IN THE
SUPREME COURT OF MISSOURI
No. SC97595

IN THE INTEREST OF D.C.M.,

Appellant,

vs.

JUVENILE OFFICE,

Respondent.

Appeal from the Circuit Court of Pemiscot County, Division I
Thirty-Fourth Judicial Circuit, Pemiscot County No. 18PE-JU00022
The Honorable W. Keith Currie, Judge

Brief of National Juvenile Defender Center on Behalf of Appellant D.C.M.

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Index

Page

Table of Authorities

Statutes:

Rules:

Other Authorities:

Jurisdictional Statement

Amicus adopts the jurisdictional statement set forth in Appellant's Brief.

Authority to File

This brief is being filed pursuant to Rule 84.05(f) with consent of the parties.

Interest of *Amicus Curiae*

The National Juvenile Defender Center (NJDC) was created to ensure excellence in juvenile defense and promote justice for all children. NJDC 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. NJDC 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. NJDC 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. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. NJDC has participated as Amicus Curiae before the United States Supreme Court, as well as federal and state courts across the country.

"[D]ue process requires that every child who faces the loss of liberty should be represented from their first appearance through, at least, the disposition of their case by an attorney with the training, resources, and time to effectively advocate the child's interests."[1]

Introduction

"[C]hildren, like adults, are denied their right to counsel not only when an attorney is entirely absent, but also when an attorney is made available in name only."[2] Effective juvenile defense not only requires specialized practice, wherein the attorney must meet all the obligations due to an adult client, but also necessitates expertise in juvenile-specific law and policy, the science of adolescent development and how it impacts a young person's case, skills and techniques for effectively communicating with youth, collateral consequences specific to juvenile court, and various child-specific systems affecting delinquency cases, such as schools and adolescent mental health services.[3]

Children "cannot be viewed simply as miniature adults" and should not be treated as such.[4] Rather, "[a] child's age is far more than

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[1] *Statement of Interest of the United States*, *N.P. et al. v. Georgia*, No. 2014-CV-241025, 1 (Ga. Super. Ct. 2015), https://www.justice.gov/file/377911/download [hereinafter *Dep't of Justice Statement of Interest in N.P.*].

[2] *Id.* at 7.

[3] Nat'l Juvenile Defender Ctr., *National Juvenile Defense Standards*, § 1.3 (2012), http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf [hereinafter *Nat'l Juv. Def. Standards*].

[4] *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception."[5] Youth have different cognitive, emotional, and behavioral capacities than adults, and defenders must engage thoughtfully when communicating with youth and in crafting legal arguments with respect to a youth's reduced culpability and increased likelihood of desistance.[6]

The juvenile defender must apply this knowledge when representing youth at all stages of the court system, including, but not limited to pretrial detention hearings, initial hearings, suppression hearings, the adjudicatory phase of a trial, disposition hearings, transfer hearings, or any competence proceedings while a youth remains under the jurisdiction of the juvenile court.

Juvenile defenders must ensure a client-centered model of advocacy in which they empower and advise each young client using developmentally appropriate communication, so the young person is equipped to understand and make informed decisions about their case, including whether to accept a plea offer or go to trial, to testify or remain silent, to accept or advocate against a disposition proffered by

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[5] *J.D.B.*, 564 U.S. at 272 (citations and internal quotation marks omitted).

[6] Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Ass'n, *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems* at 2 (2d ed. 2008), http://www.njdc.info/pdf/10_Core_Principles_2008.pdf [hereinafter *Ten Core Principles*]. *See generally* Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 Dev. & Psychopathology 453 (2010).

the state, and to offer alternatives to juvenile court involvement and treatment.[7]

Juvenile defender systems must provide counsel with the necessary training, support, and oversight to ensure attorneys invest the time needed to build rapport with clients, obtain discovery and conduct investigation, engage in motion practice and appropriately prepare for hearings, monitor the post-disposition needs of clients within the court's jurisdiction, and consult with the client to ensure stated-interest representation at all stages of court involvement.[8]

Today, more than 50 years after the U.S. Supreme Court guaranteed children constitutional protections in *In re Gault*,[9] it is critical that the due process protections guaranteed to youth, including the vital role of qualified defense counsel, are fully realized in juvenile courts around the country. Further, in order to ensure that youth in Missouri are able to enforce these rights Amicus asks this Court to enact youth-specific standards and procedures for ineffective-assistance-of-counsel claims raised by youth, as set forth below.

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[7] Nat'l Juvenile Defender Ctr., *Role of Juvenile Defense Counsel in Delinquency Court*, 9 (2009), https://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf [hereinafter *Role of Juv. Defense Counsel*]. *See also Ten Core Principles*, *supra note* 6.

[8] *Dep't of Justice Statement of Interest in N.P.*, *supra note* 1, at 14.

[9] 387 U.S. 1, 36 (1967).

Statement of Facts

Amicus adopts the statement of facts set forth in Appellant's brief.

Argument

I. A young person in a delinquency proceeding has the right to the effective assistance of counsel and the record in this case is sufficient to establish Chris's claim of ineffective assistance of counsel; thus, the matter must be remanded to the juvenile court for a new hearing.[10]

A. The Role of Counsel in Juvenile Court

More than fifty years ago, the U.S. Supreme Court recognized children's constitutional rights to due process and to the assistance of counsel in delinquency court.[11] The Court recognized that juvenile delinquency proceedings—especially those in which a child's liberty is at stake—are comparable in seriousness to the felony prosecution of an adult.[12]

The Court outlined the vital role of counsel for children: "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the child] has a defense and to prepare and submit it" and held that children

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[10] Amicus will address the first and fourth transfer questions this section, and will address transfer questions two and three in turn, in the sections II and III.

[11] *Gault*, 387 U.S. at 36, 39, 41.

[12] *Id.* at 36.

need "the guiding hand of counsel at every step in the proceedings against [them]."[13]

As in the defense of an adult, a juvenile defender is charged with presenting the voice of the client and representing their expressed interests throughout the case.[14] But in order to fulfill this role, a juvenile defender must also understand child and adolescent development, be able to evaluate a client's maturity and competency, and be able to communicate effectively not only with young clients, but also with parents and guardians without compromising their ethical duties to the child.[15] After *Gault*, with attorneys by their side, young people accused of delinquent acts were to become participants, rather than spectators, in their court proceedings.

1. Child-centered representation is required at every stage of delinquency proceedings.

To receive "the guiding hand of counsel at every step in the proceedings" in juvenile court,[16] counsel must take immediate action to ensure that the child's interests are protected.[17]

Early and frequent contacts are important opportunities for the defender and child to build rapport, trust, and confidence in each

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[13] *Gault, 387 U.S.* at 36..

[14] *Nat'l Juv. Def. Standards*, *Guiding Principles*, *supra note* 3, at 9.

[15] *Id.* at §§ 1.3, 2.1, 2.2, 2.3, 2.6.

[16] *Gault* at 36.

[17] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 2.1.

other.[18] But, by the time youth meet their attorney, they may have been questioned by many adults—police officers, deputy juvenile officers, and family members. A youth may be distrustful of additional adult questioning and may not even be able to distinguish their defender from all the other adults in the system.

Defenders must take the time to explain that their job is to help defend their clients against the charges and represent the client's interests.[19] In addition to asking for information, it is vital for counsel to take time to discuss what is likely to happen in court and to help the client understand the nature of the attorney-client relationship.[20]

When working with young clients, describing the attorney-client relationship can be especially tricky. Juvenile defense attorneys are trained to practice expressed-interest representation in delinquency cases.[21] In order to do that with a young person, defenders must guard against acquiescing to a child's uninformed whims and must instead make a concerted effort to help them make informed decisions based on facts and outcomes that may not be readily identifiable to them.[22]

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[18] *Nat'l Juv. Def. Standards*, *supra note* 3, at §§ 2.1 cmt., 2.4. *See also Inst. for Judicial Admin. & Am. Bar Ass'n, Juvenile Justice Standards Annotated: A Balanced Approach xvi-xviii*, at 36 (Robert E. Shepherd, Jr., ed. 1996), https://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf [hereinafter *IJA-ABA Juv. Justice Standards*].

[19] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 2.1.

[20] *Id.* at § 2.2.

[21] *Id.* at § 1.2 (requiring that representation of young people be client-directed).

[22] Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency*

While tempting, it would be inappropriate for a juvenile defenders to consciously or unconsciously try to control the decisions a client makes by withholding or manipulating information or coercing the young person to make what the attorney feels is the "best" decision.[23]

Advocacy that emphasizes the importance of providing advice and counsel with an emphasis on age- and child-appropriate counsel is the best approach, and meets counsel's duty to thoroughly explain matters so that clients can make informed decisions:

> [This model of advocacy] also acknowledges the continuum of cognitive and psychosocial limitations among youth without relying on overbroad, bright-line presumptions that strip juveniles of their constitutional right to counsel and gives the lawyer an opportunity to teach, guide, and even persuade children without losing the child's trust or usurping the parent's role of moral instructor.[24]

Some youth in the delinquency system have disabilities that affect critical aspects of their functioning, especially their ability to communicate and comprehend.[25] Juvenile defenders must be alert to the special needs of each client and also learn of the client's strengths—be they familial, personal, or potential—and help integrate those

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Cases, 81 Notre Dame L. Rev. 245, 248-249, 307 (2005) (endorsing a "collaborative" model of advocacy "in which attorneys may educate children and adolescents on the short- and long-term consequences of all potential case-related decisions; patiently lead youth through the pros and cons of each option; and enhance the youth's ever evolving decisionmaking skills and capacity.") [hereinafter *Loyalty, Paternalism*].

[23] *Id.* at 307.

[24] *Id.* at 323. *See* Mo. R. Bar 4-1.4(b) (2017).

[25] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 2.6.

strengths into the theory of the case, any plea bargaining, and disposition planning.[26]

In some cases, a child's disabilities may pose significant enough barriers to forming an attorney-client relationship that the attorney may need to carefully consider alternatives to fulfill their role, such as raising competency as an issue in the case or working with other professionals who are able to overcome the communication barrier—like a therapist or social worker—to attempt to determine what the client would do if competent and act accordingly. [27]

No matter what form it takes, the attorney-client relationship is fundamental to effective representation, and it takes time to establish. Counsel for children must be aware of the unique characteristics of each client and take the time needed not only to learn about the child's strengths, but also to integrate those strengths into the case strategy at every step of the representation.[28]

Regular contact with young clients and ongoing client communication is also essential to obtaining information necessary for locating witnesses; preserving evidence; obtaining information necessary for potential motions; ascertaining the client's mental and physical health, including competence to stand trial or mental state at

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[26] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 2.1.

[27] *Loyalty, Paternalism*, *supra note* 22, at 323. *See* Mo. R. Bar 4-1.14, cmt. 3 (2007) (explaining that the presence of other persons does not affect the attorney-client privilege and that the attorney "must look to the client, and not family members, to make decisions on the client's behalf.").

[28] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 2.1 cmt. *See also IJA-ABA Juv. Justice Standards*, *supra note* 18, at 1, 15.

the time of the alleged offense; obtaining records and delinquency history; and gathering information regarding how the child was treated by investigating agencies, arresting officers, or facility staff.[29] Spending time with a client is the most effective means to both establishing an attorney-client relationship and preparing the defense.[30]

National Council of Juvenile and Family Court Judges (NCJFCJ) guidelines state that counsel should be appointed prior to the detention or initial hearing and must have time to consult with and prepare the client.[31] No matter when they are appointed, attorneys need to spend time and build rapport with their youth clients in a confidential setting:

> Counsel must anticipate that a young client, due to his or her developmental immaturity, may require frequent contact between court dates. Counsel must also assume that young clients will often not understand the language of court officers, even if they have been in court previously. Prior to court hearings, counsel should contact the client to remind him or her of the objectives of the hearing, expectations of the client and counsel at the hearing, as well as the date, time, and location of court. Counsel should clarify how and when the client should be in contact, as well as counsel's willingness to receive collect calls from detention facilities. If the client is detained, counsel, or

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[29] *Nat'l Juv. Def. Standards*, *supra note* 3, at §§ 2.1, 2.4. *See also IJA-ABA Juv. Justice Standards*, *supra note* 18, at 1, 15.

[30] *Id.; Nat'l Juv. Def. Standards*, *supra note* 3, at §§ 2.1, 2.4.

[31] Nat'l Council of Juvenile & Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 30 (2005), http://www.ncjfcj.org/sites/default/files/juveniledelinquencyguidelinescompressed%5B1%5D.pdf [hereinafter *NCJFCJ Juv. Delinquency Guidelines*].

someone from counsel's office, should visit the client in detention regularly, including regular visits in between court dates.[32]

2. The barriers to effective legal representation for youth in Missouri generally and counsel's deficient and prejudicial performance in this case

Missouri's system of juvenile defense delivery has enabled ineffective practice with regard to attorney-client relationships. In 2013, an assessment of juvenile indigent defense services in Missouri concluded, "Legal representation of youth in delinquency proceedings across Missouri is uneven at best" and that "for those youth who do receive lawyers, it is often too late to have meaningful impact."[33] Assessment investigators reported that "in some counties, counsel is not appointed during the early stages of proceedings when key decisions are made about the case."[34] Deputy Juvenile Officers (DJOs) reported that when appointment of counsel is delayed, "the fact-finding

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[32] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 2.4 cmt. (citing Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 L. & Hum. Behav. 723 (2005)) (finding that spending more time with an attorney increased legal comprehension in youth). *See also* Nat'l Juvenile Defender Ctr., *Role of Juv. Defense Counsel*, *supra note* 7, at 24 (discussing the ABA's Model Rule of Professional Conduct 1.4 concerning communication); Mo. R. Bar 4-1.4(b) (2017), 4-1.14(a) (2007).

[33] Nat. Juvenile Defender Ctr., *Missouri: Justice Rationed, An Assessment of Access to Counsel and Quality of Juvenile Defense Representation in Delinquency Proceedings*, 41 (2013), https://njdc.info/our-work/juvenile-indigent-defense-assessments/missouri-assessment/ [hereinafter *NJDC Mo. Assessment*].

[34] *Id.* at 41.

process is minimalized" and defense counsel cannot effectively fulfill their role in the disposition stage, especially where DYS commitment is a possibility.[35]

Assessment investigators found that far too many attorneys spent woefully insufficient time with clients, resulting in diminished quality of representation and damaged attorney-client relationships.[36] In one county, two youth explained to investigators "extremely negative views of their public defenders":

> They felt that their defenders did not fight for them, did not listen to them, and did not include them in making decisions about the case. One noted that the attorney only spent five to seven minutes with him right before court and said in disgust about the attorney that he did not think the attorney even knew his name.[37]

Even when defenders have adequate time to prepare, they face barriers to providing adequate representation. Specifically, Missouri's juvenile defenders struggle with limited resources under a court culture in which the defender voice is undervalued, the emphasis is on adult clients, and juvenile defenders provide admittedly "shameful" representation.[38] In one jurisdiction, a defender admitted, "There is not

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[35] *NJDC Mo. Assessment*, *supra note* 33, at 41.

[36] *Id.* at 44.

[37] *Id.* (noting also that detention staff in two counties expressed concern that defenders did not regularly visit or return calls from detained youth and rarely visited clients between the initial detention hearing and their next court date).

[38] *Id.* at 52.

a lot I can do...it's essentially standing next to someone while they get sent to DYS for petty nonsense."[39]

A study of attorney workload standards in Missouri concluded in 2014 that attorneys should reasonably expect to spend 19.5 hours on a juvenile case, excluding in-court time "to provide reasonably effective assistance of counsel."[40]

In this case, Chris's trial was held 12 days after the petition was filed and eight days after counsel was appointed.[41] According to the study, Chris's defense counsel would expect to have spent an average of more than 2.4 hours per day on each of the eight days before trial to provide reasonably effective assistance.[42] But the record reflects that counsel did not request a psychological evaluation and that there was apparently no investigation into Chris's autism diagnosis or its possible effect on the alleged offense; on Chris's ability to participate in and make crucial decisions about his case, like whether to go to trial or testify at trial; or into how his special needs would affect the appropriateness of a possible DYS commitment.[43]

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[39] *NJDC Mo. Assessment*, *supra note* 33, at 52.

[40] RubinBrown, *The Missouri Project, A Study of the Missouri Public Defender System and Attorney Workload Standards*, 6 (June 2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf [hereinafter *The Missouri Project*].

[41] (D2, D1).

[42] *The Missouri* Project, *supra note* 40, at 6.

[43] Although Chris's mother repeatedly referenced her son's autism diagnosis (*see, e.g.,* Tr. 81, 90, 98), defense counsel mentioned it only once, awkwardly, on cross examination. (Tr. 47). Defense counsel did

These failures constitute deficient performance under the NJDC and IJA-ABA juvenile defense standards and the NCJFCJ guidelines noted above, especially because reasonably competent counsel would have discovered through minimal internet research that Chris's autism would have been relevant to every aspect of Chris's case.[44]

For example, Indiana University's Resource Center for Autism notes, "Individuals with autism spectrum disorders (ASD) who are fluently verbal are not free of language and communication challenges" and individuals with ASD may:

- Appear to have a good vocabulary and a sophisticated command of the language system based on their verbal utterances.
    - In some instances sophisticated language may reflect repetition of bits of dialogue heard on television or in the conversation of others. This mitigated echolalia may or may not be used in appropriate contexts.

[* * *]

- Appear to have some difficulty grasping the main idea, drawing conclusions and making other inferences from conversation, text, TV programs, and movies.
- Appear to have difficulty understanding humor in television programs, movies, cartoons (animated and static), and everyday interactions.
- Appear to have difficulty with WH question forms such Who, What, Where, When, Why, How and others.

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not request a psychological evaluation or present individualized dispositional alternatives on Chris's behalf. (Tr. 89, 92, 95).

[44] *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (referring to ABA standards as "well-defined norms" and finding that counsel's departure from them constituted ineffective assistance). *See also* Mo. R. Bar 4-1.1 (2017), 4-1.3 (2007).

[45] Beverly Vicker, *Social Communication and Language Characteristics Associated with High Functioning, Verbal Children and Adults With*

Counsel's deficient performance affected the outcome below, in that counsel blindly acquiesced to Chris's likely insufficiently counseled decision to testify as the defense's only witness[46] and the juvenile court heavily relied on that testimony when finding Chris delinquent: "I heard Chris's testimony, and can put two and two together."[47] The court further reasoned:

> But the long story short is Chris said in his testimony – on his cross-examination, I mean he didn't voluntarily say it, but Mr. Anderson asked him – I'm trying to find my note – "Are you the only one telling the truth today?" and, basically, Chris said yes.
> [* * *]
> Chris is the only one who says, you know, I didn't make these statements. And, in all honesty, Chris is the only one who stands to gain by maybe not being more than truthful with the Court today. Chris is too young to know anything about the O.J. Simpson trial, but Chris was asked if he had ever used the "N" word, and he said, "I've never used the 'N' word." And I can tell you right now, pretty much anybody whoever says that, I just – I don't believe them because I think at one point in our lives, regrettably, we probably have all used that word, even – even if it's in a joking term.[48]

Counsel failed to act competently and diligently in Chris's case and these failures affected the outcome. Accordingly, the matter must be remanded for a new hearing.

Autism Spectrum Disorder, https://www.iidc.indiana.edu/pages/Social-Communication-and-Language-Characteristics-Associated-with-High-Functioning-Verbal-Children-and-Adults-with-ASD [hereinafter *Social Communication and Language Characteristics*].

[46] (Tr. 67-78).

[47] (Tr. 81).

[48] (Tr. 85-86).

B. Juvenile Defenders' Investigation and Pre-Trial Litigation Responsibilities

1. Juvenile defenders must thoroughly investigate, engage in vigorous motions practice, and utilize experts when defending youth.

As the Court in *Gault* explained, juvenile defense counsel must "make skilled inquiry into the facts".[49] In all delinquency cases, information about the case is necessary to aid in the decision to plead or go to trial. It is the lawyer's duty to conduct prompt investigation and to "[e]xplore all avenues leading to facts concerning responsibility for the acts or conditions alleged . . . ."[50] "The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities[, and t]he duty to investigate exists regardless of client's admissions . . . ."[51] And, juvenile defenders must interview all witnesses named by their client.[52]

Thorough investigation is invaluable. In addition to aiding in the client's decision to plead or go to trial, information discovered through investigation can persuade the government to drop the case altogether or dismiss certain charges. Without investigating the case or pursuing

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[49] *Gault*, 387 U.S. at 36.

[50] *IJA-ABA Juv. Justice Standards*, *supra note* 18, at 80.

[51] *IJA-ABA Juv. Justice Standards*, *supra note* 18, at 80.

[52] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 4.3.

all available discovery, defenders are unable to effectively advise about whether to admit or take the case to trial.[53]

Every child charged with an offense may have legal defenses or mitigation that can only be unearthed by a competent juvenile defender. The failure to enable this in every case runs contrary to the Supreme Court's recognition that children require counsel's assistance to investigate, ascertain whether any defenses exist, counsel their young clients, and submit arguments to the court.[54] Juvenile defenders must promptly and routinely investigate, request discovery, meet with clients, file motions, challenge detention, challenge probable cause, and strenuously advocate for the client's expressed interests after providing consultation with each young client.[55] Defenders must file appropriate motions, obtain and review discovery and *Brady* material, and make arguments to protect the client's rights throughout the process.[56]

Defenders must also take care to recognize and overcome any barriers to effective communication with their client, enlist expert assistance when necessary, and take time to ensure full understanding and clear communication, especially with clients whose disabilities affect communication.[57] Experts should also be utilized when

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[53] *Role Of Juv. Defense Counsel*, *supra note* 7, at 14-15.

[54] *See Gault*, 387 U.S. at 36.

[55] *NCJFCJ Juv. Delinquency Guidelines*, *supra note* 31, at 30–31; *Nat'l Juv. Def. Standards*, *supra note* 3, at §§ 3.6–4.8.

[56] *See Brady v. Maryland*, 373 U.S. 83 (1963). *See also Role of Juv. Defense Counsel*, *supra note* 7, at 15; *Nat'l Juv. Def. Standards*, *supra note* 3, at §§ 4.5, 4.7.

[57] *Id.* at §2.6.

advocating for clients at the disposition hearing.[58] And at a minimum, counsel must prepare to provide individualized advocacy at the disposition hearing, including taking steps to ensure the proper administration of medication as part of the disposition plan.[59]

Defense must provide thorough investigation, case preparation, and motions practice for every child. Although effective out-of-court preparation takes time,[60] anything less amounts to a denial of the right to counsel mandated by *Gault*.[61]

2. The barriers to effective pre-trial representation for youth in Missouri generally and counsel's deficient and prejudicial performance in this case

Missouri's system of juvenile defense delivery has enabled ineffective practice with regard to trial preparation. In its 2013 assessment, NJDC reported that across Missouri, juvenile defenders routinely neglect client contact and engage in "an abbreviated analysis of possible ways to proceed through complex legal hearings."[62] And, in

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[58] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 6.7.

[59] *Id.* at § 6.7.

[60] *The Missouri* Project, *supra note* 40, at 6 (noting that an average of 19.5 hours per juvenile case must be expected to provide reasonably effective assistance of counsel).

[61] *See Gault*, 387 U.S. at 36. *See Dep't of Justice Statement of Interest in N.P.*, *supra note* 1, at 14.

[62] *NJDC Mo. Assessment*, *supra note* 33, at 44.

most of the counties visited by investigators, defenders reported they "have insufficient time to conduct adequate investigation."[63]

In Chris's case, the record reflects that counsel did not file a discovery motion and did not thoroughly investigate or review all of the discovery that was available. At trial, Chris's attorney requested a continuance, claiming that he had not been provided information about three youth who were at the cafeteria table with Chris at the time of the alleged offense, Joshua, Jonathan, and Marcus, and wished to subpoena them to testify.[64] In response, counsel for the Juvenile Office said that defense counsel had been given access to the police reports, "which named all of those witnesses," and "had every opportunity to have those witnesses here today."[65]

Failing to adequately investigate a matter or interview and subpoena witnesses demonstrates ineffective representation and can reflect sufficient prejudice to warrant a new trial.[66] Defense counsel's admission on the record that he was unaware of the material provided to him is proof that his failure to consider the witnesses was not a

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[63] *NJDC Mo. Assessment*, *supra note* 33, at 45.

[64] (Tr. 79).

[65] (Tr. 79).

[66] *See Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990) (*en banc*); *Kenley v. Armontrout*, 937 F.2d 1298, 1304, 1308 (8th Cir. 1991)(citing *Strickland v. Washington*, 466 U.S. 668, 691(1984)); *Clay v. State*, 954 S.W.2d 344, 349 (Mo. App. E.D. 1997); *In re Edward S.*, 92 Cal.Rptr. 3d 725, 741 (Cal.Ct. App. 2009) (finding deficient performance for failure to investigate); *Rolan v. Vaughn*, 445 F.3d 671, 682 (3rd Cir. 2006) (finding "failure to conduct any pre-trial investigation is objectively unreasonable").

strategic choice, but an ineffective failure to provide basic defense representation.

Moreover, Chris has a diagnosis of autism, as reflected in his mother's repeated attempts to advocate for her son throughout his case.[67] Chris's attorney was aware of that diagnosis.[68] But, Chris's attorney appears to have taken no steps to investigate what effect such a disability would have on the nature of the statement Chris was alleged to have made, Chris's perception of his conversations with other students, whether a child with difficulties in communication and social interactions could understand his right to testify and make an informed decision about such a choice, or even competently testify on his own behalf, and what individual and special needs Chris has that would need to be presented and advocated for at disposition.[69] And, Chris's attorney failed to procure any experts to testify on Chris's behalf at the adjudication or disposition phases of the hearing.

While Chris's attorney did file a one-page motion to dismiss in the case, it too fell short of reasonably competent representation.[70] Specifically, the court noted that defense counsel's motion asserted that Chris's statement does not "fall within the purview of the statute -- and I don't know what this means -- of the telephone call that the statute was designed to address. I mean, the statute doesn't say anything

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[67] (Tr. 47, 81, 90, 98).

[68] (Tr. 47).

[69] *See Social Communication and Language Characteristics*, *supra note* 45.

[70] (Tr. 86-87); (D5).

about a telephone call…."[71] This shows that counsel failed to research or review the elements of the offense charged.

Because counsel did not advocate for Chris at the disposition portion of the hearing and offered nothing about Chris's autism diagnosis or his medication, the record supports that Chris's attorney failed to adequately investigate Chris's dispositional needs or present any alternatives to DYS commitment.[72]

Because the record in this case reflects a failure of counsel to spend the time and exert the effort necessary to investigate the matter, review discovery, subpoena necessary witnesses, and learn about Chris's individual as well as his special needs, and because counsel's failures affected the outcome of the case, the matter must be remanded for a new hearing.

C. Juvenile Defenders' Responsibilities in Anticipation of and During an Adjudication Hearing

1. Juvenile defenders must provide the same vigorous defense owed to adult defendants at trial while taking a child-centered approach to each child's case.

Given *Gault's* mandate that youth receive due process protections in delinquency proceedings, at a bare minimum, youth are entitled to what might be expected of effective representation for adults.[73] Defense

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[71] (Tr. 86-87).

[72] (Tr. 90, 96) (referencing that Chris was on medication); (Tr. 89) (reflecting that counsel presented no dispositional evidence on Chris's behalf).

[73] *See Gault,* 387 U.S. at 36, 39, 41.

counsel must talk with their clients to understand the client's goals and expectations in every case.[74] Although an attorney's job is to advise and provide client-centered, individualized counsel, the ultimate decision must be the client's as to whether to proceed to trial.[75]

Advising young clients on the merits of going to trial is one of the most challenging aspects of juvenile practice. In keeping with expressed-interest representation, defense attorneys must counsel clients with an objective assessment of the case and ensure that the youth has sufficient information to make an informed decision without exercising undue influence on the client's decision.[76]

If a client chooses to proceed to trial, the attorney must engage in the full range of trial practice, including filing appropriate motions,[77] preparing witness testimony,[78] making appropriate motions and objections during the course of the trial,[79] cross-examining government witnesses, and presenting defense witnesses and other evidence necessary for an adequate defense.[80] In short, it is defense counsel's duty to ensure that their client's presumption of innocence is respected

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[74] *See Nat'l Juv. Def. Standards*, *supra note* 3, at § 4.9.

[75] *Id. See* Mo. R. Bar 4-1.2 (2008).

[76] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 4.9.

[77] *Id.* at § 4.7.

[78] *Id.* at § 5.2.

[79] *Id.* at §§ 5.3, 5.6, 5.8.

[80] *Id.* at §§ 5.5, 5.6, 5.8, 5.9.

and that the government meets its burden of proving its case.[81] Defense counsel must not fall victim to the informality of trials in juvenile court and should present opening and closing arguments.[82]

2. The barriers to effective representation for youth in adjudication hearings in Missouri generally and counsel's deficient and prejudicial performance in this case

Missouri's system of juvenile defense delivery has enabled ineffective practice with regard to adjudication advocacy. NJDC's assessment team found that children in Missouri who proceed to trial face a lower standard of proof in court hearings in which the emphasis is on services over children's constitutional rights:

> [One defender] commented that the philosophy of the court is, "can we prove enough to allow us to do what we need to do for this kid." A defender in another county stated that the courts, "see no harm in convicting a child to get services that they believe are in the child's best interest." Though well intentioned, when courts adjudicate youth delinquent to mete out services, the result can derail a youth's education, career potential, and entire future. The standard for guilt is not "enough," it is proof beyond a reasonable doubt.[83]

Defense counsel in this case did not provide representation that protected Chris's constitutional rights. Counsel had a duty to investigate Chris's autism diagnosis and the effect it would have on the attorney-client relationship, the special considerations that would need

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[81] *Role of Juv. Defense Counsel*, *supra note* 7, at 16.

[82] *Nat'l Juv. Def. Standards*, *supra note* 3, at §§ 5.4, 5.10.

[83] *NJDC Mo. Assessment*, *supra note* 33, at 48.

to be taken when counseling Chris about the course of representation and possible outcomes, and the need for special advocacy at every stage of the proceedings as the case progressed.[84] These failures were both glaring and compounded during the adjudication hearing.

Chris's theory of defense at the adjudication phase of the hearing was that he was innocent—that he never made the alleged threats and that all the other witnesses were lying.[85] The communication limitations of people like Chris, who have autism spectrum disorders but are verbally fluent, are especially relevant in this case.[86] Reasonably competent counsel would have investigated Chris's autism diagnosis, utilized that information when communicating with him about deciding whether to testify at trial and the possible defenses that counsel should investigate and pursue, and presented expert testimony in Chris's defense. It appears that counsel did not make any choice, much less a strategic one, about how Chris's limitations were relevant to his defense and did not seem to understand or attempt to determine how they mattered.

These deficiencies are starkly evident when counsel stated on cross examination that Chris "stated that he was only joking with some

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[84] *See supra* pp. 22-27.

[85] (Tr. 69-78).

[86] *Social Communication and Language Characteristics*, *supra note* 45 (providing that individuals with ASD may "reflect repetition of bits of dialogue heard on television or in the conversation of others * * * Appear to have some difficulty grasping the main idea, drawing conclusions and making other inferences from conversation, text, TV programs, and movies [and may a]ppear to have difficulty understanding humor in television programs, movies, cartoons (animated and static), and everyday interactions.").

people in the cafeteria" and that Chris's mother "advised officers that her son was autistic and he might have possibly been influenced by something he observed on television."[87] Counsel's statements on cross revealed that counsel had reason to believe that Chris's autism may have had relevance to the alleged offense, yet failed to investigate or pursue it fully.

Counsel's deficiencies affected the outcome because counsel pursued a defense theory on cross examination that was not only in direct conflict with Chris's theory of defense, but also served to make Chris appear that he was not being honest in his testimony to the court.[88] And, the court relied heavily on its perception that Chris was not credible when finding him delinquent as charged.[89]

As set forth in Chris's brief, counsel was also ineffective for failing to investigate and procure the attendance of exculpatory witnesses; failing to object to, and in some cases eliciting, testimony of irrelevant matters such as Chris' commission of prior other crimes and bad acts; and directly asking Chris if other witnesses were lying.[90]

At the close of evidence during the adjudication hearing, the court overruled counsel's poorly researched motion to dismiss that

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[87] (Tr. 47).

[88] *Compare* (Tr. 47) *with* (Tr. 69-78).

[89] (Tr. 81, 85-86).

[90] Br. of Appellant, D.C.M. at 26-28, 38-44; (Tr. 53-54, 60-61, 69-70, 72, 75-79, 85).

included reference to an element that was not in the statute Chris was charged with violating.[91]

Counsel's performance was shockingly deficient at the adjudication phase and plainly prejudicial. Accordingly, this Court must remand for a new adjudication hearing.

D. Juvenile Defenders' Responsibilities During a Disposition Hearing

1. Juvenile defenders must provide child- and client-centered advocacy at disposition hearings.

Gault recognized that juvenile delinquency proceedings, especially those in which a child's liberty is at stake, are comparable in seriousness to the felony prosecution of an adult.[92] Thus, disposition is a critical stage of practice in delinquency proceedings, and one that can directly impact a young person's future success. "The active participation of counsel at disposition is often essential to protection of clients' rights and to furtherance of their legitimate interests [and, i]n many cases, the lawyer's most valuable service to clients will be rendered at this stage of the proceedings."[93]

Dispositional advocacy must be based on thorough and effective planning with youth clients; and, as much as possible within the contours of the attorney-client relationship, with the client's family. Although client goals at a disposition hearing may be quite different

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[91] (Tr. 86-87).

[92] *Gault,* 387 U.S. at 36.

[93] *IJA-ABA Juv. Justice Standards*, *supra note* 18, at 89.

from other stages of the proceedings, "[t]he role of counsel at disposition is essentially the same at disposition as at earlier stages of the proceedings: to advocate, within the bounds of the law, [for] the best outcome available under the circumstances according to the client's view of the matter . . . ."[94]

Disposition planning should begin at the first meeting between defender and client. Good planning can result in not only client-driven outcomes, but also better advocacy and better-informed pre-trial advocacy and negotiations.[95] As part of disposition planning, defense counsel should investigate and obtain as much information about the client as possible, including family background and any relevant educational, social, psychological, and psychiatric evaluations or disposition reports, and should challenge the reports and recommendations, as warranted.[96]

The attorney should also be aware of all of the possible disposition options and identify the least restrictive options to discuss with the child.[97] In order to do this satisfactorily, the attorney must be familiar with the client's history, current goals and options, and the available programs, alternatives to placement, and collateral consequences of adjudication.[98] Counsel should discuss and explain

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[94] *IJA-ABA Juv. Justice Standards*, *supra note* 18, at 179. *See also Nat'l Juv. Def. Standards*, *supra note* 3, at §§ 1.1, 6.1.

[95] *Id.* at §§ 4.2 cmt., 4.4 cmt.

[96] *Id.* at §§ 4.2 cmt., 4.4 cmt., 6.1-6.7.

[97] *Id.* at §§ 6.2–6.5.

[98] *Id.* at § 6.2; Riya Saha Shah & Lisa S. Campbell, *Ineffective Assistance and Drastic Punishments: The Duty to Inform Juveniles of*

disposition procedures, as well as any probation or commitment plans proposed by the prosecutor or probation officer to the child.[99]

At the time of disposition, the attorney must advocate for the client's wishes, challenging any reports submitted to the court that are adverse to the client's interests.[100] After the hearing, the attorney must also explain the disposition order to the client, clarifying and emphasizing the client's obligations under that order, and informing the client of the potential consequences of not following the order.[101] The attorney must also advise the youth of the right to appeal a disposition.[102]

Defenders have an obligation to consult with their clients, to ascertain their interests and needs, and to actively present a disposition recommendation that is independent of that of the court or probation staff.[103] Further, counsel must familiarize themselves with the dispositional alternatives available to the court and must work with the child to formulate and present a disposition plan that is appropriate to the child's circumstances.[104]

Collateral Consequences in a Post-Padilla Court, 3 Duke F. for L. & Soc. Change 163, 178–79 (2011).

[99] *Nat'l Juv. Def. Standards*, *supra note* 3, at § 6.3.

[100] *Id.* at §§ 6.5, 6.7.

[101] *Id.* at § 6.8.

[102] *Id.* at § 7.2.

[103] *Id.* at §§ 6.3-6.6.

[104] *IJA-ABA Juv. Justice Standards*, *supra note* 18, at 89-90.

All youth deserve to have defense counsel who will listen to them, advise them, and work with them to build a plan that moves them toward success and away from the court. This client-driven disposition plan must be presented to the court and given the time and consideration required of fair and effective juvenile courts. Anything less compromises the rights of children to effective representation at all stages of the proceedings.[105]

2. The nature of and barriers to effective disposition representation for youth in Missouri generally and counsel's deficient and prejudicial performance at the disposition hearing in this case

Missouri's system of juvenile defense delivery has enabled ineffective disposition representation for youth. At the time of NJDC's assessment, many youth in Missouri did not have attorneys at their disposition hearings.[106] In those cases, investigators found, "[w]ithout defense counsel, the court has almost no other choice but to go along with the recommendations of the DJO."[107] In counties where youth regularly have attorneys for disposition, almost half told investigators that they often contest the DJO's disposition recommendations.[108] Some attorneys challenged the DJO's recommendations through cross examination and others provided fuller representation—offering dispositional alternatives, calling witnesses, and presenting

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[105] *Dep't of Justice Statement of Interest in N.P.*, *supra note* 1, at 14.

[106] *NJDC Mo. Assessment*, *supra note* 33, at 49.

[107] *Id.*

[108] *Id.*

community-based disposition plans developed with their client.[109] Defenders in more rural counties, however, reported they "lack the resources and options to develop alternative disposition plans and rely on the DJO for disposition planning."[110]

Missouri's standards require DJOs to make reasoned disposition recommendations that consider the least-restrictive and appropriate intervention for each child.[111] But, possibly due to confusion about the significance of Chris's age, court believed it had no choice but to commit Chris to DYS.[112]

Specifically, the court found that Chris was "in need of care and treatment which cannot be furnished him by placing him back in the home with his mother, but instead, requires the care, legal and physical custody, and discipline of a facility or program of the Division of Youth Services."[113] The judge noted that there were no community-based treatment services for Chris: "The problem with Chris is, is his age. He's getting ready to turn 17, and there's not any services within juvenile that we can do that in a couple of weeks or a month are going to do what the Court believes to be any good."[114] Chris's attorney failed

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[109] *NJDC Mo. Assessment*, *supra note* 33, at 49.

[110] *Id.*

[111] *Missouri Juvenile Officer Performance Standards*, § 3.1 (2017), https://www.courts.mo.gov/file.jsp?id=304.

[112] (Tr. 89-99).

[113] (Tr. 99).

[114] (Tr. 99). *But see* §§ RSMo, 211.031(3)(2016), 281.181(2005) (providing that juvenile courts have jurisdiction over children who are

to object to this inaccurate statement regarding dispositional options for 17-year-olds like Chris and did not advocate for Chris's dispositional interests at all—he offered no community-based alternatives for cognitive programming, therapy, mentoring, or skill building in the school, with a social worker, or in out-patient therapy on Chris's behalf.[115] He simply accepted that a DYS commitment was the only option.

Given that there was nothing offered on Chris's behalf, and nothing offered about Chris's autism diagnosis to assist the court in determining appropriate dispositional alternatives to DYS, it is not surprising that the court had no choice but to accept the DJO's recommendations.[116] Simply put, defense counsel's failure to prepare for and advocate for Chris's individual as well as his special needs at disposition left Chris in the same position as if he had no attorney at all. As a result, the court committed Chris to DYS for an indefinite term.[117]

The record supports that Chris's attorney failed to provide effective assistance of counsel at nearly every step in the proceedings against Chris and that counsel's deficient performance affected the

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seventeen for offenses committed prior to age seventeen and has a full range of placement options for children who are seventeen.).

[115] (Tr. 89).

[116] (Tr. 89).

[117] (D11).

outcome of this case; accordingly, the matter must be remanded a new hearing.[118]

II. This Court must afford young people who are adjudicated delinquent the ability to enforce their right to effective assistance of counsel through claims of ineffective assistance of counsel on direct appeal in Missouri. This Court should hold that a youth-appropriate ineffectiveness-of-counsel standard is the only path to ensure young people can fully realize their right to effective assistance of counsel in a system that is at once, civil, remedial, adversarial, and highly specialized.

A. Children must have the ability to enforce their right to effective assistance of counsel on direct appeal.

"Appeals play a unique role in the delinquency context, even beyond providing for accuracy and integrity in the conclusions, they are often the only vehicle for public accountability and transparency."[119] Appellate representation for children is a vital aspect of juvenile defense: "A robust and expeditious juvenile appellate practice is a

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[118] *See Williams v. Taylor*, 529 U.S. 362, 395-99 (2000) (finding that poor preparation for the sentencing phase constituted ineffective assistance of counsel in a capital case); *Wiggins v. Smith*, 539 U.S. 510, 528, 534 (2003) (finding counsel who failed to investigate mitigating evidence for sentencing ineffective in a capital case).

[119] Megan Annitto, *Juvenile Justice on Appeal*, 66 U. Miami L. Rev. 671, 690 (2012) [hereinafter *Juvenile Justice on Appeal*].

fundamental component of a fair and effective juvenile delinquency system."[120]

Far from the once-common perception that delinquency proceedings are just "kiddie court," adjudications have long-term consequences and important implications for plea negotiations or sentencing if a young person is court-involved in the future.[121] And, because more juvenile court records are now public, including all adjudications for felony-level offenses such as Chris's, once adjudicated, many Missouri children carry the stigma of their delinquent acts throughout their lives.[122]

In addition to their constitutional right to counsel set forth in *Gault*, children in Missouri's delinquency proceedings have the right to counsel in "all stages of the proceedings, including appeal, unless relieved by the court for good cause shown"[123] and "the court shall appoint counsel for the [youth] when necessary to assure a full and fair hearing."[124]

But, while *Gault* provided children with much needed due process protections, including the right to counsel and the right to

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[120] Nat'l Juvenile Defender Ctr., *Appeals: A Critical Check on the Juvenile Delinquency System* 2 (2014), http://njdc.info/wp-content/uploads/2014/10/Appeals-HR-10.4.14.pdf.

[121] *Juvenile Justice on Appeal*, *supra note* 119, at 701.

[122] § 211.321.1-.2 RSMo, (2004).

[123] 387 U.S. 1, 36; § 211.211.6 RSMo, (2017). *See also* Mo. Sup. Ct. R. 115.01(a) (2010).

[124] Mo. Sup. Ct. R. 115.02(a) (2010).

effective assistance of counsel,[125] it did not ensure that counsel would in fact be effective and did not provide an appellate remedy when counsel is not.[126]

Too often, counsel is not effective, and too often it is through no fault of their own. Across the U.S., juvenile indigent defense systems face a dearth of resources.[127] Defenders who represent youth, especially in rural and remote areas, "face unique challenges that make it difficult to provide client-centered and expressed interest representation for youth."[128]

Deficiencies in the quality of representation were addressed by the U.S. Department of Justice recently, when it urged states to ensure competent representation for all youth as set forth in *Gault*:

> For too long, the Supreme Court's promise of fairness for young people accused of delinquency has gone unfulfilled in courts across our country. . . . Every child has the right to a competent attorney who will provide the highest level of professional guidance and advocacy. It is time for courts to adequately fund

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[125] *Gault*, 387 U.S. at 37; *Kent v. United States*, 383 U.S. 541, 554 (1966); *In Interest of R.G.*, 495 S.W.2d 399, 403 (Mo. 1973).

[126] *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771, 777 (2010) [hereinafter *Losing Hold of the Guiding Hand*].

[127] Nat'l Juvenile Defender Ctr., *Defend Children: A Blueprint for Effective Juvenile Defender Services* 5 (2016), https://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf [hereinafter *Defend Children*](citing Nat'l Juvenile Defender Ctr., *State Assessments,* http://njdc.info/our-work/juvenile-indigent-defense-assessments).

[128] *Defend Children* at 4.

indigent defense systems for children and meet their constitutional responsibilities.[129]

In Missouri, NJDC's assessment revealed glaring deficiencies for many children:

> The report indicated in many juvenile courts, zealous advocacy by attorneys on behalf of young clients was seen as a barrier to getting them services through the correctional system. Attorneys handling juvenile cases, both public and private, often had little training in juvenile legal issues and spent minimal time with their clients, the report says.
>
> Cat Kelly, director of the Missouri State Public Defender System, says juvenile courts may be operating under the impression that counsel is not necessary in juvenile cases.
>
> 'Because the people working with the juveniles really, I believe, do have the best interests of the child at heart, they want to move toward providing services that they believe that child needs," she said in an interview. "Which is fabulous, except that unless the child actually did something wrong, they shouldn't be in the system at all.'[130]

While the right to direct appeal is provided to most children across the country as a matter of state statutory or constitutional law, the right to raise ineffective assistance of counsel claims on direct

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[129] Press Release, *Dep't of Justice, Department of Justice Statement of Interest Supports Meaningful Right to Counsel in Juvenile Prosecutions* (Mar. 13, 2015), https://www.justice.gov/opa/pr/department-justice-statement-interest-supports-meaningful-right-counsel-juvenile-prosecutions.

[130] Scott Lauck & Donna Walter, *Report faults Mo. defense of juveniles,* Mo. Lawyers Weekly, Apr. 4, 2013 https://molawyersmedia.com/2013/04/04/report-faults-mo-defense-of-juveniles/. *See also NJDC Mo. Assessment*, *supra note* 33, at 33-58.

appeal varies from state to state.[131] For myriad reasons, federal courts disfavor claims of ineffective assistance of counsel on direct appeal, and most states indicate a preference that such claims be raised in a collateral action.[132] There are criticisms of both options: "The advantages of collateral attack parallel defects in the process of direct review."[133] But these discussions are of little practical consequence here, because neither the Missouri juvenile delinquency statutes nor Supreme Court Rules provide any avenue for children to raise claims of ineffective assistance of counsel.[134]

Chris was denied his right to effective assistance to counsel, but has no remedy; accordingly, this Court must grant him and all children who have been adjudicated in Missouri's juvenile courts the right to assert IAC claims on direct appeal.

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[131] *Losing Hold of the Guiding Hand*, *supra note* 126, at 802; *Com. v. Grant*, 572 Pa. 48, 62 (2002).

[132] *Id.*; Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 692 (2007) [hereinafter *Structural Reform in Criminal Defense*].

[133] Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on* Massaro v. United States, 42 Brandeis L.J. 793, 796 (2004).

[134] *See* Br. of Appellant, D.C.M., at 29.

B. This Court should adopt a youth-specific standard for claims of ineffective assistance of counsel on direct appeal.

Appellate courts across the country hear claims of IAC in juvenile delinquency cases employing the *Strickland* standard.[135] But few of these claims prevail: Between 1995 and 2005, more than six million youth were found delinquent, only 290 youth filed claims alleging ineffective assistance of counsel, and only 41 were successful.[136]

Chris and Amicus assert that his case presents a somewhat rare example of an ineffectiveness claim that succeeds under the deferential *Strickland* standard. But in future cases, this Court should require the use of a youth-specific standard that takes into consideration the unique features of youth and their proceedings in juvenile court.

1. Montana employs a youth-specific standard for IAC claims arising in juvenile court.

As Chris offers in his brief, this Court could adopt Montana's youth-specific standard, which recognizes the unique features of young

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[135] *See, e.g.*, *In re N.A.*, CA2011-06-106, 2012WL1494525 *4-*5 (Oh. Ct. App. 2012) (reversing for IAC where counsel "inexplicably failed to raise the issue of competency at disposition"); *Commonwealth v. Bart B.*, 679 N.E.2d 531, 534 (Mass. 1997) (stating that the determination of ineffective assistance of counsel is governed by *Strickland*); *State v. Dawson*, 768 So. 2d 647, 650 (La. Ct. App. 2000) (citing several state cases that analyzed ineffective assistance of counsel claims under two-prong *Strickland* test, finding that juvenile defendants did not meet either prong when their attorney stipulated to probable cause prior to transfer hearing).

[136] *Losing Hold of the Guiding Hand*, *supra note* 126, at 806.

clients and delinquency proceedings.[137] That standard examines whether counsel has experience and training in representing child clients, as well as verifiably competent understanding of applicable law, and whether counsel has adequately investigated the matter, met with the client, researched the applicable law, adequately prepared for the hearing, reviewed discovery and interviewed witnesses, and, among other things, demonstrated relevant trial skills.[138]

2. This Court should adopt a youth-specific standard that conforms to recent U.S. Supreme Court jurisprudence that emphasizes the special mitigating factors of youth.

Amicus urges this Court to go further and consider a youth-specific standard in light of the emphasis on individualized sentencing in cases involving youth and counsel's responsibility to investigate and present mitigating factors of youth in such cases.

Although the law has long recognized that the fundamental differences between adult and youthful offenders support greater protections and special treatment for children, recent decisions have intensified this focus. At the core of these decisions is the mitigating effects of youth and reduced culpability of children who commit violations of law. These beliefs are so well established that even the dissent in *Graham v. Florida* conceded that most children are less

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[137] Br. of Appellant, D.C.M., at 34-38.

[138] *Matter of K.J.R.*, 391 P.3d 71, 77 (Mont. 2017) *reh'g denied*.

culpable than adults: "juveniles can sometimes act with the same culpability as adults," but only in "rare and unfortunate cases."[139]

While at first blush, capital cases and cases involving young defendants may not seem to have much in common, the Court's recent focus on youth evolved from cases involving the death penalty.

The two lines of cases intersected in *Thompson v. Oklahoma*, in which the U.S. Supreme Court prohibited sentences of death for children under 16.[140] One year later, age and death were considered together again when the Court declined to extend *Thompson* to children 16 and older in *Stanford v. Kentucky*.[141] On the same day as *Stanford*, the Court upheld a sentence of death for a person with what was then called "mental retardation" in *Penry v. Lynaugh*.[142] But, in just 13 years, *Penry* was abrogated by *Adkins v. Virginia*,[143] and three years after that, *Stanford* was abrogated by *Roper v. Simmons*.[144] In *Roper*, the Court drew the line for the mitigating factors of youth at age

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[139] 560 U.S. 48, 109, (2010), (Thomas, J. dissenting), (citing Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. Law & Family Studies 11, 69-70 (2007); Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 2, 31 (2005), https://www.hrw.org/report/2005/10/11/rest-their-lives/life-without-parole-child-offenders-united-states).

[140] 487 U.S. 815, 837 (1988).

[141] 492 U.S. 361, 379 (1989).

[142] 492 U.S. 302, 340 (1989).

[143] 536 U.S. 304, 321 (2002).

[144] 543 U.S. 551, 577 (2005).

18, holding that a sentence of death for offenses committed by youth violate the Eighth Amendment's prohibition against cruel and unusual punishment.[145]

After *Roper*, the progression of cases involving youth, death, and intellectual disability laid the foundation for four additional seminal cases emphasizing the mitigating factors of youth.[146]

In *Graham*, the Court recognized the "twice diminished moral culpability" of a youth who does not kill or intend to kill and prohibited the sentence of life without the possibility of parole for children who commit non-homicide offenses.[147] One year later, in *J.D.B.*, the Court extended its rationale to juvenile court proceedings generally: "'Our history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults" and enacted a reasonable juvenile standard as an overlay, requiring youth to be considered under the totality of the circumstances in the custody analysis under *Miranda*.[148]

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[145] *Roper*, 543 U.S. at 577.

[146] *Graham*, 560 U.S. at 109; *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 718 (2016).

[147] *Graham* at 48, 69, 80.

[148] *J.D.B.* at 274-275, 279-281 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–116 (1982). *See also In re S.C.W.*, No. 25421, 2011 WL 2565623, at *4-*5 (Oh. Ct. App. June 29, 2011) (extending *J.D.B.*'s requirement that age be considered under the totality of the circumstances in custody to the determination mens rea in a child's case.). *See generally* Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth* Amendment, 67 Am. U. L. Rev. 1513 (2018); Christopher M. Northrop & Kristina R. Rozan, *Kids Will be*

Miller soon followed, holding that mandatory life-without-parole sentences violate the Eighth Amendment.[149] The Court explained that a trial court must consider both a child's age and "the wealth of characteristics and circumstances attendant to it" prior to sentencing.[150] Most recently, when deciding the retroactive effect of *Miller*, the Court refined the definition of the members of this class as: "juvenile offenders whose crimes reflect the transient immaturity of youth," opposed to "the rarest of children, those whose crimes reflect 'irreparable corruption.'"[151]

Without question, the mitigating factors of youth affect every aspect of cases involving youth. So much so, that the jurisprudence involving youth has even been construed to establish a burden shift in certain cases. For example, the Supreme Court of Connecticut determined that the language in *Miller* and *Montgomery* suggest "that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances[; and, t]his presumption logically would extend to discretionary schemes that authorize such a sentence."[152] Therefore, mitigation and an

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Kids: Time for a "Reasonable Child" Standard for Proof of Objective Mens Rea Elements, 69 Me. L.Rev. 109 (2017).

[149] *Miller*, 567 U.S. at 489.

[150] *Id.* at 476.

[151] *Montgomery*, 136 S. Ct. at syl., 726 (citations omitted).

[152] *Connecticut v. Riley*, 110 A.3d 1205, 1214 (Conn.2015).

individualized determination are necessary in such cases involving youth.[153]

In light of the need for age and its attendant features to be given special consideration in cases involving youth, Amicus asks this Court to consider two cases, which found ineffectiveness of counsel warranting reversal in capital cases, as providing the best framework for a youth-specific IAC standard for Missouri.[154]

First, in *Williams v. Taylor*, the Court found that defense counsels' performance was deficient when they failed to introduce mitigating evidence, including evidence of intellectual disability, juvenile and social service records, evidence about Williams's childhood, and a key character witness.[155] Citing the ABA Standards for Criminal Justice, the Court determined that "trial counsel did not fulfill their obligation to conduct a thorough investigation of [Williams's] background.[156] And, rather than emphasizing the outcome in the prejudice analysis under *Strickland*, the Court considered the totality

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[153] *See Riley*, 110 A.3d at 1214

[154] *Williams v. Taylor*, 529 U.S. 362, 395-99 (2000) (finding that poor preparation for the sentencing phase constituted ineffective assistance of counsel); *Wiggins v. Smith*, 539 U.S. 510, 528, 534 (2003) (finding counsel who failed to investigate mitigating evidence for sentencing ineffective).

[155] *Williams*, 529 U.S. at 363-64.

[156] *Id.* at 396 (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed.1980)).

of the available mitigation evidence and reversed and remanded the matter.[157]

Three years later in *Wiggins v. Smith*, the Court reversed based on IAC where counsel did not conduct reasonable investigation in accordance with the ABA's Capital Defense Standards and put on a "halfhearted" mitigation case.[158] Importantly, the Court reasoned that the incomplete investigation was caused by counsel's inattention, not any reasoned strategic judgment.[159]

In light of *Roper* and its progeny, and the IAC holdings in *Williams* and *Wiggins*, this Court should hold that in cases involving the representation of youth, counsel's actions are deficient when they fail to fulfill their duty to conduct a thorough investigation of all mitigating factors, including youth and, when relevant, a youth's disability, and fail to present such mitigation to the court.

Prevailing norms of practice, such as the ABA standards cited in *Williams* and *Wiggins* and the NJDC Juvenile Defense Standards and IJA-ABA Standards raised here, are guides to determining what is reasonable.[160] And, it must be emphasized that under the cases set forth above and the NJDC Standards, youth is always a mitigating factor.[161]

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[157] *Williams*, 529 U.S. at 397, 375.

[158] *Wiggins,* 539 U.S. at 511-12, 526.

[159] *Id.* at 534.

[160] *Id.* at 522.

[161] *Miller*, 132 S.Ct. at 2467; *Graham*, 560 U.S. at 77-78; *Roper*, 543 U.S. at 570; *Nat'l Juv. Def. Standards*, *supra note* 3, at § 1.3 cmt (emphasizing effective representation requires specialized training,

Further, under a youth-specific second prong of *Strickland* as set forth in *Wiggins*, the "available mitigating evidence [is] taken as a whole" to determine prejudice.[162] Importantly, the range of mitigating evidence that must be investigated includes not only information and records from the child's own life, but also research and commonsense conclusions about youth that have been recognized as a matter of law.[163] Further, in cases involving youth where counsel's performance is deficient, prejudice must be presumed.[164] Thus, where the record reflects that counsel for youth failed to investigate and failed to present information concerning the mitigating factors of youth in accordance with prevailing norms of practice, counsel is ineffective and remand is required.[165]

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preparation, and education, and that "[d]evelopmental science can provide important mitigating evidence at detention, transfer, adjudication, and disposition hearings") (citing generally Roper, 543 U.S. 551; *Graham*, 560 U.S. 48; *J.D.B.*, 564 U.S. 261; *Miller*, 567 U.S. 460.

[162] *Wiggins*, 539 U.S. at 538 (citing *Williams*, 529 U.S. at 398).

[163] *J.D.B.*, 564 U.S. at 272 (reasoning that a child's age is a "fact that generates commonsense conclusions about behavior and perception" and that children as a class are "generally are less mature and responsible than adults.") (internal citations omitted).

[164] *See Strickland*, 466 U.S. at 692 (recognizing prejudice must be presumed in circumstances in which it "is so likely that cases-by-case inquiry into prejudice is not worth the cost.").

[165] *See generally Nat'l Juv. Def. Standards*, *supra note* 3; *IJA-ABA Juv. Justice Standards*, *supra note* 18; *NCJFCJ Juv. Delinquency Guidelines*, *supra note* 31.

The juvenile justice system once laudably strived to bury youthful discretions "in the graveyard of the forgotten past."[166] But those days are long gone. Now, young people face serious and lifelong consequences of court involvement, but they also now have a firmly established right to the effective representation in juvenile court.[167]

As found in the 2013 assessment, and often due to recognized systemic deficiencies, Missouri youth remain at risk of receiving substandard representation.[168] Accordingly, this Court must not only afford Missouri's children a mechanism to challenge their adjudication when counsel's performance is deficient, but must institute a youth-specific IAC standard that ensures justice and fairness for all Missouri youth.

III. When a juvenile court record is deemed insufficient to resolve a claim of ineffective assistance of counsel in juvenile court, the matter must be remanded for a hearing in Juvenile Court.

Chris and Amicus assert that the record below supports a finding of IAC under even the most stringent *Strickland* analysis. In the alternative, Amicus asks this Court to adopt a procedure when a record is not sufficient, which would take into consideration the unique needs of youth in such proceedings.

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[166] *See, e.g., Gault*, 387 U.S. at 32.

[167] *Id.* at 37; *Kent*, 383 U.S. at 554; *R.G.*, 495 S.W.2d at 403.

[168] *See generally NJDC Mo. Assessment*, *supra note* 33; *Report faults Mo. defense of juveniles, supra note* 130.

In his brief, Chris proposes that the Court enact a rule similar to a procedure in Oklahoma that allows non-record evidence to be supplemented into the direct appeal record to support an IAC claim.[169]

Any procedure adopted by this Court should allow for full investigation of and inquiry into counsel's training and expertise regarding the representation of youth charged with delinquency offenses, as well as general criminal defense.[170] The investigation must also include inquiry into the time spent outside of court and in preparation for any juvenile court hearings in accordance current standards and expectations, such as the Missouri Project study, which found that attorneys should expect to spend 19.5 hours per juvenile case, excluding in-court time "to provide reasonably effective assistance of counsel."[171]

Amicus suggests that the procedure promulgated must allow sufficient time to allow for thorough investigation, development, and supplementation of the record.[172] While Missouri is making efforts to

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[169] Br. of Appellant, D.C.M., at 45; Oklahoma R. of Crim. App. 3.11(B)(3)(b) (2003).

[170] *See, e.g.*, *Nat'l Juv. Def. Standards*, *supra note* 3; *IJA-ABA Juv. Justice Standards*, *supra note* 18; *NCJFCJ Juv. Delinquency Guidelines*, *supra note* 31; ABA Standards for Criminal Justice: Prosecution and Defense Function (4th ed.2015).

[171] *The Missouri* Project, *supra note* 40, at 6.

[172] *See Structural Reform in Criminal Defense*, *supra note* 132, at 712 (suggesting a minimum period of six months, with an option for extension of time, when necessary).

improve access to counsel and the quality of representation of youth,[173] Missouri's juvenile court judges, staff, and juvenile defense attorneys need this Court's guidance about such a procedure. More importantly, Missouri youth need the ability to meaningfully enforce their long-held right to effective assistance of counsel, because until this Court weighs in, children in Missouri have nothing more than a hollow promise. Accordingly, Amicus asks this Court to enact a youth-specific procedure for future cases in which the juvenile court record is deemed insufficient to resolve a claim of ineffective assistance of counsel in juvenile court.

Conclusion

Amicus asks this Court to find the record supports that Chris did not receive effective assistance of counsel and remand the matter for rehearing. Amicus also asks this Court to enact a youth-specific standard for future IAC claims arising out of delinquency proceedings and a youth-specific procedure for children to pursue IAC claims when the juvenile court record needs to be developed to support their claims.

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[173] *See, e.g., Public Defender Commission Budget Request for Fiscal Year 2020*, at 3, https://oa.mo.gov/sites/default/files/FY_2020_State_Public_Defender_Budget_Gov_Rec.pdf (requesting funds to provide more public defenders for children in Missouri); Nat'l Juvenile Defender Ctr., *NJDC Certified JTIP Trainers as of August 2017*, at 9, https://njdc.info/wp-content/uploads/2017/08/certified-jtip-trainers-as-of-Aug-2017.pdf (reflecting that there are four attorneys who have been certified to deliver trainings in Missouri based on NJDC's Juvenile Training Immersion Program Certification in Missouri); *Missouri State Public Defender*, *Lawyer Training*, https://publicdefender.mo.gov/employment/working-for-mspd/training/ (providing training programs to attorneys who do juvenile defense).

Now, more than 50 years after *Gault* gave children the right to effective assistance of counsel, Missouri's children deserve nothing less.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief complies with Rule 84.06(b) and contains 11,103 words as counted by Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, which does not exceed the 31,000 words allowed for an appellant's brief.

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