measure, tailored to the individual cases, and does not address the broader issue of how juveniles can litigate their rights." (Resp. Br. at 16).[3] But that is true with TPR and SVP cases, and although such an approach is not all inclusive, it is better than children having no available remedy when their attorneys' performances were deficient at delinquency proceedings, which is the present situation. Although direct appeal is not a solution for all children, at least it offers an avenue for a few.

Respondent cites to this Court's decision in *Grado* as to why "direct appeal is an ill-suited path for bringing such claims," (Resp. Br. at 15). But that citation is misplaced because the *Grado* court did in fact address IAC claims on direct appeal, since the record was adequate.

Thus, the real question in this case is not whether such claims can be raised on direct appeal, but whether the present record is adequate to review the IAC claim raised on this appeal, and if not, what mechanism should be used for resolving factual disputes

[3] Other than suggesting that children should wait until the legislature enacts legislation or this Court drafts a rule, Respondent offers no present solution for children to litigate their rights to the effective assistance of counsel. This would leave children with no current redress.

regarding the effectiveness of counsel where the proffered evidence is outside the record. Those issues are discussed below.

This Court should not apply a "meaningful hearing" standard for IAC claims in delinquency cases:

Respondent concedes that Chris's opening brief "correctly point[s] out, most other jurisdictions apply the *Strickland* standard to gauge the effectiveness of counsel at delinquency hearings. See Appellant's Brief at 34 (collecting cases)."[4] (Resp. Br. at 19). Respondent posits that all of these jurisdictions "do not recognize the distinctions that arise because of different due process standards for juvenile proceedings." *Id*.

Rather than follow this overwhelming weight of authority, Respondent argues that this Court should instead use the "meaningful hearing" standard used by court in TPR cases. (Resp. Br. at 20-21). Yet Respondent fails to cite a single case from another jurisdiction applying the "meaningful hearing" standard in a delinquency case. This Court should decline to be the first jurisdiction to do so, absent a compelling reason that is not made by Respondent's brief. Cf. *Grado*, 559 S.W.3d at 903-05 (Draper, J., concurring) ("[T]he state cannot cite any legal authority – from Missouri or other jurisdiction – applying such a minimal standard to SVP proceedings.").

[4] Chris's brief cited 22 jurisdictions that use the *Strickland* standard in delinquency cases and three more jurisdictions that have found the *Strickland* prejudice standard is too burdensome even for adult defendants, and thus apply a lesser standard in determining the effectiveness of counsel.

The record is adequate to address the IAC claim:

As noted above, claims of IAC may be raised on direct appeal when the record is adequate, *e.g., Grado*, 559 S.W.3d at 897-98, and the standard to judge counsel's performance is at least the *Strickland* standard. *Grado*, 559 S.W.3d at 903-05 (Draper, J., concurring).

Respondent claims that the record in this case is inadequate to demonstrate that Chris's trial counsel was ineffective, and that Chris has not shown that absent witnesses would have provided a viable defense. (Resp. Br. at 22-23).

Chris was talking with Jonathan and two other boys when he allegedly made the threat (Tr. 30, 38, 70). Respondent admits that Jonathan told the police that he did not hear Chris making any threats (Resp. Br. at 22-23). Nevertheless, Respondent asserts that Chris "overstates the value of Jonathan's testimony" because "Jonathan also said he did not doubt that the threat was made." (Resp. Br. at 23). But that part of Jonathan's statement would be inadmissible because it is the equivalent of testimony that Chris is the type of person who would say such a thing. Evidence is inadmissible to prove character as the basis for an inference that an accused acted in conformity therewith and committed the crime charged. *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992); *Simons v. State*, 719 S.W.2d 479, 480 (Mo. App. S.D. 1986) (testimonies of witnesses that the defendant was not the "type of person" to have committed the crime was inadmissible).

Further, this is not a situation where trial counsel adequately investigated, weighed the positives and negatives of Jonathan's testimony, and elected not to call him as a witness. In other words, there was no "trial strategy" present here. "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). Also see, *Chambers v. Armontrout*, 907 F.2d 825, 829–30 (8th Cir. 1990) ("Missouri argues, however, that [defense counsel's] decision not to interview Jones was reasonable in light of the damaging aspects of Jones' testimony. We disagree. Other witnesses had testified to the negative aspects of Jones' testimony cited by [defense counsel] as justifying his decision not to interview Jones.").

Here, the record is adequate to resolve the IAC claim because it shows that defense counsel did not adequately investigate witnesses since he told the court, when requesting a continuance, that it was only through Chris's hearing 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 this was true because the Juvenile Office had given defense counsel access to reports, "which named all of those witnesses," and defense counsel "had every opportunity to have those witnesses here today" but failed to do so (Tr. 79).

As noted above, failing to interview witnesses relates to trial preparation and not trial strategy. *Chambers*, 907 F.2d at 828. Counsel must make a reasonable investigation in the preparation of a case or make a reasonable decision not to conduct a particular investigation. *Kenley*, 937 F.2d at 1304. Here, the record establishes beyond any doubt that defense counsel's investigation and performance was constitutionally inadequate. His mid-hearing 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,* is clear. Based on the undisputed facts set out in the record on appeal, defense counsel's serious error of failing to investigate 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.

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 evaluate Chris's trial counsel's ineffectiveness, it should remand the case instead of affirming. When the record is insufficient for determining the merits of an IAC claim, this Court should allow a remand to the trial court for an evidentiary hearing on ineffectiveness. This need not be done in every case, but should be reserved for only those cases in which there is a showing that there are valid grounds to expect that a new trial might be granted by the trial court. Absent an express legislative procedure for vindicating the right to adequate counsel, this Court should fashion an appropriate procedure.

In *C.M.B.R.*, 332 S.W.3d at 820, 823, because this Court reversed on other grounds, this Court found it unnecessary to establish a mechanism for resolving factual disputes regarding the effectiveness of TPR counsel where the proffered evidence is outside the record.

Similarly, this Court in *Grado* did not reach "the difficult issue of how such claims would be raised and determined for errors allegedly occurring off the record or on appeal, in light of the lack of post-hearing process applicable to civil SVP commitments." *Grado*, 559 S.W.3d at 892.

Thus, in TPR, SVP, and delinquency cases, this Court has recognized that these groups of litigants are entitled to the effective assistance of counsel, but as of yet, none of these litigants have been provided a mechanism, either by the legislature or this Court, to raise IAC claims when additional evidence is needed outside of the record on appeal.

As this Court noted in *C.M.B.R.*, 332 S.W.3d at 820, n. 22, other states addressing the issue, in the context of TPR cases, have remanded for a hearing in the trial court, citing *In re A.L.E.*, 248 Ga.App. 213, 546 S.E.2d. 319, 325 (2001). Also see, *In re Alonzo O.*, 2015 IL App (4th) 150308, 40 N.E.3d 1228 (2015) (remand was 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).

In other circumstances, this Court has remanded for further evidence. For instance, in *State v. Terry*, 304 S.W.3d 105 (Mo. banc 2010), the defendant filed a motion to remand for newly discovered evidence on appeal. This Court remanded so the defendant could file a motion for new trial based on the new evidence. *Id*. at 111-12. This Court held that it had the inherent power to remand a case to the trial court for consideration of newly discovered evidence presented for the first time on appeal. *Id*. at 109.

In doing so, however, this Court dismissed the appeal. *Id.* Because a dismissal would further delay the proceedings, keeping Chris incarcerated even longer, Chris suggests that instead this Court should remand to the Juvenile Court for a limited hearing, instruct the court to make findings and conclusions on the issue, and file those findings with this Court within a set period of time so this Court can resolve the issue on appeal, while deferring to the Juvenile Court on any factual findings.

Other jurisdictions utilize a remand procedure when an IAC claim is raised on direct appeal. In *State v. Van Cleave*, 239 Kan. 117, 119-21, 716 P.2d 50, 582-83 (1986), the Kansas Supreme Court held that the procedure recommended when there is a claim of newly discovered evidence while the case is pending on appeal is equally applicable to an IAC claim, which arises after the case is pending on appeal, where it can be determined that there are valid grounds to expect that a new trial might be granted by the trial court. The court noted that this option would avoid the delay and expense of a separate action and a separate appeal. *Id.*, 239 Kan. at 119-20, 716 P.2d at 583. Further, this remand procedure would provide the trial court, which observed trial counsel's actions, with an opportunity to consider effective assistance of counsel claims. *Id.*

Subsequently, the Kansas Supreme Court held that the *Van Cleave* remand procedure was also available for SVP appeals when the detained person raises an IAC claim. *In re Ontiberos*, 295 Kan. 10, 27, 287 P.3d 855, 866 (2012).

There are other examples where Missouri appellate courts have used a remand procedure to allow for the introduction of additional

evidence. For instance, in *State v. Wilder*, 946 S.W.2d 760 (Mo. App. E.D. 1997) (Russell, P.J.; Simon and Karohl, J.J.), the appellate court remanded the case to the trial court for a factual determination on the issue of whether defendant's silence during an interrogation was pre-or post-*Miranda*, and instructed the trial court to file with the appellate court within 90 days, or such additional time as may be allowed, a copy of its findings and conclusions of law on that issue. *Id*. at 765. After remand, the appellate court reversed and remanded for a new trial. *State v. Wilder*, 955 S.W.2d 229 (Mo. App. E.D. 1997).

Another option would be for this Court to appoint a special master under Rule 68.03, which could be the Juvenile Court judge in this case. See *State v. Griddine*, 75 S.W.3d 741 (Mo. App. W.D. 2002) (Breckenridge, P.J.), recalling the mandate because of an IAC claim, vacating its prior opinion, and remanding for resentencing after this Court appointed a special master under Rule 68.03. Also see, *C.M.B.R.*, 332 S.W.3d at 820, n. 22, wherein this Court noted that the appointment of a special master under Rule 68.03 would be a potential mechanism for an appellate court to resolve any factual disputes.

Either of these approaches is preferable to doing nothing, as suggested by Respondent, and preferable to a habeas corpus, which is the only other possible available remedy for children claiming IAC, because in a habeas corpus proceeding, the child is not entitled to the appointment of counsel, *State ex rel. Marshall v. Blaeuer*, 709 S.W.2d 111 (Mo. banc 1986), almost all children would be incapable of filing and litigating a habeas corpus proceeding without the assistance of counsel, and the habeas judge would likely be a different judge, which would be less equipped that the trial judge 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, *Thomas v. State*, 808 S.W.2d 364, 366-67 (Mo. banc 1991). Further, a procedure such as habeas corpus, which allows an IAC claim only after the direct appeal has been exhausted would only further delay the finality of the juvenile delinquency adjudication, and would result in many children being released from custody before their habeas actions would be concluded.

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. As a result, his subsequent commitment to DYS violates Due Process. 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 present additional evidence demonstrating defense 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. Chris was prejudiced because these three students were at Chris's table in the cafeteria when he allegedly made the threat, 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 make any threat, and presumably the other two would have testified similarly since they were at Chris's table, yet they were not called as witnesses by the Juvenile Officer.

Respondent argues that the Juvenile Court did not abuse its discretion in overruling Chris's request for a recess or continuance to have three witness subpoenaed to testify because "nothing on the record indicates a compelling reason to even contemplate a continuance" and because the "record on appeal is silent as to what [the] testimony would have been." (Resp. Br. at 27). Respondent is wrong on both accounts.

It was undisputed that when Chris was in the school cafeteria, he was talking with Jonathan, Joshua, and Marcus (Tr. 30, 69-70).[5] If, arguendo, Chris had made any statement about feeling like blowing up the school, these three boys are the ones who would have heard it since they were the students who Chris was talking with. Yet, none of them

[5] There is a dispute whether or not Zach was seated near the group of boys (Tr. 30, 39, 69-70).

testified at the hearing, and Chris's attorney did not interview any of them to find out what they heard or did not hear (Tr. 79).

This mid-trial discovery, by the court and defense counsel, that the three boys who were part of the conversation, wherein it was alleged that Chris made the threat, were not present for the adjudication hearing is a compelling reason to grant a continuance. Once the court found out that Chris's attorney was negligent as to his investigation, the court had the opportunity to correct the mistake and provide Chris a fair trial by granting Chris's attorney's request for a recess or continuance. Instead, Chris is still incarcerated over a year later without a fact-finder hearing the testimony of these three material witnesses.

It is true that the record is silent as to two of these witnesses' proposed testimonies.[6] But as to the other witness, Jonathan, the record is not silent. In this regard, Respondent argues that this Court should not consider the police reports that had been filed with the Juvenile Court, and are part of the record on this appeal, even though the court took judicial notice of its files (D1, Tr. 87). But there was additional testimony made about Jonathan's proposed testimony.

Immediately after the Juvenile Court denied the request for a recess or continuance, Chris's mother told the court that she wanted to make a statement (Tr. 79). After she was put under oath (Tr. 80), she testified that at least one of the witnesses who was sitting with Chris would testify that he did not hear Chris make any threats:

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[6] The fact that the Juvenile Officer did not have either of them testify, however, is an indication that they would not have testified favorably for the Juvenile Officer.

> One of the people in [the police officer's] 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).[7] Thus, contrary to Respondent's argument, the record is not silent as to what this witness had told the police.

Respondent also argues that Chris "oversells the value of Jonathan's testimony" because "Jonathan also said he did not doubt that the threat was made" (Resp. Br. at 28). But as also explained in the argument section of Point I of this reply brief, that part of Jonathan's testimony would be inadmissible opinion or bad character evidence. In essence, that part of Jonathan's statement is the equivalent of testimony that Chris is the type of person who would say such a thing. But evidence is inadmissible to prove character as the basis for an inference that an accused acted in conformity therewith and committed the crime charged. *State v. Sladek*, 835 S.W.2d 308, 314 (Mo. banc 1992); *Simons v. State*, 719 S.W.2d 479, 480 (Mo. App. S.D.

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

1986) (testimonies of witnesses that the defendant was not the "type of person" to have committed the crime was inadmissible).

Further, the fact that Jonathan said some less than flattering things about Chris makes his statement that he did not hear Chris make any threats more believable as being an unbiased witness because clearly Jonathan would not cover up for Chris. The fact that a witness has both good and bad things about an accused does not make their testimony immaterial or irrelevant. See, *Chambers v. Armontrout*, 907 F.2d 825, 829–30 (8th Cir. 1990) ("Missouri argues, however, that [defense counsel's] decision not to interview Jones was reasonable in light of the damaging aspects of Jones' testimony. We disagree. Other witnesses had testified to the negative aspects of Jones' testimony cited by [defense counsel] as justifying his decision not to interview Jones.").

The failure to have any witness testify in support of Chris's trial testimony that he did not make any threats was prejudicial, as evidenced by the court's statement finding Chris guilty: "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). The denial of a continuance was prejudicial. 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.

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 (Point I).

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 (Reply Point II).

Respectfully submitted,

/s/ Craig A. Johnston

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CERTIFICATE OF COMPLIANCE

I certify that the attached reply brief complies with Rule 84.06(b) and contains 4,704 words as counted by Microsoft Word, excluding the cover page, the signature block, and this certificate of compliance, which does not exceed the 7,750 words allowed for an appellant's reply brief.

/s/ Craig A. Johnston

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