

SC97869

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**IN THE MISSOURI SUPREME COURT**

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**IN THE INTEREST OF D.E.G.,**

**Appellant,**

**v.**

**JUVENILE OFFICER OF JACKSON COUNTY,**

**Respondent.**

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

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**APPELLANT'S REPLY BRIEF**

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TIM HONSE # 67424  
Assistant Public Defender  
Missouri State Public Defender  
Trial Division – District 16  
324 East 11<sup>th</sup> St.  
Oak Tower, 20<sup>th</sup> Floor  
Kansas City, Missouri 64106

Tel: 816.889.2099 ext. 277  
Fax: 816.889.2999  
Tim.honse@mspd.mo.gov

Counsel for Appellant

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### **JURISDICTIONAL STATEMENT**

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original Appellant's Brief.

**REPLY ON ISSUE OF APPEALABLE ORDER AND RESPONDENT'S MOTION**  
**TO DISMISS**

D.E.G. asks this Court to change the process for appealing certification previously established in *In re T.J.H.*, 479 S.W.2d 433 (Mo. banc 1972) (hereinafter *T.J.H.*) and allow this appeal.

Time is of the essence and the current process prevents meaningful redress

D.E.G. currently awaits adult trial while held in isolation in the Jackson County Detention Center in order to be secluded from the adult inmates, where he has no access to the educational services, or human interaction, that a 16 year old needs. This is doing permanent damage to his adolescent development and will have lifelong consequences on both D.E.G. and the community to which he will return someday. This isolation is by policy of the Jackson County Detention Center in order to keep him safe from the adult inmates at that institution, although the law itself no longer protects him from this danger. Either way, D.E.G. faces many months in isolation or many months in danger of victimization by adult inmates. Even if a higher court overturns the certification decision sometime into the future, if the appeal is delayed, there will be no way to repair this damage.

Missouri courts go to great lengths to protect the identity of juvenile litigants. Even here this Court has done so for D.E.G. in the case pending before it, however at this very moment D.E.G. has an information pending against him in the 16<sup>th</sup> Circuit Court of Jackson County where he has no such protection. That case is public record, with records accessible on the internet, and hearings and the trial being in an open courtroom. Even if

a higher court overturns the certification decision sometime into the future, if the appeal is delayed, there will be no way to repair this damage.

Respondent has not addressed the permanent prejudice that will occur if D.E.G. must wait to appeal the judgement of certification. If the Court finds Appellant's jurisdictional statement unconvincing, and denies this review of the appellate process, then Appellant will file a motion to dismiss in the Circuit Court wherein D.E.G. currently faces the adult criminal charges and preserve these issues for direct appeal in that case. These issues may come before this Court again years into the future through D.E.G.'s direct appeal, after he has "aged out" of the currently available juvenile dispositions, such that neither D.E.G. nor our community would be able to benefit from his rehabilitation therein. Even if a higher court overturns the certification decision sometime into the future, if the appeal is delayed, there will be no way to repair this damage.

The State of New Mexico considered this issue and found that the right to appeal the judgement of certification was required for these very reasons, and also described this right to appeal as existing in the majority of jurisdictions across the U.S. with statutes similar to Missouri's § 211.261.1 RSMo. *In re Doe II*, 86 N.M. 37 (N.M. Ct. App. 1974) (citing cases in Alaska, Arizona, California, Hawaii, Kansas, Maryland, New Jersey, Ohio, Oregon, Texas, Alabama, Florida, Georgia, Idaho, Indiana, Nevada, and Rhode Island) (Missouri's approach in *T.J.H.* is contrary to any other jurisdiction with statutes similar to § 211.261.1 RSMo). New Mexico law provides similar protections for children charged under juvenile code, "which would be finally and irreparable lost if we were to delay review of the transfer order until after a criminal conviction." *Id.* at 38. (being

incarcerated with adults in an adult facility, law enforcement records becoming open to the public, as well as publicity in the prosecution itself.) “If an improvident transfer order is entered, these important statutory rights and protections could be needlessly and irreparably lost.” *Id.*

Missouri too protects children from being incarcerated in an adult jail or detention facility prior to disposition of a juvenile case. § 211.151 RSMo. Juvenile delinquency proceedings and their records must be kept confidential except by court order. § 211.321.2 RSMo. Law enforcement records regarding children must be kept separate from adult records, and must be kept confidential except by court order. § 211.321.3 RSMo. See also Rule 122.03. Thus, an improper judgement of certification likewise needlessly and irreparable harms these important statutory protections, even if it is to be overturned after Appellant’s direct appeal years into the future.

Any future relief that might be granted D.E.G. through the currently existing process to appeal the certification decision would be a hollow victory for both D.E.G. and the community to which he will someday return.

A writ of prohibition was never the appropriate action for D.E.G.

Respondent asks the Court to dismiss this appeal based on her misinterpretation and misapplication of *State ex rel T.J.H. v. Bills*, 504 S.W.2d 76 (Mo. 1974) (hereinafter *Bills*). This appeal is not factually or procedurally similar to *Bills* so the procedure described there is not applicable. The writ of prohibition described in *Bills* was a challenge “to the sufficiency of the order to transfer, not to its correctness” (*Id.* at 79), after certification hearing was held, because the certification order in *Bills* was



insufficient where it did not set forth findings stating the basis for the decision to certify the juvenile. Respondent wrongly asserts that here D.E.G. should have filed a writ of prohibition prior to certification hearing, which is not even what *Bills* established. Here D.E.G. is not challenging the sufficiency of the order, but is instead requesting review of both the appeal process itself as well as the correctness of the way the certification hearing was held. *Bills* is wrongly applied by Respondent and a writ of prohibition was never the proper remedy for Appellant to have sought.

Prohibition is one of the extraordinary writs and is appropriate “when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.” *State ex rel. D.C. v. McShane*, 136 S.W.3d 67 (2004) (hereinafter *D.C.*). Here however, there is an appeal process by which these important questions of law may eventually be reviewed by the higher courts, namely through motion to dismiss in Circuit court, preservation through trial, and direct appeal, along with alleged error the trial itself, which will take years to accomplish. Appellant is seeking review of that process through this appeal because that process is inadequate to address the interests of the juvenile who will age out of the juvenile system during that passage of time. The existence of this process, however untimely it may ultimately be, makes prohibition an inappropriate request.

A writ of prohibition is also used to prevent something erroneous from occurring before the lower court takes the action. In *D.C.* ) the prohibition was granted to prevent the juvenile court from holding a certification hearing because D.C. was not competent to

proceed, after the juvenile court had already decided the question of competency. Here, appellant could not know what errors would occur in the certification hearing until the hearing was held, and thus could not request a writ of prohibition.

Finally, *Bills* and *D.C.* directly follow the precedent of *T.J.H.* which is challenged in this appeal. If the Court is persuaded by Appellant's jurisdiction statement in Appellant's original brief, that time is of the essence in the appeal of the certification decision and *T.J.H.* should be overruled, then the grounds for Respondent's motion to dismiss, as well as the argument that writ of prohibition was the appropriate remedy, are likewise inapplicable. However, if this Court is not persuaded to overrule *T.J.H.*, then this appeal will be denied on those grounds, not because a writ of prohibition was the correct avenue for Appellant as suggested by Respondent.

The judgment of certification is final

Respondent has not addressed the issue of whether the order of certification is a final order. "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. The judgement of certification is indeed a final order because it disposes of all issues in juvenile case and all parties, and there is no statutory exception to § 211.261.1 RSMo. *T.J.H.* is contrary to the legislative intent of § 211.261.1 RSMo.

The 9<sup>th</sup> Circuit U.S. Court of Appeals did a survey of certification appeal processes around the country when it reviewed the certification process for the Territory of Guam, finding that the majority of those jurisdictions "having broad statutory language" of appeal of the judgement of certification "have been interpreted as permitting

the juvenile to appeal the certification order immediately after the order's entry" rather than after the adult prosecution. *People of Territory of Guam v. Kingsbury*, 649 F.2d 740 (1981). See also *In re Doe II*, 86 N.M. 37 (N.M. Ct. App. 1974). Missouri's *T.J.H.* decision is in the minority in interpreting such a broad statutory right to appeal as § 211.261.1 the way that it does when it finds that the judgement of certification is not a final appealable order.

Respondent does argue that she is the inappropriate party because the judgement of certification "divests the juvenile court of jurisdiction and subjects the juvenile to prosecution under the general laws of the state." This mischaracterizes the Juvenile Officer's petition against the juvenile as being one and the same case as the subsequent adult criminal prosecution. In fact, the juvenile petition institutes a completely separate civil case, entirely independent from any subsequent criminal prosecution. "Juvenile proceedings are civil, not criminal, and are focused on continuing care, protection, and rehabilitation of the juvenile, not punishment." *In Interest of A.C.C.*, 561 S.W.3d 425, 428 (Mo. Ct. App. 2018) (citing *J. D. H. v. Juvenile Court of St. Louis County*, 508 S.W.2d 497, 500 (Mo. banc 1974)). Respondent is correct in her contention that she is not a party to the adult criminal prosecution, but the reason that is true is because that is an independence case which was allowed to proceed only if and when the juvenile petition was dismissed by the judgement of certification.

Defendants are frequently prosecuted concurrently by both a civil petition and a criminal indictment for the same alleged conduct, because those are separate actions protected by the law in their own way. The party prosecuting those independent actions

is also different, and each has the right to seek remedy for Defendant's alleged conduct. Nothing precludes both the civil and the criminal plaintiff from proceeding concurrently against the same Defendant regarding the same conduct because they are separate civil and criminal actions.

The civil prosecution of a juvenile petition is different than that kind of civil case in its inception, in that it is not created by the Constitution, but rather by statute, and is limited by that statute. Section 211.031 RSMo. creates the civil remedy for the prosecution of children under the age of 18 who are alleged to be in need of care and treatment of the juvenile court for a variety of different reasons, including because the child is alleged to have committed criminal conduct, and establishes exclusive original jurisdiction in the juvenile court for such alleged criminal conduct. The separate adult criminal prosecution is therefore precluded by this exclusive jurisdiction unless and until the juvenile is certified pursuant to § 211.071 and the juvenile case is thus dismissed. This procedure however does not mean that the civil juvenile case is one and the same with the subsequent adult criminal prosecution just because § 211.031 prevents them from both being prosecuted concurrently. The juvenile petition and the criminal prosecution remain different in both their character and their inception, despite the fact that they cannot proceed concurrently.

A subsequent criminal prosecution of a certified juvenile is not automatically initiated by or through the judgement of certification that dismisses the independent juvenile petition. See *State v. K.J.*, 97 S.W. 3d 543 (Mo. Ct. App. 2003) (hereinafter *K.J.*) (a judgement of certification dismissing a juvenile petition was entered against K.J.,

and the State's prosecuting attorney chose not to file criminal charges for that alleged conduct.) The independent decision of whether or not to initiate an adult criminal prosecution after certification is still within the discretion of the State's prosecuting attorney. *Id.* Section 211.031 RSMo allows the juvenile officer to consult with the prosecuting attorney concerning the alleged conduct, and whether the prosecutor would pursue charges if the juvenile is certified. Section 211.068 RSMo allows the State's prosecuting attorney to testify at the certification hearing about likelihood of whether or not an adult prosecution will even be pursued if the juvenile is certified. The State's prosecuting attorney does not always pursue an adult criminal case for the same conduct. See *K.J.*

The facts that (1) the plaintiffs must be different, (2) § 211.071 allows the adult prosecution only after *dismissal* of the juvenile petition, and (3) the State's prosecuting attorney has independent discretion on whether or not to file adult criminal charges all lend credence to the argument that the judgement of certification is indeed a final order.

*T.J.H. infringes on the constitutional right to appeal*

Respondent has not addressed the issue raised by *Golsby v. Lombardi*, 559 S.W.3d 878 (Mo. banc 2018), wherein this Court held that Supreme Court Rule 81.04(e) was invalid because it conflicted with the right of appeal as protected by Article V, section 5 of the Missouri Constitution. Like Rule 81.04(e), *T.J.H.* changes and is in conflict with the right of appeal of the final judgment established in § 211.261.1 RSMo by creating a jurisdictional hurdle to the juvenile's right to appeal the certification decision.

The problem in *K.J.* ) was actually created by this jurisdictional hurdle. There, K.J. was certified to stand trial as an adult once, but no subsequent adult criminal charges were filed for that alleged conduct. As a result, K.J. had no opportunity to appeal the certification decision because of the holding in *T.J.H.* , and a second certification hearing was required for subsequent alleged conduct. If *T.J.H.* is overruled then the situation in K.J. will no longer be a problem.

For all of these reasons Respondent's motion to dismiss should be denied and Appellant requests that this Court allow direct appeal of the certification decision.

### **STATEMENT OF FACTS**

Appellant adopts and incorporates by reference the Statement of Facts from his original Appellant's Brief.

## **REPLY ARGUMENT**

### **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 it’s judgement of dismissal pursuant § 211.071 RSMo without holding any party to any burden of proof, § 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.**

*State v. Nathan* says that Missouri’s certification 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 to relinquish jurisdiction in a way that is sufficient to permit meaningful appellate review.” 404 S.W.3d 253, 260 (Mo. banc 2013). Although juvenile proceedings are civil in nature 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 because “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.” *In re Winship*, 397 U.S. 358, 365-66 (1970) (internal citations omitted). If this is true in adjudication where even if the juvenile is found guilty, then it must also be true in certification hearing, where the juvenile loses many statutory protections afforded to juveniles and faces adult criminal prosecution. These same civil labels and good intentions are equally as damaging to due process in certification hearings held without a clear burden of proof clearly placed upon a particular party, as was held in this case.

Without a clear burden of proof, clearly placed upon a particular party, the basis for the court’s decision to relinquish jurisdiction cannot be sufficiently set forth, and there can be no record sufficient to permit meaningful appellate review. The appellate court is left to guess what burden of proof was applied by the certifying court and to whom it was applied. The standard of review for an appeal is always linked hand in hand with the burden of proof in the original case, so if the burden of proof is unclear or nonexistent, the appellate standard of review is meaningless.

Here, the Judgement of Dismissal Pursuant to Section 211.071, RSMo entered on January 9, 2019 (LF D75) does not articulate what burden of proof was met nor by whom it was met, in reaching the court’s judgement of certification. The court did not articulate what burden of proof was required in the hearing, nor whom had it. The attorney for the juvenile officer never articulated that the juvenile officer had met any burden of any degree. This prevents this Court from conducting meaningful appellate review because

there is insufficient record from which this Court to evaluate either the certifying court's decision or whether the juvenile officer presented sufficient evidence.

Respondent spends a majority of her argument regarding this point discussing presumption of innocence or guilt, an issue not raised on appeal. Moreover, the certifying court explicitly articulated in its order that it "did not assume the truth of the allegations" in the petition (LF D75 p2). Additionally Respondent argues that precedent required the court to presume the facts alleged to be true, however in Missouri *State v. Nathan* clearly states that the Missouri courts do not assume the allegations to be true. *Nathan* at 260.

Respondent likewise misunderstands Appellant's request regarding this point on appeal. Nowhere does Appellant ask this Court to require a full fact-finding of the conduct alleged in the petition. Nowhere does Appellant argue that the burden of proof should be beyond a reasonable doubt as to the single issue of whether the juvenile committed the offense, which encompasses only four of the ten factors the court considers in the certification hearing. See § 211.071.6 RSMo. Appellant asks for this Court to require a clear burden of proof regarding the *certification decision*, not the facts of the petition. Certainly the facts of the petition are included within many factors the juvenile court may consider, however Appellant is not asking the Court to require that the juvenile officer prove the offense beyond a reasonable doubt.<sup>1</sup> Rather, Appellants point is that there is no clear burden of proof for the certification decision as a whole.

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<sup>1</sup> Appellant's second point on appeal addresses the issue of the offense itself in more detail. There the issue is that there is not a finding of probable cause as any part of the certification process, either prior to the hearing or during

Respondent, as well as prior decisions related to these issues, articulate a concern that Appellant's argument creates double jeopardy problems. In conjunction with a finding of probable cause (Appellant's point two) however, the relief that D.E.G. seeks would not create any problem with the protection against double jeopardy. While Appellant is arguing that the burden of proof placed upon the juvenile officer for the certification decision as a whole should be beyond a reasonable doubt, this does not mean that the certifying court would have found beyond a reasonable doubt that the juvenile committed the offense if there is also a finding of probable cause as a part of the process.

Every day courts in Missouri hold probable cause hearings that determine facts and have a clear burden of proof placed clearly on a particular party, and these do not run afoul of double jeopardy. Unless preliminary hearing is waived, every criminal case that goes to jury trial has already had a fact-finding hearing wherein either a judge or a grand jury has found probable cause that the complaint be bound over to circuit court, but double jeopardy does not prevent the State from proceeding to trial against that defendant. A finding of probable cause concerning the facts alleged in the juvenile officer's petition would run afoul of double jeopardy protection no more than does an adult case being bound over to circuit court.

Even if the Court does not agree with Appellant on point two and require an actual probable cause determination to be made prior to certification, the same principle applies. Just because the Court has heard evidence on those certification elements that concern the

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the hearing. A determination of probable cause regarding the incident itself as part of the entire juvenile process is also an integral part of ensuring due process in Missouri's certification process.

facts of the petition and decided beyond a reasonable doubt that the juvenile should be certified, does not answer the same question of fact of fact of whether or not the defendant is guilty. For example, many cases that go to trial have previously had a suppression hearing in which the court has made a factual determination on many important facts in the case, with a clear burden of proof being placed upon the State to address the specific question of that type of hearing, and double jeopardy does not prevent the State from proceeding to trial against that defendant. There, the factual question that the court must decide is whether the search and/or seizure made was illegal in some way, as dictated by § 542.296.6 RSMo. Although the court must make factual determinations to reach its conclusion, the ultimate question is different than the question for the fact-finder at trial. The question to be answered by the court at certification hearing, whether the juvenile should be certified to stand trial as an adult, is likewise different from the ultimate question for the fact-finder at trial. A finding of beyond a reasonable doubt that the juvenile should be certified to stand trial as an adult would run afoul of double jeopardy protection no more than does a court's decision at suppression hearing.

Requiring a clear burden of proof and placing that burden on a particular party for the certification decision would protect the right to a fair certification hearing and ensure a decision that sets forth the basis to relinquish jurisdiction in a way that is sufficient to permit meaningful appellate review without causing double jeopardy problems similarly to preliminary hearings, suppression hearings, and others.

Respondent relies heavily upon *Breed v. Jones* which says that “the [U.S. Supreme] Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support” the certification decision, but “only that, whatever relevant criteria, and whatever the evidence demanded” by the State statute, that the decision must be made prior to certification. 421 U.S. 519, 537 (1975). Neither *Breed* nor any other case however says that it is acceptable for a State to have *no* clear criteria, or *no* clear nature or quantum of evidence, upon which the court may decide to certify. Although the U.S. Supreme Court does not prescribe any burden of proof for Missouri’s certification court, this does not mean that the complete absence of *any* clear burden of proof clearly placed upon a particular party is acceptable. Indeed, because *Breed* says “whatever relevant criteria, and whatever the evidence demanded,” it is clear that the Court expects the State to outline their own criteria and quantum of evidence by which the decision will be made and reviewed. What the quantum should be may be open for debate, but no case says that it is constitutional for there to be no quantum at all. Ultimately, if the Court finds that a clear burden of proof is required, but is not convinced by Appellant’s argument that the standard should be beyond a reasonable doubt, there are numerous other burdens of proof that the Court might consider.

**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 § 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.

Appellant adopts and incorporates by reference the argument from his original Appellant's Brief, as well as those arguments made concerning this point in his Reply point one.

**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.

Appellant adopts and incorporates by reference the argument from his original Appellant's Brief. Should the Court find Appellant's record on appeal regarding this point on appeal to be deficient, Appellant additionally asks for a remand to develop additional record on this point.

**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.**

Appellant adopts and incorporates by reference the argument from his original Appellant's Brief. Appellants does correct one significant factual mistake in Respondent's brief, which says that Appellants is currently charged with first degree murder, first degree assault, two counts of armed criminal action, and felony resisting arrest. In fact, the juvenile petition alleged one count of first degree assault and one count of armed criminal action, and the current information pending in 16<sup>th</sup> Circuit Court charges the same.

Should the Court find Appellant's record on appeal regarding this point on appeal to be deficient, Appellant additionally asks for a remand to develop additional record on this point.



**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 it’s 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.**

It is “of ‘critical importance’ that the material submitted to the judge [at certification hearing], be subjected, within reasonable limits [...] to examination, criticism and refutation.” *Kent v. U.S.*, 382 U.S. 541, 563 (1966). One of the issues in *Kent* was that the certifying court had considered records that had not been provided to the juvenile or his counsel. Regarding those records, the Court said, “there is no irrebuttable presumption of accuracy attached to staff reports,” and juvenile’s counsel must have access to them in order to subject them to examination, criticism, or refutation. *Id.* Counsel must be “given an opportunity to function.” *Id.* at 561. One of defense counsel’s most central functions in any hearing is the job of cross-examination.

Gaining access to records without the opportunity to subject them to examination, criticism, or refutation at the hearing itself by cross-examination of a witness who has personal firsthand knowledge of the contents of those records is meaningless. Examination, criticism, or refutation requires counsel to be able to inquire as to the accuracy of the records, not just a rote recital of those records by a third party

Section 211.071.6 RSMo requires that the juvenile officer submit a written report summarizing the factors for the court to consider at the certification hearing. Nowhere does this authorize or require the certifying court to base its decision *solely* upon this report or the DJO's testimony concerning that report. Inasmuch as § 211.071.6 requires this report to be made, such hearsay is clearly admissible at the certification hearing. This could be considered a statutory exception to the rule against hearsay in this specific, narrow context. Just because some hearsay is admissible for the certifying court's consideration however does not mean that it should be acceptable for the court to base their decision *solely* on this unexamined hearsay.

Here, the court relied entirely upon the testimony of one witness, the Deputy Juvenile Officer, Ms. Sandy Rolo-Hawkins, who had no personal knowledge about any single factor for the court to consider. Ms. Rolo-Hawkins testified that her report and testimony were derived exclusively from review of other secondary sources. Ms. Rolo-Hawkins testified to details of the conduct alleged in the petition solely by summarizing police reports written by others, which themselves contained statements of other witnesses. She did not speak to any of those witnesses herself, nor any member of law enforcement, but only summarized written documents. Ms. Rolo-Hawkins testified to

details of prior unadjudicated referrals of alleged bad acts by D.E.G. which had not been charged, prosecuted, or tested in court, based solely on her review of police reports and records kept by the Juvenile Officer. She did not speak to any of these witnesses herself, but only summarized written documents. Ms. Rolo-Hawkins testified regarding details of D.E.G.'s conduct in detention to which she had no personal knowledge, based solely on written reports of other detention staff. 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, based solely on her review of medical and school reports. She did not speak to any of these witnesses herself, but only summarized written documents. 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. No other witness who had any personal knowledge regarding any single factor that the court considered was presented.

Appellant was not able to examine, criticize, or refute anything to which the sole witness testified, because she ultimately knew nothing about any subject. She was no more than a conduit through which this information passed, functionally *precluding* Appellant from examining the contents of that testimony as required by *Kent*.

**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.**

Appellant adopts and incorporates by reference the argument from his original Appellant's Brief, as well as those arguments made concerning this point in his Reply point five.

## CONCLUSION

Although Appellant believes any one of these points on appeal should result in reversal, it is the combination of these numerous errors and prejudices that make this certification particularly wrong. There was no burden of proof placed clearly on any party for which Appellant to know how to defend, or for the appellate courts to review the certifying court's decision. There was also no probable cause determination or opportunity to adversarially challenge those factors concerning the facts of the allegation, under any standard whatsoever, at any point prior to the certification decision. There was also no opportunity to cross-examine or challenge any of the other factors the court considered because the Deputy Juvenile Officer, with no personal knowledge of any factor, was the only witness, including but not limited to prior unadjudicated referrals against Appellant. All of this also took place within a system that exists within persistent conflict of interest between the court and the juvenile officer, and which disproportionately applies certifications to children of color. The combination of these many failings created an unconstitutional and unfair hearing, at which D.E.G.'s rights were rendered meaningless and illusory.

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

Respectfully submitted,

/s/ Tim Honse

TIM HONSE # 67424

Assistant Public Defender

Missouri State Public Defender

Trial Division – District 16

324 East 11<sup>th</sup> St.

Oak Tower, 20<sup>th</sup> Floor

Kansas City, Missouri 64106

Tel: 816.889.2099 ext. 277

Fax: 816.889.2999

Tim.honse@mspd.mo.gov

Counsel for Appellant

**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 **6,201** words, which does not exceed the 7,750 words allowed for an appellant's brief under Rule 84.04.

A true and correct copy of the attached *Appellant's Reply Brief* was sent through the e-filing system on October 30, 2019 to: Lori Fluegel, Attorney for Respondent, fluegel4@yahoo.com.

/s/ Tim Honse  
Tim Honse