Investigation of the
St. Louis County Family Court
St. Louis, Missouri

United States Department of Justice
Civil Rights Division

July 31, 2015

TABLE OF CONTENTS

SUMMARY OF FINDINGS

The Civil Rights Division of the United States Department of Justice opened its investigation of the Family Court of the Twenty-First Judicial Circuit of the State of Missouri ("St. Louis County Family Court") on November 18, 2013. This investigation was initiated pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, which authorizes the Department of Justice ("DOJ") to seek remedies for a pattern or practice of conduct that violates the constitutional or federal statutory rights of children in the administration of juvenile justice.[1] We have reason to believe that the St. Louis County Family Court fails to ensure that children appearing for juvenile justice proceedings receive adequate due process, as required under the Fourteenth Amendment of the Constitution. We also have reason to believe that the St. Louis County Family Court engages in conduct that violates the constitutional guarantee of Equal Protection under the law.

We find the following specific due process violations:

- St. Louis County Family Court fails to provide adequate representation for children in delinquency proceedings, in violation of the Due Process Clause of the Fourteenth Amendment. *In re Gault*, 387 U.S. 1, 34-43 (1967). Several factors contribute to this denial of constitutionally-adequate representation by counsel, including the staggering caseload of the sole public defender assigned to handle all indigent juvenile delinquency cases in St. Louis County, an arbitrary system of determining eligibility for public defender representation and appointing private attorneys for children who do not qualify for public defender services, the flawed structure of the St. Louis County Family Court, and significant gaps in representation between detention hearings and subsequent court appearances.

- St. Louis County Family Court fails to adequately protect children's privilege against self-incrimination. For example, the Family Court's requirement that a child admit to the allegations to be eligible for an informal processing of his case is coercive, and potentially forces a child to be a witness against himself in subsequent proceedings. *Gault*, 387 U.S. at 55 ("[T]he constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.").

- St. Louis County Family Court fails to provide adequate probable cause determinations to children facing delinquency charges. *Schall v. Martin*, 467 U.S. 256 (1984); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1974); *R.W.T. v. Dalton*, 712 F.2d. 1225, 1227 (8th Cir. 1983). Probable cause determinations are made on an *in camera, ex parte* basis, and children have no opportunity at any stage of the proceedings to challenge probable cause.

[1] Although the Court also hears "child welfare" cases (*e.g.*, cases involving abuse or neglect, custodial issues, or adoption), consistent with the scope of 42 U.S.C. § 14141, we examined only the Court's activities involving juvenile justice cases. We use the term "juvenile justice" to encompass delinquency and status offenses. Delinquency offenses refer to acts committed by a juvenile that would be considered a crime if committed by an adult. Status violations refer to juvenile offenses that would not be crimes if committed by an adult, e.g., truancy and running away from home.

- St. Louis County Family Court fails to provide children facing certification to be criminally tried in adult criminal court with adequate due process. In particular, the Family Court's failure to consider, and permit adversarial testing of, the prosecutive merit of the underlying allegations against the child at the certification hearing fails to "measure up to the essentials of due process and fair treatment," in violation of the Fourteenth Amendment. *See Kent v. United States*, 383 U.S. 541, 562, 567 (1966).

- St. Louis County Family Court also fails to ensure that children's guilty pleas are entered knowingly and voluntarily, in violation of children's rights under the Fifth, Sixth and Fourteenth Amendments. *See Boykin v. Alabama*, 395 U.S. 238 (1969). Judges and commissioners do not adequately examine whether children understand the rights they give up when pleading guilty to an offense, nor the potential collateral consequences of doing so.

- The organizational structure of the Family Court, wherein both prosecutor and probation officer are employees of the court, the prosecutor is counsel for the probation officer, and the probation officer acts as both an arm of the prosecution as well as a child advocate, causes inherent conflicts of interest. These conflicts of interest are contrary to separation of powers principles and deprive children of adequate due process. U.S. Const., art. I, art. II, § 2, cl. 5; art. III, § 2.

In making our Equal Protection findings, we first determined the rate at which Black children are overrepresented at key stages within the St. Louis County juvenile justice system. Then, we examined St. Louis County's case data – more than sixty variables for nearly 33,000 cases, including all juvenile delinquency and status offenses resolved between 2010 and 2013 in the St. Louis County Family Court – using odds ratio and logistic regression techniques. These techniques track the odds that a child's case will be handled in a specific way at different stages in the juvenile court process. The data shows that in certain phases of the County's juvenile justice system, race is – in and of itself – a significant contributing factor, even after factoring in legal variables (*e.g.*, nature of the charge) and social variables (*e.g.*, age). In short, Black children are subjected to harsher treatment because of their race.

- Black children are almost one-and-a-half times (1.46) more likely than White children to have their cases handled formally, even after introducing control variables such as gender, age, risk factors, and severity of the allegation. This ratio means that Black children have a lower opportunity for diversion when compared with White children.

- Race has a significant and substantial impact on pretrial detention. Even after controlling for the severity of the offense, the risks presented by the youth and the age of the youth, Black youth have two-and-a-half times (2.50) the odds of being detained (held in custody) pretrial than do White children.

- When Black children are under the supervision of the Court and violate the conditions equivalent to probation or parole, the Court commits Black children almost three times (2.86) more to the Missouri Division of Youth Services than White children who are

under similar Court supervision. This disparity exists even when we control for past referrals and treatment. Children committed to Division of Youth Services custody are placed in restrictive out-of-home settings.

- After controlling for severity of the offense and other variables, the odds of the Court placing Black youth in Division of Youth Services custody after adjudication (the juvenile equivalent of an adult conviction) are more than two-and-a-half times (2.74) the odds of White youth placement. White youth are significantly more likely to be placed in a less restrictive setting -- such as on probation with in-home services or in a residential treatment facility that is not operated by the state -- rather than in Division of Youth Services custody.

Based on these data, and the fact that the disparities are unexplainable on grounds other than race, we find Equal Protection violations at each of these decision points.

I. BACKGROUND

A. History of the Modern-Day Juvenile Court System

A review of the evolution of the juvenile court system in the United States provides important context for our findings about the St. Louis County Family Court. The first juvenile court system was established in Chicago, Illinois, in 1899, and other jurisdictions set up similar juvenile court systems in the years that followed. The purpose of these newly established juvenile court systems was to identify the unmet needs that precipitated the child's delinquent act and the treatment necessary to address those needs. Proceedings were informal, and the constitutional due process safeguards enjoyed by adult criminal defendants were modified or eliminated in the juvenile court system.

One result of this approach was that children found to have committed the same delinquent act were subjected to widely varying dispositions, ranging from court supervision to institutionalization for the duration of their childhood. By the middle of the twentieth century, concerns arose that the juvenile court's informal, widely discretionary approach was actually harming youth, not helping them as intended.

More than forty years ago, the Supreme Court addressed the problem of giving juvenile courts unfettered discretion while denying children constitutional safeguards in *Gault*, 387 U.S. 1.[2] The *Gault* Court held that children must be provided basic constitutional protections in

[2] Gerald Gault was fifteen years old when he and a friend were accused of making a lewd phone call to a neighbor. *Id.* at 5. He was arrested at his family's home and taken to the local juvenile detention center. *Id.* A county probation officer, Officer Flagg, filed the juvenile court petition that charged Gerald with delinquency, but failed to identify any factual basis for this charge. *Id.* at 6. The court held a hearing a few days later. Gerald was not represented by counsel, and the neighbor who allegedly received the lewd call neither testified nor was present during this hearing. Instead, Officer Flagg informed the court as to what the neighbor told him about the incident during a single telephone conversation between the officer and the neighbor. *Id.* At the conclusion of the hearing, the judge committed Gerald to the state training school until he turned twenty-one years of age. *Id.* at 7. Notably, if

delinquency proceedings, including the right to counsel, the right to notice of the charges, the right to confront witnesses, and the privilege against self-incrimination. In declaring that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," the Court stated that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure . . . . Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." *Id.* at 18-19.

But the *Gault* Court also acknowledged the careful balance that juvenile courts must strike between ensuring the opportunity for an adversarial testing of the facts before making findings of delinquency and engaging in a rehabilitative process during disposition:

> Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted. While 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….

Id. at 26-27. Thus, while the *Gault* Court set forth essential constitutional protections that children must be afforded during delinquency proceedings, it likewise acknowledged that the juvenile court's unique mission of rehabilitation requires some flexibility and informality.

B. St. Louis County, Missouri

St. Louis County is the most populated county in Missouri. The County surrounds and is independent of the city of St. Louis.[3] With over one million residents, it represents approximately one-sixth of Missouri's total population. Almost 70% of the County's residents are White, and less than 25% are Black. Roughly 60% of the County's youth (aged 17 and under) are White and just over 30% are Black.[4] About 10% of St. Louis County residents live below the poverty level. The County is comprised of 23 independent school districts.[5] There are 89 separate municipalities within St. Louis County, and almost all of these municipalities have their own police force.[6]

Gerald had been an adult charged with a similar crime, the maximum sentence he could have received was 60 days in the county jail or a fine. *Id.* at 29.

[3] St. Louis City is an independent city with an additional population of more than 300,000 residents.

[4] The remaining 10% of the County's youth population is comprised of Hispanic, American Indian and Asian youth. National Center for Juvenile Justice for the Office of Juvenile Justice and Delinquency Prevention, *Easy Access to Juvenile Populations: 1990-2013* (2014), http://www.ojjdp.gov/ojstatbb/ezapop/.

[5] *See* U.S. Census Bureau, *2012 Census of Governments* (Sept. 2013), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF (last visited March 11, 2015).

[6] *Id.* On March, 4, 2015, this office released the findings of its investigation of the police department and municipal court for one of St. Louis County's municipalities, the City of Ferguson. After an extensive review, DOJ concluded

C. The St. Louis County Family Court

Each of Missouri's 45 judicial circuits has either an "administrative judge" of a family court, or in smaller circuits, at least one designated family court judge within the circuit court. When the family courts hear cases involving allegations of juvenile delinquency, the court is often referred to as "juvenile court," and its function is distinguishable from the court's functions in "child welfare" cases. As noted, our investigation focuses on the "juvenile court" functions of the St. Louis County Family Court.[7]

Missouri law provides that the purpose of its juvenile code is "to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court." Mo. Rev. Stat. § 211.011. Children who come within the jurisdiction of the juvenile court are to "receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them." *Id.*

At the time of our investigation, Judge Ellen Levy Siwak was the Administrative Judge for the Family Court of the Twenty-First Judicial Circuit of the State of Missouri. In January 2015, Judge Siwak transferred to a position outside of the Family Court and Judge Thea A. Sherry assumed the position of Administrative Judge. In addition to the Administrative Judge, there is one additional judge and two commissioners who preside over delinquency (as well as child welfare) matters in St. Louis County.[8] In 2014, over six thousand children were referred to the St. Louis County Family Court for law and status violations**.**

Missouri law provides that each family court "shall appoint a juvenile officer," and that this juvenile officer shall "serve under the direction of the court in each county." Mo. Rev. Stat. § 211.351. 1; *see also Your Missouri Courts*, http://www.courts.mo.gov/page.jsp?id=631 (last visited April 13, 2015) ("The juvenile officer performs under the direction of the judge of the juvenile or family court . . . .").

The responsibilities of the Chief Juvenile Officer of the Family Court of the Twenty-First Judicial Circuit of the State of Missouri (also referred to as the St. Louis County Family Court

---

that the City of Ferguson engages in a pattern of unconstitutional policing and court practices that both reflect and exacerbate existing racial bias, and that discriminatory intent is part of the reason for these disparities. DOJ further found that race-based disparities in police and court practices provided significant evidence of discriminatory intent, citing the Supreme Court's statement that "the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997). A copy of DOJ's Ferguson Findings Report can be found at: http://www.justice.gov/crt/about/spl/findsettle.php.

[7] Although the St. Louis County Family Court is a division of the State's Twenty-First Judicial Circuit, we understand from discussions with counsel for the Court that some positions within the Family Court are filled by county employees.

[8] Commissioners are appointed by a panel of Circuit Court judges for four-year terms. Mo. Rev. Stat. § 211.023. Their findings must be reviewed and adopted by a Family Court judge. Mo. Rev. Stat. § 211.029.

Administrator) are vast. He is the "chief liaison" between the family court judges and the court administrators. He handles all employment-related matters, including hiring, contracting for services, promoting employees, hearing and arbitrating grievances, and disciplining and/or firing all non-judicial Family Court employees. The Juvenile Officer also oversees all social service, legal, and operational matters within the Family Court as well as all budgetary and funding matters.[9]

To fulfill all of these duties, the Chief Juvenile Officer directs the Juvenile Office, which is organized into a number of departments, including delinquency and clinical services, detention services, court programs, legal services, child protective human resources, and operations units. Each of these departments is staffed by Deputy Juvenile Officers, commonly referred to as DJOs, who are overseen by a director.

With the exception of core judicial responsibilities, the DJOs in St. Louis County are responsible for virtually every aspect of Family Court operations. They administer *Miranda* warnings to children during police interrogations, review referrals to the court, and staff and operate the detention facility. DJOs decide whether to offer informal supervision to a child or whether to send a youth's case to the legal department to determine whether to "petition" the Court to hear the case formally. DJOs supervise children being handled informally and determine whether to file petitions when children violate conditions of informal supervision. DJOs act as victim advocates. They conduct investigations, write reports and make recommendations regarding whether to waive the Family Court's jurisdiction so that a child can be prosecuted in adult criminal court. DJOs also supervise children who have been placed on formal supervision, and staff the alternatives to detention and community-based educational and treatment programs operated by the Family Court. DJOs have authority to make arrests, but are likewise charged with protecting the interests of the children with whom they work. DJOs are considered "parties" to all proceedings before the Family Court. Mo. Sup. Ct. R. 110.04(a)(20).

The Juvenile Office's legal department includes attorneys, or legal officers, who provide representation to DJOs in Family Court proceedings. Significantly, legal officers in Missouri do not function like traditional prosecutors. That is, they do not represent the interests of the State (as embodied by the executive branch). Rather, they represent the DJO. *See* Mo. Sup. Ct. R.116.03 (In delinquency proceedings, evidence against the juvenile "shall be presented by counsel for the juvenile officer."). The Court's Legal Director confirmed during our site visit that in St. Louis County, legal officers maintain a confidential, attorney-client relationship with the DJOs they represent. Thus, there are no traditional prosecutors involved in St. Louis County Family Court proceedings.

All of the individuals in the Juvenile Office ultimately work for the same Administrative Judge, to whom they submit recommendations about children and appear before in court. The Chief Juvenile Officer reports directly to the Administrative Judge. The director of each department in the Juvenile Office answers to the Chief Juvenile Officer and, through him, the Administrative Judge. This organizational structure extends to the Juvenile Office's legal department, which is overseen by a Legal Director who answers to the Chief Juvenile Officer

[9] Job Description for Family Court Administrator (Chief Juvenile Officer) (provided to DOJ by the Family Court).

and, through him, to the Administrative Judge. *See* Appendix A, St. Louis Family Court Judiciary and Administration organizational chart (individual names redacted). The juvenile officers are hired, supervised, and subject to firing by the Administrative Judge. *See* Mo. Rev. Stat. § 211.351.1; *Smith v. 37th Judicial District of Missouri*, 847 S.W.2d 755, 756-57 (Mo. 1993) (deputy juvenile officer's employment "is 'at the will of the juvenile court and he was subject to removal at any time by the judge, with or without cause.'") (internal citation omitted).

D. Juvenile Indigent Defense

As discussed above, the U.S. Constitution provides children with the right to counsel in delinquency proceedings. *See supra* p. 5. Missouri law provides that children have a right to counsel at every stage of delinquency proceedings. Mo. Rev. Stat. §§ 211.211.1; 211.211.6; Mo. Sup. Ct. R. 115.02. The Family Court is required to appoint counsel "when necessary to assure a full and fair hearing," including every delinquency case in which the child cannot afford to retain counsel. Mo. Rev. Stat. §211.211.3. Counsel for indigent children are to be appointed when a petition is filed, unless a request for earlier appointment is made. Mo. Rev. Stat. §§ 211.211.2; 211.211.3; Mo. Sup. Ct. R. 115.02(c). Children may not waive their right to counsel without the approval of the judge. Mo. Rev. Stat. §§ 211.211.8; Mo. Sup. Ct. R. 115.01(b).

The Missouri State Public Defender ("MSPD") provides representation to indigent adults and children in criminal and juvenile delinquency proceedings. The agency is funded almost entirely from state general revenue,[10] and has 36 district offices located throughout the state. Each of the district offices is led by a District Defender. District 21 provides representation to St. Louis County (and is referred to in this document as the "St. Louis County PD Office" or the "local public defender's office").

The indigent public defense system in Missouri has faced extraordinary challenges for a number of years due to extremely limited resources and a chronic budgetary crisis. A 2009 assessment of Missouri's public defender system found that it had the second lowest per-capita expenditures of all states in the country and was on "the brink of collapse."[11] In 2010, the MSPD notified twenty-two judicial districts covering forty-three counties that the public defender offices serving them might not have capacity to take new cases unless there were drastic reductions in their caseloads. By July 2010, the agency had "certified" that two of its public defender offices were beyond their maximum allowable caseloads (per administrative rule of the Missouri Public Defender Commission), and placed those offices on limited availability status. By 2012, eighteen of the State's public defender trial district offices were certified and placed on limited availability status, and another nine, including the St. Louis County PD Office, were pending certification. *2012 MSPD Ann. Rep*. at 6. Because of a recent change in state law,

[10] *See 2014 MSPD Ann. Rep*. at 8. In fiscal year 2014, MSPD was appropriated a total of $35,290,793 from the state's general revenue. The defender agency also collects a small amount of funds pursuant to Mo. Rev. Stat. § 600.090, which requires public defenders to assess liens against MSPD clients. Payments collected from those liens are deposited into the Legal Defense and Defender Fund ("LDDF"). In fiscal year 2014, MSPD collected approximately $1,344,000 under the LDDF program. *2014 MSPD Ann. Rep.* at 8.

[11] The Spangenberg Group and The Center for Justice, Law and Society at George Mason University, *Assessment of the Missouri State Public Defender System Final Report* at 21, 64 (Oct. 2009).

however, the MSPD can no longer limit the availability of a local public defender office for new cases and, instead, must get permission from the court to do so on a case-by-case basis. [12]

The MSPD continues to be stretched beyond reasonable capacity despite its repeated warnings about the dire consequences this poses for indigent defendants:

> Whenever imprisonment, for any length of time, is a possible sentence under the law, the constitutional guarantee of a right to the assistance of counsel is triggered and public defenders are likely to be involved. At least, that's the way it's supposed to work -- when there are enough public defenders to go around. Today in Missouri, there are not. The number of people needing defender services has steadily climbed over the years at a much faster rate than public defender staffing. We now face the situation where there are many more cases than there are lawyers to handle them.

2012 MSPD Ann.Rep. at 2.

All juvenile delinquency cases opened by the St. Louis County PD Office are assigned to a sole public defender within that office. In fiscal year 2014, this office opened 394 juvenile cases. *2014 MSPD Ann. Rep.* at 82.

The public defender represents every child in St. Louis County who is not represented by private counsel at initial detention hearings.[13] After the initial detention hearing, children must apply and be deemed financially eligible for that public defender to provide representation at subsequent hearings.[14] In Missouri, the income of the child's parents generally is assessed to determine public defender eligibility.[15] Moreover, there are indications that eligibility standards

---

[12] In late 2010, the MSPD challenged one Missouri court's attempt to require the local public defender to accept additional cases beyond its maximum allowable caseload in a writ taken to the Missouri Supreme Court. In 2012, the Missouri Supreme Court ruled that, because there was no finding by the trial court that the Commission's rule setting the permissible caseload was invalid or inapplicable, the trial court should have applied it. *See State ex. rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 612 (Mo. 2012). In 2013, however, the state enacted a law in response to the *Waters* decision, requiring that a public defender office get permission from the court before refusing a case. Mo. Rev. Stat. § 600.062.

[13] We expect that very few children are represented at detention hearings by private attorneys, given the relatively small number of children who have private counsel at subsequent delinquency proceedings. Despite requests to the Office of State Courts Administrator and the local public defender's office, however, we were unable to locate data regarding how many children are represented by private counsel at detention hearings.

[14] Our interviews with judges, commissioners, and other court employees in St. Louis County yielded inconsistencies with regard to the determination of public defender eligibility. While one judge told us that the MSPD makes all eligibility decisions, other people (including the District Defender, who oversees the St. Louis County public defense system) stated that it is in fact a DJO who determines whether a young person qualifies for public defender representation.

[15] *See* Mo. Code. Regs. Ann. tit.18 § 10-3.010(3)(B)(3) ("The parent's income should be considered if they support the defendant and the defendant is under eighteen (18) years of age unless a parent is an alleged victim of the charged offense."). To qualify for the public defender's services, the parental income must not exceed the federal poverty guidelines. MO. CODE. REGS. ANN. tit.18 § 10-3.010(3)(A).

exclude needy would-be juvenile clients. According to Missouri Public Defender Commission, "Missouri ranks 50th out of 50 states in income eligibility standards for public defender services, leaving a wide gap of ineligible defendants who, in reality, still lack the means to retain private counsel in the market." *2013 MSPD Ann. Rep.* at 1. Relying on parental income to determine eligibility for indigent defense poses potential problems for children in the juvenile justice system. For example, the appointment of counsel may be delayed while the family's application is processed and eligibility is assessed.[16] Moreover, faced with potential legal fees, cash-strapped parents may persuade a child that counsel is unnecessary.

In addition to the one public defender, the Family Court judges and commissioners in St. Louis County frequently appoint private attorneys to represent children charged with delinquency. As discussed further in the findings section, fees for the services of these appointed attorneys are reportedly set by the judge at his or her discretion.

Historically, students from local law school clinics also have provided representation to children in delinquency proceedings pursuant to Missouri Supreme Court Rule 13. Rule 13 permits law students to represent consenting clients in state court proceedings under the supervision of a practicing attorney. Law students from Washington University's Juvenile Law and Justice Clinic ("Juvenile Clinic"), for example, had been providing representation to children in the Family Court for a number of years. Shortly after the announcement of DOJ's investigation, however, the Court informed the clinic's directors that it would no longer "accommodate" Washington University Law students practicing in its courtrooms pursuant to Rule 13.[17]

---

[16] *See* King, Hon. Kenneth J; Puritz, Patricia; and Shapiro, David A., *The Importance of Early Appointment of Counsel in Juvenile Court* (2014) at 15 ("Even where young people and their families are willing and able to provide all requested information to prove indigence, in some jurisdictions the appointment of counsel can take days to process, thus postponing hearings for youth who try to exercise their right to counsel. This delay – or even the anticipation of the delay – may cause young people to forgo their right to counsel to speed up the process.").

[17] Washington University's Juvenile Clinic was excluded under troubling circumstances, particularly in light of the very limited resources of the public defender's office and, as discussed further in the findings section, the serious constitutional deficiencies in children's access to effective representation in St. Louis County. On the day that DOJ announced its investigation, the Clinic's director sent a widely distributed email in which she praised DOJ's investigation as well as her clinic's "efforts as zealous advocates and change agents." Four days later, the Court's Legal Department notified the University's director of externship programs that "until further notice, per the instructions of [the Family Court Legal Director], the St. Louis County Family Court will not be accepting any law student interns from Washington University" – even though this same office had been actively recruiting a new Washington University intern just a couple weeks earlier. Significantly, the Court chose to ban only Washington University law students, and not students from other local law schools. *See* Heather Cole, "St. Louis County Family Court Shuns Wash. U. Legal Clinic Students; Decision Follows DOJ's Launch of Investigation," Missouri Lawyers Weekly, February 27, 2014 (quoting the interim director of St. Louis University's law clinic as stating that the Family Court's reported ban on law students "doesn't affect *our* lawyers' and students' abilities to go into St. Louis County, whether family or juvenile court.") (emphasis added).

E. National Juvenile Defender Center Report on Access to Counsel

In April 2013, the National Juvenile Defender Center ("NJDC") issued a comprehensive assessment of youth access to counsel in juvenile courts throughout Missouri.[18] With input from local experts, the NJDC assessed ten judicial circuit courts covering twenty counties and over half of the State's total population, as well as half of the total number of youth who are processed through the State's family courts. The family courts in all ten judicial circuits, including the St. Louis County Family Court, granted members of NJDC's investigative team access to observe a range of family court proceedings and conduct confidential interviews and meetings with key justice system personnel. NJDC investigators also visited county detention centers and state-run commitment facilities, and collected self-report survey information. NJDC Report at 13.

The system that NJDC investigators reportedly found in Missouri is one that, in many critical respects, resembles the juvenile justice systems in operation around the country in the 1960s, before the Supreme Court issued the *Gault* decision. The NJDC Report describes Missouri children proceeding through the court systems without meaningful access to counsel. NJDC investigators concluded that, even when counsel is provided, it is usually at later stages of the adjudicatory process, when it is too late to have any meaningful impact on the child's disposition.

NJDC investigators also concluded that the family court structure in Missouri results in blurred and conflicting roles on the part of judges, legal officers and, in particular, DJOs. Investigators found that DJOs have a "limited understanding . . . 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." *Id.* at 38. The NJDC concluded that the net result of all of these factors is that Missouri's juvenile justice system largely functions in a "pre-*Gault*" fashion. "[Y]outh 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 . . . ." *Id.* at 35.

The NJDC Report does identify a few promising practices its team observed during its investigation, including the role that law school clinics play in promoting access to counsel. The Report specifically highlights the juvenile indigent defense clinics at both St. Louis University and Washington University, stressing that "[c]linics like these offer immediate assistance for juveniles, long-term training for new lawyers, and recognition of juvenile defense as a specialized practice." *Id.* at 54.

---

[18] *See* Mary Ann Scali & Kim Tandy with Jaime Michel & Jordan Pauluhn, *Missouri: Justice Rationed, An Assessment of Access to Counsel and Quality of Juvenile Defense Representation in Delinquency Proceedings*, National Juvenile Defender Center (Spring 2013) ("NJDC Report"). NJDC is a non-profit, non-partisan organization whose mission is "[t]o promote justice for all children by ensuring excellence in juvenile defense." http://njdc.info/about-njdc/mission-vision-statement/ NJDC has issued comprehensive standards for juvenile representation that have been adopted widely in the field of juvenile defense.

The NJDC Report concludes with a series of recommendations, including allocating sufficient resources, and ensuring timely appointment of counsel and representation at all critical stages of proceedings. NJDC also recommends addressing "the expansive role of the deputy juvenile officer . . . 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." *Id* at 55-56.

After issuing the report, NJDC held meetings with Missouri juvenile defense stakeholders to discuss its findings and assist in the development of work plans to address the problems identified in its report, and the MSPD has worked with NJDC to provide specialized training to public defenders throughout the State who handle juvenile cases. However, there continues to be just one public defender assigned to handle all juvenile cases in St. Louis County. [19]

II. DOJ INVESTIGATION

Since opening our investigation in November 2013, we have analyzed data provided by the Missouri Office of State Courts Administrator regarding over sixty variables for nearly 33,000 cases, including all delinquency and status offenses resolved in St. Louis County Family Court between 2010 and 2013. We also have reviewed over 14,000 pages of documents, including the Family Court records of over 120 children; court transcripts of proceedings in approximately 70 detention, adjudication, disposition and certification hearings; court policies, procedures, and other operational documents; MSPD annual reports, and NJDC's report. In addition to DOJ attorneys, our team included two consultants – a law school clinical professor and experienced juvenile defense attorney, and a nationally-recognized expert on measuring juvenile justice disparities through statistical analysis.

We visited the Family Court from June 10-12, 2014, toured the courthouse and interviewed a number of court personnel, including all of the judges and commissioners; the Juvenile Officer; the Legal Director; the Directors of Delinquency Services, Court Programs, and the Detention Center; and deputy juvenile officers. Subject to limitations imposed by the Court in its discretion, we observed one juvenile detention hearing. [20] We met with representatives of

[19] In June 2013, the Missouri Supreme Court issued a new Operating Rule, effective January 1, 2014, which states: "Those juvenile officers and their staff who are not licensed to practice law in this state shall not engage in the practice of law." *See* Mo. Sup.Ct., Court Operating Rule 29, Juvenile Officer Practice of Law (June 6, 2013). However, the rule does not provide any additional guidance or direction about how to comply with its admonition. We did not identify any other steps that the State has taken in response to the findings in the NJDC report.

[20] Missouri juvenile records and proceedings are confidential and not available for public inspection except in limited circumstances involving higher level offenses. Other records and proceedings may be disclosed upon court order, but the Court refused to grant discretionary disclosure to our team. Instead, the Court restricted our access to portions of records in cases involving youths charged with higher level offenses. *See* Mo. Rev. Stat.§ 211.321.1 (exception to confidentiality of youth records for cases in which "a petition or motion to modify is sustained which charges the child with an offense which, if committed by an adult, would be a class A felony under the criminal code of Missouri, or capital murder, first degree murder, or second degree murder"); Mo. Rev. Stat. § 211.321. 2(2) (exception to confidentiality of youth records for cases in which youths are ("adjudicated delinquent pursuant to subdivision (3) of subsection 1 of section 211.031, for an offense which would be a felony if committed by an

both the state and local public defender's offices. We spoke with representatives of the juvenile law clinics at both Washington University and St. Louis University. We interviewed private attorneys with experience as appointed attorneys for delinquency proceedings in the Family Court. We also spoke to the parents of several youth who had been involved in delinquency proceedings with the Family Court.

Based on our review of all of this information, and consistent with what NJDC found in its statewide investigation, we find that the St. Louis County Family Court fails to ensure that children facing delinquency proceedings have adequate legal representation. We also find that the Family Court violates children's privilege against self-incrimination, fails to provide adequate probable cause determinations, fails to provide children facing certification for criminal prosecution in adult criminal court with adequate due process, and fails to ensure that children's guilty pleas are entered knowingly and voluntarily. Moreover, we find that the Family Court structure creates significant and unavoidable conflicts of interest that run contrary to separation of powers principles and deprive children of adequate due process.

Additionally, we find that the St. Louis County Family Court engages in conduct that violates the constitutional guarantee of Equal Protection. Even after controlling for other factors such as gender, age, risk factors, and severity of the allegation, we find that Black children are disproportionately represented in decisions to: formally charge youth versus handle matters informally; detain youth pretrial; commit youth under existing Court supervision to Division of Youth Services custody; and place youth in a secure Division of Youth Services facility after conviction.

III. DUE PROCESS VIOLATIONS

A. Systemic Failures Leading to Inadequate Representation

1. Legal Standards

The Due Process Clause of the Fourteenth Amendment guarantees children charged with juvenile delinquency the right to representation by counsel. *Gault*, 387 U.S. at 36; *see also Gideon v. Wainwright*, 372 U.S. 335 (1963) (states are constitutionally obligated to provide counsel to individuals facing criminal charges who cannot afford an attorney). Embedded in the right to counsel is the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Furthermore, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). Thus, zealous, competent defense representation is essential to a constitutionally-sound adjudicatory system:

---

adult"); Mo. Rev. Stat. § 211.171. 6 (exception to confidentiality of proceedings in limited circumstances involving higher level offenses).

> The right to the effective assistance of counsel is . . . *the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.* When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

U.S. v. Cronic, 466 U.S. 648, 656-57 (1984) (emphasis added).

Juvenile prosecutions, like those of adults, must undergo this "crucible of meaningful adversarial testing." *Id.* at 656-57. Effective legal representation is a crucial element of procedural due process for children charged with delinquency:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'

Gault, 387 U.S. at 37 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1962)); s*ee also In re Winship*, 397 U.S. 358 (1970) (prosecution must prove allegations of delinquency beyond a reasonable doubt).

The developmental immaturity of children and the effects it has on judgment and decision-making impose unique responsibilities on juvenile defense lawyers in providing constitutionally adequate representation. *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2397 (2011) ("The law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."). National practice standards assist in fleshing out those obligations. NJDC, for example, has issued standards that require that juvenile defense attorneys: (1) "be skilled in juvenile defense [and] knowledgeable about adolescent development and the special status of youth in the legal system;" (2) "provide continuous, active representation throughout the entirety of the client's contact with the juvenile justice system;" and (3) "litigate the client's case vigorously and challenge the state's ability to prove its case beyond a reasonable doubt". *National Juvenile Defense Standards* 1.1 (National Juvenile Defender Center 2012) ("NJDC Standards").[21]

[21] NJDC Standards also set forth specific juvenile defense practices that are essential to these overarching principles, including the vigorous opposition to pre-trial detention and pursuit of requests for re-hearings or appeals on behalf of detained clients (*NJDC Standards* 3.8, 3.9); duties relating to pre-trial investigation and discovery (*NJDC Standards* 4.1 – 4.11); robust motion practice, including, *inter alia*, motions to suppress evidence (*NJDC Standard* 4.7); seeking and advocating zealously at pre-trial hearings (*NJDC Standard* 4.8); active plea negotiations that secure some benefit for the client (*NJDC Standard* 4.9); the pursuit of interlocutory appeals and collateral challenges to adverse rulings (*NJDC Standard* 4.11); effective, skilled trial practice (*NJDC Standards* 5.1 – 5.11); development of and advocacy for "client-driven" dispositional plans and, when necessary, formal, adversarial dispositional hearings (*NJDC Standards* 6.1 – 6.9); appellate representation, including appeals from final judgments (*NJDC Standards* 7.2 – 7.4) and interlocutory appeals and collateral challenges to custody determinations (*NJDC Standard* 4.10); and, when possible, post-dispositional representation, particularly on behalf of children committed to state

2. Findings

We found substantial deficiencies in the State's system of ensuring that indigent juveniles in St. Louis County receive meaningful access to counsel. As the Supreme Court recognized, "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. In St. Louis County, however, systemic shortcomings stifle zealous advocacy and prevent any adversarial testing of facts in the St. Louis County Family Court, in contravention of children's right to adequate representation. None of the signposts of zealous advocacy, such as pre-trial motion practice, contested hearings, independent evaluations, and expert witnesses, are present in the St. Louis County Family Court. For example:

- Approximately 60% of lawyers who represent detained youth in Family Court enter the case at least seven days – *and as many as 232* days – after the child's detention hearing is held.[22] As a result of these delays, critical investigation opportunities are lost; witnesses are no longer willing or available, memories fade, and physical evidence useful to the defense disappears. While these delays continue, children remain in limbo in the detention center, without the benefit of legal advice, counsel, and advocacy. They often lack even a basic understanding of Family Court procedure or the cases against them, and the resulting confusion can lead to desperation, negative behaviors, and depression.

- In fiscal year 2014, the public defender's office closed 277 delinquency cases and four status offense cases in the Family Court; only three of these cases involved a contested adjudication.[23] The rarity of trials, combined with the fact that children who plead guilty generally enter pleas to every count with which they are charged (even when these involve multiple incidents that occurred over a period of several years), indicates that little critical evaluation or testing of the facts occurs. Instead, the allegations against youth are simply assumed to be true.[24]

- No defense challenge to the Court's on-paper probable cause determination was made at any point in any proceeding we reviewed.

---

custody (*NJDC Standard* 7.5) and in probation and parole violation proceedings (*NJDC Standard* 7.7). These standards are consistent with DOJ's own views. *See, e.g.*, Statement of Interest of the United States at 12, *N.P. v. State of Georgia*, 2014-cv-241025 (Sup. Ct. Ga. Mar. 13, 2015) (citing NJDC Standards in discussion of requirements for adequate representation in juvenile proceedings).

[22] As noted, the public defender represents most children for purposes of the detention hearing only. After that, however, children are required to apply and be deemed financially eligible for subsequent public defender representation. We found significant gaps in representation for children between the detention hearing and subsequent hearings.

[23] Although similar data regarding children represented by appointed counsel was not made available to us, of the records we received, only one involved a contested adjudication by a private attorney in the same time period.

[24] The common practice of pleading to every count also indicates a lack of arms-length plea negotiations in the Juvenile Court. This results in part from the rarity of motion practice and trials; without the threat of a negative outcome, the DJO and her attorney have little incentive to negotiate.

- According to data provided by the Office of State Courts Administrator, only seven motions to suppress evidence were filed in delinquency and status offense cases between June 30, 2012, and June 30, 2014. Furthermore, our review of available records reveals that discovery motions are generic, "boilerplate" motions. In the absence of vigorous motion practice, violations of children's Fourth, Fifth, and Sixth Amendment rights go unchallenged and unchecked.[25]

- Although data provided by the Office of State Courts Administrator indicates that 152 motions to dismiss were filed in delinquency cases between June 30, 2012, and June 30, 2014, these appear to have been almost exclusively certification motions (which, in Missouri, are technically motions to dismiss the juvenile complaint and refer the matter to a court of general jurisdiction) filed by the Family Court's legal department, rather than by the defense. The only defense dismissal motions contained in the records we reviewed were several boilerplate motions to dismiss certification cases, which either were denied outright or subsumed by guilty pleas. Yet, numerous other bases exist for pre-trial dismissal of delinquency complaints, including facial insufficiency and lack of adjudicative competency, among others. Like the failure to challenge probable cause or file suppression motions, the failure to pursue such claims evidences a denial of the zealous advocacy to which children charged with delinquency are entitled.

- Based on our review of transcripts, defense counsel raised few objections, even in the face of extensive leading of key prosecution witnesses, damaging hearsay and other excludable testimony, and improper evidentiary foundations. In one case, the child testified but did not appear to have been adequately prepared. No other defense witnesses were called in any of the cases we reviewed.

- Our review of transcripts revealed no evidentiary dispositional hearings (equivalent to adult sentencing hearings). In every case, the Court entered the dispositional order without taking testimony from witnesses, and, in all but a handful, on the statement of the DJO report alone. In several cases, the Court file included a letter from the child and, in several others, a psychological evaluation had been ordered by the Court. Even when the defense attorney opposed the DJO's recommendation, he or she did not seek to cross-examine the DJO, retain or call expert or lay witnesses, submit independent evaluations or reports, or develop and present a comprehensive and persuasive alternative

[25] Hearing transcripts revealed instances of obvious suppression issues that were not raised during proceedings. In one example, the police officer relied on a "show-up" identification to arrest a child for an alleged assault. A show-up is a method of identifying an alleged perpetrator in which the police display a single person to a witness and ask him or her whether that person committed the crime in question. Because only one person is shown to the witness, show-ups have "been criticized as inherently suggestive and a practice to be avoided . . . ." *United States v. Sanders*, 547 F.2d 1037, 1040 (8th Cir. 1976); *see also Neil v. Biggers*, 409 U.S. 188, 198 (1972) ("Suggestive confrontations are disapproved because they increase the likelihood of misidentification . . . ."). Yet, no suppression motion was filed and no challenge to the identification procedure was raised. In another case, a gun was recovered after an arguably unlawful stop of the child by the police. Although the defense attorney did suggest that the stop was illegal during her trial summation, she did not file a suppression motion, erroneously stated during her summation that a stop must be predicated on probable cause [*see contra*, *Terry v. Ohio*, 392 U.S. 1 (1968)], and never asked the court to suppress the evidence. The court found the youth guilty of the offense without addressing the Fourth Amendment issues, and no effort was made to preserve them for appeal.

> dispositional plan to the Court. Instead, on occasion, defenders offered a tepid oral objection to the Court and asserted their client's wishes with regard to disposition. This is not effective oral advocacy and falls far short of the level of practice demanded by national juvenile defense standards.[26]

- The St. Louis County juvenile public defender hired no expert witnesses in fiscal year 2014. Expert witnesses are often essential to effective defense advocacy. Without expert testimony, it may be impossible to assert a competency defense, call into question ballistics or other laboratory analyses, challenge the admissibility of confessions or eyewitness testimony, or negate intent.

- Motions for "mental examinations" were made in just ten delinquency cases between June 30, 2012 and June 30, 2014, and the Family Court granted only one of these motions.[27]

- Not a single appeal from a St. Louis County Family Court case was filed in fiscal year 2014.[28]

Taken together, these failings reflect a system devoid of adversarial process. When no motions or appeals are filed, when no independent investigation takes place, when the actions of the police go unexamined, when all but a handful of cases result in a guilty plea to all counts and when DJO-recommended dispositions are almost always accepted without challenge, the only possible conclusion is that children in St. Louis County do not receive adequate or effective representation in delinquency proceedings, in violation of the Constitution:

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, if there is no opportunity for appointed counsel to confer with the accused to prepare a defense, or circumstances exist that make it highly unlikely that any lawyer, no matter how competent, would be able to provide

---

[26] *See NJDC Standard* 6.7 ("At the disposition hearing, counsel must advocate for the client's constitutional rights . . . . be familiar with court rules, statutes, and case law regarding the client's right to an evidentiary hearing at the disposition phase of the proceeding, including the ability to call experts or other witnesses whose testimony could have bearing on the appropriateness of the disposition options; . . . ensure that the facts the court considers in reaching its disposition decision are made part of the record, as well as counsel's objections to the disposition plan and any disputed findings of fact that serve as the basis of the court's decision; and . . . (c) counsel should ensure that the needs and rights of the client are addressed in the disposition order with specificity, including how the state will meet its obligation to provide educational, vocational, and rehabilitative services, as well as the location and duration of the services, the place of confinement, eligibility for aftercare/parole if appropriate, requirements for evaluations or treatment, assignment to drug rehabilitation, and credit for time served . . . .").

[27] The data does not reveal whether the motions were made by the DJO or the defense.

[28] Appeals are necessary to ensure fidelity to the law, lend a degree of transparency to the normally opaque juvenile court system, and provide needed judicial interpretation of controlling law. Thus, the American Bar Association "urges federal, state, local, tribal and territorial governments to ensure that juveniles are provided effective appellate representation and have access to appeals consistent with state statutes and/or state constitutional provisions." *See* American Bar Association Resolution 103A and Accompanying Report (February 2014), http://www.americanbar.org/news/2014-mym-reporter-resources/2014-mym-hod-resolutions/103a.html.

> effective assistance, the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed.

Wilbur v. City of Mount Vernon, 989 F. Supp.2d 1122, 1131 (W.D. Wash. 2013).[29]

We have identified several systemic barriers that contribute to this denial of effective representation in St. Louis County Family Court. These barriers include: (a) an excessive public defender caseload, (b) an arbitrary system of appointing counsel, (c) structural barriers to effective representation, and (d) delays in appointment of counsel. Each is discussed below.

a. Excessive Public Defender caseload

Only one juvenile public defender is assigned full-time to the St. Louis County Family Court.[30] The week of our visit, she had an open case count of 209, including a murder case. In fiscal year 2014, the local public defender's office opened 394 juvenile cases. *2014 MSPD Ann. Rep*. at 82. This is nearly double the National Advisory Commission on Criminal Justice's widely-accepted caseload standard of 200 cases per year for juvenile defense attorneys.[31] Moreover, in determining appropriate caseloads, the American Bar Association recommends consideration not only of the sheer number of cases a defender is assigned, but also the attorney's "workload," that is, the complexity of the assigned cases, the defender's skill and experience level, and resources available (such as available support staff).[32]

Our findings about the public defender's excessive caseload are consistent with a recent statewide study conducted by the American Bar Association. In a report published in 2014, it found that public defenders in Missouri spend an average of just 4.6 hours on juvenile cases, less than a quarter of the estimated 19.5 hours necessary to provide reasonably effective assistance of counsel in juvenile cases.[33] Indeed, the MSPD has acknowledged that, without adequate resources, public defenders cannot be "the effective check and balance that the citizens of Missouri and the cause of justice need them to be." *2014 MSPD Ann. Rep*. at 5. "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice." *Kent*, 383 U.S. at 561.

---

[29] *See also* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771, 791-92 (2010) (the due process rights promised by *Gault* are "threatened by routine and widespread substandard representation" in part because "many attorneys for juveniles do not interview witnesses or visit the crime scene. They do not file pre-trial motions. They do not prepare for dispositional hearings" and they are unprepared for bench trials).

[30] In cases where the local public defender cannot represent a child due to a potential conflict of interest, public defenders from neighboring counties occasionally provide representation.

[31] *Nat'l Advisory Comm'n On Crim. Justice Standards and Goals*, 13.12 (1973).

[32] American Bar Association, *Ten Principles of a Public Defense Delivery System* (February 2002).

[33] American Bar Association, *The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards* (January 2014). The Study applied the "Delphi methodology" to provide estimates of what workload standards *should* be in order for a public defender to provide reasonably effective assistance of counsel.

b. Arbitrary system of appointing attorneys

As discussed above, the St. Louis County Family Court operates a bifurcated system of counsel appointment for indigent children. State law provides that the public defender is to make the eligibility determination for any person seeking its services, but that "[u]pon motion by either party, the court in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant." Mo. Rev. Stat. 600.086. Thus, in other judicial circuits in Missouri, children who cannot afford a lawyer submit an application for public defender representation directly to the local public defender's office, and the eligibility determination is based on the federal poverty guidelines.

Instead of using the standard MSPD application, the St. Louis County Family Court utilizes its own form, and the DJO, not the public defender, obtains financial information from the parent, after which the Family Court determines whether to appoint the public defender, or one of several private attorneys who have an agreement with the Family Court to accept these assignments with the expectation that parents will pay the private attorney a reduced legal fee.[34] The MSPD is not informed that a child has sought public defender representation until the DJO has asked the Court to appoint the office and the judge has entered the order.[35]

Moreover, the Family Court does not utilize uniform procedures to determine financial eligibility for representation by the public defender or assigned counsel. In response to one of our team's document requests, we were informed that the four judges and commissioners in St. Louis County use markedly different income guidelines to determine financial eligibility. Then-Judge Siwak and Commissioner Wiese created their own formulae, Commissioner Monahan uses the federal poverty guidelines, and Judge Warner does not rely on any specific income guidelines.

If the DJO or the Court determines that a child does not qualify for public defender representation but the child's parent is nevertheless unable to retain private counsel, the Court will appoint a lawyer and order the parent to pay a "retainer" against future legal fees. Like the eligibility determination, there are no guidelines for setting these fees; the files we reviewed included court orders or liens against parents for fees ranging from $150 - $2000. In response to a document request, the Court advised us that five private attorneys received all assignments during the six months for which our team sought data.

Each of the judges and commissioners we interviewed told us that he or she had a "list" of attorneys who regularly accepted appointments in juvenile delinquency cases. Unlike many other jurisdictions, Missouri has no formal panel structure for appointment or supervision of these attorneys. There are, moreover, no statutorily required or recommended training programs or standards for juvenile defense lawyers, and the Court imposes no requirements on these

---

[34] As discussed above, even though Court officials told our team during our site visit that the MSPD determines financial eligibility, the MSPD Division Director, the District Defender for St. Louis County and a DJO who the Court permitted us to interview all contradicted the assertions of the Court.

[35] This practice violates Mo. Code of Regs. Ann. tit.18 § 10-3.010(1)(B), which provides that the Public Defender or his or her designee must determine financial eligibility.

lawyers to receive specialized training, supervision or oversight. Furthermore, like the public defender, appointed private attorneys rarely file motions, try cases, or contest dispositional recommendations.

The arbitrary attorney appointment process described above raises numerous concerns. In the absence of uniform financial eligibility standards, similarly-situated children do not have the same access to the free legal representation provided by the MSPD. The lack of training, supervision, and oversight of appointed counsel may engender constitutionally-infirm advocacy, as might the sense of personal obligation the attorney feels toward the appointing judge. Finally, the absence of regularity in the appointment process creates the appearance of impropriety and calls into question the fairness of the entire proceeding.

c. Organizational barriers to effective representation

The organizational structure of the Court creates a power imbalance between the prosecution and the defense. The inherent conflicts of interest caused by the organizational design of the Family Court and the resulting deprivations of due process are discussed more fully in Section III.F, below. We note here, however, that when the roles of prosecutor, probation officer, and administrator of *Miranda* warnings are all fulfilled by court employees, it renders defense challenges to their credibility and judgment extraordinarily difficult. Moreover, the absence of formal adversarial proceedings works to protect the DJO from cross-examination. In addition, the DJO is not merely a witness, the role typically played by probation officers, but a represented party to the proceedings. This may work to prevent the defense attorney from speaking directly with the DJO or engaging in ongoing, informal advocacy.[36]

Moreover, despite their quasi-prosecutorial functions, DJOs have unfettered access to children during the pendency of proceedings, particularly those in detention. For example, one parent we spoke to confirmed that her son spoke with his DJO on a number of occasions without counsel present. Some DJOs do not appear to fully understand or respect the role of defense counsel, further impeding procedural regularity in the courtroom.[37] This creates role confusion for youth and their families, who do not understand the difference between the DJO and the attorney. For example, one parent reported to us that her child's DJO described her role as making sure the youth "was treated fairly," and another parent reported that her son's DJO explained his role as "helping [her son] out" – roles more appropriately attributed to one's counsel.

---

[36] *See also* Mo. Rules Prof'l. Conduct 4-4.2 (2007) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.")

[37] NJDC made similar observations about DJOs throughout the state, noting "a limited understanding by many of the DJOs as to the role that defense counsel played throughout the proceedings," and as a result, "often little regard, and in some cases actual resistance, to youth representation . . . ." NJDC Report at 38.

d. Delays in attorney appointments

Although it is laudable that the MSPD ensures that every child has representation at the detention hearing, subsequent gaps in representation between the detention hearing and subsequent court appearances leave children without access to attorneys during their first, often difficult, days in detention. During this time period, DJOs routinely speak with children about their cases, sometimes giving legal advice that interferes with and undermines the defense attorney's subsequent client counseling. In addition, crucial witnesses may disappear and other investigative opportunities may be lost.

Defense attorneys frequently are assigned on the day of, or one or two days before, the initial adjudication date, which may occur months later. In light of the high percentage of cases that are resolved by a guilty plea and immediate disposition at the first adjudication hearing, it is unlikely that these attorneys have conducted the investigation, legal research, motion practice, and dispositional planning and advocacy that are essential to juvenile defense representation. *See, e.g.*, NJDC Std. 4.1-4.11; 6.1-6.9; *cf. Wilbur*, 989 F. Supp.2d at 1124 (finding that indigent defendants subjected to what "amounted to little more than a 'meet and plead' system . . . . could not fairly be said to have been 'represented' by [counsel] at all.").

A similar gap in access to counsel exists in the post-dispositional phase of delinquency cases. Although the right to counsel for children charged with delinquency extends through the appellate process, public defenders and court personnel reported that juvenile appeals rarely are filed in St. Louis County Family Court cases. In fact, the public defender filed no juvenile appeals in St. Louis County in 2014. When no appeal is filed, "services of counsel are terminated following the entry of an order of disposition." Mo. Rev. Stat. § 211.211.6. Thus, children committed to the Department of Youth Services, do not have legal representation. Children in long-term state custody often suffer substantial deprivations of their civil and educational rights.[38] Accordingly, post-disposition is a critical stage in delinquency proceedings for which counsel should be provided. *NJDC Standard* 7.5.

B. Violation of Privilege Against Self-Incrimination

1. Legal Standards

The Fifth Amendment privilege against self-incrimination applies to children charged with delinquency. *Gault*, 387 U.S. at 55**.** The Supreme Court, furthermore, has consistently recognized that children's developmental immaturity renders them more vulnerable than adults to police coercion and manipulation. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948). Among the factors that courts consider in determining the voluntariness of an interrogation-produced statement is the location in which the interrogation takes place. *See Withrow v. Williams*, 507 U.S. 680, 693 (1993).

---

[38] *See, e.g.*, Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration* (The Annie E. Casey Foundation 2011) (discussing the prevalence of deprivation and abuse in juvenile correctional facilities nationwide).

2. Findings

a. Interrogations in the detention center

According to the Court personnel we were permitted to interview, at the time of our site visit, the majority of juvenile interrogations took place in the Family Court's secure juvenile detention center. Children were transported by the police to the courthouse, where they were ushered through two sets of locked doors and into an unmistakably jail-like setting. They were placed in a small room where they could see and hear detained youth and detention personnel. Conducting interrogations in the detention center under these circumstances is highly coercive and sends a message to the child, whether subliminal or overt, that refusing to talk may result in being locked up alongside the other youth in the facility.

b. Court personnel (DJO) reading *Miranda* rights to juveniles

In St. Louis County, a DJO, rather than a police officer, is responsible for advising children of their Fifth Amendment right against self-incrimination as set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), and determining whether they understand their rights and give knowing and voluntary waivers. *See* Mo. Sup. Ct. R. 126.01. Having *Court* personnel involved in police interrogations and responsible for administering *Miranda* warnings is extraordinarily unusual, if not unique. While DJO administration of the *Miranda* warnings may be intended to provide a layer of protection from police over-reaching, the muddled role of DJOs undermines any potential benefit. As noted earlier, DJOs are Court employees. Therefore, the practice of using DJOs to give *Miranda* warnings places the credibility of Court employees at issue in every case in which a child makes an inculpatory statement. This is a significant number; according to Court data, between June 30, 2012 and June 30, 2014, 492 children were interrogated in the St. Louis County Juvenile Detention Center and 430 waived their *Miranda* rights.

If defense attorneys were to challenge the admissibility of statements made by a child after *Miranda* warnings were supposedly given, the suppression hearings would focus on whether the DJO administered the warnings at all and, if so, whether the administration was legally sufficient; what efforts, if any, were made to have the parent present during the interrogation; whether the child or parent requested counsel, and, if so, what actions the DJO took to obtain or refer the family to a lawyer; whether the child understood the warnings; whether the child lacked legal capacity to waive his or her rights; and whether the DJO subjected the child to physical force or psychological coercion. That this inquiry centers on the actions of a Court employee renders it rife with conflict for the judge or commissioner and also creates a potential chilling effect on the defense attorney. In addition, because DJOs carry out so many different functions, it may not be clear to children whether a DJO who gives *Miranda* warnings is acting as a law enforcement adversary, as a benign figure looking out for the child's interests, or something in between. All these factors may further erode children's confidence in the integrity of the proceedings, thus discouraging them from pursuing valid Fifth Amendment claims and, perhaps, perpetuating unconstitutional practices.[39]

[39] *See generally*, E. Allen Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988) (Procedural fairness positively affects litigants' perceptions of outcomes, even when outcomes are less favorable than those obtained in settings offering fewer procedural protections).

c. Compelled Admission for Informal Adjustments

The informal adjustment process is a diversionary mechanism which, if completed successfully, forestalls formal court adjudication. Depending on their prior records of delinquency involvement, children charged with lower-level felonies may be tracked for informal adjustment, along with children charged with misdemeanors and status offenses. According to data provided by the Office of State Courts Administrator, roughly half of the children referred to the Court between June 30, 2012 and June 30, 2014 were tracked for informal adjustment.

If the DJO decides to offer informal adjustment to a youth, he or she explains that it is a voluntary process and that, as a condition of participation, children are required to admit to the charges against them, and that if the child refuses to engage in this process, the DJO may recommend that a delinquency petition be filed. The DJO further advises the child that he or she has a right to consult with counsel and that anything the child says could be used against him or her at subsequent court proceedings.[40]

The practice of requiring admissions from children who are eligible for informal adjustment is troubling because children who did not commit the act they are accused of, or who may have legal defenses, are nonetheless forced to admit to committing the act or face the risk of prosecution if they refuse. In addition, although statements made during the adjustment process are inadmissible at adjudication hearings, they may be included in the DJO's pre-disposition and certification reports to the Court and, therefore, impact the Family Court's decisions. In one of the records we reviewed, for example, a youth's prior informal adjustment was included in the DJO's Certification Investigation Report; the DJO ultimately recommended that the youth be certified to be tried in adult court.[41] Moreover, a child's participation in informal adjustment itself signals an admission of wrongdoing, since in the absence of such an admission, the child would not have been permitted to enter the program. This could negatively affect the child if he or she violates the adjustment conditions or is re-arrested, as the DJO's report informs the Court of prior adjustments.

---

[40] Although Missouri law provides that children have a right to be represented "at all proceedings," the Court is required to appoint counsel only "[w]hen a petition has been filed" and counsel is "necessary to assure a full and fair hearing." Mo Rev. Stat. § 211.211.3. Thus, there is no state law requirement that children have legal representation during informal adjustments. The public defender's office does not provide representation for children in the informal adjustment process, and there is no system in place for the appointment of counsel for indigent youth facing informal adjustment proceedings. During our site visit, court personnel informed us that children being considered for informal adjustment might seek assistance from Legal Services of Eastern Missouri. However, in a subsequent telephone interview, an informal adjustment DJO told our team that this was not the case. Instead, if a child or parent requests counsel, she and her colleagues refer him or her to private attorneys "who have shown up on other cases."

[41] The Court ultimately denied the motion to dismiss the juvenile petition in order to certify the child for adult prosecution and, instead, retained juvenile jurisdiction over the child.

C. Lack of Probable Cause Inquiry at Detention Hearings

1. Legal Standards

The Fourth Amendment requires a prompt determination of probable cause by a "neutral and detached magistrate," whenever the State seeks to hold a person in prolonged pre-trial detention. *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). In probable cause determinations, the Court examines whether there is reasonable cause to believe that the accused has committed the crime. *Id.* As the Supreme Court explained in *Gerstein*, "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships . . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." *Id.* at 114.

The *Gerstein* Court further explained, "[a]lthough we conclude that the Constititution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely" and that "the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.* at 123. The Court stressed that whatever the probable cause procedures a state adopts, "it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty . . . ." *Id.* at 124.

The Supreme Court has not specifically applied *Gerstein* to juveniles. However, it relied heavily on *Gerstein* in *Schall v. Martin*, 467 U.S. 256 (1984). In *Schall*, the Court upheld a juvenile preventative detention statute where "notice, a hearing, and a statement of facts and reasons are given prior to any detention under [the statute]" and then "a detained juvenile is entitled to a formal, adversarial probable-cause hearing . . . ." *Id.* at 277.

In *R.W.T. v. Dalton*, 712 F.2d. 1225 (8th Cir. 1983), the Eighth Circuit held that "juveniles are entitled to a probable-cause hearing before a neutral and detached magistrate. . . ." *Id.* at 1227. [42] In affirming the lower court's decision, the Eighth Circuit made clear that "*ex parte* determinations of probable cause" are not sufficient to satisfy the Fourth Amendment:

> The District Court found that although sometimes the juvenile judge made a probable-cause determination before or shortly after the juvenile was incarcerated, 'this is mainly the product of the juvenile court judge's reliance on the representation of the juvenile officer. As such, even though a reasonable determination as to probable cause is made in some cases, no hearing is held before a neutral and detached judicial officer.'

Id. at 1229 (citing the lower court record). Extending *Gerstein*'s rationale, the Eighth Circuit cited approvingly to decisions recognizing that probable-cause hearings are "fundamental to juveniles' rights to due process." *Id,* at 1230.

[42] *R.W.T* was abrogated on unrelated grounds in *Kaiser Aluminum v. Bonjono*, 494 U.S. 827 (1990).

Missouri amended its Juvenile Code in the wake of the *R.W.T.* decision to require probable cause hearings in status offense cases. In a legislative anomaly, however, it failed to enact a similar provision for delinquency cases. *Compare* Mo. Rev. Stat. § 211.061 (delinquency probable cause determinations take place before the detention hearing) *with* Mo. Rev. Stat. § 211.063.1 (detained status offenders entitled to "probable cause hearing").

2. Findings

In St. Louis County, probable cause determinations in delinquency cases are made by a judge or commissioner within twenty-four hours of a child's arrest on the basis of documents prepared and submitted by a DJO – a Court employee – to the judge or commissioner. If the child is arrested on a weekend or holiday, the judge relies on the DJO's telephonic statements, issues an oral approval of the detention request, and reviews and signs the paperwork on the next court day. This *in camera, ex parte*, hearsay-based review is the *only* probable cause inquiry that occurs in delinquency cases in St. Louis County. *Cf. R.W.T.* at 1227, 1229 (holding that "juveniles are entitled to a probable-cause hearing before a neutral and detached magistrate," and that probable cause determinations that are "mainly the product of the juvenile court judge's reliance on the representation of the juvenile officer" do not satisfy the Fourth Amendment). The issue is not revisited at the subsequent detention hearing, or at any other stage of juvenile proceedings including, as discussed in the next section, certification hearings.

We were permitted to observe only one detention hearing during our site visit, but interviews with Court personnel and the detention hearing transcripts we reviewed indicate that it was conducted in typical fashion. The case involved a boy charged with a robbery that had occurred a number of months earlier. Seated at the table were the presiding commissioner, the intake DJO, the attorney for the DJO, the father of the complaining witness, a victim-advocate DJO, the child, the public defender, two of the child's family members, and a caseworker. The commissioner noted the appearances on the record. The intake DJO, who previously had submitted her detention report, made a brief statement and requested continued detention. In response to the commissioner's questions, the complainant's father described the trauma his daughter had suffered as a result of the incident and asked the commissioner to continue the detention. Again responding to the commissioner's questions, the boy's mother, grandmother, and caseworker described his excellent school record and the supervisory mechanisms that would be put into place should the commissioner release him. None of the witnesses was sworn, and neither the public defender nor the attorney for the DJO asked any questions (although the public defender did urge the commissioner to release her client). Probable cause as to whether that child had committed the alleged offense was never evaluated.

The transcript of detention proceedings for another youth reveals that this youth had an initial, very brief detention proceeding, during which the legal officer recommended the youth remain in detention pending completion of a home study by the DJO of the youth's grandmother's home as a potential placement for the youth. The commissioner did not evaluate probable cause. In fact, this initial proceeding involved no discussion or even mention of the charges against the youth. The public defender requested the youth be released to the grandmother's home, and the commissioner detained the youth pending completion of the home study. More than five weeks later, the youth had a second detention hearing. This hearing

primarily consisted of the admission of the DJO's detention hearing summary report and a discussion of what might be an appropriate placement for the youth. At one point in the proceedings, the youth asked the Court to explain the nature of the charges against him. But at no point did the commissioner evaluate probable cause, nor did the public defender raise the issue.

Denying children the opportunity to challenge probable cause at detention hearings is of particular concern due to the delay between the detention hearing and the initial adjudication hearing. Generally, adjudication hearings are calendared between twenty-one and thirty days after the detention hearing and, occasionally, they are adjourned for even longer periods of time. As a result, children remain in secure detention, removed from their families, homes and schools, for weeks or even months with no meaningful examination of the legal sufficiency of the allegations against them. Moreover, since the law provides evidentiary probable cause hearings for status offenders, its denial in delinquency cases makes no sense. *See* Mo. Rev. Stat. § 211.063.[43] There simply is no logical basis for denying children charged with delinquency this essential constitutional protection, and its denial exposes children to the risk of being detained and prosecuted on the basis of insubstantial or insufficient complaints.

D. Lack of Probable Cause Inquiry at Certification Hearings

1. Legal Standards

The determination of whether to transfer a child from family court to an adult court to be criminally prosecuted must comport with "the essentials of due process." *Kent*, 383 U.S. at 557. In *Kent*, although the Supreme Court did not specifically consider the factors that juvenile courts must consider at waiver hearings, it tacitly endorsed those set forth by the District of Columbia's waiver statute, including "the prosecutive merit of the complaint, *i.e.*, whether there is evidence upon which a Grand Jury may be expected to return an indictment" – in other words, whether the complaint is supported by probable cause. *See Kent*, 383 U.S. at 555-558.

Consistent with *Kent*, most jurisdictions have adopted the probable cause factor in case law or legislation. National juvenile justice standards likewise prohibit transfer of children in the absence of a probable cause finding made after a hearing.[44] Legal scholars, too, have acknowledged the essentiality of a probable cause determination in certification hearings.[45]

---

[43] In addition, adults charged with felonies in Missouri have the right to a preliminary hearing on the question of probable cause, at which they are represented by counsel and may cross-examine prosecution witnesses. Mo. Rev. Stat. § 544.250 (2005).

[44] *See, e.g., Juvenile Justice Standards Relating to Transfer Between Courts* §§ 2.1(D) and commentary (Inst. Of Judicial Admin./Am. Bar Ass'n 1980) (juvenile court must hold evidentiary waiver hearing); 2.2 (A) (a juvenile court should waive jurisdiction only upon a finding of probable cause that the child has committed a serious felony); and 2.2 (B) (the probable cause determination should be based on evidence admissible in an adjudicatory hearing in juvenile court).

[45] *See, e.g.*, Stacy Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 Fordham L. Rev. (1996) 2425, 2438 ("[T]he most basic requirement for judicial waiver is that the evidence supports the allegations").

2. Findings

Despite the near-unanimity with regard to the importance of "prosecutive merit," probable cause is not among the factors that the Family Court considers at hearings to determine whether to transfer a child to adult criminal court (commonly referred to as "certification hearings" in Missouri). *See* Mo. Rev. Stat. §211.071. Our review of records and transcripts reveals that the DJO usually recommends that the Family Court retain jurisdiction over the youth. However, the threat of certification, and the accompanying lack of assessing "prosecutive merit," may be used improperly as a coercive bargaining tool, leading many to enter into pleas and consequent state supervision when they may be entitled to release. Most of the cases we reviewed followed an identical path: the attorney for the DJO provided the pre-certification report to the judge; the DJO testified; the judge, following the DJO's recommendation, denied the motion to certify the child to adult court; the child pled guilty (sometimes after a brief adjournment to allow the judge to prepare his or her decision), and the Court then moved on to disposition. In most of the cases we reviewed, the child subsequently was placed with Division of Youth Services for an indeterminate term.[46]

Without question, the apparent reluctance of DJOs to recommend certification is commendable. The relatively seamless and swift course of these cases through the system, however, suggests that the threat of certification precipitated a plea bargain, resulting in the child consenting to a DYS placement in order to avoid certification. While this is not an unusual scenario in juvenile courts, it generally occurs in a system that either provides for an on-the-record probable cause hearing (often at the detention stage) at which the child is represented by counsel, or requires the court to evaluate "prosecutive merit" at the certification hearing, or extends both of these protections to children. In St. Louis County Family Court, the lack of opportunity to challenge probable cause at the detention hearing combined with the absence of any requirement that the Court evaluate the "prosecutive merit" at the certification hearing puts youth at risk of placement in the most restrictive settings in Missouri's juvenile justice system. Under these circumstances, children may plead guilty in the Family Court to avoid the threat of a certification motion for allegations that would not survive evidentiary scrutiny in adult court.

The need for adversarial testing of probable cause lies in the *Kent* Court's recognition that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . ." *Kent*, 383 U.S. at 554, as well as in principles of fundamental fairness. When a child is certified to be criminally tried in the adult court system, he or she suffers immediate harms even if the charges ultimately are dismissed. These harms include, among others, transfer to an adult jail, in which children suffer substantially higher rates of abuse and suicide than occur in juvenile facilities;[47] elimination of the confidentiality

---

[46] We note that in all of the records and transcripts we reviewed, the Court ultimately decided *against* certifying the youth to adult court and retained juvenile court jurisdiction over the child.

[47] Jeffrey Ziedenberg, *You're an Adult Now: Youth in Adult Correctional Systems*, 11 (National Institute of Corrections 2011) (noting that youth in adult facilities "face increased risks of self-harm and abuse by other detainees" and discussing the challenges of keeping youth safe in adult facilities); *See also* Human Rights Watch/American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and*

protections that attach to juvenile proceedings and the concomitant stigmatization of a criminal charge; exposure to harsher disciplinary policies, including prolonged periods of isolation; and removal from educational and other programs that are available in juvenile detention centers but not offered in adult facilities. Moreover, in Missouri, juvenile courts permanently lose jurisdiction over children who are certified to adult court, unless the child is ultimately acquitted. *See* Mo. Rev. Stat. § 211.071.9. Thus, once a child is convicted as an adult, he will be charged as an adult for any subsequent offenses, regardless of the nature or severity of the offense.[48] The potential for such devastating consequences, in addition to those that attach to an adult conviction of the offense, compels greater scrutiny of evidentiary sufficiency than a cursory document review. Consequently, we find that St. Louis County Family Court's failure to consider prosecutive merit at certification hearings violates children's right to due process under the Fourteenth Amendment.

E. Inadequate Plea Colloquies

1. Legal Standards

As the Supreme Court made clear in *Boykin*, 395 U.S. 238, a guilty plea is both an acknowledgement of responsibility and a waiver of fundamental trial rights, including the privilege against self-incrimination and the right of confrontation. *Id.* at 242-43. Thus, in order to plead guilty, an adult or juvenile defendant must be competent to stand trial and understand the rights that he or she is waiving. *Id.* A plea colloquy that does not ensure that the accused understands the range of constitutional rights which he is giving up, does not describe the extent of the punishments he may face in light of his admission, does not inform him of the possible ways in which he might be able to defend himself, and does not address the relationship between the facts of his case and the governing law is inadequate and fails to meet constitutional standards. *See Shafer v. Bowersox*, 329 F.3d 637, 648-49 (8th Cir. 2003).

A valid plea colloquy must be tailored in light of the accused's mental condition. *Godinez v. Moran*, 509 U.S. 389, 400-401 (1993). The Court must be assured that the individual – not a hypothetical, "reasonable" defendant – actually understands the aforementioned elements and is making the plea knowingly and voluntarily. *Shafer*, 329 F.3d at 649-650 ("[D]id he actually understand the consequences of a particular decision?"). The court conducting the plea colloquy must conduct a "penetrating and comprehensive" inquiry into the defendant's background, experience, and the circumstances of the case "to determin[e] whether he understood the

---

Prisons Across the United States, 18-19 (October 2012) (discussing the risks of harm to youth in adult correctional facilities).

[48] Additionally, studies have found that children who are transferred to adult courts have a higher likelihood of re-offending and continuing anti-social behaviors. For this reason, a review of studies commissioned by the Centers for Disease Control and Prevention assessing the effects of transfer laws on juveniles concluded that "transfer policies have a generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system." Department of Health and Human Services, Centers for Disease Control and Prevention, 56 Morbidity and Mortality Weekly Report, No. 9, Recommendations and Reports, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult system: A Report on the Recommendations of the Task Force on Community Preventative Services* 9 (2007).

consequences of his decision." *Shafer* at 650 (citing *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) and *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)).

The Supreme Court has also made clear that a child's age and experience categorically set him apart from an adult in ways that mandate different and careful treatment:

> We have observed that children 'generally are less mature and responsible than adults,' *Eddings*, 455 U.S., at 115-116; that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion); that they 'are more vulnerable or susceptible to . . . outside pressures' than adults, *Roper*, 543 U.S. at 569; and so on. *See Graham v. Florida*, 560 U.S. 48, ___, 130 S. Ct. 2011 (2010) (finding no reason to 'reconsider' these observations about the common 'nature of juveniles').

J. D. B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011).

Significant concerns emerge when the person entering a guilty plea is a child.[49] Young people's developmental immaturity and lack of experience alone render them less likely than adults to understand the rights they are waiving and the legal and factual requirements of the charge to which they are admitting; one study found that children understood only 5.5% -14% of the terminology used in plea allocutions.[50] Moreover, this lack of comprehension is exacerbated when, as is often the case in delinquency cases, the child suffers from learning disabilities, mental health disorders, or cognitive delays.[51] National standards thus demand that judges take particular precautions before accepting a child's guilty plea, including the use of developmentally-appropriate language and cross-checking for understanding.[52]

2. Findings

We found significant inadequacies in the plea colloquies used by the two judges and two commissioners in the St. Louis County Family Court. None appears to evaluate legal

---

[49] *See* Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L. Rev. 943, 944 (2010). Redlich found that, perhaps in part due to a lack of understanding, children enter false guilty pleas more frequently than adults.

[50] *See* Barbara Kaban & Judith Quinlan, *Rethinking a 'Knowing, Intelligent and Voluntary' Waiver in Massachusetts Juvenile Courts*, 5 J. of the Ctr. for Families, Children and the Courts 35 (2004).

[51] Some experts estimate that 70% of system-involved youth suffer from mental health disorders. *See* Kathleen R. Skowyra and Joseph J. Cocozza, Ph.D., *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System* vii (National Center for Mental Health and Juvenile Justice 2007). Other studies have found that a similar percentage may suffer from learning disabilities and other conditions affecting comprehension and understanding. Mary Magee Quinn et al. *Youth with Disabilities in Juvenile Corrections: A National Survey* , 79 Exceptional Children 339, 340 (Spring 2005).

[52] *See Juvenile Justice Standards Relating to Adjudication* 3.1 and 3.2 (Am. Bar. Ass'n 1977).

competency. With regard to waiver of rights, there were wide variations among the four magistrates, but none used accessible language or took steps to ensure children's comprehension of the rights they were foregoing, beyond formulaic "do you understand?" and yes/no questions. In most instances, furthermore, children were simply asked if they committed the acts alleged in the complaint, with no examination as to whether they possessed the requisite *mens rea*, that is, criminal intent. Finally, at no point was any inquiry made or warning given regarding potential collateral consequences of a plea.[53]

One judicial officer at the Court, for example, routinely asks the attorney for the DJO to read into the record verbatim the allegations contained in the complaint, which contain complex statutory language. He then asks the defense attorney whether the child in fact intends to enter the plea. At this point, the judicial officer asks the child a series of questions. The following transcript is typical:

> THE COURT: Young lady, is that correct? Do you intend to admit to that?
> THE JUVENILE: Yes, your honor.
> THE COURT: I've got to ask you a few questions to make sure you understand what you're doing here. Number one, do you understand you always have a right to have a trial in my courtroom?
> THE JUVENILE: Yes, sir.
> THE COURT: Number two, do you understand that you always have a right to be represented by [an attorney] in any trial in my courtroom?
> THE JUVENILE: Yes, sir.
> THE COURT: Finally, and this is the most important one: do you understand that if you do admit to these charges, and I accept that admission, that you're giving up your right to have a trial on these issues?
> THE JUVENILE: Yes, sir.
> THE COURT: Okay. Now, have you had time to discuss this with [your attorney] and your mom?
> THE JUVENILE: Yes.
> THE COURT: And it's your decision to go ahead and admit the tampering charge?
> THE JUVENILE: Yes, sir.
> THE COURT: Is that because it's true?
> THE JUVENILE: Yes, sir.
> THE COURT: Okay. All right. I think she knows what she's doing. What she's doing make sense to me. Therefore, I'll accept the admission and find the allegation of tampering . . . to be true.

Despite the child's dutiful "Yes, sir" replies, there is no indication in this transcript that she has legal capacity, comprehends the rights she is waiving, is admitting to facts that satisfy the elements of the statute she is charged with violating, or understands the language of that statute. In addition, the Court fails even to list, let alone explain, the rights embodied in a trial, and no effort is made to ensure that the child understands what would occur during a trial. There also is

[53] Such consequences might include exclusion from school or public housing, sex offender registration, or deportation, among others. *See Padilla v. Kentucky*, 559 U.S. 356 (2010); Mo. Rev. Stat. § 211.425.1; Ashley Nellis, Ph.D., *Collateral Consequences for Young Offenders*, The Champion 20 (NACDL, Spring-Summer 2011).

no discussion of the DJO's dispositional recommendation or the likely disposition. Equally troubling, at no time does the Court evaluate whether the admission was knowing, voluntary, and un-coerced.

In another example, although the particular judicial officer conducting the colloquy was more thorough and probing than in the previous example, we nevertheless identified several shortcomings. When questioning the child, for example, the judicial officer employs language that is not developmentally appropriate and uses legal jargon such as "burden of proof," "testify," and "allegations," without confirming that the youth understands what these terms mean. Additionally, neither the attorney nor the judge questions the child about his *mens rea*, even though evidence that the child intended to commit the act in question is required to prove the particular charge pending against him. In addition, although the defense attorney asks her client if he is entering the admission "knowing the deputy juvenile officer's recommendation," she fails to elicit testimony to establish what that recommendation is. Thus, although this allocution is more careful than in the previous example, it still does not establish fully that the child has made a knowing and voluntary admission.

F. Constitutionally Flawed Family Court Structure

1. Legal Standards

Both the United States and Missouri Constitutions establish tri-partite systems of government that set forth a carefully delineated role for each of the three branches in the definition, prosecution, and adjudication of delinquent behavior. The legislative branch enacts statutes that proscribe particular acts and set forth the range of judicial responses to those acts. U.S. Const., art. I, § 1; Mo. Const., Art. III, §§ 19 *et seq*. The executive branch investigates alleged violations of the law and prosecutes those violations. U.S. Const., art. II, § 2, cl. 5 (The President must "take care that the laws be faithfully executed."); Mo. Const. art. IV, § 2 ("The Governor shall take care that the laws are distributed and faithfully executed"). The authority to adjudicate "cases and controversies" is vested in the judicial branch. U.S. Const. art. III, § 2; Mo. Const. art. V, § 1. Under this constitutionally-mandated division of labor, it is not within the purview of the judiciary, which is responsible solely for adjudicatory functions, to investigate alleged offenses or act in a prosecutorial capacity. Rather, the prosecutorial function falls squarely within the executive branch's obligation to "take care" that laws are enforced. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (whether to bring charges against a defendant is solely within the discretion of the prosecutor).

Obvious conflicts arise when the judiciary exerts undue control over prosecutorial functions. Where the roles of judge and prosecutor are blurred, judges essentially judge themselves.[54] When such conflicts exist, due process violations occur. *See Tumey v. State of*

[54] For this reason, the Supreme Court has prohibited prosecutors from performing functions that fall within the purview of the judiciary. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (where prosecutor signed search warrant, evidence must be suppressed). *See also, Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict-a decision which has long been regarded as the special province of the Executive Branch…").

Ohio, 273 U.S. 510, 532 (1926) ("Every procedure which would offer a possible temptation to the average man as a judge … not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.").

To promote both judicial and prosecutorial independence, national juvenile court standards place prosecutorial authority squarely in the executive rather than the judicial branch of government. *See, e.g*., *Juvenile Justice Standards Relating to Court Organization and Administration* 1.2 cmt. (Inst. Of Judicial Admin./Am. Bar Ass'n 1980)("ABA Juvenile Standards") (cautioning that constitutional issues exist "when intake decisions are made by employees selected by a judge to carry out his or her policies. Further, the authority to make the ultimate intake determination is increasingly vested through statute in the office of the prosecutor, in order to make the decision as to whether to prosecute independent of judicial control."**)**. Similarly, the National District Attorneys Association's National Prosecution Standards make clear the independent obligations of the prosecutor: "The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. A prosecutor should at all times display proper respect and consideration for the judiciary, without foregoing the right to justifiably criticize individual members of the judiciary at appropriate times and in appropriate circumstances." *National Prosecution Standards,* 1-1.1 (National District Attorneys Association 1979).

2. Findings

We find that the St. Louis County Family Court organizational structure presents inherent conflicts of interest among the judges, DJOs and legal officers in delinquency proceedings, is contrary to constitutional separation of powers principles, and deprives children of adequate due process. As explained in Section I.C, above, there are no executive branch prosecutors involved in delinquency proceedings in Family Court. Rather, the Family Court's own legal officers are responsible for bringing delinquency actions against children. But, unlike traditional prosecutors, the legal officers are not ethically constrained to pursue justice or act in accordance with the public interest. Instead, the legal officers' ethical responsibilities are to pursue the objectives of, and advocate zealously for, their clients – the DJOs. Mo. R. Prof. Conduct 4.1.2, 4.1.3 and 4.1.6. In fact, the Family Court's legal officers consider communications between themselves and the DJOs to be protected by the attorney-client privilege. And because the legal officer, like the DJO, is a Court employee, the monolithic nature of the Court and its staff, and the perception of biased decision-making it engenders, is reinforced.[55]

[55] Our observations about the Court's flawed structure and its impact on due process rights are analogous to concerns about the Ferguson, Missouri municipal court that were recently expressed by court administration experts. *See* Missouri Office of State Courts Administrator, *A Report by the State Courts Administrator's Office and Judge Roy L. Richter to the Supreme Court of Missouri Concerning Ongoing Efforts to Improve the State's Municipal Divisions* (May 11, 2015) (State Courts Ferguson Report). The Missouri Supreme Court asked experts to review the Ferguson court after DOJ issued its findings about the court and the Ferguson police department. *See* DOJ's Ferguson Findings Report, *supra* n. 6. These experts noted DOJ's observations about the close relationship between the Ferguson prosecutor (who also serves as the city attorney), the city police, the Ferguson court staff, and the city itself. The experts identified "potential conflicts of interest" of concern both to the experts and to the Missouri Court of Appeals judge who has been handling Ferguson's municipal cases and implementing reforms since DOJ's findings were issued. State Courts Ferguson Report at 15. The identified areas of concern included that court staff –

This entwining of judge, DJO, and legal officer likely deters children's defense counsel from engaging in zealous advocacy, and exacerbates the inadequate representation issues discussed above. Failures of zealous advocacy, in turn, impede the adversarial testing of facts that lies at the heart of Sixth Amendment protections. *See Cronic*, 466 U.S. at 656.

Our review of hearing transcripts reveals that the DJOs' detention, certification, and disposition reports and recommendations are accepted by the judge without foundational testimony; DJOs are not subjected to defense cross-examination at detention, certification, or dispositional hearings; the validity of waivers of *Miranda* rights, which are obtained by the DJO, similarly go unquestioned; and DJO recommendations appear to be followed by the Court almost without exception.[56] In one case, for example, the judge, accepting the DJO's dispositional recommendation, stated on the record that "[the DJO] is one of the DJOs I trust most." Both the perception and the reality are that the judge and the DJO are one entity. *Cf. ABA Juvenile Std.* 1.2 at p. 15 ("The [juvenile intake function, juvenile probation services,] and juvenile detention programs should be administered by the executive branch of government."). Indeed, every time a judge enters an order accepting a DJO recommendation, he or she is, in essence, affirming the credibility, judgment, and effectiveness of his or her own employee. *Cf. Id.* at p. 16 ("Judicial independence is increased when reviewing the individual case reports and recommendations of executive agency officials as contrasted with those of the court's own employees. Further, executive agency probation officers may well assert more objective and independent recommendations at the critical juvenile justice processing stages.").

Thus, unlike in the vast majority of states, no Executive Branch prosecutor who is charged with exercising independent judgment on behalf of the State appears in Family Court proceedings. *See* Josh Gupta-Kagan, *Where the Judiciary Prosecutes in Front of Itself*, 78 MO. L. REV. 1245, 1257-1260 and accompanying footnotes (judiciary oversees prosecutorial functions in only three states). Instead, the legal officer is both a Court employee and an advocate for the DJO.

When the defense attorney is forced to negotiate with an agent of the Court rather than a truly independent prosecutor, there is an imbalance of power. Not surprisingly, out of 277 delinquency cases the public defender's office closed in St. Louis County in 2013, only three were resolved by a contested adjudicatory hearing and none appears to have involved a contested, evidentiary hearing at disposition (*i.e.,* sentencing).

Of course, not every case must or should be tried. To the contrary, favorable outcomes that are consistent with a child's interests can be achieved through a vigorous, balanced

---

part of the judicial branch – reported to the city's executive branch, and that court staff handled work for the prosecutor, who is an executive branch official. The experts found that the reporting structure "potentially compromises the separation our government is to have between the judicial branch … and the executive branch," *id.*, and stated that court and prosecutor practices need to conform to Missouri Supreme Court rules in order to ensure due process. *Id.* at 16.

[56] Notably, these courtroom procedures in many ways mirror those described in the *Gault* majority opinion. Just as Officer Flagg charged, detained, and sought long-term confinement of Gerald Gault, so, too, do the DJOs make these determinations in St. Louis County. *Gault,* 387 U.S. at 5-7.

negotiation process. In order for this process to occur, however, each of the parties must acquire, through discovery and independent investigation, sufficient information to evaluate the strengths and weaknesses of its case and the case of its adversary and believe that, should negotiations fail, the Court might issue a ruling that is less favorable than the best possible negotiated agreement.

Neither a robust inquiry into the facts nor a robust negotiation process appears to take place in St. Louis County. Instead, many of the cases we reviewed were resolved with a guilty plea at the first adjudication hearing, followed by an immediate dispositional "hearing," at which the only evidence was the uncontroverted report of the DJO and, very occasionally, a psychological evaluation. Among the cases that involved certification motions, most were resolved with a guilty plea and an immediate placement in a treatment facility operated by the Division of Youth Services, generally on the first adjudication date.

The Court personnel we interviewed were proud of the Court's efforts to divert youth away from the formal juvenile justice system and the many alternatives to detention that are available in St. Louis County, as well as of the small, long-term state facilities that are the centerpiece of Missouri's treatment of delinquent children. Each and every person asserted a strong commitment to the children who come before the Court and an equally strong belief in the effectiveness of these programs. However, neither an institutional emphasis on diversion nor the availability of effective intervention programs excuses a constitutionally infirm court structure or the lack of adversarial process it engenders. The desire to help does not obviate the Constitution.

IV. EQUAL PROTECTION VIOLATIONS

Our investigation also examined the existence and frequency of Black children's contact with certain stages in the St. Louis County Family Court's juvenile justice system. Unlike our findings regarding due process, which affect all children regardless of race, the findings discussed in this section set out our conclusions about whether the Court treats Black and White children equally.[57] In this analysis, our consultant examined data for 32,169 cases referred to the Court in 2010, 2011, 2012, and 2013. We limited our data review and equal protection analysis to only White and Black youth because these two groups account for 98.6% of all referrals; with Hispanic and Asian youth accounting for 0.7% each.[58]

We analyzed how youth proceeded through the St. Louis County Family Court's juvenile justice system by reviewing major stages known as decision points. Decision points refer to each of the stages in the juvenile justice process that require a decision to be made about the youth's

[57] We use the terms Black and White instead of African-American and Caucasian because they more accurately describe the children we examined in St. Louis County. The term Black includes a broader range of children, including those who may not have been born in the United States. The term White does not include those identified as Latino or Hispanic. Black and White children account for 98.6% of the juveniles referred to the St. Louis County Family Court.

[58] The experiences of Hispanic and Asian youth are important; however, the relatively low numbers and percentages of the totals mean that such a review cannot be meaningfully accomplished using statistical procedures and the limited time frame in the Office of State Courts Administrator data.

.

case. These decision points are: Referral, Diversion, Detention, Filing of a Petition, Findings of Delinquency, Placement on Probation, Placement in a Secure Juvenile Correctional Facility, and Transfer (known in Missouri as Certification) to Adult Court.

We find that Black children are disproportionately represented in four decision points of the St. Louis County juvenile justice system. While there are many factors that contribute to racial disparities in any juvenile justice system, the data we examined from the Court strongly suggest that during these four decision points, race is – in and of itself – a significant contributing factor.

Black youth are overrepresented during the following major decision points:

1. Formal Petition. Once the Court accepts a youth's case (otherwise known as accepting a "referral"), the referral must be handled either formally (through a petition) or informally. The odds of a referral being handled through a formal petition are almost one-and-a-half times (1.46) higher for cases involving Black youth than White youth.

2. Pretrial Detention. Race has a significant and substantial impact on pretrial detention. Even after controlling for the severity of the offense, the risks presented by the youth and the age of the youth, Black youth have two-and-a-half times (2.50) greater odds of being detained (held in custody) pretrial.

3. Commitment to Division of Youth Services. When youth are under the supervision of the Court and violate the conditions equivalent to probation or parole, the Court can decide to commit youth to Division of Youth Services custody. Commitment to Division of Youth Services custody can result in placement in a secure facility. We find that of the cases under Court supervision, cases involving Black youth are almost three times (2.86) more likely to involve commitment to Division of Youth Services.

4. Post-Adjudication Placement in Division of Youth Services Custody. The final Court decision after a youth has been determined delinquent is the disposition, or sentencing, of the youth. One option in Missouri is to place the youth outside of his or her home in secure Division of Youth Services custody. The odds of the Court placing Black youth in Division of Youth Services custody are more than two-and-a-half times (2.748) the odds of White youth being placed, even after controlling for age, gender, risk factors, and the severity of the allegations involved.

In summary, we find that, taking into account all recorded differences in risk factors, at these four stages Black youth are subjected to more formality and harsher outcomes. Black youth have a higher likelihood of having their cases proceed formally rather than through informal diversion; being detained prior to trial; being transferred out of the Court's jurisdiction and committed to the Division of Youth Services; and being placed in Division of Youth Services custody after adjudication. We reached this conclusion after examining the raw statistical data that demonstrated a racially disproportionate impact for Black children, and after controlling for non-racial data, such as age, backgrounds, severity of allegations, and gender. The statistically significant racial disparities we found are unexplainable on grounds other than

race and are evidence of racial bias. We conclude that with respect to these aspects of the juvenile court process, St. Louis County violates the rights guaranteed to Black youths under the Equal Protection Clause of the Fourteenth Amendment.

A. Legal Standard - Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from conduct that would "deny any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV § 1. The "central purpose" of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). The Constitution's guarantee of equal protection prohibits a jurisdiction from treating similarly-situated children within the juvenile justice system differently based upon a child's race. "In general, the Equal Protection Clause requires that state actors treat similarly-situated people alike." *Bogren v. Minnesota*, 236 F.3d 399, 408 (8th Cir. 2000).

A jurisdiction's action will not violate the Constitution "solely because it results in a racially disproportionate impact." *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (citing *Washington*). To show a violation of the Equal Protection clause, proof of racially discriminatory intent or purpose is required. *Id.*; *Washington*, 426 U.S. at 239; *Little Rock School Dist. v. Pulaski Cnty. Special School Dist. No. 1*, 778 F.2d 404, 410 (8th Cir. 1985)). Discriminatory purpose can be determined by examining the "totality of the relevant facts, including the fact …that the law bears more heavily on one race than another." *Washington*, 426 U.S. at 242. *See also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n. 24 (1979) (discriminatory intent inquiry is "practical" and based on the totality of the circumstances, because "what any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid"). There are, however, instances when "a clear pattern, unexplainable on grounds other than race," can demonstrate a discriminatory intent or purpose. *Arlington Heights*, 429 U.S. at 266; *see also Washington*, 426 U.S. at 242. Moreover, a jurisdiction's action need not be based solely, primarily, or even dominantly on a discriminatory intent or purpose, but instead, it is sufficient to demonstrate that a discriminatory intent was "a motivating factor" in the decision-making within the system. *Arlington Heights*, 429 U.S. at 266.

In addition, as courts have widely acknowledged, direct statements exhibiting racial bias are exceedingly rare, and are not necessary for establishing the existence of discriminatory purpose. *See, e.g.*, *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (noting that "discriminatory intent is rarely susceptible to direct proof"); *see also Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 64 (1st Cir. 1999) (noting in case under Title VII of the Civil Rights Act that "[t]here is no requirement that a plaintiff . . . must present direct, 'smoking gun' evidence of racially biased decision making in order to prevail"); *Robinson v. Runyon*, 149 F.3d 507, 513 (6th Cir. 1998) (noting in Title VII case that "[r]arely will there be direct evidence from the lips of the defendant proclaiming his or her racial animus").

We applied this jurisprudence in our Equal Protection analysis of the Court. As explained more fully below, after analyzing all of the raw data and relevant control variables, the disparate impact on Black children cannot be explained by factors other than race. We therefore

conclude that discriminatory intent is at least a "motivating factor" in the decision making in St. Louis County Family Court. This constitutes a violation of the right to equal protection under the laws.

B. Methodology to Assess Racial Disparities

We relied on statistical evidence to assess the issues involving racial disparities in the operations of the St. Louis County Family Court. We used four years of data about the Court's actions between 2010 and 2013, provided by the Court to the Missouri Office of State Courts Administrator, to determine if there is substantially different handling of cases involving Black and White youth.

In order to measure whether there is disparity in the St. Louis County Family Court, our consultant first examined the Court's Relative Rate Index ("RRI") to determine whether, with respect to Black youth, there is Disproportionate Minority Contact ("DMC") – that is, whether Black youth are overrepresented at several key points.[59] Second, to the extent we found overrepresentation, we equalized the characteristics with logistic regression, in order to determine whether factors other than race could explain the disproportionate results. All terms are discussed in detail below.

1. Disproportionate Minority Contact and the Relative Rate Index

RRI is the mechanism used to determine the level of DMC at different contact points in the juvenile justice system.[60] Our consultant examined St. Louis County's RRI to determine the existence and level of DMC or overrepresentation of minority youth in the juvenile justice system, and whether this overrepresentation is occurring at each phase of the juvenile court process.[61]

The RRI formula first determines the total number of events in each of the system's decision points categorized by race. Then, for each race category, the formula creates a rate of contact by dividing the number of events for each decision point by the number of events in the

---

[59] Disproportionate Minority Contact is a term closely associated with the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601 et seq., ("JJDP Act") which is administered by the Department of Justice. The JJDP Act requires all states receiving grant funding under the Act to address the "disproportionate number of juvenile members or minority groups who come into contact with the juvenile justice system." 42 U.S.C. § 5633 (a)(2). The Act's requirement to address DMC is a "core requirement" of the Act, and a state's failure to address it can jeopardize the state's grant funding under the Act. *Id*. at (c)(1)-(2). As interpreted by DOJ, "contact" means not only a child's entry into the justice system, but ongoing contact with the system as the case is processed.

[60] Our consultant was one of the developers of the RRI.

[61] As indicated in the text, our findings are based on data about the Court's actions between 2010 and 2013. Shortly before release of these findings, the Missouri Juvenile and Family Division issued its 2014 Annual Report. This report contains RRI values based on 2014 data collected by the Office of State Courts Administrator. We have reviewed this report, as well as the 2014 data that the State of Missouri provided to the Department of Justice's Office of Juvenile Justice and Delinquency Prevention, and find that any changes in RRI values are relatively small and do not materially change the degree to which the St. Louis County Family Court handles Black and White youth differently.

preceding decision point. The rates for each minority race are compared to rates for the White youth by dividing the rate of each minority race by the rate for the White youth. The result is the RRI, a numerical indicator based on neutral value of 1.0. Thus, any numerical value departing from 1.0 holds statistical significance. A numerical value **exceeding 1.0** means that Black children have a higher, statistically significant rate of representation at the particular decision point being considered. A numerical value below 1.0 means that Black children have a lower, statistically significant, rate of contact in that decision point as compared to the White children in that decision point.

The Department of Justice's Office of Juvenile Justice and Delinquency Prevention ("OJJDP") provides national leadership on reducing racial and ethnic disparity. To accurately measure overrepresentation, OJJDP utilizes the RRI. All jurisdictions receiving a grant from the Department under the Juvenile Justice and Delinquency Prevention Act , including St. Louis County, must periodically report to OJJDP the numbers of children proceeding through their juvenile justice system and the level of disparity for each statistically significant minority group at different decision points of the juvenile process. OJJDP uses these plans to make annual determinations of compliance with the Act. The decision points analyzed by the RRI formula include:

- Juvenile Arrests
- Referrals to Juvenile Court (concerning cases that are brought before the juvenile court on delinquency matters either by a law enforcement officer or other complainant)
- Cases Diverted (concerning cases referred to juvenile court that are resolved without the filing of formal charges. The charges may be dismissed, resolved informally, or resolved through various options that do not include continuing through the formalized court process)
- Cases Involving Secure Detention Prior to Disposition (concerning children who are held in a secure detention facility before the final disposition of their cases)
- Cases Petitioned (concerning cases where formal delinquency charges are filed)
- Cases Resulting in Delinquent Findings
- Cases Resulting in Probation
- Cases Resulting in Confinement in Secure Juvenile Correctional Facility
- Cases Certified to Adult Criminal Justice System

At different points in the St. Louis County juvenile justice system, decisions are made by various actors. Once a youth is referred to juvenile court (usually through a law enforcement officer making a custodial arrest), Deputy Juvenile Officers will make initial decisions regarding diversion, detention, and the filing of a petition; then, these decisions are reviewed by legal officers[62] and judges, and those decisions will determine how far the juvenile will proceed through the system.

[62] Legal officers have many of the same roles and responsibilities as prosecutors or state's attorneys in other states. However, as discussed above in our findings on due process, legal officers also represent the legal interests of the Deputy Juvenile Officers in court. *See also* NJDC Report, *supra* note 18.

We used the RRI formula to compare the rates of Black youth to that of White youth within the various points of the juvenile justice system. We did not, however, use one of the points in the OJJDP recommended process – "Juvenile Arrests." Missouri, like several other states, does not report arrest data as part of its reporting system, which makes calculating that measure of disparity difficult. So, our consultant used referral to juvenile court as the first point of contact, the method which is used in Missouri.

In addition to calculating St. Louis County's RRI, our consultant compared the County's RRI data to national data and to data from "peer counties," using U.S. Department of Health and Human Services to identify comparable counties in terms of urbanization and population.[63]

When the RRI data for St. Louis is compared to national data, Black children in St. Louis County have a higher rate of disparity in every decision point of the juvenile justice system. For example, the rate of disparity for Black children at the point of post-disposition placement in secure confinement is 2.4, twice the rate of disparity for Black children nationwide. However, it might be expected that for many urban centers, a comparison of the rate at which Black children are overrepresented in the juvenile justice system with Black children's rate of representation nationwide would yield a similar result. Thus, we conducted the peer county analysis to determine if the measures of disparity in St. Louis County exceed a "usual" pattern of higher levels of disparity in urban centers.[64]

The peer county analysis shows that in several respects, St. Louis County's RRI is similar to other urban areas. However, as illustrated in the table below, even when compared to peer jurisdictions, St. Louis has a substantially higher RRI in pretrial detention, filing of delinquency petitions, and placement in secure confinement after disposition. With respect to pretrial detention and the filing of delinquency petitions, Black children in St. Louis County are represented at a lower rate in these decision points than in peer counties, and thus the RRI for Black children in St. Louis is lower than in the peer counties. However, White children in St. Louis are represented at these decision points at a rate that is *even lower* than Black children, thus resulting in St. Louis having a higher level of racial disparity than in the peer counties. These RRI findings are consistent with one theme of the case analysis described below -- although there are progressive juvenile justice practices in St. Louis County, Black and White children do not benefit equally from those progressive practices.

---

[63] As part of its analysis of community indicators, the U.S. Department of Health and Human Services has developed a mechanism for selecting sets of peer counties. The method involved developing 88 strata, or groupings of counties with similar demographic profiles. Primary demographic variables used in the classification included: 1) frontier status; 2) population size; 3) poverty levels; 4) median age; and 5) population density. Based on these criteria, St. Louis County was placed in Strata 1. http://wwwn.cdc.gov/CommunityHealth/homepage.aspx?j=1. Our consultant compared St. Louis County with 30 other counties in Strata 1 that report data on minority contact to OJJDP.

[64] The mere fact that racial disparities may exist in other urban counties does not invalidate or excuse equal protection violations in St. Louis County.

Comparison of St. Louis County, Peer Counties, and National Disparities for Black Youth

	St. Louis (2013)			Peer County Median (2013)			National (2011)		
Decision Stage	White Rate	Black Rate	RRI Black	White Rate	Black Rate	RRI Black	White Rate	Black Rate	RRI Black
Referred to Juvenile Court	19.1	95.8	5.0	19.9	89.6	4.8	31.0	74.1	2.4
Cases Diverted	88.9	79.9	0.9	30.1	27.3	0.8	30.3	21.6	0.7
Detained Pretrial	5.4	13.8	2.6	23	36.3	1.6	19.1	23.8	1.2
Petition (Delinquency charges) Filed	10.8	19.4	1.8	53.2	53.5	1.1	50.4	59.8	1.2
Found Delinquent	78.3	73.1	0.9	54	63.2	1.1	60.7	56.0	0.9
Placed on Probation	30.9	38.1	1.2	66.4	52	0.9	65.8	60.0	0.9
Placed in Secure Confinement	4.3	10.5	2.4	6.1	8.2	1.5	22.5	28.1	1.2
Transfer to Adult Court	2.5	5	2.0	0.5	0.7	1.8	0.7	0.9	1.3

2. Logistic Regression and Odds Ratio

Second, our consultant used statistical controls to equalize the case characteristics involving White and Black youth. The tools used for this process are called "logistic regression" and "odds ratio." Logistic regression examines the simultaneous impact of a set of control variables and then provides a measure, known as odds ratio, of the likelihood of difference in processing for White and Black youth, controlling for the impacts of several control variables, which are discussed in the next section. These techniques track the odds that a child's case will be handled in a specific way at different decision points in the juvenile court process.

Where the RRI captures a snapshot of the treatment of White and Black youth at specific points in the juvenile court process, the odds ratio and logistic regression techniques follow a child's case through the system. To determine the probability that a child's case in the St. Louis County Family Court would be handled in a particular way at different decision points of the juvenile court process, our consultant used the odds ratio. He calculated the probability (odds) of particular decisions occurring and compared odds for White and Black youth by creating a ratio of the two odds.

To isolate the impact of race on the different decision points, our consultant conducted further analysis of the case data using a logistic regression technique. This method simultaneously considers the impact of other factors such as the number of risk factors, age, gender, the offense charged, the severity of the alleged offense, and a prior delinquency finding. Logistic regression assesses the impact of each of these factors, the significance of the factors, and the impact, if any, on the race effect. In short, this method introduces other control variables to determine whether the disproportionate impact on Black children could be explained by factors other than race. As with RRI, in calculating the odds ratio, 1.0 represents a race neutral ratio.

3. Application of Control Variables to Court Decisions

Our examination of equal protection issues in the St. Louis County Family Court followed a particular logical sequence. We examined the various decisions involved in the processing of juvenile delinquency cases in the Court. We also examined racial differences in those decisions, taking into account other case-relevant factors which might account for differing outcomes for the youth involved.

The Office of State Courts Administrator provided us with a data system of over sixty variables for nearly 33,000 cases. As noted above, we evaluated data about more than 32,000 cases, excluding the very small percentage of cases involving Hispanic and Asian children. In evaluating the data about St. Louis County, our consultant drew from the data system's risk variables. Age at disposition was used as a control variable, as well as the legal classification of the allegation as a felony, misdemeanor, or infraction or ordinance violation.

The measure of severity was constructed from the Court's data by examining the Court's decision to handle a case formally (via petition) as opposed to informally (through warning or diversion programs). The percentage that was handled formally for each type of allegation was used as an indicator of the severity of the allegation.

The following table shows the average of each of these items (for both Black and White juveniles) for cases with dispositions recorded in the St. Louis County Family Court for the calendar years 2010 – 2013. The allegations in these cases range from misdemeanor offenses, such as trespassing, to serious felony offenses, such as murder. According to the case information provided to us, the St. Louis County Family Court cases involving Black youth tend to be more serious in nature than cases involving White youth. For example, 14.2% of the charges for all youth involved felonies. But, 16% of the charges against Black youth involved felonies, compared to only 10.8% of the charges against White youth.[65] The risk variables

[65] This assumes, however, that law enforcement charging practices are identical for White and Black youth, even though several studies question such an assumption in other jurisdictions. *See* Huizinga, David; Thornberry, Terence P.; Knight, Kelly E.; Lovegrove, Peter J.; Loeber, Rolf; Hill, Karl; and Farrington, David P., *Disproportionate Minority Contact in the Juvenile Justice System: A Study of Differential Minority Arrest/Referral to Court in Three Cities* (September 2007) (noting that "Disproportionate Minority Contact cannot be explained by differences in the offending behavior of different racial groups."). *See also* Christine Patterson, Missouri Office of State Courts Administrator, *Recommendations for Reducing Disproportionality and Disparity in Missouri Certification Decisions*, Missouri Juvenile Justice Advisory Group at 3 (March 2013) (noting that "several studies have shown that African American youth are not more likely to *commit* certain crimes but rather are more likely to

measured reflect that as well. While the gender and age mix are generally quite similar, the number of risk factors is generally higher for cases involving Black youth, with the exception of prior substance abuse issues, which is higher among White youth.

Risk, Allegation, and Individual Characteristics Noted in St. Louis County Case Records, by Race of Juvenile (2010-2013)

	Race of Juvenile		
Variables	**White**	**Black**	**Total**
Risk Variables			
Under 15 at First Referral	31%	41%	38%
Has Prior Referrals	31%	39%	36%
Assault Referrals	16%	23%	21%
Prior Out of Home Placement	14%	20%	18%
Negative Peer Relationships	20%	29%	26%
History of Child Abuse or Neglect	6%	9%	8%
Prior Substance Abuse	21%	17%	18%
School Attendance or Discipline Problems	25%	37%	33%
Ineffective Parental Management	20%	31%	27%
Parental Incarceration	6%	17%	13%
Risk Score (number of items)	1.9	2.6	2.4
Allegation Variables			
Severity of Allegation*	15.0	22.9	20.2
Percent Felony	10.8	16.0	14.2
Percent Misdemeanor	48.3	52.1	50.8
Percent Infractions or Ordinance	0.5	0.5	0.5
Percent Juvenile Offense	39.1	30.0	33.2
Demographic Variables			
Age	15.1	14.8	14.9
Gender (Percent Male)	64.3	63.9	64.1
Total Number	11,177	20,992	32,169
***Measured by the percent of cases with this allegation which were handled by petition process			

Since both the severity of the allegation and level of risk are relevant factors to be considered in most juvenile proceedings, we took the impact of these factors into account in our equal protection analysis. As described in the findings and analyses which follow, our consultant first examined the relationship of the race of juvenile to the decisions in the Court; second, examined the pattern of that relationship over time (from 2010 through 2013); and finally,

---

be *charged* with certain crimes," and recommending additional research to understand why African American youth in Missouri are more likely to be charged with certain offenses. (emphasis in original.)

re-examined that relationship introducing statistical controls for these demographic, case, and risk factors.

Consistent with the RRI calculations, the case analysis shows that Black children are disproportionately represented during four decision points in the St. Louis County Family Court.[66] Specifically, the case analysis shows that Black children are more likely to have their cases handled formally, to be detained prior to trial, to be transferred out of the Court's jurisdiction and committed to the Division of Youth Services, and to be placed in Division of Youth Services custody after adjudication. Moreover, the case analysis shows that these outcomes cannot be fully explained by factors other than race. These statistical findings indicate a pattern or practice of constitutional violations.

C. Findings

1. Black Children have a Lesser Chance of Having Their Cases Handled Informally

a. Overall Results

We find that Black children are not treated equally in the Court's decisions to have the cases of Black youth handled formally, also known as filing a petition. The odds ratio predicts that formal case handling occurs almost one-and-a-half times more often for Black youth, after introducing the control variables. This means White youth have more opportunity for the desired outcome of informal processing. Further, these disparities in handling Black youth via petition cannot be explained as based on anything other than race. The "central purpose" of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race." *Washington*, 426 U.S. at 239. The Court is in violation of equal protection of Black youth at this juvenile justice decision point.

[66] While the RRI is based on decision points about which all states report to OJJDP, the variables in our case analysis are specific to decisions made by the St. Louis County Family Court. After reviewing the Court's decision-making, our consultant identified thirteen stages that flow or result from decisions made by the Court. These thirteen case analysis decisions are specific to St. Louis County, although some of them also overlap with decision points in the RRI analysis. (For example, both RRI-related decision points and our St. Louis County case analysis include the decision whether to detain a child prior to trial.) As discussed in this section, we find equal protection violations in four of the thirteen stages where race has a significant and substantial impact, as discussed in this section. In the remaining areas, the racial disparity data is statistically insignificant. The thirteen stages assessed by our consultant are: (1) deciding whether to confine the youth to pretrial detention; (2) deciding whether to commit a child under existing Court supervision to Division of Youth Services custody; (3) deciding whether to retain jurisdiction (as opposed to sending the case to another juvenile court); (4) deciding whether to accept the referral of the youth's case to the Court; (5) deciding whether to deal with the case formally or informally; (6) deciding whether to provide additional service for informal cases; (7) deciding whether to provide supervision to youth on informal adjustment; (8) deciding whether to dismiss a petition as opposed to continuing the case to a findings; (9) deciding whether to find the petition "true"; (10) certifying the case to adult court; (11) ordering services for youth found delinquent; (12) deciding whether services for youth found delinquent will be provided in or out of the home; and (13) post-disposition commitment to Division of Youth Services.

b. Analysis

A major decision made in all juvenile courts is whether to handle the case formally through a petition of delinquency or to handle the case informally, such as through victim restitution, with a warning, a service referral, drug counseling, an educational program, curfew, or family supports.[67] Processing a case informally is considered more desirable for youth because after successful completion of an informal disposition, the case is dismissed. Typically, if offered informal processing, a juvenile voluntarily agrees to specific conditions for a specified time period.[68] If, however, the juvenile fails to meet the conditions, the case is referred for formal processing and proceeds as it would have if the initial decision had been to refer the case for an adjudicatory hearing, which is equivalent to a trial proceeding and held before the juvenile court judge.[69]

In St. Louis County Family Court, nearly four out of five cases are handled through informal means. This high level of diversion through the juvenile court system is commendable. However, Black and White children do not have an equal chance to benefit from informal treatment. Our consultant found that initially, the odds of formal processing are nearly three times higher (odds ratio of 2.90) for Black youth; however, after using control variables, the odds ratio for race was reduced to 1.465.

The table below reflects the data when logistic regression is applied to the decision to refer youth for formal processing. It depicts our analysis of several variables, including risk and the severity of the alleged offense. We found that even when severity was considered, the effect of race is still statistically significant (odds ratio of 1.465). A simple interpretation is that roughly half of the difference in the diversion decision is related to risk and severity, but that means that half of the racial differences in the use of diversion are not explainable in terms of risk, age, gender, or severity of the allegation. The disproportionate representation cannot be fully explained by factors other than race, and establishes an equal protection violation.

Factors Predicting Formal Handling of a Referral (2010-2013)

Variable	Regression Weight	Significance	Odds Ratio
Race	.382	.000	**1.465**
Gender	-.217	.000	.805
Age	-.033	.023	.967
# of Risk Factors	.371	.000	1.449
Severity of Allegation	5.754	.000	315.576

[67] U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juveniles In Court* (June 2003), https://www.ncjrs.gov/html/ojjdp/195420/page2.html

[68] *See* NJDC Report, *supra* note 18.

[69] *Id.*

2. Black Children have a Greater Chance of Receiving Pretrial Detention

a. Overall Results

Our analysis revealed that the odds of Black children receiving pretrial detention are 2.5 times greater than the odds for White children, after introducing control variables. As described earlier, an odds ratio of 1.0 is neutral, meaning there is no disparity between Black and White children. However, an odds ratio above 1.0 indicates that Black children are disproportionately represented in the particular stage - the higher the number, the greater the disparity reflecting an apparent problem in providing equal protection of the laws. In analyzing data about pretrial detention, even when our consultant controlled for other variables such as risk, age, gender, and severity of the allegation, the data revealed a statistically significant effect in the Court's decision making. That leads us to find that the disparate outcomes in pretrial detention are not solely the product of race neutral factors. Rather, a child's race is one of the determining factors for the decision to detain a youth. In other words, there is evidence of racial bias in this decision point and sufficient basis for us to conclude that the Court is in violation of the Equal Protection Clause.

b. Analysis

Pretrial detention is a form of locked custody of youth in pretrial status. Juvenile detention centers are the juvenile justice system's version of "jail," in which youth are being held before the court has judged them delinquent.[70] Under Missouri State law and the State Supreme Court Rules, once a child is before the juvenile court, the court preliminarily examines the reason for detention and either orders the child released or detained until adjudication.[71] Missouri law supports the presumption that juveniles should be released and not remain in custody unless authorized by the court, the judicial officer, or other appropriate persons upon showing substantial reasons exist for detaining the juvenile.[72]

Detained youth, awaiting their court date, can spend anywhere from a few days to months in locked custody and are therefore physically and emotionally separated from their families and communities.[73] Research has shown that secure detention is a gateway into the juvenile justice system, and if a youth is placed in secure detention, the odds increase of going deeper into the system.[74] Pretrial detention has been shown to increase the likelihood that a child will be

---

[70] Vincent Schiraldi and Jason Ziedenberg, The Justice Policy Institute, *Reducing Disproportionate Minority Confinement: The Multnomah County, Oregon Success Story and Its Implications*, 5 (2002).

[71] *See* Mo. Rev. Stat. § 211.141.1; Jill Jolen Meyers, *Juvenile Justice Procedures,* in *Juvenile Justice: A Guide to Theory, Policy, and Practice 141 (7th ed., Steven M. Cox et al., 2010).*

[72] *See* Mo. Rev. Stat. § 211.141.1

[73] Barry Holman and Jason Ziedenberg, The Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, (2006).

[74] *See* Patterson, *supra* note 65.

formally charged and receive more serious sanctions.[75] The loss of liberty associated with pretrial detention can have a profoundly negative impact on a youth's mental and physical well-being, their education, and their employment.[76] Moreover, as discussed in our due process findings, because the majority of lawyers representing detained children in St. Louis County do not enter the case for days, weeks, or even months after the detention decision is made, a child in pretrial detention can remain in limbo, unrepresented and potentially vulnerable to violations of the right against self-incrimination.

Notably, the St. Louis County Family Court's overall use of pretrial detention is low when compared to national and peer county data. Unfortunately, despite a lower use of pretrial detention overall, the disparity in the use of detention for Black and White youth in St. Louis County is large. To understand the odds of the Court referring Black youth to pretrial detention, we examined the odds ratio. As reflected in the table below, this is first determined by taking the number of White youth with detention (375) divided by the number of White youth without detention (10,802). The odds of detention for a White youth are thus .035 to 1.00. Similarly, the odds that Black youth will be detained are determined by dividing the number of Black youth who were held in detention (2,238) divided by the number who were not held in detention (18,754). The odds of detention for a Black youth are thus .119 to 1.00. The odds ratio is simply the odds for a Black youth divided by the odds for a White youth or .119 divided by .035 or 3.43. The results of this calculation are that the odds of a Black youth experiencing pretrial detention are 3.43 times greater than the odds for a White youth.

Pretrial Detention Utilization by Race (2010 – 2013)

		Juvenile Race			
		White	**Black**	**Total**	**Odds Ratio**
Case involved pretrial detention	No	10,802 96.6%	18,754 89.3%	29,556 91.9%	
	Yes	375 3.4%	2,238 10.7%	2,613 8.1%	
Odds of "Yes"		0.035	0.119	0.088	3.43
Total		11,177	20,992	32,169	

Even after controlling for variables, including severity of the allegation, the most important factor in determining pretrial detention, the odds ratio is 2.50. This disparity is still statistically significant.

[75] Office of State Courts Administrator, *Florida's Juvenile Delinquency Court Assessment*, 24 (April 2003); Charles E. Frazier & Donna M. Bishop, *The Pretrial Detention of Juveniles and Its Impact on Case Disposition*, 76(4) J. Crim. L. & Criminology 1132 (1985).

[76] Frazier and Bishop, *supra* note 75.

Our consultant noted that the pattern of odds ratios from 2010 through 2013 shows a consistent improvement in the relationship of race to pretrial detention, as depicted in the table below. Despite the decline in the odds ratios over the years, however, the results for 2013 still indicate a marked and substantial difference, with Black children more than twice as likely to experience pretrial detention.

Percentage and Odds of Cases involving Pretrial Detention, by Race and Year (2010-2013)

	Juvenile's Race			Odds		
Year	White	Black	Total	White	Black	Ratio
2010	2.4%	10.0%	7.3%	0.025	0.111	4.416
2011	3.1%	10.0%	7.4%	0.032	0.111	3.500
2012	3.5%	10.5%	8.1%	0.036	0.118	3.277
2013	5.0%	12.4%	10.1%	0.053	0.141	2.679
all years	3.4%	10.7%	8.1%	0.035	0.119	3.437

The data and our consultant's analysis show that, when compared to White children, Black children in St. Louis County Family Court are significantly more likely to receive pre-trial detention because these children are Black. The disparity in initial detention demonstrates that Black children are treated significantly worse than White children, even after accounting for other social and legal factors.

As such, a Black child brought before the Court has a substantially higher chance of being detained prior to a detention or probable cause hearing – despite his or her offense level, prior delinquent offenses, or other social conditions – than a White child. The disparity in experiences is large, unexplained by factors other than race, and reflects an apparent problem in providing equal protection of the laws. These facts are sufficient for us to conclude that race was an improper motivating factor in pretrial detention decisions. *Arlington Heights*, 429 U.S. at 266; *see also Bogren*, 236 F.3d at 408 ("Equal Protection Clause requires that state actors treat similarly situated people alike.").

3. Accounting for Nonracial Control Variables, the Court Disproportionately Commits Black Children under Existing Court Supervision to Division of Youth Services Custody

a. Overall Results

We found that when the Court decides to commit youth who are under existing Court supervision into Division of Youth Services custody Black children are disproportionately committed. After controlling for variables, the data revealed that the odds of the St. Louis County Family Court committing Black youth to Division of Youth Services custody are 2.86 times greater than the chances of the Court committing White youth in these same circumstances. As discussed earlier, an odds ratio of 1.0 is neutral; therefore, a finding of 2.86 times greater reveals Black children are disproportionately represented in the decision to commit youth to this kind of custody. We find that the effect of race on committing Black youth to Division of Youth Services custody cannot be explained by other measurable factors and

therefore we conclude that these commitments reflect unlawful discrimination on the basis of race.

b. Analysis

One of the decisions made by the St. Louis County Family Court is to either commit a youth who is under existing Court supervision for a previous offense to Division of Youth Services custody or to retain jurisdiction.[77] The decision to commit a youth to Division of Youth Services custody during this decision point is equivalent to a youth receiving a probation or parole revocation. When a youth is committed to Division of Youth Services custody, the youth no longer has the option for formal or informal processing through the Court.

The tables below depict the total number of cases where youth under existing Court supervision were committed to Division of Youth Services in St. Louis County. Over a four year period (2010-2013), the total number is small (255 commitments). However, the rate of commitment is markedly higher for cases involving Black youth. Across all four years, the odds ratio for this difference in rates is initially 3.67. After introducing control variables the ratio declines to 2.86, still a statistically significant number (*See* the table below, "Factors Predicting Commitment to Division of Youth Services").

Total Numbers of Youth Committed to Division of Youth Services, by Race (2010-2013)

		Juvenile Race			Odds Ratio before Control Variables
		White	Black	Total	
Transferred to Division of Youth Services, (no other finding)	No	9,877 99.7%	17,482 98.8%	27,359 99.1%	
	Yes	34 .3%	221 1.2%	**255** .9%	
Odds of "Yes"		0.003	0.013	0.009	3.67
Total		9,911 100.0%	17,703 100.0%	27,614 100.0%	

[77] Mo. Rev. Stat. §219.021; *see also* Division of Youth Services, Missouri Department of Social Services (2014), http://www.dss.mo.gov/dys/.

Factors Predicting Commitment to Division of Youth Services (Control Variables) (2010-2013)

Variable	Regression Weight	Significance	Odds Ratio After Control Variables
Race	1.052	.000	**2.865**
Gender	-.837	.000	.433
Age	.540	.000	1.716
# of Risk Factors	.175	.000	1.191
Severity of Allegation	.897	.000	2.453

This data indicates that even after taking into account other factors, there remains a large and statistically significant difference by race in the handling of these cases and in the use of a commitment to Division of Youth Services. We conclude that totality of this data reflects that "the law bears more heavily on one race than another." *Washington*, 426 U.S. at 242. For the Black youth involved, the numbers indicate a violation of their equal protection rights because of their race.

4. Black Children Have a Greater Chance of Receiving Division of Youth Services Placement When Adjudicated Delinquent

a. Overall Results

In the previous section, we explained our finding that the St. Louis County Family Court commits Black youth who are under Court supervision to Division of Youth Services custody at a higher rate than their White counterparts. Here, we also find that at the disposition of a case, the Court places Black youth in Division of Youth Services custody at a high rate. Specifically, the odds ratio of Division of Youth Services placement for Black youth is 2.59, which is a little more than two-and a-half times higher than cases involving White youth. After controlling for variables, the relationship of race to placement actually increased to 2.748.

Once a youth is adjudicated delinquent, the Court may place the youth at home on probation with in-home services, place the youth in an institution or agency that is not operated by Division of Youth Services and that is authorized or licensed by law to care for children, or commit the youth to Division of Youth Services.[78] A child may be committed to the Division of Youth Services custody when the juvenile court determines a suitable community-based

[78] Mo. Rev. Stat. § 211.181.

treatment service does not exist, or has proven ineffective.[79] The Division of Youth Services operates treatment programs ranging from non-residential day treatment centers through secure residential institutions.[80]

Commitment to Division of Youth Services is the most restrictive disposition option in the Missouri juvenile system.[81] When a child is placed with Division of Youth Services, the Court terminates jurisdiction and does not conduct hearings to review the care, treatment, and progress of the child in custody. Unless an appeal is filed, the services of counsel are terminated following the entry of an order of disposition.[82] Therefore, when children are *committed* to the Department of Youth Services as the result of delinquency adjudications, they are not afforded post-dispositional representation. Further, once the Court commits a child to this type of custody, the Court usually does not state a specific period of time or release date for the child. Instead, the Division of Youth Services determines when to release children, unless the Court specifies a minimum length of stay at Division of Youth Services.[83] With little or no opportunity to obtain legal representation, a child's ability to petition the Court for early release is severely limited.

We find a significant racial disparity in the Court's decision to remove children from their home and into Division of Youth Services custody. Black youth are at least two and half times more likely to receive placement with Division of Youth Services. The effect of race on the decision to place Black children in Division of Youth Services custody cannot be explained by other measurable factors and therefore, provides sufficient basis for us to conclude that the decision is the result of discriminatory intent, in violation of Black children's rights under the Equal Protection Clause.

b. Analysis

Disposition is a phase of delinquency proceedings similar to the sentencing phase of adult trials. Disposition follows a delinquency finding that the allegation in the formal petition was found true.[84] During this phase, judges in the St. Louis County Family Court decide whether to place youth on probation with in-home services or out-of-home placement, including whether to remand to Division of Youth Services custody. The Court can place youth in Division of Youth Services 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

[79] Mo. Rev. Stat. § 219.021

[80] Missouri Department of Social Services, *Division of Youth Services* (2014), http://dss.mo.gov/dys/.

[81] *See* NJDC Report, *supra* note 18.

[82] Mo. Rev. Stat. § 211.211.6.

[83] Mo. Rev. Stat. § 211.181.4.

[84] As described in our due process findings, the great majority of children enters pleas to the allegations against them, and do not have a contested trial.

(2) that it would not be in the best interest of the child to stay in the home.[85] Division of Youth Services custody includes the option for placement in secure facilities.

Four years of dispositions (2010-2013) revealed that 563 youth were ordered to out-of-home Division of Youth Services placement. This is a small number of cases when compared with the 32,000 cases which were handled during these four years. However, in this relatively small number of placements, we again found a significant disparity between Black and White children. The following tables examine the odds of a child being placed in Division of Youth Services custody after adjudication. The odds ratio is 2.59; however, after controlling for variables, the odds of Division of Youth Services placement actually increased to 2.74 (*See* below table "Factors Predicting Placement in Division of Youth Services"). This means that among those cases that involved out-of-home placements, the odds that such a placement would include placement in Division of Youth Services custody were more than two-and-a-half times higher for cases involving Black youth than for cases involving White youth.

Placement in Division of Youth Services Custody, by Race (2010-2013)

		Juvenile Race			Odds Ratio
		White	Black	Total	
Out of Home Placement is to Division of Youth Services	No	97 70.3%	203 47.8%	300 53.3%	
	Yes	41 29.7%	222 52.2%	263 46.7%	
Odds of "Yes"		0.423	1.094	0.877	**2.59**
Total		138 100.0%	425 100.0%	563 100.0%	

Factors Predicting Placement in Division of Youth Services Custody

Variable	Regression Weight	Significance	Odds Ratio
Race	**1.011**	**.000**	**2.748**
Gender	-.578	.029	.561
Age	.861	.000	2.366
# of Risk Factors	.143	.001	1.154
Severity of Allegation	.342	.255	1.407

Given the relatively small numbers of cases considered each year, it is not surprising that the data about Division of Youth Services placement appears to vary over time. Nonetheless, in each year we reviewed, there were substantially more Black youth who received an out-of-home placement to Division of Youth Services, ranging between ninety-six and 116 cases (*see* table

[85] Mo. Sup. Ct. R. 128.03(e).

below). Thus, even with yearly fluctuating percentages, the following table depicts that in *all* years, the odds of a Black youth receiving a placement in Division of Youth Services are significantly and substantially higher than the odds of a White youth receiving a placement in Division of Youth Services.

Percent of Out-of-Home Placements in which the Placement is to Division of Youth Services, by Race and Age

	Juvenile Race					Odds		
Year	White		Black		Total	White	Black	Ratio
	N	Percent	N	Percent				
2010	38	31.6%	114	57.9%	51.3%	0.46	1.38	2.98
2011	36	16.7%	99	48.5%	40.0%	0.20	0.94	4.71
2012	30	36.7%	96	45.8%	43.7%	0.58	0.85	1.46
2013	41	35.3%	116	55.2%	50.7%	0.55	1.23	2.26

A simple summary of these results is that for all youth subjected to out-of-home placement, it was more likely that Black youth were placed in out-of-home Division of Youth Services custody. The odds show that the Court is more likely to choose to remove Black children from their home and into secure custody than to take the same action when the children involved are White. Even after controlling for legal and social factors, the difference in rates of disproportionate contact is not likely to be the result of a chance or random process. Black children are placed in Division of Youth Services custody at a higher rate by virtue of being Black. This pattern of unequal treatment of Black children is a violation of the Equal Protection Clause.

V. REMEDIAL MEASURES

A. Due Process

The St. Louis County Family Court should immediately implement the following remedial measures to correct the due process deficiencies in its delinquency matters. These remedial measures address the Court's failure to ensure youths' meaningful access to counsel, protect youths' privilege against self-incrimination, evaluate probable cause at detention and certification hearings, and conduct adequate plea colloquies, and are also designed to remedy the constitutionally-flawed structure of the Court. Implementation of these measures will work to address the systemic violations of children's constitutional rights in the St. Louis County Family Court and to ensure that the Court provides children with due process of law.

We recognize that a number of these recommendations involve practices that are governed by state law. Nevertheless, the Court's structural problems described above must be addressed in order to correct the constitutional violations identified in our findings.

1. Create an effective and constitutionally compliant system of indigent juvenile defense, and ensure that every child is afforded zealous legal representation

a. Ensure that children are assigned counsel at all critical stages of delinquency proceedings, including prior to the initial detention hearing, and continue that assignment throughout the child's involvement in the Court, including post-disposition.

b. Reduce caseloads of juvenile public defenders to nationally-recognized standards, including standards governing issues such as the complexity of assigned cases, the defender's skill and experience level, and the resources available.

c. Provide juvenile defense-specific training and back-up support to juvenile defenders.

d. Afford defense attorneys meaningful access to forensic social workers and expert witnesses in order to promote and provide holistic juvenile defense.

e. Encourage, increase, and enhance motion, trial, and dispositional practice in the Family Court.

f. Establish the expectation that defense counsel will meet national practice standards for indigent juvenile defense, and support defenders in attaining those standards.

g. Adopt a presumption of indigency for all children charged with delinquency.

h. Create a transparent assigned counsel panel with clear eligibility and certification criteria; mandatory, juvenile defense-specific training; uniform fee schedules; oversight mechanisms; and objective and fair case assignment processes. Provide government funds for payment of legal fees.

i. Establish clear guidelines governing when assigned counsel, rather than the MSPD, will be assigned to represent a child.

j. Eliminate judgments and liens against parents and children for legal fees.

2. Protect children's privilege against self-incrimination

a. Prohibit police interrogations in the Juvenile Detention Center unless the child's attorney is present.

b. Prohibit Court employees from administering *Miranda* warnings or participating in interrogations.

c. Ensure access to counsel during police interrogations and the informal adjustment process.

d. Prohibit use of statements made by children during informal adjustments at any stage of juvenile or criminal court proceedings.

3. Require evidentiary probable cause determinations at detention and certification hearings.

4. Adopt constitutionally sound and developmentally appropriate plea colloquies to ensure that children make knowing and voluntary guilty pleas.

a. Provide comprehensive explanations of trial rights and the impact of waiving them, using developmentally appropriate language.

b. Ensure that children understand their rights and the impact of waiver by asking each child to explain each right in his or her own words during the plea colloquy.

c. Require that children admit to specific facts and the requisite mental state in plea allocutions, rather than merely assenting to the statutory language of the counts charged in the petition.

d. Inform children of possible collateral consequences before they enter pleas, using developmentally appropriate language.

5. Remedy separation of powers violations caused by court structure

a. Disentangle judicial, prosecutorial, and probation functions.

b. Transfer Delinquency and Clinical Services, Court Programs, Detention, and Legal Departments from judicial to executive branch.

c. Negate the attorney-client privilege that currently exists between the DJO and the Legal Department.

d. Provide training to DJOs about the role and responsibilities of defense attorneys.

B. Equal Protection

We also recommend that the Court move swiftly to implement remedial measures to address the equal protection violations we identified.[86] Implementation of these remedial measures should address the racial disproportionality that exists in key decision points in the Court's process, and ensure that Black and White children are treated equally.

1. Assess the extent and causes of DMC within the Court to inform and direct the Court's DMC reduction-efforts

a. Continue to collect data and information to determine where DMC occurs.

b. Assess the impact of the Court's policies, procedures, and programs on DMC levels at different decision points. Involve community and other non-traditional partners in this process.

c. Engage in strategic planning to develop a strategy to address DMC, form a committee to execute the plan, and decide up-front how success will be determined.

2. Institute efforts to provide training and technical assistance for Court staff

a. Provide training to raise staff's awareness about the subtle ways that racial bias, conscious or unconscious, affect policy and practice.

b. Increase staff diversity, especially in upper management.

c. Train Court staff about DMC.

d. Train staff on proper use of neutral decision-making tools.

e. Incorporate demonstrated awareness of racial disparities and equal protection issues into expectations for Court staff.

3. Assess racial disparities in formal petitions

a. Assess and review the decisions to process cases informally vs. formal petitions and whether the informal process is equally available to Black and White youth.

b. Develop a report of how comparable cases (based on offense severity) have been handled through non-petition mechanisms (diversion). This report should track the race of the youth. When such alternatives are not available for Black youth,

[86] Some of these remedial measures are consistent with guidelines from the National Council of Juvenile and Family Court Judges Model Court project, which generated principles for improved court systems' handling of juvenile delinquency cases.

the reason for non-use of diversion should be documented and examined in the aggregate.

c. When disparities are evidenced, consider any appropriate plans for remedial action, and make information about such actions available to the public.

4. Work towards reducing overrepresentation in pretrial detention

a. Collect information to monitor the Disproportionate Minority Contact levels of pretrial detention.

b. Collect and track information on the detention screening and detention decision criteria, including whether the referral was the result of a DJO's order to detain a youth and the reasoning.

c. Inventory the available alternatives for detention (after school support programs, alternative shelters, assessment centers, etc.) both with respect to type of resource and location in the St. Louis County. Those locations should be assessed in relation to the areas from which youth are placed in detention currently. Work with other community leaders to ensure that diversion options are accessible to Black youth.

d. Seek alignment with a nationally recognized detention reform organization that could provide analytic guidance and technical assistance in validation of risk assessment instruments, implementation of alternative programs, tracking the use of detention, etc.

5. Assess the racial disparities in commitment to Division of Youth Services

a. Improve data documentation in the juvenile information system about commitment to Division of Youth Services.[87]

   i. Capture additional information in the juvenile information system to elaborate on the specific reason for commitment, and the alternatives that were considered prior to authorizing the commitment.
   ii. Fully record whether counsel is available to youth subject to these commitment orders.
   iii. Continually assess the likelihood that such a racial disparity pattern might demonstrate a violation of equal protection provisions.

b. Develop a remedial action plan to address racial disparities in commitments to Division of Youth Services, and make information about such actions available to the public on an annual basis.

[87] The juvenile information system is the Court's integrated juvenile court case-management database, and is used to electronically capture juvenile offender records.

6. Address racial disparities in post-disposition out-of-home placement with the Division of Youth Services

a. Complete and make public annually a report on the use of post-disposition Division of Youth Services placement to demonstrate patterns of equal access and accountability. The report should:

   i. Analyze how Black youth are handled via placement with Division of Youth Services (based on offense severity) and via non-Division of Youth Services mechanisms (other placements).
   ii. Identify events when alternatives to Division of Youth Services placement are not available for Black youth, document the reason for non-use of alternatives, and examine the aggregate. Those explanations should be systematically examined and addressed wherever feasible.

b. When the analysis and report indicate that disparities are evident, the Court should include plans for remedial action in an annual report.

7. Improve data collection, analysis, and technical information to address racial disparities

a. Improve the Court's juvenile information system to develop the capacity to summarize data on racial disparity in addition to examining individual case reports. The staff should have the ability to pull and place data in a standard file format (such as Excel, Access, or SPSS), or have the ability to write standard report summaries of the individual case reports within the existing juvenile information system.

b. Court staff must gain the expertise to develop and produce reports from the juvenile information system. Reports on racial disparities should be produced both on an as-needed and on a quarterly basis.

c. Develop "management reports" on a quarterly basis which show patterns of racial disparity. The Court's upper management staff must review findings of the management reports and make recommendations for appropriate actions.

d. Use data reports gained from quarterly review of the juvenile information system as a mechanism to increase contact with law enforcement and other justice agencies, seeking to engage the entire system in efforts to increase equal treatment within the County.

8. Share information with the community about the existence of racial disparities and plans to address it

a. Make data about disparities in stages/decision points public.

b. Inform the public of the Court's strategies to reduce identified disparities.

c. On at least an annual basis, solicit public input about disparities and equal treatment, and about the Court's strategy to address it. Consider public input in formulating the Court's plans.

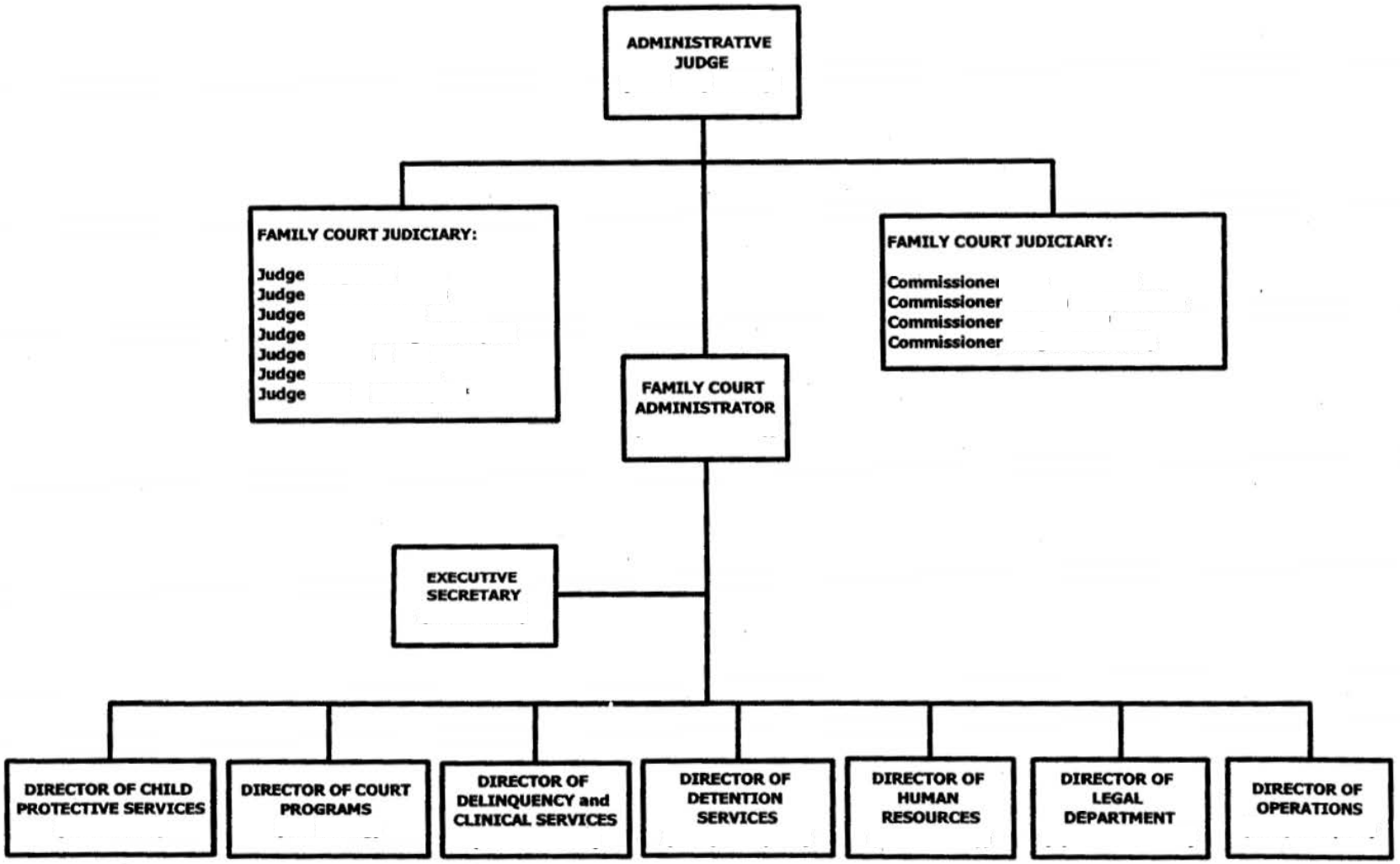
d. Consider creating a community advisory council to receive the above information, receive (and solicit) community reactions and to advise the Court on actions which may help to address community perceptions of disparity.

VI. CONCLUSION

The Department of Justice is committed to seeking a voluntary resolution to address the deficiencies identified in our investigation. We have a shared interest in ensuring that children appearing before the Court receive their constitutionally guaranteed rights to due process and equal protection under the law. As indicated by some of the remedial measures described above, we also believe that efforts to resolve our findings should be as transparent and accessible as possible to the wider St. Louis Community. Given the substantial infrastructure already in existence in the Missouri juvenile justice system, and the commitment to children articulated by the Court officials and other stakeholders with whom we spoke, we believe that the needed reforms are attainable.

APPENDIX A

FAMILY COURT JUDICIARY AND ADMINISTRATION



1/14