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Dearborn Circuit Court
Dearborn County, Indiana

STATE OF INDIANA	)	IN THE SEVENTH JUDICIAL CIRCUIT
	) SS:	
COUNTY OF DEARBORN	)	Cause No.: 15C01-2209-F3-000008
STATE OF INDIANA	)	
	)	
vs.	)	
	)	
DAKOTA ENGELKING,	)	
Defendant	)	

DEFENDANT'S VERIFIED MOTION TO DISMISS

COMES NOW the Defendant, Dakota Engelking, by and through Counsel Michael C. Cunningham, and respectfully requests the Court to issue an order dismissing this matter pursuant to Ind. Code §§ 35-34-1-4(a)(4), (10) & (11). In support of this Motion, and pursuant to Ind. Crim. R. 3, the Defendant submits a memorandum of law "stating specifically the grounds for dismissal."

WHEREFORE, the Defendant respectfully requests the Court issue an Order Dismissing this matter pursuant to Ind. Code §§ 35-34-1-4(a)(4), (10) & (11).

Respectfully Submitted,

Michael C. Cunningham
Counsel for Defendant
814 Main Street
Brookville, IN 47012
(765) 647-4105

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by E-Filing to: Dearborn County Prosecutor this 8th day of April, 2023.

MULLIN, McMILLIN & McMILLIN, LLP

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. Relevant Facts

According to the sworn probable cause affidavit, filed in this matter, on November 23, 2021, DCS received a report of alleged sexual abuse of a child, C.S. (a male child), alleged to have been committed by C.S.'s uncle, Dakota Engelking (Dakota), when Dakota was a minor. C.S. has three siblings: S.S. (M); I.S. (F); and C.S. (F).

A forensic interview was conducted on December 2, 2021 at the Child Advocacy Center (CAC). During the CAC interview, C.S. (who was 11 years old the time of the interview), allegedly disclosed that Dakota had touched him inappropriately when C.S. was "around five years of age." (*See,* Probable Cause Affidavit). C.S. turned five on May 6, 2015.

On December 15, 2021, Detective Barry Bridges of the Dearborn County Sheriff's Department, interrogated Dakota (who was born on December 9, 1998 and was 23 years old at the time of the interrogation). During Bridge's interrogation, Dakota allegedly advised that, when he was a minor, he had inappropriate interactions with C.S. but stopped after he realized it was not appropriate.

During the interrogation, Bridges sought to determine when these incidents may have occurred. Bridges asked if it "would've happened when you were driving? In other words, had your driver's license?" (*See,* Interrogation Video at 2:00:16). Dakota responded "I think *I may have just gotten it* like right about that timeframe." *Id* at 2:00:30 (emphasis added). Bridges wrote in his probable cause affidavit that he had learned that Dakota turned sixteen in December of 2014 and received his drivers license on June 10, 2015. (*See,* Probable Cause Affidavit). But Dakota's driving record also indicates that he

received his learner's permit in March of 2014 – when he was fifteen years old. (*See,* BMV Record).

Bridges further noted that Dakota believed the incident could have happened when he was a sophomore. (*See,* Probable Cause Affidavit). During his interrogation, Dakota allegedly disclosed that he believed the inappropriate contact occurred when he was in "lower grade high school…I think it might've been like summer of 2014." (*See,* Interrogation Video at 1:59:22, 2:01:19). Dakota was a sophomore during the 2014-2015 school year. (*See,* Engelking HS Transcript). If the school year started in August of 2014, then Dakota was fifteen years old for approximately three months of that school year. And, the summer of 2014 would have been between Dakota's freshman and sophomore year, when Dakota was fifteen years old.

Detective Bridges' sworn probable cause affidavit does not allege that the inappropriate contact was compelled by force or imminent threat of force. Nor does he allege that C.S. was mentally disabled or deficient. Nor does the affidavit allege any inappropriate contact with a female child. Nor is any penetration alleged.

Based upon the foregoing information, on September 27, 2022, the State of Indiana charged Engelking with two (2) counts of Rape as Level 3 Felonies, for incidents that allegedly occurred "on, about, or between December 9, 2014 and May 6, 2016." (*See,* Charging Information).

II. Indiana Code § 35-34-1-4

Indiana Code § 35-34-1-4(a) states that this Court may, upon motion of the Defendant, dismiss an information upon certain grounds. In this case, Dakota requests the Court to dismiss this information pursuant to Ind. Code §§ 35-34-1-4(a)(4), (10) & (11).

"Facts permitted to be raised in a motion to dismiss a charging information generally concern only pre-trial procedural matters," *Pavolich v. State*, 6 N.E.3d 969, 974 (Ind.Ct.App. 2014), which include challenging the adequacy of a charging information. *See State v. King*, 502 N.E.2d 1366, 1369 (Ind.Ct.App.1987).

Indiana cases have held that pretrial motions to dismiss based on insufficiency of the evidence are improper, and that sufficiency of evidence is to be decided at trial. *State v. Nesius*, 548 N.E.2d 1201 (Ind. Ct. App. 1990); *State v. Houser*, 622 N.E.2d 987 (Ind. Ct. App. 1993). However, trial courts have the same responsibility as prosecutors "to make certain that a person is not erroneously charged." *State v. D.M.Z.*, 674 N.E.2d 585, 587 (Ind. Ct. App. 1996). Thus, a trial court considering a motion to dismiss need not rely entirely on the text of the charging information but can hear and consider evidence in determining whether a defendant can be charged with the crime alleged. *Id*; Ind. Code § 35-34-1-8; *See also State v. Fettig*, 884 N.E.2d 341 (Ind. Ct. App. 2008) (trial court did not abuse its discretion in dismissing battery charge against defendant, whom trial court found acted within bounds of her authority to physically discipline her student).

"Upon the motion to dismiss, a defendant who is in a position adequately to raise more than one (1) ground in support thereof shall raise every ground upon which he intends to challenge the indictment or information." Ind. Code § 35-34-1-4(c).

Dakota raises the following issues in support of dismissal: (1) "the indictment or information does not state the offense with sufficient certainty," pursuant to Ind. Code § 35-34-1-4(a)(4); (2) "there exists some jurisdictional impediment to conviction of the defendant for the offense charged" pursuant to Ind. Code § 35-34-1-4(a)(10); and (3) violation of due process as "any other ground that is a basis for dismissal as a matter of

law," pursuant to Ind. Code § 35-34-1-4(a)(11).

A motion to dismiss pursuant to Ind. Code § 35-34-1-4(a)(4) must be made twenty (20) days prior to the omnibus date if the Defendant is charged with a felony, while a motion to dismiss pursuant to Ind. Code §§ 35-34-1-4(a)(10) & (11) may be made or renewed at any time before or during trial. *See,* Ind. Code § 35-34-1-4(b).

A motion made under Ind. Code § 35-34-1-4(a)(4) may still be heard and granted even after the twenty (20) day time period has passed. *See,* Ind. Code § 35-34-1-4(b). This Court may still hold a hearing, and in ruling on a Motion to Dismiss "may hear and consider evidence beyond the charging information to determine whether the defendant may properly be charged with having committed a criminal act." *Littleton v. State*, 954 N.E.2d 1070, 1076 (Ind. Ct. App.2011); *and see, Ceasar v. State*, 964 N.E.2d 911 (Ind. Ct. App. 2012) (noting that the trial court denied the Defendant's motion to dismiss under Ind. Code § 35-34-1-4(a)(5) as untimely but heard evidence on the Defendant's motion to dismiss under Indiana Code § 35-34-1-4(a)(11)).

Thus, the Motion to Dismiss is properly and timely before the Court.

III. Information Fails to State the Offense with Sufficient Certainty

A motion to dismiss an information may be granted if "The indictment or information does not state the offense with sufficient certainty." Ind. Code § 35-34-1-4(a)(4).

The purpose of a "charging information is to provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense." *Lebo v. State*, 977 N.E.2d 1031, 1038 (Ind.Ct.App.2012). The Indiana Court of Appeals has held that in order for a charging information to be sufficient, it "generally needs only contain a statement of

the 'essential facts constituting the offense charged,' as well as the statutory citation, the time and place of the commission of the offense, the identity of the victim (if any), and the weapon used (if any)." *State v. Sturman,* 56 N.E.3d 1187, 1196 (Ind.Ct.App. 2016)(citing *Pavlovich v. State,* 6 N.E.3d 969, 975 (Ind.Ct.App.2014)). The Indiana Supreme Court has further held:

> "It is a fundamental tenet of pleading criminal causes that the Information must set "forth the nature and the elements of the offense charged in plain and concise language...." This precision in pleading, which is embraced within our constitution, is designed to afford all criminal defendants the safeguards guaranteed by due process of law. To permit a 'conviction upon a charge not made would be sheer denial of due process.'

Griffin v. State, 439 N.E.2d 160, 162 (Ind. 1982)(internal citations omitted).

Article 1, Section 13 of the Indiana Constitution provides: "In all criminal prosecutions, the accused shall have the right ... to demand the nature and cause of the accusation against him, and to have a copy thereof."

"This Constitutional provision requires that the indictment or information sufficiently inform the accused of the nature of the charges against him so that he may anticipate the State's proof and prepare a defense in advance of trial." *Flores v. State,* 485 N.E.2d 890, 892 (Ind. 1985) (Amendments to robbery information, deleting references to "wallet" and "jewelry box" so as to simply accuse defendant of taking "property" from victims, failed to apprise defendant of the two robbery charges against him and, thus, violated Const. Art. 1, §§ 12, 13.) This requirement for a sufficient charging information also implicates the protections provided by the "due course of law" clause of Article 1, Section 12 of the Indiana Constitution. *Id* at 893.

In this matter, the State charged Dakota with two counts of rape as a Level 3 Felony. The rape statute reads as follows:

> **IC 35-42-4-1 Rape; restitution**
> Sec. 1. (a) Except as provided in subsection (b), a person who knowingly or intentionally has sexual intercourse with another person or knowingly or intentionally causes another person to perform or submit to other sexual conduct (as defined in IC 35-31.5-2-221.5) when:
> (1) the other person is compelled by force or imminent threat of force;
> (2) the other person is unaware that the sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) is occurring;
> (3) the other person is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) cannot be given; or
> (4) the person disregarded the other person's attempts to physically, verbally, or by other visible conduct refuse the person's acts;
> commits rape, a Level 3 felony.

Counts I and II are identical and read as follows:

> Gena Allen being duly sworn upon her oath states that on, about, or between December 9, 2014, and May 6, 2016, in Dearborn County, State of Indiana, Dakota Engelking knowingly or intentionally had sexual intercourse with another person, to wit: C.S., or intentionally caused another person to perform or submit to other sexual conduct (defined in IC 35-31.5-2-221.5) when the other person was compelled by force or imminent threat of force; or the other person was so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct cannot be given.

See, Charging Information.

The charging information is as broad as it is uncertain. And, it would require the State to prove *all* of the following elements beyond a reasonable doubt:

(1) Dakota Engelking

(2) knowingly or intentionally

(3) had sexual intercourse

(4) with another person, to wit: C.S.,

(5) or intentionally caused

(6) another person

(7) to perform

(8) or submit to

(9) other sexual conduct (defined in IC 35-31.5-2-221.5)

(10) when the other person was compelled by force

(11) or imminent threat of force;

(12) or the other person was so mentally disabled or deficient

(13) that consent to sexual intercourse cannot be given.

(14) or other sexual conduct cannot be given.

First, the charging information fails to specify whether Dakota engaged in "sexual intercourse" or "other sexual conduct." The term "sexual intercourse" means "an act that includes any penetration of the *female* sex organ by the male sex organ." I.C. 35-31.5-2-302 (emphasis added). And, "other sexual conduct," means an act involving "(1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." I.C. 35-31.5-2-221.5.

Specificity of the alleged conduct is especially important when considering that the alleged victim, C.S. (a male child), has a female sibling with the same initials. The charging information alleges that "Dakota Engelking…had sexual intercourse with another person, to wit: C.S." As noted above, "sexual intercourse," may only occur with a female; yet all the allegations contained in the probable cause affidavit only apply the male C.S.

The State then uses the disjunctive "or" to allege that Dakota either had sexual intercourse "or intentionally caused another person to perform or submit to other sexual conduct."

Here, unlike the allegation regarding "sexual intercourse," the State fails identify the "person" that Dakota allegedly caused to perform or submit to the other sexual conduct. Given these separate allegations and differences between sexual intercourse and other sexual conduct, it does not follow that the "person" is C.S. But, even if it is C.S., there is still the problem of distinguishing between the male C.S. and the female C.S. Moreover, the State fails to specify the "other sexual conduct," allegedly at issue.

Second, the element "when the other person was compelled by force or imminent threat of force," is unmodified, and does not specify whether this applies to the sexual intercourse element or the other sexual conduct element, and it further fails to establish *who* was compelled by force or imminent threat of force. Moreover, while Detective Bridges never alleges in his probable cause affidavit that Dakota compelled anyone by force or imminent threat of force, the "force," or "threat of force," is not alleged or specified in the charging information.

Finally, the State again uses the disjunctive "or" to allege that Dakota committed one or two separate acts that constitute rape. *Baker v. State*, 948 N.E.2d 1169, 1175 (Ind. 2011) ("One of the well-established rules of criminal pleading is that there can be no joinder of separate and distinct offenses in one and the same count. A single count of a charging pleading may include but a single offense.").

After accusing Dakota of compelling the alleged victim to submit to either sexual intercourse or other sexual conduct "by force or the imminent threat of force," the State also alleges that maybe rape was committed, not by force, but instead because "the other person was so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct cannot be given."

Here it is difficult to determine whether the State is alleging that Dakota committed rape because he compelled the alleged victim, by force, to submit to the sexual acts; or, if the State is alleging that Dakota committed rape because the alleged victim was "so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct cannot be given." It is further unclear whether the "mentally disabled or deficient" element applies to C.S. (male or female) or some other unspecified person; and whether this element applies to sexual intercourse or other sexual conduct.

But whatever the case may be, Indiana law is clear that the "mentally disabled or deficient" element focuses not on a person's age and legal competency but instead upon the person's mental competency and capacity. *See, e.g.*, *Gale v. State*, 882 N.E.2d 808 (Ind. Ct. App. 2008); *Warrick v. State*, 538 N.E.2d 952 (Ind. Ct. App. 1989); *Bozarth v. State*, 520 N.E.2d 460 (Ind. Ct. App. 1988) (concluding that "reasonable persons of ordinary intelligence are capable of discerning the kind of conduct that would generally fall within the proscriptions of this statute"); *Hall v. State*, 504 N.E.2d 298 (Ind. Ct. App. 1987).

In other words, a child, who is of ordinary intelligence but is not legally competent, does not suffer from a mental disability or deficiency. Thus, generally speaking, a person who has sexual intercourse or other sexual conduct with a child, who

is of ordinary intelligence, commits child molesting – not rape. *See,* Ind. Code § 35-42-4-3(a).

The State's use of alternative and disjunctive allegations as to the acts, means, intents, and results charged, within one charging information, compounds the insufficiency of the charging information. *See,* Ind. Code § 35-34-1-5(a)(5) (noting that an information may be amended on motion of the prosecutor "at any time because of any immaterial defect, "including: the use of alternative or disjunctive allegations as to the acts, means, intents, or results charged.").

The use of alternative allegations and disjunctives (like "or") can lead to violations of the Defendant's Indiana and Federal Constitutional rights including non-unanimous jury verdicts. And the failure of the State to plainly specify the allegations violates Dakota's State and Federal Constitutional rights by depriving him of his ability to know the charges against him and to "anticipate the State's proof and prepare a defense in advance of trial." *Flores,* 485 N.E.2d at 892.

The charging information in this matter wholly fails to state the allegations with sufficient certainty because the State fails to specify the alleged victim and the conduct that allegedly constitutes rape in this matter.

IV. There exists some jurisdictional impediment to conviction of the offenses for the offenses charged.

This matter must be dismissed because "there exists some jurisdictional impediment to conviction of the defendant for the offense charged." I.C. 35-34-1-4(a)(10). A motion to dismiss an information must be granted if the information "is defective under section 6 of this chapter." I.C. 35-34-1-4(a)(1). "An indictment or information is defective when…the allegations d*emonstrate that the court does not have jurisdiction of the offense charged*."

I.C. 35-34-1-6 (emphasis added). Furthermore, Ind. Code § 35-34-1-6(c) states that except where amending an information is permitted under Ind. Code § 35-34-1-5 (regarding amendment for immaterial defects), the information "s*hall be dismissed* upon motion when it is defective," including when the Court does not have jurisdiction. Ind. Code § 35-34-1-6(c)(emphasis added).

"Subject matter jurisdiction refers to a court's constitutional or statutory power to hear and adjudicate a certain type of case." *In re D.P.*, 151 N.E.3d 1210, 1213 (Ind. Ct. App. 2020). If a court lacks subject matter jurisdiction, any judgment it enters is void. *Id*. Moreover, "The age of the offender is determinative of subject matter jurisdiction in the juvenile court…" *Id.* at 1211 (quoting *Tyman v. State*, 459 N.E.2d 705, 708 (Ind. 1984)).

As a general matter, circuit courts have jurisdiction over criminal cases, and juvenile courts have jurisdiction over delinquency cases." *State v. Neukam*, 189 N.E.3d 152 (Ind. 2022).

A delinquent act occurs when a child, before turning eighteen, "commits an act ... that would be an offense if committed by an adult". I.C. 31-37-1-2(1). However, the delinquent-act statute permits exceptions where the "juvenile court lacks jurisdiction under IC 31-30-1". *See,* I.C. 31-37-1-2. This exception applies when children allegedly commit "direct-file" offenses that can be filed only in criminal court. *See,* I.C. 31-30-1-4(a).

Because Dakota was under the age of 18, and indeed was under the age of 16, at the time of the alleged offense, this adult criminal court does not have subject matter jurisdiction over this matter. And, because Dakota is now over the age of 21 the juvenile court does not have jurisdiction either. *See, D.P. v. State*, 151 N.E.3d 1210 (Ind. 2020); *and State v. Neukam*, 189 N.E.3d 152 (Ind. 2022) (noting that juvenile courts lose jurisdiction once the

alleged offender reaches twenty-one years of age).

The State attempts to get around the jurisdictional problem in this matter by charging Dakota with rape.

Under the "direct file" statute, a juvenile court "does not have jurisdiction over an individual for an alleged violation of…rape…if the individual was at least sixteen (16) years of age but less than eighteen (18) years of age at the time of the alleged violation." I.C. 31-30-1-4(a)(4).

Thus, whether this court has jurisdiction is a question of statutory interpretation. In construing statutes, the primary goal is to determine the legislature's intent. *Jackson v. State*, 50 N.E.3d 767, 772 (Ind. 2016). "But to ascertain that intent, we must first look to the statutes' language. If the language is clear and unambiguous, we give effect to its plain and ordinary meaning and cannot resort to judicial construction." *Id*.

The "direct file" statute plainly states that "The juvenile court does not have jurisdiction" if the individual "*was at least sixteen* (16) years of age…*at the time* of the alleged violation." I.C. 31-30-1-4(a)(4) (emphasis added). If the juvenile court *does not* have jurisdiction when the person is 16 at the time of the offense, the juvenile court *would have* jurisdiction when the person is fifteen years of younger at the time of the alleged offense. *See*, Ind. Code § 31-30-1-1(1) (Indiana's juvenile courts have "exclusive original jurisdiction, except as provided in sections 9, 10, 12, and 13 of this chapter, in the following: (1) Proceedings in which a child, including the child of divorced parents, is alleged to be a delinquent child under IC 31-37.").

Thus, a juvenile court is not deprived of exclusive original jurisdiction over Level 3 Felony Rape allegedly committed by a 15-year-old. *See, e.g.*, *State v. Pemberton*, 186

N.E.3d 647, 652 (Ind. Ct. App. 2022). And, the "direct file" statute cannot confer jurisdiction of this offense on this Court because Dakota was not sixteen years old at the time of the offense.

In this matter, the State facially alleges, but cannot prove, that Dakota was sixteen years old when this alleged incident occurred. On the other hand, the Defense has shown, by a preponderance of the evidence, that, if these acts occurred, they occurred during a time when Dakota was fifteen years old. *See,* Ind. Code § 35-34-1-8(f).

As noted above, Dakota would have turned sixteen years old on December 9, 2014. During his interrogation, Dakota informed Detective Bridges the incident may have occurred when he had "just gotten" his license. (Interrogation video at 2:00:30). Dakota's driving record indicates that he received his learner's permit, which would have first allowed him to legally drive under supervision of an adult, in March of 2014 – when he was fifteen years old. (*See,* BMV Record).

Furthermore, Dakota believed the incident could have happened when he was a sophomore. (*See,* Probable Cause Affidavit). During his interrogation, Dakota allegedly disclosed that he believed the inappropriate contact occurred when he was in "*lower grade high school*…I think it might've been like *summer of 2014*." (*See,* Interrogation Video at 1:59:22, 2:01:19)(emphasis added). Dakota was a sophomore during the 2014-2015 school year. (*See,* Engelking HS Transcript). If the school year started in August of 2014, then Dakota was fifteen years old for approximately three months of that school year. And, the summer of 2014 would have been between Dakota's freshman and sophomore year, when Dakota was fifteen years old.

The State attempts to show that Dakota was sixteen by using C.S.'s statement that the incident occurred when he was "around five years old," which would put the allegations in 2015, during a time when Dakota was sixteen years old. *See, e.g., Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992) (Noting that time is not of the essence in the crime of child molesting, but that "The exact date becomes important only in limited circumstances, *including where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies*."(emphasis added)).

However, if C.S.'s birthday is May 6, 2010, that means there was a seven-month period from the time C.S. turned four years old on May 6, 2014 until Dakota turned sixteen on December 9, 2014. This time period would encumber the time when Dakota had his driving permit, the late summer of 2014 and the beginning of his sophomore year – all of which occurred when Dakota was fifteen years old.

"Our justice system prefers to determine whether an act is a crime, what kind of crime it is, and what forms of punishment are available for that act based on the moment when the crime was committed." *Pemberton*, 186 N.E.3d at 654 n. 7 (Ind. Ct. App. 2022) (citing *Peugh v. United States*, 569 U.S. 530, 532-33, 133 S. Ct. 2072, 2077-78, 186 L.Ed.2d 84 (2013)).

When taken as true, as the State undoubtedly would prefer, Dakota's statements to Detective Bridges reveal that any inappropriate contact occurred during a time when he was fifteen years old, and still a child himself. Therefore, this Court does not have jurisdiction over the matter, and the case must be dismissed.

V. Other Grounds for Dismissal as a Matter of Law: Due Process Violation

Prosecution of Dakota in the adult system would violate his state and federal due process rights. Pursuant to Ind. Code § 35-34-1-4(a)(11), a motion to dismiss an information may be granted for "any other ground that is a basis for dismissal as a matter of law." I.C. 35-34-1-4(a)(11). "Such grounds would include a violation of a defendant's constitutional right to due process. Additionally, trial courts 'have inherent authority to dismiss criminal charges where the prosecution of such charges would violate a defendant's constitutional rights.' Section 35–34–1–4 is merely legislative recognition of this authority." *Matlock v. State*, 944 N.E.2d 936, 938 (Ind. Ct. App. 2011).

"The Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Indiana Constitution prohibit state action which deprives a person of life, liberty, or property without the 'process' or 'course of law' that is due, that is, a fair proceeding." *Pigg v. State*, 929 N.E.2d 799, 803 (Ind. Ct. App. 2010), *trans. denied*. The same analysis is applicable to both federal and state claims. *Carlberg*, 694 N.E.2d at. 241.

Due process protects "against arbitrary action of government... whether the problem is the denial of fundamental procedural fairness or the exercise of governmental power without any reasonable justification." *Dunn v. Fairfield Cmty. High Sch. Dist. No.* 225, 158 F.3d 962, 965 (7th Cir.1998) (internal citations and quotation marks omitted). "It is well established that whenever process is constitutionally due, no matter the context, it must be granted in a meaningful manner." *Isby v. Brown*, 856 F.3d 508, 529 (7th Cir. 2017).

As noted above, the Court does not have jurisdiction over Dakota in this case, because he was fifteen, not sixteen, at the time of this alleged offense. Therefore, any

prosecution of Dakota in adult court, for acts he allegedly committed as a child, would run afoul of due process and his right to be held to account under the juvenile system, rather than the adult criminal system.

The United States Supreme Court has recognized that children are "constitutionally different from adults," and that juveniles "have diminished culpability and greater prospects of reform," and "they are less deserving of the most severe punishments." *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 2464, 183 L.Ed.2d 407 (2012).

Regarding the purpose of Indiana's juvenile justice system, our Indiana Supreme Court has stated:

> The nature of the juvenile process is rehabilitation and aid to the juvenile to direct his behavior so that he will not later become a criminal. For this reason the statutory scheme of dealing with minors is vastly different than that directed to an adult who commits a crime. Juvenile judges have a variety of placement choices for juveniles who have delinquency problems, ranging from a private home in the community, a licensed foster home, a local juvenile detention center, to State institutions such as the Indiana Boys School and Indiana Girls School. None of these commitments are considered sentences. A child can become a juvenile delinquent by committing acts that would not be a violation of the law if committed by an adult, such as incorrigibility, refusal to attend public school, and running away from home. A child can also become a delinquent by committing acts that would be a crime if committed by an adult. In the juvenile area, no distinction is made between these two categories. When a juvenile is found to be delinquent, a program is attempted to deter him from going further in that direction in the hope that he can straighten out his life before the stigma of criminal conviction and the resultant detriment to society is realized. In contrast, when an adult is convicted of a crime, the conviction is a stigma that follows him through life, creating many roadblocks to rehabilitation. In addition to the general stigma of being an "ex-con", or a felon, the

> conviction subjects him to being found a habitual criminal if he later commits additional felonies, and affects his credibility as a witness in future trials. The Legislature purposely designed the procedures of juvenile determinations so that these problems are not visited on those found to be juvenile delinquents in a juvenile court.

Jordan v. State, 512 N.E.2d 407, 408-9 (Ind. 1987).

The only way this matter could properly, and constitutionally, proceed in adult court, without violating due process is to require the State to prove beyond a reasonable doubt that Dakota was actually sixteen years old at the time of the alleged offense.[1] In this matter, Dakota's age *when the offense was allegedly committed* determines whether the law aggravates the alleged act and the alleged punishment. For if Dakota was under the age of sixteen then this matter would not be a crime, but would instead be a delinquent act, over which this Court does not have jurisdiction. Prosecution of Dakota would, therefore, violate his right to be treated as a juvenile.

CONCLUSION

For the foregoing reasons, this matter should be dismissed pursuant to to Ind. Code §§ 35-34-1-4(a)(4), (10) & (11).

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[1] Given the fact of Dakota's age, as alleged by the State, would increase punishment in this matter, it is the State's burden to prove Dakota's age beyond a reasonable doubt in order to ensure that Dakota is not deprived of due process and that he is properly and accurately prosecuted. See, e.g., C.S. v. State, 735 N.E.2d 273, 276 (Ind.Ct.App.2000)(The State must prove beyond a reasonable doubt that the juvenile committed the charged offense.); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

VERIFICATION

Undersigned Counsel affirms under the penalties of perjury that the foregoing representations are true to the best of his knowledge and recollection.

Michael C. Cunningham