

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. _____

E.C.,

Plaintiff-Petitioner,

v.

VIRGINIA DEPARTMENT OF JUVENILE JUSTICE,

Defendant-Respondent.

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

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<i>United States v. Kent</i> , 383 U.S. 541 (1966).....	18
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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).....	5, 6, 8, 9
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).....	20
A.B.A. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-41(a) (1993).	29
AMERICAN COUNCIL OF CHIEF DEFENDERS & NATIONAL JUVENILE 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	20
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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	13
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Joshua A. Tepfer, Laura H. Nirider, & Lynda M. Tricarico, <i>Arresting Development: Convictions of Innocent Youth</i> , 62 RUTGERS L. REV. 887 (2010).....	26

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Mark Gooch, *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..... 12, 16

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Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L. J. 1111 (2006)..... 31

Nat'l Juvenile Defender Ctr., *Assessments*, <http://www.njdc.info/assessments.php> (last visited March 17, 2011)..... 20

NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS, *JUVENILE JUSTICE STANDARDS RELATING TO INTERIM STATUS* (1980)..... 20

National Ass'n of Counsel for Children, *NACC Policy Agenda: Juvenile Justice Policy*, adopted May 17, 1997, available at http://www.naccchildlaw.org/?page=Policy_Agenda..... 20

NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25* (2005), available at <http://www.ncfcj.org/content/view/411/411/>..... 20

NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *RECONNECTING: THE ROLE OF THE JUVENILE COURT IN REENTRY* (2005)..... 13

NATIONAL JUVENILE DEFENDER CTR., *ENCOURAGING JUDGES TO SUPPORT ZEALOUS DEFENSE ADVOCACY FROM DETENTION TO POST-DISPOSITION* (2006)..... 23

NATIONAL JUVENILE DEFENDER CTR., *NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* (2003). 9

Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings, Part II*, CRIM. JUST., Fall 2000 31

Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007);passim

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004)). 26

THE SPANGENBERG GROUP, A.B.A., A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA (2004).....	3, 4, 7, 8
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	16
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VIRGINIA STATE CRIME COMMISSION, STUDY OF VIRGINIA'S JUVENILE JUSTICE SYSTEM, H.J.R. 113, 2008 Reg. Sess. (Va. 2008).....	6, 7, 8
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IDENTITY OF AMICI CURIAE

Amicus Curiae, the National Juvenile Defender Center, is joined by the Disability Law Clinic, the Mid-Atlantic Juvenile Defender Center, 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, and Wallace J. Mlyniec.¹

SUMMARY OF THE ARGUMENT

Habeas review is critically important to Virginia juveniles because it is the only legal mechanism they have to protect their constitutional right to the effective assistance of counsel. Given unique factors in Virginia's juvenile justice system, including: extremely low compensation rates for juvenile defense attorneys; the fact that Virginia juvenile courts are not courts of record; the lack of access to post-conviction counsel for the great majority of youth committed to state facilities; the inability of youth to file *pro se* should they obtain the knowledge to challenge their adjudications without the assistance of post-conviction counsel; and the indeterminate sentences that most juveniles receive, if the circuit court's ruling is upheld,

a juvenile's ability to review ineffective assistance of counsel claims will be significantly diminished, and in many cases foreclosed, for Virginia's youngest and most vulnerable defendants. In addition to the factors unique to Virginia's juvenile court system, the juvenile court culture, which often discourages zealous advocacy, may undermine the reliability of juvenile adjudications.

The circuit court's ruling in this case, that Virginia courts lose jurisdiction over pending habeas cases when the petitioner is released from detention, exacerbates these problems and should be overturned, as it curtails the right to counsel for juvenile defendants in Virginia. If upheld, the circuit court's decision would require juvenile petitioners not only to file, but also necessitate that the reviewing court reach a decision on the merits of the petition before the juvenile is released from detention. Such a requirement seriously diminishes, and in many cases essentially forecloses a juvenile's right to habeas review – a right that is critical to protect a juvenile's due process right to counsel. For these reasons, this Court should grant the petition for appeal, vacate the order of the decision below, and remand this case for consideration of petitioner's writ of habeas corpus on the merits.

¹ A brief description of each organization and individual can be found in

ARGUMENT

I. LIMITING ACCESS TO HABEAS REVIEW FOR JUVENILES IN VIRGINIA CURTAILS THEIR CONSTITUTIONAL RIGHT TO COUNSEL

Habeas review is essential to Virginia juveniles, 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*, 529 S.E.2d 769, 781 (Va. 2000); *Browning v. Commonwealth*, 452 S.E.2d 360, 362 n. 2 (Va. Ct. App. 1994); *Pfaller v. Commonwealth*, 1403-99-2, 2000 WL 1015872, at *2 (Va. Ct. App. July 25, 2000). See *Walker v. Mitchell*, 299 S.E.2d 698, 699 (Va. 1983). Unlike other states, Virginia does not permit a defendant to raise an ineffective assistance of counsel claim on direct appeal. THE SPANGENBERG GROUP, A.B.A., A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 33 (2004) (hereinafter INDIGENT DEFENSE IN VIRGINIA). Rather, such claims can only be raised in state habeas or post-conviction proceedings after a direct appeal has been exhausted. See *Walker v. Mitchell*, 299 S.E.2d 698, 699 (Va. 1983). See also *Johnson v. Commonwealth*, 529 S.E.2d 769, 781 (Va. 2000); *Browning v. Commonwealth*, 452 S.E.2d 360, 362 n. 2 (Va. Ct. App. 1994); *Pfaller v. Commonwealth*, 1403-99-2, 2000 WL 1015872, at *2 (Va. Ct. App. July 25, 2000). This delay at the outset substantially limits the ability of juvenile

defendants in Virginia to challenge the effectiveness of representation by their defense counsel. This is particularly problematic as the very structure of the juvenile justice system in Virginia – extremely low compensation to court-appointed counsel for juvenile cases and the absence of a record – dramatically increases the likelihood that juveniles will not receive the effective advocacy they are constitutionally entitled to receive.

The problems posed by the inability of juveniles to assert ineffective assistance of counsel on direct appeal are compounded by the fact that Virginia provides no right to an attorney in non-capital state habeas proceedings. INDIGENT DEFENSE IN VIRGINIA 33 (2004). While adult prisoners who do not have counsel can file their habeas petitions *pro se*, Virginia law does not permit defendants under the age of 18 to file *pro se*. VA. CODE § 8.01-8 (2007). Thus, even if a juvenile developed the wherewithal to understand their habeas rights, unrepresented by counsel, they cannot file a petition on their own behalf to assert those rights.

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. This narrowing will have a severe and

pernicious effect on the ability of inadequately represented juveniles to seek habeas relief and as such this Court should grant the petition for appeal and overturn the lower court's ruling.

A. Juveniles in Virginia are More Likely to be Denied Effective Representation and Less Likely to Have Access to Habeas Review Due to the Commonwealth's Extremely Low Compensation Rates and Lack Of Record

Attorneys taking court-appointed juvenile cases receive considerably lower compensation rates than both Virginia court-appointed attorneys representing adults and their counterparts representing juveniles in surrounding states. 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) (hereinafter VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL); *see also* VA. CODE § 19.2-163 (2008 & Supp. 2009). Specifically, Virginia caps compensation for court-appointed counsel for juveniles at \$120 per case in Juvenile and Domestic Relations ("JDR") Court and at \$158 per case in circuit court. VA. CODE § 19.2-163 (2008 & Supp. 2009). This statutory cap on earnings for juvenile attorneys provides for less than 1.5 hours of compensated representation of juvenile clients – barely enough time to conduct a proper initial interview of the client, and in no way a sufficient

period of time to conduct appropriate investigation or case preparation.² By contrast, court-appointed counsel representing an adult in Virginia on an identical charge may receive up to \$1,235 per case – nearly double the maximum compensable amount provided to juvenile court attorneys. *Id.*

Virginia's juvenile compensation structure is also exceptionally low when compared to juvenile compensation rates across the nation. Virginia is one of only two states in the entire country with a non-waivable maximum fee system for court-appointed counsel.³ 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,

² Although court-appointed counsel for juveniles may petition for extra fees through a supplemental waiver, the supplemental compensation is limited to a maximum of \$650 per case, or slightly more than the equivalent of seven hours of work. VA. CODE § 19.2-163 (2008 & Supp. 2009). Such supplemental waivers are permissible, but by no means guaranteed. VIRGINIA STATE CRIME COMMISSION, STUDY OF VIRGINIA'S JUVENILE JUSTICE SYSTEM, H.J.R. 113, 2008 Reg. Sess., at 22 (Va. 2008) (hereinafter STUDY OF VIRGINIA'S JUVENILE JUSTICE SYSTEM). Moreover, the forms to request such waivers are considered complex by some attorneys. *Id.* at 24. Therefore, many overburdened juvenile attorneys simply may not feel it is worth the time to make such requests for additional funds when weighing the limited supplemental amounts and the time it would take to request a waiver.

³ Mississippi is the only other state with non-waivable maximum fees for appointed counsel. However, in Mississippi, court-appointed attorneys are able to earn an unlimited hourly rate for overhead expenses on top of their

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. Of these states, Kentucky is the only other state providing for a compensation cap for juvenile attorneys. However, even with this cap, juvenile court-appointed attorneys in Kentucky can receive up to \$900 per case on typical juvenile cases and up to \$1,500 for representation in violent felony cases. *Id.* The remaining five states mentioned provide for hourly compensation rates with much higher or waivable caps or no caps at all.⁴

Virginia's low compensation rates for attorneys representing juvenile defendants are undoubtedly a significant barrier to effective representation – owing to the specialized practice skills required to assist juvenile clients and unique hearings like detention, waiver, and disposition – which in many ways are more complex, time consuming, and require more court appearances than the cases of adult defendants. As a result of this

statutory fee entitlement at a presumptive rate of \$25 per hour. INDIGENT DEFENSE IN VIRGINIA, *supra*, at 45.

⁴ For example, Tennessee provides for an hourly rate of up to \$100 with caps up to \$4,000 dependent on the type of charge. STUDY OF VIRGINIA'S JUVENILE JUSTICE SYSTEM, *supra*, at 23; *see also* TENN. SUP. CT. R. 13. Additionally, Virginia's southern neighbor, North Carolina, provides for uniform pay for both prosecutors and public defenders and no disparity between juvenile and adult attorneys. NATIONAL JUVENILE DEFENDER CTR.,

nominal compensation rate, court-appointed juvenile counsel may be required to take on more clients than they can adequately represent in order to earn sufficient compensation to maintain their practice. They 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 *id.* at 24. Indeed, 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 Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 793 (2010) (hereinafter Fedders, *Losing Hold of the Guiding Hand*).

Further, due to these strikingly low compensation rates, many experienced attorneys will cease to take these cases when they are able to provide for their practice through other means. See INDIGENT DEFENSE IN VIRGINIA, at 52. As a result, many of the attorneys most competent to handle complicated juvenile cases are pushed out of the system in search of cases offering more favorable compensation rates. Thus, Virginia

juveniles may experience inadequate representation because they have a smaller and likely less experienced pool of quality attorneys from which to draw on seeking representation.

Compounding the structural barriers to effective representation imposed by the low compensation rates for juvenile attorneys is the fact that in 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. Further, while having the right to a *de novo* appeal to circuit court, VA. CODE § 16.1-136 (2010), juveniles lack a written record on which they can rely. Therefore, as in the instant case, juvenile petitioners do not have a record to rely upon to establish their right to habeas relief. The lack of a record to demonstrate the factual and legal bases of their position that their attorney acted ineffectively constitutes a significant barrier to juveniles seeking to present habeas claims of ineffective representation. Without a record or transcript, preparing a habeas petition demands substantially more time to conduct a full investigation and develop an evidentiary basis to support habeas claims. In many cases it will be simply impossible to conduct an

investigation, prepare and file a petition, and fully litigate the petition through the reviewing court's final decision before the juvenile is released from detention.

Taken together, Virginia's low compensation scheme for court-appointed juvenile counsel and lack of a record in delinquency proceedings create an environment in which juvenile defendants are more likely to be denied effective representation and less likely to have access to meaningful habeas review. The circuit court's determination, that it lacked jurisdiction to reach the merits of petitioner's habeas claims because he was released from detention before the case was heard, exacerbates these shortcomings. Further, it significantly decreases the likelihood that post-conviction courts will review the most compelling of juvenile claims, those where a juvenile, like in the instant case, indicates but for counsel's ineffectiveness he would not have pled guilty because he is in fact innocent. See discussion *infra* Part II.B. Rather than risk exposing an innocent youth to a wrongful conviction, this Court should overturn the circuit court's decision and allow petitioner's habeas claims to be reviewed on the merits.

B. Significant Barriers Exist in Virginia that Already Impede a Juvenile's Ability to Seek Habeas Review.

1. Juveniles in Virginia have Limited or No Access to Post-Conviction Counsel

The harm that this decision, if upheld, will cause becomes even more apparent when taking into consideration the lack of post-conviction legal assistance available to the great majority of confined juvenile defendants. Juveniles adjudicated delinquent and placed into state custody in Virginia do not have a right to access an attorney unless they are pursuing an appeal of their underlying delinquency case or are being represented as a serious juvenile offender. VA. CODE §§ 16.1-266; 16.1-285.2; 16.1-285.1(E) (2010). However, some states, recognizing the vulnerability of juveniles in the legal system and the corresponding importance of access to counsel even 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-dispositional counsel).

The lack of access to post conviction counsel in Virginia becomes even more problematic because the sentencing court rarely has continuous jurisdiction over juvenile defendants. The vast majority of the youth committed to state custody, including the petitioner in the case before the court, receive indeterminate commitments. 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.⁵ VA. CODE § 16.1-285 (2010). No juvenile

committed indeterminately may be detained longer than 36 months or

beyond the juvenile's 21st birthday for any offenses except murder and

manslaughter. *Id.*; see also discussion *infra* Part I.B.3. However,

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). Instead, in Virginia the sentencing court loses

jurisdiction over a juvenile defendant who has been indeterminately

committed to state custody 60 days after the disposition hearing. *Id.*

Virginia's cut-off of jurisdiction 60 days after disposition is significantly

earlier than the national norm and in stark contrast to the great majority of

⁵ 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,

states who retain some form of jurisdiction over a juvenile's entire time in custody.⁶ Ironically, the circuit court's ruling will most harm the least serious of the juvenile offenders, those committed to state custody indeterminately rather than as serious offenders⁷ – as they are the ones who have no right to access counsel 60 days after their commitment.

The lack of access to post-conviction counsel for most confined youth makes it less likely that a juvenile defendant will be able to challenge the constitutionality of his adjudications or confinement. With no access to

http://www.djj.virginia.gov/Residential_Programs/pdf/LOS_Guidelines_July_1_2008.pdf.

⁶ 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. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT 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 and 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).

⁷ 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).

post-conviction counsel, the juvenile defendant who is even aware of his or her habeas rights is likely a rare exception.

2. Children Under the Age of 18 Cannot File *Pro Se* In Virginia.

Even the rare juvenile who becomes aware of his potential habeas claim without the assistance of counsel,⁸ cannot file a *pro se* habeas petition until he turns 18. In Virginia, minors do not have standing to sue on their own, and can only sue by their “next friend.” VA. CODE § 8.01-8 (2007). Nonetheless, juvenile prisons in Virginia tend to be geographically isolated, meaning that parents have limited ability to visit their children or assist them by filing a habeas petition on their behalf.⁹ Yet without one or

⁸ 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 providing either an attorney *or* access to a law library, see 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.

⁹ 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, which contributed 3, 095, 2,038, 2,068, and 1,187 juvenile intakes, respectively, to the Virginia Court Service Unit in 2010. Virginia DJJ, *Community Programs*, in DATA RESOURCE GUIDE (2010), available at http://www.djj.virginia.gov/About_Us/Administrative_Units/Research_and_E

both parents filing the petition on behalf of the juvenile as “next friend,” juveniles are unable to file for habeas relief. VA. CODE § 8.01-8 (2007). In other words, without access to counsel or independently gained familiarity with the law, juveniles lack the tools and knowledge to vindicate their legal rights particularly as Virginia further restricts them by prohibiting pro se filing of habeas petitions on their own. The circuit court’s ruling adds additional limitations to the ability of juvenile defendants to challenge the constitutionality of their adjudications and should be overturned.

3. Since Juveniles in Virginia Face Indeterminate Periods of Detention, Requiring the Merits of a Filed Habeas Petition to be Reached Prior to a Juvenile’s Release Will Dramatically Shorten, and in Some Cases Foreclose Habeas Review for Juveniles.

As discussed earlier, in Virginia, claims of ineffective assistance of counsel can only be raised after a direct appeal has been exhausted. See discussion *supra* Part I. Therefore, in order to file a habeas petition a defendant must not only wait to exhaust direct appeal before filing, but must also ensure that his habeas petition is filed before being released from detention.¹⁰ The fact that juveniles tend to serve shorter periods of confinement and parole than adults means that they are even more

valuation_Unit/pdf/Community_Programs_Intro_CSU_and_VJCCCA_2010.pdf.

hindered in their ability to vindicate their legal rights because their window of time to file is comparatively shorter particularly if the circuit court's decision is upheld.

Like the defendant in the case before the Court, a majority of juveniles serve indeterminate sentences of less than three years with the actual period of time affected by behavior. See discussion *supra* Part I.B.1. In 2010, 81.4 percent of Virginia DJJ inmates had an indeterminate commitment, which by definition cannot be longer than 3 years. *Juvenile Population Trends*, 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. In comparison, 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. VIRGINIA DEPARTMENT 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. A large portion of Virginia's juvenile inmates, therefore, are in custody for a short and uncertain period of time.

¹⁰ It is undisputed that parole is equivalent to detention.

Further, besides serving shorter and indeterminate periods in physical custody, juveniles also tend to serve much shorter parole periods than adults – again limiting the period in which they are considered to be detained for purposes of seeking habeas review.¹¹ Therefore, even without the circuit court’s restrictive view of habeas jurisdiction, juveniles face an exceptionally limited window of time to file for habeas relief as they must ensure that their habeas petitions are filed before being released from detention but after having exhausted direct appeal.

On the one hand, the Virginia juvenile justice system should be applauded for its use of shorter and indeterminate sentences for its least serious juvenile offenders, in accord with the United States Supreme Court’s recognition that youth are different than adults in that they are less culpable and more capable of redemption and growth by reason of youth and immaturity. *See generally Roper v. Simmons*, 543 U.S. 551, 571 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010). On the other hand, however, these same features of Virginia’s juvenile system, in reality, operate to hinder access to habeas relief, rather than assist juveniles who

¹¹ 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. DJJ Agency Policies and Procedures

have demonstrated good behavior, and are deemed appropriate for earlier release. 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 make it extremely difficult for juveniles to pursue habeas claims.

II. JUVENILES RIGHT TO COUNSEL IS RENDERED MEANINGLESS WITHOUT SUFFICIENT ACCESS TO HABEAS REVIEW.

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

Through a series of cases that began in 1966, the United States Supreme Court established a juvenile's right to due process protections when facing delinquency proceedings, including the right to counsel. *In re Gault*, 387 U.S. 1, 12 (1967); *United States v. Kent*, 383 U.S. 541, 553 (1966); *In re Winship*, 397 U.S. 358, 359 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971); see also *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court stated that, "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he

has a defense and to prepare and submit it.” *Gault*, 387 U.S. at 36. Youth in particular require the “guiding hand of counsel at every step in the proceedings against him.” *Id.*

The juvenile’s need for assistance of counsel is uncontroverted in light of the Supreme Court’s more recent decisions in *Roper* and *Graham*, which recognize that juveniles are categorically less mature, less able to weigh risks and long-term consequences, more vulnerable to external pressures, and more compliant with authority figures than adults. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010). The importance of an effective attorney with specialized skills to assist a youth in navigating the legal system and understanding the legal intricacies and workings of the juvenile court has never been clearer. This is critical for juveniles in Virginia, where, as previously discussed, factors such as low compensation rates for juvenile defense attorneys, the absence of a trial record from juvenile court, lack of access to post-conviction counsel, and the legal complexities that make it difficult for a juvenile to understand and protect their rights, necessitate effective assistance. See *also* discussion *infra* Part I.B.1. Additionally, while *Gault* has long established youth’s constitutional right to counsel, the

(2003).

adequacy of such representation has been a persistent concern because the very culture of juvenile court practice may undermine the reliability of juvenile adjudications.¹² 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 of counsel has been repeatedly recognized and codified in national standards for juvenile court practice.¹³ This is true also in Virginia, which, through the Virginia Indigent

¹² See Fedders, *supra*, at 791-95; Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 283 (2007); 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 5-12* (1995); see also Nat'l Juvenile Defender Ctr., *Assessments*, <http://www.njdc.info/assessments.php> (last visited March 17, 2011).

¹³ See AMERICAN COUNCIL OF CHIEF DEFENDERS & NATIONAL JUVENILE DEFENDER CENTER, *TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS* (2005), *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf; INST. OF JUDICIAL ADMIN. & A.B.A., *JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS* (1980); *A CALL FOR JUSTICE*, *supra*; National Ass'n of Counsel for Children, *NACC Policy Agenda: Juvenile Justice Policy*, adopted May 17, 1997, *available at* http://www.naccchildlaw.org/?page=Policy_Agenda; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS, *JUVENILE JUSTICE STANDARDS RELATING TO INTERIM STATUS* (1980), Standard 7.6C (right to counsel at each stage of formal juvenile justice process); NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25* (2005), *available at* <http://www.ncfcj.org/content/view/411/411/>.

Defense Commission has adopted standards of practice for lawyers representing juveniles in delinquency proceedings.¹⁴

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

Unfortunately, in spite of the constitutional guarantee of right to counsel, the codification of national and state standards to reinforce that right, and the adoption of more punitive dispositions within the juvenile justice system, the ineffective assistance of counsel is far too common in our nation's juvenile courts. Now more than ever, the safeguard of habeas review, to protect the rights of juveniles who receive ineffective legal

¹⁴ While it is true that the Virginia Indigent Defense Commission has adopted high standards of practice for lawyers representing juvenile defendants, see VIRGINIA INDIGENT DEFENSE COMMISSION, STANDARDS OF PRACTICE FOR INDIGENT DEFENSE COUNSEL 10 (2006), available at <http://www.publicdefender.state.va.us/PDF%20documents/Standards%20of%20Practice.pdf>, 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 to overcome the structural barriers to effective representation discussed in this section." See *id.*

representation, is as critical in delinquency proceedings as in adult criminal proceedings. This Court should overturn the lower court's ruling to ensure that juveniles in Virginia have a meaningful opportunity to review their counsel's potentially deficient performance.

B. There is an Increased Risk of Unreliable Adjudications in Juvenile Court Making Habeas Review Critical.

Due to the unique culture of juvenile court, and the relative lack of sophistication and susceptibility of juvenile defendants to both false confessions and guilty pleas, the risk of unreliable adjudications in juvenile court is unacceptably high, making habeas review even more important.

1. 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, too often, juvenile courts subordinate accurate fact-finding and protection of the child's constitutional rights to the attorney's or court's perception of the child's best interests and need for treatment, disregarding 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 NATIONAL JUVENILE 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).

So while it is critical for defense counsel to engage juvenile clients in meaningful discussion about their case – perhaps even more critical than with adult defendants given juvenile immaturity - a lack of resources and time constraints often leave children's lawyers overburdened and ill-prepared to engage on this level. See Majd & Puritz, *supra*, at 559-60. Meaningful discussion entails not only meeting with their clients for sufficient period of time, but also requires an attorney to develop a client's confidence in their attorney's loyalty to them and willingness to put on a meaningful defense. Failure to do so exacerbates a child's general

mistrust of adults and creates difficulty in establishing an effective attorney-client relationship.¹⁵

As a result of this and other factors, 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 beyond the failure of counsel to effectively counsel and engage with their clients, include: absence of jury trials;¹⁶ a juvenile court culture desiring to “help” juveniles that at times discourages and sometimes precludes zealous and adversarial advocacy; high case loads; 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

¹⁵ Lack of trust in the attorney-client relationship is often intensified by racial hurdles. Brief for NAACP Legal Defense & Educational Fund et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 130 S. Ct. 2011, (2010) (Nos. 08-7412, 08-7621), 2009 WL 2197340, at 8 (hereinafter *Graham* Brief) (citing Annett Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 596 (2008)). Minority children, particularly those of African American and Latino descent, represent a disproportionate amount of youth who pass through the juvenile justice system.

¹⁶ 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.

confessions, may be unreliable. See Drizin & Luloff, *supra*, at 275-83, 289-93; see also discussion *supra* Part I (relating to unique Virginia factors that further lend to unreliability of juvenile adjudications).

2. Juvenile Defendants are at Increased Risk of False Confessions.

The Supreme Court of the United States 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). In more recent decisions, the Court has recognized that juveniles are categorically less mature and consequently more vulnerable to external pressures that may lead them to be compliant with authority figures than are adults. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010). Because of their youthful tendencies it is not uncommon for juveniles to make false confessions or enter false guilty pleas when they are pressured to do so.

Even in a standard police interrogation juveniles are susceptible to pressure from police and are likely to falsely confess. See *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) ("there is mounting empirical

evidence that these pressures [associated with custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed”) (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906-07 (2004)). And where a juvenile is subject to more vigorous interrogation, the United States Supreme Court has recognized that fear and panic might lead a juvenile to confess to a crime he did not commit, making the assistance of counsel even more critical. See *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (“We cannot believe that a lad of tender years is a match for the police in [a situation where the youth is questioned from midnight to 5 a.m.]. He needs counsel and support if he is not to become the victim first of fear, then of panic.”).

Moreover, a recent empirical study of proven wrongful convictions of youth has found that juveniles are twice as likely as their adult counterparts to confess to crimes they did not commit. See Joshua A. Tepfer, Laura H. Nirider, & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904 (2010). 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, 466 (1966). Given

the nature of this type of evidence, which 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.

3. Juvenile Defendants Are at an Increased Risk of False Guilty Pleas Imposing Harsh Life-Long Collateral Consequences In Addition to the Direct Consequences of an Adjudication.

Beyond the nature of police interrogations, which may lead to false confessions, false guilty pleas are not uncommon when juveniles enter the court system. See Fedders, *supra*, at 795; Drizin & Luloff, *supra*, at 292. The juvenile court culture perpetuates a system where an extraordinarily high number of cases are resolved by guilty pleas. See Fedders, *supra*, at 795; Drizin & Luloff, *supra*, at 292. Although no national figures detail the rate at which delinquency cases are resolved by a guilty plea, some state studies indicate that the rate is upward of ninety percent. 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). Guilty pleas, in and of themselves, obviously are not necessarily indicative of poor legal representation; they may in fact reflect particularly effective defense advocacy. However, in juvenile court, where zealous advocacy is sometimes discouraged, 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). Additionally, 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, 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 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. In fact, such failure to counsel a child about the consequences of a guilty plea and alternative options is a serious violation of an attorney's duty to provide effective representation and

should result in withdrawal of a plea. See *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 PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-41(a) (1993). Indeed, 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. Drizin & Luloff, *supra*, at 319.

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 *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 – 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.

This is particularly problematic when representing juvenile defendants as, in many ways, these attorneys have an increased obligation to ensure that the client fully comprehends the weight of the evidence against him before trial and accurately evaluates the short-term and long-term consequences of accepting a guilty plea in order to make a reasoned and well-informed decision. *See generally Graham Brief*, at 21. Where there is a question of inadequate investigation or meaningful discussion with the client about the direct and collateral consequences of a plea, habeas review is of the utmost importance to protect an innocent child from the harmful consequences of an ill-advised guilty plea.

This safeguard is particularly significant considering that a delinquency adjudication may carry significant collateral consequences that can follow juveniles throughout their entire lives and hinder successful re-

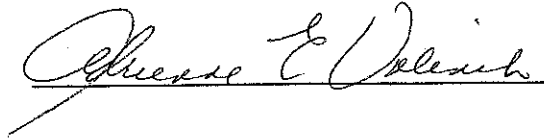
integration into society. As in the instant case,¹⁷ such consequences may include sex offender registration for life that cannot be sealed, restrictions on housing, employment, and suffrage, among other consequences. See Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings, Part II*, CRIM. JUST. 41, 47 (2000), available at <http://www.abanet.org>; see also Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L. J. 1111, 1114-15 (2006). Particularly where the direct consequences of an adjudication, which may have resulted from ineffective assistance of counsel, are further aggravated by life-long collateral consequences the merits of a habeas claim should be reached. This Court should overturn the restrictive circuit court ruling because curtailing access to habeas review for juveniles essentially denies them their constitutional right to effective counsel.

¹⁷ 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.

CONCLUSION

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,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief *Amicus Curiae* was served by first-class mail to:

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On this 18th day of March, 2011.



Matthew Engle

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 **Disability Law Clinic** at the University of Richmond School of Law joins in the filing of this brief. The Disability Law Clinic represents children, at no cost, in juvenile courts and special education proceedings and has filed habeas corpus petitions on behalf of institutionalized juveniles in Virginia. Recognizing that the practice of children's law requires knowledge of the intersection of many disciplines including psychology, education, social work, and child development, law students in the disability Law Clinic, supervised by a full time clinical faculty member, work collaboratively with professionals in other fields to address the specialized needs of their clients. Goals of the clinic include not only providing direct service to clients, but also the elevation of the practice of law. The outcome of this case will have a direct impact on the population served by the Disability Law Clinic.

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.

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.