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“The Worst of Both Worlds”:¹ Defending Children in Juvenile Court

Caterina DiTraglia*

I. INTRODUCTION

In 1970, Judge Theodore McMillian and Dorothy McMurtry, writing about Juvenile Court in Missouri, described the fertile soil from which “the basic requirements of due process and fairness”² grew in criminal proceedings against children. They noted “[t]he unprecedented rise of crime and delinquency, [and] the resultant hue and cry for law and order.”³ They recognized that “juvenile offenders were caught up in the same web that characterizes treatment of criminal adult offenders—retribution, condemnation, deterrence and incapacitation” which should trigger the important due process rights to assistance of counsel, protection against self-incrimination, and confrontation of witnesses.⁴

Twenty-seven years later, the same call to “get tough” on juvenile⁵ crime has generated increasingly punitive laws for young offenders in Missouri.⁶ However, corresponding legal procedures, available to adults charged with crimes have not kept pace in the juvenile system. For example, children are not entitled to jury trials.⁷ The burden of proof for crimes alleged against a child on juvenile probation is lower than proof beyond a reasonable doubt, the standard for an adult who reoffends.⁸ Waivers of counsel are commonplace.⁹ Prosecutors

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1. This was Justice Fortas’ characterization of juvenile courts in *Kent v. United States*, 383 U.S. 541, 556 (1966).

2. *In re Gault*, 387 U.S. 1, 12 (1967).

3. Theodore McMillian & Dorothy McMurtry, *The Role of the Defense Lawyer in Juvenile Court—Advocate or Social Worker?*, 14 ST. LOUIS U. L.J. 561, 562 (1970).

4. *McMillian*, *supra* note 3, at 565-84.

5. In Missouri, juvenile court has jurisdiction over children under seventeen years who are charged with crimes. MO. REV. STAT. § 211.031(3) (1994).

6. *See generally* MO. REV. STAT. § 211 (1994 & Supp. 1997); MO. REV. STAT. § 491 (1994 & Supp. 1997).

7. *In re PAM*, 606 S.W. 2d 449, 456 (Mo. Ct. App. 1980); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

8. *N.J.B. v. State*, 941 S.W.2d 782, 784 (Mo. Ct. App. 1997). While the court finds that a person may be found to be in violation of his or her probation based on a quantum of evidence that is “clear and convincing” in both adult and juvenile court, the court further holds that an adjudication (finding of guilt in juvenile court) may be made on a felony and a misdemeanor using the lesser standard as well. For adults, a new

have access to privileged treatment records and information, without court order, regarding children who are transferred into the adult system, that they could not access for adult offenders.¹⁰

Many involved in the juvenile court system continue to prefer informality and a cooperative approach in making efforts to rehabilitate children. However, the thrust of Missouri's Juvenile Code and related laws increasingly is focused on the protection of the community over an individual child's confidentiality and treatment needs. The juvenile system is, therefore, unavoidably antagonistic, and because it lacks a tradition or historical practice which protects the rights of children who are at risk of losing their liberty in an adversarial process (whether through placement in a group home, institution, or an adult prison), the protection of children's rights through effective assistance of counsel is one of the crucial elements of the fair administration of justice in Missouri's juvenile courts.

II. THE NEW STATUTES

In 1995, the Missouri General Assembly enacted major revisions to the Missouri Juvenile Code. While the amended Juvenile Code states that the

conviction, regardless of a person's probationary status, must be based upon proof beyond reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970); *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877); *State v. Simler*, 167 S.W.2d 376, 382 (Mo. 1943).

9. While no statewide data is kept on how many children waive their right to counsel in Missouri, in 1996 the Missouri State Public Defender's Office conducted a study of juvenile court representation in the Public Defender System. PROPOSAL FOR MISSOURI PUBLIC DEFENDER'S JUVENILE DIVISION (Aug. 1996). Approximately 2,442 cases were identified in which children were represented by attorneys from the Public Defender's Office in fiscal year 1994, while close to 11,402 delinquency and criminal cases were processed in Missouri's juvenile courts statewide according to the most recent data available at the time from the Division of Youth Services (the agency charged with collecting such information). MISSOURI JUVENILE COURT STATISTICS REPORT (1994). While private counsel are appointed in certain circuits to handle juvenile cases, the disparity in numbers suggests there are a significant number of cases where counsel was waived. These totals do not distinguish between status offenses (such as truancy or incorrigibility) law violations and certifications. *See also Puritz et. al., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, A REPORT OF THE AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CENTER, 44 (Dec. 1995).

10. MO. REV. STAT. § 211.071.5 (Supp. 1997) states in part that prosecutors "shall have access to the disposition records" if a child facing certification has prior adjudications. Disposition records often contain statements of other family members, peers, teachers, or school counselors, psychological, psychiatric or medical evaluations or treatment records of a child. Prosecutors in adult court normally do not have the same access to this information regarding adult defendants.

state's "child welfare policy" remains "the best interest of the child," the preference for achieving that policy by placement in the child's own home was removed.¹¹

The basic behaviors which could result in a referral to juvenile court, such as truancy, incorrigibility, conduct injurious to self or others, and violation of laws, remain the same under the new code.¹² However, for certain offenses there is no longer a minimum age at which a child can be incarcerated and forced to stand trial as an adult.¹³ For these offenses, a hearing before a judge to consider certification for transfer to the adult system is mandatory at any age. For all other felonies, the minimum age for certification has been lowered from fourteen to twelve years.¹⁴

Once a child has been certified to stand trial as an adult, he or she is permanently excluded from juvenile court jurisdiction.¹⁵ The only way a child can be "uncertified" is if he or she is found not guilty after a trial.¹⁶ The irrevocable nature of the certification decision under the new law might well reopen the question of whether certification decisions in Missouri are now final orders which can be appealed. Prior to this change in the law, certification orders were not considered "final" and did not trigger appellate rights.¹⁷ A motion for certification triggers access by a prosecutor in the adult system to the child's social file, without having to secure a court order.¹⁸

Hearings in juvenile court are now open to the public if a child is charged with a class A or B felony, or a C felony if a child has two prior felony adjudications. Prior to enactment of the new Code, the pleadings and social records of children convicted in juvenile court of class A felonies or murder were the only juvenile court records open to the public.¹⁹ Under the new law, juvenile officers (social workers for juvenile court) may at any time share information concerning any child or any case with victims, witnesses, school

11. Compare MO. REV. STAT. § 211.011 (1994) with MO. REV. STAT. § 211.011 (Supp. 1997).

12. MO. REV. STAT. § 211.031 (1994).

13. MO. REV. STAT. § 211.071.1 (Supp. 1997). Mandatory certification hearings are now required for a child at any age, for the offenses of first degree murder, second degree murder, first degree assault, forcible rape, forcible sodomy, first degree robbery, distribution of drugs or if a child has two prior adjudications for offenses which would be felonies if committed by an adult. It remains in the court's discretion, however, to decide if a child should be certified.

14. MO. REV. STAT. § 211.071.1 (Supp. 1997).

15. MO. REV. STAT. § 211.071.9 (Supp. 1997).

16. MO. REV. STAT. § 211.071.10 (Supp. 1997).

17. *In re T.J.H.*, 479 S.W.2d 433 (Mo. 1972); *State v. Bills*, 495 S.W.2d 722 (Mo. Ct. App. 1973).

18. MO. REV. STAT. § 211.071.5 (Supp. 1997).

19. MO. REV. STAT. § 211.321.1 (1994).

personnel, police and prosecutors, or any custodian.²⁰ Furthermore, the records of felony proceedings in juvenile court which result in adjudication now are open to the public in the same manner that adult criminal records would be.²¹

Under the new Code, placements with social service residential facilities may be ordered for a determinate period of time.²² In some respects, this means a child can now be "sentenced" to live in a group home or social service institution regardless of his or her treatment progress or capacity to function at home.

For many years, an adult's prior adjudications in juvenile court have been available to courts in the adult system for the purposes of sentencing.²³ Under recently enacted law, certain juvenile adjudications also can be used for up to three years after the case is closed to challenge the credibility of a person who testifies in court.²⁴ Furthermore, an adjudication for any sexual offense (even a misdemeanor) in juvenile court may be used to challenge a person's credibility in court for the rest of his or her life.²⁵

Likewise, the "Safe Schools Act,"²⁶ enacted by the Missouri General Assembly in 1995, has imposed numerous requirements on Missouri Schools regarding children who engage in criminal or delinquent behavior. This change in the law allows schools to suspend or expel children who are adjudicated for certain crimes, either for a substantial period of time²⁷ or permanently.²⁸ While these laws may be a desirable means to the end of avoiding problems in the

20. MO. REV. STAT. § 211.321.2(1)(a) (Supp. 1997). This statute does not authorize the release of information disseminated by a juvenile officer to any person or agency not listed.

21. MO. REV. STAT. § 211.321.2(2) (Supp. 1997).

22. MO. REV. STAT. § 211.181.4 (Supp. 1997).

23. MO. REV. STAT. § 211.321.1 (1994); *State v. Reagan*, 427 S.W.2d 371 (Mo. 1968); *State ex rel. Whittaker v. Webber*, 605 S.W.2d 179 (Mo. Ct. App. 1980).

24. MO. REV. STAT. § 491.078.1 (Supp. 1997)

25. MO. REV. STAT. § 491.078.2 (Supp. 1997)

26. The Missouri Safe Schools Act consists of Sections 160.011-160.457 and 167.020-167.627 of the Missouri Revised Statutes.

27. MO. REV. STAT. § 167.161.2 (Supp. 1997) (allows a school to consider juvenile court records at a hearing regarding a child's suspension or expulsion). *See also* MO. REV. STAT. § 160.261.3 (Supp. 1997) (providing that a student who is determined to have brought a weapon to school may be suspended for a period of not less than one year or expelled).

28. MO. REV. STAT. § 167.171.3 (Supp. 1997). This Section provides that a student may not be readmitted or enrolled in school if the student has been charged with or convicted in juvenile or adult court for the following: (1) distribution of drugs to a minor; (2) first degree murder; (3) second degree murder; (4) first degree assault; (5) forcible rape; (6) forcible sodomy; (7) first degree robbery; (8) first degree arson; and (9) kidnaping. While readmittance after an acquittal is permitted, it is not required by the statute. MO. REV. STAT. § 167.171.3 (Supp. 1997).

schoolhouse, lack of access to education²⁹ significantly defeats most efforts to rehabilitate a child.

III. DEFENSE COUNSEL IN THE JUVENILE SYSTEM

A child who is charged with an offense in juvenile court is entitled to a lawyer.³⁰ In Missouri, if requested, the court must appoint counsel even before a formal charge or "petition" is filed.³¹ After a petition is filed, the court is required to appoint counsel for a child if "necessary to assure a full and fair hearing."³² Furthermore, a child cannot waive the right to a lawyer without the court's permission.³³ The court must provide counsel for a child whether or not the child's parents wish to, or are able to, pay the legal fees.³⁴

The apparent preference for legal representation of children codified and interpreted in Missouri's law is not always appreciated in the day-to-day processing of juvenile delinquency cases. This is evidenced by the number of cases in Missouri involving children who are adjudicated without the benefit of a lawyer to assess the validity of the accusations, to assist in presenting a defense if the child has one, or to advocate for the child's wishes.³⁵ This condition exists for several reasons: (1) waivers of counsel may speed up the processing of cases and alleviate some administrative burdens;³⁶ (2) the historical practices and procedures in juvenile court that are an anathema to any criminal defense lawyer's sense of fair process³⁷ still exist in some respects because there are no

29. Section 167.164 provides: "Any suspension issued pursuant to section 167.161, or this section, or expulsion pursuant to section 167.161, shall not relieve the state or the suspended student's parents or guardians of their responsibilities to educate the student." MO. REV. STAT. § 167.164 (Supp. 1997).

30. *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

31. MO. SUP. CT. R. 116.01(b)

32. MO. SUP. CT. R. 116.01(c)

33. MO. SUP. CT. R. 116.01(h)

34. *State ex rel. Gordon v. Copeland*, 803 S.W.2d 153 (Mo. Ct. App. 1991).

35. *See supra* note 9.

36. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*. J. CRIM. L. & CRIMINOLOGY 1185, 1200 (1989).

37. *See* McMillian, *supra* note 3, at 562. Judge Theodore McMillian describes juvenile court in Missouri prior to *Gault*: "Moreover, we judges knew that: (1) notice of the charges at our informal hearings was meager; (2) the juvenile court officer, supposedly a confidant of the child, was often his accuser; (3) no witnesses were produced or sworn, and hearsay was rampant; (4) the child was frequently called upon or, in extreme cases, coerced to be his accuser; (5) the friendly judge was prosecutor, defense counsel, and jury; and (6) neither the child nor his family were advised of the right to counsel, or the right of the child to remain silent." *Id.* (citation omitted).

formal procedural rules for the conduct of a juvenile court hearing;³⁸ and (3) the appointment of counsel for a child is meaningless if large caseloads, lack of training, and lack of resources render the representation a mere formality.³⁹

A. *The Need for Defense Counsel*

Despite the fact that some juvenile court personnel, seeking to rehabilitate children, view the presence of defense counsel in their midst as an interference, the United States Supreme Court recognized in *In re Gault* that the *parens patrie* approach to protecting the best interests of children charged with crimes has failed miserably.⁴⁰ Upon coming to this realization, the Court found that the right to assistance of counsel is an elementary safeguard for children in juvenile court. The current punitive trend in Missouri law regarding juveniles charged with crimes adds urgency to the findings of *Gault* and mandates that children receive aggressive and well-informed defense representation. This representation should be focused on protecting the legal rights and wishes of the child rather than the child's perceived welfare or the welfare of the community, matters which are better left to the courts, juvenile officers, legal officers (lawyers for juvenile officers), and prosecutors.

In the final analysis, providing children with properly trained and funded counsel actually contributes to the goal of reforming delinquent behavior in that it has three important consequences: First, legal defense in general keeps the system honest and serves as a check on the abuse of power.⁴¹ Second, if a child feels that the process is fair, he or she is more likely to cooperate and accept the

38. MO. REV. STAT. § 211.171.1 (Supp. 1997); See also MO. REV. STAT. § 510.310 (1994), which governs procedure in equity: "In cases tried upon the facts without a jury, the court shall rule upon all objections to evidence as in jury cases."

Therefore, it appears that the formal rules of evidence apply to juvenile adjudicative hearings. However, as a practical matter, judges often follow the guidelines set out in Missouri Revised Statutes Section 211.171.1 (Supp. 1997), which states: "The procedure to be followed at the hearing shall be determined by the juvenile court judge and may be as formal or informal as he considers desirable." Presumably, Section 211.171.1 applies only to the dispositional issues and not to the guilt/innocence issues but that is not the reality in some courts.

39. Puritz, *supra* note 9, at 19-27.

40. *In re Gault* 387 U.S. 1, 28-29 (1967). Justice Fortas noted the procedural differences between juvenile and adult courts and described the delinquency adjudication as analogous to a Star Chamber proceeding. *Id.* at 18. Had Gerald Gault been an adult, he would have been entitled to substantial protection under the United States and Arizona constitutions and would have been subject at most to a minimal fine or two months imprisonment for his offense. *Id.* at 29. As a juvenile, he was committed to a correctional facility for an indefinite term of up to six years. *Id.* Justice Fortas ended his comments by concluding: "Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 28.

41. *Id.* at 38 n.65.

outcome. Even the appearance of unfairness in a legal system undermines confidence in, and respect for, the judicial process and fosters a desire to avoid or rebel against what may be legitimate precepts of the court. Any person, particularly an adolescent, would resist the dictates of an authority that gave him or her no voice and no advocate in the process. Finally, when a court, in deciding disposition,⁴² recognizes and appreciates a child's interests, more opportunities exist to inculcate the child in the effort to re-direct behavior, making the child more likely to succeed and rendering the utilization of expensive institutional resources unnecessary.⁴³

B. Discovery as Advocacy in Juvenile Court

Defense representation in juvenile court operates in three basic stages: (1) the adjudicatory stage, at which the child's guilt or innocence is at issue; (2) the dispositional stage, at which the court must decide what to do with a child who is adjudicated or convicted of a charge; and (3) the certification stage, at which the court must decide whether the child should stand trial as an adult for the charges alleged. Endemic to all three phases is the defense counsel's obligation to engage in a meaningful discovery process in order to present a defense, confront witnesses, and preserve the record for appeal. While discovery is certainly not the only duty of defense counsel in juvenile court, it is often the linchpin of a fair result and a meaningful appeal.

In juvenile court, discovery is governed by the Missouri Rules of Juvenile Court⁴⁴ and the Missouri Rules of Civil Procedure.⁴⁵ The Rules of Civil Procedure allow for discovery of *any* matter relating to the claim or defense of *any party* as long as the information *appears reasonably calculated to lead to the*

42. Disposition in a juvenile case is the action taken regarding a child after he or she has been adjudicated or found guilty of a charge. The court may enter an order as unrestricted (no court supervision, return the child home) or restricted (putting the child in the custody of the Division of Youth Services for residential placement) as it deems appropriate. The court is not limited in this regard by the nature of the charge.

43. Dean Macallair, *Disposition Case Advocacy in San Francisco's Juvenile Justice System: A New Approach to Deinstitutionalization*, 40 *CRIME & DELINQUENCY* 84-95 (1994). Macallair profiles a study in which 243 youths, recommended for commitment by their probation officers, were randomly selected to receive defense-based disposition reports prepared by case advocates working on their behalf. The results of the study established that 72% of the children with advocates as compared to 49% in the control group (not given such defense advocacy) were diverted from state correctional facilities. In 1994, the Fourth State Building Bond Issue was passed allocating \$20 million for new residential facilities for children in the custody of Division of Youth Services. In 1995, the Juvenile Crime Bill allocated \$7 million for additional facilities and staff. *Id.*

44. MO. SUP. CT. R. 118.03(b), MO. SUP. CT. R. 119.05(e).

45. MO. SUP. CT. R. 110.04, MO. SUP. CT. R. 56-61.

*discovery of admissible evidence.*⁴⁶ This rule gives defense counsel wide latitude for investigation of the case against a child, both at the adjudicatory stage and the dispositional stage. The discovery rules of criminal procedure, applicable to adults, arguably are narrower in scope in that they are limited to nine basic areas of inquiry.⁴⁷ However, the criminal rules provide a convenient guide for an attorney engaging in discovery in a case involving a child charged with a crime. These rules require that defense counsel have timely access to such things as police reports, lab reports and depositions of witnesses. Thus, reference to the rules of criminal procedure by a defense attorney in juvenile court proceedings likely would result in informed guilty pleas, expedited hearings, a minimum of surprise, and an opportunity for effective cross-examination in juvenile court, as are already fostered through the rules of criminal procedure in adult cases.⁴⁸

In juvenile certifications cases, in which the court is to weigh all evidence regarding the decision to relinquish jurisdiction,⁴⁹ including testimony regarding the facts of a particular charge,⁵⁰ discovery regarding the facts of the underlying case is crucial to presenting a defense. Because the amended Juvenile Code permanently impacts the status of a child who is certified, yet may be innocent of a charge,⁵¹ it is further incumbent upon defense counsel to investigate the charges sufficiently to support the argument that an innocent or less culpable

46. MO. SUP. CT. R. 56.01(b)(1).

47. MO. SUP. CT. R. 25.03. The nine basic areas set out in the criminal rules of discovery are: (1) names and addresses of witnesses and any memoranda of witness statements; (2) statements of defendants or co-defendants and names and addresses of witnesses thereto; (3) transcripts of grand jury proceedings; (4) transcripts of preliminary hearing proceedings; (5) reports of experts; (6) books, papers, documents, photographs or objects which the state intends to introduce; (7) record of criminal convictions of state's witnesses; (8) information regarding photographic or electronic surveillance relating to the offense charged; (9) any exculpatory information.

48. *State v. Buckner*, 526 S.W.2d 387, 392 (Mo. Ct. App. 1975).

49. *State v. Garbe*, 740 S.W.2d 266 (Mo. Ct. App. 1987); The criteria for certification are set out in Section 211.071.6 of the Missouri Revised Statutes, but this Section indicates that the court is not "limited to" these factors. MO. REV. STAT. § 211.071.6 (Supp. 1997). See also MO. SUP. CT. R. 118.04(c).

50. *State v. Tate*, 637 S.W.2d 67, 71 (Mo. Ct. App. 1982), *overruled by State v. Carson*, 941 S.W.2d 518 (Mo. 1998). In *Tate*, the court heard evidence that the defendant had bludgeoned a thirteen year old girl, that the defendant failed to seek help for the victim or report the crime and demonstrated no remorse or sorrow for what had happened. In *State v. Owens*, the court considered evidence that the victim was grabbed from behind and told she would be killed if she did not keep still. 582 S.W.2d 366, 376 (Mo. Ct. App. 1979). The court also considered testimony regarding the details of the rape and beating of the victim including that a knife was used in the crime. *Id.* The victim's blood stained clothes were introduced into evidence at the certification hearing.

51. MO. REV. STAT. § 211.071.10 (Supp. 1997)

child should not be certified,⁵² or that the alleged crime does not warrant certification.⁵³

Defense counsel, under the discovery rules, is entitled to access to a child's social file and records because they are relevant to decisions regarding the competency of a child to proceed,⁵⁴ responsibility for behavior,⁵⁵ and disposition or placement. Access to the social file is necessary because the rules of procedure in juvenile court hearings are "as formal or informal" as the judge considers desirable.⁵⁶ Thus, the procedures protecting an adult defendant in a criminal prosecution do not necessarily apply in juvenile proceedings, making the job of defense counsel much more difficult in juvenile proceedings than in most proceedings in which an adult's liberty is at stake. Arguably, a lawyer must be more prepared to object to, and cross examine, the testimony of juvenile officers or other social service workers than he or she would be in hearings in which the court strictly enforces rules of evidence and procedure. This makes the content (or lack of content) of a child's social file relevant to demonstrate the juvenile officer's degree of thoroughness in preparing the child's placement recommendation. Since many courts give great deference to the opinions of juvenile officers,⁵⁷ an attorney for a child who wishes to challenge a recommendation must engage in thorough discovery and investigation of the child's background and the basis of the juvenile officer's opinions.

Especially in certification cases, in which the juvenile court's decision is based on "whether the child is a proper subject to be dealt with under the provisions of [the Juvenile Code] and whether there are reasonable prospects of rehabilitation within the juvenile justice system,"⁵⁸ all social records from all agencies that may have been involved with a child and all previous assessments

52. "It is not the prerogative of the juvenile court to make a determination in the dismissal proceeding [certification hearing] whether the juvenile is guilty of the offense charged." *Tate*, 637 S.W.2d at 71. However, it is certainly part of defense counsel's job to advocate for a child prior to the hearing to avoid the permanent effects of certification. The prosecutor, legal officer or juvenile officer, have the power to dismiss or reduce the charges if the child is innocent or less culpable. MO. REV. STAT. § 211.091.4 (Supp. 1997).

53. Section 211.071.6 includes factors which seem to require the court to consider the facts of the charge in the certification decision. For example the court is to consider: "(1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction; (2) Whether the offense alleged involved viciousness, force and violence." MO. REV. STAT. § 211.071.6 (Supp. 1997).

54. MO. SUP. CT. R. 123.01(a)(2); MO. REV. STAT. § 211.161 (Supp. 1997); Thomas Grisso et al., *Competency to Stand Trial in Juvenile Court*, INT'L J.L. & PSYCHIATRY, 1-20 (1987).

55. MO. SUP. CT. R. 123.01(a).

56. MO. REV. STAT. § 211.171.1 (Supp. 1997)

57. MO. SUP. CT. R. 119.05 (court may order a social study by the juvenile officer).

58. MO. REV. STAT. § 211.071.6 (Supp. 1997)

or treatment efforts should be reviewed in preparation to defend against the motion to dismiss.⁵⁹ For example, information regarding inappropriate or inadequate intervention by social service agencies on behalf of a client who was abused or neglected, alternative placements for rehabilitation that have not yet been offered to a child, and mental health or developmental needs identified regarding a child would be relevant and discoverable in preparation for a certification hearing.⁶⁰

Furthermore, discovery often is important for record preservation. When defense counsel fails to establish that the denial of due process in juvenile court is prejudicial to the child, the appellate court is loathe to reverse for an abuse of discretion. Therefore, in a situation in which defense counsel had only four days to prepare for a certification hearing,⁶¹ or when defense counsel failed to object to a certification hearing held without a written report of the juvenile officer having been submitted to the court,⁶² the court of appeals looked to the issue of what evidence existed, was investigated, or presented to establish that the child was prejudiced by the court's actions. While this may be a difficult standard for defense counsel to meet, the standard nonetheless must be met through thorough investigation of the underlying charge, the prior services and current services available to the child in the juvenile system, and the child's developmental and treatment issues. Due to time constraints, much of this work may have to be done after the certification hearing and presented in a motion to quash the indictment or information and remand to juvenile court. After certification, the motion to quash is required to preserve any juvenile court issues for appeal in a criminal case.⁶³

59. Under Section 211.071.6, the posture of the case at a certification hearing is that the juvenile officer is moving that the court actually dismiss the case against the child in the juvenile system so that the adult court can exercise its jurisdiction over the child. MO. REV. STAT. § 211.071.6 (Supp. 1997).

60. *Kent v. United States*, 383 U.S. 541 (1966); *Watkins v. United States*, 343 F.2d 278 (D.C. Cir. 1964). The *Kent* court stated:

The child is entitled to counsel . . . and counsel is entitled to see the child's social records. These rights are meaningless . . . unless counsel is given an opportunity to function.

[I]f the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to 'denigrate' such matter. There is no irrebuttable presumption of accuracy attached to staff reports.

Kent, 383 U.S. at 562-63.

61. *State v. Selvy*, 921 S.W.2d 114 (Mo. Ct. App. 1996).

62. *State ex rel. K.D.C. v. Copeland*, 852 S.W.2d 417 (Mo. Ct. App. 1993).

63. *Id.* at 421.

V. CONCLUSION

While the right of a child to defense counsel has been a fundamental due process right for over two decades, the reality of juvenile court practice does not foster the kind of basic constitutional protections that traditional criminal defense practice encompasses. Although such protections have been perceived as inappropriately adversarial in the past, it is certainly time to recognize that children who commit crimes are treated more like adult defendants today than ever before. An attorney who lacks knowledge of the case against his or her client for failure to engage in aggressive discovery compromises almost all of a child's constitutional rights. Informed advocacy, rather than passive acceptance, is the appropriate response to a juvenile system which may permanently jeopardize the liberty interests of Missouri's youngest citizens.

