

COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	↑COURT USE ONLY↑
COURT OF APPEALS, STATE OF COLORADO Case Number: 2011CA434	
DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO Case Number: 98CR264 The Honorable Nancy A. Hopf and The Honorable Richard B. Caschette	
Petitioner/Defendant: NATHAN GAYLE YBANEZ v. Respondent/Plaintiff: PEOPLE OF THE STATE OF COLORADO	Case No. 2014SC190
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AMICUS BRIEF IN SUPPORT OF PETITIONER NATHAN YBANEZ	

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this amicus brief complies with all applicable requirements of C.A.R. 28 and 32. This brief contains 2,674 words as measured by the word-count function of Microsoft Word. The undersigned acknowledges that the brief may be stricken if it fails to comply with any applicable requirements of C.A.R. 28 or 32.

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STATEMENT OF THE ISSUES

Whether (1), in direct file proceedings where a juvenile's parent, defense attorney, or both, has a conflict of interest, a guardian ad litem and/or alternate defense counsel should be appointed in order to represent the juvenile's best interests and provide an effective defense; and (2), in juvenile direct file proceedings, the juvenile's conflict waiver should be made on the record.

INTEREST OF AMICUS CURIAE

The District Attorney for Twentieth Judicial District has been actively involved in issues related to juvenile justice. After reviewing Mr. Ybanez's opening brief and the briefs of the other *amici curiae* in support of Mr. Ybanez, the District Attorney determined that this case involves issues where the experience and perspective of a district attorney can be useful to the Court. Specifically, the District Attorney offers the Court a unique and valuable perspective regarding the necessity of having procedural safeguards in place to protect the rights of juveniles who are charged as adults.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case, including the nature of the case, proceedings below, statement of the facts, and disposition in the lower courts.

SUMMARY OF THE ARGUMENT

First, in direct file proceedings where a juvenile's parent, defense attorney, or both, has a conflict of interest, a guardian ad litem or alternate defense counsel should be appointed in order to represent the juvenile's best interests and provide an effective defense.

The purpose of a defense attorney is distinct from the purpose of a guardian ad litem or parent. Defense counsel is required to be an effective legal advocate for the defendant. The duty of a parent or guardian ad litem is slightly different. Optimally, a parent will be involved with their child's legal proceedings in a manner consistent with their child's best interests. Where a parent is unable to do this, a guardian ad litem can and should be appointed in order to represent the juvenile's best interests.

When a parent or defense attorney has a conflict of interest against the juvenile, he or she is unable to act in the best interests of the juvenile or represent the juvenile effectively. Because direct file proceedings against juveniles involve serious charges and potentially adult sentences, it is especially important in direct file cases that the juvenile has both someone acting in his or her best interests as well as effective defense counsel. When a parent or a defense attorney has a conflict of interest and cannot satisfy their duties, a guardian ad litem and alternate defense counsel should be appointed.

Second, in direct file proceedings a juvenile's waiver of conflict should be made on the record in order to ensure the waiver was knowing, voluntary, and intentional.

The right to conflict-free counsel is a fundamental right guaranteed by the Sixth Amendment. Where fundamental rights are concerned, courts do not presume that a defendant has waived them unless the waiver was valid.

In order to be valid, a waiver of a fundamental right must be made voluntarily, knowingly, and intentionally. This requirement encompasses additional requirements for the trial court, such as an accurate determination that the waiver was actually made voluntarily, knowingly, and intentionally. The best way to ensure the validity of a waiver of a fundamental right, such as that to conflict-free counsel, is to put the conflict waiver on the record.

ARGUMENT

III. In direct file proceedings where a juvenile's parent, defense attorney, or both, has a conflict of interest, a guardian ad litem or alternate defense counsel should be appointed in order to represent the juvenile's best interests and provide an effective defense.

1. The purpose of a defense attorney is distinct from the purpose of a guardian ad litem or parent.

Where a parent is unable to act on behalf of their child's best interests, a defense attorney cannot be considered a substitute for the parent or appointed guardian because defense counsel and parents/guardians have distinct purposes.

This is especially true when the attorney him or herself has a conflict of interest against the juvenile.

An attorney's duty is to provide effective legal assistance to the defendant by advocating for the defendant's cause. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This duty encompasses the specific duties to consult and advise the defendant on important legal decisions, such as whether to waive certain rights or present particular defenses. *See, e.g., People in Interest of M.M.*, 726 P.2d 1108, 1120 (Colo. 1986). Ultimately, the duty to assist the defendant culminates in ensuring that a defendant receives a fair trial. *Wheat v. United States*, 48 U.S. 153, 159 (1988) (citing *Strickland*, 466 U.S. at 689).

On the other hand, the purpose of a guardian ad litem is to “act in the best interests” of the juvenile they are appointed to represent, § 19-1-103(59), C.R.S., even if those interests go against what the juvenile wants. In juvenile proceedings, guardians ad litem may be appointed when the juvenile does not have a parent or guardian, when there is a conflict of interest between the parent and the juvenile, or when the court finds appointment of a guardian is “necessary to serve the best interests of the child.” § 19-1-119(2)(a), C.R.S.. § 19-1-119 expressly states that guardians appointed for any of the three reasons above are not substitutes for defense counsel. § 19-1-111(2.5), C.R.S..

Because of their different purposes and duties, defense counsel and a guardian ad litem occasionally work towards different goals. For example, if a juvenile defendant wants to return home despite the poor environment provided by his parents, defense counsel would be obligated to work toward that outcome, whereas a guardian ad litem would likely recommend an alternative outcome more consistent with the juvenile's best interests. Therefore, a juvenile in a direct file proceeding should be able to benefit from both a guardian ad litem and defense counsel. Defense counsel cannot always represent a juvenile's best interests and simultaneously provide a zealous defense in favor of the juvenile's preferred outcome for a legal proceeding.

2. A parent or defense attorney with a conflict of interest against the juvenile is unable to act in the best interests of the juvenile or represent them effectively.

When there are no conflicts of interest, parents are typically an important part of a juvenile defendant's legal proceeding. The parent of a juvenile defendant is required to attend all legal proceedings concerning their child. § 19-2-113, C.R.S. This presence is intended to protect the juvenile, especially in proceedings where a juvenile may be able to waive a fundamental right. For example, parental presence is required by § 19-2-511(1) for all police interrogations of juveniles. § 19-2-511(1), C.R.S.; *People v. White*, 64P.3d 864, 873 (Colo. App. 2002). At these proceedings parents are required to be present—unless defense counsel is

present—in order “to assure that the juvenile’s [fundamental rights are] fully afforded to him or her,” and to ensure that “any statement made by the child [is] given voluntarily, knowingly, and intelligently.” *People v. Legler*, 969 P.2d 691, 694 (Colo. 1998).

However, conflicted parents are unable to act in the best interests of their child. Where a parent’s interests may be adverse to those of the juvenile, the parent’s presence at a juvenile’s proceeding is not sufficient to ensure that the juvenile’s rights are fully afforded to him or her, or that the child’s statements are given voluntarily, knowingly, and intelligently. *See id.* In order to satisfy the intent of § 19-2-511(1), C.R.S., parents must be able to provide “effective guidance and advice” by freely giving advice to their child. *People in Interest of L.B.*, 513 P.2d 1069 (Colo. App. 1973). If parents are prevented from giving effective guidance by reason of a conflict of interest against the juvenile, the juvenile receives little protection provided by the presence of their parent and the juvenile’s statements cannot be considered to have been given voluntarily, knowingly, or intelligently. *See Legler*, 969 P.2d at 691.

Just as a parent with a conflict of interest is unable to act in the best interest of their child, conflicted defense counsel is often unable to act as effective counsel for the juvenile. The Sixth Amendment aims to “guarantee an effective advocate for each criminal defendant.” *Wheat*, 486 U.S. at 159. Implicit in effective

advocacy is that the attorney does not have a conflict of interest that would prevent him or her from providing effective legal assistance. *People v. Martinez*, 869 P.2d 519, 524 (Colo. 1994) (citing *Holloway v. Arkansas*, 435 U.S. 475, 483-84 (1978)). Although having effective, conflict-free counsel is important for all defendants, it is especially so for juveniles, who are unable to make critical legal decisions or understand legal proceedings in the same manner as an adult. *See* § 13-22-101, C.R.S. (juveniles are not allowed to enter into a contract, manage an estate, sue or be sued, or make decisions about their own body); *see also* § 19-2-511(1) (requiring a parent to be present for police interrogation of a juvenile).

Ultimately, in cases where the parent is unable to act in the best interests of the child, or in counsel's case, is unable to represent the child effectively, a guardian ad litem and/or alternate defense counsel should be appointed in order to ensure that the juvenile's rights are protected and that his or her interests are being properly represented. A juvenile should not be left to move through the criminal justice system without an effective guardian and an attorney by their side. Not appointing a guardian ad litem or alternate defense counsel in these cases effectively denies the juvenile defendant both a guardian and an attorney.

3. Direct file proceedings are the most serious juvenile cases with the most serious consequences.

Only the most serious juvenile cases become direct file proceedings. *See* § 19-2-517(1), C.R.S.. In these cases the juvenile becomes eligible to be tried as an

adult because of the nature of the crime or the defendant's criminal history. *See id.* Furthermore, if a juvenile is convicted as a result of direct file proceedings, he or she can be sentenced as an adult (while still being exempt from the mandatory minimum sentencing scheme set out by § 18-1.3-406, C.R.S., unless the juvenile committed a class 1 felony or a sex offense subject to Part 9 of §18-1.3). § 19-2-517(6).

A conflict-free parent and effective counsel are always important when a juvenile is facing legal proceedings. However, conflict-free parents and effective counsel become even more important—if not necessary—when a juvenile is being charged under the direct file statute and could therefor face adult sentencing or forty years in prison before being eligible for parole.

IV. In direct file proceedings a juvenile's waiver of conflict should be made on the record in order to ensure the waiver was knowing, voluntary, and intentional.

1. The right to conflict-free counsel is a fundamental right guaranteed by the Sixth Amendment.

The Sixth Amendment guarantees that in all criminal prosecutions the accused has the right to counsel to assist in his defense. U.S. Const. amend. VI. However, the aim of this amendment is not simply to provide the defendant counsel, it is to provide the defendant an “effective advocate.” *E.g., Wheat*, 486 U.S. at 159. Therefore, the Sixth Amendment right to effective counsel

encompasses the right to “conflict-free representation.” *Martinez*, 869 P.2d at 524 (citing *Holloway*, 435 U.S. at 483-84).

The right to effective, conflict-free counsel is not only a constitutional right, it is the most fundamental and pervasive right guaranteed to a criminal defendant. *Hutchinson v. People*, 742 P.2d 875, 880 (Colo. 1987). Access to effective counsel “affects the defendant’s ability to assert any other rights he may have.” *Id.* For example, without counsel, the significance of the right to a trial would be greatly reduced. *Id.* (citing *United States v. Cronin*, 466 U.S. 648, 653 (1984)).

2. Courts presume against waiver where constitutional rights are concerned.

Courts “do not presume acquiescence in the loss of fundamental constitutional rights.” *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Therefore, courts will “indulge every reasonable presumption against [the] waiver” of a fundamental constitutional right, such as the right to conflict-free counsel. *Curtis*, 681 P.2d at 514.

3. Waiver of a fundamental right must be voluntary, knowing and intentional.

Even when a court will allow a defendant to waive a fundamental right, the waiver is only valid where the defendant “voluntarily, knowingly, and intentionally [relinquished the] right.” *People v. Harrington*, 500 P.2d 360, 361 (Colo. 1972) (citing *Johnson*, 304 U.S. at 464). For example, *Curtis*, a consolidation of two

cases, concerns two defendants who did not testify at their respective trials. *Curtis*, 681 P.2d at 508, 509. The first defendant was not advised that the decision to testify was his decision to make, *id.* at 508, and there was no indication of his informed waiver on the trial court record, *see id.* at 515. However, the second defendant was advised, *id.* at 509, although there was no evidence of this on the record, *see id.* at 515. The court held that the first defendant had not waived his right voluntarily, knowingly, and intentionally, *id.* at 515, but the defendant who had been advised of his right validly waived it, *id.* at 516. *Curtis*, which concerns the waiver of the right to testify, can be properly analogized to the issue of waiving the right to counsel because the right to counsel has been deemed the most pervasive of a defendant's rights. *Hutchinson*, 742 P.2d at 880. A defendant waiving the right to effective counsel should be protected as much as if not more so than the defendant waiving the right to testify.

The requirement that a valid waiver of a constitutional right be made voluntarily, knowingly, and intentionally creates for the courts a duty to “question the defendant *on the record* to ascertain whether waiver of the right ... [was] made with a complete understanding of [the defendant's] rights.” *Curtis*, 681 P.2d at 516; *see also Johnson*, 304 U.S. at 465 (emphasis added). In order to ensure that the defendant completely understood his rights, he or she must be “fully advised of

existing or potential conflicts.” *Martinez*, 869 P.2d at 525 (citing *People v. Castro*, 657 P.2d 657, 944 (Colo. 1983)).

Furthermore, “the record must affirmatively show that the trial court fully explained” the defendant’s rights and the nature of any attorney conflicts. *Curtis*, 681 P.2d at 516. By placing the waiver on the record during or before trial, the trial court can accurately determine whether waiver was valid. *Id.* Furthermore, the trial court’s determination of validity will be easily reviewable on appeal. *Id.* In the reverse, not placing the waiver on the record increases the likelihood of a defendant impermissibly waiving a constitutional right. *Id.*

Where these requirements apply to adult defendants attempting to waive fundamental rights, they also apply to juvenile defendants. The criminal justice system works to protect juveniles and ensure they make considered and educated choices with assistance from a parent and/or counsel. *See* § 19-2-511(1) (requiring parents to be present at juvenile interrogations to ensure the juvenile does not ignorantly waive his or her Fifth Amendment right); *see also* § 13-22-101 (juveniles are not allowed to enter into a contract, manage an estate, sue or be sued, or make decisions about their own body). Putting a juvenile’s conflict waiver on the record will best assure that the waiver was valid.

CONCLUSION

First, because parents and counsel with a conflict of interest against the juvenile are unable to represent the juvenile's best interests or effectively advocate for the juvenile, in direct file proceedings where a juvenile's parent, defense attorney, or both, has a conflict of interest, a guardian ad litem or alternate defense counsel should be appointed.

Second, because valid waivers of fundamental rights must be made voluntarily, knowingly, and intentionally, and because trial courts have a duty to ensure that waivers of fundamental rights are valid, such waivers in juvenile direct file proceedings should be made on the record.

Dated: August 7, 2015.

Twentieth Judicial District,
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CERTIFICATE OF SERVICE

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