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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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COLLEEN DAVISON, legal guardian for K.B., a minor, on behalf of  
themselves and others similarly situated, and GARY MURRELL,

Respondents,

v.

STATE OF WASHINGTON and WASHINGTON STATE OFFICE  
OF PUBLIC DEFENSE,

Petitioners.

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On Appeal from the Superior Court of the  
State of Washington for Thurston County

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*AMICI CURIAE* BRIEF OF JUVENILE LAW CENTER AND  
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN  
SUPPORT OF RESPONDENTS DAVISON AND MURRELL

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## IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of *amici curiae* are set forth in the accompanying Motion for Leave to File an *Amicus Curiae* Brief.

## INTRODUCTION

As Respondents have argued, and as the U.S. Supreme Court has explained, “a provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States.” *Gideon v. Wainwright*, 372 U.S. 335, 340, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). (“[C]ertain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.” (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44, 56 S. Ct. 444, 80 L. Ed. 660 (1936))).

*Amici* write separately to highlight the extent to which effective assistance of counsel for children is “fundamental and essential to a fair trial,” and to highlight the deep importance of the right to young people in Washington and nationally. Under the United States and Washington Constitutions, youth have a Due Process right to effective assistance of counsel. *In re Gault*, 387 U.S. 1, 36, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967);

*See Lesperance v. Superior Court for Island County*, 72 Wn.2d 572, 434 P.2d 602 (1967). While the right to counsel is important to any criminal defendant, this Due Process right is particularly vital for young people who have a more limited capacity to navigate the juvenile justice system on their own: They have lower literacy levels than adults, minimal knowledge of the legal system, greater impulsivity, and greater susceptibility to coercion.

### **STATEMENT OF THE CASE**

*Amici curiae* adopt the Statement of the Case as set forth by Respondents.

### **ARGUMENT**

Under the Washington and U.S. Constitutions, the State is obligated to provide youth with the effective assistance of counsel; while the State can delegate the task of providing counsel to the counties, it cannot delegate its constitutional responsibility to ensure access to effective counsel because the right is fundamental.

#### **I. The Right To Counsel Is Fundamental And Essential To A Fair Trial**

Over fifty-five years ago, the U.S. Supreme Court held the State must provide a free attorney to a criminal defendant who cannot afford to hire one because “lawyers in criminal courts are necessities, not luxuries.” *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799

(1963). Washington State has recognized a defendant's right to an appointed attorney for over 100 years. *See* Wash. Const. art. I, § 22 (amended 1922) (The Washington Constitution, as adopted in 1889 gave defendants the right "to appear and defend in person, and by counsel").

The right to counsel "operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution," *United States v. Wade*, 388 U.S. 218, 227, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), and remains one of the most guarded rights under the Constitution. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (holding police must stop interrogation when a suspect invokes her right to counsel); *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (holding when a suspect invokes his right to counsel, the police cannot recommence questioning without his attorney present unless the defendant reinitiates questioning). Moreover, "the Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 84 L. Ed. 377 (1940).

This Court has also made clear that the right to counsel means the right to effective assistance of counsel: "no conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel." *State v. Cory*, 62 Wn.2d 371, 376, 382 P.2d



1019 (1963) (en banc). Indeed, failing to properly ensure effective assistance of counsel “could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel.” *Avery*, 308 U.S. at 446. *See also Quesnell v. State*, 83 Wn.2d 224, 234, 517 P.2d 224 (1973) (en banc) (holding, in the context of civil commitments, that “assistance of counsel must be considered and afforded in a meaningful way rather than in form only”). The *Quesnell* Court further reasoned that “[t]he most formidable abridgement of due process guarantees . . . occurs where ‘lip service’ is paid to certain rights of the accused as a mere formality, with the consequence that any substantive protection is woefully lacking.” *Quesnell*, 83 Wn.2d at 233–34.

In *In re Gault*, the U.S. Supreme Court recognized that the right to counsel also applies to youth in delinquency proceedings, concluding that “[t]he 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.” 387 U.S. 1, 36, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (citing *Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932)). The Court therefore held that youth in adjudicatory hearings have a right to counsel under the Due Process Clause of the Fourteenth Amendment, and

if they are unable to afford counsel, counsel must be appointed for them. *Id.* at 41. *See also Kent v. United States*, 383 U.S. 541, 561, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966) (“The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.”). Following *Gault*, this Court reversed a juvenile adjudication because the court did not notify the youth of her right to counsel. *See Lesperance v. Superior Court for Island County*, 72 Wn.2d 572, 574–75, 434 P.2d 602 (1967) (The Court also recommended Washington align its juvenile code with the *Gault* holding.).<sup>1</sup> This Court has also concluded that “[i]n [an] era of crystallizing constitutional rights, the procedural wisdom of trial courts providing counsel [to minors] cannot be over emphasized.” *State v. Angevine*, 62 Wn.2d 980, 986, 385 P.2d 329 (1963).

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<sup>1</sup> Moreover, youth may have even greater rights under Washington law than under the federal Constitution. The right to appointed counsel for youth is also codified in Washington law. *See* RCW § 13.40.140(1)-(3). This right attaches at the intake interview and applies during all critical stages of the proceedings. RCW § 13.40.140(2); RCW § 13.40.080(11). Additionally, Washington’s constitutional right to counsel under Article I, Section 22 may provide greater protections for youth than the U.S. Constitution. *See State v. Bassett*, 192 Wn.2d 67, 78, 428 P.3d 343 (2018) (making clear that the Washington Constitution may be more protective than the U.S. Constitution and clarifying that the Washington Constitution’s prohibition on cruel and unusual punishment “often provides greater protection than the Eighth Amendment”).

## **II. The Fundamental Right To Counsel Is Particularly Important For Youth, Given Their Unique Vulnerabilities**

Both U.S. Supreme Court and Washington case law recognize key characteristics of adolescence that heighten youth's need for counsel. First, youth struggle to understand, let alone effectively navigate, legal proceedings without a lawyer. Second, youth susceptibility to coercion heightens the risk of unfairness in legal proceedings. Third, youth have trouble weighing long-term consequences, meaning they may waive their rights to receive more immediate finality.

Adolescents are particularly in need of counsel because of their lower literacy levels. "Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense." *Graham v. Florida*, 560 U.S. 48, 78, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Thus, when defendants are "young, ignorant, [and] illiterate" it contributes to the devastating impact of the denial of effective assistance of counsel. *Powell v. Alabama*, 287 U.S. 45, 57-58, 71, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In *Gault*, the Court similarly recognized the connection between literacy and the need for effective counsel, citing, with approval, the conclusions of the President's Crime Commission:

The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge.

387 U.S. at 38 n.65 (quoting Nat'l Crime Comm'n Report, pp. 86-87). *See also Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S. Ct. 1209, L. Ed. 2d 325 (1962) (highlighting the importance of counsel during interrogation and noting that a young person “would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take”); *State v. Jones*, 95 Wn.2d 616, 625, 628 P.2d 472 (1981) (en banc) (recognizing that a youth’s age, intelligence, education and experience may bear on that youth’s ability to waive his rights. (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 88 S. Ct. 2560, 61 L. Ed. 2d 197 (1979)); *see also* RCW § 13.40.140(11) (preventing children under 12 from waiving their rights without a parent present).

The youth in this case—all age 16 or under and some with school problems, Plaintiffs’ Opening Brief in Support of Motion for Summary Judgment [hereinafter “Plaintiffs’ Opening Brief”] at 2-6,—lack the education levels and knowledge necessary to understand the intricacies of

the justice system. This is consistent with national research showing that youth in the justice system tend to read significantly below grade level.<sup>2</sup> Without the effective assistance of attorneys, these young people will be at a severe disadvantage in delinquency proceedings.

Teenagers' susceptibility to coercion also heightens their need for effective assistance of counsel. The *Gault* court recognized that youth need counsel "wherever coercive action is a possibility." 387 U.S. at 38 (quoting Nat'l Crime Comm'n Report, pp. 86-87). The U.S. Supreme Court has recognized that youth need unique protections from coercion in contexts as diverse as police interrogations, *J.D.B.v. North Carolina*, 564 U.S. 261, 264–65, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) ("It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."), school prayer, *Lee v. Weissman*, 505 U.S. 577, 592, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (observing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," and finding unconstitutional school prayer at graduation ceremonies), and criminal sentencing, *Roper v. Simmons*, 543

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<sup>2</sup> Mindee O'Cummings et al., *The Importance of Literacy for Youth Involved in the Juvenile Justice System*, National Evaluation and Technical Assistance Center for the Education of Children who are Delinquent, Neglected, and At-Risk 2 (2010), available at [https://neglected-delinquent.ed.gov/sites/default/files/docs/literacy\\_brief\\_20100120.pdf](https://neglected-delinquent.ed.gov/sites/default/files/docs/literacy_brief_20100120.pdf).

U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (observing that youth should be exempt from the death penalty because they “are more vulnerable or susceptible to negative influences and outside pressures”). This Court has similarly recognized that youth need heightened protections from coercion. *See State v. Prater*, 77 Wn.2d 526, 534, 463 P.2d 640 (1970) (en banc) (holding that youth deserve heightened protections in the context of police interrogations and *Miranda* warnings).

All delinquency proceedings heighten the possibility of coercion. The adversary is an adult who is knowledgeable about the legal system and has significant influence over decisions regarding the youth’s future, including his future liberty. The proceedings will determine whether the youth will be separated from family, friends and home; whether she will be in a detention center, a group home, or another custodial setting; and what kind of treatment she will receive. That almost every youth in this case made statements to police highlights the salience of this point. Plaintiffs’ Opening Brief at 2-6, 12. That their attorney failed to file motions to suppress her clients’ statements to police, tried to convince her clients to take pleas, and left them to defend themselves in front of a judge illustrates the profound consequences of the ineffective legal representation and the absence of state oversight. *See* Plaintiffs’ Opening Brief at 9-13.

Youth are also particularly in need of constitutional protections in court because of their impulsivity and difficulty with long-term planning.

[A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”

*Roper*, 543 U.S. at 569 (second alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). Thus, this Court has recognized that a “juvenile’s immaturity, impetuosity, and failure to appreciate risks and consequences” should bear on the youth’s sentence. *State v. Gilbert*, 193 Wn.2d 169, 176, 438 P.3d 133 (2019). While these cases expose youth’s reduced decision-making abilities in the context of sentencing, the reasoning applies to youth’s need for effective assistance of counsel. Indeed, “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.” *Graham*, 560 U.S. at 78. For example, a young person may be inclined to take a plea when an adult would not; youth are therefore particularly in need of the “guiding hand of counsel” to protect them from the overwhelming coercion of the

adjudicatory process.<sup>3</sup> *In re Gault*, 387 U.S. at 36 (quoting *Powell*, 287 U.S. at 64).

Absent effective counsel, the process in the county has been anything but fair. That is made clear by the facts of this case: M.D. received an illegal sentence, K.B. did not receive a mandatory capacity hearing, and J.C. waited over a month to meet with counsel. Plaintiffs’ Opening Brief at 2-5.

Moreover, youth in Grays Harbor were deprived of their right to counsel not only because counsel failed to advocate effectively for the basic needs of their clients, but also because counsel lacked the knowledge or specialized skills required to defend youth in the juvenile justice system. Recognizing the delicacy, and the importance, of representing youth, the Supreme Court of Washington has imposed additional duties on juvenile defense attorneys. An attorney’s duty to investigate is particularly important in juvenile cases because “[f]alse confessions (especially by children), mistaken eyewitness identifications, and the fallibility of child testimony are well documented.” *State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956

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<sup>3</sup> Effective assistance of counsel also supports the juvenile justice system’s focus on rehabilitation. According to the *Gault* Court, “counsel can play an important role in the process of rehabilitation.” 387 U.S. at 38 n.64. A young person who feels he is not being treated fairly will resist efforts at rehabilitation, and thus “the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.” *Id.* at 26.



(2010) (en banc). Defense attorneys must form confidential relationships with young clients to guard against the “substantial risk that the child [will] defer to the parents.” *Id.* at 113. Moreover, under Washington law, “the nature of the juvenile’s surrounding environment and family circumstances, the extent of the juvenile’s participation in the crime, the way familial and peer pressures may have affected him or her, how youth impacted any legal defense, and any factors suggesting that the juvenile might be successfully rehabilitated” are all essential considerations during disposition. *Gilbert*, 193 Wn.2d at 176 (citing *State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 391 P.3d 409 (2017)). Accordingly, attorneys must investigate these factors to advocate effectively for their clients.<sup>4</sup>

The State provided no oversight when attorneys in Grays Harbor County failed to satisfy any of these heightened standards. Attorneys failed

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<sup>4</sup> The Washington Bar Association also imposes heightened professional responsibilities on lawyers defending youth. See Washington State Bar Ass’n, *Performance Guidelines for Juvenile Offense Representation* (2017) [hereinafter *Guidelines*], [https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/performance-guidelines-for-juvenile-offense-representation.pdf?sfvrsn=f0207f1\\_6](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/performance-guidelines-for-juvenile-offense-representation.pdf?sfvrsn=f0207f1_6). “Juvenile defense is a specialized practice anchored in juvenile-specific training and practice skills.” *Id.* at 2. While rules of professional conduct do not set the floor for effective assistance of counsel, “relevant standards are often useful to courts in evaluating things like effective assistance of counsel.” *A.N.J.*, 168 Wn.2d at 110. The *Guidelines* expand on the standards for attorneys representing adult criminal defendants in four general ways: (1) they require juvenile defense attorneys to communicate with clients in developmentally appropriate ways; (2) juvenile defense attorneys’ scope of representation is broader than general criminal defense attorneys; (3) modern understandings of adolescent brain development should guide juvenile defense attorneys’ work; and (4) juvenile defense attorneys must continuously advocate for the wellbeing of their clients. See, e.g., *Guidelines*, R. 2, R. 2.2., R. 3.1, R. 3.3.

to spend enough time with clients to build the rapport necessary for effective communication; they failed to challenge unlawful detention or the conditions of confinement; they didn't intervene on behalf of numerous youth experiencing mental health crises; they lacked knowledge of developmental science, Washington law requiring capacity hearings for young clients, and the differing *Miranda* standard for youth as set out in *J.D.B.* See Plaintiffs' Opening Brief at 2-5. The State's failure to provide needed oversight in the face of such clearly ineffective counsel violates the Washington and U.S. Constitutions.

### CONCLUSION

The State has an obligation to ensure that youth are provided with effective assistance of counsel. While it can delegate responsibility for the provision of counsel to the counties, its obligation to ensure access to constitutionally effective counsel precludes abdication of its oversight responsibility to the county authority. Willful blindness of local failure is no oversight at all; lack of oversight is a derogation, not a fulfillment, of the State's constitutional obligation. For these reasons, *Amici* respectfully request that the Court rule in favor of Respondents.

Respectfully Submitted,

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## Transmittal Information

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