IN THE

Supreme Court of Virginia

RECORD NO. 110523

E. C.,

Appellant,

v.

VIRGINIA DEPARTMENT OF
JUVENILE JUSTICE,

Appellee.

BRIEF OF AMICI CURIAE, NATIONAL JUVENILE DEFENDER CENTER, ET AL., IN SUPPORT OF THE APPELLANT

Nadia Natasha Seeratan (NY 4099354)
Counsel for Amici Curiae
NATIONAL JUVENILE DEFENDER CENTER
1350 Connecticut Avenue, NW, Suite 304
Washington, DC 20036
(202) 452-0010, ext. 113
(202) 452-1205 (fax)
nseeratan@njdc.info

Adrienne E. Volenik (VA 39928)
Disability Law Clinic
University of Richmond School of Law
28 Westhampton Way
Richmond, Virginia 23173
(804) 289-8921
(804) 287-6489 (fax)
avolenik@richmond.edu

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. LIMITING ACCESS TO HABEAS CORPUS REVIEW FOR JUVENILES IN VIRGINIA CURTAILS THEIR ALREADY ENDANGERED CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL 3

A. Juveniles Have a Well Established Right to Counsel Which Must be Protected Through Habeas Review *5*

B. Habeas Review to Challenge Ineffective Assistance of Counsel is Critically Important as Juveniles in Virginia Face Many of the Same Post-Conviction or Collateral Consequences as Adults 8

C. Significant Factors Exist in Virginia that Already Limit a Juvenile's Ability to Seek Habeas Review..... 10

1. After Direct Appeal is Exhausted Juveniles Have No Right to Post-Conviction Counsel an d are Unlikely to Know About Possible Relief Available Through a Habeas Proceeding..... 11

2. Children Under the Age of 18 Cannot File Cases *Pro Se* In Virginia and Would Require the Assistance of Counsel..... 12

3. The Lower Court's Ruling that Habeas Petitions Must be Fully Litigated Prior to the Juvenile Securing Release from Custody, will Harm those Juveniles Facing Indeterminate Commitment.....14

II. IN VIRGINIA JUVENILE COURT THERE IS AN INCREASED RISK OF UNRELIABLE ADJUDICATIONS RESULTING FROM INEFFECTIVE ASSISTANCE OF COUNSEL MAKING HABEAS REVIEW CRITICAL.....19

A. Juvenile Court Culture Contributes to the Unreliability of Juvenile Adjudications.....20

B. The Lack of a Record in Virginia Juvenile Courts Increases the Likelihood of Ineffective Assistance of Counsel 22

C. The Commonwealth's Extremely Low Compensation Rates for Representation in Juvenile Cases Increases the Risk of Ineffective Assistance of Counsel.....23

D. Juvenile Defendants are Uniquely Susceptible to False Confessions Increasing the Risk of Unreliable Adjudications and Making Habeas Review Even More Important.....28

E. Juvenile Defendants Are at an Increased Risk of False Guilty Pleas Heightening the Risk of Unreliable Adjudications and Underscoring the Need for Access to Habeas Review.....30

CONCLUSION **34**

APPENDIX A .....**A**

TABLE OF AUTHORITIES

Cases

Browning v. Commonwealth, 452 S.E.2d 360 (Va. Ct. App. 1994).....3, 10
Gideon v. Wainwright, 372 U.S. 335 (1963).....5
Graham v. Florida, 130 S. Ct. 2011 (2010).....8, 28, 29
Haley v. Ohio, 332 U.S. 596 (1948).....28
In re Gault, 387 U.S. 1 (1967).....5, 23
J.D.B. v. North Carolina, 131 S.Ct 2394 (2011).....8, 28, 29, 34, 35
Johnson v. Commonwealth, 529 S.E.2d 769 (Va. 2000).....3, 10
Kimmelman v. Morrison, 477 U.S. 365 (1986).....32
Miranda v. Arizona, 384 U.S. 436 (1966).....30
Pfaller v. Commonwealth, 1403-99-2, 2000 WL 1015872 (Va. Ct. App. July 25, 2000).....3,11
Roper v. Simmons, 543 U.S. 551 (2005).....8, 28, 29
State v. A.N.J., 225 P.3d 956 (Wash. 2010).....33
State v. S.M., 996 P.2d 1111 (Wash. Ct. App. 2000).....33
Strickland v. Washington, 466 U.S. 668 (1984).....20, 32
Walker v. Mitchell, 299 S.E.2d 698 (Va. 1983).....3,10
Welch v. United States, 604 F.3d 408 (7th Cir. 2010).....21

Statutes

Va. Code § 16.1-266 (2010).....12
Va. Code § 16.1-285 (2010).....15, 16
Va. Code § 16.1-285.1(E) (2010).....12, 15
Va. Code § 16.1-285.2 (2010).....12, 15
Va. Code § 16.1-289 (2010).....16
Va. Code § 16.1-69.5 (2010).....22
Va. Code § 19.2-163 (2008 & Supp. 2009).....23
Va. Code § 8.01-8 (2007).....12, 13, 14

Other Authorities

A.B.A. Juvenile Justice Ctr. & Mid-Atlantic Juvenile Defender Ctr., Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings (2002)...7,19, 20, 21, 22, 24, 25,26, 27,30, 31, 32

A.B.A. Juvenile Justice Ctr., Juvenile Law Ctr., & Youth Law Ctr., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings (1995).....7, 19
A.B.A. Standards for Criminal Justice Prosecution Function and Defense Function 4-41(a) (1993).....32, 33
A.B.A., Spangenberg Group, *A Comprehensive Review of Indigent Defense in Virginia* (2004).....10, 11, 27
Drizin, Steven A. & Luloff, Greg *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257 (2007)....19, 22,30,31, 33, 34
Fedders, Barbara *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation,* 14 Lewis & Clark L. Rev. 771 (2010).....19, 26, 30, 32
Gooch, Mark, *State Responsible and Local Responsible Juvenile Population Trends, Presentation Before Senate Finance Public Safety Committee*, Oct. 20, 2010 *available at* http://www.djj.virginia.gov/Resources/DJJ_Presentations/pdf/Juvenile%20Offender%20Trends-final_20101020.pdf.....15, 18
Hessick, F. Andrew & Saujani, Reshma *Plea Bargaining And Convicting The Innocent: The Role Of The Prosecutor, The Defense Counsel, And The Judge*, 16 BYU J. Pub. L. 189 (2002).....31
IJA-ABA Joint Comm'n on Juv. Just. Standards, *Standards Relating to Counsel for Private Parties, Investigation and Preparation* § 4.3(a)-(b) (1979).....32, 33
Majd, Katayoon & Puritz, Patricia *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 Geo. J. on Poverty L. & Pol'y 543 (2010).....20, 21
Mlyniec, Wallace J.*In re Gault At 40: The Right To Counsel In Juvenile Court – A Promise Unfulfilled*, 44 No. 3 Crim. L. Bull. 371 (2008).....30
Nat'l Juvenile Defender Ctr., *Assessments*, http://www.njdc.info/assessments.php (last visited September 25, 2011) ...7
National Juvenile Defender Ctr., Encouraging Judges to Support Zealous Defense Advocacy from Detention to Post-Disposition (2006).....21
Shepherd, Jr., Robert E. *Collateral Consequences of Juvenile Proceedings, Part II*, Crim. Just., Fall 2000 .....4, 10
Pinard, Michael *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 Nev. L. J. 1111 (2006).....4, 10
Tepfer, Joshua A. , Nirider, Laura H. & Tricarico, Lynda M. *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887 (2010).....29

Virginia Department of Corrections, State Responsible Offender Population Trends (2010), *available at* http://www.vadoc.state.va.us/about/facts/research/new-statsum/offenderpopulationtrends_fy05-fy09.pdf.....18
Virginia Indigent Defense Commission, Standards of Practice for Indigent Defense Counsel (2006).....6
Va. State Crime Comm'n, Study of Virginia's Juvenile Justice System, H.J.R. 113, 2008 Reg. Sess. (Va. 2009) 24, 26, 27

IDENTITY OF AMICI CURIAE

Amici Curiae, National Juvenile Defender Center and the Mid-Atlantic Juvenile Defender Center, are joined by the Center on Wrongful Convictions of Youth, Families & Allies of Virginia's Youth, the Mental Disabilities Clinic, Parents Engaged for Learning Equality, Voices for Virginia's Children, Kristin Henning, Julie McConnell, Wallace J. Mlyniec, and Adrienne E. Volenik.[1]

SUMMARY OF THE ARGUMENT

Juveniles are the most vulnerable class of criminal defendants in the courts of the Commonwealth, as well as around the country, and are the defendants least capable of protecting their rights. They are reliant on the "guiding hand of counsel" to help them navigate the juvenile justice system and protect their constitutional rights. Accordingly, preservation of a juvenile's right to counsel and the ability to secure review of ineffective assistance of counsel claims are essential for juvenile defendants.

In Virginia, the only practical legal mechanism available to juveniles to raise a claim of ineffective assistance of counsel is habeas corpus.

---

[1] A brief description of each organization and individual can be found in Appendix A.

Habeas review is critically important to protect their constitutional due process right to the effective assistance of counsel -- a right already jeopardized by Virginia's extremely low compensation rates for court appointed counsel for juvenile defendants, the lack of a written record of juvenile proceedings, the difficulty to protect this right given the general lack of access to post-adjudication counsel for most committed youth, and their inability to file habeas petitions *pro se*. This safeguard is particularly significant considering that a delinquency adjudication may carry significant post-conviction and collateral consequences that follow juveniles throughout their entire lives and can hinder successful re-integration into society. The simple reality is the consequences of an adjudication for a juvenile do not end upon release from detention. Ironically, the realities of these consequences frequently are not realized by a youth until he is returned back to the community.

The lower court's decision to substantially shorten the time juvenile defendants have to file and fully litigate their habeas petitions intensifies obstacles to securing constitutionally required effective assistance of counsel. This will result in irreparable damage for many juveniles who have to bare harsh life-long consequences of a juvenile adjudication. Consequently, if this Court allows the lower court's ruling to stand, a

juvenile's ability to raise ineffective assistance of counsel claims will be significantly diminished, and in many cases foreclosed, for Virginia's youngest and most vulnerable defendants. The undersigned Amici, therefore, urge this Court to vacate the order of the decision below and remand this case for consideration of petitioner's writ of habeas corpus on the merits.

ARGUMENT

I. LIMITING ACCESS TO HABEAS CORPUS REVIEW FOR JUVENILES IN VIRGINIA CURTAILS THEIR ALREADY ENDANGERED CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Habeas review is essential to Virginia juveniles, especially as it is the only mechanism by which they can protect their due process right to the effective assistance of counsel. *See Johnson v. Commonwealth*, 259 Va. 654, 675, 529 S.E.2d 769, 781 (2000); *Browning v. Commonwealth*, 19 Va.App. 295, 297, 452 S.E.2d 360, 362 n. 2 (1994); *Pfaller v. Commonwealth*, 1403-99-2, 2000 WL 1015872, at *2 (Va. Ct. App. July 25, 2000). *See also Walker v. Mitchell*, 224 Va. 568, 571, 299 S.E.2d 698, 699 (1983).

While children have largely been afforded procedural due process protections since the 1960's, they are now also subject to many of the

same severe post-conviction consequences as their adult counterparts. As in the instant case, the need to provide juveniles with the zealous advocacy required to ensure effective assistance of counsel in delinquency hearings is amplified by serious and far-reaching collateral consequences, encompassing a broad range of areas relating to education, employment, housing, public benefits, and other civil liberties. Such consequences extend well beyond the actual sentences imposed on convicted delinquents and can substantially reduce a juvenile's ability to reintegrate into society and transition successfully to adulthood. *See generally* Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings, Part II*, 15 Crim. Just., 41 (2000); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 Nev. L. J. 1111, 1115 (2006).

The lower court's ruling in this case, that it loses jurisdiction to review the merits of a habeas petition if the juvenile is released from detention during the pendency of a habeas proceeding, dramatically narrows the timeframe for juveniles to challenge violations of their constitutional right to effective assistance of counsel, exposing them to potentially devastating consequences of an adjudication. Due to "intricacies" in Virginia's juvenile justice system, this narrowing significantly diminishes, and in many cases

forecloses, the ability to review ineffective assistance of counsel claims for Virginia's youngest and most vulnerable defendants. As such, this Court should overturn the lower court's ruling.

A. Juveniles Have a Well Established Right to Counsel Which Must be Protected Through Habeas Review

Nearly 45 years ago, in *In re Gault*, the United States Supreme Court established that children charged with delinquency have a fundamental constitutional right to counsel under the Due Process clause of the Fourteenth Amendment. 387 U.S. 1 (1967). *See also Gideon v. Wainright*, 372 U.S. 335 (1963) (establishing that criminal defendants have a constitutional right to counsel under the Sixth and Fourteenth amendments).

The Court stated:

> Under our Constitution, the condition of being a boy does not justify a kangaroo court.... There is no material difference in this respect between adult and juvenile proceedings of the sort here involved.... The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

In re Gault, 387 U.S at 28-29 (footnotes omitted).

Gault established that a child has the right to assistance of counsel in a delinquency proceeding because a determination of delinquency carries

the "awesome prospect of incarceration in a state institution until the Juvenile reaches the age of 21." *Id.* at 36-37.

In order to guard against practices that may allow for less than adequate representation, in the decades since *Gault*, the scope and importance of the representation by counsel have been repeatedly recognized and codified in national standards for juvenile court practice.[2] This is true also in Virginia which, through the Virginia Indigent Defense Commission has adopted standards of practice for lawyers representing juveniles in delinquency proceedings.[3] Va. Indigent Def. Comm'n,

---

[2] *See* Am. Council of Chief Defenders & Nat'l Juv. Defender Ctr., *Ten Core Principles for Providing Quality Delinquency Representation through Indigent Defense Delivery Systems* (2005), *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf; Inst. of Jud. Admin. & A.B.A., *Juvenile Justice Standards: Standards Relating to Pretrial Court Proceedings* (1980); A.B.A. Juv. Just. Ctr. et al., Nat'l Juv. Defender Ctr., *A Call for Justice: An Assessment of Access to Counsel & Quality of Representation* (2002); Nat'l Ass'n of Counsel for Children, *NACC Policy Agenda: Juvenile Justice Policy*, adopted May 17, 1997, *available at* http://www.naccchildlaw.org/?page=Policy_Agenda; Nat'l Advisory Comm'n on Crim. Just. Standards, *Juvenile Justice Standards Relating to Interim Status* (1980), Standard 7.6C (right to counsel at each stage of formal juvenile justice process); Nat'l Council of Juv. & Fam. Ct. Judges, Juvenile *Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 25 (2005), *available at* http://www.ncfcj.org/content/view/411/411/.

[3] While it is true that the Virginia Indigent Defense Commission has adopted high standards of practice for lawyers representing juvenile defendants, *see* in order to be enforced a juvenile defendant must be both familiar with the standards and willing to speak up against the attorney representing him, a reality so unlikely as to call into serious question the strength and utility of these benchmarks and to whether they are sufficient

Standards of Practice for Indigent Defense Counsel 10 (2006), *available at* http://www.publicdefender.state.va.us/PDF%20documents/Standards%20of%20Practice.pdf.

Today, the promise of the guiding hand of counsel has become even more critical as legislative policies across the country and in Virginia have placed more youth at risk of adult prosecution, created more punitive juveniles dispositions, and imposed more burdensome and enduring collateral consequences for juvenile adjudications.

Unfortunately, in spite of the constitutional guarantee of the right to counsel and the codification of national and state standards to reinforce that right, ineffective assistance of counsel is far too common in our nation's juvenile courts. *See* A.B.A. Juv. Just. Ctr. et al., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 5-12 (1995) [hereinafter *A Call for Justice*]; Nat'l Juvenile Defender Ctr., *Assessments*, http://www.njdc.info/assessments.php (last visited September 25, 2011) [hereinafter *Assessments*]. *See also* A.B.A. Juv. Just. Ctr. & Mid-Atlantic Juv. Defender Ctr., *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 27, 31, 43 (2002)

---

to overcome the structural barriers to effective representation discussed in this section." *See id.*

(hereinafter *Virginia: An Assessment of Access to Counsel*). In Virginia, the challenges facing inadequately represented youth are exacerbated because of barriers that impede a juvenile's ability to seek habeas review. The safeguard of habeas review serves to protect the rights of juveniles who receive ineffective legal representation and is as critical in delinquency proceedings as in adult criminal proceedings. Consequently, this Court should overturn the lower court's ruling to ensure that juveniles in Virginia have a meaningful opportunity to seek review of their claims that their counsel's performance was deficient.

B. Habeas Review to Challenge Ineffective Assistance of Counsel is Critically Important as Juveniles in Virginia Face Many of the Same Post-Conviction or Collateral Consequences as Adults

In construing juveniles' rights, recent decisions by the United States Supreme Court recognize that juveniles have a limited understanding of the justice system and face particular challenges in navigating that system. *See Graham v. Florida*, 130 S.Ct. 2011, 2032 (2010) (juveniles' limited understanding puts them at a "significant disadvantage in criminal proceedings"). *See also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (juveniles are categorically less mature, less able to weigh risks and long-term consequences); *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (juveniles are more vulnerable to external pressures, and more compliant

with authority figures than adults). Given the unique vulnerabilities of youth, when representing juvenile defendants attorneys have an increased obligation to ensure that their client fully comprehends the weight of the evidence against them before trial, and to ensure the youth accurately understands and evaluates the short and long-term consequences of accepting a guilty plea in order to make a reasoned and well-informed decision.

Where, as in the instant case, there is a question of inadequate representation resulting in acceptance of an ill-advised guilty plea because of the attorney's failure to conduct appropriate case preparation and investigation, failure to file motions to suppress harmful evidence, and failure to have meaningful discussion about the direct and collateral consequences of a plea, the safe guard of habeas review is of the utmost importance. As in the instant case,[4] such consequences may include sex offender registration for life that cannot be sealed, restrictions on housing,

---

[4] The facts, which are undisputed in the instant case, reveal that the alleged victim fully recanted her allegations of rape against petitioner, and that the recanting victim's mother filed an affidavit in support of petitioner's habeas petition stating that her daughter's initial statements to the police were lies and that petitioner was wrongfully convicted. Given that in Virginia a violation of the forcible rape statute is a felony conviction for a sexually violent crime, and is attached to a requirement of sex offender registration that carries with it numerous life-long direct and collateral consequences, it is essential that petitioner have an opportunity for review of his habeas petition on the merits.

employment, educational opportunities, public benefits, military service, and suffrage, among other consequences. *See* Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings, Part II*, Crim. Just. 41, 47 (2000); *see also* Michael Pinard, *supra*, at 1114-15. Where ineffective assistance of counsel is further aggravated by life-long collateral consequences the merits of a habeas claim should be reached.

C. Significant Factors Exist in Virginia that Already Limit a Juvenile's Ability to Seek Habeas Review

The lower court's ruling in this case, that it loses jurisdiction to review the merits of the claims raised in a habeas petition if the juvenile is released from detention while the habeas is pending, dramatically narrows the time frame within which juveniles can challenge violations of their constitutional right to effective assistance of counsel. Unlike most other states, Virginia does not permit a defendant to raise an ineffective assistance of counsel claim on direct appeal. A.B.A., Spangenberg Group *A Comprehensive Review of Indigent Defense in Virginia* 33 (2004) (hereinafter *Indigent Defense in Virginia*). Rather, claims of ineffective assistance of counsel can only be raised in state habeas or post-conviction proceedings after a direct appeal has been exhausted. *See Walker v. Mitchell*, 224 Va. 568, 571 at 699 (1983). *See also Johnson v. Commonwealth*, 259 Va. 654 at 675 (2000); *Browning v. Commonwealth*,

19 Va.App. 295 at 297, n. 2 (1994); *Pfaller v. Commonwealth*, 2000 WL 1015872, at *2. Such a restriction at the outset substantially limits the ability of juvenile defendants in Virginia to challenge the effectiveness of representation by their defense counsel. The vast majority of juveniles committed to state custody receive indeterminate, shorter sentences than adults. The absence of a right to post-conviction counsel for non-capital defendants and a Virginia rule prohibiting minors under the age of eighteen from filing *pro se* habeas petitions add additional layers to barriers juveniles already face seeking habeas review. Consequently, if the lower court's ruling is allowed to stand, all but a very small minority of youth will essentially be barred from ever raising a habeas claim.

1. After Direct Appeal is Exhausted Juveniles Have No Right to Post-Conviction Counsel and are Unlikely to Know About Possible Relief Available Through a Habeas Proceeding

In Virginia, juveniles are not entitled to assistance of counsel if they want to seek post-conviction relief. Only adults convicted of capital crimes have such guaranteed access. *Indigent Defense in Virginia*, *supra*, 33 (2004). Unlike adults, indigent juveniles adjudicated delinquent and placed into state custody in Virginia receive representation only for direct-appeals

or at serious juvenile offender reviews.[5] Va. Code §§ 16.1-266; 16.1-285.2; 16.1-285.1(E) (2010).). Since ineffective assistance claims cannot be raised on direct appeal in Virginia, the lack of access to post-conviction counsel for most confined youth makes it unlikely that a juvenile defendant will be able to challenge the constitutionality of his adjudications or confinement even if a valid claim exists. The lower court's decision narrows the time frame within which juveniles must locate counsel and file a challenge, further impeding their already restricted rights. With no access to post-conviction counsel, the child defendant who is aware of existing habeas rights will be a very rare exception.

2. Children Under the Age of 18 Cannot File Cases *Pro Se* In Virginia and Would Require the Assistance of Counsel.

Even the rare youth who becomes aware of potential habeas claims cannot file those claims pro se.[6] Va. Code § 8.01-8 (2007). Thus, even if

---

[5] Conversely, some states, recognizing the vulnerability of juveniles in the legal system and the corresponding importance of access to counsel after disposition, *do* provide juveniles with a right to counsel. *See* Cal. R. Ct., R. 5.663; Idaho Code § 19-852 (2007); Ky. Rev. Stat. § 31.110 (2006) (statutes reflecting that California, Idaho, and Kentucky specifically provide juveniles with access to post-disposition counsel).

[6] It is unlikely that a confined juvenile will realize the potential for a habeas claim without post-conviction counsel because Virginia's juvenile prisons do not provide access to law libraries. While the United States Supreme Court has held that a state can satisfy its constitutional duty under *Bounds v. Smith* to provide prisoners with meaningful access to the courts by

juveniles understand their habeas rights, they cannot file a petition on their own behalf to assert those rights. They require the assistance of counsel.

In Virginia, minors do not have standing to sue on their own, and can only sue by their "next friend." *Id.* Without counsel, children -- particularly indigent children-- are dependent upon a parent or adult relative to acquire counsel and file on their behalf. This is problematic for various reasons but particularly in the instance where there is child-parent conflict and the parent does not agree with or support a child's desire to file a habeas petition. Even if a parent wanted to serve as next friend, the physical distance between many families and confined youth and limited access of parents to their children makes even this likelihood remote.[7] Yet without one or both parents filing the petition on behalf of the juvenile as "next

---

providing either an attorney *or* access to a law library, 430 U.S. 817 (1977); *Lewis v. Casey*, 518 U.S. 343 (1996); *Williams v. Leeke*, 584 F.2d 1336 (4th Cir. 1977), Virginia denies its juveniles the right to access both post-conviction counsel *and* law libraries.

[7] Most juvenile correctional centers in Virginia are geographically isolated. Virginia's Department of Juvenile Justice runs seven juvenile correctional centers: Barrett, Beaumont, Bon Air, Culpeper, Hanover, Natural Bridge, and Oak Ridge. Of these, only Bon Air and Oak Ridge are within 20 minutes of a large city—Richmond. None of Virginia's correctional centers are close to the large cities of Newport News, Virginia Beach, Norfolk, or Portsmouth. Va. Dep' t Juv. Just., *Community Programs, in Data Resource Guide* (2010), *available at* http://www.djj.virginia.gov/About_Us/Administrative_Units/Research_and_Evaluation_Unit/pdf/Community_Programs_Intro_CSU_and_VJCCCA_2010.pdf.

friend," juveniles are unable to file for habeas relief. Va. Code § 8.01-8 (2007). In other words, without assistance of counsel, juveniles lack the tools, knowledge and access to the courts needed to vindicate their legal rights. As a result, the lower court's ruling intensifies already existing limitations on the ability of juveniles to challenge the constitutionality of their adjudications and should be overturned.

3. The Lower Court's Ruling that Habeas Petitions Must be Fully Litigated Prior to the Juvenile Securing Release from Custody will Harm those Juveniles Facing Indeterminate Commitment.

In Virginia, in order to file a habeas petition asserting ineffective assistance of counsel the defendant must not only wait to exhaust direct appeals but must also ensure that habeas petitions are filed before they are released from post-adjudication detention.[8] The lower court's decision

---

[8] It is undisputed that parole is equivalent to detention. *See Peyton v. Rowe*, 391 U.S. 54, 66 (1968) (the United States Supreme Court has unequivocally rejected the premise that physical discharge from custody is the only relief available in a habeas corpus proceeding); *Jones v. Cunningham*, 371 U.S. 236, 242 (1963) (a person who was paroled after he filed his habeas corpus petition could still obtain relief from the restraints imposed by the parole conditions); *Preiser v. Rodriguez,* 411 U.S. 475, 487 (1973) (affirming that "habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and obtain future releases"). *See also Carroll v. Johnson*, 278 Va. 683, 692, 685 S.E.2d 647, 650 (2009) ("[t]he Supreme Court's decisions in *Peyton* and *Preiser* strongly support the argument that the "immediate release rule" requiring immediate release from detention should be abrogated in Virginia").

further curtails juveniles' access to habeas review by adding the restriction that not only must the habeas petition be filed before a youth is released from detention but the merits of the petition must also be resolved. This decision should be overturned because it creates greater impediments to habeas review, further limiting an already short period of time during which youth can bring a habeas petition.

A majority of juveniles committed to state custody, including the petitioner in the case before the court, serve indeterminate sentences. Va. Code §§ 16.1-285.2; 16-1.285.1(E) (2010); Mark Gooch, *State Responsible and Local Responsible Juvenile Population Trends, Presentation Before Senate Finance Public Safety Committee*, Oct. 20, 2010, at 19 [hereinafter *Juvenile Population Trends*], *available at* http://www.djj.virginia.gov/Resources/DJJ_Presentations/pdf/Juvenile%20Offender%20Trends-final_20101020.pdf. The actual period of time served by a juvenile with an indeterminate sentence is affected by behavior and responsiveness to treatment.[9] Va. Code § 16.1-285 (2010). No juvenile committed indeterminately may be detained longer than 36 months or

[9] DJJ's Length of Stay Guidelines are used to determine the actual period of time served. Guidelines for Determining the Length of Stay of Juveniles Indeterminately Committed to the Department of Juvenile Justice, Revised July 1, 2008, http://www.djj.virginia.gov/Residential_Programs/pdf/LOS_Guidelines_July_1_2008.pdf.

beyond the juvenile's 21st birthday for any offenses except murder and manslaughter. *Id.* Indeterminately committed youth do not return to court for review hearings, nor can they obtain court-appointed counsel for those hearings. Va. Code § 16.1-289 (2010). Unlike a great majority of other states, Virginia does not retain jurisdiction over a juvenile for the entire time the youth is in custody.[10] Indeterminate commitments add uncertainty as to the length of time a juvenile will be committed and can result in largely divergent outcomes. Youth with indeterminate sentences are often released before they can assert ineffective assistance of counsel claims because their window of time to file is comparatively smaller than a juvenile committed for a more serious offense and thus a lengthier period. While indeterminate sentences are reflective of a preference by the legislature to have children released from detention as early as possible, the lower

---

[10] Juvenile courts in four states maintain authority over the handling of state-committed youth from the beginning to the end of the process, including re-entry, while an additional forty-two states are accorded jurisdiction, oversight, or some other form of jurisdiction throughout a youth's time in custody. Nat'l Council of Juv. & Fam. Ct. Judges, *Reconnecting: The Role of the Juvenile Court in Reentry* 38 (2005). Additionally, some jurisdictions have required states to provide counsel to incarcerated youth to meet the constitutional duty under *Bounds v. Smith*, 430 U.S. 817 (1977), to provide meaningful access to the courts. *See, e.g.*, *John L. v. Adams*, 969 F.2d 228, 234 (6th Cir. 1992); *Morgan v. Sproat*, 432 F. Supp. 1130, 1158 (S.D. Miss. 1977); *See also* Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles A Constitutional Right to Counsel At All Stages of the Juvenile Court Process*, 60 Rutgers L. Rev. 175 (2007).

court's requirement that a habeas petition be fully adjudicated prior to release harms those juveniles who are deemed to be the least serious offenders[11] and recommended for release. Since youth who are sentenced indeterminately cannot raise ineffective assistance of counsel claims on a direct appeal and do not have the right to post-conviction appellate counsel to assist in filing habeas claims, they are significantly disadvantaged in comparison to more serious offenders -- even adults.[12] Further, it is unlikely that a youth would turn to the trial lawyer for assistance with an appeal alleging the trial lawyer's ineffectiveness, so the youth is left without reasonable re-course to seek assistance in asserting claims of innocence and seeking habeas relief.

---

[11] Youth who are sentenced as serious juvenile offenders are entitled to a review hearing two years after their sentencing, and then every year thereafter. Va. Code §§ 16.1-285.2; 16-1.285.1(E) (2010). While Virginia provides jurisdiction over serious offenders even after release, that jurisdiction does not attach to indeterminately committed juveniles, who represent the majority of juvenile commitments in Virginia. *See* Va. Code § 16.1-289 (2010).

[12] This is also true with respect to parole as juveniles tend to serve much shorter parole periods than adults do, which also limits their ability to successfully utilize the habeas process to address ineffective assistance of counsel claims.In Virginia, juveniles receive recommended minimum parole periods of four, six, or nine months depending on their classification as low, medium, or high risk, respectively; although the supervision period cannot extend beyond the juvenile's 21st birthday. Dep't Juv. Just. Agency Policies & Procedures Manual, *Risk-Based Case Management and Parole Supervision Matrix* 2 (2003).

This is no insignificant matter. In 2010, 81.4 percent of juveniles in the custody of the Virginia Department of Juvenile Justice had an indeterminate commitment. *Juvenile Population Trends*, *supra*, at 19. Further, in 2010, 78 percent of indeterminately committed juveniles were serving sentences with a minimum length-of-stay of less than 18 months. *Id.* at 15. This contrasts starkly with length of stays for adult inmates. In 2009, the average sentence length for parole eligible adult inmates in the Virginia Department of Corrections was approximately 8 years, and the average sentence length for all new court commitments was 4.3 years. Va. Dep't of Corrections, *State Responsible Offender Population Trends* 4 (2010), *available at* http://www.vadoc.state.va.us/about/facts/research/new-statsum/offenderpopulationtrends_fy05-fy09.pdf. Unlike adult offenders, or serious youthful offenders, a large portion of Virginia's juvenile inmates, therefore, are in custody for a short and uncertain period of time, giving them less time to file and fully litigate habeas petitions and correct wrongs that may have resulted from ineffective assistance of counsel.

Such a hindrance has devastating consequences for a youth whose ability to access habeas review is curtailed by the lower court's limiting view on jurisdiction. Their rule, which would require that juvenile defendants must not only investigate and file, but also fully litigate their claims before

they are released from parole, will significantly limit juveniles to pursue habeas claims curtailing their due process rights.

II. In Virginia Juvenile Court there is an Increased Risk of Unreliable Adjudications Resulting from Ineffective Assistance of Counsel Making Habeas Review Critical.

The threat of increased barriers to habeas relief posed by the lower court's decision will compound existing problems within Virginia's juvenile delinquency system. This poses great risks that juveniles will not receive the effective assistance of counsel to which they are entitled. While *Gault* has long established youth's constitutional right to counsel, the adequacy of such representation presents a persistent concern because the culture of juvenile court practice may undermine the reliability of juvenile adjudications. *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation,* 14 Lewis & Clark L. Rev. 771, 791-95 (2010); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 283 (2007); *A Call for Justice*, *supra*, at 5-12; *see also Virginia: An Assessment of Access to Counsel, supra,* at 31 & 43; *Assessments*, *supra*. Factors in Virginia's juvenile courts which increase the risk of unreliable adjudications resulting from ineffective assistance of counsel include: juvenile court culture that at times discourages zealous

advocacy; the absence of a record; and extremely low compensation to court appointed counsel for juvenile cases. These factors dramatically heighten the risk of unreliable adjudications making access to habeas review absolutely necessary for Virginia's youth.

A. Juvenile Court Culture Contributes to the Unreliability of Juvenile Adjudications

Attorneys play a critical role in ensuring that the adversarial system produces "just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). However, a misplaced focus by attorneys and the court lend to a non-adversarial emphasis based on perceptions of the child's best interests and need for treatment, interfering with a defense attorney's ethical obligation to act as a zealous advocate for their client and, thus, undermining the constitutional obligation to provide effective assistance of counsel to juvenile clients. *See* Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 Geo. J. on Poverty L. & Pol'y 543, 555-56 (2010) (describing reports that juvenile courts and judges place a "premium" on "maintaining a friendly atmosphere" that discourages some attorneys from filing motions or pursuing defenses); *see also Virginia: An Assessment of Access to Counsel, supra*, at 31& 43 (finding that juvenile defenders practicing in Virginia did not see the need to be adversarial and

felt it was the culture of juvenile court to "work things out."). *See generally* Nat'l Juv. Defender Ctr., *Encouraging Judges to Support Zealous Defense Advocacy from Detention to Post-Disposition* (2006) (calling on judges to recognize that *Gault* requires attorneys to represent their juvenile clients with zeal).

A defense attorney's misplaced focus on a child's best interest may be heightened by a lack of resources and time constraints, which often leave children's lawyers overburdened and ill-prepared to engage clients in meaningful discussion about their cases, to conduct adequate investigations, and to appropriately prepare a case. *See* Majd & Puritz, *supra*, at 559-60. *See also Virginia: An Assessment of Access to Counsel, supra* (finding that in lawyers in Virginia's juvenile justice system struggle with insufficient compensation and resources and are discouraged from zealous advocacy). Such a misplaced focus leaves the most vulnerable of defendants –juveniles—without the effective assistance of counsel to which they are entitled. As a result, adjudications obtained in the juvenile court "may well lack the reliability of real convictions in criminal courts." *See Welch v. United States*, 604 F.3d 408, 432 (7th Cir. 2010) (Posner, J., dissenting). Other factors that may compromise the reliability of

convictions include: absence of jury trials;[13] poor investigation; infrequent use of motions; over-reliance on pleas; a general lack of training among attorneys on representation of youth and adolescents; and a heightened possibility that some of the evidence introduced in juvenile court, such as juvenile confessions, may be unreliable. *See* Drizin & Luloff, *supra*, at 275-83, 289-93. *See also Virginia: An Assessment of Access to Counsel, supra*, at 31 & 43.

B. The Lack of a Record in Virginia Juvenile Courts Increases the Likelihood of Ineffective Assistance of Counsel

Virginia juvenile courts are not courts of record. Va. Code § 16.1-69.5 (2010). As a result, proceedings in JDR Court lack a certain level of accountability, and informality is tolerated, if not even encouraged. *See Virginia: An Assessment of Access to Counsel, supra*, at 32. This lack of a record makes juveniles more vulnerable to ineffective assistance of counsel.

This deficiency and the devastating consequences that accompany a lack of a record were recognized by the Unites States Supreme Court in *In*

---

[13] Juveniles in Virginia have the right to a jury trial only on appeal from the proceedings in Juvenile and Domestic Relations Court, a right that assessments suggest is seldom utilized. Va. Code § 16.1-136 (2010); *see also Virginia: An Assessment of Access to Counsel, supra*, at 16.

re Gault when they first established a juvenile's right to counsel. The Court stated:

> As the present case illustrates, the consequences of failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him.

387 U.S. at 58 (citations omitted).

The lack of a record to demonstrate the factual and legal bases of the conviction, as well as the facts that demonstrate that a youth did not receive effective assistance of counsel, constitutes a significant barrier to juveniles seeking to present habeas claims. The youth is placed in the awkward and often untenable position of having to seek assistance in recreating a record on the same lawyer whose ineffective assistance they are now asserting. Without a record or transcript, preparing a habeas petition demands substantially more time to conduct a full investigation and develop an evidentiary basis to establish their right to habeas relief.

C. The Commonwealth's Extremely Low Compensation Rates for Representation in Juvenile Cases Increases the Risk of Ineffective Assistance of Counsel.

Attorneys taking court-appointed juvenile cases receive considerably lower compensation rates than both court-appointed attorneys representing adults in Virginia and their counterparts representing juveniles in surrounding states. *Virginia: An Assessment of Access to Counsel, supra*, at 19-20; *see also* Va. Code § 19.2-163 (2008 & Supp. 2009). In Virginia, court-appointed attorneys are paid $75/hour for in-court time and $55 for out-of-court time. *See* Va. State Crime Comm'n, *Study of Virginia's Juvenile Justice System,* H.J.R. 113, 2008 Reg. Sess., at 8 (Va. 2009) (hereinafter *Study of Virginia's Juvenile Justice System*). The maximum fee that can be awarded is dependent on the nature of the charges and the court involved. *Id.* Juvenile cases are capped by statute at $120 per charge but the court is only funded to pay $112 per charge. *Id.* A juvenile court judge may not waive the cap even for a complex case. *Id.* Specifically, statutory caps on earnings for juvenile attorneys in Virginia dictate that attorneys are only compensated for less than 1.5 hours of any work they perform in representing a juvenile client.[14] Va. Code § 19.2-163 (2008 & Supp. 2009). These low compensation rates create a disincentive

[14] Attorneys may petition for extra fees but supplemental compensation is limited to a maximum of $650 per case and is not guaranteed. Va. Code § 19.2-163 (2008 & Supp. 2009). Va. State Crime Comm'n, *Study of Virginia's Juvenile Justice System,* H.J.R. 113, 2008 Reg. Sess., at 22 (Va. 2009) (hereinafter *Study of Virginia's Juvenile Justice System*).

for lawyers to engage in case preparation, investigation, filing of motions, or other work outside of the court hearings in which they participate. *See Virginia: An Assessment of Access to Counsel, supra,* at 19-20. Arguably, the compensation rate provides barely enough time to conduct a proper initial interview of the client. Certainly it is a rate that fails to adequately compensate an attorney for necessary investigation, research or case preparation.[15] By contrast, court-appointed counsel representing an adult in Virginia on an identical charge may receive nearly double the maximum compensable amount that may ultimately be provided to juvenile court attorneys.[16] *Id.*

Virginia's low compensation rates for attorneys representing juvenile defendants undoubtedly make juveniles more vulnerable to ineffective

---

[15]Standards Relating to Counsel for Private Parties, Investigation and Preparation § 4.3(a)-(b) (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1979)("(a) It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives.
The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.). *See generally A.B.A. Standards for Criminal Justice Prosecution Function & Defense Function* 4-41(a) (1993)

[16] Adult defenders may receive up to $1,235 per case.

representation. This is especially true given the specialized practice skills required of attorneys who represent juvenile clients at detention, waiver, and disposition hearings – hearings which are often more complex and time consuming, and require more court appearances, than the cases of adult defendants. These attorneys may also lack the time, resources or the financial incentive, to vigorously investigate potential defenses, file necessary motions, go to trial or even file appeals to circuit court. *See Study of Virginia's Juvenile Justice System*, *supra,* at 24; *see also Virginia: An Assessment of Access to Counsel*, *supra,* at 19-20. Many court-appointed attorneys do not even meet their clients until they walk through the courtroom doors on the day of trial. *See Virginia: An Assessment of Access to Counsel*, *supra*, at 24-26 (providing examples of the barriers to client contact and representation of juveniles); *see also* Fedders, *supra,* at 14.

Virginia's juvenile compensation structure is also exceptionally low when compared to juvenile compensation rates across the nation. Indeed, Virginia provides by far one of the lowest compensation rates in the country for court-appointed lawyers. *Virginia: An Assessment of Access to Counsel*, *supra,* at 19. Among the surrounding states of Kentucky, Maryland, North Carolina, Tennessee, and West Virginia, Virginia has the

lowest reimbursement rate for court-appointed attorneys in juvenile cases. *Study of Virginia's Juvenile Justice System*, *supra,* at 23.

Further, due to these strikingly low compensation rates, many experienced attorneys refuse to take these cases. *See Indigent Defense in Virginia*, *supra* at 52; *Virginia: An Assessment of Access to Counsel*, *supra,* at 19-20, 31. As a result, many of the attorneys who are the most competent to handle complicated juvenile cases elect to take cases that offer more favorable compensation rates instead. *See Virginia: An Assessment of Access to Counsel, supra,* at 19, 31. When this happens, juveniles are more likely to be represented by less competent counsel, and therefore, more likely to need access to the habeas process to challenge their convictions.

Taken together, Virginia's juvenile court culture, lack of a record in delinquency proceedings, and low compensation scheme for court-appointed juvenile counsel creates an environment in which juvenile defendants are more likely to be denied effective representation. Rather than risk exposing an innocent youth to a wrongful conviction and the record and collateral consequences that flow from it, this Court should overturn the circuit court's decision and allow petitioner's habeas claims to be reviewed on the merits.

D. Juvenile Defendants are Uniquely Susceptible to False Confessions Increasing the Risk of Unreliable Adjudications and Making Habeas Review Even More Important.

The United States Supreme Court has long held that juveniles are entitled to special care and protection. *See Haley v. Ohio*, 332 U.S. 596, 599 (1948) (relying on youthfulness to find that the fifteen year old defendant's confession was involuntary, stating: "[a]nd where, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record [of a confession] must be used). The Court recognizes that when a juvenile is subject to vigorous interrogation, fear and panic might lead a youth to confess to a crime he did not commit, making the assistance of counsel even more critical. *See id.*

More recently, relying on developmental and neuroscientific research, the Court recognized the need for a Constitutional analysis that responds to the vulnerabilities of youth. The Court adopted categorical rules based on the general developmental differences between juveniles and adults that underscore juvenile defendants need greater procedural protections than adults. *See J.D.B. v. North Carolina*, 131 S.Ct. 2394, *Graham*, 130 S.Ct. 2011, *Roper v. Simmons*, 543 U.S. 551. Specifically, the Court recognizes that juveniles are categorically less mature and consequently more vulnerable to external pressures that may lead them to be more compliant

with authority figures than are adults. *See J.D.B. v. North Carolina*, 131 S.Ct. at 2401; *Graham v. Florida*, 130 S. Ct. at 2030 (2010); *Roper v. Simmons*, 543 U.S. at 569.

In *J.D.B.* the Court underscored juveniles' susceptibility to adult pressure increases the risk of false confessions. *J.D.B.*, 131 S.Ct. at 2401 (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). The Court observed that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *Id.* at 2403. Because of their youthful tendencies, it is not uncommon for juveniles to make false confessions when they are pressured to do so. In fact, a recent empirical study of proven wrongful convictions of youth found that juveniles are twice as likely as their adult counterparts to confess to crimes they did not commit. *See* Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010) (an examination of 103 wrongful convictions of factually innocent teenagers and children – found that a false confession contributed to 31.1% of the juvenile cases studied, as compared against only 17.8% of adult wrongful convictions).

Unfortunately, these false confessions often result in wrongful adjudications and convictions because confession evidence is considered

"the most compelling possible evidence of guilt." *Miranda v. Arizona*, 384 U.S. 436 at 466. Given that this type of evidence is regularly introduced against children in juvenile proceedings, there is a crucial need for appropriate checks and balances, including habeas review, to ensure the veracity of juvenile adjudications.

E. Juvenile Defendants Are at an Increased Risk of False Guilty Pleas Heightening the Risk of Unreliable Adjudications and Underscoring the Need for Access to Habeas Review

The culture of juvenile court perpetuates a system where an extraordinarily high number of cases are resolved by guilty pleas *See* Wallace J. Mlyniec, *In re Gault At 40: The Right To Counsel In Juvenile Court – A Promise Unfulfilled*, 44 No. 3 Crim. L. Bull.371 (2008); Fedders, *supra*, at 795; Drizin & Luloff, *supra*, at 292. *See also Virginia: An Assessment of Access to Counsel*, *supra,* at 27 (indicating that some attorneys and judges in Virginia estimate that 85-90% of youth plead guilty). Guilty pleas, in and of themselves, are not necessarily indicative of poor legal representation; and may in fact reflect particularly effective defense advocacy. However, in juvenile court, where zealous advocacy is sometimes discouraged, compensation rates are particularly low, and there is an absence of a record, there is a heightened risk that a guilty plea could be the result of a lack of effort by the defense attorney. *See* Fedders,

supra, at 795; F. Andrew Hessick & Reshma Saujani, *Plea Bargaining And Convicting The Innocent: The Role Of The Prosecutor, The Defense Counsel, And The Judge*, 16 BYU J. Pub. L. 189, 210 (2002). A youth's lawyer, whether consciously or not, may coerce a youth into a false guilty plea for several possible reasons. *See Virginia: An Assessment of Access to Counsel*, *supra* at 20, 27, 31 & 43. Preconceived ideas about a client's guilt, particularly where a client has confessed, may lead defense attorneys to encourage acceptance of a plea. *See* Drizin & Luloff, *supra*, at 293; Hessick & Saujani, *supra,* at 213. This may occur even though there may be grounds to file a motion to suppress the confession and challenge its voluntariness. The risk of a false guilty plea is exacerbated by the fact that judges and prosecutors often encourage guilty pleas to avoid the adversarial nature of litigation, including the filing of discovery and pretrial motions and to avoid lengthy trials. *See* Hessick & Saujani, *supra*, at 211-14; *see also* Drizin & Luloff, *supra*, at 292.

Further, the risk of false pleas is compounded when lawyers fail to meet with their juvenile clients, fail to spend time investigating their clients' potential defenses, or fail to counsel their clients regarding their options and the potential consequences of a plea. Many court-appointed attorneys do not even meet their clients until they walk through the courtroom doors

on the day of trial. *See Virginia: An Assessment of Access to Counsel*, *supra*, at 24-26 (providing examples of the barriers to client contact and representation of juveniles); *see also* Fedders, *supra*, at 793.

Defense counsel has a constitutional duty to investigate every client's case and make reasonable decisions in determining what investigation is unnecessary. *Strickland*, 466 U.S. at 691. The Sixth Amendment requires that counsel investigate and prepare every case, not only to exonerate, but also to protect the rights of the accused. A failure to investigate and file appropriate motions may constitute ineffective assistance of counsel. *See A.B.A. Standards for Criminal Justice Prosecution Function and Defense Function* 4-41(a) (1993) [hereinafter *A.B.A. Standards for Criminal Justice*]. *See also Standards Relating to Counsel for Private Parties, Investigation and Preparation* § 4.3(a)-(b) (IJA-ABA Joint Comm'n on Juv. Just. Standards 1979) (the duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.) [hereinafter *Standards Relating to Counsel for Private Parties, Investigation and Preparation*]. *See, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (failure to investigate and present Fourth Amendment claim was constitutionally ineffective).

Where an attorney fails to have meaningful meetings with their client and to counsel a child about the consequences of a guilty plea and alternative options – as is often the case in juvenile court where low paid defense attorneys must manage high case loads, speed through cases, and only meet with their client for a few minutes before a hearing – information that could assist a client is not garnered. Drizin & Luloff, *supra*, at 293. In fact, such failure to counsel a child regarding accepting a pleas is a serious violation of an attorney's duty to provide effective representation and should result in withdrawal of a plea. *See, e.g., State v. S.M.*, 996 P.2d 1111, 1117-18 (Wash. Ct. App. 2000) (finding ineffective assistance of counsel for failure to counsel the child about the implications of a guilty plea to a sex offense); *State v. A.N.J.*, 225 P.3d 956, 966-67 (Wash. 2010) (finding ineffective assistance of counsel for failing to meet with the client, to meaningfully investigate the case, and misinforming the client of the collateral consequences of the plea). *See generally A.B.A. Standards for Criminal Justice, supra,* at 4-41(a). It is critical for defense attorneys to investigate cases before recommending that a client plead guilty or taking a case to trial. It is only through investigation that lawyers can discover the facts needed to acquit their clients, regardless of whether they are guilty or innocent. *See id.; see also Standards Relating to Counsel for Private*

Parties, Investigation and Preparation, supra, at § 4.3(a)-(b); Drizin & Luloff, *supra*, at 319.

As recognized most recently in *J.D.B.*, juveniles are particularly vulnerable to external pressures from adults. *See J.D.B.*, 131 S.Ct. at 2401. Just as youth are more susceptible to false confessions under police interrogation, youth are more likely to submit to pressure by their lawyer to accept a plea, even though they fail to appreciate the implications of a guilty plea. Habeas review is necessary to ensure that a juvenile has an opportunity to challenge false pleas that resulted from ineffective assistance of counsel, as in the instant case where the trial lawyer insisted that a plea was the only alternative to trial in circuit court and unavoidable incarceration in an adult prison. Habeas review is crucially important to preserve a juvenile's right to challenge ineffective assistance of counsel that may have resulted in a false guilty plea.

CONCLUSION

Habeas corpus is an essential safeguard to ensure that a juvenile's constitutional due process right to counsel is preserved through the ability to raise and have reviewed a claim of ineffective assistance of counsel. This safeguard is critically important as delinquency adjudications carry increasingly punitive, life-long collateral consequences. Not only do the

consequences of a delinquency adjudication not end upon release from detention, but the current system does nothing to hold counsel accountable when their representation is ineffective. This lack of accountability is a breeding ground for poor representation across the board in juvenile court. The lower court's decision to substantially shorten the time juvenile defendants have to file and fully litigate their habeas petitions intensifies obstacles to securing constitutionally required effective assistance of counsel. The "commonsense reality" is that although children are different, *J.D.B.*, 131 S.Ct. at 2399, the protections guaranteed them under the Constitution still continue to be elusive. This Court should overturn the lower court's restrictive ruling because it significantly limits juveniles' access to habeas review and denies them their constitutional right to effective counsel. Such a rule is compelled by developmental and scientific research and consistent with decades of United States Supreme Court jurisprudence recognizing that "children cannot be viewed simply as miniature adults." *Id.* at 2404. For the foregoing reasons, *Amici Curiae*, National Juvenile Defender Center, *et al.*, respectfully request that this Court grant the Petition for Appeal, vacate the order of the Stafford County Circuit Court, and remand this case for a plenary hearing and further proceedings in consideration of petitioner's writ of habeas corpus.

Respectfully Submitted,

Nadia Natasha Seeratan (NY 4099354)
Counsel for Amici Curiae
NATIONAL JUVENILE DEFENDER CENTER
1350 Connecticut Ave. NW, Suite 304
Washington, DC, 200036

Adrienne E. Volenik (VA 39928)
Disability Law Clinic
University of Richmond School of Law
28 Westhampton Way
Richmond, Virginia 23173

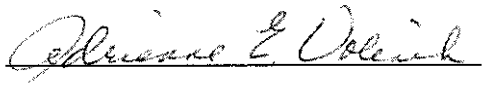
Dated: September 27, 2011

CERTIFICATE

I certify that this Brief of *Amici Curiae* is presented in Arial size 14 font, and does not exceed 50 pages. I further certify that a true copy of the foregoing Opening Brief was served via hand-delivery to

Gregory W. Franklin, Esq.
John W. Blanton, Esq.
Assistant Attorneys General
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-2071
(804) 371-0151 (fax)

on this 27th day of September, 2011.



APPENDIX

APPENDIX A

STATEMENTS OF INTEREST OF AMICI CURIAE

Organizations

The **National Juvenile Defender Center** (NJDC) was created to ensure excellence in juvenile defense and promote justice for all children. The 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. The 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. The 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. The 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.

The **Mid-Atlantic Juvenile Defender Center** (MAJDC) is one of the nine Regional Centers, created by the National Juvenile Defender Center (NJDC), which operates within a network of juvenile defender centers working together to effect positive change for the juvenile defense bar nationwide. The Mid-Atlantic region includes Maryland, the District of Columbia, Virginia, West Virginia, and Puerto Rico. MAJDC develops resources to assist in building the capacity of the juvenile defense bar in the region, to improve access to counsel and the quality of representation for children in the juvenile justice system, and to ensure that children receive due process in delinquency proceedings. The Center coordinates regional projects, including partnerships with local agencies to compile and analyze juvenile indigent defense best practices, providing targeted, state-based training and technical assistance, and offering support for complex cases. The Mid-Atlantic Juvenile Defender Center is based out of the National Juvenile Defender Center office, in Washington, D.C.

The **Center on Wrongful Convictions of Youth** (CWCY) is part of Northwestern University School of Law's Bluhm Legal Clinic and is a joint project of two of the Clinic's highly acclaimed Centers: the Children and Family Justice Center and the Center on Wrongful Convictions. The CWCY's unique mission is to uncover and remedy wrongful adjudications and convictions of children, as well as to promote public awareness and support for nationwide initiatives – such as efforts to reduce juvenile false confessions and increase reliability in the juvenile court system –aimed at preventing future wrongful convictions. In so doing, the CWCY works with experienced juvenile attorneys and wrongful conviction experts across the nation on a daily basis. Most recently, CWCY attorneys secured the exoneration and release of Thaddeus Jimenez, a young man who was arrested at age thirteen and sentenced to forty-five years in prison for a murder that he did not commit. *See* Matthew Walberg, Teen, Wrongly Convicted, Out 16 Years Later as Man, Chicago Tribune, May 5, 2009. The founder of the CWCY, Steven Drizin, has also recently been cited by the United States Supreme Court as an authority on false confessions and wrongful convictions. Corley v. U.S., 129 S. Ct. 1558, 1570 (2009) (stating that "there is mounting empirical evidence that these pressures [associated with custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed") (citing Steven Drizin and Richard Leo, The Problem of False Confessions in the Post-DNA World, 82 N. C. L. Rev. 891, 906-07 (2004)).

Families & Allies of Virginia's Youth (FAVY) is a diverse statewide organization that works to improve life outcomes for youth who are involved in — or are at risk of being involved in — Virginia's justice systems. FAVY informs and supports families and youth who encounter the justice system. FAVY also advocates for justice system reforms, especially equitable, age-appropriate, and rehabilitative treatment of youth in the justice system.

FAVY's membership includes people from throughout the Commonwealth of Virginia — mostly family members of young people in the juvenile justice system, along with concerned community members and advocates.

The **Parents Engaged for Learning Equality** (PELE) Special Education Advocacy Clinic at William & Mary Law School was created to provide direct representation and special education advocacy to families of children with special needs through use of law students serving as special education advocates. The PELE Clinic trains tomorrow's attorneys in the

field of special education law, and assists both current attorneys and lay advocates in learning how to navigate the intricacies of the Individuals with Disabilities Education Improvement Act of 2004 on behalf of families.
The PELE Clinic is multi-disciplinary in nature, working with education professionals and students so that both disciplines can learn from each other, develop professional awareness and respect, and provide a more holistic approach to the assistance of families in seeking a free and appropriate public education for their children. This professional relationship also aids another of PELE's missions, to work collaboratively with schools to foster better relationships between the schools and the families which PELE serves. The PELE Clinic also provides support to legislative issues related to children's advocacy in order to aid in safeguarding all juveniles in the Commonwealth of Virginia.
The PELE Clinic recognizes that juveniles with disabilities are overrepresented in the juvenile justice system and that our clients with disabilities, particularly those suffering from emotional disturbance, are at significant risk of ending up in juvenile court. Often behaviors associated with a juvenile's disability are misinterpreted as being unrelated to that disability, leading to criminal charges. In addition, juveniles with disabilities are less likely to be able to contribute successfully to their defense or appeal of an underlying conviction than their non-disabled peers. The PELE Clinic's concern for this at-risk population in the juvenile justice system motivates our support for this Amicus Brief.

Voices for Virginia's Children is an independent, non-partisan research and advocacy organization that champions public policies to improve the well-being of Virginia's children and youth. As part of its work, Voices monitors trends in juvenile justice and advocates for new public policies and practices to improve the juvenile justice system. Voices routinely supports the work of both the National Juvenile Defender Center and the Mid-Atlantic Juvenile Defender Center by collaborating with other stakeholders to improve the juvenile justice system in Virginia. Most recently, Voices has partnered with the JustChildren program of the Legal Aid Justice Center (LAJC) on legislative proposals to address the juvenile transfer issue. Additionally, Voices is a partner in the LAJC "Don't Throw Away the Key" campaign and often prepares and delivers joint testimony on bills before the Virginia legislature. Furthermore, as an Annie E. Casey Foundation grantee and the Kids Count entity for Virginia, Voices supports the foundation's ongoing efforts to improve the juvenile justice system.

The issues before the court in E.C. v. Virginia Department of Juvenile Justice exemplify the policies and practices that are in need of reform to more justly and effectively serve juvenile defendants in Virginia. As this amicus brief furthers Voices' important mission of improving the Virginia juvenile system, Voices for Virginia Children hereby states its interest in and support for the amicus brief.

Individuals

Kristin Henning is a Professor of Law at Georgetown University School of Law and Co-Director of the Georgetown Juvenile Justice Clinic. The Clinic was founded in 1973 to represent children accused of misdemeanor and felony offenses in the District of Columbia. Clinic faculty, fellows and students provide highly effective holistic representation to their clients by protecting the rights and interests of youth in the juvenile justice system, advocating on behalf of youth in related proceedings such as special education and school disciplinary hearings and lobbying for mental health services, drug treatment and other interventions that are appropriately matched with the child's age, mental capacity and developmental stage. Clinic faculty and alumni engage in local, regional and national juvenile justice reform by training defenders throughout the country, developing local and national juvenile justice standards for lawyers and other stakeholders, writing and updating practice manuals, conducting research and publishing law review articles that analyze the need for reform and consulting with local and state officials to advance reform efforts.

Julie E. McConnell is a Clinical Professor of Law at the University of RIchmond School of Law and the Director of the Juvenile Delinquency Clinic. The Clinic represents children charged with misdemeanor and felony level offenses in Juvenile Domestic Relations District Courts in the Central VIrginia area. Clinic faculty and third-year law students provide comprehensive, highly individualized and effective representation to youth and their families. The clinic works with the child and their family to attempt to address the underlying causes of delinquent behavior. The clinic also works to improve the level of representation afforded children in the criminal justice system by working in the broader community to provide training and assistance to juvenile court practitioners. Further, the Clinic works with community organizations and the legislature to improve access to justice for children. McConnell has worked with children in a group home setting, served as a clerk in the Virginia Court of Appeals, as a public

defender in the City of Richmond for more than five years and as an Assistant Commonwealth's Attorney in Richmond Juvenile and Domestic Relations Court for almost six years.

Wallace J. Mlyniec is a Professor of Law at Georgetown University School of Law and Co-Director of the Georgetown Juvenile Justice Clinic. The Clinic was founded in 1973 to represent children accused of misdemeanor and felony offenses in the District of Columbia. Clinic faculty, fellows and students provide highly effective holistic representation to their clients by protecting the rights and interests of youth in the juvenile justice system, advocating on behalf of youth in related proceedings such as special education and school disciplinary hearings and lobbying for mental health services, drug treatment and other interventions that are appropriately matched with the child's age, mental capacity and developmental stage. Clinic faculty and alumni engage in local, regional and national juvenile justice reform by training defenders throughout the country, developing local and national juvenile justice standards for lawyers and other stakeholders, writing and updating practice manuals, conducting research and publishing law review articles that analyze the need for reform and consulting with local and state officials to advance reform efforts.

Adrienne Volenik is a Clinical Professor of Law at the University of Richmond School of Law and Director of the Disability Law Clinic. In the Disability Law Clinic, law students, under Professor Volenik¹s supervision, represent children in special education matters and in juvenile courts. In the past, the Clinic has filed habeas corpus petitions on behalf of institutionalized juveniles in Virginia. Recognizing that the practice of children¹s law requires knowledge of many disciplines including psychology, child development, education, and social work, law students enrolled in the Disability Law Clinic work collaboratively with professionals in other fields to address the specialized needs of their clients. Faculty and students within the Clinic strive to provide high quality legal services to clients and to elevate the practice of law. The outcome of this case will have a direct impact on the population they serve.