No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

A.M.,

Petitioner,

v.

STATE OF INDIANA

Respondent.

On Petition for a Writ of Certiorari to the

Indiana Supreme Court

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QUESTIONS PRESENTED

Fifteen-year-old A.M. was facing imprisonment for his acts of delinquency, which could have lasted until he turned twenty-one. He had been placed on probation for an delinquency act, but violated probation. When offered an opportunity to express A.M.'s position on the appropriate sanction, A.M.'s counsel instead lectured A.M. for committing a dismissed allegation that was significantly more serious than those A.M. had admitted to, telling A.M. in open court that he was going to the Department of Correction and he hoped he learned his lesson.

The questions presented are:

1. Does the Due Process Clause of the Fourteenth Amendment provide children a right to counsel at **all** proceedings where their liberty is at stake?

2. For adults, this Court has developed the *Strickland* and *Cronic* standards to evaluate claims of ineffective representation, even where the right to counsel emanates from the Due Process Clause of the Fourteenth Amendment. Do children also deserve application of these standards as a minimum safeguard to ensure them objectively reasonable representation and fundamentally fair delinquency proceedings?

3. Does a child facing a prison commitment as a result of delinquency proceedings possess autonomy to control the objectives of their defense?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption to the case on the cover page.

RELATED CASES

There are no related cases.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner A.M. respectfully petitions this Court for a writ of certiorari to review the judgment of the Indiana Supreme Court below.

OPINION AND ORDER BELOW

The Indiana Supreme Court's opinion in *A.M. v. State*, (App. A, 1a—7a) is published at 134 N.E.3d 361 (Ind. 2019), *reh'g denied*. The vacated opinion of the Indiana Court of Appeals (App. D. 14a—20a) is published at 109 N.E.3d 1034 (Ind Ct. App., 2018) *reh'g denied, trans. granted and vacated* by134 N.E.3d 361 (Ind. 2019). The Kosciusko County Juvenile Court's order (App. B, 8a—12a) is unpublished.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on November 12, 2019; rehearing was denied on January 24, 2020. (App. C. 13a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the U.S. Constitution provides, in part: "No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law[.]"

INTRODUCTION

In re Gault, 387 U.S. 1, 41 (1967) held "that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed" a child possesses a right to counsel. Not long before *Gault*, this Court had extended the Sixth Amendment right to counsel in criminal proceedings to the states in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Since *Gideon*, and even before, this Court has taken several opportunities to explore the boundaries of the right to counsel in criminal proceedings and given meaning to processes that enforce that right. For example, *Strickland v. Washington*, 466 U.S. 668 (1984), clarified that the right to counsel is the right to effective counsel, and formalized a two-prong test to evaluate that effectiveness. The *Strickland* standard has been extended to representation on appeal as well, even though the right to appellate counsel, *Douglas v. California*, 372 U.S. 353 (1963), and the right to effective appellate counsel, *Evitts v. Lucey*, 469 U.S. 387 (1984), emanates from the Due Process Clause of the Fourteenth Amendment, just as the right to counsel for juveniles announced in *Gault* does.

However, this Court has not further defined the right to counsel in delinquency proceedings since *Gault*, and several questions have been left to the states. This case presents the rare opportunity to address three questions left after

Gault: *Do juveniles possess a right to counsel in proceedings where the proper disposition is being decided? What standard applies to claims that counsel in delinquency proceedings was ineffective? Do juveniles possess a right to control the objectives of their representation?*

In the vacuum of this Court's guidance, the states have developed varied interpretations of what the juvenile right to counsel means, and how to enforce it, or have avoided the questions altogether. A number of states have cited to *Strickland* and other precedents originally developed in the context of the Sixth Amendment cases to review claims that delinquency counsel performed ineffectively. In this case, the Indiana Supreme Court concluded that the *Strickland* standard was too rigorous to evaluate A.M.'s ineffective assistance of counsel (IAC) claims. Instead it crafted a new test for evaluating effectiveness for counsel provided via the Due Process Clause, explaining:

> In assessing fundamental fairness, a court should not focus on what the child's lawyer might or might not have done to better represent the child. Rather, the court should consider "whether the lawyer's overall performance was so defective that the . . . court cannot say with confidence that the" juvenile court imposed a disposition modification consistent with the best interests of the child.

A.M. v. State, 134 N.E.3d 361, 368 (Ind. 2019) (quoting *Baker v. Marion Cty. Office of Family and Children,* 810 N.E.2d 1035, 1041 (Ind. 2004)). Just two years earlier, the Montana Supreme Court held that the *Strickland* test is a "highly deferential standard [which] is insufficient to protect the fundamental liberty interests at stake in special civil proceedings." *In re K.J.R.,* 391 P.3d 71, 77 (Mont. 2017). This case is

the opportunity to determine what standard applies to claims by children that their counsel was ineffective. In doing so, the preliminary question of whether children hold a constitutionally protected right to counsel at proceedings where the proper disposition is considered must be answered, which is a decision which has long deserved consideration.

Further, the Indiana Supreme Court made ripe the consideration of whether children can direct the objectives of their defense: specifically, whether to admit to criminal conduct, and whether to consent to a loss of liberty. Or, stated another way: do children deserve an advocate who represents their expressed interests, or can a best-interests advocate suffice, especially where what the attorney believes is best for the child differs from the child's objectives?

The Indiana Supreme Court actually *commended* A.M.'s counsel for representing A.M.'s "best interests" when chastising A.M. for committing criminal conduct that had neither been proven nor admitted to, while arguing that A.M. deserved an indeterminate prison commitment. *A.M.*, 134 N.E.3d at 368. Not much judicial authority has touched on the role of counsel in delinquency proceedings, but National juvenile defense standards and legal scholars agree that expressed-interest representation, not best-interest representation, is the approach necessary to give meaning to a child's right to counsel, and to ensure that children believe they have been treated fairly. National Juvenile Defense Standards, §§ 1.1, 1.2

(Nat'l Juvenile Defender Ctr. 2012)[1]; *e.g.,* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245 (2005); Robin Walker Sterling, *Role of Juvenile Defense Counsel in Delinquency Court* (2009). And, the U.S. Department of Justice has advocated that a child who faces a loss of liberty deserves an advocate who zealously advocates "their interests." *See* Statement of Interest of the United States, *N.P. et al. v. Georgia*, No. 2014-CV-241025, 1, and 13 (Ga. Super. Ct. 2015).

This Court should grant certiorari.

STATEMENT OF THE CASE

1. On February 13, 2018, A.M. appeared before the juvenile court to answer to a modification of his prior disposition based on allegations that he had committed burglary, battery, possessed and consumed alcohol, left home without permission, missed school, violated curfew, not complied with recommended services, and had contact with another child also on probation. App. E, 23a—24a. At the hearing, the prosecutor redacted the allegations that A.M. committed burglary and drank alcohol, and the prosecutor and A.M.'s attorney[2] "stipulated" that A.M. admitted to the remaining allegations, without comment to or from A.M. App. E, 24a—25a. The

[1] https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf at §§ 1.1, 1.2

[2] A.M.'s counsel at this hearing has since been disbarred for receiving several attorney disciplinary complaints, criminal charges, and refusing to even respond to disciplinary proceedings. *In re Scott J. Lennox*, Case No. 19S-DI-628, 2020 Ind. LEXIS 382 (Ind. May 6, 2020).

probation officer recommended that A.M. be "awarded to the Indiana Department of Corrections," and the juvenile court gave A.M.'s counsel an opportunity to respond. App. E, 25a. A.M.'s counsel explained:

> I am befuddled by the actions of [A.M.]. I think he's a good kid. I think he's got a bright future ahead of him. He's smart, has some real opportunities, but the path he's going down is leading him to prison and he's just going to end up wallowing away there, probably spend most of his life there. You don't break into people's houses, you don't steal guns, don't follow the rules, get kicked out of school. You don't get an education and that's going to end up being his downfall. I think except for being kicked out of Gateway, he could have had an opportunity here. He could have been on home detention and shown everybody that he could do right. Instead he's going to go to the DOC, go to Logansport for an evaluation, do his six months, eight months or a year, as long as he does right, and hopefully will come back and have learned a lesson. I have a lot of hope for [A.M.]. I hope he understands that what's going to happen here is not a punishment but rather a chance to get a leg up in life and to try to do the right thing. I hope he does good, and when he comes back he can really grow and be a good kid.

App. E, 25a—26a. The juvenile court obliged, and ordered A.M. committed to the Department of Correction indeterminately, which could have lasted until he turned twenty-one years old. App. B, 8a—12a.

2. A.M. appealed arguing that A.M.'s counsel provided ineffective assistance. The Court of Appeals held that at any delinquency proceedings other than adjudication, the correct standard to judge effectiveness of counsel was whether there was the warm body of a lawyer in the courtroom: "if counsel appeared and represented the petitioner in a procedurally fair setting which resulted in a

judgment of the court, it is not necessary to judge his performance by rigorous standards." *A.M. v. State*, 109 N.E.2d 1034, 1041 (Ind. Ct. App. 2018), *trans. granted and vacated by A.M. v. State,* 134 N.E.3d 361 (Ind. 2019). App. D 14a—20a. The Court of Appeals borrowed this "less stringent standard" from a case analyzing the effectiveness of counsel in state post-conviction relief cases. *Id*. (*citing Baum v. State*, 533 N.E.2d 1200 (Ind. 1989)).

3. The Indiana Supreme Court granted transfer, and issued a decision using a standard similar to that employed by the Court of Appeals, but slightly different—a standard sometimes referred to as the "Baum-plus standard." *A.M. v. State*, 134 N.E.3d at 367-69 (majority opinion and Justice Slaughter, concurring in judgment). App. A, 1a—7a. The majority articulated the standard as follows:

> When a juvenile raises an ineffective-assistance-of-counsel claim following a modified disposition, we focus our inquiry on whether it appears that the juvenile received a fundamentally fair hearing where the facts demonstrate the court imposed an appropriate disposition considering the child's best interests. In assessing fundamental fairness, a court should not focus on what the child's lawyer might or might not have done to better represent the child. Rather, the court should consider whether the lawyer's overall performance was so defective that the court cannot say with confidence that the juvenile court imposed a disposition modification consistent with the best interests of the child.

Id. at 368 (cleaned up). The majority went on to explain that A.M.'s counsel performed effectively by acknowledging, "what everyone else in the room already knew—that this was A.M.'s last chance" and by expressing hope that A.M. could be rehabilitated by going to the Department of Correction. *Id*.

REASONS FOR GRANTING THE PETITION

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

In re Gault, 387 U.S. at 36.

I. Further development of the right to counsel in delinquency proceedings and how to enforce that right is needed.

The right to counsel is relied upon or yielded by hundreds of thousands of children throughout our nation every year,[3] and that alone should be reason enough for this court to address that right from time to time. As of today, more than fifty-three years from *Gault*, this Court has yet to revisit and refine the right to counsel for children, despite addressing and refining the right to counsel for adults seemingly every year since 1984, when *Strickland* and *Cronic* were contemporaneously handed down. This case is the rare opportunity[4] to give

[3] *See*, https://www.ojjdp.gov/ojstatbb/court/qa06201.asp?qaDate=2017 (last visited April 11, 2020). *See also*, https://www.ojjdp.gov/mpg/litreviews/Indigent-Defense-for-Juveniles.pdf (last visited May 13, 2020) ("Despite the Supreme Court's affirmation of these constitutional protections, studies have shown that youth often do not access the legal resources afforded to them.").

[4] Juvenile appeals, and more specifically, claims of ineffective assistance in delinquency proceedings, are relatively rare when compared to the appellate and post-conviction systems that are a part of the adult criminal process. *See*, Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev., 773, 774 (2010); *See, also*, Megan Anitto, *Juvenile Justice on Appeal*, 66 U. Miami L. Rev., 671 (2012).

meaning to the right to counsel for children, and promote fairness in an important area of law, prone to disproportionate results.[5]

A. It is time for this Court to recognize a right to counsel at <u>all</u> proceedings where children face a loss of liberty.

Out of appropriate judicial restraint, the *Gault* Court explicitly limited the reach of its decision to the "specific problems presented," despite stating that the juvenile needs counsel "at every step" of the proceedings. 387 U.S. at 13, 36. As a result, the *Gault* Court explicitly limited its holding requiring the provision of counsel from application to the disposition and post-disposition phases at stake here. *Id*. at 13, and 27. And, of course, since no lawyer had represented Gerald Gault at the relevant proceedings, the discussion did not address the performance aspects of counsel, or how to resolve claims that counsel performed ineffectively.

Now, nearly every United States jurisdiction provides a statutory right to counsel at the juvenile disposition phase—most of them like Indiana—expressly recognizing a right to counsel at every stage of delinquency proceedings. *See*, Henning, *supra*, at 252; Ind. Code §31-32-2-2, Ind. Crim R. 25; *D.H. v. State*, 688 N.E.2d 221, 223-24 (Ind. Ct. App. 1997). Moreover, national juvenile defense leaders have recognized that for many children in the delinquency system, "disposition is the most important phase of the juvenile court proceedings." Nat'l Juvenile

[5] The Indiana Criminal Justice Institute has found disproportionate minority contact for juveniles in the justice system at every step of the system—referral to detention or commitment. *See*, Equity in Indiana's Juvenile Justice System, (2018) (found at https://www.in.gov/cji/files/DMC%20Report%202019.pdf (last checked June 19, 2020).

Defender Ctr., *National Juvenile Defense Standards,* 106 (2012).[6] The provision of counsel at disposition and post-disposition phases by states is not a reason to ignore the constitutional implications of those rights, but rather, demonstrates why the right should be given constitutional dimension through the Due Process Clause. *See, Douglas v. California,* 372 U.S. 353 (1963)*; Evitts v. Lucy*, 469 U.S. 387, 401 (1985) ("When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.").

States that have addressed claims of ineffective assistance of counsel (IAC) raised by children in delinquency proceedings have consistently held that the right to counsel applicable to children is the right to effective counsel.[7] *Gault* acknowledged what had been held in *Kent v. United States*, 383 U.S. 541 (1966): in proceedings for waiver of jurisdiction by the juvenile court to adult court, children hold a right to "effective assistance of counsel," and indicated that the right to effective counsel was one of the "essentials of due process and fair treatment." 387 U.S. at 30. *Gault* reiterated "this view, here in connection with juvenile court adjudication of 'delinquency,' as a requirement which is a part of the *Due Process Clause* of the *Fourteenth Amendment*[.]" 387 U.S. at 30-31.

[6] http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf

[7] The South Carolina Supreme Court held that a parolee did not have the right to effective counsel, because the right was a due process right to counsel, but has not applied that logic to juveniles in delinquency proceedings. *Duckson v. State*, 586 S.E.2d 576, 577-78 (S.C. 2003).

Holding there is a right to effective counsel is not enough. Practitioners and courts need guidance on what that right entails, and this case presents an ideal scenario to address two fundamental questions: (1) *what is the standard to enforce effective representation in delinquency proceedings,* and (2) *does it differ depending upon the phase of the proceedings?* Of course, both of those questions as applied in this case would require this Court to hold that the Due Process Clause of the Fourteenth Amendment provides a right to counsel at juvenile proceedings where the appropriate sanction or rehabilitation is being considered, and that a minimum level of effectiveness accompanies that right—just as it does the right to counsel at adjudication proceedings. However, these holdings reflect the progress of juvenile representation, are essential to the cannon of juvenile constitutional law, and probably should have been made already. *See,* Marsh Levick, *Still Waiting: The Elusive Quest to Ensure Juveniles A Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 Rutgers L. Rev. 175 (2007).

B. Indiana got it wrong on an important issue of federal law: what standard applies to children's claims that their counsel was ineffective. It is time for this Court to address this issue so other jurisdictions do not follow Indiana's lead.

i. Indiana has created a confusing standard that applies Strickland to adjudication phases, and its minted due process standard to all other phases.

The Indiana Supreme Court created what it coins as a Fourteenth Amendment due process standard to evaluate efficacy of counsel. The standard originates from the Indiana's standard to evaluate performance of state post-conviction counsel, where there is no right to counsel, and diverts analysis away

from the conduct of the attorney, focusing primarily on the ultimate outcome and perceived best interests of the child. *A.M.*, 134 N.E.3d at 368. By footnote, the Indiana Supreme Court reserved the application of this special due process standard to "disposition-modification hearing[s] only," and left in place application of the *Strickland* standard to adjudication proceedings—at least for now. *A.M.*, 134 N.E.3d at 364, n.2. The purported reason for the distinction: *Strickland* created a Sixth Amendment standard for analyzing claims of IAC. *See*, *e.g.*, *A.M.,* 134 N.E.3d at 365 ("[W]e conclude that the child's ineffective-assistance-of-counsel claim in a disposition-modification hearing is better evaluated under a Fourteenth Amendment due process standard, not the Sixth Amendment's *Strickland* test.").

In light of *Gaul*t, Indiana Supreme Court's rationale for applying a due process standard for disposition and modification proceedings, but not adjudication proceedings, is particularly confusing. *Gault* revealed the right to counsel in *adjudication proceedings* from the Fourteenth Amendment's Due Process Clause. So, applying *Strickland* to that phase of the proceedings, but not elsewhere based on the rationale that *Strickland* is a Sixth Amendment case makes no sense. It is even more perplexing why Indiana would create such a distinction when *Strickland* analysis applies to adult appellate effectiveness claims, where the right to counsel emanates from the Fourteenth Amendment's Due Process Clause, similar to the right to counsel at adjudication proceedings articulated in *In re Gault*. *See, Douglas v. California,* 372 U.S. 353 (1963)*; Evitts v. Lucy*, 469 U.S. 387 (1985); *See also*, *Hill v. State*, 960 N.E.2d 141, 145 (Ind. 2012) ("Appellate counsel's performance, like

trial counsel's performance, is governed by the two-part test enunciated in *Strickland*[.]).

ii. Many jurisdictions do not impose such a distinction between right to counsel emanating from the Sixth Amendment v. Fourteenth Amendment; other jurisdictions have yet to address the issue.

Looking across the legal landscape of states and federal jurisdictions, there is variance in how they have handled claims of IAC stemming from delinquency proceedings, if they have grappled with the question at all. Many states have applied *Strickland* or its progeny to the analysis; some have applied another standard or used language that could have been borrowed from *Strickland*, but it is unclear if they have imposed the *Strickland* test altogether; some have refused to consider the claim as presented without articulating a standard; and others have not yet grappled with the issue in published decision. Two have rejected *Strickland* or similar standards, but for conflicting reasons, and two that have not addressed the issue have precedents that indicate they may reject *Strickland*, but for different reasons. The variance implores this Court's consideration to provide guidance and ensure that the important right to counsel is adequately protected throughout the nation.

Multiple federal jurisdictions have looked to Sixth Amendment precedents to address juvenile right-to-counsel issues: *See*, *e.g.*, *Reed v. Duter*, 416 F.2d 744, 749 (7th Cir. 1969)("*Gault* must be construed as incorporation in juvenile court procedures, which may lead to deprivation of liberty, all of the constitutional safeguards of the Fifth and Sixth Amendments . . . which apply by operation of the

Fourteenth Amendment[.]"); *see also, United States v. M.I.M.*, 932 F.2d 1016, 1018 (1st Cir. 1991) (relying on Sixth Amendment precedents to hold that juvenile had a right to counsel on first direct appeal.), *Deshawn E. ex rel. Charlotte E. v. Safir,* 156 F.3d 340, 349 (2nd Cir. 1998) (applying Sixth Amendment safeguards to the right to counsel for juveniles), *United States v. Myers*, 66 F.3d 1364, 1370 (4th Cir. 1995) (applying Sixth Amendment safeguards to juvenile waiver hearing), and *John L. v. Adams*, 969 F.2d 228, 237 (6th Cir. 1992) (observing that juvenile appellate rights can be recognized from the Sixth Amendment right to counsel).

Several states have explicitly employed the *Strickland*'s two-prong test to evaluate the effectiveness of counsel in delinquency proceedings. *See*, *e.g.*: *D.D. v. State*, 253 So.3d 121 (Fla. Ct. App. 2018) (Holding that the child was prejudiced by the attorney's deficient performance, but not addressing the genesis for that standard); *State v. J. J.M.*, 282 Or.App. 459, 387 P.3d 426 (Or. Ct. App. 2015); *In re K.A.T., Jr.,* 69 A.3d 691 (Pa. Super. Ct. 2013); *In re D.L.*, 96 So.3d 580, 582 (La. Ct. App. 2012); *In re D.M.,* 708 S.E.2d 550, 554 (Ga. Ct. App. 2011); *In re Angel R.*, 77 Cal. Rptr.3d 905, 908 (Cal. Ct. App. 2008); *In re G.E.S.,* 2008-Ohio-2671 (Ohio, Ct. App. 2008); *In re D.A.*, 197 P.3d 849, 854 (Kan. Ct. App. 2008); *Housekeeper v. State*, 197 P.3d 636 (Utah 2008); *State v. Megan S.*, 671 S.E.2d 734 (W. Va. 2008); *Owens v. Russell*, 726 N.W.2d 610 (S.D. 2007); *In re K.G.*, 957 So.2d 1050 (Miss. Ct. App. 2007); *In re Parris W.*, 363 Md. 717, 770 A.2d 202 (Md. 2001); *In re K.J.O.,* 27 S.W.3d 340 (Texas Ct. App. 2000); *In re L.B.*, 404 N.W.2d 341 (Minn. Ct. App. 1999); *In re LDO*, 858 P.2d 553 (Wyo. 1993); *In re J.B.,* 618 A.2d 1329 (Vt. 1992). Arkansas

referred to the test as being "whether trial counsel's performance fell below that standard required by the Sixth Amendment of the United States Constitution," but refused to review the claim of IAC as raised on appeal. *Walker v. State*, 955 S.W.2d 905, 908 (Ark. 1997). In an unpublished opinion, the Michigan Court of Appeals applied the *Strickland* two-prong test, along with a third prong inquiring as to whether the "attendant proceedings were fundamentally unfair or unreliable." *In re Smith,* 2007 Mich. App. LEXIS 2306 (Mich. Ct. App. 2007) (*citing People v. Rodgers,* 645 N.E.2d 294 (Mich. Ct. App. 2001)). Massachusetts has determined that satisfaction of its *Saferian* standard necessarily satisfies the *Strickland* standard. *Commonwealth v. Ogden O.*, 448 Mass. 798, 864 N.E.2d 13 (Mass. 2007); *Commonwealth v. Fuller*, 394 Mass. 251, 256 n.3, 475 N.E.2d 381 (1985). A Circuit Court in Virginia has applied the *Strickland* standard to a juvenile's claims of IAC in a habeas corpus proceeding, but no similar application has been found by Virginia's appellate courts. *See*, *E.C. v. Va. Dep't of Juvenile Justice*, 88 Va. Cir. 49 (Va. Cir. Ct. 2014).

North Carolina relied upon Sixth Amendment precedents of *Cronic* and *Herring v. New York,* 422 U.S. 853 (1975), to evaluate a juvenile's claim that his counsel's silence was IAC. *In re C.W.N.*, 227 N.C.App. 63, 742 S.E.2d 583 (N.C. Ct. App. 2013). The North Carolina Court ultimately disagreed, but had no qualms about applying Sixth Amendment precedents to evaluate a child's claims of IAC.

New Mexico has employed a two-prong standard to evaluate whether a child received IAC in a delinquency proceeding that preceded the transfer to adult court

and sentencing, which is similar to *Strickland's* two-prong test. *State v. Ernesto M.*, 121 N.M. 562, 569, 915 P.2d 318 (N.M. Ct. App. 1996). The standard used for children is also applied to adult claims in criminal proceedings, so it must comport with *Strickland's* two-prong test. *See*, *State v. Gonzales*, 113 N.M.221, 229-30, 824 P.2d 1023, 1031-32 (1992).

New York has imposed the following standard to claims of IAC by children in delinquency proceedings: whether the evidence, the law, and the circumstances of a particular case, viewed in the totality of the time of the representation, reveal that the attorney provided meaningful representation. *In re Gregory AA.*, 20 A.D.3d 726, 726-27 (N.Y. App. Div. 2005). Just as with New Mexico, this standard seems to be the same standard applied to adult proceedings in New York. *See, People v. Baldi*, 54 NY2d 137, 147, 429 N.E.2d 400 (N.Y. 1981).

Kentucky, Tennessee, and Wisconsin have relied upon *Strickland* and/or *United States v. Cronic*, 466 U.S. 648 (1984) to evaluate efficacy of counsel at juvenile transfer hearings, but may not have applied those precedents to claims of IAC in other delinquency proceedings. *See, State v. Hinkle,* 2019 WI 96, 389 Wis. 2d 1, 935 N.W.2d 271, 281, n.15 (Wis. 2019); *Commonwealth v. Robertson*, 431 S.W.3d 430 (Ky. Ct. App. 2013); *Howell v. State*, 185 S.W.3d 319 (Tenn. 2006). Similarly, Washington relied upon *Strickland's* two-prong test where juvenile counsel failed to timely file a motion that could have kept the juvenile in juvenile court upon turning 18, as opposed to the case being dismissed and then refiled in adult court. *State v. Maynard*, 351 P.3d 159 (Wash. 2015).

Other states have considered juveniles' claims of ineffective assistance on appeal, but addressed the claim without articulating the proper standard to evaluate effectiveness. Just last year, the Missouri Supreme Court addressed how and when a claim that counsel in delinquency proceedings was ineffective can be raised. *D.C.M. v. Pemiscot Count Juv. Off.*, 578 S.E.3d 776, 782 (Mo., 2019) ("Despite the right to effective assistance of counsel, no statute or case from this Court provides a mechanism for a committed juvenile to raise an ineffective assistance of counsel claim."). The Missouri Supreme Court acknowledged that such claims could be raised on direct appeal, but remanded for a hearing in the trial court to develop the record, without articulating what standard to apply.

Similarly, in Alabama, when such claims were raised on appeal, the discussion revolved around how claims could be raised, but no standard was ever articulated to review such claims. *W.B.S. v. State*, 192 So.3d 417 (Ala. Crim. App. 2015). Idaho, as well, addressed the proper procedural tool for a child to raise an IAC claim, and even cited to *Strickland* for the base proposition that the right to effective counsel is necessary to ensure a fair trial, but did not state directly what standard governs the claim of IAC by a juvenile. *State v. Doe*, 34 P.3d 1110 (Idaho Ct. App. 2001).

Moreover, a search of national legal precedent for claims of ineffective representation in delinquency proceedings revealed no results for Alaska, Delaware, Connecticut, Maine, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Rhode Island, or South Carolina. Hawaii noted that children

have a right to effective counsel, just as adults would, but did not address what standard to apply in evaluating such claims. *In re Doe*, 107 Haw. 12, 16 (Haw. 2005) ("Because effective assistance of counsel is fundamental to a fair trial, it should be guaranteed in juvenile law violator proceedings as have other fundamental criminal case guarantees.")

Two states have precedents that indicate they may reject application of *Strickland* for differing reasons, but have yet to address the specific question. The South Carolina Supreme Court has indicated that parolees do not have a right to effective counsel because their right to counsel stems from due process, not the Sixth Amendment. *Duckson v. State*, 586 S.E.2d 576, 577-78 (S.C. 2003) ("An ineffective assistance claim is premised, however, on the violation of the individual's Sixth Amendment right to counsel. [] No such Sixth Amendment right to counsel exists, however, in the context of a parole revocation hearing with is an administrative rather than criminal proceeding.") And, the Connecticut Supreme Court used a distinct fundamental fairness analysis to review the constitutional question of what notice is required, but has yet to evaluate a claim of IAC. *In re Steven G.*, 556 A.2d 131 (Conn. 1989).

Finally, the two states that have rejected application of the *Strickland* standard to juvenile IAC claims did so for contradicting reasons: Indiana and Montana. The Indiana Supreme Court declined to adopt the "rigorous *Strickland* standard," *A.M.*, 134 N.E.3d at 367, and the Montana Supreme Court rejected *Strickland* as being too deferential "to protect the fundamental liberty interests at

stake in special civil proceedings." *In re K.J.R.,* 391 P.3d at 77. Indiana articulated the alternative standard focused on the outcome alone, and Montana ultimately declined to "adopt a particular standard for youth court ineffective assistance of counsel claims . . . because the parties have not raised or briefed the issue[.]" *Id.* at 78.

iii. Indiana imposed a lesser standard by deflecting away from, or omitting altogether, attorney performance.

The Indiana Supreme Court stated that it was not imposing a "lesser standard" to evaluate claims of ineffective representation, but at the same time declined "to adopt the Sixth Amendment's rigorous *Strickland* standard." *Id.* at 367. The Indiana Supreme Court then articulated a standard that deflected away from or omits evaluation of the attorney's performance when evaluating whether the attorney provided effective representation. *A.M.*, 134 N.E.3d at 368 ("[A] court should not focus on what the child's lawyer might or might not have done to better represent the child.").

The evaluation of the resulting outcome of any proceeding is undermined where the specific acts of representation provided by the lawyer are ignored. Applying that concept to the facts here, A.M.'s own attorney advocated for his imprisonment, and thus the decision was not subjected to adversarial testing. "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal[.]" *Strickland*, 466 U.S. 685. And, an accurate proceeding is reached by adversarial process. "Truth is best discovered by powerful statements on both sides of the question." *Cronic*, 466 U.S. 655 (cleaned-up).

Further, Indiana's new standard prevents a beneficial part of review of these claims—appellate evaluation and commentary on what are the prevailing professional norms for effective performance in a given set of circumstances to ascertain what objectively reasonable representation looks like. Scrutinizing what counsel did or did not do can allow courts to review standards for guidance, which in turn informs practitioners of professional norms that apply to various areas of the law. *See*, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (Referring to standards from the American Bar Association for guidance on reasonable efforts to develop mitigating evidence.); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)("[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'").

In summary, "the right to counsel is the right to effective assistance of counsel," *Strickland*, 466 U.S. at 686, and that right is best protected by the two-prong analysis articulated in *Strickland* unless a total breakdown of the adversarial process has occurred. *Cronic*, 486 U.S. at 658. Either way, the determination must be informed by evaluation of the actions by counsel. By removing analysis of counsel's performance from juvenile IAC claims, Indiana has imposed a lesser right to counsel for children. This Court should grant certiorari to address the lesser right to counsel that Indiana children now hold, and prevent it from spreading to other jurisdictions.

C. The IAC standards used to enforce the adult right to counsel protect a minimum level of objectively reasonable representation, ensure fair proceedings, and should be extended to juvenile delinquency IAC claims.

i. The Strickland standard ensures objectively reasonable representation—a standard which children equally deserve.

The deficient performance prong of the *Strickland* standard is limited to an evaluation of whether the representation fell below an "objective standard of reasonableness." 466 U.S. at 688. This court has not imposed "specific guidelines for appropriate attorney conduct," but rather has held that counsel representation is properly measured by "reasonableness under prevailing professional norms." *Wiggins*, 539 U.S. at 521. However, the Indiana Supreme Court essentially rejected this part of the *Strickland* standard as being too rigorous. *A.M.*, 134 N.E.2d at 367. By doing so, the Indiana Supreme Court indirectly stated that children do not deserve a standard tailored to protect an objectively reasonable level of representation. This case is the opportunity to explain that counsel provided for children in delinquency proceedings must meet the test of providing objectively reasonable representation that is reasonable under prevailing professional norms.

ii. Strickland and Cronic are tailored to protect fair proceedings, the same justification for access to counsel for children.

As the Indiana appellate courts pointed out, *Strickland* is a case involving the Sixth Amendment right to counsel, but it is broader and can apply to the right to counsel under the Due Process Clause. *Strickland* itself explained in broadly applicable language that the right to counsel is the right to effective counsel, and

created a test to ensure fundamental fairness in court proceedings. *Strickland*, 466 U.S. at 684-85. Likewise, *Cronic* explained that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." 466 U.S. at 658. The *Strickland* standard has since been read to protect the concept of fundamentally fair proceedings and adjudications: "Errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of a federal writ. The deprivation of the right to the effective assistance of counsel recognized in *Strickland* is such an error." *Williams v. Taylor*, 529 U.S. 362, 375 (2000) (cleaned up).

Because the protection of an effective right to counsel provided by *Strickland* and *Cronic* is attributed to the provision of fairness, those standards overlap directly with the basis for provision of counsel for children. A core criticism of the juvenile delinquency system addressed by *Gault* was that "[f]ailure to observe the fundamental requirements of due process has resulted in instances . . . of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." 387 U.S. at 20. To fix these problems, *Gault* provided counsel. In doing so it quoted as support the Standards for Juvenile and Family Courts, published by the Children's Bureau of the United States Department of Health, Education, and Welfare: "As a component part of a fair hearing required by due process guaranteed under the 14th amendment, notice of the right to counsel

should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel." 387 U.S. at 39.

D. This Court could impose a heightened standard which recognizes the unique aspects of representing children.

As noted above, juxtaposed to Indiana's determination that *Strickland* is too rigorous is Montana, which explained that *Strickland* is too deferential:

> While the Strickland test continues to be appropriate for adult criminal proceedings, we have previously determined that its highly deferential standard is insufficient to protect the fundamental liberty interests at stake in special civil proceedings that, though analogous to criminal proceedings, involve protective or remedial considerations not present in criminal proceedings.

In re K.J.R., 391 P.3d 71, 77 (Mont. 2017).

A look at the specific directives in *Gault* can inform the need for counsel that is adept at working with children: "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Gault,* 387 U.S. at 36. These directives cannot be separated from the context within which they are applied—an attorney representing "[t]he juvenile." *Id.*

"It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully informed than adults[.]" *Roper v. Simmons*, 543 U.S. 551, 599 (2005). These traits impact the client/ lawyer relationship as well, and justify

the application of a heightened standard of representation for children when compared to adults.

> Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as a part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.

Graham v. Florida, 560 U.S. 48, 78 (2010) (cleaned up). Whether these considerations are protected by focusing on prevailing professional norms that are tailored to juvenile defense, or by articulating a distinct standard focused on the representation of children, this case provides an opportunity to provide direction as to how effective representation for children might differ from effective representation of adults.

No matter what standard is to be applied ultimately, it is clear that this case is the vehicle to finally address these issues some fifty-three years after *Gault*. Two incremental steps leading outward from *Gault* can be taken with this case—recognition of the right to counsel at post-adjudication proceedings, and creating the standard by which effectiveness of counsel is evaluated. Because juvenile appeals are rare, and claims of IAC even more rare in those proceedings, now is the opportunity to address these important issues.

II. Juveniles must possess the autonomy to control the objectives of their defense, which has to be protected by counsel who are loyal to their clients.

Another question brought out by the Indiana Supreme Court's decision is whether a child in delinquency proceedings possesses the autonomy to determine and control the objectives of his defense. The *A.M.* Court found that A.M. did not receive ineffective assistance because his counsel "collaborated with the judge, the probation officer, and the prosecutor to ensure that A.M. received a fundamentally fair proceeding that resulted in an appropriate disposition serving A.M.'s best interests." 134 N.E.3d at 368. The court went on to explain that, in the collaborative setting of delinquency court, "good advocacy may not include adversarial argument" and "effective assistance may take many forms and tones," including advocating for "placement in the DOC [where] consistent with [the child's] best interests." *Id.* at 369. By saying these things, the Indiana Supreme Court effectively held that where a child's attorney believes that the child deserves to go to prison, the attorney can, and probably should, advocate for the imprisonment of their client no matter what the client's position is.

This is not the rule across the country. In *People v. Austin M.*, 975 N.E.2d, 22, 40 (Ill. 2012), the Illinois Supreme Court noted the punitive characteristics of juvenile proceedings, which subject juveniles to "serious, life-altering consequences." As a result of this reality, the Illinois Supreme Court determined "the 'type' of counsel which due process and our Juvenile Court Act require to be afforded

juveniles in delinquency proceedings is that of defense counsel, that is, counsel which can only be provided by an attorney whose singular loyalty is to the defense of the juvenile." *Id*.

Moreover, it should not be the rule when the guidance concerning the lawyer-client relationship is consulted. The Indiana Rules of Professional Conduct, which should have been influential here, provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation," which is echoed in the Model Rules of Professional Conduct. Ind. Prof. Cond. R. 1.2; ABA Model Rules of Professional Conduct, Rule 1.2 (1983). This mandate should not be undermined simply because A.M. was a child. Where a client's capacity to make adequately considered decisions is diminished because of minority or other reason, "the lawyer shall, as far as reasonably possible, maintain normal client-lawyer a normal client-lawyer relationship with the client." Ind. Prof. R. 1.14; ABA Model Rules of Professional Conduct, Rule 1.14 (1983).

Further, national standards and experts focused on the defense of children emphasize the need for lawyers to represent the expressed interests of their clients.

> By the early 1980s, there was professional consensus that defense attorneys owe their juvenile clients the same duty of loyalty as adult clients. That coextensive duty of loyalty requires defenders to represent the legitimate "expressed interests" of their juvenile clients, and not the "best interests" as determined by the attorney.

Robin Walker Sterling, *Role of Juvenile Defense Counsel in Delinquency Court,* 3 (2009).[8] *See*, *also*, Nat'l Juvenile Defender Ctr., National Juvenile Defense Standards, Standard 1.12 Elicit and Represent Client's Stated Interests (2012).[9]

Nevertheless, this Court has not addressed the role of counsel in juvenile proceeding, or the corollary question of what level of autonomy do children possess to control the objectives of their defense beyond what can be deduced from *Gault*. This Court should grant certiorari to answer multiple questions. Where the child's attorney believes that the child deserves a prison commitment, but the child does not agree, what role does the attorney play when fulfilling the constitutional mandate of counsel that ensures a fair proceeding: best interests advocate, or expressed interests advocate? Relatedly, is the child's attorney in a collaborative role with the judge, probation officer, and prosecutor as explained by the Indiana Supreme Court here, or does the child's attorney hold a more traditional role of advocate for his client in an adversarial process?

A. The adversarial model has been recognized as essential and indispensable to accurate fact-finding and fair proceedings in criminal cases, and should be applied to delinquency proceedings where a child's liberty is at stake.

Even before this Court recognized the right to appointed counsel as applicable to the states in *Gideon*, it had already noted that appointed counsel must

[8] https://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf (last visited, June 19, 2020).

[9] http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf (last visited, June 19, 2020).

function in the role of an advocate, as opposed to that of amicus curiae. *Ellis v. United States*, 356 U.S. 674, 675 (1958). Since *Ellis*, this Court has reminded on more than one occasion that "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system[.]" *Strickland*, 466 U.S. at 685; *see also, Cronic*, 466 U.S. at 655 ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."). As discussed above in section I, the adversarial model protects two aspects of the court process which children need and deserve as much as anyone: fairness and accuracy.

Adversarial testing is no less important for delinquency proceedings than for criminal proceedings. Indeed, it may be even more important that fairness is preserved in the juvenile setting by advocacy for the child's desired dispositional alternative. *See*, *In re Gault*, 387 U.S. at 26 ("[T]he appearance as well as the actuality of fairness . . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.") Moreover, adversarial testing in the context of proceedings where the end-goal is to reach the best interests of the child is not counterintuitive. Where the child's stated objectives may not be in their best interests, the adversarial process provides a counter to the child's position. *See*, Henning, *supra*, at 285 ("[E]ven where the child . . . unwisely instructs his attorney

to advocate for his release from detention back to the community, the judge will ultimately decide whether that release is appropriate.").

B. The right to counsel revealed by *Gault* should protect the autonomy of the individual.

More recently, this Court has explained that by the decision to "gain assistance, a defendant need not surrender control entirely to counsel." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Some decisions are left to counsel, but some decisions are reserved for the client: "whether to plead guilty, waive the right to jury trial, testify in one's own behalf, and forgo an appeal," fall within this latter category—essentially the objectives belong to the client. *Id*. Whether to concede, or actually request, a prison commitment should fall within the latter category as well.

For children, *Gault* itself addressed this issue indirectly by explaining that the neither the probation officer nor judge can serve as counsel for the child where a child's freedom is at stake:

> The probation officer cannot act as counsel for the child. [] Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court. A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of liberty for years is comparable in seriousness to a felony prosecution.

In re Gault, 387 U.S. at 36. The need for independent counsel in delinquency proceedings was apparent to the *Gault* Court despite that the goals of the judge and probation officer were to seek and prescribe what was best for the child. And the

reason that an advocate was needed was the significance of the liberty interest at stake in delinquency proceedings.

Moreover, the child needs a lawyer to express *the child's* position and view point to protect the fairness of the proceedings. 387 U.S. at 36 ("The juvenile needs the assistance of counsel to . . . ascertain *whether he has a defense and to prepare and submit it*.") (emphasis added). But, *Gault* had no need to address a circumstance where the child's counsel usurped the decision on an objective of the proceeding; as such, the *Gault* Court did not elaborate at length on the autonomy of the child to direct the objectives of his defense. This case provides that opportunity.

C. Best-interest representation undermines the fundamental rights of the child.

Professor Henning summarized some of the dangers of best-interest representation in a way that is particularly prescient in this case:

> An attorney who believes that juvenile court intervention is best for the child may refuse to fight or be lackadaisical in fighting allegations of delinquency—even if he or she knows the client is innocent. The best-interest advocate may also freely disregard the attorney-client privilege and/or ignore the child's right against self-incrimination in order to ensure that the child gets the treatment the attorney thinks he needs.

Henning, *supra*, 288-89. The Indiana Supreme Court's decision that the role of counsel is best-interest advocate working in collaboration with the judge, probation officer, and prosecutor will inevitably spill over into other objectives of the proceeding. If an attorney can decide that his client deserves a prison commitment, the attorney can decide that it is in the child's best interest to be adjudicated for an

otherwise defensible offense. Attorneys could forego challenges to the admissibility of incriminating statements taken in violation of the Fifth Amendment, or forego suppression motions on evidence seized in contravention of the Fourth Amendment. "By allowing attorneys to advocate in the best-interest of the child, the system merely substitutes the unbridled discretion of the court [rejected by *Gault*] for the unbridled discretion of counsel." Henning, *supra*, at 290.

Further, the potential for improper judicial influence over public defense attorneys in Indiana has already been the subject of scrutiny. Many Indiana counties rely upon judges to employ public defenders, which in turn may incentivize these attorneys to promote what they anticipate to be the judge's desired outcome, not their client's objectives.[10] A.M.'s counsel expressed befuddlement, to the extent that he could not defend against A.M.'s imprisonment, but "[i]t is difficult to get a man to understand something, when his salary depends on his not understanding it[.]" Upton Sinclair, I Candidate for Governor: And How I Got Licked (1934).

The impacts of these dangers do not stop at the adjudicatory phase, especially where disposition options include confinement in a prison institution. And it should also be noted that, despite appellate holdings interpreting that commitment to Indiana's juvenile Department of Correction facilities is not a form of punishment, *see*, *M.C. v. State,* 134 N.E.3d 453 (Ind. Ct. App. 2019) *reh'g denied, trans. denied*,

[10] Kathleen Casey, Indiana Task Force on Public Defense: Final Report and Recommendations of the Reporting Subcommittee to the Indiana Public Defender Commission, August 22, 2018, at 38 (found at https://www.in.gov/publicdefender/files/Indiana%20Task%20Force%20Report.pdf (last checked May 24, 2020)).

the facilities utilize all of the hallmarks of a prison: concrete block walls, razor wire fences, steel doors opened and shut by remote guard station, prison guards in uniform carrying pepper spray and handcuffs, uniforms for inmates, routine frisks, and use of solitary confinement to control behavior.[11]

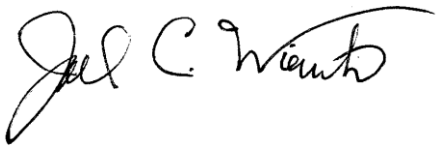
Moreover, this could be a particularly important consideration by this Court, because not all jurisdictions recognize that children have a right to self-representation, as adults do. *See*, *People ex. rel. J.V.D.,* 442 P.3d 1030, 1033 (Colo. Ct. App. 2019) ("*Farretta v. California,* 422 U.S. 806 [] (1975) holds that the Sixth Amendment implies the right to self-representation, but neither the Supreme Court nor the State of Colorado has expressly extended the right of self-representation to juveniles."). Where children want to advance a defense or disposition alternative in contrast to what their defense counsel wishes to advance in their best interests, children may find themselves stuck with that lawyer's representation even where the child could advocate for themselves. This Court's intervention is needed to prevent children's voices in delinquency proceedings from being drowned out by attorneys who shirk their role as advocate.

CONCLUSION

The petition for a writ of certiorari should be granted.

[11] *See, e.g.,* natgeotv.com, "Prison Documentaries, Pendleton Juvenile Correctional Facility," (Aug. 28, 2017) (found at https://youtube.com, last checked June 2, 2019); *see also*, "Juvenile Prison: Life Inside – De-escalation: [J.S.]," https://ijccr.dlib.indiana.edu/media_objects/xp68kg21m (last checked April 17, 2020).

Respectfully submitted,



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