APPENDIX A

A.M. v. State

Supreme Court of Indiana

February 28, 2019, Argued; November 12, 2019, Decided; November 12, 2019, Filed

Supreme Court Case No. 19S-JV-603

Reporter
134 N.E.3d 361 *; 2019 Ind. LEXIS 850 **; 2019 WL 5883520

A.M., Appellant (Defendant), -v- State of Indiana, Appellee (Plaintiff).

Prior History: [1]** Appeal from the Kosciusko Superior Court 1, No. 43D01-1708-JD-292. The Honorable David C. Cates, Judge. On Petition to Transfer from the Indiana Court of Appeals, No. 18A-JV-618.

A.M. v. State, 2018 Ind. App. LEXIS 288, 109 N.E.3d 1034 (Ind. Ct. App., Aug. 20, 2018)

Case Summary

Overview
HOLDINGS: [1]-The Supreme Court held that a due process standard governs a child's claim that the child received ineffective assistance in a disposition-modification hearing during his or her delinquency proceedings. In assessing these claims, the court considers counsel's overall performance and determines whether that performance ensured the child received a fundamentally fair hearing resulting in a disposition serving the child's best interests; [2]-Defendant minor failed to demonstrate he received ineffective assistance of counsel. Considering defense counsel's overall performance, the Supreme Court could not say he performed so defectively that it lost confidence in the juvenile court's disposition modification. Defense counsel helped ensure defendant received a fundamentally fair hearing where the juvenile court reached an accurate disposition that furthered his best interests.

Outcome
Juvenile court's order affirmed.

Counsel: ATTORNEYS FOR APPELLANT: Cara Schaefer Wieneke, Joel C. Wieneke, Wieneke Law Office, LLC, Brooklyn, Indiana.

ATTORNEYS FOR AMICI CURIAE JUVENILE LAW CENTER AND NATIONAL JUVENILE DEFENDER CENTER: Amy Karozos, Greenwood, Indiana; Marsha L. Levick, Juvenile Law Center, Philadelphia, Pennsylvania.

ATTORNEYS FOR APPELLEE: Curtis T. Hill, Jr., Attorney General; Stephen R. Creason, Angela N. Sanchez, Lee M. Stoy, Jr., Deputy Attorneys General, Indianapolis, Indiana.

Judges: Goff, Justice. Chief Justice Rush and Justices David and Massa concur. Justice Slaughter concurs in judgment with separate opinion.

Opinion by: Goff

Opinion

[*362] Goff, Justice.

More than half a century ago, the Supreme Court of the United States avowed that a child's right to counsel is neither "a formality" nor "a grudging gesture to a ritualistic requirement," but rather "the essence of justice." *Kent v. United States*, 383 U.S. 541, 561, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). Since then the settled law has been that children enjoy a constitutional due process right to the effective assistance of counsel during juvenile delinquency proceedings.

The law remains **[**2]** unsettled, however, on the standard to evaluate claims from children alleging ineffective assistance of counsel. Here, A.M. asserts that his attorney rendered him ineffective assistance during a disposition-modification hearing. Reflecting the uncertainty in the law, A.M. and the State offer two competing standards for deciding the claim—one founded in the Sixth Amendment's right to counsel for a criminal proceeding and one founded in the Fourteenth Amendment's due process clause.

We hold today that a due process standard governs a child's claim that he received ineffective assistance in a disposition-modification **[*363]** hearing during his delinquency proceedings. In assessing these claims, we consider counsel's overall performance and determine whether that performance ensured the child received a fundamentally fair hearing resulting in a disposition serving his best interests. Given the facts of this case, A.M. has failed to demonstrate he received ineffective assistance of counsel, so we affirm the trial court.

Factual and Procedural History

Born in June 2002, A.M. has a long history with the juvenile justice system. At the age of ten, he had already committed three delinquent acts amounting to Class D felony battery with bodily injury if committed **[**3]** by an adult. He attended an alternative schooling program for several years, where he received special education and outpatient services for an emotional disability. During his time at the school, A.M. received multiple suspensions and several referrals to the juvenile court for fighting, violence against school staff, destruction of property, and possession of marijuana. Eventually, the school expelled him for "fail[ing] to comply," finding no relationship between his behavior and his disability and only slight progress in his outpatient program. Appellant's App. Vol. II, p. 128.

In July 2017, A.M. and his friends approached a younger boy at the Kosciusko County fairgrounds, forcing him into an abandoned tent so that A.M. could fight him. A.M. beat the other boy and kicked him repeatedly in the head while he was down, leaving him with severe injuries requiring medical treatment. A.M. later threatened the boy with a text message stating, "You better not tell the cops about this." *Id.* at 15, 53-54.

This incident ultimately led to a true finding of disorderly conduct, a Class B misdemeanor if committed by an adult. The juvenile court placed A.M. on supervised probation until the age of eighteen. But in **[**4]** the months that followed, he consistently failed to abide by the terms of his probation—leaving home without permission, threatening his family, skipping school, staying out past curfew, spending time with another juvenile delinquent, and missing his mental-health evaluations. Police also suspected his involvement in the burglary of a classmate's home.

Because his actions posed a danger to others, and out of concern for A.M.'s safety and best interests, the probation department recommended his placement with the Department of Correction (DOC). In its modification report, the probation department also opined that placement in the DOC would ensure A.M. received the necessary education and services.

During a modification hearing in February 2018, A.M.'s counsel, who had defended the juvenile against past delinquency allegations, negotiated with the prosecutor to redact certain allegations from the Petition to Modify, including allegations that A.M. committed unrelated acts constituting residential burglary and theft of a handgun if committed by an adult. A.M.'s counsel also prevented A.M. from having to admit allegations that he consumed alcohol on the school bus. A.M. did, however, admit **[**5]** to allegations that he battered a random boy at the bus stop and that he committed various status offenses. A.M.'s counsel also made the following statement to the court:

> I am befuddled by the action 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 **[*364]** 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 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 try to do the right thing. I **[**6]** hope he does good, and when he comes back he can really grow and be a good kid.

Tr. pp. 6-7.

In adopting the probation department's recommendation, the juvenile court committed fifteen-year-old A.M. to the DOC for an indeterminate period.

A.M. appealed, arguing that he received ineffective assistance of counsel. Our Court of Appeals unanimously denied A.M.'s claim in a published opinion. *A.M. v. State*, 109 N.E.3d 1034 (Ind. Ct. App. 2018). We now grant transfer, thereby vacating the Court of Appeals opinion in part[1] to decide the following unanswered question of Indiana law: What review standard controls juvenile ineffective-assistance-of-counsel claims?[2]

Standard of Review

A juvenile's constitutional and statutory rights to effective counsel are issues of law, which we review de novo. *R.R. v. State*, 106 N.E.3d 1037, 1040 (Ind. 2018); *see generally Bridges v. State*, 260 Ind. 651, 299 N.E.2d 616 (1973); Ind. Code §§ 31-32-2-2, -4-1.

Discussion and Decision

The parties agree the United States Constitution guarantees A.M. the right to effective assistance of counsel. They even agree that the Fourteenth Amendment's due process clause affords A.M. that right. They disagree, however, over the proper standard courts should employ when evaluating whether counsel renders ineffective assistance to a juvenile, like A.M.

A.M. contends his ineffective-assistance-of-counsel claim must be evaluated under the Supreme **[**7]** Court's well-established Sixth Amendment standard in *Strickland v. Washington*—i.e., deficient attorney performance that prejudices the client's criminal **[*365]** defense.[3] *See* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The State counters that, because his right to counsel flows from the Fourteenth Amendment, A.M.'s claims of ineffectiveness must be evaluated under a due process standard governing civil proceedings, not *Strickland*'s standard for criminal proceedings.

According to the State, the distinction between these two standards is important because the latter applies to civil proceedings (as in the juvenile justice context), which impose a less stringent standard. The due process standard for evaluating ineffective assistance of counsel—though applied in various contexts and using varying language—essentially asks whether counsel represented the client in a procedurally fair proceeding that yielded a reliable judgment from the trial court. *See, e.g.*, *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989) (declining to apply *Strickland*'s "rigorous standard" to assess the performance of counsel in post-conviction cases); *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005) (applying *Baum* rather than *Strickland* to claims of ineffective post-conviction counsel); *Baker v. Marion*

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[1] A.M. also claimed that the juvenile court abused its discretion by failing to obtain and consider all information relevant to his unique and varying circumstances, and by failing to adequately explain its reasons for imposing the most severe disposition, despite the existence of intermediary dispositional alternatives that had not yet been utilized. Our Court of Appeals rejected these arguments, which we summarily affirm. *See* Ind. Appellate Rule 58(A)(2).

[2] 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. As the State acknowledged at oral argument, the adjudicative and dispositional phases differ from disposition modification and the question of what constitutes ineffective assistance in those phases may not be the same. But, more importantly, the State noted how the question of ineffectiveness in those phases is not properly before us. *See* Oral Argument at 17:50-18:50, 34:20-34:35. Therefore, we leave for another day the decision of what ineffective-assistance-of-counsel standard governs in the adjudicative and initial dispositional phases, particularly whether our opinion in *S.T. v. State*, 764 N.E.2d 632 (Ind. 2002), was rightly decided.

[3] A.M. makes no separate ineffective-assistance-of-counsel claim under the Indiana Constitution.

Cty. Office of Family and Children, 810 N.E.2d 1035, 1039-41 (Ind. 2004) (declining to apply *Strickland* to assess counsel's performance in cases involving termination of parental rights); **[**8]** *Childers v. State*, 656 N.E.2d 514, 517 (Ind. Ct. App. 1995) (declining to apply *Strickland* to assess counsel's performance in probation revocation case).

On one hand, we agree with the State that the constitutional genesis for a child's right to effective counsel differs from that for the criminal defendant—and different origins yield different tests. But on the other hand, we cannot endorse a less stringent standard for children, given their vulnerability and the special relationship children share with the State by way of the *parens patriae* doctrine. Looking both at the constitutional and statutory origins for a child's right to counsel, along with the juvenile system in which that right manifests, we see that a child's attorney assumes a role in a disposition-modification hearing that is altogether different from an attorney in a criminal proceeding. Accordingly, we conclude that a 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.

Yet we also conclude that *Baum*'s standard, which basically asks only whether the attorney was present, provides too low a benchmark for measuring counsel's performance in juvenile proceedings. So today **[**9]** we apply a due process test assessing the ineffective assistance of counsel that takes into account the distinguishing features of juvenile law. This test considers counsel's overall performance and then focuses on whether that performance ensured the juvenile received a fundamentally fair hearing that resulted in a disposition serving the child's best interests.

I. A.M.'s right to effective counsel comes from the Fourteenth Amendment's due process guarantee and, therefore, must be evaluated under a due process standard and not the *Strickland* standard.

Over fifty years ago, the Supreme Court of the United States handed down its landmark decision in *In re Gault*, holding that juveniles have a constitutional right to **[*366]** counsel in delinquency proceedings. 387 U.S. 1, 36-37, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), *abrogated on other grounds by Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986). Recognizing that juvenile delinquents could potentially face a "loss of . . . liberty . . . comparable in seriousness to . . . felony prosecution[s]," the high Court concluded the due process clause of the Fourteenth Amendment requires that juveniles have counsel to ensure they receive fair proceedings. *Id.* at 36, 41. As with an adult criminal defendant, the Court explained, a "juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, **[**10]** to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* at 36 (footnote omitted).

Though at the time *Gault* was decided, Indiana had long "followed the 'fair treatment' under 'due process' rule in dealing with juvenile problems," this Court, in *Bible v. State*, expressly acknowledged the Supreme Court's mandate that "Fourteenth Amendment standards of procedural due process are applicable to juvenile proceedings." 253 Ind. 373, 385, 387-88, 254 N.E.2d 319, 325, 326 (1970). In evaluating the due process demands for juveniles (in the context of a child's right to a jury trial), this Court—citing the State's *parens patriae* power—rejected an approach of grafting criminal standards wholesale onto juvenile matters because significant differences separate juvenile from criminal proceedings. *Id.* at 321-23 (discussing the history of juvenile law in Indiana). Unlike their criminal counterparts, Indiana's juvenile courts provide a child "the closest scrutiny and care in order to help him to avoid a life of crime." *Id.* at 323. To that end, under Indiana law, juvenile delinquency hearings are "conducted free from the formalities, procedural complexities, and inflexible aspects of criminal proceedings." *Id.* Considering these differences this **[**11]** Court concluded that "the constitutional safeguards vouchsafed a juvenile in [delinquency] proceedings are determined from the requirements of due process and fair treatment, and not by the direct application of the clauses of the Constitution which in terms apply to criminal cases." *Id.* at 326 (internal quotation marks omitted) (quoting *Pee v. United States*, 274 F.2d 556, 559, 107 U.S. App. D.C. 47 (D.C. Cir. 1959)).

In the years since *Bible*, we've elaborated on the differences between the juvenile and criminal systems, namely how the *parens patriae* doctrine animates the former system, setting it apart from the latter in both theory and practice. We've explained that Indiana's juvenile justice system gives "the court the power to step into the shoes of the parents" in order to "further the best interests of the child." *In re K.G.*, 808 N.E.2d

631, 635, 636 (Ind. 2004). This foundation for juvenile law distinguishes it from criminal law because, while children generally enjoy the same constitutional guarantees against governmental deprivation as adults, "the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" *Id.* at 636 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979)). Reflecting this goal, our statutory law gives judges "broad discretion" over juvenile proceedings. **[**12]** *Id.*

Almost half a century removed from *Gault* and *Bible*, we heed their lessons still. Though parallels exist between Indiana's criminal and juvenile systems, there remain significant differences separating the two, not least of which are the constitutional origins for criminal and juvenile rights. Since a juvenile's constitutional **[*367]** rights arise from the Fourteenth Amendment's due process guarantee, they must be applied and assessed through a due process lens. Nevertheless, as we discuss below, we do not see the *Baum* standard as a suitable test to evaluate A.M.'s (and similarly situated juveniles') ineffective-assistance-of-counsel claims.

II. A test founded in due process that ensures the juvenile fundamental fairness must be applied to assess counsel's effectiveness in a disposition-modification hearing.

Though we decline to adopt the Sixth Amendment's rigorous *Strickland* standard, we do not believe due process provides juveniles—vulnerable as they are—with "lesser standard[s]." *See Baum*, 533 N.E.2d at 1201. As the Supreme Court of the United States said in *Gault*, the child needs counsel's "guiding hand" to navigate "every step in the proceedings against him." 387 U.S. at 36 (citation omitted). We do not see *Baum*'s standard—which essentially asks only whether the **[**13]** attorney appeared to represent her client in a fair proceeding that resulted in a judgment—as an adequate measure of counsel's performance in juvenile matters. We, therefore, elect to bypass *Baum*'s test and apply a different due process standard to assess whether counsel rendered the juvenile ineffective assistance in the disposition-modification hearing.

We find that standard in cases evaluating parents' right to counsel in termination-of-parental-rights (TPR) proceedings. On first impression, it may seem inapt to compare a parent's right to effective assistance of counsel in a TPR matter to a child's right to effective counsel in a delinquency-modification proceeding. But these two groups of litigants share striking similarities. First, both the parents' and the child's rights to counsel share the same statutory and constitutional origins. I.C. § 31-32-4-1; *see* U.S. Const. amend. XIV, § 1. Second, these statutory and constitutional rights are vindicated in parallel proceedings that are "dramatically different from criminal proceedings" because they focus on the best interests of the child and not the child's guilt or innocence. *See Baker*, 810 N.E.2d at 1037, 1039.

In *Baker*, this Court, when considering the method of assessing an ineffective-assistance-of-counsel **[**14]** claim in TPR proceedings, rejected both the *Strickland* and *Baum* standards. *Id.* at 1036-37. The Court opted instead to tweak *Baum*'s due process test to address the important interests at stake:

> Where parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest.

Id. at 1041 (footnote omitted).[4] In articulating this test, this Court reasoned that, "[b]ecause of the doctrine of Parens Patriae and the need to focus on the best interest of the child, the trial judge, who is the fact finder, is required to be an attentive and involved participant in the process." **[*368]** *Id.* (quoting *In re Adoption of T.M.F.*, 392 Pa. Super. 598, 573 A.2d 1035, 1042-43 (Pa. Super. 1990)). We observed that, since TPR and juvenile proceedings require "judicial involvement that is much more intensive" **[**15]** than in most criminal cases, "the role of the lawyer, while important, does not carry the deleterious impact of ineffectiveness that may occur in criminal proceedings." *Id.* (quoting *In re Adoption of T.M.F.*, 573 A.2d at 1042-43).

We find *Baker*'s reasoning instructive and relevant to the

[4] The *Baker* Court labeled its ineffective-assistance-of-counsel test as a "similar approach" to *Baum*. 810 N.E.2d at 1041 n.6. And in *Graves*, this Court described our *Baker* test as "something akin to the *Baum* standard." 823 N.E.2d at 1196 n.4.

question before us now. Indeed, because of the similarities between parents' and children's due process rights, and between the roles of the court and counsel in TPR and juvenile proceedings, we draw on *Baker* to establish an ineffective-assistance-of-counsel standard for cases like the one before us today.

So, 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. *See id.*; I.C. § 31-37-18-6. 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" **[**16]** juvenile court imposed a disposition modification consistent with the best interests of the child. *See Baker*, 810 N.E.2d at 1041.

We now turn our attention to the facts before us to determine whether, under this standard, A.M.'s counsel performed ineffectively.

III. A.M. received effective assistance of counsel during his disposition-modification hearing.

A.M. believes his attorney failed to effectively assist him during the modification hearing because his counsel expressed confusion at A.M.'s downward-spiraling behavior rather than advocate for a placement other than the DOC. *See* Oral Argument at 1:15-2:02. But counsel's argument, when considered in context, reflected what everybody else in the courtroom already knew—that this was A.M.'s last chance. Parsing through the record,[5] and considering counsel's overall performance, we see that counsel collaborated with the judge, the probation officer, and the prosecutor to ensure A.M. received a fundamentally fair proceeding that resulted in an appropriate disposition serving A.M.'s best interests.

The record shows that counsel negotiated an agreement in which the burglary and drinking allegations against A.M. were dropped. What's more, counsel's statement at the hearing **[**17]** acknowledged A.M.'s strengths and weaknesses, offering a candid assessment of A.M.'s situation. Without glossing over A.M.'s faults, counsel advocated for his client, calling him "a good kid" with "a bright future ahead of him." Tr. pp. 6-7. Counsel also noted that A.M.'s best interests required that he attend school, which meant receiving an education through the DOC since he'd been expelled from the alternative program. Ultimately, counsel expressed hope that, through a modified disposition to the DOC, A.M. could be rehabilitated from a juvenile delinquent to a law-abiding adult.

[*369] When the judge sits in a parental role over a collaborative setting, good advocacy may not include adversarial argument that highlights the juvenile's positive traits alone. In proceedings that turn on the best interests of the child given the past and present circumstances, effective assistance of counsel that ensures fundamental fairness may take different forms and tones. Considering counsel's overall performance here, we cannot say he performed so defectively that we lose confidence in the juvenile court's disposition modification. Given A.M.'s inability to rehabilitate in less-restrictive settings, his **[**18]** expulsion from school, and his increasingly violent behavior, placement in the DOC proved consistent with his best interests. In our view, A.M.'s counsel helped ensure A.M. received a fundamentally fair hearing where the court reached an accurate disposition that furthered his best interests.

Conclusion

For these reasons, we affirm the juvenile court's order that modified A.M.'s disposition to the DOC.

Rush, C.J., and David and Massa, JJ., concur.

Slaughter, J., concurs in judgment with separate opinion.

Concur by: Slaughter

Concur

Slaughter, J., concurring in judgment.

[5] Because A.M. brought this ineffective-assistance-of-counsel claim on direct appeal rather than a Trial Rule 60(B) motion, we have a limited record before us. For example, we do not have the benefit of testimony revealing how the parties, probation, A.M.'s parents, and the court arrived at the decision to make A.M. a ward of the DOC.

I agree with the Court that A.M.'s ineffective-assistance-of-counsel claim lacks merit. I also agree that A.M.'s claim is not governed by the rigorous standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Only cases implicating the Sixth Amendment's right to counsel trigger *Strickland* scrutiny. Instead, for non-criminal cases, counsel's effectiveness is subject to the minimal procedural-due-process standard under the Fourteenth Amendment, which requires fundamental fairness. As we have held, counsel meets this standard "if counsel in fact appeared and represented the [client] in a procedurally fair setting which resulted in a judgment of the court". *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989). Relief to the client is thus available only "in the 'extraordinary **[**19]** circumstances'" that the lawyer "abandoned the case and prevented the client from being heard". *Graves v. State*, 823 N.E.2d 1193, 1196 (Ind. 2005) (quoting *Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004)). See also *Waters v. State*, 574 N.E.2d 911, 912 (Ind. 1991) ("Counsel, in essence, abandoned his client and did not present any evidence in support of his client's claim."). This is, to be sure, a low bar for assessing whether counsel was constitutionally ineffective.

We have previously invoked *Baum*, or a standard like *Baum*, in other fundamental-fairness inquiries. See *Graves*, 823 N.E.2d at 1196; *Baker v. Marion Cty. Office of Family & Children*, 810 N.E.2d 1035, 1041 n.6 (Ind. 2004). But the Court today announces a heightened "*Baum*-plus" standard for assessing counsel's effectiveness in this juvenile, non-criminal proceeding: whether counsel's overall performance at the disposition hearing "was so defective that . . . [we] cannot say with confidence that the juvenile court imposed a disposition modification consistent with the best interests of the child." (Internal citation omitted).

My objection to the Court's approach is that I do not perceive any meaningful difference between the "*Baum*-plus" standard the Court embraces today and the *Strickland* standard it purportedly rejects. *Strickland* asks whether counsel's performance fell below some minimal level of competence, and whether the sub-par performance was prejudicial. Today's "*Baum*-plus" **[**20]** standard also is a two-prong inquiry, asking whether counsel's performance was **[*370]** deficient and, if so, whether the client was prejudiced. Prejudice under *Strickland* is straightforward—the result of the proceeding likely would have been different had counsel performed capably. But prejudice under the Court's "*Baum*-plus" standard is unclear and prompts more questions than answers, including what "best interests of the child" even means in these proceedings:

- Is it solely a results-based inquiry?
- Or does process matter?

Also unclear is what yardstick applies for assessing whether a given disposition serves the child's best interests:

- Is the child's own view dispositive?
- Is the child's view even relevant?
- Is it appropriate to ask the paternalistic question whether the outcome is good for the child's long-term interest, even if the child does not presently see things that way?

Yet another question is whether there must be a causal link between the lawyer's deficient performance and the judicial outcome? In other words, if the court would have decided the matter contrary to the child's best interests even if counsel had performed competently, should it matter that counsel was not up to snuff? **[**21]** The answers to these questions are not self-evident. Rather than wrestle with these questions, I would simply apply the *Baum* standard and, on this record, affirm the trial court.

For these reasons, I concur in our Court's judgment but do not join its opinion.

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APPENDIX B

STATE OF INDIANA

DISPOSITIONAL ORDER
(Wardship Awarded to Department of Correction)

Superior Court No. 1
Juvenile Division

Cause No.: 43D01-1708-JD-292

In the Matter of A[redacted] M[redacted] Jr

A Child Alleged to be a Delinquent Child.

Date of Birth: 06/08/2002

The State of Indiana appears by Deputy/Prosecuting Attorney. The Child appears in person, A[redacted] M[redacted] JR. The child's parent(s), appear in person. In addition, Attorney, SCOTT LENNOX, Spanish interpreter MONICA MEDINA-CONDE and probation officer, KARA SHIVELY, is present in court.

The delinquency petition comes on for a dispositional hearing.

The juvenile, having been found to have committed the delinquent act alleged in the petition filed herein, the Court now finds that the child did commit the delinquent act as follows: ORIGINAL CHARGE: COUNT A: DISORDERLY CONDUCT – GUILTY. HAS NOT PERORMED WELL UNDER SUPERVISION RULES AS IMPOSED OCTOBER 30, 2017. A) COMMITTED ACTS OF BATTERY ON JANUARY 11, 2018. B) LEFT HOME WITHOUT PERMISSION ON DECEMBER 28, 2017 AND MADE VERBAL THREATS TO HIS FAMILY. C) WAS EXPELLED FROM GATEWAY ON JANUARY 17, 2018. D) FAILS TO ABIDE BY COURT ORDER CURFEW OF 8:00 P.M. E) HAS FAILED TO COMPLY WITH BOWEN CENTER COUSELING SERVICES. F) HAS CONTINUED TO HAVE CONTACT WITH [redacted].

Pursuant to Ind. Code 31-6-4-15.5(a) (1) and 31-6-7-16(c), the Court now awards wardship of the child to the Indiana Department of Correction for housing in any correctional facility for children or any community-based correctional facility for children. (The child, A[redacted] M[redacted] JR, a male, is not known to the Court to be pregnant/NA.) The Court's dispositional order is entered for the following reason: IT IS FURTHER ORDERED WARDSHIP OF RESPONDENT CHILD BE AWARDED TO THE INDIANA DEPARTMENT OF CORRECTION JUVENILE DIVISION INTAKE UNIT, INDIANA BOYS SCHOOL AT LOGANSPORT, INDIANA.

The sheriff is hereby ordered to transmit this dispositional order, a copy of the delinquency petition, a copy of the predispositional report, and a summary of the Court's information concerning the child to the Indiana Department of Correction.

The Sheriff of Kosciusko County shall execute this order by transporting the child, A[redacted] M[redacted] JR, to the ST. JOSEPH COUNTY JUVENILE JUSTICE CENTER TO BE THERE DETAINED UNTIL WEDNESDAY, FEBRUARY 14, 2018 AT WHICH TIME THE SHERIFF SHALL TRANSPORT A[redacted] M[redacted] JR TO THE INTAKE UNIT OF LOGANSPORT JUVENILE CORRECTIONAL FACILITY, LOGANSPORT, INDIANA.

So ORDERED this 13th day of FEBRUARY, 2018.

Judge _____

State of Indiana
County of Kosciusko

I, Ann Torpy, Clerk of said County, do hereby certify that David C. Cates, whose genuine signature is appended to the foregoing Dispositional Order, was, at the date thereof, and is Judge of the Court having juvenile jurisdiction in this county. IN WITNESS whereof, I have hereunto set my hand and affixed the seal of said Court at Warsaw, Indiana, this 13th day of FEBRUARY, 2018.

Clerk Ann Torpy

IN THE SUPERIOR COURT NO. 1 OF KOSCIUSKO COUNTY
JUVENILE DIVISION
121 NORTH LAKE STREET
WARSAW, KOSCIUSKO COUNTY, INDIANA

IN THE MATTER OF
P[redacted] M[redacted] JR.
DOB 06/08/2002

CASE NO. 43D01-1708-JD-292

JUVENILE DISPOSITION ORDER
UPON PETITION TO MODIFY PRIOR DISPOSITIONAL DECREE

Comes now the hour scheduled for hearing upon modification report and request to modify prior dispositional decree filed January 19, 2018. State of Indiana appears by the Prosecuting Attorney or his Deputy with Probation Officer Kara Shively. Respondent child, A[redacted] M[redacted] JR., appears in person, by counsel, Scott J. Lennox, and accompanied by his parent(s). Present Spanish interpreter Monica Medina-Conde. Hearing held upon Modification Report and request to Modify Prior Dispositional Decree. State of Indiana and counsel for respondent child stipulate that the following allegations of the modification report are redacted as follows:

~~Paragraph 3 – It is alleged in the attached Kosciusko County Sheriff's Department report #2017 3450 that P[redacted] M[redacted] Jr. committed the acts of Burglary, F/5; and Theft, A/M on December 27, 2017.~~

~~It is alleged by staff of WCHS and Gateway that P[redacted] M[redacted] Jr. committed the act of Illegal Possession/Consumption of Alcohol while on the school bus on January 10, 2018.~~

~~Paragraph 7 – Your petitioner further alleges and says that Antonio Medellin Jr. violated rule #12 of his Rules of Supervision which states You shall not use nor possess alcoholic beverages. It is alleged that P[redacted] M[redacted] Jr. possessed alcohol on the school bus on January 10, 2018.~~

The Court being duly advised now finds respondent child, A[redacted] M[redacted] JR., has not performed well under supervision rules as imposed October 30, 2017, for the reasons set forth in the Petition for Modification of Prior Dispositional Decree in that respondent child:

a) committed an act of battery on 1/11/18;

b) left home without permission on 12/28/17 and made verbal threats to his family;

c) was expelled from Gateway on 1/17/18;

d) fails to abide by court ordered curfew of 8:00 p.m.;

e) has failed to comply with Bowen Center counseling services;

f) has continued to have contact with [redacted].

That by reason of the foregoing facts the Court finds respondent child has not behaved well, is effectively beyond the control of his parent(s).

The Court further finds that reasonable efforts were made to prevent the child's removal from the child's parent(s) by placing subject on formal supervision on October 30, 2017, and has failed to abide by and comply with Rules of Supervision set forth by the Court on that date, and as more fully outlined in the Modification Report and Request for Modification of Dispositional Decree filed herein.

The child needs further family preservation services of care, treatment, and rehabilitation that the parent cannot offer at this time. The removal of the child was authorized and necessary as remaining in the home would be contrary to the best interests and safety and welfare of the child. Reasonable efforts to prevent the removal of the child from his home have been made and as set forth in the pleadings and papers of the Probation and or all other service providers filed herein are incorporated by reference. It is in the best interests and safety and welfare of the child to remain outside of the parent's custody.

This disposition is consistent with the safety and the best interest of the child and is the least restrictive and most appropriate setting available close to the parent's home, least interferes with the family autonomy, is least disruptive of family life, and imposes the least restraint on the freedom of the child and the child's parents.

The respondent's legal settlement is Warsaw Community Public Schools.

The Kosciusko County Probation Department has made reasonable efforts to finalize a permanency plan.

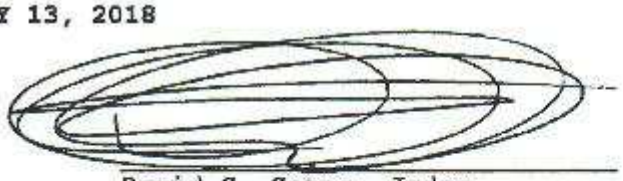
IT IS, THEREFORE, ORDERED that wardship of respondent child, J[redacted] I[redacted] JR., be awarded to the Indiana Department of Correction Juvenile Boys Division until he completes the program of the Indiana Department of Correction.

IT IS FURTHER ORDERED that respondent child's parent(s) cooperate and participate in any treatment or counseling programs as recommended by the Indiana Department of Correction in order to achieve successful rehabilitation of respondent child.

The Court finds that justice would not be served by ordering payment from the parent or guardian for the cost of services.

IT IS FURTHER ORDERED that the Sheriff of Kosciusko County transport A[redacted] M[redacted] JR. to the St. Joseph County Juvenile Justice Center to be there detained until WEDNESDAY, FEBRUARY 14, 2018 at which time the Sheriff shall transport A[redacted] M[redacted] JR. to the intake unit of the Logansport Juvenile Correctional Facility, Logansport, Indiana.

DATED AND ORDERED FEBRUARY 13, 2018

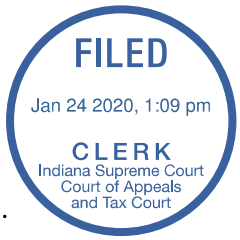


David C. Cates, Judge
Kosciusko Superior Court No. 1

Copies to:
Probation
Lennox
Parent
Sheriff-transport copy

APPENDIX C

In the Indiana Supreme Court



A.M.,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
19S-JV-603

Court of Appeals Case No.
18A-JV-618

Trial Court Case No.
43D01-1708-JD-292

Order

Appellant's Petition for Rehearing is hereby DENIED.
Done at Indianapolis, Indiana, on 1/24/2020.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

A.M. v. State

Court of Appeals of Indiana

August 20, 2018, Decided; August 20, 2018, Filed

Court of Appeals Case No. 18A-JV-618

Reporter
109 N.E.3d 1034 *; 2018 Ind. App. LEXIS 288 **; 2018 WL 4040265

A.M., Appellant-Respondent, v. State of Indiana, Appellee-Petitioner

Subsequent History: Rehearing denied by A.M. v. State, 2018 Ind. App. LEXIS 379 (Ind. Ct. App., Oct. 19, 2018)

Affirmed by, in part, Superseded by, in part A.M. v. State, 2019 Ind. LEXIS 850 (Ind., Nov. 12, 2019)

Transfer granted by, Vacated by A.M. v. Ind., 2019 Ind. LEXIS 890 (Ind., Nov. 12, 2019)

Prior History: [1]** Appeal from the Kosciusko Superior Court. The Honorable David C. Cates, Judge. Trial Court Cause No. 43D01-1708-JD-292.

Case Summary

Overview
HOLDING: [1]-The trial court acted within its discretion in modifying the juvenile's placement and concluding that the juvenile was not denied his right to the effective assistance of counsel, because the juvenile's expulsion from his alternative school was a significant factor in evaluating his best interest, the juvenile demonstrated no respect for the rules of his supervised placement, disregarded his court-imposed curfew and disobeyed his mother and stepfather, and under a due process analysis, counsel appeared at a procedurally fair modification hearing and negotiated a redaction of three allegations against the juvenile, all involving criminal conduct.

Outcome
Judgment affirmed.

Counsel: ATTORNEY FOR APPELLANT: Cara Schaefer Wieneke, Wieneke Law Office, LLC, Brooklyn, Indiana.

ATTORNEYS FOR APPELLEE: Curtis T. Hill, Jr., Attorney General; Lee M. Stoy, Jr., Deputy Attorney General, Indianapolis, Indiana.

Judges: Crone, Judge. Bailey, J., and Brown, J., concur.

Opinion by: Crone

Opinion

[*1036] Crone, Judge.

Case Summary

P1 Fifteen-year-old A.M. was adjudicated a juvenile delinquent for conduct amounting to class B misdemeanor battery if committed by an adult. He was placed on parental supervision/probation. He subsequently committed criminal acts and violated other probation rules, and the State moved to modify his placement. The trial court held a dispositional hearing and modified his placement to the Department of Correction ("DOC"). A.M. now appeals, claiming that the trial court abused its discretion by relying on insufficient information and by failing to explain its reasons for modifying his placement to the DOC. He also contends that he was denied his constitutional right to the effective assistance of counsel during the modification hearing. Finding that the trial court acted within **[**2]** its discretion in modifying A.M.'s placement and concluding that A.M. was not denied his right to the effective assistance of counsel, we affirm.

Facts and Procedural History

P2 A.M., born in June 2002, is a teenager with a history of emotional and behavioral issues. At age eight, he began counseling to address his issues and was enrolled at an alternative school. In his seven years of attendance at the school, he was frequently truant and/or tardy and had multiple suspensions for fighting, "explosive rage," property destruction, e.g., throwing chairs and flipping desks, and violent acts against school personnel. Appellant's App. Vol. 2 at 65. At age ten, he had three true findings for acts amounting to class D felony battery with bodily injury if committed by an adult. He was put in parental placement under the supervision of the probation department. In the ensuing years, he had several suspensions from school and several referrals to the juvenile court, which were dismissed.

P3 In 2017, A.M. beat up a fellow teenager at the fairgrounds, and the victim required emergency room treatment for cuts on his face. This incident resulted in a true finding for acts amounting to class B misdemeanor **[**3]** disorderly conduct if committed by an adult. Again, A.M. was placed on supervised probation in his mother and stepfather's home. He was ordered to avoid all criminal activity, avoid possession and use of controlled substances, alcohol, and tobacco, attend school regularly, obey school rules and teachers, study for one hour per school night, obey his parents, abide by an 8:00 p.m. curfew, assist in meal preparation and clean up at home, prepare a list of long- and short-term goals, participate in mental health services and anger management counseling, submit a written apology to his victim, complete community service, and avoid all direct and indirect contact with a certain named individual. *Id.* at 77.

[*1037] P4 Within two months of the supervised probation order, A.M. was a suspect in a burglary involving the residence of one of his classmates. Shortly thereafter, he was arrested for acts amounting to class B misdemeanor battery if committed by an adult, stemming from a physical altercation at the bus stop. He was suspected of alcohol use, expelled from his alternative school, and wanted by police for theft of a firearm. These developments prompted the State to seek a modification of A.M.'s placement **[**4]** to the DOC. At the hearing on the motion to modify, the parties stipulated to the redaction of the burglary- and alcohol-related allegations. A.M. admitted to the remaining allegations in the motion to modify, which included the battery allegation as well as the violation of several rules, including those related to his conduct and attendance at school, conduct at home, curfew, participation in counseling, and the no-contact order. The parties also stipulated to the admission of a police report in which A.M. admitted to stealing a handgun. The trial court issued a dispositional order finding that A.M. had committed criminal acts and violated several of the rules of his placement. The court modified his placement to the juvenile division of the DOC. A.M. now appeals the trial court's order. Additional facts will be provided as necessary.

Discussion and Decision

Section 1 — The trial court acted within its discretion in modifying A.M.'s placement.

P5 A.M. asserts that the trial court abused its discretion in modifying his placement. The disposition of a juvenile adjudicated a delinquent is a matter committed to the trial court's discretion, subject to the statutory considerations of the child's **[**5]** welfare, community safety, and the policy favoring the least harsh disposition. *R.H. v. State*, 937 N.E.2d 386, 388 (Ind. Ct. App. 2010). We review the trial court's dispositions and modification thereof for an abuse of discretion, which occurs if its decision is clearly against the logic and effect of the facts and circumstances before it or the reasonable inferences that may be drawn therefrom. *Id.; see also K.A. v. State*, 775 N.E.2d 382, 386 (Ind. Ct.

App. 2002) (applying abuse of discretion standard where juvenile challenged modification of placement to DOC following her violation of terms of suspended commitment), *trans. denied*. In determining whether a trial court has abused its discretion, we neither reweigh evidence nor judge witness credibility. *Ripps v. State*, 968 N.E.2d 323, 326 (Ind. Ct. App. 2014).

P6 The crux of A.M.'s argument is that the trial court modified his placement to the harshest option — the DOC — without sufficient information concerning his circumstances and without adequately explaining its reasons for doing so. Juvenile court proceedings are civil, not criminal, in nature. *T.K. v. State*, 899 N.E.2d 686, 687-88 (Ind. Ct. App. 2009). "[T]he goal of the juvenile process is rehabilitation so that the youth will not become a criminal as an adult." *Id.* As such, juvenile courts have a variety of placement choices. *Id.* Indiana Code Section 31-37-18-6 reads,

> If consistent with the safety of the community and the best **[**6]** interest of the child, the juvenile court shall enter a dispositional decree that: (1) is:
> (A) in the least restrictive (most family like) and most appropriate setting available; and
> (B) close to the parents' home, consistent with the best interest and special needs of the child;
> (2) least interferes with family autonomy;
> (3) is least disruptive of family life;
>
> **[*1038]** (4) imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian; and
> (5) provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

P7 Indiana Code Section 31-37-18-9(a)(5) requires the trial court to state its reasons for the disposition chosen. This involves the trial court's issuance of written findings and conclusions concerning the child's care, treatment, rehabilitation, or placement; parental participation in the plan; efforts made to prevent the child's removal from the parent; family services offered; and the court's reasons for its disposition. Ind. Code § 31-37-18-9(a)(1)-(5).

P8 With respect to the sufficiency of the information to support the trial court's decision, we note that the trial court specifically incorporated by reference all the pleadings and papers of the service providers and probation department. **[**7]** Appellant's App. Vol. 2 at 137. These documents include probation department reports and correspondence, A.M.'s lengthy school disciplinary record, his juvenile criminal history, including victim incident reports, his records from the counseling center, and the police report in which he admitted to having recently stolen a handgun. In short, there is no dearth of information in the record to support the trial court's modification order. A.M.'s claims to the contrary amount to invitations to reweigh evidence, which we may not do. *See Ripps*, 968 N.E.2d at 326.

P9 A.M. also claims that the trial court committed reversible error in failing to adequately explain its reasons for modifying his placement. We disagree. The trial court specified several reasons in its dispositional order, including that A.M. committed battery while in his current placement, left home without permission, made verbal threats to his family, was expelled from school, failed to abide by the court-ordered curfew, failed to comply with counseling services, and continued to have contact with the named individual with whom all contact was prohibited. Appellant's App. Vol. 2 at 134, 136-37. The court concluded, in relevant part,

> That by reason **[**8]** of the foregoing facts the Court finds respondent child has not behaved well, is effectively beyond the control of his parent(s).
> The Court further finds that reasonable efforts were made to prevent the child's removal from the child's parent(s) by placing subject on formal supervision on October 30, 2017, and [he] has failed to abide by and comply with Rules of Supervision set forth by the Court on that date, and as more fully outlined in the Modification Report and Request for Modification of Dispositional Decree filed herein.
> The child needs further family preservation services of care, treatment, and rehabilitation that the parent cannot offer at this time. The removal of the child was authorized and necessary as remaining in the home would be contrary to the best interests and safety and welfare of the child. Reasonable efforts to prevent the removal of the child from his home have been made and as set forth in the pleadings and papers of the Probation and or all other service providers filed herein are incorporated by reference. It is in the best interests and safety and welfare of the child to remain outside of the parent's custody.
>
> This disposition is consistent with the safety **[**9]** and the best interest of the child and is the least restrictive and most appropriate setting available close to the parent's home, least interferes with the family autonomy, is least disruptive of family life, and imposes the least restraint **[*1039]** on the freedom of the child and the child's parents.

Id. at 137.

P10 The record indicates that A.M.'s expulsion from his alternative school was a significant factor in evaluating his best interest. Probation officer reports and testimony show that due to excessive absences, tardies, suspensions, and eventual expulsion, A.M. was receiving only three to four hours of education each week and that his best interest would be to attend school while in the DOC. *See* Tr. Vol. 2 at 6. The trial court expressed its concern not only about A.M.'s continued rule-breaking and criminal conduct but also about the impact on his education and his prospects for resuming a full-time education, a critical piece of his rehabilitation:

> [A.M.], back at the end of October of last year you were here for disposition and you were placed upon supervision with certain rules. One of those basic rules was to quit taking actions which would be crimes if committed by an adult. It looks like **[**10]** you chose not to abide by that rule. You were to abide by the rules of your parent. You chose not to abide by that rule. You're not getting an education. You're committing acts which would be crimes, felonies, major crimes. I'm going to adopt the recommendation from my Probation Department and direct that your wardship be placed with the Indiana Department of Corrections, Juvenile Division, for completion of that program. How long you are there is largely determined by your attitude and the effort you place to complete that program. It is my hope that you will be successful in that program, and that you take a good attitude to that.

Id. at 7-8.

P11 Loss of parental control was also a critical factor in the trial court's decision. For the preceding eight years, A.M. was placed in less restrictive placements with parental supervision. These simply did not work. He continued to commit violent acts both in and out of school. He demonstrated no respect for the rules of his supervised placement, disregarded his court-imposed curfew, and disobeyed his mother and stepfather. His family relationships declined to the point where he left home for extended periods and threatened his family when they reported **[**11]** him to probation officers. These circumstances do not bode well concerning A.M.'s prospects for success with less restrictive options such as electronic monitoring or in-home detention.

P12 A.M. argues that the trial court should have conducted a more thorough inquiry into various issues such as the effect of his emotional disability on his conduct and his prospects for successful rehabilitation through less restrictive placement options. The court considered the school's expulsion report, which stated that the expulsion committee found no connection between A.M.'s conduct and his emotional disability. Moreover, the counseling center reports indicate that A.M. made little to no progress during his supervised placement in this case. The probation department found him to be a danger to himself and others and concluded that the DOC would provide him with the best chance of receiving an education and the services he needs to reform. Simply put, A.M.'s lengthy record of criminal and behavioral issues spans several years, and time after time, he *has* been afforded less restrictive placements and has failed to respond positively. The trial court found that given the loss of parental control **[**12]** and A.M.'s expulsion from school, these failed placement options are no longer viable. The trial court acted within its discretion **[*1040]** in modifying A.M.'s placement to the DOC.[1]

Section 2 — A.M. was not denied his constitutional right to effective assistance of counsel.

P13 Finally, A.M. maintains that he was denied his constitutional right to the effective assistance of counsel at the disposition modification hearing. Raising ineffectiveness of counsel on direct appeal is permissible, but in doing so, the defendant proceeds without the benefit of a developed record and will be barred by res judicata from raising the issue in subsequent proceedings. *Brewington v. State*, 7 N.E.3d 946, 978 (Ind. 2014), *cert. denied* (2015).

P14 The Sixth Amendment to the U.S. Constitution and Article 1, Section 13 of the Indiana Constitution guarantee a criminal defendant the right to counsel. The Supreme Court of the United States "has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). The parties do not dispute that juveniles also have a

[1] In his reply brief, A.M. claims that the trial court erred in failing to advise him of his right to appeal the modification order. Because he did not raise the issue in his primary brief, it is waived. *See French v. State*, 778 N.E.2d 816, 825-26 (Ind. 2002) (issues raised for the first time in appellant's reply brief are waived).

constitutional right to counsel. *See also* Ind. Code §§ 31-32-2-2, 31-32-4-1 (expressing juvenile's statutory right to counsel). However, the parties disagree concerning the appropriate standard to be applied to an ineffective assistance claim in the context of juvenile delinquency disposition **[**13]** modification proceedings. A.M. maintains that his attorney's performance must be assessed according to the two-pronged test found in *Strickland*. 466 U.S. at 687. The *Strickland* test, rooted in the Sixth Amendment, requires the defendant to demonstrate both deficient performance and prejudice resulting from it. *Id.; Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). A.M. relies on *S.T. v. State*, 764 N.E.2d 632, 634-35 (Ind. 2002), which applied the *Strickland* test in evaluating counsel's performance during a juvenile delinquency adjudication. The State relies on *In re Gault*, 387 U.S. 1, 35-41, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), where the United States Supreme Court held that a juvenile has a right to counsel during delinquency proceedings and that this right is rooted in the Due Process Clause of the Fourteenth Amendment rather than in the Sixth Amendment. There is a lack of clarity and consistency among and even within jurisdictions concerning the source and applicability of the constitutional right to counsel enjoyed by juveniles in delinquency proceedings.[2]

[*1041] P15 Under a due process analysis, the reviewing court applies a less stringent standard in reviewing counsel's performance: "If counsel appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not **[**14]** necessary to judge his performance by rigorous standards." *Jordan v. State*, 60 N.E.3d 1062, 1068 (Ind. Ct. App. 2016) (quoting *Childers v. State*, 656 N.E.2d 514, 517 (Ind. Ct. App. 1995), *trans. denied* (1996)). This less stringent standard has been applied to assess counsel's performance in post-conviction proceedings, *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989), and in probation revocation proceedings, *Jordan*, 60 N.E.3d at 1069.

P16 Indiana courts have not squarely addressed whether the two-pronged *Strickland* test or the due process test is the proper test to be used in analyzing the effectiveness of juvenile's counsel during the various phases of delinquency proceedings, and we encourage our supreme court to provide guidance in this area. A.M. correctly observes that the *S.T.* court applied the *Strickland* test in assessing counsel's performance during his juvenile delinquency adjudication. 764 N.E.2d at 634-35. However, there is no indication that the court considered or mandated that standard for pre- or post-adjudicative phases. *Id.* S.T.'s ineffective assistance claim pertained to counsel's performance during the delinquency adjudication phase, not the pre-adjudicative or post-adjudicative phases. *Id.* at 634. The *Gault* court noted a distinction between the various phases of juvenile proceedings:

> We do not in this opinion consider the impact of these constitutional provisions upon the totality **[**15]** of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For

[2] *See, e.g., People v. Austin M.*, 2012 IL 111194, 975 N.E.2d 22, 39, 363 Ill. Dec. 220 (Ill. 2012) (holding that minors in delinquency proceedings have right to a *defense* attorney, and in particular, the effective assistance of counsel as recognized in *Gault*); *State ex rel. W.B.*, 206 So. 3d 974, 985 (La. Ct. App. 2016) (applying two-pronged *Strickland* test in assessing counsel's performance during juvenile delinquency adjudication hearing); *State ex rel. K.M.T.*, 18 So. 3d 183, 192 (La. Ct. App. 2009) (noting *Gault*'s distinction between adjudication phase and disposition phase in juvenile proceedings and then applying *Strickland*'s two-pronged test and concluding that minor failed to establish ineffective assistance of counsel during either phase); *In re Parris W.*, 363 Md. 717, 770 A.2d 202, 206-07 (Md. Ct. Spec. App. 2001) (citing *Gault* concerning source of juvenile's right to counsel as due process clause and applying *Strickland*'s two-pronged test for assessing counsel's performance); *In re C.S.*, 115 Ohio St. 3d 267, 2007- Ohio 4919, 874 N.E.2d 1177, 1187-88 (Ohio 2007) (adopting *Gault* analysis, finding that juvenile's right to counsel arises from due process); *In re C.R.*, 2014-Ohio-1936, 2014 WL 1875787, at *5 2014) (applying *Strickland*'s two-pronged test to ineffective assistance claim in juvenile proceeding to determine juvenile's offender classification); *In re K.J.O.*, 27 S.W.3d 340, 342-43 (Tex. Ct. App. 2000) (concluding that although juvenile delinquency trial is civil proceeding, it is quasi-criminal, thus guaranteeing juvenile the right to effective assistance of counsel per *Strickland*); and *In Interest of LDO*, 858 P.2d 553, 556 (Wyo. 1993) (applying *Strickland*'s two-pronged analysis for evaluating counsel's performance during juvenile delinquency adjudication hearing). Essentially, it appears that the courts that are applying *Gault*'s holding that a juvenile has a due process right to counsel during delinquency proceedings per the Fifth and Fourteenth Amendments are often applying a *Strickland* analysis, rooted in the Sixth Amendment, when analyzing the effectiveness of the juvenile's counsel during the adjudication phase, or in the case of *C.R.*, to the juvenile offender classification phase. *See C.R.*, 2014-Ohio-1936, 2014 WL 1875787, at *5. Whether the various courts have intentionally considered and rejected an alternate analysis or simply defaulted to a *Strickland* analysis is not apparent.

> example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play. The problem is to ascertain the precise impact of the due process requirement upon such proceedings.

387 U.S. at 13-14 (citation omitted).

[*1042] P17 We believe that these proceedings — not for the delinquency adjudication itself but for a modification of the disposition — are most akin to probation revocation proceedings, which are quasi-civil in nature and involve the factual determination that the probationer has violated a term of his probation followed by **[**16]** the entry of a disposition modification or revocation. *See Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008) (in probation revocation proceedings, trial court first determines whether a violation occurred and then determines whether the violation warrants revocation). As such, much like in the case of a probationer, counsel's appearance for and representation of a juvenile in a procedurally fair setting resulting in judgment would make it unnecessary to judge his performance by *Strickland*'s more rigorous standards. *See Jordan*, 60 N.E.3d at 1068.

P18 A.M. claims that counsel did nothing to promote his interests, and thus he essentially received *no* assistance from counsel. We disagree. The record shows that counsel negotiated a stipulation with the State whereby three of the allegations in support of modification were redacted; these allegations were that A.M. possessed an alcoholic beverage, consumed an alcoholic beverage on a school bus, and committed burglary. These alleged acts were not only violations of A.M.'s supervised probation rules but also criminal conduct that could have resulted in additional true findings. As such, the negotiation of the stipulation was neither insignificant nor against A.M.'s best interest. In this respect, we note that even **[**17]** under the *Strickland* test, this evidence supports a finding of effective, not deficient, performance. To the extent that A.M. focuses on the result, "the harshest disposition available," as evidence of ineffective assistance, this argument improperly presupposes that any client who ultimately receives the maximum sentence or harshest penalty otherwise allowed by law necessarily received ineffective assistance of counsel. Appellant's Reply Br. at 13. As discussed, it was A.M.'s continued failure to adhere to the law and the rules of his placement that caused his placement to be modified to the most restrictive option.

P19 A.M. also cites counsel's closing remarks as evidence that counsel essentially had given up and failed to advocate for his best interest:

> [Counsel]: 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 **[**18]** education and that's going to end up being his downfall. I think except for being kicked out of [school], 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.

Tr. Vol. 2 at 6-7.

P20 Counsel's closing remarks do not amount to a violation of A.M.'s right to the effective assistance of counsel, whether under **[*1043]** a due process analysis or a *Strickland* analysis. Under a due process analysis, counsel appeared at a procedurally fair modification hearing and negotiated a redaction of three allegations against A.M., all involving criminal conduct.[3] Based on

[3] Under *Strickland*, counsel's remarks do not amount to deficient performance, especially when considered together with the negotiated redactions. Nor does the mere fact that A.M. received the harshest available placement amount to a showing of prejudice under *Strickland*. *See Strickland*, 466 U.S. at 694 (prejudice prong necessitates showing of reasonable probability that but for counsel's deficient

the foregoing, we conclude that A.M. has failed to meet his burden of establishing that he was denied his constitutional **[**19]** right to counsel during his disposition modification proceedings. Consequently, we affirm.

P21 Affirmed.

Bailey, J., and Brown, J., concur.

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performance, the outcome would have been different).

STATE OF INDIANA IN KOSCIUSKO SUPERIOR COURT NO.1

SS: []

COUNTY OF KOSCIUSKO CAUSE NO. 43D01-1708-JD-292

A.M., Jr.

Appellant/Juvenile

v.

STATE OF INDIANA

Appellee/Plaintiff

TRANSCRIPT OF MODIFICATION HEARING

BEFORE THE HONORABLE DAVID C. CATES

JUDGE OF THE KOSCIUSKO SUPERIOR COURT NO. 1 JUVENILE DIVISION

DATE: FEBRUARY 13, 2018

KATHY PERKINS

OFFICIAL COURT REPORTER

KOSCIUSKO SUPERIOR COURT NO. 1

APPEARANCES

ON BEHALF OF THE PLANTIFF, STATE OF INDIANA

J. BRAD VOELZ

CHIEF DEPUTY PROSECUTING ATTORNEY

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574-372-2419

[redacted]

ON BEHALF OF THE JUVENILE A.M.

SCOTT J. LENNOX

LENNOX, SOBEK & BUEHLER LLC

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[redacted]

FEBRUARY 13, 2018

THE COURT: We are on record in 43D01-1708-JD-292 in the Matter of A.M. Jr. Are you A.M., Jr.?

A. Yes, sir.

THE COURT: Child appears in person and by counsel, Mr. Scott Lennox. The State appears by Chief Deputy Prosecuting Attorney Brad Voelz. I have my probation officer, Kara Shively, present. Ma'am, your name?

A. Leticia Sanchez.

THE COURT: And your relationship?

A. Mama.

THE COURT: Monica, you are here. I take it you are going to perform interpreting services for Ms. Sanchez, is that correct?

A. Yes.

THE COURT: I will have you stand and raise your right hand.

OATH TO INTERPRETER

MONICA MEDINA CONDE

THE COURT: We are here based upon a modification report filed January 19, 2018, and here for hearing as to modification. Is the State prepared to proceed?

MR. VOELZ: We are, yes, sir.

THE COURT: Please do.

MR. VOELZ: Thank you, sir. A.M.'s attorney, Mr.

Lennox, and the State have entered a stipulation we would like to present to you. It would be that in the modification report, paragraph 3, the first allegation of a Burglary that occurred on December 27, 2017, the State would redact that. The following allegation alleging consumption of alcohol on a school bus January 10, 2018, the State - we stipulate to redact that. Paragraph 7, regarding possession of alcoholic beverages, we have stipulated to redact that. And we have stipulated, Your Honor, if I could approach the bench please?

THE COURT: You may.

MR. VOELZ: The submission of a police report case number 2018-00251. Move to admit that.

THE COURT: Any objection, Mr. Lennox?

MR. LENNOX: No objection to the Court receiving that as evidence. It is my understanding it will not be included or added to the Motion to Modify. It's just simply for the Court's consideration on the modification.

THE COURT: And the stipulations as proposed by the State?

MR. LENNOX: No objection. We would consent and stipulate as well.

THE COURT: So ordered. Additional evidence on behalf of the State?

MR. VOELZ: The State and the child have further stipulated that A.M. admits to the remaining allegations in the

modification report.

MR. LENNOX: That is so stipulated, Your Honor.

THE COURT: And so ordered. Anything else?

MR. VOELZ: No, sir.

THE COURT: Evidence on behalf of the child, Mr. Lennox?

MR. LENNOX: None, Your Honor.

THE COURT: Ms. Sanchez, do you have any evidence in this regard?

A. No.

THE COURT: Argument on behalf of the State?

MR. VOELZ: I will defer to Ms. Shively for recommendations.

PROBATION: The recommendation from the Probation Department is the same as previously submitted in the Modification Report. Especially because of the most recent incident report that's been given to the Court that alleges theft of a firearm. A.M. has been expelled from Gateway. He's only receiving three to four hours of education each week, and we believe it's in his best interest at this time that his wardship be awarded to the Indiana Department of Corrections.

THE COURT: Argument on behalf of the child, Mr. Lennox?

MR. LENNOX: Thank you, Your Honor. If it pleases the Court: I am befuddled by the actions of A. 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. 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. Thank you.

THE COURT: Thank you, Mr. Lennox. A., anything you wish to say before I proceed?

A.M. No, sir.

THE COURT: A., back at the end of October of last year you were here for disposition and you were placed upon supervision with certain rules. One of those basic rules was to quit taking actions which would be crimes if committed by an adult. It looks like you chose not to abide by that rule. You

were to abide by the rules of your parent. You chose not to abide by that rule. You're not getting an education. You're committing acts which would be crimes, felonies, major crimes. I'm going to adopt the recommendation from my Probation Department and direct that your wardship be placed with the Indiana Department of Corrections, Juvenile Division, for completion of that program. How long you are there is largely determined by your attitude and the effort you place to complete that program. It is my hope that you will be successful in that program, and that you take a good attitude to that. I'm going to direct you be transported to the Juvenile Justice Center in South Bend for transport to the Indiana Department of Correction Boys School on February 14, 2017. Today you are going to the Juvenile Justice Center pending that transportation. That will be my order.

END OF RECORD

IN THE KOSCIUSKO SUPERIOR COURT NO. 1

JUVENILE DIVISION

WARSAW, KOSCIUSKO COUNTY, INDIANA

IMO A.M., JR., CASE NO. 43D01-1509-JD-352

A delinquent child

VS

STATE OF INDIANA

REPORTER'S CERTIFICATE

I, Kathy Perkins, Court Reporter for the Kosciusko Superior Court No. 1, Kosciusko County, State of Indiana, do hereby certify that I am the Official Court Reporter of said Court, duly appointed and sworn to report the evidence of causes tried therein.

That I prepared the foregoing transcript from the machine recordings, and certify that the transcript is a true and correct transcript of the Modification Hearing held in this cause on February 13, 2018.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my official seal this 10th day of April 2018.

/s/ Kathy Perkins
Kathy Perkins
Official Court Reporter
Kosciusko Superior Court No. 1
Kosciusko County, Indiana