No. 97662

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

In the Interest of D.M.

Appeal from the Circuit Court of the City of St. Louis, Missouri
Twenty-Second Judicial Circuit, Division 30
The Honorable Jimmie Edwards, Judge

BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* ON BEHALF OF APPELLANT

Marsha L. Levick
Counsel of Record
Jennifer Pokempner
Emily C. Keller
Juvenile Law Center
1315 Walnut Street
Fourth Floor
Philadelphia, PA 19107
(215) 625-0551

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

At its core, this case concerns the fundamental due process protections to which a child is entitled at a proceeding in which she may be adjudicated delinquent. "It has long been settled that due process and fair treatment are required in juvenile court adjudications of delinquency by the Fourteenth Amendment's Due Process Clause." *T.S.G. v. Juvenile Officer*, 322 S.W.3d 145, 149 (Mo. Ct. App. 2010). In this case, the trial court used its knowledge of D.M.'s history in the child welfare system, including knowledge of prior misconduct acquired by the court in the course of also presiding over D.M.'s child welfare case, as evidence to adjudicate her delinquent for the charge of assault on school property. Not only was this information improperly considered by the court with respect to the charges against D.M., it was also information that D.M.'s counsel had no access to and therefore could not adequately challenge. This use of prior misconduct to establish propensity to commit the acts at issue before the court violate D.M.'s due process rights under both the state and federal Constitutions as well as Missouri statutory law..

Children in the child welfare system are at particularly high risk of crossing over to the juvenile justice system and face harsh outcomes when they do become involved in that system. These poor outcomes are not, however, inevitable; the child welfare system has the both the ability and the authority to provide the resources and services necessary to support vulnerable children's healthy development and address their mental and behavioral health needs. Ideally, the child welfare system can serve as a tool to address behavior problems and prevent delinquency; in this case, D.M's history in the child

welfare system was unfortunately used as a weapon – rather than a shield -- to adjudicate her delinquent.

While the court showed empathy for D.M. during the course of the delinquency proceeding, The United States Supreme Court made clear over forty years ago that neither benevolence nor good intentions can ever serve as a substitute for fair procedure. *See, e.g., In re Gault*, 387 U.S. 1, 18 (1967) (stating that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.")

STATEMENT OF FACTS

Amicus adopts the Statement of Facts presented by Appellant.

ARGUMENT

I. The Court Violated D.M.'s Due Process Rights By Considering Prior, Unrelated Bad Acts, The Evidence Of Which Was Not Available To D.M.'s Counsel, In Adjudicating The Child Delinquent

A. Due Process Requires That An Adjudication Of Delinquency Be Based Solely On Evidence Related To The Offenses Before The Court, Not Upon Inadmissible Evidence Of Prior Bad Conduct

Due process prohibits a court from considering a defendant's prior bad conduct or propensity to commit bad acts when determining guilt or innocence. "The general rule concerning the admission of evidence of uncharged crimes, wrongs, or acts is that evidence of prior uncharged misconduct is not admissible for the purpose of showing the propensity of the defendant to commit such crimes." *State v. Burns,* 978 S.W.2d 759, 761 (Mo. 1998). *See also State v. Dudley*, 912 S.W.2d 525, 528 (Mo. Ct. App. 1995) (finding that "evidence of other crimes committed by defendant is inadmissible if it is offered to show that defendant is a person of bad character, or a person with a propensity to commit

criminal acts."). The use of propensity evidence is unconstitutional: "The rationale underlying this rule is grounded in the view that [e]vidence of other crimes, when not properly related to the cause on trial, 'violates defendant's right to be tried for the offense for which he is indicted.'" *State v. Vorhees,* 248 S.W.3d 585, 591 (Mo. 2008) (quoting *State v. Sladek,* 835 S.W.2d 308, 311 (Mo. 1992) (internal citations omitted). Propensity evidence both fails to provide direct evidence of guilt and has a prejudicial effect on the trier of fact. Such evidence

> is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Dudley, 912 S.W. 2d at 528 (quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)). *See also State v. Wallace,* 952 S.W.2d 395, 397 (Mo. Ct. App. 1997) ("'Proffered evidence will run afoul of th[is] rule . . . if it shows that the defendant has committed, been accused of, been convicted of or definitely associated with another crime or crimes.'") (quoting *State v. Hornbuckle,* 769 S.W.2d 89, 96 (Mo. 1989)).

Propensity evidence is improper because it does not provide direct evidence of whether the individual committed the precise crime for which he is being charged, but rather uses inferences and associations to make the case.[1] *See e.g., State v. Sladek*, 835 S.W.2d at 312 ("In assessing whether or not evidence of uncharged crimes is admissible

[1] This requirement that guilt must be proven beyond a reasonable doubt applies with equal force to matters in juvenile adjudications. *See In re Winship*, 397 U.S. 358, 359 (1970); *In re Fisher,* 468 S.W.2d 198 (Mo. 1971) (following *Winship*).

it is essential that the primary rule of evidence governing the admission of evidence of uncharged crimes be observed – that is, that the proof of such crimes has a legitimate tendency to directly establish the defendant's guilt."). Without this direct nexus,[2] we risk the factfinder incorrectly inferring that because the individual behaved in a particular way before, he behaved similarly in the instant case. *See, e.g., Vorhees,* 248 S.W.3d at 592 (it was improper to admit evidence that defendant committed a sexual offense with a minor that was similar to the charged offense); *Sladek*, 835 S.W.2d at 312 (court held that the fact that the defendant may have inappropriately touched several patients did not establish his guilt for the charge of rape before the court and could not be considered). "The difficulty with evidence of other crimes is that it tends to run counter to the rule that prevents using a defendant's character as the basis for inferring guilt."[3] *State v. Dudley,*

---

[2] The exceptions to this rule include allowing consideration of prior bad conduct when they tend "to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or the identity of the alleged perpetrator." *State v. Davis*, 211 S.W.2d 86, 88 (Mo. 2006). None of these exceptions apply in this case.

[3] While propensity evidence is prohibited in criminal and juvenile matters, it may be especially damaging and unreliable in juvenile cases. The U.S. Supreme Court has noted on multiple occasions that an important and constitutionally relevant difference between children and adults is children's ability to change over time as they mature. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 570 (2005) ("[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."). *See also id.* ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.") (internal citation omitted). Youthful bad conduct often results from poor decision making skills and impulse control characteristic of a child's brain development and social milieu. *See id.* at 569; *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010). As a youth matures, decision making skills improve as does impulse control. The Court has noted research showing that youthful bad conduct rarely continues into adulthood and does not foreshadow a life time of bad conduct or criminality. *See Roper*, 543 U.S. at 570; *Graham*, 130 S. Ct. at 2026. Thus,

912 S.W.2d at 528 . In fact, the court has cautioned that "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *State v. Reese*, 274 S.W.2d 304, 307 (Mo. 1955). These cases uniformly mandate strict adherence to the rule disallowing consideration of prior bad conduct so as to ensure an individual due process and fair proceedings. As the United States Supreme Court recognized in *Gault*, 387 U.S. at 21, these rules "are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data."

In *State v. Frezzell*, in which the defendant was charged with endangering a department of corrections employee, the trial court considered evidence of defendant's twelve prior conduct violations while in prison. 251 S.W. 3d 380, 383 (Mo. App. Ct. 2008). The charged offense involved the throwing of urine and feces, and the prior conduct violations concerned similar conduct. *Id.* The trial court admitted the prior bad conduct under the common scheme or plan exception: "Essentially, the State argues that Defendant acted in accordance with this pattern of conduct." *Id.* at 384. The appellate court rejected this reasoning and identified this as an improper use of prior misconduct to

---

not only does introduction of past bad conduct violate a child's due process rights; it is also contrary to what research teaches about childhood and adolescent development and is particularly unlikely to accurately predict a propensity.

show propensity. "[I]t certainly is not enough to show that the person on trial committed one or more crimes of the same general nature in order to fall within the common scheme or plan exception. For the prior crimes to be admissible under a common scheme or plan, it must be shown that the prior crimes had some relation to the general criminal enterprise." *State v. Bernard,* 849 S.W.2d 10, 14 (Mo. 1993). Similarity of behavior is not enough. *Frezzell,* 251 S.W.3d at 385. The court continued that

> The only apparent purpose the disputed evidence served in the trial was to show that Defendant had a tendency to engage in the conduct for which he was on trial. This amounts to propensity evidence in that it showed that because Defendant had engaged in similar conduct in the past, he was more likely to have committed the charged offenses because that was his nature. This is exactly what the bar against propensity evidence seeks to avoid.

Id.

In the instant case, the trial court committed the exact same error. The court considered prior acts of misconduct unrelated to the charged incident and offense in the adjudication process.[4] In the adjudication hearing, the court stated: "The previous school she was in, she had over seventeen behavioral referrals. She had four suspensions. The kid's got some serious, serious problems." *In the Interest of D.M.*, Adjudication Hr'g Tr. 45-46, Oct. 24, 2011 [hereinafter Hr'g Tr.]. Soon after this statement, the court declared:

---

[4] Not only did the court consider prior acts that were unrelated to the charges at issue, it mentioned disabilities and diagnoses of the child that indicated conduct and behavior problems: "I know [D.M.], and [D.M.'s] parental rights were terminated when she was one year old. [D.M.] is in foster care and [D.M.] does not have a mom and dad to call. I know that she's on medication. She's bipolar. She has seizures. . . . She has a behavioral IEP." Hr'g Tr. 45. To the extent that considerations of these facts were used to establish propensity to commit the charged offense before the court, their introduction would also be error.

> Everything that they say [D.M.] did, [D.M.] did. There's no question about it. I know she cursed him out; I know she hit him; I know she kicked him. I know all of that stuff, that stuff she did.

Id. at 47. After briefly questioning D.M., the court stated "So everything he said you did, you did. *I already knew that.*" *Id.* at 48 (emphasis added). Soon after these statements, the court adjudicated D.M. delinquent. *Id.* at 50. The court used these prior acts precisely for the purpose for which they are impermissible. Prior behavioral referrals and D.M.'s "serious problems" were introduced to show that D.M. was the type of youth who would have engaged in the exact conduct with which she was charged. Because the court considered inadmissible evidence of prior bad acts and D.M.'s propensity for misbehavior as evidence of her guilt of the crime charged, D.M.'s right to due process was violated and reversal is required.

B. It Violates Due Process For The Court To Consider Evidence Which Counsel Does Not have Access To And Cannot Refute, Impeach, Or Otherwise Explain

The Court in *In re Gault* held that the right to confront witnesses—and the evidence they present--against a child charged with a delinquent offense is an essential and required component of the Due Process clause of the United States Constitution. *See In re Gault*, 397 U.S at 56 ("confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of 'delinquency' and an order committing Gerald to a state institution for a maximum of six years."). In this case, the bad conduct evidence presented and considered by the court came from the court's knowledge of information in D.M.'s child welfare court record. The child's delinquency

attorney did not have access to this information and thus was unable to test its accuracy or relevance or challenge the information in an adequate or responsible way. By proceeding in this manner, the trial court denied D.M. one of the most basic components of due process for a child at risk of being adjudicated delinquent and ordered into out of home placement. The Missouri Supreme Court has long noted this core component of due process:

> But it is just that a party should have the issues of fact of his case, or of his defense, decided, and the sufficiency of the evidence thereon reviewed, upon evidence lawfully introduced in the trial of his case, or defense, in the trial court. It is there that he has the opportunity to confront and cross-examine the witnesses who may testify against him and examine such documentary proof as may be introduced into evidence by the adverse party. It is only in the trial court that a party has an opportunity to rebut, impeach, or explain, if he can, such evidence as may be adverse to his cause. . . . It is not just that a court should, in deciding the issues of a case, consider evidence introduced in another and different case, and thus decide a case upon evidence which a party had been afforded no opportunity to refute.

Knorp v. Thompson, 175 S.W.2d 889, 894 (Mo. 1943).

In a related context, several state appellate courts have addressed the issue of whether the juvenile court in termination of parental rights proceedings may properly take judicial notice[5] of facts and conduct from the family's child welfare files. The rules regarding taking judicial notice of facts from another proceeding or matter closely track the above-discussed rules and law on admission of prior bad acts:

[5] In this case, the court simply stated acts of misconduct from D.M.'s child welfare file and did not formally take judicial notice of these facts. Because the end result was the same – consideration of evidence of prior bad conduct – the above cited cases are instructive.

> As a general rule, courts will not judicially notice the records and facts in one action in deciding another and different one, because a party is entitled to have the merits of his case reviewed upon the evidence lawfully introduced at the trial of his claim or defense in the trial court, and a reviewing court should not decide a case upon evidence which a party has had no opportunity to refute, impeach or explain. Nevertheless, exceptions are admitted, and the extent to which this general rule is strictly applied or relaxed depends largely upon considerations of expediency and justice in a particular case, as well as what it is the court undertakes to notice.

In the Matter of the Adoption of K. 417 S.W.2d 702, 705 (Mo. Ct. App. 1967). The court held that this case fell within the limited exceptions because the matter was an adoption where the state had significant interest and the issue before the court in the termination case concerned whether the mother's past conduct constituted neglect or abandonment. *Id.* Thus, unlike D.M.'s case, the matter before the court specifically involved an assessment of past conduct over time. *Id. See also In the Interest of A.A.T.N.,* 181 S.W.3d 161, 166 (Mo. Ct. App. 2006). Central to the court's analysis was the fact that the appellants had counsel at the previous proceedings and "had a full opportunity to refute, impeach and explain the evidence presented against him." *Id.* at 168. *See also In the Interest of C.M.W.*, 813 S.W.2d 331, 333 (Mo. Ct. App. 1991) (The appellate court found that it was proper in a termination of parental rights hearing for the trial court to take judicial notice of separate child welfare files of the children where the appellant had the same counsel in the prior proceedings "and, thus, had an opportunity to refute, impeach or explain evidence that was presented against her.").

As discussed above, appellant argues that evidence of prior misconduct may not be introduced in a delinquency adjudicatory hearing when it does not fall into any of the enumerated exceptions above and simply constitutes propensity evidence. It is especially

pernicious here where D.M.'s delinquency attorney had no access to the information and thus was unable to properly protect her due process rights with respect to confrontation and cross-examination of witnesses and evidence presented. The proceeding below stands in stark contrast to the termination of parental rights cases noted above, where the parent challenging the consideration of the prior evidence had counsel at the prior proceedings who was able to test the veracity and reliability of the evidence. No such opportunity existed here.

II. Children In The Child Welfare System Require Particular Care And Protection When They Are Referred To The Juvenile Justice System

A. Missouri's Child Welfare System Can Appropriately Address The Complex Behavioral Health Needs Of Children In That System

The child welfare system, overseen by the juvenile court, has the tools and authority to address the complex mental and behavioral health needs of dependent children, and prevent unnecessary referrals to the juvenile justice system. Missouri statutes require that any child who comes within the jurisdiction of the juvenile court must "receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state." Mo. Rev. Stat. § 211.011. Specifically, Missouri requires that the Children's Division "[p]rovide protective . . . services to the family and child . . . to safeguard their health and welfare, and to help preserve and stabilize the family whenever possible." Mo. Rev. Stat. § 210.109(5). The juvenile court must "cooperate with the division in providing such services." *Id.* The juvenile court has broad authority to determine a child's placement and order assessments, evaluations, treatment and services.

Given the scope of the child welfare system, children with complex behavioral or mental health needs can receive interventions, supports, and treatment through the child welfare system; there is no need to adjudicate these children delinquent in order to access treatment services. For example, in D.M.'s child welfare case, the court exercised its power to make key decisions regarding where D.M. would live and what services she would receive, including mental health and behavioral health services. *See* Hr'g Tr. 46, 48 (discussing where the judge had ordered D.M. to live and whether the judge had recently ordered D.M. hospitalized). The judge had the power to order an educational advocate for D.M., as well as a behavioral individualized education program to address her behaviors at school. *Id.* at 46, 49.[6]

Juvenile justice involvement was not necessary for D.M. to receive the services she needed or to protect public safety; in fact, the services the judge ordered after adjudicating D.M. delinquent were available to her based on her child welfare involvement.[7] Research has found that children like D.M., who are in need of mental health treatment and services and who are already in the child welfare system, are *not* better served in the juvenile justice system given the child welfare system's ability to

[6] Had these orders been fully implemented, it is likely that D.M.'s referral to the juvenile justice system could have been prevented altogether. The judge had ordered a behavioral individualized education program (I.E.P.) for D.M. at school that was never implemented. Hr'g Tr. 46. The school acknowledged that they had never received the evaluation of D.M. that had been initiated by the school district. *Id.* at 58. The judge stated that the school lacked an understanding of D.M. and therefore did not handle her behaviors appropriately. *Id.* at 47, 51, 56, 57. Rather than responding to D.M. in ways that would de-escalate her behaviors, the school responded in a way that escalated her behaviors and resulted in her referral to the juvenile justice system.

[7] The judge sent D.M. to a group home where she had been previously placed through the child welfare system. Hr'g Tr. 51. He also ordered a psychiatric examination. *Id.* at 54.

appropriately address the children's complex needs. *See* Denise C. Herz & Joseph P. Ryan, *Building Multisystem Approaches in Child Welfare and Juvenile Justice* 28 (Center for Juvenile Justice Reform & American Public Human Services Association, 2008). Therefore, when a child already committed to the child welfare system is arrested, diversion from the juvenile justice system should be explored. *Crossover Youth Practice Model* 42 (Center for Juvenile Justice Reform & Casey Family Programs), *available at* http://cjjr.georgetown.edu/pdfs/cypm/cypm.pdf . Those involved in the case should determine whether the child's needs can be met – and public safety protected – without the child's involvement in the juvenile justice system. This diversion can prevent the negative consequences of involvement in the delinquency system such as the risk of deeper penetration in the justice system or the consequences of a delinquency record discussed below, Section II.C. *Id.* at 43. These bad outcomes can be avoided while also promoting the rehabilitative and public safety goals of the juvenile justice system.

B. Appropriate Child Welfare Services Can Reduce The Risk Of Subsequent Involvement In The Juvenile Justice System

D.M. came into contact with the juvenile justice system while she was already in the care of Missouri's child welfare system. Unfortunately, children who have been abused and neglected are at increased risk of becoming involved in the delinquency system. *See* Herz & Ryan at 5.[8] Children who lack stable child welfare placements, for

[8] The correlation between child welfare and juvenile justice involvement is particularly strong for children such as D.M. who are removed from their biological families and placed in substitute care settings such as group homes or foster care. Children placed in substitute care are twice as likely to engage in delinquent behaviors as children who receive services within their homes. Herz & Ryan at 6. Additionally, children placed in

example, suffer greatly as this instability is associated with wide-ranging negative outcomes. *Id.* at 7; *Crossover Youth Practice Model* at 85. These risks can and should be reduced by ensuring that youth in the child welfare system receive appropriate services and treatment. As discussed above, ensuring that appropriate due process protections are in place decreases the risk that children will inappropriately "cross over" to delinquency court jurisdiction in the absence of direct evidence exists that a delinquent act was committed.

A youth's child welfare history does not, of course, make subsequent juvenile justice involvement inevitable. In fact, the child welfare system can provide supports and services, such as targeted, timely mental health services, that *reduce* the likelihood that children who have been neglected and abused will enter the juvenile delinquency system. Herz & Ryan at 13. Strong attachments with parents or foster parents reduce the likelihood that a child will become involved in the juvenile justice system; academic achievement and school engagement can also lessen the risk. *Id.* at 12. Research has found that a key to preventing youth in the child welfare system from entering the juvenile justice system is to keep at-risk youth in school with appropriate individualized service plans. *Id.*

---

group homes are at a higher risk of offending than children in other foster care settings. Herz & Ryan at 7.

C. Juvenile Justice System Involvement Can Have Lasting, Negative Consequences Which May be Particularly Significant for Children In The Child Welfare System

Involvement in the juvenile justice system can have can have long-lasting, negative consequences. In Missouri, a juvenile delinquency record can "limit the juvenile's access to public housing, restrict employment and licensing, and deny an opportunity for higher education." American Bar Association Criminal Justice Section, *Think Before You Plea: Juvenile Collateral Consequences in the United States (Missouri), available at* http://www.beforeyouplea.com/mo. The consequences for children like D.M., who are adjudicated of offenses that would be felonies if committed by an adult, are particular damaging because their records are not confidential. For these children, the records of the dispositional hearing and related proceedings are open to the public to the same extent as records of adult criminal proceedings. Mo. Rev. Stat. § 211.321.

For a child with existing behavior problems, an adjudication of delinquency can quickly lead to deeper penetration into the system. Once on probation, even relatively minor behavior problems carry significant consequences. For example, missing school or missing curfew is no longer simply a poor decision that can be addressed with increased supervision or necessary support; instead it may be a probation violation that can result in detention or longer or more restrictive out-of-home placements.

Children who have been in the child welfare system fare particularly badly in the juvenile justice system. These children are likely to receive harsher delinquency court

sentences than those without a child welfare history. Herz & Ryan at 26. They are also more likely to be detained, less likely to receive probation, and more likely to be sent to out-of-home placements. *Id.* at 27-28.

D. A Child's Simultaneous Involvement In The Child Welfare And Juvenile Justice Systems Should Not Be A "Double-Edged Sword"

Given the number of children who become involved in both the child welfare and juvenile justice systems – as well as the overlapping services available to children in these systems – researchers and academics note the need for better collaboration. Herz & Ryan at 26, 35; Bilchik & Nash at 19. Under the Missouri approach, a "one family/one judge" model, one judge hears all matters involving the particular child and family, including both child welfare and juvenile justice proceedings. *Id.* This model operates under the assumption that if everyone involved in the case – including the judge and the lawyers – have a knowledge and understanding of the child's and family's history and court history, the court can take a more holistic and efficient approach to meeting the needs of the child and family. Michael Nash & Shay Bilchik, *Child Welfare and Juvenile Justice – Two Sides of the Same Coin, Part II,* Juv. & Fam. Just. Today, Winter 2009, at 23.[9]

The one family/one judge model may be particularly appropriate and efficient at the dispositional phase of proceedings when the judge is determining what placement and

[9] Proponents of this approach suggest having the same counsel for both the dependency and delinquency cases. *See* Bilchik & Nash at 19. D.M., however, had different lawyers in her child welfare and delinquency cases, and her delinquency lawyer did not have access to D.M.'s complete social and family history, which was contained in her child welfare record.

services would be appropriate for the child and family. An understanding of the child's family history, placement history, and behavioral and mental health history allows a judge to consider the services that previously have been ordered and their effectiveness, the services currently being provided, the family and community resources available, and the child's overall strengths and needs. As the United States Supreme Court noted in Gault, "[w]hile due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child." *In re Gault*, 387 U.S. at 27.

The one family/one judge approach, however, does run afoul of 'ordinary due process' when, as here, a child charged with delinquency appears before a judge who has an extensive knowledge of her behavioral and social history. *Gault* and its progeny have made clear that rigorous due process protections must be afforded children during the delinquency adjudicatory hearing where innocence or guilt is determined. *See Gault*, 387 U.S. at 387. "The one judge/one family model makes it difficult to preserve due process." Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm With Caution*, 40 Fam. Ct. Rev. 435, 439 (2002). Because of the risk that a judge will not be able to disregard incriminating – but inadmissible – evidence from a child's social history when ruling on the charges, some commentators caution against adopting a one

family/one judge family court model. *See id.*[10] To protect a child's due process rights, the one family/one judge model requires that judges in delinquency hearings consciously disregard inadmissible – or unadmitted – evidence and information from the child welfare history when making determinations about a child's innocence or guilt. *Id.*

In D.M.'s case, no wall separated D.M.'s child welfare history from the court's deliberation of the delinquency charges against her. Ignoring the commands of the due process clause entirely, the court expressly took D.M.'s behavioral history into account in adjudicating her delinquent, noting that his knowledge of D.M.'s history was a "double-edged sword." Hr'g Tr. 45. Before adjudicating D.M. delinquent, the court noted her history of school behavioral referrals and suspensions. *Id.* at 45-46. Based on his knowledge of the child welfare case, he stated, "The kid's got some serious, serious problems," *id.* at 46, and went on to find, "Everything they said [D.M.] did, [D.M.] did. There's no question about it. I know she cursed him out; I know she hit him; I know she kicked him. I know all that stuff, that stuff she did." *Id.* at 47. As discussed *supra,* Point I, the reliance on this information – information that was not admitted into evidence or shared with D.M.'s attorney – violated D.M.'s right to due process.

The one family/one judge model is intended to streamline services to children and families involved in multiple systems; it was not designed as a prosecutorial tool. Yet

[10] Some states have enacted legislation that prohibits a juvenile court judge from examining a child's social history until after determining the child's guilt or innocence. Geraghty & Mlyniec at 439. For example, the District of Columbia prohibits a juvenile court judge from viewing a social investigation until after the judge completes the fact-finding (or adjudication) hearing. D.C. Code § 16-2319 (a).

that's precisely what happened here. D.M.'s involvement in the child welfare system, and the judge's knowledge of that involvement, was a "sword" that the judge used against her in finding her delinquent of the alleged acts. While the one family/one judge model can vastly improve the delivery of services to vulnerable children and families, it cannot operate without regard to one of the key tenets of our justice system – the right of the accused to confront and cross-examine the witnesses and evidence against her.

CONCLUSION

D.M.'s due process and state law rights were violated by the court's consideration at her adjudicatory hearing of evidence of prior bad conduct to which her attorney did not have access and were recorded in her child welfare case record. Accordingly, her adjudication of delinquency should be reversed.

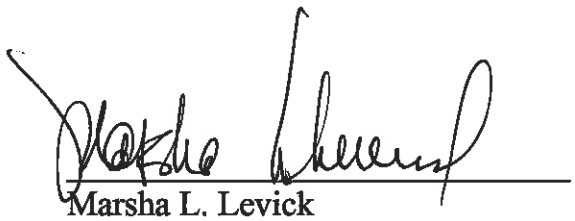
Respectfully submitted,

Marsha L. Levick
Counsel of Record
Jennifer Pokempner
Emily C. Keller
Juvenile Law Center
1315 Walnut Street
Fourth Floor
Philadelphia, PA 19107
(215) 625-0551

DATED: February 13, 2012

CERTIFICATE OF COMPLIANCE

I certify that the Brief of *Amicus Curiae* Juvenile Law Center in support of Appellant in the case *In The Interest of D.M.*, No. 97662, complies with the page limits of Special Rule 360. The number of words in the Brief is: 6,207 words.



Marsha L. Levick
Counsel of Record
Juvenile Law Center
1315 Walnut Street
Fourth Floor
Philadelphia, PA 19107
(215) 625-0551

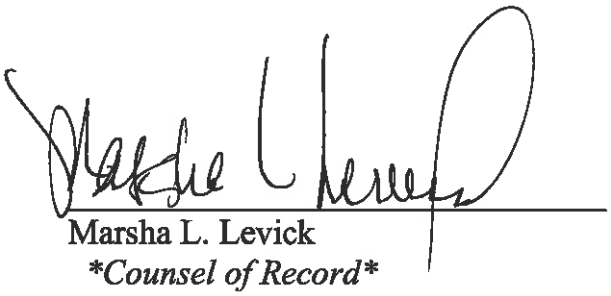
DATED: February 13, 2012

CERTIFICATE OF SERVICE

I, Marsha L. Levick, Esq., certify that, on the 13th of February, 2012, a true and correct paper copy of the foregoing brief, along with a CD-ROM copy of the brief, was served by U.S. first-class mail upon the persons listed below. The CD-ROM copies were scanned for viruses and are virus free. Pursuant to Special Rule 363, a copy of the brief was filed with the clerk of this court by an electronic e-mail message with an attachment containing a copy of the brief.

Carolyn Whitehorn, Esq.
St. Louis City Juvenile Court
920 N. Vandeventer
St. Louis, MO 63108

Sarah Johnson, Esq.
Assistant Public Defender
Office of the Missouri Public Defender
1114 Market Street
Suite 602
St. Louis, MO 63101



Marsha L. Levick
Counsel of Record
Juvenile Law Center
1315 Walnut Street
Fourth Floor
Philadelphia, PA 19107
(215) 625-0551

DATED: February 13, 2012