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CONCLUSION37

INTEREST OF *AMICI*

Amici curiae, Loyola Civitas ChildLaw Center, Children and Family Justice Center, National Juvenile Defender Center, and Juvenile Law Center are recognized both in Illinois and nationally for their advocacy and policy work on behalf of youth in the juvenile and criminal justice systems. *Amici* are practicing attorneys, academics, and researchers with a wealth of experience in addressing issues relating to the representation of juveniles in the delinquency system. *Amici* have seen the positive outcomes that result from effective legal representation for juveniles—including targeted and appropriate disposition and treatment, aftercare planning, and education about collateral consequences of adjudications and expungements. *Amici* have also seen the lasting adverse effects that follow when children charged with crimes are provided with inadequate representation and therefore strongly believe that attorneys representing children in delinquency proceedings are bound by the same constitutional duties and ethical rules that govern lawyers representing adults in criminal proceedings. Specifically, a child’s attorney, after fully counseling his child client, must represent his client’s “expressed interests” even when he disagrees with the client’s decision. Any representation otherwise should constitute a *per se* conflict.

STATEMENT OF FACTS

Amici, Juvenile Law Center *et al.*, adopt the statement of facts set forth by Appellant, Austin M.

ARGUMENT

The question before this Court is whether Austin M's constitutional right to counsel in a delinquency proceeding has been breached where his lawyer served as both counsel and Guardian *ad Litem* (GAL). In this dual role, the lawyer was tasked with defending Austin M. against allegations of delinquency, while simultaneously tasked with advising the court as to Austin's best interests and how they bore on the outcome of the delinquency proceeding. *Amici* submit that these two assigned roles are incompatible, creating a conflict of interest *per se* which requires reversal of the adjudication below.

Austin M's right to counsel is not at issue. Nearly 45 years ago, the United States Supreme Court held that children charged with delinquency have a fundamental constitutional right to counsel under the Due Process clause of the Fourteenth Amendment. *In re Gault*, 387 US 1 (1967). *Gault* followed on the heels of the Supreme Court's decision four years earlier in *Gideon v. Wainwright*, where the Court held that criminal defendants have a constitutional right to counsel under the Sixth and Fourteenth amendments. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In *Gideon*, the Court wrote:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.... "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Gideon, 372 U.S. at 344-45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

The prominence of counsel in our hierarchy of due process was underscored in *Gault*, where the Court extended the right to counsel to children charged with delinquency in juvenile court:

Under our Constitution, the condition of being a boy does not justify a kangaroo court.... There is no material difference in this respect between adult and juvenile proceedings of the sort here involved.... 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."

387 U.S at 28-29 (footnotes omitted).

The precise question before this Court is what this settled right to counsel in juvenile court means: Do children have the same right to a zealous, conflict-free advocate as an adult, with a singular duty to defend them against the state and to hold the state to its heavy burden under our constitutional framework? Does Austin M. have the right not only to the guiding of hand of counsel to help him navigate the complex proceedings and adverse consequences at issue in juvenile court, but a right to counsel who will give voice to his own expressed interests and desires without regard to the views of the state, the judge, other stakeholders or even his own lawyer as to what is 'best' for him?

In 1963, Attorney Abe Fortas – who four years later would author the Supreme Court's *Gault* decision after his appointment to the United States Supreme Court -- asked the Court a simple question on behalf of his client, Clarence Earl Gideon:

"I believe this case dramatically illustrates that you cannot have a fair trial without counsel. Under our adversary system of justice, how can our civilized nation pretend that there is a fair trial without the counsel for the prosecution doing all he can within the limits of decency, and the counsel for the defense doing his best within the same limits, and from that clash will emerge the truth?"

Anthony Lewis, *Gideon's Trumpet* 171 (1964).

The clash of adversaries remains the tested method for arriving at the truth under the dictates of our Constitution. Austin M. has the right to a lawyer who will do “all he can within the limits of decency” to ensure his own voice is heard amid that clash.

I. THE CONSTITUTIONALLY MANDATED RIGHT TO COUNSEL FOR JUVENILES CHARGED WITH CRIMES IS INCOMPATIBLE WITH REPRESENTATION BY A GUARDIAN *AD LITEM*.

A. Children in Delinquency Proceedings Have the Same Established Right to Counsel and Zealous Advocacy as Adults.

The right to counsel is a cornerstone of procedural fairness because attorneys play a critical role in ensuring that the adversarial system produces “just results.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). *Gault* established that a child has the right to counsel at the adjudicatory stage of a delinquency proceeding because the child’s liberty may be curtailed. *Id.*; see also *Gideon*, 372 U.S. 335. Although *Gault* did not mandate the wholesale incorporation of adult constitutional criminal procedure into every aspect of a juvenile delinquency proceeding, the Court cautioned that the juvenile court process must remain procedurally fair:

[W]e do not mean...to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

Gault, 387 U.S. at 30, citing *Kent v. United States*, 383 U.S. 541, 562 (1966). The Illinois Supreme Court has adopted this reasoning, acknowledging that “certain due process safeguards normally associated with criminal proceedings have been extended for the protection of juveniles to accord them *fundamental fairness*.” *In re Beasley*, 66 Ill. 2d 385, 389 (1977) (emphasis added). The Illinois Juvenile Court Act also protects the due process rights of minors charged as delinquents under the Act. 705 ILCS 405/5-101(1)(d)

(West 2009) (ensuring “due process, as required by the Constitutions of the United States and the State of Illinois, through which each juvenile offender and all other interested parties are assured fair hearings at which legal rights are recognized and enforced.”). To effectuate this goal, Section 405/5-101(3) specifies that minors charged with a crime “shall have all the procedural rights of adults in criminal proceedings, unless specifically precluded by laws that enhance the protection of such minors.” 705 ILCS 405/5-101(3). Thus, fundamental fairness is the yardstick by which courts measure the scope of due process safeguards required to protect the rights of a child in juvenile court. *See, e.g., In the Interest of D.L.B.*, 140 Ill. App. 3d 52, 56 (4th Dist. 1986) (although juvenile proceedings are not criminal in nature, certain procedural due process safeguards have been extended for the protection of juveniles in furtherance of fundamental fairness); *In the Interest of S.K.*, 137 Ill. App. 3d 1065, 1068 (2d Dist. 1985) (standard for measuring due process in juvenile proceeding is fundamental fairness).

A child’s right to the effective assistance of counsel is one such fundamental right. In *Gault*, the Supreme Court noted that assistance of counsel was essential for the determination of delinquency, which carries the “awesome prospect of incarceration in a state institution until the Juvenile reaches the age of 21.” 387 U.S. at 36-37. This echoed the Court’s reasoning in *Kent*, where the Court wrote: “[t]he 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.” 383 U.S. at 561-62. In both cases, the Court underscored the importance of a child’s right to the effective assistance of counsel, especially during the adjudication phase of a delinquency proceeding. This right is one of the “essential” components of fair treatment in the determination of delinquency. *Id.*

Illinois courts have also consistently applied the principles of *Gault* to delinquency proceedings brought under the Illinois Juvenile Court Act, affirming that due process safeguards, *including* the right to counsel, are essential to fundamental fairness. *See, e.g., People v. Giminez*, 23 Ill. App. 3d 583, 585 (3d Dist. 1974). Furthermore, among the rights specifically afforded all minors under the Act, including those charged with a crime, is the right to be represented by counsel. 705 ILCS 405/1-5 (1). Indeed, Illinois, like many states, has extended this right to counsel to all stages of a delinquency proceeding. *See* 705 ILCS 405/1-5. In recognition of the importance of this right, this same section provides that “[n]o hearing... under this Act may be commenced unless the minor who is the subject of the proceeding is represented by counsel.”¹

This Court affirmed this view of the child’s right to counsel, noting that certain due process safeguards associated with criminal trials apply to juvenile delinquency hearings as well. *Beasley*, 66 Ill. 2d at 390. More recently in *In re A.G.*, this Court noted:

virtually all of the constitutional requirements of a criminal trial have been introduced into juvenile delinquency proceedings. These due process safeguards include the right to adequate notice of charges, the right to counsel, the right to remain silent, and the right to confront and cross-examine witnesses.

In re A.G., 195 Ill. 2d 313, 318 (2001). Importantly, there is no qualification of the constitutional rights recognized here and their counterparts in a criminal trial. This Court has held that according to statute, “the procedural rights of the minor shall be the rights of

¹ In 2005, the Illinois General Assembly further protected this right by amending the Juvenile Court Act to provide that, in delinquency proceedings, “a minor may not waive the right to the assistance of counsel in his or her defense.” 705 ILCS 405/5-170(b). Article V of the Act also provides for the assistance of counsel prior to the filing of charges by requiring the appointment of counsel during an interrogation of a minor under the age of 13. 705 ILCS 405/5-170(a).

adults unless specifically precluded by laws enhancing their protection.” *In re W.C.*, 167 Ill. 2d 307, 321 (1995). Children in delinquency proceedings need zealous and client-directed advocacy for the same reasons as adults in criminal trials— they ensure the fundamental fairness of the proceedings.

Zealous and client-directed representation requires that a lawyer “abide by a client’s decisions concerning the objectives of the representation” and “consult with the client as to the means by which they are to be pursued.” Model Rules of Professional Conduct R. 1.2(a). The client controls whether to plead, whether to take the witness stand, and where applicable whether to ask for a jury. *Id.* This rule requires that an attorney act within the stated or expressed interest of a juvenile client, not his best interest. “In stark contrast to the expressed-interest model, an attorney advocating in the best-interest of the child may discount or altogether ignore the wishes of the child client and instead make decisions that he or she believes to be most appropriate for the care or rehabilitation of the child.” Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 246-47 (2005).

The Model Rules state that a lawyer should “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor” and “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” R. 1.3 cmt. 1. Moreover, the Illinois Rules of Professional Conduct (“the Rules”) require an attorney for a child to provide the same representation as an attorney for an adult. Rule 1.14 provides that an attorney is obligated to maintain a normal client-lawyer relationship “as far as reasonably possible” in the case of a client

who is under a disability, including the disability of minority. 134 Ill. 2d R. 1.14 (West 2009). *See* Helene M. Snyder & Susan A. McDaniels, *Effectively Representing Children*, 14 CBA Rec. 34 (2000) (“The only distinction in the Rules between representation of the adult and the child-client appears in Rule 1.14 (a)...”). The Rules delineate the standards of representation with which all Illinois attorneys must comply. The purpose of the Rules is to guide the conduct of attorneys in the representation of clients and to maintain public confidence in the legal system. The attorney-client relationship is one of “trust and confidence.” ILCS S. Ct. Rules of Prof. Conduct, Art. VIII, Preamble, *available at* http://www.state.il.us/court/supremecourt/rules/art_viii/ArtVIII.htm. Within this relationship, “such confidence only can be maintained if the lawyer acts competently and zealously pursues the client’s interests within the bounds of the law.” *Id.*

Providing client-directed, zealous advocacy is necessary to achieve the Illinois Juvenile Court Act’s goal of providing due process and assuring for fair hearings. The dual appointment creates both a conflict for counsel (does he advocate expressed interest or best interest) and an ambiguity of role (is counsel a zealous advocate for the client or an agent of the court).

It is against this backdrop that this court must now determine whether a minor’s “right to counsel” is breached during a delinquency proceeding when the child’s counsel acts simultaneously as defense counsel and GAL. The United States Supreme Court, the Illinois legislature, the Illinois Rules of Professional Conduct, and the Illinois and United States Constitutions all compel the conclusion that a minor in a delinquency proceeding must be afforded the same right to counsel afforded an adult during a criminal trial – a right which is incompatible with best interests advocacy.

B. The Roles of Attorney and *Guardian Ad Litem* Are Vastly Different and Often Present Irreconcilable Conflicts for the Attorney.

The attorney's role under the Illinois Juvenile Court Act, the Illinois Rules of Professional Conduct and the Sixth and Fourteenth Amendments differs in essential ways from the role of a GAL. First, within the bounds of law and ethics, an attorney's exclusive allegiance is to his or her client. As part of this duty an attorney must abide by a client's decisions concerning the objectives of representation after consultation and counseling, even in circumstances in which the lawyer has a differing view on what is in a client's best interests. *See* 134 Ill. 2d R. 1.2(a). By contrast, a GAL's principal responsibility is to make an independent assessment of a client's best interests and advocate in support of that position before the court. *See In re Mark W.*, 228 Ill. 2d 365, 374 (2008) ("The traditional role of the guardian *ad litem* is not to advocate for what the ward wants but, instead, to make a recommendation to the court as to what is in the ward's best interests."). This is true even when the client disagrees with the GAL's assessment of his or her interests, and even when such best interests advocacy may compromise the client's right to assert his innocence. Second, within the bounds of law, an attorney must maintain all client confidences. Rule 1.6 provides that "a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure." 134 Ill. 2d R. 1.6(a). No such duty binds a GAL, who actually may be *required* to disclose confidences if necessary to protect and advocate for the best interests of a child. Last, an attorney – unlike a GAL – is clearly duty-bound to avoid joint representation of clients if conflicts between them will materially impact the representation. 134 Ill. 2d R. 1.7.

The Illinois Juvenile Court Act also distinguishes between a child's attorney and a GAL. Although minors under the Juvenile Court Act must be represented by an attorney at all stages of the proceedings, the Act provides for the *additional* appointment of a GAL under certain circumstances. In child protection cases, the Act authorizes the appointment of a GAL when a child is alleged to have been abused or neglected. 705 ILCS 405/2-17. This section defines the role of a GAL as representing "the best interests of the minor" and imposes on the child's GAL a responsibility to "present recommendations to the court consistent with that duty." 705 ILCS 405/2-17(1). In delinquency proceedings, while the responsibility of a GAL is left undefined, the court's authority to appoint a GAL must be premised on either a finding of a potential conflict of interest between the minor and his or her parents, or the determination that appointment of a GAL is in a minor's best interests. 705 ILCS 405/5-610(1). In both dependency and delinquency proceedings under the Act, the responsibility of the GAL is to focus on the child's best interests. This best interests advocacy stands in clear contrast to the constitutional, statutory, and ethical obligations of an attorney representing an alleged juvenile delinquent during the guilt/innocence phase of a trial where the child's liberty may be curtailed.

Limits on the use of GALs in delinquency proceedings reflect the critical role of lawyers in delinquency proceedings to ensure that alleged delinquent minors receive the form of representation contemplated by the Supreme Court in *Gault*. In *Gault*, the Supreme Court found that the right to counsel could not be replaced by a probation officer charged with protecting the child's interests. 387 U.S. at 35-36. Likewise, this right cannot be watered down by splitting the child's counsel – a single individual – into

two capacities: a GAL charged by the court with protecting the child's best interests, and a defense lawyer charged with preparing and executing the child's legal defense during a delinquency proceeding. Such a splitting of counsel's role would be anathema in criminal court; it should be foreclosed in a juvenile delinquency hearing as well.

C. National Codes, Standards, and Court Decisions Require an Attorney to Provide Zealous and Conflict-free Representation to his Client, a Duty in Direct Conflict with the Duty of the Guardian *Ad Litem*.

Contemporary juvenile defense practice standards require that defense attorneys represent the expressed interests of their clients, not an outdated, pre-*Gault* mode of best interests advocacy. Currently, a substantial and growing number of jurisdictions preclude children's lawyers in delinquency proceedings from serving as both the attorney and GAL, either through statute, case law or practice standards. A majority of state standards require a clear distinction between the two roles. These states have recognized that if the attorney represents the client's best interests, the attorney-client relationship is irretrievably broken, effective and constitutionally-mandated legal assistance cannot be provided, and multiple harms may befall the client as a consequence.

This Court should be persuaded by the majority view disfavoring dual appointment because: (1) contemporary standards are indicative of fundamental fairness, the test used to determine which due process rights should be afforded juveniles; and (2) the Sixth Amendment guarantees effective assistance of counsel, which is measured by "the legal profession's maintenance of standards." *Strickland*, 466 U.S. at 688.

At least eight state legislatures have now made clear the distinction between the roles of GAL and defense attorney. The states that explicitly *disallow* a dual appointment – a growing trend in recent years – have specifically acted to safeguard the juvenile's

right to effective assistance of counsel.² For example, in 2009 Alabama adopted a new juvenile court act, which defined an attorney as one “who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child or minor as is due an adult client,” and defines a GAL as one who “protect[s] the best interests of an individual without being bound by the expressed wishes of that individual.” Ala. Code. §§ 12-15-102(5), (10) (LexisNexis 2009). The New Mexico legislature added a provision to its statute in 2005 that “[a] guardian ad litem shall not serve concurrently as both the child’s delinquency attorney and guardian ad litem.” N.M. Stat. Ann. § 32A-1-7(I) (LexisNexis 2009). Mississippi’s statute was amended in 2007 to include the statement, “[i]n delinquency matters the court shall appoint legal defense counsel who is not also a guardian ad litem for the same child.” Miss. Code Ann. § 43-21-201(1) (2009). The Wisconsin legislature amended its statute regarding access to counsel in 2005 to state: “Counsel may not act as guardian ad litem for any party in the same proceeding.” Wis. Stat. Ann. § 938.23(1j). *See also* Alaska Stat. § 25.24.310 (“The court shall require a guardian *ad litem* when, in the opinion of the court, representation of the child’s best interests, to be distinguished from preferences, would serve the welfare of the child. The court in its order appointing a guardian *ad litem* shall limit the duration of the appointment of the guardian *ad litem* to the pendency of the legal proceedings affecting the child’s interests, and shall outline the guardian *ad litem*’s responsibilities and limit the authority to those matters related to the guardian’s effective representation of the child’s

² As explained in Part I.A, *supra*, the right to effective assistance of counsel is the right to zealous, client-directed representation. Best interests representation does not satisfy the constitutionally mandated right to effective assistance of counsel. It is important to note that three states do specifically permit dual appointment. *See* Ind. Code Ann. § 31-32-3-3; Tex. Fam. Code Ann. § 51.11(c) (Vernon 2010); Wyo. Stat. Ann. § 14-6-222 (2011).

best interests in the pending legal proceeding.”); Minn. Stat. Ann. § 260B.163 (West 2010) (“Counsel for the child shall not also act as the child’s guardian ad litem.”).

In the absence of clear statutory guidance, courts in other states have prohibited attorneys from acting simultaneously in dual roles for the same minor client.³ The majority of these cases were decided after 1997, demonstrating an established trend toward safeguarding a juvenile’s right to effective assistance of counsel. These decisions likewise acknowledge that dual appointment of a lawyer as both counsel and GAL in delinquency cases contravenes current best practices. Like Illinois, these courts have all defined the role of GAL as an advocate for the best interests of the juvenile, *see, e.g., In re Mark W.*, 228 Ill. 2d 265 (2008), but have gone further in holding that the best interests

³*Ark. Dept. Of Human Services v. Mainard*, 358 Ark. 204, 211 (2004) (“[A]s the right to counsel and the right to an attorney ad litem are mentioned in separate subdivisions of the statute, it is apparent that these are not intended to be the same person.”); *Ireland v. Ireland*, 246 Conn. 413, 438 (1998) (en banc) (“An attorney for the child should not express to the court...his or her opinion as to the best interests of the child.”); *Francka v. Francka*, 951 S.W.2d 685, 692 (Mo. App. 1997) (“Although the best interests of the child are always paramount, the guardian’s relationship to the child is not strictly that of attorney and client.”); *Jacobsen v. Thomas*, 323 Mont. 183, 191-92 (2004) (“[A]n attorney appointed by the court to represent a child is not also the guardian ad litem. In addition, MCA § 40-4-205 states the guardian ad litem ‘may’ be an attorney. This indicates lay persons may act as guardians. Therefore, the statute contemplates a guardian ad litem has a unique role to protect the interests of the child. This role is different from the traditional advocacy role played by attorneys.”) (internal citation omitted); *Orr v. Knowles*, 215 Neb. 49, 53 (1983) (“[W]e feel the duties and responsibilities of a guardian ad litem...are *not* coextensive with those of an attorney who might represent a minor in proceedings under this section. A guardian ad litem is to determine the best interests of the minor without necessary reference to the wishes of the minor.”); *Ross v. Gadwah*, 131 N.H. 391, 395 (1988) (“[W]e now hold that the attorney-client privilege is incompatible with the guardian’s role as a party to and expert witness in [the] proceedings.... Nothing herein should be interpreted as precluding attorneys from serving as guardians ad litem.... However, when so appointed, they do not act as legal counsel for the child, but rather as parties to the proceedings.”); *In re D.B.*, 155 Vt. 580, 585 (1991) (“[T]he roles of attorney and guardian ad litem for a minor are separate in order to avoid the conflict that could result where ‘legal counsel is cast in the quandary of acting as both attorney and client.’” (internal citation omitted)).

advocacy of a GAL conflicts with an attorney's role to represent the child under *Gault* and its progeny. For example, the Arkansas Supreme Court wrote that,

nothing indicates that Allen was represented by defense counsel during the criminal contempt proceedings. To be sure, he had the services of an attorney ad litem, but the ad litem only represented 'the best interest of [the] juvenile,' see Ark. Code Ann. §§ 9-27-303(7) and 9-27-316(f)(5)(A) (Supp. 2003), and not Allen's due process and other constitutional rights, as a defense attorney would.

Ark Dept. of Human Services v. Mainard, 358 Ark. 204, 211 (2004). The Nebraska Supreme Court provided a more proscriptive analysis when it decided that "[i]t is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the *client* to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law." *Orr v. Knowles*, 215 Neb. 49, 53 (1983) (emphasis added). Even lower courts here in Illinois, which have sanctioned dual appointment in some contexts, have recognized the conflict: "[w]e are mindful there are inherent conflicts that exist when an attorney acts as both a juvenile's attorney as well as his guardian *ad litem*." *In re B.K.*, 358 Ill. App. 3d 1166, 1170 (2005).

In addition to legislation and court decisions, some states have adopted practice standards barring one individual from serving as both attorney and GAL. Following *Gault*, the American Bar Association in 1980 produced twenty-three volumes of juvenile justice standards. The volume on the role of counsel in delinquency proceedings contains recommendations to aid attorneys in providing quality representation for children. The ABA wrote, "[c]lient's interests are paramount: However engaged, the lawyer's principal duty is the representation of the client's legitimate interests." §3.1. In the commentary to those standards, the ABA noted,

In light of these constraints on representation in practice, the general standard set forth in section 3.1(a) should be considered substantive and not merely hortatory. Adversarial representation and devotion to a client's perceived interests may be more or less inconvenient for counsel in juvenile court; this consequence is, however, part of the lawyer's professional role and must be accepted.

IJA/ABA Juvenile Justice Standards Relating to Counsel for Private Parties § 3.1 (1996).

The ABA standards articulate how defense counsel can fulfill the promises of *Gault* through zealous advocacy of the client's *expressed* interests.

In 2004 the National Juvenile Defender Center and National Legal Aid and Defender Association delineated the obligations of juvenile defense attorneys in its joint publication, *Ten Core Principles For Providing Quality Delinquency Representation Through Public Defense Delivery Systems*, (2d ed. July 2008), available at http://www.njdc.info/pdf/10_Core_Principles_2008.pdf (hereinafter *Ten Core Principles*). The *Ten Core Principles* reiterated the ABA's focus on zealous representation of the client's expressed interests and encouraged states to adopt practice standards on juvenile defense. *Id.* ("We hope and trust they will prove useful in future efforts to reform and improve juvenile indigent defense systems across the country.").

Since the adoption of the Ten Core Principles, ten states and Washington, D.C. have now created or updated juvenile defense standards explicitly requiring defenders to zealously advocate for the expressed interests of the client, and prohibiting the attorney from substituting judgment, i.e. advocating for the best interests of the client.⁴ As an example, the Virginia legislature formally adopted standards that said:

⁴ State Bar of California, *Guidelines of Indigent Defense Delivery Systems* (2006), available at <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=fwTzyTmupEY%3D&tabid=2326>; Attorney Practice Standards For Representing Juveniles Charged With Delinquency or as Persons in Need of Supervision, C-1 Role of Counsel for

The primary and most fundamental obligation of a juvenile defense counsel (hereinafter 'counsel') is to provide zealous and effective representation for the client at all stages of the juvenile court proceedings. Counsel's duty and responsibility is to promote and protect the child's expressed wishes. If personal beliefs or attitudes make it impossible for defense counsel to fulfill the duty of zealous representation, counsel had a duty to refrain from representing the client.

Virginia Indigent Defense Commission, *Standards of Practice for Indigent Defense*

Counsel in Non-Capital Criminal Cases at the Trial Level, Standard 1: Obligations of

Respondent (Submitted by Rufus G. King, Chief Judge, Superior Court of the District of Columbia; Adopted by administrative order 04-13, June 2004), *available at* <http://www.dccourts.gov/dccourts/docs/0413a.pdf>; Florida Guidelines of Practice for Attorneys Who Represent Children in Delinquency Proceedings, A-1 Role of the Attorney for the Child (adopted by Legal Needs of Children's Standing Committee of the Florida Bar, July 2009), *available at* http://www.ojp.usdoj.gov/BJA/topics/Plenary4/Workshops/Workshop4G/C_Martinez-Final.PDF; State of Georgia Performance Standards for Juvenile Defense Representation in Indigent Delinquency and Unruly Cases, Performance Standard 1 & 3 (adopted by the Georgia Public Defender Standards Council, December 2004), *available at* http://www.gpdsc.com/docs/cpdsystem-standards-juvenile_cases.pdf; Committee for Public Counsel Services, Performance Guidelines, Rule 1.1 & 1.4 (Massachusetts), *available at* http://www.publiccounsel.net/Practice_Areas/yap%20pdf/juvenile_delinquency_youthful_offender_%28trial_level%29.pdf; *In the Matter of the Review of Issues Concerning Presentation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411, Standard 5-1, Nev. (2008); Law Guardian Representation Standards, Standard A-2 & A-3 (adopted by New York State Bar Association, 1992), *available at* http://www.nysba.org/AM/Template.cfm?Section=Law_Guardian_Representation_Standards&Template=/CM/ContentDisplay.cfm&ContentID=11557; Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 2.1 Role of Defense Counsel (adopted by North Carolina Commission on Indigent Defense Services, December 2007), *available at* http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Juv_Del_perf_guides_1-08.pdf; Standards of Representation of Clients in Juvenile Delinquency Cases, Role of defense counsel (adopted by Ohio Public Defender Commission, 2004), *available at* http://www.opd.ohio.gov/Juvenile/Jv_Standards.pdf; Principle and Standards for Counsel in Criminal, Delinquency, Dependency and Commitment Cases, Standard 2.3 (Oregon, Adopted by Board of Governor, September 1996), *available at* http://www.osbar.org/surveys_research/idtf/chapter2.html; Standards of Practice for Indigent Defense Counsel in Non-Capital Criminal Cases at the Trial Level, Performance Standard 1: Obligations of Juvenile Defense Counsel (legislatively mandated by Va. Code Ann. § 19.2-163.01(A)(4) (2005), *available at* <http://www.publicdefender.state.va.us/PDF%20documents/Standards%20of%20Practice.pdf>.

Juvenile Defense Counsel (legislatively mandated by Va. Code Ann. § 19.2-163.01(A)(4) (2005), available at <http://www.publicdefender.state.va.us/PDF%20documents/Standards%20of%20Practice.pdf>).

Conflating the roles of attorney and GAL in delinquency proceedings is in direct conflict with the admonition of the standards promulgated by the ABA over thirty years ago, as well as the more recent iterations of this principle by NJDC and NLADA – national leaders on this issue. An attorney who also dons the hat of a GAL cannot possibly abide by these national or state practice standards. The court’s decision below contravenes these practice standards, as well as the case law and statutes discussed above which similarly bar such dual appointments. Indeed, the lower court itself perfectly captured the folly of such an undertaking. In describing Mr. Novak’s role, the court observed, “[h]e represents what’s in the best interests of the [m]inors, which may or may not be what the [m]inors or the parents think is in their best interest.”

The role and obligations of counsel in contemporary delinquency proceedings foreclose counsel from advocating for the client’s best interests while simultaneously opposing the State’s delinquency allegations. The goals and objectives of each role are antagonistic, creating splintered representation, which will always fall short of the constitutional mark required by *Gault*. Fundamental fairness is ill-served by dual appointment; Illinois should align its practice with that of the majority of states to address this issue.

II. THE APPOINTMENT OF ATTORNEYS TO SERVE AS BOTH COUNSEL AND GUARDIAN *AD LITEM* CREATES A *PER SE* CONFLICT.

A. Counsel for a Child in a Delinquency Proceeding Must Provide Zealous and Conflict-Free Representation.

This Court should acknowledge that dual representation creates a *per se* conflict, in accord with dictates of the United States Supreme Court, the United States and Illinois Constitutions, and Illinois state statutes, as well as professional standards regarding the attorney's ethical responsibilities to his client. "Implicit within the right to counsel is that such representation be effective," *In the Interest of Johnson*, 102 Ill. App. 3d 1005, 1011 (1st Dist. 1981) (citing *Powell v. Alabama*, 287 U.S. 45 (1932)); the right to effective representation includes the correlative right to conflict-free representation. *See People v. Graham*, 206 Ill. 2d 465, 472 (2003) (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Glasser v. United States*, 315 U.S. 60 (1942); *People v. Washington*, 101 Ill. 2d 104, 109-10 (1984)). The Illinois Supreme Court has repeatedly stated that a defendant's fundamental right to effective assistance of counsel entitles the person represented to the "undivided loyalty of counsel and prohibits a defense attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations." *People v. Franklin*, 75 Ill. 2d 173, 686 (1979) (citing *People v. Coslet*, 67 Ill. 2d 127, 134 (1977); *People v. Kester*, 66 Ill. 2d 162, 166 (1977); *People v. Stoval*, 40 Ill. 2d 109, 110-11 (1968)). *See also People v. Hernandez*, 231 Ill. 2d 134, 142-43 (2008) (right to conflict free representation to avoid putting the attorney in a duplicitous position which fetters the attorney's full talents as a vigorous advocate); *People v. Spreitzer*, 123 Ill. 2d 1, 14 (1988) (noting the difficult position that conflicts engender to a lawyer who may have provided able and vigorous defense with complete loyalty)."

In the adult criminal context, Illinois courts have “identified three *per se* conflicts requiring reversal: (1) defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel contemporaneously represents a prosecution witness; or (3) defense counsel is a former prosecutor who had been personally involved in the defendant’s prosecution.” See *Hernandez*, 231 Ill. 2d at 143 (2008) (referencing prior Illinois Supreme Court decisions where a *per se* conflict was identified).⁵ Although *per se* conflict has been found in juvenile dependency proceedings (see *In re D.B.*, 246 Ill. App. 3d 484, 492 (4th Dist. 1993) (no *per se* conflict established) and *In re S.G.*, 347 Ill. App. 3d 476, 481 (5th Dist. 2004) (*per se* conflict established)), the application of this rule to delinquency proceedings is a matter of first impression for this Court.⁶ Given the especially close

⁵ See also *Spreitzer*, 123 Ill. 2d at 14 (*per se* conflict where defense counsel has a prior contemporaneous association with victim); *People v. Moore*, 189 Ill. 2d 521, 538 (2000) (*per se* conflict where defense counsel contemporaneously represents a prosecution witness); *People v. Thomas*, 131 Ill. 2d 104, 111 (1989) (*per se* conflict where defense counsel contemporaneously represents a prosecution witness); *People v. Lawson*, 163 Ill. 2d 187, 217-18 (1994) (*per se* conflict where defense counsel was a former prosecutor personally involved in prosecution of the defendant).

⁶ The willingness of the Illinois Appellate courts to tolerate apparent role conflicts in the context of abuse and neglect proceedings is not without limits. In *In re Darius G.*, the Second District found it impossible for the attorney to provide conflict-free zealous representation to his client, the child’s mother, in a termination proceeding after he had already advocated for the best interests of the child as the child’s GAL in the earlier dependency proceeding. 346 Ill. Dec. 634 (2d Dist. 2010). The court reasoned that the attorney would be influenced in his representation of the mother by his earlier advocacy on behalf of the child, preventing conflict-free, zealous representation. *Id.* Its observation in distinguishing *In re S.G.* and *In re D.B.* is instructive: “[i]t is what is not in the record, or what is incapable of being reflected by the record, that prompts us to apply the *per se* conflict-of-interest rule in this case. Our concern is with the opinions [the attorney] had already formulated about the ‘best interests of the children’ when representing them and how those opinions might adversely impact his ability to later effectively represent [the mother] with ‘undivided loyalty.’” *Id.* at 197-98.

analogy between delinquency and criminal proceedings, there is no principled reason for not also recognizing *per se* conflicts in the delinquency context.

The three scenarios recognized as creating *per se* conflicts for criminal defense counsel all involve obstacles to an attorney providing zealous and conflict-free representation. This Court should recognize that an attorney acting as both a GAL and defense counsel creates yet another clear example of a *per se* conflict. This situation creates a conflict because a GAL and a defense attorney in a delinquency proceeding are tasked with different objectives and responsibilities for the same child. This dual assignment is like any other conflict which arises from the attorney's representation of two individuals or entities with possibly competing or different interests.⁷ Here, the attorney is asked to represent two potentially opposing viewpoints, the expressed interest of the child which he is professionally obligated to follow and the best interests of the child which the court has also asked him to discern and advocate, whether or not these views are compatible. As a zealous advocate the attorney must do everything he can to serve the client's interest in acquittal; as a GAL the attorney must consider whether accepting the consequences of adjudication and placement or supervision to obtain services is in his client's *best interests*. The attorney's ethical obligation to his client is ineluctably compromised.

⁷ A *per se* conflict is one in which "facts about a defense attorney's status...engender, by themselves, a disabling conflict." (emphasis in original). *Morales*, 209 Ill. 2d at 346, quoting *People v. Spreitzer*, 123 Ill. 2d 1, 14 (1988). When a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a *per se* conflict arises. *People v. Janes*, 168 Ill. 2d 382, 387 (1995). This is true whether that person or entity is the Court or society's interest in rehabilitation or safety.

Indeed, an examination of the *per se* conflict rule reveals that it is intended to avoid exactly the type of situation created when an attorney acts in a hybrid role. This Court has recognized that a GAL “functions as the ‘eyes and ears of the court’ and not as the ward’s attorney.” *In re Mark W.*, 228 Ill. 2d 365, 374 (2008). The GAL’s role “is not to advocate for what the ward wants but, instead, to make a recommendation to the court as to what is in the ward’s best interests.” *Id.* This court has held that representation is lacking and a conflict exists when counsel “is in a duplicitous position where his full talents – as a vigorous advocate having the single aim of acquittal by all means fair and honorable – are hobbled or fettered or restrained by commitments to others.” *Stoval*, 40 Ill. 2d at 112. In the instant case, Mr. Novak’s advocacy on behalf of Austin was undoubtedly ‘hobbled’ by his duties to report his subjective opinion about Austin’s best interests to the court.

B. Counsel Serving as Both Attorney and Guardian Ad Litem May Forego Certain Essential Defense Obligations, Leading to Forfeiture of the Juvenile’s Constitutional and Statutory Rights as Well as Other Adverse Outcomes.

An attorney serving as GAL will likely fail to subject the prosecution’s case to the full-blown “crucible of meaningful adversarial testing,” constituting ineffective assistance of counsel, *United States v. Cronin*, 466 U.S. 648, 656 (1984), and establishing a *per se* conflict. When an attorney soft-pedals a child’s defense, he is no longer fulfilling his role as counsel as guaranteed the child by the Fourteenth Amendment. *See id.*; *Strickland*, 466 U.S. at 687.

Competent juvenile defense counsel, like criminal defense counsel, must help juvenile defendants protect their constitutional rights, avoid self-incrimination, and mount an adequate defense. Judith B. Jones, U. S. Dep’t of Justice Office of Juvenile

Justice & Delinquency Prevention, *Juvenile Justice Bulletin* 2 (June 2004). Yet the GAL views his role as non-adversarial, subordinating accurate fact-finding to the attorney's perception of the child's best interests and need for treatment. Such best interests advocacy frequently results in the relinquishment of the youth's constitutional rights, and creates an enhanced risk of wrongful convictions. See Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 289 (2007); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 Geo. J. on Poverty L. & Pol'y 543, 555-56 (2010). See also Ellen Marrus, *Effective Assistance of Counsel In The Wonderland of Kiddie Court – Why The Queen of Hearts Trumps Strickland*, 39 Crim. L. Bull. 393, 393-95, 417-24 (2003) (when defense attorneys act in concert with the prosecutor or other court actors by relying on their presumption that adjudication is necessary to obtain needed services, they elevate this goal over their obligation to provide their client with zealous advocacy).

The National Juvenile Defender Center (NJDC), through its assessment of juvenile defense counsel in states across the country, has highlighted examples of how ineffective performance, driven by best interests advocacy, can create a *per se* conflict. See Nat'l Juvenile Defender Ctr., *Assessments*, <http://www.njdc.info/assessments.php> (last visited Mar. 22, 2011). See also Patricia Puritz et al., ABA Juvenile Justice Ctr., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995). The assessments establish that where attorneys fail to conduct client-directed advocacy, serious harms occur to the child as a result of this

deficient performance.⁸ Deficient performance resulting from best interests advocacy occurs at every stage of the delinquency proceeding, leading to direct adverse consequences for the client and further demonstrating the need for a *per se* conflict rule in such cases.

1. When Counsel Simultaneously Serves as Guardian *Ad Litem*, he is Less Likely to Conduct an Investigation, Identify Witnesses, and Prepare for Trial.

Counsel plays a critical role in ensuring that innocent persons are not wrongly convicted. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). Assigning a best interests advocacy role to the juvenile's lawyer strips the juvenile of their constitutionally mandated advocate. Without defense counsel to argue their innocence, juveniles face an increased risk of punishment. In the adult criminal context, the Supreme Court has recognized that counsel must investigate and prepare every case, not only to exonerate, but also to protect the rights of the accused.

⁸ National and state assessments of juvenile defender systems reveal that defense attorneys operating under a best interests model falsely assume that acting as a "team player" and cooperating with the prosecutor, judge, or probation officer will result in the best outcomes for the juvenile. *See, e.g.*, Children and Family Justice Ctr. & Nat'l Juvenile Defender Ctr., *Illinois: An Assessment of Access to Counsel and Quality of Representation in Youth Court Proceedings* 63 (2007), available at http://www.njdc.info/pdf/illinois_assessment.pdf (defense counsel acting in the best interests of the child accept that their role is not adversarial, but instead requires cooperation with the prosecutor to do what is best for the minor); ABA Juvenile Justice Ctr. & Nat'l Juvenile Defender Ctr., et al., *Ohio - Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 26 (2003), available at http://www.njdc.info/pdf/Ohio_Assessment.pdf (defense counsel advocated for juvenile's incarceration for treatment purposes in accordance with the probation officer's recommendation, despite juvenile's desire to return home). The assessments further demonstrate that it is not uncommon for an attorney acting in the presumed best interests of a juvenile to waive probable cause at a detention hearing based on counsel's personal opinion that a juvenile will experience better outcomes in an out-of-home placement than at home. *See also* Majd & Puritz, *supra*, at 554.

See Strickland, 466 U.S. at 691. Any failure to investigate and file appropriate motions may constitute ineffective assistance of counsel. *See e.g., Kimmelman v. Morrison*, 477 U.S. 365 (1986) (failure to investigate and present Fourth Amendment claim was constitutionally ineffective). Where that risk of flawed or lax investigation is heightened by counsel serving as GAL as well as counsel, the risk further underscores the need to recognize such dual appointment as a *per se* conflict.

As illustrated by the NJDC assessments, best interests advocates often neglect to adequately prepare for trial. They may believe that their client will be best served by accepting the consequences of a juvenile adjudication to obtain services and treatment, therefore obviating their obligation to research and investigate their clients' cases. *See Barbara Fedders, Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771, 794-95 (2010). *See also ABA Juvenile Justice Ctr. & Mid-Atl. Juvenile Defender Ctr., Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 31 (2003), available at <http://www.njdc.info/pdf/mdreport.pdf>. Indeed, it is critical for defense attorneys to investigate cases before recommending that a client plead guilty or take a case to trial. It is only through investigation that lawyers can discover the facts needed to acquit their clients, regardless of whether they are guilty or innocent. Drizin & Luloff, *supra*, at 319. No one other than counsel for the juvenile has the duty to argue for the juvenile's innocence. Counsel's failure to fulfill this duty is perhaps the clearest example of *per se* conflict in counsel's representation. *See, e.g., Quartararo v. Fogg*, 849 F.2d 1467 (2d Cir. 1988) (finding counsel ineffective for failing to argue the defendant's claim of innocence to the jury); *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir.

1997) (finding counsel ineffective for failing to put on evidence in a case where the defendant claimed innocence); *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985) (finding counsel ineffective for failure to contact a potential alibi witness). *See also Patterson v. LeMaster*, 21 P.3d 1032 (N.M. 2001); *In re K.J.O.*, 27 S.W.3d 340 (Tex. Ct. App. 2000).

In addition to ignoring their obligation to investigate in support of their client's claim of innocence, GAL's may also fail to hold the state to its statutory burden of proving the elements of the offense beyond a reasonable doubt. *See Drizin & Luloff, supra*, at 292. No one, adult or juvenile, shall lose his liberty "unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt" beyond a reasonable doubt. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *In re Winship*, 397 U.S. 358 (1970). Failing to hold the prosecution to its burden of proof in order to secure services for the juvenile strips the juvenile of his constitutionally guaranteed right to effective assistance of counsel establishing a *per se* conflict.

2. When Counsel Simultaneously Serves as Guardian Ad Litem, he is Less Likely to Cross-Examine Witnesses, Thereby Forfeiting his Client's Right to Confrontation.

The constitutional right to confront witnesses often goes unprotected when an attorney for a juvenile advocates under the best interests model. *See, e.g.*, Nat'l Juvenile Defender Ctr., *Juvenile Legal Defense: A Report on Access to Counsel and Quality of Representation for Children in Nebraska 55* (2009), *available at* http://www.njdc.info/pdf/nebraska_assessment.pdf (juvenile felt that her lawyer did not argue for the things she wanted after a witness for the prosecution testified but her lawyer did not ask the witness any questions). Because a GAL is focused on what is best for the client rather than the client's interest in asserting his innocence, the GAL may desire an

adjudication and therefore neglect to adequately prepare the case. The lawyer may forgo cross-examination and impeachment of prosecution witnesses, believing that vigorous examination might prevent the court from reaching disposition and ordering services the client “needs.” Such conduct violates professional standards where failure to examine a witness will prejudice the client’s interest. *See IJA/ABA Juvenile Justice Standards Relating to Counsel for Private Parties* § 7.8(a) (1996). When the attorney does not take the time to ascertain the details of the event in question, the attorney will be ill-prepared to adequately question the witnesses. *See generally* 134 Ill. 2d R.1.1(a) (“Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.”). Neglecting to conduct a cross examination of the prosecution’s witnesses, because an attorney is acting as a GAL, is a constitutional violation of the juvenile’s right to confront their accusers. This risk is inherent when defense counsel acts as a GAL and further establishes the need to recognize dual appointment as a *per se* conflict.

3. When Counsel Simultaneously Serves As Guardian *Ad Litem*, he may be Required to Disclose Client Confidences and Otherwise Privileged Communications.

Because best interests representation necessarily requires that client confidences be revealed to the court, in direct contrast to the traditional, client-directed representation that ensures privileged communications, the attorney-client relationship is severely compromised. Revealing client confidences to the court has been recognized as ineffective assistance of counsel and should constitute a *per se* conflict in cases of dual representation. *See, e.g., Blanco v. Singletary*, 943 F.2d 1477, 1505 (11th Cir. 1991) (finding ineffective assistance of counsel when counsel revealed confidential, damaging

information to the trial judge). *See also* 134 Ill. 2d. R. 1.6(a) (“a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.”). When the defense attorney uses information a juvenile shares in confidence against the juvenile during the court proceeding, as the best interests model dictates, the attorney breaches the attorney-client relationship. Such disclosures of confidential communications also foster distrust and confuse the juvenile, who now sees his advocate working against him. *See Nat’l Juvenile Defender Ctr., North Carolina: An Assessment of Access to Counsel and Quality of Representation in Youth Court Proceedings* 39 (2003), available at <http://www.njdc.info/pdf/ncreport.pdf> (As a result of this confusion about counsel’s role, many juveniles did not appear to be clear about who was representing them or working “against” them. Some attorneys were observed taking a “best interests” approach by, for example, agreeing that detention might work as a “wake up call” for certain youth.). *See also* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 *Crime & Just.* 81, 136-37 (2000); Emily Buss, “You’re My What?” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 *Fordham L. Rev.* 1699, 1713-16 (1996). As one of the most inviolate tenets of the attorney-client relationship, the disclosure of client confidences by a GAL is evidence of an insurmountable *per se* conflict that cannot be sanctioned.

4. When Counsel Simultaneously Serves as Guardian *Ad Litem*, he is less likely to File Motions.

Best interests advocacy may result in the failure to file pre-trial, trial, and post-trial motions on behalf of a juvenile client. Such failure can have serious adverse outcomes for the juvenile, including the admission of damaging evidence that may have

been illegally obtained and impairing the client's ability to defend against the allegations. Motions are essential to ensuring fairness and due process in the proceeding. In addition to challenging illegally obtained evidence, motions serve as a check against the admission of illegal hearsay (which inhibits the right to confrontation), or other evidence which may be detrimental to the client's interests. *See* Elizabeth Calvin, *et al.*, *Juvenile Defender Delinquency Notebook: Advocacy and Training Guide*, 193, 206 (2d ed. 2006) (Filing motions to suppress illegally obtained evidence in advance of going to trial is a vital role of defense counsel to protect the rights of the innocent.). *See also* *People v. Moore*, 279 Ill. App. 3d 152 (5th Dist. 1996).

In particular, filing motions to suppress juvenile confessions is critical given the susceptibility of juvenile defendants to make false confessions. *See* Drizin & Luloff, *supra*, at 289. *See also* Joshua A. Tepfer, Laura H. Nirider & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev 904 (2010) (discussing a recent empirical study of proven wrongful convictions of youth which found that juveniles are twice as likely as their adult counterparts to confess to crimes they did not commit.). *See, e.g.*, ABA Juvenile Justice Ctr. & Juvenile Law Ctr., *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 5 (2003), available at <http://www.njdc.info/pdf/pareport.pdf> (stating that the failure of counsel to file motions on behalf of their clients is deficient representation).⁹

⁹ *In re A.R.*, 295 Ill. App. 3d 527 (1st Dist. 1998) (finding ineffective assistance of counsel where defense counsel did not challenge the legality of a juvenile's arrest or the voluntariness of his confession).

Even before the most recent research, the United States Supreme Court itself recognized that fear and panic might lead a juvenile to confess to a crime he did not commit, making the assistance of zealous and conflict-free counsel even more important. *See Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (“[W]e cannot believe that a lad of tender years is a match for the police in [a situation where the youth is questioned from midnight to 5 a.m.]. He needs counsel and support if he is not to become the victim first of fear, then of panic.”). Courts continue to acknowledge the vulnerability of youth as well as the coercion that is often present during custodial interrogations. *See, e.g., A.M. v. Butler*, 360 F.3d 787, 797 (7th Cir. 2004) (noting that application of a “reasonable juvenile” standard “is consistent with the inquiry in determining whether a confession or a waiver of a constitutional right was voluntary”); *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) (stating that “there is mounting empirical evidence that these pressures [associated with custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed”) (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 906-07 (2004)); Saul Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3 (2010) (noting that juveniles’ developmental differences put them at special risk for false confessions in the interrogation room); *Gault*, 387 U.S. at 52 (stating that “authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of ‘confessions’ by children”). The risk that a GAL will fail to file key motions in opposition to the delinquency allegations, leaving the juvenile with little or no defense to the charges, is further evidence of a *per se* conflict in dual appointment.

5. When Counsel Simultaneously Serves as Guardian *Ad Litem*, he is Less Likely to Adequately Advise a Juvenile About Plea Offers or Properly Counsel him Regarding the Entry of an Admission.

Although juvenile court culture may encourage the quick resolution of cases through pleas in order to provide services to the juvenile, best interests representation may lead to an overreliance on pleas. When counsel acts as a GAL, he may override a juvenile client's expressed wishes with regard to the desired outcome of the case or may fail to objectively advise a client about his options. This is compounded by the fact that guilty pleas are often encouraged by judges and prosecutors to avoid the adversarial nature of litigation, including the filing of discovery and pretrial motions, and to avoid lengthy trials. *See* Andrew Hessick & Reshma Saujani, *Plea Bargaining And Convicting The Innocent: The Role Of The Prosecutor, The Defense Counsel, And The Judge*, 16 *BYU J. Pub. L.* 189, 211-14 (2002). *See also* Drizin & Luloff, *supra*, at 292. Misadvising a client regarding plea options because counsel is focused on the client's perceived best interests is another example of how dual representation may constitute a *per se* conflict.

Furthermore, overreliance on pleas may stem from counsel's failure to appropriately investigate the case, which, as discussed above, can result from counsel acting as both GAL and counsel. A thorough investigation provides the defense attorney ammunition when entering plea negotiations with the prosecutor. When counsel deems the investigation irrelevant, it is unsurprising that false guilty pleas result, as juvenile clients may be encouraged to plead guilty out of a sense of hopelessness. Drizin & Luloff, *supra*, at 292. The GAL's preconceived views about a client's guilt, or preconceived view that the child's need for services trumps consideration of his actual

guilt or innocence, exacerbates this risk. *Id.* at 293; Hessick & Saujani, *supra*, at 213. Uncounseled guilty pleas or the proffer of pleas based on what the GAL thinks is in the child's best interests can be subject to scrutiny; courts are increasingly rejecting pleas on appeal where the plea was entered without counseling the client about both the direct and collateral consequences of a delinquency adjudication, as well as alternative options to the plea. *See State v. S.M.*, 996 P.2d 1111, 1117-18 (Wash. Ct. App. 2000) (finding ineffective assistance of counsel for failure to counsel the child about the implications of a guilty plea to a sex offense); *State v. A.N.J.*, 225 P.3d 956, 966-67 (Wash. 2010) (finding ineffective assistance of counsel for failing to meet with the client to meaningfully investigate the case, and misinforming the client of the collateral consequences of the plea). *See generally* A.B.A. Standards for Criminal Justice Prosecution Function and Defense Function 4-41(a) (1993).

6. When Counsel Simultaneously Serves as Guardian *Ad Litem*, he is Less Likely to Advocate for the Least Restrictive Placement of the Child.

When best interests representation leads to the juvenile's placement in a more restrictive setting than necessary, such advocacy breaches the attorney's obligation to argue for the least restrictive placement. Several state assessments revealed that in some cases the defense attorney advocating under a best interests approach would ask for a more restrictive placement than that recommended by the prosecutor or probation. *See e.g.*, Nat'l Juvenile Defender Ctr., *South Carolina: Juvenile Indigent Defense - A Report on Access to Counsel and Quality of Representation in Delinquency Proceedings* 21 (2010), available at http://www.njdc.info/pdf/south_carolina_assessment.pdf (describing an incident where a defender repeatedly asked for more restrictive placements than the

Department of Juvenile Justice or the solicitor recommended); ABA Juvenile Justice Ctr., *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 40 (2003), available at <http://www.njdc.info/pdf/mtreport.pdf>. (A 15-year-old described a situation where the judge stated that he did not think the juvenile needed to be in detention, but the juvenile's defense attorney raised the probation officer's recommendation causing the judge to change his mind and commit the juvenile to detention); Nat'l Juvenile Defender Ctr., *Mississippi: An Assessment of Access to Counsel and Quality of Representation in Youth Court Proceedings* 42 (2007), available at http://www.njdc.info/pdf/mississippi_assessment.pdf (defense counsel informed the court in a post-adjudication hearing that detention would be in her client's best interests – despite the fact that her client asked the court to explore other placement options and stated she did not want to go to detention). In criminal cases, failure to present mitigating evidence has routinely been held to be ineffective assistance of counsel.¹⁰ Given the increasingly punitive character of juvenile dispositions, counsel for the juvenile must, at a minimum, present mitigating evidence in support of the least restrictive option at disposition. An attorney simultaneously acting as GAL is likely to directly advocate for a more restrictive placement based on what he perceives to be the best interests of the juvenile client, ignoring both the wishes of the client and his professional obligation to seek the least restrictive alternative. The increased likelihood of such deficient performance demonstrates the need for the application of a *per se* conflict rule.

¹⁰ See *People v. Morgan*, 187 Ill. 2d 500, 545 (2007) (holding ineffective assistance of counsel where the defense attorney failed to investigate and present mitigating medical and mental health evidence); *People v. Thompson*, 191 Ill. 2d 438, 469-70 (2000) (holding ineffective assistance of counsel where the defense attorney's failure to present mitigating evidence was not a strategic decision, but rather a failure to properly prepare).

III. AN ADJUDICATION OF DELINQUENCY MAY RESULT IN COLLATERAL CONSEQUENCES THAT EXTEND BEYOND INCARCERATION AND INTO ADULTHOOD, UNDERSCORING THE NEED FOR ZEALOUS REPRESENTATION.

The importance of establishing a *per se* conflict rule to prevent dual appointment and provide children with zealous and conflict-free representation in delinquency hearings is amplified by the increasingly serious and far-reaching consequences that can follow from a juvenile adjudication. These consequences may extend well beyond the actual sentences imposed on convicted delinquents, encompassing a broad range of collateral consequences relating to education, employment, housing, public benefits, and other civil liberties. All of these consequences can substantially reduce a juvenile's ability to reintegrate into society and transition successfully to adulthood. *See generally* Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings, Part II*, 15 Crim. Just., 41 (2000); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 Nev. L. J. 1111, 1115 (2006).

For children adjudicated delinquent in Illinois, a growing list of underlying crimes now includes the obligation that their names be placed on public lists of offenders. Since 1999, juveniles convicted of certain sex crimes have been obligated to place their names on a public register of offenders, in some instances for life. 730 ILCS §§ 150/3-5 & 150/7. More recently, other existing registration requirements applicable to juveniles adjudicated delinquent for violent offenses against other youth have been extended to encompass a broad range of crimes, including aggravated battery. *See* P.A. 96-1294 § 5, eff. July 26, 2010, amending 730 ILCS § 154/4(b)(1). Under this statute, a child found

delinquent for nothing more serious than fighting another youth in a public school would be subject to a mandatory registration requirement of 10 years to life, upon reaching the age of 17. *See People v. Ojeda*, 397 Ill. App. 3d 285 (2d Dist. 2009) (battery occurring in a public high school deemed aggravated under criminal statute applicable to battery committed on “public property”); 730 ILCS §§ 154/5 & 154/40 (juvenile committing aggravated battery against another youth subject to mandatory registration). The placement of an individual’s name on a registry may itself lead to other adverse consequences, including the loss of employment, housing, or social supports. *See generally* Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. Contemp. Crim. Just. 67 (2005) (describing both tangible and intangible consequences of registration requirement).

Juvenile adjudications may also interfere significantly with a youth’s ability to pursue his or her education. In the arena of secondary education, the Illinois School Code directs school boards to work with local law enforcement agencies to develop reciprocal reporting systems between schools and local law enforcement agencies regarding criminal offenses committed by students. 105 ILCS § 5/10-20.14(b). The School Code also obligates local law enforcement to report to the principal of any public school whenever a child is detained in connection with proceedings under the Juvenile Court Act charging a criminal offense. 105 ILCS § 5/22-20. *See also* 705 ILCS § 405/1-7 (allowing school officials access to juvenile law enforcement records otherwise treated as confidential). In higher education, an increasing number of college and financial aid applications inquire into juvenile adjudications, *Shepherd, supra*, at 42, and certain drug offenses can make an individual ineligible for financial aid. Higher Education Act, Pub.

L. No. 89-329, 79 Stat. 1219 (1965). In all of these ways, mandated disclosure of information about juvenile convictions may cause not only the less tangible consequences associated with public stigmatization, but also the actual loss of educational opportunities.

An adjudication of delinquency may also prompt the loss of housing, employment, public benefits, and privacy rights. With regard to housing, federal law explicitly authorizes public housing authorities to evict tenants whose children engage in delinquent behavior relating to illegal drugs, whether such activity occurs on or off the premises. *See* 42 U.S.C. § 1437d(1)(6); *Dep't of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002). Federal law also bars any family, including an individual subject to a lifetime sex offender registration requirement, from living in any federally subsidized housing. *See* 42 U.S.C § 13663. Similar provisions of local housing law may extend beyond drug and sex offenses. For example, the city of Chicago has enacted an ordinance on “drug and gang houses, houses of prostitution and other disorderly houses” that is used routinely to impose fines, eviction orders, or even forfeiture of private property based on criminal or delinquent activity of occupants. *See* Municipal Code of Chicago, Title 8, Ch. 4, § 090 (8-4-090).

In the area of employment, army regulations provide that a juvenile conviction may render an applicant ineligible for enlistment. *See* Army Reg. 601-210(4-24). While each division of the military has distinct regulations governing the use of juvenile delinquency and criminal records, no division explicitly prohibits the use of such records as a basis for disqualifying applicants for enlistment. While a juvenile may in some circumstances request a moral waiver to enlist in the army, certain enumerated offenses

render an applicant ineligible for waiver. *Id.* Adjudications of delinquency may also result in ineligibility for public benefits, including Temporary Assistance for Needy Families (TANF) and food stamps. Federal Welfare Reform Law, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, as amended by the Balanced Budget Act of 1987, Pub. L. No. 105-33, 111 Stat. 251 (enacting and amending 21 U.S.C. § 862a). With regard to privacy rights, juvenile sex offenders must submit to mandatory HIV testing and face the prospect of court-ordered disclosure of test results to any individual or entity deemed appropriate in the discretion of the court. 750 ILCS § 405/5-710(9).

Finally, a growing body of social science literature demonstrates that the incarceration of children following juvenile convictions may actually hinder the minor's prospects of rehabilitation and increase the likelihood of recidivist behavior. Studies indicate that while incarceration may deter a small proportion of children from engaging in further criminal activity, juvenile incarceration is strongly linked to recidivism. Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, at 4, 6 (2006), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf. The consequences of incarcerating a child “may include negative changes in attitude toward antisocial behavior, affiliation with antisocial peers, and identification with deviancy.” *Id.* at 5, quoting T. J. Dishion, J. McCord, & F. Pouline, *When Interventions Harm: Peer Groups and Problem Behavior*, 54(9) *Am. Psychol.* 755764 (1999). These consequences contribute to the difficulties faced by


children seeking to reintegrate into their communities following incarceration, and thus in turn to the burdens and risks carried by those communities.

Although these collateral consequences may stem from *any* adjudication of delinquency and not solely those where defense attorneys' advocacy is compromised by serving simultaneously as a GAL, they underscore the importance of providing children with counsel who are prepared to provide a vigorous and aggressive defense to proposed interventions that may have lifelong adverse consequences. From social stigma to registration, to educational gaps and removal from the home, zealous, conflict-free representation plays a central role in minimizing the harmful direct and collateral consequences that result from delinquency adjudications.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to reverse the Appellate Court's decision and find a *per se* conflict in juvenile delinquency representation when an attorney acts in a hybrid role as both defense attorney and guardian *ad litem*.

Respectfully submitted,


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