NO. 4-08-0435

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

In re Austin M., a Minor

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner-Appellee,

v.

AUSTIN M.
Respondent-Appellant

On appeal from the Circuit Court of the Eleventh Judicial Circuit, Ford County, Illinois (No. 06-JD-17), the Honorable Stephen R. Pacey, Judge Presiding

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BRIEF OF JUVENILE LAW CENTER; THE LOYOLA *CIVITAS* CHILDLAW CENTER; THE CHILDREN AND FAMILY JUSTICE CENTER; THE YOUTH LAW CENTER; AND THE NATIONAL JUVENILE DEFENDER CENTER AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT-APPELLANT

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INTEREST AND IDENTITY OF *AMICI*

Amici[1] represent 16 organizations and professionals[2] across Illinois and the country with special experience and expertise in juvenile defense. The organizations submitting this brief work with, and on behalf of, adolescents at every stage of the juvenile and criminal justice process. *Amici* are advocates, academics, and researchers who bring a unique perspective and a wealth of experience in providing for the care, treatment, and rehabilitation of youth in the juvenile justice system. *Amici* know from first hand experience that youth who enter the system need extra protection and special care, clearly necessitated by their status as youth. *Amici* also recognize as a result of their collective experience that adolescent immaturity often manifests itself in numerous ways, including diminished ability to assess risks, make good decisions, and control impulses, thus requiring the guiding hand of counsel through their contact with the juvenile court system. *Amici* have seen the positive outcomes that result from effective legal representation for juveniles—including targeted and appropriate disposition and treatment, aftercare planning, and education about collateral consequences of adjudications and expungements—and therefore we strongly advocate that there should be no difference in the type of legal representation provided at adjudication between a juvenile charged with a delinquent offense and an adult charged with a criminal offense.

STATEMENT OF FACTS

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

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[1] The authors would like to thank Professor Diane C. Geraghty, Director, *Civitas* ChildLaw Center and Terry Schuster, University of Texas Justice Corps Fellow, Juvenile Law Center for their assistance with this brief.

[2] A brief description of each organization and professional is located at Appendix A.

SUMMARY OF ARGUMENT

More than forty years ago, the United States Supreme Court extended the constitutional guarantee of counsel to youth facing delinquency charges. This was not the right to a guardian *ad litem* (GAL) representing the best interests of the child, but the right to zealous representation, just as an adult has in a criminal proceeding. While juvenile court may not mirror the adult criminal justice system in all respects, during the delinquency hearing, a child has a right to counsel coextensive with adults in criminal trials. Providing a child with a counsel who serves as both a GAL and a defense lawyer fails to ensure the fundamental fairness required under the United States Constitution and violates the attorney's ethical and professional obligations to his client. As more punitive changes to the juvenile justice system become widespread, the guarantee to effective and zealous representation has taken on even greater importance.

The attorney in the instant case explicitly defined his role as "seeking the truth." By equating his role with that of the judge and the prosecutor, Austin's counsel completely failed to fulfill his legal and ethical obligation to serve as a zealous advocate for his client. This case illustrates the dangers of allowing lawyers to wear two hats in juvenile court; such practice effectively silences youth facing delinquency charges that not only threaten their liberty but also carry significant collateral consequences that may follow them throughout their lives.

ARGUMENT

I. CHILDREN INVOLVED IN DELINQUENCY PROCEEDINGS HAVE A WELL-SETTLED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL THAT MUST NOT BE MATERIALLY DIFFERENT FROM THE RIGHT TO COUNSEL AFFORDED ADULTS IN CRIMINAL TRIALS.

A. The Supreme Court's Decision in *In re Gault* Affirms the Fundamental Requirement that Children Charged With Acts of Delinquency Are Entitled to the Effective Assistance of Counsel.

The right to counsel is a cornerstone of procedural fairness because attorneys play a critical role in ensuring that the adversarial system produces "just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In criminal cases, an attorney's duty of loyalty and competence is an essential component of a defendant's Sixth Amendment right to counsel. The United States Supreme Court recognized a minor's right to counsel in juvenile court more than forty years ago in *In re Gault*. 387 U.S. 1 (1967). *Gault* established that a child has the right to counsel at the adjudicatory stage of a delinquency proceeding because the child's liberty may be curtailed. *In re Gault*, 387 U.S. 1 (1967); *see also Gideon v. Wainwright*, 372 U.S. 335 (1963). Many states, including Illinois, have extended this right to guarantee the right to counsel at all stages of a delinquency proceeding. *See* 705 ILCS 405/1-5 (West 2009). In *Gault*, the United States Supreme Court wrote:

> 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.

Gault, 387 U.S. at 36.

Today, a child's need for assistance of counsel has become more critical, as a greater number of youth are at risk of adult prosecution, dispositions have become longer

and more punitive, and delinquency adjudications now carry collateral consequences that follow the youth into adulthood or, in some cases, for the rest of their lives. Because of the increasing seriousness of delinquency adjudications, children should be provided with zealous legal representation throughout the delinquency process. In the decades since *Gault*, the scope and importance of the representation of counsel has been repeatedly recognized and codified in national standards for juvenile court practice.[3]

Although *Gault* did not mandate the wholesale incorporation of adult constitutional criminal procedure into every aspect of a juvenile delinquency proceeding, the Court cautioned that the juvenile court process must remain procedurally fair:

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

Gault, 387 U.S. at 30, citing *Kent v. United States*, 383 U.S. 541, 562 (1966). The Illinois Supreme Court has adopted this reasoning, acknowledging that "certain due process safeguards normally associated with criminal proceedings have been extended for the protection of juveniles to accord them *fundamental fairness*." *In re Beasley*, 66 Ill. 2d. 385, 389 (1977) (emphasis added).

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[3] *See* American Council of Chief Defenders & National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation through Indigent Defense Delivery Systems* (2005), *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf; Am. Bar Ass'n, *et al*., *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio*, Chapter 6: Recommendations (2003), *available at* http://www.njdc.info/pdf/Ohio_Assessment.pdf; Inst. of Judicial Admin. & Am. Bar Ass'n, *Juvenile Justice Standards: Standards Relating to Pretrial Court Proceedings* (1980); Patricia Puritz, *et al*, Am. Bar Ass'n Juvenile Justice Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995); National Ass'n of Counsel for Children, *NACC Policy Agenda: Juvenile Justice Policy*, adopted May 17, 1997, *available at* http://www.naccchildlaw.org/?page=Policy_Agenda; National Advisory Commission on Criminal Justice Standards, *Juvenile Justice Standards Relating to Interim Status* (1980), Standard 7.6C (right to counsel at each stage of formal juvenile justice process); National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* at 25 (2005), *available at* www.ncfcj.org/content/view/411/411/.

Thus fundamental fairness is the yardstick by which courts measure the scope of due process safeguards required to protect the rights of a child in juvenile court. *See e.g.*, *In the Interest of D.L.B.*, 140 Ill. App. 3d 52, 56 (4th Dist. 1986) (although juvenile proceedings are not criminal in nature, certain procedural due process safeguards have been extended for the protection of juveniles in furtherance of fundamental fairness); *In the Interest of S.K.*, 137 Ill. App. 3d 1065, 1068 (2nd Dist. 1985) (standard for measuring due process in juvenile proceeding is fundamental fairness). A child's right to the effective assistance of counsel is one such fundamental right. In *Gault*, the Supreme Court directly compared the right to counsel during a delinquency hearing with an adult's right to counsel in a criminal trial. *Gault*, 387 U.S. at 36. The Court stated,

> [t]here is no material difference in this respect between adult and juvenile proceedings of the sort here involved…[a] proceeding where the issue is whether a child will be found to be "delinquent" and subjected to loss of his liberty for years is comparable in seriousness to a felony prosecution.

Id. The Court further noted that assistance of counsel was essential for the determination of delinquency, which carries the "awesome prospect of incarceration in a state institution until the Juvenile reaches the age of 21." *Id.* at 36-37. The Supreme Court struck this same theme in *Kent v. United States*, where the Court wrote:

> [t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel. There is no justification for the failure of the Juvenile Court to rule on the motion for hearing filed by petitioner's counsel, and it was error to fail to grant a hearing.

383 U.S. at 561-662. The Court's reasoning in both cases underscores the importance of a child's right to the effective assistance of counsel, especially during the adjudication phase of a delinquency proceeding. This right is one of the "essential" components of

fair treatment in the determination of delinquency. *Id.*

Illinois courts have consistently applied the principles of *Gault* to delinquency proceedings brought under the Illinois Juvenile Court Act, affirming that certain due process safeguards, including the right to counsel, are essential to fundamental fairness. *In re C.R.H.*, 163 Ill. 2d 263, 269 (1994); *In re S.R.H.*, 96 Ill. 2d 138, 144 (1983); *In the Interest of D.S.*, 122 Ill. App. 3d 326, 328 (1st Dist. 1984); *People v. Giminez*, 23 Ill. App. 3d 583, 585 (3rd Dist. 1974). The Illinois Juvenile Court Act also protects the due process rights of minors charged as delinquents under the Act. 705 ILCS 405/5-101 (1)(d) (West 2009) (ensuring "due process, as required by the Constitutions of the United States and the State of Illinois, through which each juvenile offender and all other interested parties are assured fair hearings at which legal rights are recognized and enforced."). To effectuate this goal, Section 405/5-101 (3) specifies that minors charged with a crime "shall have all the procedural rights of adults in criminal proceedings, unless specifically precluded by laws that enhance the protection of such minors." 705 ILCS 4-5/5-101 (3) (West 2009). Among the rights specifically afforded all minors under the Act, including those charged with a crime, is the right to be represented by counsel. 705 ILCS 405/1-5 (1) (West 2009). Underscoring the importance of this right, this same section provides that "[n]o hearing ... under the Act may be commenced unless the minor who is the subject of the proceeding is represented by counsel."[4] Finally, Article V of the Act specifically addresses the right to counsel, providing,

> (a) In a proceeding under this Article, a minor who was under 13 years of age at the time of the commission of an act that if committed by an

[4] In 2005, the Illinois General Assembly further protected this right by amending the Juvenile Court Act to provide that, in delinquency proceedings, "a minor may not waive the right to the assistance of counsel in his or her defense." 705 ILCS 405/5-170(b).

> adult would be a violation of Section 9-1, 9-1.2, 9-3, 9-3.2, 9-3.3, 12-13, 13-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 must be represented by counsel during the entire custodial interrogation of the minor.

705 ILSC 405/5-170 (West 2009).

The Illinois Supreme Court affirmed this view of the child's right to counsel, noting that certain due process safeguards associated with criminal trials extend into juvenile delinquency hearings. *Beasley*, 66 Ill. 2d at 390. More recently in *In re A.G.*, the Illinois Supreme Court noted:

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

In re A.G., 195 Ill. 2d 313 318 (2001). Importantly, there is no qualification of the constitutional rights recognized here and their counterparts in a criminal trial. The Illinois Supreme Court has held that according to statute, "the procedural right of the minor shall be the rights of adults unless specifically precluded by laws enhancing their protection." *In re W.C.*, 167 Ill. 2d 307, 321 (1995). Absent language describing how counsel in a delinquency proceeding should function differently from a counsel in an adult trial, no difference should be permitted or sanctioned. Children in delinquency proceedings need the procedural safeguards specifically afforded them in delinquency proceedings for the same reasons adults in criminal trials do – they ensure the fundamental fairness of the proceedings.

B. As Juvenile Courts Have Become More Punitive, There is a Greater Need to Ensure Zealous Representation for Youth Accused of Delinquent Offenses.

The juvenile justice system was established more than a hundred years ago in recognition that children were developmentally different than adults. Jay D. Blitzman, *Gault's Promise*, 9 Barry L. Rev. 67 (2007). States concluded that children should not be involved in the adult criminal justice system but instead should have a different court system for determining delinquency and dependency issues. Wanda Mohr, Richard J. Gelles & Ira M. Schwartz, *Will the Juvenile Justice Court System Survive? Shackled in the Land of Liberty: No Rights for Children*, 564 Annals of the Amer. Acad. of Pol. & Soc. Sci. 37, 38 (1999). The early juvenile justice system was premised on the *parens patriae* philosophy and focused on treatment and rehabilitation instead of punitive consequences. This reasoning was based on social scientists' findings that children were more amenable to rehabilitation. Joanna S. Markman, *In Re Gault: A Retrospective in 2007: Is it Working? Can it Work?*, 9 Barry L. Rev. 123, 126 (2007). The court and other professionals were solely responsible for deciding what was in "the best interest" of the children – often not to the child's benefit. Mohr, et al, *Will the Juvenile Justice Court System Survive?,* at 39. The lack of due process and advocacy for juvenile offenders led to inconsistency in sentencing and movement away from the original goals of rehabilitation.

During the 1980s and 1990s the country experienced a shift in ideology based on the perception that juvenile crime was increasing. The media's skewed portrayal of juvenile crime ignited public fear, motivating politicians and lawmakers to respond by proposing "get tough" policies. Markman, *In Re Gault: A Retrospective*, at 130.

Policymakers moved away from a vision of a rehabilitative justice system towards one of punitive justice. Tara Kole, *Recent Development: Juvenile Offenders*, 38 Harv. J. on Legis. 231, 234 (2001).

Consistent with this trend, the Illinois Legislature in 1999 effected significant changes to the Juvenile Court Act, placing a new emphasis on holding children accountable for their crimes. Amendments to Article V added in 1999 provided for the first time that the central goals of the Juvenile Act were protection of the public and holding children accountable for their offenses. Pub. Act 50-950, effective Jan. 1, 1999 (adding new section 705 ILCS 405/5-101).[5] This change, according to the Illinois Supreme Court, "represents a fundamental shift from the singular goal of rehabilitation to include the overriding concern of protecting the public and holding juvenile offenders accountable for violations of the law." *In re A.G.*¸ 195 Ill. 2d at 317. As delinquency adjudications have become increasingly similar to criminal trials, more procedural protections have been extended to children. *See Beasley*, 66 Ill. 2d at 389; (holding procedural rights of the minor shall be the rights of adults unless specifically precluded by laws enhancing their protection); *see also In re W.C.* 167 Ill. 2d 307; *In re A.G.* 195 Ill. 2d 313; *In re Samantha V.*, 2009 WL 3063430 at 8 (Ill. 2009).

These changes in the emphasis of Juvenile Court proceedings are mirrored across the country in juvenile justice systems that have become increasingly punitive nationwide. For example, historically the "best interests of the child" was expressly articulated as the primary objective of juvenile delinquency proceedings. Yet today only

[5] These same amendments also added language establishing that minors are entitled to the same procedural protections as adults unless greater protections are provided by statute. Juvenile Court Act. Pub. Act 50-950, effective Jan. 1, 1999 (adding section 705 ILCS 405/5-101(3)).

three states emphasize the best interests of the child as the primary purpose of juvenile court. Ky. Rev. Stat. Ann. § 600.010 (LexisNexis 2009); Mass. Gen. Laws. Ann. ch. 119 § 53 (LexisNexis 2009); W. Va. Code Ann. § 49-5-13 (LexisNexis 2009). At least six states have enacted statutes that explicitly articulate traditional criminal justice goals, such as deterrence, punishment, accountability, and public safety. N.C. Gen. Stat. § 7B-1500 (2009); Conn. Gen. Stat. § 46b-121h (2008); Hawaii Rev. Stat. Ann. § 571-1 (LexisNexis 2009); Tex. Fam. Code. Ann. § 51.01 (Vernon 2009); Wyo. Stat. Ann. § 14-6-201 (2009). Fifteen states embrace balanced and restorative justice principles that emphasize accountability and victim restoration over rehabilitation. Alaska. Stat. § 47.05.060 (2009); Fla. Stat. Ann. § 985.02 (LexisNexis 2009); Idaho Code Ann. § 20-501 (2009); Md. Code Ann., Cts. & Jud. Proc. § 3-802 (LexisNexis 2009); N.J. Rev. Stat. § 2A:4A-21 (2009); 42 Pa. Cons. Stat. Ann. § 6301 (2009); Wis. Stat. § 938.01 (2009); Ala. Code § 12-15-101 (2009); Cal. Wel. & Inst. Code § 202 (Deering 2009); D.C. Code Ann. § 16-2301.02 (LexisNexis 2009); Ind. Code Ann. § 31-10-2-1 (LexisNexis 2009); Minn. Stat. § 242.18 (2009); Mont. Code Ann. § 41-5-102 (2009); Or. Rev. Stat. § 419C.001 (2009); Wash. Rev. Code Ann. § 13.40.010 (LexisNexis 2009). A growing majority of states have enacted amendments to their juvenile codes to reflect similarities between juvenile delinquency and criminal proceedings, including the availability of no contest pleas, blended sentences, parole provisions, fines, and restitution. Katherine Hunt Federle & Paul Skendelas, *Thinking Like a Child: Legal Implications of Recent Developments in Brain Research for Juvenile Offenders, in* Law, Mind and Brain (Michael Freeman and Oliver R. Goodenough, eds., 2009). Similarly, many states have enacted statutory changes eliminating certain long-standing features of the juvenile

system, such as limited access to juvenile records, limiting jurisdiction to age 21, closed courtrooms, and the prohibited use of juvenile adjudications in subsequent proceedings. *Id*. The widespread elimination of these characteristics demonstrates the national consensus toward a more punitive juvenile system.

In light of this policy shift, *Gault*'s requirement that children receive competent representation for children is more important than ever. As one commentator has noted,

> The representation of juvenile offenders not only requires competency, but specialized skills and knowledge that appointed counsel used to dealing with adult cases may not possess. Some of these special considerations are (1) an understanding of child and adolescent development from a psychological and legal perspective; (2) communication, consultation and confidentiality issues; (3) issues relating to the child-parent relationship; and (4) issues regarding the determination of the objectives of the representation.

Markman, *In Re Gault: A Retrospective*, at 135. Although the juvenile justice system retains a focus on rehabilitation, this alone cannot justify the erosion of critical procedural safeguards afforded children.

C. Juvenile Adjudications Result in Collateral Consequences that Extend Beyond the Child Reaching the Age of Majority.

Zealous and effective representation is essential because juvenile delinquency adjudications result in at least equal, if not greater, collateral consequences to adjudicated youth than do adult sentences. These collateral consequences hinder a juvenile's successful re-integration into society, impeding his ability to pursue his education and obtain housing or employment, and may affect future possible sentencing as an adult. *See* Robert E. Shepard, Jr., *Collateral Consequences of Juvenile Proceedings, Part II*, 15(3) Crim. Just. Magazine (2000), *available at* www.abanet.org; See also Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the*

Collateral Consequences of Adjudications, 6 Nev. L. J. 1111, 1115 (2006). An increasing number of college and financial aid applications inquire into juvenile adjudications, and certain drug offenses can make an individual ineligible for financial aid. Shepard, *Collateral Consequences of Juvenile Proceedings*; Higher Education Act, Pub. L. No. 89-329, 79 Stat. 1219 (1965). An adjudication of delinquency may hinder plans to enlist in the military. *See* Army Reg. 601-210(4-24). While each division of the military has distinct regulations governing the use of juvenile delinquency and criminal records, no division explicitly prohibits the use of such records. A juvenile may request a moral waiver to enlist in the army; however, certain enumerated offenses render an applicant ineligible for waiver. *Id*.

In addition to creating barriers to future success, juvenile adjudications also can restrict a youth's current livelihood, such as when restrictions on their ability to obtain a drivers' license impede them from obtaining gainful employment. For example, the City of Chicago maintains an ordinance on "drug and gang houses, houses of prostitution and other disorderly houses" that is used routinely to impose fines, eviction orders, or even forfeiture of private property based on criminal or delinquent activity of occupants. *See* Chicago, Il., Code, title 8, ch. 4, § 090 (8-4-090) (2009). Adjudications of delinquency may also result in ineligibility for public benefits, including Temporary Assistance for Needy Families (TANF) and food stamps. Federal Welfare Reform Law, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

D. The Illinois Rules of Professional Conduct Guarantee a Person Charged with a Crime the Right to Loyal, Zealous, and Conflict-free Representation by an Attorney.

In addition to the constitutional and statutory obligations to provide effective and zealous representation on behalf of one's client, attorneys also have an ethical obligation to represent their child clients as they would their adult clients. The Illinois Rules of Professional Conduct ("the Rules") delineate the standards of representation with which all Illinois attorneys must comply. The purpose of the Rules is to guide the conduct of attorneys in the representation of clients and to maintain public confidence in the legal system, by ensuring that attorneys act "competently and with loyalty to the best interests of their clients." 134 Ill. 2d Preamble (West 2009). The attorney-client relationship is one of "trust and confidence." *Id*. Within this relationship, "such confidence only can be maintained if the lawyer acts competently and zealously pursues the client's interests within the bounds of the law." *Id*.

The constitutionally-mandated duties of an attorney in a criminal case are identical to the responsibilities imposed on attorneys under the Rules.[6] Specifically, the Rules impose a general duty of competence (134 Ill. 2d R. 1.1), a responsibility to abide by a client's decisions concerning the objectives of representation (134 Ill. 2d R. 1.2), an obligation to explain matters "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" (134 Ill. 2d R. 1.4 (b)), a duty to refrain from using or revealing confidential information obtained from the client without

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[6] The Illinois Supreme Court has adopted new Illinois Rules of Professional Conduct, effective Jan. 1, 2010. For the first time Illinois has included comments designed to provide guidelines for interpretation of the Rules. *See* Alberto Bernabe, *Coming Soon to a Law Practice Near You: The New (and Improved?) Illinois Rules of Professional Conduct*, 39 Loy. U. Chi. L.J. 691, 696 (2008). Comment 20 provides: "[S]ince the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of a breach of the applicable standard of conduct."

consent after disclosure (134 Ill. 2d R. 1.6 (a)), and a duty to avoid joint representation of clients if it will be adverse to or materially limit the interests of another client (134 Ill. 2d R. 1.7).

It is against this backdrop that this court must now determine whether a minor's "right to counsel" is breached during a delinquency proceeding when child's counsel acts simultaneously as both the child's defense counsel and the child's GAL. The United States Supreme Court, the Illinois legislature, The Illinois Supreme Court Rules of Professional Conduct, and Illinois case law all support the conclusion that a minor in a delinquency proceeding must be afforded the same right to counsel afforded an adult during a criminal trial.

II. APPOINTING LAWYERS TO SERVE AS GUARDIANS *AD LITEM* FOR CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS MAY SUPPORT CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND JEOPARDIZE JUVENILE COURT JUDGMENTS ON APPEAL.

Juvenile defendants such as Austin, whose attorneys act in their "best interests" rather than in their zealous defense, will likely receive ineffective assistance of counsel, as analyzed under both *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984). The right to counsel includes the right to the effective assistance of counsel. *Strickland*, 466 U.S. at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970)). The Sixth Amendment does not define what is meant by effective representation. It "relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id*. at 688. Among the basic professional duties included in the right to effective assistance are "a duty of loyalty" and "a duty to avoid conflicts of interest." *Id*. Illinois courts have similarly defined the Sixth

Amendment right to counsel to include "assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations." *People v. Spreitzer*, 123 Ill. 2d 1, 13 (1988). *See also People v. Hernandez*, 231 Ill. 2d 134, 142 (2008) ("A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation.") (citing *People v. Morales*, 209 Ill. 2d 340, 345 (2004)). In the context of criminal proceedings, a lawyer's primary responsibility is to defend against the state's efforts to secure a conviction. "If counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents – as a *vigorous advocate having the single aim of acquittal by all means fair and honorable* – are hobbled or fettered or restrained by commitments to others, effective assistance of counsel is lacking." *People v. Hernandez*, 231 Ill. 2d at 143 (quoting *People v. Stoval*, 40 Ill. 2d 109, 112 (1968)) (emphasis added).

A. An *Attorney* Representing a Minor Charged with a Crime Provides Vastly Different Representation from a *Guardian Ad Litem*.

The attorney's role under the Rules of Professional Conduct and the Sixth and Fourteenth Amendments differs in essential ways from the role of a GAL. First, within the bounds of law and ethics, an attorney's exclusive allegiance is to his or her client. As part of this duty an attorney must abide by a client's decisions concerning the objectives of representation after consultation and counseling, even in circumstances in which the lawyer has a differing view on what is in a client's best interest. See 134 Ill. 2d R. 1.2 (a) (West 2009). By contrast, a GAL's principal responsibility is to make an independent assessment of a client's best interest and advocate in support of that position before the

court.[7] This is true even when the client disagrees with the GAL's assessment of his or her interest. Second, again within the bounds of law, an attorney must maintain all client confidences. Rule 1.6 provides that "a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure." 134 Ill. 2d. R. 1.6(a) (West 2009). No such duty binds a GAL, who indeed may be required to disclose confidences if necessary to protect and advocate for the best interests of a child.

Furthermore, a majority of states have enacted provisions protecting minors' rights to conflict-free representation.[8] Legislatures in other states have made clear the distinct and conflicting roles of GAL and defense attorney.[9] Similarly, courts in other

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[7] *See In re Mark W.*, 228 Ill.2d 365 (2008) ("The traditional role of the guardian ad litem is not to advocate for what the ward wants, but, instead, to make a recommendation to the court as to what is in the ward's best interests."). *See also*, Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 266 (2005) ("Traditionally, while a guardian *ad litem* will be viewed as an arm of the court who will advocate in the best-interest of the child, counsel for the child will generally have a duty of undivided loyalty and confidentiality to the child.").

[8] *See* Ala. Code §§ 12-15-102(5), (10), 12-15-202(f)(1) (LexisNexis 2009); Alaska Stat. §§ 47.12.090(a), (b) (2009); Ariz. Rev. Stat. §§ 8-221(A), (I) (LexisNexis 2009); Ark. Code Ann. §§9-27-316(a)(1), (d), (f)(1), (f)(2) (2009); Cal. Court. R. 5.663 (c), (d) (2009); Fla. Stat. Ann. § 985.033(1) (LexisNexis 2009); Fla. R. Juv. Proc. 8.170 (2009); Idaho Code Ann. §§ 16-2429, 16-1514, 20-514 (2009); Mass. Ann. Laws ch. 119, § 39F, ch. 215, § 56A (LexisNexis 2009); Minn. Stat. §§ 260B.163, 260C.007 (2008); Minn. R. Juv. Proc. 3.01 (2005); Miss. Code Ann. §§ 43-21-121, 43-21-201(1) (2009); Mo. Rev. Stat. §§ 211.211, 452.423 (2008); Mo. Sup. Ct. R. 116.01(a) (2009); Neb. Rev. Stat. §§ 43-247, 43-272 (LexisNexis 2009); Nev. Rev. Stat. Ann. §§ 62D.030, 159.0455, 432B.500 (LexisNexis 2009); N.H. Rev. Stat. Ann. §§ 169-B:12, 461-A:16 (LexisNexis 2009); N.J. Rev. Stat. § 2A:4A-39 (2009); N.J. Ct. R. 5:8B (2009); N.M. Stat. Ann. §§ 32A-1-7(A), (I), 32A-2-14(B), (H) (LexisNexis 2009); N.C. Gen. Stat. §§ 7B-601, 7B-2000(a), 7B-2001 (2008); N.D. Cent. Code §§ 27-20-26, 27-20-48 (2009); Or. Rev. Stat. §§ 419C.005, 419C.200 (2007); Pa. R. Juv. Ct. P. 151(A) (2005); R.I. Gen. Laws § 14-1-58 (2009); R.I. R. Juv. P. 9 (2005); S.C. Fam. Ct. R. 36 (2009); S.D. Codified Laws §§ 26-7A-31, 26-7A-8 (2009); Vt. Stat. Ann. tit. 33 § 5112(a), (b) (2009); Va. Code Ann. § 16.1-266(B), (C), (E) (2009); Wash. Rev. Code Ann. §§ 13.34.030(9), 13.34.070(3) (LexisNexis 2009); Wis. Stat. §§ 48.23, 48.235 (2009).

[9] *See* Minn. Stat. § 260C.163 subd. 3(d)(2008) ("Counsel for the child shall not also act as the child's guardian ad litem."); N.M. Stat. Ann. § 32A-1-7(I) (LexisNexis 2009) ("A guardian ad litem shall not serve concurrently as both the child's delinquency attorney and guardian ad litem."); Wisc. Stat. § 938.23(1j) (2009) ("Counsel shall advance and protect the legal rights of the party represented. Counsel may not act as guardian ad litem for any party in the same proceeding."); *see also* Idaho Code Ann. § 20-514 (2009) ("[I]n the event the court shall find that there is a conflict of interest between the interests of the juvenile and his parents or guardian, then the court shall appoint separate counsel for the juvenile."); Miss. Code Ann. § 43-21-121(3)(2009) ("The guardian ad litem is not an adversary party.").

states have distinguished between the two roles, and prohibited attorneys from acting in a dual role for the same minor client.[10] Other states also outline the distinctions and conflicts in the two roles in both local rules of juvenile procedure and legal ethics opinions.[11]

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[10] *See Ireland v. Ireland*, 246 Conn. 413, 438 (1998)(en banc) ("As we have stated: 'Typically, the child's attorney is an advocate for the child, while the guardian ad litem is the representative of the child's best interests.' [citation omitted] Further, we have expressed a concern about conflating the two roles. [citation omitted]. . . . [W]e conclude . . . that such a distinction between the two roles is proper. An attorney for the child should not express to the court . . . his or her opinion as to the best interests of the child."); *In re Welfare of S.A.W. and J.W.W.*, 2009 WL 2998116 at *14 (Sept. 22, 2009) ("[T]here is not question that the role of an attorney and the role of a guardian ad litem are distinct and drastically different."); *Jacobsen v. Thomas*, 323 Mont. 183, 191-92 (2004) ("[A]n attorney appointed by the court to represent a child is not also the guardian ad litem. [citation omitted] In addition, MCA § 40-4-205 states the guardian ad litem "may" be an attorney. This indicates lay persons may act as guardians. Therefore, the statute contemplates a guardian ad litem has a unique role to protect the interests of the child. This role is different from the traditional advocacy role played by attorneys."); *Orr v. Knowles*, 215 Neb. 49, 53 (1983) ("The Code of Professional Responsibility establishes that an attorney must zealously represent the wishes of his or her client. It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law. . . . [W]e feel the duties and responsibilities of a guardian ad litem . . . are *not* coextensive with those of an attorney who might represent a minor in proceedings under this section. A guardian ad litem is to determine the best interests of the minor without necessary reference to the wishes of the minor."); *Ross v. Gadwah*, 131 N.H. 391, 395 (1988) ("[W]e now hold the attorney-client privilege is incompatible with the guardian's role as a party to and expert witness in [the] proceedings. . . . Nothing herein should be interpreted as precluding attorneys from serving as guardians ad litem . . . . However, when so appointed, they do not act as legal counsel for the child, but rather as parties to the proceedings."); *Village Apartments of Cherry Hill v. Novak*, 383 N.J. Super. 574, 579 (2006) ("While the attorney acts as a zealous advocate for his client, the guardian ad litem determines for him or herself what action is in the ward's best interests and advocates for that position. [citation omitted] While an attorney provides services to a client, the guardian ad litem services the court on the ward's behalf."); *In re D.B.*, 155 Vt. 580, 585 (1991) ("[T]he roles of attorney and guardian ad litem for a minor are separate in order to avoid the conflict where 'legal counsel is cast in the quandary of acting as both attorney and client.'" [citation omitted]); *see also Francka v. Francka*, 951 S.W.2d 685, 692 (Mo.App. 1997) ("Although the best interests of the child are always paramount, the guardian's relationship to the child is not strictly that of attorney and client.").

[11] *See, e.g.*, Minn. R. Juv. Proc. 24.02 (2005) ("When the court appoints a guardian ad litem, the guardian ad litem shall not be the child's counsel."); Legal Ethics Opinion 1729 (1999), Virginia State Bar's Standing Committee on Legal Ethics, *available at* http://www.vacle.org/opinions/1729.TXT ("In determining the ethical duties of an attorney serving as a GAL, this committee has recognized that the relationship of the GAL and the child is different from the relationship of attorney and client."); Marcia M. Boumill, *Ethical Issues in Guardian ad Litem Practices*, 86 Mass. L. Rev. 1, 12 (2001) ([Appointing one person to act simultaneously as a child's attorney and guardian ad litem] causes a clear conflict of interest in those cases in which a child is old enough to speak for himself and seeks to promote a position that is different from that propounded by the GAL. Massachusetts eliminates such conflicts by separating the roles of attorney and GAL and making it clear that individuals appointed as counsel for the child are *always* appointed for advocacy purposes. . . . Massachusetts clearly defines the role of each appointee and does not expect the same lawyer to act in a dual capacity. If an attorney for a child believes that a GAL is

The Illinois Juvenile Court Act also distinguishes between a child's attorney and a GAL. Although minors under the Juvenile Court Act must be represented by an attorney at all stages of the proceedings, the Act provides for the additional appointment of a GAL under certain circumstances. In child protection cases, the Act authorizes the appointment of a GAL whenever a child is alleged to have been abused or neglected. 705 ILCS 405/2-17 (West 2009). This section defines the role of a GAL as representing "the best interests of the minor" and imposes on the child's GAL a responsibility to "present recommendations to the court consistent with that duty." 705 ILCS 405/2-17 (1) (West 2009). Moreover, in delinquency proceedings under Article V of the Juvenile Act, while the responsibility of a GAL is left undefined, the court's authority to appoint a GAL must be premised on either a finding of a potential conflict of interest between the minor and his or her parents, or the determination that appointment of a GAL is in a minor's best interest. 705 ILCS 405/5-610 (1) (West 2009). Both Article II and Article V of the Act thus clearly focus the responsibility of a GAL on the representation of the child's best interests. This responsibility stands in clear contrast to the constitutional, statutory and ethical obligations of an attorney representing an alleged juvenile delinquent during the guilt/innocence phase of a trial.

While the Act recognizes that there may be exceptions to the general premise that attorneys should maintain normal client relationships with their child clients (such as situations in which a youth's and parent's views diverge on what is in a child's best interests, or when a young offender's mental status impairs his or her ability to make

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required to adequately serve the child's needs, the attorney may request such an appointment without jeopardizing his representation of the child. Once appointed as an advocate, the lawyer should never attempt to assume a GAL role since confidential information that was acquired incident to the attorney/client relationship must always be preserved.")

reasoned choices about the objectives of representation), limits on the use of GALs in delinquency proceedings are consistent with the understanding of the critical importance of affording alleged delinquent minors with the form of representation contemplated by the Supreme Court in *Gault.*

In *Gault,* the Supreme Court found that the right to counsel could not be replaced by a probation officer charged with protecting the child's interest. Likewise this right cannot be watered down by splitting the child's counsel – a single individual – into two capacities: a GAL charged by the court with protecting the child's best interest, and a defense lawyer charged with preparing and executing the child's legal defense during a delinquency adjudication. Such a splitting of roles would be anathema to an adult's right to a lawyer in a criminal trial; it should be foreclosed in a juvenile delinquency hearing.

In the present case, Austin's attorney was forced to choose between confronting the witnesses that would be called to testify against Austin on the one hand, or pursuing what he perceived to be the best interest of the child on the other. He chose the latter despite Austin's insistence that he was innocent. Austin's voice at this hearing was thus effectively silenced. No one skillfully inquired into the facts or witnesses on Austin's behalf. No one objected to prejudicial evidence that in a criminal proceeding would not have been admissible. Put simply, no one planned or submitted Austin's legal defense. Austin was entitled to an attorney – a zealous advocate – who would have challenged the admissibility and credibility of the video-taped testimony and cross-examined the witnesses who incriminated him.

B. In This Case, While Mr. Novak Was Not Appointed as Guardian *Ad Litem*, Both He and the Court Conceived of His Role as Akin to That of a GAL Rather Than That of a Client-Driven Attorney.

Mr. Novak was retained by the parents of brothers Austin and Richard to represent both boys in delinquency proceedings in which they were each charged with sexual offenses against the other, as well as offenses against two other younger boys. At Mr. Novak's first appearance, the trial judge explicitly stated that Mr. Novak would be representing the best interests of Austin and his brother, while openly acknowledging that this representation might conflict with "what the Minors ... think is in their best interests." (Vol. III, R. 3.) Thus, from the outset, the court made clear its understanding that Mr. Novak was not acting in the role of a traditional attorney, but rather in the role of a GAL. Mr. Novak expressed a similar view of his role. At the outset of the January 19, 2007 hearing, Mr. Novak explained his reasoning for permitting the State to introduce several videotaped statements of minors in lieu of courtroom testimony, emphasizing his belief that this strategy was in the boys "best interests," that the parents (who retained him) wanted to know the truth, and that if his clients had indeed committed the alleged offenses that government intervention to help the boys would be "not inappropriate." He went on to state:

> I don't view such a proceeding as adversarial as it might be if it were an adult case. I view this as a truth seeking process on all parts. I explained this to the parents. I think they are comfortable with me being a lawyer for both kids. They agree it is in the best interest and beneficial to everybody that I continue to represent both, but I wanted to say that on the record, Judge. … I am comfortable with being a lawyer for both and comfortable with proceeding with the testimony by way of video tape.

(Vol. III, R. 6.) With these comments, Mr. Novak left Austin exposed to prosecution without the aid of a defense deemed fundamental by the Supreme Court in *Gault*.

C. A Juvenile Defense Attorney Acting in His Client's "Best Interests" Rather Than in His Client's Defense, will Likely Provide Ineffective Assistance of Counsel Under *Strickland v. Washington*.

Claims of ineffective assistance of counsel are analyzed under the test established in *Strickland*, and adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 526 (1984).[12] The test has two components—deficiency and prejudice. First, a defendant must establish that his defense counsel's performance was deficient, in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment". *Strickland*, 466 U.S. at 687. Because judicial scrutiny of defense counsel's performance is highly deferential, a defendant must overcome the presumption that the challenged action or inaction of counsel was the product of sound trial strategy. *Id.* at 689; *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Once a defendant establishes that his counsel's representation was deficient, a defendant must then demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland*, 466 U.S. at 694; *Albanese*, 104 Ill. 2d at 525.

While *Strickland* allows for a presumption that counsel's conduct falls "within the wide range of reasonable professional assistance" this presumption implies that counsel's

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[12] Illinois courts have held that the *Strickland* test is applicable to proceedings under the Illinois Juvenile Court Act. *See In re Kr. K. and Ke. K.*, 258 Ill. App. 3d 270 (2d Dist. 1994) ("Constitutional standard set forth in Strickland for ineffective assistance of counsel applies in abuse and neglect cases under the Juvenile Court Act."); *In the Interest of D.M.*, 258 Ill. App. 3d 6679 (lst Dist. 1994) (child protection); *In the Interest of Johnson*, 102 Ill. App. 3d 1005 (lst Dist. 1984) (neglect*); In the Interest of Stefanini*, 57 Ill. App. 3d 788 (lst Dist. 1978) (delinquency*); In the Interest of Williams*, 30 Ill. App. 3d 1025 (4th Dist. 1975) (delinquency).

action or inaction was undertaken *in the client's defense*. *Strickland*, 466 U.S. at 689; *People v. Hattery*, 109 Ill. 2d 449, 461 (1986). An attorney acting as both the child's defense counsel and GAL will likely find himself in an untenable position, torn between the obligation to press the client's legal claims and the obligation to help the court address the client's social or emotional needs. *See* Janet E. Ainsworth, *Re-Imagining and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1130 (1991). When an attorney with these conflicting duties soft-pedals the child's defense, his actions no longer constitute *defense strategy*; he is no longer acting as the "counsel" guaranteed the defendant by the Sixth and Fourteenth Amendments. *See Strickland*, 466 U.S. at 687. His actions or inactions, while they may be in the child's best interests, are errors when undertaken by a defense attorney, and may drastically affect the outcome of the case and lead to colorable claims of ineffective assistance of counsel on direct appeal when viewed through a Sixth and Fourteenth Amendment lens.

- **Advising a client as a guardian *ad litem*, rather than as a defense attorney**

An attorney offering a client advice as his guardian rather than as his defense counsel may be providing ineffective assistance. For example, a Washington appellate court reversed a child's conviction for a sexual offense, finding ineffective assistance of counsel for failure to adequately counsel the child about entering a guilty plea. *State v. S.M.*, 996 P.2d 1111, 1117-18 (Wash. Ct. App. 2000). The court held that, if properly counseled, it was reasonably probable that the child would not have entered a guilty plea had he understood that he had the option of a trial in which the State had to prove its case beyond a reasonable doubt, and in which his silence would not be held against him. *Id*. at 1117. The court also found it likely that the child would have pled to a lesser offense that

did not carry a duty to register as a sex offender had counsel advised him of the possibility. *Id.*

- **Revealing client confidences to the court**

An attorney who reveals client confidences to the court will be found ineffective. *See, e.g., Blanco v. Singletary*, 943 F. 2d 1477, 1505 (11th Cir. 1991) (finding ineffective assistance of counsel when defense counsel revealed damaging information to the trial judge, violating client confidences). Professional standards make clear that a juvenile defense attorney should not knowingly reveal a client's confidence or secret, or knowingly use a client's confidence or secret to the client's disadvantage without his consent. 134 Ill. 2d R. 1.6(a) (West 2009); *See also IJA/ABA Juvenile Justice Standards Relating to Counsel for Private Parties*, § 7.9(a) (1996).

A defense attorney who reveals a child client's confidential information – even in the name of acting in the client's best interest to obtain treatment services for the child – violates clear professional standards and provides ineffective assistance of counsel.

- **Failing to seek the suppression of illegally obtained evidence**

Moving to suppress illegally obtained evidence before going to trial is a vital role of defense counsel to protect the rights of the accused. Elizabeth Calvin, *et al.*, Juvenile Defender Delinquency Notebook: Advocacy and Training Guide, 193, 206 (2d ed. 2006). When defense counsel does not file a motion to suppress the only evidence against his client, and that evidence was obtained through an illegal search and seizure, his performance is deficient. *See People v. Moore*, 279 Ill. App. 3d 152 (5th Dist. 1996) (finding counsel ineffective for failing to move to suppress illegally obtained evidence against the defendant).

An attorney acting as both defense counsel and GAL who does not move to suppress illegally obtained evidence that is detrimental to the client is ineffective, even if he believes that it is in the client's best interests to allow the court to consider the evidence. For example, the failure to move to suppress a coerced confession (even if believed to be in the client's best interests) can be considered ineffective assistance where there is a reasonable probability that but for counsel's deficient performance, the juvenile would not have been adjudicated delinquent. *See People v. Haynie*, 347 Ill. App. 3d 650 (1st Dist. 2004) (finding ineffective assistance of counsel where defense counsel failed to file a motion to suppress juvenile's coerced statement to police); *In re A.R.*, 295 Ill. App. 3d 527 (1st Dist. 1998) (finding ineffective assistance of counsel where defense counsel failed to challenge the legality of a juvenile's arrest, and the voluntariness of his confession). Juvenile defendants have a right to seek the exclusion of unreliable evidence, but having this right is meaningless without competent counsel to invoke it. National Juvenile Defender Center / National Legal Aid & Defender Association, *Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems* (2008).

There is significant evidence in Austin's case that his statement to the police may have been coerced – he was interrogated late at night and denied any wrongdoing in the face of repeated accusations that he was lying. Vol. I, C. 21; Vol. III, R. 18, 24-25. According to the investigator from the Department of Children and Family Services, the interrogating officer's techniques became "very aggressive" and "very loud," and he treated Austin as though he were lying. Vol. IV, R. 82-83. Although the statement produced by the officers indicated that Austin admitted to sexual contact with his foster

brother, Austin's foster father who was present during the interrogation denied that Austin had made such a statement, and testified that he stopped the interview after Captain Bane became too aggressive and accusatory. Vol. IV, R. 68-70, 76-77.

Mr. Novak did not move to suppress this statement as involuntary and unreliable, because he had been instructed by the court to represent what was in Austin's best interests, rather than representing the stated interests of Austin or his foster father. *See* Vol. II, R. 3. According to the court, had the statement not been introduced into evidence, the prosecution's case would not have been proven beyond a reasonable doubt. Vol. I, C. 24. Therefore, under *Strickland*, counsel's failure to move to suppress the unreliable statement was an error that cannot rightly be seen as a defense strategy; and there is a reasonable probability that, but for Mr. Novak's error, he would not have been adjudicated delinquent.

- **Failure to cross-examine witnesses**

An attorney acting as both defense counsel and GAL might forgo cross-examination and impeachment of prosecution witnesses, believing that vigorous cross-examination might prevent the court from helping his client. Professional standards dictate that counsel be prepared to examine fully any witness whose testimony is damaging to the client's interests, advising that "[i]t is unprofessional conduct for counsel knowingly to forgo or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interest". *IJA/ABA Juvenile Justice Standards Relating to Counsel for Private Parties*,§ 7.8(a) (1996). *See* 134 Ill. 2d R.1.1 (a) (West 2009) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation."). Where the witnesses

offering testimony against the accused are unreliable, defense counsel's failure to impeach or cross-examine them creates a colorable claim of ineffective assistance of counsel.

Mr. Novak's decision to waive Austin's right to confront the witnesses against him would likely be considered ineffective assistance of counsel. *See* Vol. III, R. 4-5. Mr. Novak recognized that the statements of the complainants lacked credibility, as did the court. *Id*.; Vol. I, C. 23-24. Mr. Novak also understood that Austin denied the allegations against him. Vol. III, R. 4. Yet rather than calling the complainants to the stand and challenging their credibility, Mr. Novak waived the right to confront them, believing that if the accusations were true a government intervention would be in Austin's best interests. Vol. III, R. 4-5. Under *Strickland*, counsel's failure to examine and impeach the complainants, and his pursuit of a delinquency adjudication despite Austin's stated interests, cannot properly be viewed as a defense strategy. Austin can also demonstrate a reasonable probability that, but for counsel's unprofessional conduct, he would not have been found guilty.

- **Failure to challenge evidence that is detrimental to the client**

Defense counsel's failure to discredit the evidence where the prosecution's case against a defendant is faulty cannot be deemed a strategy undertaken in the client's defense, even if defense counsel believes that his client needs treatment. The role of GAL clearly conflicts with the role of defense counsel where the GAL would sacrifice the child's defense and prejudice the client, creating a colorable claim of ineffective assistance of counsel. *See People v. Sutherland,* 194 Ill. 2d 289 (2006) (finding counsel ineffective for failing to discredit the prosecution's linking of the defendant to the crime

scene); *Grace v. State*, 683 So. 2d 17 (Ala. Ct. App. 1996) (finding counsel ineffective for failing to object to damaging evidence that the prosecution failed to disclose in discovery); *Doles v. State*, 786 S.W. 2d 741 (Tex. Ct. App. 1989) (finding counsel ineffective for introducing a portion of a written statement, which allowed the state to introduce all of the statement containing damaging information).

- **Failure to argue reasonable doubt because the attorney believes his client is guilty**

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). No one, adult or juvenile, shall lose his liberty "unless the government has borne the burden of producing the evidence and convincing the factfinder of his guilt". *Speiser v. Randall*, 357 U.S. 513, 526 (1958). When a defense attorney fails to make the case for reasonable doubt when it exists, the government is not held to its burden, and the defendant is likely to be prejudiced. *See State v. Burns*, 6 S.W. 3d 453 (Tenn. 1999) (finding counsel ineffective for failing to present exculpatory evidence that might have raised a reasonable doubt about the defendant's involvement in the offense); *Sund v. Weber*, 588 N.W. 2d 223 (S.D. 1998) (finding counsel ineffective for failing to present witnesses to demonstrate a reasonable doubt of guilt); *Terrero v. State*, 839 So. 2d 873 (Fla. Ct. App. 2003) (finding counsel ineffective for failing to call an eyewitness who could have created a reasonable doubt about the identification of the defendant as the perpetrator). Even when no theory of defense is available, if counsel proceeds to try the case, he must hold the prosecution to its heavy burden of proof beyond a reasonable doubt. *Cronic*, 466 U.S. at 656 n.19. Failure to hold the prosecution to its burden, when there is a reasonable probability that

the outcome of the proceeding would be different, constitutes ineffective assistance of counsel.

In the instant case, two complainants had been victims of sexual abuse prior to their placement in the M. home. Vol. III, R. 48; Vol. IV, R. 52-54. The first accusation was made after *one of the complainants* – not the defendant – was caught touching a cousin in a sexual manner. Vol. III, R. 13, 16, 27, 30-31, 47. The accusations in the complainants' videotaped statements contained several bizarre discrepancies, causing the court to find them "suspect" and "lack[ing] credibility". Vol. I, C. 23-24. Members of the M. family had seen no indication of sexual activity in the home. Vol. III, R. 67-68, 81; Vol. IV, R. 10, 27-28, 33, 38, 39, 64-67. The M.s also testified that Austin was never left to babysit the younger foster children. Vol. IV, R. 24-25, 71, 73. When told of the accusations, Mrs. M. checked the cameras in the home but found no evidence of sexual contact between the children; she then tried to "trick" an admission out of Austin, who consistently and believably denied the allegations. Vol. IV, R. 11-12, 34-35, 49, 58-59. Mr. M. testified that he had "grave doubts" about Austin's guilt. Austin denied any wrongdoing in the face of repeated accusations by the police that he was lying. Vol. I, C. 21; Vol. III, R. 18, 24-25. There is evidence that the statement that the police produced from Austin's interrogation was coerced, and Mr. M. denied that Austin ever made such a statement. Vol. IV, R. 68-70, 76-77, 82-83. In short, Austin's attorney had significant evidence in the record to argue reasonable doubt.

Mr. Novak, however, stated on the record that "I don't view such a proceeding as adversarial as it might be if it were an adult case." Vol. III, R. 6. When waiving Austin's right to confront his accusers, Mr. Novak stated that "The boys deny [the sexual conduct]

occurred, but I think . . . that if such acts happened, then it needs to stop. . . . I have a duty to these two boys, nobody else. But we are . . . seeking the truth . . . here the same as the court and the same as the prosecutor." Vol. III, R. 4-5. Thus, it appears on the record that Mr. Novak had the opportunity to successfully argue reasonable doubt, but chose not to, believing that the accusations against Austin were true. Counsel's failure to make the case for reasonable doubt was an error outside the bounds of sound defense strategy and likely constitutes ineffective assistance of counsel under *Strickland*.

- **Not arguing innocence, because the attorney doesn't believe the client is innocent**

The right to counsel is a protection designed in part to ensure that innocent persons are not wrongly convicted. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). Without defense counsel to argue his innocence, the juvenile justice system increases the risk of exposing an innocent youth to punishment.

Under *Strickland*, a youth may argue that counsel's failure to investigate and present a defense of innocence is an error outside the range of sound defense strategy and, but for that error, there is a reasonable probability that the result of his trial would have been different.[13] *See Quartararo v. Fogg*, 849 F. 2d 1467 (2d Cir. 1988) (finding counsel ineffective for failing to argue the defendant's claim of innocence to the jury); *Groseclose v. Bell*, 130 F. 3d 1161 (6th Cir. 1997) (finding counsel ineffective for failing to put on evidence in a case where the defendant claimed innocence); *Nealy v. Cabana*, 764 F. 2d 1173 (5th Cir. 1985) (finding counsel ineffective for failure to contact a

[13] In support of this second point, the youth would have to present significant evidence that, if found and presented by counsel, would have demonstrated reasonable doubt.

potential alibi witness); *Patterson v. LeMaster*, 21 P. 3d 1032 (N.M. 2001) (finding counsel ineffective for failure to challenge an unreliable identification of the defendant, and advising the defendant to plead no contest, even though the defendant maintained innocence); *In re K.J.O.*, 27 S.W. 3d 340 (Tex. Ct. App. 2000) (finding juvenile defense counsel ineffective for failure to challenge the government's evidence and present alibi witnesses).

- **Failure to present mitigating evidence at disposition in favor of the least restrictive appropriate placement of the child**

A vital role played by juvenile defense counsel is presenting mitigating evidence in an effort to ensure that disposition is the least restrictive option that meets the needs of the youth and society. *Ten Core Principles* at Principle 8. Juvenile defense attorneys have a responsibility to advocate for treatment and placement alternatives that serve the unique needs and dispositional requests of each child, independent from the recommendations of court or probation staff. *Id*. This advocacy requires bringing mitigating evidence to the court's attention when it tends to favor a less restrictive placement. Illinois courts have held that when failure to present mitigating evidence prejudices a client, the client has a colorable claim of ineffective assistance of counsel. *See People v. Orange*, 168 Ill. 2d 138 170-1 (2008) (holding ineffective assistance of counsel where the defense attorney failed to present mitigation evidence at sentencing); *see also People v. Morgan*, 187 Ill. 2d 500, 545 (2007) (holding ineffective assistance of counsel where the defense attorney failed to investigate and present mitigating medical and mental health evidence); *People v. Thompkins*, 191 Ill. 2d 438, 471 (2000) (holding ineffective assistance of counsel where the defense attorney's failure to present mitigating evidence was not a strategic decision, but rather a failure to properly prepare).

D. When a Juvenile Defense Attorney Acts in a Client's "Best Interests," the Client Loses the Opportunity to Be Heard, Giving the Client a Colorable Claim for Ineffective Assistance of Counsel under *United States v. Cronic*.

In *United States v. Cronic*, a companion case to *Strickland*, the U.S. Supreme Court held that under certain circumstances, ineffective assistance of counsel will be presumed without the application of the two-part *Strickland* test. 466 U.S. 648 (1984). The court emphasized that the Constitution's guarantee of the effective assistance of counsel is based on the premise that "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free". *Cronic*, 466 U.S. at 665 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). The Court concluded in *Cronic* that the Constitution requires, at a bare minimum, that defense counsel act as a true advocate for the accused. *Cronic*, 466 U.S. at 658-59. Where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 658-59. The Court explained:

> [t]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate' [citation omitted]. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Cronic, 466 U.S. at 656-57.

The Illinois Supreme Court found ineffective assistance of counsel under the *Cronic* standard in *People v. Hattery*, where defense counsel admitted defendant's guilt to the fact-finder, despite his plea of not guilty. 109 Ill. 2d 449, 465 (1986). The court

found that the circumstances were so likely to prejudice the defendant that prejudice need not be show, but could be presumed; the court found ineffective assistance of counsel without applying the two-part *Strickland* test, relying instead on *Cronic*. *Id.*

In *People v. Johnson*, the Illinois Supreme Court noted that in reaching its conclusion in *Hattery*, it relied on a number of cases in which ineffectiveness was presumed because it was clear that the counsel's theory was contradictory to the defendant's position. 128 Ill. 2d 253, 268 (1989); *See Francis v. Spraggins*, 720 F. 2d 1190 (11th Cir. 1983); *People v. Fischer*, 326 N.W. 2d 537 (Mich. 1982); *State v. Wiplinger*, 343 N.W. 2d 858 (Minn. 1984). The court emphasized that one of the goals of *Hattery* was to "prevent counsel from undermining the defense preferred by the client". *Johnson*, 128 Ill. 2d at 268-69. Thus, although counsel may correctly feel that the client's posture is unwise or not in his "best interests," the lawyer is not acting as an advocate if he substitutes his own view for that of the client.

When a juvenile defense attorney acts in a child's "best interests," and his view of the child's "best interests" differs from the child's stated interests, he is not acting as an advocate under the cases interpreting *Hattery* – he is undermining the preferred defense of the client, and prejudice to the client can be presumed. In order to provide effective assistance of counsel, a defense attorney "must play the role of an active advocate, rather than a mere friend of the court". *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). In delinquency proceedings, where juveniles often face severe consequences, it is the assistance of counsel – not the assistance of a parent or probation officer – that is essential to due process and fair treatment. *See Gault*, 387 U.S. at 36-37; *see also Fare v. Michael C.*, 442 U.S. 707, 719-22 (1979) (distinguishing the request for counsel under

Miranda from the request for a parent or probation officer). Providing counsel to juveniles in delinquency proceedings restrains the judge from ordering a course of treatment or punishment for a child, based on the recommendation of a parent or probation officer, without first hearing evidence as to the recommendation's legitimacy. *See Gault*, 387 U.S. at 36-37; Samuel M. Davis, *et al.*, Children in the Legal System 917 (3d ed. 2004).

When juvenile defense counsel fails to vigorously cross-examine witnesses, fails to challenge evidence that is detrimental to the client, or fails to investigate and present evidence of reasonable doubt or innocence, he fails to function in a meaningful sense as the government's adversary. In certain cases these failures are more than mere errors – they constitute an abandonment of the client at a critical stage of the proceeding. *Cronic*, 466 U.S. at 666; *see Osborn v. Shillinger*, 861 F. 2d 612, 625 (10th Cir. 1988); *United States v. Swanson*, 943 F. 2d 1070, 1074 (9th Cir. 1991). Where, as in Austin's trial, the juvenile defense attorney sees his role as "the same as the court and the same as the prosecutor" (Vol. III, R. 4-5), the attorney has completely abandoned his role as a zealous advocate for his client. *See People v. Dodson*, 331 Ill. App. 3d 187, 193 (5th Dist. 2002) (finding ineffective assistance of counsel where the defense attorney stipulated to all of the prosecution's evidence, virtually ensuring a conviction). Under these circumstances, the child loses the opportunity to be heard, and the result of the proceeding is presumptively unreliable. *See Cronic*, 466 U.S. at 656-57; *In re J.B.*, 618 A.2d 1329, 1332 (Vt. 1992) (finding that the juvenile defense attorney's course of action "could not be considered one which was functionally independent from and disassociated with the prosecution," and thus the juvenile's counsel was not acting as an advocate within the

parameters of the constitutional guarantee. Notably, the court explained that had J.B.'s counsel engaged in a course of advocacy for his client and challenged the delinquency adjudication, "J.B. might still have received the benefits of treatment without the stigma of an adjudication".

E. This Court Should Decline to Follow Illinois Appellate Cases That Have Been Limited by Subsequent Case Law and Are Contrary to the Weight of Professional and Academic Opinion on the Role of An Attorney in Delinquency Cases.

Amici acknowledge that several Illinois appellate courts have sanctioned situations in which an attorney for a delinquent minor reaches conclusions about what is in the best interests of a client that conflict with the client's wishes. *See In the Interest of K.M.B.,* 123 Ill. App. 3d 645 (4th Dist. 1984); *In re R.D.,* 148 Ill. App. 3d 381, 382 (1st Dist. 1986). However, these cases should not be considered dispositive here, both because their holdings do not apply to the circumstances presented by Austin's case, and because subsequent developments have eroded their reasoning.

In *K.M.B.,* decided in 1984, the minor was represented by a public defender who was also appointed as GAL, and who differed with her client at disposition as to whether the minor should return home to her mother or be placed outside the home. *K.M.B.,* 123 Ill. App. 3d at 646 (4th Dist. 1984). The lawyer informed the court of K.M.B.'s wishes, but then made a conflicting recommendation to the court. *Id.* In rejecting the minor's claim that this conduct deprived her of her constitutional right to the effective assistance of counsel, the appellate court focused on the distinct nature of juvenile court hearings, concluding that it was part of the "professional responsibility and obligation" of a lawyer to stand ready to recommend a sentence even if contrary to the wishes of her client. *Id*. at 648.

The decision in *R.D.*, decided in 1986, involved a public defender who was appointed as both attorney and GAL at arraignment but took no subsequent action in her role as GAL. *R.D.*, 148 Ill. App. 3d at 386 (1st Dist. 1986). On appeal, the minor challenged the disposition committing him to the Department of Corrections, arguing that the mere fact of his attorney's assignment as GAL undermined the lawyer's duty to advocate zealously on behalf of her client's wishes. Relying[14] on *K.M.B.*, the court found no inherent conflict in serving as both lawyer and GAL, concluding that "the juvenile counsel and the GAL have essentially the same obligations to the minor and society." *R.D.*, 148 Ill. App. 3d at 387. *See also In re B.K.*, 358 Ill. App. 3d 1166 (5th Dist. 2005) (following *K.M.B.* and *R.D.* in finding no *per se* conflict of interest arising from dual appointment of same individual as both attorney and GAL in delinquency cases).

Significantly, both *K.M.B.* and *R.D.* involved claimed conflicts relating to representation at the dispositional stage of a delinquency hearing. Neither case involved challenges to the lawyer's effectiveness at the factfinding phase of the trial process. Here, in contrast, the attorney, Alan Novak's, abdication of his role as attorney is precisely what moved the Supreme Court in *Gault* to recognize a child's right to representation by an attorney as a constitutional requirement. Austin lost the zealous assistance of counsel. This failing cannot be reconciled with either Austin's

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[14] The court incorrectly relied on a single footnote in *Gault* to support the proposition that an attorney for a youth has a "professional responsibility and obligation" to make a dispositional recommendation contrary to his or her client's own judgment if the lawyer determines that it is in the client's best interest. *See Gault*, 387 U.S. at 38. The *K.M.B.* court failed to acknowledge that the footnote was followed by language that strongly supported the constitutional right to counsel at the adjudicatory stage of a delinquency proceeding, stating that "the lawyer's function as unrelenting advocate cannot be relinquished." *See* Lawrence W. Kessler, *Note*, *Rights and Rehabilitation in the Juvenile Courts*, 67 Colum. L. Rev. 281, 324-27 (1967). A fair reading of the meaning behind the footnote in *Gault*, is that it was intended to allay concerns that giving a youth the right to counsel in a delinquency proceeding would undermine the very rationale for having a separate system of justice for youth accused of crimes. This is in contrast to the *K.M.B.* court's reading of the Supreme Court's language as supporting the idea of a best interest role for attorneys in delinquency cases.

constitutional right to the effective assistance of counsel, or Mr. Novak's ethical duty to act as a zealous advocate for his client.

For example, Illinois courts have acknowledged that conflicts between the role of an attorney and that of a GAL may be sufficient to warrant the separation of roles in order to safeguard the child's right to an attorney. This Court recognized that in some circumstances independent counsel may be required, such as "when a minor is of an age to share with his attorney confidences the attorney would not be permitted to share with the guardian *ad litem.*" *In re J.D.*, 351 Ill. App. 3d 917, 921 (4th Dist. 2004). This Court went on to caution that "[t]rial courts should carefully consider potential conflicts before appointing the guardian *ad litem*'s attorney to also represent the minor." *Id.* The court in *In re B.K.*, 358 Ill. App. 3d at 1174 sounded a similar note of caution, commenting that trial courts "must also not hesitate to appoint separate attorneys to perform the individual roles [of attorney and guardian *ad litem*] if a conflict arises during the course of juvenile proceedings." In a child protection dispute, the First District also acknowledged that a competent child has a right to choose a lawyer who would not make recommendations as a GAL that conflicted with the client's stated desires. *In re A.W.*, 248 Ill. App. 3d 971, 977 (1st Dist. 1993).

Furthermore, the rehabilitative ideal that drove the courts' holdings in both *K.M.B.* and *R.D.* – and that supported the idea that a lawyer may ethically take a position contrary to the wishes of a competent client – no longer exclusively guides application of the provisions of Article V, as demonstrated by adoption of a more balanced purpose of the juvenile court system. *See* 705 ILCS 405/5-101.

Finally, the decisions in *K.M.B.* and *R.D.* were issued at a time when children's law practitioners, scholars, and professional groups were grappling with the proper role of attorneys in the representation of children in a range of legal proceedings. In the last two decades, however, a strong consensus has emerged that an attorney for a youth charged with a crime is ethically obligated to function in the traditional role of an advocate for his or her client's objectives of representation without regard to the lawyer's own judgment as to what is in the client's best interest.[15] Thus, over time, the premises underlying these cases can no longer be sustained. *K.M.B.*, *R.D.*¸ and their progeny cannot justify excusing a lawyer who abdicates his fundamental responsibility of zealously defending a child against charges of delinquency at trial. This case presents an opportunity for the court to re-examine these troubling precedents and bring Illinois in line with national consensus that has emerged since those cases were decided.

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[15] See Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 256 (2005) ("Today, even where disagreement persists among scholars over the role of counsel in abuse and neglect and other child-related proceedings, the weight of academic opinion now firmly supports the traditional expressed-interest, adversary model of advocacy in delinquency cases."); Robin Walker Sterling, et. al, *The Role of Juvenile Defense Counsel in Delinquency Court*, National Juvenile Defender Center (2009) (The duty of loyalty "requires defenders to represent the legitimate "expressed interests" of their juvenile clients, and not the "best interests" as determined by the attorney); 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, 294 (2003) ("the attorney needs to understand her role. She is not a guardian ad litem, ... [s]he is an advocate."); Frank E. Vandervort, *When Minors Face Major Consequences: What attorneys representing children in delinquency, designation, and waiver proceedings need to know*, 80 Mich. B. J. 36, 38 (2001) ("Representing what a child's parent wants or what the lawyer believes will serve the child's best interests is not part of counsel's role in a delinquency proceeding."). *See also IJA/ABA Juvenile Justice Standards Relating to Counsel for Private Parties* § 5.2 (a) (1996) (requiring that the juvenile delinquency client be permitted to direct the objectives of representation, including decisions as to whether to plead guilty, whether to testify, etc., in consultation with his or her attorney).

III. MR. NOVAK VIOLATED THE ILLINOIS RULES OF PROFESSIONAL CONDUCT WHEN HE REPRESENTED BOTH AUSTIN M. AND RICHARD M. DESPITE THE PER SE CONFLICT OF INTEREST THAT JOINT REPRESENTATION PRESENTED.

In the case at bar, Mr. Novak neglected his duty under the Illinois Rules of Professional Conduct when he agreed to represent Austin and Richard simultaneously. While joint representation does not always constitute a conflict of interest, dual representation in this case constituted a *per se* conflict because each client was charged with an offense against the other arising out of the same incident. The fact that both clients were minors did not mitigate Mr. Novak's duty under the Rules. In addition, under Rule 1.7, joint representation is never permitted unless an attorney has a reasonable belief that neither client will be adversely affected *and* has received the consent of both clients after full disclosure. 134 Ill. 2d. R. 1.7(b) (West 2009). Neither of these requirements was satisfied in this case. Finally, Mr. Novak violated Rule 1.8 (e) when he accepted a plea agreement in the case without obtaining the individual consents of Austin and Richard. *See* 134 Ill. 2d R. 1.8(e) (West 2009).

A. Mr. Novak breached his duty under Rule 1.7 (a) and (b) when he knowingly represented Austin M. and Richard M. despite the fact that such representation adversely affected and materially limited his duty of undivided loyalty.

Rule 1.7 is the general rule governing an attorney's duties when there is an actual or potential conflict of interest. The Rule states, in pertinent part:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after disclosure.
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's own interests, unless (1) the lawyer reasonably

> believes the representation will not be adversely affected; and (2) the client consents after disclosure.

134 Ill. 2d R. 1.7 (West 2009). In this case Austin and Richard were each charged with one count of criminal sexual abuse against the other. In addition, each boy was charged with misdemeanor criminal sexual abuse against his younger foster brothers, Dylan and Jonathan. By agreeing to represent Austin, Mr. Novak owed a duty of loyalty and zealous representation to his client, the alleged victim of his other client, Richard, to whom he owed a similar duty of loyalty and zealous representation. This *per se* conflict resulted in a situation in which the representation of each client adversely affected the other and materially limited the lawyer's responsibilities to another client.

In addition to violating his professional duties under Rule 1.7, Mr. Novak committed reversible error when he agreed to represent a defendant and his victim in the same case. Under Illinois law, a *per se* conflict of interest arises when "facts about a defense attorney's status ... engender, *by themselves*, a disabling conflict." *People v. Morales,* 209 Ill. 2d 340, 346 (2004), *quoting People v. Spreitzer,* 123 Ill. 2d 1 (1988) (emphasis in original). Such a disabling conflict arises "when defense counsel has a prior or contemporaneous association with the victim... or when defense counsel contemporaneously represents a prosecution witness." *People v. Hernandez,* 231 Ill. 2d 134, 143 (2008). In *Hernandez,* the court held that defense counsel's representation of the defendant and the man the defendant was accused of attempting to murder created an impermissible conflict of interest. *Hernandez,* 231 Ill. 2d at 146. The court reasoned, "[w]here, as here, an attorney represents both the defendant and the alleged victim of defendant's crime, there is a high probability of prejudice to a defendant and an equally high degree of difficulty of proving that prejudice." *Hernandez,* 231 Ill. 2d at 147. The

court went on to articulate a bright line rule: "If counsel represents the defendant *and* the victim of the defendant's alleged conduct, then that ends the matter." *Id*. at 147. *See also People v. Stoval*, 40 Ill. 2d 109 (1968) (automatic reversal required where attorney simultaneously represented a jewelry store and a defendant accused of robbing the store).

In this case, Mr. Novak openly acknowledged that joint representation of Austin and Richard constituted a conflict of interest when he stated that if this were an adult case, his clients would "deserve the benefit of individual representation [and] separate consideration." (Vol. III, R. 5-6). He attempted to justify his conduct in agreeing to represent both clients by distinguishing juvenile court proceedings from other types of cases and misdemeanors from other offenses. Notably, he articulated his understanding of his role as the attorney for Austin and Richard as identical to that of the prosecutor and the judge in the case: "I have a duty to these two boys, nobody else. But we are seeking the truth ... here the same as the [c]ourt and the same as the prosecutor is our position." The Rules, however, do not permit an attorney to abdicate his or her duty of loyalty and zealous representation based on the nature of the proceeding or the potential consequences to the client. To the contrary, Rule 1.14 makes it clear that an attorney is obligated to maintain a normal client-lawyer relationship "as far as reasonably possible" in the case of a client who is under a disability, including the disability of minority (134 Ill. 2d R. 1.14) (West 2009). *See* Helene M. Snyder & Susan A. McDaniels, *Effectively Representing Children,* 14 CBA Rec. 34 (2000) ("The only distinction in the Rules between representation of the adult and the child-client appears in Rule 1.14 (a) ...)". Given the facts of this case, the Illinois Supreme Court's unambiguous case law on the subject, and Mr. Novak's admitted understanding of the conflict of interest created by

joint representation, he could not reasonably have believed that joint representation would not adversely and materially affect his ability to zealously represent the independent interests of his clients.

B. Mr. Novak Failed to Adhere to Rule 1.7(c) Which Required Him to Disclose to Austin M. and Richard M. the Advantages and Risks Posed by Joint Representation.

Rule 1.7 (c) outlines specific disclosure requirements: "When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved." 134 Ill. 2d. R. 1.7(c) (West 2009). Mere disclosure is insufficient to satisfy the Rules.

The record in this case indicates that Mr. Novak explained to the youths' parents his view that juvenile court proceedings involve "a truth seeking process on all parts," and based on this, his belief that they (the parents) were "comfortable with me being a lawyer for both kids." (Vol. III, R.6). Mr. Novak told the court, however, that he was uncertain whether he had discussed the conflict of interest with his clients. (Vol. III, R. 9-10). Even if he had disclosed the conflict to his clients, there is nothing in the record to suggest that he explained the advantages, disadvantages and implications of joint representation to his clients, as required by Rule 1.7 (c). Mr. Novak had an affirmative duty to advise his clients that joint representation would hinder his ability to represent either one of them zealously. For instance, he should have informed Austin and Richard that if either of them chose to testify, he would not be able to cross-examine them because it could hurt the other's chances of acquittal. Although the court went a little further and noted for the record that failure to object to Mr. Novak's representation of both minors would result in waiver of the issue on appeal, the Rules of Professional

Conduct do not permit a judge to cure an attorney's violation of his or her ethical responsibilities under the Rules. [16]

C. Mr. Novak Violated Rule 1.8(e) When He Accepted a Plea Agreement Without the Individual Consent of Austin M. and Richard M.

Rule 1.8(e) states, "A lawyer who represents two or more clients shall not participate in a criminal case an aggregate agreement as to guilty or *nolo contendere* pleas, unless each client consents after disclosure, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." 134 Ill. 2d. R. 1.8(e) (West 2009). Under this rule, Mr. Novak could not agree to any type of aggregate plea bargain without the consent of Richard and Austin. The fact that this was a juvenile court proceeding did not alter Mr. Novak's duty under this Rule. Based on the record, Richard and Austin never consented to any type of aggregate agreement. Mr. Novak stated that he and the State's Attorney discussed "a little bit of *quid pro quo*" in exchange for the fact that defense waived its right to cross-examine witnesses by allowing the videotaped statements of Jonathan and Dylan to be admitted. Specifically, the agreement was that if Mr. Novak waived his clients' right to confrontation and cross-examination, the State would not seek incarceration upon conviction. (Vol. III, R. 11). While the Court inquired if this agreement was part of the conversation and subsequent decision, this query was directed to Mr. and Mrs. M, not to Austin and Richard. Nothing in the record indicates that Austin and Richard were part of

[16] Although the responsibilities of the trial court in a case of joint representation is beyond the scope of this amicus brief, it should be noted that Illinois law suggests that the judge in this case was under an obligation to insist on separate counsel for Austin and Richard given the *per se* conflict inherent in dual representation of defendant and victim. See *People v. Spreitzer*, 123 Ill. 2d 1, 18 (1988) ("If counsel brings the potential conflict to the attention of the trial court at an early stage, a duty devolves upon the trial court to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel.").

the conversation or ensuing agreement to waive the right to confrontation and cross-examination in exchange for the State not seeking a sentence of secure confinement. This agreement did not apply to one of the boys; it was an aggregate agreement as contemplated in Rule 1.8(e). Therefore, before making any agreement regarding the guilt of Austin and Richard, Mr. Novak was obligated to disclose the proposed agreement to Austin and Richard and obtain their consent.

In sum, by proceeding with the joint representation of Austin and his brother, and by failing to properly consult with his clients or secure their independent consent as to critical matters of strategy, Mr. Novak violated his ethical responsibilities under Rules 1.7 and 1.8 of the Illinois Supreme Court Rules of Professional Conduct. Nothing in the nature of juvenile court proceedings excuses these violations. Austin's constitutional right to counsel was violated.

CONCLUSION

For the foregoing reasons, *amici*, Juvenile Law Center *et al*., request this Court to rule in favor of Appellant.

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APPENDIX A

ORGANIZATIONS

The **Barton Child Law & Policy Clinic** is a program of Emory Law School dedicated to ensuring safety, well-being and permanency for abused and court-involved children in Georgia. These outcomes are best achieved when systems only intervene in families when absolutely necessary, treat children and families fairly, provide the services and protections they are charged to provide, and are accountable to the public and the children they serve. The mission of the clinic is to promote and protect the well-being of neglected, abused and court-involved children in the state of Georgia, to inspire excellence among the adults responsible for protecting and nurturing these children, and to prepare child advocacy professionals.

The Barton Clinic was founded in March 2000. The Barton Clinic has been involved in representation of juveniles in delinquency cases since the summer of 2001. Initially, such representation occurred in collaboration with the Southern Juvenile Defender Center, which was housed in the Barton Clinic until 2005. The Barton Clinic currently houses the Barton Juvenile Defender Clinic (JDC), which was founded in 2006.

The JDC provides a clinical experience for third year law students in the juvenile court arena. The focus of the clinical experience is to provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring courts make decisions informed by the child's educational, mental health and family systems objectives. As part of their clinical experience, student attorneys represent child clients in juvenile court and provide legal advocacy in the areas of school discipline, special education, mental health and public benefits, when such advocacy is derivative of a client's juvenile court case. Students also engage in research and participate in the development of public policy related to juvenile justice issues.

Legal services provided by the Barton Clinic are provided at no cost to our clients.

The ***Civitas*** **ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its ChildLaw Clinic, the Center routinely provides representation to child clients in juvenile delinquency, child protection, domestic relations, and other types of cases involving children. Clinic faculty routinely accept dual appointments as attorney and guardian *ad litem* in child protection cases, consistent with practices in Cook County. As a fundamental component of both the Clinic program and other related curricular offerings, the Center's faculty and students regularly address the specialized issues of ethics and professional responsibility peculiar to the representation of child clients. These issues frequently involve the kind of problems surrounding role definition and conflict of interest that are at the heart of the instant appeal. Thus, from both an academic and a practitioner's perspective, the ChildLaw Center has a particular interest in the resolution of this case.

The **Central Juvenile Defender Center**, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky, Tennessee, Indiana, Arkansas, Missouri, and Kansas.

The Northwestern University School of Law's Bluhm Legal Clinic has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center** (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Ten clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

Founded in 1977, the **Children's Law Center of Massachusetts (CLCM)** is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM attorneys regularly participate as faculty in MCLE and other continuing legal education seminars and serve as *amicus curiae* in juvenile justice and child welfare matters in Massachusetts courts. The CLCM is particularly concerned with fair treatment and outcomes for juveniles in delinquency proceedings and in adult court. This case presents questions of significance to the rights of all juveniles. Therefore, we must add our voice to address the issues raised in this appeal.

The **Juvenile Justice Initiative** (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firm. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our initiatives seek to create a constituency for youth in the justice system with an emphasis on promoting intervention strategies, ensuring fairness for youth in the justice system, and building community resources for comprehensive continuums of services and sanctions to reduce reliance on confinement. Our collaborations work in concert with other organizations, advocacy

groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system.

Juvenile Law Center (JLC), one of the oldest public interest law firms for children in the United States, was founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies: for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. Information about JLC, including downloadable versions of publications and amicus briefs, is available at www.jlc.org.

The **Midwest Juvenile Defender Center** (MJDC) is an eight state regional network of defense attorneys representing juveniles in the justice system. It was created to increase the capacity of juvenile defenders in the Midwest. MJDC gives juvenile defense attorneys a more permanent capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile crime. MJDC provides support to juvenile defenders to ensure that youth are treated fairly in the justice system.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice.

The National Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **Northeast Juvenile Defender Center (NJDC)** is committed to ensuring excellence in juvenile defense and promoting justice for all children caught up within the juvenile justice system. A regional affiliate of the National Juvenile Defender Center, the NJDC strives to increase and support effective advocacy for young people in New Jersey, Delaware, New York, and Pennsylvania. Focus areas of the NJDC include juvenile detention conditions and over-utilization; dispositional advocacy; over-representation of minority children in the juvenile justice system; and training, advocacy, and technical assistance for juvenile defenders and defender agencies.

Housed jointly within the two Rutgers Law Schools and the Defender Association of Philadelphia, the NJDC works to evaluate and improve the juvenile defense and juvenile justice systems and to assist professionals working within those systems. To date, the NJDC has collaborated with the Juvenile Law Center, the American Bar Association, and the National Juvenile Defender Center on an assessment of juvenile defense services in Pennsylvania; created a regional listserve; presented training programs in New York, New Jersey, and Pennsylvania; worked with the New Jersey Office of the Public Defender to enhance access to effective assistance of counsel for children charged with delinquency; and offered advocacy support to attorneys across the region.

In light of its central commitment to ensuring due process for young people, the NJDC has significant expertise in the issues raised by this litigation and substantial interest in its outcome.

The **Southern Juvenile Defender Center** (SJDC) works to ensure excellence in juvenile defense and secure justice for children in delinquency and criminal proceedings in the southeastern United States. SJDC educates attorneys and court personnel about the role of counsel in delinquency cases and provides training and resources to juvenile defenders. SJDC is based at the **Southern Poverty Law Center** (SPLC) in Montgomery, Alabama. Founded in 1971, SPLC has litigated numerous civil rights cases on behalf of incarcerated children and other vulnerable populations.

The **Youth Law Center** is a San Francisco-based national public interest law firm working to protect the rights of at-risk children, especially those at risk of or involved in the juvenile justice or child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in almost every State. Over the past decade, Center attorneys have worked extensively with the National Juvenile Defender Center to assure that young people in the juvenile justice system receive the constitutional protections of *In re Gault* (1967) 387 U.S. 1, including the right to be represented by an attorney in delinquency proceedings. In 1995, the Center co-authored *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, the first national assessment of juvenile delinquency defense, and has remained involved in subsequent assessments. Currently, the Center leads the California Team in the John D. and Catherine T. MacArthur Foundation's Juvenile Indigent Defense Action Network, a multi-year national project working to improve the capacity and quality of juvenile delinquency representation. Because of this work, the Center is familiar with the issues involved, and interested in assuring that the Court have all of the relevant legal authority and background information it needs to decide this case.

INDIVIDUALS

Kristin Henning is a **Professor of Law and Co-Director of the Juvenile Justice Clinic at the Georgetown Law Center**. Prior to her appointment to the Georgetown faculty, Professor Henning was the Lead Attorney for the Juvenile Unit of the Public Defender Service (PDS) for the District of Columbia, where she represented clients and helped organize a specialized Unit to meet the multi-disciplinary needs of children in the juvenile justice system. Professor Henning has been active in local, regional and national juvenile justice reform, serving on the Board of the Mid-Atlantic Juvenile Defender Center, the Board of Directors for the Center for Children's Law and Policy, and the D.C. Department of Youth Rehabilitation Services Advisory Board and Oversight Committee. She has served as a consultant to organizations such as the New York City Department of Corrections and the National Prison Rape Elimination Commission, and was appointed as a reporter for the ABA Task Force on Juvenile Justice Standards. Professor Henning has published a number of law review articles on the role of child's counsel, the role of parents in delinquency cases, confidentiality, and victims' rights in juvenile courts, and therapeutic jurisprudence in the juvenile justice system. Professor Henning also traveled to Liberia in 2006 and 2007 to aid the country in juvenile justice reform and was awarded the 2008 Shanara Gilbert Award by the Clinical Section of the Association of American Law Schools in May for her commitment to social justice on behalf of children. Professor Henning received her B.A. from Duke University, a J.D. from Yale Law School, and an LL.M. from Georgetown Law Center. Professor Henning was a Visiting Professor of Law at NYU Law School during the Spring semester of 2009.