

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Court of Appeals, Colorado, Case No. 2011CA434
District Court, Douglas County, Colorado, Case No.
98CR264

Petitioner:

Nathan Gayle Ybanez

v.

Respondents :

The People of the State of Colorado



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Case Number:

2014 SC 190

**COLORADO OFFICE OF THE CHILD'S REPRESENTATIVE
BRIEF OF *AMICUS CURIAE***

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with C.A.R. 28(g) in that it contains 5,212 words and does not exceed 30 pages.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Colorado Office of the Child's Representative

By: Sheri M. Danz, Attorney Regulation #34794



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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Amicus seeks to provide information and argument regarding the following issue presented for review:

Whether a child charged as an adult with first-degree murder, whose parent is a victim of the crime and a prosecution witness, is entitled to a guardian *ad litem* to assist with his defense and to advise him regarding the waiver of his constitutional trial rights.

STATEMENT OF THE CASE AND FACTS¹

In 1998, Mr. Ybanez was charged with the murder of his mother. He was sixteen years old at the time of the alleged offense. At the time of Mr. Ybanez's trial, Mr. Ybanez was seventeen years old. Mr. Ybanez's father, who served as a prosecution witness, hired defense counsel to represent Mr. Ybanez. Mr. Ybanez was found guilty of first-degree murder and sentenced to life without parole.

In his post-conviction proceeding, Mr. Ybanez contended that a new trial was required because the district court failed to appoint him a Guardian *ad litem* (hereinafter "GAL"). On appeal, the Court of Appeals held that the district court neither abused its discretion nor violated Mr. Ybanez's due process rights by failing to appoint him a GAL. In its decision, the Court of Appeals reasoned:

¹ The facts set forth in this section are taken from the decision of the Court of Appeals.

We are aware of no cases discussing section 19-2-517(5). However, the supreme court and a division of this court have recognized in other contexts that, even absent statutory authorization, a trial court has discretionary authority to appoint a GAL for a person whose capacity for rational decision-making is substantially impaired. *See People in the Interest of M.M.*, 726 P.2d 1108, 1117-19 (Colo. 1986) (termination of parental rights); *In re Marriage of Sorenson*, 166 P.3d 254, 256-57 (Colo. App. 2007) (dissolution of marriage). In such cases, a GAL should be appointed if the court is reasonably convinced that the person is not mentally competent to participate effectively in the proceeding. *M.M.*, 726 P.2d at 1118. Conversely, a court does not abuse its discretion by failing to appoint a GAL if the person is capable of understanding the nature and significance of the proceeding; is able to make decisions on his or her own behalf; and has the ability to communicate with and act on the advice of counsel. *Id.* at 1120; *Sorenson*, 166 P.3d at 256-57.

People v. Ybanez, slip op. at 4 (Colo. App. 2014). The Court of Appeals relied on defense counsel's testimony that he had asked questions to determine Mr. Ybanez's competency and had concluded that Mr. Ybanez was competent so had therefore decided not to seek appointment of a GAL. *Id.* at 5-6.

INTEREST OF AMICUS CURIAE

The Colorado General Assembly created the Office of the Child's Representative (hereinafter "OCR") in 2000 for the purpose of ensuring the provision of uniform, high-quality legal representation and non-legal advocacy to children in judicial proceedings. § 13-91-104(1), C.R.S. (2014). All GAL services for children in delinquency and adult criminal proceedings are paid for exclusively

through the OCR, which is funded by general fund appropriations. Colorado Supreme Court Chief Justice Directive (hereinafter “CJD”) 04-06(I)(B); § 13-91-102(2), C.R.S. (2014). In Fiscal Year 2013-14, the OCR provided services to approximately 17,000 children by contracting with approximately 250 attorneys across the state, employing staff attorneys at its El Paso County Guardian ad Litem (GAL) Office, and contracting with three pilot multidisciplinary staff offices in Denver and Arapahoe Counties. OCR 2014 Annual Report to the General Assembly at 7 (hereinafter “Gen. Assemb. Rep.”). The OCR’s responsibilities include but are not limited to enhancing the provision of GAL services in Colorado by providing training to attorneys and judicial officers, making recommendations to the Chief Justice of the Colorado Supreme Court concerning the establishment of minimum training requirements and best practice standards, and overseeing the practice of GALs to ensure compliance with all relevant statutes, orders, rules, directives, policies, and procedures. § 13-91-105(1)(a), C.R.S. (2014).

The decision of the Court of Appeals mistakenly applies an adult analysis to the consideration of whether a GAL should be appointed for a child pursuant to § 19-2-517(8), C.R.S. (2014). This Court’s decision as to whether a GAL should have been appointed to assist with Mr. Ybanez’s defense and advise Mr. Ybanez on the waiver of his constitutional rights will potentially create significant

confusion regarding the role of GALs in direct file and delinquency proceedings.

As *amicus*, the OCR does not seek to weigh in on whether the district court should have appointed Mr. Ybanez a GAL. Instead, the OCR seeks to offer its analysis on the basis for the appointment of a GAL for a child postured as an adult in any proceeding and to ensure that this Court's decision is based on an accurate analysis of the role and ethical obligations of a GAL.

STANDARD OF REVIEW

Question 2 involves a question of law, governed by a *de novo* standard of review. *People ex rel. A.C.*, 304 P.3d 589, 594 (Colo. App. 2011), *aff'd sub nom. M.S. v. People*, 303 P.3d 102 (Colo. 2013) (citing *People in Interest of A.J.L.*, 243 P.3d 244, 249 (Colo. 2010) (citations omitted)).

SUMMARY OF ARGUMENT

Charging a child as an adult does not transform that child into an adult. Whether subject to a proceeding such as a dependency and neglect or domestic relations proceeding, a named party in a civil proceeding, a “juvenile” in a juvenile delinquency proceeding, or a defendant in an adult proceeding, a child is a child. In the numerous statutory provisions and rules allowing and requiring appointment of a GAL for children in various case types, one thing is clear: the basis for the appointment of a GAL extends beyond the adult analysis of incompetence and

includes consideration of the child's circumstances, particularly the availability of an adult parent or guardian to protect the child's best interests throughout the proceeding.

Once appointed, the GAL has a unique role distinct from that of defense counsel. The best interests of the child—not the child—is the client of the GAL, and the GAL's fiduciary duties and ethical obligations define that role. While the objectives of the child drive defense counsel's strategy and consent of the child governs defense counsel's confidentiality, an independent and thorough assessment of the child's best interests informs the GAL's advocacy and duty of confidentiality. When appointed, GALs advance the best interests of the child throughout each phase of the proceeding by ensuring the presentation of information pertinent to the child's best interests. GALs may also contribute to the due process of proceedings by apprising defense counsel of information potentially relevant to the child's defense and by raising to the court issues regarding the quality of defense representation, such as potential conflicts of interest or otherwise inadequate and ineffective assistance. However, GALs cannot serve as part of the defense team, cure any conflict of interest between defense counsel and the child, or fulfill defense counsel's obligation to advise the child on the waiver of constitutional rights.

ARGUMENT

I. The Decision Whether to Appoint a GAL for a Child Defendant in an Adult Criminal Proceeding Should Include Consideration of the Availability of a Parent or Guardian to Protect and Advance the Child’s Best Interests throughout the Proceeding.

A. Colorado’s GAL appointment statutes and standards recognize the unique vulnerabilities of children subject to legal proceedings.

One needs to look no further than the United States Supreme Court to understand that children remain children even when charged in adult proceedings and that their status as children warrants unique considerations and protections. In *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2397 (2011), the Court looked to a long line of its cases establishing that “[a] child’s age is far ‘more than a chronological fact’”:

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children “generally are less mature and responsible than adults,” *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982); that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion); that they “are more vulnerable or susceptible to ... outside pressures” than adults, *Roper v. Simmons*, 543 U.S. 551, 569 (2005); and so on. See *Graham v. Florida*, 560 U.S. 48 (2010) (finding no reason to “reconsider” these observations about the common “nature of juveniles”). Addressing the specific context of police interrogation, we have observed that events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” *Haley v. Ohio*, 332 U.S.

596, 599 (1948) (plurality opinion); *see also Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (“[N]o matter how sophisticated,” a juvenile subject of police interrogation “cannot be compared” to an adult subject). Describing no one child in particular, these observations restate what “any parent knows”—indeed, what any person knows—about children generally. *Roper*, 543 U.S. at 569.

J.D.B. v. North Carolina, 131 S.Ct. 2394, 2403 (2011) (internal citation format altered). The *J.D.B.* Court built on this jurisprudence by holding that the child’s age is relevant to the custody analysis set forth by *Miranda v. Arizona*, 86 S. Ct. 1602 (1966). *See J.D.B.*, 131 S. Ct. at 2396.

While its decisions in *Roper v. Simmons*, 543 U.S. at 551, *Graham v. Florida*, 560 U.S. at 67, and *Miller v. Alabama*, 132 S. Ct. 2455 (2012) focused on the constitutionality of sentences, the medical and social science research the United States Supreme Court relied on to conclude that juveniles’ “transient rashness, proclivity for risk, and inability to assess consequences” lessens a child’s culpability and increases the likelihood of reform, *see Miller* 132 S.Ct. at 2465, applies equally to a child’s ability to navigate complex legal proceedings, assess long-term consequences of decisions made throughout those proceedings, and make informed decisions about what background information to share with defense counsel. Indeed, in imposing a categorical rule prohibiting life without

parole sentences for nonhomicide offenses, the Supreme Court stated the following:

As some *amici* note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation.

Graham, 560 U.S. at 78 (citations omitted).

Colorado's GAL appointment statutes serve as one way in which Colorado law protects the unique vulnerabilities of children subject to judicial proceedings. Colorado statutes require the appointment of a GAL for children in dependency and neglect proceedings, minor parents facing termination of parental rights in those proceedings, and minors under the age of 15 who are wards of the state and subject to mental health commitment proceedings. *See* §§ 19-1-111(1), 19-3-203, 19-3-602(3), 27-65-103(3), C.R.S. (2014). Colorado law authorizes the appointment of a GAL for children in a wide array of other proceedings, including juvenile delinquency, criminal, truancy, adoption and relinquishment, probate,

mental health, paternity, judicial bypass, and domestic relations proceedings. *See* §§ 19-1-111(2)(a) (delinquency), 19-2-517(8) (criminal), 19-1-111(2)(b) (truancy), 19-5-103(9)(a) (relinquishment), 15-14-115 (probate), 19-4-110 (paternity), 12-37.5-107(2)(b) (judicial bypass), 14-10-116(1) (providing for appointment of Child's Legal Representative in domestic relations proceedings), C.R.S. (2014). Section 13-22-101(c), C.R.S. (2014) and Colo. R. Civ. P. 17(c) also provide that any child under the age of 18 suing or being sued requires the appointment of a GAL or someone acting on the minor's behalf.

B. Colorado law contemplates a juvenile-focused analysis for the appointment of a GAL that includes consideration of the availability of a parent.

While Colorado's statutes providing for the appointment of GALs for children are not identical, a review of these statutes yields two consistent themes. First, grounds for the appointment of a GAL for a child are more expansive than adult GAL appointment grounds and do not depend on findings of incompetency, mental illness, developmental disability, or mental impairment. Second, the availability of a parent, guardian, or other similarly situated person to protect the child's best interests throughout the proceedings factors heavily into the appointment analysis.

Adult GAL appointment provisions require findings of incompetence, mental impairment, mental illness, developmental disability, or other general inability to make critical decisions. *See, e.g.*, Colo. R. Civ. P. 17(c); § 19-1-111(2)(c), C.R.S. (2014); *People in Interest of M.M.*, 726 P.2d 1108, 1118-19 (Colo. 1986) (discussing appointment of GAL for adults in dependency and neglect proceedings and other civil contexts). Neither rule nor statute suggests that this standard provides sufficient protection for children or should apply to children. By providing for the appointment of a GAL for “infants or incompetent persons” and requiring the appointment of a GAL for a child who lacks a “representative, such as a general guardian, conservator, or other like fiduciary” or whose representative “fails to act,” Colorado Rule of Civil Procedure 17(c) sets forth a distinct analysis for children that turns on parental availability rather than competency. While Colorado’s GAL appointment statutes set forth a variety of factors for courts to consider in the appointment of a GAL for a child that are detailed below, it is important to note that not one statute makes reference to a child’s mental capacity or competence.

It is clear that the decision whether to appoint a GAL for a child facing adult criminal charges cannot turn on the child’s competency alone.

Requiring a defendant who lacks sufficient mental capacity to understand the proceedings and participate in his or her defense violates the due process clause of the United States Constitution. *Dusky v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Colorado's Criminal Code sets forth specific procedures to effectuate this longstanding constitutional principle. *See* § 16-8.5-101 *et seq.*, C.R.S. (2014). Basing the GAL appointment in an adult criminal proceeding on a finding of incompetence would produce an absurd result in which only those children deemed incompetent to proceed would obtain the protection of a GAL and would be an abuse of discretion.

As § 19-2-517(8) does not provide any guidance for the court's exercise of its discretion, a comprehensive analysis of Colorado's statutes providing for the appointment of GAL for children is helpful. These appointment statutes fall into three categories: required appointment; discretionary appointment based on best interests of the child and availability of the parent; or discretionary appointment without any statutory guidance. These mandatory appointments occur when the very nature of the proceeding or the posture of the case presents a potential or actual conflict between the child and the parent. This category of appointment statutes

covers children in dependency and neglect proceedings, *see* §§ 19-1-111(1), 19-3-203, C.R.S. (2014), and children facing a mental health commitment who are wards of the state or who are under the age of fifteen and object to the petition filed by their parents, *see* §§ 27-65-103(3), (7)(c), C.R.S. (2014). Additionally, children postured as parents facing termination of parental rights are entitled to the appointment of a GAL. *See* § 19-3-602(3).

Several statutes providing for the appointment of GALs for children allow discretionary appointment but set forth factors for the court's consideration. Section 19-1-111(2)(a), which provides for the appointment of a GAL in delinquency proceedings and is therefore most analogous to the direct file appointment, allows a GAL appointment when a parent or guardian does not appear at any hearing, a conflict of interest exists between the parent or guardian and the child, or the court otherwise finds that the GAL appointment serves the best interests of the child. Despite the permissive nature of this statutory language, case law makes clear that a parent whose interests are hostile to the child cannot assist a child in making a knowing, voluntary, and intelligent waiver of his or her rights. *See People v. Legler*, 969 P.2d 691, 695-96 (Colo. 1998) (holding that statutory protection of parental presence during custodial interrogations required by

§ 19-2-511(1), C.R.S. (2014) is not fulfilled by custodian with objectively hostile interests to those of the child). Similar to § 19-1-111(2)(a), § 19-5-103(9)(a), C.R.S. (2014) allows the appointment of a GAL in adoption proceedings upon a finding of conflict of interest between a parent and the child or a best interests finding. While the court in a paternity action has the discretion to make the child a party to the case and to appoint a GAL, the Children’s Code makes clear that “the child’s mother or father may not represent the child as guardian or otherwise.” § 19-4-110. In probate proceedings, a court may appoint a GAL for a child “if the court determines that representation of the interest otherwise would be inadequate.” § 15-14-115. Of the statutes providing factors for consideration in the appointment of a GAL for a child, only the GAL appointment statute in truancy does not specifically reference parental or guardian availability to represent the best interests of the child. *See* § 19-1-111(2)(b) (requiring a finding that the appointment is “due to exceptional and extraordinary circumstances”).

Notably, only two GAL appointment statutes other than § 19-2-517(8) fall into the last category providing no guidance: § 14-10-116(1), which provides for the appointment of a Child’s Legal Representative in a domestic

relations proceeding and § 12-37.5-107(2)(b), which provides for the GAL appointment in judicial bypass proceedings.

As in all of the case types discussed above, a child charged in an adult criminal proceeding remains a child in need of adult guidance, protection, and support. When a parent is unavailable to provide such support at any phase of the proceeding due to a conflict or any other reason, it is the GAL who steps in to fulfill the role of the guardian for the purpose of the proceeding. Although § 19-2-517(8) does not provide guidance for the court's exercise of its discretion to appoint a GAL, a comprehensive review of Colorado's GAL appointment for child statutes clearly indicates that consideration of parental availability to protect and advance the child's best interests is an important factor for a court in a direct file proceeding to consider in determining whether to appoint a GAL.

II. The GAL Serves as an Important Protection in a Criminal Proceeding but Does Not Fulfill the Role of Defense Counsel.

A. The GAL's independent investigation and advocacy promotes the best interests of the child throughout the proceeding and in some instances will serve to protect the child's due process rights.

The GAL is “a person appointed by a court to act in the best interests of a person.” § 19-1-103(59), C.R.S. (2014) (applying specifically to

proceedings under the Children’s Code). The client of the GAL is the best interests of the child, and all actions taken by the GAL must further the GAL’s duty of loyalty to these best interests. CJD 04-06(V)(B), (D); *L.A.N. v. L.M.B.*, 292 P.3d 942, 950 (Colo. 2013). GALs “are ultimately tasked with acting on behalf of the child’s health, safety, and welfare.” *People v. Gabriesheski*, 262 P.3d 653, 659 (Colo. 2011). The GAL does not take a passive role in the proceeding but serves as an active advocate for the best interests of the child throughout the appointment. *See L.A.N.*, 292 P.3d at 949. To advance the best interests of the child, a GAL must perform an ongoing independent investigation throughout his or her appointment. *See* CJD 04-06(V)(F) (requiring GAL in proceedings other than D&N proceedings to “perform all duties as directed by the court, as set forth by statute, and as required by the Rules of Professional Conduct as described in section V.B”); CJD 04-06(V)(B) (explaining that the client of the GAL is the best interests of the child and that the GAL’s professional responsibilities flow from this unique definition of client); Colo. R. Prof’l. Conduct 1.3 (defining an attorney’s duty of diligence to a client).

The GAL’s unique investigatory and advocacy responsibilities promote the best interests of the child throughout the appointment, including

at the bond, placement, transfer, plea, decision to testify, and sentencing phases. First, the GAL ensures that the court receives all information relevant to the child's best interests during its consideration of the child's eligibility for bond, the type of bond, and the conditions of release. *See* §§ 16-4-101(1), C.R.S. (2014) (listing offenses ineligible for bail); 16-4-103(5), C.R.S.(2014) (listing factors relevant to bond type and amount, including but not limited to “the nature and extent of family relationships,” the “character and reputation of the person,” and the “identity of persons who agree to assist the person in custody in attending court at the proper time”).

Second, the GAL advocates for a pretrial placement order serving the best interests of a child ineligible for bond or unable to post bond. Section 19-2-508(3)(c)(II), C.R.S. (2014) now provides that any juvenile charged as an adult not be held at any adult jail or pretrial facility unless the district court finds after a hearing “that an adult jail is the appropriate place of confinement for the juvenile.” *See* HB 12-1139, 1st Sess. (Colo. 2012) (eliminating prior presumption that juveniles charged as adults be held in adult facilities absent agreement by the prosecution and defense counsel that the juvenile should be held in a juvenile facility). The statutory scheme sets forth a number of factors for the court's consideration, including the

juvenile’s “current emotional state, intelligence, and developmental maturity, including any emotional or psychological trauma,” “the risk to the juvenile caused by his or her placement in an adult jail,” and the likelihood of deprivation of contact with other people due to the need to separate the child from adults. *See* §19-2-508(3)(c)(III), C.R.S. (2014). The investigative responsibilities of the GAL place the GAL in an optimal position to gather and present information relevant to these considerations. Additionally, the GAL may obtain information throughout his or her ongoing representation relevant to the child’s conditions of confinement and requiring reconsideration of any previous detention orders. *See, e.g.*, § 19-2-508(3)(c)(VI), C.R.S. (2014) (allowing juvenile placed in an adult jail to petition for reconsideration of court’s order).

Section 19-2-517(3)(a), C.R.S. (2014) allows a juvenile charged as an adult to request that the case be transferred to juvenile court. Section 19-2-517(3)(b), C.R.S. (2014) lists several factors to be considered at the reverse transfer hearing, which include the age and maturity of the juvenile “as determined by considerations of the juvenile’s home, environment, emotional attitude, and pattern of living,” and the “current and past mental health status of the juvenile.” As with bond and pretrial placement, a GAL

ensures that a court's transfer decision is informed by consideration of all information pertaining to the best interests of the child that is relevant to the statutory considerations. Additionally, the GAL must alert defense counsel and, when necessary, the court, to any issues impacting the validity of any plea made by the child or the child's decision whether to testify. *See* Colo. R. Crim. P. 11(b) (setting forth findings the court must make prior to accepting a plea of guilty or nolo contendere); *People v. Curtis*, 681 P.2d 504, 513 (Colo. 1984) (requiring findings that defendant's decision whether to testify is voluntary, knowing, and intentional).

Finally, the GAL serves as an important protection for the child at the sentencing phase. It is now a constitutional principle that a life without the possibility of parole sentence for a child convicted as an adult should be a rare event that occurs only after individualized consideration of the child's "youth and attendant circumstances." *Miller v. Alabama*, 132 S.Ct. at 2471; *see also People v. Tate, Banks v. People, Jensen v. People*, 2015 CO 42 (2015) (remanding *Tate* and *Banks* to district court for an "individualized sentencing process" that takes into account "youth and attendant circumstances"). The considerations relevant to a child's youth and attendant circumstances, including but not limited to "immaturity,

impetuosity, failure to appreciate risks and consequences,” “the family and home environment that surrounds [the child] and from which he cannot usually extricate himself,” and “the way familial and peer pressures may have effectuated” the child in the commission of the offense, *see Miller*, 132 S.Ct. at 2468, are not abstract concepts. A district court’s individualized sentence must take into account these considerations as applied to the unique history and circumstances of the child. As the legal advocate representing the child’s best interests, the GAL must ensure that all information relevant to these considerations and serving the child’s best interests is presented at this individualized sentencing hearing.

In summary, parents who are unavailable due to a conflict or some other issue may not readily offer information critical to considerations of bond, placement, transfer, plea acceptance, waiver of constitutional rights, and sentencing. The GAL plays an important role in ensuring that all information relevant to the child’s best interests is uncovered and presented at each phase.

In addition to ensuring the advancement of the child’s best interests through the presentation of relevant evidence, the GAL in an adult criminal proceeding advances the child’s best interests and protects the child’s due

process rights in other important ways. For example, while the GAL is not responsible for setting forth the litigation strategies and objectives, *see* Colo. R. Prof'l Conduct 1.2 (client sets objective, counsel sets strategy), if the GAL becomes aware of childhood trauma, abuse or neglect, or any other background information potentially relevant to the child's defense, the GAL will share such information with defense counsel, enabling defense counsel to conduct the appropriate investigation and research necessary to determine whether to incorporate the information into the defense strategy. If the child experiences hardship or trauma as a result of conditions of confinement, the GAL will present such information to the adult or juvenile facility and to the court when necessary. The GAL is also in a position to raise any issues with defense representation, such as the conflict and otherwise ineffective assistance alleged in this proceeding, with the court.

The Court of Appeals erred when it limited its focus to Mr. Ybanez's age at the time of the trial and his need for a GAL at that point in the proceedings. The above analysis makes clear that a GAL serves to protect and promote the best interests of the child throughout the entire proceeding and duration of the GAL's appointment.

B. The GAL cannot fulfill the role of defense counsel or serve as a member of the defense team.

Despite the important contribution a GAL may make in a criminal proceeding, a GAL does not fulfill the role of defense counsel, cannot substitute for defense counsel, and cannot cure any conflict of interest in defense counsel's representation. As recognized by this Court in *Gabrieheski*, GALs do not perform the role of counsel:

Rather than representing the interests of either the petitioner or respondents in the litigation, or even the demands or wishes of the child, the legal responsibility for whom is at issue in the proceedings, the guardian ad litem is statutorily tasked with assessing and making recommendations to the court concerning the best interests of the child. . . . And while the applicable Chief Justice Directive clearly contemplates that such guardians ad litem may be performing functions touching on their professional obligations as lawyers, and therefore requiring their adherence to the Rules of Professional Conduct, *see, e.g.*, CJD 04–06 V. F., no more than the statutes themselves does it purport to designate an attorney-client relationship between a guardian ad litem in dependency and neglect proceedings and the child who is the subject of those proceedings. . . . Nothing in the term “guardian ad litem,” which on its face indicates merely a guardian for purposes of specific proceedings or litigation, suggests an *advocate* to serve as counsel for the child as distinguished from a *guardian*, charged with representing the child's best interests. *See generally* Black's Law Dictionary (9th ed. 2009).

262 P.3d at 659 (citations omitted) (analyzing the role of a GAL in a dependency and neglect proceeding).

While the GAL appointment statute may be discretionary, child defendants are entitled to defense counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). The particular importance of available, specialized, and effective defense counsel for children is now established. H.B. 13-1279, 1st Sess. (Colo. 2013) (requiring judge to make every effort to ensure that a child in a delinquency proceeding does not prematurely waive the right to counsel); Campaign for the Fair Sentencing of Youth, *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence* at 5 (June 9, 2015) (hereinafter “Campaign for Fair Sentencing of Youth Guidelines”) fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf. (last visited June 9, 2015) (“set[ting] forth a national standard of practice to ensure zealous, constitutionally effective representation for all juveniles facing a possible life sentence”). GALs may be able to raise issues with defense representation but do not replace the critical function that defense counsel provides.

GALs do have duties of confidentiality, loyalty, and diligence. *See* CJD 04-06(V)(B); *see generally* Colo. R. Prof'l. Conduct. 1.3-1.9 (defining professional obligations of loyalty, confidentiality, and diligence).

However, the unique client of the GAL, the “best interests of the child,” directs these professional responsibilities, rather than the objectives and desires of the child. CJD 04-06(V)(B); *see also* Colo. R. Prof'l. Conduct 1.2. The GAL’s professional obligations place the GAL in a position of potential conflict with defense counsel, eliminating the GAL as an appropriate member of the defense team. *See* Campaign for Fair Sentencing of Youth Guidelines, *supra*, at 9 -10 (outlining the defense team composition, specifying that all members of the defense team must be agents of the defense counsel, and requiring all members of the defense team must have a duty of loyalty to the child client and “act at the direction of the child client”).

The question certified in this case asks whether a child in a direct proceeding is entitled to a GAL “to assist with his defense and to advise him regarding the waiver of his constitutional trial rights.” It is the role of defense counsel—not the GAL—to advise on the waiver of any constitutional rights. As the above analysis makes clear, while the GAL must inform defense counsel and the court of any issues impacting the validity of a plea agreement or a child’s decision whether to testify, such as the child’s understanding of the consequences or any pressures the child may

be facing impacting the voluntariness of the decision, the responsibilities and authority of the GAL do not allow the GAL to advise on the waiver of constitutional rights. Similarly, while a GAL may raise issues regarding the adequacy of defense counsel's representation, the GAL is not a member of the defense team and does not "assist in the defense."

CONCLUSION

Amicus requests that this Court's analysis of Mr. Ybanez's entitlement to a GAL give due consideration to Mr. Ybanez's status as a juvenile and be based on an accurate analysis of the role of the GAL, including its protections and limitations.

Respectfully submitted this 18th day of June, 2015,



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**Colorado Appellate Rule 29(f) Addendum: Statutory Provisions Regarding
the Appointment of a GAL for a Child²**

§ 12-37.5-107, C.R.S. (2014)(Judicial Bypass)

(2)(b) The court, in its discretion, may appoint a guardian ad litem for the minor and also an attorney if said minor is not represented by counsel.

14-10-116, C.R.S. (2014) (Domestic Relations Proceedings)

(1) The court may, upon the motion of either party or upon its own motion, appoint an attorney, in good standing and licensed to practice law in the state of Colorado, to serve as the legal representative of the child, representing the best interests of the child in any domestic relations proceeding that involves allocation of parental responsibilities. In no instance may the same person serve as both the child's legal representative pursuant to this section and as the child and family investigator for the court pursuant to section 14-10-116.5. Within seven days after the appointment, the appointed person shall comply with the disclosure provisions of subsection (2.5) of this section.

² Only relevant provisions of statutes provided.

(2) The legal representative of the child, appointed pursuant to subsection (1) of this section, shall represent the best interests of the minor or dependent child, as described in section 14-10-124, with respect to the child's custody, the allocation of parental responsibilities, support for the child, the child's property, parenting time, or any other issue related to the child that is identified by the legal representative of the child or the appointing court. The legal representative of the child shall actively participate in all aspects of the case involving the child, within the bounds of the law. The legal representative of the child shall comply with the provisions set forth in the Colorado rules of professional conduct and any applicable provisions set forth in chief justice directives or other practice standards established by rule or directive of the chief justice pursuant to section 13-91-105(1) (c), C.R.S., concerning the duties or responsibilities of best interest representation in legal matters affecting children. The legal representative of the child shall not be called as a witness in the case. While the legal representative of the child shall ascertain and consider the wishes of the child, the legal representative of the child is not required to adopt the child's wishes in his or her recommendation or advocacy for the child unless such wishes serve the child's best interest as described in section 14-10-124.

§ 15-14-115, C.R.S. (2014) (Probate)

At any stage of a proceeding, a court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

§ 19-1-111, C.R.S. (2014) (Children's Code General Appointment Statute)

(1) The court shall appoint a guardian ad litem for the child in all dependency or neglect cases under this title.

(2) The court may appoint a guardian ad litem in the following cases:

(a) For a child in a delinquency proceeding where:

(I) No parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, relative, stepparent, or spousal equivalent appears at the first or any subsequent hearing in the case;

(II) The court finds that a conflict of interest exists between the child and parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, relative, stepparent, or spousal equivalent; or

(III) The court makes specific findings that the appointment of a guardian ad litem is necessary to serve the best interests of the child and such specific findings are included in the court's order of appointment.

(b) For a child in proceedings under the “School Attendance Law of 1963”, article 33 of title 22, C.R.S., when the court finds that the appointment is necessary due to exceptional and extraordinary circumstances;

(c) For a parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, stepparent, or spousal equivalent in dependency or neglect proceedings who has been determined to have a mental illness or developmental disability by a court of competent jurisdiction; except that, if a conservator has been appointed, the conservator shall serve as the guardian ad litem. If the conservator does not serve as guardian ad litem, the conservator shall be informed that a guardian ad litem has been appointed.

(2.5) A court shall not deem a guardian ad litem who is appointed by the court for a juvenile in a delinquency proceeding pursuant to subsection (2) of this section to be a substitute for defense counsel for the juvenile.

(3) The guardian ad litem for the child shall have the right to participate in all proceedings as a party, except in delinquency cases.

(4)(a) Except as provided in paragraphs (b) and (c) of this subsection (4), the appointment of a guardian ad litem pursuant to this section shall continue until such time as the court's jurisdiction is terminated.

(b) The appointment of the guardian ad litem shall terminate in a delinquency proceeding:

(I) At the time sentence is imposed, unless the court continues the appointment because the child is sentenced to residential or community out-of-home placement as a condition of probation; or

(II) When the child reaches eighteen years of age, unless the child has a developmental disability.

(c) The court may terminate the appointment of a guardian ad litem in a delinquency proceeding on its own motion or on the motion of the guardian ad

litem when the appointment is no longer necessary due to any of the following reasons:

(I) The child's parent, guardian, legal custodian, custodian, person to whom parental responsibilities have been allocated, relative, stepparent, or spousal equivalent appears at a hearing in the case;

(II) The conflict of interest described in subparagraph (II) of paragraph (a) of subsection (2) of this section no longer exists; or

(III) The appointment no longer serves the best interests of the child.

(5) The guardian ad litem shall cooperate with any CASA volunteer appointed pursuant to section 19-1-206.

(6) Any person appointed to serve as a guardian ad litem pursuant to this section shall comply with the provisions set forth in the chief justice directive 97-02, concerning the court appointment of guardians ad litem and other representatives and of counsel for children and indigent persons in titles 14, 15, 19 (dependency and neglect only), 22, and 27, C.R.S., and any subsequent chief justice directive or other practice standards established by rule or directive of the chief justice

pursuant to section 13-91-105, C.R.S., concerning the duties or responsibilities of guardians ad litem in legal matters affecting children.

§ 19-2-517, C.R.S. (2014) (Adult Criminal Proceedings)

(8) The court in its discretion may appoint a guardian ad litem for a juvenile charged by the direct filing of an information in the district court or by indictment pursuant to this section.

§ 19-3-203, C.R.S. (2014) (Dependency and Neglect Proceedings)

(1) Upon the filing of a petition under section 19-3-502 that alleges abuse or neglect of a minor child, the court shall appoint a guardian ad litem. Nothing in this section shall limit the power of the court to appoint a guardian ad litem prior to the filing of a petition for good cause.

(2) The guardian ad litem shall be provided with all reports relevant to a case submitted to or made by any agency or person pursuant to this article, including reports of examination of the child or persons responsible for the neglect or dependency of the child. The court and social workers assigned to the case shall keep the guardian ad litem apprised of significant developments in the case, particularly prior to further neglect or dependency court appearances.

(3) The guardian ad litem shall be charged in general with the representation of the child's interests. To that end, the guardian ad litem shall make such further investigations as the guardian ad litem deems necessary to ascertain the facts and shall talk with or observe the child involved, examine and cross-examine witnesses in both the adjudicatory and dispositional hearings, introduce and examine the guardian ad litem's own witnesses, make recommendations to the court concerning the child's welfare, appeal matters to the court of appeals or the supreme court, and participate further in the proceedings to the degree necessary to adequately represent the child. In addition, the guardian ad litem, if in the best interest of the child, shall seek to assure that reasonable efforts are being made to prevent unnecessary placement of the child out of the home and to facilitate reunification of the child with the child's family or, if reunification is not possible, to find another safe and permanent living arrangement for the child. In determining whether said reasonable efforts are made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern.

§19-4-110, C.R.S. (2014)(Paternity)

The child may be made a party to the action. If the child is a minor, the court may appoint a guardian ad litem. The child's mother or father may not represent the child as guardian or otherwise.

§ 19-5-103(9)(a) C.R.S. (2014)(Relinquishment)

(9)(a) The court may appoint a guardian ad litem to protect the interests of the child if:

(I) The court finds that there is a conflict of interest between the child and his or her parents, guardian, or legal custodian;

(II) The court finds that such appointment would be in the best interests of the child; or

(III) The court determines that the child is twelve years of age or older and that the welfare of the child mandates such appointment.

§ 27-65-103, C.R.S. (2014) (Mental Health)

(3) A minor who is fifteen years of age or older or a parent or legal guardian of a minor on the minor's behalf may make voluntary application for hospitalization.

Application for hospitalization on behalf of a minor who is under fifteen years of age and who is a ward of the department of human services shall not be made unless a guardian ad litem has been appointed for the minor or a petition for the same has been filed with the court by the agency having custody of the minor; except that such an application for hospitalization may be made under emergency circumstances requiring immediate hospitalization, in which case the agency shall file a petition for appointment of a guardian ad litem within seventy-two hours after application for admission is made, and the court shall appoint a guardian ad litem forthwith. Procedures for hospitalization of such minor may proceed pursuant to this section once a petition for appointment of a guardian ad litem has been filed, if necessary. Whenever such application for hospitalization is made, an independent professional person shall interview the minor and conduct a careful investigation into the minor's background, using all available sources, including, but not limited to, the parents or legal guardian and the school and any other social agencies. Prior to admitting a minor for hospitalization, the independent professional person shall make the following findings:

- (a) That the minor has a mental illness and is in need of hospitalization;
- (b) That a less restrictive treatment alternative is inappropriate or unavailable; and

(c) That hospitalization is likely to be beneficial.

...

(7)(a) When a minor does not consent to or objects to continued hospitalization, the need for such continued hospitalization shall, within ten days, be reviewed pursuant to subsection (5) of this section by an independent professional person who is not a member of the minor's treating team and who has not previously reviewed the child pursuant to this subsection (7). The minor shall be informed of the results of such review within three days of completion of such review. If the conclusion reached by such professional person is that the minor no longer meets the standards for hospitalization specified in subsection (3) of this section, the minor shall be discharged.

(b) If, twenty-four hours after being informed of the results of the review specified in paragraph (a) of this subsection (7), a minor continues to affirm the objection to hospitalization, the minor shall be advised by the director of the facility or his or her duly appointed representative that the minor has the right to retain and consult with an attorney at any time and that the director or his or her duly appointed representative shall file, within three days after the request of the minor, a statement requesting an attorney for the minor or, if the minor is under fifteen

years of age, a guardian ad litem. The minor, his or her attorney, if any, and his or her parent, legal guardian, or guardian ad litem, if any, shall also be given written notice that a hearing upon the recommendation for continued hospitalization may be had before the court or a jury upon written request directed to the court pursuant to paragraph (d) of this subsection (7).

(c) Whenever the statement requesting an attorney is filed with the court, the court shall ascertain whether the minor has retained counsel, and, if he or she has not, the court shall, within three days, appoint an attorney to represent the minor, or if the minor is under fifteen years of age, a guardian ad litem. Upon receipt of a petition filed by the guardian ad litem, the court shall appoint an attorney to represent the minor under fifteen years of age.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2015, a true and correct copy of the foregoing Colorado Office of the Child's Representative Amicus Curiae brief was served electronically via ICCES or by US mail on the following:

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