

SC97869

IN THE MISSOURI SUPREME COURT

IN THE INTEREST OF D.E.G.,

Appellant,

v.

JUVENILE OFFICER OF JACKSON COUNTY,

Respondent.

Appeal from Jackson County Circuit Court
16th Judicial Circuit
The Honorable J. Dale Youngs, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant, D.E.G., appeals the Judgment of Dismissal Pursuant to § 211.071, RSMo in *In the Interest of D.E.G.*, 1816-JU001391 following a certification hearing in the Circuit Court of Jackson County in which he was determined not to be a proper subject to be dealt with under the juvenile code and in which jurisdiction over him was transferred to the court of general jurisdiction (LF D74 p8-9).¹ At this time D.E.G. has been indicted in the court of general jurisdiction with the conduct alleged in the earlier petition, and that indictment remains pending in the Circuit Court of Jackson County. D.E.G. timely filed his notice of appeal of the judgment entered in 1816-JU001391 (LF D75 p1-3).

D.E.G. filed his application for transfer prior to disposition from the Missouri Court of Appeals, Western District on May 10, 2019. This Court ordered transfer on June 25, 2019. Mo. Const., Art. V, § 10; Rule 83.01.

¹ The Record on Appeal consists of a Legal File (“LF”), Transcript (“Tr.”). The Legal File consists of documents referenced by Appeal Doc No. and page (“LF D# p#”).

APPEALABLE ORDER

D.E.G. asks this Court to review the process established approximately 47 years ago in *In re T.J.H.*, 479 S.W.2d 433 (Mo. banc 1972, as well as the dissent in that opinion, and ultimately to adopt the perspective of the dissent to allow direct appeal of the judgment of dismissal of the petition against the juvenile (the judgment of certification), thereby changing the longstanding process of appeal of certification in the State of Missouri.

"An appeal shall be allowed to the child from any final judgment, order or decree made under the provisions of this chapter..." § 211.261.1 RSMo. In contrast to § 211.261 in 1972 this Court established a contrary appellate process for one particular kind of judgment, order, or decree made under chapter 211, namely, a judgment dismissing a petition against a juvenile allowing him to be prosecuted in the court of general jurisdiction. *T.J.H.* 479 S.W.2d 433 There this Court held that such a judgment of dismissal is not a final order, and thus is subject to a different process for review. *Id.* at 434. The alternative process for review established in 1972, which D.E.G. is moving to be reconsidered, is by a motion to dismiss the indictment in the circuit court wherein the adult charge is pending. *Id.* at 435.

The dissent written by Judge Robert Seiler in *T.J.H.* articulates all of the reasons why the process established by the majority in that case is both contrary to statute and impractical. § 211.261.1 "is clear and to the point" and carves out no exception that a judgment dismissing the petition allowing juvenile to be prosecuted in the court of general jurisdiction is not in fact a *final* judgment. *T.J.H.* 479 S.W.2d at 435 (Seiler

dissent). Indeed, the judgment dismissing the petition disposes of all of the issues in the case and all parties. *Id.*

The order was not tentative, informal, or incomplete. It left nothing for future determination in the juvenile court and was final. Whether anything more would be done with the juvenile depended on third parties—the prosecutor or the grand jury. If there is to be a subsequent prosecution it will be an independent action, not a continuation of the juvenile proceeding. What happens in the criminal prosecution will in no way affect what was done in juvenile court. The order of dismissal thus meets all the tests by which we ordinarily judge what is a final judgment or order in a civil or criminal case.

Id. "The principal opinion reaches a result contrary to the clear legislative intent to broaden the scope of appeal from the juvenile court." *Id.*

The majority relied on two cases in establishing this process in Missouri, one from Illinois which was addressing Illinois juvenile code with significant differences from Missouri chapter 211, and one from the District of Columbia which was addressing federal law with significant differences from Missouri chapter 211. *Id.* at 435-436. In contrast to Illinois and the District of Columbia, the dissent points out that Hawaii and a majority of other courts which have considered this question have allowed direct appeal of certification. *Id.*

Not only is the process established by *T.J.H* contrary to § 211.261 and decided on non-binding cases from other jurisdictions about markedly different statutes, but the process is also impractical and "hollow" for the juveniles who find themselves certified as adults because by the time they can seek review under *T.J.H*

the juvenile will already irretrievably have lost his right to be shielded from publicity, his right not to be jailed with adults, not to be finger-printed or

photographed without permission of the juvenile judge, and his right of his being in custody not to be considered an arrest.

Id. This reality is prejudicial to D.E.G. and those similarly situated.

Time is of the essence for D.E.G. and all juveniles in his position because the dispositions available upon a finding of juvenile delinquency are markedly different than those dispositions available to a convicted adult defendant, and those exclusively juvenile dispositions are only available for a limited amount of time, as long as D.E.G. remains in the age group for which those dispositions are designed. Each day that passes puts D.E.G. one step closer to becoming ineligible for juvenile dispositions such as commitment to the Division of Youth Services, for no other reason than that D.E.G. grows older. The *T.J.H.* process builds in months or even years of litigation in the court of general jurisdiction before a juvenile certification can be reviewed by a higher court. By that time, even if the higher court finds that the certification was in error, the juvenile has either aged out of eligibility for juvenile dispositions, or has gotten so close to aging out that there is not enough time remaining for the juvenile disposition to provide meaningful treatment and intervention before the young person does age out. This is additional prejudice.

Here, D.E.G. was 15 years old at the time of his alleged offense and turned 16 since then (Tr. 20). By the time the adult case is resolved and D.E.G. can seek appellate review of his certification as an adult he will likely be 17, or even 18 by the time that review is actually considered by busy appellate courts, and the time for meaningful treatment and intervention by a juvenile disposition will be minimal or entirely gone.

Should a higher court find error in the certification proceedings, an earlier review would allow time for meaningful intervention in the life of the juvenile, which not only benefits the juvenile but also the community to which the juvenile will return someday.

This Court has recently addressed a similar question in *Goldsby v. Lombardi*, 559 S.W.3d 878 (Mo. banc 2018). There Rule 81.04(e) was found to violate the Missouri Constitution because it conflicted with the statutory right of appeal.

Article V, § 5 of the Missouri Constitution vests this Court with the power to “establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law.” But the constitution specifically prohibits this Court from adopting rules that “change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, *or the right of appeal.*”

Id. at 881. As a rule established by this Court, Rule 81.04(e) could not change or be in conflict with the statutory right of appeal and was thus invalid. *Id.*

T.J.H. similarly infringes upon the statutory right of appeal guaranteed by § 211.261.1. Although not a Supreme Court Rule *per se*, the process established in *T.J.H.* is like a rule established by this Court that changes the substantive right of appeal found in § 211.261.1 for those children whose cases are dismissed pursuant to § 211.071. As such *T.J.H.* violates Article V, § 5 of the Missouri Constitution.

For these reasons D.E.G. asks this Court to review the process established approximately 47 years ago in *T.J.H.*, as well as the dissent in that opinion, and ultimately to adopt the perspective of the dissent and allow direct appeal of the judgment of dismissal of the petition against the juvenile (the judgment of certification), thereby changing the longstanding process of appeal of certification in the State of Missouri.

STATEMENT OF FACTS

D.E.G. is an African-American male (Tr. 28) who is sixteen years of age (Tr. 20). At the time of the certification hearing in this case he had very recently turned sixteen, and at the time of the conduct alleged against him he had been fifteen years of age (Tr. 20).

On October 26, 2018, the Juvenile Officer of Jackson County filed her petition in the interest of D.E.G. alleging D.E.G. to be in need of care and treatment for allegedly committing two acts of juvenile delinquency, namely, assault in the first degree and armed criminal action (LF D44 p1-3).

On October 29, 2018, the Juvenile Officer of Jackson County filed her motion for a certification hearing pursuant to § 211.071 RSMo (LF D46 p1-3). The hearing was scheduled for January 2, 2019 (LF D65 p1-3). The Deputy Juvenile Officer filed her certification report on December 26, 2018 recommending that D.E.G. be certified to stand trial in the court of general jurisdiction (LF D67 p1-21).

On January 2, 2019 D.E.G. filed his motion to deny certification of juvenile for unconstitutionality of Missouri's certification process on numerous grounds (D68 p1-26), followed by the Juvenile Officer of Jackson County's response (LF D69 p1-19).

The Honorable J. Dale Youngs, Judge, overruled and denied D.E.G.'s motion and proceeded to hold the hearing (Tr. 4). At hearing, the Juvenile Officer presented only one witness, Deputy Juvenile Officer Sandy Rollo-Hawkins (Tr. 5). Ms. Rolo-Hawkins testified about her review of other secondary sources in order to compile her certification report and make a recommendation (Tr. 5-25). The Juvenile Officer moved to admit the

certification report and the social file, which were both admitted over D.E.G.'s objections (Tr. 7-8). Ms. Rolo-Hawkins testified to details of the conduct alleged in the petition, over D.E.G.'s renewed and continuing objection (Tr. 8-10). Ms. Rolo-Hawkins testified to details of prior unadjudicated referrals to the Juvenile Officer of D.E.G., over D.E.G.'s renewed and continuing objection (Tr. 11-14). Ms. Rolo-Hawkins testified regarding details of D.E.G.'s conduct in detention to which she had no personal knowledge, as well as statements D.E.G.'s mother had made to her, over D.E.G.'s continuing objection (Tr. 14-17). Ms. Rolo-Hawkins testified regarding D.E.G.'s medical and mental health condition, as well as his educational background, with no personal knowledge of any of these subjects, over D.E.G.'s continuing objection (Tr. 18-19).

On cross-examination, Ms. Rolo-Hawkins testified that her entire testimony was based upon her review of secondary source documentation and that she had no personal knowledge of any of the information contained in her report outside of compiling and reviewing those sources (Tr. 26-30).

D.E.G. timely filed his notice of appeal of the judgment entered in 1816-JU0001391 (LF D75 p1-3). D.E.G. filed his application for transfer prior to disposition from the Missouri Court of Appeals, Western District on May 10, 2019. This Court ordered transfer on June 25, 2019. This appeal follows.

POINTS ON APPEAL

POINT I: VAGUE OR NONEXISTENT BURDEN OF PROOF VIOLATES THE CONSTITUTION

The trial court erred, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and to effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo without holding any party to any burden of proof, because § 211.071 RSMo provides no burden of proof to be applied, nor does any other statute, rule, or precedent, which resulted in the court applying an unknown standard at the hearing, preventing D.E.G. from knowing how to prepare to defend himself, and preventing a clear record for review, all of which falls below the Constitutional minimum.

U.S. Const., Amends. V, VI, & XIV

Mo. Const., Art. I, §§ 10 & 18(a)

§§ 211.071, 542.296, 563.026, 563.031 RSMo

MAI-CR 408.20

In re Winship, 397 U.S. 358 (1970)

Kent v. U.S., 383 U.S. 541 (1966)

State v. Nathan, 404 S.W.3d 253 (Mo. banc 2013)

Taylor v. Kentucky, 436 U.S. 478 (1978)

**POINT II: INADEQUATE PROBABLE CAUSE DETERMINATION VIOLATES
THE CONSTITUTION**

The trial court erred, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and to effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo without providing an adequate probable cause determination at the initiation of delinquency proceedings, of which certification is just one part, because § 211.071 RSMo provides no such mechanism, nor does any other statute, rule, or precedent, which resulted in the court considering the nature of the offenses alleged without ever having even the most basic adversarial testing of those charges.

U.S. Const., Amends. V, VI, & XIV

Mo. Const., Art. I, §§ 10 & 18(a)

§§ 211.061, 211.071, 544.250, 544.270, 544.280, 544.360, 544.380 RSMo

Rules 21.03, 22.09, 127.07

In re Winship, 397 U.S. 358 (1970)

Kent v. U.S., 383 U.S. 541 (1966)

State v. Nathan, 404 S.W.3d 253 (Mo. banc 2013)

**POINT III: CONFLICT OF INTEREST IN MISSOURI'S JUVENILE COURT'S
VIOLATES THE CONSTITUTION**

The trial court erred, in violation of D.E.G.'s right to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and in violation of the principle of separation of powers under Article I, Article II, § 2, and Article III, § 2 of the Constitution and Article II, § 1 of the Missouri Constitution when it entered its judgement of dismissal pursuant to § 211.071 RSMo while operating in a persistent conflict of interest in all juvenile cases including certification hearings, which resulted in a decision by the trial court that has the appearance of impropriety.

U.S. Const., Art. I, Art. II, § 2, Art. III § 2, Amends. V, & XIV

Mo. Const., Art. I, § 10, Art. II, § 1

§ 211.071 RSMo

Rule 4-1.7

In re Winship, 397 U.S. 358 (1970)

Kent v. U.S., 383 U.S. 541 (1966)

State v. Nathan, 404 S.W.3d 253 (Mo. banc 2013)

**POINT IV: MISSOURI'S DISPROPORTIONATE APPLICATION OF
CERTIFICATION TO AFRICAN-AMERICAN YOUTH VIOLATES THE
CONSTITUTION**

The trial court erred, in violation of D.E.G.'s rights to equal protection under the Fourteenth Amendment to the Constitution, and to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo after disproportionately applying certification proceedings to African-American juveniles, of which D.E.G. is one, which has resulted in African-American youth being disproportionately certified to stand trial as adults.

U.S. Const., Amends. V, & XIV

Mo. Const., Art. I, § 10

§ 211.071 RSMo

In re Winship, 397 U.S. 358 (1970)

Kent v. U.S., 383 U.S. 541 (1966)

State v. Nathan, 404 S.W.3d 253 (Mo. banc 2013)

POINT V: RULES OF EVIDENCE ARE ROUTINELY IGNORED IN VIOLATION OF THE CONSTITUTION

The trial court erred, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, to effective counsel under the Sixth Amendment to the Constitution and Article I, § 18(a), of the Missouri Constitution, and to confront the witnesses against him as protected by the confrontation clauses of the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo without providing any opportunity for adversarial testing, challenging, or confronting the evidence used in the trial court's decision to certify, which resulted in the court certifying D.E.G. to stand trial as an adult in a hearing comprised exclusively of improperly admitted and untested evidence.

U.S. Const., Amends. V, VI, & XIV

Mo. Const., Art. I, §§ 10, & 18(a)

§ 211.071 RSMo

Rules 116.02 & 128.02

Crawford v. Washington, 541 U.S. 36 (2004)

In re Winship, 397 U.S. 358 (1970)

Kent v. U.S., 383 U.S. 541 (1966)

State v. Nathan, 404 S.W.3d 253 (Mo. banc 2013)

**POINT VI: UNADJUDICATED REFERRALS CONSIDERED BY THE COURT
VIOLATES THE CONSTITUTION**

The trial court erred, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, to effective counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, and to confront the witnesses against him as protected by the confrontation clauses of the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo after considering unadjudicated prior referrals against him that had never been tested, challenged, or confronted, which resulted in the court certifying him to stand trial as an adult with unfair consideration of improperly admitted and untested evidence.

U.S. Const., Amends. V, VI, & XIV

Mo. Const., Art. I, §§ 10, & 18(a)

§ 211.071 RSMo

Rules 116.02 & 128.02

In re Winship, 397 U.S. 358 (1970)

Kent v. U.S., 383 U.S. 541 (1966)

State v. Nathan, 404 S.W.3d 253 (Mo. banc 2013)

State v. Tolliver, 101 S.W.3d 313 (Mo. Ct. App. 2003)

ARGUMENT ON APPEAL

POINT I: VAGUE OR NONEXISTENT BURDEN OF PROOF VIOLATES THE CONSTITUTION

The trial court erred, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and to effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo without holding any party to any burden of proof, because § 211.071 RSMo provides no burden of proof to be applied, nor does any other statute, rule, or precedent, which resulted in the court applying an unknown standard at the hearing, preventing D.E.G. from knowing how to prepare to defend himself, and preventing a clear record for review, all of which falls below the Constitutional minimum.

Preservation

“To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process,” “the trial court must have ruled thereon,” and “the point raised on appeal must be based upon the theory advanced at the trial court.” *Sharp v. Curators of Univ. of Missouri*, 138 S.W.3d 735, 738 (Mo. Ct. App. 2003) (internal citations omitted).

D.E.G. raised this challenge prior to the certification hearing pursuant to § 211.071 RSMo, as soon as possible after it became clear that the Juvenile Office intended to recommend certification. The Deputy Juvenile Officer filed her certification report on

December 26, 2018 recommending that D.E.G. be certified to stand trial in the court of general jurisdiction (LF D67 p1-21). On January 2, 2019 D.E.G. filed his motion to deny certification of juvenile for unconstitutionality of Missouri's certification process asserting these grounds (D68 p1-26) prior to the hearing to be held that day. Although this was filed on the same day as the certification hearing, both the trial judge and the attorney for the Juvenile Officer were familiar with the claims in D.E.G.'s motion because they had previously been litigated in another case through a nearly identical motion (Tr. 3-4). The trial court ruled on the constitutional issue by overruling it on the record and proceeding with the certification hearing (Tr. 4), which is memorialized in the court's judgement of dismissal pursuant to § 211.071, RSMo. (LF D76 p1).

Standard of Review

“The standard of review for constitutional challenges to a statute is de novo.” *Phillips v. Edmundson*, 240 S.W.3d 691, 693 (Mo. 2007) (citing *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007)).

Discussion

Due process and effective assistance of counsel for juveniles

The United States Supreme Court has held that criminal due process safeguards provided to adult criminal defendants are equally paramount and required in juvenile adjudication proceedings, despite the fact that juvenile proceedings are civil proceedings rather than criminal. *In re Winship*, 397 U.S. 358, 365-66 (1970) (“civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for ‘(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.” (internal citations omitted)). The United States Supreme Court has further held that the certification process is “a ‘critically important’ action determining vitally important statutory rights of the juvenile.” *Kent v. U.S.*, 383 U.S. 541, 556 (1966). Indeed, “The need [for effective assistance of counsel] is even greater in the adjudication of waiver² [than other stages] [...] since it contemplates the imposition of criminal sanctions.” *Id.* at 558 (internal citations omitted).

The seminal case on Missouri's certification process is *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013), which says that

Certification proceedings do not have to “conform with all of the requirements of a criminal trial or even of the usual administrative hearing” as long as they “measure up to the essentials of due process and fair treatment.” The process is constitutional if a hearing is provided, the juvenile is given the right to counsel and access to his or her records, and it results in a decision that sets forth the basis for the decision to relinquish jurisdiction in a way that is sufficient to permit meaningful appellate review.

Id. at 260 (internal citations omitted, citing and interpreting *Kent*).³ However, the same reasoning that requires criminal due process safeguards in adjudication, in that certification is a proceeding where the issue is whether the child will be subjected to loss of his liberty for years, should apply to certification as well, especially since it is a

² In *Kent* “waiver” is used in place of “transfer” or “certification” as used in Missouri.

³ *Nathan* also found that Missouri's certification process, as challenged by Nathan in that case, was constitutional. In this case, however, D.E.G. challenges the certification process on very different grounds. Nathan claimed that he should have been entitled to a finding by a jury that he had committed the crime charged beyond a reasonable doubt before the Court could consider those charges at certification hearing. The Court rejected that argument, finding that such a system would run afoul of double jeopardy protections. D.E.G. is not asking for a mini-trial. He is asking for his constitutional rights as described throughout this brief to be provided, without implicating double jeopardy.

critically important stage, and in other ways according to the Supreme Court even more important than other stages, of juvenile proceedings.

Burdens of proof

Various burdens of proof are required in different legal settings. A non-exhaustive list includes: beyond a reasonable doubt, by clear and convincing evidence, by preponderance of the evidence, more probably true than not, of probable cause, and of reasonable suspicion. Some clear burden of proof, clearly placed upon some party to the litigation, is required in every legal setting, whether by common law precedent or by statute. For example, in an adult criminal trial or juvenile adjudication, the burden of proof is on the State, or the Juvenile officer, to prove beyond a reasonable doubt that the accused is guilty as charged. *See Winship*, 397 U.S. at 368. Upon a motion to suppress filed by the Defendant, the burden of proof is upon the State to prove by preponderance of the evidence that the motion should be denied. § 542.296.6 RSMo. If the Defendant injects the issue of self-defense into a criminal trial, the burden of proof is on the State to prove beyond a reasonable doubt that the Defendant's use of force was not justified. § 563.031.5 RSMo. If the Defendant wishes to claim justification of emergency measures, the burden of proof is on the Defendant to prove that it is more probably true than not that his conduct was lawful as an emergency measure. § 563.026.3 RSMo and MAI-CR 408.20.

Missouri's certification process, however, does not provide such a clear burden of proof, nor does it place a burden clearly on a particular party. § 211.071.1 merely states that the Court "may in its discretion, dismiss the petition and transfer the child to a court

of general jurisdiction for prosecution under the general law." Further, § 211.071.1 allows the motion to be made by the juvenile officer, or even by the Court itself. Neither § 211.071 nor any case law interpreting this statute provides a clear burden of proof nor instructs as to upon whom any burden is placed. This is unconstitutional.

Because the certification hearing is a critically important action determining vitally important statutory rights, at which the need for effective assistance of counsel is paramount, a clear burden of proof placed clearly on a particular party to the litigation is necessary to protect due process and to provide effective assistance of counsel. Just as the presumption of innocence is "axiomatic and elementary" and "lies at the foundation of the administration of our criminal law" and our Constitution, *see Taylor v. Kentucky*, 436 U.S. 478, 483 (1978), so to is a clear burden of proof placed clearly upon a particular party.

Also because certification is a critically important action that is, according to the United States Supreme Court even more important than adjudication, the burden at the certification hearing should be equally as stringent, beyond a reasonable doubt, and the burden should be clearly placed upon the Juvenile Officer.

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’

Winship, 397 U.S. at 363 (internal citations omitted) (holding that the beyond a reasonable doubt standard applies to juvenile adjudication).

Constitutional failings of delinquency and certification in Missouri

After a thorough investigation of the St. Louis County Family Court the Civil Rights Division of the United States Department of Justice (DOJ) issued an extensive report in 2015 outlining numerous Constitutional failings in the juvenile delinquency process practiced in that jurisdiction. Many of the failings they observed in St. Louis County are part and parcel of Missouri's delinquency proceedings across the entire State of Missouri, and are in fact built into the system by statute and by institution. The DOJ concluded that

St. Louis County Family Court fails to provide children facing certification to be criminally tried in adult criminal court with adequate due process. In particular, the Family Court's failure to consider, and permit adversarial testing of, the prosecutive merit of the underlying allegations against the child at the certification hearing fails to "measure up to the essentials of due process and fair treatment," in violation of the Fourteenth Amendment.

United States Dept. of Justice, "Investigation of the St. Louis Family Court, St. Louis, MO," July 31, 2015, at 3 (internal citations omitted) (LF D69 p4). These problems persist and extend statewide, including in the Sixteenth Circuit.

Missouri's failure to clearly define and burden of proof nor clearly place any burden on any particular party at certification hearing is one of many pieces of Missouri's juvenile justice system that fails Constitutional muster.

For these reasons D.E.G. requests the Court to reverse the trial court's judgement dismissing the juvenile petition against him because Missouri's certification process fails constitutional requirements by its vague or nonexistent burden of proof at certification hearing, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth

Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and to effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution.

**POINT II: INADEQUATE PROBABLE CAUSE DETERMINATION VIOLATES
THE CONSTITUTION**

The trial court erred, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and to effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo without providing an adequate probable cause determination at the initiation of delinquency proceedings, of which certification is just one part, because § 211.071 RSMo provides no such mechanism, nor does any other statute, rule, or precedent, which resulted in the court considering the nature of the offenses alleged without ever having even the most basic adversarial testing of those charges.

Preservation

“To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process,” “the trial court must have ruled thereon,” and “the point raised on appeal must be based upon the theory advanced at the trial court.” *Sharp v. Curators of Univ. of Missouri*, 138 S.W.3d 735, 738 (Mo. Ct. App. 2003) (internal citations omitted).

D.E.G. raised this challenge prior to the certification hearing pursuant to § 211.071 RSMo, as soon as possible after it became clear that the Juvenile Office intended to recommend certification. The Deputy Juvenile Officer filed her certification report on December 26, 2018 recommending that D.E.G. be certified to stand trial in the court of

general jurisdiction (LF D67 p1-21). On January 2, 2019 D.E.G. filed his motion to deny certification of juvenile for unconstitutionality of Missouri's certification process asserting these grounds (D68 p1-26) prior to the hearing to be held that day. Although this was filed on the same day as the certification hearing, both the trial judge and the attorney for the Juvenile Officer were familiar with the claims in D.E.G.'s motion because they had previously been litigated in another case through a nearly identical motion (Tr. 3-4). The trial court ruled on the constitutional issue by overruling it on the record and proceeding with the certification hearing (Tr. 4), which is memorialized in the court's judgement of dismissal pursuant to § 211.071, RSMo. (LF D76 p1).

Standard of Review

“The standard of review for constitutional challenges to a statute is de novo.” *Phillips v. Edmundson*, 240 S.W.3d 691, 693 (Mo. 2007) (citing *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007)).

Discussion

Due process and effective assistance of counsel for juveniles

The United States Supreme Court has held that criminal due process safeguards provided to adult criminal defendants are equally paramount and required in juvenile adjudication proceedings, despite the fact that juvenile proceedings are civil proceedings rather than criminal. *In re Winship*, 397 U.S. 358, 365-66 (1970) (“civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for ‘(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." (internal citations omitted)). The United States Supreme Court has further held that the certification process is "a 'critically important' action determining vitally important statutory rights of the juvenile." *Kent v. U.S.*, 383 U.S. 541, 556 (1966). Indeed, "The need [for effective assistance of counsel] is even greater in the adjudication of waiver [than other stages] [...] since it contemplates the imposition of criminal sanctions." *Id.* at 558 (internal citations omitted).

The seminal case on Missouri's certification process is *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013), which says that

Certification proceedings do not have to "conform with all of the requirements of a criminal trial or even of the usual administrative hearing" as long as they "measure up to the essentials of due process and fair treatment." The process is constitutional if a hearing is provided, the juvenile is given the right to counsel and access to his or her records, and it results in a decision that sets forth the basis for the decision to relinquish jurisdiction in a way that is sufficient to permit meaningful appellate review.

Id. at 260 (internal citations omitted, citing and interpreting *Kent*). However, the same reasoning that requires criminal due process safeguards in adjudication, in that certification is a proceeding where the issue is whether the child will be subjected to loss of his liberty for years, should apply to certification as well, especially since it is a critically important stage, and in other ways according to the Supreme Court even more important than other stages, of juvenile proceedings.

Probable cause in Missouri's juvenile proceedings

After a thorough investigation of the St. Louis County Family Court the Civil Rights Division of the United States Department of Justice (DOJ) issued an extensive

report in 2015 outlining numerous Constitutional failings in the juvenile delinquency process practiced in that jurisdiction. Many of the failings they observed in St. Louis County are part and parcel of Missouri's delinquency proceedings across the entire State of Missouri, and are in fact built into the system by statute and by institution.

St. Louis County Family Court fails to provide adequate probable cause determinations to children facing delinquency charges. *Schall v. Martin*, 467 U.S. 256 (1984); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1974); *R.W.T. v. Dalton*, 712 F.2d. 1225, 1227 (8th Cir. 1983). Probable cause determinations are made on an in camera, ex parte basis, and children have no opportunity at any stage of the proceedings to challenge probable cause. St. Louis County Family Court fails to provide children facing certification to be criminally tried in adult criminal court with adequate due process. In particular, the Family Court's failure to consider, and permit adversarial testing of, the prosecutive merit of the underlying allegations against the child at the certification hearing fails to 'measure up to the essentials of due process and fair treatment,' in violation of the Fourteenth Amendment.

United States Dept. of Justice, "Investigation of the St. Louis Family Court, St. Louis, MO," July 31, 2015, at 2 (LF D69 p3). This reality plagues more than just St. Louis, extending statewide, including the Sixteenth Circuit.

Missouri law does provide a certain type of probable cause finding for juveniles:

An order to continue the child in detention shall only be entered upon the filing of a petition or motion to modify and a determination by the court that probable cause exists to believe that the child has committed acts specified in the petition or motion that bring the child within the jurisdiction of the court under subdivision (2) or (3) of sub§ 1 of § 211.031.

§ 211.061.3(2) RSMo; *see also* Rule 127.07(a).

This "probable cause" finding is qualitatively different from what is afforded to adults accused of a felony criminal offense. An adult is afforded the right to "a preliminary examination before some associate circuit judge in the county where the

offense is alleged to have been committed.” § 544.250 RSMo, *see also* Rule 22.09. The State cannot proceed in prosecution without such a hearing, or without waiver of such a hearing by the accused. *Id.* A preliminary examination for an adult accused is an evidentiary hearing that is conducted in the presence of the accused, with examinations of witnesses under oath. § 544.270 RSMo. The procedure utilized for these preliminary examinations is similar to the procedure utilized for actual trials: “[t]he order of conducting the trial or hearing, with respect to the introduction of the evidence and the examination of witnesses, shall be the same as governs in the trial of criminal cases before circuit judges, as far as practicable.” § 544.280 RSMo. This means that the State has the burden of production and the burden of proof. The accused enjoys the right to confront the State's witnesses and the right to counsel. The rules of evidence apply at preliminary hearing, as well as the right to invoke the witness exclusionary rule. § 544.360 RSMo. An adult accused enjoys the right to present his own evidence, including the right to testify on his own behalf. § 544.380 RSMo.

The "probable cause" determination under § 211.061.3(2) is no different than the initial determination, under Rule 21.03, for issuing a warrant for an adult accused of a misdemeanor offense, and under Rule 22.04(a) for issuing a warrant for an adult accused of a felony offense. That determination of probable cause is based on the summary, non-evidentiary, and uncontested review of the “statement of probable cause” filed pursuant to Rule 21.04, just as the probable cause determination under § 211.061.3(2).

The probable cause determination provided in § 211.061.3(2) does not afford a juvenile any of the rights afforded to the adult. The juvenile accused is not afforded the

right to: 1) an evidentiary hearing at which the Juvenile Office has the burden to proceed and the burden of proof; 2) an evidentiary hearing that is conducted in the presence of the juvenile, with testimony under oath; 3) be represented by counsel in an adversarial setting; 4) examine and confront the complainant and witnesses called against him; 5) enjoy the protections of the rules of evidence, including the witness exclusionary rule; 6) introduce his own evidence and/or his own testimony; or 7) waive such a hearing.

Although this applies to all stages of delinquency proceedings in this State, this is particularly alarming at certification hearing because the certification hearing is a critically important action determining vitally important statutory rights, at which the need for effective assistance of counsel is paramount. A probable cause determination prior to critical certification hearing is necessary to protect due process and to provide effective assistance of counsel.

For these reasons D.E.G. requests the Court to reverse the trial court's judgement dismissing the juvenile petition against him because Missouri's certification process fails constitutional requirements by providing inadequate probable cause determinations at the initiation of delinquency proceedings, of which certification is just one part, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and to effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution.

POINT III: CONFLICT OF INTEREST IN MISSOURI'S JUVENILE COURT'S VIOLATES THE CONSTITUTION

The trial court erred, in violation of D.E.G.'s right to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and in violation of the principle of separation of powers under Article I, Article II, § 2, and Article III, § 2 of the Constitution and Article II, § 1 of the Missouri Constitution when it entered its judgement of dismissal pursuant to § 211.071 RSMo while operating in a persistent conflict of interest in all juvenile cases including certification hearings, which resulted in a decision by the trial court that has the appearance of impropriety.

Preservation

“To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process,” “the trial court must have ruled thereon,” and “the point raised on appeal must be based upon the theory advanced at the trial court.” *Sharp v. Curators of Univ. of Missouri*, 138 S.W.3d 735, 738 (Mo. Ct. App. 2003) (internal citations omitted).

D.E.G. raised this challenge prior to the certification hearing pursuant to § 211.071 RSMo, as soon as possible after it became clear that the Juvenile Office intended to recommend certification. The Deputy Juvenile Officer filed her certification report on December 26, 2018 recommending that D.E.G. be certified to stand trial in the court of general jurisdiction (LF D67 p1-21). On January 2, 2019 D.E.G. filed his motion to deny certification of juvenile for unconstitutionality of Missouri's certification process

asserting these grounds (D68 p1-26) prior to the hearing to be held that day. Although this was filed on the same day as the certification hearing, both the trial judge and the attorney for the Juvenile Officer were familiar with the claims in D.E.G.'s motion because they had previously been litigated in another case through a nearly identical motion (Tr. 3-4). The trial court ruled on the constitutional issue by overruling it on the record and proceeding with the certification hearing (Tr. 4), which is memorialized in the court's judgement of dismissal pursuant to § 211.071, RSMo. (LF D76 p1).

Standard of Review

"The standard of review for constitutional challenges to a statute is de novo." *Phillips v. Edmundson*, 240 S.W.3d 691, 693 (Mo. 2007) (citing *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007)).

Discussion

Due process for juveniles

The United States Supreme Court has held that criminal due process safeguards provided to adult criminal defendants are equally paramount and required in juvenile adjudication proceedings, despite the fact that juvenile proceedings are civil proceedings rather than criminal. *In re Winship*, 397 U.S. 358, 365-66 (1970) ("civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '(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.'" (internal citations omitted)). The United States Supreme Court has further held that the certification process is "a 'critically important'

action determining vitally important statutory rights of the juvenile." *Kent v. U.S.*, 383 U.S. 541, 556 (1966).

The seminal case on Missouri's certification process is *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013), which says that

Certification proceedings do not have to "conform with all of the requirements of a criminal trial or even of the usual administrative hearing" as long as they "measure up to the essentials of due process and fair treatment." The process is constitutional if a hearing is provided, the juvenile is given the right to counsel and access to his or her records, and it results in a decision that sets forth the basis for the decision to relinquish jurisdiction in a way that is sufficient to permit meaningful appellate review.

Id. at 260 (internal citations omitted, citing and interpreting *Kent*). However, the same reasoning that requires criminal due process safeguards in adjudication, in that certification is a proceeding where the issue is whether the child will be subjected to loss of his liberty for years, should apply to certification as well, especially since it is a critically important stage, and in other ways according to the Supreme Court even more important than other stages, of juvenile proceedings.

Organization structure of Missouri's Family Court system

After a thorough investigation of the St. Louis County Family Court the Civil Rights Division of the United States Department of Justice (DOJ) issued an extensive report in 2015 outlining numerous Constitutional failings in the juvenile delinquency process practiced in that jurisdiction. Many of the failings they observed in St. Louis County are part and parcel of Missouri's delinquency proceedings across the entire State

of Missouri, and are in fact built into the system by statute and by institution. The DOJ has concluded that this is a problem in St. Louis County.

The organizational structure of the Family Court, wherein both prosecutor [Attorney's for the Juvenile Officer] and probation officer [Juvenile Officer and Deputy Juvenile Officer] are employees of the court, the prosecutor is counsel for the probation officer, and the probation officer acts as both an arm of the prosecution as well as a child advocate, causes inherent conflicts of interest. These conflicts of interest are contrary to separation of powers principles and deprive children of adequate due process. U.S. Const., art. I, art. II, § 2, cl. 5; art. III, § 2.

United States Dept. of Justice, "Investigation of the St. Louis Family Court, St. Louis, MO," July 31, 2015, at 3 (LF D69 p4). This reality plagues more than just St. Louis, extending statewide, including the Sixteenth Circuit.

Juvenile courts across the State of Missouri, by their very structure, violate due process norms and ethical mandates under the United States and Missouri Constitutions, Missouri Rules of Professional Conduct, and Missouri Rules of Judicial Conduct. Our juvenile court judges and commissioners are directly and indirectly involved in the charging, processing, prosecuting, adjudicating, and sentencing of Missouri's youth in violation of law by way of this conflict of interest, and in violation of separation of powers and due process.

These arguments are not being advanced in an effort to impugn the integrity of individual actors or suggest ill will on the part of any of the court's staff or its judges or commissioners. Instead, these arguments suggest that the Missouri legislature has placed the courts, the Juvenile Officer, and her staff in an impossible and persistent conflict of

interest, wherein they are expected to operate within a system and long-standing practices that have developed around an unconstitutional structure.

Missouri Juvenile Officers, who serve as the intake arm of juvenile justice and its probation agency, and the prosecutors who represent them, known as Attorneys for the Juvenile Officers, are institutionally part of the Judge's own staff. While these actors may state that their day to day work is quite separate, there is no official requirement for checks and balances to maintain these divisions. The consequences of this conflicted structure and its related unconstitutional practices are particularly troubling when young people face losing their liberty or transfer to adult court at the hands of these state actors. These problems manifest themselves in three different ways in Missouri juvenile procedures: through the role of the Judge, the Juvenile Officer and the Attorney for the Juvenile Officer. The Judge, the Juvenile Officer, and the Attorney for the Juvenile Officer have no choice - the choice was made by the Missouri Legislature and the Missouri Supreme Court in the statutes and rules provided to these parties to effect juvenile courts in this state.

The separation of powers problem in Missouri's existing juvenile court structure has been noted by judges, the Missouri Bar, the National Juvenile Defender Center⁴, the American Bar Association, and now the Department of Justice in its most recent report on St. Louis County Family Court.

⁴ National Juvenile Defender Center, "Missouri: Justice Rationed: An Assessment of Access to Counsel and Quality of Juvenile Defense Representation in Delinquency Proceedings," Spring 2013 (LF D70).

Problems Regarding Judicial Function and Role in Juvenile Court

Under present law and practice in Missouri juvenile courts, the judiciary holds power unchecked by another branch. Subordinate judicial branch officials (Juvenile Officers) determine which juvenile court cases to file, decide what charges to bring, and against whom, and whether to prosecute such charges. Then, judicial branch officials, Judges, adjudicate the factual and legal issues raised in the case. Thus, the judicial branch files and prosecutes petitions in front of itself. Josh Gupta-Kagan, *Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure*, 78 Mo. L. Rev. 1245, 1250 (2013) (LF D71 p6).

Just as juvenile defendants enjoy the essential due process protections that adult defendants have, thanks to *In Re Gault*, 387 U.S. 1 (1967), juveniles should be tried in a system that respects basic principles of American government, including the separation of powers. The current system present in Missouri's juvenile courts is unconstitutional because it violates the separation of powers doctrine established under both the Missouri and United States' Constitutions.

Under Missouri's Constitution, Article II establishes three branches of government, and its language suggests tight boundaries between the three branches:

the powers of government shall be divided into three distinct departments, the legislative, judicial, and executive, each which shall be confided to a separate magistracy and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Missouri's constitution also includes a take care clause nearly identical to the United States Constitution that assigns prosecutorial discretion to the executive branch. Article IV of the Missouri Constitution provides that "The governor shall take care that the laws are distributed and faithfully executed, and shall be a conservator of the peace throughout the state."

Further, both the United States Supreme Court and the Supreme Court of Missouri has recognized that the purpose of separating powers is to prevent the concentration of unchecked power in the hands of one branch of government. *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (1993). *See also, State Auditor v. Joint Comm. On Legislative Research*, 956 S.W.2d 228, 232 (Mo. 1997); *State v. Goodwin*, 457, U.S. 368, 381-81 (1982); *United States v. Nixon*, 418 U.S. 683, 693 (1974).

As a well settled constitutional matter, the judiciary may not serve as both the investigating or prosecuting agent and the fact finder. The United States Supreme Court has long held that serving in such dual roles violates due process norms of impartiality. *Turney v. Ohio*, 273 U.S. 510 (1927) (violation of due process for judicial officer to have a "direct, personal, pecuniary interest in convicting the defendant"); *In Re Murchison*, 349 U.S. 133, 136 (1955) ("No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.") (finding due process violation based on personal bias of judge and his involvement in prior related proceedings).

Separation of power principles also requires prosecutorial and judicial roles to be distinct. *Town of New Town v. Rumery*, 480 U.S. 386 (1987) ("Our decisions [...] uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute [...] so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute and what charge to file or bring before a grand jury, generally rests entirely in his discretion"); *see also U.S. v. Doe*, 125 F.3d 1249, 1255 (9th Cir. 1997) ("separation of powers mandates judicial respect for the prosecutor's independence").

When a judge wears both hats in issuing or upholding warrants he or she may also violate the Fourth Amendment rights of a defendant. *Lo-Ji Sales v. New York*, 422 U.S. 319 (1979) (finding Fourth Amendment violation where judicial officer played role in investigation and granted search warrant); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) ("the seizure and search ...[could not] constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in [the] case"). Judges are not permitted to personally gather evidence that they plan to consider in any matter, and in fact should seek to recuse themselves whenever there may be a doubt as to their bias in any case. *See, e.g. Mo. Code of Judicial Conduct, Rule 2-2.3 Bias, Prejudice, and Harassment* ("judge shall perform duties of office without bias"); *see also State v. Edman*, 915 A.2d 857 (Conn. 2007) ("even though a judge personally believes himself to be unprejudiced, unbiased and impartial, he should nevertheless certify his disqualification where there are circumstances of such a nature to cause doubt

as to his partiality, bias or prejudice") (citing *Merritt v. Hunter*, 575 P.2d 623 (Okla. 1978); *People v. Lowenstein*, 325 N.W.2d 462 (Mich. App.)).

Because of the nature of the juvenile code and Supreme Court rules in Missouri, this conflict of interest is exactly what occurs, day in and day out, in Missouri's juvenile courts. From the court's approval of delinquency petitions that result in the temporary detention of youth, to issuing determinations at detention hearings for continued pretrial restraint of such young people, to certifying children to stand trial as adults, and to render a final decision of guilt or innocence based on the evidence presented at adjudication, Missouri's juvenile judges are making determinations about facts that have been gathered and presented by their own staff.

Although judges may suggest that they are able to disregard the fact that those who prosecute cases before them, or who are the parties seeking particular outcomes for youth, are their very own employees, even a good faith presumption of impartiality must give way to the appearance of impropriety, the realities of juvenile court practices around the state, and common sense. *See State v. Whitfield*, 939 S.W.2d 361, 367 (Mo. banc 1997) ("presumption of honesty and integrity" is undermined by "appearance of impropriety and doubt the impartiality of the court").

Problems Regarding Juvenile Officer & Staff, Their Function & Role in Family Court

The Juvenile Officer and her Deputies and staff function as probation officers and investigative agents for the State of Missouri. They are also referred to as the client of the prosecutor, who are the Attorneys for the Juvenile Officer. Members of their staff assist in gathering information for use during the prosecution of delinquency proceedings,

they act as law enforcement agents who effectuate arrests and detention of youth and participate in interrogations of youth, and sometimes act as alleged advocates for the very same youth they prosecute.

For example, Juvenile Officers and staff serve as intake screeners at the beginning of a case to determine in the first instance if charges should be brought. Attorneys for the Juvenile Officer then oversee this assessment by filing the delinquency petitions that bring those charges. When a child is brought to court to answer for those charges, lines become blurred. Youth are informed both that the Juvenile Officer is the plaintiff bringing the suit against the child, and that the Juvenile Officer will be making recommendations to the court about pretrial detention and disposition at the end of the case. In this way the Juvenile Officer and staff serve as a double agent, both a represented opposing party in litigation, as well as the individual with whom the child and family is expected to share critical information in the hope that will be considered by the Juvenile Officer to suggest the child's release from detention. *See, e.g., In re M.M.*, 320 S.W. 3d 191 (Mo. App. E.D. 2010).

Juvenile Officers and staff frequently represent that they are "advocates" for youth, creating further confusion in the minds of the children and family members who encounter them. This is in no small part because Juvenile Officers often conduct extensive interviews with the children well before, during and after an attorney is provided. Many children and family members become upset when these same Juvenile Officers and staff, who were believed to be advocates of the youth, turn on them, use information shared against them, and recommend a child's detention, certification or

placement. This further interferes with the child's relationship with his attorney, who tells the child he is someone they can and should trust with information useful to their representation.

The Juvenile Officer's staff play conflicted roles too numerous to mention, including but not limited to investigator, friend, questioner, advocate, accuser and advisor. Juvenile Officers play the role of advocate in their interactions with youth by seeking to develop trust and talking with them about future goals and desires. At the same time they actively collect evidence against youth for use in prosecution through detention hearings, adjudication, disposition, and certification. This is unethical and unconstitutional. The Deputy Juvenile Officer is almost always called by the Attorney for the Juvenile Officer as a witness against the Juvenile at every stage. This is particularly problematic considering the fact that the Juvenile Officer and his or her staff are all technically employees of the Court who will ultimately hear and decide the case.

Problems Regarding Attorney for the Juvenile Officer Function & role in Family Court

The above dynamics also demonstrate the third problem created by the court's structure, that is, the ethical challenges facing Attorney's for the Juvenile Officer who must operate in such conflicted systems while trying to fulfill ordinary professional responsibilities as attorneys, as well as their special duties as prosecutors.

On one hand, attorneys generally must take care to represent their clients free of any conflicts that would impede their ability to achieve the client's objectives. Missouri Rules of Professional Conduct, Rule 4-1.7: Conflicts of Interest: Current clients, Comment 8 ("Even where there is no direct adverseness, a conflict of interest exists if

there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests"). This includes restrictions on accepting payment or a salary from one place for purposes of representing a third party, Missouri Rules of Professional Conduct, Rule 4-1.7: Conflicts of Interest: Current clients Comment 12 (describing limits on representation for individual when attorney's salary is paid by a third party), and disclosure of professional relationship that may impact the client. Missouri Rules of Professional Conduct, Rule 4-1.7: Conflicts of Interest: Current clients, Comment 10 (outlining conflicts that can arise out of employment relationships.)

In Missouri family courts, this duty to their client and/or their employer is conflicted. Is the duty owed to the Court who employs them, or to the Juvenile Officer whom they represent? Moreover, family court attorneys are arguably receiving compensation from the court system for their representation of third party clients, i.e. juvenile officers, in a manner that raises serious questions.

On the other hand, prosecutors have special duties beyond those of ordinary counsel. Regardless of what they are called, here, Attorneys for the Juvenile Officer are juvenile court prosecutors. Therefore, like other prosecutors their primary ethical obligation is to seek justice. Missouri Rules of Professional Conduct, Rule 4-1.7: Special Responsibilities of a Prosecutor, Comment 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). They may not simply pursue convictions or seek to achieve particular outcomes to satisfy individual persons. *Id.* Claiming, therefore, that they represent the interests or objectives of

juvenile officers above all else would appear to conflict with express ethical duties to the public.

This, too, happens on a regular basis in our state's juvenile courts. Attorneys for the Juvenile Officer take positions to advance the desires of their clients, Juvenile Officers, rather than single-mindedly advancing the interest of justice. This position is especially problematic when one considers that juvenile officers generally are not attorneys. § 211.361 RSMo. They do not know the elements of the crimes charged, nor are they experts in constitutional suppression principles or the rules of evidence. As our Supreme Court has recently reiterated, allowing them as non-attorneys to directly or indirectly make legal decisions in individual cases runs a great risk of inappropriate abdication of the prosecutorial role and misconduct. Missouri Supreme Court Rule 29; *see also, e.g.* Missouri Rules of Professional Conduct, Rule 4-1.7: Special Responsibilities of a Prosecutor, Comment (“Like other lawyers, prosecutors are subject to Rules 4-5.1, which relate to responsibilities regarding lawyers and non-lawyers who work for or are associated with the lawyer’s office”).

The purpose of the Juvenile court when it was first created was to achieve therapeutic aims, but this happened before the landmark decision of *In Re Gault*, which guaranteed a child due process rights in delinquency proceedings. The therapeutic purpose of juvenile court cannot do away with legal protection for individual rights. As stated by Gupta-Kagan,

juvenile courts are places where cozy in-groups of repeat players, the judges, lawyers and case workers who routinely practice in juvenile court-subtly and often unintentionally create an institutional culture. That culture

dissuades individuals from challenging decisions and further disempowers the disproportionately poor, minority, and female headed families.

Gupta-Kagan, 78 Mo. L. Rev. at 1275 (LF D71 p31). Permitting this unconstitutional practice rips due process guarantees away from children.

For these reasons D.E.G. requests the Court to reverse the trial court's judgement dismissing the juvenile petition against him because Missouri's certification process fails constitutional requirements by the courts and the Juvenile Officer operating in a persistent conflict of interest in all juvenile cases including certification hearings, in violation of D.E.G.'s right to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, and in violation of the principle of separation of powers under Article I, Article II, § 2, and Article III, § 2 of the Constitution and Article II, § 1 of the Missouri Constitution.

POINT IV: MISSOURI'S DISPROPORTIONATE APPLICATION OF CERTIFICATION TO AFRICAN-AMERICAN YOUTH VIOLATES THE CONSTITUTION

The trial court erred, in violation of D.E.G.'s rights to equal protection under the Fourteenth Amendment to the Constitution, and to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, when it entered its judgment of dismissal pursuant to § 211.071 RSMo after disproportionately applying certification proceedings to African-American juveniles, of which D.E.G. is one, which has resulted in African-American youth being disproportionately certified to stand trial as adults.

Preservation

“To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process,” “the trial court must have ruled thereon,” and “the point raised on appeal must be based upon the theory advanced at the trial court.” *Sharp v. Curators of Univ. of Missouri*, 138 S.W.3d 735, 738 (Mo. Ct. App. 2003) (internal citations omitted).

D.E.G. raised this challenge prior to the certification hearing pursuant to § 211.071 RSMo, as soon as possible after it became clear that the Juvenile Office intended to recommend certification. The Deputy Juvenile Officer filed her certification report on December 26, 2018 recommending that D.E.G. be certified to stand trial in the court of general jurisdiction (LF D67 p1-21). On January 2, 2019 D.E.G. filed his motion to deny certification of juvenile for unconstitutionality of Missouri's certification process

asserting these grounds (D68 p1-26) prior to the hearing to be held that day. Although this was filed on the same day as the certification hearing, both the trial judge and the attorney for the Juvenile Officer were familiar with the claims in D.E.G.'s motion because they had previously been litigated in another case through a nearly identical motion (Tr. 3-4). The trial court ruled on the constitutional issue by overruling it on the record and proceeding with the certification hearing (Tr. 4), which is memorialized in the court's judgement of dismissal pursuant to § 211.071, RSMo. (LF D76 p1).

Standard of Review

"The standard of review for constitutional challenges to a statute is de novo." *Phillips v. Edmundson*, 240 S.W.3d 691, 693 (Mo. 2007) (citing *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007)).

Discussion

Due process for juveniles

The United States Supreme Court has held that criminal due process safeguards provided to adult criminal defendants are equally paramount and required in juvenile adjudication proceedings, despite the fact that juvenile proceedings are civil proceedings rather than criminal. *In re Winship*, 397 U.S. 358, 365-66 (1970) ("civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '(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.'" (internal citations omitted)). The United States Supreme Court has further held that the certification process is "a 'critically important'

action determining vitally important statutory rights of the juvenile." *Kent v. U.S.*, 383 U.S. 541, 556 (1966).

The seminal case on Missouri's certification process is *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013), which says that

Certification proceedings do not have to "conform with all of the requirements of a criminal trial or even of the usual administrative hearing" as long as they "measure up to the essentials of due process and fair treatment." The process is constitutional if a hearing is provided, the juvenile is given the right to counsel and access to his or her records, and it results in a decision that sets forth the basis for the decision to relinquish jurisdiction in a way that is sufficient to permit meaningful appellate review.

Id. at 260 (internal citations omitted, citing and interpreting *Kent*). However, the same reasoning that requires criminal due process safeguards in adjudication, in that certification is a proceeding where the issue is whether the child will be subjected to loss of his liberty for years, should apply to certification as well, especially since it is a critically important stage, and in other ways according to the Supreme Court even more important than other stages, of juvenile proceedings.

Equal Protection

The equal protection clause of the Fourteenth Amendment prohibits a state from conduct that would "deny any person within its jurisdiction equal protection of the laws". The central purpose of the Equal Protection clause is the "prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). The Constitution's guarantee of equal protection prohibits a jurisdiction from treating similarly situated children within the juvenile justice system differently based upon a

child's race. *Cf. Bogren v. Minnesota*, 236 F.3d 399, 408 (8th Cir. 2000). A jurisdiction's actions will not violate the Constitution "solely because it results in a racially disproportionate impact." *See Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). To show a violation of the Equal Protection Clause, proof of racially discriminatory intent or purpose is required. *Id.* Discriminatory purpose can be determined by examining the "totality of relevant facts, including the fact [...] that the law bears more heavily on one race than another." *Washington*, 426 U.S. at 242. A jurisdiction's action need not be based solely, primarily, or even dominantly on a discriminatory intent or purpose, but instead, it is sufficient to demonstrate that a discriminatory intent was a "motivating factor" in the decision-making within the system. *Arlington Heights*, 429 U.S. at 266. Direct statements exhibiting racial bias are exceedingly rare and not necessary for establishing the existence of discriminatory purpose. *See, e.g., Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (noting that "discriminatory intent is rarely susceptible to direct proof").

Under § 211.071 RSMo, Missouri has determined that there are certain circumstances in which it is necessary (or permissive) for the court to consider whether a child should be certified to adult court on the petition that has been filed in juvenile court. The Judge then must consider ten factors in making his or her determination as to whether the child is a proper subject for the general laws of Missouri. The relevant factor to this argument is §211.071.6(10), racial disparity in certification.

After a thorough investigation of the St. Louis County Family Court the Civil Rights Division of the United States Department of Justice (DOJ) issued an extensive

report in 2015 outlining numerous Constitutional failings in the juvenile delinquency process practiced in that jurisdiction, including violations of due process and equal protection. Many of the failings they observed in St. Louis County are part and parcel of Missouri's delinquency proceedings across the entire State of Missouri, and are in fact built into the system by statute and by institution. The DOJ has concluded that this is a problem throughout the stages of juvenile court proceedings in St. Louis County, and these problems extend statewide, including the Sixteenth Circuit. United States Dept. of Justice, "Investigation of the St. Louis Family Court, St. Louis, MO," July 31, 2015, at 3-4 (LF D69 p4-5).

Looking at the most current Missouri Juvenile & Family Division Annual Report (Calendar 2017) (*hereinafter* Annual Report) which provides a "comprehensive account of both case activity and youth served for calendar year 2017", p. 7 (LF D72 p7), there are two sections that address certification, and Disproportionate Minority Contact. The report also looks at the Relative Rate Index (RRI) to determine if there is Disproportionate Minority Contact (DMC) with respect to African American youth.

With regard to Certification to Adult Court, § 9 (page 43) (LF D72 p43) provides demographic information of youth certified statewide by gender, race and age. Figure 9-2 shows that the percentage of offenders certified to adult courts was disproportionately greater for African American offenders (74%) than for white (26%). This disparity has consistently increased each year since at least 2009 when the percentage of certifications to adult courts of African Americans was 66%. *See* Missouri Juvenile & Family Division Annual Report (Calendar 2009) to (Calendar 2016). Figure 9-4 shows that the number of

offenders certified to adult courts declined between 2010 and 2012 for all races. In 2013 the number of certification increased dramatically for African American offenders, and remains high, while certification of white youth continues to remain low.

With regard to Disproportionate Minority Contact, it is one of the four core requirements of the Juvenile Justice and Delinquency Prevention Act of 1974 as amended in 2002 (*see* Annual Report p. 49) (LF D72 p49). All states are required by OJJDP to make efforts to document and reduce DMC. The Annual report looks at the Relative Rate Index, and indicates that "if the RRI is larger than 1.00, that means that the minority group experiences contact more often than white youth". With regard to Statewide Relative Rate Indices (RRI), African American youth experienced the largest disproportionality overall (p. 51) (LF D72 p51). African American youth experienced disproportionality at diversion, petition, supervision and certification. African American youth have an overall RRI of 5.7 at the certification point, meaning they are 5.7 times more likely than white youth to be certified as an adult. *See* explanation of RRI on p. 49 (LF D72 p49).

The tenth factor to be considered when determining if a child is appropriate for certification under §211.071, is race. Based upon the Missouri Juvenile & Family Division Annual Report, and based upon the disparate treatment that African American children receive as opposed to their white counterparts, race plays a role in many decisions, including the decision to certify a child. To argue that it does not play a factor is to ignore all of the recent findings that the DOJ made with regard to African American children in the St. Louis County juvenile justice system, as well as the statewide findings

made in the Annual Report. These realities are present in the Sixteenth Circuit and the conclusions apply here as well.

Here, D.E.G. is black, African-American, and his mere interaction with the system leads him to be disparately treated. Charging decisions, detention decisions, and certification decisions have all affected D.E.G., and affect him now.

For these reasons D.E.G. requests the Court to reverse the trial court's judgement dismissing the juvenile petition against him because Missouri's certification process fails constitutional requirements by disproportionately applying certification proceedings to African American juveniles in violation of D.E.G.'s rights to equal protection under the Fourteenth Amendment to the Constitution, and to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution.

POINT V: RULES OF EVIDENCE ARE ROUTINELY IGNORED IN VIOLATION OF THE CONSTITUTION

The trial court erred, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, to effective counsel under the Sixth Amendment to the Constitution and Article I, § 18(a), of the Missouri Constitution, and to confront the witnesses against him as protected by the confrontation clauses of the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo without providing any opportunity for adversarial testing, challenging, or confronting the evidence used in the trial court's decision to certify, which resulted in the court certifying D.E.G. to stand trial as an adult in a hearing comprised exclusively of improperly admitted and untested evidence.

Preservation

“To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process,” “the trial court must have ruled thereon,” and “the point raised on appeal must be based upon the theory advanced at the trial court.” *Sharp v. Curators of Univ. of Missouri*, 138 S.W.3d 735, 738 (Mo. Ct. App. 2003) (internal citations omitted).

D.E.G. raised this challenge prior to the certification hearing pursuant to § 211.071 RSMo, as soon as possible after it became clear that the Juvenile Office intended to recommend certification. The Deputy Juvenile Officer filed her certification report on

December 26, 2018 recommending that D.E.G. be certified to stand trial in the court of general jurisdiction (LF D67 p1-21). On January 2, 2019 D.E.G. filed his motion to deny certification of juvenile for unconstitutionality of Missouri's certification process asserting these grounds (D68 p1-26) prior to the hearing to be held that day. Although this was filed on the same day as the certification hearing, both the trial judge and the attorney for the Juvenile Officer were familiar with the claims in D.E.G.'s motion because they had previously been litigated in another case through a nearly identical motion (Tr. 3-4). The trial court ruled on the constitutional issue by overruling it on the record and proceeding with the certification hearing (Tr. 4), which is memorialized in the court's judgement of dismissal pursuant to § 211.071, RSMo. (LF D76 p1).

Standard of Review

“The standard of review for constitutional challenges to a statute is de novo.” *Phillips v. Edmundson*, 240 S.W.3d 691, 693 (Mo. 2007) (citing *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007)).

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The United States Supreme Court has held that criminal due process safeguards provided to adult criminal defendants are equally paramount and required in juvenile adjudication proceedings, despite the fact that juvenile proceedings are civil proceedings rather than criminal. *In re Winship*, 397 U.S. 358, 365-66 (1970) (“civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for ‘(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.” (internal citations omitted)). The United States Supreme Court has further held that the certification process is “a ‘critically important’ action determining vitally important statutory rights of the juvenile.” *Kent v. U.S.*, 383 U.S. 541, 556 (1966). Indeed, “The need [for effective assistance of counsel] is even greater in the adjudication of waiver [than other stages] [...] since it contemplates the imposition of criminal sanctions.” *Id.* at 558 (internal citations omitted).

The seminal case on Missouri's certification process is *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013), which says that

Certification proceedings do not have to “conform with all of the requirements of a criminal trial or even of the usual administrative hearing” as long as they “measure up to the essentials of due process and fair treatment.” The process is constitutional if a hearing is provided, the juvenile is given the right to counsel and access to his or her records, and it results in a decision that sets forth the basis for the decision to relinquish jurisdiction in a way that is sufficient to permit meaningful appellate review.

Id. at 260 (internal citations omitted, citing and interpreting *Kent*). However, the same reasoning that requires criminal due process safeguards in adjudication, in that certification is a proceeding where the issue is whether the child will be subjected to loss of his liberty for years, should apply to certification as well, especially since it is a critically important stage, and in other ways according to the Supreme Court even more important than other stages, of juvenile proceedings.

Confrontation

The United State Supreme Court has held that testimonial out-of-court statements by a witness is barred under the Confrontation Clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 54 (2004). This is true regardless of whether such statements are deemed reliable by court because where testimonial statements are concerned the only indicium of reliability sufficient to satisfy constitutional demands is actual confrontation. *Id.*

Importance of rules of evidence in this setting

Because the certification hearing is a critically important action determining vitally important statutory rights, at which the need for effective assistance of counsel is paramount, the rules of evidence designed to protect substantive constitutional rights must be followed. "If a decision on waiver is 'critically important' it is equally of 'critical importance' that the material submitted to the judge [...] be subjected, within reasonable limits [...] to examination, criticism and refutation." *Kent*, 383 U.S. at 563. Indeed, what is the point of requiring counsel's effective presence at such a hearing if that counsel is not expected to do the job of a trained and licensed attorney, specifically to ensure that complicated rules of evidence are followed? "These rights are meaningless—an illusion, a mockery—unless counsel is given an opportunity to function." *Id.* at 561. If the rules of evidence do not apply to certification hearing, then the right to counsel is meaningless. *Cf.* Missouri Supreme Court Rule 116.02, which provides that at all hearings involving adjudication of the allegations of the petition or motion to modify,

“the rules of evidence shall apply.” *In accord*, Missouri Supreme Court Rule 128.02(b) (At an adjudication hearing, “[t]he rules of evidence shall apply”).

After a thorough investigation of the St. Louis County Family Court the Civil Rights Division of the United States Department of Justice (DOJ) issued an extensive report in 2015 outlining numerous Constitutional failings in the juvenile delinquency process practiced in that jurisdiction. Many of the failings they observed in St. Louis County are part and parcel of Missouri's delinquency proceedings across the entire State of Missouri, and are in fact built into the system by statute and by institution. The DOJ concluded that

St. Louis County Family Court fails to provide children facing certification to be criminally tried in adult criminal court with adequate due process. In particular, the Family Court's failure to consider, and permit adversarial testing of, the prosecutive merit of the underlying allegations against the child at the certification hearing fails to “measure up to the essentials of due process and fair treatment,” in violation of the Fourteenth Amendment.

United States Dept. of Justice, "Investigation of the St. Louis Family Court, St. Louis, MO," July 31, 2015, at 3 (internal citations omitted) (LF D69 p4). These problems persist and extend statewide, including in the Sixteenth Circuit. These problems are made true in part by the fact that the rules of evidence are not applied at certification hearing.

Here, the Juvenile Officer, and ultimately the trial court in its decision, relied solely on testimony from the Deputy Juvenile Officer, who testified to her Certification Report that contained information that the Deputy Juvenile Officer compiled almost exclusively from a variety of other sources, sources from which Juvenile should be able

to inquire about their reliability, which is the reason for the rule against hearsay, as well as the right to confront witnesses against him as protected by the Confrontation clause. The Juvenile Officer proffered testimony from the Deputy Juvenile Officer regarding the nature of the present charges, accusations about which the Deputy Juvenile Officer has no personal knowledge, and through whom the Juvenile cannot inquire about reliability nor confront the actual witnesses against him. The Juvenile Officer proffered testimony from the Deputy Juvenile Officer regarding whether there is a repetitive pattern of offenses, any prior record of delinquency or accusations against the Juvenile, institutional placement, substance abuse, conduct in detention, sophistication and maturity, mental health, family life, education and school behavior, and other subjects, all of which the Deputy Juvenile Officer had no personal knowledge, and through whom D.E.G. could inquire about the reliability of that testimony nor confront the actual witnesses against him. Additionally, the trial court admitted into evidence the juvenile's social file with no foundation having been laid as to the authenticity and veracity of the documents to be used in the court's decision.

For these reasons D.E.G. requests the Court to reverse the trial court's judgement dismissing the juvenile petition against him because Missouri's certification process fails constitutional requirements by failing to provide him opportunity for adversarial testing, challenging, or confronting the evidence used in the trial court's decision to certify, in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, to effective counsel under the Sixth Amendment to the Constitution and Article I, § 18(a), of the Missouri

Constitution, and to confront the witnesses against him as protected by the confrontation clauses of the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution.

**POINT VI: UNADJUDICATED REFERRALS CONSIDERED BY THE COURT
VIOLATES THE CONSTITUTION**

The trial court erred, in violation of D.E.G.’s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, to effective counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, and to confront the witnesses against him as protected by the confrontation clauses of the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgement of dismissal pursuant to § 211.071 RSMo after considering unadjudicated prior referrals against him that had never been tested, challenged, or confronted, which resulted in the court certifying him to stand trial as an adult with unfair consideration of improperly admitted and untested evidence.

Preservation

“To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process,” “the trial court must have ruled thereon,” and “the point raised on appeal must be based upon the theory advanced at the trial court.” *Sharp v. Curators of Univ. of Missouri*, 138 S.W.3d 735, 738 (Mo. Ct. App. 2003) (internal citations omitted).

D.E.G. raised this challenge prior to the certification hearing pursuant to § 211.071 RSMo, as soon as possible after it became clear that the Juvenile Office intended to recommend certification. The Deputy Juvenile Officer filed her certification report on December 26, 2018 recommending that D.E.G. be certified to stand trial in the court of

general jurisdiction (LF D67 p1-21). On January 2, 2019 D.E.G. filed his motion to deny certification of juvenile for unconstitutionality of Missouri's certification process asserting these grounds (D68 p1-26) prior to the hearing to be held that day. Although this was filed on the same day as the certification hearing, both the trial judge and the attorney for the Juvenile Officer were familiar with the claims in D.E.G.'s motion because they had previously been litigated in another case through a nearly identical motion (Tr. 3-4). The trial court ruled on the constitutional issue by overruling it on the record and proceeding with the certification hearing (Tr. 4), which is memorialized in the court's judgement of dismissal pursuant to § 211.071, RSMo. (LF D76 p1).

Standard of Review

“The standard of review for constitutional challenges to a statute is de novo.” *Phillips v. Edmundson*, 240 S.W.3d 691, 693 (Mo. 2007) (citing *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007)).

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seriousness to a felony prosecution." (internal citations omitted)). The United States Supreme Court has further held that the certification process is "a 'critically important' action determining vitally important statutory rights of the juvenile." *Kent v. U.S.*, 383 U.S. 541, 556 (1966). Indeed, "The need [for effective assistance of counsel] is even greater in the adjudication of waiver [than other stages] [...] since it contemplates the imposition of criminal sanctions." *Id.* at 558 (internal citations omitted).

The seminal case on Missouri's certification process is *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013), which says that

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Id. at 260 (internal citations omitted, citing and interpreting *Kent*). However, the same reasoning that requires criminal due process safeguards in adjudication, in that certification is a proceeding where the issue is whether the child will be subjected to loss of his liberty for years, should apply to certification as well, especially since it is a critically important stage, and in other ways according to the Supreme Court even more important than other stages, of juvenile proceedings.

Confrontation

The United State Supreme Court has held that testimonial out-of-court statements by a witness is barred under the Confrontation Clause of the Sixth Amendment unless the

witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 54 (2004). This is true regardless of whether such statements are deemed reliable by court because where testimonial statements are concerned the only indicium of reliability sufficient to satisfy constitutional demands is actual confrontation. *Id.*

Prior bad acts

Although perhaps not quite as fundamental as presumption of innocence and burden of proof, exclusion of evidence of prior bad acts by a Defendant has become central to American jurisprudence with rare exception. In Missouri "The propriety of admitting [such] evidence depends on the purpose for which it was admitted. Evidence of prior bad acts is not admissible for the purpose of showing the propensity of the defendant to commit the charged crimes." *State v. Tolliver*, 101 S.W.3d 313, 315 (Mo. Ct. App. 2003) (citing *State v. Burns*, 978 SW3d 759 (Mo. banc 1998) (finding § 556.025 RSMo unconstitutional)). This protection is rooted in the Fifth, Sixth and Fourteenth Amendments of the Constitution and Article I, §§ 17 and 18(a) of the Missouri Constitution. Missouri's consideration of alleged prior bad acts at certification, codified in § 211.071.6(4), "Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code," is functionally equivalent to propensity evidence and is unconstitutional for the same reason §556.025 was found unconstitutional in *Burns*.

Because the certification hearing is a critically important action determining vitally important statutory rights, at which the need for effective assistance of counsel is

paramount, the rules of evidence designed to protect substantive constitutional rights must be followed. "If a decision on waiver is 'critically important' it is equally of 'critical importance' that the material submitted to the judge [...] be subjected, within reasonable limits [...] to examination, criticism and refutation." *Kent*, 383 U.S. at 563. Indeed, what is the point of requiring counsel's effective presence at such a hearing if that counsel is not expected to do the job of a trained and licensed attorney, specifically to ensure that complicated rules of evidence are followed? "These rights are meaningless—an illusion, a mockery—unless counsel is given an opportunity to function." *Id.* at 561. If the rules of evidence do not apply to certification hearing, of which the rules on prior bad acts is one, then the right to counsel is meaningless. *Cf.* Missouri Supreme Court Rule 116.02, which provides that at all hearings involving adjudication of the allegations of the petition or motion to modify, "the rules of evidence shall apply." *In accord*, Missouri Supreme Court Rule 128.02(b) (At an adjudication hearing, "[t]he rules of evidence shall apply").

This is particularly problematic and offensive when the alleged prior bad acts are unadjudicated, as they are in this case. Such unadjudicated allegations have never been tested in any way, nor has the juvenile ever had any opportunity to challenge the reliability of the allegations or confront his accusers.

After a thorough investigation of the St. Louis County Family Court the Civil Rights Division of the United States Department of Justice (DOJ) issued an extensive report in 2015 outlining numerous Constitutional failings in the juvenile delinquency process practiced in that jurisdiction. Many of the failings they observed in St. Louis

County are part and parcel of Missouri's delinquency proceedings across the entire State of Missouri, and are in fact built into the system by statute and by institution. The DOJ that

St. Louis County Family Court fails to provide children facing certification to be criminally tried in adult criminal court with adequate due process. In particular, the Family Court's failure to consider, and permit adversarial testing of, the prosecutive merit of the underlying allegations against the child at the certification hearing fails to "measure up to the essentials of due process and fair treatment," in violation of the Fourteenth Amendment.

United States Dept. of Justice, "Investigation of the St. Louis Family Court, St. Louis, MO," July 31, 2015, at 3 (internal citations omitted) (LF D69 p4). These problems persist and extend statewide, including in the Sixteenth Circuit. These problems are made true in part by the fact that unadjudicated referrals are considered by the trial court at certification hearing.

Here, the court considered numerous prior allegations against D.E.G. in the form of referrals to the Juvenile Officer that were never filed, adjudicated, or adversarially tested in any way.

For these reasons D.E.G. requests the Court to reverse the trial court's judgement dismissing the juvenile petition against him because Missouri's certification process fails constitutional requirements by the trial court's consideration of unadjudicated referrals in violation of D.E.G.'s rights to due process under the Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, to effective counsel under the Sixth Amendment to the Constitution and Article I, § 18(a), of the Missouri Constitution, and to confront the witnesses against him as protected by the confrontation

clauses of the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution.

CONCLUSION

Based on the argument presented, D.E.G. respectfully requests this Court reverse trial court's decision which dismissed the juvenile petition against him, to vacate and set aside the judgment, and remand the case to the trial court, returning D.E.G. to the jurisdiction of family court.

Respectfully submitted,

/s/ Tim Honse

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Tim Honse, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **15,318** words, which does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.04.

A true and correct copy of the attached *Appellant's Brief* was sent through the e-filing system on August 12, 2019, to: Daniel Barry, Attorney for Respondent at Daniel.Barry@courts.mo.gov.

/s/ Tim Honse
Tim Honse