STATE OF MICHIGAN

_____

IN THE MATTER OF
CHRISTOPHER ROSS, JR.,
_____/

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee, No. 158764

v.

CHRISTOPHER ROSS
Respondent-Appellant.
_____/

Family Court No. 2014-826056-DL
Court of Appeals No. 331096
_____/

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE

Filed under AO 2019-6

WILLIAM J. VAILLIENCOURT, JR.
President
Prosecuting Attorneys Association of Michigan

KYM WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training,
and Appeals

TIMOTHY A. BAUGHMAN (P 24381)
Special Assistant Prosecuting Attorney
1441 St. Antoine, Room 1113
Detroit, Michigan 48226
(313) 224-5792

Table of Contents

Index of Authorities

Case Page

FEDERAL CASES

STATE CASES

STATUTES

OTHER AUTHORITY

Statement of the Question

I.

Should the standard for granting a new trial in a juvenile delinquency case be the same as the standard for granting a new trial in a criminal case, and the standard for judging counsel performance at the adjudicative phase of a delinquency proceeding the two-part test set forth in *Strickland v. Washington*?

Defendant answers: YES

Amicus answers: YES

Statement of Facts

Amicus joins in the statement of facts of the People.

Argument

I.

The standard for granting a new trial in a juvenile delinquency case should be the same as the standard for granting a new trial in a criminal case, and the standard for judging counsel performance at the adjudicative phase of a delinquency proceeding should be the two-part test set forth in *Strickland v. Washington*

A. Introduction: the issues

1. The issues in the Court's order for supplemental briefing

This Court has directed that the following issues be briefed:

- (1) whether appeals from juvenile adjudications for criminal offenses are governed by the time limits for civil cases or by the time limits for criminal cases, see MCR 7.305(C)(2);

- (2) whether the standard for granting a new trial in a juvenile delinquency case is the same as the standard for granting a new trial in a criminal case, compare MCR 3.992(A) with MCR 6.431(B);

- (3) whether juveniles who claim a deprivation of their due process right to counsel must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and

- (4) whether the Court of Appeals erred in reversing the trial court's decision to grant the respondent a new trial based on evidence that trial counsel did not obtain or present.[1]

[1] *In re Ross*, —Mich.—, 937 N.W.2d 360 (2020).

2. The issues raised by the respondent in the application for leave and in the Court of Appeals, and by the People in their response to the application

In his application for leave to appeal, respondent raised these issues:

- The Court of Appeals vacated the juvenile court's ruling granting a new trial based on ineffective assistance of counsel, disregarding *People v. Trakhtenberg*, 493 Mich. 38 (2012) and *People v. Ackley*, 497 Mich. 381 (2015) and absolving counsel's failure to investigate and obtain known exculpatory records as "trial strategy." Should that opinion be vacated, and the trial court's ruling reinstated?

- Should this Court review or peremptorily reverse restrictions on the scope of the *Ginther* hearing, where Christopher's successful motion to remand sought to litigate several issues, yet the lower courts limited Christopher to only three?

- If the Court of Appeals is correct about counsel's inability to obtain the phone records or testimony of various witnesses, does that (and/or the polygraph results) constitute newly discovered evidence entitling Christopher to a new trial?[2]

In their answer to the application, the People asserted that respondent's application was from a civil matter under MCL § 712A.1(2), and was filed outside the 42-day limit of MCR 7.305(C)(2) for civil cases; this Court has an internal operating procedure, MSC IOP 7.305(C)(5), providing that "The Clerk's Office strictly enforces the time limitations for filing applications for leave to appeal. Late filings are returned, if practicable, to the filer without being docketed. Further, the Court will not accept a

[2] Respondent's application, p. i.

motion to extend the time for filing an application for leave to appeal, MCR 7.316(B)."

3. The new arguments raised for the respondent-appellant in the Court's order, and the party-presentation principle

And so Issue (1) specified by the Court for briefing was raised by the People at the earliest possible time—in their response to the appellant's jurisdictional statement. Argument (2), specified by the Court, concerning whether the standard for granting a new trial is different in juvenile delinquency cases from criminal cases, was not raised by the appellant in the application, nor was argument (3), specified by the Court, concerning whether the *Strickland* standard or a different standard applies to claims that a new trial is warranted by counsel's performance in delinquency cases. Issue (4) appears to have been raised in appellant's application. Arguments (2) and (3) were also not raised by appellant in the Court of Appeals.[3]

MCR 7.305(H)(4)(b) says that "On motion of any party establishing good cause, the Court may grant a request to add additional issues not raised in the application for leave to appeal or not identified in the order granting leave to appeal," and MCR 7.316(A)(3) provides that the Court may "permit the reasons or grounds of appeal to be amended or new grounds to be added." Though these rules suggest that the grounds for consideration may be expanded only on motion, there is no doubt that the Court can add issues on its own motion. And the Court regularly does

[3] See Court of Appeals opinion, *In re Ross*, 2018 WL 3998721 (2018).

so,[4] on occasion deciding a case on a ground not raised at all by the appellant,[5] sometimes even without briefing or argument on the question.[6] But when is this appropriate? And is the Court consistent in so doing?

On the flip side, concerning the appellee, MCR 7.307 provides that "A party is not required to file a cross-appeal *to advance alternative arguments in support of the judgment* or order appealed" (emphasis supplied); rather, a cross-appeal is required from the appellee only "to seek *new or different relief* than that provided by the judgment or order appealed" (emphasis added). This is because a judgment of the trial court should be affirmed for any reason supported by the record, even if not relied upon by the trial court.[7] The rule is consistent with statements of the United States Supreme Court that it is "settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."[8] Further, there is a distinction between

---

[4] See e.g. the order in the present case, and such cases as *People v. Wilder*, 942 N.W.2d 33-34 (2020), directing briefing as to "whether the harmless error test of *People v. Lukity* . . . should be refined or amended in all cases . . . or where the question turns on the evaluation of conflicting testimony at trial," though no such arguments were made in either the Court of Appeals or in the application for leave to appeal.

[5] See *People v. Temelkoski*, 501 Mich. 960 (2018),

[6] See *People v. McKinley*, 496 Mich. 410 (2014).

[7] See *Allen v. USAA Cas. Ins. Co.*, 790 F.3d 1274, 1278 (CA 11, 2015).

[8] *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481, 96 S. Ct. 2158, 2159, 48 L. Ed. 2d 784 (1976).

arguments and issues. Particularly when a case advances to the highest court of the jurisdiction, "[p]arties are not confined . . . to the *same arguments* which were advanced in the courts below upon a . . . question there discussed."[9] And yet, though raising new arguments for the appellant on its own, and, as indicated, sometimes deciding the case on the new argument without an opportunity for briefing and argument, the Court has on many occasions considered additional arguments in *opposition* to reversal—that is, in *support* of the judgment—to be waived if not raised by the prosecutor in the Court of Appeals,[10] despite MCR

See also 20 Fed. Prac. & Proc. Deskbook § 111 (2d ed.) ("An appellee may defend a judgment on any ground consistent with the record, even if rejected in the lower court. But it cannot attack the decree with a view either to enlarging its own rights thereunder or to lessening the rights of its adversary unless it files a cross–appeal, whether what it seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below"); *Reed v. Commonwealth*, 834 S.E.2d 505, 509 (Va. App., 2019).

[9] *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 86, 108 S. Ct. 1645, 1655, 100 L. Ed. 2d 62 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 197–198, 19 S.Ct. 379, 380–381, 43 L.Ed. 665 (1899).

And see Andrey Spektor, Michael A. Zuckerman, "Ferrets and Truffles and Hounds, Oh My Getting Beyond Waiver," 18 Green Bag 2d 77, 79 (2014) (discussing the "oft-forgotten distinction between 'issues' and 'arguments': you cannot raise an entirely new issue on appeal, but you can, in some cases, make new arguments relating to an already-raised issue").

[10] See, e.g, *People v. Walker*, 504 Mich. 267, 276 (2019) ("The prosecution argues for the first time in its supplemental brief to this Court that defendant waived any challenge to the instruction by approving of the instruction before it was given. The prosecution abandoned this theory"); *People v. McGraw*, 484 Mich. 120, 131 (2009) (but note that *McGraw* does not actually support *Walker*, which cites it, as *McGraw* said that "we do not contend that an appellee is required to file a cross-appeal to raise a waiver argument. We simply conclude that an appellee should *at some point* actually raise the waiver argument" (emphasis supplied). And so a new argument raised by the appellee in the Supreme Court in support of the judgment should be considered).

7.307(B), and the general rule that the judgment may be affirmed on any ground supported by the record, along with the requirement in MCL § 769.26 that "*No* judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice" (emphasis supplied).

In *Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch.*[11] this Court rejected Justice Markman's attempt to resolve the case on an *argument* not raised by a party as to the issue in the case, calling it a "judicial

---

And only very recently in *People v. Jemison*, 2020 WL 3421925, (fn 4) (2020) this Court said:

> The prosecution argues that the defendant waived appellate review of this issue by failing to object in writing when it notified the defendant that it intended to admit Cutler's written report into evidence under MCR 6.202. In other words, the prosecution argues that a defendant's failure to comply with a court rule which governs the admissibility of an expert's report waives his constitutional right to confront the witness who authored the report. Merits aside, because the prosecution did not raise this argument before the Court of Appeals, we decline to address it. [citing *Walker* and *McGraw*].

Ironically, the Court later overlooked defendant's failure to argue *Crawford v Washington*, 541 US 36, 124 S.Ct.1354, 158 L.Ed. 2d 177 (2004) in the Court of Appeals ("Perhaps because the defendant did not cite *Crawford* in his briefing in the Court of Appeals, or perhaps because this Court has cited *Craig* without the need to consider *Crawford*'s sea change to Confrontation Clause jurisprudence . . . the Court of Appeals did not address *Crawford*").

[11] *Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch.*, 502 Mich. 695 (2018).

overreach," and saying that "If it is truly 'of no consequence [that the party had not made the argument],' best we ditch the adversarial system of law today, as under the dissent's approach we the Court will always know not only the better answer than any supplied by the parties *but even the better questions than those asked by the parties*."[12] And not long ago Justice Viviano, concurring in the denial of leave to appeal, responded to the dissenting justice by saying that "it is not our role to find and develop unpreserved arguments on behalf of litigants. See *Carducci v. Regan*, 230 U.S. App. D.C. 80, 86, 714 F.2d 171 (1983) (Scalia, J.) ('The premise of our adversarial system is *that appellate courts do not sit as self-directed boards of legal inquiry and research*, but essentially as arbiters of legal questions presented and argued by the parties before them')."[13] Yet Justice Scalia, a strong proponent of the party-presentation

---

[12] Id., at 710 (emphasis added).

[13] *People v. Worthington*, 503 Mich. 863 (2018) (Viviano, J., concurring).

And see *Greenlaw v. United States*, 554 U.S. 237, 243–44, 128 S. Ct. 2559, 2564, 171 L. Ed. 2d 399 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights. . . . But as a general rule, '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief')."

And only this term in *United States v. Sineneng-Smith*, —U.S.—, 2020 WL 2200834, at 3 (May 7, 2020), the Court reversed the 9th Circuit's "takeover of the appeal," saying that "Courts are essentially passive instruments of government. . . . They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties" (cleaned up). The Court recognized that the "party presentation principle is supple, not

principle, concurred in the reversal of the Court of Appeals in *United States v. Burke*,[14] though his rationale was, he acknowledged, one that the United States as appellant had neither argued below nor in the Supreme Court, a rationale going to the nature of the claim raised itself. Justice Scalia emphasized the importance of the principle of party presentation, which, he said "is more than just a prudential rule of convenience," as "its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."[15] Nonetheless, he believed that deciding the case on the basis he suggested was appropriate, for the reason that "there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law *whose nonexistence is apparent on the face of things*, simply because the parties agree upon it—particularly when the judgment will reinforce error already prevalent in the system."[16]

Despite the statements in *Michigan Gun Owners* and *People v. Worthington*, the Court *does* raise arguments and issues not raised in the application, sometimes, as amicus has noted, deciding cases on these issues, and, on occasion without opportunity for briefing and argument. Given that this is so—and it is certainly sometimes appropriate for the Court to direct briefing on additional arguments—amicus suggests the Court at some point consider setting out some principle for when the

---

ironclad," but found that the actions of the panel of the 9th Circuit had gone "well beyond the pale."

[14] *United States v. Burke*, 504 U.S. 229, 246, 112 S. Ct. 1867, 1877, 119 L. Ed. 2d 34 (1992) (Scalia, J., concurring).

[15] Id., 112 S.Ct. at 1877.

[16] Id.

raising of an issue or argument by the Court not raised by the appellant is appropriate,[17] and, most particularly, also at some point establish that the raising of additional arguments by the appellee to *support* a judgment is permissible, so long as supported by the record. It is, amicus submits, inappropriate for the judiciary to act as a "self-directed board of legal inquiry and research" for the appellant, while denying to the appellee additional arguments in *support* of the judgment, arguments raised by the appellee him or herself and *not* the Court; the former should be rare, the latter should always be permissible,[18] especially given this Court's duty under MCL § 769.26.

4. The arguments to be addressed by amicus

Here, respondent has raised an issue that he is entitled to a new trial because of ineffective assistance of counsel. This Court has raised two arguments in potential support of this issue not raised by the respondent: 1) that the standard for a new trial may be different in juvenile delinquency cases from criminal cases, and 2) that the standard for ineffective assistance of counsel may be different in juvenile delinquency cases from criminal cases. It is these two arguments that amicus will address here; the argument that the application was untimely here, this being a civil matter, amicus leaves to the People.

---

[17] See Timothy A. Baughman, "Appellate Decision Making in Michigan: Preservation, Party Presentation, and the Duty to 'Say What the Law Is'," 97 U. Det. Mercy L. Rev. 223, 245-57 (2020); Robert J. Martineau, "Considering New Issues on Appeal: The General Rule and the Gorilla Rule," 40 Vand. L. Rev. 1023, 1060 (1987).

[18] And there is no unfairness to the appellant, who may respond by way of a reply brief, allowed under the rules. MCR 7.305(E); MCR 7.312(E).

B. The standard on a motion for new trial in a juvenile delinquency case should be the same as in a criminal case

This Court noted in its order directing briefing on whether the standard for granting a new trial is the same in a delinquency case as in a criminal case, "compare MCR 3.992(A) with MCR 6.431(B)." Do, then, the texts of the rules suggest a different standard?[19] The criminal rule provides:

> (B) Reasons for Granting [a new trial]. On the defendant's motion, the court may order a new trial on *any ground that would support appellate reversal* of the conviction or because it believes that *the verdict has resulted in a miscarriage of justice*. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

The rule concerning delinquency adjudications provides:

> (A) Time and Grounds. Except for the case of a juvenile tried as an adult in the family division of the circuit court for a criminal offense . . . a party may seek a rehearing or new trial by filing a written motion *stating the basis for the relief sought* within 21 days after the date of the order resulting from the hearing or trial. . . . A motion will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously

---

[19] Respondent misperceives, amicus believes, that which the Court has directed be briefed. Respondent spends much time on the process and procedure of review of a delinquency adjudication, claiming that different timing deadlines somehow violate due process. That delinquency adjudications and dispositions have their own rules—and that they may be somewhat expedited as compared to the processing of adult appellate review—seems hardly startling, nor irrational. In any event, the Court directed briefing on the "whether the *standard* for granting a new trial in a juvenile delinquency case is the same as the standard for granting a new trial in a criminal case." Amicus thus discusses the standard not the process here, and it appears that respondent is of the view that the standard for the two should be the same, a view amicus shares.

> considered by the court, which, if true, would cause the court to reconsider the case.[20]

The criminal rule thus establishes two bases for the granting of a new trial: 1) the finding of error that would require appellate reversal, and 2) the finding that the verdict is a miscarriage of justice.[21] The rule in delinquency cases states no grounds for the granting of the motion, but only that a written motion must be filed stating the basis for relief, and that the motion must present a matter not previously presented to the court, or, if presented, not previously considered by the court. The criminal rule does not apply other than by analogy to juvenile adjudications, which " [e]xcept as otherwise provided . . . are not criminal proceedings."[22] But the analogy marches.

The analogy marches best where criminal charges under the penal code are brought. Though the matter is not a criminal case, "the substantive criminal law applies because the critical issue is whether the

---

[20] Amicus does find it rather peculiar that the judge in a delinquency adjudication may not, under the rule, on a motion for rehearing or new trial be presented with an argument that he or she made an error requiring appellate reversal, where the matter was presented to and considered by the court during trial, unlike under MCR 6.431(B), where it is appropriate to attempt to convince the judge that an outcome-determinative mistake was made in a ruling made after argument during trial. There is nothing unconstitutional about the difference, but it seems odd.

[21] This provision does not mean that the trial judge may grant a new trial on any basis, no matter how frivolous, but that some matters are committed to the sound discretion of the trial judge, such as claims that the verdict is against the great weight of the evidence, or that newly discovered evidence compels a retrial. See e.g. *People v. Lemmon*, 456 Mich. 625 (1998); *People v. Ramsey*, 503 Mich. 941 (2019); *People v. Rao*, 491 Mich. 271, 275 (2012).

[22] MCL § 712A.1(2).

juvenile violated the law."[23] Under the court rules, the rules of evidence apply, the standard of proof is beyond a reasonable doubt, and the verdict must be guilty or not guilty of the charged offense or an included offense.[24] The juvenile respondent has a right to counsel both under statute[25] and the constitution, though the constitutional right arises not from the Sixth Amendment,[26] the proceeding not being criminal, but from the requirement of due process.[27] Due process also guarantees the juvenile respondent the right against self-incrimination, and the right to confrontation and cross-examination.[28] Though due process does not provide a right to jury trial at the adjudication,[29] Michigan law so provides.[30]

---

[23] *In re Alton*, 203 Mich. App. 405, 407 (1994) ("this is not a criminal case, but a juvenile delinquency proceeding. . . . Nevertheless, the substantive criminal law applies because the critical issue is whether the juvenile violated the law").

[24] MCR 3.942(C), (D).

[25] MCL § 712A.17c(1), (2).

[26] Whether the counsel right under due process requires counsel performance consistent with *Strickland v Washington*, 466 US 668,, 104 S Ct 2052, 80 L Ed 2d 674 (1984) is the subject of section C., infra.

[27] *In re Gault*, 387 U.S. 1, 41, 87 S. Ct. 1428, 1451, 18 L. Ed. 2d 527 (1967). See also *In re Winship*, 397 U.S. 358, 368, 90 S. Ct. 1068, 1075, 25 L. Ed. 2d 368 (1970).

[28] Id, 87 S.Ct. at 1451-59.

[29] *McKeiver v. Pennsylvania*, 403 U.S. 528, 528, 91 S. Ct. 1976, 1978, 29 L. Ed. 2d 647 (1971).

[30] MCL § 712A.17(2); MCR 3.911(C);

Though the analogy to MCR 6.431(B) marches, it also limps; any analogy will limp if you make it walk far enough. Here it limps with regard to disposition and thus dispositional hearings. Prison is not a possible result of a delinquency finding based on an adjudication for violation of a felony.[31] There are periodic reviews of dispositions,[32] and the jurisdiction of the court over the juvenile may only be extended to age 21.[33] The court is to ensure that each minor coming within the jurisdiction of the court receives "the care, guidance, and control, preferably in the minor's own home, that is conducive to the minor's welfare and the best interests of the public." And when the minor is removed from parental control, he or she is to be "placed in care as nearly as possible equivalent to the care that the minor's parents should have given the minor."[34]

Under MCR 3.902(A) the correction of error is governed by MCR 2.613, and that rule provides in section (A) that "An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCL § 769.26, applicable to criminal trials, provides

---

[31] See MCL § 712A.18 for the range of possible disposition after a dispositional hearing.

[32] MCR 3.945(A)(2), (B).

[33] MCL § 712A.18d; MCR 3.945(B)(1);

[34] MCR 3.902(B).

that "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." This means that the criminal defendant must show that it is more probable than not that the error was outcome determinative; that is, "the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error."[35]

Though amicus has located no case allocating the burden of persuasion under MCR 2.613(A), it appears from the text that the appellant—the party attacking the judgment—must show that there is error, and that the error has resulted in a judgment inconsistent with substantial justice. It would seem, then, that the party attacking the judgment must show, to demonstrate that it is not consistent with substantial justice where based on a claim of trial error, that it is likely that without the error a different result would have obtained. The criminal standard and that in MCR 2.613(A) are reasonably analogous, and so amicus believes that the grounds for appellate reversal of a criminal case under MCR 6.431(B)—a finding of error that would require appellate reversal, or a finding that the verdict is a miscarriage of justice—should be applied to juvenile delinquency adjudications. And

[35] *People v. Lukity*, 460 Mich. 484, 495-496 (1999).

ordinary concepts of issue preservation, and review for plain error of unpreserved issues, should apply.

This appears consistent with those jurisdictions that have considered the question. Pennsylvania has said that it "applies the same standard for reviewing weight of the evidence claims in juvenile cases as those involving adults."[36] Ohio has said that "An adjudication of delinquency of a juvenile is reviewed under the same standards as a criminal conviction."[37] It is the rule in Texas that sufficiency of the evidence in a delinquency is reviewed by the same standard as a conviction in a criminal case.[38] In West Virginia, "an adjudication of delinquency is subject to the same standards of review on appeal as is a criminal conviction."[39] Review for error of a delinquency adjudication based on a violation of a penal statute should be no different than in an ordinary criminal case.

---

[36] *In Interest of J.G.*, 145 A.3d 1179, 1187 (Pa. Super. 2016).

[37] *In re A.W.*, 2008 WL 1822399, at 2 (Ohio Ct. App., 2008) (unreported).

[38] *In re I.A.G.*, 297 S.W.3d 505, 507 (Tex. App. 2009). Ohio says the same thing, *In re Washington*, 691 N.E.2d 285 (Ohio Ct. App., 2008 1998), as do South Dakota, *People ex rel. B.J.T.*, 707 N.W.2d 489, 492 (S.D., 2005); Arkansas, *P.J. v. State*, 578 S.W.3d 307, 309 (Ark. Ct. App., 2019); Georgia, *In Interest of E. B.*, 806 S.E.2d 272, 277 (Ga. Ct. App., 2017); Maryland, *In re Timothy F.*, 681 A.2d 501, 506 (Md. Ct. Spec. App., 1996); and others.

[39] *State v. Eddie Tosh K*, 460 S.E.2d 489, 493 (Va., 1995); *State v. William T.*, 338 S.E.2d 215, 218 (Va., 1985) ("Rules of evidence and procedural rights applicable in adult criminal proceedings are applicable with equal force in juvenile adjudicatory proceedings. . . . We have thus recognized the similarity between the adjudicatory stage of a juvenile case and the trial in an adult criminal case. . . . Therefore, an adjudication of delinquency is subject to the same standards of review on appeal as is a criminal conviction").

C. The standard for ineffective assistance of counsel on review if a the adjudicative phase of a juvenile delinquency proceeding should be the *Strickland* standard[40]

Respondent says that the "two part test set forth in *Strickland*"[41] ought to apply to review of juvenile delinquency adjudications. Amicus agrees; the contest here is on the application of the test, not the test to be applied. There are two phases to a final delinquency adjudication. First, of course, is the trial—or adjudicatory phase—under MCR 3.942. The matter proceeds in all respects as would a criminal trial of an adult defendant; the rules of evidence apply, proof must be beyond a reasonable doubt, the respondent has the right to counsel[42] and the right to a jury trial,[43] and the verdict "must be guilty or not guilty of either the offense charged or a lesser included offense." If the respondent is found guilty, then the matter proceeds to the dispositional stage under MCR 3.943. The concern there is not the responsibility of the respondent for the conduct alleged, that having been determined at the adjudicatory phase, but, put generally, determination of an order of disposition that is "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained."[44] Though the nature of the offense may change

---

[40] Respondent also states that the tests should be the same. Respondent's supplemental brief, p. 15 ("Juvenile defendant's [sic] claiming a a deprivation of their Due Process right to counsel should be required to satisfy the two-part test set forth in *Strickland*. . . .").

[41] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984).

[42] MCL §712A.17c(1).

[43] MCR 3.911: MCR 3.915(A).

[44] MCL § 712A.18(1).

the calculus,[45] the dispositional phase is irrelevant here. The claims brought by respondent concern the adjudicative and not the dispositional phase of the process, and so discussion of whether any different standard for ineffective assistance of counsel than *Strickland* should apply at the dispositional hearing is inappropriate here.[46] Amicus thus limits its discussion to the adjudicative phase, or trial.[47] The analogy between a criminal trial and the adjudicative phase of the delinquency hearing is extremely close, and there is no reason to review the reliability of its result with regard to counsel performance through a different lens than provided by *Strickland*—and again, respondent does not argue for one.

---

[45] See e.g. MCL § 712A.18(1)(m): "If the court entered a judgment of conviction under section 2d of this chapter, enter any disposition under this section or, if the court determines that the best interests of the public would be served, impose any sentence upon the juvenile that could be imposed upon an adult convicted of the offense for which the juvenile was convicted."

[46] See *Thomas M. Cooley Law Sch. v. Doe 1*, 300 Mich. App. 245, 270–71 (2013) ("We therefore decline, under the well-recognized concept of judicial restraint, to go beyond the facts that are before us in this case. We do not issue advisory opinions, nor does the Supreme Court, except in very limited circumstances not present here").

[47] In an Indiana case the matter was in the reverse; the standard to be applied at a dispositional-modification hearing not the adjudicative phase of the delinquency proceeding was before the court, which therefore limited itself to that issue: "Since A.M. challenges his counsel's performance in the disposition-modification hearing only, and not the prior adjudicative or dispositional phases, we confine this opinion to claims of ineffective assistance of counsel during a disposition-modification hearing." *A.M. v. State*, 134 N.E.3d 361, 364 (Ind. 2019). The standard of ineffective assistance at the adjudicatory phase has been held in Indiana to be the *Strickland* standard. *S.T. v. State*, 764 N.E.2d 632 (Ind. 2002).

The right to counsel in the adjudicative phase of a delinquency proceeding proceeds not from the Sixth Amendment, but from statute,[48] and, as a constitutional matter, due process, the proceeding not being a criminal prosecution within the meaning of the Sixth Amendment.[49] Given that a delinquency trial adjudicating a violation of a criminal statute is virtually indistinguishable from a criminal trial, there seems no reason to treat the requirements as to counsel performance at the proceeding differently from an adult criminal trial; that is, no reason not to apply the dictates of *Strickland*, and the wealth of case law construing and applying it. Just as with a criminal trial, a "fair assessment" of counsel's performance in a delinquency adjudicatory proceeding "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," and the reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy,'" as there are "countless ways to provide effective assistance in any given case."[50] Application of the *Strickland* test to counsel performance at delinquency dispositional proceedings appears to be the

---

[48] MCL § 712A.17c(1).

[49] See *In re Gault*, 87 S.Ct. at 1451. ("[I]n respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."); *In re Carey*, 241 Mich. App. 222, 227 (2000).

[50] *Strickland*, 104 S. Ct. at 2065.

approach taken by other jurisdictions,[51] and there is no reason to depart from it.

.

[51] See e.g. *In Gilliam v. State*, 808 S.W.2d 738, 739–740 (Ark., 1991): *In re Welfare of L.B.*, 404 N.W.2d 341, 345 (Minn.App .1987); *Interest of J.A.*, 2019 IL App (1st) 181763-U, ¶ 37, 2019 WL 1212775, at 6 (Ill. App. Ct., 2019); *In re E.G.*, 808 N.W.2d 756 (Iowa Ct. App. 2011) ("We are confident that the *Strickland* test for effective assistance of counsel should apply in the juvenile delinquency context as well, and we join those other state courts that have explicitly adopted the standard. See, e.g., *In re Parris W.*, 770 A.2d 202, 206 (2001); *In re Welfare of L.B.*, 404 N.W.2d 341, 345 (Minn.Ct.App.1987); *M.B. v. State*, 905 S.W.2d 344, 346 (Tex.Ct.App.1995); *D.C.M. v. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 782, 2019 WL 3796185 (Mo. 2019).

Relief

WHEREFORE, amicus submits that this Honorable Court should affirm the Court of Appeals.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training,
and Appeals

/s/ Timothy A. Baughman
_____
TIMOTHY A. BAUGHMAN (24381)
Special Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-5792

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body-text font is 12 point Century Schoolbook set to 150% line spacing. This document contains __5896_____ countable words.

/s/ Timothy A. Baughman
_____
TIMOTHY A. BAUGHMAN (P24381)
Special Assistant Prosecuting Attorney