STATE OF FLORIDA
DISTRICT COURT OF APPEAL
THIRD DISTRICT

IN THE INTEREST OF

R.L-R., A Minor,

CASE NO.: 3D12-1897
CONSOLIDATED: 3D12-1892

LOWER TRIBUNAL NO.:
08-15104

# RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

This petition challenges an 18-page court order from the Dependency Division of the Circuit Court of the 11th Judicial Circuit on the applicability of the attorney-client privilege. The order addresses the question of whether the communication from a youth to his attorneys *ad litem*, disclosing his whereabouts, falls within the scope of the attorney-client privilege and, if so whether disclosure may be compelled anyway if the State demands it. The lower court properly concluded that the information counsel obtained squarely falls under the attorney-client privilege doctrine and disclosure could not be compelled in this case because (a) the youth disclosed his location to his counsel only on condition of strict confidentiality, (b) the disclosure was made within the context of the client-lawyer relationship, (c) the disclosure would not have been made without counsel's assurances of the inviolability of the privilege, and (d) none of the established exceptions to the attorney-client privilege under Florida law are satisfied.

## STATEMENT OF THE FACTS

The youth, R.L-R. ("R.L.") was 12 years old when he came into care in February 2008, Order at R86, and has been represented by counsel since April 2008. Appendix To The Guardian *Ad Litem* Program's Petition for Writ of Certiorari 12-2, hereinafter "GAL App. __ - ___". In four years he has been in as

many as 49 placements and has had inconsistent school placement and attendance. R1-R46.

Today he is 16 years old and, as the lower court found, "it is undeniable that he is extremely intelligent and articulate and has consistently been able – and more than willing – to coherently and eloquently articulate his concerns and desires. He understands the nature of the proceedings; the role of DCF and the Court; and the overall objective of his dependency case." Order at R87.

On June 1, 2012, R.L. was ordered to a placement that he refused to go to. Order at R87. He had complained of the quality and conditions there many times before. Order at R87. He then went on runaway status. GAL App. 14-1. Trusting no one else in the court system, R.L. shared general contact and location information with his counsel during a conversation about his dependency case. Order at R88. R.L. provided this information to his counsel only after he specifically inquired whether it would remain confidential and after he specifically instructed counsel not to reveal it and received assurances from counsel that they would not. GAL App. 11-46. R.L. provided the information only because his counsel confirmed it would not be shared with anyone else. GAL App. 11-46.

R.L. did not provide this information to the Guardian Program.[1] R.L. did not provide this information to a caseworker or to any designee or employee of the Department.[2]

On June 12, 2012, counsel for the youth was questioned by the court about his location and counsel refused to give the specific location citing the attorney-client privilege. Order at R88. The Department then filed a motion to compel counsel to reveal the location information which resulted in the lower court's order. Order at R102.

Respondent confirms the factual presentation from the lower court established in the lower court order in pages 85 to 102 of the Record.

## SUMMARY OF THE ARGUMENT

This is a case about a fundamental tenet of the client-lawyer relationship – the lawyer's duty to keep the client's confidences. This duty is buttressed by the attorney-client privilege against compelled disclosure, which prevents a lawyer from being forced to violate the duty of confidentiality to the client by being made

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[1] On July 19, 2012, the Guardian Program filed a Petition for Writ of Certiorari despite only being appointed on the matter on May 31, 2012. GAL App. 12-1. The Guardian Petition alleges they never had a guardian *ad litem* speak to or observe R.L. in any setting. GAL App. 12-4). Yet the Program filed a brief asserting his "best interest."

[2] On July 19, 2012, the Department filed an appeal, which this Court correctly transformed into a Petition for Writ of Certiorari and joined with the Guardian Program Petition.

to testify in a court about the client's confidences. Driving the privilege is the axiom that a client must be able to rely on the confidentiality of his communications with his lawyer or he will not invest in his lawyer the information the lawyer needs to adequately represent that client. It is that understanding of the lawyer's unique role and position that gives a client the confidence to trust the lawyer with confidential information, which he would not entrust to anyone else.

This is true even when the client is 16 years old. No Florida law or court opinion has ever stood to the contrary. There is no precedent for piercing the privilege in the case of a foster youth who has run away. There is no legitimate state interest in preventing a youth from having attorney-client privileged communications with his lawyer.

This case arose precisely because that attorney-client bond was respected by attorney, client and court. The State, through its Department of Children and Families ("the Department") and through its volunteer Guardian *Ad Litem* Program ("Guardian Program"), urged the court below to violate the privilege by manufacturing a standoff between two significant areas of law which neither challenge each other, nor have ever been weighed against each other in a Florida court – the Florida dependency laws and the Florida Evidentiary Code affirming the attorney-client privilege.

Resisting this unfounded request to compel disclosure, the trial court upheld two key principles: (1) Confidentiality helps a lawyer provide quality representation; if a lawyer cannot guarantee an attorney-client privileged communication for the most essential facts for which their clients request it, no youth client will confide in their lawyers; and (2) A youth who is provided independent legal representation is entitled to the same rights and privileges associated with legal representation as would be assured an adult.

The lawyer's challenge of managing confidential client information when others in the juvenile dependency system are pursuing it prompted this case. Because a foster youth trusted counsel's promise of a privileged communication, he invested information in his lawyer about his location while on runaway. Were it not for that promise of confidentiality, the communication would not have occurred. Order at R91. Neither the Department nor the Guardian Program dispute that. The information was given in confidence by a youth who trusted the privilege and his lawyers when he elected to confide in them information he would not share with anyone else, including the Department and the Guardian Program. This scenario is exactly why the attorney-client privilege exists. *See* Order at R88. Without the privilege's protection, the youth would have communicated to no-one when he ran away and the parties would not be here today. No one would know where R.L. is.

The lower court protected the bedrock of the relationship between attorney and client that is the promise of complete confidentiality enshrined in the privilege and confirmed that this protection is due even where the client is a 16-year-old foster youth dependent on the state. In doing so, the court looked to the attorney-client privilege as codified in Florida's Evidence Code, Fla. Stat. § 90.502(2), the lawyer's duty of confidentiality as set forth in the Florida Bar Rules, Rule 4-1.6 (c)(1), Rules Regulating the Florida Bar, the case law interpreting these laws, and his experience with the two lawyers representing R.L. in this case over the last four years. The trial court also paid great deference to the specific protections of Chapter 39, in which the State's dependency laws are codified, as well as to the rule of law embodied in the framework of the Florida statutes, and correctly found no legal basis to depart from the essential requirements of the attorney-client privilege in this case.

The path set by the court below neither thwarts justice, nor violates the essential requirements of law. Indeed, it is the only resolution of the Department's motion below that satisfies the essential requirements of Florida law. As such it is not the proper subject for a Writ of Certiorari before this Court. The lower court order should be upheld and Petitioners' Writs denied.

## STANDARD OF REVIEW

A petition for certiorari is the proper vehicle by which to review a trial order regarding the attorney-client privilege. *Jenney v. Airdata Wiman, Inc.*, 846 So. 2d 664, 666-667 (Fla. 2d DCA 2003); *see also Robichaud v. Kennedy*, 711 So. 2d 186, 187 (Fla. 2d DCA 1998) ("Certiorari is the appropriate avenue to challenge a trial court order directing the disclosure of communications presumptively covered by the attorney client privilege.").

In contrast to the final judgment standards of *de novo* review, for questions of law, and abuse of discretion, for questions of fact, this court is prevented from granting the extraordinary writ of certiorari and disturbing the trial court's order unless the order constitutes a departure from the "essential requirements of law." *Sheppard & White, P.A. v. City of Jacksonville*, 751 So. 2d 731, 733 (Fla. 1st DCA 2000); *Nat'l Union Fire Ins. Co. v. Fla. Constr., Commerce & Indus. Self Insurers Fund*, 720 So. 2d 535, 535-36 (Fla. 2d DCA 1998). Thus, to obtain a writ of certiorari in Florida, petitioner is required to "demonstrate that the trial court departed from the essential requirements of law, resulting in irreparable harm that cannot be adequately remedied on final appeal." *Kirlin v. Green.* 955 So. 2d 28, 29 (Fla. 3d DCA 2007) (citing to *Belair v. Drew*, 770 So. 2d 1164 (Fla. 2000)).

It is of particular relevance here that a writ is not earned or appropriate where a court merely interprets a law incorrectly. The standard is only met where

the trial court fails to apply the correct law. *Ivey v. Allstate Insurance Co.,* 774 So. 2d 679 (Fla. 2000) (citing to *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995)).

If and only if the threshold requirement of irreparable harm is met, will the appellate court engage in an analysis of whether the non-final order departed from the essential requirements of the law. *In re G.D.* 870 So. 2d 235, 236 (Fla. 2d DCA 2004). When review of a trial court order is challenged, an irreparable harm is only shown if there is a material injury. *See Nader v. Florida Dept. of Highway Safety and Motor Vehicles*, 87 So. 3d 712 (Fla. 2012) (requiring: "(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm)"; and (2) a "departure from the essential requirements of the law."); *Belair v. Drew*, 770 So. 2d 1164, 1166 (Fla. 2000); *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) (to grant the petition, the court must find not only that the trial court departed from the essential requirements of the law, but also that the departure resulted in a "miscarriage of justice"); *Samuel v. Shands Teaching Hosp. & Clinics, Inc.*, 984 So. 2d 627, 628 (Fla. 1st DCA 2008).

It is significant here that the Department, even after being notified by this Court's July 24, 2012, order that their filing would be treated as a Petition for Writ of Certiorari, failed to aver a material injury or irreparable harm. By failing to allege material injury in its brief, the Department waives the argument. *Duest v.*

*Dugger*, 555 So. 2d 849 (Fla. 1990)(finding that failure to fully brief an argument waives it); *Coolen v. State*, 696 So. 2d 738 (Fla. 1997); *Wyatt v. State*, 71 So. 3d 86 (Fla. 2011).

## ARGUMENT

### I. THE LOWER COURT ORDER SATISFIES THE ESSENTIAL REQUIREMENTS OF LAW BECAUSE IT PROTECTS THE PRIVILEGED INFORMATION A YOUTH PROVIDED HIS ATTORNEYS.

The lower court's order preserves the most essential core of the practice of law by protecting the privilege which allows attorneys to represent clients, including youthful clients. The Department and the Guardian Program simply disagree with the court because they want access to any information that will help them fulfill their statutory obligation. But this information falls outside their statutory purview in the form in which it was provided to counsel. The client gave this information to his lawyers only because of the privilege and only to assist them in representing him. Order at R91. The lower court respected Florida's clearly established law by respecting and enforcing the attorney-client privilege.

Petitioners argue that Judge Hanzman erred when he refused to compel the youth's attorneys from disclosing his confidential location but fail to point to either (a) one case or statute declaring that a client's location can *never* be considered privileged or (b) one established exception to the attorney-client privilege that

would compel disclosure of R.L.'s location. Instead, Petitioners rely generally on "the dictates of Chapter 39" as supporting their position that there can be no privilege assertion here because failure to force the attorneys to disclose R.L.'s location frustrates the purpose of Chapter 39. Petition of the Department of Children and Families 16-23, hereinafter "Dep't Pet. __ -__". They further argue that the mandate to protect R.L. supersedes the claim of privilege because the State's compelling interest to protect children is paramount Dep't Pet. 23-31. In essence, both arguments conflate to the unsupported assertion that there is an unwritten exception to the attorney-client privilege whenever the Department demands the location of a dependent youth because they have no other method of communicating with the youth themselves. *See* Fla. Stat. § 90.502(4)(listing no such exception).

There is much to glean from what Petitioners do not argue in their filings. Though Petitioners abstain from describing the communication at issue here as "privileged", they do not dispute that it meets the statutory definition of privilege under Florida law or that R.L. intended his communication to be kept in confidence by his attorneys. They do not argue that there is a special set of attorney-client privilege rules established for youth. They do not dispute that there is no self-harm exception to the attorney-client privilege recognized under Florida law. As the lower court pointed out, they neither contend R.L. lacks legal capacity to assert the

privilege, nor that it was not communication "necessary to obtain legal advice." Order at R85. Petitioners do not address the applicable law head-on because it does not favor them.

The order of the court below answered directly the question of whether a client's location can ever be privileged – answering Yes – and whether a client's status as a dependent youth on runaway has a material effect on this determination – answering No. Order at R101. This was not a departure from the essential requirements of the law because Florida law does not have a *per se* rule that a client's location can never be the subject of a privileged communication. And, while there are clearly established statutory exceptions to the attorney-client privilege under the Florida evidence code, the facts here meet none of them. *See* Fla. Stat. § 90.502(4) (2011).

Curiously, Petitioners themselves characterize their questions for review as "novel", Dep't Pet. 11, and "of first impression," Dep't Pet. 16, undercutting any argument that the court below could have disregarded an established principle of law. The issues presented cannot logically be novel and, at the same time, capable of being decided in clear contravention of established law. Petitioners may not like the law as it stands but they cannot dispute it.

### A. The communication by the youth is privileged under the clearest interpretation and application of existing law.

Judge Hanzman's interpretation and application of the law was considered, thorough and proper in this case. *See* Order at R101. Judge Hanzman properly began his analysis by determining first whether R.L.'s communication of his location to his attorneys matched the definition set forth in Florida's evidence code, which provides that:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

Fla. Stat. §90.502(2).

He also looked to the Florida Bar rules regarding the lawyer's duty of confidentiality:

> (a) **Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.
>
> (b) **When Lawyer Must Reveal Information.** A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent a client from committing a crime; or
> (2) to prevent a death or substantial bodily harm to another.
>
> (c) **When Lawyer May Reveal Information.** A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to serve the client's interest unless it is information the client

specifically requires not to be disclosed;
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(5) to comply with the Rules of Professional Conduct.

(d) **Exhaustion of Appellate Remedies.** When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) **Limitation on Amount of Disclosure.** When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule."

Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar.

The court applied both the evidence code and the bar rules to R.L.'s communication and found that R.L. met the statutory requirements to render his communication confidential and suitable for protection under the attorney-client privilege, particularly because R.L.'s intent was clearly that the communication be kept in confidence by his attorneys. Order at R91. ("The record in this case established that R.L.'s 'communication' of his whereabouts was clearly 'not intended to be disclosed to third parties' and it therefore falls squarely within the plain language of the statute").

No party disputes that the communication from R.L. to his attorneys meets the statutory definition of privilege under § 90.502(2) of the Florida Statutes. The

Department and Guardian Program maintain they should be able to compel R.L.'s attorneys to disclose his location regardless of what the evidence code and bar rules provide and that a special exception should be created for cases such as these. No law or sound argument supports this contention.

It is important to note that the dependency system where this matter arises focuses solely on abused, neglected and abandoned youth. It does not involve child custody or divorce. Fla. Stat. § 39.001(1) (2012). Youth are before a court where the State has physically removed them from their biological parent. *See* Fla. Stat. § 39.013 (2012).

For youth, the stakes are high and the decisions are critical. Pokempner, Shah, Houldin, Dale, & Schwartz, *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 Harv. C.R.-C.L. L. Rev. 529 (2012). These are "by design, complicated, multi-step proceedings that are tailored to balance child safety and the rights of parents." *Id.* at 538. Once adjudicated as a dependent child, they may live in foster care for months or years, be moved from place to place, and may be permanently separated from there biological family. *Id.* (citing Sue Badeau & Sarah Gesiriech, *A Child's Journey Through the Child Welfare System*, 6, 8-9 (2003), available at http://www.pewtrusts.org (detailing a child's

journey through the child welfare system and multiple decision points in the process)). It is in this context the lower court examined the question brought before it and resolved it with every consideration of the weighty responsibilities of the juvenile division of the circuit court in favor of R.L. and the privilege. It could not have been resolved in ignorance of the special circumstances surrounding juvenile dependency cases. However, nothing in Florida's dependency law warranted then or warrants now a departure from the established Florida law mandating the attorney-client privilege.

### B. Existing Florida law bars communication of the youth's location by counsel to anyone.

Judge Hanzman then went on to consider whether a client's address should be afforded less protection than other types of attorney-client communications, as Petitioners contend. Following Fla. Stat. § 90.502(1)(c), the lower court found no less protection is justified. Fla. Stat. § 90.502(1)(c) provides that a communication between a lawyer and client is:

> ..."confidential" if it is not intended to be disclosed to third persons other than:
> 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
> 2. Those reasonably necessary for the transmission of the communication.

*Id.*

In assessing this question, the lower court not only applied and distinguished the cases cited by the parties but also conducted its own thorough investigation into the decisions on point. Judge Hanzman found that, although the issue is complex, the weight of authority falls on the side of preserving the client's expectation of confidentiality when, as here, the client communicated his location to his attorneys with the intent that it be kept confidential. Order at R93 ("...a thorough review of decisions on this point confirms that courts have consistently sustained the privilege when the client provides the address intending such information to be confidential."). Judge Hanzman cited to a half-dozen cases[3] supporting this interpretation of the privilege, Order at R93-94, including where the client requires confidentiality from his attorneys precisely because he does not want to be located:

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[3] The court cited: "*In the matter of Jacqueline F.*, 404 N.Y.S. 2d 790, 795 (N.Y. 1978) ("An attorney may validly assert the privilege as to his client's .... address in the limited instances where the client intended such information to be confidential ...."); *McDonald v. Berry*, 134 S.E. 2d 392 (S.C. 1964) (noting rule that an address given confidentially by a client to an attorney while consulting him in a professional capacity was a privileged communication); *State v. Kirk*, 505 P. 2d 619 (Kan. 1973) (citing 97 C.J.S. witnesses, § 286 p. 812 for the general rule that an address given confidentially by a client to an attorney while consulting with him in a professional capacity is a privileged communication); *Jafarian-Kerman v. Jajarian-Kemlan*, 424 S.W. 2d 333 (Mo. App. 1968) (where client gave his concealed address to his attorney in confidence, the attorney would not be compelled to disclose it except to prevent the furtherance of a crime or fraud); *Brennan v. Brennan*, 422 A. 2d 510 (Pa. 1980) (upholding assertion of attorney-client privilege to prevent disclosure of address provided by client in confidence)" Order at R93.

> If the client's residence has been concealed, or if the client is in hiding for some reason or other, and the attorney knows his address only because the client has communicated it to them confidentially as his attorney for the purpose of being advised by him, and has not communicated it to the rest of the worked, then the client's address is a matter of professional confidence, which the attorney may not be required to disclose.

*Dike v. Dike*, 75 Wn.2d 1 (Wash. 1968) (quoting *Ex Parte Schneider*, 294 S.W. 723, 736 (Mo. App. 1927)).

When presented with the authority cited by Petitioners, Judge Hanzman rightly concluded that they were relying "upon cases which do not involve situations where the client's address was disclosed to counsel in confidence", Order at R94, and, thus, were inapposite:

> This court does not take issue with the holding in *Greenberg Traurig* and *Suarez* and is of course bound by this precedent.....But these holdings cannot, with intellectual honesty be extended to- and applied in- a situation where the client's address was provided in strict confidence; by a client who expressly instructed counsel not to disclose it; and where the client's immediate objective was not to be located.

Order at R95.

The court aptly considered and distinguished Petitioner's proffered cases in support of their argument that R.L.'s attorneys should disclose his location, including *Greenberg, Traurig, Hoffman, Lippoff, Rosen & Quentel v. Bolton*, 106 So. 2d 97 (Fla. 3d DCA 1998) (involved provision of address to attorney as part of routine retention process with no indication of an expectation of confidentiality);

*Suarez v. Hillcrest Development of South Florida Inc*, 742 So. 2d 423 (Fla. 3d DCA 1999) (no suggestion that attorneys received the client's address via a confidential communication or that they were instructed to maintain the client's address in confidence).

Judge Hanzman did not depart from the holdings in those cases; he simply did not agree that these holdings properly apply to the facts presented here so as to compel disclosure. Order at R11. This conclusion is reasonable based on an abundance of authority that called for the privilege to be upheld. Most directly on point is the Fourth Circuit holding that the general rule is to preserve the confidentiality of addresses provided confidentially:

> As a general rule an address given confidentially by a client to an attorney while consulting him in a professional capacity is a privileged communication, and he will not be compelled to disclose it where no sufficient ground is shown for the necessity therefore.

*Mercado v. Parent*, 421 So. 2d 740, 741 (Fla. 4th DCA 1982) (quoting 97 C.J.S. Witnesses § 286, at p. 812 (1957) and citing the reflection of same in McCormick's Handbook of the Law of Evidence § 90 (E. Cleary 2d ed. 1972).

It bears emphasizing that there is no *per se* rule that a client's address or other identifying facts can never be privileged such that Petitioners would be guaranteed to prevail on their motion to compel. *See*, e.g., *Fellerman v. Bradley*, 99 N.J. 493, 501 (N.J. 1985), cited at Dep't Pet. 22 (acknowledging that there is no *per se* exemption of a client's address from the class of communications that are

protected by the privilege); *In re Grand Jury Proceedings*, 517 F.2d 666, 672 (5th Cir. 1975) ("The government and the court below have taken the position that a client's identity, fee and bonding arrangements can never be privileged unless disclosure would lead automatically to conviction for a criminal offense. *That is not the law.*" (emphasis added)).

Petitioners obviously do not agree with Judge Hanzman's interpretation of the case law. But they do not and cannot argue that he failed to apply the correct law. Indeed, Petitioners concede below that it is only a general rule that the attorney-client privilege generally excludes protection of addresses, but that there is no case on point in Florida with the facts at issue before this Court. *See* Dep't. Pet. 21. Petitioners continue to hedge their position on appeal with phrases like "although not squarely on point..." introducing each of their main arguments. Dep't Pet. 20. Calling this a case of first impression, the Department concedes there is no established law violated rendering a grant of certiorari unwarranted.

Missing from Petitioners' analysis is the answer to the Pandora's box their sought outcome would open here. If this Court were to open this floodgate under the auspices of a narrow exception to the privilege, the leak in the privilege might never be stopped. The Department provides no standard by which to limit the gaping exception to the privilege they propose here for other future confidential information they might seek. It is not hard to predict the likely withering of the

attorney-client relationship in the face of the lack of guaranteed understanding of what is and is not protected. The lower court found this "undeniable" when he found "compelled disclosure will chill open dialogue between R.L. and his attorney." Order at R91. The court went on:

> Other dependent children fortunate enough to secure *ad litem* counsel will likewise be deterred from full disclosure absent an assurance of confidentiality. The undesirable but inevitable result will be to hinder the "freedom of consultation" the privilege is designed to promote, for if this type of communication is not protected, "it will not be made."

Order at R90, (citing *Wigmore, supra,* § 2291).

## II. PETITIONERS FAIL TO IDENTIFY ANY VALID BASIS FOR REVERSING THE LOWER COURT'S ORDER DENYING THE MOTION TO COMPEL.

The trial court respected the law despite being urged by the Department to ignore it. The court below refused to redraft the law to create - not apply - a non-existent exception to the law of evidence and to the dependency law. With no pertinent case law to support the manufactured claim that Chapter 39 is an implied exception to the centuries-old privilege between attorney and client, the Department and Guardian Program propose alternative arguments unsupported by precedent focused on the administration of justice and the legislature's purposes in crafting Chapter 39. None are persuasive.

### A. The administration of justice is not thwarted by respecting the privileged communication here.

The purpose of the privilege is advanced by upholding it in this case. Petitioners' contention that the lower court opinion thwarts the administration of justice ignores the reasoned eloquence of the lower court's order and fails to understand how upholding the privilege serves the best interest of youth.

Protecting the attorney-client privilege strengthens the bond between attorney and client. By properly recognizing that this communication is "confidential," the court found it supported the purpose of the privilege "to promote freedom of consultation of legal advisors by clients." Order at R91. (citing 8 Wigmore Evidence § 2291). Judge Hanzman reasoned that the "communication must be privileged to the utmost extent, or it will not be made." Order at R91 (citing 8 Wigmore Evidence § 2291). Indeed, if R.L. had not had the utmost confidence that his attorneys would not reveal his location, he would never have communicated this fact to them because he would not have risked being found. This conclusion was supported by the court's finding that R.L. is intelligent, eloquent and understands the nature of the dependency proceedings. Order at R87; Petition of the Guardian Program (hereinafter "GAL Pet.") 22. R.L. is sufficiently sophisticated to formulate the requisite intent to cloak his communications with his

attorneys with privilege. Forcing his attorneys to now disclose that information would compromise the relationship between R.L. and his attorneys developed over the several years. Indeed, it would become the lawyer's duty to advise youthful clients that their communication are not guaranteed confidentiality, thus chilling their discourse. The result will be that neither R.L. nor any other youth would feel free to consult his independent legal advisers because information he shares to advance his legal interests would not be protected. Attorneys and their clients writ large would be wary too that the privilege is not reliable if the government can effectively abrogate the privilege beyond the statutorily established exceptions by simply making an unsupported assertion that its interests are paramount. That is what Petitioners are attempting to do here.

The purpose of the privilege is not primarily, as Petitioners contend, to "promote the administration of justice," Dep't Pet. 17; *see also* GAL Pet. 13-14, this is a secondary consequence of "full and frank communication between attorneys and their clients," which "thereby promote[s] broader public interests in the observance of the law and the administration of justice," *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). And, the standard by which to determine whether the disclosure of a communication between an attorney and a client can be compelled is not a weighing of the administration of justice against the privilege, as Petitioners would have this Court believe. *See* GAL Pet. 14 ("...counsel's

refusal to disclose the child's whereabouts prevents the court from administering any justice to this child..."); Dep't Pet. 21 ("The lower court's ruling is without support as the United States Supreme Court in *Swidler*, supra, held that the intent of the privilege is to "promote broader public interests in the observance of law and the administration of justice").

The privilege exceptions the Department and Guardian Program advocate do not exist in the Florida Evidence Code or the Rules Regulating the Florida Bar and do not comport with any reasonable interpretation of their exceptions. *See* Fla. Stat. § 90.502(2) (2011); Rule 4-1.6 (c)(1), Rules Regulating the Florida Bar. Florida Statute § 90.502 specifically enumerates five specific instances where the privilege should not apply.[4] No reading of these exceptions could possibly include "communications made by children in dependency cases, even when compelled

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[4] Fla. Stat. § 90.502(4) provides that there is no lawyer-client privilege under this section when:
(a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.
(b) A communication is relevant to an issue between parties who claim through the same deceased client.
(c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.
(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.
(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

disclosure may be used in their 'best interest' or [is] necessary to ensure their safety." Order at R93. [5] It is telling that Petitioners do not even attempt to suggest that the exceptions include the factual setting here. They urge for a new exception. Of course, under the accepted statutory construction doctrine of *expressio unius est exclusio alterius*, the express inclusion of items in a statute means that those not listed are excluded. *See Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976); *see* also *McFadden v. State*, 737 So. 2d 1073 (Fla. 1999); *Jordan v. State*, 801 So. 2d 1032, 1034 (Fla. 5th DCA 2001). No new exceptions can be written by the Department.

### B. There is no legal authority for pitting the department's statutory obligation against a core right of the youth to all the protections of representation through a privilege with their attorney.

This petition is only before this court because the Department was seeking creative strategies to gain information about a youth it has not otherwise managed

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[5] Cases cited by Petitioners where the client's identity or address were compelled based on the crime-fraud exception have no application here as Petitioners have not argued and cannot establish that this or any other established exception the privilege applies. *See Turner v. State*, 530 S.2d 45 (Fla. 1987), cited at GAL Pet. 18 (compelling disclosure because one of the express statutory exceptions was met since the communication was relevant to an issue of the lawyer's breach of duty; no discussion of child interest or whether an address is privileged); *Fellerman v. Bradley*, 99 N.J. 493, 501 (N.J. 1985), cited at Dep't Pet. 22 (acknowledging that there is no per se exemption of a client's address from the class of communications that are protected by the privilege and deciding that in this case communication fell under the crime-fraud exception to the privilege; ; no discussion of child interest or whether an address is privileged); *Burden v. Church of Scientology of California*, 525 F. Supp. 44 (D.C. Fla. 1981) (identity and address of client compelled under crime-fraud exception to the privilege, but no discussion of child interest or whether an address is privileged).

to obtain. This caused the Department to juxtapose the strength of the attorney-client privilege against other principles in dependency which no Florida court has ever found overrides the privilege. As the lower court found, nothing in Florida law supports the promotion of even the most significant tenants of the dependency code over the attorney-client privilege in this matter. The Department's lack of success here does not warrant invasion of the attorney-client privilege and the far reaching consequences of such a decision.

Judge Hanzman's decision not to engage in the "balancing" analysis set forth in this line of cases was appropriate. Order at R101, fn. 9. He reasoned that "[c]ourts which have compelled disclosure under a 'balancing analysis' typically do so when necessary to protect innocent third parties, such as a youth child taken out of the jurisdiction contrary to a court order by the lawyer's client." *Id.* (citing, e.g., *Dike*, supra). "In such instances disclosure is necessary to prevent an ongoing crime and render the court's custody judgment effective." *Id.* (citing, e.g., *Jacqueline F.*, supra). Here, as Judge Hanzman aptly noted, R.L. has not been 'taken' by anyone, let alone a client of Ms. Vigil and Mr. Moore. He is the client." *Id.* (emphasis added). In fact, none of the child-safety "balancing" cases cited by Petitioners are dispositive of the issues before this Court. *See* Dep't Pet. 18-20. In all those cases, the client was not the youth but a third-party who compromised the

safety of the youth that the state was seeking to protect. Here, the client is the child. [6]

The assertion of a state interest alone is not sufficient to override the youth's rights. In *State v. JP*, Dep't Pet. 19, for example, the Supreme Court recognized that most constitutional rights of youths are "virtually co-extensive" with those of adults and specifically called out the right to privacy and right to counsel as prime examples of that fact. *State v. J.P.*, 907 So. 2d 1101, 1110-1111 (Fla. 2004); *see also In re Gault*, 387 U.S. 1 (1967) (concluding that juvenile who is involved in a delinquency proceeding which may result in commitment to a state institution has a right to counsel and that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults"). In fact, the state is required to respect and uphold the constitutional rights of youths, regardless of

[6] None of the cases cited by Petitioners for the contention that concerns for the child's safety trump the privilege involve balancing the assertion of the privilege by the child client himself, who is also the child that the state wants to protect. *See Dike v. Dike*, 75 Wn.2d 1, cited at Dep't Pet. 20 (court first asserted the general rule that a client's location is presumed confidential if it was given to the attorney in confidence but then goes on to address the exceptions to this general rule and found that the requirements of the exception were met and disclosure was necessary in this case to protect an innocent third party – the child); *In re Matter of Jacqueline F.* , 47 N.Y. 2d 215, cited at Dep't Pet. 29 (client's location was not privileged where she absconded with her niece when she learned her custody was being revoked by the parents); *Sepler v. State*, 191 So. 2d 588 (Fla. 3d DCA 1966), cited at GAL Pet. 18 (communication of client's identity was not compelled because he had conveyed sufficient facts to aid in the investigation of the case of a missing girl so that incursion of the privilege was not warranted even under the crime-fraud exception to the privilege).

whether a parent disagrees with the exercise of those rights. *Id., see also Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503, 511 (1979) ("a child, merely on account of his minority, is not beyond the protection of the Constitution."); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)(finding, in the abortion context, a constitutional assertion survives a parent's wishes for their rights-bearing child).

Because of factual findings the lower court made here, it was right not to engage in a balancing test. Only in cases where there is a compelling state interest, such as protecting a youth's safety from a client claiming privilege, will a court even engage in a balancing analysis between the child's fundamental rights and the state's efforts and authority to protect youths.[7] No case has invoked that contrast in the dependency context on behalf of a youth or where, as here, the youth is the client claiming privilege. In fact, the Bar Rules provide that a lawyer may not disclose a client's confidences even if it would be in their best interest, when specifically instructed not to disclose the information, as R.L. instructed his counsel here. *See* Rule 4-1.6(c)(1). Here the trial court made specific findings that the youth's safety was not at issue, Order at R102, so the balance is not between

[7] The lower court declined to rule or "comment on whether a serious threat of imminent harm to the child would justify compelled disclosure of his whereabouts. That question will have to await another day." Order at R102. The Court correctly found that the question of whether the privilege yields in the face of "immediate danger" was not presented or supported under the facts here.

safety and privilege but between privilege and the obligation of the Department and Guardian Program to accomplish their statutorily-defined tasks. The Department and the Guardian Program are misdirected in urging this court to replace the factual findings of the trial court at the appellate stage. *Ivey v. Allstate Insurance Co.*, 774 So. 2d 679 (Fla. 2000) (citing to *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995)); *Nader v. Florida Dept. of Highway Safety and Motor Vehicles*, 87 So. 3d 712 (Fla. 2012).

If and only if the state had appropriately substantiated a compelling interest, and a court were to engage in a strict scrutiny analysis, would it be required to analyze whether any efforts by the state were narrowly tailored to those interests. *See State v. J.P.*, 907 So. 2d 1101, 1117-19 (concluding that the curfew laws at issue were not sufficiently narrowly tailored to the stated interests in protecting youths and reducing juvenile crime because they would affect other innocent conduct as well). Here, there is no compelling state interest in protecting a child in dependency proceedings from having full and frank discussions with his independent legal counsel. There is no compelling interest in requiring the disclosure of a child's location because it would chill any youth or attorney from discussing that and other confidential information in the future. And, even if there were a sufficiently compelling state interest in locating the child to fulfill Petitioners' obligations under Chapter 39, overriding the attorney-client privilege

and thereby also compromising the child's constitutional right to effective assistance of counsel is overly broad and would serve to discourage all manner of full and frank discussions with counsel – not just those that would be related to a child's safety.

### C. Nothing in the lower courts order threatens the purposes and goals of Chapter 39.

The Department's argument that Chapter 39's purpose would be thwarted by upholding the privilege in this case is misguided. As Petitioners point out, Dep't Pet. at 22, and Judge Hanzman explained, Order at R93, the legislature expressly abrogated a number of privileges in Chapter 39 precisely to protect children and to assure their harm is reported. However, the attorney-client privilege is expressly exempted from this provision at Fla. Stat. § 39.204:

> The privileged quality of communication between husband and wife and between any professional person and his or her patient or client, and any other privileged communication **except that between attorney and client** or the privilege provided in s. 90.505, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect and shall not constitute grounds for failure to report as required by s. 39.201 regardless of the source of the information requiring the report, failure to cooperate with law enforcement or the department in its activities pursuant to this chapter, or failure to give evidence in any judicial proceeding relating to child abuse, abandonment, or neglect.

Fla. Stat. § 39.204 (2012) (emphasis added). This is the only place the attorney-client privilege appears in Chapter 39. Where the dependency law successfully challenges the sanctity of other privileges, it leaves the attorney-client privilege intact. Fla. Stat. § 39.204 (2012).

Indeed, the privilege between attorney and client is not challenged by the best interest mandates of Florida's dependency law — rather, it is strengthened by it. A youth's interests are best protected in a functioning dependency court system that upholds all the laws of the state, including those which govern the actions of all officers of the dependency court, including the youth's attorney. It is through respect for rules and standards like the privilege that foster youth can build trust in the system that must govern them. That is a principle of the rule of law. Chipping away at the rules of the system chips away at the belief youth will have in it. It is only by upholding the established law that the dependency court can function to protect and serve the youth before it.

Nothing in Chapter 39 is challenged by respecting the confidentiality between attorney and client. In fact, the best interests of the child are best protected when a court respects the rule of law and affirms the youth's right to the full representation of counsel. The Court found that forcing his attorneys to disclose confidential information would likely end the trust between the youthful client and the attorneys and leave all parties with no information about his location.

Order R91. The Department does not dispute this and the Guardian Program concedes it. GAL Pet. 21.

What Petitioners fail to understand but the lower court clearly grasped, was that the effect of what looks like a harmless abandonment of the legal principles and precedent for the protection of one youth, has devastating effects on the predictability and efficacy of the dependency court system. If youth learn that their confidential relationships are penetrable when it comes to sharing their location on runaway, they simply will not share confidential information with their attorneys. This is exactly what R.L. did here with every other assigned counselor in the court (caseworker, guardian *ad litem*, etc.) with whom he had no confidentiality. This is why the court reasonably found it would be the same result if confidentiality were denied here. Order at R92. If lawyers knew that the answers to the questions they ask their clients may not be protected, lawyers simply will not ask. And then they will never learn the answers; no one will. These outcomes are certainly not in the child's best interests. These are outcomes further from the mission and purpose of Chapter 39 than the results the lower court order confirmed. The Department and the Guardian should agree that this outcome serves the youth's best interests.

## III. THERE IS NO MATERIAL INJURY HERE AND THE DEPARTMENT'S FAILURE TO ASSERT ONE WAIVES THE ARGUMENT.

When the Department seeks review of a trial court order through a petition for writ of certiorari, it accepts a tremendous challenge because it is required to demonstrate: (1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a "depart[ure] from the essential requirements of the law." *Nader v. Florida Dept. of Highway Safety and Motor Vehicles*, 87 So. 3d 712 (Fla. 2012); *see also Belair v. Drew*, 770 So. 2d 1164, 1166 (Fla. 2000). Here they have failed to allege material injury sufficient to give the appellate court certiorari jurisdiction.

The best evidence that there is no material injury is the fact that the Department alleges no material injury. The text of the Department's brief outlines a complaint that the Department cannot do its job but never alleges this is an injury material to anyone. Especially in light of the facts here where the youth has rejected the Department's services and the outcome of learning the location would be the youth running again, the injury here lacks materiality in a specific and unique way. Of course, by failing to allege material injury in its brief, the Department waives the argument. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990)

(finding that failure to fully brief an argument waives it); *Coolen v. State*, 696 So. 2d 738 (Fla. 1997); *Wyatt v. State*, 71 So. 3d 86 (Fla. 2011).

The Department can allege no material injury because, to be material, the injury must be a departure from the essential requirements of law such that a later appeal is inadequate. *Chalfonte Development Corp. v. Beaudoin*, 370 So. 2d 58, 1979 Fla. App. LEXIS 14426 (Fla. 4th DCA 1979) (court rightly refused petition for certiorari where non-final order conformed to the essential requirements of law and there was no proof that a denial of the petition would cause material injury throughout the subsequent proceedings); *Learn v. Shackelford*, 903 So. 2d 335, (Fla. 2d DCA 2005). If this court were to grant a petition where the lower court order did not depart from essential requirements of law, it would exceed its authority under the rules of the Florida Supreme Court. *See Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011).

Petitioners misconstrue the standard for certiorari review when they argue that it was a departure from the requirements of the law for the court below to distinguish and decline to follow the cases they relied upon. This Court is not authorized to grant certiorari to resolve a dispute between parties over the interpretation of law because this would contradict and undermine the Florida Supreme Court standard. The Supreme Court has overturned grants of certiorari relief where the appellate court "merely disagreed with the circuit court's

interpretation of the applicable law, which, as explained in *Heggs*, is an improper basis for common law certiorari." *Ivey v. Allstate Insurance Co.*, 774 So. 2d 679, 683 (Fla. 2000) (citing *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995)).

Though the Guardian Program alleges an injury, the lower court dismisses it as immaterial. Explaining that the "safety" of the child "is not squarely presented" the court finds the youth is "not in imminent danger." Order at R101. The Department does not accuse the court of an abuse of discretion for this finding. It is only the Guardian Program which second guesses the court's judgment on this point because it disagrees with the factual findings of the court. This is not a proper matter for a Writ of Certiorari. The GAL petition makes policy arguments for establishing a new precedent, but the need for new precedent is not an appropriate basis for granting certiorari relief in Florida.[8]

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[8] Though Chapter 39 describes the Guardian Program as a "party," here such status may not be valid where there is no interest represented by the Guardian that is not already presented by the Department. The petitions simultaneously filed by the Department and by the Guardian Program, mutually aver that the best interest of the child in this case is the same - that his location be disclosed. The GAL Petition's redundant presentation of the position of the same "client," the best interest, is unnecessary and a challenge to the fair presentation of arguments to this court where each party in interest has only one voice and representation. This Court may have concluded the same when it joined the filings of the Department and the Guardian Program and directed all counsel to treat them as one petition. To the extent the two "best interest" briefs do differ in legal strategy, this would

The District Court should refrain from granting certiorari relief here because there has not been "a violation of clearly established principles of law resulting in a miscarriage of justice." *Combs v. State*, 436 So. 2d 93, 95 (Fla. 1983). The Florida Supreme Court, in *Ivey*, quoted Judge Altenbernd's opinion in *Stilson v. Allstate Ins. Co.*, 692 So. 2d 979, 982-83 (Fla. 2d DCA 1997), providing,

> "...there is a great temptation in a case like this one to announce a 'miscarriage of justice' simply to provide precedent where precedent is needed. We do not interpret *Heggs* as giving this court the degree of discretion in a certiorari proceeding.

*Stilson* at 982-83.

There was no precedent for this motion to compel before the lower court. There remains no legal authority for it here.

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support the unfair nature of allowing two legal representatives to argue for the same interest, party and outcome.

No volunteer of the Guardian Program has met, counseled or obtained any information about the youth not already known to the Department and the Court. GAL App. 12-1. These unique circumstances put the party status of the Guardian Program into question. Respondent asks that this court consider, as part of its consideration of the Petition as a whole, whether to strike the petition of the Guardian Program as a party brief in this matter and recast the brief as an amicus brief.

The volunteer lay GAL has no rights which would be affected by the outcome of the process. Arguably the Guardian Program's obligation to present the stated interest of the youth makes that a component of their best interest "representation" but, for the reasons stated above, that is not possible here.

## IV. ANY OTHER DECISION BY THE LOWER COURT WOULD HAVE VIOLATED THE YOUTH'S CONSTITUTIONAL RIGHTS UNDER THE FLORIDA AND U.S. CONSTITUTION.

### A. Granting this writ of certiorari would violate respondent's right to access courts under the Florida constitution.

The right to access the courts is fundamental in Florida and is not restricted to adults. Florida's Constitution specifically guarantees a citizen's access to courts. Fla. Const. Art. I, § 21; *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001) (per curiam). *See also* Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Update*, 35 Nova L. Rev. 305 (2011).

For R.L., access to the court is manifested through the mechanism of an attorney. Especially in this instance, where the child is on runaway so the only access to the administration of the courts is through his counsel, access to court translates to access to counsel. Altering the relationship between the youth and attorney in a way that denies access to the confidential attorney-client relationship, damages and limits that access. Such a finding would violate R.L.'s right to access Florida courts under the Florida constitution.

The Supreme Court of Florida has a duty to ensure access to the courts for every citizen. *Lussy v. Fourth Dist. Court of Appeal*, 828 So. 2d 1026, 1027 (Fla. 2002) (per curiam); *Peterson v. State*, 817 So. 2d 838, 840 (Fla. 2002) (per

curiam); *Henriquez v. State*, 774 So. 2d 34, 35 (Fla. 3d DCA 2000) (per curiam). This is not just an implied right that we find in the state's constitutions on many issues, but a "specifically mentioned" provision which courts have found "deserves more protection." *Mitchell*, 786 So. 2d at 527.

Article I, Section 21 is violated if a "statute obstructs or infringes that right to any substantial degree." *Id.* at 527. A court decision that significantly infringes upon the right of access to courts violates this state constitutional mandate. If this Court were to reverse the lower court's order, the resulting directive would limit R.L.'s court access by limiting his access to full representation of counsel. this would violate his rights under the Florida constitution.

### B. Due process requires meaningful right to attorney-client privilege in child welfare matters.

The dependency system where this matter arises focuses solely on abused, neglected and abandoned youth. It does not involve child custody or divorce. The youth before it experience a removal from their biological parent by the state. The stakes for children involved in the child welfare system are high. Once adjudicated as a dependent child, they may live in foster care for months or even years, be moved from place to place, and may be permanently separated from there biological family. *See* Sue Badeau & Sarah Gesiriech, *A Child's Journey Through the Child Welfare System* 6, 8-9 (2003), available at http://www.pewtrusts.org

(detailing a child's journey through the child welfare system and multiple decision points in the process).

The crucial decisions made in dependency are, as experts have described "by design, complicated, multi-step proceedings that are tailored to balance child safety and the rights of parents." Pokempner, Shah, Houldin, Dale, & Schwartz, *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 Harv. C.R.-C.L. L. Rev. 529 (2012).

### 1. Foster care places sufficient limits on the child's liberty to invoke due process protections

R.L. has "a constitutional right 'to be free of unnecessary pain and a fundamental right to physical safety;' rights the State is obligated to safeguard." *Smith v. Beasley*, 775 F. Supp. 2d 1344, 1355 (M.D. Fla. 2011) (citing *Ray v. Foltz*, 370 F.3d 1079, 1082 (11th Cir. 2004).) As the lower court acknowledges, that is "more than just a statutory obligation to make reasonable efforts to find R.L. *See* Fla. Stat. § 39.0141." Order at R92. R.L., like any youth removed by the state, must be able to realize the right to access, advocate and be heard in the system. The youth requires a voice in his own proceeding. This is a voice only a lawyer can provide. Here the court found that piercing the privilege as the Petitioner's

request would chill communication between the youth and his counsel causing R.L. to function as if he had no counsel at all. Order at R91. To deny R.L. the opportunity to relate and confide in his lawyer like any other citizen, would deny him access to the justice system. Therefore, denial of an attorney-client privilege would violate R.L.'s right to due process. *See* INST. OF JUDICIAL ADMIN. & ABA JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO ABUSE AND NEGLECT 109-10 (1981); Sarah Dina Moore Alba, Comment, *Searching for the "Civil Gideon": Procedural Due Process and the Juvenile Right to Counsel in Termination Proceedings*, 13 U. Pa. J. Const. L. 1079, 1081 (2011); Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 Ariz. L. Rev. 381, 384 (2011); Gerard F. Glynn, *The Child's Representation Under CAPTA: It is Time for Enforcement*, 6 Nev. L.J. 1250, 1259 (2006); Bernard P. Perlmutter & Carolyn S. Salisbury, *"Please Let Me Be Heard:" The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution*, 25 Nova L. Rev. 725, 755 (2001); Shireen Y. Husain, Note, *A Voice for the Voiceless: A Child's Right to Legal Representation in Dependency Proceedings*, 79 Geo. Wash. L. Rev. 232, 233 (2010).

Youth have a liberty interest that is significantly affected once placed in state care. *See* Michael J. Dale & Louis M. Reidenberg, Providing Attorneys for

Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Update, 35 Nova L. Rev. 305 (2011). Courts have recognized that a child's placement in state care is a significant intrusion on and restriction of the liberty interests of the child by the state, parallel to involuntary commitment or incarceration. *See, e.g.*, *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc) ("The liberty interest in this case is analogous to the liberty interest in Youngberg [where an individual was involuntarily committed]. In both cases, the state involuntarily placed the person in a custodial environment, and in both cases, the person is unable to seek alternative living arrangements."); *see also Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (quoting *Taylor*, 818 F.2d at 795); *B.H. v. Johnson*, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989) (same). *See* also Michael J. Dale & Louis M. Reidenberg, Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Update, 35 Nova L. Rev. 305 (2011).

This liberty interest cannot be limited without due process. Here process is guaranteed through the mechanism of the youth's lawyer. In *Parham v. J.R.*, the Florida courts acknowledge the due process implications of dependency status and the resulting process protections that are due. *Parham*, 442 U.S. 584 (1979). The *Parham* court perceived that a foster child's liberty interest might be put at risk in

such situations where no parental advocate was present if proper due process protections were not put in place.

Central to the guarantees of a lawyer for a youth is that an attorney must take on all the traditional roles of a lawyer--zealous advocacy, undivided loyalty, confidentiality. AM. BAR ASS'N MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 1(C). The Model Act relies upon Rule 1.14 of the ABA Model Rules of Professional Responsibility. Model Rules of Prof'l Responsibility R. 1.14 cmt. (1983). Counsel's role is critical in these proceedings as they help a youth understand the process and consequences of their decisions and guide the child in making those decisions. Michael J. Dale & Louis M. Reidenberg, Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Update, 35 Nova L. Rev. 305 (2011). This requires the attorney to maintain the traditional attorney-client relationship to the greatest extent possible. ABA Model Act *Id.* § 7(d) (diminished capacity); citing the Model Rules of Prof'l Responsibility R. 1.14 (1983).

**2. Due process protections include allowing a youth the full access to his counsel where dependency invokes his liberty interest.**

Because of the liberty interest at stake here, procedures are necessary to protect the youth's rights. The Supreme Court recognized that procedural due

process imposes constraints on decisions by governments that deprive individuals of liberty interests within the Due Process Clause. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In addressing the level of process due, Florida State Constitution claims are evaluated using the same test the Supreme Court of the United States used in *Mathews*. 424 U.S. 319, 335 (1976); *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996); *Santosky v. Kramer*, 455 U.S. 745, 754-68 (1982). The Florida due process standard, citing *Mathews*, looks at: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the [state's] interest." 424 U.S. at 335.

The private interest here is access to the court system through the right to counsel. What the youth would lose if the lower court order were reversed is access to the justice system through his lawyer. No substitute procedural safeguards are available to R.L. because, as the facts bear out, no other counselor in the system can give the youth a confidential counselor as embodied in the Florida evidentiary code and the bar rules.

The Department and the Guardian Program would argue that the State interest here is the protection of this and future youths in their care. Petitioners would urge this Court to find those interests outweigh any other before this Court. Yet the lower court, privy to the significance of all of these interests as well as the

other two *Mathews* factors outlined above, disagreed. The lower court found that the state also has an interest in the administration of justice but that justice requires respect for the privilege between attorney and client. The lower court concluded that "compelled disclosure will chill open dialogue," Order at R91, and cited agreement with Wigmore on Evidence that this would "hinder the 'freedom of consultation' the privilege is designed to promote, for if this type of communication is not protected, 'it will not be made.' " Order at R91-92 citing 8 Wigmore on Evidence § 2291. The Court also concluded that "we are far better off in a situation where *someone* they trust is aware of their location, than we are in a situation where *no one* is." Order at R92. It is here that the lower court affirms the public policy behind the privilege, ("encouraging open dialogue between clients and counsel" Order at R92), finding it directs the court to respect the privilege between the youth and his counsel.

Petitioners argue that the lower court ruling prevents them from completing their statutory obligation. But if the only purpose of meeting their statutory obligations is to protect the best interest of the child, that is answered where the lower court found that upholding the privilege protects the youth's rights while simultaneously serving his best interest. The best interests goal of Petitioners is protected here. So under the third prong of *Matthews*, due process obligations to the youth are met only by protecting the privilege between youth and attorney

because that decision also satisfies the state's interest in serving the best interests of this youth.

## CONCLUSION

For the reasons set forth above and as may be advanced at oral argument, R.L. respectfully requests that this Court deny the Department's and the Guardian Program's Petitions for Writ of Certiorari and uphold the order below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of this R.L.'s Response in Opposition to the Department of Children & Families' and the Guardian *ad Litem* Program's Petitions for Writ of Certiorari was served by U.S. Mail this 27th day of August, 2012 and by email the 28th day of August 2012 as follows:

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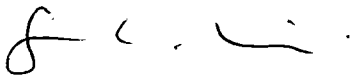

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## CERTIFICATE OF SERVICE

I certify that this computer generated petition is composed in 14-point Times New Roman font and complies with the font requirements of Fla. R. App. P. 9.100(1) and 9.210(a)(2).

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