IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0228

IN THE MATTER OF:

J.G.F.,

A Youth Under the Age of 18.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial Youth Court,
Lewis and Clark County, the Honorable Kathy Seeley, Presiding

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ISSUES PRESENTED

1. Youths enjoy constitutional and statutory rights to a jury trial in youth court proceedings. The youth court did not fulfill its statutory duty to advise an inexperienced 14-year-old J.G.F. of his jury trial rights, J.G.F. did not waive those rights in writing, and the record lacks sufficient evidence to establish he personally relinquished those rights fully knowing the nature of the rights and the consequences of doing so. Did the court violate J.G.F.'s rights when it held a bench trial anyway?

2. Youths enjoy a constitutional right to effective assistance of counsel in youth court proceedings, which includes the right to have counsel file motions to suppress evidence obtained in violation of the youth's rights to remain silent and to counsel and prohibiting the admission of involuntary confessions. During J.G.F.'s stationhouse interrogation, his mother—also the parent of the alleged victim—operating under significant conflicts of interests with her son, agreed to waive his rights and assumed an adversarial and hostile role by interrogating J.G.F., providing incriminating evidence, and angrily instructing him to "be completely fucking honest." Only after the

investigating officer misrepresented his half-sister's disclosure and told J.G.F. he believed everything she told him did the tearful and frightened boy tell the officer what he wanted to hear. Was J.G.F. denied the right to effective assistance of counsel by counsel's failure to file a motion to suppress his confession?

STATEMENT OF THE CASE

The State filed a delinquency petition in youth court alleging then-13-year-old Appellant J.G.F. committed acts that, if committed by an adult, would constitute four counts of felony sexual assault against his then-4-year-old half-sister, A.L. (Y.C. Doc. 7.) Although J.G.F. did not personally waive his rights to a jury trial in writing or orally in court, the court proceeded to hold a one-day bench trial. Relying on J.G.F.'s admissions during a custodial stationhouse interrogation, and even though A.L. denied he touched her intimate parts at trial, the court found the allegations in the petition were true. (*See* Y.C. Doc. 34, attached as Appendix A, COL 5-12 and Order 1.) The court placed J.G.F. on probation for three years upon conditions and retained jurisdiction until age 21 for financial purposes only. (Y.C. Doc. 42, attached as Appendix B, at 1-3.)

STATEMENT OF FACTS

I. J.G.F.'s interrogation

In February 2021, 13-year-old J.G.F. was living with his mother, E.L. [Mother], and his four siblings, including his half-sister, A.L., who had just turned 5. (*See* App. A, FOF 1-3 (accurately identifying J.G.F.'s birthdate but miscalculating his age).) On February 22, Helena Police Detective Brandon Wootan, child protection specialist Justine Clinch, and a uniformed officer, arrived at the family's home unannounced and told Mother they needed to do a forensic interview with A.L. (*See* App. A, FOF 16; Trial Tr. at 103, 130-31.) Mother consented. (Trial Tr. at 131.) J.G.F. and his siblings remained at home with T.M., Mother's sister [Aunt], who was cooperating with the authorities. (Trial Tr. at 102-04.)

Wootan and Clinch watched A.L.'s interview remotely. (Trial Tr. at 131-32.) At the conclusion, Wootan told Mother that A.L. "had disclosed some sort of physical contact in what I would describe as her sexual or intimate parts." (Trial Tr. at 132.) Wootan informed Mother he would like to interview J.G.F. the following day, but she "insisted"

the interview occur that evening. (App. A, FOF 26.) Mother told Aunt to bring J.G.F. to the stationhouse, where he saw A.L. with Mother. (Trial Tr. at 103, 131, 188.)

Detective Wootan interviewed J.G.F. in a small room equipped with video equipment. (*See gen.* State's Ex. 8, offered and admitted Trial Tr. at 138.) Also present were Mother and Clinch. (Trial Tr. at 133.) Mother and J.G.F. sat on opposite ends of a couch, with Mother perched on the edge and her son behind her. She was turned away from J.G.F. through much of the interview. She did not look at her son. (*See gen*. State's Ex. 8; App. A, FOF 27.) J.G.F. was aware Mother was upset. (*See* Trial Tr. at 207.) When the interview started, J.G.F. was wearing a winter coat with the hood up, obscuring his face. (Trial Tr. at 136; *see also* State's Ex. 8.) Wootan described J.G.F. as "very close guarded," with "very rigid" posture, and stated "[i]t was pretty clear he was uncomfortable in the situation." (Trial Tr. at 133.)

Wootan began the interrogation after 7:00, telling J.G.F. he was going to advise him and Mother of J.G.F.'s rights because he was at the police station and "behind a locked door." (App. A., FOF 27; State's

Ex. 7, offered and admitted, Trial Tr. at 147, at 2.) Wootan explained this did not mean he was under arrest or that Wootan had decided to charge him with anything. (*Id.*) Mother piped in, "The *Miranda* rights?," and indicated she would sign "that form." (*Id.*) Wootan then read the following advisory:

> So before we ask any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to talk to a lawyer before we ask you any questions and have him or her with you while you're being questioned. If you or your parents cannot afford a lawyer, one will be appointed for you. You can decide at any time to exercise your rights and stop talking.

(State's Ex. 7 at 3.)

When Wootan asked "do you have any questions any of the things I've read you?," Mother responded, "No. Pretty solid." (*Id.*) Wootan then asked J.G.F., "Do you understand—you understand it?" J.G.F. responded, "Uh-huh." (*Id.*) J.G.F. asked no questions and received no further explanation before signing "G."[1] on the form. (*Id.* at 3-4.) He was never told he was free to leave the locked room, or how his

[1] J.G.F. goes by his middle name.

statements could be used against him in "a court of law," what a lawyer did, or how to "exercise his rights."

Knowing J.G.F. was under 16, Wootan turned to the waiver portion of the form, explaining "Mom has to agree" to waive his rights, which she promptly did. (State's Ex. 7 at 4.) Wootan told J.G.F. if he was "okay with talking" to Wootan "without a lawyer present," he needed to sign the waiver. (*Id.*) Again J.G.F. had to be reminded to sign his full name. Mother signed as his parent. (*Id.* at 4-5.) J.G.F. later testified he did not completely understand his *Miranda* rights but signed the waiver because he "just wanted to get it over with." (Trial Tr. at 187.)

Wootan informed J.G.F. he could tell Wootan if there was "something he didn't want to answer." (State's Ex. 7 at 7.) Wootan told J.G.F. he expected J.G.F. to do most of the talking, and Wootan was there to listen. When asked if she had any questions, Mother indicated she was "listening as well." (*Id.* at 7.) But Mother did not merely listen; she repeatedly interjected throughout the interview. (*See, e.g.*, State's Ex. 7 at 13-14, 18-19, 31, 33.)

Wootan knew or learned J.G.F. was 13, in eighth grade, and had been receiving mental health services through his school for years. (State's Ex. 7 at 8-9, 42; 2/23/2021 Tr. at 11 (testifying regarding mental health issues); *see also* App. A, FOF 29.)

J.G.F. did not know why he was being interviewed. (State's Ex. 7 at 7, 18; Trial Tr. at 187.) After some discussion regarding his family situation, Wootan informed J.G.F., "One of your siblings told us that you've been touching them inappropriately." (State's Ex. 7 at 18.) When J.G.F. expressed some confusion with the term "inappropriate," Mother took over:

> [MOTHER]: Do you remember when you came to me—
>
> MR. [F.]: Yes.
>
> [MOTHER]: —and you were trying to be honest, and you said that, and I specifically asked you, and I explained to you the difference between spanking and inappropriate touching?
>
> MR. [F.]: Yes.

(State's Ex. 7 at 18-19.)

Wootan then asked J.G.F. which sibling he thought "reported the inappropriate touching?" J.G.F. guessed A.L., explaining he tickled her. (App. A, FOF 30-31; State's Ex. 7 at 19-20.) J.G.F. testified he thought

it was A.L. because he had seen her at the police station when he came in for questioning that night and his other siblings were at home. (Trial Tr. at 188.)

Wootan told J.G.F. his "goal in this is not to send you away for the rest of your life;" he thought J.G.F. "had some issues . . . that you need some help for;" "the road to getting better starts now;" and "the goal of everyone in this room, is not to bury you" but "to help you." (State's Ex. 7 at 20-21.) Unsatisfied with J.G.F.'s answers, Wootan stated A.L. had told him that J.G.F. touches her "pee-pee"; she had told J.G.F. to stop but he wouldn't; that it was a game; and that Wootan believed "everything she told" him. (*Id*. at 21, 23; *but see* App. A, FOF 32.) J.G.F. stated when he was rubbing her back, he sometimes "went a little far, going too far down." (App. A, FOF 32.) Wootan informed J.G.F. he believed J.G.F. knew what he was doing and it was not an accident, prompting a tearful J.G.F. to agree, "I do touch her there." (App. A, FOF 32; State's Ex. 3 at 23-25.) When Wootan congratulated J.G.F. for taking "a really big step," stating although he had "confessed committing a crime," "this is how we get you the help that you need," State's Ex. 3 at 27, J.G.F. began sobbing audibly, prompting Wootan to

ask if he needed to "take a minute." (*Id*. at 25; *see also* State's Ex. 8 at 19:18:50-19:19:10.)

J.G.F. stated he had rubbed A.L.'s "vagina" over her clothing but had stopped because he "realized it was wrong." (State's Ex. 7 at 25-26, 35; App. A, FOF 34.) J.G.F. also expressed he did not want to end up like his dad, which resulted in him crying heavily. (*See* State's Ex. 8 at 19:24:10-19:24:30; State's Ex. 7 at 29.) When J.G.F. repeated that concern, Mother interjected in an annoyed tone, "Your dad doesn't touch little girls." (App. A, FOF 34; State's Ex. 7
at 31.)

After a lengthy lead-in regarding J.G.F. having to live with what he had done, Wootan asked, "So you said, *it* started about a month ago, right? How many times in that month, do you think?" J.G.F., crying, responded, "About four or five." (App. A, FOF 35; State's Ex. 7 at 28; State's Ex. 8 at 19:23:25-19:23:45 (emphasis added).) However, the record does not indicate J.G.F. ever stated he started touching A.L. "about a month ago." J.G.F. later testified he thought Wootan was referring to something else when he said "it" started a month ago. (App. A, FOF 46.)

Wootan told J.G.F. if there was anything else that he was leaving out, "now would be the time." (State's Ex. 7 at 32-33.) Mother angrily jumped in:

> [MOTHER]: To be completely fucking honest.
>
> DET. WOOTAN: Yes.
>
> [MOTHER]: So that you can get fucking help. You know right from wrong.
>
> MR. [F.]: I know.
>
> [MOTHER]: Is this your way of punishing me?

(State's Ex. 7 at 33; State's Ex. 8 at 19:30:05-19:30:45.)

J.G.F. later tearfully stated he did not know what sexual gratification was, he did not get "some sort of pleasure" when touching A.L., he had no "goal" in touching his sister, and he didn't know why it happened, it just did. (State's Ex. 7 at 36-37; App. A, FOF 36.)

Although Wootan offered to cite and release J.G.F., Mother opted to have him arrested and sent to the Great Falls Juvenile Detention Facility. (Trial Tr. at 144-45.) When J.G.F. learned this, J.G.F. asked Wootan if there would be other kids there. When Wootan answered yes, J.G.F. exclaimed, "Are you trying to kill me?" (State's Ex. 7 at 40.) J.G.F.'s next concern was how he was going to get to school the next

day. (*Id*. at 41.) Despite being assured confessing would result in J.G.F. getting help, around 9:00 p.m., J.G.F. was arrested, searched, and placed in handcuffs and leg chains for transport to jail. (*Id*. at 39-47; State's Ex. 8 at 20:11:55-20:21:55; Trial Tr. at 136.)

J.G.F. testified when he feels "attacked" or "under stress," he "start[s] blubbering and say[ing] stuff" that he doesn't really mean or that may not be true in hopes of just "get[ting] out of there." (Trial Tr. at 186, 192-93.) J.G.F. found Wootan a "little" "intimidating," and the interview was "insane[ly]" stressful. (*Id*. at 186, 204.) J.G.F. agreed Mother also asked him leading questions in a stressful or intimidating way, her command that he needed to "be completely fucking honest" so he could get some "fucking help" was very intimidating, and having Mother in the room was a cause of his stress. (*Id*. at 205-06.)

II. A.L.'s alleged disclosures

Contrary to what Wootan told Mother before the interrogation and J.G.F. during it, A.L. had not previously told him—or said to anyone—that J.G.F. touched her pee-pee. (*See* App. A, FOF 8-25 (absence of that finding).) A.L.'s therapist, Kristina Dukart, a certified play therapist, testified A.L.' s play—burying a naked girl doll in the sand and flooding

the tray with water—along with her toileting issues[2] were "empirically related" to and "potentially consistent" with sexual abuse.[3] (Trial Tr. at 44-46; *see also* App. A, FOF 12-13.) "Reflecting" that an agitated Mother had talked about a recent toileting incident in A.L.'s presence, Dukart asked the girl doll if she wanted to talk about that, or how she felt about it. (*Compare* Trial Tr. at 19 *with* 46-47.) Several minutes later, A.L. stated "[G.] plays the pee-pee game with" her. (App. A, FOF 13; Trial Tr. at 47.) In response to Dukart's subsequent questioning, A.L. indicated the doll did not like the pee-pee game, had asked J.G.F. to stop but he wouldn't, and was not supposed to tell anyone about the game, and that mommy got mad when "she" tells. (App. A, FOF 13.) A.L. did not explain how to play the pee-pee game. (*See* App. A, FOF 13; Trial Tr. at 47, 49.)

Dukart called the child abuse hotline, initiating the investigation that resulted in Mother consenting to A.L.'s forensic interview. (App. A, FOF 14-16.) Paula Samms, a certified forensic interviewer, conducted

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[2] A.L. was urinating in inappropriate places. (App. A, FOF 8.)

[3] Dukart was not noticed as an expert witness, *see* Y.C. Docs. 14-15, and her notes were never provided to the defense, *see* Y.C. Doc. 27 (request to produce never ruled on). This testimony was admitted without objection.

that interview. (App. A, FOF 18.) She testified the purpose of a forensic interview is to "help[] young people tell us if something is happening as accurately as possible." (Trial Tr. at 62.) To reduce suggestibility, forensic interviews are conducted in a non-authoritarian environment with an interviewer who is not an authority figure and outside the presence of their parents, who can influence their child's answers. (*Id*. at 87-88.) The child's developmental stage should be taken into account, and the questions should be concrete and not leading or suggestive. (*Id*. at 87-89.) Samms indicated she regularly conducts forensic interviews on alleged victims or witnesses up to age 18, but not minor suspects because "they have rights I can't fulfill. It's not my role on the team." (*Id*. at 64.)

A.L.'s interview started around 5:30 p.m. (App. A, FOF 18.) Samms testified she had been informed A.L. had made an "accidental and prompted disclosure" to a counselor that she and J.G.F. were playing a game involving "sexual touching." (Trial Tr. at 67.) Samms spent the next 34 minutes attempting to corroborate that alleged disclosure. (App. A, FOF 25 (interview length).)

A.L. did not spontaneously offer information about "inappropriate" touching. (App. A, FOF 21.) Samms had to ask A.L. "several different questions" and use multiple "different prompts" to get her to start talking about the alleged touching "game." (Trial Tr. at 69-70; *see also* State's Ex. 3, offered and admitted, Trial Tr. at 78, at 1-9.) A.L. revealed nothing about J.G.F. and touching until Samms gave her no less than 18 different prompts and had already introduced the concepts of touching A.L.'s body and a bad "game." (*Id*. at 8-9.) In addition, A.L.'s "disclosure" came after Samms told A.L.:

> So, [A.L.], sometimes I talk to kids because somebody has hurt them on their body, or touched them on their body; [pause] or something like that. And did you know, if somebody hurt you on your body, or touches you on your body, that's important to let a grownup know?

(*Id.* at 8.)

A.L. eventually stated she and J.G.F. played the "body parts game," but you only touch your own body parts. (App. A, FOF 21-22; State's Ex. 3 at 9-10.) Samms then pulled out an anatomically-correct drawing "to help focus" A.L. on her body parts even more. (Trial Tr. at 70.) A.L. identified the genital area on the diagram as the "pee-pee," denied she had a pee-pee, explained only boys have pee-pees, and then

stated she was going to grow one. (State's Ex. 3 at 19-20.) This was not A.L.'s first fantastical claim during the interview. (*See id.* at 5 (her siblings were 5 and Mother was 10); *id.* at 9 (she cracked all her bones when playing).)

When Samms asked A.L. what parts of her body "get touched" in the game with J.G.F., she responded, "Just all of my parts. Even my hair. . . . And then he gives me ice cream." (App. A, FOF 23.) A.L. later stated J.G.F. gives her ice cream "[a]fter he touches my body parts." (App. A, FOF 23; State's Ex. 3 at 21-22.) A.L. indicated "touching all of your bodys [sic.]" is "not safe." (State's Ex. 3 at 21-22.)

Samms asked A.L. to draw a picture of J.G.F. playing "that game." A.L. drew a stick figure of J.G.F. smiling because "[h]e's just so excited he's doing the game." She drew a second one where she was saying "no, that's not safe. You cannot touch my body parts, [G.]." A.L. stated J.G.F. was "smiling to do the game. And now he's not. . . . He's just scared. And I'm not doing that game with him." (App. A, FOF 24; *see also* State's Exs. 1-2, offered and admitted at 76, 121.) A.L. was unable to depict what body parts J.G.F. was touching during the game on her drawing. (*See gen.* App. A, FOF (absence of finding); Trial Tr.

at 82-83; *see also* State's Exs. 1-2.) When asked what she made of the conversation regarding touching not being "safe," Samms admitted she did not know. (Trial Tr. at 85.)

Samms yet again told A.L. it was important to let a grownup know if "somebody touches or bothers nipples, or pee-pees, or butts." (State's Ex. 3 at 26.) A.L. responded that was "gross" and "they have to wash their hands." (*Id*. at 26-27.) When asked, "has somebody ever had to wash their hands because that's gross," A.L. answered, "G." (*Id*. at 27.)

III. The aftermath

Aunt testified that on the day after J.G.F.'s arrest, Mother, in A.L.'s presence, stated A.L. was not telling the truth and J.G.F. had been intimidated during the interview. (Trial Tr. at 104-05.) A.L. later told Aunt she was not lying. (*Id*.) Later that same day, Mother told J.G.F. he had been intimidated and needed to talk to his lawyer and change his story. (App. A, FOF 39.)

Shortly thereafter, J.G.F.'s siblings were removed from Mother's care and placed with Aunt because Mother did not believe A.L.'s disclosure was true. (App. A, FOF 40; Trial Tr. at 112.) Aunt testified A.L.'s brothers often called her a liar and said it was her fault that they

could not go home. (App. A, FOF 41.) Once, A.L. was crying and told Aunt she was not lying about J.G.F. "touching her vagina." She then pulled her pants down and started rubbing her genital area "hard," explaining that was what he did to her and would not stop when she asked. (App. A, FOF 42; Trial Tr. at 116.)

Mother sent a card to J.G.F. indicating A.L. had retracted the allegations. She further encouraged J.G.F. to stand up for himself, but only "if" he touched A.L. "by accident only or felt intimidated and or bullied into saying something for that liar detective." (App. A, FOF 43.)

IV. J.G.F.'s purported waiver of his jury trial rights

The court did not inform J.G.F. of his jury trial rights at the probable cause and detention hearing. (2/23/2021 Tr. at 5.) The court did not advise J.G.F. of any rights at what was supposed to be his initial appearance on the petition. (*See gen.* 3/3/2021 Tr.) At the continuation of that hearing, the court cursorily advised J.G.F. of the charges against him, the maximum penalty, and his rights to remain silent and to counsel. (*See* 3/10/2021 Tr. at 3-4.) After J.G.F.'s counsel, Mike

Trosper, indicated J.G.F. was prepared to enter denials, the judge stated:

> I'm not going to go through all of your rights, Mr. [F.]. I mean, if you are going to admit, I would go through a lot more stuff with you, but your attorney tells me you are going to deny.

(3/10/2021 Tr. at 5-6.)

J.G.F. denied the allegations in the petition. (3/10/2021 Tr. at 6.) No written advisement of rights was filed.

In the omnibus hearing memorandum, both parties asserted their rights to a 12-person jury trial through their attorneys. (Y.C. Doc. 10 at 5.) Included was the following language:

> The Youth waives the Youth's right to a jury trial and acknowledges that the Youth has been fully advised of the Youth's constitutional right to a jury trial and is voluntarily and knowingly waiving that right to a jury trial.

(Y.C. Doc. 10 at 6.)

J.G.F. did not sign this waiver or the omnibus form; Trosper did.

At the first final pretrial conference, Trosper mentioned the case would be heard by a jury. (7/21/21 Tr. at 4-5.) After trial was

continued, a second final pretrial conference was held. At the beginning of that hearing, Trosper stated:

> Your Honor, I spoke with my client briefly before this hearing, just discussing the jury trial and what it entails and the options at this point. He has opted for a bench trial instead of a jury trial.

(11/3/2021 Tr. at 3.)

The court and counsel then discussed scheduling and logistics regarding the bench trial for several minutes. (*Id.* at 3-5.) Eventually, the judge turned to J.G.F.:

> THE COURT: So, Mr. [F.], do you understand what we're talking about, not having a jury? I'll be the person that decides; do you understand that?
>
> THE YOUTH: Uh-huh, yes.

(*Id.* at 5.)

The court then informed J.G.F. he needed to be present for the December 6th trial. (*Id.*) On December 6, 2021, the court held a bench trial without further discussion. (*See* 12/6/2021 Tr. at 5.)

V. Trial

At the bench trial, A.L. correctly identified her vagina but denied anyone had ever touched her there, stating "[t]hat never happened." (Trial Tr. at 32-33, 35; App. A, FOF 7.) A.L. denied anyone gave her ice

cream after touching her vagina. (App. A, FOF 7.) She denied speaking with Samms. (App. A, FOF 7.) She denied knowing what the "body part game" is. (Trial Tr. at 34.) She remembered speaking with Dukart, but when asked if she ever talked to her about J.G.F. touching her privates, she stated, "I can't remember." (*Id.* at 36-37.) She denied telling anyone else about J.G.F. touching her, including Aunt. (*Id.* at 37.) As discussed above, her extrajudicial statements to Dukart, Samms, and Aunt were admitted into evidence.

J.G.F. testified he never touched anyone sexually and denied he touched A.L.'s vagina. (Trial Tr. at 184, 193.) He admitted he did touch her butt when spanking her. (*Id.* at 184.)

Incorrectly identifying J.G.F.'s age, the court found J.G.F.'s testimony at trial regarding the interrogation was "incredible." (App. A, FOF 47.) Relying in large part on J.G.F.'s admissions during that interrogation and his testimony disavowing those statements, the court found J.G.F. committed four acts of sexual assault. (*See* App. A, FOF 26-36, 45-48, COL 8-10, 12.)

STANDARD OF REVIEW

Constitutional questions receive plenary review, and this Court examines a court's application and interpretation of statutes, including the Youth Court Act, *de novo*. *In re K.J.R.*, 2017 MT 45, ¶11, 386 Mont. 381, 391 P.3d 71.

This Court will "discretionarily review an issue not raised at trial which concerns a fundamental constitutional right" where failure to review the alleged error "may result in a manifest miscarriage of justice, [or] leave unsettled the question of the fundamental fairness of the proceedings . . . ." *State v. Valenzuela*, 2021 MT 244, ¶10, 405 Mont. 409, 495 P.3d 1061 (internal quotation marks and citations omitted). Where an appellant "assert[s] a claim that, if valid, would implicate a significant constitutional right," such as the right to a jury trial, this Court will invoke this discretionary power to determine "if his constitutional right . . . has, in fact, been violated." *See Valenzuela*, ¶12; *State v. Dahlin*, 1998 MT 113, ¶15, 289 Mont. 182, 961 P.2d 182.

SUMMARY OF THE ARGUMENT

When 13-year-old J.G.F. was taken to the police station for questioning, it was his first contact with the justice system. He had no

idea why he was there. Mother did not speak to him before the interrogation, and was so angry, she could not look at him during it. Although there were three adults in the room, none were there to assist him in understanding or exercising his rights.

Indeed, Mother had already agreed to the interview, ordered his appearance for it, waived his rights in writing without discussing them with J.G.F.—who did not fully understand them—interrogated him, provided incriminating evidence, and angrily instructed him to "be completely fucking honest." Wootan merely read the normal advisory to J.G.F. as if he was an adult, informing him he was behind a locked door, and never telling him he was free to leave. He minimized the importance of the interview by saying the goal was to get J.G.F. "help." And he then misrepresented the evidence against J.G.F., stating A.L. had told him that J.G.F. touched her pee-pee—even though she had never said that to anyone—and stated he believed her. Once J.G.F. told Wootan what he wanted to hear, he was hauled off to juvie in handcuffs and leg chains—also with Mother's consent.

Things did not improve when J.G.F. went to court. Despite his tender age, the court abdicated its statutory duty to advise him of his

rights. J.G.F.'s counsel initially requested a jury trial in writing—as did the State. Neither J.G.F. nor his counsel waived his jury trial rights in writing. J.G.F. never verbalized that he wished to waive those rights—and no one asked him if he did. Without inquiring about or finding that J.G.F. knowingly, intelligently, and voluntarily waived his jury trial rights, the court held a bench trial, finding J.G.F. guilty based, in large part, on his involuntary confession.

Throughout these proceedings, J.G.F.'s rights were ignored or outright trampled on. He was denied his constitutional and statutory jury trial rights when the court held a bench trial without the required written waiver. What's more, he did not personally and affirmatively indicate at any time that he was intentionally relinquishing those rights, and the record does not contain sufficient evidence establishing he did so with full understanding of those rights and the consequences of doing so. The court should have conducted a proper colloquy to ensure any purported waiver was constitutionally valid. Holding a bench trial in spite of these errors resulted in a violation of J.G.F.'s fundamental jury trial rights that requires reversal under the plain error doctrine.

Alternatively, J.G.F.'s confession was the product of an invalid waiver of his rights by Mother, who harbored significant and irreconcilable conflicts of interests with J.G.F. due to also being the parent of the alleged victim, which prevented her from acting solely in her son's best interests. Those conflicts were on full display during the interrogation through her hostile and adversarial conduct. Mother and Wootan joined forces to create a coercive environment against which this frightened, inexperienced boy did not stand a chance. Because J.G.F.'s rights were not properly waived with the consent of a nonconflicted parent and his resulting confession was not voluntary, and because the court relied on the confession heavily in finding J.G.F.'s guilt in a case where the evidence was conflicting and not strong, counsel's failure to file a motion to suppress constituted ineffective assistance that prejudiced his defense under any standard. His adjudication and disposition orders should be reversed.

ARGUMENT

I. This Court should exercise its discretion under the plain error doctrine and conclude J.G.F.'s jury trial rights were violated when the youth court conducted a bench trial without informing this inexperienced boy of those rights or obtaining any affirmative indication from J.G.F. personally, either in writing or orally, that he knowingly, intelligently, and voluntarily waived those rights.

A. Because the bench trial was held in the absence of a written waiver of the parties' rights to a jury trial, reversal is required.

"The right to trial by jury in Montana 'is secured to all and shall remain inviolate.'" *State v. E.M.R.*, 2013 MT 3, ¶22, 368 Mont. 179, 292 P.3d 451, quoting Mont. Const. art. II, § 26. The right to a jury trial is both fundamental and personal. *State v. Reim*, 2014 MT 108, ¶30, 374 Mont. 487, 323 P.3d 880. Youths enjoy this fundamental constitutional right in court proceedings. *See E.M.R.*, ¶¶22, 26; *see also* Mont. Const. art. II, § 15. In addition, the Youth Court Act explicitly grants youths a statutory right to a jury trial. § 41-5-1502(1), MCA; *see also E.M.R.*, ¶22.

The Montana Constitution provides a case may be tried without a jury "by consent of the parties expressed in such manner as the law may allow." Mont. Const. art. II, § 26. To protect youths' fundamental

rights, § 41-5-1412(1), MCA, provides that any person afforded rights under the Youth Court Act "must be advised of those rights and any other rights existing under law at the time of the person's first appearance on a petition" under the Act "and at any other time specified in" the Act. Section § 41-5-333, MCA, further specifies that "[a]t a probable cause hearing pursuant to 41-5-332, the youth must be informed of the youth's constitutional rights and the youth's rights under" the Act. Those rights include the jury trial rights described above.

Having been so advised, the youth, his parent, or attorney must demand a jury trial, "or a jury trial is waived." § 41-5-1502(1), MCA. That subsection does not explicitly set forth a procedure for waiving the right to a jury trial once a jury trial has been demanded; however, subsection (4) provides the "jury trial must be conducted in accordance with Title 46, chapter 16." § 41-5-1502(4), MCA. Pursuant to that chapter, a jury trial may be waived only "[u]pon written consent of the parties." § 46-16-110(3), MCA.

In *Dahlin* ¶¶20, 23, this Court concluded "in order for a criminal defendant to waive his right to a jury trial, that waiver must be in

writing with the consent of both parties and filed with the district court" as set forth in § 110(3). Defense counsel's oral representation in open court in the presence of Dahlin was insufficient to waive his right to a jury trial. *Dahlin*, ¶¶20, 23. Although Dahlin failed to preserve this issue below, the Court nonetheless reviewed it under the plain error doctrine because it implicated a fundamental constitutional right and failure to review it would leave unsettled a question of the fundamental fairness of the proceedings. *Dahlin*, ¶15. The Court concluded failure to follow the statutory procedure violated Dahlin's right to a jury trial, and reversal of his conviction was required, regardless of whether the State could show a knowing, voluntary, and intelligent waiver. *Dahlin*, ¶¶22, 25.

In *Reim*, ¶¶30, 34, the Court once again invoked the plain error doctrine to review the defendant's claim that the district court improperly concluded he had validly waived his right to a jury trial, but distinguished *Dahlin* on its facts. The Court held the written waiver requirement was satisfied where the State requested a bench trial in writing and the defendant's attorney filed a written motion to vacate the jury trial. Because Reim—an adult—personally did not object at

the start of trial when the judge stated he had a written waiver from Reim and proceeded to hold a bench trial, his attorney's written waiver could be attributed to him. *Reim*, ¶¶33-34.

Dahlin and *Reim* require reversal of J.G.F.'s adjudication and disposition order. Both J.G.F. and the State demanded a jury trial in writing through counsel, as Trosper later confirmed in open court. Consistent with § 110(3), the omnibus form contained a waiver section, which explicitly informed the youth of the right, contained an affirmation that the waiver was knowing and voluntary, and required the youth's signature. But J.G.F. did not sign that waiver or the omnibus form. Thus, as in *Dahlin*, the court conducted a bench trial without any written waiver from J.G.F. or the State. *Reim* is distinguishable because there is no written waiver or motion signed by J.G.F.'s attorney that could even arguably satisfy the written waiver requirement. Like in *Dahlin* and *Reim*, this Court should review this claim under the plain error doctrine. And as in *Dahlin*, ¶24, this Court should conclude J.G.F.'s right to a jury trial was violated and reversal of his adjudication and disposition orders is required.

B. Because the youth court did not find, and there is insufficient evidence in the record establishing, that J.G.F., with full knowledge and understanding of his jury trial rights, personally, intentionally and voluntarily relinquished them, this case must be reversed.

Waiver is the "'intentional relinquishment or abandonment' of a fully known right" free from coercion. *In re Gault*, 387 U.S. 1, 42 (1967), *quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *Accord State v. Ariegwe*, 2007 MT 204, ¶83, 338 Mont. 442, 167 P.3d 815. That is, at a minimum, a waiver must be knowing, intelligent, and voluntary. *See, e.g., Dahlin*, ¶22; *Reim*, ¶34. A valid waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Whether a juvenile has validly chosen to forgo his rights depends upon the totality of the circumstances surrounding the alleged waiver, including "the juvenile's age, experience, education, background, and intelligence," as well as "whether he has the capacity to understand . . .

the nature of his . . . rights and the consequences of waiving those rights." *See Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

"This Court indulges in every reasonable presumption against waiver of a fundamental constitutional right," *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶18, 396 Mont. 57, 443 P.3d 504, and will "not presume acquiescence in the loss of fundamental rights," *Ariegwe*, ¶83. Thus, the State bears the burden of proving by a preponderance of the evidence that a waiver is constitutionally valid. *Salsgiver*, ¶17.

J.G.F.'s adjudication and disposition order must be reversed because the court did not find, and the record here is insufficient to establish, that J.G.F. intentionally relinquished his right to a jury trial with full awareness of the nature of that right and its consequences. J.G.F. did not personally orally waive those rights in court. The youth court did not ask J.G.F. whether he wished to waive his right to a jury trial, and he never stated on the record that he did. The court's sole question to J.G.F. was whether he understood what the adults in the room were talking about—not whether he agreed with them. There was no oral waiver.

J.G.F.'s silence cannot be construed as an implicit waiver or ratification of his attorney's statement under the facts of this case. J.G.F. was a child with no prior youth court history. Like most kids his age, he simply answered the question posed to him by the authority figure in the black robe up on the bench. Nothing more can be inferred from his failure to speak out of turn in court. It did not constitute an affirmative and intentional relinquishment of the jury trial rights.

That is particularly so because J.G.F. was never advised of his constitutional and statutory rights to a jury trial by the court as required by the Youth Court Act. Nor did the court advise the boy of those rights when the alleged waiver occurred. No written acknowledgment of rights was filed. J.G.F.'s silence in the face of these omissions was not a waiver.

Regardless, the court did not find, and the record here is insufficient to support a finding, that J.G.F. more likely than not knowingly and intelligently waived those rights. "[A] trial court must satisfy itself that [a defendant's] waiver of his constitutional rights is knowing and voluntary," meaning that he "actually does understand the significance and consequences of a particular decision." *Godinez v.*

Moran, 509 U.S. 389, 400 & n.12. This is a "serious and weighty responsibility" where the party's liberty is at stake. *See Johnson*, 304 U.S. at 465. Thus, many jurisdictions require the court to conduct a colloquy before accepting a waiver, especially where the court is aware of a salient fact that might render the alleged waiver less than knowing and intelligent, such as the declarant's mental or emotional instability, language barrier, or low I.Q. or learning disability. *See, e.g., United States v. Shorty*, 741 F.3d 961, 966-69 (9th Cir. 2013); *see also United States v. Lilly*, 536 F.3d 190, 197 (3d Cir. 2008) (colloquy waiver endorsed by no less than nine circuit courts of appeals). Where such circumstances exist, the court must inform the defendant that a jury consists of 12 jurors; he has the right to assist in choosing the jury; the jury verdict must be unanimous; and if he waives the right, the judge will decide the case herself. *Shorty*, 741 F.3d at 966. The court then must question the defendant to ensure he understands the "benefits and burdens" of a jury trial. *Shorty*, 741 F.3d at 967.

Youths "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."

J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) (internal quotation marks and citation omitted). Thus, "the greatest care must be taken to assure" a youth is making a knowing and voluntary decision that is "not the product of ignorance of rights or of adolescent fantasy, fright or despair." *See Gault*, 387 U.S. at 56. This Court should require an appropriate colloquy in youth court cases such as this, where no written waiver exists and the court had reason to believe the youth's waiver might have been less than knowing and intelligent due to his young age and inexperience. Here, at the detention hearing, the youth court learned J.G.F. was young, *see* 2/23/2021 Tr. at 7, had no prior involvement with youth court probation, *id.* at 10, and suffered from mental health issues, *id.* at 11. Yet, the court never advised J.G.F. he had the right to a jury trial or explained to him what a jury is, what a jury normally "decides," or how the process of selecting a jury works or ensure that he understood what he was giving up. Failure to do so rendered the subsequent bench trial a violation of J.G.F.'s jury trial rights.

For all of these reasons, J.G.F.'s jury trial rights were violated, and this structural error mandates reversal of this case.

II. J.G.F. was denied the right to effective assistance of counsel by counsel's failure to move to suppress his alleged confession.

A. J.G.F.'s alleged confession was not admissible.

The Fifth Amendment to the United States Constitution and Article II, Section 25 of the Montana Constitution provide that no one shall be compelled in any criminal case to be a witness against himself. Prior to questioning a youthful suspect in custody, he "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *J.D.B.*, 564 U.S. at 269; *see also In re Z.M.*, 2007 MT 122, ¶39, 41, 337 Mont. 278, 160 P.3d 490.

A youth is in custody only if, under the totality of the circumstances, a reasonable youth of the child's age would not have felt free to terminate the interrogation and leave. *See J.D.B.*, 564 U.S. at 271-72; *Evans v. Montana Eleventh Jud. Dist. Court, Flathead Cnty.*, 2000 MT 38, ¶¶19, 21, 298 Mont. 279, 995 P.2d 455.

A youth may waive his rights only if the totality of the circumstances surrounding the interrogation, including "the juvenile's

age, experience, education, background, and intelligence, and . . . [his] capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights" show he did so knowingly, intelligently, and voluntarily. *Michael C.*, 442 U.S. at 724-25.

However, "[a]dvising a suspect of [his] *Miranda* rights, even if done properly, is not a license to coerce a confession." *State v. Eskew*, 2017 MT 36, ¶18, 386 Mont. 324, 390 P.3d 129. Involuntary confessions violate the due process rights guaranteed by the Fourteenth Amendment and Article II, Section 17 of the Montana Constitution and are not admissible. This due process right applies in youth court proceedings. *See J.D.B.*, 564 U.S. at 280; *Z.M.*, ¶¶39, 41.

Whether a confession is voluntary depends on the totality of the circumstances surrounding the interrogation, including the youth's

> age and level of education; the interrogation technique used by the police; whether the defendant was advised of his or her *Miranda* rights; the defendant's prior experience with the criminal justice system and police interrogation; the defendant's background and experience; and the defendant's demeanor, coherence, articulateness, and capacity to make full use of his or her faculties.

Evans, ¶22.

Moreover, "[a] confession may not be induced by threats or violence, promises, or lies and deception by the interrogator." *Eskew*, ¶18. "Lying to the suspect about what law enforcement knows about her involvement in the crime is particularly repulsive to and totally incompatible with the concept of due process[,] . . . [and] [w]e will not condone the use of deception to obtain a confession." *Eskew*, ¶18 (internal quotation marks and citations omitted). The State bears the burden to prove by a preponderance of the evidence that the confession or admission was voluntary. *Eskew*, ¶13.

When applying this test, a court must "take into account special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved." *Michael C.*, 442 U.S. at 725. *See also Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) ("special care in scrutinizing the record must be used" when examining the voluntariness of 15-year-old's confession). Indeed, research shows adolescents often misunderstand words and phrases commonly found in *Miranda* warnings and struggle to understand the implications of waiving those rights. *Juvenile Miranda Waiver and Parental Rights*, 126 Harv. L. Rev. 2359, 2359-60 (2013) (citing studies).

They are more prone to comply with authority figures by confessing rather than remaining silent. *Id.* And they are especially prone to false confessions, particularly if they are under 15. *Id.*

In particular, the Supreme Court has found involuntary youth confessions made without "counsel and support" from "someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him." *Haley*, 332 U.S. at 600 (15-year-old). *See also Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962) (youth "would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights. . . . Without some adult protection . . . , a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.").

Consistent with these cases, the Youth Court Act provides additional protection to youths taken into custody for questioning, including notification to the youth's parent or guardian. § 41-5-331(1), MCA. The purpose of the parental notification is to provide the youth with "assistance . . . in deciding whether to waive his or her rights or alternatively, obtain counsel." *State v. McKee*, 2006 MT 5, ¶25, 330

Mont. 249, 127 P.3d 445. When the youth is under 16, a youth's waiver is effective only if the youth and a parent agree; otherwise, "the youth may make an effective waiver only with the advice of counsel." § 41-5-331(2), MCA. A confession made in violation of § 331 is involuntary and inadmissible. *Z.M.*, ¶45; *McKee*, ¶26; *Evans*, ¶21.

J.G.F., a then-13-year-old boy with an eighth-grade education, serious emotional issues, and no youth court experience, was subjected to a custodial stationhouse interrogation when, after being driven to the station at Mother's direction, he was questioned for nearly an hour in a small room and was specifically told he was "behind a locked door." Wootan repeatedly suggested J.G.F. was not being honest, confronted J.G.F. with the so-called evidence of his guilt—namely misstatements regarding what A.L. had disclosed—and told J.G.F. he believed A.L. Moreover, Mother—the person legally tasked with assisting her son in understanding and exercising his rights—made no effort to do so, instead joining in the interrogation and angrily ordering him to "be completely fucking honest." Although he was advised of his *Miranda* rights, no one explained those rights to him, and he did not understand them. Notably, he was never told he was free to leave. And although

he was repeatedly told the purpose of the interview was to get him "help," *id*. at 20-22, 25, at the end, he was arrested, handcuffed, and hauled away to juvenile jail. No reasonable 13-year-old would have felt free to terminate the interrogation and walk out the locked door under these circumstances. *See Evans*, ¶¶20-21.

Although Mother agreed to waive J.G.F.'s rights, as the parent of both the suspect and the victim, Mother had irreconcilable conflicts of interests with J.G.F. regarding the subject of his interrogation. Having learned from Wootan that A.L. had allegedly disclosed J.G.F. touched her sexual or intimate parts and wanting to determine whether A.L.'s "disclosure" was true, she agreed to waive J.G.F.'s rights, insisting the interrogation occur immediately despite the late hour, so she could "listen[]" to what J.G.F. had to say for himself. She then allowed her son to waive his rights without consulting with him about that decision in any way. Her body language, demeanor, and tone throughout the interrogation indicated she was disgusted and angry with her son. When J.G.F. expressed confusion regarding the term "inappropriate" touching, she assumed the roles of interrogator by questioning him and adverse witness by revealing inculpatory evidence to the effect that she

had explained the difference between inappropriate touching and spanking to him before. When he tearfully stated he did not want to end up like his dad, she angrily interjected, "Your dad doesn't touch little girls." And then she berated and cursed at him, instructing him to "be completely fucking honest" so he could get "fucking help," and accused him of trying to "punish her."

To top it off, it was Mother who chose to have J.G.F. placed in juvie rather than return home with her. Notably, Mother was the subject of an ongoing child abuse investigation, and the CPS in charge of that investigation was also present for J.G.F.'s interrogation. Mother's interests in defending herself in that investigation and preventing the removal of her other children were at odds with J.G.F.'s interests, as evidenced by the fact that his siblings were removed after Mother determined A.L.'s allegations were untrue and sided with J.G.F.

Because of her significant conflicts of interests, Mother could not fulfill her role as a parent to provide "counsel and support" to J.G.F., *Haley*, 332 U.S. at 600, nor was she solely "concerned with securing [her son's] rights," *Gallegos*, 370 U.S. at 54-55. Rather than functioning as J.G.F.'s "parent" during the interrogation, she was functioning as the

mother of the alleged victim. As this Court recognized in *State v. District Ct. of Eighth Judicial Dist.*, 176 Mont. 257, 577 P.2d 849 (1978), a "youth's interests and the interests of his parents might conflict," and, thus, a parent cannot simply waive a youth's rights on his behalf. Other courts have recognized such conflicts may arise where a parent is also the parent or a close relative of the alleged victim. *See, e.g., In re I.F.*, 229 Cal.Rptr.3d 462, 480-81 (Cal. Ct. App. 2018) (parent of victim and suspect had serious conflict of interests and might encourage cooperation where another parent might counsel silence and thus "unwittingly interfere with the thoughtful exercise of the child's constitutional rights, or even contribute to a false confession."); *Matter of P.W.G.*, 426 P.3d 501, 512-13 (Kan. Ct. App. 2018) (parent of victim and accused had an "irreconcilable conflict" that precluded him from acting solely in accused's best interests).

Construing a statute that, similar to § 41-5-331, MCA, required a parent to consent to the interrogation of a youth under 14, the West Virginia Supreme Court held in *Matter of Steve William T.*, 499 S.E.2d 876, 884-85 (W.Va. 1997), that the statute's requirements would be rendered meaningless if it permitted a parent with a conflict of interests

with the child to provide the requisite consent. Similarly, the Kansas Court of Appeals concluded in *P.W.G.*, 426 P.3d at 512-13 that any consultation between the youth and his father—who was also the father of the victim—regarding the youth's rights would be insufficient under that state's waiver statute due to the father's conflict. This Court, too, should conclude a parent's consent to waive a youth's rights under § 331 is invalid unless it is made by a nonconflicted parent. Because Mother could not and was not functioning as J.G.F.'s parent due to irreconcilable conflicts of interests with her son related to the subject of the interrogation, her consent was invalid under § 331. Without the consent of a nonconflicted parent or the advice of counsel, J.G.F.'s waiver was insufficient, and his confession was inadmissible.

Alternatively, Mother's conflicts of interests weigh heavily against any finding that J.G.F.'s confession was voluntary. Although the presence of a parent normally weighs in favor of a finding of voluntariness, the opposite is true where the parent harbors a significant conflict of interests due to being the parent of the alleged victim, especially where there is evidence suggesting that conflict prevented the parent from counseling the youth as an adult concerned

solely with his welfare, or leads the parent to take action contrary to the child's interests, such as urging the child to cooperate with the police or taking an active role in the interrogation. *See, e.g., In re A.L.*, 157 N.E.3d 350, ¶¶20-21, 38 (Ohio Ct. App. 2020); *State ex rel. J.E.T.*, 10 So.3d 1264, 1275, 1278 (La. App. 2009); *State v. A.S.*, 999 A.2d 1136, 1147-48 (N.J. 2010).

All of those circumstances are present here. Mother did not consult with J.G.F. as an adult solely concerned with his welfare. She ordered him to cooperate with Wootan, and assumed an active role in that process by interrogating him and providing inculpatory evidence. Rather than being a supportive presence assisting J.G.F. in securing his rights, her presence created a coercive environment in violation of them by intimidating and causing added stress for her son.

What's more, Wootan intimidated J.G.F. by repeatedly challenging J.G.F.'s answers and telling him he thought J.G.F. was not being honest and was minimizing what happened. He manipulated J.G.F. into confessing by telling him the reason for the interview was to get him "help," and then arrested and charged him. Most importantly, he used deception to elicit J.G.F.'s confession, overstating the evidence

against J.G.F. by misstating that A.L. told him that J.G.F. touched her pee-pee. That false statement led directly to J.G.F. breaking down in tears and admitting he did "touch her there." But "[l]ying to the suspect about what law enforcement knows about her involvement in the crime is . . . totally incompatible with the concept of due process" and this Court "will not condone the use of deception to obtain a confession." *Eskew*, ¶18. It should not condone its use against a frightened boy here.

Mother and Wootan joined forces to create a coercive environment against which J.G.F. did not stand a chance. The State could not establish the totality of the circumstances surrounding J.G.F.'s confession show it was the product of free will; rather, it was the product of psychological coercion, intimidation, and deception. Its use against him at trial did not comport with fundamental notions of due process and fairness. It should have been suppressed.

B. Counsel's failure to move to suppress J.G.F.'s confession constituted ineffective assistance.

Allegedly delinquent youths have a due process right to effective assistance of counsel under the Fourteenth Amendment to the U.S. Constitution and Article II, section 17 of the Montana Constitution. *K.J.R.*, ¶33; *Gault*, 387 U.S. at 36-37. This Court has not identified

what standard should be applied when considering whether a youth has been denied effective assistance. *See K.J.R.*, ¶¶29, 31. However, the Court explicitly "decline[d] to adopt the *Strickland* [*v. Washington*, 466 U.S. 668, 686 (1994)] test" applicable in criminal cases to evaluate ineffective assistance of counsel (IAC) claims in youth court proceedings. *K.J.R.*, ¶¶32-33. The Court concluded *Strickland*'s two-prong test, which requires the defendant to show "counsel's performance was objectively deficient and resulted in actual prejudice," "is insufficient to protect the fundamental liberty interests at stake in youth court proceedings. *K.J.R.*, ¶¶30, 33. To the contrary, this Court suggested the record regarding counsel's performance should be evaluated by referencing a checklist of non-exclusive minimum criteria governing a youth attorney's advocacy skills and training and experience. *See K.J.R.*, ¶¶26, 33 (discussing test for counsel in child abuse and neglect cases from *In re A.S.*, 2004 MT 62, 320 Mont. 268, 87 P.3d 408). Reversal in such cases is required only if "substantial prejudice" resulted from counsel's conduct. *K.J.R.*, ¶36.

This Court should adopt a modified version of the test set forth in *A.S.* as discussed in *K.J.R.*, ¶32, for the evaluation of IAC claims in

youth court cases that is tailored to the specialized legal and practical issues arising in such cases and the special characteristics of the youths who are the subjects of such proceedings. That test should require the record to affirmatively show defense counsel raised potentially meritorious objections to evidence, including by moving to suppress evidence obtained in violation of the youth's rights. It should also account for the lack of any procedural mechanism akin to a postconviction proceeding during which the youth may further develop the record regarding IAC claims by requiring the record to contain affirmative evidence indicating counsel provided effective assistance to the youth, and by requiring the beneficiary of counsel's error, the State, to show there is no reasonable possibility that counsel's performance affected the outcome of the proceedings, *i.e.*, the same test this Court applies to determine whether a preserved trial error resulted in a fundamentally unfair trial. *See State v. Van Kirk*, 2001 MT 184, ¶¶36, 42-43, 306 Mont. 215, 32 P.3d 735.

Counsel failed to raise a meritorious objection to the State's evidence by moving to suppress J.G.F.'s confession, which was inadmissible due to the lack of consent from a nonconflicted parent and

was involuntary under the totality of the circumstances. The State will be unable to show it is not reasonably possible that J.G.F.'s confession contributed to the court's findings of guilt. The State cannot "demonstrate that the quality of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Van Kirk*, ¶44. That is so because "[a] confession is like no other evidence," and "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

In contrast, without J.G.F.'s coerced admissions, the State's case was not strong. A.L. testified the allegations "didn't happen." A.L. did not tell Dukart that J.G.F. touched her vagina/pee-pee or any other intimate parts. And to the extent she disclosed anything "inappropriate" in her forensic interview, that disclosure only happened after Samms prodded her at least 18 times, introduced the concepts of touching body parts and a bad "game," and told her it was "important" to tell an adult if anyone "touched her body." Even then, A.L. still did not say that J.G.F. touched her vagina/pee-pee. Nor did she draw a

picture depicting that. It was only after she had been questioned, twice, at length and through highly suggestive means, and then accused of lying by her family that she allegedly affirmatively stated as much—a statement she later disavowed at trial.

The youth court relied heavily on J.G.F.'s alleged confession and his "incredible" explanation for why he made those admissions even though they were not true. In particular, the court relied on J.G.F.'s admission that "he had inappropriately touched A.L. in her genital area . . . on four or five occasions," and his admissions that he had rage issues when concluding the State had proved beyond a reasonable doubt that J.G.F. sexually assaulted A.L. at least four times. (App. A, COL 8, 10, 12.) The judge did not state she would have found the allegations in the petition true absent the youth's confession and resulting trial testimony. The confession, thus, contributed to his adjudication. This Court should conclude J.G.F. is entitled to a new trial free of the taint of his involuntary and invalid confession.

Even if this Court were to apply *Strickland*, reversal is still required. Counsel elicited facts regarding the suggestive, intimidating, and coercive nature of the interrogation during trial—as did the State

during J.G.F.'s cross-examination. Counsel then argued J.G.F.'s admissions were made under suggestible circumstances "with his mother screaming at him, the detective suggesting that he was not being completely truthful the entire time, and that being at the police station with a figure of authority," and that those facts somehow affected the State's burden to provide corroborating evidence under § 41-5-1415(3), MCA. (*See* Trial Tr. at 219.) But, as the court found, those facts had nothing to do with how much corroboration was required. (*See* App. A, COL 9.) Those facts, instead, had *everything* to do with whether the confession was admissible at all. But Trosper never moved to suppress J.G.F's statements, a point the prosecutor made during rebuttal. (Trial Tr. at 225.)

There can be no legitimate reason or plausible justification for counsel's failure to file a meritorious motion to suppress J.G.F.'s involuntary confession under these circumstances. *See State v. Kougl*, 2004 MT 243, ¶15, 323 Mont. 6, 97 P.3d 1095. And, as discussed above, the admission of that confession undermined confidence in the judge's ultimate determination of J.G.F.'s guilt, which was based heavily on that confession. Because it is reasonably probable that the confession

contributed to J.G.F.'s adjudication, this Court should reverse J.G.F.'s adjudication and disposition orders.

CONCLUSION

This Court should reverse J.G.F.'s adjudication and disposition orders.

Respectfully submitted this 17th day of October, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,997, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman
TAMMY A. HINDERMAN

APPENDIX

CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-17-2023:

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Dated: 10-17-2023