



# MISSOURI: JUSTICE RATIONED

An Assessment of Access to Counsel and  
Quality of Juvenile Defense Representation  
in Delinquency Proceedings

Spring 2013

National Juvenile Defender Center  
Central Juvenile Defender Center



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Quality of Juvenile Defense Representation  
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# EXECUTIVE SUMMARY

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While Missouri stands out for its innovation in providing small, regionalized juvenile corrections programs, an effective juvenile justice system is not built solely upon the corrections options available to youth after they have navigated their way through a complex legal process. An effective juvenile justice system must encompass the foundational elements of fundamental fairness and due process. **The system must include legal advocacy and zealous representation by competent and well-trained attorneys who uphold the rights of children at all critical stages.** The 1967 United States Supreme Court decision *In re Gault* extended the principles of due process to delinquency proceedings.<sup>1</sup> It held that accused youth facing the awesome prospect of incarceration have the right to counsel.<sup>2</sup> Due process is violated when children’s legal interests are not protected.

This assessment is designed to provide policy makers and juvenile defense leaders with relevant baseline information about whether youth have timely and meaningful access to qualified counsel in delinquency proceedings, identify systemic barriers to quality representation, highlight best practices, and provide recommendations and implementation strategies for improving Missouri’s juvenile indigent defense delivery system.

The report begins with a summary of the evolution of due process and the right to counsel for youth in delinquency proceedings. It then provides an overview of this right as it pertains to youth in Missouri, and gives a snapshot of the state’s judicial system, the juvenile justice system, and the indigent defense system. A synopsis of Missouri juvenile law and the various stages of delinquency proceedings are then described to facilitate an understanding of how youth navigate through the system.

Findings made in the report are based upon the results of survey data from judges and attorneys across the state, interviews with other key stakeholders, youth and families, and information obtained from extensive site visits to local juvenile courts in a sampling of jurisdictions. Three overarching concerns were identified by the investigative team as endemic in the system, and reached across many areas of practice:

1. Missouri’s indigent defense system is in crisis and has endured at least two decades of crushing caseloads and inadequate resources to provide its mandated services. In spite of numerous reports, attempts, legislative fixes, and litigation, the system remains broken and forced to ration services. With the exception of a few counties that rigorously defend the right to counsel for juveniles, youth are discouraged from and systematically denied counsel throughout the state.
2. While Missouri is recognized for innovative facilities and an effective service delivery system for youth in the delinquency system, this does not negate the need for adequate due process protections to be put into place. There is an imbalance between acknowledging and protecting the basic rights established in *In re Gault* and adjudicating youth delinquent in order to obtain services or otherwise intervene in the lives of children and families.
3. The structure of Missouri’s juvenile court, by its very nature, creates conflicting roles. The role of the deputy juvenile officer (Missouri’s equivalent of probation officer) and legal officer (Missouri’s equivalent of prosecutor), as designed and implemented, presents challenges to the judiciary regarding the fair implementation of due process, supervision, and the requirement of impartiality. The role of the deputy juvenile officers may also contribute to high rates of youth waiving their right to counsel.

It is against this backdrop that the juvenile defense delivery system must be put into context. Ensuring due process for youth in delinquency proceedings takes low priority in the system. This denial of due process is well

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<sup>1</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>2</sup> *Id.* at 36-37.



known, and it is deeply entrenched in the culture of many juvenile courts, as evidenced by the many interviews, reports, and other sources of information reviewed as part of this assessment.

Findings also include descriptions of barriers to accessing counsel, and barriers to effective practice among attorneys defending youth at each critical stage of court proceedings. However, the investigative team also found several promising practices and programs that promote the representation of indigent youth, including some run by Missouri law schools.

The Recommendations are directed at all three branches of government and other stakeholders that impact juvenile defense practices. These Recommendations should be used as the basis for various reform initiatives to improve access to and quality of representation for children who come before the juvenile courts in Missouri. Included in the final chapter are both Core Recommendations and Implementation Strategies. The Core Recommendations, also provided directly below, focus on the principal areas in which work is needed to improve both access to counsel and quality of representation for youth in the delinquency system. The Implementation Strategies derive from these Core Recommendations and provide more detailed suggestions for achieving reform in specific areas.

## THE CORE RECOMMENDATIONS

1. **Ensure Timely Appointment of Counsel:** Youth must be appointed counsel and have access to counsel early in their case.
2. **Reduce Waiver of Counsel:** Missouri should establish a presumption against waiver of counsel; whereby, a youth must first consult with counsel before any waiver is permitted. No child should be denied counsel because of lack of resources.
3. **Afford Representation at All Critical Stages:** Missouri youth should be afforded counsel at all critical stages of the proceedings.
4. **Allocate Sufficient Resources:** Missouri must commit adequate funding to juvenile representation that allows for reasonable caseloads and effective advocacy. Juvenile defenders must also have access to ancillary services such as investigators, experts, and social workers.
5. **Strengthen Monitoring and Oversight:** The indigent defense delivery system should include a separate juvenile division to centralize leadership, innovation, and responsibility around juvenile defense. The division would strengthen positive practices and policies and would provide ongoing statewide oversight and monitoring.
6. **Establish Data Collection:** A system of data collection should be established, which can track appointment of counsel at early stages, and other pertinent data regarding juvenile representation to aid management in decision making. Best practices and innovations should be identified and promoted through data collection.
7. **Recognize Juvenile Defense as a Specialized Area of Practice:** Juvenile defense should be recognized and appreciated as a highly specialized practice. A system with ongoing training, support, and networking among defenders should be established. Attorneys should participate in comprehensive training before working in juvenile court, and they should have the opportunity for ongoing training to enhance their practice skills and knowledge of the field.
8. **Reduce Youth in the Adult System:** The age for adult criminal court jurisdiction in Missouri should be raised from 17 to 18.

9. **Adopt Standards of Practice:** Juvenile defense practice standards should be adopted and implemented statewide. Expectations regarding ethical obligations and performance of attorneys providing representation at all critical stages should be included.
10. **Address the Role of the Deputy Juvenile Officer:** The expansive role of the deputy juvenile officer should be addressed to ensure that it does not influence, directly or indirectly, the ability of youth to be appointed counsel early in the process, and to prevent statements made to these individuals from being admissible in court.



# INTRODUCTION

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In 2013, over forty-five years after the landmark Supreme Court decision affording youth the right to counsel in delinquency proceedings, youth are regularly denied access to and provision of counsel in many states. The National Juvenile Defender Center, in partnership with our regional juvenile defender centers and other key stakeholders, has embarked on a 50 state strategy to assess access to and quality of juvenile defense afforded to youth in conflict with the law.

Several consistent themes emerge from these state assessments, including: an array of systemic barriers that prohibit youth from receiving timely access to qualified juvenile defense counsel; juvenile defense is not recognized or acknowledged as a specialized legal practice; and juvenile defense is significantly under-resourced. While all juvenile justice professionals want to ensure the best outcomes for young people and for society, the U.S. Supreme Court clearly noted in *In re Gault* that, the “absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment,” and that “Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”<sup>3</sup> Since the *Gault* decision, juvenile indigent defense systems have faltered and failed, leaving far too many children defenseless in courts of law across the country.

Underscoring the importance of a specialized juvenile defense bar, the Supreme Court noted in its 2010 decision in *Graham v. Florida* that there are, “...special difficulties encountered by counsel in juvenile representation. As some *amici* note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.”<sup>4</sup> Juvenile defenders require specialized knowledge and understanding of adolescence; the skills needed to address unique hearings such as detention, transfer, and disposition; and the capacity to assist and engage their youthful clients in effective decision-making toward their defense if they are to overcome this “significant disadvantage.”

While Missouri stands out for its innovation in providing small, regionalized juvenile correctional programs, an effective juvenile justice system is not built solely upon the corrections options available to youth after they have navigated their way through a complex legal process. The juvenile justice system must encompass the foundational elements of fundamental fairness and due process. It must include legal advocacy and zealous representation by competent and well-trained attorneys who uphold the rights of children at all critical stages. This piece of Missouri’s juvenile justice system has been long neglected and patently misunderstood.

Missouri’s indigent defense system has reached its tipping point. In a 2009 assessment (the third since 1993), a national consulting group on indigent defense systems found that the Missouri State Public Defender (MSPD) was the lowest funded state public defender system in the country and was on “the brink of collapse.”<sup>5</sup> The caseload crisis, for which there has been no relief in two decades, has “placed MSPD’s attorneys in the cruelest of positions, one in which they are virtually guaranteed to fail, despite efforts that could fairly be described as heroic.”<sup>6</sup> In spite of efforts to reach out to all three branches of government, the MSPD has failed to obtain sufficient funding to provide constitutionally required defense services. Since 2008, MSPD has had administrative rules that establish maximum caseloads for each office and authorize the office directors to place an office on “limited

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<sup>3</sup> *Id.* at 18.

<sup>4</sup> *Graham v. Florida*, 130 S.Ct. 2011, 2032 (2010).

<sup>5</sup> ROBERT L. SPANGENBERG, DAVID J. NEWHOUSE, & JON B. GOULD, THE SPANGENBERG GROUP & THE CENTER FOR LAW, JUSTICE AND SOCIETY AT GEORGE MASON UNIVERSITY, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM: FINAL REPORT 64 (Oct. 2009) [hereinafter ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM]. The Spangenberg Group is no longer in existence.

<sup>6</sup> ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, *supra* note 5, at 65.

availability” status to allow more time for serious cases.<sup>7</sup> Ongoing writ litigation in the Missouri Supreme Court has determined the reasonableness of the caseload protocol; however, it did not remedy the underlying problems of the broken and underfunded system.<sup>8</sup>

Little to no attention has been paid to what this crisis means for youth in the delinquency system. In fact, juvenile cases make up only about 2.36% of the cases represented by the MSPD.<sup>9</sup> In the 2009 assessment of the MSPD the question of juvenile representation was left unanswered, “Whether these low rates reflect a deliberate decision of the MSPD or instead are representative of a system in which indigent clients do not seek the services of a public defender even when they are eligible, the results are the same: an already overburdened MSPD is not serving potential clients....Indeed, we are deeply concerned by the few juvenile cases being handled by the MSPD, which appears remarkably low and for which we have been unable to determine an immediate cause. This question merits further investigation and serious scrutiny.”<sup>10</sup>

The breaking point is here. The time for serious scrutiny is now. This report is part of a national strategy to review state juvenile indigent defense delivery systems and evaluate how effectively attorneys in juvenile court are fulfilling their constitutional and statutory obligations to their clients. It is important to note that the findings made in this report are based on information obtained from a number of sources, including existing data, reports, prior assessments, online surveys, and on-site investigative interviews, and observations. The information presented in this report is in aggregate form and does not reflect the practices in every juvenile court jurisdiction or public defender office. These are trends identified in Missouri, which are reflective of large scale systemic issues, as well as some best practices for service delivery. The intent of this report is to highlight the challenges faced by lawyers, judges, and other key stakeholders in ensuring access to justice for children and to offer recommendations to build upon their dedication and capacity.

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“The problem is not an abstract one. Its story is not told in statistics and pie charts, but in short-cuts that lead to wrongful convictions, incarcerations for weeks or even months with no access to counsel, attorney disciplinary proceedings and malpractice lawsuits with the state of Missouri on the hook. Triage has replaced justice in Missouri’s courts. The breaking point is no longer coming. It is here.”

*Cathy R. Kelly, Missouri State  
Public Defender*

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## I. PURPOSE OF ASSESSMENT

Juvenile indigent defense assessments are comprehensive in scope and designed to furnish policy makers, indigent defense leaders, and other key stakeholders with baseline qualitative and systemic information upon which they can make informed choices regarding the nature and structure of their state juvenile indigent defense system. The assessment process investigates and presents a complete picture of the strengths and weaknesses of a juvenile defense system with tailored recommendations crafted to address each state’s distinctive characteristics. Assessments are designed to help decision-makers focus on key trouble spots and highlight best practices.

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<sup>7</sup> STATE OF MISSOURI PUBLIC DEFENDER COMMISSION, FISCAL YEAR 2012 ANNUAL REPORT: THE RIGHT TO COUNSEL AND THE STATE PUBLIC DEFENDER SYSTEM IN MISSOURI 2 (2012), available at <http://www.publicdefender.mo.gov/about/FY2012AnnualReport2.pdf> [hereinafter FISCAL YEAR 2012 ANNUAL REPORT].

<sup>8</sup> *Id.* at 5; see also *State ex. rel. Missouri Public Defender Commission v. Waters*, 370 S.W.3d 592, 598 (Mo. 2012).

<sup>9</sup> FISCAL YEAR 2012 ANNUAL REPORT, *supra* note 7, at 8.

<sup>10</sup> ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, *supra* note 5, at 58.

## II. METHODOLOGY

The National Juvenile Defender Center (NJDC) relied upon its well-tested and highly structured methodology to conduct this juvenile indigent defense assessment. NJDC, in partnership with our regional juvenile defender centers and other key stakeholders, have completed state assessments in 21 states, including Missouri. Until this process began, issues, policies, and funding decisions specific to juvenile defense had never been fully understood or studied separately from the adult system. Throughout the assessment process it has become clear that the adult criminal justice model has not served juvenile courts or its clients well.

In Missouri, the State Public Defender invited NJDC and its partner, the Central Juvenile Defender Center (CJDC), to conduct an assessment of juvenile indigent defense to fill the knowledge gap and educate lawmakers and others about access to counsel for youth in the state. The Chief Justice of Missouri's Supreme Court issued a letter to juvenile court judges across the state asking for their cooperation in meeting with assessment investigators and providing access to juvenile court hearings. Other stakeholders within Missouri's juvenile justice system were engaged by NJDC and CJDC staff and were supportive in the statewide assessment process as well.

The assessment began with repeated visits to the state for meetings with key stakeholders, policymakers, advocates, and defenders. NJDC staff prepared a comprehensive briefing memorandum with general information about Missouri's geography, demographics, economy, judicial branch, and politics, and specific information about Missouri's juvenile justice system including the juvenile code, arrest statistics, disproportionate minority contact, the right to counsel in juvenile delinquency proceedings, transfer to adult court, and the adult indigent defense system.

With advice and input from on-the-ground experts, NJDC and CJDC selected a sample of counties and judicial circuits for in-depth study. The selected sample includes sites that handle approximately 50% of the youth who go through Missouri's juvenile delinquency courts and comprise over 50% of the state's total population. The sites were selected based on a thorough analysis of state demographics, population rates, juvenile arrest data, disposition rates, and the location of public defender offices, juvenile courts, detention centers, and other youth facilities. The goal in selecting these counties was to ensure that the information gathered would be representative of the delivery of juvenile defense services throughout the state, as practices vary significantly across jurisdictions. The study sample includes urban, suburban, and rural areas, and reflects the geographic and cultural diversity of the state. To ensure confidentiality, the names of the jurisdictions visited and those interviewed remain anonymous.

An investigative team of experts in juvenile defense were then recruited by NJDC and CJDC to conduct extensive visits in the selected sites. The investigative team included current and former public defenders, private practitioners, academics, juvenile defense policy experts, and juvenile justice advocates. Team members all possess extensive knowledge of the role of defense counsel in juvenile court. Investigative teams were trained and then fanned out across the state to conduct court observations and confidential meetings and interviews with key justice system personnel. The teams also visited county detention centers and state-run commitment facilities where they interviewed administrators and staff. Each team member used standardized interview protocols developed by NJDC and specifically tailored to Missouri's juvenile court system to guide their investigative activities. Upon completion of each site visit, investigators debriefed with NJDC staff and submitted field notes derived from in-depth interviews and court observations at each site. Investigators' field notes were mined for prominent themes, analyzed and incorporated into the assessment findings.

Additionally, with the assistance of the Office of State Courts, a self-report survey was sent to all juvenile court judges handling delinquency and status cases from the 45 judicial circuits in Missouri, from which 19 surveys were completed and returned. Self-report surveys were also conducted with the 34 public defender trial offices representing Missouri's 114 counties and the City of St. Louis. Thirty offices completed the survey about juvenile practices within their jurisdictions. Stakeholders and NJDC staff members compiled data from both judges and defenders that was used as one source of information about access to counsel, quality of representation issues, and systemic barriers.



# CHAPTER ONE

## Due Process and the Role of Counsel in Delinquency Proceedings

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### I. THE EVOLUTION OF DUE PROCESS AND THE RIGHT TO COUNSEL IN DELINQUENCY PROCEEDINGS

On July 1, 1899, Illinois created the first juvenile court in the United States.<sup>11</sup> Prior to the development of this court, minors accused of crime were treated as adults. The juvenile court movement intended to remove children from the harshness of criminal court and adult prisons and improve their chances of rehabilitation.<sup>12</sup> The new juvenile courts involved only cursory proceedings, utilizing judicial economy and a *parens patriae* approach to justice with no regard for due process or protection of children's legal rights. No defense attorneys were involved. Social workers and others recommended "the best disposition," and courts were allowed unfettered discretion to decide what was best for wayward youth.<sup>13</sup> Children were placed in child-only facilities, training schools, and private foster homes.<sup>14</sup> Soon thereafter, most other states followed suit.<sup>15</sup>

For many years after their creation, juvenile courts survived constitutional challenges.<sup>16</sup> States denied children many of the standard procedural rights, including right to counsel, right to notice of charges against them, right to a jury trial, and right against self-incrimination.<sup>17</sup> Children were often convicted by a mere preponderance of the evidence and courts regularly denied basic due process rights.<sup>18</sup>

In *In re Gault*, the Supreme Court extended fundamental elements of due process to juveniles in delinquency proceedings.<sup>19</sup> The case specifically held that juveniles have the right to counsel under the Due Process Clause of the 14th Amendment.<sup>20</sup> The Court stated that youth in juvenile court were getting "the worst of both worlds."<sup>21</sup> Youth received "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>22</sup>

In *Gault*, the Court also explained the dangers of substituting other individuals to serve as the child's advocate.<sup>23</sup> "The probation officer cannot act as counsel for the child. His role...is as arresting officer and witness against the child. Nor can the judge represent the child."<sup>24</sup> No matter how many court personnel looked after a child's best

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<sup>11</sup> HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, 93-95 (2006) [hereinafter OJJDP 2006 NATIONAL REPORT].

<sup>12</sup> *Id.* at 95-96.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 20-21 (2012).

<sup>15</sup> OJJDP 2006 NATIONAL REPORT, *supra* note 11, at 94.

<sup>16</sup> Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 794-95 (1966), cited in *In re Gault*, 387 U.S. 1, 11 (1967).

<sup>17</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 12 (2005) [hereinafter JUVENILE DELINQUENCY GUIDELINES]; COMM'N ON BEHAVIORAL & SOCIAL SCIS. AND EDUC., JUVENILE CRIME, JUVENILE JUSTICE 158 (2001).

<sup>18</sup> *Gault*, 387 U.S. at 17.

<sup>19</sup> See generally *Gault*, 387 U.S. 1.

<sup>20</sup> *Id.* at 20.

<sup>21</sup> *Id.* at 30.

<sup>22</sup> *Id.* at 19 n.23 (internal quotations and citation omitted).

<sup>23</sup> *Id.* at 36.

<sup>24</sup> *Id.*



interests, any child facing “the awesome prospect of incarceration” needed “the guiding hand of counsel at every step in the proceedings against him.”<sup>25</sup>

*Gault* also extended the right to notice of charges, the privilege against self-incrimination, and the right to confront and cross-examine adverse witnesses to juveniles.<sup>26</sup> In cases following *Gault*, the Court also held that proof beyond a reasonable doubt is required to convict juveniles in delinquency proceedings and that double jeopardy bars multiple prosecutions of a juvenile for the same allegations.<sup>27</sup> The Court reiterated that “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court[.]”<sup>28</sup>

Following these legal changes, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDP) in 1974.<sup>29</sup> The JJDP created statutory mechanisms to protect the rights and welfare of youth involved in the juvenile justice system, and required the National Advisory Committee on Juvenile Justice and Delinquency Prevention to develop national juvenile justice standards and guidelines.<sup>30</sup> The Committee published a manual of standards in 1980 recommending that counsel represent children at early stages of delinquency proceedings and that many status offenses should be decriminalized.<sup>31</sup>

In 1992, Congress reauthorized the JJDP and reaffirmed the importance of the role of defense counsel in delinquency proceedings.<sup>32</sup> It specifically noted the deficiencies of prosecutorial and indigent defense delivery systems.<sup>33</sup> Congress recognized the need for more information about the functioning of delinquency courts across the country and asked the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) to address the issue.<sup>34</sup> The JJDP was last reauthorized in 2002.<sup>35</sup>

At the same time, leading non-governmental organizations also acknowledged the necessity of protections for youth in delinquency courts. Beginning in 1971, the Institute for Judicial Administration (IJA) and the American Bar Association (ABA) produced 23 volumes of juvenile justice standards.<sup>36</sup> The standards were designed to establish a juvenile justice system of lasting excellence that would not fluctuate in response to transitory headlines or controversies.

Despite these standards, federal law, the array of Supreme Court cases, and numerous reform efforts, states are still struggling to effectively implement basic due process rights for juveniles almost half a century after *In re Gault*. Where and to what extent Missouri has implemented these due process guarantees for juveniles has been largely unknown until now.

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<sup>25</sup> *Id.* (internal quotations and citation omitted).

<sup>26</sup> See *In re Winship*, 397 U.S. 358, 377-78 (1970) (describing rights affirmed in *Gault*).

<sup>27</sup> See *id.* and *Breed v. Jones*, 421 U.S. 519 (1975).

<sup>28</sup> *Winship*, 397 U.S. at 365-66.

<sup>29</sup> Pub. L. No. 93-415 (1974) (codified as amended at 42 U.S.C. §§5601).

<sup>30</sup> NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, Standards for the Administration of Juvenile Justice, §3.132 Representation by Counsel –for the Juvenile (1980).

<sup>31</sup> *Id.*

<sup>32</sup> Juvenile Justice and Delinquency Prevention Act Amendments of 1992, Pub. L. No. 102-586, 106 Stat. 4982 (1992).

<sup>33</sup> See *id.*

<sup>34</sup> See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP ANNUAL REPORT 2002 30 (2002), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/202038.pdf>.

<sup>35</sup> See 42 U.S.C. § 5601-5681; see also 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 and Act 4 Juvenile Justice, <http://www.act4jj.org/> (last visited 2/13/2013).

<sup>36</sup> See Institute for Judicial Administration & American Bar Association, *Juvenile Justice Standards*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/criminal\\_justice/pages/JuvenileJusticeStandards.html](http://www.americanbar.org/groups/criminal_justice/pages/JuvenileJusticeStandards.html). For a description of the project see INST. FOR JUDICIAL ADMIN. & AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH xvi-xviii (Robert E. Shepherd, Jr., ed. 1996) [hereinafter IJA-ABA JUVENILE JUSTICE STANDARDS].

## II. THE ROLE OF COUNSEL IN DELINQUENCY PROCEEDINGS

As in all states, Missouri attorneys representing children in the juvenile delinquency system must be prepared to assist clients to “cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the client] ... has a defense and to prepare and submit it.”<sup>37</sup> The U.S. Supreme Court reaffirmed these principles when it declared, “[w]e made clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts,” and held that juveniles were constitutionally entitled to proof “beyond a reasonable doubt” during an adjudication hearing.<sup>38</sup>

Affording the right to counsel in delinquency proceedings is critical; yet, it is equally important to recognize that juvenile defense is a specialized legal practice requiring distinct training and skills for the practitioner.<sup>39</sup> Effective juvenile defense demands all of the training and knowledge of criminal defense practice in addition to specific expertise in adolescent development and juvenile justice. It is essential for a public defense delivery system to appreciate that children and adolescents differ from adults in significant ways. For example, children do not possess the same cognitive, emotional, or behavioral capacities as adults. Thus, juvenile defenders must create legal arguments addressing juvenile culpability and rehabilitation.<sup>40</sup> Juvenile lawyers also must learn about and master the elements unique to juvenile proceedings like detention hearings, disposition hearings, certification hearings, and juvenile competence proceedings.

Juvenile defense lawyers face additional challenges in establishing effective relationships with their young clients. Getting arrested and/or detained is a traumatizing and frightening experience. This holds especially true for children and adolescents. By the time youth meet their attorneys, they may have been questioned by many adults—including police officers, deputy juvenile officers, and family members. A youth may be distrustful of additional adult questioning and may not even be able to distinguish his or her defender from all the other adults in the system. Thus, at the start of a case, lawyers must work hard to establish rapport with their client. Defenders must take the time to explain that their job is to help defend their clients against the charges and represent the client’s interests.<sup>41</sup> In addition to asking for information, it is vital for counsel to take time to discuss what is likely to happen in court and to help the client understand the nature of the attorney-client relationship.<sup>42</sup>

Developing a good working relationship with youth in highly stressful circumstances raises unique challenges and requires special awareness and responses by counsel. An attorney’s ability to both perceive and appropriately address a young client’s fears and anxieties is central to their ability to work effectively with the client and to ensure high-quality defense. Youth in the delinquency system often have disabilities that affect critical aspects of their functioning, especially their ability to communicate and comprehend.<sup>43</sup> Juvenile defenders must be alert to the special needs of each client and also learn of the client’s strengths—be they familial, personal, or potential—and help integrate those strengths into the theory of the case, any plea bargaining, and the disposition planning.<sup>44</sup>

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<sup>37</sup> *In re Gault*, 387 U.S. 1, 36 (1967).

<sup>38</sup> *In re Winship*, 397 U.S. 358, 365-66 (1970).

<sup>39</sup> NATIONAL JUVENILE DEFENDER CENTER, NATIONAL JUVENILE DEFENSE STANDARDS, § 1.3: SPECIALIZED TRAINING REQUIREMENTS FOR JUVENILE DEFENSE (2012) [hereinafter NAT’L JUV. DEF. STDS.].

<sup>40</sup> NATIONAL JUVENILE DEFENDER CENTER & NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS 2 (2d ed. 2008).

<sup>41</sup> NAT’L JUV. DEF. STDS., *supra* note 39, at § 2.1: ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT.

<sup>42</sup> NAT’L JUV. DEF. STDS., *supra* note 39, at § 2.2: EXPLAIN THE ATTORNEY-CLIENT RELATIONSHIP.

<sup>43</sup> NAT’L JUV. DEF. STDS., *supra* note 39, at § 2.6: OVERCOMING BARRIERS TO EFFECTIVE COMMUNICATION WITH THE CLIENT.

<sup>44</sup> NAT’L JUV. DEF. STDS., *supra* note 39, at § 2.1 cmt.: ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT.

The defense lawyer plays a critical role for youth in delinquency court by protecting clients from unfairness, promoting accuracy in decision making, providing alternatives for decision makers, and monitoring institutional treatment, aftercare, and re-entry. Throughout the entire court process the juvenile defender is the individual responsible for bringing the child's perspective and interests before the court.

### **III. CONCLUSION**

The jurisprudence delineating juvenile rights in the delinquency system has long recognized the importance of due process guarantees, and the essential role that counsel plays in these proceedings at all critical stages. Codes of professional conduct, administrative orders, case law, legal scholarship, and standards of practice have further defined the role of juvenile defense counsel, and the specialized nature of juvenile defense practice.

# CHAPTER TWO

## Legal Representation of Youth in Context

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### I. THE RIGHT TO COUNSEL IN MISSOURI

Missouri incorporates the constitutional requirements of due process and the right to counsel for juveniles accused of crimes in its statutory chapter on Juvenile Courts, which state that Missouri children are “entitled to be represented by counsel in all proceedings.”<sup>45</sup> At a minimum, this means children must have an attorney representing their interests from the detention hearing through final disposition.

Missouri Supreme Court Rules also provide for a right to counsel at informal adjustment conferences. The Rules state that “the juvenile officer<sup>46</sup> shall inform [the juvenile and guardian] at the commencement of the conference of the right to counsel and the right of the juvenile to remain silent.”<sup>47</sup> If the juvenile or the guardian requests counsel, the juvenile officer must adjourn the informal conference to allow the juvenile to consult with counsel.<sup>48</sup>

Missouri statute and Court Rules both require the appointment of counsel when necessary to assure full and fair hearings,<sup>49</sup> when a juvenile requests appointment prior to filing of a petition and the requesting child is indigent,<sup>50</sup> or in a proceeding when there appears to the court to be a conflict of interest between the juvenile and his or her parents, guardians, or custodians.<sup>51</sup> According to Missouri Supreme Court Rules, the attorney appointed to a child as guardian *ad litem* may also be appointed as counsel for the juvenile in a delinquency matter unless a full and fair hearing (as determined by the court) requires separate counsel for the expressed interests of the child.<sup>52</sup>

After a petition has been filed, a child may only waive his right to counsel with the approval of the court.<sup>53</sup> A court analyzing a waiver must do so in the context of the juvenile’s age, experience, education, background, intelligence, and capacity to understand the warnings received.<sup>54</sup> If a child chooses to waive his or her right to counsel, the child may undo the waiver at any stage of the proceeding.

By Missouri statute, an attorney is relieved of his or her duties once a final disposition has been ordered by the court.<sup>55</sup> Counsel is to serve for the appeal as well, but has no further obligation if no appeal is taken.<sup>56</sup>

### II. SYSTEM STRUCTURES IN MISSOURI

#### A. Structure of Missouri’s Judicial System

The court system in Missouri includes three levels; the Missouri Supreme Court, three regional Courts of Appeal, and 45 circuit courts. The Missouri Supreme Court is the state’s highest court and has

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<sup>45</sup> MO. REV. STAT. § 211.211.1.

<sup>46</sup> The juvenile officer in Missouri is the equivalent of a probation officer in other states.

<sup>47</sup> MO. SUP. CT. R. 112.03, 115.01.

<sup>48</sup> R. 112.03.

<sup>49</sup> MO. REV. STAT. § 211.211.3, MO. SUP. CT. R. 115.02(a).

<sup>50</sup> MO. REV. STAT. § 211.211.2.

<sup>51</sup> § 211.211.7.

<sup>52</sup> MO. SUP. CT. R. 115.02 cmt.

<sup>53</sup> MO. REV. STAT. § 211.211.8.

<sup>54</sup> *In re D.L.*, 999 S.W.2d 291, 294 (Mo. Ct. App. 1999) citing *In re A.D.R.* 603 S.W.2d 575, 584 (Mo. 1980).

<sup>55</sup> MO. REV. STAT. § 211.211.6.

<sup>56</sup> *Id.*

exclusive jurisdiction over certain cases<sup>57</sup> and certain cases can be transferred to the Supreme Court at the Court's discretion.<sup>58</sup>

Below the Missouri Supreme Court in the state court hierarchy is the Missouri Court of Appeals. The Court of Appeals is divided into three regional districts—the Eastern District, the Western District, and the Southern District. The Court of Appeals handles all appeals from the circuit courts.<sup>59</sup> For the vast majority of appeals, the Court of Appeals' decision is final; unless the appeal relates to an issue within the Missouri Supreme Court's authority or the Missouri Supreme Court uses its discretion to accept the appeal.

The lowest level of courts in Missouri is the trial or circuit court. Missouri's counties and the city of St. Louis are divided into 45 judicial circuits.<sup>60</sup> Every county and the city of St. Louis are included in a circuit, with some circuits comprised of multiple counties. The circuit courts are typically located in the county seat, but there may be additional locations.<sup>61</sup> Missouri circuit courts have various divisions, including associate circuit, small claims, municipal, family, probate, criminal, and juvenile courts.<sup>62</sup>

The juvenile and family courts are specialized court divisions within the circuit courts. Missouri law mandates that all judicial circuits—except in jurisdictions that have a family court pursuant to statute—must designate by local court rule the division(s) of the circuit court to be made into juvenile divisions, and the classes of cases that will be assigned to each.<sup>63</sup> Some Missouri circuit courts also have specialized divisions including teen courts, drug courts, and truancy courts that divert youth from regular juvenile court proceedings.<sup>64</sup>

The Office of Court Services Administrator (OSCA) is an arm of the courts and conducts statistical analyses for annual reports in order to provide the Missouri juvenile and family court division with data on the number of status, law, and abuse-neglect referrals processed by Missouri's juvenile court divisions.<sup>65</sup>

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<sup>57</sup> MO. CONST. art. V § 3 (Missouri Supreme Court has authority to review: (1) the validity of a United States Statute or treaty; (2) the validity of a Missouri statute or constitutional provision; (3) the state's revenue laws; (4) challenges to a statewide elected official's right to hold office; and, (5) imposition of the death penalty.)

<sup>58</sup> MO. CONST. art. V § 10.

<sup>59</sup> MO. CONST. art. V § 3.

<sup>60</sup> *Circuit Courts of Missouri*, YOUR MISSOURI COURTS: THE JUDICIAL BRANCH OF STATE GOVERNMENT, <http://www.courts.mo.gov/page.jsp?id=321> (last visited 2/15/2013).

<sup>61</sup> *Id.*

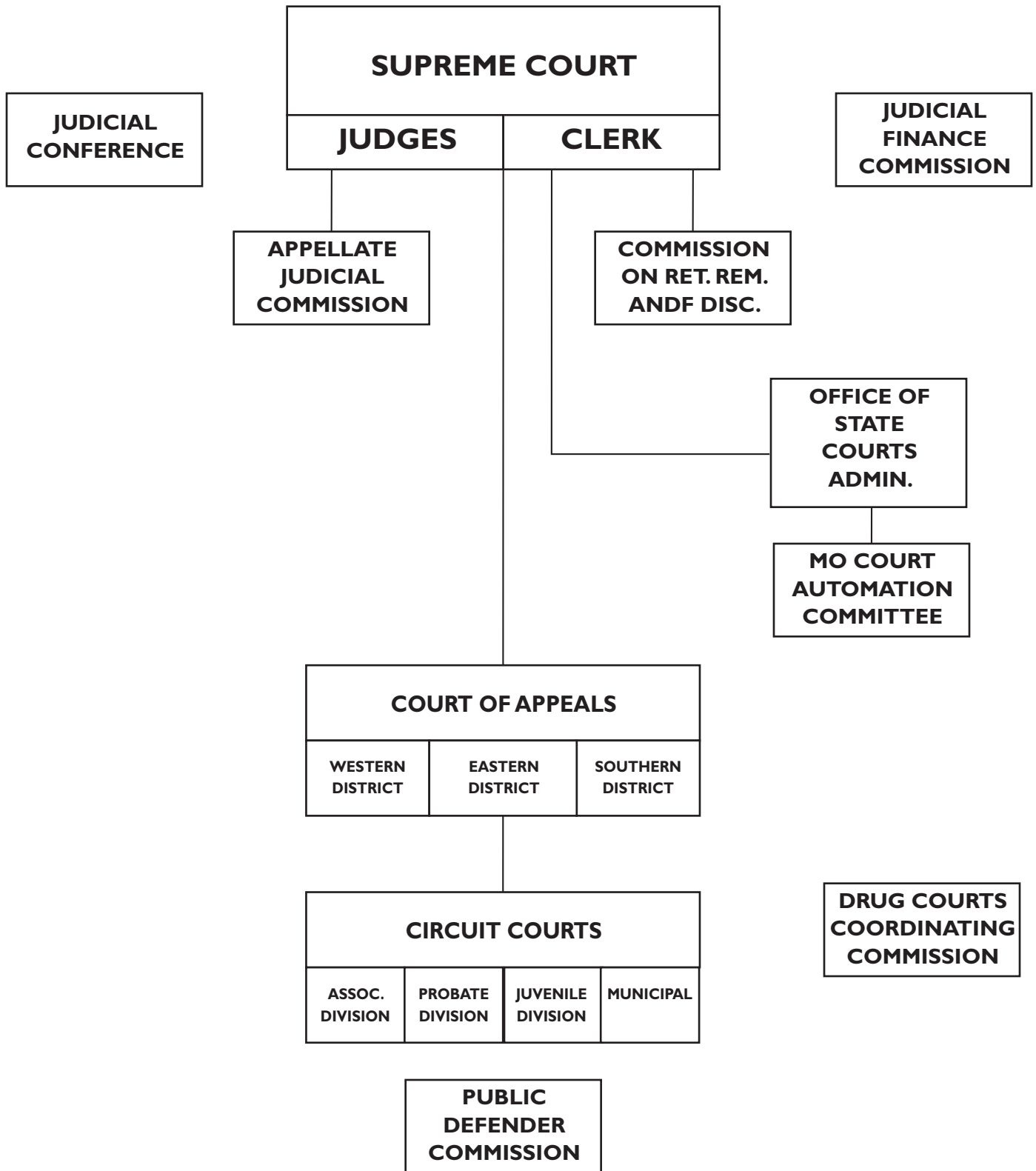
<sup>62</sup> *Id.*

<sup>63</sup> MO. REV. STAT. § 487.010.1.

<sup>64</sup> *About Your Courts*, YOUR MISSOURI COURTS: THE JUDICIAL BRANCH OF STATE GOVERNMENT, <http://www.courts.mo.gov/page.jsp?id=258> (last visited 2/13/2013).

<sup>65</sup> *See generally* OFFICE OF STATE COURT ADMINISTRATOR, MISSOURI JUVENILE AND FAMILY DIVISION ANNUAL REPORT (2011) [hereinafter MJFD 2011 REPORT].

# ORGANIZATIONAL CHART OF MISSOURI'S JUDICIAL BRANCH



## B. Structure Of Missouri's Juvenile Justice System

### 1. Juvenile and Family Courts

The Missouri juvenile court was established in the early 1900s but did not have its own procedures and authority until the enactment of the juvenile code in 1957. In 1993 and 1995 a series of extensive amendments to the Juvenile Code impacted waiver, confidentiality, determinate and dual sentencing, juvenile and family court funding, structure, personnel, and programs.<sup>66</sup> In 1993, the Missouri legislature, following the national one-family/one-judge trend to addressing family issues in the legal system, enacted a new law that created a designated family court in six judicial circuits.<sup>67</sup> In 1995, the amended Juvenile Crime Bill expanded both the age range of children that could be placed into the Division of Youth Services (DYS) custody and the services DYS could provide.<sup>68</sup> The Bill also increased information sharing across agencies, reduced confidentiality of records, and allowed for dual jurisdiction and determinate sentencing.<sup>69</sup>

The 45 circuit courts encompass Missouri's 115 counties and the city of St. Louis.<sup>70</sup> Missouri's juvenile and family courts are specialized court divisions within the circuit courts. At a minimum, each of Missouri's 45 judicial circuits has a judge who oversees the juvenile office in charge of all juvenile court cases. In turn, each juvenile office is headed by a lead juvenile officer who supervises key system players such as legal officers as well as deputy juvenile officers (DJOs). Legal officers are the equivalent of prosecuting attorneys and DJOs are the equivalent of probation officers in other states. Their roles are described in greater detail below.

#### a. Judges and Commissioners

Circuit level judges are either elected or appointed by a non-partisan commission in Missouri. The judges rotate through different divisions within their circuit. The presiding circuit judge or administrative judge of the family court is ultimately responsible for overseeing family court personnel, such as legal officers and DJOs.

#### b. Legal Officers

Legal officers have many of the same roles and responsibilities as prosecutors or state's attorneys in other states. However, legal officers also represent the legal interests of the DJOs in court. Many of the legal officers bear the title, "Attorney for the Juvenile Officer." In essence, this means that the prosecutor represents the probation officers in court. Therefore, if the allegations of the petition are denied, the legal officer (who is counsel for the juvenile officer) elicits evidence from the DJO at a hearing on the petition.<sup>71</sup> All parties at the hearing are allowed to put on witnesses, cross-examine, and testify.<sup>72</sup> Legal officers defend the petition based on the evidence gathered.

#### c. Deputy Juvenile Officers (DJOs)

DJOs work for the judicial circuit's juvenile office and are the individuals primarily responsible for processing delinquency and status offense cases through Missouri's juvenile and family courts. DJOs are vested with all the

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<sup>66</sup> See Mark Schlinkmann & Kim Bell, *Carnahan Signs Juvenile Crime Bill: Allows Trials in Serious Cases*, ST. LOUIS POST-DISPATCH, June 13, 1995, at 1B.

<sup>67</sup> MO. REV. STAT. § 487.010.

<sup>68</sup> MISSOURI JUVENILE JUSTICE ADVISORY GROUP, COMPREHENSIVE 3-YEAR PLAN COMPONENTS FOR FISCAL YEARS 2009-2011 6 (2009).

<sup>69</sup> *Id.* at 6-7.

<sup>70</sup> See *About Your Courts*, *supra* note 64.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*



power and authority of sheriffs to make arrests; however, DJOs must allow interrogations to be conducted by law enforcement officers.<sup>73</sup> During an interrogation, the DJO is responsible for both informing the juvenile of his or her rights and protecting the interests of the juvenile.<sup>74</sup> This role—acting as both an arm of the prosecution and a protector of due process rights—may be unique to Missouri DJOs.

The DJO also plays a unique role in the screening and intake of delinquency cases. DJOs are responsible for investigating referrals, determining legal sufficiency, and writing and filing petitions. DJOs determine which cases should be handled formally and forwarded to the juvenile court for processing, and which can be disposed of informally, either through dismissal or informal supervision.<sup>75</sup>

DJOs also administer more traditional juvenile court probation services, which include predisposition investigations, dispositional recommendations, and probation supervision. Depending on the circumstances and the results of risk/needs assessments, DJOs may recommend a youth be placed in out-of-home services such as a private licensed residential care facility, or with a member of the child's family. They may also recommend that a child be committed to DYS and/or Missouri's Children's Division (Missouri's child welfare agency).

#### d. Detention Facilities

By the end of 2011, Missouri had 19 juvenile detention facilities run by the circuit courts.<sup>76</sup> Not all judicial circuits have a juvenile detention facility, so those that do not enter into an agreement with juvenile detention facilities to detain youth if necessary. In 2011, Missouri's detention facilities admitted at least 6,953 juveniles.<sup>77</sup>

Detention reform has been a part of the Missouri juvenile justice agenda since 2006 when several counties began to work with the Annie E. Casey Foundation Juvenile Detention Alternatives Initiative (JDAI). There are now 18 JDAI sites in Missouri, each focusing on reducing the unnecessary detention of youth in the delinquency system.<sup>78</sup> Missouri has committed to state expansion of JDAI and developed a JDAI replication team to oversee new sites.<sup>79</sup> To support these reform measures, the Missouri Supreme Court has issued orders mandating a statewide risk-assessment instrument and the downsizing of multiple detention facilities.<sup>80</sup>

### 2. Missouri Division of Youth Services (DYS)

DYS is the state agency responsible for the care and treatment of delinquent youth committed to its custody by the state courts.<sup>81</sup> DYS is a subsection of the Missouri Department of Social Services.<sup>82</sup>

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<sup>73</sup> MO. SUP. CT. R. 111.01; *see also* Juvenile Officer Handbook, Missouri Courts (June 13, 2012), <http://www.courts.mo.gov/hosted/resourcecenter/JO%20Published%20April%2019.2011/whnjs.htm>.

<sup>74</sup> *Id.*

<sup>75</sup> *See* Mary Kay O'Malley, *The Juvenile Office*, in MISSOURI DESKBOOK ON JUVENILE LAW I-I, 1-9 (2007).

<sup>76</sup> MJFD 2011 REPORT, *supra* note 65, at 29.

<sup>77</sup> *Id.* at 30.

<sup>78</sup> JDAI HelpDesk, JDAI Sites, <http://www.jdaihelpdesk.org/SitePages/jdai-sites.aspx> (last visited 2/15/2013).

<sup>79</sup> The Annie E. Casey Foundation, *Missouri Taking JDAI to Scale*, JDAI NEWS (Summer 2011), *available at* <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/Resources/JDAI/2011/Summer%202011/Feature%20Story/Missouri%20taking%20JDAI%20to%20scale.aspx>; Press Release, Circuit Court Budget Committee, Missouri Courts Announce Plan to Implement Smarter Use of Juvenile Detention Alternatives, Facilities (April 12, 2011), *available at* <http://www.courts.mo.gov/pressrel.nsf/3966cdf827e0d8d7862565ec00679fb1/03e3a1a346bf45018625786f0783615?OpenDocument> [hereinafter Circuit Court Budget Committee Press Release].

<sup>80</sup> Circuit Court Budget Committee Press Release, *supra* note 79.

<sup>81</sup> *See* MO. REV. STAT. § 219.016.1.; *see also* Division of Youth Services, Missouri Department of Social Services (2009), *available at* <http://www.dss.mo.gov/dys/>.

<sup>82</sup> *See* MO. REV. STAT. § 660.010.7.



DYS operates under a unique model of corrections that is known nationally as the “Missouri Model.”<sup>83</sup> This model emphasizes rehabilitation in small regional facilities with therapeutic environments rather than the traditional model of larger, more punitive adult-style corrections facilities.<sup>84</sup> The “Missouri Model” has been looked at and replicated by a number of other states seeking alternatives to their adult-style corrections models.

DYS runs 32 juvenile residential facilities throughout Missouri,<sup>85</sup> and is responsible for juveniles placed into the custody of the state by the court. Therefore, DYS has substantial control over the confinement of youth.<sup>86</sup> Juveniles in Missouri are subject to indeterminate sentencing.<sup>87</sup> Once placed in DYS custody, the agency determines whether a juvenile will be placed in a residential facility, how long to hold a juvenile, when a juvenile will be released, and how long he or she will be supervised after release.<sup>88</sup> Although judges occasionally impose a minimum period of custody, DYS usually controls release.

### C. Structure of Missouri’s Indigent Defense System

The Missouri State Public Defender System (MSPD) provides representation for both adult and juvenile cases.<sup>89</sup> The mission of MSPD is:

To provide high quality, zealous advocacy for indigent people who are accused of a crime in the State of Missouri. The lawyers, administrative staff, and support staff will ensure that this advocacy is not compromised. To provide this uncompromised advocacy, the Defender System will supply each client with a high-quality, competent, ardent defense team at every stage of the process in which public defenders are necessary.<sup>90</sup>

MSPD encompasses 33 district offices with three additional offices located in St. Louis, Kansas City, and Columbia that handle capital and appellate cases. The Public Defender Commission—which governs MSPD—consists of seven individuals appointed by the governor. These commissioners also are responsible for hiring MSPD’s Director.

In Missouri, juveniles have a right to counsel for all stages of the proceedings.<sup>91</sup> Youth can either hire their own attorney or ask that one be appointed. Missouri law entitles every party in juvenile courts to be represented by counsel.<sup>92</sup> By statute, the court must appoint counsel for a child prior to the filing of a petition if a request is made and the court finds that the child is the subject of a juvenile court proceeding. The court must also find that the child making the request is indigent.<sup>93</sup>

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<sup>83</sup> See THE ANNIE E. CASEY FOUNDATION, *THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS 2* (2010) [hereinafter *MISSOURI MODEL*].

<sup>84</sup> *Id.* at 4.

<sup>85</sup> Missouri Department of Social Services, Division of Youth Services, *DYS Frequently Asked Questions: General Operations*, <http://www.dss.mo.gov/dys/faq/genopt.htm> (last visited 2/13/2013).

<sup>86</sup> Most defendants in Missouri—adult and juvenile—are subject to sentencing at the discretion of the judge. *MISSOURI MODEL*, *supra* note 83, at 22. The guidelines are not rigid. See NATIONAL CENTER FOR STATE COURTS, *STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 18* (July 2008).

<sup>87</sup> *MISSOURI MODEL*, *supra* note 83, at 22.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Missouri State Public Defender, *Mission and Principles*, <http://www.publicdefender.mo.gov/about/mission.htm> (last visited 2/13/2013).

<sup>91</sup> MO. REV. STAT. § 211.211.1.

<sup>92</sup> *Id.*

<sup>93</sup> § 211.211.2.

In order to be indigent, a person—including a juvenile—must establish that he or she does not have the means available to him or her to obtain counsel on his or her behalf. This determination is based on all the circumstances of the case including ability to make bond, income, and the number of persons dependent on the person moving to be found indigent for support.<sup>94</sup> The primary factor to determine indigency is income.<sup>95</sup> In order to be eligible for public defender services, a person must not have income that exceeds the federal poverty guidelines as issued in the *Federal Register*.<sup>96</sup> For 2013, a single person household must make \$11,490 or less in order to qualify.<sup>97</sup> Under Missouri regulations, when determining the income level, a person's debts and expenses, a spouse's income, and assets need to be taken into account.<sup>98</sup> "If a defendant is receiving disability payments, pension, unemployment compensation, or Social Security, this is considered income and the amount of the payment must be considered."<sup>99</sup> If a person is under 18, the parents' income must also be considered.<sup>100</sup> A Missouri Court of Appeals decision held that parents are not required to procure counsel for their child, and that the income and assets of the juvenile are the only consideration for whether an appointment is appropriate.<sup>101</sup>

In response to toughening penalties for juveniles enacted in 1995, MSPD established separate juvenile public defender units, called Youth Advocacy Units, to serve St. Louis City and County in 1997, and another in Kansas City in 2000.<sup>102</sup> These Youth Advocacy Units were designed to be a model for juvenile representation throughout the state and to help train other public defenders on juvenile issues.<sup>103</sup> These units were responsible for reducing the number of children transferred to adult court and increasing public awareness of juvenile law.<sup>104</sup> However, Missouri's ongoing budget crisis resulted in the elimination of the MSPD Juvenile Advocacy Units in 2007.

### III. OVERVIEW OF DELINQUENCY PROCEEDINGS IN MISSOURI: A SUMMARY OF THE JUVENILE COURT STATUTE

#### A. Juvenile Court Jurisdiction

In a judicial circuit, the juvenile or the family court has exclusive jurisdiction in juvenile cases involving abuse and neglect, status offenses, and delinquency. Under the Missouri Juvenile Code, "child" means any person younger than 17 years of age, or who is 17 years old and alleged to have committed a status offense.<sup>105</sup> The juvenile or family court has jurisdiction over status offenses and delinquency cases where a person that is 17 and under is alleged to have committed a status offense,<sup>106</sup> or is alleged to have violated state law or municipal ordinance prior to becoming 17.<sup>107</sup>

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<sup>94</sup> MO. CODE REGS. ANN. tit. 18, § 10.3 (2012).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Annual Update of the HHS Poverty Guidelines, 78 Fed. Reg. 5182 (Jan. 24, 2013).

<sup>98</sup> MO. CODE REGS. ANN. tit. 18, § 10.3 (2012).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *State ex rel. Gordon v. Copeland*, 803 S.W.2d 153, 154 (Mo. Ct. App. 1991).

<sup>102</sup> Caterina DiTraglia, *Juvenile Initiative for Missouri's Public Defender System* 1 (Missouri State Public Defender System, Fall 1999); see also DOUGLAS E. ABRAMS, *A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI* 157 (2003).

<sup>103</sup> DiTraglia, *supra* note 102, at 21.

<sup>104</sup> *Id.* at 14.

<sup>105</sup> MO. REV. STAT. § 211.021.2.

<sup>106</sup> *Id.* A status offense is one that is only illegal because of the child's age—i.e. truancy, curfew, etc.

<sup>107</sup> § 211.031.1(3).

Juvenile court may retain its jurisdiction over a child until he or she turns 21, unless the child is in DYS custody.<sup>108</sup> DYS can petition the court to retain jurisdiction up to age 21 if it determines the child is still in need of services.<sup>109</sup> Even when a child has been committed to DYS, the court can regain jurisdiction by requesting it from DYS. This jurisdiction does not include cases where the youth has committed an offense after turning 17.<sup>110</sup>

The juvenile or family court does not have jurisdiction over:

- Any child who is a resident or found in the county, is over 15 years old, and is alleged to have violated a state or municipal traffic law that is not a felony;
- Any child who is over 15 years old and alleged to have violated the prohibition on the possession or use of tobacco by minors;<sup>111</sup>
- Any child who is 17 years old unless he or she is alleged to have committed a status offense; or
- Any youth between 17 and 21 years old that the court had retained continuing jurisdiction, if that youth committed a criminal offense between those ages.<sup>112</sup>

The juvenile court has concurrent jurisdiction with:

- The **municipal court** over any child alleged to have violated a municipal curfew ordinance;
- The **circuit court** for any child who is alleged to have violated a state or municipal ordinance involving use of any tobacco product;<sup>113</sup> and
- The **adult court** for a youth younger than 17 years old who has been transferred to adult court and whose prosecution results in a conviction or plea of guilty, if the court chooses to invoke dual jurisdiction and impose a juvenile disposition that would postpone the execution of an adult criminal sentence.

Not all juvenile cases are handled by the juvenile courts. A child between the ages of 12 and 17 who has committed an offense that would be considered a felony if committed by an adult can be transferred or “certified” to adult court by motion of the court, juvenile officer (probation officer), child, or the child’s custodian. The court has discretion whether to certify the case to adult court and must hold a hearing on the motion. In the case of certain serious felonies, there is no age limit for certification, and the court must hold a hearing before deciding to dismiss the juvenile petition and transfer the case to adult court.<sup>114</sup>

## B. Pre-Adjudication Custody and Detention

In Missouri, a youth may be taken into judicial custody through a court order, by a police officer, or by a juvenile officer. The juvenile court gains legal authority over youth as soon as they are taken into custody.<sup>115</sup> Although taking a juvenile into judicial custody is not legally considered to be an arrest, youth may be taken into custody

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<sup>108</sup> § 211.041.

<sup>109</sup> See *R.L.C., Jr., vs. Div. Youth Serv.*, 967 S.W.2d 674 (Mo. Ct. App. 1998).

<sup>110</sup> MISSOURI JUVENILE OFFICER HANDBOOK: JURISDICTION AND VENUE (2012), *available at* [http://www.courts.mo.gov/hosted/judedintra/juvenile%20Handbook/Status\\_Offenses\\_Delinquency/JurisdiVen.htm](http://www.courts.mo.gov/hosted/judedintra/juvenile%20Handbook/Status_Offenses_Delinquency/JurisdiVen.htm).

<sup>111</sup> § 211.031.

<sup>112</sup> § 211.071.2.

<sup>113</sup> *Id.*; § 211.031.3. Note that there appears to be a discrepancy between the two statutes. The laws, when read together, state that while the juvenile court does not have jurisdiction over these cases, it also shares concurrent jurisdiction with the circuit court. This may be an error in statute writing.

<sup>114</sup> § 211.071.1.

<sup>115</sup> MO. SUP. CT. R. 127.01.

when it is alleged that they violated state criminal laws or municipal ordinances. Youth may also be taken into judicial custody for several types of status offenses.<sup>116</sup>

In Missouri, youth who are taken into custody must be advised of the following prior to interrogation:

- They have the right to remain silent;
- That any statement they make to anyone can be and may be used against them;
- They have the right to have a parent, guardian, or custodian present during questioning;
- They have the right to consult with an attorney and that one will be appointed and paid for them if they cannot afford one; and
- That even though they begin to talk, the youth retains the right to stop talking at any time.<sup>117</sup>

The person who takes the youth into judicial custody must immediately notify a juvenile officer and undertake a reasonable attempt to notify the juvenile's parents, guardian, or custodian. If someone besides a juvenile officer takes the youth into custody, he or she must submit a written report to the juvenile officer as soon as possible within 12 hours. The written report must state the facts and circumstances that led to the youth being taken into custody and the reasons the juvenile was not released.<sup>118</sup> The detained youth must be immediately informed verbally and in writing of the reason for detention, the right to remain silent, the right to counsel, the right to a detention hearing, and his or her rights during secure detention.<sup>119</sup>

“Generally, juveniles should not be held in secure detention unless they present a risk to public safety or may fail to appear in court for their hearing.”<sup>120</sup> Each juvenile held in custody is rated using the juvenile detention assessment (JDTA) written checklist of criteria for specific detention-related risks. The overall risk score is a guide in making the initial decision whether to detain a juvenile in secure detention, utilize an alternative to secure detention, or release him or her to a custodian with or without conditions pending a hearing.<sup>121</sup>

In order for a youth to be placed in detention, the juvenile court must issue an order that he or she be detained, or the juvenile officer must order a 24-hour temporary detention.<sup>122</sup> During this time, the juvenile officer must obtain sufficient information from the law enforcement officer conducting the investigation, file a petition or a motion to modify, and submit it to the judge for an order of temporary detention. Within the 24-hour period, a juvenile judge must review the complaint or motion to modify and any supporting reports and statements. Upon reviewing these documents, the judge may order that the juvenile be released or detained pending a detention hearing. The judge may order continued detention only upon determining that: (1) probable cause exists that the juvenile committed the alleged delinquent or status offense; and (2) conditions requiring continuing detention exist.<sup>123</sup>

If the judge orders the child continue to be detained, a detention hearing must be held within three days, not including Saturdays, Sundays, and legal holidays, unless the court continues the hearing for good cause.<sup>124</sup> At the

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<sup>116</sup> MO. REV. STAT. § 211.031.

<sup>117</sup> § 211.059; MO. SUP. CT. R. 126.01; *see also J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (holding that age is a relevant factor in determining if *Miranda* warning must be given).

<sup>118</sup> MO. SUP. CT. R. 127.02.

<sup>119</sup> R. 127.05, 115.02, 127.07, 127.08, 127.10.

<sup>120</sup> MO. SUP. CT. OP. R. 28.01.

<sup>121</sup> *Id.*

<sup>122</sup> MO. SUP. CT. R. 127.06.

<sup>123</sup> R. 127.07; MO. REV. STAT. § 211.061. These conditions are not defined by statute or Supreme Court Rule.

<sup>124</sup> *Id.*

detention hearing, the judge simply determines whether or not there is good reason to detain the youth until the adjudicatory hearing. In order to continue detention, the judge must make specific findings about the need for continued detention.<sup>125</sup> If the court orders that the youth be detained after this hearing, the court must review the order every 30 days until the final order of disposition.<sup>126</sup> If a juvenile is released, the court may place limitations upon what the youth is permitted to do, who he is allowed to see, and to whom he is released.<sup>127</sup>

### C. Diversion and Informal Adjustment

In Missouri, youth not formally processed through the juvenile court can go through an informal court process or be referred to diversion programs. Missouri law enables government subsidies for early intervention programs designed to keep at-risk youth out of the formal justice system, while retaining supervision over the youth through a diversion program.<sup>128</sup> These programs were created to divert juveniles from the formal system, provide services, and maintain some level of oversight.

Prior to filing a petition, the juvenile officer can decide that an informal adjustment is appropriate for a case and will hold an informal adjustment conference with the youth and his or her parent, guardian, or custodian.<sup>129</sup> The juvenile officer must counsel and advise the youth and his or her parent, guardian, or custodian about the right to counsel and the right to remain silent when an informal adjustment is made. The youth is required to admit to the allegations, and, if done so, such informal adjustment is considered in the juvenile's court history as an admitted referral. The adjustment can include supervision by the juvenile officer and temporary placement of the youth with an appropriate person other than the parent, guardian, or custodian.<sup>130</sup> At any time, the juvenile officer can terminate the informal process without further proceedings or file a petition in the interest of the juvenile. However, the informal adjustment process cannot continue beyond 12 months from the date of the informal adjustment agreement.<sup>131</sup>

### D. Petition

Before the juvenile can be brought before a juvenile court, information must be referred to the juvenile officer, who makes a preliminary inquiry to either make an informal adjustment or file a petition.<sup>132</sup> Filing a petition formally creates a juvenile court case.<sup>133</sup> If it does not appear that there is sufficient information to bring a juvenile into the jurisdiction of the court, the complaining witness is notified and can seek the attention of a judicial officer who determines the necessity of additional investigation.<sup>134</sup>

When petitions are filed for delinquency and status offenses in juvenile court, the court clerk must issue a summons for service to all parties. The summons, which should be personally served, requires the juvenile and the juvenile's parents, guardian, or custodian to appear at the hearing date set.<sup>135</sup> If the juvenile is detained, the judicial officer shall ensure that the juvenile is brought to the hearing.<sup>136</sup> Personal service must occur at least 24 hours before the time set for the hearing, but when circumstances permit, earlier notice should be given.<sup>137</sup>

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<sup>125</sup> MO. SUP. CT. R. 127.08.

<sup>126</sup> *Id.*

<sup>127</sup> R. 127.02(d).

<sup>128</sup> MO. REV. STAT. § 219.041; Missouri Department of Social Services, *DYS Frequently Asked Questions: Juvenile Court Diversion*, <http://www.dss.mo.gov/dys/faq/juv.htm> (last visited 2/13/2012).

<sup>129</sup> MO. SUP. CT. R. 112.

<sup>130</sup> R. 112.01.

<sup>131</sup> R. 112.04.

<sup>132</sup> R. 111.01.

<sup>133</sup> *Id.*

<sup>134</sup> R. 111.01(c).

<sup>135</sup> R. 114.01(b); MO. REV. STAT. § 211.111.

<sup>136</sup> § 211.111.

<sup>137</sup> *Id.*

The petition may be amended with approval from the court at any time, and a petition can be dismissed by the juvenile officer.<sup>138</sup>

### E. Adjudication Hearing

If the juvenile officer does not initiate an informal adjustment, the case will be filed by petition and proceed to adjudication. The adjudication stage is the juvenile equivalent of trials in the adult criminal justice system. At the adjudication hearing, the court will hear juvenile admissions on allegations in the petition or motion to modify and shall receive evidence on those allegations that have not been admitted.<sup>139</sup> The court must also determine: (1) whether the juvenile and the juvenile's parents, guardian, or custodian have received notice of the hearing and been informed of the allegations and the range of possible dispositions if the allegations are admitted or proved; (2) whether the juvenile has been informed of the right to counsel and, unless counsel has been previously retained or waived, whether he or she objects to proceeding without counsel; and (3) whether the juvenile's parents, guardian, or custodian have been informed of the right to counsel and whether any objections to proceeding without counsel exist.<sup>140</sup>

The adjudication hearing must be held on the record.<sup>141</sup> During the hearing, the rules of evidence apply and all parties are afforded the opportunity to testify, present evidence, cross-examine witnesses, present arguments of law and fact, and assert arguments concerning the weight, credibility, and effect of the evidence.<sup>142</sup> To reach a finding of guilt in a delinquency proceeding, the court must find that the state proved the allegations beyond a reasonable doubt.<sup>143</sup> For allegations of status offenses, the government's standard of proof is by clear and convincing evidence.<sup>144</sup>

### F. Disposition

If a juvenile is found to have violated the law, a disposition hearing is held to determine placement or treatment. The juvenile court may hold a dispositional hearing either separately or immediately after an adjudication hearing.<sup>145</sup> At a disposition hearing, the court must determine and make findings on the disposition, or sentence, to be imposed on the juvenile. The disposition findings include the legal and physical custody of the youth, as well as any services, treatment, and placement necessary to facilitate the care, protection, and discipline of the youth.<sup>146</sup> The court must receive evidence at a hearing on the record and must make a determination that is in the best interests of the youth.<sup>147</sup> Although the rules of evidence do not apply, all parties must have the opportunity to testify, present evidence, cross-examine witnesses, present arguments of law and fact, and present arguments concerning the weight, credibility, and effect of the evidence.<sup>148</sup>

The court must admit into evidence any social study, recommendations of the DJO, any support regarding the recommendations of the DJO, and material relevant to determining the appropriate disposition in the interest of the juvenile.<sup>149</sup> The court, or any party, may order a social study, which must include an investigation and evaluation of the habits, surroundings, conditions, and tendencies of the youth and the youth's parents, guardian, or

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<sup>138</sup> MO. SUP. CT. R. 113.02.

<sup>139</sup> R. 128.02.

<sup>140</sup> *Id.*; see also *In the Interest of M.M.*, 320 S.W.3d 191, 195-97 (Mo. Ct. App. 2010); *In the Interest of D.L.*, 999 S.W.2d 291, 293-97 (Mo. Ct. App. 1999).

<sup>141</sup> MO. SUP. CT. R. 128.02(b).

<sup>142</sup> *Id.*

<sup>143</sup> R. 128.02 cmt.

<sup>144</sup> *Id.*

<sup>145</sup> R. 128.03(a).

<sup>146</sup> R. 128.03 cmt.; MO. REV. STAT. § 211.459.

<sup>147</sup> MO. SUP. CT. R. 128.03(b).

<sup>148</sup> *Id.*

<sup>149</sup> R. 128.03(c).



custodian.<sup>150</sup> All ordered evaluations and reports must be made available to all parties, attorneys, guardians *ad litem*, and volunteer advocates at least 15 days prior to any dispositional hearing.<sup>151</sup>

There are several dispositional options for youth that have been adjudicated delinquent. Youth may be placed at home on probation with in-home services, placed in a residential facility, or committed to DYS.<sup>152</sup> Additional sanctions may also be brought against adjudicated youth. The state can suspend or revoke a state or local driver's license;<sup>153</sup> the youth can be ordered to make restitution;<sup>154</sup> or the court can select an organization at which the juvenile is required to complete community service.<sup>155</sup> If the juvenile violated a municipal ordinance or committed what would otherwise constitute a misdemeanor, the court may order the juvenile pay \$25 to the clerk of the court.<sup>156</sup> The juvenile may be assessed \$50 if he or she committed an act that would constitute a felony if committed by an adult.<sup>157</sup>

The most restrictive disposition option is a commitment to the Missouri DYS. Any child may be committed to the custody of DYS when the court determines a suitable community-based treatment service does not exist or has been proven ineffective. The court can place youth in DYS custody only after it has determined and made findings on: (1) whether reasonable efforts were made to prevent or eliminate the need for removal of the youth from home; and (2) that it would not be in the best interest of the child to stay in the home.<sup>158</sup> The court may specify a minimum length of stay at DYS or leave it to DYS's discretion.<sup>159</sup> If the youth is committed to DYS, jurisdiction of the juvenile court is terminated.

In Missouri, courts must biennially review a random sample of assessments of children and the disposition of each child's case to recommend assessment and disposition equity throughout the state.<sup>160</sup> The statute does not explicitly provide a method for review, but requires that the confidentiality of the cases be protected.<sup>161</sup> This review should also examine any racial disparity in certification to adult court.<sup>162</sup>

### G. Post-disposition Proceedings

After a disposition order has been entered, the juvenile has the right to appeal the sentence. A juvenile or a parent, guardian, legal custodian, relative, or next friend, on the juvenile's behalf, can appeal any final judgment, order, or decree under the juvenile code.<sup>163</sup> Notice of appeal must be filed within 30 days after the judgment, disposition order, or decree has been entered. Notice of appeal or any motion filed subsequent to the final judgment does not suspend the judgment unless the court orders it.<sup>164</sup> Counsel for a child must serve at all stages of the juvenile court proceedings, including appeal, unless relieved by the court.<sup>165</sup> Delinquency appeals are heard by the Missouri Court of Appeals and may be heard by the Missouri Supreme Court upon its own discretion.<sup>166</sup>

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<sup>150</sup> R. 118.01.

<sup>151</sup> MO. REV. STAT. § 211.455.3.

<sup>152</sup> § 211.181.3.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> MO. SUP. CT. R. 128.03(e).

<sup>159</sup> MO. REV. STAT. § 211.181.4.

<sup>160</sup> § 211.141.5.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> § 211.261.1.

<sup>164</sup> *Id.*

<sup>165</sup> § 211.211.

<sup>166</sup> Your Missouri Courts, *Supreme Court*, <http://www.courts.mo.gov/page.jsp?id=27> (last visited 2/20/2013).

Appeals are not the only form of post-dispositional relief. A disposition order may be changed at any time by the court's own motion.<sup>167</sup> The juvenile officer, parent, legal guardian, custodian, spouse, relative, or next friend of a child that is committed to the custody of an institution or agency can also petition the court at any time for a modification of the custody order.<sup>168</sup> The court can deny the petition without a hearing or can conduct a hearing about the issues in the petition and make orders regarding those issues as it determines to be proper.<sup>169</sup>

Extraordinary writs—such as *habeas corpus* and *mandamus*—are available to challenge a youth's confinement as illegal, if the confinement itself is unlawful (when minors, for example, are held in adult jails despite statutory prohibitions), if the juvenile's detention exceeds statutory length, or if harmful conditions exist.<sup>170</sup>

## H. Children in Adult Criminal Court

For youth between the ages of 12 and 17, a hearing to certify a youth to adult court is required and is only allowed if the child has committed an offense that would have been a felony if committed by an adult.<sup>171</sup> The juvenile court has discretion over whether or not a juvenile petition should be dismissed and transferred to adult court for youth under 17 years old. Youth who commit criminal offenses at the age of 17 are automatically tried in adult court, as individuals 17 and older do not fall under the definition of "child" in Missouri's juvenile court system.<sup>172</sup>

There is no age limit for certification to adult court if the petition alleges that the child committed any of the following felonies: (1) first degree murder; (2) second degree murder; (3) first degree assault; (4) forcible rape; (5) forcible sodomy; (6) first degree robbery; and/or (7) distribution of drugs.<sup>173</sup> Transfer to adult court is also permitted if the juvenile committed two or more prior unrelated felony offenses.<sup>174</sup> In these cases, the court is required to hold a hearing on whether the child should be certified. Written notice of the certification hearing must be given to the juvenile and his or her custodian consistent with state law.<sup>175</sup>

In preparation for a certification hearing, the juvenile officer must prepare a written report that includes all available information relevant to the criteria to be considered by the court, including but not limited to:

- The seriousness of the offense alleged and whether protection of the community requires transfer to a court of general jurisdiction;
- Whether the offense alleged involves viciousness, force, and violence;
- Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;
- Whether the offense alleged is part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;
- The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions, and other placements;

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<sup>167</sup> § 211.251.1.

<sup>168</sup> § 211.251.2.

<sup>169</sup> § 211.251.3.

<sup>170</sup> See § 211.051.

<sup>171</sup> § 211.071.1.

<sup>172</sup> § 211.021.

<sup>173</sup> § 211.071.1.

<sup>174</sup> *Id.*

<sup>175</sup> § 211.071.4.



- The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition, and pattern of living;
- The age of the child;
- The program and facilities available to the juvenile court in considering disposition;
- Whether or not the child can benefit from the treatment or rehabilitative program available to the juvenile court; and
- Racial disparity in certification.<sup>176</sup>

If the court dismisses the juvenile court petition and allows a child to be prosecuted in adult court, jurisdiction of the juvenile court over that child is terminated forever, unless the child is found not guilty.<sup>177</sup>

When sentencing a certified juvenile, Missouri law allows the adult court to invoke dual jurisdiction of both the criminal and juvenile codes. This allows the court to impose a juvenile disposition as a condition of the suspended adult criminal sentence. When the youth reaches the age of 17, the court must hold a hearing to revoke the suspension and order the youth to be taken to the Department of Corrections, direct that the offender be placed on probation, or direct that the offender remain in the custody of DYS, if DYS agrees to the placement.<sup>178</sup>

If DYS agrees to the placement, it must petition the court for a hearing before it releases a child under dual jurisdiction at any time before he or she reaches the age of 21. At that time, the court can either revoke the suspended adult sentence or direct that the youth be placed on probation.<sup>179</sup>

#### IV. CONCLUSION

The Missouri juvenile court system is similar to other states in many ways and is distinctive in several other ways that have a significant impact on the due process rights of youth. The findings in the next chapter will describe the strengths of this system as well as the challenges that impact access to justice for youth in Missouri's delinquency courts.

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<sup>176</sup> § 211.071.6.

<sup>177</sup> § 211.071.5, 6.

<sup>178</sup> § 211.073.

<sup>179</sup> § 211.073.5.

## CHAPTER THREE

### Assessment Findings and Analysis

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This chapter begins with key findings about Missouri’s system of juvenile indigent defense and the barriers to providing an effective juvenile defense delivery system. Overarching themes related to resources, structure, and juvenile court culture are important to better understand the climate in which juvenile indigent defense operates. The second section presents a discussion of barriers that limit youth’s access to counsel as well as issues related to the timing and appointment of counsel. Section three is devoted to the examination of barriers to effective juvenile defense practice, focusing on key stages of proceedings, and practices which impede fundamental fairness and the establishment of an adequately trained and prepared defense bar. The chapter concludes with strengths and promising practices that were observed or highlighted.

#### I. BARRIERS TO PROVIDING AN EFFECTIVE JUVENILE INDIGENT DEFENSE SYSTEM

##### A. Inadequate Resources to Ensure Effective Juvenile Defense

A discussion about Missouri’s juvenile defense delivery system must necessarily acknowledge that the entire indigent defense system in Missouri is in crisis, and has been struggling for over the last two decades.<sup>180</sup> MSPD has not been fully staffed to meet caseload requirements since 1989—the year the public defender system went statewide to assume responsibility for all of Missouri’s indigent defendants. Growing caseloads throughout the 1990s outpaced staffing levels and peaked by 2004. In the years following, the number of indigent criminal cases did not decrease. MSPD was forced to find ways to keep their caseloads manageable and alleviate the critical overload.<sup>181</sup>

In 2005, the Missouri Bar President chaired a Task Force on indigent defense which hired a national consulting group to do an outside assessment of the Public Defender system. The findings of that report noted that the Missouri system had the lowest *per capita* expenditure of all statewide public defender systems, and noted that attorneys were “practicing triage” in violation of ethical and constitutional requirements.<sup>182</sup> In 2007, after a Senate Interim Committee recommended caseload reductions and increases in both attorney and support staff,<sup>183</sup> MSPD received \$1.15 million to help cover cases by contracting out to private attorneys.<sup>184</sup> In desperation, the Public Defender Commission retained the advice and counsel of the Partner in Charge of the Community Services Team at the law firm Holland & Knight,<sup>185</sup> and worked toward enactment of an administrative rule to determine maximum allowable caseloads for each office and authorized the director to place an office on “limited availability” status once it exceeded this maximum for three consecutive months. The limited availability rule went into effect in the fall of 2008.<sup>186</sup> In 2009, the Missouri legislature adopted a law to statutorily clarify that the Commission had the authority to set and enforce caseload limits for public defender offices; however, the governor vetoed this legislation with a message that the real fix for this problem was more resources.<sup>187</sup>

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<sup>180</sup> STATE OF MISSOURI PUBLIC DEFENDER COMMISSION, FISCAL YEAR 2011 ANNUAL REPORT: ASSURING THE PUBLIC DEFENSE—THE RIGHT TO COUNSEL AND THE STATE PUBLIC DEFENDER SYSTEM IN MISSOURI 2 (2011) [hereinafter 2011 PUBLIC DEFENDER REPORT].

<sup>181</sup> *Id.* at 1-7.

<sup>182</sup> *Id.* at 3.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 4.

<sup>185</sup> Steve Hanlon heads the Community Services Team of Holland & Knight LLP, and did not charge for his services. He has national expertise in litigating cases involving inadequate resources for indigent defense systems. *See* Press Release, Missouri State Public Defender, Public Defender Commission Adopts Rule to Limit Availability of Overloaded Offices to Take on More Cases (Nov. 2, 2007), *available at* <http://publicdefender.mo.gov/Newsfeed/20071102.htm>.

<sup>186</sup> FISCAL YEAR 2012 ANNUAL REPORT, *supra* note 7, at 2.

<sup>187</sup> *Id.* at 3.

The Missouri Bar Foundation then hired the same national consulting group and the George Mason University Center for Law, Justice, and Society to conduct a follow-up study in hopes of developing a caseload standard to determine specific needs. That study was unable to make that determination as hoped. The study revealed a situation so dire that to recommend standards “would serve only to institutionalize bad practices.”<sup>188</sup> The Missouri Supreme Court then decided that the public defender could not turn away categories of cases due to case overload and that the proper remedy was to make the office unavailable until it could reduce the caseload below the standards set by the Commission.

By 2010, MSPD received a meager \$250,000 increase in additional funding, and notified 22 judicial districts, including 43 counties, that the public defender offices serving them were at risk of closing their doors to additional cases until there were drastic reductions in caseloads. The responses by the judiciary were varied; some courts began appointing private lawyers to handle juvenile cases, while others increased pre-screening of probation violation reports. A number of prosecutors agreed to waive jail time on lower level offenses. While this helped, it did not bring the public defender offices within maximum allowable caseloads.<sup>189</sup> By July of 2010, two counties were “certified” and placed on limited availability status.<sup>190</sup> By the end of 2011, eight offices serving 23 counties were certified and were taking steps to refuse cases in excess of their maximum monthly intake under the Commission’s regulations.<sup>191</sup>

MSPD challenged the appointment of new cases by the court in Christian County in a writ taken to the Missouri Supreme Court. A Special Master was assigned to take evidence on the reasonableness and accuracy of the Caseload Protocol that the Commission adopted and held hearings in late 2010.<sup>192</sup> In July of 2012, the Missouri Supreme Court held that because there was no finding by the trial court that the rule was invalid or inapplicable, the trial court should have respected the rule and applied it. The opinion does not resolve the caseload crisis in Missouri. It merely reduces the number of cases handled by MSPD, not the number filed by prosecutors. The Court recognized that “the inherent authority of courts to manage their caseloads in this manner will continue and should be utilized so as to best ensure that a defendant’s constitutional rights, the defender’s ethical duties, and the State’s right to prosecute wrongdoers are respected.”<sup>193</sup> While the opinion does not invalidate the process currently being used to certify counties as unavailable for accepting new cases, the ultimate lack of resources to provide a constitutionally sound system has yet to be addressed. As of October 1, 2012, 18 of MSPD’s trial district offices were certified and placed on limited availability and another nine were pending certification.<sup>194</sup>

The formula established by MSPD for determining maximum allowable workloads is based upon the number of attorney hours needed to effectively handle each case. Cases are “weighted” generally based upon the anticipated number of attorney hours needed. Juvenile cases are weighted at 10 hours each.<sup>195</sup> Of the 80,588 new cases opened through the trial division in 2012,<sup>196</sup> only 1,923 were juvenile delinquency or status offender cases.<sup>197</sup> This means that juvenile cases were little more than 2% of the MSPD caseload in 2012.

It is against this backdrop that the juvenile defense delivery system must be analyzed. In Fiscal Year 2012, the Missouri Supreme Court reported a total of 4,631 new juvenile delinquency and status offense petitions

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<sup>188</sup> ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM, *supra* note 5, at 45.

<sup>189</sup> FISCAL YEAR 2012 ANNUAL REPORT, *supra* note 7, at 4.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 5.

<sup>192</sup> *State ex. rel. Missouri Public Defender Commission v. Waters*, 370 S.W.3d 592, 601 (Mo. 2012).

<sup>193</sup> *Id.*

<sup>194</sup> FISCAL YEAR 2012 ANNUAL REPORT, *supra* note 7, at 5.

<sup>195</sup> 2011 PUBLIC DEFENDER REPORT, *supra* note 180, at 101.

<sup>196</sup> FISCAL YEAR 2012 ANNUAL REPORT, *supra* note 7, at 8.

<sup>197</sup> *Id.* at 9.

statewide.<sup>198</sup> MSPD reports that during the same time period, it was assigned only 1,923 juvenile delinquency or status offender cases.<sup>199</sup> With only 24 juvenile cases contracted out to private counsel due to conflicts of case overload, this leaves questions about access to counsel for approximately 60% of Missouri's court-involved youth.<sup>200</sup>

The mystery of what happens to the vast majority of youth who come before Missouri's court on delinquency and status charges that are not encompassed in MSPD's data has begun to unravel. With the exception of the few counties observed rigorously defending the right to counsel for juveniles, and a few which assign and pay for private counsel or enlist pro bono help, youth are discouraged from and systematically denied counsel throughout the state. This denial of due process is well known, and it is deeply entrenched in the culture of many juvenile courts, as evidenced by the many interviews, reports, and other sources of information reviewed as part of this inquiry.

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But the issue of resource deficiencies does not tell the whole story. The lack of understanding about the critical role of counsel for juveniles is intertwined with minimizing the allocation of resources and justifying the lack of necessity of ensuring youth are provided lawyers. The very structure of the system, with a strong emphasis on diversion and a model corrections program, may well lend itself to support the denial of counsel. Although perhaps intended to further the best interests of youth, their legal rights are ignored. These barriers combine to create a culture where many if not most youth proceed unrepresented through juvenile court proceedings.

#### **B. Notable Service Delivery System for Youth but Insufficient Emphasis on Basic Due Process Guarantees**

Missouri has long been recognized for its successful approach in having a solid continuum of care for community-based services and for providing treatment and rehabilitation for youth in the delinquency system in small, regionalized facilities. The investigative team was impressed by the practices in many counties to divert low level offenders from formal court processing and to handle a significant percentage of juvenile cases informally. One investigator visiting a medium-sized county noted that it was "simply remarkable in the number of cases that are referred to diversion.... Only 10% of cases are filed, and these cases are described as youth who did not successfully complete diversion or 'serious' cases."

Indeed, in its 2011 report, OSCA data showed a total of 29,110 law violations by juveniles, of which more than 69% were misdemeanors.<sup>201</sup> Fewer than 19% of the total offenses were felony level, and only about 3% were A or B level felonies.<sup>202</sup> 81% of law violation cases were disposed of through the informal court process.<sup>203</sup> Of the remaining cases, the most common formal dispositions included in-home supervision (10%), and placement outside of the home (5%).<sup>204</sup> For status offense cases, 88% were disposed of informally. In-home supervision was the most common formal disposition (6.4% of cases.)<sup>205</sup> About 3.4% of status offenders were placed outside of home upon formal disposition.<sup>206</sup>

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<sup>198</sup> OFFICE OF STATE COURTS ADMINISTRATION, TABLE 4I CIRCUIT COURT, FY 2012 JUVENILE CASES FILED BY CASE TYPE, <http://www.courts.mo.gov/file.jsp?id=58747>.

<sup>199</sup> FISCAL YEAR 2012 ANNUAL REPORT, *supra* note 7, at 9.

<sup>200</sup> *Id.* at 75.

<sup>201</sup> MJFD 2011 REPORT, *supra* note 65, at 13.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 17.

<sup>204</sup> *Id.*

<sup>205</sup> MJFD 2011 REPORT, *supra* note 65, at 20.

<sup>206</sup> *Id.*

Another investigator described one of the treatment facilities as “an amazing secure facility with wonderful programming.” One seasoned investigator who spends significant time touring juvenile facilities as part of his job indicated, “I have a highly developed ability to assess when a facility presents itself in one way but is in fact completely different. [This] facility seemed to me to be absolutely what it claims to be, a humane and caring environment dedicated to meaningful rehabilitation.” The process also identified well-regarded practices by some courts to determine whether a youth’s behavior was symptomatic of abuse, neglect, and/or mental health issues, or whether the behavior actually requires any “treatment.”

However, a good system of services and programming for this population does not negate the need for adequate due process protections. In Missouri, there appears to be an imbalance between acknowledging and protecting the basic rights established in *In re Gault* over 45 years ago and adjudicating youth delinquent in order to meet the perceived treatment needs of the youth before the court.<sup>207</sup> Unfortunately, due process protections often lose out under the guise of rehabilitation and treatment.

This is evidenced by the fact that a very high number of youth are committed to DYS for misdemeanors, technical violations, status offenses, and non-violent felony offenses. Of the 920 youth committed to DYS in 2012, 39.7% of the total commitments were for class C, D, and/or unspecified felonies, which include property offenses, drug crimes, and theft. Just over 38% of youth were committed to DYS for misdemeanors and other non-felonies, which include probation violations and escapes from custody. Finally, 10.9% of youth committed to DYS were committed for juvenile offenses such as truancy and curfew violations.<sup>208</sup> *The need for heightened due process protections is underscored by the fact that the majority of youth committed to DYS are there for non-violent, low-level offenses and technical violations.*

As one juvenile court judge noted, “The choices for juvenile justice systems are either great outcomes and no due process or great due process and no good outcomes. The trick is to mix the best of both worlds to marry procedure with compassion.”

An excellent step toward achieving the goal of marrying procedure with compassion was the establishment of the Youth Advocacy Units by MSPD in 1997. The offices were created in recognition of the unique nature of juvenile law, and the differing needs of young clients. They were also established in recognition of increased legislative penalties for juveniles, and to ensure protections were in place similar to their adult counterparts. The units included juvenile dispositional specialists to develop client-driven disposition plans and placement options. Juvenile attorneys in these offices served as trainers and advisors to other defender offices with smaller juvenile caseloads. The programs successfully documented reductions in DYS commitments and adult certifications, while serving many other functions. Falling victim to budget cuts, the units were eliminated in 2007. As the Public Defender Commission notes in its 2007 report:

The programs were doing good work. However, with the shortage of resources in the rest of the system, the extra resources devoted to juvenile practice could no longer

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As one juvenile court judge noted, “The choices for juvenile justice systems are either great outcomes and no due process or great due process and no good outcomes. The trick is to mix the best of both worlds to marry procedure with compassion.”

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<sup>207</sup> 387 U.S. 1 (1967). Such protections include the right to timely notice of the charges, advisement of the right to counsel, protection against self-incrimination, and the right of confrontation and cross-examination of witnesses and other evidence.

<sup>208</sup> MISSOURI DIVISION OF YOUTH SERVICES FY 2012 ANNUAL REPORT 7 (2012).

be supported. Those offices were eliminated; the two juvenile dispositional specialist positions were converted to attorney FTE, and the juvenile cases rolled back into the regular caseloads of the existing trial offices in those areas. Those involved in Missouri's juvenile justice system consider this a major step backward and a failure of Missouri's public defender system. They are correct. There is nothing else MSPD can eliminate, reduce, or change to shore up the system.<sup>209</sup>

The Juvenile Advocacy Units could have been a significant driver in enhancing juvenile defense practices in Missouri by modeling a culture of child-focused representation. The assessment team found no concerted attempts to incorporate the concepts of the Juvenile Advocacy Units into current practice.

### C. Structural Challenges Minimize the Role of Defense Counsel

The structure of the Missouri juvenile court, by its very nature, creates conflicting roles. Juvenile court judges have a direct (or at least an indirect) supervisory role over legal officers (juvenile prosecutors) and DJO's (probation officers). The requirement of neutrality on the part of the judges, as well as independent decision making on the part of the legal officers in a prosecutorial role, is compromised under such a structure.

Similarly, many have expressed concern that practices bordering on the unauthorized practice of law by some DJOs create potential legal and ethical problems for some courts. In addition to judicial monitoring and oversight, DJOs are represented by legal officers in all court proceedings. Prosecutors literally stand in as general counsel for DJOs in the same hearings where they are supposed to represent the interests of the state. DJOs make many of the filing (i.e. legal sufficiency) decisions that are more appropriately made by prosecutors. DJOs in Missouri have roles and responsibilities that include duties typically carried out by law enforcement, probation, and prosecution. This comingling of duties creates an inherent conflict in their role with youth.

The judiciary is responding to this issue and concerns about the allegations of unauthorized practice of law by DJOs, who are not attorneys. A recent inquiry by the State Court Administrator found that in some circuits DJOs were representing themselves in court proceedings and preparing their own pleadings. In other circuits, DJO's were represented by counsel but still drafted and signed pleadings.<sup>210</sup> The inquiry suggested that some of the DJO activities may constitute the unauthorized practice of law and noted that changes could have a significant effect on some long standing practices in some circuits.<sup>211</sup>

The role of the DJO is problematic in other ways. It was described by one legal officer as "basically a pre-*Gault* role." The DJOs are required by their position to advise youth of their rights, investigate the allegations, prosecute the case in court, present their arguments for disposition, and then monitor the youth if placed on probation. As one

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The [DJO's] have major role confusion, veering from caring and protective advocacy for the child's interest to interrogation and punishment, and sometimes using caring, protective approaches to get statements to ensure punishment."

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<sup>209</sup> STATE OF MISSOURI PUBLIC DEFENDER COMMISSION, FISCAL YEAR 2007 ANNUAL REPORT 66 (2007).

<sup>210</sup> Letter from Gary Waint, Office of State Court Administrator, to Juvenile Court Judges and Juvenile Officers (Nov. 4, 2011).

<sup>211</sup> *Id.*



investigator noted, “the bad aspect of this approach is that the [DJO’s] have major role confusion, veering from caring and protective advocacy for the child’s interest to interrogation and punishment, and sometimes using caring, protective approaches to get statements to ensure punishment.” In *State of Missouri v. Bustamante*, a 2011 decision by a Missouri trial court noted this role confusion when it held that a DJO went far beyond her statutory role when describing herself as an advocate for the youth while obtaining incriminating statements that were ultimately suppressed as a result.<sup>212</sup> The court noted that the DJO used deceptive practices to suggest to the youth that she was an “advocate” looking at best interest, but involvement in the interrogation of the youth exceeded her role as a DJO.<sup>213</sup>

Although the investigative team met many passionate and caring individuals who served as DJOs, their role in the ultimate disposition of cases often impeded the ability of the case to proceed with adequate due process, including the appointment of and assistance of counsel. DJOs are involved in deciding whether—and often what—charges get filed, engaging in interrogation, reading *Miranda* rights, and taking signed statements from youth during these sessions that can be used against them. They also prepare reports and make recommendations to the court. There was a limited understanding by many of the DJOs as to the role that defense counsel played throughout the proceedings, particularly during the investigation and fact-finding phases. As such, there was often little regard, and in some cases actual resistance, to youth representation at early stages in the proceedings or at all.

Counties varied in the degree to which they embraced a “pre-*Gault*, best interest” court. In several counties there was a court culture that appeared to exert pressure on defenders to work as a team with the other stakeholders, while most counties did exert both covert and overt pressure for attorneys to minimize zealous advocacy and work with the judge and the DJO to obtain services for youth coming in contact with the court. In one county, there was a blatant disrespect for the role of defenders as expressed interest advocates. A public defender interviewed there said, “Adversarial posturing does not work – collaboration and social work does. [PDs] have a unique role in this system; it’s more social work than legal work.”

## II. BARRIERS LIMITING ACCESS TO COUNSEL

### A. Waiver of Counsel Among Children in the Juvenile Court is Alarming High

The Missouri State Public Defender represents only a portion of the total delinquency cases filed each year. As mentioned earlier, in Fiscal Year 2012, the Missouri Supreme Court reported a total of 4,631 new juvenile delinquency and status offense petitions statewide.<sup>214</sup> MSPD reports that during the same time period, it was assigned only 1,923 juvenile delinquency or status offender cases.<sup>215</sup> 24 juvenile cases were contracted out to private counsel due to conflicts of case overload.<sup>216</sup> *Nearly 60% of the youth that come before the Missouri courts are not represented by the state’s designated system of indigent defense.*

It cannot be determined with certainty that these youth all waive the appointment of counsel and their right to counsel, or are otherwise denied lawyers. In some counties, judges have reported using

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> OFFICE OF STATE COURTS ADMINISTRATION, TABLE 41 CIRCUIT COURT, FY 2012 JUVENILE CASES FILED BY CASE TYPE, <http://www.courts.mo.gov/file.jsp?id=58747>.

<sup>215</sup> FISCAL YEAR 2012 ANNUAL REPORT, *supra* note 7, at 9.

<sup>216</sup> *Id.* at 75.

privately appointed counsel for juvenile cases, or at least for cases which arise after the local office is certified and unavailable to take new cases. In at least one county, there was reported appointment in all cases, with no involvement of MSPD. The judge in this county stated that, “No youth can understand enough to waive counsel. It is a fundamental fairness system. No youth can understand that process.” A handful of other courts have utilized pro bono attorneys to represent juveniles. There is no consistent data kept or reported on the remaining roughly 60% of cases not provided lawyers through MSPD. However, based upon observations and interviews in multiple sites, the number of youth who proceed without counsel is alarmingly high in many counties. The reasons for and the rates of waiver of counsel vary by jurisdiction, but several important themes emerged during site visits and in interviews.

First and foremost, the impact of limits on availability of defense counsel in the adult indigent defense system is magnified in juvenile court. In counties that are “certified,” judges cannot exceed capacity in their number of appointments and the weighted point value assigned to each type of case. As one judge explained, cases are assigned a number of hours, and for juvenile cases, that number is ten hours, regardless of the complexity or seriousness of the case. Adult probation violations are ten hours, and felony cases are at 33 hours. He could not appoint juveniles attorneys once he reached his threshold numerically. There was enormous frustration on the part of public defenders, judges, and legal officers in these certified counties where “rationing” of hours resulted in youth being denied lawyers even when they were eligible and requested them.

As one public defender pointed out, “In a month where the judge doesn’t have to worry about numbers, he will send us cases. If he has to be concerned about hours, they push kids into waiving a lawyer.”

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One of the most troubling findings by investigators is the role that the DJO often plays in directly or indirectly promoting waiver of counsel. One investigator noted, “Defense attorney presence is *de minimus*. The public defender is rarely involved and there is no significant private bar involvement.... These children do not consult with an attorney. The DJO is clearly in control of the system. The officers [DJOs] screen cases, take pre-trial statements and admissions from the child, determine whether to prosecute, and prepare reports and recommendations for sentencing.... While the nature of offenses being dealt with are not generally serious, what this means is that the net is wider and guilt and challenging legal issues becomes lost. The culture is supported by a ‘not much is at stake attitude.’”

One DJO explained that they get police reports, statements from youth, and “...everything we need. After the process is done, kids don’t ask for lawyers. They might want one just for disposition.” This officer did not see how a lawyer could make a difference in most cases because, “the judge already knows we have exhausted resources.”

Parents also have an important role to play in the proceedings, and their support and resources can have a significant positive effect on the outcome of the case. But parental consultation should not substitute for the advice of an attorney who can best counsel the child regarding the facts of the case, possible defenses, the range of penalties, and potential collateral consequences of adjudication. Parents may exert undue influence over the youth to admit to charges, take responsibility, and move the case to disposition without understanding the possible dangers of self-representation. In some cases, parental conflicts were noted (e.g. where they were the victim), or the parent simply did not want to return to court for financial, employment, logistic, or other reasons.

Investigators noted that youth often waived their right to counsel without understanding what an attorney does or why one might be important to the case. When asked if youth understood the rights they are waiving, one judge admitted, “[N]o, they don’t. For two reasons: kids are trying to avoid additional expenses for their parents, and the parents say, ‘this is nothing.’” The financial considerations were noted by some investigators as well. One



individual noted that “the fact that the Office of the Public Defender charges a significant amount of money to represent indigent clients (including detained juveniles) and that the amount is significantly less if the child enters a guilty plea is likely an added incentive to waive counsel or, if not to waive counsel, to plead guilty.” Others noted that youth do not understand the role of counsel and assume there is nothing that an attorney can do about their cases. Youth are also encouraged to wind up their cases and plead out without counsel by DJOs. In spite of the fact that all youth should be presumed eligible in terms of indigence, counsel is discouraged, or if requested, denied in most cases where there is ‘no dispute’ about the charges. Unfortunately, because no defender has ever looked at the case, whether a legal dispute exists is impossible to determine.

Judicial colloquies—the process through which young people are advised of their rights and what it means to waive them—regarding the rights of children in the courtroom varied considerably. Investigators found some excellent practices by juvenile judges who took concerted time and energy to explain rights in developmentally appropriate ways. In some cases, judges appointed counsel to children facing more serious charges even though youth indicated they didn’t need one. In other cases, judges did not advise of the dangers of self-representation or the potential disposition and collateral consequences that youth may face if they waived their rights. One investigator noted an assumption on the part of the court that the child will waive the right to counsel and witnessed “subtle pressure put on the children” by inferring that their parents would have to pay for private counsel, and the youth would meanwhile remain in detention.

#### **B. The Process for Determining Indigence is Inconsistent, and in Some Jurisdictions Contributes to High Waiver Rates**

The determination of indigence for purposes of appointment of counsel is not well understood and is not consistently applied in juvenile court. Investigators reported a mix of responses ranging from an all-inclusive approach that presumes indigence for youth to one in which parents are nearly always charged a fee and a lien is placed on their potential tax credits.

As a general principle, public defender services in Missouri are not free. Indigence, or eligibility for public defender services is tied to the federal poverty guidelines.<sup>217</sup> And even after indigence is determined, some of the fees charged for having an attorney in juvenile cases can be substantial. At the end of a case, the public defender fills out a form that is submitted to the court and signed by a judge providing authority for MSPD to “intercept” any state money that would otherwise go to the client to make sure that the fee is paid. The fee may be waived or the judge may decide not to sign the form. A juvenile case that results in a plea costs \$125, one that has an “early disposition” costs \$65, and a case taken to trial costs \$250,<sup>218</sup> with a lien on tax refunds due to the parent. Extra fees for taking depositions, hiring experts, and hiring investigators may also be imposed.<sup>219</sup> There was conflicting information as to whether these fees were ever collected; however, MSPD’s form clearly states, “your income tax refund may be intercepted to satisfy this debt.”<sup>220</sup> The graduated fee system clearly incentivizes juveniles to plea, even where they are not held personally responsible for paying for public defender services, because parents may pressure youth to plea or waive counsel entirely to avoid fees.

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<sup>217</sup> MO. CODE REGS. ANN. tit. 18, § 10.3 (2012).

<sup>218</sup> Missouri Public Defender, *Fee Schedule* [http://www.publicdefender.mo.gov/clients/fee\\_schedule.htm](http://www.publicdefender.mo.gov/clients/fee_schedule.htm) (last visited 2/19/2013).

<sup>219</sup> Missouri Public Defender, *Frequently Asked Questions for Clients* [http://www.publicdefender.mo.gov/clients/FAQ\\_clients.htm](http://www.publicdefender.mo.gov/clients/FAQ_clients.htm) (last visited 2/19/2013).

### C. Counsel is Frequently Appointed Late in the Process After Critical Rights Have Been Forfeited by the Child

Juvenile defense systems should not only ensure that children do not waive the appointment of an attorney to assist them, but also ensure that counsel are assigned at the earliest possible stage of the delinquency proceeding.<sup>221</sup>

Site visits suggests that in some counties, counsel is not appointed during the early stages of proceedings when key decisions are made about the case. Reports from several DJOs indicate that the fact-finding process is minimalized, and that counsel, if appointed, has a stronger role in the disposition stage, particularly if a DYS commitment is being considered. This approach fails to recognize the importance of advocacy and the role that counsel can and should play in decisions involving detention, pretrial issues, the right to remain silent, and the presumption of innocence. One assessment team member noted that, “While waiver is extraordinarily high, for those youth who do receive lawyers, it is often too late to have meaningful impact.”

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### III. BARRIERS TO EFFECTIVE PRACTICE

Legal representation of youth in delinquency proceedings across Missouri is uneven at best. Although site visitors observed numerous incidences of effective juvenile defense advocacy on behalf of youth, an even greater number of proceedings were observed where there was no attorney representing the child or the representation was completely lacking.

Juvenile defense counsel is required to act as the client’s voice in the proceedings. The attorney must act based on the expressed interests of the client, not what the attorney deems is in the client’s “best interests.”<sup>222</sup> Defense counsel owes juveniles the same duty of loyalty that is owed to adult criminal defendants. Juvenile defenders should not assume they know what is best for the client; instead, they should employ a client-centered approach that seeks the client’s input and conveys respect for the client’s perspective.

To the greatest extent possible, defense counsel should allow the client to be the primary decision maker during a case.<sup>223</sup> A client should be advised by his or her attorney, but should personally direct whether to cooperate with alternative disposition options, accept plea offers, be tried as an adult, testify, or agree to specific dispositional recommendations.<sup>224</sup> The lawyer maintains control over trial strategy and tactics.

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<sup>220</sup> Missouri Public Defender, *Fee Schedule* [http://www.publicdefender.mo.gov/clients/fee\\_schedule.htm](http://www.publicdefender.mo.gov/clients/fee_schedule.htm) (last visited 2/19/2013).

<sup>221</sup> AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2002), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

<sup>222</sup> See NAT’L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 7 (2009) [hereinafter ROLE OF JUVENILE DEFENSE COUNSEL]; see also MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (2012); NAT’L JUV. DEF. STDS., *supra* note 39, at § 1.2: ELICIT AND REPRESENT CLIENT’S STATED INTERESTS.

<sup>223</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2012); NAT’L JUV. DEF. STDS., *supra* note 39, at § 2.2: EXPLAIN THE ATTORNEY-CLIENT RELATIONSHIP.

<sup>224</sup> NAT’L JUV. DEF. STDS., *supra* note 39, at § 2.2 cmt.: EXPLAIN THE ATTORNEY-CLIENT RELATIONSHIP.

To effectively represent the client's expressed interests, "counsel should seek from the outset to establish a relationship of trust and confidence with the client."<sup>225</sup> A juvenile defender must keep his or her client advised of developments in the case. Additionally, the defender is bound by attorney-client privilege for communication with his or her client.<sup>226</sup> The defender cannot disclose information to parents or guardians, even if the attorney thinks that it would be in the child's best interests.

In Missouri, these dynamics are important. While many court actors—the DJOs, judges, and prosecutors—attempt to work in the best interests of the child and the community,<sup>227</sup> the juvenile defender needs to work for the child's expressed interests.<sup>228</sup>

## A. Role of Counsel at Critical Stages of Delinquency Proceedings

### 1. Arrest

At the earliest points of youth interaction with the justice system, an attorney can safeguard a child's rights with swift advice and action. A juvenile defender's presence during interrogation can ensure that the client does not fall prey to undue coercion, fatigue, or threat of enhanced prosecution.<sup>229</sup> In Missouri, youth can request counsel "prior to the filing of a petition" and receive the guiding hand of counsel during this critical phase of court processing.<sup>230</sup>

Across Missouri, site visitors were told that attorneys rarely, if ever, play a role during post-arrest pre-petition procedures like line-ups, interrogations, identifications, and questioning, despite a Constitutional right to counsel at these stages. In fact, it would seem that in Missouri the role of defense counsel in these early stages of court processing has been superseded by DJOs. Although DJOs are not supposed to participate in interrogating youth, they are assigned the task of giving *Miranda* warnings and "protecting" juvenile's rights during interrogation.<sup>231</sup> Ironically, DJOs are also responsible for charging decisions and filing petitions against the youth. These roles are in direct conflict. In several different counties, interviewers reported discussing this practice with DJOs who readily acknowledged interrogation as part of their role. After a DJO in one county explained this practice a site visitor noted,

This situation seems to create a clear conflict of interest between the [DJO's] assumed duty of child's counsel for the purposes of interrogation and her primary duty as a representative of the Juvenile Office that initiates prosecutions. Second, it must be impossible for a child in such a situation to distinguish between the [DJO] and the police officer, thus muddying the waters with respect to the voluntariness of the child's statement to the police.

The dangers of this dual role of the DJO gained public attention in 2011 in the *Missouri v. Bustamante* case.<sup>232</sup> The *Bustamante* case (described earlier in this report) illustrates DJO's role confusion and its impacts on kids'

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<sup>225</sup> IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 36, at Standards Relating to Counsel for Private Parties 3.3(a); *see also* NAT'L JUV. DEF. STDS., *supra* note 39, at § 2.1 cmt.: ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT.

<sup>226</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 11; NAT'L JUV. DEF. STDS., *supra* note 39, at § 2.3: EXPLAIN CLIENT CONFIDENCES AND CONFIDENTIAL INFORMATION.

<sup>227</sup> MO. REV. STAT. § 211.091; MISSOURI JUVENILE OFFICER HANDBOOK, STATUS/DELINQUENCY: PARTIES (2011), available at <http://www.courts.mo.gov/hosted/resourcecenter/JO%20Published%20April%2019.2011/whnjs.htm>.

<sup>228</sup> NAT'L JUV. DEF. STDS., *supra* note 39, at § 2.5: PARENTS AND OTHER INTERESTED THIRD PARTIES.

<sup>229</sup> *Id.* at § 3.2: Representation of the Client in Police Custody.

<sup>230</sup> *See* MO. REV. STAT. § 211.211.

<sup>231</sup> *See* MISSOURI JUVENILE OFFICER HANDBOOK, INTERVIEW AND INTERROGATION OF JUVENILE (2011).

<sup>232</sup> *State of Missouri v. Bustamante*, Case No. 09AC-CR03516 (Mo. Cir. Ct. June 21, 2011) (order sustaining defendant's motion to suppress).

passage through the system. In this decision the judge noted the confusion created when a DJO described herself as the youth's advocate while taking an incriminating statement, "This deception likely misled the defendant into believing that [the DJO] was there to look after her best interests when, in fact, this was not her role."<sup>233</sup>

This decision in Missouri provides a clear example of what many developmental scholars have concluded: youth are vulnerable and in need of added protection in interrogation settings.<sup>234</sup> However, the current practice in Missouri effectively asks DJOs to serve as both law enforcement and youth advocate in interrogation settings. These inherently conflicting duties cannot be carried out by a single individual. DJOs cannot replace the critical protective role of defense counsel in the interrogation context. The decision in *Missouri v. Bustamante* highlights the inherent dangers of the DJOs' dual role. Providing youth with access to counsel during interrogation contexts would offer youth with the most comprehensive protections possible.<sup>235</sup>

## 2. Detention and Arraignment Hearings

Missouri youth have a right to counsel in all juvenile proceedings. Despite the clear and critical liberty interest at stake in detention hearings, youth received little or no representation at detention hearings in almost half of the counties visited. Reasons for the lack of legal representation at detention hearings varied. In one county, a defender explained that defenders often did not receive notice of a detention hearing in time to actually attend the detention hearing. In another county, the district defender said there were not enough juvenile clients to justify having a defender attend detention hearings. In yet another county, the defenders' office made a policy decision not to attend detention hearings since the judge refused to allow defenders to advocate for youth at this stage. The lack of defender presence at detention hearings not only denies youth the right to counsel, but also impedes the attorney-client relationship. As noted by one defender in reference to the judge preventing defender advocacy at detention hearings, "one problem with not representing children at their initial detention is it makes creating a good attorney-client relationship more difficult."

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In some of the counties visited, the courts have crafted less than adequate stopgap measures to address the absence of counsel at detention. In one county the court uses pro bono counsel to represent youth at detention hearings. But even in this county, pro bono counsel said timing of appointment poses a barrier to effective representation. The public defender in the county said that many of the pro bono counsel do not know anything about juvenile defense. "I got a call the other day from a bankruptcy attorney who had been appointed [to a juvenile case] and had no idea where to start."

Even where attorneys are present at detention hearings, the hearings are rendered "pro forma" due to the timing of appointment of counsel. Appointments are made so late that it is difficult to prepare and provide effective advocacy. In several counties where defenders did appear at detention hearings, defenders said they were appointed on the day of the hearing and not long before the detention hearing was scheduled to be heard. As a

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<sup>233</sup> *Id.*

<sup>234</sup> See Thomas Grisso, *Juvenile Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980); Jessica Owen-Kostelnik, N. Dickon Reppucci, & Jessica Meyer, *Testimony and Interrogation of Minors*, 61 AM. PSYCHOLOGIST 286 (2006); Kaitlyn McLachlan, Ronald Roesch, & Kevin Douglas, *Examining the Role of Interrogative Suggestibility in Miranda Rights Comprehension in Adolescents*, 35 LAW & HUM. BEHAV. 165 (2011).

<sup>235</sup> NAT'L JUV. DEF. STDS., *supra* note 39, at § 3.2: REPRESENTATION OF THE CLIENT IN POLICE CUSTODY.

result, many of these attorneys said they had only minutes before the hearing to talk with their clients, prepare an argument based on the client's input, investigate probable cause, investigate alternatives to detention, and present a cohesive plan to the court. A legal officer in one county expressed concern that late involvement by the defenders resulted in youth sitting in detention longer than necessary, forcing juveniles to look to the DJOs to discuss legal issues and options. Since the DJOs' role with youth begins much earlier than defenders, they have already completed an investigation of the case as well as an interrogation of the youth before the detention hearing. By the time of the detention hearing, DJOs have either already developed a release plan with specific release requirements, or they have a strong set of reasons why release should not be recommended. Consequently, DJOs' recommendations are more informed and are generally affirmed by the court. DJOs in some counties stated that there was no need for defense attorneys at detention hearings because the DJOs had a recommendation for the court and "they had it covered."

In the detention hearings observed where counsel was present, few attorneys even made arguments to the court. Probable cause was never tested or challenged. Generally, the youth were brought before the judge in leg chains, the judge looked to the DJO for a recommendation, and the judge followed that recommendation. It is hard to imagine that a youth in these proceedings would have any idea what transpired. To add to the confusion a child might feel during these proceedings, in one county visited, the detention hearings for youth were conducted via videoconference. The child watched everyone in the courtroom from a monitor back in the detention facility. Everyone *except* the child was in court—including the attorney, where the child was fortunate enough to have one.

### 3. Case Preparation and Client Contact

For youth who are not detained, the first meeting with their attorney is often at the initial court appearance. Despite the fact that earlier intervention by lawyers to investigate the charges, provide legal advice, and explore alternatives to secure commitment may have significant impact on the entire course of the case.<sup>236</sup>

Spending time with a client is really the only means to both establish an attorney-client relationship and to prepare the defense case.<sup>237</sup> Across Missouri, investigators were told that attorneys had only minutes before hearings were held to meet with their clients. In these brief encounters, plea decisions were made based on cursory discussions of the events, and then an abbreviated analysis of possible ways to proceed through complex legal hearings. Not only does the lack of client contact and case preparation diminish the quality of representation, it is damaging to the attorney-client relationship. In one county, two detained youth expressed extremely negative views of their public defenders. They felt that their defenders did not fight for them, did not listen to them, and did not include them in making decisions about the case. One noted that the attorney only spent five to seven minutes with him right before court and said in disgust about the attorney that he did not think the attorney even knew his name.

Also, defenders' lack of contact can exacerbate the stress related to detention and system involvement. In at least two different counties, detention staff expressed concern that defenders did not regularly visit their clients and did not return phone calls from detained clients. One detention superintendent specifically noted that youth rarely saw their attorneys between the detention hearing and the next court date, which created a lot of anxiety for detained youth.

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<sup>236</sup> IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 36, at Standards Relating to Counsel for Private Parties 6.4(a) ("If the client is detained or the client's child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody."); NAT'L JUV. DEF. STDS., *supra* note 39, at § 3.1: REPRESENTATION OF THE CLIENT PRIOR TO INITIAL PROCEEDINGS.

<sup>237</sup> NAT'L JUV. DEF. STDS., *supra* note 39 at §§ 2.1 cmt.: ROLE OF JUVENILE DEFENSE COUNSEL AT INITIAL CLIENT CONTACT, 2.4 cmt.: REPRESENTATION OF THE CLIENT IN POLICE CUSTODY.

#### 4. Investigation and Discovery

Every defense attorney has a mandated constitutional duty to investigate every client's case and make reasonable decisions about what investigation is necessary.<sup>238</sup> This duty obligates defense attorneys to conduct investigation prior to counseling a client about possible plea negotiations. Prompt investigation allows counsel to obtain quick information about the prosecution's case and assess strengths and weaknesses.

The IJA/ABA's *Juvenile Justice Standards* and National Juvenile Defender Center's *National Juvenile Defense Standards* provide that, during the initial stages of representation, many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. The lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protect their clients' interests.<sup>239</sup>

Juvenile defense attorneys have a duty to promptly investigate cases, locate witnesses, examine evidence, obtain exculpatory material, and find information that can aid a client's potential defenses.<sup>240</sup> Even if the lawyer believes the client is guilty, this duty does not change.<sup>241</sup> Attorneys should not allow the juvenile to accept a plea agreement without first examining all available evidence in the prosecution's file and any documents and records of the DJO.<sup>242</sup>

In addition to, and as a result of the investigation, the juvenile defense counsel should protect the pretrial rights of the defendant. Among others, these include the right to remain silent, the compulsory process right, and the right to exclude inadmissible evidence. The lawyer should file appropriate motions, obtain discovery and *Brady* material, and argue on behalf of the client's rights throughout the process.<sup>243</sup>

In most of the counties visited, the attorneys representing youth in delinquency proceedings said they have insufficient time to conduct adequate investigation. Even in counties where defender offices had access to investigators and could request assistance on cases, the ratio of defense investigators to attorneys was often so inadequate that it was difficult to access their services.

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<sup>238</sup> *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

<sup>239</sup> IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 36, at Standards Relating to Counsel for Private Parties 4.1; NAT'L JUV. DEF. STDS., *supra* note 39, at §§ 2.1: Role of Juvenile Defense Counsel at Initial Client Contact, 4.1: Investigate Facts of the Case.

<sup>240</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 14-15; IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 36, at Standards Relating to Counsel for Private Parties 4.3; NAT'L JUV. DEF. STDS., *supra* note 39, at PART IV: ROLE OF JUVENILE DEFENSE COUNSEL PRE-TRIAL.

<sup>241</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 14-15; IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 36, at Standards Relating to Counsel for Private Parties 4.3; NAT'L JUV. DEF. STDS., *supra* note 39, at § 4.1 cmt.: INVESTIGATE FACTS OF THE CASE.

<sup>242</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 15.

<sup>243</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963); see also ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 15; NAT'L JUV. DEF. STDS., *supra* note 39, at §§ 4.5: SEEK DISCOVERY GENERALLY, 4.7: REPRESENT THE CLIENT THROUGH PRE-TRIAL MOTION PRACTICE.



The discovery process is not a substitute for independent investigation. Missouri has open file discovery,<sup>244</sup> and investigators found that in many counties, the discovery practice consisted of the legal officers making their files available to juvenile defense attorneys for copy and/or inspection. In some of the counties visited, the legal officer made the copies and sent the discovery to the defense office. In one county, the defender said that it was onerous to have to take the time to go inspect and copy discovery. In general, however, discovery was not noted as a significant barrier to effective representation but instances of active investigation were rare.

#### 5. Pretrial Hearings and Motion Practice

Motions practice is essential to effective defense work.<sup>245</sup> Well-executed motions can win the case by securing dismissal, excluding evidence, or altering the course of the litigation. The range of possible motions to file and argue in juvenile court is vast. From discovery to suppression to severance to dismissal, an active motions practice indicates an engaged defense.

In Missouri's juvenile courts, investigators found that there were few motions written, argued, or filed during the course of site visits. Again, the culture of many of the juvenile courts discourages formal assertion of legal issues and encourages hallway conversations to resolve legal questions. In fact, a legal officer in one county said that she had only received one written motion in the last several years and "it was from a newbie who should have known better and just called me."

#### 6. Adjudication and Plea Agreements

Juvenile adjudication hearings are the equivalent of trials in the adult criminal justice system. In Missouri, juveniles do not have a constitutional right to trial by jury. Consequently, trials are before juvenile court judges.<sup>246</sup> Youth in Missouri who have been arrested and charged with a crime remain innocent until proven guilty beyond a reasonable doubt.<sup>247</sup> However, the most common observation across the state is that youth in juvenile court need only be "guilty enough" to prove they need some services.

It is the juvenile defender's duty to ensure that the adversarial system is preserved and that the state bears the burden of proving its case.<sup>248</sup> Defense counsel must ensure that all parties respect the presumption of innocence.<sup>249</sup> The elements of the crime and its lesser included offenses should be the central focus of the trial.<sup>250</sup> The juvenile defender must vigorously defend his or her client and clearly explain to the defendant his or her rights and the advantages and disadvantages of exercising them.<sup>251</sup> At the adjudicatory hearing, defense counsel should be thoroughly familiar with the results of pretrial investigations, advance defense theories, utilize experts when needed, and emphasize the heavy burden that the prosecution bears to prove guilt.

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<sup>244</sup> MO. R. CRIM. PRO. 25.03.

<sup>245</sup> NAT'L JUV. DEF. STDS., *supra* note 39, at § 4.7 cmt.: REPRESENT THE CLIENT THROUGH PRE-TRIAL MOTION PRACTICE.

<sup>246</sup> See generally MO. REV. STAT. § 211.171; see also *State v. Andrews*, 329 S.W.3d 396 (Mo. 2010).

<sup>247</sup> See *In the Interest of C.L.B.*, 225 S.W.3d 233 (Mo. Ct. App. 2000); see also *In re Winship*, 397 U.S. 358 (1970).

<sup>248</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 16.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 17.

<sup>251</sup> *Id.* at 16-17.

Most juvenile delinquency cases in Missouri are resolved by plea agreement. In the majority of the counties visited, all of the stakeholders agreed that 90-99% of the cases result in a plea. However, when and how the pleas are taken varies greatly across the state. In one county there was an active reluctance to allowing and accepting a plea at an initial hearing, and yet in another county over 90% of the cases were disposed of at the detention or initial hearing.

What matters most in a plea agreement is whether the child has had the assistance of a defense attorney who has had sufficient time to investigate, negotiate, counsel, and advise prior to the resolution of a juvenile case. Defenders may accomplish significant goals for a youth through plea bargaining in some cases. They may get charges reduced or dismissed, or they may present mitigating factors or other evidence that illustrates the limited role of their clients in the presenting offense. As mentioned previously, many youth in Missouri proceed to plea without an attorney. In one county, the court estimates that more than 90% of youth in detention plead guilty via video at the detention hearing without ever having met their defense attorney in person. However, even in counties where youth do have counsel, a lack of resources can impede counsel's ability to adequately investigate and negotiate the resolution of a case. In one county a judge noted, "If [defenders] had more time and more people, we would have more trials—instead there are more deals cut. Down here when a kid admits, attorneys don't always look at if it can be proved."

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The U.S. Supreme Court issued two opinions in 2012 that underscored the importance of effective representation in the plea process and stated that lawyers must conduct investigations into the charges, make recommendations based on the strength of the state's case, and carefully explain the pros and cons of accepting a plea offer to a client.<sup>252</sup> Although many of the juvenile cases observed were resolved only minutes after an attorney met a young client, the attorneys in these cases were not absolved of their duties to: (1) conduct an adequate investigation; (2) present all plea offers; (3) advise of the consequence of the plea; and (4) form a confidential relationship independent of parents.<sup>253</sup>

Moreover, Missouri law makes it clear that the court should not accept a plea unless the child knowingly, intelligently, and voluntarily waives the right to trial, to cross-examine witnesses, and to remain silent.<sup>254</sup> The record must show explicit advisements and waivers of these constitutional rights and acceptance of the possible consequences.<sup>255</sup> Site visitors reported that counties varied in the extent to which judges delivered developmentally appropriate colloquies—the process through which young people are advised of their rights and what it means to waive them. In some counties, site visitors reported good practices with judges taking the necessary time to ensure youth made knowing, intelligent, and voluntary waivers. In other counties, site investigators reported that judges delivered colloquies so fast it was hard for the investigators—most of whom are lawyers themselves—to understand the warnings.

Although the majority of cases observed were resolved by plea, both with and without attorneys, two of the counties visited had a very active trial practice. Attorneys in these counties investigated their cases, spent greater amounts of time with their clients, called witnesses, entered evidence, and presented a defense. But even in these counties

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<sup>252</sup> *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

<sup>253</sup> See *Frye*, 132 S.Ct. 1399; *Lafler*, 132 S.Ct. 1376.

<sup>254</sup> See *State v. Simon*, 680 S.W.2d 346 (Mo. Ct. App. 1984).

<sup>255</sup> *Brady v. United States*, 397 U.S. 742 (1970).



where the defenders were mounting a defense, they commented that the philosophy of the court is, “can we prove enough to allow us to do what we need to do for this kid.” A defender in another county stated that the courts, “see no harm in convicting a child to get services that they believe are in the child’s best interest.” Though well intentioned, when courts adjudicate youth delinquent to mete out services, the result can derail a youth’s education, career potential, and entire future. The standard for guilt is not “enough,” it is proof beyond a reasonable doubt.

## 7. Disposition

The significance of disposition cannot be overstated. Juvenile dispositions should “facilitate the care, protection and discipline of children” in a way that serves the best interests of the juvenile.<sup>256</sup> “The active participation of counsel at disposition is often essential to protection of clients’ rights and to furtherance of their legitimate interests.”<sup>257</sup>

Missouri allows for a range of dispositions for adjudicated youth, which include probation, placement in residential settings, and commitment to DYS.<sup>258</sup> Defense counsel must afford youth the opportunity to proffer an alternative to the DJO’s recommended dispositional plan by developing a client-driven option that addresses the interests of the client and is responsive to the court’s concerns.<sup>259</sup> Investigation for material relevant to disposition should be conducted at every stage of the proceedings.<sup>260</sup>

Juveniles should take an active role in weighing dispositional options and deciding which would work best.<sup>261</sup> The attorney should inform the juvenile of the possible consequences and the factors the court will consider.<sup>262</sup> Counsel should also prepare the youth for interviews with DJOs and inform them of how their statements will be used in court.<sup>263</sup> Other experts should be consulted to help create an individualized dispositional option to present to the court.<sup>264</sup> Defense counsel should also work to ensure that procedural rights are protected during the disposition hearing by objecting to inadmissible hearsay, examining witnesses, and proffering witnesses.<sup>265</sup>

After a youth is adjudicated delinquent, Missouri law allows for disposition either immediately following the adjudication or in a separate hearing.<sup>266</sup> In most counties observed, the court goes directly from adjudication of the charges to disposition. Generally, the DJOs make a dispositional recommendation that is uncontested by defense and is accepted by the court.

Strong dispositional advocacy by a juvenile defender has long-term impact on the life of their clients. Although many youth in Missouri do not have an attorney at disposition, an attorney is the only person whose role it is to advocate for what the client thinks is an acceptable disposition with conditions that are realistic to adhere to. The defense attorney also advises the client about the possible disposition alternatives, the court process involved in disposition, and the likely outcomes. In the absence of a juvenile defender, the child must rely on the opinion of the DJO who investigated the charges, conducted the interrogation, extracted a statement, and formalized the

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<sup>256</sup> MO. REV. STAT. § 211.011.

<sup>257</sup> IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 36, at Standards Relating to Counsel for Private Parties 9.1.

<sup>258</sup> MO. REV. STAT. § 211.083; § 211.181.

<sup>259</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 18; *see also* NAT’L JUV. DEF. STDS., *supra* note 39, at §§ 6.3: INVOLVE CLIENT IN DEVELOPMENT OF DISPOSITION PLAN AND PREPARE CLIENT FOR THE HEARING, 6.6: PROPOSE INDEPENDENT DISPOSITION PLAN.

<sup>260</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 18.

<sup>261</sup> *Id.* at 17-18.

<sup>262</sup> *Id.*

<sup>263</sup> *See* MO. REV. STAT. § 211.411 (outlining the role of police and DJOs to collect and relay facts).

<sup>264</sup> NAT’L JUV. DEF. STDS., *supra* note 39, at § 6.6 cmt.: PROPOSE INDEPENDENT DISPOSITION PLAN.

<sup>265</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 18; *see also* MODEL RULES OF PROF’L CONDUCT R. 1.3 (2012).

<sup>266</sup> MO. SUP. CT. R. 128.03(a).

petition. Without defense counsel, the court has almost no other choice but to go along with the recommendation of the DJO.

In the counties where youth do have an attorney at disposition, almost half of the attorneys said they often contest disposition recommendations offered by the DJO. Some of these attorneys were observed simply cross-examining the DJO to test the strength of their recommendation. In other counties, defenders offered alternative recommendations to the court, called witnesses, and presented community-based options they had developed with their client. Defenders in more rural counties said they lack the resources and options to develop alternative disposition plans and rely on the DJO for disposition planning.

## 8. Appellate Review

A juvenile's right to counsel and the duty to represent a client does not end after disposition, if the juvenile wishes to appeal. Missouri statute requires counsel to serve for all stages of the case, including appeal.<sup>267</sup> Despite this right to counsel, it appears many juveniles are not being represented for appeals. This is not entirely a result of high waiver of counsel; instead, it results from appeals not being filed. In Fiscal Year 2012, MSPD filed three juvenile appeals and closed four, within the entire state system.<sup>268</sup> Juvenile appeals accounted for 0.15% of the public defender's appellate practice for the year.<sup>269</sup>

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Although private attorneys might bring other juvenile appeals, this almost never happens. In the counties visited, almost no key player could remember when the last juvenile appeal was filed. One commissioner reported having no appeals from his decisions in over 15 years. Of the few individuals recalling juvenile appeals, most could only recall one appeal in their years practicing.

The appellate process is intended to provide individuals with several layers of review. It prevents a person's future from being determined by one individual. However, the extreme lack of juvenile appeals leaves juvenile court decisions untested and without appeals, the law remains undeveloped and unreviewed. The final decision for juvenile cases can thus take place in an informal setting without counsel, without informing the juvenile of his or her rights, and without regard for due process rights. Without appeals, juvenile rights may be short-circuited and the ill-defined and nebulous procedure may even discourage others from filing appeals in the future. In Missouri, juvenile's right to appeal is simply not utilized.

## 9. Other Post-Disposition

In addition to the lack of juvenile appeals, other post-disposition actions in Missouri are notably lacking. By statute, attorneys are relieved of their duties when a final disposition is in place.<sup>270</sup> This heavily impacts juveniles during probation review hearings. The public defender closes a case after disposition; thus, ongoing monitoring of the case is not possible. Public defenders are reappointed only when new charges are brought.

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<sup>267</sup> See MO. REV. STAT. § 211.211.

<sup>268</sup> FISCAL YEAR 2012 ANNUAL REPORT, *supra* note 7, at 65.

<sup>269</sup> *Id.* at 8.

<sup>270</sup> See MO. REV. STAT. § 211.211.

However, juvenile defense attorneys have obligations not addressed in the Missouri statute. Juvenile defense counsel should research and timely file writs of *habeas corpus* and others motions challenging the outcome of a case.<sup>271</sup> Defense lawyers can be effective in addressing problems concerning the fact, conditions, or duration of confinement by bringing these motions.<sup>272</sup>

Attorneys should also periodically check on their clients to determine if there are resolvable issues preventing successful completion of their disposition.<sup>273</sup>

Post-disposition review is an effective tool for ensuring court orders are monitored, youth are released from facilities at the earliest point possible, and community programming is used effectively. Once a youth is committed to DYS, there are no regular reviews. Periodic reviews occur only for juvenile offenders who are in the community. While some counties have a more formal post-disposition review process, these seem to be the exception, not the norm. Still, it is important to note that these reviews usually occur without attorneys. As a result, when problems arise in review hearings, youth have no one to advocate on their behalf. One defender explained, “[A review hearing] is where so much happens...that is where we start writing the narrative about the child.” Once youth get to a hearing where they are facing placement due to an accumulation of violations or other problems, there is no recognition that a lack of defender advocacy at post-dispositional review hearings may inhibit the court’s ability to have all of the information necessary to make appropriate decisions.

#### 10. Ancillary Representation

Though there were significant discussions of the multiple systems impacting the lives of most youth in the delinquency system, investigators did not see examples of ancillary representation in Missouri. Youth in the juvenile justice system often have an array of legal and social needs outside of the juvenile court. Often a youth’s needs are multi-systemic and branch into arenas such as school discipline, special education, mental health, substance abuse, housing, familial problems, and immigration. A juvenile’s status in any of these arenas can significantly impact delinquency proceedings. For example, the outcome of a school disciplinary hearing could influence detention advocacy or dispositional outcomes.

With the goal of affording clients holistic representation, juvenile defense counsel should, either directly or indirectly, provide youth referrals and/or assistance in ancillary services of the law that intersect juvenile indigent defense.<sup>274</sup> Juvenile defense counsel should become familiar with resources that will assist youth in addressing legal and social issues outside of the juvenile justice system. Juvenile defense counsel who face limitations in providing ancillary services directly, should develop contacts with advocates who can represent youth in other systems.<sup>275</sup>

#### B. Youth Tried in Adult Courts

The jurisdictional age is set at 17 in Missouri, which results in all 17 year-olds facing criminal charges being automatically processed in the adult system. Excluding less serious traffic, municipal, and conservation violations, 3,199 17 year-olds were charged in Missouri’s adult criminal system in 2011.<sup>276</sup> Additionally, a number of youth below the age of 17 are “certified” as adults and processed through the adult system. In 2011

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<sup>271</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 19.

<sup>272</sup> *Id.* at 20.

<sup>273</sup> *Id.*; at 20; NAT’L JUV. DEF. STDS., *supra* note 39, at § 7.1: MAINTAIN REGULAR CONTACT WITH CLIENT FOLLOWING DISPOSITION.

<sup>274</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, NAT’L JUV. DEF. STDS., *supra* note 39, at § 1.4: SCOPE OF REPRESENTATION.

<sup>275</sup> ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 21.

<sup>276</sup> Email from Tina Senter, Research Analyst, Missouri Office of State Courts Administrator to authors (Mar. 1, 2013, 12:04 EST) (on file with authors).

alone, 74 youth were certified as adults.<sup>277</sup> Unfortunately, the total number of certification hearings conducted was not available. However, in two counties, judges estimated that of the total number of certification hearings held, about 25% of youth were certified and transferred to the adult court. Given that the mechanism through which Missouri transfers youth is a judicial hearing, juvenile defenders have the opportunity to mount a strong defense to retain youth in the juvenile court. Unfortunately, due to limited resources and the lack of a specialized juvenile defense bar, defenders are often unable to effectively argue on behalf of youth at certification hearings.

Missouri, similar to many other states, disproportionately transfers African American youth to adult court. A recent report issued by the Missouri Juvenile Justice Association in collaboration with the Missouri Juvenile Justice Advisory Group, examined disproportionality in the certification of African American youth in Missouri.<sup>278</sup> Using data of youth cases disposed for felony allegations between 2008 and 2011 from the Judicial Information System (JIS) from all of Missouri's judicial circuits, the report found the disproportionate certification of African American youth by level of offense, offense type, and kind of offense. Although the report acknowledges that its analysis cannot draw the conclusion that inequities in processing “caused” the disproportionate certification of African American youth, they do state that “[t]he totality of these findings appears to suggest that there may be more of an inclination to certify African American youth than Caucasian youth.”<sup>279</sup>

Given these statistics, it is important to note that among the several criteria identified by statute that a judge must review in making a determination to “certify” a youth is the consideration of whether or not racial bias plays a role in the certification process. Defenders can play an important role in addressing the disproportionate certification of African American youth by addressing this issue head on in certification hearings. One of our site visit teams had the opportunity to witness this promising practice while observing a certification hearing where a defender referenced this criterion and asked the judge to consider the issue of racial bias in determining whether or not the youth should be certified to the adult court.

### C. Lack of Juvenile Court Specialization, Training, and Standards

Training of public defenders and appointed counsel in Missouri's juvenile court is minimal—almost non-existent. The lack of training was a major issue identified by many of the key stakeholders. Among many of the counties visited, there was a general consensus that public defenders, judges, and prosecutors lacked training on juvenile issues. These key players lacked both opportunities for such trainings and resources to host or attend them. Current training for the public defenders is a three day conference that may or may not include occasional juvenile topics. Some of the individuals interviewed expressed a need for additional training on adolescent development and issues unique to juvenile adjudications.

One public defender expressed interest in more training on delinquency proceedings and newer techniques for fighting certification. Another court officer indicated that there was some juvenile training that was beneficial, but it mostly focused on child protection. Of the training available, there was not much consistency or availability. Most of the training is very ad hoc. A major barrier to effective training for public defenders is that the heavy caseloads prevent individuals from conducting or attending any extensive training—especially on juvenile issues.

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<sup>277</sup> MJFD 2011 REPORT, *supra* note 65, at 36.

<sup>278</sup> Catherine Patterson, *How Do Certified Youth Compare to Eligible Non-Certified Youth: Descriptive Statistics*, MISSOURI JUVENILE JUSTICE ASS'N (Nov. 2012), available at <http://www.courts.mo.gov/file.jsp?id=58501>.

<sup>279</sup> *Id.* at 7.

The disbandment of the juvenile-specific units perpetuated the lack of training and specialization. While these units were in place, the public defenders in those offices were recognized for their expertise, specialization, and training on juvenile issues. Now, juvenile courts are used as “training” grounds to prepare public defenders for adult cases. Juveniles no longer have trained attorneys; instead, they have attorneys in training. The focus on juvenile specialization has faded to the detriment of juvenile defendants.

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Adding to the confusion about role of counsel and juvenile defense specialization is the Missouri mechanism for allowing attorneys to play the dual role of defense attorney and guardian *ad litem* in the same case in juvenile court. Under Missouri Supreme Court Rules, juvenile defense attorneys can be appointed to act as a guardian *ad litem* for the same child they are defending in a delinquency case despite the inherent conflict between these two functions.<sup>280</sup> It is well settled that the role of the juvenile defender is to represent the stated interests of their juvenile clients.<sup>281</sup> In contrast, the role of the guardian *ad litem* is to represent what the attorney believes is in the best interest of the child. As stated in a 2012 opinion addressing a similar mechanism in Illinois, “...the type of ‘counsel’ which due process ...require[s] to be afforded juveniles in delinquency proceedings is that of *defense counsel*, that is, counsel which can only be provided by an attorney whose singular loyalty is to the defense of the juvenile.”<sup>282</sup> Although the assessment teams did not observe this dual appointment in practice, the fact that it is permissible is untenable with due process.

#### D. Juvenile Court Culture

Courts in Missouri overwhelmingly discount the role of juvenile defense counsel by failing to appoint counsel at the outset, ignoring the defender voice when attorneys are involved in juvenile cases, and significantly restricting resources so that juvenile defenders cannot mount an adequate defense. Unfortunately, the lack of resources may force defenders to choose whether their time is spent with adult or juvenile clients. Along with the lack of resources, the lack of prestige awarded to defending juvenile clients is a constant issue. Speaking on that point, a chief DJO in one county expressed concern that defenders view juvenile court as “kiddie court” and spend more time preparing for and speaking to adult clients than they do with juvenile clients. A juvenile defender in one county explained, “We’re drowning. We do a shameful job on our juvenile cases in this county.”

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Even when attorneys have the opportunity to be advocates, their voices are often ignored. In one jurisdiction where most youth are represented by counsel, a defense attorney stated, “In juvenile court, I am not much more than a potted plant. My judges have virtually always (I can think of one exception in seven years) sided with the juvenile officer [DJO] in spite of the evidence, rules of procedure, or law. Commonly, my only achievement in a juvenile case is to explain the process to the client and attempt to comfort him/her. My work seldom changes the end result of the case.” Another juvenile defender stated, “There is not a lot I can do...it’s essentially standing next to someone while they get sent to DYS for petty nonsense.”

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<sup>280</sup> MO. SUP. CT. R. 115.02 cmt.

<sup>281</sup> See ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 222, at 7; NAT’L JUV. DEF. STDS., *supra* note 39, at § 1.2: ELICIT AND REPRESENT CLIENT’S STATED INTERESTS; IJA-ABA JUVENILE JUSTICE STANDARDS, *supra* note 36, at Standards Relating to Counsel for Private Parties 3.1; *People v. Austin M.*, 975 N.E.2d 22 (Ill. 2012).

<sup>282</sup> *Austin M.*, 975 N.E.2d at 44.

## IV. STRENGTHS AND PROMISING PRACTICES

### A. Counties with Routine Appointment of Counsel

While the practice of allowing youth to waive their right to counsel was pervasive throughout many jurisdictions, there were exceptions to this in counties where adequate resources for appointment of counsel were provided. Judges in those counties recognized that youth could generally not competently waive counsel without consultation and should be entitled to the assistance of an attorney through all critical stages. We heard resolve on the part of these judges that in spite of the public defender caseload crisis, juveniles would not go unrepresented in their courts.

In one jurisdiction where no waiver of counsel was seen, the judge noted that, unlike his counterparts, he appreciated the importance of juvenile court and intentionally uses a different vocabulary and demeanor. He mentioned that training through the judicial college specifically on juvenile law helped, although there was no ongoing juvenile training for judges in Missouri. In this jurisdiction, attorneys are appointed following arrest and lawyers were present at detention and at all other initial hearings.

In another jurisdiction—where the public defender system does not receive juvenile court appointments—the court has established a system of using private attorneys to handle all delinquency cases. A fund for legal costs was established by the county and provides funds for defense attorney and guardian *ad litem* appointments. The defense attorneys appointed in that county were generally experienced solo practitioners who receive little or no pay for their services. They were described as “tough, zealous advocates” in part because of their significant experience in adult criminal cases. Even prosecutors noted that these attorneys take procedural due process obligations seriously. “I have to come prepared with all of my i’s dotted and my t’s crossed. They want details,” said one of the prosecutors. Youth in this jurisdiction are appointed counsel once charges are filed.

### B. The Role of Law Schools in Forging Change

Missouri has four law schools—Saint Louis University, University of Missouri-Columbia, University of Missouri-Kansas City, and Washington University in St. Louis. These schools can and do offer significant contributions to the field of juvenile defense. By raising awareness and providing thousands of hours of free legal service to juveniles in the state, clinical programs have helped to provide training to new lawyers who can develop as leaders in the field and create a dialogue on emerging trends in juvenile defense practice.

Several of the law schools have hosted symposia on access to counsel and juvenile justice. In 2010, the *Missouri Law Review* hosted a symposium entitled *Broke and Broken: Can We Fix Our State Indigent Defense Systems?*<sup>283</sup> The symposium looked at the problems facing the nation’s indigent defense systems. The program brought together national scholars and Missouri experts on indigent defense. In 2012, Washington University hosted a colloquium entitled *Evolving Standards in Juvenile Justice: From Gault to Graham and Beyond*.<sup>284</sup> Events like these help bring attention to the major problems facing indigent and juvenile defense in Missouri.

The law schools are also promoting access to counsel through clinical programs. The clinics serve two main purposes; they offer free legal services to indigent juveniles and train law students to become effective juvenile

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<sup>283</sup> See University of Missouri School of Law, Missouri Law Review Symposium 2010, *Broke and Broken: Can We Fix Our State Indigent Defense Systems?* (Feb. 26, 2010), available at <http://law.missouri.edu/faculty/symposium/symposium10/>.

<sup>284</sup> See Washington University Law School, Access to Equal Justice Colloquium, *Evolving Standards in Juvenile Justice: From Gault to Graham and Beyond* (Mar. 23, 2012), available at <http://law.wustl.edu/accessequaljustice/>.



advocates. Both Saint Louis University and Washington University have clinics dedicated to juvenile indigent defense.<sup>285</sup> These clinics allow students to gain hands-on experience working with children and defending them on delinquency charges. Clinics like these offer immediate assistance for juveniles, long-term training for new lawyers, and recognition of juvenile defense as a specialized practice.

### C. Youth Advocacy Units

Specialized Youth Advocacy Units had a strong impact on the representation youth received in Missouri. Reinstating these units across the state would significantly improve due process protections for Missouri youth in juvenile court. In 1995, the Missouri General Assembly took a more punitive approach to juvenile crime.<sup>286</sup> Missouri's law became focused on community protection instead of juvenile rehabilitation.<sup>287</sup> The public defender system recognized the higher stakes and secured resources to staff a Youth Advocacy Unit within the Trial Division. Offices were located in St. Louis and Kansas City.<sup>288</sup> These units were created in 1997 to provide specialized training and services.<sup>289</sup> The units included investigators, dispositions specialists, and licensed social workers who were part of the defense team.

In the years immediately following the creation of the Youth Advocacy Unit, there was a significant reduction in DYS commitments in St. Louis City and St. Louis County.<sup>290</sup> Additionally, the number of juveniles certified as adults decreased while the Youth Advocacy Units were responsible for juvenile cases.<sup>291</sup> These units were able to provide more attention and services directly to the juveniles. The attorneys and social workers handling the cases were able to be acutely aware of the particular needs and challenges facing juveniles.

There was a proposal to expand the Youth Advocacy Units to cover additional counties in Missouri.<sup>292</sup> However, this plan was never executed. Budget problems prevented the expansion and led to combining the Youth Advocacy Units with the general Trial Division.<sup>293</sup> What was a promising practice that could have been replicated with significant results fell victim to the state's indigent defense resource crisis.

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<sup>285</sup> See *Child Advocacy Clinic*, SAINT LOUIS UNIVERSITY, <http://slu.edu/school-of-law-home/academics/legal-clinics/civil-advocacy-clinics>; *Civil Justice Clinic*, WASHINGTON UNIVERSITY LAW SCHOOL, <http://law.wustl.edu/civiljustice/index.aspx?id=393>.

<sup>286</sup> See MO. REV. STAT. § 211 (1994 & Supp. 1997).

<sup>287</sup> See Caterina DiTraglia, "*The Worst of Both Worlds*": *Defending Children in Juvenile Court*, 63 MO. L. REV. 477, 478-871 (1998).

<sup>288</sup> See *Youth Advocacy*, MISSOURI STATE PUBLIC DEFENDER, [http://www.publicdefender.mo.gov/legal/youth\\_advocacy.htm](http://www.publicdefender.mo.gov/legal/youth_advocacy.htm).

<sup>289</sup> *Id.*

<sup>290</sup> Letter from Deputy Director Vicky Weimholt to Attorney Caterina DiTraglia (Aug. 30, 1999) (on file with authors).

<sup>291</sup> See Letter from Caterina DiTraglia to Director J. Marty Robinson (Sept. 3, 1999) (on file with authors).

<sup>292</sup> See *id.*

<sup>293</sup> See Justine Finney Guyer, *Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335 n.42 (2009).

# CHAPTER FOUR

## Conclusion and Recommendations

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Children facing criminal or status offenses in Missouri’s juvenile justice system frequently do so without the benefit of counsel or without adequate representation through all critical stages. As this report identifies, there are significant gaps in both access to and quality of representation provided to youth that fall well below the standards established by the Institute of Judicial Administration and American Bar Association’s *Juvenile Justice Standards*, the ABA *Rules of Professional Conduct*, the *Ten Core Principles for Juvenile Indigent Defense* established by NJDC, and NJDC’s newly released *National Juvenile Defense Standards*. Justice is often rationed to juveniles in Missouri for a variety of reasons, not the least of which is the crisis in the public defender system and the *parens patriae* attitude that is still present in some courtrooms.

Missouri’s strength is in its commitment to rehabilitation and the collaborative efforts built into its juvenile system. Across the state, there are many committed and talented people who work hard to protect the rights of children. The dozens of individuals throughout Missouri’s juvenile system who committed time, resources, and insights by participation in and contribution to this assessment are reflective of the commitment to children in Missouri. This is encouraging in moving forward to use this report as a catalyst for changing the system.

When attorneys have the time and training to provide zealous representation, there can be an immediate and long-term impact on ensuring due process and decreased system costs to counties and to the state. Lawyers have the ability to develop effective and meaningful relationships with their young clients, and they should be an integral part of ensuring that youth are not adjudicated delinquent as a means to access services. And when adjudication is substantiated, defense counsel ensure that youth are subject only to the most appropriate and effective services and programs in the least restrictive setting possible.

The following recommendations were formed after a careful review of the data and findings compiled in this study. The recommendations are divided into “Core Recommendations” and “Implementation Strategies.” Core Recommendations are the key proposals with general application. They represent the principal areas in which work is needed to improve both access to counsel and quality of representation for youth in the delinquency system. The Implementation Strategies flow from these Core Recommendations to provide more detailed suggestions to relevant state or local entities.

### Core Recommendations:

1. **Ensure Timely Appointment of Counsel:** Youth must be appointed counsel and have access to counsel early in their case.
2. **Reduce Waiver of Counsel:** Missouri should establish a presumption against waiver of counsel; whereby, a youth must first consult with counsel before any waiver is permitted. No child should be denied counsel because of lack of resources.
3. **Afford Representation at All Critical Stages:** Missouri youth should be afforded counsel at all critical stages of the proceedings.
4. **Allocate Sufficient Resources:** Missouri must commit adequate funding to juvenile representation that allows for reasonable caseloads and effective advocacy. Juvenile defenders must also have access to ancillary services such as investigators, experts, and social workers.



5. **Strengthen Monitoring and Oversight:** The indigent defense delivery system should include a separate juvenile division to centralize leadership, innovation, and responsibility around juvenile defense. The division would strengthen positive practices and policies and would provide ongoing statewide oversight and monitoring.
6. **Establish Data Collection:** A system of data collection should be established, which can track appointment of counsel at early stages, and other pertinent data regarding juvenile representation to aid management in decision making. Best practices and innovations should be identified and promoted through data collection.
7. **Recognize Juvenile Defense as a Specialized Area of Practice:** Juvenile defense should be recognized and appreciated as a highly specialized practice. A system with ongoing training, support, and networking among defenders should be established. Attorneys should participate in comprehensive training before working in juvenile court, and they should have the opportunity for ongoing training to enhance their practice skills and knowledge of the field.
8. **Reduce Youth in the Adult System:** The age for adult criminal court jurisdiction in Missouri should be raised from 17 to 18.
9. **Adopt Standards of Practice:** Juvenile defense practice standards should be adopted and implemented statewide. Expectations regarding ethical obligations and performance of attorneys providing representation at all critical stages should be included.
10. **Address the Role of the Deputy Juvenile Officer:** The expansive role of the deputy juvenile officer should be addressed to ensure that it does not influence, directly or indirectly, the ability of youth to be appointed counsel early in the process, and to prevent statements made to these individuals from being admissible in court.

### Implementation Strategies:

To make substantial improvements in Missouri’s system of juvenile indigent defense, the cooperation of numerous entities must be involved. The legislature, judiciary, Missouri Public Defender System, law schools and local and state bar associations can and must all play a role in a concerted effort to reform policy and practice. The Implementation Strategies below are designed to address the Core Recommendations with specific multi-systemic reforms.

### The Legislative Branch should:

- Adequately fund the system of indigent defense to encompass sufficient resources for a strong juvenile defense delivery system as well as conflict attorneys;
- Require representation of children to extend after disposition and provide funding for this representation;
- Enact a presumption of indigence for children and eliminate the requirements of a lien and fees once representation is provided;
- Strengthen the waiver of counsel statute to limit the ability of courts to allow youth to waive their right to counsel without adequate procedural safeguards;
- Restrict the ability of DJOs to obtain and utilize incriminating statements by juveniles in later proceedings and re-examine the line of supervisory authority for these positions to eliminate actual or perceived conflicts; and

- Join the majority of other states by changing the statutory age for youth in juvenile court to 18 in order to provide fair and developmentally appropriate advocacy and services to all juveniles in the state.

**The Judicial Branch should:**

- Work to remove the barriers to appointment of counsel for youth in the delinquency system and significantly reduce the number of unrepresented youth;
- Assure that counsel is appointed for all critical stages of the proceedings, including early appointment at the detention hearing stage and through disposition and post-disposition proceedings;
- Examine court rules to ensure waiver of counsel is limited and that youth are otherwise afforded adequate due process protections; and
- Ensure that colloquies in all juvenile cases are legally adequate and developmentally appropriate.

**The Missouri State Public Defender should:**

- Continue the longstanding efforts with the legislative branch in advocating for a fully funded indigent defense delivery system, especially for juvenile defense;
- Take the lead in reforming juvenile indigent defense and in implementing the core recommendations of this assessment;
- Promulgate practice standards for juvenile defenders that require attorneys to meet with clients prior to court proceedings, consult with clients and families about the case and social information, investigate cases, file motions as appropriate, provide vigorous and independent advocacy at detention, adjudication, disposition and post-disposition hearings, negotiate for fair and favorable plea agreements, prepare for and set trials to ensure that the government can meet its burden, and advise clients about all proceedings and consequences for any decision made;
- Create a high-impact culture for juvenile defense practice within the state that recognizes the practice as a specialized field and recruits and maintains well-trained and zealous lawyers;
- Create a state level Juvenile Division within MSPD, which can focus on enhancing appeals and other post-disposition work, providing specialized juvenile defense training, implementing juvenile defense policy work, and offering technical support for trial offices on juvenile cases;
- Reinstatement the Youth Advocacy Units in the counties or comparable offices which can specialize in juvenile practice in large jurisdictions as well as provide assistance and consultation for smaller offices;
- Implement a means of electronic sharing across the state—e.g. listservs, social media, etc.—for those engaged in juvenile defense practices to share information and resources and provide technical assistance;
- Actively engage the law schools to further student interest and skill building in juvenile defense work and to develop potential leadership in the next generation of lawyers;
- Identify and suggest changes in court rules, which could improve access to counsel and quality of representation for youth in the delinquency system; and
- Work with and promote JDAI initiatives in participating counties to ensure that youth are provided with effective detention advocacy and that defenders are actively engaged with the JDAI committees and leadership structure. MSPD should be an active participant in the state leadership group for JDAI.

### **Missouri Law Schools Should:**

- Continue to provide and expand high quality clinical and experiential learning programs, which can train students to be practice ready in the field of juvenile defense and identify current and relevant issues for litigation;
- Enhance the dialogue around juvenile defense reform through continued use of symposia, publications, and continuing education seminars; and
- Actively engage as a partner with MSPD and other state and non-profit entities to implement reforms identified in this assessment.

### **Local and State Bar Organizations should:**

- Recognize juvenile defense as a specialized area of practice;
- Develop and promote policies that will support and improve juvenile indigent defense reform efforts;
- Support a fully funded indigent defense delivery system that adequately funds juvenile defense as a specialized field; and
- Offer specialized juvenile defense training programs.



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