

IN THE
MICHIGAN SUPREME COURT

In re CHRISTOPHER ROSS, JR., Minor

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner- Appellee,

v.

Supreme Court No. 158764

Court of Appeals No. 331096

Oakland CC: 2014-826056-DL

CHRISTOPHER ROSS, JR.,

Respondent-Appellant.

On Appeal from the State of Michigan Court of Appeals

**BRIEF OF AMICI CURIAE JUVENILE LAW CENTER
IN SUPPORT OF RESPONDENT-APPELLANT CHRISTOPHER ROSS, JR.**

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INTEREST AND IDENTITY OF *AMICUS CURIAE*

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

Juvenile Law Center was invited by this Court, in its order dated January 29, 2020, to file an *amicus curiae* brief in this case.

SUMMARY OF THE ARGUMENT

Of the questions presented to amici curiae by the Court's order dated January 29, 2020, Juvenile Law Center submits this brief to address question (3): "[W]hether juveniles who claim a deprivation of their due process right to counsel must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984)."

Under any standard, the right to assistance of counsel necessarily means the right to *effective* assistance of counsel. The Supreme Court has explained that to hold otherwise "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. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446 (1940). *See also Kent v. United States*, 383

U.S. 541, 561 (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.”)

The guarantee of effective assistance of counsel extends to youth in juvenile delinquency proceedings. *In re Gault*, 387 U.S. 1 (1967). In *Gault*, the United States Supreme Court situated the right to counsel for youth in juvenile court under the Fourteenth Amendment’s guarantee of fundamental fairness. As the U.S. Supreme Court recognized, the right was far more than just a mechanistic nod to procedural fairness: “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.” *In re Gault*, 387 U.S. at 36 (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

The fundamental fairness standard requires that courts and counsel take a youth-centered approach that recognizes that youth are particularly vulnerable within the legal system, that they lack the maturity and development of adults, and that, absent effective counsel, they are at particular risk of harm. Because youth are uniquely vulnerable to harm by ineffective assistance of counsel, ineffective representation under the Fourteenth Amendment warrants a rebuttable presumption of prejudice, distinct from the Sixth Amendment *Strickland* standard.

ARGUMENT

I. **The Right to Counsel for Youth is Secured Under the Fourteenth Amendment’s Guarantee of Fundamental Fairness in Juvenile Proceedings.**

The Supreme Court in *In re Gault* distinguished the juvenile justice system from the adult criminal justice system, establishing the right to counsel in juvenile proceedings under the Fourteenth Amendment’s due process protections instead of the Sixth Amendment protections. *In re Gault*, 387 U.S. 1, 36 (1967); *People v. Hana*, 443 Mich. 202, 211 n.31 (1993) (“Careful review of both *Kent* and *Gault* reveals a reluctance on the part of the United States Supreme

Court to establish a clear link between the Fifth and Sixth Amendments . . . to juvenile proceedings. Rather, both cases focus on general concepts of due process extended to juveniles pursuant to the Fourteenth Amendment.”). Before *Gault*, the Supreme Court had already acknowledged that a teenager, too young to exercise or even comprehend their rights, becomes an “easy victim of the law” *Haley v. Ohio*, 332 U.S. 596, 599 (1948) and that juvenile proceedings must satisfy “the basic requirements of due process and fairness.” *Kent v. United States*, 383 U.S. 541, 553 (1966). *See also Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (“Due process emphasizes fairness between the State and the individual.”) (internal quotations omitted). By the time of its *Gault* decision, procedural fairness had become the cornerstone of the juvenile justice system. *See Gault*, 387 U.S. at 28 (“Under our Constitution, the condition of being a [child] does not justify a kangaroo court.”)

To make real its guarantee of fair treatment, the Court held that the assistance of counsel must be provided to any young person who is at risk of a loss of liberty in delinquency proceedings. *Gault*, 387 U.S. at 41. The Court emphasized that “[t]he absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures.” *Gault*, 387 U.S. at 18. The Court highlighted the importance of counsel in delinquency proceedings, explaining that the right to counsel is a constitutional necessity because a child “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.” *Gault* at 36. Justice Harlan, in his concurring opinion, agreed that the right to counsel was, in fact, “imperative to assure the proceedings' fundamental fairness.” *Id.* at 72; *United States v. Cronin*, 466 U.S. 648, 654 (1984) (“Of all the rights that an

accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”)

Michigan courts have followed *Gault* and guarantee youth the right to counsel when a young person is at risk of a loss of physical liberty. *See People v. Daoust*, 577 N.W.2d 179, 187 (Mich. Ct. App. 1998) (affirming “juveniles are guaranteed the right to counsel in delinquency proceedings which may result in commitment to an institution in which the juvenile's freedom is curtailed”) (citations omitted); *Walls v. Dir. of Institutional Servs.*, 269 N.W.2d 599 (Mich. Ct. App. 1978) (extending the constitutional right to counsel in delinquency proceedings to post-adjudication proceedings, if the juvenile may face commitment to an institution).

II. Fundamental Fairness Requires an Exacting Standard for the Effective Representation of Counsel that Accounts for the Developmental Status of Youth.

The fundamental fairness guaranteed in juvenile proceedings requires heightened protection for young people, given their unique vulnerability. As the U.S. Supreme Court explained in *Gault*, juvenile defendants “require[] the guiding hand of counsel at every step in the proceedings against [them]” because of their immaturity, lack of experience, and susceptibility to coercion. 387 U.S. 1 at 36 (internal citations omitted). The Court further emphasized the vulnerability of juvenile defendants and the importance of 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.

Gault at n. 95. *See also Powell v. Alabama* 287 U.S. 45, 56 (1932) (recognizing that the fact that defendants were “young, ignorant, [and] illiterate,” contributed to the devastating impact of their denial of effective assistance of counsel). As the Supreme Court has recognized, youth face

particular challenges engaging with legal system actors, including police and even their own attorneys. *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012), warranting heightened protections for youth in court.

Supreme Court case law has repeatedly affirmed, in a variety of legal contexts, that young people require greater protection than adults because of their developmental status. *Graham*, 560 U.S. at 68–69 (confirming “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds” particularly in decreased capacity for behavioral control and increased capacity for rehabilitation); *Miller*, 567 U.S. at 471–72 (confirming that juveniles’ “transient rashness, proclivity for risk, and inability to assess consequences . . . lessened [their] moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed” (internal quotations omitted)); *Roper*, 543 U.S. at 569–70 (confirming juveniles lack maturity and have “an underdeveloped sense of responsibility[,] . . . are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure[,] . . . [and their character] is not as well formed as that of an adult”); *Eddings v. Okla.*, 455 U.S. 104, 115–16 (1982) (“Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.”). *See also J.D.B. v. North Carolina*, 564 U.S. 261, 279–80 (2011) (affirming individuals “need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age” as it requires only “common sense to know that a 7-year-old is not a 13-year-old and neither is an adult”); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”).

Extensive scientific research further underscores distinctions between youth and adults relevant to the appropriate standards for representation. Youth are more impulsive, more susceptible to coercion, less mature, and more capable of change than adults. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 FUTURE CHILD 2, 29 (2008) (describing “a large body of recent research that was not available twenty years ago” that “offers insights about adolescence and about young offenders); *see also* Terrie E. Moffit, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 4, 674 (1993).

More specifically, scholars reaffirm the unique challenges youth face in the court system. Children rarely have the education, emotional maturity, understanding of the legal system, or access to resources to represent themselves in delinquency proceedings. “The deficiencies that children present in a criminal context, such as their impulsive decision-making, their inability to fully comprehend the intricacies of the law, their memory perceptions, and their inarticulateness, make it difficult to assure a level of representation that comports with notions of fundamental fairness.” Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 299 (2003) (citing studies showing that almost all minors fail to understand Miranda warnings even when they are explained in child friendly terms as supportive of an exacting standard for counsel under a fundamental fairness analysis). Developmental status may “affect adolescents’ capacity to understand their rights, appreciate the benefits and consequences of exercising or waiving those rights, and make reasoned and independent decisions about the best course of action.” Lindsay C. Malloy et al., *Interrogations, Confessions, And Guilty Pleas Among Serious Adolescent Offenders*, 38 L. & HUM. BEHAV. 2 (2014). As a result, “juveniles’ legal decisions, including

those related to admissions of guilt, may reflect poor legal abilities/understanding, inappropriate reasoning (e.g., failure to consider the strength of evidence against them.” *Id.* See also Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUM. BEHAV. 611, 620 (2016) (“Youth are less likely than adults to identify potentially viable defenses related to their innocence.”) Research likewise demonstrates that youth have difficulties comprehending abstract rights, such as those they must relinquish when pleading guilty. Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 228-33 (2006). Researchers have also found that “juveniles were more likely than adults to suggest not talking to their attorney and to recommend denying involvement in the crime, and less likely to recommend honest communication with one’s attorney.” Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 953 (2010).

While a young person’s developmental status creates legal disadvantages regardless of race, Black, Latino and Indigenous youth suffer the burden of ineffective counsel most severely. There is notable racial disproportionality in all stages of the juvenile justice system. See Kenneth B. Nunn, *The End of Adolescence: The Child As Other: Race and Differential Treatment In Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, at 683-688; 708-708. (2002). For example, while Black youth represent only 15% of the U.S. population between the ages of 10-17, they represent 26% of all juvenile arrests and 30% of all delinquency referrals. Black youth represent 45% of all pre-adjudication decisions and 46% of cases transferred to adult criminal court. National Academies Press, *Juvenile Crime, Juvenile Justice*, 231 (2001) <https://www.nap.edu/read/9747/chapter/8>. Disparities in treatment at the point of arrest are the most significant contributor. “Despite few differences in delinquent behaviors or status

offending, African American juveniles” are “much more likely to be arrested.” The Sentencing Project, *Racial Disparities in Youth Commitments and Arrests* (Apr. 1 2016) <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/>. Decision-making at each point of the system heightens the disparities. “Among those juveniles who are arrested, black [sic] youth are more likely to have their cases referred to juvenile court. Among those cases referred to court, black [sic] youth are more likely to have their cases heard (and not diverted pre-adjudication). Among those cases that are adjudicated, black [sic] youth are less likely to receive probation and more likely to be committed to secure placement in a juvenile facility.” *Id.* Studies have shown that unconscious racial stereotyping by system stakeholders, including police, probation, and the courts, may play a role in these disparities. Kristen Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 460 (2013). These disparities heighten the importance of counsel, but counsel, too, may manifest unconscious bias toward their youth clients, Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AMERICAN CRIMINAL LAW REVIEW 649 (Summer, 2017), highlighting the need for a more protective legal standard of ineffectiveness.

III. Fundamental Fairness Requires Diligent Youth-Centered Representation

Contemporary professional standards call for fundamentally fair, youth-centered representation that includes heightened responsibilities of counsel toward their youth clients. A heightened standard for the effective representation of youth should conform with the “[p]revailing norms of practice” as reflected in recognized juvenile defense standards. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). National standards specifically define the requirements for

effective representation of young people.¹ See generally NJDC, NATIONAL JUVENILE STANDARDS available at <https://njdc.info/wpcontent/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>; see also *In re K.J.R.*, 386 Mont. 381, 390 & n.5 (Mo. 2017) (citing the NATIONAL JUVENILE STANDARDS in assessing an ineffective assistance of counsel claim). These standards make clear that, to represent a juvenile defendant effectively at any stage of a proceeding, a defense attorney must – at a minimum – “be knowledgeable about adolescent development and the special status of youth in the legal system,” be familiar with “the specialized skill of communicating with young clients in a developmentally appropriate and effective manner,” and “conduct a prompt, thorough, and independent investigation into the facts and circumstances of the case,” among many other things. NJDC, NATIONAL JUVENILE STANDARDS, Standards 1.1, 1.3 & 4.1.²

National standards recognize that many incarcerated youth struggle with significant deficits in both expressive and receptive language. NDTAC, *Fact Sheet: Youth with Special Education Needs in Justice Settings*, 1-2, 1-2 (2014), available at https://neglected-delinquent.ed.gov/sites/default/files/NDTAC_Special_Ed_FS_508.pdf. To account for these deficits, the standards require that attorneys defending juveniles “communicat[e] with young

¹ Michigan currently has no state-level system of oversight or enforcement to ensure that the county-based juvenile defense delivery systems provide effective and constitutionally required trial-level or post-disposition services. *Michigan Assessment*, NJDC, <https://njdc.info/our-work/juvenile-indigent-defense-assessments/michigan-assessment/>. It is therefore imperative that courts look to the national standards for best practices.

² While the standard for the effective representation of youth is guaranteed under the Fourteenth Amendment’s fundamental fairness standard, even the Sixth Amendment standard must take into account the unique needs of youth. The Supreme Court in *Strickland* made clear that reasonableness was to be measured based on “prevailing professional norms.” *Strickland*, 466 U.S. at 688 (1984). The prevailing norms in juvenile representation are captured by the National Juvenile Defense Standards. These standards take into account the unique developmental vulnerabilities of youth that makes effective representation critically important and guides counsel on practices necessary to center the needs and interests of their youth clients.

clients in a developmentally appropriate and effective manner,” and are “properly trained in effective adolescent interviewing techniques.” NJDC, NATIONAL JUVENILE DEFENSE STANDARDS, Standard 1.3. Furthermore, juvenile defenders have a duty to “recognize barriers to effective communication” and “take all necessary steps to ensure that differences, immaturity, or disabilities do not inhibit the attorney-client communication.” *Id.*, Standard 2.6. The National Juvenile Standards specifically address the relationship between the attorney and his or her client and a parental figure, stating “Counsel may not permit a third party, including a parent, to interfere with counsel’s assessment of the case” or representation more generally. *Id.*, Standard 2.5. However, where necessary, juvenile defenders are required to enlist the help of outside experts or other third parties such as social workers or psychologists. *Id.* The numerous parties in a youth’s case, sometimes including their parent ³, social worker, teacher, or psychologist, create a different relationship between an attorney and their juvenile client and leaves a possibility of structural harm occurring throughout the representation. Unique standards are appropriate in the juvenile justice context not only because of the developmental status of youth, but also because of the unique rehabilitative purpose of the juvenile justice system. *See McKeiver v. Pennsylvania*, 403 U.S. 552 (1971) (“Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties.”); *see also Gault* at 26 (“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.”)

³ In the instant case, Mr. Ross’s attorney had to work with Mr. Ross’s mother in order to obtain phone records. Involving Mr. Ross’s mother as an additional party necessary to secure evidence contributed to the attorney receiving and presenting incorrect phone records in court.

IV. Fundamental Fairness Requires a Rebuttable Presumption of Prejudice

Under the Sixth Amendment *Strickland* standard, criminal defendants claiming ineffective assistance of counsel must demonstrate actual prejudice to successfully succeed in their claim; this standard is inappropriate for youth clients and for the juvenile justice context. Because of the particular vulnerabilities and lack of legal competence of young people, prejudice ought to be presumed where constitutionally deficient performance has been identified in juvenile court.

A. Strickland's Requirement that Criminal Defendants Prove Prejudice Creates an Unduly Heavy Burden for Youth Clients

Sixth Amendment jurisprudence has proven itself inadequate to hold counsel to high standards of representation. In setting the standard for ineffective assistance claims the Supreme Court in *Strickland* determined that deference must be given to the acts of attorneys, over the interests and needs of their clients, largely to support procedural efficiency. *See Strickland*, 466 U.S. 668, 690 (“Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.”); *see also Michel v. Louisiana*, 350 U.S. 91, 101 (1955) (relying on the “presumption of effectiveness” and the possibility of “sound trial strategy” to find the failure of counsel to timely move to quash critical evidence did not equate to constitutionally ineffective assistance.)

While deference to counsel may be appropriate in the adult criminal context, it does not meet the needs of fundamental fairness for youth. Under any circumstances, it is extremely difficult for a criminal defendant to prove that, but for counsel’s misconduct, the result of their trial would have been different. George C. Thomas, III, *History’s Lesson for the Right to Counsel*, 2004 U. ILL L. REV. 543, 551 (2004); Matthew J. Fogelman, *Justice Asleep Is Justice*

Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial, 26 J. LEGAL PROF. 67, 78 (2002) (“Requiring a defendant to bear the burden of demonstrating a ‘reasonable probability’ that the result of the proceeding would have been different but for counsel’s ineffective assistance is merely a deceptive way of saying that the defendant must prove that he would have been acquitted. In other words, he must prove his innocence rather than forcing the state to prove his guilt.”); George C. Thomas, III, *History’s Lesson for the Right to Counsel*, 2004 U. ILL L. REV. 543, 551 (“[T]o require prejudice in the right to counsel context is essentially to say to a defendant that the right to a competent lawyer exists only when the state’s case is weak.”). As a result, courts rarely find a violation under *Strickland*, even when an attorney’s conduct is found to be egregiously deficient. *See, e.g. Avery v Procunier*, 750 F.2d 444, 445, 447 (5th Cir. 1985) (affirming counsel was not ineffective in upholding the defendant’s sentence of life imprisonment when his attorney was appointed the morning of trial due to lack of prejudice); *Haney v State*, 603 So.2d 368, 377–78 (Ala. Crim. App. 1991) (finding no *Strickland* violation because there was no prejudice to defendant when one his attorneys was incarcerated overnight for contempt of court during the trial due to his own intoxication); *People v Garrison*, 765 P.2d 419, 440–41 (Cal. 1989)) (en banc) (affirming a defendant’s attorney “did a fine job” and that representation was effective despite the fact that the lawyer “consumed large amounts of alcohol each day of the trial” and “was arrested for driving to the courthouse with a .27 blood-alcohol content” on the second day of jury selection); *State v Wille*, 595 So. 2d 1149, 1151–52 (La. 1992) (affirming defendant’s death sentence despite the fact his counsel—a convicted felon—was serving his sentence of community service through representation of the defendant, which he did not disclose to his client and he admitted created a conflict of interest); *People v Tippins*, 570 N.Y.S.2d 581, 582–83 (N.Y. App. Div.

1991) (holding assistance of counsel was effective when the defendant’s court-appointed attorney unethically solicited a fee from the defendant’s mother and was found “sleeping during portions of his trial”); *McFarland v State*, 928 S.W.2d 482, 505 (Tex. Crim. App. 1996) (concluding counsel’s performance in capital case was sufficient under *Strickland* despite his sleeping during trial). This standard is inapt for youth as it prioritizes finality rather than fair adjudication and appropriate protections for youth.

B. A Rebuttable Presumption is Appropriate under the Fourteenth Amendment and Consistent with Existing Rules of Evidence

When a set of facts or circumstances often produces a given result, courts or legislatures may create a *presumption* that this result has been reached, absent contrary evidence. When a rebuttable presumption of this kind is created, the burden of production—or the burden of going forward with relevant evidence—shifts to the alternate party. Curt A. Benson, *Michigan Rule of Evidence 301, I Presume*, MICH. BAR J. 34, 35 (2008) (“Courts and legislatures have singled out many sets of basic facts and given them the status of presumptions. These patterns, these ‘basic facts,’ are facts that, if proved, trigger the presumption.”). Presumptions are established in law for a variety of reasons, including “procedural fairness, public policy considerations, efficiency, and convenience.” *Id.*

Establishing a presumption of prejudice for youth alleging ineffective assistance of counsel is appropriate under the Fourteenth Amendment fundamental fairness standard as it supports the juvenile court’s focus on rehabilitation, addresses the need for a protective standard, and responds appropriately to the developmental status of youth. The presumption also advances efficiency by placing evidentiary obligations on the party best able and best resourced to meet them – the State. As noted above, youth are less mature and less able to understand the complex proceedings of court. More importantly, for purposes of efficacy and convenience, they lack the

resources to marshal and present evidence. Youth as a class meet most legal definitions of indigence. They have little to no income from work, face high unemployment rates, and have a duty to attend school which makes any meaningful work impossible. And, as described above, racial disparities in the juvenile justice system mean that Black, Latino, and Indigenous youth are particularly at risk in legal proceedings and in their lawyer-client relationships. These realities must be reflected in the standard by which the quality of counsel is evaluated. Youth, who lack an awareness of court procedures and lack the sophistication of adults, ought not to be disadvantaged by their age. Instead of placing the burden of production on children to prove they were prejudiced by inadequate representation, that burden should fall on the party best positioned to carry it—namely, the State.

In practice, the presumption of prejudice would operate as any other presumption under Michigan law. Specifically, the burden of production on the element of prejudice would fall on the State to prove a youth was not prejudiced despite proof their counsel performed deficiently in their representation. While the burden of persuasion would remain with the young person asserting the ineffective assistance of counsel claim, upon a finding of deficient performance, the court would presume prejudice, absent the presentation of evidence by the State indicating the contrary. *See, e.g., In re Mardigian Estate*, 917 N.W.2d 325 (Mich. 2018) (affirming there is a rebuttable presumption of undue influence when an attorney drafts a will in his or her own favor); *Widmayer v. Leonard*, 422 N.W.2d 280, 290 (1985) (“The latter burden [of production] may shift several times during the trial, whereas the burden of persuasion generally remains with the plaintiff.”). This standard would satisfy to the requirements of Michigan Rule of Evidence 301, which establishes that:

[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift

to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Applying this presumption does not guarantee that a court will find the attorney's representation to be ineffective. On the contrary, while this presumption will shift the burden of proof, the State can rebut the presumption by producing evidence indicating counsel's deficient performance did not prejudice the juvenile's case. *See, e.g., Bieszck v Avis Rent-A-Car System, Inc.*, 583 N.W.2d 691 (1998) (affirming a common-law presumption that the operator of a vehicle is driving with the express or implied consent of the owner, but holding the rental car company overcame this presumption with the introduction of rebuttal evidence). As a result, this mechanism would still be sufficient to protect adjudications or convictions where counsel's deficient performance is merely a technicality or had a negligible impact on the case, while appropriately increasing the court's protection of young people and meeting the Fourteenth Amendment's requirement of fundamental fairness.

CONCLUSION

Wherefore, Juvenile Law Center respectfully requests that this Court adopt a robust standard for evaluating ineffective assistance of counsel claims in juvenile proceedings that is consistent with the Fourteenth Amendment's requirement of fundamental fairness. This standard must ensure a level of representation that is accountable to youth clients and incorporates practices that meet the unique challenges youth face in understanding the role of counsel and participating effectively in their own defense.

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Dated: August 7, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective email addresses disclosed on the pleadings on August 7, 2020.

By: s/ Carrie Bechill

Carrie Bechill