

IN THE  
MISSOURI SUPREME COURT  
No. SC97869

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IN THE INTEREST OF D.E.G  
Appellant  
vs.

JUVENILE OFFICER,

Respondent.

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APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY,  
MISSOURI, FAMILY COURT DIVISION, DIV. 6  
16th JUDICIAL CIRCUIT, JACKSON COUNTY  
THE HONORABLE DALE YOUNGS, JUDGE

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RESPONDENT'S BRIEF

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## STATEMENT OF FACTS

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).<sup>1</sup>

The Honorable J. Dale Youngs, Judge, overruled and denied D.E.G.'s motion and proceeded to hold the hearing (Tr. 4). Following a certification hearing in the Juvenile Circuit Court of Jackson County D.E.G. was determined not to be a proper subject to be dealt with under the juvenile code and jurisdiction over him was transferred to the court of general jurisdiction (LF D74 p8-9). D.E.G. was indicted in the court of general jurisdiction with the conduct alleged in the earlier petition, and that indictment remains

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<sup>1</sup> The Appellant did not file a Writ of Habeas Corpus prior to the certification hearing.

pending in the Circuit Court of Jackson County and the Jackson County Prosecutor's Office is responsible for the prosecution of the case. A motion to dismiss has not been filed in the pending case in Jackson County Circuit Court.

### **I. ARGUMENT**

**The Juvenile Officer of the Juvenile Court is not the proper party to this appeal as the Juvenile Court no longer has jurisdiction over the juvenile proceeding as the case is currently charged in the Circuit Court of Jackson County.**

A dismissal of a juvenile case pursuant to RSMO 211.071(9) divests the juvenile court of jurisdiction and subjects the juvenile to prosecution under the general laws of the state. Section 211.071(9) states, "When a petition has been dismissed thereby permitting a child to be prosecuted under the general law, the jurisdiction of the juvenile court over that child is forever terminated, except as provided in subsection (10) of this section, for an act that would be a violation of a state law or municipal ordinance." RSMo. 211.071(9) (2007). The exemption in subsection (10) of the statute describes a situation in which a defendant, found not guilty under the general laws, commits a subsequent offense while still under the age of 17. In that case, the juvenile could still be within the jurisdiction of the juvenile court. The statute makes clear that such a situation would be unique because once a juvenile case is dismissed, the juvenile court no longer has jurisdiction over the case, and the juvenile is subject to the general laws of the state. *Id.* The Western District interpreted this statute, stating, "The statute lists no conditions under which the juvenile court regains jurisdiction other than a finding of 'not guilty' by the court of general jurisdiction." *State v. Davis*, 988 S.W.2d 68, 71 (Mo.App.



W.D. 1999).

The remedy for the juvenile while the case is pending in Juvenile Circuit Court is to file a Writ of Prohibition. Here, D.E.G. failed to file such a writ but rather filed a motion to dismiss the certification which was denied by the Judge of the Juvenile Circuit Court.

Since the Juvenile Circuit Court no longer has jurisdiction, the Attorney for the Juvenile Office is no longer a party to the proceeding and no longer has jurisdiction over the juvenile unless the juvenile was found not guilty in the Circuit Court matter. Since the case was indicted in the Circuit Court of Jackson County the Jackson County Prosecuting Attorney's Office is now the party prosecuting the case, the Prosecuting Attorney's Office of Jackson County is the proper party to serve with the notice of Appeal.

The juvenile failed to invoke the proper remedy while the case was before the Juvenile Circuit Court, as he could have filed a Writ of Prohibition in which the Juvenile Officer would have remained a party and thus would be the appropriate party to respond to the Writ. However the juvenile did not elect to file a Writ of Prohibition and thus when the case was released from the Juvenile Court Jurisdiction, the Juvenile Office is no longer a party to the matter. Where juvenile's petition and presumptive proofs showed that the order of the juvenile court, relinquishing jurisdiction to the general law, was void on its face as a matter of law because it gave no statement of reasons for the determination, prohibition was an appropriate remedy to preclude the magistrate *from proceeding in criminal prosecution. State ex rel. T. J. H. v. Bills, 504 S.W.2d 76* (Mo. 1974).

Wherefore Respondent request the Motion to Dismiss be granted, as the Juvenile Officer

is not the proper party to the proceeding since the case is currently pending in the Circuit Court of Jackson County after the Juvenile Circuit Court released jurisdiction of the Juvenile, and the Juvenile did not request a Writ of Prohibition prior to the certification hearing. Notwithstanding the Respondent will address the Appellant's additional arguments.

## **II. ARGUMENT**

**The trial court did not error or violate 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 nor effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when it entered its judgment of dismissal pursuant to § 211.071 RSMo as the trial court properly followed the procedures provided in § 211.071 and did not violate the burden of proof.**

## **STANDARD OF REVIEW**

The constitutionality of a statute is a question of law, the review of which is de novo. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo.banc 2007). A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly' violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *State v. Richard*, 298 S.W.3d 529, 531 (Mo.banc 2009). The Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Murrell v. State*, 215

S.W.3d 96, 102 (Mo.banc 2007). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. *Id.* The party challenging the validity of the statute has the burden of proving the statute unconstitutional. *Id.*

### ARGUMENT

Appellant relies on the case of *State v. Nathan*, 404 S.W. 3d 253 (Mo. banc 2013) that states, 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. Respondent agrees with Appellant that *State v. Nathan* is the seminal case however Appellant then leaps to a conclusion, without citing any precedents that a juvenile should be afforded the same due process as a juvenile is afforded in an adjudication proceeding. Appellant argues this due process should be proof beyond a reasonable doubt and the burden should be on the Juvenile Officer. Appellant relies on *Kent v. U.S.*, 383 U.S. 541 556(1966) to support this argument however in *Kent v. United States*, the Supreme Court established that a juvenile possesses no fundamental right to be adjudicated in the juvenile justice system, nor does she have a fundamental right to a transfer hearing prior to be tried in a criminal court. *Kent v. United States*, 383 U.S. 541, 553 (1966). In *Kent v. United States*, the Court held

that juvenile-certification proceedings are constitutional as long as they provide for a hearing, the right to counsel, the right to access the juvenile's records, and a decision stating why jurisdiction is being relinquished. *Id.* at 557-62. But the Court cautioned that it did "not mean by [its holding] to indicate that the hearing... must conform with all of the requirements of a criminal trial or even of the usual administrative hearing," only that it "measure up to the essentials of due process and fair treatment." *Id.* Appellant argues that he is not requesting a "mini trial", footnote 3, page 21, however that is exactly what he is proposing in placing the burden on the Juvenile officer to prove beyond a reasonable doubt the certification of the juvenile which is the same standard required for adjudication of the juvenile.

In *Breed v. Jones*, 421 U.S. 519 (1975), the Court clarified the limited holding in *Kent* and noted that it had set no constitutional rules outlining the type and quantum of evidence required to relinquish juvenile-court jurisdiction:

[T]he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court. We require only that, whatever the relevant criteria, and whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile-court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such

proceedings. *Id.* at 537-38.

The Court also noted the need to maintain flexibility within the juvenile-justice system and that States should be free to choose whatever standards they deem fit in determining whether a juvenile court should relinquish jurisdiction. *Id.* at 535 (“[T]ransfer provisions represent an attempt to impart to the juvenile-court system the flexibility needed to deal with youthful offenders who cannot benefit from the specialized guidance and treatment contemplated by the system.”). Because a juvenile has double-jeopardy protection from being prosecuted in adult court following an adjudication in juvenile court over the same offense, the Court stressed that a juvenile transfer or certification proceeding, whatever its form, not occur as part of an adjudicatory proceeding. *Id.* at 538 n.18.

Defendant’s argument that due process requires full fact finding at the certification hearing - essentially an adjudication - would be directly contrary to *Breed*. The court in *Breed* found that the juvenile’s right to be free from double jeopardy was violated by a juvenile court’s adjudication that the juvenile committed the alleged offenses followed by its transfer of the juvenile to adult court for criminal prosecution of those offenses. *See Breed*, 421 U.S. at 531. *See also Kinder v. State*, 515 So.2d 55, 70-71 (Ala.Cr.App. 1986).

Due process requires only that the court follow the statute in making the certification decision; it does not require the statute to contain any specific factors to consider or findings that must be made. *See Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978) (“This means that the procedural protections which must be afforded a juvenile before he may

be transferred to adult offender status vary in terms of the particular statutory scheme which entitles him to juvenile status in the first place.”). “[T]here are no substantive constitutional requirements as to the content of the statutory scheme a state may select.” *Id.* at 289. Under *Kent* and *Breed*, it is the terms of the certification statute that determine the amount of process the juvenile is due; due process does not control the content of these statutes. *Id.* at 289-90.

The Missouri Supreme Court, in construing a previous version of § 211.071, held that the juvenile-certification statute “vests in the juvenile judge a discretion, after receiving the investigation report and hearing evidence, to determine whether the juvenile... is a proper subject to be dealt with under the juvenile code. *Coney v. State*, 491 S.W.2d 501, 511 (Mo. 1973). The court further held that this version of the statute, which was much less comprehensive than the current version, did not violate the holding in *Kent*. *Id.* at 512. The court noted that while *Kent* “requires a statement of reasons for the juvenile court’s decision” to relinquish jurisdiction, it “does not specify any particular form or require detailed findings of fact.” *Id.* (emphasis added) (internal quotation marks omitted). *See also In Interest of A. D. R.*, 603 S.W.2d 575, 580 (Mo. banc. 1980).

The court in *A.D.R.* acknowledged *Breed* and stated that the Court “has never attempted to prescribe criteria for, or the nature or quantum of evidence that must support, a decision to transfer a juvenile for trial in an adult court”. *Id.* at 580. Finally, the court noted that to the extent Missouri’s juvenile code creates a “right” for treatment in juvenile court, any such right is expressly limited by § 211.071. *Id.* at 579-80.

The purpose of Defendant's certification hearing was not to determine his guilt or innocence. Rather, its purpose was to determine whether Defendant would be tried in the juvenile court system or under the general law as an adult.

*State v. Perry*, 954 S.W.2d 554,569 (Mo.App.S.D. 1997). See also *Stout v. Commonwealth*, 44 S.W.3d 781 (Ky.App. 2000) (holding that juvenile-transfer statute's failure to include a standard of proof governing the district court's transfer determination did not violate due process).

"It is axiomatic that a juvenile offender has no constitutional right to be tried in juvenile court." *Stout*, 44 S.W.3d at 785. "[T]reatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved." *Woodard v. Wainwright*, 556 F.2d 781, 785 (5thCir.1977).

Missouri's certification statute itself does not require specific fact finding into the offense allegedly committed. It speaks to the "alleged" offense; none of the 10 factors the juvenile court considers requires it to find detailed facts establishing the juvenile's level of culpability in the offense alleged § 211.071.6.

In *In re W.T.L.*, 656 A.2d 1123 (D.C. 1995), the court rejected an argument nearly identical to the one Defendant advances here. In that case, which involved a juvenile-certification statute similar to Missouri's, the juvenile argued that the statute was unconstitutional because it did not provide him with the right to "fact-finding" at the

transfer hearing and created a presumption of guilt. *Id.* at 1131. The court first noted that “a federal statutory presumption similar to that attacked by [the juvenile] ‘is not inconsistent with a juvenile’s due process rights because the trial itself functions as a corrective for any reliance on inaccurate allegations made at the transfer stage.’” *Id.* at 1132 (quoting *In re Sealed*, 893 F.2d 363, 369 (1990) (holding that due process is not violated by a presumption in the federal juvenile-transfer statute that the juvenile committed the alleged offense)). The court also rejected the argument that Kent constitutionally required that juvenile-transfer statutes provide these protections by relying on the Court’s later decision in *Breed*. *Id.*

In *People of Territory of Guam v. Kingsbury*, 649 F.2d 740 (9th Cir. 1981), the juvenile defendant argued that his due process rights were violated by the juvenile court’s failure to inquire into his motive to commit the charged offense before certifying him to stand trial as an adult. In rejecting this claim, the court held that “[i]n the context of juvenile certification procedures, due process requires the rights to counsel, to adequate notice and to a statement of reasons at a hearing to determine whether a juvenile is to be tried as an adult.” *Id.* at 743. Moreover, it held that under Kent the “specific factors to be considered and the weight to be given to each, however, are discretionary.” *Id.* at 743-44.

The plain language of section 211.071 RSMo. demonstrates that the focus in a certification hearing is on the juvenile and not the conduct alleged in the Petition. *State v. Nathan*, 404 at 259. The basic purpose of the hearing is to balance the appropriateness of treatment in the juvenile system, the juvenile’s amenability to treatment and the community’s need for protection from the juvenile. The ultimate purpose...is to protect



the public in those cases where rehabilitation within the juvenile court framework appears impossible.” *State v. Tate*, 637 S.W.2d 67, 71 (Mo. App. E.D. 1982). “Rule 129.04c does not require or permit a full hearing into the facts of the alleged offense.” Comment 1, Missouri Supreme Court Rule 129.04. A trial on the merits of the case occurs after the Court rules on the certification issue either in the juvenile court or the adult court. In that trial, the juvenile is afforded all constitutional protections including a presumption of innocence.

Missouri law provides that the Court must assume the allegations in the Juvenile Officer’s petition are true. *State v. Simpson*, 836 S.W.2d 75 (Mo. App. S.S. 1992); *State v. Tate*, 637 S.W.2d 67, 71 (Mo. App. E.D. 1982); *Hooker v. State*, 569 S.W.2d 403 (Mo. App. W.D. 1978). As succinctly stated in *Hooker*, “Movant is correct in asserting that the Juvenile Court did not hear evidence concerning his guilt of the underlying offense, but proof of guilt of the underlying offense is not a prerequisite to juvenile court action under Section 211.071 RSMo 1969”. *Hooker* at 405. *Nathan* at 253. The quantum of the evidence pointing to the juvenile’s guilt is of no concern to the determination to waive jurisdiction. *Breed v. Jones*, at 537-38, *State v. Nathan*, at 253, *State v. Tate*, 637 S.W.2d 67 (Mo. App. E.D. 1982).

In further support of this lesser standard applicable to certification hearings, Supreme Court Rule 116.02 provides “at all hearings involving *adjudication of the allegations* of the petition or motion to modify, the rules of evidence shall apply” (emphasis added). Thus, the technical rules of evidence do not apply to certification proceedings because

there is no adjudication of the allegations.

Missouri has adopted the federal courts' position that the court may assume the allegations are true in a certification proceeding. A court is not required to examine the veracity of the allegations lodged against the juvenile; it is entitled to accept the prosecution's allegations as true. *United States v. Juvenile*, 451 F.3d 571 (9<sup>th</sup> Cir. 2006). All seven United States Courts of Appeal upon considering this issue has found no constitutional defect in the court's assumption. In *United States v. Juvenile*, the court stated:

Every circuit that has considered the issue has held that a district court may assume that the juvenile committed the alleged offense for the purposes of transfer proceedings.

*United States v. Welch*, 15 F.3d 1202, 1208 (1<sup>st</sup> Cir. 1993) (“[T]he district court. . .may assume, without receiving evidence, that the government’s factual allegations relating to the character of the offenses are true.”); *United States v. Doe*, 871 F.2d 1248, 1250 n. 1 (5<sup>th</sup> Cir. 1989) (“For purposes of a transfer hearing, the district court may assume the truth of the offense as alleged.”); *In re Sealed Case*, 282 U.S. App. D.C. 1566, 893 F.2d 363, 369 (D.C. Cir. 1990) (“While a juvenile can contest the offered by the government for five of Section 5032’s six ‘interest of justice’ categories, a judge is entitled to assume that the juvenile committed the offense charged for the purpose of the transfer hearing.”); *United States v. Juvenile LWO*, 160 F.3d 1179, 1181 n.1 (8<sup>th</sup> Cir. 1998) (“A district court may assume the truth of the alleged offense at a transfer hearing . . .and we has so stated

the facts as alleged.”); *United States v. Leon, D.M.*, 132 F.3d 583, 589-90 (10<sup>th</sup> Cir. 1997) (“[I]n making the transfer decision, the court may assume the truth of the government’s allegations regarding the defendant’s commission of the charged crime.”); *United States v. A.R.*, 38 F.3d 699, 703 (3d Cir. 1994) ([T]he district court ‘is entitled to assume that the juvenile committed the offense charged for the purpose of the transfer hearing.’”). While this court has, in dicta, spoken approvingly of this practice, we have not had occasion to rule on whether the district court may assume that the accused juvenile is guilty of the offense or offenses set forth in the charging instrument. See *United States v. Miguel*, 338 F.3d 995, 1003 n. 23 (9<sup>th</sup> Cir. 2003) (The transfer statute suggests that assuming the truth of the allegations is entirely appropriate.”). *United States v. Juvenile* at 576.

In *United States v. Welch*, 15 F.3d 1202 (1<sup>st</sup> Cir. 1993) the First Circuit noted the Juvenile’s lack of law supporting his contention: “Given the breadth of Congress’s consignment of “jurisdictional” determinations to the prosecutor’s discretion under the FJDA, it is not surprising that appellants cite no case law directly supporting their asserted right to pretrial evidentiary hearing on the district court’s jurisdiction to try them as adults.” *United States v. Welch*, at 1208.

In *In re Sealed*, 893 F.2d 363 (D.C. Cir. 1990) the District Court, after ruling that “a judge is entitled to assume that the juvenile committed the offense charged,” observed that “[s]uch a presumption is not inconsistent with a juvenile’s due process rights because

the trial itself functions as a corrective for any reliance on inaccurate allegations made at the transfer stage.” *In re Sealed*, at 369. The court noted that if a juvenile defendant is tried as an adult and found not guilty, the defendant is returned to juvenile status and thus suffers no harm from any erroneous attribution of guilt in the transfer proceedings.

The federal system mirrors the Missouri statute in this regard, i.e., if certified and subsequently acquitted at the criminal trial, the juvenile will be returned to the juvenile system for any subsequent offense alleged to have been committed prior to the juvenile’s seventeenth birthday. Section 211.071.10 RSMo.

The Juvenile cites no actual support that 211.071 RSMo or Rule 129.04 violates the juvenile’s presumption of innocence. Both cases cited by the Juvenile, *Kent v. United States*, 383 U.S. 541 (1966) and *State v. Nathan*, 404 S.W.3d 253, (Mo. banc 2013) establish that 211.07 RSMo does not violate constitutional rights. Mere “conclusions that the legislation violated prohibitions expressed in certain sections of the constitution” are insufficient to support a claim that a statute is unconstitutional. *Leiser v. City of Wildwood*, 59 S.W.3d 597, 605 (Mo. App. E.D. 2001).

The trial court did not error or violate 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 nor effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when the court entered it’s judgment of dismissal pursuant to § 211.071 RSMo as the trial court properly

followed the procedures provided in 211.071. The trial court's judgment should be affirmed.

### **III. ARGUMENT**

**The trial court did not violate 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, or to effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution, when the court entered its judgment of dismissal pursuant to § 211.071 RSMo as probable cause was not required.**

### **STANDARD OF REVIEW**

The constitutionality of a statute is a question of law, the review of which is de novo. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo.banc 2007). A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly' violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *State v. Richard*, 298 S.W.3d 529, 531 (Mo.banc 2009). The Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo.banc 2007). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. *Id.* The party challenging the validity of the statute has the burden of proving the statute unconstitutional. *Id.*

## ARGUMENT

Appellant relies on the same cases cited in Appellant's Argument I. which, Respondent addressed in Respondent's Argument II. The only additional precedent relied upon by Appellant to support Appellant's position that there must be probable cause for a certification is a United States Department of Justice Investigation of the St. Louis County Family Court regarding the practices at the St. Louis Family Court. The Investigation of the St. Louis County Family Court was not an evaluation of the practices in Jackson County, Missouri. There was no support to the Juvenile's claim that it highlight's practices statewide. The Report fails to cite any specific case with a specific violation of the constitution.

Most importantly the report ignores Missouri Supreme Court rulings on the issue as discussed in Respondent' Argument II. As articulated by the Appellant the Report is at best mere conclusions without any factual basis as applied to the Sixteenth Judicial Circuit. Further, it is contrary the holdings of all seven United States Court of Appeals cases that have considered the issue. *United States v. Juvenile*, 451 F.3d 571 (9<sup>th</sup> Cir. 2006). Appellant makes blanket statements including "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.” And “this reality plagues more than just St. Louis, extending statewide, including the Sixteenth Circuit.”<sup>2</sup>

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).

Appellant argues that the adult “probable cause” standard pursuant to § 544.380 RSMo is different for adults than juveniles and compares the juvenile “probable cause” to Rule 21.04.

Appellant claims that there was an inadequate probable cause determination and therefore violated the Constitution is without merit. Juvenile courts are courts of limited jurisdiction, limited to the powers authorized by Chapter 211 RSMo and the Missouri Supreme Court Rules. *In the Interest of A.H.*, 689 S.W.2d 771, 773 (Mo.App. 1985).

Charges filed by the Juvenile Officer pursuant to subdivision (3) of 211.031.1 RSMo are “delinquency charges” not “criminal charges” and subject to the procedures in Chapter 211 RSMo and Missouri Supreme Court Rules 25 and 110.01 through 130. Chapter 544 and Missouri Supreme Court Rules 21 and 22 do not apply to actions filed pursuant to 211.031 RSMo. “From the inception of the juvenile court system, wide differences have been tolerated -- indeed insisted upon – between the procedural rights accorded to adults

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<sup>2</sup> Appellant’s brief page 30

and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles...the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury.” *In re Gault*, 387 U.S. 1, 14 (1967).

The type of preliminary hearings described by the Appellant is not required in juvenile proceedings but will be available to the Juvenile if he is transferred to a Court of General Jurisdiction. The Appellant sights no authority that he has a right to a preliminary hearing. Given the nature of juvenile delinquencies, the Supreme Court has included Rule 25 into the rules governing delinquency matters. Pursuant to the maxim *expresio imius est exclusion alteris*, inclusion of one thing implies the exclusion of others, (See *State v. Bouser*, 17 S.W.3d 130 (Mo. App. W.D. 1999), Rule 22 was specially excluded from juvenile delinquency matters. Further, Chapter 544 RSMo does not apply to juvenile cases. Further, there is no requirement that it should. *State v. Nathan* at 260.

In *United States v. Welch*, 15 F.3d 1202 (1<sup>st</sup> Cir. 1993) the First Circuit noted the Juvenile’s lack of law supporting his contention: “Given the breadth of Congress’s consignment of other “jurisdictional” determinations to the prosecutor’s discretion under the FJDA, it is not surprising that appellants cite no case law directly supporting their asserted right to pretrial evidentiary hearing on the district court’s jurisdiction to try them as adults.” *United States v. Welch*, at 1208.

In *In re Sealed Case*, 893 F.2d 363 (D.C. Cir. 1990) the District Court, after ruling that “a judge is entitled to assume that the juvenile committed the offense charged,” observed



that “[s]uch a presumption is not inconsistent with a juvenile’s due process rights because the trial itself functions as a corrective for any reliance on inaccurate allegations made at the transfer stage.” *In re Sealed Case*, at 369. The court noted that if a juvenile defendant is tried as an adult and found not guilty, the defendant is returned to juvenile status and thus suffers no harm from any erroneous attribution of guilt in the transfer proceedings.

The federal system mirrors the Missouri statute in this regard, i.e., if certified and subsequently acquitted at the criminal trial, the juvenile will be returned to the juvenile system for any subsequent offense alleged to have been committed prior to the juvenile’s seventeenth birthday. Section 211.071. 10 RSMo.

The trial court did not deny the Appellant due process by entering the court’s judgment dismissing the juvenile petition against Appellant because Missouri’s certification process does not fail constitutional requirements as there were probable cause determinations as required by RSMo 211.061.3(2) at the initiation of delinquency proceedings and such did not violate Fifth and Fourteenth Amendments to the Constitution and Article I, § 10 of the Missouri Constitution, nor to effective assistance of counsel under the Sixth Amendment to the Constitution and Article I, § 18(a) of the Missouri Constitution. The trial court’s judgment should be affirmed.

#### **IV ARGUMENT**

**The trial did not error, 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, or violate 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 the trial court entered the judgment of dismissal pursuant to § 211.071 RSMo as there is no persistent conflict of interest or impropriety in juvenile cases including certification hearings.**

### **STANDARD OF REVIEW**

The constitutionality of a statute is a question of law, the review of which is de novo. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo.banc 2007). A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly' violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *State v. Richard*, 298 S.W.3d 529, 531 (Mo.banc 2009). The Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo.banc 2007). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. *Id.* The party challenging the validity of the statute has the burden of proving the statute unconstitutional. *Id.*

### **ARGUMENT**

Local Rule 100 provides the organizational chart for the Sixteenth Judicial Circuit, Family Court Division. There is no basis in fact or practice that Juvenile Officer staff are institutionally part of the Judge's own staff. The Administrative Judge of the Family Court is not the Appointing Authority of the Juvenile Officer. *See* 211.351.1. RSMo. The

Juvenile Officer does not appear before the Presiding Judge. *See* 211.351.2 RSMo. The Administrative Judge of the Family Court does not hire or supervise the Juvenile Officer or her staff. Administrative Judge of the Family Court does not make the decision to terminate the employment of a Juvenile Office employee. *See* 211.351.1 RSMo. The Juvenile Officer operates under the supervision of the Court Administrator. While the law grants public employees some due process and administrative appeal rights in the termination process, it is the Court Administrator who makes the termination of employment decision. *Cleveland Board of Education v. Loudemill*, 470 U.S. 532 (1985).

In practice, Administrative Judge of the Family Court has more authority to dictate the appointment of specific defense attorney for a juvenile alleged to have committed a delinquency offense and specific counsel to represent parents and a Guardian ad Litem in a child protection case, than counsel for the Juvenile Officer. In the present case, the Administrative Judge appointed the Public Defender's Office to represent the Appellant. The Appellant does not argue that these appointments infringe upon an independent judiciary. Nor does the Appellant argue that the Office of State Public Defender, which was created by Section 600.019.1 RSMo, be removed as an independent department within the *judicial branch* of state government.

There is no support for the Appellant's claim that Missouri juvenile court judges are directly and indirectly involved in the charging, processing, prosecuting, adjudicating, and sentencing (juveniles are not sentenced under 211.181 RSMo as the purpose of the system is treatment and rehabilitation and not punishment) in violation of law by way of

conflict of interest and violation of Separation of Powers and the right to Due Process. Further, there is no merit to the Juvenile's claim that the structure of the Juvenile Court violates due process norms and ethical mandates under the United States and Missouri Constitutions, Missouri Rules of Professional Conduct, and Missouri Rules of Judicial Conduct.

The Appellant alleges there is an unlawful separation of powers between the Juvenile Court Judge and Juvenile Officer and abrogates a judiciary that is independent. Such a conclusion flies in the face of the many times a judicial officer has dismissed a case due to the Juvenile Officer's failure to establish probable cause within twenty-four hours of a juvenile's detention or acquitted a juvenile due to the Juvenile Officer's failure to prove the allegations beyond a reasonable doubt. It is not uncommon for the juvenile court judge to reject the dispositional or certification recommendation of the Juvenile Officer.

Juvenile courts are a court of limited jurisdiction created by legislative act. Its functions were not usurped by the court but were delegated to it by the executive branch and the legislature. If the Appellant's position was correct all administrative judges and hearing officers in the executive branch would suffer the same conflict of interest and there is no legal support for this proposition.

Missouri Courts have noted that "The delegation of functions normally associated with the judiciary, such as determining facts, applying the law, and entering judgments does not violate the separation of powers clause because the provision primarily separates

powers, not functions.” *Mitchell v. Nixon*, 351 S.W.3d 676, 680 (Mo. App. W.D. 2011).

In another case, the court stated that “The separation of powers clause prevents the unchecked power in the hands of one branch of government, but it does not erect a complete barrier between the governmental departments.” *Lewis v. City of University City*, 145 S.W.3d 25 (Mo. App. E.D. 2004).

The Family Court’s administrative functions are a necessary consequence of the discretion given to it by the executive and legislative branches. The juvenile court judge does not charge, investigate or prosecute a juvenile.

The Respondent fully supports and concurs in the holdings of numerous cases holding a judge must be impartial and act in accordance with the separation of powers doctrine. However, the Appellant has failed to present any facts to suggest that the judge in this or any other juvenile cases has violated these standards.

The Appellant offers no evidence to support the argument that the Juvenile Court judge is involved, directly or indirectly, with the charging, processing, investigating or prosecuting of the Appellant. There is no evidence the juvenile court judge has ordered or suggested, either directly or by ex parte communication, any prosecutorial investigation or that this or any Juvenile be charged with a specific offense or no offense at all.

Contrary to the Appellant’s assertion, a judge does not violate ethical standards by approving a prosecutor's request for a search warrant based upon probable cause in accordance with the law. Section 542.276 RSMo. Nor does a juvenile court judge exceed

his judicial authority when he orders a juvenile detained based upon a petition filed by the Juvenile Officer and supported by an affidavit alleging probable cause in accordance with Rule 127.07.

Further, the Appellant has not provided one piece of evidence the juvenile court judge has a personal bias against the Appellant or counsel for the Appellant. There has been no evidence presented that the judge has any direct, personal or pecuniary interest in the Appellant's case.

The role of the Juvenile Officer, as provided by Missouri Law, does not violate the Constitution, Separation of Powers or Ethical Standards.

Despite the Appellant's contention, there is no role confusion for the Juvenile Officer. Missouri law is quite clear. The purposes clause of the Juvenile Code provides that;

The purpose of this chapter is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them. The child welfare policy of this state is what is in the best interests of the child. Section 211.011 RSMo.

The Juvenile Officer is the "primal instrument" for implementing the objectives of the

Juvenile Code. *In re F.C.*, 484 S.W.2d 21 (Mo. App. 1972). The Juvenile Officer's primary duty in implementing the objectives of the Juvenile Code is to screen cases referred by law enforcement, the Children's Division and others to determine whether the child comes within the jurisdiction of the court. This screening consists of a legal and best interest determination. The Juvenile Officer reviews for best interest issues, while the attorney for the Juvenile Officer screens for legal sufficiency. This very distinct bifurcated review is necessary so that a Juvenile Officer does not practice law without a license and a Juvenile Officer attorney does not impinge upon the duty of the Juvenile Officer to act in the juvenile's best interests and the interests of the state. *Id.*

Implicit in the filing of a petition, such as in the instant case, is a finding that the Juvenile Officer believed it was in the juvenile's best interest and the interest of the state to proceed formally rather than informally, and the Juvenile Officer attorney found that there was probable cause that the juvenile committed the offense.

Without any foundation or citation, the Juvenile argues that Deputy Juvenile Officers frequently represent themselves as "advocates" for juvenile before the court. However, "acting in the best interest" of a juvenile must not be confused with acting as an "advocate" for the juvenile. These goals might be aligned at times, but are often at odds. The Juvenile's attorney is his advocate, not the assigned Deputy Juvenile Officer.

The Juvenile alleges that a juvenile could be confused regarding the Juvenile Officer's role, but offers no evidence of such confusion. Certainly, if a juvenile were confused, it

would be incumbent upon his attorney to provide clarification. In this case, inasmuch as counsel was appointed for the Juvenile on the first day of his detention, such clarification could have been provided at the earliest instance.

Appellant notes that Deputy Juvenile Officers conduct extensive interviews with juveniles. Appellant fails to point out that these interviews focus exclusively on the juvenile's adjustment in detention, necessary for the juvenile welfare while detained and social factors, necessary for a dispositional report to the court, if adjudicated or if a certification hearing is scheduled. The Juvenile Officer is mandated by law or court order to conduct such investigations and submit a report regarding the juvenile's background and treatment needs to assist the court in reaching the best and most appropriate disposition. Section 211.071.6 RSMo., Rule 118.01. In such cases, the Juvenile Officer has no choice but to interview the juvenile and gather information relevant to the disposition. If the juvenile does not wish to cooperate with the Juvenile Officer, that is the juvenile's prerogative. Counsel for the Juvenile has the option to submit, and has submitted in past hearings, his own evidence and reports regarding a proposed disposition. In a bench-trying case, the juvenile court judge is free to consider all of the evidence and grant it the weight it deserves.

Arguments similar to the Juvenile's current contention were soundly rejected in *In the Interest of M.C.*, 504 S.W.2d 641 (Mo. App. E.D. 1974). In this case, the juvenile argued that the Deputy Juvenile Officer acted as a prosecutor or police officer when he advised the juvenile of his constitutional rights in the presence of his parents and police and the



juvenile thereafter made an incriminating statement when questioned by the police. The Juvenile reasoned that by using his position, the Deputy Juvenile Officer lulled the juvenile into a false sense of security and disarmed him so that he unwittingly signed a paper waiving his constitutional rights and also signed an incriminatory statement.

The Appellate Court held that the Deputy Juvenile Officer's actions and interview were consistent with the statutory duties imposed on the Juvenile Officer for any child coming within the exclusive original jurisdiction of the juvenile court, subject to the constitutional protections granted by *In re Gault*, at 1. The Court found no constitutional defect.

Juvenile officers have imposed upon them by statute the duty to make such investigations and furnish the court with such information and assistance as the judge may require to aid him in making this determination. They are required to keep a written record of these investigations and to submit reports thereon to the judge. *M.C.*, at 647.

The law prohibits the Juvenile Officer from questioning the juvenile regarding the pending offense. Section 211.059 RSMo; *State v. Tolliver*, 561 S.W.2d 407 (Mo. App. W.D. 1977). The Appellant does not allege that the Juvenile Officer questioned him regarding the pending offense. In a small sense, the role of the Juvenile Officer is somewhat akin to the role of an adult probation officer gathering information necessary for the required presentence investigation report pursuant to Section 557.026 RSMo. An order from the juvenile court judge directing the Juvenile Officer to prepare a

dispositional report does not reflect any bias, conflict or separation of powers violation on the part of the judge any more than it does in a criminal case.

The Appellant argues that Juvenile Officer staff investigates and gather evidence for use during prosecution. The Juvenile Officer has appointed "Investigators" who are not sworn in as Deputy Juvenile Officers, but who assist the Juvenile Officer Attorney in preparing for the delinquency hearing. Such appointments are in accordance with the Local Court Rule which permits the Court Administrator to appoint necessary personnel. The role of this Investigator position is no different from the investigators employed by the Public Defender's Office and the Circuit Attorney's Office. The investigator assists the Juvenile Officer Attorney by interviewing victims and witnesses, gathering police and medical reports, serving subpoenas, etc. The Juvenile Office investigator is bound by the same prohibitions against questioning a juvenile and, in practice, has no contact with the juvenile. In fact, the Juvenile Officer is a represented party and entitled to all statutory duties, rights and protections of a party. Rule 110.04(20). That a represented party requests their attorney's consent prior to an interview by opposing counsel and hence, compliance with the Missouri Rules of Professional Conduct, should come as no surprise. The Juvenile cites no instance when such a request was denied. In practice, defense attorneys freely consult with Deputy Juvenile Officers outside the presence of their attorney and have full access to all Juvenile Officer files and reports pursuant to discovery.

The Role of Counsel for the Juvenile Officer, as provided by Missouri Law, Does Not

Violate the Constitution, Separation of Powers or Ethical Standards. The Juvenile Officer has a right to retain counsel. Rule 115.01. Certainly, no one would suggest that a Juvenile Officer should proceed in a hearing without counsel, thereby practicing law without a license. In accordance with Local Rule, the Court Administrator, not the judge, has hired several attorneys to represent the Juvenile Officer. Salaries for Juvenile Officer attorneys are paid out of the Juvenile Office budget, which is paid for by Jackson County, Missouri. *See* 211.383.2 RSMo. The State pays the salaries of Circuit Judges.

As discussed above, the attorney for the Juvenile Officer does not have a conflict of interest under Missouri Rules of Professional Conduct, Rule 4-1.7. Further the source of the attorney for the Juvenile Officer's salary does not violate Rule 4-1.7. The attorney for the Juvenile Officer's employment does not create any conflict of interests under Comment 10 of Rule 4-1.7. The attorney for the Juvenile Officer represents the Juvenile Officer and not the Court. Regardless of the source of the salaries, an attorney's duty of loyalty is to the client and not the person who pays the attorney. The comment to the Missouri Rules of Professional Conduct, Rule 4-1.7 on Conflict of Interest provides:

Interest of Person Paying for a Lawyer's Service [13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 4-1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person

paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of Rule 4-1.7(b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Missouri Rule of Professional Conduct 4-3.8 places special ethical considerations upon a "prosecutor in a criminal case." Some of these due process provisions are applicable to both criminal prosecutors and Juvenile Officer attorneys, e.g., "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Others are clearly inapplicable, e.g., "not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes..." Attorneys who represent the Juvenile Officer are not prosecutors because the juvenile proceeding is not a criminal case. Section 211.271 RSMo provides that a delinquency adjudication is not a criminal conviction. The taking into custody by law enforcement is not considered an arrest. Section 211.131 RSMo. It is well settled law that a juvenile court proceeding is civil in nature, not criminal. *State ex rel R. L. W. v. Billings*, 451 S.W.2d 125 (Mo. 1971).

Nevertheless, Juvenile Officer attorneys abide by the *applicable* special Rules of Professional Conduct, especially as they relate to due process rights of juveniles. For instance, as noted above, the legal screening of a case, including the determination of probable cause is the sole province of the Juvenile Officer attorney. The Juvenile Officer

does not determine probable cause. If the Juvenile Officer believes a juvenile would benefit from the formal services of the court, but the Juvenile Officer attorney concludes the case lacks prosecutive merit, the attorney does not file a petition. Counsel cannot provide any example of where the client (Juvenile Officer) ordered the attorney to file a petition despite the attorney's determination of no probable cause because this has never happened.

The attorney for the Juvenile Officer signed and filed the petition in the case at bar. Counsel for the Juvenile has not suggested, nor offered any evidence, that the Juvenile Officer made or influenced the probable cause determination. If this were at issue, the Juvenile's remedy would be to challenge the sufficiency of the petition. *In Interest of R.R.P.*, 545 S.W.2d 351 (Mo. App. E.D. 1976).

The Appellant seems to "cherry pick" Rules of Professional Conduct that are very clearly applicable to criminal prosecutors only to create an illusion of a conflict of interest between the Juvenile Officer and her attorney. However, the Missouri Rule of Professional Conduct must not be read in a way that renders their language meaningless or unreasonable.

At the very core of the juvenile system are the *parens patriae*, treatment, non-punitive and non-criminal principles which make it separate and distinct from the criminal system. If not for these underlying principles, there would be no need for a separate system. As a result of these distinctions, many cases have held that the position of prosecuting attorney

is incompatible with the position of Juvenile Officer. *State vs. Arbeiter*, 449 SW 2d. 627 (Mo. 1970); *In re F.C.*, 484 S.W.2d 21 (Mo. App. 1972). In the *F.C.* case, the court noted that prosecutors are responsible for prosecuting transgressions against the welfare of society and not rehabilitation and treatment of children. Due to these incompatible goals, the elected prosecutor cannot also be the juvenile officer. "The functions of juvenile officer and prosecuting attorney cannot be accommodated in one person without undermining the *parens patriae* foundation of our juvenile system." *F.C.* at 26.

Clearly, the legislature did not intend to impose all prosecutor goals and standards upon the juvenile officer. The logical extension of this concept is that all prosecutor principles do not apply to the attorney for the Juvenile Officer. Therefore, the Juvenile Officer attorney's duty of loyalty to the juvenile officer does not violate the Missouri Rule of Professional Conduct.

The trial did not error, 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, or violate 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 the trial court entered the judgment of dismissal pursuant to § 211.071 RSMo as there is no persistent conflict of interest or impropriety in juvenile cases including certification hearings and the trial court's judgment should be affirmed.

#### **V. ARGUMENT**

**The trial court did not error or violate 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 the trial court entered the judgment of dismissal pursuant to § 211.071 as there is no evidence to support that the trial court disproportionately certified D.E.G. as he is an African American juvenile.**

### **STANDARD OF REVIEW**

The constitutionality of a statute is a question of law, the review of which is de novo. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo.banc 2007). A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly' violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *State v. Richard*, 298 S.W.3d 529, 531 (Mo.banc 2009). The Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo.banc 2007). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. *Id.* The party challenging the validity of the statute has the burden of proving the statute unconstitutional. *Id.*

### **ARGUMENT**

While it is true there is currently a disproportionate number of African American youth certified in Missouri as reflected in the most current Missouri Juvenile and Family Division Annual Report (2016, the Appellant offers no evidence that this certification

was racially motivated and not a product of other causes. The Missouri Juvenile and Family Division Annual Report does not take into account other relevant factors in delinquent statistics such as socio-economic conditions, urban core conditions, gang activity by racial groups, etc. The Report also does not consider the specific charges that are more frequently certified. In *State v. Tate*, 637 S.W.2d 67, 71 (Mo. App. E.D. 1982), the court stated, “the seriousness, and particularly the violent or vicious nature of the crime may constitute strong evidence that the juvenile is not a fit subject for the rehabilitative facilities of the juvenile court.”

While racial disparity is a factor the court should consider during a certification hearing, Section 211.071.6 (10) RSMo., the court has the discretion to give this factor the weight it deems appropriate in the circumstances.

The Appellant offers no evidence to indicate that race was a factor in charging of offenses or the recommendation of the Juvenile Officer.

The Appellant is currently charged with Murder, First Degree; Assault, First Degree; two counts of Armed Criminal Action and Felony Resisting Arrest. Appellant’s offenses are serious and especially violent and vicious. Appellant poses a risk to the community. Overturning the certification of the Appellant because there is a disproportionate number of African American youth certified in Missouri makes no sense and shocks the conscience. There is no evidence supporting the Appellant’s claim for violations of equal protection or due process based on his race. The statistics regarding race do not render the



certification process in Missouri unconstitutional.

The trial court did not error or violate 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 the trial court entered the judgment of dismissal pursuant to § 211.071 as the court did not disproportionately certify D.E.G. because he is an African American juvenile and the trial court's judgment should be affirmed.

## VI. ARGUMENT

**The trial court did not error or violate 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 nor 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 judgment of dismissal pursuant to § 211.071 as the rules of evidence are not ignored.**

## STANDARD OF REVIEW

The constitutionality of a statute is a question of law, the review of which is de novo. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo.banc 2007). A statute is presumed to be constitutional and will not be invalidated unless it clearly and

undoubtedly’ violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *State v. Richard*, 298 S.W.3d 529, 531 (Mo.banc 2009). The Court will resolve all doubt in favor of the act’s validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo.banc 2007). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. *Id.* The party challenging the validity of the statute has the burden of proving the statute unconstitutional. *Id.*

### ARGUMENT

Appellant recognizes Missouri Supreme Court Rule 116.02, which provides that all hearing involving adjudication of the allegation of the petition or motion to modify , “the rules of evidence shall apply” However the Appellant argues without any precedent that the rules of evidence should in addition apply to certification hearings because of the investigation and report in 2015 of the St. Louis Family Court the Civil Rights Division of the United States Department of Justice. This issue was addressed in Respondent’s Argument III. The trial court’s judgment should be affirmed.

### VII. ARGUMENT

**The trial court did not error or violate 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 nor 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 judgment of dismissal pursuant to § 211.071 as the court properly considered the unadjudicated prior referrals.**

### **STANDARD OF REVIEW**

The constitutionality of a statute is a question of law, the review of which is de novo. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo.banc 2007). A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly' violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *State v. Richard*, 298 S.W.3d 529, 531 (Mo.banc 2009). The Court will resolve all doubt in favor of the act's validity and may make every reasonable intendment to sustain the constitutionality of the statute. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo.banc 2007). If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted. *Id.* The party challenging the validity of the statute has the burden of proving the statute unconstitutional. *Id.*

### **ARGUMENT**

The Appellant's argument that unadjudicated referrals considered by the Court violate the Constitution are without support and merit. All authority cited are about adult criminal trials and propensity evidence that defendant committed the crime alleged. Certifications

are not trials on the merits. The evidence is not used as propensity evidence. *State v. Tolliver*, 101 S.W.3d 313 (Mo. App. 2003) and *State v. Burns*, 978 S.W.3d 759 (Mo. Banc 1998) are not applicable to the type of proceeding under 211.071 RSMo. The certification hearing is not a hearing on the merits of the charges alleged.

“Rule 129.04c does not require or permit a full hearing into the facts of the alleged offense.” Comment 1, Missouri Supreme Court Rule 129.04. A trial on the merits of the case occurs after the Court rules on the certification issue either in the juvenile court or the adult court. The trial court did not error or violate 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 nor Article I, § 18(a), of the Missouri Constitution, nor 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 judgment of dismissal pursuant to § 211.071 as the court properly considered the unadjudicated prior referrals. The trial court’s judgment should be affirmed.

### **CONCLUSION**

The trial court did not error or violate 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 nor 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 judgment of dismissal pursuant to § 211.071 RSMo as the trial court was in compliance with RSMo 211.071 in that the trial court was not required to apply a probable cause or beyond a reasonable doubt standard in the certification hearing, the juvenile was not disproportionately treated as he was an African American male, rules or evidence were applied correctly and unadjudicated referrals were properly considered by the court for purposes of certification. The trial court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Lori Fluegel, hereby certify: The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, 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 10,791 words which does not exceed the word count allowed for Respondent's Brief. On this 15th day of October, 2019, electronic copies of Respondent's Brief was sent by delivery through the Missouri e- Filing System to Tim Honse, Attorney for the Juvenile at Tim.honseJohnston@mspd.mo.gov.

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