IN THE

COURT OF APPEALS OF INDIANA

No. 18A-JV-618

A.M., *Appellant-Petitioner*,	Appeal from the Kosciusko Superior Court,
v.	No. 43D01-1708-JD-292,
STATE OF INDIANA, *Appellee-Respondent*.	The Honorable David C Cates, Judge.

BRIEF IN RESPONSE TO PETITION TO TRANSFER

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The Court of Appeals fully and properly considered all aspects of A.M.'s ineffective assistance of counsel claim, whether that claim properly arises out of the Due Process Clause of the Fourteenth Amendment or the Assistance of Counsel Clause of the Sixth Amendment to the United States Constitution.[1] A.M. asks this Court to definitively extend to all types of juvenile delinquency proceedings the ineffective assistance of counsel standard for Sixth Amendment-guaranteed counsel identified in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). But this Court should at least decide that issue in a case where the difference matters, and it does not in this case because the Court of Appeals considered A.M.'s *Strickland* argument and rejected it. *A.M. v. State*, 109 N.E.3d 1034, No. 18A-JV-618, slip op. at 14–16 (Ind. Ct. App. Aug. 20, 2018).

A.M. barely acknowledges that portion of the Court of Appeals decision, let alone explain how that court incorrectly concluded that counsel's performance was not deficient under the circumstances or prejudicial to him. In fact, A.M. never explains precisely what additional or alternative actions counsel should have taken on A.M.'s behalf, almost certainly because there was no reasonable alternative for the trial court to have taken here, given the astonishingly serious nature of A.M.'s continuing delinquent acts. The simple fact of the matter is that A.M. has

[1] A.M. explicitly does not state a claim under Article 1, Section 13 of the Indiana Constitution. *See Petition to Transfer* at 6 (casting that A.M.'s argument solely as a federal one).

exhausted all ability of his family, schools, social services, probation, and judicial leniency to help him at this time; placement in the Department of Correction was the only viable option that the juvenile court had remaining to help A.M. succeed. Because it makes no difference in this case how appellate courts are to judge the performance of counsel in juvenile placement modification proceedings, this Court should deny transfer here and refrain from offering an advisory opinion on that question.

I.
A.M. received effective assistance of counsel under any standard.

This Court should deny transfer because the question presented makes no difference in how A.M.'s case should be resolved. No one questions that A.M. had a constitutional and statutory right to counsel, nor does anyone question the fact that he received the assistance of counsel at his placement modification hearing. What A.M. and the State disagree about is whether his counsel rendered constitutionally effective assistance, and what legal standard governs that question. But as the Court of Appeals observed, A.M.'s counsel rendered effective assistance no matter whether judged under the Sixth Amendment *Strickland* or Fourteenth Amendment due process standards. *A.M.*, slip op. at 14–16. This is because A.M.'s delinquent acts did not merely continue while he was on probation, they significantly escalated into acts including the random and unprovoked beating of another child at a bus stop and the stealing of a firearm merely because it would be "cool" to have a gun. Indeed, it was not counsel's representation, but "A.M.'s continued failure to adhere

to the law and the rules of his placement that caused his placement to be modified to the most restrictive option." *A.M.*, slip op. at 14.

Counsel effectively represented A.M. at the placement modification hearing when the totality of representation, the purpose of the juvenile proceeding, and A.M. incorrigible conduct are all considered. To overcome the strong presumption that counsel provided adequate legal representation, *Strickland* requires a defendant to show both that: 1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and 2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001) (*citing Strickland*, 466 U.S. at 687–88, 694). A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id*. "And rather than focusing on isolated instances of poor tactics or strategy in the management of a case, the effectiveness of representation is determined *based on the whole course of attorney conduct*." *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997) (emphasis added). A.M.'s argument fails to consider the entirety of his counsel's representation, as well as the effect of A.M.'s own acts that made it nearly impossible to help him without placement at DOC. *A.M.*, slip op. at 14, 16 n.3 (observing that A.M.'s argument gives near-exclusive focus on the fact that he received the harshest placement possible instead of the circumstances that led to that result). In fact, A.M.'s argument neglects consideration of the entire purpose of juvenile law.

"Juvenile law is constructed upon the foundation of the State's parens patriae power, rather than the adversarial nature of corpus juris." *In re K.D.*, 962 N.E.2d 1249, 1255 (Ind. 2012). A.M.'s modification hearing in particular was not an adversarial proceeding because he freely admitted committing the delinquent acts. As A.M. has eloquently pointed out, "Indiana has a well-established policy of ensuring that 'children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation.'" *D.S. v. State*, 829 N.E.2d 1081, 1084 (Ind. Ct. App. 2005) (quoting *State ex. Rel. Camden v. Gibson Circuit Court*, 640 N.E.2d 696, 697 (Ind. 1994)). And because "[t]he statutory scheme for dealing with juveniles who commit illegal acts is vastly different than the statutory scheme for sentencing adults who commit crimes," it seems logical that all parties involved strive for the best possible disposition and placement for the juvenile. This means sometimes all parties involved—the court, the State, probation department, and even the juvenile himself—might agree on placement.

Here it appears that all parties agreed on placement, and so A.M. cannot show that his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms and prejudice. This is because after A.M.'s counsel made his statement, the juvenile court asked A.M. if he wished to say anything, and he responded with a "No, Sir" (Tr. 7). A.M., who had regular experience with the juvenile system, would have expressed his disagreement with his attorney about placement in the DOC if he had actually

disagreed. A.M. did no such thing. The same can also be said about A.M.'s mother, who also elected not to say anything (Tr. 6).

Furthermore, A.M.'s counsel's performance was reasonable throughout the entirety of the proceedings. As previously mentioned, although A.M. admitted to violating his supervision, his counsel negotiated out the even more damaging allegations, such as burglary, which if committed by an adult would have been a Level 5 felony and theft, which if committed by an adult would have been a Class A misdemeanor (Tr. 5–6; App. Vol. II, 136–37). A.M. also did not have to admit to possessing alcohol (Tr. 5–6; App. Vol. II, 136–37). Instead, A.M. only admitted to a few status offenses and battering another student at a bus stop, which would have only been a Class B misdemeanor if committed by an adult (Tr. 5–6; App. Vol. II, 87–88, 134–38).

Finally, even if A.M.'s counsel's performance was not reasonable, A.M. cannot show a reasonable probability that he would not have been placed in the DOC if his counsel had argued for a different placement. A.M.'s placement in the DOC was the only remaining option available to the juvenile court in order for it to adequately balance the best interests and safety of both A.M. and society. This is because A.M. has displayed past violent behavior that included battering school personnel and other students (App. Vol. II, 37, 88). In fact, A.M. has three prior adjudications for battery—which would have been Class D felonies if committed by an adult—and in this case he was on court supervision after admitting to disorderly conduct that involved beating up another juvenile (App. Vol. II, 32, 35, 88). And one of the

reasons for modification in this case was for yet another battery that A.M. committed against a random juvenile at a bus stop for apparently no reason (App. Vol. II, 87, 111, 115–116).

Additionally, A.M. was suspended from school for failure to "comply" (App. Vol. II, 128). Finally, after the filing of the modification report, the probation department learned that A.M. stole a firearm from a home because he thought it would be "cool" to have a firearm (State's Ex. 1). Thus, in light of A.M.'s violent behavior and the numerous other efforts to rehabilitate A.M. as outlined in the modification and predisposition reports, there is no reasonable probability that A.M. would have been placed anywhere else.

II.
Nevertheless, due process is the proper assessment of counsel in juvenile proceedings.

In a future case where this Court's opinion would be something other than advisory, it may be helpful for this Court to give a definitive statement that due process is adequate protection of the right to counsel in juvenile proceedings. The Court of Appeals was correct when it concluded that the due process analysis is most appropriate for assessing the guarantee of counsel's assistance at least for placement modification proceedings. *A.M.*, slip op. at 13–14. But the same is true for all aspects of juvenile delinquency proceedings.

This is not to say that a juvenile does not have a right to counsel. He has both a statutory and a constitutional due process right to counsel. *In re Gault*, 387 U.S. 1, 35–41 (1967); Ind. Code §§ 31-32-2-2 and 31-32-4-1. But the constitutional right

to counsel in juvenile cases derives from the Fourteenth Amendment due process right, not the Sixth Amendment. *See Gault*, 387 U.S. at 35–41 (finding the juvenile's right to counsel in the Fourteenth Amendment's Due Process Clause); *Bridges v. State*, 260 Ind. 651, 653, 299 N.E.2d 616, 617 (1973) (understanding the right to counsel in juvenile cases as a matter of due process). *See also In re C.S.*, 874 N.E.2d 1177, 1187 (Ohio 2007) (The Supreme Court's cases, including *Gault*, "make clear that the right to counsel in a juvenile case flows to the juvenile through the Due Process Clause of the Fourteenth Amendment, not the Sixth Amendment."). The *Strickland* analysis was designed to give effect to the interests protected by the Sixth Amendment, so it is inappropriate to apply that analysis to a different question involving a different right that exists to protect different interests.

To be sure, this Court has previously applied the *Strickland* test to at least one juvenile proceeding, although it did not explicitly consider on what standard the Constitution requires. *S.T. v. State,* 764 N.E.2d 632 (Ind. 2002). *Cf. Bridges*, 260 Ind. at 653, 299 N.E.2d at 617 (in a pre-*Strickland* case, observing that the right to counsel is guaranteed by the Due Process Clause). At most, our courts have applied the *Strickland* standard *with no analysis of its applicability*, simply assuming that a juvenile has the same right as an adult criminal defendant. But *Strickland* is the analysis that considers whether a defendant's Sixth Amendment right to counsel has been violated. The Sixth Amendment applies only to "criminal prosecutions," *see* U.S. Const. amend. VI, and thus has no applicability to juvenile delinquency proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (recognizing

that juvenile proceedings are not criminal prosecutions subject to the Sixth Amendment). *Strickland* is completely designed to ensure that the adversarial process worked properly, so it has no place in the non-adversarial, ameliorative juvenile justice proceeding.

Indiana courts have declined to apply the *Strickland* analysis to evaluate counsel's performance in a variety of other contexts in which a party's right to counsel flows only from the Due Process Clause or a statute or rule and not from the Sixth Amendment. *See, e.g., Baker v. Marion County Office of Family & Children*, 810 N.E.2d 1035, 1039–41 (Ind. 2004) (declining to apply *Strickland* to assess the performance of counsel in parental rights termination cases); *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989) (declining to apply *Strickland* to assess the performance of counsel in post-conviction cases); *Childers v. State*, 656 N.E.2d 514, 517 (Ind. Ct. App. 1995) (declining to apply *Strickland* to assess counsel's performance in probation revocation cases), *trans. denied*. Those courts have properly applied an analysis focused on the principles inherent in due process that asks whether counsel appeared and "represented the party in a procedurally fair setting which resulted in a judgment of the court" or whether counsel was so defective that the party did not receive a "fundamentally fair trial" and the court cannot have any confidence in the outcome of the proceeding. *See Baker*, 810 N.E.2d at 1041; *Graves v. State*, 823 N.E.2d 1193, 1196 & nn.1, 4 (Ind. 2005); *Baum*, 533 N.E.2d at 1201; *Childers*, 656 N.E.2d at 517.

The due process standard should likewise apply in this context, especially considering that this case in particular involves the modification of A.M.'s supervision. In the analogous area of criminal probation revocations, this Court has found that the *Baum* standard applies. *Jordan v. State*, 60 N.E.3d 1062, 1069 (Ind. Ct. App. 2016) ("given the civil nature of probation revocation proceedings and the corresponding due process rights applicable in such proceedings, we will apply the *Baum* standard to Jordan's claim of ineffective assistance of probation revocation counsel"). On this point, the Court of Appeals and the State agree, *A.M.*, slip op. at 13–14, and A.M. does not explain the logical basis for applying Strickland to the juvenile placement modifications when it would not apply to adult probation revocations. Nor is one readily apparent.

Rather than delve into the details of counsel's performance as our courts would for a criminal trial, this Court should look to see whether he represented A.M. in a procedurally fair setting that resulted in a reliable adjudication, as that is the interest that is protected by the Fourteenth Amendment. Here, that standard was met. When the State moves for a modification of a dispositional decree, the probation officer must give notice to the person affected and the juvenile court must hold a hearing. I. C. § 35-37-22-3(b). Although this statute requires a hearing, the statute "does not specify what the hearing must include." *In re M.T.*, 928 N.E.2d 266, 269 (Ind. Ct. App. 2010). Thus, this court has previously held that the hearing must be an evidentiary hearing, and that due process principles require adequate notice of the allegations, appointment of counsel, the constitutional privilege

against self-incrimination, and the right to confront opposing witnesses. *Id*. at 269–71 (citing *In re K.G.*, 808 N.E.2d 631, 635 (Ind. 2004)); *K.A. v. State*, 938 N.E.2d 1272, 1275 (Ind. Ct. App 2010).

A.M. admitted to several allegations contained in the modification report, so whether there is a reliable adjudication—or modification—is not at issue here (Tr. 5–6; App. Vol. II, 136–37). Just because A.M.'s counsel expressed befuddlement with A.M.'s actions—which is quite reasonable— at the time for arguing placement, it does not mean that A.M. was in essence deprived counsel. This is because A.M. received the benefit of counsel throughout the entire proceedings. In fact, A.M.'s counsel worked with the State to have redacted several more damaging allegations contained in the modification report—burglary, theft, and possession of alcohol—which resulted in A.M. not having to admit to them (Tr. 4–5).

Despite these efforts by A.M.'s counsel, A.M.'s own conduct is what really sealed his fate. *A.M.*, slip op. at 14. By having a history of battering others and continuing to do so for no reason, being expelled from school for failing to comply, not working to improve his behavior as indicated by the Bowen Center Reports, refusing to listen to his parents, not abiding by his curfew, and finally stealing a firearm because he thought it would be "cool" to have one, A.M.'s placement in the DOC was almost a forgone conclusion. Thus, A.M.'s counsel's only option was to inform the court that A.M. was a smart and good kid and that he hoped that A.M. ends up learning a lesson. A.M. was not in essence deprived counsel, but rather received realistic assistance of counsel that effectively tested the allegation by

having some allegations redacted and by ensuring the process as a whole was conducted fairly as due process requires.

CONCLUSION

The State respectfully requests that this Court deny transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 10, 2018, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on December 10, 2018, the foregoing document was electronically served upon the following person(s) via IEFS:

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