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40 MAP 2022

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 40 MAP 2022

COMMONWEALTH OF PENNSYLVANIA,
APPELLANT,
V.

NAZEER TAYLOR,
APPELLEE.

BRIEF FOR APPELLANT

APPEAL FROM THE OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA, AT NO. 856 EDA 2017, DATED JULY 29, 2021, REVERSING THE JUDGMENT OF SENTENCE IMPOSED BY THE HONORABLE WILLIAM R. CARPENTER AND REMANDING FOR DISMISSAL IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY AT NO. CP-46-CR-3166-2014., dated January 31, 2017.

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STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court has jurisdiction to review final orders of the Superior Court where the mode of review is by a petition for allowance of appeal and that petition has been granted. 42 Pa.C.S. § 724(a); Pa. R.A.P. 1112(a), (c).

ORDER IN QUESTION

On May 19, 2020, this Court reversed a Superior Court decision, remanding this matter "for a determination, in the first instance, and with developed advocacy of the parties, of whether the harmless error doctrine is applicable to the juvenile court's constitutionally deficient misapplication of the Juvenile Act's transfer provisions and, if it is not or if the error is not harmless, for consideration of the available relief under these circumstances." *Commonwealth v. Taylor*, 230 A.3d 1050, 1073 (Pa. 2020).

The order in question is the ensuing July 29, 2021, Superior Court panel decision reversing the trial court's judgment of sentence and remanding this matter to the trial court for dismissal, based on the conclusion of two members of the panel that the harmless error doctrine is inapplicable and that dismissal is the only available remedy because the trial court lacks jurisdiction. *Commonwealth v. Taylor*, No. 856 EDA 2017, 2021 WL 3206496, at *13 (Pa. Super. July 29, 2021) ("Judgment of sentence reversed. Case remanded. Jurisdiction relinquished").

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The questions accepted for review are questions of law, so the standard of review is *de novo*, and the scope of review is plenary. *Commonwealth v. Williams*, 129 A.3d 1199, 1213 (Pa. 2015); *Commonwealth v. Cullen–Doyle*, 164 A.3d 1239, 1241 (Pa. 2017).

To the extent that this Court decides to review the certification decision for harmless error, the scope of review for the factual record should be limited to the certification transcript, the certification order, and the trial court's 1925(a) opinion as far as it relies on the certification transcript and order. *See Commonwealth v. Moss*, 543 A.2d 514, 516 (Pa. 1988) ("Review of the certification hearing transcript and order indicates that the court simply weighed the evidence differently than Moss would have liked").

STATEMENT OF THE QUESTIONS PRESENTED

I. Whether Pennsylvania's courts have the constitutional and statutory authority to hold defendants fully accountable for Crimes Code violations, even when those defendants age out of the parameters of the juvenile division of a court of common pleas during the appellate process, given that Pennsylvania's Constitution and statutory law vest the singular court of common pleas in each judicial district with unlimited original jurisdiction in all cases where jurisdiction is not vested in another court?

(Superior Court answered in the negative).

II. Whether the harmless error doctrine applies where a certifying judge lists an impermissible factor as one of several factors in support of a decision to certify a juvenile to be tried as an adult?

(Superior Court answered in the negative).

STATEMENT OF THE CASE

In July 2012, A.O., who was eleven at the time, moved in with the Parkers, his new foster family. Over the next thirteen months, his new foster brother raped him repeatedly. That foster brother was defendant, Nazeer Taylor, who was just two months shy of his sixteenth birthday when A.O. moved in. The sexual exploitation and abuse of this victim ended when defendant left the home, about one month prior to his seventeenth birthday. Notes of Testimony ("N.T.") 6/20/16 at 15-32, 90, 96-97, 104-05.[1]

While A.O. admittedly at trial did not remember the exact order of the many rapes, defendant generally used one of two *modus operandi*. If A.O. was in his bedroom, defendant would enter and force A.O. to perform oral or anal sex. When defendant was finished, he threatened physical violence against A.O. before he left. Similarly, if A.O. was in the bathroom, defendant would enter and force A.O. to engage in oral or anal sex, sometimes both. Again, before he left, defendant made sure A.O. knew he would harm him if he told anyone. *Id.* at 15-22, 28-32; *see, e.g.*, *id*. at 18 ("He took it out and put it in his pants and told me, Don't tell nobody or I'll beat

[1] Defendant's date of birth is September 12, 1996.

you the F up"). After defendant moved out, A.O. confided in his foster mother, Mrs. Parker, telling her that defendant made him do "nasty stuff," including anal and oral sex. N.T. 6/20/16 at 105, 108.

On April 2, 2014, the Honorable Joseph A. Smyth held the first of a two-part certification hearing. At the end of part I of the certification hearing, the Commonwealth argued that under 42 Pa.C.S. § 6355(g), the burden of proof had shifted to defendant to establish that continuation of his case under the Juvenile Act served the public interest, and that he was amenable to treatment, supervision or rehabilitation as a juvenile, because he was over fifteen at the time of the offense, was previously adjudicated for "felony one burglary," and the Commonwealth had established a *prima facie* case for rape and involuntary deviate sexual intercourse. N.T. 4/2/14 at 114. The court then agreed that the Commonwealth had established a *prima facie* case. Defendant offered no argument in response, and the court concluded proceedings for the day, without any reference to defendant's refusal to accept responsibility. *Id*. at 114-15.

On April 25, 2014, the same judge held part II of the certification hearing, with defendant then having the statutory burden of proof. The hearing began with testimony from defendant's expert Dr. Nicole

Machinski, as he attempted to meet his burden. Defendant was "17½" years old at the time. N.T. 4/25/14 at 3, 21, 103-04.

Attesting to her qualifications, Dr. Machinski conceded that she had never testified at a certification hearing, and that she had conducted forty-four psychosexual evaluations "for the Defender's Association of Philadelphia for the purposes of decertification," as opposed to only two "for the Family Court of Philadelphia for the purposes of certification." *Id*. at 2, 10, 30. She went on to testify that she thought defendant was amenable to treatment in the juvenile system.

On cross-examination, however, she admitted she did not review the Mission Kids DVD,[2] watch A.O. testify, contact the police officers involved in the case, or talk to Mrs. Parker. Instead, she reviewed defendant's DHS file and only spoke to defense counsel and defendant. She was also unaware of the extent to which the repeated rapes affected A.O., despite knowing that victim impact was one of the statutory factors that the court had to consider. N.T. 4/25/14 at 4, 27, 31-33; 42 Pa.C.S. § 6355(a)(4)(iii)(A).

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[2] Mission Kids is Montgomery County's child advocacy center. At Mission Kids, a multi-disciplinary team works together to care for the child and address any needs that may exist. N.T. 6/21/16 at 15.

The court found that Dr. Machinski's testimony was riddled with inconsistences. Indeed, she admitted that someone like defendant poses a risk and threat to public safety, and she agreed that the nature and circumstances of his repeated offenses were serious. Dr. Machinski also testified that even though defendant committed a series of forcible rapes merely six months after he completed intensive treatment through EIHAB,[3] it did not weigh against his amenability to treatment. Yet she agreed that someone who displayed antisocial behavior is less amenable to treatment. Most tellingly, she agreed that residential burglary, using drugs while under court supervision, and stealing from relatives—all things defendant did— constituted antisocial behavior. N.T. 4/25/14 at 34-35, 41-42, 44-45.

The Commonwealth called its own expert, Michael Yoder, a supervisor with the Montgomery County Juvenile Probation Department, as a rebuttal witness. Mr. Yoder testified that he performed a comprehensive review of defendant's file. Among other things, he reviewed a psychiatric evaluation, DHS records, placement records from

[3] EIHAB Human Services, formerly known as St. Michael's, is an organization that provides services to individuals with developmental disabilities and behavioral health challenges. https://www.eihab.org/ (visited Aug. 12, 2021).

EIHAB, evaluations completed by Dr. Machinski, defendant's criminal record from Delaware County, and defendant's high school records. He also spoke with Delaware County officials and Philadelphia juvenile probation officials, watched A.O. testify, and viewed the Mission Kids DVD. *Id.* at 72, 78.

Mr. Yoder testified that defendant's actions were not those of a typical juvenile sex offender because of their seriousness and degree. Further, because defendant sexually assaulted A.O. after entering the juvenile system for burglary and undergoing intensive treatment at EIHAB, his criminal behavior escalated in severity. Mr. Yoder testified that he did not believe defendant was amenable to treatment in the juvenile system because of the seriousness of his crimes and the fact that he already received treatment from EIHAB.[4] And he noted that most residential

[4] In his answer to the Commonwealth's petition for allowance of appeal in this case, defendant inaccurately accused the Commonwealth of "misleading" the Court on this point, with "no citation to the record." *Answer by Respondent*, 609 MAL 2021 at 1. The Commonwealth cited pages 88-91 of the notes of testimony from part II of defendant's certification hearing, *i.e.*, N.T. 4/25/14 at 88-91. To quote Mr. Yoder: "My opinion is that he's not amenable to treatment in the juvenile system. . . . I base my opinion on the seriousness of the crime, the fact that he has received treatment in the past . . . . if he were to do well in placement and be

treatments for sex offenders last a minimum of two years, and the juvenile system would lose jurisdiction over defendant when he turned twenty-one, so it would only be able to supervise him for a year after his release from placement. *Id.* at 88-91.

Mr. Yoder also testified that SCI–Pine Grove could effectively treat defendant because the facility has a youthful offender program with individual counseling, group counseling, educational programs, treatment for sex offenders, and treatment for drugs, alcohol, and assaultive behaviors. Additionally, SCI–Pine Grove could provide for all the treatment needs Dr. Machinski noted. Dr. Machinski believed that defendant was amenable to treatment because he expressed positive goals for the future, was polite and respectful to those in positions of authority, formed strong bonds with his friend's parents, and had very little opportunity to benefit from mental health treatment. In response, Mr. Yoder rejected her allegation that defendant respected authority figures because he was ungovernable with his grandmother and uncontrollable with his aunt after EIHAB treatment. Further, when he lived with his aunt,

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released after a 2-year commitment . . . that would leave us just a year of supervision . . . ." *Id*. at 90-91.

defendant used drugs, did not follow directions, and missed curfew. Mr. Yoder also noted that defendant only lived with his friend's parents for about four months, and there was no sign that he had formed a bond with his grandmother or original foster family, both of whom he lived with for a longer period. *Id.* at 93-96.

After hearing all the evidence, Judge Smyth heard oral argument on whether defendant satisfied his burden of proving that retaining his case in the juvenile system served the public interest and that he was amenable to treatment, supervision or rehabilitation as a juvenile under 42 Pa.C.S. § 6355(g). The defense argued that "[t]he issue . . . really boils down to amenability to treatment[,]" essentially downplaying the statutory question of whether retaining the case in the juvenile system served the public interest. *Id*. at 104. Other than asserting that "[t]his is not one of the more sophisticated child predator type sex assault cases[,]" his argument focused on the general appropriateness of juvenile placement given the three and a half years available in the juvenile system. *Id*. at 105. In all, of the seven statutory factors outlined for determining public interest under 42 Pa.C.S. § 6355(a)(4)(iii), defendant ignored the first two factors (victim and community impact), and barely addressed the next three, if at all (threat to

public safety, nature and circumstances, and degree of culpability). Rather, defendant's core argument focused on the final factor (amenability to treatment and rehabilitation as a juvenile) and the second to last factor (adequacy and duration). N.T. 4/25/14 at 104-07.

The Commonwealth countered by reminding the court that defendant had the burden of proof, noting that "the defense wants to focus on the one factor that they actually presented evidence on, and that's amenability; however, amenability is only one of seven factors." *Id*. at 107. The Commonwealth further argued that all seven of the statutory factors favored certification, addressing each of the seven factors one-by-one. When discussing factor number six of the seven, adequacy and duration, the Commonwealth made the mistake of including the undisputed fact that that defendant required a greater duration of treatment than he otherwise would because he was "in denial." *Id*. at 109 ("I'm bringing that up because . . . the first step toward treatment is admission. Even the defense expert said that."). At no point during the certification hearing did defendant call the court's attention to the fact that it was inappropriate to consider his denial when estimating the required duration of treatment.

That it violated the Constitution eluded the Commonwealth, court, and defendant alike.

Lastly, the Commonwealth argued that the defense expert's opinion was incredible because she did not consider the statutory factors aside from amenability, and because the reasons she offered for amenability were irrelevant. Ultimately, the Commonwealth argued that the seven statutory factors were "all in the Commonwealth's favor[.]" *Id*. at 107-11.

Following argument, the court stated its reasons for certification in open court, explaining why defendant failed to meet his burden of proof. First, on the issue of amenability to treatment, the court found that defendant's expert testimony was "inconsistent" because she discounted the fact that prior treatment did not prevent the instant series of crimes by emphasizing that they were different in type, but then she said defendant would do well in sex offender treatment because he did well in his prior treatment. *Id*. at 113 ("So in one sense, she tries to separate the two, and in another sense, she tries to blend the two, and I find that testimony to be inconsistent").

Second, also on the issue of amenability, while the defense painted defendant as antisocial and damaged through no fault of his own, it left the

court unpersuaded as to whether he could be rehabilitated at all. *Id*. ("But is he so damaged that he can't be rehabilitated for a sex offender, or can he be rehabilitated for a sex offender?").

Third, the court explained why it was unpersuaded concerning the duration of treatment defendant would require. Albeit inappropriately, the court noted that defendant's failure to admit was also "sort of [defendant's] conundrum, because time [was] of the essence. He's approaching 18 years old." The court continued: "If you're going to go on the sex offenders' treatment, it's important that you admit, No. 1 . . . . And here, we can't identify the depth of the problem largely because we're not admitting that there is a problem." *Id*. at 114. The court added: "Counsel said now he wants to say he [will] participate[] in treatment . . . , and defense counsel argued, well, maybe the treatment's not talking about sex offenders' treatment. And that's the very issue, though, is he amenable to sex offenders' treatment?" *Id*. The court added that, "in the juvenile system, time is running out." *Id*. Defendant did not bring his constitutional concern to the attention of the court or the Commonwealth when the court offered this rationale, inadvertently violating his Fifth Amendment rights.

Fourth, and finally, the court held that the remaining five statutory factors, which defendant largely failed to address, weighed in favor of certification. The court held: "So for all the reasons in the statute as enumerated by [the Commonwealth] and because it's the defense burden of proof, I'm going to grant the Commonwealth's motion to certify him to adult court." *Id*. at 115.

In sum, based on the totality of evidence presented, including the inconsistency of defendant's expert testimony, the court determined that defendant would be tried as an adult, and certified him accordingly because it found that defendant did not meet his burden of proof as all seven of the statutory factors weighed in favor of certification. *Id*. at 112-15; *Commonwealth v. Taylor*, No. CP-46-CR-3166-2014 at 1 (C.C.P. (Mont.) June 16, 2017) (Carpenter, J.) (*Trial Court Opinion*).

On June 21, 2016, just three months before defendant's twentieth birthday, a jury convicted him of rape of a child (18 Pa.C.S. § 3121(c)), rape by forcible compulsion (18 Pa.C.S. § 3121(a)(1)), rape by threat of forcible compulsion (18 Pa.C.S. § 3121(a)(2)), three counts of involuntary deviate sexual intercourse by forcible compulsion (18 Pa.C.S. § 3123(a)(1)), three counts of involuntary deviate sexual intercourse by threat of forcible

compulsion (18 Pa.C.S. § 3123(a)(2)), three counts of involuntary deviate sexual intercourse with a child (18 Pa.C.S. § 3123(b)), four counts of sexual assault (18 Pa.C.S. § 3124.1), two counts of indecent assault by forcible compulsion (18 Pa.C.S. § 3126(a)(2)), and indecent assault of a person less than 13 years of age (18 Pa.C.S. § 3126(a)(7)). The court later sentenced him to an aggregate term of ten to twenty-five years' imprisonment followed by ten years' probation. He was twenty-years-old at the time of his sentence.

Defendant appealed to the Superior Court claiming, *inter alia*, that the trial court erred by certifying him to be tried as an adult. Specifically, he presented the following argument to the trial court in his concise statement of matters complained of on appeal:

> The trial court erred in certifying Appellant to be tried as an adult where both juveniles, Appellant 15 and the Complaint [sic] at 11 and 12 were in search of their sexual identities and his actions were described as not sophisticated but in fact bold and foolish. Although Appellant suffered neglect, abuse and abandonment, he was amenable to treatment and had shown that he responded well to treatment when provided and where the prosecution's basis for certification focused on placement at SCI Pine Grove more so than amenability.

Defendant's *Concise Statement* ¶1 (filed April 18, 2017). Yet again, defendant failed to give the trial court an opportunity to address or remedy

the inadvertent violation of his Fifth Amendment right against self-incrimination.

In the trial court's responsive 1925(a) opinion, addressing defendant's certification challenge as it existed at that time, the Honorable William R. Carpenter quoted the reasoning Judge Smyth offered at the certification hearing as detailed above. Judge Carpenter added:

> Applying the law to the facts of this case, the decision to certify Taylor as an adult was proper. The evidence presented by the Commonwealth provided that Taylor was the main and only actor in a bold scheme to continually victimize A.O., who was 11 and 12-years old at the time. The series of assaults were forcible rapes [that] left A.O. traumatized. In addition, the Commonwealth showed that Taylor poses a risk to the community [and] is not amenable to treatment in the juvenile system through the testimony of Mr. Yoder and the cross-examination of Dr. Machinski. The record shows that Judge Smyth considered the factors under 42 Pa.C.S.A. § 6355(a)(4)(iii). There was no abuse of discretion in the Court's determination.
>
> Taylor's contention that he and A.O. were in search of their sexual identities has no support in the record. It is just another attempt by Taylor to circumvent his culpability for the crimes he has committed. Finally, Taylor's assertion that he is amenable to treatment was contradicted by the testimony of Mr. Yoder and the cross-examination of Dr. Machinski.

Trial Court Opinion dated June 16, 2017 (Carpenter, J.) at 12.

Defendant turned twenty-one on September 12, 2017. It was not until almost a month after that, October 10, 2017, when defendant argued for the first time, in his brief to the Superior Court, nearly three-and-a-half years after the April 25, 2014 certification hearing, that the certifying court committed reversible error by penalizing him for "not giving up his constitutional right to remain silent[.]" *Defendant's Brief in Support of Appeal*, 856 EDA 2017 (filed 10/10/17) at 28.

Addressing the fact that defendant was raising this issue for the first time in his appellate brief, the Superior Court explained:

> Taylor's main argument on appeal is that the trial court violated his Fifth Amendment right against compulsory self-incrimination because it based its certification decision on the fact that Taylor had not admitted to the crimes. Although Taylor did not raise this claim in his Rule 1925(b) statement, he did not waive it. Whether certification is proper is a question of jurisdiction, which cannot be waived.

Commonwealth v. Taylor, No. 856 EDA 2017, 2018 WL 4290127, at *12 (Pa. Super. Sept. 10, 2018) (*First Superior Court Opinion*).

The Superior Court went on to reject defendant's belated claim, as follows:

> Here, in stating its reasons, the juvenile court referenced Taylor's failure to admit guilt and that admission was a step in sex offender treatment. This was error. . . . However, in our review of an order granting certification, we do not focus on one aspect of the record alone. Rather, we examine the record as whole to determine whether the ultimate decision of granting certification was an abuse of discretion. . . . We presume that the juvenile court properly considered and weighed the relevant information before it. . . .
>
> On this record, we find the juvenile court did not abuse its discretion in finding Taylor failed to carry his burden to establish that certification was not proper. In rendering its decision, the court cited the seriousness of the alleged crime, the time remaining in the court's jurisdiction, and the failure of Taylor's previous treatment to prevent the alleged crimes. We conclude that, although the juvenile court stated an impermissible consideration, based on all evidence presented at the hearing, and the totality of the reasoning provided by the juvenile court, the juvenile court did not abuse its discretion.

First Superior Court Opinion at *6 (citations omitted).

Thereafter, however, this Court granted defendant's petition for allowance of appeal on the issues of (1) whether a juvenile court violates the Fifth Amendment by holding an offender's refusal to admit guilt against him during a certification hearing, and (2) whether the Superior Court erroneously concluded that there was no abuse of discretion because the lower court also considered other statutorily required factors. *Commonwealth v. Taylor*, 204 A.3d 361 (Pa. 2019).

On May 19, 2020, this Court agreed with the Superior Court's conclusion that the lower court erred, but disagreed with the decision to affirm the conviction. This Court reversed the Superior Court's ruling, and remanded:

> for a determination, in the first instance, and with developed advocacy of the parties, of whether the harmless error doctrine is applicable to the juvenile court's constitutionally deficient misapplication of the Juvenile Act's transfer provisions and, if it is not or if the error is not harmless, for consideration of the available relief under these circumstances.

Commonwealth v. Taylor, 230 A.3d 1050, 1073 (Pa. 2020).

In its July 29, 2021 opinion, the Superior Court reversed defendant's judgment of sentence, holding: (A) that the constitutional error in the certification proceeding that preceded defendant's jury trial is not amenable to harmless error analysis; and (B) "we are constrained to conclude the only available remedy is discharge." *Commonwealth v. Taylor*, 856 EDA 2017, 2021 WL 3206496, at *13 (Pa. Super. July 29, 2021) (*Second Superior Court Opinion*).

The Commonwealth petitioned for allowance of appeal to give this Court the opportunity to determine: (1) whether the harmless error doctrine can apply to an impermissible consideration in juvenile

certification; and (2) the scope of the "unlimited original jurisdiction" vested in the courts of common pleas by Article V, Section 5 of the Pennsylvania Constitution and 42 Pa.C.S. § 931(a). This Court granted the Commonwealth's petition.

SUMMARY OF THE ARGUMENT

The most appropriate course of action in this case given the constitutional error is to remand to the unlimited original jurisdiction of the court of common pleas to correct the error and proceed accordingly, either discharging defendant or upholding his sentence. The court's authority to do justice comes from the sweeping jurisdictional grant of Article V, Section 5 of the Pennsylvania Constitution and 42 Pa.C.S. § 931(a). The Commonwealth does not challenge the now-repealed statutory concept of exclusive juvenile division jurisdiction that lives on in caselaw, but does challenge extending that caselaw to defy the Constitution.

Alternatively, this Court should hold that harmless error analysis is appropriate in this case because the error at issue was not a structural defect affecting the framework of the certification proceeding, but rather an error in process, capable of quantitative assessment because of the several enumerated statutory factors that were unaffected by the certifying court's error. While defendant had the burden of proving both that retaining his case in the juvenile system served the public interest and that he was amenable to treatment, supervision, and rehabilitation as a juvenile, the overwhelming balance of factors militated in favor of certification.

ARGUMENT

The process of certifying a juvenile for trial as an adult and the decision to do so are matters of grave significance that should never be taken lightly. Likewise, the importance of an individual's right to remain silent in the face of criminal accusation can hardly be overstated. That right is, indeed, sacrosanct in the American criminal justice system, and thankfully so. At the same time, what lies at the heart of our justice system is justice itself, and the shared government responsibility to reasonably safeguard citizens from individuals who have demonstrated a propensity for victimizing others, especially where that propensity tends toward the most serious of violent and sexual offenses, and even more so when the citizens at risk are among our most vulnerable.

Balancing these interests, and given the prolonged history of this case, the most appropriate course of action at this point is remand to the court of common pleas for a proper certification decision that does not offend any constitutional rights. *See, e.g., Kent v. United States,* 383 U.S. 541, 564-65 (1966) (holding the "drastic relief" of releasing a juvenile rapist is not appropriate following a juvenile court certification error, and

remanding to a trial court to correct that error, even though the offender had aged out of the operative juvenile system).

For this reason, the below discussion will begin by explaining why this Court should hold that the Court of Common Pleas of Montgomery County has the legal authority to decide certification without improper considerations, and the discussion will close by addressing non-prejudicial error as an alternative means of reaching a just resolution.

I. PENNSYLVANIA'S COURTS HAVE THE CONSTITUTIONAL AND STATUTORY AUTHORITY TO HOLD DEFENDANTS FULLY ACCOUNTABLE FOR CRIMES CODE VIOLATIONS, EVEN WHEN THOSE DEFENDANTS AGE OUT OF THE PARAMETERS OF THE JUVENILE DIVISION OF A COURT OF COMMON PLEAS.

The Pennsylvania Constitution and corresponding statutes give the Court of Common Pleas of Montgomery County jurisdiction to correct its error in this case. Notwithstanding the fact that a jury unanimously found defendant guilty of multiple counts of child-rape and related offenses beyond a reasonable doubt, and notwithstanding the fact that defendant never presented his constitutional certification challenge to the court of common pleas, the Superior Court panel majority, felt "constrained to conclude" otherwise based on the following outdated reasoning.

> [T]he juvenile division has exclusive jurisdiction to determine whether to transfer a matter to the criminal division. . . . The juvenile division, however, no longer has jurisdiction over Taylor, who is over the age of 21 and no longer a "child" under the Act . . . . Although it could have done so, the General Assembly did not provide a mechanism for a court to have jurisdiction to hold a certification hearing where a certification determination was reversed on appeal, but a juvenile turned 21 during the appellate process.

Second Superior Court Opinion, 2021 WL 3206496, at *13.

The panel's reasoning is wrong because both the Pennsylvania Constitution and the General Assembly's statutory law provide the mechanism and mandate vesting unlimited original jurisdiction — *i.e.*, the unlimited power to pass judgment on law and fact in the first instance — in the courts of common pleas.[5]

[5] The phrase "original jurisdiction" has been defined as: "Jurisdiction in the first instance; jurisdiction to take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts. Distinguished from *appellate* jurisdiction[;]" and "A court's power to hear and decide a matter before any other court can review the matter. Cf. *appellate jurisdiction*." BLACK'S LAW DICTIONARY 1251 (4th ed. 1951); 856 (7th ed. 1999). Given that original jurisdiction in criminal and juvenile cases is vested in the courts of common pleas, this Court generally recognizes that appellate issues not presented there (and not waived as a result) "should be resolved in the first instance by the common pleas court on remand." *Commonwealth v. Wright*, 78 A.3d 1070, 1087 (Pa. 2013).

On April 23, 1968, Pennsylvania adopted Article V, Section 5 of the Pennsylvania Constitution, under which:

> There shall be one court of common pleas for each judicial district . . . . (b) having unlimited original jurisdiction in all cases except as may otherwise be provided by law.

PA. CONST. art. V, § 5.

Prior to December 6, 1972, the "Juvenile Court Act of June 2, 1933," (otherwise known as the Juvenile Court Code or Juvenile Court Law), specifically 11 P.S. § 244, defined the "jurisdiction of the Juvenile Court," by providing that juvenile courts "shall have and possess full and exclusive jurisdiction in (a) all proceedings affecting delinquent, neglected and dependent children[.]" *Commonwealth v. Marlin,* 305 A.2d 14, 16 n.2 (Pa. 1973) (quoting the Act of June 2, 1933, P.L. 1433, § 2, *as amended*, 11 P.S. § 244); *Commonwealth v. Jordan*, 7 A.2d 523, 526 (Pa. Super. 1939) (same). On that date, however, the General Assembly repealed several statutes, including Section 244.

On July 9, 1976, following the adoption of Article V, Section 5 of the Constitution, the General Assembly enacted the "Juvenile Act," with an effective date of June 27, 1978. In doing so, the General Assembly

purposely used the title "Juvenile Act" rather than "Juvenile Court Act," "in view of the recent *consolidation of original jurisdiction* solely in the several courts of common pleas by Section 5 of Article V of the Pennsylvania Constitution, as amended 1968." 42 Pa.C.S. § 6301 *comment* (emphasis added). Similarly, in the Juvenile Act's definition section, the General Assembly defined the term "Court[,]" not as the juvenile division of a court of common pleas, but as "the court of common pleas" itself. 42 Pa.C.S. § 6302.

On the same date, July 9, 1976, again following the adoption of Article V, Section 5 of the Constitution, the General Assembly enacted 42 Pa.C.S. § 952, which explains:

> The divisions of a court of common pleas are administrative units composed of those judges of the court responsible for the transaction of specified classes of the business of the court. In a court of common pleas having two or more divisions *each division of the court is vested with the full jurisdiction of the whole court*, but the business of the court may be allocated among the divisions of the court by or pursuant to general rules.

Id. (emphasis added).

Also following Article V, Section 5, the General Assembly enacted 42 Pa.C.S. § 931, which provides, in part: "Except where exclusive original

jurisdiction of an action or proceeding is . . . vested in *another court* of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings . . . ." *Id.* (enacted on October 5, 1980 and amended thereafter) (emphasis added). Notably, the General Assembly used the term "another court" here, not another division, so the allocation or vesting of jurisdiction in any division of the same court of common pleas cannot operate to divest that court of jurisdiction. Accordingly:

> By constitution and by statute, the court of common pleas has unlimited original jurisdiction in all cases, actions, and proceedings, and is thus empowered, subject to a few statutory exceptions . . . to decide any matter arising under the laws of this commonwealth.

Commonwealth v. McPhail, 692 A.2d 139, 141 (Pa. 1997) (plurality) (footnote omitted listing the "few statutory exceptions" that actually vest jurisdiction in another court, namely: 42 Pa.C.S. §§ 723, 725, 742, 761, 762, 763, and 764).

Since the General Assembly's repeal of the statutory provision that vested "exclusive jurisdiction" in juvenile courts (11 P.S. § 244), our courts have referenced 42 Pa.C.S. §§ 6303(a) and 6322 as the basis for continuing

to recognize "exclusive jurisdiction" in a juvenile division. *See, e.g.*, *Commonwealth v. Johnson*, 669 A.2d 315, 321 (Pa. 1995) ("Section 6322 of the Juvenile Act clearly establishes that, *in general*, the prosecution of juveniles charged with criminal offenses is within the exclusive jurisdiction of the juvenile division") (emphasis added); *Second Superior Court Opinion,* 2021 WL 3206496, at *13 ("In Pennsylvania, the juvenile division has exclusive jurisdiction to determine whether to transfer a matter to the criminal division"). Notably, the phrase "exclusive jurisdiction" cannot be found anywhere in these statutory provisions. Nonetheless, despite the subsequent changes in the law and in the state Constitution as noted, our courts have continued to employ the terminology of the Juvenile Court Act as it existed in 1933.

The collective constitutional and statutory import of these changes, however, is that the court of common pleas in any given judicial district is now but one unified court, collectively having "unlimited original jurisdiction of all actions and proceedings," unless original jurisdiction is vested in some other court. 42 Pa.C.S. § 931(a). That does not change the holding of *Commonwealth v. Greiner*, 388 A.2d 698, 701 (Pa. 1978), under which: "By the [Juvenile Act of 1972], the legislature . . . made it clear that

whenever possible its provisions should control in resolving matters pertaining to juveniles." (Emphasis added). But when circumstances arise where that becomes impossible for some reason or another, the General Assembly has, in fact, provided a catch-all for original jurisdiction by enacting 42 Pa.C.S. § 931.

Not only has the General Assembly provided this catch-all without limitation, but it specifically chose the terms "unlimited" and "all actions and proceedings." By default then, unless original jurisdiction lies in some other court, original jurisdiction exists within the court of common pleas, and the decision as to which division will decide a matter is not case dispositive, but one of administration. In other words, the question of which division will exercise the court's original jurisdiction is merely administrative, not a question of whether the court of common pleas has original jurisdiction at all. *See* 42 Pa.C.S. § 952.

It does not offend the state Constitution to generally assign that unlimited original jurisdiction to one division or another, or even to enforce such an assignment as "jurisdictional," but it does offend the Constitution to construe such an assignment as changing unlimited jurisdiction to no jurisdiction at all. And the reason that offends the

Constitution, at least in part, is that divisions of a court of common pleas "are not separate sovereigns" deriving their power from independent sources; but rather, the jurisdiction of any division of the court of common pleas ultimately "flows from the sovereign Commonwealth of Pennsylvania[.]" *McPhail*, 692 A.2d at 142.

In a vacuum, the words "'*unlimited* original jurisdiction' in '*all* actions and proceedings' not exclusively vested elsewhere" are "clear and unambiguous[.]" *In re Admin. Order No. 1-MD-2003*, 936 A.2d 1, 6 (Pa. 2007) (quoting 42 Pa.C.S. § 931 and recognizing the "sweeping statutory grant of jurisdiction in the courts of common pleas") (emphasis supplied by this Court's opinion). The Superior Court, however, muddled the scope of this authority by relying on the above-referenced concepts that predate these constitutional and legislative changes. The Commonwealth asks this Court to restore the clear import of this "sweeping" constitutional and legislative grant of original jurisdiction. *Id*.

That a defendant ages out of the reach of a court's juvenile division does not mean the entire court of common pleas is without recourse. When a matter is taken in, or transferred to, a division within a court of common pleas where "such matter is not allocated by law," the remedy is not to

quash or dismiss the matter, "but rather, a transfer to the correct division." *In re Estate of Cantor*, 621 A.2d 1021, 1023 (Pa. Super. 1993) (citing 42 Pa.C.S. § 5103(c)). Thus where a juvenile division is empowered to make a certification decision, and a criminal division is empowered to exercise the courts' original jurisdiction over adults accused of violating the Crimes Code, these divisions should be able to collectively (be it jointly or alternatively) exercise the unlimited original jurisdiction of the court of common pleas to do justice as expected by society, and as intended by the General Assembly.

Moreover, the Superior Court's holding that the court of common pleas does not have the authority to do justice in this case conflicts with *Commonwealth v. Anderson*, 630 A.2d 47 (Pa. Super. 1993) and *Commonwealth v. Monaco*, 869 A.2d 1026 (Pa. Super. 2005). In *Anderson*, the defendant committed crimes as a juvenile, then fled apprehension. He was not arrested until after turning 21-years-old. The Superior Court held:

> Appellee's current age places him outside the Juvenile Act's definition of a child. Therefore, the Juvenile Act does not apply to him. 42 Pa.C.S.A. § 6302(2). ***The inapplication of the Act to the appellee, however, does not mean that he inhabits a jurisdictional limbo between the Family Court Division and the Trial Division.*** Because of his

> current age, appellee is not a child.[] Thus, he should be tried as an adult in the Trial Division."

Commonwealth v. Anderson, 630 A.2d at 49–50.

And while Anderson was complicit in the delay in holding him judicially accountable because he fled apprehension, the Superior Court extended the *Anderson* rationale to the defendant in *Commonwealth v. Monaco*, a case in which the defendant was not responsible for the delay in prosecution. *See Commonwealth v. Monaco*, 869 A.2d 1026, 1030 (Pa. Super. 2005) ("Absent some improper motivation for the [Commonwealth's] delay, we conclude that *Anderson* is applicable"). There, the Superior Court reasoned that "The right to be treated as a juvenile offender is statutory rather than constitutional[,]" and that the defendant "no longer fell within the ambit of the juvenile justice system" because he no longer satisfied the statutory definition of a child, even though he satisfied that definition when he committed his crimes. *Id*. at 1029.

In both cases, the Superior Court concluded that the courts of common pleas had jurisdiction to bring a defendant to justice for crimes committed as a juvenile, even though the defendant had aged beyond the Juvenile Act. Those cases recognize that there is no mystical space between

divisions of a singular court of common pleas where an individual might escape the court's unlimited jurisdiction after harming others in violation of the laws of this Commonwealth. The fact that the Commonwealth in the instant case was diligent in apprehending defendant when he was seventeen and a half does not mean that this case should be treated any differently when determining whether the court of common pleas has jurisdiction.

Nonetheless, in this case, the Superior Court panel majority completely overlooked 42 Pa.C.S. § 931 and its analysis failed to apply Article V, Section 5, ultimately reaching the untenable, indeed unconstitutional, conclusion that the courts of common pleas do not have unlimited original jurisdiction in this case or any like it. To reach this untenable and unconstitutional result, the panel majority misapplied *Johnson*, and misconstrued the Commonwealth's argument as being at odds with *Johnson*. To be clear, the Commonwealth is not challenging *Johnson's* holding, but does challenge the extension of that holding to the point that it offends the Pennsylvania Constitution and countermands the statutes that are based thereon.

Johnson holds divisional transfer orders from criminal to juvenile are "jurisdictional in every sense of the term[,]" so that "if the challenged order is improper," jurisdiction does not vest with the juvenile division, and jeopardy does not attach *to prevent prosecution in criminal court*. *Johnson*, 669 A.2d at 321. What *Johnson* does not say is that a teenager can break the laws of the Commonwealth by victimizing a child, and then age into a jurisdictional loophole where he is beyond the reach of the "unlimited original jurisdiction" that the Pennsylvania Constitution affords to the courts of common pleas. PA. CONST. art. V, § 5.

Johnson deals only with transfer from a criminal division to a juvenile division, and criticized the Commonwealth for ignoring the difference between that and transfer in the opposite direction. It referenced *Commonwealth v. Greiner*, a case decided under a predecessor to the Juvenile Act, for cases, like this one, involving transfers from juvenile divisions to criminal divisions. *Greiner*, 388 A.2d at 701.

In *Greiner*, this Court remanded the case to a juvenile division, and did not sanction the "drastic relief" of discharge or hold that the court of common pleas was without jurisdiction to receive a case on remand. *Kent*, 383 U.S. at 565. In fact, *Greiner* held that the trial court acted without

authority in trying the defendant as an adult because, unlike in this case, the applicable statute did not shift the burden of proof from the Commonwealth, and the Court determined that the Commonwealth's evidence was insufficient as a matter of law to support the transfer. *Greiner*, 388 A.2d at 702. Here, the Juvenile Act placed the burden on defendant, and there was certainly sufficient evidence to support the transfer, so there is no question that the court acted in accordance with the Juvenile Act.

Likewise, in *Johnson*, this Court did not endorse the drastic relief of discharge or hold that the court of common pleas had no jurisdiction to receive the case on remand. Rather, in the context of resolving a double jeopardy question, *Johnson* held that jurisdiction does not vest in the receiving "court" without a proper transfer order. *Johnson*, 669 A.2d at 321. The Commonwealth does not presently dispute that core principle. The Commonwealth argues that the challenged order in this case was, in fact, proper because it remains fully supported by sufficient evidence of record as a matter of law, even when limited to appropriate considerations once the offending consideration is removed. Aside from a harmless error determination, however, the only way to properly ascertain whether the

transfer is fully supported by the remaining considerations is remand to the court of common pleas to exercise its unlimited original jurisdiction to render an assessment independent of the improper consideration in the first instance.

The panel below took *Johnson*'s holding beyond its intended context by *divesting* the court of common pleas of all jurisdiction, in total disregard of both Article V, Section 5, and Section 931. In contrast, *Johnson* ultimately validated the original jurisdiction of the court of common pleas.

There is no tension between *Johnson* and Article V, Section 5 or Section 931(a), unless and until there is an attempt to use *Johnson* to leave the entire court of common pleas with no original jurisdiction at all, which, of course, *Johnson* did not do. Thus, this case presents a nuance not mentioned in *Johnson*. That case specifically says: "Clearly, the Juvenile Act is the type of legislation which exemplifies the legislature's desire *to vest* limited and exclusive jurisdiction in one division of the court of common pleas, in order to meet the special needs of our youth." *Johnson*, 669 A.2d at 320. That limited jurisdiction is jurisdiction over juveniles, not necessarily jurisdiction over the decision making process without regard to an individual's age.

Here, it must be acknowledged that the jurisdiction of the juvenile division is "limited" as compared to the full and unlimited jurisdiction of an entire court of common pleas. *Johnson*, 669 A.2d at 320. Moreover, it is unnecessary to turn *Johnson*'s general proposition into an absolute. Rather than deal in absolutes when recognizing the limited jurisdiction of a juvenile division, this Court holds that juvenile justice provisions are to be applied "whenever possible." *Greiner*, 388 A.2d at 701.

The fact that the phrase "exclusive jurisdiction" can no longer be found anywhere in the entire Juvenile Act is not a mere oversight by the General Assembly, because prior to the adoption of Article V, Section 5 of the Constitution and the enactment of Section 931, "Juvenile Court" legislation did use that phrase. *See* Juvenile Court Act of June 2, 1933, 11 P.S. § 244 (Repealed by 1972, Dec. 6, P.L. 1464, No. 333, § 40); *Marlin,* 305 A.2d at 16 n.2; *Jordan*, 7 A.2d at 526. The General Assembly specifically removed the "full and exclusive jurisdiction" wording from its juvenile justice legislation following the change in Pennsylvania's Constitution. As noted above, the reason the General Assembly changed the wording of its juvenile justice legislation was to accommodate "the recent consolidation of original jurisdiction solely in the several courts of common pleas by Section

5 of Article V of the Pennsylvania Constitution, as amended 1968." 42 Pa.C.S. § 6301 *comment*.

Again, recognizing the change in the Constitution, the General Assembly enacted 42 Pa.C.S. § 931, giving "the courts of common pleas . . . unlimited original jurisdiction of all actions and proceedings" not vested in some other court. *Id*. To now hold that the Court of Common Pleas of Montgomery County has no original jurisdiction based on the notion of exclusive jurisdiction in a juvenile court, this Court would have to disregard the changes in Pennsylvania's Constitution, ignore Section 931(a), and stretch precedent beyond its intended context, to the end of doing what no case has done since the effective date of the current Juvenile Act: divest the courts of common pleas of their "unlimited original jurisdiction of all actions and proceedings." 42 Pa.C.S. § 931(a).

The panel majority below wrongly faulted the General Assembly for supposedly failing to provide a mechanism for the Judiciary to do justice in this case. *Second Superior Court Opinion,* 2021 WL 3206496, at *13. If the General Assembly, in following the Constitution, attempted and failed to provide the courts of common pleas with "unlimited original jurisdiction of all actions and proceedings" and the ability to transfer cases between

divisions of the court as needed to effectuate the exercise of that unlimited jurisdiction, one has to wonder what magic words were required beyond the plain language of Sections 931 and 952. 42 Pa.C.S. §§ 931, 952.

The undersigned is unaware of any statutory provision saying a criminal division is prohibited from conducting a certification analysis when exercising the court's unlimited original jurisdiction out of necessity because of an offender's age. Likewise, the undersigned is unaware of any provision saying a criminal division cannot retain jurisdiction because of an offender's age, while referring a case to its juvenile division for the limited purpose of conducting a new certification analysis.

Ultimately, the Commonwealth is not asking this Court to create jurisdiction. Rather, it is respectfully asking this Court to recognize that the state Constitution and General Assembly already did. The General Assembly effectively covered all bases by establishing a general rule of default and unlimited jurisdiction through Section 931(a), which essentially mimics the jurisdictional grant of Article V, Section 5. This Court should not carve out any exceptions to the constitutionally and statutorily established unlimited original jurisdiction of the courts of common pleas. Until a case arising out of a Crimes Code violation becomes final in the

sense that all avenues of direct appeal have been exhausted, the courts of common pleas retain unlimited original jurisdiction, while appellate jurisdiction rests in the Superior Court and in this Court.

Moving forward in this case, it should be noted that the evidentiary record for certification purposes has been closed since April 25, 2014. The respective testimony of both parties' witnesses has been preserved, and can be redacted if and as needed. Given defendant's advanced age for a juvenile at the time of the offense, his prior adjudication for felony burglary, and the Commonwealth's establishment of a *prima facie* case that defendant committed rape and involuntary deviate sexual intercourse, it was and is his burden under 42 Pa.C.S. § 6355(g) to persuade the court that retaining his case in the juvenile system would have served the public interest, and that he was amenable to treatment, supervision and rehabilitation as a juvenile. The Commonwealth does not believe that any evidentiary supplementation is in order. A judge of the court of common pleas should review the certification hearing records without considering defendant's denial, and render a new decision on whether defendant satisfied his burden of proving it was appropriate to retain his case in the

juvenile division. If not, then the conviction stands, and if so, then defendant is discharged. *Accord Kent*, 383 U.S. at 564-65.

II. HARMLESS ERROR ANALYSIS IS APPLICABLE WHERE A CERTIFYING JUDGE LISTS AN IMPERMISSIBLE CONSIDERATION AS ONE OF SEVERAL FACTORS IN DETERMINING THAT A JUVENILE FAILED TO MEET HIS BURDEN OF PROOF.

In line with the Commonwealth's duty to promote the safety of the community and to seek justice for the victims in this case, the Commonwealth argues, in the alternative, that the harmless error doctrine applies, and that the error was non-prejudicial beyond a reasonable doubt under the circumstances presented.

A. Harmless Error Analysis is Applicable in this Case.

The certifying court's error is not the kind that the United States Supreme Court has deemed 'structural,' and, therefore, beyond the possibility of remedy by harmless error analysis. The certifying judge's error in this case was neither "structural" under *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), nor *Arizona v. Fulminante*, 499 U.S. 279 (1991).

In *Fulminante*, the Court acknowledged:

> the general rule [is] that a constitutional error does not automatically require reversal of a conviction, [as] the Court has applied harmless-error analysis

> to a wide range of errors and has recognized that most constitutional errors can be harmless.

Fulminante, 499 U.S. at 306. In identifying the common thread in cases where the Court found constitutional error to be harmless, the Court noted that they were cases in which some error in presenting a case to a jury could be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id*. at 307–08. The Court distinguished these instances of "trial error" from "structural defects in the constitution of the trial mechanism, ***which defy analysis by 'harmless-error' standards***." *Id*. at 309 (emphasis added). Identifying specific "structural defects in the constitution of the trial mechanism" that would defy such analysis, the Court pointed to (1) the absence of counsel, (2) a presiding judge who is not impartial, (3) excluding members of one's race from a grand jury, (4) denying the right to self-representation at trial, and (5) denying the right to a public trial. *Id*. at 309-310; *see also McCoy*, 138 S.Ct. at 1511 ("violation of a defendant's Sixth Amendment-secured autonomy" is "structural," and therefore not subject to harmless error review). In each of those instances,

the impact of such an error would be impossible, or nearly impossible, to calculate.

In *Fulminante*, the Court explained:

> Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

499 U.S. at 310.

In *McCoy*, the United States Supreme Court found structural error where an attorney admitted his client's guilt over the client's objection. The court reiterated *Fulminante*'s definition of the phrase structural error as one that "'affect[s] the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself.'" *McCoy*, 138 S.Ct. at 1511. *McCoy* then identified three sub-categories of errors that "may" affect the framework of a trial. *Id*. Under the first:

> An error may be ranked structural . . . "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal

> principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty."

Id. (quoting *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017)).

As a second sub-category of errors that "might" affect the framework of a trial, the court noted: "An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice[.]" *Id*. And for the third sub-category of errors that might affect the framework of a trial, the Court referenced situations "where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt." *Id*.

It is noteworthy that the Court did not say that every error which falls into one of these three sub-categories is automatically a "structural" error. Rather, those types of errors "may" or "might" be structural, depending on whether they meet the court's clear definition of the term structural, *i.e.*, depending on whether the errors actually affect the framework within which the trial proceeds, and are not merely errors in the process itself. *Id*. While the Court gave examples of errors that would fall into the different sub-categories, the common thread connecting those

examples (preventing a defendant from making his own choices, denying a defendant his counsel of choice, and a judge's failure to charge a jury with the appropriate standard for criminal convictions) is that each potentially impacts the whole process of a trial, rather than a mere portion of it. *See Brecht v. Abrahamson*, 113 S.Ct. 1710, 1717 (1993) ("The existence of such defects . . . requires automatic reversal of the conviction because they infect the entire trial process").

And using *McCoy* itself as an example, the error in counsel admitting his client's guilt over the client's objection was structural under the first two sub-categories, or "the first two rationales," because (1) McCoy was prevented from making his own choices, and (2) the impact counsel's admission had on the jury was impossible to measure. *Id*. In misreading *McCoy*'s analysis in this case, the Superior Court failed to recognize that each of these three categories point to errors that affect the framework within which a trial proceeds, as opposed to a simple, albeit potentially egregious, error in the process. The "common thread" that connects cases where the Court holds harmless error analysis *is* applicable,

> is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively

> assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Fulminante, 499 U.S. at 307-08.

Here, the error at issue was "simply an error in the . . . process itself," capable of quantitative assessment, and not a "structural defect affecting the framework" in which the proceeding took place. *Id*. The error at issue was an analytical error affecting the consideration of, at most, two of seven statutory factors that the court was required to consider in the procedural context of determining whether defendant met his burden of proving that retaining his case in the juvenile system would serve the public interest, and that he was amenable to treatment, supervision and rehabilitation as a juvenile. 42 Pa.C.S. § 6355(g).

In determining whether the public interest might be served by retaining the case in the juvenile system, the certifying judge was required to consider:

> (A) [1] the impact of the offense on the victim or victims;
> (B) [2] the impact of the offense on the community;
> (C) [3] the threat to the safety of the public or any individual posed by the child;
> (D) [4] the nature and circumstances of the offense allegedly committed by the child;

(E) [5] the degree of the child's culpability;
(F) [6] the adequacy and duration of dispositional alternatives available under [the Juvenile Act] and in the adult criminal justice system; and
(G) [7] whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering [nine (9) sub-factors.]

42 Pa.C.S. § 6355(a)(4)(iii).

Importantly, "for purposes of analyzing the factors in § 6355(a)(4)(iii), a trial court may (but need not) assume that the juvenile is guilty and committed the alleged acts constituting the offense." *Commonwealth v. Brown*, 26 A.3d 485, 508 (Pa. Super. 2011). This fact significantly distinguishes this case from any other where the determination at issue was whether or not the accused actually committed the crime. For certification purposes, once a *prima facie* case was established, whether defendant actually committed the crime was of little to no relevance. This is so because the outcome determinative consideration was the court's assessment of whether defendant satisfied his burden of proof using the requisite statutory factors, and guilt is not one of them.

Thus, the certifying court's error did not impact the entire certification proceeding. It did not affect the court's consideration of the

impact of this series of rapes on the victim, or how this series of rapes impacted the community. It did not affect the court's consideration of the threat to public safety or the victim that defendant continued to pose. It did not affect its consideration of the nature and circumstances of the offense, or its consideration of the degree of defendant's culpability. In fact, in spite of having the burden of proof, defendant did not present any evidence or argument on these first five factors that would tend toward retaining his case in the juvenile system.

With regard to the remaining two factors, (F) adequacy and duration of available alternatives, and (G) amenability as a juvenile, the error did impact the court's consideration of these factors, in part. The Court improperly questioned duration based on defendant's denial of wrongdoing, but did not use the denial for a determination of whether juvenile treatment might be adequate independent of duration. Even if a court were to presume that juvenile treatment would have been adequate independent of duration, that would be only one of seven factors militating against certification.

Turning to the last factor, amenability to treatment, supervision or rehabilitation as a juvenile, the General Assembly provided nine different

sub-factors to consider: "(I) age; (II) mental capacity; (III) maturity; (IV) the degree of criminal sophistication exhibited by the child; (V) previous records, if any; (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child; (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction; (VIII) probation or institutional reports, if any; [and] (IX) any other relevant factors[.]" 42 Pa.C.S. § 6355(a)(4)(iii)(G). Excepting sub-factor VII, it is readily apparent that the court's consideration of defendant's denial of any wrongdoing had no relevance to its analysis of these eight specified sub-factors.

With seven factors to consider, and nine sub-factors, this case is a prime candidate for the type of quantitative assessment that fits what the United States Supreme Court would call an error in process, as opposed to structural error. Because the certifying court's error was an error in process, it was not a defect affecting the framework of the certification analysis. This defect does not defy analysis by harmless error standards. Therefore, the certifying court's error was not structural as that term is employed by the United States Supreme Court.

The Commonwealth acknowledges that in reaching the opposite conclusion, the Superior Court in this case relied heavily on *Interest of J.M.G.*, 229 A.3d 571 (Pa. 2020) (Mundy, J.). For the following reasons, that reliance was misplaced, and the holding of *Interest of J.M.G.* should not be extended to the highly distinguished facts and procedure in this case.

In *Interest of J.M.G.*, a majority of this Court held harmless error analysis inapplicable to violations of psychotherapist-patient privilege in Act 21 involuntary commitment proceedings, remanding the matter (ultimately to the court of common pleas) for further proceedings. *Id*. at 583. In doing so, the majority made no reference whatsoever to the question of whether the error at issue was, in fact, "structural," *i.e.*, whether it affected the framework of the proceeding. Justice (now Chief Justice) Baer and Justice Todd disagreed with the analysis, concluding that harmless error analysis should be applied to the privilege violation in that context, particularly because the breach in that case "is not the type of error that 'affects the framework' within which Act 21 proceedings occur," and because the breach of privilege "may be 'quantitatively assessed[.]'" *Id*. at 588 (Todd, J., joined by Baer, J., concurring in result) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006)).

Rather than looking for structural error, however, the *Interest of J.M.G.* majority relied on a comment in *Chapman v. California*, 386 U.S. 18 (1967), a case that long predates *Fulminante*. The *Chapman* Court's holding was three-fold. First, it expressly declined to adopt a rule saying, "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Chapman,* 386 U.S. at 22 ("We decline to adopt any such rule"). Second, the Court held: "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. And third, the Court held that the specific prosecutorial remarks and jury instructions at issue in that case were not harmless. *Id*.

Relevant to the majority analysis of *Interest of J.M.G.*, the High Court commented:

> The California constitutional rule emphasizes 'a miscarriage of justice,' . . . . We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. State of Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' *Id*., at 86—87, 84 S.Ct. at 230. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never

> be treated as harmless error,[8] this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal.
> . . . .
>
> 8 See, e.g., *Payne v. State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (right to counsel); *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (impartial judge).

Chapman, 386 U.S. at 23; *Id*. at 23 n.8 (underline added, underlined portion quoted in *Interest of J.M.G.*).

The takeaway from *Chapman* that guided the analysis in *Interest of J.M.G.* is that where (1) a person is coerced into a confession which is used against them at trial, (2) an accused person is deprived of the right to counsel, or (3) an accused person is deprived of the right to an impartial decision-maker, those exceptional constitutional violations are "so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman,* 386 U.S. at 23; *Id*. at 23 n.8. The majority in *Interest of J.M.G.* ultimately added a fourth item to *Chapman*'s narrow list of exceptional violations that can never be harmless: psychotherapist-patient privilege violations in involuntary commitment proceedings.

The Superior Court in this case extended *Interest of J.M.G.* to add a fifth item to *Chapman*'s narrow list: penalizing a juvenile's refusal to admit wrongdoing in certification proceedings by holding that refusal against the juvenile on a limited number of factors in a multi-factored analysis. While all constitutional rights are important and significant in the abstract, the High Court in *Chapman* generally counseled in favor of viewing even constitutional errors in the setting of a particular case to determine whether the actual error was insignificant enough *in its context* to be deemed harmless. *Chapman,* 386 U.S. at 22. For the following reasons, the setting and error in this case are distinct enough from the narrow list referenced in *Chapman* and the error in *Interest of J.M.G.* to warrant the application of traditional harmless error review.

Unlike in the instant case, the trial court order in *Interest of J.M.G.* deprived J.M.G. of his freedom, as the order was that J.M.G. be involuntarily committed. J.M.G. actually made incriminating statements that should have been kept out of court. Instead, those statements were used to incarcerate him. *Interest of J.M.G.*, 229 A.3d at 575. Similarly, in *Payne*, a coerced confession was admitted as evidence at a criminal trial and used in that context for the purpose of depriving Mr. Payne of both life

and liberty, as a jury convicted him of murder and he was sentenced to death. *Payne*, 356 U.S. at 561. In the landmark case of *Gideon v. Wainwright*, Mr. Gideon was also deprived of his freedom, although his deprivation resulted from the denial of his right to an attorney at a felony trial. *Gideon*, 372 U.S. at 337. And in the prohibition era case of *Tumey v. Ohio*, Mr. Tumey similarly faced incarceration as a result of criminal conviction where the village mayor, who had a pecuniary interest in Tumey's conviction and an official motive to convict to help the financial needs of the village, ordered him imprisoned for alcohol possession until all fines were paid. The High Court remanded the case for further proceedings, holding: "No matter what the evidence was against him, he had the right to have an impartial judge." *Tumey*, 273 U.S. at 535.

As important as are all the underlying constitutional rights implicated in these cases, the significance of each error was heightened by the fact that the result of each of those proceedings was a determination to incarcerate, and in some cases impose additional criminal penalty. In sharp contrast in this case, the constitutional error surfaced in a proceeding where the defendant had the burden of proof, and the worst legally acceptable outcome for the accused was a fair trial before an impartial

judge and twelve person jury who could only convict if all twelve were persuaded of his guilt beyond a reasonable doubt. Defendant's liberty was not directly at stake in the certification proceeding. The interest directly at stake was limited to his conditional statutory right to remain in the juvenile system. While that conditional statutory right is important, an error in this context, especially where the defendant has the burden of proof, does not reach the heightened significance of errors that have the potential to directly result in incarceration and death sentences without: (1) a subsequent first-instance review of the evidence, (2) the possibility of acquittal by an independent and untainted fact-finder, or (3) the independent requirement of a unanimous jury verdict. Therefore, the error in this case does not warrant similar exception from the applicability of traditional harmless error analysis.[6]

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[6] For the same reasons, this case is distinct from the cases relied upon by the Superior Court below which hold that improper burden shifting and adverse-inference jury instructions create *per se* reversible error. *See Commonwealth v. Lewis*, 598 A.2d 975, 980 (Pa. 1991) (remanding for a new trial and holding: "Juries must be told in no uncertain terms that no adverse inference may be drawn from a defendant's failure to take the stand"); *Commonwealth v. Edwards*, 637 A.2d 259, 261 (Pa. 1993) (holding the "no-adverse-inference" instruction was harmless, but in future cases it will be per se reversible error to give the charge where the defendant asks that it not be given); *Commonwealth v. Kelly*, 724 A.2d 909, 911, 914 (Pa. 1999)

A second significant distinction between this case and the others is the extent to which the rights at issue were violated. Although *Interest of J.M.G.* and *Payne* both deal with infringement upon the right against self-incrimination, the violation in both of those cases was that the individual's incriminating statements were used against them in the proceeding that resulted in their incarceration. Indeed, Mr. Payne's incriminating statement was actually a coerced confession used against him at trial. In contrast, defendant in this case never incriminated himself, there was no coerced confession, none of his words were used as evidence to convict him of a crime, and the violation at issue was so indirect that neither the certifying judge nor counsel on either side even noticed the error until years later when the appeal was pending in the Superior Court. The error surely needed to be addressed on appeal, but it was much different from those previously held to warrant exception from harmless error review.

Finally, if this Court ultimately concludes that justice cannot be done through remand because there is no jurisdiction for the offending court to correct its error, that would lead to perhaps the most poignant distinction

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(remanding for a new trial and holding a "burden-shifting jury instruction" is "not receptive to 'harmless error' analysis").

of all. What *Interest of J.M.G.*, *Payne*, *Gideon* and *Tumey* all have in common is that in each instance, the cases were remanded for further proceedings and correct application of the law in the courts below. *Interest of J.M.G.*, 229 A.3d at 583; *Payne*, 356 U.S. at 569; *Gideon*, 372 U.S. at 345; *Tumey*, 273 U.S. at 535. The fact that remand was possible in those cases added to their justification in declining harmless error review. If this Court holds there is no jurisdiction to correctly apply the law, harmless error review is society's only hope of seeing the courts do justice in this case, and its only hope for continued supervision for a convicted child-rapist who may be "so damaged that he can't be rehabilitated[.]" N.T. 4/25/14 at 113. The Commonwealth has a compelling interest in both protecting the community and full rehabilitation. Supervision and accountability are a means to that end. For these reasons, this Court should hold that the harmless error doctrine applies under these circumstances.

B. <u>The Certifying Court's Error was Non-Prejudicial</u>.

In light of the lengthy procedural history of this case, the Commonwealth offers the following argument to assist the Court in the event that it decides to reach beyond the questions accepted for review to

consider whether the error at issue was non-prejudicial. Setting aside the certifying court's improper consideration, the record demonstrates that the remaining statutory factors support certification beyond a reasonable doubt.

Again, in the context of this case, it was defendant's burden to prove that the public interest would be served by retaining the case in the juvenile system, ***in addition to*** proving that he was amenable to treatment, supervision or rehabilitation as a juvenile under 42 Pa.C.S. § 6355(g). The statutory scheme required the certifying judge to consider all of the factors listed in 42 Pa.C.S. § 6355(a)(4)(iii) in making those determinations. And regardless of amenability, defendant's burden of proving that retaining his case in the juvenile system served the public interest cannot be overlooked, especially because of the presumption that "the General Assembly intends to favor the public interest as against any private interest." 1 Pa.C.S. § 1922(5).

A certifying court must consider the factors, but it "need not address, *seriatim*, the applicability and importance of each factor and fact in reaching its final determination." *Commonwealth v. Ruffin*, 10 A.3d 336, 339 (Pa. Super. 2010) (citing *Commonwealth v. Jackson*, 722 A.2d 1030, 1034 (Pa.

1999)). The Act does not specify the weight that should be given to each factor. *Id*. Further, "an appellate court may not require detailed or intricate explanations of the rationale for certification when a detailed juvenile file and arguments of counsel have been presented for consideration." *Commonwealth v. McDonald*, 582 A.2d 328, 333-34 (Pa. Super. 1990).

Regarding the statutory factors, the defense expert admitted that a series of forcible rapes would have a severe impact on the victim and that a rapist poses a danger to the community. N.T. 4/25/14 at 33-34. Additionally, she testified that the danger to the community posed by a rapist would be increased if the rapist was perpetrating while under DHS supervision, in a foster home, and had a history of burglary—all circumstances present in this case. *Id*. at 34. She recognized that the nature and circumstances of the conduct were serious. *Id*. at 35. Finally, she admitted that if the acts were true, defendant is highly culpable. *Id*. at 37. In sum, the defense's own expert essentially conceded five out of the seven factors the court considered in determining whether to certify defendant.

The Commonwealth's expert Mr. Yoder's testimony also made it clear that defendant's treatment would be most effective within the adult

system. Specifically, Mr. Yoder noted that the juvenile system only had about three years of jurisdiction over defendant. He found this problematic (without factoring in defendant's refusal to admit) because most juvenile residential placements for sex offenders last a ***minimum*** of two years. So even assuming defendant did well in treatment and was released after two years, the juvenile system would only have one year of supervision remaining. *Id*. at 90-91. Mr. Yoder also testified that the Department of Corrections has youthful offender treatment programs that could address all of defendant's rehabilitative needs. *Id*. at 92.

Additionally, the Commonwealth addressed all seven factors in its argument, which the court is presumed to have considered. *Commonwealth v. Sanders*, 814 A.2d 1248, 1251 (Pa. Super. 2003) (noting reviewing court presumes that juvenile court analyzed entire record); *McDonald*, 582 A.2d at 333-34 (appellate court may not require detailed or intricate rationale for certification where argument has been presented). The Commonwealth noted the impact of several forcible rapes on an 11-12 year old victim is severe, that a rapist creates a danger to the community, and has a serious impact upon the community. N.T. 4/25/14 at 108. Similarly, someone who previously committed a felony burglary and continues on to commit a

series of forcible rapes six months after treatment is dangerous. *Id*. Regarding the nature and circumstances of the offense, defendant committed several violent rapes over the course of a year while he lived with the victim. *Id*. Defendant was 16-17 at the time, and the victim was just 11-12 years old. Defendant's reign of terror only stopped because he ran away from home, and the victim finally had the courage to tell someone what defendant had repeatedly done to him. *Id*. at 109. Defendant was extremely and fully culpable for his actions. *Id*.

Regarding the adequacy and duration of dispositional alternatives available, (again, leaving aside defendant's claim that he did nothing wrong) the Commonwealth pointed to the short jurisdictional period left in the juvenile system, and the appropriateness of the treatment options available in the state correctional system. *Id*. Thus, without the improper consideration as it related to a mere subpart of one the statutorily enumerated factors, the balance of factors (A) through (F) overwhelmingly weighed in favor of certification.

Turning to the last of the seven factors, beyond his burden to show that retaining his case in the juvenile system served the public interest, defendant also had the burden of establishing that he was amenable to

treatment, supervision and rehabilitation in the juvenile system. 42 Pa.C.S. § 6355(g)(1)(ii), (2). To do so, he presented Dr. Machinski as an expert. She stated she believed he was amenable to juvenile treatment. She formed her opinion because she believed that defendant had little opportunity to benefit from treatment provided by the juvenile justice system, he supposedly responded well to treatment outside of the juvenile justice system, and he expressed that he was willing to participate in treatment. N.T. 4/25/14 at 27.

The record, however, contradicts the existence of the factors Dr. Machinski relied on. Although provided by DHS rather than the juvenile justice system, defendant had the opportunity to benefit from a residential treatment facility that addressed his needs. Importantly, on cross, Dr. Machinski acknowledged that she formed her opinion based in part on the mistaken assumption that defendant was not placed at a residential treatment facility. *Id*. at 39-41. While she expressly said that EIHAB is "not an RTF," defendant's other witness, social-worker Alda Sales Vinson, testified that "St. Michael's or EIHAB[,]" "is an RTF[.]" *Id*. at 69. Ms. Vinson had to explain that she placed defendant in the residential treatment facility's group home setting, in what she described as a partial

program though which he received individual therapy, group therapy, family therapy, anger management, educational services, and a drug and alcohol program. *Id*. at 70.

Dr. Machinski conceded that residential treatment facilities provide a high level of therapeutic treatment. *Id*. at 41. Under her mistaken belief that EIHAB is not a residential treatment facility, however, she said that her understanding was that defendant's partial program was "a little bit different than an RTF." *Id*. She also conceded that the difference between defendant's program and her view of a residential treatment facility does not mean that defendant received a low level of intervention. *Id*. In reality, the group home setting was provided by the residential treatment facility, thus satisfying a court directive which Dr. Machinski was unaware of, that defendant be placed at a residential treatment facility. *Id*. at 39-40. Yet, despite this high level and wide range of therapeutic treatment, only six months after his release, he repeatedly raped a victim who was between 11-12 years old. *Id*. at 40-43.

Similarly, Dr. Machinski listed four reasons she believed defendant was amenable to treatment in her report, all of which were contradicted by the evidence. Dr. Machinski's report noted defendant was amenable to

treatment because he (1) expressed positive goals for the future, (2) is polite and respectful to authority figures, (3) had a strong bond with a friend's parents, and (4) had little opportunity to benefit from mental health treatment. *Id*. at 95. Although the statute directs courts to consider any relevant factor, defendant offered nothing to substantiate that having positive goals for the future significantly impacts an individual's amenability to treatment. As for defendant's attitude towards authority figures, defendant was essentially ungovernable with his grandmother. Similarly, he was ungovernable when he lived with his aunt, and the reports revealed that he used drugs while there, failed to follow her directions, and missed curfew. *Id*. Regarding his bond with his friend's parents, defendant only lived with them for a period totaling four months. He lived with both his grandmother and his foster family for longer periods of time, and defendant offered nothing to suggest he formed bonds in those placements. *Id*. at 96. Finally, as referenced above, Dr. Machinski did not know the depth of treatment defendant received when she wrote her report. In reality, defendant received comprehensive mental health treatment at two different facilities. *Id*. at 96-97.

Aside from the circumstances Dr. Machinski considered regarding amenability, courts are statutorily required to consider whether a defendant can be rehabilitated prior to the expiration of juvenile jurisdiction. 42 Pa.C.S. § 6355(a)(4)(iii)(G). Consequently, the court had to consider the fact that the juvenile system could only supervise defendant for three years (regardless of whether he admitted wrongdoing). Because the extent of his problem was unclear, the juvenile court recognized that three years might not be long enough to effectively treat him if he failed to make sufficient progress. N.T. 4/25/14 at 113-15. Defendant's lack of amenability was apparent based on the statutory factors regardless of admission or denial. *Id*.

In particular, the record addressed other statutorily enumerated amenability factors including defendant's age, mental capacity, maturity, the degree of criminal sophistication exhibited, previous records, the nature and extent of defendant's prior delinquency, and previous attempts to rehabilitate. 42 Pa.C.S. § 6355(a)(4)(iii)(G). As for these factors, defendant was seventeen and a half at the time of the certification hearing, and was not intellectually disabled. N.T. 4/25/14 at 21, 38. Defendant was previously adjudicated delinquent for felony burglary. *Id*. at 39.

Additionally, after his grandmother put him out of her house because she believed he was stealing from her, defendant entered a residential treatment facility through DHS, which allowed him to participate in a variety of treatment programs that ultimately did not prevent his conduct here. *Id*. at 39-40.

Although Dr. Machinski testified that defendant would be amenable to juvenile treatment, she admittedly only reviewed a fraction of the records and documents available, which rendered her testimony less than convincing. *Id*. at 112-13. Moreover, she contradicted herself when she agreed that someone who engages in antisocial behavior is less amenable to treatment before she acknowledged that defendant engaged in several types of antisocial behavior. *Id*. at 45-48.

Unlike Dr. Machinski, Mr. Yoder testified that defendant was not amenable to supervision or rehabilitation in the juvenile system. *Id*. at 90. Mr. Yoder based this opinion on, among other things, the seriousness of the crime, the fact that the defendant already received some treatment, and the short time available in the juvenile system. *Id*. Mr. Yoder elaborated, testifying that most juvenile residential placements for sex offenders last a minimum of two years, which would only leave one year of supervision,

assuming defendant did well and was released after only two years. *Id*. at 90-91. Mr. Yoder also testified that defendant's actions were of a greater degree and level of seriousness compared to typical juvenile sex offender behavior. *Id*. at 88. Mr. Yoder testified that the crime was more sophisticated than typical juvenile sex offender behavior because defendant used food to bribe the victim not to talk, engaged in the behavior under his foster parents' roof while they were present in the home, and sought out the victim while the victim was alone in the bathroom. *Id*. at 88-89.

Based on the properly considered evidence set forth at the certification hearing, defendant utterly failed to meet his burden show he was amenable to treatment. In trying to meet his burden, he presented an expert who formed her opinion on mistaken beliefs, other factors that the record contradicted, and an incomplete review of the relevant materials. Therefore, defendant failed to meet his burden of proving amenability to treatment, supervision and rehabilitation in the juvenile system, just like he failed to show that retaining his case in the juvenile system would somehow serve the public's interest.

Even if this Court concludes that defendant's evidence raised some question as to amenability, the remaining statutory factors, which defendant did not address at the certification hearing, unquestionably favored certification, especially since there is no doubt that he failed to show retaining his case in the juvenile system served the public interest. Based on the record as a whole, the juvenile court's consideration of defendant's silence was a minor aspect of the evidence against him. It is beyond a reasonable doubt, therefore, that defendant failed to meet his burden of proof, so the certifying court's error was not prejudicial.

CONCLUSION

For the reasons discussed above, the Commonwealth respectfully requests remand to the unlimited original jurisdiction of the Court of Common Pleas of Montgomery County to conduct a proper certification analysis in the first instance based on a properly redacted closed record. Alternatively, the Commonwealth requests remand to the Superior Court for harmless error analysis in the first instance.

RESPECTFULLY SUBMITTED:

/s/ Todd N. Barnes

_____

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Appendix I

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-46-CR-00003166-2014
V.	:	
NAZEER TAYLOR	:	**856 EDA 2017**

OPINION

CARPENTER J. **JUNE 16, 2017**

FACTUAL AND PROCEDURAL HISTORY

Appellant, Nazeer Taylor ("Taylor"), appeals from the judgment of sentence entered on January 31, 2017, following his conviction of rape of a child, multiple counts of rape – forcible compulsion and many related crimes.

Taylor's committed these crimes during the time period spanning from July of 2012 through August of 2013, when Taylor, who was then 15-years-old raped his foster brother, A.O., a then 11-year old boy. At the time, both Taylor and A.O. were living in the home of Gloria Parker, their foster mother in Pottstown, Montgomery County, Pennsylvania. About six months after Taylor moved away, A.O. confided in Ms. Parker about the sexual assaults. Taylor was eventually arrested, and initially charged as a juvenile.

On April 25, 2014, a two-day certification hearing concluded in which the Honorable Joseph A. Smyth determined that Taylor would be tried as an adult. Taylor proceeded to a jury trial on June 20, 2016 at which he was

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found guilty of rape and numerous related crimes. On January 31, 2017, Taylor was sentenced. This timely appeal followed.

ISSUES

I. Whether certification was proper.

II. Whether the motion for a mistrial was properly denied.

III. Whether accusations of homosexual activity did not hamper Taylor's ability to receive a fair trial.

IV. Whether this Court made proper evidentiary rulings.

DISCUSSION

I. Certification was proper

First, Taylor asserts that this Court erred in certifying him to be tried as an adult where he and A.O. were juveniles, and were in search of their sexual identities. Taylor argues that his actions were described as unsophisticated, but in fact bold and foolish. Taylor contends that although he suffered neglect, abuse and abandonment he was amenable to treatment and had shown that he responded well to treatment when provided. Taylor argues that the prosecution based its certification request on placement at SCI - Pine Grove more than amenability.

On April 2, 2014 and April 25, 2014, the two-day certification hearing was conducted by Judge Smyth. At the hearing, the Commonwealth presented the testimony of the victim, A.O., and his foster mother, Ms. Parker. On behalf of Taylor, defense counsel called Dr. Nicole Machinski, a Psy.D. to testify as an expert with specialized training in the area of identification and

treatment of juvenile sex offenders and in the area od certification of sex offenders.(Certification Hearing 4/4/14 p. 9). Also to testify on behalf of the defense was Alda Sales-Vinson, a Department of Human Services worker who was overseeing Taylor's case. Finally, the Commonwealth presented the testimony of Michael Yoder, who was accepted as an expert to testify as to amenability and options available in the juvenile and adult systems. (Certification Hearing 4/25/14 pp. 76, 78).

A.O., whose date of birth is August 24, 2000, testified as to the nature and extent of the sexual assaults spanning over the period of about a year while both he and Taylor were living with Ms. Parker. (Certification Hearing 4/2/14 p. 6, 9). In particular, A.O. testified as to the details of the sexual assaults which started a couple of weeks after he started sixth grade. Id. at 11. A.O. did not tell anyone at first about the assaults because he was scared of Taylor. Taylor had threatened to beat him up if he did. Id. at 28 - 29, 31. A.O. also testified that the assaults caused not to be able to control his bathroom habits. Id. at 33 - 35.

Ms. Gloria in pertinent part testified to the behavioral changes she observed in A.O. Id. at 79 - 80, 86 - 88. She told the Court that A.O. was trying to pull his tongue out of his mouth and he was soiling his clothing. Id. She also described an incident which made her suspicious that Taylor was doing something inappropriate with A.O. Id. at 83 - 86.

As the defense expert, Dr. Machinski testified on direct examination as to Taylor's family background, which included neglect and

abuse. (Certification Hearing 4/25/14 p. 13). She diagnosed Taylor with adjustment disorder with mixed anxiety and depressed mood, as well as physical abuse of a child and sexual abuse of a child. Id. at 15. Dr. Machinski also detailed intervention that Taylor received in the past. Specifically, she stated that he had none until he was 14, at the time that entered DHS custody. Id. at 16. At that time, he was sent to EIHAB, St. Michael's School for Boys where he received individual therapy and group therapy. Id. This therapy was to address his issues related to his diagnosis of adjustment disorder with mixed emotions and conduct, attention deficit hyperactivity disorder, oppositional defiant disorder, alcohol abuse and cannabis abuse. Id. Dr. Machinski testified that according to the records, the treatment at EIHAB was effective over time and that his aggressive, angry oppositional and defiant behaviors improved and his grades improved significantly in school. Id. at 18. After Taylor was discharged from that program, Taylor had outpatient therapy at Devereux, while in foster care. Id. at 17. However, the records reveal that Taylor's attendance to these therapy sessions was inconsistent. Id.

Dr. Machinski addressed his criminal record stating that when he was 13, he was arrested on burglary and related offenses in Delaware County, resulting in a delinquent adjudication. Id. at 19. The doctor also opined that Taylor who was then 17 at the time of the hearing, would be in the Court's jurisdiction for a sufficient period of time if he remained in the juvenile system that would permit treatment. Id. at 21. It was Dr. Machinski's opinion that Taylor would be amenable to treatment in the juvenile system. Id. at 27.

On cross-examination, Dr. Machinski admitted that in preparing her report and testimony she only spoke to defense counsel and to Taylor and only reviewed Taylor's DHS file. Id. at 31. She did not review the Mission Kids DVD, did not watch A.O. testify at any time in court, she did not contact any of the officers involved in the case nor did she contact Ms. Parker. Id. at 32 - 33. Importantly, she was unaware of the impact of the offense on the victim. Id. at 33.

Also on cross-examination, the doctor admitted that someone like Taylor would present a risk and threat to public safety. Id. at 34. She agreed that the nature and circumstances of the forcible rapes are serious in nature. Id. at 35. As to the factor of culpability, Dr. Machinski also agreed that he is culpable as the main actor of these rapes. Id. at 37.

As to the factors of amenability, and previous treatments, the Commonwealth questioned the doctor extensively. In particular, and important to Judge Smyth's decision was her inconsistent testimony that while he received intensive treatment through EIHAB, the fact that Taylor committed the sexual assaults six months after completion of the treatment program did not weigh against Taylor's amenability to treatment. Id. at 41 - 42. She made a distinction that the previous treatment at EIHAB was not designed to treat inappropriate sexual behavior; but rather, it focused on defiance and oppositional behavior. Id. at 42. However, Dr. Machinski agreed that someone who exhibits antisocial behavior such as engaging in burglary would be less amenable to treatment. Id. at 44 - 45.

On behalf of the Commonwealth, Mr. Yoder testified. Mr. Yoder is a supervisor with the Montgomery County Juvenile Probation. Id. at 72. Mr. Yoder did a comprehensive review of Taylor's file, including a psychiatric evaluation performed by Dr. Buxbaun, DHS records, placement records from EIHAB, evaluations completed by Dr. Machinski, his criminal record from Delaware County and high school records. He also spoke with Delaware County officials and the Philadelphia juvenile probation officials. Id. at 78. He observed the victim's courtroom testimony and viewed the Mission Kids DVD. In pertinent part, Mr. Yoder testified that the allegations against Taylor are not typical juvenile sex offender behavior given the degree and seriousness of the crimes. Id. at 88. Mr. Yoder did not agree with Dr. Manchinski that the Taylor did not display sophistication in committing the assaults. He testified that in listening to the victim testify that Taylor's actions were bold - to commit the crimes while in foster home placement, under the roof of the foster parents while they were home, going into the victim's bedroom and into the bathroom. Id. at 88 - 89.

Additionally, Mr. Yoder opined that the fact that Taylor sexually assaulted the victim after coming to the Court's attention for the burglary and the placement in intensive treatment at EIHAB shows that there is an increasing level of seriousness to Taylor's criminal behavior. He moved on from burglary to committing a series of rapes on a younger victim. Id. at 89. Mr. Yoder testified that in his expert opinion Taylor is not amenable to treatment in the juvenile system. Id. at 90. He based his opinion on the seriousness of the crime,

the fact that Taylor received treatment in the past from EIHAB, the fact that the juvenile system would lost jurisdiction over him in a little over three years, where residential treatments for sex offenders is at a minimum of two years and the juvenile system would only have a year of supervision after release from a placement. Id. at 90 - 91.

Mr. Yoder believed that SCI - Pine Grove would be able to address Taylor's needs. Id. at 91 - 93. The state correction institution at Pine Grove has a youthful offender program where there is individual counseling, group counseling, educational program, treatment for sex offenders, for drug and alcohol and for assaultive behaviors. Id. at 93. He stated that all of Dr. Machinski's noted treatment needs for Taylor could be provided for at SCI-Pine Grove. Id. at 94 - 95. He also did not agree that Taylor is amenable to treatment as expressed by Dr. Machinski. Id. at 95. Dr. Machinski stated in her report that he amenable to treatment because: Taylor expressed positive goals for the future, he is polite and respectful to those in position of authority, strong bond with friend's parents and he has had very little opportunity to benefit from mental health treatment. Id. at 95. My Yoder explained that none of those factors are specified under the Act for amenability. Id. In addition, Mr. Yoder rejected the notion that Taylor is polite and respectful to authority. He was ungovernable with his grandmother and then after EIHAB treatment with his aunt. Id. While with his aunt, the reports show that he was using drugs, not following her directions, coming in after curfew. Mr. Yoder concluded that Taylor is not polite and respectful to authority figures. Id. at 95 - 96. In

addition, he disagreed that Taylor's friend's parents were a good support for him. Taylor only was with them for a short time, about four months; whereas he was with his grandmother for a longer period of time and then with his original foster family for a longer period of time, and there is no indication that he was able to form a bond with them. Id. at 96.

After argument by both the Commonwealth and defense counsel, Judge Smyth put his decision along with the reasons for his decision on the record as follows:

> All right. Thank you. I think one of the Commonwealth's arguments is that the defendant has been in treatment for almost every issue that the defendant's expert has identified and, notwithstanding that treatment, within six months committed a series of forcible rapes, which is much more serious than the issue he was in treatment for,
>
> I think the defense expert makes a distinction, and so does the defendant - - or they make a good point, not necessarily a distinction - - when they say, look, the sex offense is totally different than the burglary. And because someone was successful in a burglary, that's not at all related to the sexual offense, and he never really got treatment for the sexual offense. That's basically the argument as I understand it.
>
> And I don't' necessarily disagree with that, but then I think the defense expert becomes a little bit inconsistent and sort of goes back and forth where she counters that particular Commonwealth with you can't compare these other matters to a sex offense, but then she goes back and forth and says but because he did well in treatment in the other matters, he will do well for treatment as a sex offender. SO in one sense, she tries to separate the two, and then in another sense, she tries to blend the two, and I find that testimony to be inconsistent.

I think another dilemma or conundrum for the defense is that's their approach, he's had an unfortunate upbringing, through no fault of his own. To a certain extent, he is antisocial and damaged, and that's not his fault. But is he so damaged that he can't be rehabilitated for a sex offender, or can he be rehabilitated for a sex offender? And I think part of the dilemma is they don't' distinguish sex offenders from burglary, so now they blend their first argument and say because he's done well in the first, he can do well in the second.

And they won't admit that he's committed the sex offense, and that's sort of their conundrum, because time is of the essence. He's approaching 18 years old. The act - - you can argue degree of sophistication all you want, but it was a predatory damaging act that occurred repeatedly over a 1-yeawr period of time.

If you're going to go on the sex offenders' treatment, It's important that you admit, No. 1; examine your triggers, No. 2; talk about how you can avoid your triggers; and identify the depth of the problem. And here, we can't identify the depth of the problem largely because we're not admitting yet that there is a problem.

What if he were to sit there for a year and a half before he finally admitted that he did something? I mean, I assume he's still denying, Counsel's arguments have been phrased "if this is true, it's a horrendous act."

They made a distinction when he denied, when he said to Dr. Buxbaum - - I believe he was a psychiatrist - - "I didn't do anything wrong." Counsel said now he wants to say he participates in treatment, and defense counsel argued, well, maybe the treatment's not talking about sex offenders" treatment. And that the very issue, though, is he amenable to sex offenders' treatment? And, in the juvenile system, time is running out. As I said there is only a few years left, and the depth - - and if he doesn't make sufficient progress he's 21, he back on the streets, and he's released from the jurisdiction of the Court with no supervision at all. That's the dilemma.

> And when Dr. Machinski n her report indicates the issues that he needs treatment in and the Commonwealth argues, well, none of this has to do with amenability within the statute, well , it might, when you have four other categories, It would certainly refer to amenability for a crime that's much less serious than this, But I don't know that it means anything with regard to somebody who's committed the type of act that he's alleged to have committed.
>
> So for all the reasons in the statue as enumerated by Mr. Antonacio and because it's defense burden of proof, I'm going to grant the Commonwealth's motion to certify him to adult court. Thank you.

Id. at 112 - 115.

Out appellate court's standard of review for evaluating the certification decision of the juvenile court is as follows.

> The Superior Court must not upset the certification decision of a juvenile court unless the court has either failed to provide specific reasons for its conclusion that the juvenile is not amenable to treatment or the court committed a gross abuse of discretion. The existence of facts in the record that would support a contrary result does not demonstrate a gross abuse of discretion. To rise to a level of gross abuse of discretion, the court rendering the adult certification decision must have misapplied the law, exercised unreasonable judgment, or based its decision on ill will, bias, or prejudice.

Commonwealth v. Jackson, 722 A.2d 1030, 1032 (Pa. 1999) (internal citation and quotation marks omitted).

The Juvenile Act provides that a juvenile 14 years of age or older at the time of the alleged crime, may have their case transferred to adult criminal court for prosecution. See Commonwealth v. Rush, 562 A.2d 285, 286 (Pa.

1989). In order to support a transfer to criminal court, the court must find, in pertinent part:

> (iii) that there are reasonable grounds to believe that the public interest is served by the transfer of the case for criminal prosecution. In determining whether the public interest can be served, the court shall consider the following factors:
>
> (A) the impact of the offense on the victim or victims;
> (B) the impact of the offense on the community;
> (C) the threat to the safety of the public or any individual posed by the child;
> (D) the nature and circumstances of the offense allegedly committed by the child;
> (E) the degree of the child's culpability;
> (F) the adequacy and duration of disposition alternatives available under this chapter and in the adult criminal justice system; and
> (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:
> (I) age;
> (II) mental capacity;
> (III) maturity;
> (IV) the degree of criminal sophistication exhibited by the child;
> (V) previous records; if any;
> (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;
> (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
> (VIII) probation or institutional reports, if any;
> (IX) any other relevant factors;

42 Pa.C.S.A. § 6355(a)(4)(iii). "Section 6355(g) places the burden of proof upon the Commonwealth to establish, by a preponderance of the evidence, that the public interest is served by the transfer of the case to criminal court and that a child is not amenable to treatment, supervision, or rehabilitation as a juvenile."

Commonwealth v. In re E.F., 995 A.2d 326, 331 (Pa. 2010) (citing 42 Pa.C.S.A. § 6355(g)).

Applying the law to the facts of this case, the decision to certify Taylor as an adult was proper. The evidence presented by the Commonwealth provided that Taylor was the main and only actor in a bold scheme to continually victimize A.O., who was 11 and 12-years old at the time. The series of assaults were forcible rapes left A.O. traumatized. In addition, the Commonwealth showed that Taylor poses a risk to the community is not amenable to treatment in the juvenile system through the testimony of Mr. Yoder and the cross-examination of Dr. Machinski. The record shows that Judge Smyth considered the factors under 42 Pa.C.S.A. § 6355(a)(4)(iii). There was no abuse of discretion in the Court's determination.

Taylor's contention that he and A.O. were in search of their sexual identities has no support in the record. It is just another attempt by Taylor to circumvent his culpability for the crimes he has committed. Finally, Taylor's assertion that he is amenable to treatment was contradicted by the testimony of Mr. Yoder and the cross-examination of Dr. Machinski.

II. The motion for a mistrial was properly denied.

Second on appeal, Taylor asserts that this Court erroneously denied his motion for a mistrial, after the complainant's foster mother testified that she could smell semen when she allegedly saw him and complainant together in her bathroom. He argues that the witness further compounded the

prejudicial nature of this testimony by saying that she recognized the smell from her position as a correctional officer and that homosexual behavior is something that prisoners do. However, the record does not reflect that timely a motion for a mistrial was made. Therefore, this issue is waived.

Gloria Parker, foster mother to Taylor and the victim, testified on direct examination about the relationship between them. She explained that on one occasion Taylor's behavior caused her to be alarmed as follows:

> Q. Did the defendant do anything that caused you to be alarmed initially?
>
> A. What caused me to be alarmed, one day Andrew, Nazeer and myself, we was in the house. And I had told both of them, you both go to your own rooms, because I'm going in my room to lay down and have a nap.
>
> Then I woke up and I walked the house and I noticed that both of their bedroom doors was wide open and neither was in their bedroom. So I was calling out to them. Then I notice in the bathroom in the hallway there was a light on. And I said, Is anybody in here? Nobody responded. So I checked the door knob and the door was locked. Then I knocked on the door and I said, Who's in there? Come out.
>
> Nazeer came out, but he didn't open the door all the way. He just opened the door enough where I could see his head. So I asked him, I said, Where is Andrew? And he still wouldn't open the door enough I could see what was going on. So I told him, I said, Open the door all the way so I can see what's going on inside. He opened the door all the way and Andrew was sitting on the toilet. Then I notice the shower was on and it was steam, but it smelled like semen.
>
> ***

Q. You mentioned also that the bathroom was steaming and you smelled the smell of semen. Can you describe for the jury what you mean and how you know that smell?

A. The reason why I know the smell, because I was a correction officer for the Philadelphia Prison for over ten years. And normally, you know, walking the block, if I'm there by the shower area, you could smell that smell coming out the shower area where men would be in there I guess, you know, doing whatever, having sex or whatever, or masturbation, it could be anything.

(Trial by Jury, V. 1, 6/20/16, pp. 92 - 93, 94).

There was neither a contemporaneous objection to this testimony, nor was there a motion for a mistrial by defense counsel at this time; therefore, this issue should be considered waived.

Later, in Ms. Parker's testimony she made a similar reference as follows to which counsel did object, although he did not make a motion for a mistrial.

Q. What did you say to the defendant when you would see him giving these things to Andrew?

A. I told Nazeer, I said, This is kind of strange. Because he would come home and he would say, I was thinking about Andrew all day and I brought him these snacks. And I told him, I said, Nazeer, I worked in the prison for over ten years and this is what inmates do --

MR. COOPER: Objection Judge.

THE COURT: Sustained.

Id. at 97. As mentioned defense counsel did lodge an objection, but nothing of record shows he motioned for a mistrial.

The record does reflect that this Court gave a cautionary instruction and stated as follows:

> All right then, members of the jury, a few minutes ago the witness referred to she used words to the effect that that's what inmates do, That was in no way a reference in any way, shape or form to this particular defendant. She's referring back to some of her experience as a prison guard.

Id. at 109. The cautionary instruction made clear to the jury that the reference to inmates in Ms. Parker's testimony only referred to her time as a prison guard and has nothing to do with Taylor in any way. Therefore, even if there had been a motion for a mistrial and a denial thereof, this cautionary instruction was sufficient to remove any prejudice. The jury is presumed to follow the Court's instructions.

It was only after Ms. Parker's testimony concluded that defense counsel put his motion for a mistrial on the record, stating:

> Judge, as we discussed earlier at sidebar, the defense at this point is seeking a mistrial based on the comments by Miss Parker concerning inmate behavior in prison that she has witnessed, and with particular reference to snacks being given out, because she equated what Nazeer was doing to what inmate do....

Id. at 133.

As the record demonstrates, despite this motion for a mistrial made at the conclusion of Ms. Parker's testimony and despite a reference to an earlier conversation at sidebar, defense counsel's motion for a mistrial was not put on the record in a timely manner; therefore this issue is waived on appeal.

See Pa.R.Crim.P. 605(B) (explaining that, in order to be timely, a motion for mistrial "shall be made when the [allegedly prejudicial] event is disclosed"). Here, counsel's motion for mistrial was not made until a considerable length of time after the references were made and after the conclusion of Ms. Parker's direct, cross, recross and redirect examination testimony. Accordingly, the motion was untimely made and, thus, his claim is waived on appeal. *See* Commonwealth v. Boring, 684 A.2d 561, 568 (Pa.Super. 1996) (holding that a motion for a mistrial was untimely when it was made "a considerable length of time after the allegedly prejudicial reference was made, and after the prosecutor had concluded direct examination of the witness").

Even if this issue was not waived, the Court's cautionary instruction was sufficient to remove any prejudice.

III. Accusations of homosexual activity did not hamper Taylor's ability to receive a fair trial.

Next, Taylor contends that the allegations which involve homosexual behavior together with Ms. Parker's derogatory comments comparing the allegations to that of convicted prisoners thwarted his ability to receive an open minded hearing.

This issue seems to re-litigate Issue II, as set forth above, along with the added contention that the mere fact that the allegations involved homosexual behavior was prejudicial per se. Initially, there is not a scintilla of evidence in the record that the allegations themselves were prejudicial. Rather, it seems that the defendant is stating his own prejudice against homosexual

behavior, and wants the appellate court to assume that the jurors and this Court hold the same prejudicial views. Additionally, this Court has no control over the allegations that were made against this defendant. Further, the allegations made against this defendant in no way prejudiced this Court against him. His trial and sentencing were adjudicated in a non-prejudicial manner as this Court adjudicates all matters. Finally, this Court sustained defense counsel's objection as noted about to some of the testimony that he believed to be prejudicial. The objection was sustained and a cautionary instruction was given.

IV. This Court made proper evidentiary rulings.

Taylor challenges several of this Court's evidentiary rulings, arguing that such rulings permitted the Commonwealth to present the jury with an unfairly censored version of the relationship between him and the victim.

On appeals challenging an evidentiary ruling of the trial court, the standard of review is limited. A trial court's decision will not be reversed absent a clear abuse of discretion. Commonwealth v. Bishop, 936 A.2d 1136, 1143 (Pa.Super.2007) (citing Commonwealth v. Hunzer, 868 A.2d 498 (Pa.Super.2005)). "Abuse of discretion is not merely an error of judgment, but rather where the judgment is manifestly unreasonable or *1185 where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." Commonwealth v. Aikens, 990 A.2d 1181, 1184-85 (2010) (quoting Commonwealth v. King, 959 A.2d 405, 411 (Pa.Super.2008)).

First, Taylor asserts that it was improper for this Court to prohibit evidence that the victim had bowel control problems before he met him. However, because of this Court's ruling the Commonwealth was able to argue that the victim's problem only started when he met him and stopped when he moved away.

At the end of the victim's direct testimony, defense counsel, Benjamin Cooper, Esquire, raised the issue as follows:

> MR. COOPER: Thank you, Your Honor. It has come to our attention in the course of investigation of this case that Mr. Orozco had received a psychiatric exam with Dr. Harriet Gross in 2011, approximately November of 2011. In that report it is disclosed that Mr. Orozco did have problems controlling his bathroom habits, urinating and also defecating, and these occurrences occurred prior to him living at that house with Miss. Parker or meeting Nazeer Taylor.
>
> I wanted to ask first Mr. Orozco whether or not that, in fact, happened, and depending on his answer I would call the doctor to elicit that information. That is my request.
>
> THE COURT: And you've discussed this with the witness's attorney; is that correct?
>
> MR. COOPER: I have.
>
> THE COURT: What was the position of the attorney?
>
> MR. COOPER: He was moving to quash the subpoena, saying it was privileged under Section 42.5944.
>
> THE COURT: Are you not asserting any recognized exception?

MR. COOPER: Correct.

THE COURT: But we all do agree it would be relevant on credibility.

MR. COOPER: Correct.

THE COURT: Commonwealth's position?

MS. FEDEN: Your Honor, we would agree with the psychiatrist's attorney that it would be privileged information.

But in addition to that, even if there was some exception to, we believe, hearsay, there is no indication within this report who disclosed that.

In addition, just to be clear, the report does not say that the victim defecated on himself; he just said there was feces in his underwear. So we would argue that not only would it be irrelevant and hearsay, but most importantly and significantly the privilege exception.

THE COURT: Very well, The Court will not allow it. That means there is not to be the cross-examination of the witness, nor will the potential witness be called.

(Trial by Jury, V. 1, 6/20/16 pp. 42 - 44).

In Pennsylvania, psychiatrist-patient privilege is codified as follows:

No psychiatrist or person who has been licensed ... to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

42 Pa.C.S. § 5944. The privilege acts to bar testimony by the treating psychologist or psychiatrist, as well as the disclosure of certain records. Commonwealth v. Smith, 606 A.2d 939, 941-42 (Pa.Super. 1992).

In this case, this Court found that the privilege applied. Defense counsel agreed that there were no exceptions that he was asserting to overcome the privilege. Therefore, this Court found the testimony and witness to be barred.

Second, Taylor contends that this Court improperly prohibited evidence that Ms. Parker, was biased against him because she blamed him for joyriding in her car with her biological son. Taylor argues that in the absence of this evidence, the prosecutor was able to argue that Ms. Parker loved all the children in her home equally and had no reason other than his alleged sexual misconduct to offer incriminating evidence against him.

Contrary to this assertion, this evidence was introduced during Taylor's direct testimony, in which defense counsel asked him if he had any problems with Ms. Parker, as follows:

> Q: Did you ever have problems with Miss Parker?
>
> A: Yes.
>
> Q: Can you describe to the jury what those problems were?
>
> A: Well, me and Miss Gloria, we had problems between her and her biological son - -
>
> ***
>
> Q: And who is the biological son?

A: Tyrone Parker Junior.

Q: What were the problems?

A: She felt as though I was a bad influence on him. Like before I came there, he was fine before I came there, but while I was there he started to do like things he didn't regularly do, so I was the cause of that, in her opinion.

Q: Did there ever come a particular incident involving you and Mr. Parker Junior?

A: Yes.

Q: Tell the jury about that.

A: One was with marijuana and the other one was with a stolen vehicle.

Q: When you say "stolen vehicle", what are you describing?

A: His parents' car.

Q: What happened?

A: Well, we had a scrimmage that day, a football scrimmage, and me and Tyrone decided to stay home that night while Mrs. Gloria, Mr. Parker and Andrew went to Dorney Park. So I was in my room laying down and Tyrone came in and asked me if I wanted to go to Rolling Hills, which is in Pottstown, I said, How are we going to get there? He said, The car. I said, What car? He said, The car downstairs. I go the keys. I said, No, I'm cool. I'm not going to do that. Normally when things happen, I end up getting blamed for it. So I said, I'm cool, I'm not going to do that.

So time goes by and he calls his friend Jayden, and he comes back to my room and says I might as well go down there anyway. Me not wanting anything to happen to him. So I went with him.

> When we got into the car, we're backing out of the garage, and as soon as we drove out of the garage he passed a stop sign and didn't stop at the stop sign and passed it. So we continued driving and passed another stop sign. So then the police pulled us over and asked for license and registration, as usual, and we didn't have that, obviously. So they asked who the vehicle belonged to and he told them the parents.
>
> So I begged the cop to no say anything, because I knew what it was going to come down to. I was going to get in trouble. But he reported it anyway and he drove us back home. We went home. The parents came back and everything just broke loose, screaming, everything.
>
> The first thin - - this is going to sound a little crazy, but the first thing Miss Gloria had said to me was I brought demons to her house. As you can see, she's a very religious person. So she said that about me, and she said I had to go. So that was the main reason she wanted me out of the house. She said I'm a bad influence on her son. She said she wanted me out...

(Trial by Jury, V. 2, 6/21/16, pp. 39 - 42).

As the record demonstrates, Taylor himself testified to this evidence. He was not precluded in doing so.

In addition, the Commonwealth did argue that Ms. Parker loved her children equally, but this was a fair comment on Ms. Parker's testimony who testified that she loved her children the same. She stated "I loved both of them. I felt like both of them were my sons, and I treated both of them like they were my biological child." (Trial by Jury, V. 1, 6/20/16 p. 104).

Third, Taylor argues that this Court disallowed him to introduce evidence that the victim stole things from Ms. Parker's biological son's room, and that when the items went missing; he told her that the victim took them.

Without this evidence Taylor argues that Commonwealth was able to argue that the victim had no motive to falsely accuse him.

During Taylor's testimony he testified that there were never problems between him and the victim "Until the incident with stealing." (Trial by Jury, V. 2, 6/21/16 p. 45). Taylor was asked to describe the incident, which he began to do, until the Commonwealth objected in the basis that it under Pa.R.E. 404(a) it should be excluded. Id. After the jury was excused from the courtroom this Court stated the general rule that you can't impeach the credibility of a witness with a non-conviction. The following exchange took place:

> MR. COOPER: I think we are introducing it to show the relationship. We're not introducing it to prove the truth of the matter asserted. He's describing his relationship with Andrew. So there was a question of something missing. Then the question is, What happened next as far as you and Andrew are concerned.
>
> THE COURT: It's improper in my view.
>
> MR. COOPER: I'm sorry?
>
> THE COURT: I think it's improper. It doesn't comport with the Pennsylvania Rules of Evidence. You're very limited on how you can introduce a non-conviction, if at all.
>
> MR. COOPER: Well it goes to the bias for sure that Andrew Orozco would have against Nazeer Taylor.
>
> THE COURT: Well, the facts that we heard so far was that something was stolen from Tyrone, not his gentleman.
>
> Mr. COOPER: Correct.

THE COURT: All right, the objection will be sustained.

(Trial by Jury, V.2, 6/21/16 pp. 45 - 47).

Pennsylvania Rule of Evidence 404 provides, in relevant part:

(b) Crimes, Wrongs or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.
(3) Notice in a Criminal Case. In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.

Pa.R.E., Rule 404(b), 42 Pa.C.S.A.

"To be admissible [under Pa.R.E., Rule 404(b)(2)] there must be a specific 'logical connection' between the other act and the crime at issue which establishes that the crime currently being considered grew out of or was in any way caused by the prior set of facts and circumstances." Commonwealth v. Ross, 57 A.3d 85, 100 (Pa.Super.2012) (*en banc*) (quotation marks and citations omitted). In this case, there is no "logical connection" between the alleged incident and the sexual assaults that Taylor committed against A.O. because the

assaults began in July of 2012, the same month that A.O. moved into Ms. Parker's home. (Trial by Jury, V. 1, 6/20/16 p. 90). Counsel offered no time frame for which the alleged stealing event occurred. In addition, the fact that Taylor allegedly blamed A.O. for stealing a PlayStation from Ms. Parker's biological son, Tyrone, has no relevance to the sexual assaults.

Not only does the proposed testimony not comport with Pa.R.E. 404(a), but also the argument that the Commonwealth made in its closing could have been made whether the proposed testimony was introduced or not. The Commonwealth based its argument, i.e., that the victim had no motive to concoct these allegations against Taylor, on the process the victim has had to go through in the course of the investigation and trial, an unpleasant and uncomfortable experience. Specifically, the Commonwealth argued in part as follows:

> Then Andrew is going to put himself through having to tell Miss Gloria, a person, again, who made her views on homosexuality crystal clear. Then he's going to have to tell police. He's going to have to tell a Mission Kids interviewer about these details. He's then going to have to testify at another hearing and go through it. Then he's going to have to meet with the Commonwealth and tell them about it. Then, again, he is going to have to come here to court today and testify in front of all you strangers, people he's never met, that he has engaged in oral sex with his foster brother; that he liked it after the second time; and that he's pooping in his pants. A now-15-year-old boy is going to admit to all that? Why? What does he get for all this?

(Trial by Jury- Closing Arguments 6/21/16 p. 22). Therefore, even if the evidentiary ruling was improper, it was harmless error because any prejudice

would have been de minimus. *See generally Commonwealth v. Petroll*, 738 A.2d 993, 1005 (Pa. 1999) ("Harmless error exists if the reviewing court is convinced from the record that (1) the error did not prejudice the defendant or the prejudice was de minimis, (2) the erroneously admitted evidence was merely cumulative of other untainted evidence, or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the guilty verdict.").

CONCLUSION

Based upon the foregoing analysis, Taylor's judgment of sentence entered on January 31, 2017, should be affirmed.

BY THE COURT:

WILLIAM R. CARPENTER J.
COURT OF COMMON PLEAS
MONTGOMERY COUNTY
PENNSYLVANIA
38TH JUDICIAL DISTRICT

Copies sent on June 16, 2017
By Interoffice Mail to:
Court Administration
Raymond D. Roberts, Esquire

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
NAZEER TAYLOR	:	
Appellant	:	No. 856 EDA 2017

Appeal from the Judgment of Sentence January 31, 2017
In the Court of Common Pleas of Montgomery County Criminal Division
at No(s): CP-46-CR-0003166-2014

BEFORE: BOWES, J., McLAUGHLIN, J., and MUSMANNO, J.

MEMORANDUM BY McLAUGHLIN, J.: **FILED SEPTEMBER 10, 2018**

Nazeer Taylor appeals from the judgment of sentence entered following his convictions for rape of a child and related charges. Taylor claims the trial court erred in certifying his case to criminal court, failing to grant a mistrial, and precluding use of psychiatric testimony regarding the victim, A.O. We affirm.

Taylor was charged in a delinquency petition with multiple counts stemming from the sexual abuse of his foster brother, A.O., from July 2012 through August 2013. Taylor was 15 years old at the time of the crimes, and A.O. was 11 years old. Taylor's date of birth is September 12, 1996, and he is now over the age of 21. The juvenile court held a certification hearing on April 2 and 25, 2014, to determine whether to transfer the case to criminal court.

At the hearing, A.O. testified that the abuse occurred while he and Taylor were living with their foster mother, Gloria Parker ("Foster Mother"), and began shortly after A.O. began the sixth grade. N.T. Certification Hearing, 4/2/14, at 9, 11-30. A.O. stated that Taylor threatened to "beat [him] up" if he reported the abuse to anyone. ***Id.*** at 19. A.O. also testified that the assaults caused physical damage that affected his ability to control his bowel movements. ***Id.*** at 33.

Foster Mother testified that she observed behavioral changes in A.O., who "was trying to pull his tongue out of his mouth and . . . soiling his clothing." ***Id.*** at 79-80. Foster Mother also described a time when she discovered Taylor and A.O. in the bathroom together. ***Id.*** at 84-85.

The Commonwealth presented the expert testimony of Michael Yoder, a supervisor with the Montgomery County Juvenile Probation Department, regarding amenability to treatment and the options available in the juvenile and adult systems. N.T., 4/25/14, at 76, 78. He testified that the allegations against Taylor were not typical of juvenile sex offender behavior, given the degree and seriousness of the crimes, and the sophistication displayed by Taylor in committing the crimes. ***Id.*** at 88-89. He noted that Taylor committed the crimes "while he was in foster home placement, under the roof of the foster parents while the foster parents were at home, [by] going into the victim's room and . . . into the bathroom." ***Id.*** Taylor also committed the assaults after having been convicted of burglary and undergoing intensive therapy treatment. ***Id.*** at 89. Yoder explained that residential treatment for

sex offenders takes a minimum of two years, and that the juvenile system would retain jurisdiction over Taylor for only one year after his release from such a program. ***Id.*** at 90-91. Yoder therefore opined that Taylor was not amenable to treatment in the juvenile system. ***Id.*** at 90. Instead, Yoder recommended the youthful offender program at the State Correction Institution at Pine Grove. ***Id.*** at 91. Yoder testified regarding the programs offered at Pine Grove and stated that Pine Grove "handles all youthful offenders throughout the state" and is "designated as the facility for youthful offenders." ***Id.*** at 92.

Taylor presented the testimony of Dr. Nicole Machinski, an expert in the identification and treatment of juvenile sex offenders and in the certification of sex offenders. ***Id.*** at 9, 12. Dr. Machinski described Taylor's family background and his history of suffering neglect and abuse. ***Id.*** at 13-15. Dr. Machinski diagnosed Taylor "with adjustment disorder with mixed anxiety and depressed mood, as well as physical abuse of a child and sexual abuse of a child." ***Id.*** at 15. Dr. Machinski also testified regarding Taylor's criminal history and his previous experience and progress with therapy. ***Id.*** at 16-20. The doctor opined that Taylor would be amenable to treatment in the juvenile system. ***Id.*** at 27. She made this conclusion because he "had very little opportunity to benefit from any kind of treatment provided by the juvenile justice system thus far," he has shown he responds well to consistent treatment, and he expressed a willingness to participate in treatment. ***Id.*** at 27.

On cross-examination, Dr. Machinski stated that she based her testimony on her interviews with Taylor, Taylor's counsel, and the Department of Human Services ("DHS") worker, and on her review of Taylor's DHS file. ***Id.*** at 31-32. The doctor admitted that Taylor had committed the sexual assaults six months after he had completed an intensive therapy program. ***Id.*** at 41-42. Dr. Machinski drew a distinction between Taylor's previous treatment and sex offender treatment. She noted that his prior treatment had focused on defiance and oppositional behavior, rather than inappropriate sexual behavior. ***Id.*** at 42. However, she agreed that a person who exhibits antisocial behavior, such as residential burglary, would be less amenable to treatment. ***Id.*** at 44-45.[1]

After the close of the evidence, the Commonwealth argued that certification was proper because Taylor had committed a series of forcible rapes starting when the victim was 11, which had a severe impact on the victim. The Commonwealth further argued that having a rapist in the community creates a danger to, and has a serious impact on, the community, and poses a threat to public safety. The prosecution also pointed out that the crimes were a series of violent, forcible rapes, and that Taylor was the most culpable, as he was the rapist. ***See*** N.T., 4/25/14, at 107-12.

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[1] Taylor also presented Alda Sales-Vinson, the caseworker from DHS who had been overseeing Taylor's case.

At the conclusion of the hearing, the juvenile court determined that Taylor should be tried as an adult and certified the case to the criminal division. The court stated that it had considered the statutory factors and agreed with the Commonwealth's reasoning, including the reasoning for the impact of the offense on the victim, the impact of the offense on the community, the threat to the safety of the public, the nature and circumstances of the offense, and the degree of culpability. ***Id.*** at 115.

The court also discussed the factors addressing the adequacy and duration of treatment and amenability of Taylor to treatment, which were the factors addressed by the experts at the hearing. The juvenile court noted that the defense expert was inconsistent in her attempt to distinguish the prior treatment from treatment for sexual offenders, noting that the expert argued that the court should not find Taylor not amenable to treatment based on his prior treatment because the prior treatment did not address sexual abuse and, therefore, the treatments could not be compared, but also argued that Taylor is amenable to sexual offender treatment because he did well in prior treatments. ***Id.*** at 112-13. The court further noted that Taylor "had an unfortunate upbringing, through no fault of his own," and "[t]o a certain extent he is antisocial and damaged," but pointed out that the case involved a "predatory damaging act that occurred repeatedly over a 1-year period of time." ***Id.*** at 113, 114. It also observed with concern that Taylor would not admit he committed the sex offenses and stated that his failure to do so posed an impediment to effective sex-offender treatment:

> If you're going to go on the sex offenders' treatment, it's important that you admit, No. 1; examine your triggers, No. 2; talk about how you can avoid your triggers; and identify the depth of the problem. And here, we can't identify the depth of the problem largely because we're not admitting yet that there is a problem.

Id. at 113-14. The court noted that Taylor's time in the juvenile system was running out and "if he doesn't make sufficient progress, he's 21, he's back on the streets, and he's released from the jurisdiction of the Court with no supervision at all." ***Id.*** at 114-15.

The court concluded that Taylor was not amenable to juvenile treatment and granted certification:

> And when Dr. Machinski in her report indicates the issues that he needs treatment in and the Commonwealth argues, well, none of this has to do with amenability within the statute, well, it might, when you have four other categories. It would certainly refer to amenability for a crime that's much less serious than this. But I don't know that it means anything with regard to somebody who's committed the type of act that he's alleged to have committed.
>
> So for all the reasons in the statue as enumerated by Mr. Antonacio and because it's defense burden of proof, I'm going to grant the Commonwealth's motion to certify him to adult court. Thank you.

Id. at 115.

Following the transfer, the trial court conducted a jury trial. During Foster Mother's trial testimony, she stated that she became alarmed one day when she discovered Taylor and A.O. in the bathroom and she smelled semen. N.T. Trial, 6/20/16 at 92-93, 94. She said that she knew the smell of semen because she was "a correction officer for the Philadelphia Prison for over ten

years. And . . . if I'm there by the shower area, you could smell that smell coming out the shower area where men would be in there I guess, you know, doing whatever, having sex or whatever, or masturbation. . . ." ***Id.*** at 94. Taylor did not object.

Foster Mother subsequently testified that Taylor would bring A.O. snacks and that she confronted Taylor, saying, "I worked in the prison for over ten years and this is what inmates do -- [.]" ***Id.*** at 97. Defense counsel objected. The trial court sustained the objection and, after an off-the-record discussion, gave a cautionary instruction to the jury: "[A] few minutes ago the witness referred to, she used words to the effect that that's what inmates do. That was in no way a reference in any way, shape or form to this particular defendant. She's referring back to some of her experience as a prison guard." ***Id.*** at 109.

Following Foster Mother's testimony, defense counsel moved for a mistrial, citing Foster Mother's comments about inmates' behavior, stating he was making the motion "as we discussed earlier at sidebar." ***Id.*** at 133. The trial court denied the motion.

A.O. also testified at trial, and following direct examination, Taylor's counsel informed the court that A.O. had received a psychiatric examination in 2011, prior to moving to Foster Mother's home, which disclosed that he had had problems controlling his bowels. ***Id.*** at 42. Counsel sought permission to ask A.O. whether "that, in fact, happened, and depending on his answer [he] would call the doctor to elicit that information." ***Id.*** Counsel noted that A.O.'s

attorney had moved to quash the subpoena sent to the psychiatrist, and admitted that he was not asserting any exception to the psychiatrist-patient privilege. ***Id.*** at 43. The trial court refused to allow the questioning of A.O, or to require the psychiatrist to testify.

The jury found Taylor guilty of numerous crimes: rape of a child; rape by forcible compulsion; rape by threat of forcible compulsion; three counts each of involuntary deviant sexual intercourse by forcible compulsion, involuntary deviant sexual intercourse by threat of forcible compulsion, and involuntary deviate sexual intercourse with a child; four counts of sexual assault; two counts of indecent assault by forcible compulsion; and indecent assault of a person less than thirteen years of age.[2] On January 31, 2017, Taylor was sentenced to an aggregate term of ten to 25 years' incarceration, followed by ten years' probation. Taylor filed a timely notice of appeal.

Taylor presents the following issues on appeal:

> 1. Whether the trial court erred in certifying [Taylor] to be tried as an adult.
>
> 2. Whether the trial court erroneously denied [Taylor]'s mistrial motion.
>
> 3. Whether the trial court erred in preventing [Taylor] from introducing evidence indicating that [A.O.] had bowel control problems before he ever met [Taylor].

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[2] 18 Pa.C.S.A. §§ 3121(c), (a)(1), (a)(2); 3123(a)(1), (a)(2), (b); 3124.1; and 3126(a)(2) and (a)(7), respectively.

Taylor's Br. at 10.[3]

I. Certification Hearing

Taylor first claims the juvenile court erred in certifying him to be tried as an adult. Taylor's main argument on appeal is that the court violated his Fifth Amendment right against compulsory self-incrimination because it based its certification decision on the fact that Taylor had not admitted to the crimes. Taylor also argues that the juvenile court erred in accepting the testimony of the Commonwealth's expert that Taylor would not be amenable to treatment, rather than the defense expert testimony that he was amenable to treatment. He further argues that he is incarcerated at SCI Benner, not SCI Pine Grove, even though the testimony at the certification hearing addressed the programs for juvenile defendants at Pine Grove.

Taylor first claims the trial court erred in certifying him to be tried as an adult. We review a trial court's decision of whether to certify a minor to stand

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[3] The documents from the juvenile case file associated with Taylor's case, including the transcript of the certification hearing, were not initially included in the certified record. As we require a complete record to decide the issues, and may not consider documents not included in the certified record, ***see Commonwealth v. Preston***, 904 A.2d 1, 7 (Pa.Super. 2006) (*en banc*), we ordered the trial court to supplement the record with the requisite portions of the juvenile case file. The court did so, and we received the supplemental record on March 28, 2018. We caution that it is an appellant's duty to ensure that the certified record is complete, and that any claims that may not be resolved due to missing documents, such as transcripts, may be deemed waived. ***See id.***; ***see also Commonwealth v. B.D.G.,*** 959 A.2d 362, 373 (Pa.Super. 2008) (*en banc*) (claim waived where certified record lacked documents and exhibits necessary to resolve claim, and where those documents and exhibits were not included on the Pa.R.A.P. 1931(d) list of record documents served on counsel).

trial as an adult for an abuse of discretion. ***In re E.F.***, 995 A.2d 326, 329 (Pa. 2010). "The existence of facts in the record that would support a contrary result does not demonstrate an abuse of discretion." ***Id.*** Rather, we will find an abuse of discretion only where "the court rendering the adult certification decision . . . misapplied the law, exercised unreasonable judgment, or based its decision on ill will, bias, or prejudice." ***Id.*** (***Commonwealth v. Jackson***, 722 A.2d 1030, 1034 (Pa. 1999)).

Pursuant to the Juvenile Act, a court may transfer to criminal court a case involving a juvenile defendant who is 14 or more years of age if there is a *prima facie* case that the child committed the delinquent act alleged, the delinquent act would be considered a felony if committed by an adult, and there are reasonable grounds to believe that the public interest would be served by the transfer. 42 Pa.C.S.A. § 6355(a)(4)(i)–(iii).[4] In determining whether certifying a juvenile as an adult can serve the public interest, courts must consider the following factors:

> (A) the impact of the offense on the victim or victims;
>
> (B) the impact of the offense on the community;
>
> (C) the threat to the safety of the public or any individual posed by the child;
>
> (D) the nature and circumstances of the offense allegedly committed by the child;

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[4] The parties do not dispute that Taylor was 15 at the time of the crimes, that there was a *prima facie* case that Taylor committed the acts, or that the delinquent acts would be considered felonies if committed by an adult.

> (E) the degree of the child's culpability;
>
> (F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
>
> (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:
>
> (I) age;
>
> (II) mental capacity;
>
> (III) maturity;
>
> (IV) the degree of criminal sophistication exhibited by the child;
>
> (V) previous records, if any;
>
> (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;
>
> (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
>
> (VIII) probation or institutional reports, if any;
>
> (IX) any other relevant factors. . . .

42 Pa.C.S.A. § 6355(a)(4)(iii)(A)-(G).

In most cases, the Juvenile Act places the burden on the Commonwealth to prove by a preponderance of evidence that transfer would be in the public interest. 42 Pa.C.S.A. § 6355(g). However, the burden shifts to the defense to establish that that transfer would not serve the public interest if the juvenile was at least 15 years old at the time of the offense; was previously adjudicated delinquent of a crime that would be considered a felony if committed by an adult; and there is a *prima facie* case that the child committed an act that

would be classified as, among other things, rape or involuntary deviate sexual intercourse. 42 Pa.C.S.A. § 6355(g)(1)(ii), (2). Here, because Taylor was 15 at the time of the alleged crimes, had a prior adjudication for burglary, and there was a *prima facie* case that he had committed rape, the defense bore the burden of proving that transfer was not proper.

Taylor's main argument on appeal is that the trial court violated his Fifth Amendment right against compulsory self-incrimination because it based its certification decision on the fact that Taylor had not admitted to the crimes. Although Taylor did not raise this claim in his Rule 1925(b) statement, he did not waive it. Whether certification is proper is a question of jurisdiction, which cannot be waived. ***Commonwealth v. Johnson***, 669 A.2d 315 (Pa. 1995) ("[T]he decision to transfer a case between the juvenile and criminal divisions is jurisdictional"); ***Commonwealth v. McGinnis***, 675 A.2d 1282, 1284 (Pa.Super. 1996) (stating issue of certification of juvenile to stand trial as adult is jurisdictional and cannot be waived).

In ***Commonwealth v. Brown***, 26 A.3d 485 (Pa.Super. 2011), we held that the Fifth Amendment right against compulsory self-incrimination is applicable to decertification[5] proceedings. ***Id.*** at 495. We further concluded that the trial court had violated the defendant's Fifth Amendment rights when

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[5] The Juvenile Act excludes certain crimes, such as murder, from the definition of "delinquent act." 42 Pa.C.S.A. § 6302. Therefore, a case charging juvenile with murder, as was the case in ***Brown***, is brought before the criminal division. 26 A.3d at 492. The juvenile can then request treatment within the juvenile system by petitioning the trial court to decertify the case and transfer the proceedings to juvenile court. ***Id.***

applying the Section 6355 factors. ***Id.*** at 498. There, the trial court relied on expert testimony that the defendant could not be rehabilitated unless he took responsibility for his actions, which he had not done, and concluded that the defendant would not be amenable to treatment in the juvenile system. ***Id.*** at 498.

Here, in stating its reasons, the juvenile court referenced Taylor's failure to admit guilt and that admission was a step in sex offender treatment. This was error. ***Id.*** at 495. However, in our review of an order granting certification, we do not focus on one aspect of the record alone. Rather, we examine the record as whole to determine whether the ultimate decision of granting certification was an abuse of discretion. ***McGinnis***, 675 A.2d at 1286 (citing ***Commonwealth v. McDonald***, 582 A.2d 328, 335 (Pa.Super. 1990)). We presume that the juvenile court properly considered and weighed the relevant information before it. ***Id.*** (citing ***McDonald***, 582 A.2d at 333). ***See also Commonwealth v. Devers***, 546 A.2d 12 (Pa. 1988). "[A]n appellate court may not require detailed or intricate explanations of the rationale for certification when a detailed juvenile file and arguments of counsel have been presented for consideration." ***McDonald***, 582 A.2d at 333–34.

On this record, we find the juvenile court did not abuse its discretion in finding Taylor failed to carry his burden to establish that certification was not proper. In rendering its decision, the court cited the seriousness of the alleged crime, the time remaining in the court's jurisdiction, and the failure of Taylor's previous treatment to prevent the alleged crimes. We conclude that, although

the juvenile court stated an impermissible consideration, based on all evidence presented at the hearing, and the totality of the reasoning provided by the juvenile court, the juvenile court did not abuse its discretion.

To the extent Taylor argues that the trial court erred in accepting the testimony of the Commonwealth's expert that Taylor would not be amenable to treatment, rather than the defense expert testimony that he would be amenable, we find this claim to be meritless. The trial court did not abuse it discretion in weighing the expert testimony, finding the defense expert testimony inconsistent, and accepting the testimony of the Commonwealth witness that Taylor would not be amenable to treatment.

Further, Taylor claims that he is incarcerated at SCI Benner, not SCI Pine Grove, and notes that the testimony at the certification hearing addressed the programs for juvenile defendants at Pine Grove. We conclude that this claim is meritless. We review a trial court's certification decision based on the circumstances as they existed at the time of the hearing. Information regarding Taylor's present place of incarceration was not before the court at the time of the certification hearing (indeed, he had not been convicted or sentenced). Therefore, based on the information the juvenile court had before it, we conclude the court did not abuse it discretion.

II. Motion for Mistrial

Taylor next agues the trial court erred in denying his motion for a mistrial following Foster Mother's testimony regarding her experience as a corrections officer.

We review a trial court's decision to grant or deny a motion for a mistrial for an abuse of discretion. ***Commonwealth v. Rega***, 933 A.2d 997, 1016 (Pa. 2007) (quoting ***Commonwealth v. Simpson***, 754 A.2d 1264, 1272 (Pa. 2000)). A trial court should grant a mistrial only where "the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." ***Id.*** (quoting ***Simpson***, 754 A.2d at 1272).

However, a trial court need not grant a mistrial "where cautionary instructions are adequate to overcome any possible prejudice." ***Id.*** (quoting ***Simpson***, 754 A.2d at 1272). "[C]ourts must consider all surrounding circumstances before deciding that curative instructions were insufficient and the extreme remedy of mistrial is required." ***Commonwealth v. Manley***, 985 A.2d 256, 266 (Pa.Super. 2009) (quoting ***Commonwealth v. Bracey***, 831 A.2d 678, 682-83 (Pa.Super. 2003)). The circumstances courts must consider include "whether the improper remark was intentionally elicited by the Commonwealth, whether the answer was responsive to the question posed, whether the Commonwealth exploited the reference, and whether the curative instruction was appropriate." ***Id.*** (quoting ***Bracey***, 831 A.2d at 682-83). In addition, "the law presumes that the jury will follow the instructions of the court." ***Commonwealth v. Brown***, 786 A.2d 961, 971 (Pa. 2001) (citations omitted).

The trial court and Commonwealth claim that Taylor waived this claim because he failed to seek a motion for a mistrial at the time of the testimony.

Taylor did not object following Foster Mother's testimony that she knew the smell of semen from her work as a correction officer and did not seek a mistrial based on this testimony. We therefore agree that Taylor waived this claim. ***See*** Pa.R.A.P. 302(a) (stating issues not raised in lower court are waived and cannot be raised for first time on appeal).

However, we decline to conclude he waived the separate claim that the trial court erred in denying his motion for a mistrial based on Foster Mother's testimony regarding inmates providing snacks. Taylor objected to Foster Mother's testimony regarding the snacks, the trial court sustained the objection, and a sidebar occurred off the record. After the conclusion of her testimony, counsel stated that "[a]s discussed earlier at sidebar," he was requesting a mistrial, focusing the request on the testimony regarding snacks. Neither the Commonwealth nor the trial court indicated they were unaware of a prior motion for a mistrial. Therefore, Taylor has not waived this claim.

Nonetheless, we disagree that the trial court erred in denying the motion for a mistrial. The trial court provided a cautionary instruction following the testimony, ensuring the jury was aware that Foster Mother's testimony was not referring to Taylor, but rather to her prior experience as a corrections officer. That was sufficient to dispel any confusion and we presume the jury followed the court's instructions. ***Brown***, 786 A.2d at 971. In addition, although the remark was responsive to a question posed by the Commonwealth, the trial court sustained counsel's objection, the Commonwealth did not exploit the reference, and the instruction was

appropriate to remedy the allegedly improper testimony. ***See Manley***, 985 A.2d at 266. We conclude the trial court did not abuse its discretion in denying the motion for a mistrial.[6]

III. Evidentiary Ruling

Taylor next argues that the trial court erred when it ruled he could not present the testimony of the psychiatrist who examined A.O. in 2011. He claims that a psychiatric report stated that A.O. had trouble controlling his bowels before he entered the foster home.

We review a trial court's evidentiary rulings for an abuse of discretion. ***Commonwealth v. Nypaver***, 69 A.3d 708, 716 (Pa.Super. 2013). An abuse of discretion occurs "where the court has reached a conclusion that overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." ***Id.***

In Pennsylvania, the psychiatrist-patient privileges provides that:

> No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L. 136, No. 52), to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

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[6] To the extent Taylor claims Foster Mother's testimony regarding her religious beliefs about homosexuality prejudiced the jury, which does not appear to have been the basis of the motion for a mistrial, we agree with the trial court that there is no evidence of prejudice to the jury. 1925(a) Op. at 16-17.

42 Pa.C.S.A. § 5944.

At trial, Taylor's attorney alleged there was a psychiatric report from 2011 disclosing that A.O. had trouble controlling his bowels prior to entering the foster home. Taylor requested permission to ask A.O. whether that was true and to present the psychiatrist as a witness. N.T., 6/20/16, 42-44. A.O.'s attorney had moved to quash the subpoena under Section 5944, and Taylor did not assert any exception to the privilege.

Because the report contained privileged information, and Taylor did not establish any exception to the privilege, we conclude the trial court did not abuse its discretion in excluding the evidence.

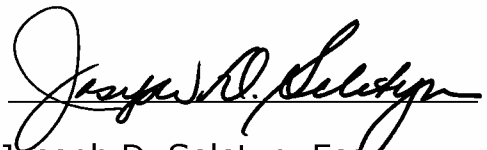
On appeal, Taylor also claims the preclusion of the evidence violated his constitutional right to confront witnesses against him. Taylor waived this claim because he did not raise it before the trial court. Pa.R.A.P. 302(a); ***Commonwealth v. Butler***, 812 A.2d 631, 633 (Pa. 2002).

Judgment of sentence affirmed.

Judge Musmanno joins the memorandum.

Judge Bowes concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/10/18

230 A.3d 1050
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Nazeer TAYLOR, Appellant

No. 29 MAP 2019
|
Argued: November 19, 2019
|
Decided: May 19, 2020

Synopsis

Background: Following transfer of delinquency petition from the Court of Common Pleas, Montgomery County, Juvenile Court Division, Joseph A. Smyth, Senior Judge, defendant was convicted in the Court of Common Pleas, Montgomery County, Criminal Division, No. CP-46-CR-0003166-2014, William R. Carpenter, J., of rape of a child and related offenses. Defendant appealed. The Superior Court, No. 856 EDA 2017, 2018 WL 4290127, affirmed. Defendant appealed.

Holdings: The Supreme Court, No. 29 MAP 2019, Wecht, J., held that:

[1] as matter of first impression, juvenile court violated Fifth Amendment by considering defendant's silence in deciding whether to certify case for transfer to adult court for prosecution, and

[2] remand was warranted for determination of whether harmless error doctrine was applicable.

Reversed and remanded.

Baer, J., concurred and dissented with opinion in which Donohue and Dougherty, JJ., joined.

West Headnotes (19)

[1] Witnesses Self-Incrimination

When scrupulously observed, the Fifth Amendment privilege against compulsory self-incrimination ensures that a court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws. U.S. Const. Amend. 5.

[2] Witnesses Self-Incrimination

Because it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon, the Fifth Amendment guarantee against self-incrimination is to be broadly construed in favor of the right which it was intended to secure. U.S. Const. Amend. 5.

1 Cases that cite this headnote

[3] **Witnesses** Proceedings to which privilege applies

Witnesses Self-Incrimination

Although the Fifth Amendment privilege against compulsory self-incrimination is commonly understood in the context of criminal allegations, its availability does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. U.S. Const. Amend. 5.

1 Cases that cite this headnote

[4] **Witnesses** Proceedings to which privilege applies

Fifth Amendment privilege against compulsory self-incrimination may be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory. U.S. Const. Amend. 5.

1 Cases that cite this headnote

[5] **Witnesses** Effect of Statutory Protection of Witness from Use of Evidence Against Himself

In context of grants of immunity, constitutional inquiry is whether the immunity granted is coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination. U.S. Const. Amend. 5.

[6] **Witnesses** Self-Incrimination

Whereas the Fifth Amendment would prohibit a state from compelling self-incriminating answers that subsequently might be used in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use. U.S. Const. Amend. 5.

[7] **Witnesses** Proceedings to which privilege applies

Witnesses Self-Incrimination

Fifth Amendment prohibits exacting a price from an individual's silence regardless of the forum in which it is invoked, so long as the threat of future criminal punishment lingers. U.S. Const. Amend. 5.

[8] **Infants** Hearing in general and time therefor

Fifth Amendment privilege against compulsory self-incrimination applies to juvenile proceedings. U.S. Const. Amend. 5.

[9] **Witnesses** Self-Incrimination

Whether self-incrimination is compelled in violation of the Fifth Amendment does not turn on the presence of a jury. U.S. Const. Amend. 5.

[10] **Infants** Hearing in general and time therefor

Protections of the Fifth Amendment are applicable to juvenile transfer proceedings. U.S. Const. Amend. 5; 42 Pa. Cons. Stat. Ann. § 6355.

[11] **Infants** Presumptions, inferences, and burden of proof

Although a juvenile court has considerable latitude in weighing relevant facts for purposes of evaluating a transfer petition, the Juvenile Act does not countenance the drawing of an adverse inference from a juvenile's refusal to admit to the offenses with which the juvenile is charged. U.S. Const. Amend. 5; 42 Pa. Cons. Stat. Ann. § 6355.

[12] **Infants** Grounds, factors, and considerations

When faced with a critical decision such as whether to certify a juvenile for transfer to an adult court for prosecution, a court may not condition its ruling upon the minor's assertions of innocence or invocation of the Fifth Amendment; to do so would place too high a cost on the juvenile's constitutional privilege against compulsory self-incrimination, guaranteed by the Fifth Amendment. U.S. Const. Amend. 5; 42 Pa. Cons. Stat. Ann. § 6355.

[13] **Infants** Hearing in general and time therefor

Juvenile Act does not provide a guarantee of immunity sufficient to displace the Fifth Amendment privilege against self-incrimination in juvenile transfer proceedings. U.S. Const. Amend. 5; 42 Pa. Cons. Stat. Ann. §§ 6338, 6355.

[14] **Infants** Grounds, factors, and considerations

Juvenile court violated Fifth Amendment by considering juvenile's silence in deciding whether to certify case for transfer to adult court for prosecution, where juvenile court held juvenile's failure to admit guilt against him during certification hearing. U.S. Const. Amend. 5; 42 Pa. Cons. Stat. Ann. § 6355.

[15] **Infants** Grounds, factors, and considerations

Minor's refusal to confess to an act for which he or she might be criminally prosecuted as an adult may not be considered when deciding whether to certify a case for transfer between juvenile and adult court. U.S. Const. Amend. 5; 42 Pa. Cons. Stat. Ann. § 6355.

[16] **Courts** Abuse of discretion in general

It is an abuse of discretion for a court to base its judgment upon an erroneous view of the law.

[17] **Infants** Grounds, factors, and considerations

Juvenile court abused its discretion by considering juvenile's silence in deciding whether to certify case for transfer to adult court for prosecution, where decision reflected misapplication of law because juvenile court exacted price for juvenile's exercise of his rights under Fifth Amendment. U.S. Const. Amend. 5; 42 Pa. Cons. Stat. Ann. § 6355.

[18] **Witnesses** Self-Incrimination

Witnesses Effect of refusal to answer

Constitutional privilege against compelled self-incrimination is a fundamental one, and any practice which exacts a penalty for the exercise of the right is without justification and unconstitutional. U.S. Const. Amend. 5.

[19] Criminal Law Remand for Determination or Reconsideration of Particular Matters

Remand was warranted for determination of whether harmless error doctrine was applicable to juvenile court's constitutionally deficient misapplication of Juvenile Act's transfer provisions and, if it was not or if error was not harmless, for consideration of available relief under circumstances, in prosecution for rape of a child and related offenses. U.S. Const. Amend. 5; 42 Pa. Cons. Stat. Ann. § 6355.

***1052** Appeal from the Order of Superior Court at No. 856 EDA 2017 dated September 10, 2018 Affirming the Judgement of Sentence dated January 31, 2017 by the Montgomery County Court of Common Pleas, Criminal Division, at No. CP-46-CR-0003166-2014. Carpenter, William R., Judge

Attorneys and Law Firms

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Karl Baker, Esq., for Amicus Curiae Defender Association of Philadelphia.

Marsha Levick, Esq., Juvenile Law Center, for Amicus Curiae Juvenile Law Center.

Peter Rosalsky, Esq., Defender Association of Philadelphia, for Amicus Curiae Defender Association of Philadelphia.

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE WECHT

***1053** This appeal asks whether a minor's Fifth Amendment privilege against compulsory self-incrimination was violated when a juvenile court granted the Commonwealth's request to have a delinquency matter transferred to an adult court for criminal prosecution, based in part upon the minor's decision not to admit culpability to the delinquent acts alleged. We hold that it was.

I.

The events that formed the basis of Nazeer Taylor's prosecution occurred between July 2012 and August 2013, when he was fifteen years old. In March 2014, the Commonwealth filed a delinquency petition alleging that Taylor committed numerous delinquent acts purportedly stemming from recurring incidents of sexual assault of his then-eleven-year-old foster brother, A.O. Pursuant to Section 6355 of the Juvenile Act, 42 Pa.C.S. § 6355, the Commonwealth petitioned the Court of Common Pleas of Montgomery County, Juvenile Court Division, to transfer the delinquency petition to the adult division for criminal prosecution.

A two-day certification hearing commenced on April 2, 2014, before the Honorable Joseph A. Smyth. At the hearing, A.O. testified that Taylor orally and anally sodomized him on several occasions when A.O. was in sixth grade, resulting in chronic physical damage and severe mental anguish. Notes of Testimony ("N.T."), 4/2/2014, at 6-77. The boys' foster mother also described a number of discrete episodes that piqued her suspicions that Taylor might have engaged in improper behavior with A.O. *Id.* at 77-112. In light of this testimony, the juvenile court found that the Commonwealth had established a *prima facie* case that Taylor had committed the delinquent acts alleged in the petition. *Id.* at 114-15. Due to Taylor's prior delinquency adjudication for burglary, a first-degree felony, the burden shifted to the defense to establish that transfer would not serve the public interest. *See* 42 Pa.C.S. § 6355(g).[1]

***1054** The hearing was continued to April 25, 2014, for Taylor's rebuttal. To substantiate Taylor's claim that he was amenable to treatment in the juvenile system, the defense offered the expert testimony of Dr. Nicole Machinski, a licensed clinical psychologist who specializes in forensic assessment, including the identification and treatment of juvenile sex offenders. N.T. 4/25/2014, at 4, 9. Based upon her evaluation of Taylor and her review of the underlying record, Dr. Machinski opined that Taylor "could certainly be treated" in the three years he had remaining "under the purview of the juvenile justice system" through either an outpatient or residential treatment program, which average "about 12 months" in length. *Id.* at 21-22. Upon cross-examination, the Commonwealth challenged Taylor's amenability to treatment by, *inter alia*, invoking the fact that Taylor had neither admitted to the delinquent act nor affirmatively taken responsibility for his actions. Specifically, the Commonwealth suggested that Taylor was "in denial" of his need for treatment, prompting a defense objection, which the court sustained. *Id.* at 44. The Commonwealth subsequently posited that "the first step in sex offender treatment [is] admitting guilt," *id.* at 58, and, after the close of evidence, reiterated its view that Taylor was "in denial" and that an "admission" would be necessary for treatment to work in this case. *Id.* at 109.

The juvenile court agreed with the Commonwealth that Taylor was not amenable to treatment within the juvenile system, certified the matter to adult criminal court, and contemporaneously offered the following rationale in support of its ruling:

> I think one of the Commonwealth's arguments is that the defendant has been in treatment for almost every issue that the defendant's expert has identified and, notwithstanding that treatment, within six months committed a series of forcible rapes, which is much more serious than the issue he was in treatment for.
>
> I think the defense expert makes a distinction, and so does the defendant -- or they make a good point, not necessarily a distinction -- when they say, look, the sex offense is totally different than the burglary. And because someone was successful in a burglary, that's not at all related to the sexual offense, and he never really got treatment for the sexual offense. That's basically the argument as I understand it.
>
> And I don't necessarily disagree with that, but then I think the defense expert becomes a little bit inconsistent and sort of goes back and forth where she counters that particular Commonwealth with [*sic*] you can't compare these other matters to a sex offense, but then she goes back and forth and says but because he did well in treatment in the other matters, he will do well for treatment as a sex offender. So in one sense, she tries to separate the two, and then in another sense, she tries to blend the two, and I find that testimony to be inconsistent.
>
> I think another dilemma or conundrum for the defense is that's their approach, ***1055** he's had an unfortunate upbringing, through no fault of his own. To a [ ] certain extent, he is antisocial and damaged, and that's not his fault. But is he so damaged that he can't be rehabilitated for a sex offender, or can he be rehabilitated for a sex offender? And I think part of the dilemma is they don't distinguish sex offenders from burglary, so now they blend their argument and say because he's done well in the first, he can do well in the second.
>
> And **they won't admit that he's committed the sex offense, and that's sort of their conundrum, because time is of the essence**. He's approaching 18 years old. The act -- you can argue degree of sophistication all you want, but it was a predatory damaging act that occurred repeatedly over a 1-year period of time.

> **If you're going to go on the sex offenders' treatment, it's important that you admit, No. 1**; examine your triggers, No. 2; talk about how you can avoid your triggers; and identify up-front the depth of the problem. **And here, we can't identify the depth of the problem largely because we're not admitting yet that there is a problem.**
>
> **What if he were to sit there for a year and a half before he finally admitted that he did something? I mean, I assume he's still denying.** Counsel's arguments have been phrased "if this is true, it's a horrendous act."
>
> **They made a distinction when he denied, when he said to Dr. Buxbaum** -- I believe he was a psychiatrist -- **"I didn't do anything wrong."** Counsel said now he wants to say he participates in treatment and defense counsel argued, well, maybe the treatment's not talking about sex offenders' treatment. And that's the very issue, though, is he amenable to sex offenders' treatment? And, in the juvenile system, time is running out. As I said, there is only a few years left, and the depth -- and if he doesn't make sufficient progress, he's 21, he's back on the streets, and he's released from the jurisdiction of the Court with no supervision at all. That's the dilemma.
>
> And when Dr. Machinski in her report indicates the issues that he needs treatment in and the Commonwealth argues, well, none of this has to do with amenability within the statute, well, it might, when you have four other categories. It would certainly refer to amenability for a crime that's much less serious than this. But I don't know that it means anything with regard to somebody who's committed the type of act that he's alleged to have committed.
>
> So for all the reasons in the statute as enumerated by [the Commonwealth] and because it's the defense burden of proof, I'm going to grant the Commonwealth's motion to certify him to adult court. Thank you.

Id. at 112-15 (emphasis added).

Following certification, from June 20-21, 2016, Taylor was tried before a jury, with the Honorable William R. Carpenter presiding. At the conclusion of trial, the jury found Taylor guilty of rape of a child and some related crimes. On January 31, 2017, the court sentenced Taylor to an aggregate term of ten to twenty-five years' imprisonment, followed by ten years' probation. Taylor appealed his judgment of sentence.

In an unpublished decision, the Superior Court affirmed. *Commonwealth v. Taylor*, 856 EDA 2017, 2018 WL 4290127 (Pa. Super. Sept. 10, 2018). Relevant here, Taylor asserted that the juvenile court violated his Fifth Amendment privilege against compulsory self-incrimination when deciding whether to transfer the matter by relying substantially upon Taylor's refusal to admit to the alleged offenses. The panel ***1056** noted that "[a]lthough Taylor did not raise this claim in his [Pa.R.A.P.] 1925(b) statement, he did not waive it. Whether certification is proper is a question of jurisdiction, which cannot be waived." *Id.* at *5 (citing *Commonwealth v. Johnson*, 542 Pa. 568, 669 A.2d 315, 320 (1995) ("[T]he decision to transfer a case between the juvenile and criminal divisions in jurisdictional."")). Turning to the merits, the court acknowledged that it previously had held that the privilege against self-incrimination applied in decertification proceedings, which require the same amenability-to-treatment analysis for juvenile defendants.[2] In *Commonwealth v. Brown*, 26 A.3d 485 (Pa. Super. 2011), a homicide case involving an eleven-year-old appellant, the panel reversed an order denying decertification because the trial court relied upon the Commonwealth's expert witness, who had testified that Brown needed to admit guilt in order to prove his amenability to treatment in the juvenile system. The Superior Court reasoned that, by holding Brown's failure to incriminate himself against him, the court violated his Fifth Amendment privilege. *Id.* at 510.

Here, the juvenile court similarly "referenced Taylor's failure to admit guilt and that admission was a step in sex offender treatment." *Taylor*, 2018 WL 4290127 at *6. Citing *Brown*, the Superior Court succinctly concluded that "[t]his was error." *Id.* Notwithstanding that "impermissible consideration," however, the panel determined that the juvenile court did not abuse its discretion in finding that Taylor had failed to carry his burden to establish that his case should remain in the juvenile system. The panel reasoned that the juvenile court's ruling was based upon the totality of the evidence presented at the hearing, which included "the seriousness of the alleged crime, the time remaining in the court's jurisdiction, and the failure of Taylor's previous

treatment to prevent the alleged crimes." *Id.* Accordingly, despite the juvenile court's erroneous invocation of Taylor's silence, the Superior Court affirmed the order certifying his transfer to adult court.

We granted Taylor's petition for allowance of appeal in order to consider whether the juvenile court violated the Fifth Amendment by considering Taylor's silence in deciding whether to certify the case for transfer to adult court for prosecution, an issue of first impression in this Court, and one of great importance to the Commonwealth.[3]

II.

A.

Taylor acknowledges that the Commonwealth satisfied the initial prerequisites for certification—namely, that it established a *prima facie* case that, when Taylor was at ***1057** least fifteen years of age, he "committed a delinquent act which, if committed by an adult, would be classified as" one of the enumerated felonies under Section 6355(g)(1)-(2)—thus shifting the burden to Taylor to demonstrate his amenability to treatment within the juvenile system. He insists, however, that the defense carried its burden on rebuttal through the expert testimony of Dr. Machinski. He also notes that even the Commonwealth's expert, Michael Yoder, a supervisor with Montgomery County Juvenile Probation, conceded on cross-examination that treatment within the juvenile system could work for Taylor and "made it clear that his opinion [on Taylor's amenability to treatment] was squarely and solely based on the fact that Taylor had not admitted to the crime charged." Brief for Taylor at 21 (citing N.T., 4/25/2014, at 99).

Focusing upon Yoder's testimony that there was insufficient time left within the jurisdiction of the juvenile court, Taylor maintains that the expert's opinion was premised upon the ostensible significance of his refusal to admit to the crimes alleged. *Id.* The Commonwealth's argument to the juvenile court similarly stressed his lack of a confession—a factor upon which Taylor claims the court placed great weight. *Id.* at 22 (observing that four of the ten paragraphs of the court's analysis were "devoted to the fact that Taylor had never admitted to committing the crimes he pled not guilty to, and also that Taylor's attorney had not admitted in open court that Taylor committed the alleged crimes"). In fact, Taylor argues, "while the juvenile court's remarks can be difficult to parse, the juvenile court actually gives no reason for its decision other than Taylor's refusal to incriminate himself." *Id.* Therefore, Taylor posits that the lower court not only misapplied the certification statute, but also violated his Fifth Amendment privilege against self-incrimination.

Furthermore, Taylor disputes the notion that we must ask "whether" the Fifth Amendment applies to juvenile transfer hearings, noting that its applicability was established by the Supreme Court of the United States more than half-a-century ago in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) (holding that juvenile transfer proceedings are subject to the guarantees of due process), and in *In re Gault*, 387 U.S. 1, 47-48, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (holding that the Fifth Amendment applies to juveniles and may be "claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory") (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 94, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)). *See* Brief for Taylor at 24 (citing *Gault*, 387 U.S. at 47, 87 S.Ct. 1428 ("It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment ... is unequivocal and without exception. And the scope of the privilege is comprehensive.")). From this authority, Taylor deduces that "it is clear that the Fifth Amendment 'applies' to a certification hearing." *Id.* at 24 (citing *Commonwealth v. Batty*, 482 Pa. 173, 393 A.2d 435, 439 n.3 (1978)).

Taylor asserts that he was penalized for failing to incriminate himself in breach of the Fifth Amendment. He suggests that there is "no precedent from a single state across our nation which has countenanced such a penalty for invoking one's Fifth Amendment right." *Id.* at 25 (citing *Christopher P. v. State*, 112 N.M. 416, 816 P.2d 485, 488 (1991) ("[W]e find no precedents [in any jurisdiction] sanctioning a court order compelling a child to make inculpatory statements in the presence of the prosecution for any purpose.")). He underscores that the juvenile certification process holds "grave consequences" for a minor and notes that,

had he remained in the juvenile ***1058** system, any supervision of him would have ceased upon his twenty-first birthday. *Id.* His current sentence in the adult system, by contrast, carries a minimum of thirty-five years' supervision, including as much as twenty-five years' confinement in a state prison. *Id.* It is precisely these considerations, he surmises, that led the Supreme Court to declare that a transfer proceeding is a " 'critically important' action determining vitally important statutory rights of the juvenile." *Id.* at 26 (quoting *Kent*, 383 U.S. at 556, 86 S.Ct. 1045). Certification thus "has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.' " *Id.* (quoting *Ramona R. v. Superior Court*, 37 Cal.3d 802, 210 Cal.Rptr. 204, 693 P.2d 789, 795 (1985) (internal citation omitted)). Because a defendant may not be penalized for the exercise of his right to remain silent, *id.* (citing *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986)), Taylor contends that the Fifth Amendment concerns at play in the juvenile court's reasoning here readily are apparent.

Moreover, Taylor invokes the Supreme Court's "penalty cases," which he maintains "stand for the proposition that a person may not be penalized in any substantive way for the exercise of his Fifth Amendment rights." *See id.* at 27 (citing *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968) (invalidating a police officer's termination for invoking Fifth Amendment privilege in appearance before a grand jury); *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) (affirming order striking down five-year ban on obtaining government contracts for New York-licensed architects who refused to sign immunity waivers upon being summoned to testify before a grand jury); *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977) (striking down New York election law providing for five-year ban on holding public office for political party officers who refuse to testify before a grand jury or waive immunity against subsequent prosecution)). Notably, Taylor argues, the "penalties" at issue in the above-mentioned cases—loss of employment, government contracts, and the right to hold public office—are "plainly less severe than the penalty of an increase of the maximum period of incarceration by 22 years and an increase of the maximum period of total supervision by 32 years," as occurred here. *Id.* at 27-28.

Additionally, Taylor focuses upon the Superior Court's discussion in *Brown* concerning the availability of "use and derivative use" immunity under the Juvenile Act. Although the Superior Court did not address that aspect of the *Brown* decision, Taylor proffers that no statutory grant of immunity could have remedied the Fifth Amendment problem here. *Id.* at 28. In order for a grant of immunity to overcome the constitutional privilege against self-incrimination, Taylor contends, it must preclude not only the use of the incriminating statement itself, but also any fruits derived from that statement. *Id.* at 28-29 (citing *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Commonwealth v. Swinehart*, 541 Pa. 500, 664 A.2d 957, 960 n.5 (1995)). Taylor endorses *Brown*'s rationale and opines that the protections contained within 42 Pa.C.S. § 6338 are insufficient to displace the privilege because the statute provides mere "use" immunity, and would not extend to evidence derived from any incriminating statement supplied in the course of a court-ordered psychiatric examination.[4] ***1059** Brief for Taylor at 29 (citing *Brown*, 26 A.3d at 499-502 (containing extensive discussion of immunity in the context of juvenile certification proceedings)).

Brown's reasoning aside, Taylor cautions that Section 6338 also is inapplicable here because it refers to statements made by a minor "in the course of a screening or assessment," 42 Pa.C.S. § 6338(c)(1), not an incriminating admission in open court. Brief for Taylor at 29. Because any inculpatory statement offered to the juvenile court by Taylor or his attorney would not have been afforded both use and derivative use immunity, Taylor asserts that the court's reliance upon his silence as grounds for certifying the matter constituted a penalty for exercising a constitutional right, in clear violation of the Fifth Amendment. *Id.* at 30.

Taylor further advances a quasi-statutory argument with a constitutional flavor. He posits that requiring a self-incriminating statement as a prerequisite to a finding of amenability to treatment in the juvenile system is a fundamental misinterpretation of the Juvenile Act, because a statute may not be interpreted in a manner violative of the Constitution. *Id.* He highlights the *Gault* Court's rejection of the government's argument that obtaining confessions from juveniles would further the objectives of the juvenile statute at issue there. The Supreme Court disagreed, countering that "evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment,' ... and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose." *Gault*, 387 U.S. at 51, 87 S.Ct. 1428. By obligating a juvenile to repent or to admit guilt on pain of transfer to adult court for criminal prosecution violates the

Fifth Amendment, Taylor believes that the juvenile court not only infringed upon a fundamental privilege guaranteed by the Constitution, but also misapplied the Juvenile Act and exceeded its lawful authority. Brief for Taylor at 31-32.

In a similar vein, Taylor also cites this Court's rejection of an analogous argument in *Commonwealth v. Bethea*, 474 Pa. 571, 379 A.2d 102 (1977), in which we held that a trial court could not impose a harsher sentence simply because a defendant exercised his Sixth Amendment right to a trial by jury. Significantly, the *Bethea* Court emphasized that requiring or encouraging an admission of guilt prior to adjudication is unconstitutional:

> Repentance has a role in penology. But the premise of our criminal jurisprudence has always been that the time for repentance comes after trial. The adversary process is a fact-finding engine, not a drama of contrition in which a prejudged ***1060** defendant is expected to knit up his lacerated bonds to society. ...
>
> Moreover, the refusal of a defendant to plead guilty is not necessarily indicative of a lack of repentance. A man may regret his crime but wish desperately to avoid the stigma of a criminal conviction.
>
> In fact, a colorable argument can be made that a glib willingness to admit guilt in order to "secure something in return" may indicate quite the opposite of repentance, and that a reluctance to admit guilt may in fact reflect repentance.

Id. at 105 n.8 (quoting *Scott v. United States*, 419 F.2d 264, 270-71 (D.C. Cir. 1969) (internal citation omitted)). That same rationale applies here, Taylor says.

Turning to the second issue, Taylor avers that the Superior Court, having determined that the juvenile court misapplied Section 6355, compounded that error by concluding that the lower court did not abuse its discretion. He cites this Court's decision in *Commonwealth v. In re E.F.*, 606 Pa. 73, 995 A.2d 326 (2010), for the proposition that, to constitute an abuse of discretion, "the court rendering the adult certification decision must have misapplied the law, exercised unreasonable judgment, or based its decision on ill will, bias, or prejudice." *Id.* at 329 (quoting *Commonwealth v. Jackson*, 555 Pa. 37, 722 A.2d 1030, 1032 (1999)). Here, by misapplying the Juvenile Act in a manner that violated the Fifth Amendment, Taylor declares simply that "the juvenile court *per se* abused its discretion." Brief for Taylor at 34.

Taylor also claims that the Superior Court conflated the abuse-of-discretion standard with harmless-error review. *Id.* Assuming that harmless error is the applicable standard under these circumstances, Taylor contends that "it is plain that the juvenile court's error was not harmless." *Id.* Specifically, Taylor disputes the panel's conclusion that the juvenile court's contemplation of "proper statutory factors" somehow "sanitize[d] the massive 'impermissible consideration,' as the Superior Court put it." *Id.* at 36 (quoting *Taylor*, 2018 WL 4290127 at *6). He analogizes the juvenile court's "reli[ance] upon an erroneous and unconstitutional factor" to the situation in *Bethea*, where this Court rejected the Commonwealth's contention that the sentencing court did not abuse its discretion by erroneously considering Bethea's jury demand when affixing his sentence because it also had considered other relevant, constitutional factors. *Id.* at 37-38.

Once an abuse of discretion has been established, Taylor advises, "a remand is generally the appropriate remedy." *Id.* at 38 (citing *E.F.*, 995 A.2d at 332-33). He asserts, however, that, having turned twenty-one during the pendency of this appeal, he now is beyond the jurisdiction of the juvenile court to re-adjudicate the Commonwealth's petition to transfer the case to criminal court. *Id.* (citing *In re Jones*, 432 Pa. 44, 246 A.2d 356, 363 n.5 (1968) ("The Juvenile Court ... loses jurisdiction over persons when they attain majority.")); *see also id.* at 39 (citing *Johnson*, 669 A.2d at 321 ("[W]e find that the transfer order in question is jurisdictional in every sense of the term. Hence, if the challenged order is improper, jurisdiction does not vest with the receiving court.")). Taylor distinguishes his situation from that at issue in *Kent*. *Id.* at 40-41. There, the Supreme Court recognized that, although it could not send the matter back to the juvenile court after Kent had aged out of the juvenile system, the Court could remand to the District Court for a *de novo* hearing pursuant to a "safety valve" in the D.C. Code, which permitted the District Court to exercise the powers of the juvenile court when the latter no longer had jurisdiction. ***1061** *Kent*, 383 U.S. at 564, 86 S.Ct. 1045 (citing *Black v. United States*, 355 F.2d 104, 107 (D.C. Cir. 1965)). Taylor contends that there is no such mechanism for holding an individual after he exceeds the age of maturity under Pennsylvania law if jurisdiction illegally was vested with the criminal court. Brief for Taylor at 42. Because the "issue of [juvenile] certification is jurisdictional and therefore not waivable,"

Commonwealth v. Moyer, 497 Pa. 643, 444 A.2d 101, 102 (1982), Taylor ventures that discharge is the only appropriate remedy for the infringement of his constitutional privilege.

B.

In a sparse, two-page response, the Commonwealth insists that there was no Fifth Amendment violation here because Taylor "opened the door to the court's limited consideration of his silence in relation to his amenability [t]o treatment before his 21st birthday." Brief for the Commonwealth at 11. Since Taylor's psychiatric expert opined that the then-seventeen-year-old Taylor adequately could be treated within the juvenile system before the court lost jurisdiction over him, the Commonwealth submits that the juvenile court was right to ponder whether Taylor "would admit guilt during treatment ... or whether it might take months or years before he was willing to take the first necessary step in treatment." *Id.* at 12. "This was an appropriate consideration given defendant's evidence and argument." *Id.* (citing *United States v. Robinson*, 485 U.S. 25, 33-34, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (holding that the defense may open the door to evidence of silence)).

The remainder of the Commonwealth's argument principally focuses upon establishing that any constitutional error was harmless. *See id.* at 13 ("Any error stemming from the consideration of defendant's refusal to incriminate himself was *de minimis* in view of the overwhelming evidence supporting the juvenile court's decision."). To that end, the Commonwealth builds upon the Superior Court's analysis of the noncontroversial factors supporting certification that the juvenile court considered. According to the Commonwealth, there was ample evidence of record demonstrating that Taylor was not amenable to treatment, contrary to his expert's opinion that he could be treated within the time remaining in the juvenile system. *Id.* at 17-19.

Moreover, juvenile courts statutorily are required to consider a defendant's capacity for rehabilitation prior to the expiration of jurisdiction. *Id.* at 19 (citing 42 Pa.C.S. § 6355(a)(4)(iii)(G)). Consequently, the Commonwealth attests, the juvenile court was well within its authority to scrutinize whether three years was sufficient to effectively treat Taylor. Although the court stated that it would have been easier to measure the extent of Taylor's problem if he had confessed, the court "did not effectively require [Taylor] to admit guilt to prove his amenability because his lack of amenability was abundantly clear based on other factors," *id.* at 20, which the Commonwealth proceeds to outline in extensive detail. *See id.* at 20-27. Viewing the record as a whole, the Commonwealth gauges that "the juvenile court's consideration of [Taylor's] silence was a miniscule aspect of the evidence weighing against him, and thus it was harmless beyond a reasonable doubt." *Id.* at 27.

C.

In reply, Taylor contests the Commonwealth's suggestion that he "opened the door" on the issue of his silence when Dr. Machinski agreed that successful completion of sex offender treatment often began with admitting guilt. Reply Brief for Taylor at 2. He notes the Commonwealth's omission of the fact that the expert merely was responding to the prosecutor's leading ***1062** question over a defense objection, one that the juvenile court sustained. Taylor claims that the record demonstrates that "at no point did the defense ever reference Taylor's silence or in any other way raise the issue." *Id.* at 3. Furthermore, he explains, the Commonwealth's reliance upon *Robinson*—the sole precedent cited in its argument on the principal issue presented—is misplaced. Although it is true that the *Robinson* Court held that a defendant may open the door to commentary on his silence, in that case the Supreme Court considered the prosecutor's remark that Robinson "could have taken the stand" to be a "fair response" to defense counsel's closing, in which he implied that the government had not allowed the defendant to explain his side of the story. *Id.* at 3 (quoting *Robinson*, 485 U.S. at 26, 32, 108 S.Ct. 864). Here, by contrast, the defense said nothing about Taylor's right or ability to testify. Taylor asserts that, at base, the Commonwealth implies that the defense inherently put Taylor's silence "at issue" simply by contesting certification, thus waiving his Fifth Amendment privilege *sub silentio*. That supposition, Taylor retorts, is premised upon a fundamental misinterpretation of the Juvenile Act.

Lastly, Taylor highlights the Commonwealth's failure directly to answer the second question presented, suggesting that the omission is a tacit concession that the juvenile court abused its discretion. Reiterating his view that a court *per se* abuses its discretion in committing a constitutional error, Taylor argues that the Superior Court's quasi-harmless error review was erroneous because a misapplication of the law resulting in the denial of a constitutional right can never be a *de minimis* infraction. He cites *Commonwealth v. Lewis*, 528 Pa. 440, 598 A.2d 975 (1991), in which this Court held that, when a defendant requests that the jury be instructed not to draw an adverse inference from his refusal to take the witness stand, a trial court's failure to give the desired charge, "when requested to do so in a timely fashion, *can never amount to harmless error*." *Id.* at 981 (emphasis in original); *see id.* at 982 ("Because the right of a criminal defendant to decline to take the stand without adverse comment or inference is a fundamental one under Article I, Section 9 [of the Pennsylvania Constitution], the failure of the trial court to give the 'no-adverse-inference' instruction when so requested is far from the type of '*de minimis*' infraction which might form the basis for a 'harmless error' finding.") (citing *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 164-65 (1978)).

Taylor similarly relies upon *Commonwealth v. Edwards*, 535 Pa. 575, 637 A.2d 259 (1993), where this Court declared that "we have no hesitancy in announcing for the future that it will be *per se* reversible error if a judge instructs the jury concerning a defendant's right to testify when the defendant has requested that no such instruction be given." *Id.* at 262. He posits that the circumstances presented here call for "[t]he same expedience and clarity ... with regard to violations of the Fifth Amendment during certification hearings." Reply Brief at 9. For these reasons, Taylor concludes that a harmless error analysis is not available under these circumstances.[5]

***1063 III.**

Faced with a question of constitutional dimensions, the parameters of our review are well-established. The standard of review is *de novo*, and our scope is plenary. *Commonwealth v. Davis*, —— Pa. ——, 220 A.3d 534, 540 (2019).

A.

The Fifth Amendment to the United States Constitution, applicable to the States pursuant to the Fourteenth Amendment, commands that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court invariably has referred to the constitutional privilege to be free from compulsory self-incrimination as the "essential mainstay" of our accusatorial system of criminal justice. *See Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (holding that the Fifth Amendment privilege is protected against abridgment by the States via the Due Process Clause of the Fourteenth Amendment). While its genesis can be traced to the ancient "maxim of the common law"—*nemo tenetur seipsum accusare*—"that no man is bound to [in]criminate himself," *United States v. Burr*, 25 F.Cas. 38, 40 (C.C. Va. 1807) (Marshall, C.J.), the privilege's evolution in England and the American colonies resulted from the "painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).

> The maxim ... had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused person[s].... So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Brown v. Walker, 161 U.S. 591, 596-97, 16 S.Ct. 644, 40 L.Ed. 819 (1896); *see generally Miranda v. Arizona*, 384 U.S. 436, 458-66, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (tracing the origins and evolution of the privilege).

[1] [2] The centrality of the privilege in American jurisprudence is beyond cavil. "The Fifth Amendment stands between the citizen and his government." *Ullmann v. United States*, 350 U.S. 422, 454, 76 S.Ct. 497, 100 L.Ed. 511 (1956) (Douglas,

J., dissenting); *see id.* at 445, 76 S.Ct. 497 ("The guarantee against self-incrimination ... is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well."); *cf. Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (noting that the "Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment"). When scrupulously observed, the privilege ensures that a "court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." *Burr*, 25 F.Cas. at 40; *see* ***1064** *Galbreath's Lessee v. Eichelbergher*, 3 Yeates 515, 516 (Pa. 1803). Because "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886), the Fifth Amendment is to be "broad[ly] constru[ed] in favor of the right which it was intended to secure." *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S.Ct. 195, 35 L.Ed. 1110 (1892); *see Boyd*, 116 U.S. at 635, 6 S.Ct. 524 ("constitutional provisions for the security of person and property should be liberally construed"); *Quinn v. United States*, 349 U.S. 155, 162, 75 S.Ct. 668, 99 L.Ed. 964 (1955) (same).

To those ends, the High Court has explained that "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). In *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the seminal decision in the so-called "penalty cases," the Court reflected upon the practice of drawing an adverse inference from a defendant's silence, which it deemed "a remnant of the 'inquisitorial system of criminal justice.' " *Id.* at 614, 85 S.Ct. 1229 (quoting *Murphy*, 378 U.S. at 55, 84 S.Ct. 1594). Reasoning that "comment on the refusal to testify ... is a penalty imposed by courts for exercising a constitutional privilege," which "cuts down on the privilege by making its assertion costly," *id.*, the Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615, 85 S.Ct. 1229; *see Malloy*, 378 U.S. at 8, 84 S.Ct. 1489 (an individual is "to suffer no penalty ... for such silence"); *United States ex rel. Vajtauer v. Comm'r of Immigration at Port of New York*, 273 U.S. 103, 112, 47 S.Ct. 302, 71 L.Ed. 560 (1927) ("no inference may be drawn from silence where there is no duty to speak"). The *Griffin* rule thus

> reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest entire load"[;] our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"[;] our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Tehan v. United States ex rel. Shott, 382 U.S. 406, 414 n.12, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966) (internal citations omitted).

[3] **[4]** Moreover, although the privilege is commonly understood in the context of criminal allegations, its availability "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Gault*, 387 U.S. at 49, 87 S.Ct. 1428; *see Miranda*, 384 U.S. at 467, 86 S.Ct. 1602 ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."). "The privilege may, for example, ***1065** be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory." *Gault*, 387 U.S. at 49, 87 S.Ct. 1428; *see, e.g.*, *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (applying the Fifth Amendment to psychiatric examinations conducted pursuant to the penalty phase of a capital murder trial).

Because "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them," *Grunewald v. United States*, 353 U.S. 391, 425, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957) (Black, J., concurring), the Supreme Court roundly has "condemn[ed] the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Slochower v. Bd. of Higher Ed. of City of New York*, 350 U.S. 551, 557, 76 S.Ct. 637, 100 L.Ed. 692 (1956); *id.* ("The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent

either to a confession of guilt or a conclusive presumption of perjury."). The Court thus has seen fit to extend the *Griffin* rule to shield one's invocation of the privilege from retribution in various non-criminal contexts. *See, e.g.*, *Spevack v. Klein*, 385 U.S. 511, 514-16, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) (disbarment proceedings); *Gardner*, 392 U.S. at 278-79, 88 S.Ct. 1913 (police departments); *Turley*, 414 U.S. at 84-85, 94 S.Ct. 316 (public contracting); *Cunningham*, 431 U.S. at 807-08, 97 S.Ct. 2132 (political office); *cf. Slochower*, 350 U.S. at 557-59, 76 S.Ct. 637 (employment in state colleges); *contra Baxter v. Palmigiano*, 425 U.S. 308, 318-19, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) (declining to extend the *Griffin* rule to prison disciplinary matters).

[5] **[6]** Self-incriminating statements only may be compelled, the Court has clarified, where the potential exposure to criminal punishment no longer exists. Such is the case with grants of immunity. In those discrete instances, "[t]he constitutional inquiry ... is whether the immunity granted ... is coextensive with the scope of the privilege." *Kastigar*, 406 U.S. at 449, 92 S.Ct. 1653; *see Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction ... but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute" the accused.). Whereas the Fifth Amendment would prohibit a State from compelling self-incriminating answers that subsequently might be used in criminal proceedings, "the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use." *Turley*, 414 U.S. at 84, 94 S.Ct. 316; *see Counselman*, 142 U.S. at 585, 12 S.Ct. 195 ("[N]o statute which leaves the party or witness subject to prosecution after he answers the [in]criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States."). For that reason, the Court has held that grants of transactional or use-and-derivative-use immunity are "sufficient to compel testimony over a claim of the privilege." *Kastigar*, 406 U.S. at 453, 92 S.Ct. 1653.

[7] **[8]** The preceding authority demonstrates that the Fifth Amendment prohibits "exact[ing] a price" from an individual's silence regardless of the forum in which it is invoked, so long as the threat of future criminal punishment lingers. *See Brooks v. Tennessee*, 406 U.S. 605, 610, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972) (striking down statute that required defendants who wished to testify to do so before any other defense testimony could be heard). And it is now hornbook law that the Fifth Amendment applies to juvenile proceedings. *See* ***1066** *Gault*, 387 U.S. at 55, 87 S.Ct. 1428; *In re Whittington*, 391 U.S. 341, 344, 88 S.Ct. 1507, 20 L.Ed.2d 625 (1968) (*per curiam*) ("[V]arious of the federal constitutional guarantees accompanying ordinary criminal proceedings were applicable to state juvenile court proceedings where possible commitment to a state institution was involved."); *cf. Kent*, 383 U.S. at 551, 556, 86 S.Ct. 1045. Pertinently, the Supreme Court has indicated that "[t]he possibility of transfer from juvenile court to a court of general criminal jurisdiction is a matter of great significance to the juvenile," and thus must comport with constitutional guarantees. *Breed v. Jones*, 421 U.S. 519, 535, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975) (holding that a prosecution following an adjudicatory proceeding in juvenile court violates the Double Jeopardy Clause of the Fifth Amendment).

When evaluating a petition to transfer a minor to adult court in Pennsylvania, a juvenile court must find "that there are reasonable grounds to believe that the public interest is served by the transfer of the case for criminal prosecution" before granting the Commonwealth's request. 42 Pa.C.S. § 6355(a)(4)(iii). "In determining whether the public interest can be served," the court must consider numerous circumstances. *Id.* The crux of this case centers upon one such circumstance, namely, "whether the child is amenable to treatment, supervision or rehabilitation as a juvenile." *Id.* § 6355(a)(4)(iii)(G). In assessing a minor's amenability to treatment, the juvenile court must weigh the following factors:

> (I) age; (II) mental capacity; (III) maturity; (IV) the degree of criminal sophistication exhibited by the child; (V) previous records, if any; (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child; (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction; (VIII) probation or institutional reports, if any; [and] (IX) any other relevant factors[.]

Id. § 6355(a)(4)(iii)(G)(I)-(IX).

Notwithstanding the court's duty to consider the minor's capacity for rehabilitation within the time remaining before jurisdiction expires, the Commonwealth cites no authority, nor have we unearthed any, that remotely suggests that the failure to admit to the commission of a delinquent act—let alone one punishable as a felony if committed by an adult—may be considered by the juvenile court in rendering its decision. To the contrary, we find the Superior Court's opinion in *Brown*, upon which the

panel below relied, to be exceedingly persuasive. There the Commonwealth charged eleven-year-old Brown with homicide and homicide of an unborn child after he allegedly shot his father's pregnant fiancé once in the head, killing her. *Brown*, 26 A.3d at 489. Brown subsequently sought to decertify the criminal proceedings and have the matter transferred to juvenile court. *Id.* Relying upon the Commonwealth's psychiatric expert, who evaluated Brown and opined that he could not be rehabilitated unless he took responsibility for his actions—which Brown had not done—the trial court denied his petition, concluding that Brown was not amenable to treatment in the juvenile system. *Id.* at 489-90. The Superior Court reversed, agreeing with Brown's assertion "that the trial court violated his rights against self-incrimination because it effectively required him to admit guilt or accept responsibility to prove that he was amenable to treatment and capable of rehabilitation." *Id.* at 493.

As a threshold matter, the Superior Court began by surveying the prevailing authority to evaluate whether the Fifth Amendment applied to decertification proceedings. The panel drew heavily from a ***1067** decision of the Supreme Court of Nevada, *In re William M.*, 124 Nev. 1150, 196 P.3d 456 (2008) (*per curiam*), which addressed a facial challenge to the state's juvenile transfer statute. Nevada's certification statute "create[d] a rebuttable presumption that juveniles who are over 13 years of age and charged with certain enumerated offenses fell outside of the jurisdiction of the juvenile court and must therefore be transferred to the district court for criminal proceedings." *Id.* at 457. "[T]o rebut the presumption of certification," the juvenile court needed to "find by clear and convincing evidence that the juvenile's criminal actions were substantially influenced by substance abuse or emotional or behavioral problems that may be appropriately treated within the jurisdiction of the juvenile court." *Id.* The juvenile appellants argued that the statute required them "to admit to the charged, but unproven, criminal actions" in violation of their constitutionally-protected privilege against self-incrimination. *Id.* The Supreme Court of Nevada agreed. Relying upon *Gault*, the Court concluded that the privilege was available to juveniles in certification proceedings and held that the statute's mandate that a juvenile "admit to the charged criminal conduct in order to overcome the presumption of adult certification ... violate[d] the juvenile's Fifth Amendment right against self-incrimination." *Id.* at 457.

Relating the *William M.* Court's reasoning to the facts in *Brown*, the Superior Court determined that the trial court "applied 42 Pa.C.S. § 6355(a)(4)(iii)(G) in a manner that required [Brown] to admit his guilt or accept responsibility to demonstrate that he was amenable to treatment and capable of rehabilitation." *Brown*, 26 A.3d at 498. Despite Brown's "assert[ions] of innocence and refus[al] to discuss the details of the crimes he allegedly committed" while undergoing psychological evaluation, the trial court relied upon the testimony of the Commonwealth's expert that Brown first would need to take "responsibility for his actions" in finding that Brown was not amenable to treatment within the juvenile system. *Id.* In so doing, the trial court improperly applied Section 6355(a)(4)(iii)(G) of the Juvenile Act "to effectively require [Brown] to admit and discuss his involvement in the actions constituting the criminal offenses," thereby violating his privilege against self-incrimination. *Id.*

The Superior Court then considered the applicability of a 2008 amendment to Section 6338 of the Juvenile Act, which added subsection (c)(1), providing for a limited grant of immunity for incriminating statements "obtained from a child in the course of a screening or assessment that is undertaken in conjunction with any proceeding under" the Act. 42 Pa.C.S. § 6338(c)(1). For purposes of the appeal, the Superior Court assumed, without expressly deciding, that the provision would shield any of the statements made by Brown to the Commonwealth's psychiatric expert. *Brown*, 26 A.3d at 499. Recognizing that an individual's Fifth Amendment privilege could be displaced, and the individual compelled to testify, pursuant to a proper grant of immunity, the panel analyzed whether the immunity granted under Section 6338(c)(1) sufficed to nullify any threat of adverse consequences flowing from a compelled, inculpatory statement.

The court began by identifying three types of immunity:

> "Use" immunity provides immunity only for the testimony actually given pursuant to the order compelling said testimony. "Use and derivative use" immunity enlarges the scope of the grant to cover any information or leads that were derived from the actual testimony given under compulsion. ... "Transactional" immunity is the most expansive, as it in ***1068** essence provides a complete amnesty to the witness for any transactions which are revealed in the course of the compelled testimony.

Id. at 499-500 (quoting *Swinehart*, 664 A.2d at 960 n.5). Because Section 6338(c)(1) provides only basic "use" immunity, which does not protect a witness from any evidence obtained as a result of his admissions, the court reasoned that any statutory immunity was "not co-extensive with the scope of the Fifth Amendment privilege," and necessarily was "insufficient to override

[Brown's] Fifth Amendment rights and compel [him] to testify against himself." *Id.* at 500. Consequently, "[i]n the absence of the requisite grant of at least use/derivative use immunity," the trial court's requirement that Brown "admit guilt or accept responsibility for his actions" on pain of transfer to adult court "subject[ed him] to a 'penalty' sufficient to compel or coerce his testimony" in violation of his Fifth Amendment privilege. *Id.* at 501-502.

In the panel's view, the trial court's interpretation of the transfer statute "encourages a juvenile to tender an admission of guilt" from which the Commonwealth could derive evidence for use in a criminal trial, impermissibly "chilling" the exercise of a fundamental right protected by the Constitution. *Id.* at 505.

> Although the Commonwealth has a legitimate interest in determining whether a defendant is amenable to treatment in the juvenile system, it was not necessary, as a matter of statutory construction, for [Brown] to make an incriminating statement to prove that he was capable of rehabilitation. By its plain language, 42 Pa.C.S.A. § 6355(a)(4)(iii)(G) and (G)(VII) do not mandate that [Brown] admit guilt, accept responsibility or discuss the details of the facts underlying the charged crimes.

Id. at 506-07. "The trial court, therefore, improperly applied 42 [Pa.C.S.] § 6355(a)(4)(iii)(G) in a way that conditioned transfer to juvenile court upon [Brown's] waiver of his Fifth Amendment rights against self-incrimination." *Id.* at 507. Accordingly, the Superior Court concluded that the trial court's misapplication of the transfer statute constituted legal error, which "tainted the entire decertification proceedings" and thus necessitated a remand for a new hearing on Brown's petition. *Id.* at 510.

Instantly, the Commonwealth has declined to contest this thorough analysis, opting instead to relegate its defense of the transfer proceedings below to the bare assertion that Taylor somehow "opened the door" to the juvenile court's consideration of his silence by deigning to contest the petition filed against him. That position, were it to prevail, would leave juveniles like Taylor with an impossible dilemma: either acquiesce to the transfer to adult court, or challenge it and effectively waive the Fifth Amendment's privilege against self-incrimination by inviting the prosecution and the court to draw an adverse inference from the juvenile's silence. We reject the Commonwealth's "heads I win, tails you lose" proposition out of hand. *Cf. Garrity*, 385 U.S. at 498, 87 S.Ct. 616 ("Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other.").

We also find the Commonwealth's reliance upon *Robinson* to be misplaced. In *Robinson*, the Supreme Court denied a Fifth Amendment challenge to the prosecutor's fleeting comment in summation that the defendant "could have taken the stand and explained [his side of the story] to you." *Robinson*, 485 U.S. at 26, 108 S.Ct. 864. Central to the Court's decision, however, was the portion of defense counsel's closing argument that implied that ***1069** the government failed to afford Robinson an opportunity to offer an explanation of the relevant events. By suggesting that the prosecution had denied Robinson the chance to explain his side of the story, the defense "opened the door" to the prosecution's oblique "adver[sion] to [his] silence," which the Court characterized as a fair response to Robinson's charge. *Id.* at 34, 108 S.Ct. 864. The *Robinson* Court thus clarified that challenges to a prosecutor's commentary on a defendant's silence must be viewed in the full context in which they arise. *See also Lockett v. Ohio*, 438 U.S. 586, 595, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (holding that "prosecutor's repeated references in his closing remarks to the State's evidence as 'unrefuted' and 'uncontradicted' " did not constitute improper commentary upon Lockett's silence where her "own counsel had clearly focused the jury's attention" there).

Conversely, here we observe that it was the Commonwealth that arguably invited a Fifth Amendment violation by commenting adversely upon Taylor's declination of culpability in the very proceedings that it initiated in order to prosecute him as an adult. Specifically, the Commonwealth twice noted that Taylor was "in denial" about his alleged offenses. N.T., 4/25/2014, at 44, 109. The first time Taylor's supposed "denial" was invoked, defense counsel's objection was quickly—and correctly—sustained by the juvenile court. *Id.* at 44. Nevertheless, the Commonwealth persisted, reiterating the point in argument. *Id.* at 109. The Commonwealth similarly alluded to Taylor's silence by suggesting to the juvenile court that "admitting guilt" was central to the question of Taylor's amenability to "sex offender treatment" within the juvenile system. *Id.* at 58. It did so again during argument, proclaiming that "the first step towards treatment is admission." *Id.* at 109. But to be clear, the record reflects that at no point did Taylor or his counsel invite commentary upon his assertion of innocence by word or by action. Ergo, the circumstances here are more akin to the situation "[w]here the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence," *Robinson*, 485 U.S. at 32, 108 S.Ct. 864, which *Griffin* plainly forbids.

[9] Of course, we grant that certification proceedings readily are distinguishable from the criminal trials at issue in *Griffin* and its progeny. But whether self-incrimination is compelled in violation of the Fifth Amendment does not turn on the presence of a jury. *See Gault*, 387 U.S. at 49, 87 S.Ct. 1428; *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 69 L.Ed. 158 (1924). Indeed, the Supreme Court has had occasion to find that the conduct of a trial judge alone sufficed to prejudice a defendant in contravention of the Fifth Amendment. In *Mitchell v. United States*, 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the Court considered whether "*a trial court* may draw an adverse inference from the defendant's silence" in making factual findings ahead of sentencing. *Id.* at 317, 119 S.Ct. 1307 (emphasis added). In that case, "Mitchell and 22 other defendants were indicted for offenses arising from a conspiracy to distribute cocaine in Allentown, Pennsylvania, from 1989 to 1994." *Id.* Mitchell entered an open guilty plea to all counts, reserving her "right to contest the drug quantity attributable to her under the conspiracy count," which the District Court advised "would be determined at her sentencing hearing." *Id.* Before accepting the plea, the court explained that, by pleading guilty, Mitchell "would waive various rights, including 'the right at trial to remain silent under the Fifth Amendment.' " *Id.* at 318, 119 S.Ct. 1307 (record citation omitted). Mitchell assented.

***1070** At sentencing, Mitchell contested the quantity of cocaine attributable to her for purposes of calculating her sentence. "[T]he District Court ruled that, as a consequence of her guilty plea, [Mitchell] had no right to remain silent with respect to the details of her crime." *Id.* at 319, 119 S.Ct. 1307. The court also noted that " 'one of the things' persuading [it] to rely on the testimony of" Mitchell's codefendants, who identified her as having "been a drug courier on a regular basis," was that Mitchell did "not testify[ ] to the contrary." *Id.* ("The District Judge told [Mitchell]: 'I held it against you that you didn't come forward today and tell me that you really only did this a couple of times. ... I'm taking the position that you should come forward and explain your side of this issue.' "). The court sentenced Mitchell to the statutory maximum term of ten years' imprisonment, and the U.S. Court of Appeals for the Third Circuit affirmed. *Id.*

The Supreme Court reversed. Likening Mitchell's plea to an offer to stipulate, the Court rejected the Government's assertion that the "guilty plea was a waiver of the privilege against compelled self-incrimination with respect to all the crimes comprehended in the plea." *Id.* at 321, 119 S.Ct. 1307; *see id.* at 325, 119 S.Ct. 1307 ("We reject the position that either [Mitchell's] guilty plea or her statements at the plea colloquy functioned as a waiver of her right to remain silent at sentencing."). The Court cautioned that "[t]reating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants," *id.* at 324, 119 S.Ct. 1307, reasoning that:

> [w]ere we to accept the Government's position, prosecutors could indict without specifying the quantity of drugs involved, obtain a guilty plea, and then put the defendant on the stand at sentencing to fill in the drug quantity. The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power. *Rogers v. Richmond*, 365 U.S. 534, 541, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961) ("[O]urs is an accusatorial and not an inquisitorial system[.]").

Mitchell, 526 U.S. at 325, 119 S.Ct. 1307 (parallel citations omitted). Hence, the Court reiterated its denunciation of the premise that, "[w]here a sentence has yet to be imposed ... 'incrimination is complete once guilt has been adjudicated.' " *Id.* (quoting *Estelle*, 451 U.S. at 462, 101 S.Ct. 1866).

Acknowledging the general rule that, "where there can be no further incrimination, there is no basis for the assertion of the privilege," the Court "conclude[d] that [the] principle applies to cases in which the sentence has been fixed and the judgment of conviction has become final." *Mitchell*, 526 U.S. at 326, 119 S.Ct. 1307; *see id.* ("If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared."). "Where the sentence has not yet been imposed," however, "a defendant may have a legitimate fear of adverse consequences from further testimony." *Id.* Because Mitchell's punishment had not yet been levied, the Court ultimately observed that, "[b]y holding [Mitchell's] silence against her in determining the facts of the offense at the sentencing hearing," the trial court "imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination." *Id.* at 330, 119 S.Ct. 1307. *Accord United States v. Hale*, 422 U.S. 171, 181, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) (holding that "it was prejudicial error for the trial court to permit cross-examination of [Hale] concerning his silence during police interrogation"); ***1071** *Grunewald*, 353 U.S. at 424,

77 S.Ct. 963 (holding that "it was prejudicial error for the trial judge to permit cross-examination of [Grunewald] on his plea of the Fifth Amendment privilege before the grand jury").

[10] **[11]** **[12]** In view of the foregoing authority, we adopt the Superior Court's well-reasoned opinion in *Brown* to the extent that it holds that the protections of the Fifth Amendment are applicable to juvenile transfer proceedings. We recognize that the Juvenile Act vests with the juvenile court a substantial degree of discretion within which to adjudge whether jurisdiction over a minor should be retained or should be transferred to an adult court for criminal prosecution. "But this latitude is not complete." *Kent*, 383 U.S. at 553, 86 S.Ct. 1045. Like the juvenile statute at issue in *Kent*, our Juvenile Act "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness." *Id*; *see Commonwealth v. Pyle*, 462 Pa. 613, 342 A.2d 101, 105 (1975) (adopting *Kent*'s formulation of the rights of juveniles in transfer proceedings and holding that "in order to try in a criminal court any person who might qualify as a juvenile, the waiver into such criminal court must be in a manner conforming to due process of law"). Although a juvenile court has "considerable latitude" in weighing relevant facts for purposes of evaluating a transfer petition, *Kent*, 383 U.S. at 552-53, 86 S.Ct. 1045, we now hold that the Juvenile Act does not countenance the drawing of an adverse inference from a juvenile's refusal to admit to the offenses with which the juvenile is charged. When faced with a critical decision such as whether to certify a juvenile for transfer to an adult court for prosecution, a court may not condition its ruling upon the minor's assertions of innocence or invocation of the Fifth Amendment. To do so would place too high a cost on the juvenile's constitutional privilege against compulsory self-incrimination, guaranteed by the Fifth Amendment. *See Griffin*, 380 U.S. at 614, 85 S.Ct. 1229.

[13] We also concur in the *Brown* Court's conclusion that Section 6338 of the Juvenile Act does not provide a guarantee of immunity sufficient to displace the Fifth Amendment privilege in juvenile transfer proceedings. The immunity statute covers only an "extrajudicial statement" that could be used against the juvenile, 42 Pa.C.S. § 6338(b), and "statements, admissions or confessions made by or incriminating information obtained from a child in the course of a screening or assessment that is undertaken in conjunction with proceedings under" Chapter 63 of the Pennsylvania Code. *Id.* § 6338(c)(1). It extends only so far as to bar the admission of evidence of a self-incriminating character "against the child on the issue of whether the child committed a delinquent act ... or on the issue of guilt in any criminal proceeding." *Id.* By its plain terms, the statute applies only to incriminating statements themselves, and does not encompass evidence derived from such statements. Therefore, the immunity contemplated in Section 6338 cannot be considered coterminous with the Fifth Amendment privilege so as to permit a court to compel a juvenile in Taylor's position to incriminate himself in order to demonstrate his amenability to treatment within the juvenile system.[6]

***1072** **[14]** In sum, Taylor's decision to maintain his innocence was committed to him and him alone by the Constitution, and he did so in clear terms while under court-mandated psychiatric examination. Plainly, he "need not have the skill of a lawyer to invoke the protection of the Self-Incrimination Clause." *Quinn*, 349 U.S. at 162, 75 S.Ct. 668; *see id.* ("It is agreed by all that a claim of the privilege does not require any special combination of words."); *cf. Tucker*, 417 U.S. at 439, 94 S.Ct. 2357 ("At this point in our history virtually every schoolboy is familiar with the concept, if not the language," of the Fifth Amendment's Self-Incrimination Clause.). But "by 'solemnizing the silence of the accused into evidence against him,' " *Portuondo v. Agard*, 529 U.S. 61, 65, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (quoting *Griffin*, 380 U.S. at 614, 85 S.Ct. 1229) (brackets omitted), the juvenile court denied to Taylor—who, we must emphasize, remained cloaked in "the presumption of innocence which the law gives to everyone," *Wilson v. United States*, 149 U.S. 60, 66, 13 S.Ct. 765, 37 L.Ed. 650 (1893)—the privilege entrusted to him by the Bill of Rights.

[15] Simply put, a minor's refusal to confess to an act for which he or she might be criminally prosecuted as an adult may not be considered when deciding whether to certify a case for transfer between juvenile and adult court. This remains true irrespective of the necessary considerations of amenability to treatment contemplated by the Juvenile Act or of the possibility of immunity contained therein. As there is no way to guarantee that certification would be denied, or decertification granted, upon an admission of guilt, a minor cannot be expected to take so broad a leap of faith.

B.

[16] Having concluded that Taylor's Fifth Amendment privilege was infringed upon in the transfer proceedings below, we need not dwell on the subordinate issue at length. It is a paradigmatic abuse of discretion for a court to base its judgment upon an erroneous view of the law. *See Mielcuszny v. Rosol*, 317 Pa. 91, 176 A. 236, 237 (1934) ("An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied ... discretion is abused."); *Commonwealth v. Braithwaite*, 253 Pa.Super. 447, 385 A.2d 423, 426 (1978) (same); *see also Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) ("A district court by definition abuses its discretion when it makes an error of law."); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").[7]

[17] Whether to certify a juvenile matter for transfer is a decision committed to the sound discretion of the juvenile court pursuant to a carefully prescribed, multi-factored statutory analysis. Although we concur in the Superior Court's pronouncement that the juvenile court committed constitutional error by weighing Taylor's silence against him, we find that the panel's rationalization that the lower court did not abuse its discretion was itself erroneous.

[18] The constitutional privilege against compelled self-incrimination "is a fundamental one," and any "practice which ***1073** exacts a penalty for the exercise of the right is without justification and unconstitutional." *Bethea*, 379 A.2d at 104. This concern is no less significant when the penalty contemplated is the transfer of a minor to adult court for criminal prosecution, where the pain of imprisonment looms overhead like the Sword of Damocles. Because the juvenile court exacted a price for Taylor's exercise of his rights under the Fifth Amendment, its decision reflects a misapplication of the law, and thus an abuse of discretion.

Traditionally, the prosecution bears the burden of demonstrating that any prejudice resulting from a *Griffin* violation did not redound to the defendant's detriment. *See Chapman v. California*, 386 U.S. 18, 25-26, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (applying harmless error review to *Griffin* errors); *Commonwealth v. Henderson*, 456 Pa. 234, 317 A.2d 288, 291 (1974) (same); *cf. Anderson v. Nelson*, 390 U.S. 523, 523-24, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968) (*per curiam*) (holding that "comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal").

[19] Here, however, we are presented with a Fifth Amendment violation which was squarely committed by a juvenile court, sitting as the finder of fact, charged with the solemn duty to adjudicate whether a minor should be tried as an adult. The *Mitchell* Court did not affix the appropriate remedy in this rare context. And we are without advocacy on the significant question of whether the instant violation ranks as error of the kind the Supreme Court has deemed "structural," and thus beyond remediation under a harmless error review.[8] Accordingly, we reverse the judgment of the Superior Court and remand for a determination, in the first instance, and with developed advocacy of the parties, of whether the harmless error doctrine is applicable to the juvenile court's constitutionally deficient misapplication of the Juvenile Act's transfer provisions and, if it is not or if the error is not harmless, for consideration of the available relief under these circumstances.[9]

It is so ordered.

Chief Justice Saylor and Justices Todd and Mundy join the opinion.

Justice Baer files a concurring and dissenting opinion in which Justices Donohue and Dougherty join.

JUSTICE BAER, concurring and dissenting

I concur in most of the majority's conclusions, including its adoption of the Superior Court's holding in *Commonwealth v. Brown*, 26 A.3d 485 (Pa. Super. 2011), that the Fifth Amendment applies to juvenile transfer proceedings. Further, I find *Brown* convincing in holding that the relevant immunity provision of the Juvenile Act does not provide juveniles a guarantee of immunity that is coterminous with the Fifth Amendment privilege against self-incrimination. *Brown*, 26 A.3d at 501. I ***1074** write separately because, as explained below, I would hold that the juvenile court in this matter committed prejudicial error by relying on Taylor's refusal to admit guilt against him in its decision to certify Taylor to be tried as an adult. Accordingly, unlike the majority, I conclude that there is no need to remand this case to conduct a harmless error or a structural error analysis. Rather, for the reasons discussed below, I would vacate the judgment of the Superior Court, reverse Taylor's judgment of sentence, and, assuming that he has not committed other crimes that would place him under the purview of the criminal justice system, order that Taylor be discharged.

A review of the record reveals that the juvenile court stated that it relied on Taylor's refusal to self-incriminate when making its decision to certify Taylor to be tried as an adult. Indeed, the juvenile court repeatedly emphasized that Taylor would not admit that he committed the offense and opined that this refusal was problematic because, *inter alia*: (1) time was essential for treatment; (2) if Taylor's denial continued, it would prevent effective treatment; and (3) Taylor's refusal to admit guilt would make it difficult to identify the depth of Taylor's problem for purposes of treatment. Notes of Testimony, 4/2/2014, at 112-15. Based on the foregoing, it is apparent that the juvenile court believed that Taylor's refusal to admit guilt made him less amenable to treatment and, thus, that Taylor should be tried as an adult.

I recognize that the juvenile court cited other permissible factors for its decision to certify Taylor to be tried as an adult, and that it is inherently difficult to determine the degree of emphasis that a fact-finding court places on a specific factor in making juvenile transfer decisions. Notwithstanding, in my view, the record sufficiently establishes that there is at least a "reasonable possibility" that the juvenile court's error "might have contributed" to its decision to certify Taylor to be tried as an adult; consequently, the error was prejudicial. *See Commonwealth v. Fulton*, 645 Pa. 296, 179 A.3d 475, 493 (2018) ("Whenever there is a reasonable possibility that an error might have contributed to the conviction, the error is not harmless.") (quoting *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 164 (1978)).

Accordingly, I would conclude that the juvenile court relied on a constitutionally impermissible factor in deciding to transfer Taylor to adult court and that this reliance was prejudicial. Given the forgoing, in my view, the Superior Court's erroneous judgment should be vacated. Rather than reach this conclusion, however, the majority instead remands the matter to the Superior Court to analyze whether the error in this case constitutes structural error, *i.e.* an error that is so fundamental that it requires no harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (recounting constitutional errors that are not subject to harmless error review because they alter the structure within which a trial proceeds).

As I would simply reverse the Superior Court's erroneous ruling, I turn to the proper remedy in this case. Taylor has already reached age 21 and was, for all the reasons explained herein, improperly certified to be tried as an adult. Taylor argues that he should be discharged, a position the Commonwealth did not challenge in its brief to this Court. *See* Appellant's Brief at 38-42. I am constrained to agree. Taylor cannot be tried in criminal court because his alleged crimes occurred when he was a juvenile, and he was improperly certified. He cannot be transferred back to juvenile court for new certification proceedings because that court lost jurisdiction over this matter when Taylor reached age 21. *See* ***1075** 42 Pa.C.S. § 6303 (Explaining that the Juvenile Act applies to, *inter alia*, proceedings in which a "child" is alleged to be delinquent or dependent); 42 Pa.C.S. § 6302 (defining "child," in relevant part, as "an individual who is under the age of 18 years [or] is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years."). Unfortunately, the only feasible relief at this juncture is to reverse Taylor's judgment of sentence and, assuming that he has not committed other crimes that would place him under the purview of the criminal justice system, direct that he be discharged.

Justices Donohue and Dougherty join this concurring and dissenting opinion.

All Citations

230 A.3d 1050

Footnotes

1 In a typical case, the Juvenile Act places upon the Commonwealth "[t]he burden of establishing by a preponderance of evidence that the public interest is served by the transfer of the case to criminal court and that a child is not amenable to treatment, supervision or rehabilitation as a juvenile." 42 Pa.C.S. § 6355(g). The Commonwealth is relieved of that burden, however, under the following conditions:

> (1)(i) a deadly weapon as defined in 18 Pa.C.S. § 2301 (relating to definitions) was used and the child was 14 years of age at the time of the offense; or
>
> (ii) the child was 15 years of age or older at the time of the offense and was previously adjudicated delinquent of a crime that would be considered a felony if committed by an adult; and
>
> (2) there is a prima facie case that the child committed a delinquent act which, if committed by an adult, would be classified as rape, involuntary deviate sexual intercourse, aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) or (2) (relating to aggravated assault), robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), robbery of motor vehicle, aggravated indecent assault, kidnapping, voluntary manslaughter, an attempt, conspiracy or solicitation to commit any of these crimes or an attempt to commit murder as specified in paragraph (2)(ii) of the definition of "delinquent act" in section 6302.

Id. § 6355(g)(1)-(2). When the foregoing "criteria are met, the burden of establishing by a preponderance of the evidence that retaining the case under this chapter serves the public interest and that the child is amenable to treatment, supervision or rehabilitation shall rest with the child." *Id.* The parties do not dispute that the transfer statute's burden-shifting criteria were satisfied here.

2 Because the Juvenile Act excludes certain crimes, such as murder, from the definition of "delinquent act," 42 Pa.C.S. § 6302, jurisdiction over such cases is vested in adult criminal court in the first instance. A juvenile so charged may petition the trial court to decertify the case and have the matter transferred to the juvenile court for adjudication. The standards for certification apply with equal force in the decertification context. *See id.* § 6322(a).

3 Specifically, we granted review of the following questions, rephrased for clarity:

> a. Does a juvenile court violate the Fifth Amendment by holding a juvenile's failure to admit guilt against him during a certification hearing?
>
> b. Did the Superior Court erroneously conclude that a juvenile court does not abuse its discretion by holding a juvenile's failure to admit guilt against him during a certification hearing because the court also considered other statutorily-required factors when making its certification decision?

Commonwealth v. Taylor, —— Pa. ——, 204 A.3d 361 (2019) (*per curiam*).

4 Section 6338 of the Juvenile Act, entitled "Other basic rights," provides in relevant part:

> **(b) Self-incrimination.--**A child charged with a delinquent act need not be a witness against or otherwise incriminate himself. ... A confession validly made by a child out of court at a time when the child is under 18 years of age shall be insufficient to support an adjudication of delinquency unless it is corroborated by other evidence.
>
> **(c) Statements and information obtained during screening or assessment.--**
>
> (1) No statements, admissions or confessions made by or incriminating information obtained from a child in the course of a screening or assessment that is undertaken in conjunction with any proceedings under this chapter, including, but not limited to, that which is court ordered, shall be admitted into evidence against the child on the issue of whether the child committed a delinquent act under this chapter or on the issue of guilt in any criminal proceeding.
>
> (2) The provisions of paragraph (1) are in addition to and do not override any existing statutory and constitutional prohibition on the admission into evidence in delinquency and criminal proceedings of information obtained during screening, assessment or treatment.

42 Pa.C.S. § 6338(b)-(c).

5 Assuming, *arguendo*, that the harmless error standard does apply, Taylor argues that the Commonwealth's treatment of that issue was inconsistent with the "overwhelming evidence of guilt" test as set forth by this Court in *Story*. *See Story*, 383 A.2d at 166 (stating "that an error may be harmless where the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict"). He contends that the Commonwealth overlooked the *Story* Court's clarification that, "in applying the overwhelming evidence test to determine if an error is harmless, a court may rely only on *uncontradicted* evidence" of guilt. *Id.* at 168 (emphasis added). Taylor notes that the factual determination here was his amenability to treatment, not his guilt, and that the defense presented

extensive expert testimony to that effect. Reply Brief for Taylor at 12-13. Because "none of the Commonwealth's evidence regarding amenability was uncontradicted," Taylor reckons that the juvenile court's legal error cannot be deemed harmless by the plain terms of that standard. *Id.* at 13.

6 Relatedly, the record fails to elucidate whether Taylor was advised of his right to remain silent prior to undergoing psychiatric assessment by the Commonwealth's expert. *Compare Estelle*, 451 U.S. at 468, 101 S.Ct. 1866 (holding that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding").

7 *Accord In re Doe*, 613 Pa. 339, 33 A.3d 615, 628 n.19 (2011) (finding an abuse of discretion where the trial court "reli[ed] upon the [juvenile's] failure to seek parental consent as a ground upon which to deny the application for judicial authorization" to exercise her constitutionally protected right to obtain an abortion).

8 *Cf. McCoy v. Louisiana*, —— U.S. ——, 138 S.Ct. 1500, 1512, 200 L.Ed.2d 821 (2018) (holding that a trial court's allowance of defense counsel's admission of guilt on behalf of his client, despite the defendant's insistent objections, was incompatible with the Sixth Amendment and thus constituted structural error necessitating the award of a new trial).

9 In light of our resolution of this case on constitutional grounds, we decline the Commonwealth's invitation to assess the weight of the certification hearing evidence based upon the parties' dueling expert testimony at this juncture.

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NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
NAZEER TAYLOR	:	
Appellant	:	No. 856 EDA 2017

Appeal from the Judgment of Sentence January 31, 2017
In the Court of Common Pleas of Montgomery County Criminal Division
at No(s): CP-46-CR-0003166-2014

BEFORE: BOWES, J., McLAUGHLIN, J., and MUSMANNO, J.

MEMORANDUM BY McLAUGHLIN, J.: **FILED JULY 29, 2021**

Nazeer Taylor has appealed from the judgment of sentence entered following his convictions for rape of a child and related offenses. He was a juvenile when he committed the offenses, but he was tried as an adult after the juvenile court granted the Commonwealth's petition to certify the case to criminal court. Taylor claims the court violated his Fifth Amendment privilege against compulsory self-incrimination by considering his failure to admit culpability when it granted certification, and that its certification order was an abuse of discretion.

In a prior decision in this case, we concluded that although the juvenile court had violated the privilege, its ultimate order granting certification was not an abuse of discretion in view of its consideration of other, permissible factors. The Pennsylvania Supreme Court granted review and agreed that the juvenile court had committed a Fifth Amendment violation. ***Commonwealth***

v. Taylor, 230 A.3d 1050, 1053 (Pa. 2020). Three Justices concluded that the error was prejudicial and would have reversed Taylor's judgment of sentence and discharged the defendant, finding no other remedy possible under the circumstances. ***Id.*** at 1075 (Baer, J., concurring and dissenting). The majority of the Court, however, determined that it could not address the applicability of the harmless error doctrine to the instant case without advocacy from the parties. The Court thus remanded to this Court for a determination of whether the harmless error doctrine is applicable here, and if it is not or if the error is not harmless, for consideration of the available relief. ***Id.*** at 1073.

Having received supplemental advocacy from the parties, we now conclude that the juvenile court's violation of Taylor's Fifth Amendment privilege constitutes structural error, not subject to harmless error review. Regarding the remedy, we follow the lead of the concurring and dissenting Justices and conclude that under Pennsylvania's statutory framework, dismissal is the only relief possible where a reversible error occurs at a certification hearing and the defendant turns 21 before the appellate process is complete. We therefore reverse.

I.

A.

Taylor was charged in a delinquency petition with multiple counts stemming from the sexual abuse of his foster brother, A.O., from July 2012 through August 2013. Taylor was 15 years old at the time of the crimes, and A.O. was 11 years old. Taylor was born in September 1996, and he is now

over the age of 21. The juvenile court held a certification hearing on April 2 and 25, 2014, to determine whether to transfer the case to criminal court.

At the hearing, A.O. testified that the abuse occurred while he and Taylor were living with their foster mother ("Foster Mother") and began shortly after A.O. began the sixth grade. N.T. Certification Hearing, 4/2/14, at 9, 11-30. A.O. stated that Taylor threatened to "beat [him] up" if he reported the abuse to anyone. ***Id.*** at 19. A.O. also testified that the assaults caused physical damage that affected his ability to control his bowels. ***Id.*** at 33.

Foster Mother testified that she observed behavioral changes in A.O., who "was trying to pull his tongue out of his mouth and . . . soiling his clothing." ***Id.*** at 79-80. Foster Mother also described a time when she discovered Taylor and A.O. in the bathroom together. ***Id.*** at 84-85.

The Commonwealth presented the expert testimony of Michael Yoder, a supervisor with the Montgomery County Juvenile Probation Department, regarding amenability to treatment and the options available in the juvenile and adult systems. N.T., 4/25/14, at 76, 78. He testified that the allegations against Taylor were not typical of juvenile sex offender behavior, given the seriousness of the crimes and the sophistication Taylor displayed in committing them. ***Id.*** at 88-89. He noted that Taylor committed the crimes "while he was in foster home placement, under the roof of the foster parents while the foster parents were at home, [by] going into the victim's room and . . . into the bathroom." ***Id.*** Taylor also committed the assaults after having been convicted of burglary and undergoing intensive therapy. ***Id.*** at 89. Yoder

explained that residential treatment for sex offenders takes a minimum of two years, and that the juvenile system would retain jurisdiction over Taylor for only one year after his release from such a program. ***Id.*** at 90-91. Yoder therefore opined that Taylor was not amenable to treatment in the juvenile system. ***Id.*** at 90. Instead, Yoder recommended the youthful offender program at the State Correction Institution at Pine Grove. ***Id.*** at 91.

Taylor countered with the testimony of Dr. Nicole Machinski, an expert in the identification and treatment of juvenile sex offenders and in the certification of sex offenders. ***Id.*** at 9, 12. Dr. Machinski described Taylor's family background and his history of suffering neglect and abuse. ***Id.*** at 13-15. Dr. Machinski diagnosed Taylor "with adjustment disorder with mixed anxiety and depressed mood, as well as physical abuse of a child and sexual abuse of a child." ***Id.*** at 15. Dr. Machinski also testified regarding Taylor's criminal history and his previous experience and progress with therapy. ***Id.*** at 16-20. The doctor opined that Taylor would be amenable to treatment in the juvenile system. ***Id.*** at 27. She reached this conclusion because he "had very little opportunity to benefit from any kind of treatment provided by the juvenile justice system thus far," he had shown that he responds well to consistent treatment, and he expressed a willingness to participate in treatment. ***Id.*** at 27.

On cross-examination, Dr. Machinski stated that she based her testimony on her interviews with Taylor, Taylor's counsel, and the Department of Human Services ("DHS") worker, and on her review of Taylor's DHS file.

Id. at 31-32. Dr. Machinski drew a distinction between Taylor's previous treatment and sex offender treatment. She noted that his prior treatment had focused on defiance and oppositional behavior, rather than inappropriate sexual behavior. ***Id.*** at 42. However, she agreed that a person who exhibits antisocial behavior, such as residential burglary, would be less amenable to treatment. ***Id.*** at 44-45.[1]

At the conclusion of the hearing, the juvenile court determined that Taylor should be tried as an adult and certified the case to the criminal division. It provided the following rationale, citing various factors, including that Taylor had not admitted having committed the sex offense:

> I think one of the Commonwealth's arguments is that the defendant has been in treatment for almost every issue that the defendant's expert has identified and, notwithstanding that treatment, within six months committed a series of forcible rapes, which is much more serious than the issue he was in treatment for.
>
> I think the defense expert makes a distinction, and so does the defendant -- or they make a good point, not necessarily a distinction -- when they say, look, the sex offense is totally different than the burglary. And because someone was successful in a burglary, that's not at all related to the sexual offense, and he never really got treatment for the sexual offense. That's basically the argument as I understand it.
>
> And I don't necessarily disagree with that, but then I think the defense expert becomes a little bit inconsistent and sort of goes back and forth where she counters that particular Commonwealth with [sic] you can't compare these other matters to a sex offense, but then she goes back and forth

[1] Taylor also presented Alda Sales-Vinson, the caseworker from DHS who had been overseeing Taylor's case.

and says but because he did well in treatment in the other matters, he will do well for treatment as a sex offender. So in one sense, she tries to separate the two, and then in another sense, she tries to blend the two, and I find that testimony to be inconsistent.

I think another dilemma or conundrum for the defense is that's their approach, he's had an unfortunate upbringing, through no fault of his own. To a [ ] certain extent, he is antisocial and damaged, and that's not his fault. But is he so damaged that he can't be rehabilitated for a sex offender, or can he be rehabilitated for a sex offender? And I think part of the dilemma is they don't distinguish sex offenders from burglary, so now they blend their argument and say because he's done well in the first, he can do well in the second.

And they won't admit that he's committed the sex offense, and that's sort of their conundrum, because time is of the essence. He's approaching 18 years old. The act -- you can argue degree of sophistication all you want, but it was a predatory damaging act that occurred repeatedly over a 1-year period of time.

If you're going to go on the sex offenders' treatment, it's important that you admit, No. 1; examine your triggers, No. 2; talk about how you can avoid your triggers; and identify up-front the depth of the problem. And here, we can't identify the depth of the problem largely because we're not admitting yet that there is a problem.

What if he were to sit there for a year and a half before he finally admitted that he did something? I mean, I assume he's still denying. Counsel's arguments have been phrased "if this is true, it's a horrendous act."

They made a distinction when he denied, when he said to Dr. Buxbaum -- I believe he was a psychiatrist -- "I didn't do anything wrong." Counsel said now he wants to say he participates in treatment and defense counsel argued, well, maybe the treatment's not talking about sex offenders' treatment. And that's the very issue, though, is he amenable to sex offenders' treatment? And, in the juvenile system, time is running out. As I said, there is only a few years left, and the depth -- and if he doesn't make sufficient progress, he's 21, he's back on the streets, and he's

> released from the jurisdiction of the Court with no supervision at all. That's the dilemma.
>
> And when Dr. Machinski in her report indicates the issues that he needs treatment in and the Commonwealth argues, well, none of this has to do with amenability within the statute, well, it might, when you have four other categories. It would certainly refer to amenability for a crime that's much less serious than this. But I don't know that it means anything with regard to somebody who's committed the type of act that he's alleged to have committed.
>
> So for all the reasons in the statute as enumerated by [the Commonwealth] and because it's the defense burden of proof, I'm going to grant the Commonwealth's motion to certify him to adult court. Thank you.

Id. at 112-15.

Following the transfer, a jury found Taylor guilty of numerous crimes: rape of a child; rape by forcible compulsion; rape by threat of forcible compulsion; three counts each of involuntary deviant sexual intercourse by forcible compulsion, involuntary deviant sexual intercourse by threat of forcible compulsion, and involuntary deviate sexual intercourse with a child; four counts of sexual assault; two counts of indecent assault by forcible compulsion; and indecent assault of a person less than thirteen years of age.[2] The court sentenced Taylor on January 31, 2017, to an aggregate term of ten to 25 years' incarceration, followed by ten years' probation.

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[2] 18 Pa.C.S.A. §§ 3121(c), (a)(1), (a)(2); 3123(a)(1), (a)(2), (b); 3124.1; and 3126(a)(2) and (a)(7), respectively.

B.

Taylor filed a timely appeal,[3] and we held that the juvenile court had erroneously considered Taylor's failure to admit guilt, but found that, in view of the record as a whole, the court did not abuse its discretion in granting certification. The Pennsylvania Supreme Court granted Taylor's petition for allowance of appeal and held that "a minor's refusal to confess to an act for which he or she might be criminally prosecuted as an adult may not be considered when deciding whether to certify a case for transfer between juvenile and adult court." ***Taylor***, 230 A.3d at 1072. It concluded that "[b]ecause the juvenile court exacted a price for Taylor's exercise of his rights under the Fifth Amendment, its decision reflects a misapplication of the law, and thus an abuse of discretion." ***Id.*** at 1073.

The Court then addressed the harmless error doctrine. It noted that "[t]raditionally, the prosecution bears the burden of demonstrating that any prejudice . . . did not redound to the defendant's detriment." ***Id.*** It pointed

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[3] Taylor presented the following issues on appeal:

> 1. Whether the trial court erred in certifying [Taylor] to be tried as an adult.
>
> 2. Whether the trial court erroneously denied [Taylor]'s mistrial motion.
>
> 3. Whether the trial court erred in preventing [Taylor] from introducing evidence indicating that [A.O.] had bowel control problems before he ever met [Taylor].

Taylor's Br. at 10.

out, however, that here, the Court was "presented with a Fifth Amendment violation which was squarely committed by a juvenile court, sitting as the finder of fact, charged with the solemn duty to adjudicate whether a minor should be tried as an adult." ***Id.*** The Court concluded that the United States Supreme Court "did not affix the appropriate remedy in this rare context" and the Court was "without advocacy on the significant question of whether the instant violation ranks as error of the kind the Supreme Court has deemed 'structural,' and thus beyond remediation under a harmless error review." ***Id.*** The Court therefore remanded to this Court "for a determination, in the first instance, and with developed advocacy of the parties, of whether the harmless error doctrine is applicable to the juvenile court's constitutionally deficient misapplication of the Juvenile Act's transfer provisions and, if it is not or if the error is not harmless, for consideration of the available relief under these circumstances." ***Id.***

Justice Baer filed a concurring and dissenting opinion, joined by Justice Donohue and Justice Dougherty. Justice Baer agreed that a Fifth Amendment violation occurred, but would have found that the Juvenile Court committed "prejudicial error by relying on Taylor's refusal to admit guilt against him in its decision to certify Taylor to be tried as an adult." ***Id.*** at 1074. He noted that the juvenile court stated it relied on Taylor's refusal to incriminate himself when making its decision to certify the case. Justice Baer pointed out that the juvenile court emphasized that Taylor had not admitted that he had committed the offense and considered his refusal "problematic because, *inter alia*: (1)

time was essential for treatment; (2) if Taylor's denial continued, it would prevent effective treatment; and (3) Taylor's refusal to admit guilt would make it difficult to identify the depth of Taylor's problem for purposes of treatment." ***Id.*** (citation omitted). Justice Baer concluded that "the record sufficiently establishes that there is at least a 'reasonable possibility' that the juvenile court's error 'might have contributed' to its decision to certify Taylor to be tried as an adult; consequently, the error was prejudicial." ***Id.*** He would therefore "conclude that the juvenile court relied on a constitutionally impermissible factor in deciding to transfer Taylor to adult court and that this reliance was prejudicial." ***Id.***

Justice Baer also concluded that, as Taylor was over the age of 21, no court had jurisdiction to hold a renewed certification hearing and, therefore, the only available remedy was dismissal. ***Id.*** at 1074-75. He would have vacated the judgment of the Superior Court, reversed the judgment of sentence, and, "assuming that [Taylor] has not committed other crimes that would place him under the purview of the criminal justice system, [would have] direct[ed] that he be discharged." ***Id.*** at 1075.

II.

Following remand, the parties submitted additional briefing on 1) whether the error was a structural error; 2) if the error was not a structural error, whether it was harmless; and 3) if it was a structural error, or not harmless, what the appropriate remedy would be. We now answer the questions the Supreme Court directed us to consider on remand.

A. Whether the Error is Structural

1. The Parties' Arguments

Taylor argues that the error was a structural error, and therefore not amenable to the harmless error standard. He argues that "misapplying the law to deny a defendant's constitutional rights can never be 'the type of *de minimis* infraction which might form the basis for a harmless error finding.'" Taylor's Supp. Br. at 22 (quoting ***Commonwealth v. Lewis***, 598 A.2d 975, 982 (Pa. 1991) (internal quotation marks omitted)). Taylor relies on ***Lewis*** and ***Commonwealth v. Edwards***, 637 A.2d 259 (Pa. 1993), to argue that the Fifth Amendment violation is not amenable to harmless error analysis. He further relies on ***Commonwealth v. Kelly***, 724 A.2d 909 (Pa. 1999), and ***Commonwealth v. Bethea***, 379 A.2d 102 (Pa. 1977).

The Commonwealth argues the harmless error doctrine does apply here. It maintains that to determine whether the harmless error doctrine applies, courts must determine whether the error is structural; if it is, then the harmless error doctrine is inapplicable. The Commonwealth states that structural defects are those that "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself." Commonwealth's Br. at 30 (quoting ***Arizona v. Fulminante***, 499 U.S. 279, 310 (1991)). The Commonwealth argues that the error here was not a structural defect in the framework of a trial, or a defect that related to the determination of guilt or innocence. Rather, the Commonwealth contends, it was an error in process, "pertaining to the consideration of a single factor

(acceptance of responsibility) among several other factors to be weighed in the procedural context of determining whether [Taylor] should be tried as an adult." ***Id.*** at 30-31. It claims the "remaining factors can be readily weighed without considering the impermissible factor to determine the degree to which the impermissible factor altered the outcome of the proceeding." ***Id.*** at 31.

2. Relevant Law

Generally, "a constitutional error does not automatically require reversal of a conviction." ***Fulminante***, 499 U.S. at 306. Rather, courts "ha[ve] applied harmless-error analysis to a wide range of errors and ha[ve] recognized that most constitutional errors can be harmless." ***Id.*** The United States Supreme Court explained that "[t]he common thread" among cases employing a harmless error analysis "is that each involved 'trial error,'" which the Court described as an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." ***Id.*** at 307-08. In contrast, errors that the Court has termed "structural" warrant relief, "entitling the defendant to automatic reversal without any inquiry into prejudice." ***Weaver v. Massachusetts***, 137 S.Ct. 1899, 1905 (2017).

In ***McCoy v. Louisiana***, the United States Supreme Court reiterated that structural errors are not subject to harmless error review. 138 S.Ct. 1500, 1511 (2018). The Court there was tasked with deciding whether defense counsel's admission of the defendant's guilt over the defendant's objection

amounted to structural error. It concluded that the error was indeed structural, for two reasons. The Court explained that the error "'affect[ed] the framework within which the trial proceed[ed],'" which the Court distinguished from "a lapse or flaw that is 'simply an error in the trial process itself.'" ***Id.*** (citation omitted). It also found that the error involved a right "'not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.'" ***Id.*** (citation omitted).

The Pennsylvania Supreme Court has similarly found some errors either not amenable to harmless error analysis or *per se* reversible. In ***Lewis***, the Pennsylvania Supreme Court held a constitutional violation occurred when the defendant did not testify at trial and requested the trial court give a "no adverse inference" jury charge, but the court failed to give the charge. 598 A.2d at 980. The Court held that "given the importance of this issue for courts and litigants . . . , the failure to give such a 'no-adverse-inference' charge, when requested to do so in a timely fashion, *can never amount to harmless error*." ***Id.*** at 981 (emphasis in original). It reasoned that "[g]iven the strong constitutional underpinnings of the 'no-adverse-inference' charge, its omission may never be treated lightly." ***Id.*** It stated that, "[b]ecause the right of a criminal defendant to decline to take the stand without adverse comment or inference is a fundamental one under Article I, Section 9, the failure of the trial court to give the 'no-adverse-inference' instruction when so requested is

far from the type of '*de minimis*' infraction which might form the basis for a 'harmless error' finding." ***Id.*** at 982.

In ***Edwards***, the Pennsylvania Supreme Court announced that it would in future cases be "*per se* reversible error," and not susceptible to harmless error analysis, if a judge gave a "no adverse inference" charge "when the defendant has requested that no such instruction be given." 637 A.2d at 261. However, the Court made no statement as to whether the error was structural. Rather, in finding the error would be reversible *per se*, the Court stated that such a rule "will avoid time[-]consuming appeals arguing about harmless error and will clearly instruct trial judges as to how to proceed on this question." ***Id.*** It imposed the rule to future cases only, however, finding that providing the "no-adverse-inference" instruction was harmless beyond a reasonable doubt in the case before it, as the evidence was overwhelming. ***Id.***

In ***Kelly***, the Court concluded that a harmless error analysis was not warranted where a jury instruction violated Due Process by creating an impermissible mandatory presumption with respect to a material element of the crime charged. 724 A.2d at 913. The mandatory presumption permitted the jury to find a material element met without concluding the Commonwealth had proved it beyond a reasonable doubt. ***Id.*** at 911. The Court in effect considered the error structural, stating that the erroneous instruction had illegally "shifted the burden to the accused to disprove a material element of the crime" and engaging in harmless error review on appeal would improperly invade the jury's function. ***Id.*** at 913-14.

Other of the Pennsylvania Supreme Court's decisions are relevant here. In ***Bethea***, the Court held it was "constitutionally impermissible for a trial court to impose a more severe sentence because a defendant has chosen to stand trial rather than plead guilty." 379 A.2d at 105. The Court reasoned:

> That principle is premised primarily upon the rationale that the right to a trial by jury is a fundamental one, constitutionally guaranteed to all criminal defendants, and that a practice which exacts a penalty for the exercise of the right is without justification and unconstitutional. The price exacted by imposing a harsher sentence on one who chooses to put the state to its proof by a jury trial rather than plead guilty is obvious. Not only is the individual defendant penalized for the present exercise of his constitutional right but, should the practice become sufficiently well known within a given jurisdiction, a substantial chilling effect on the exercise of the right would inevitably ensue.

Id. at 104 (footnotes omitted).

The Court remanded for resentencing without mention of the possibility of harmless error. It explained that to determine whether to vacate the sentence where the trial court has committed such an error, courts must ask "not whether the trial court considered legitimate factors in fixing sentence, but whether it considered only such factors." ***Id.*** at 106. The Court concluded that "any increase in sentence which results from a defendant's decision to put the state to its proof puts a price upon the exercise of a fundamental constitutional right, and hence is unjustified." ***Id.***

We find particular guidance in ***Interest of J.M.G.***, 229 A.3d 571, 573-74 (Pa. 2020), in which the Court held the harmless error doctrine inapplicable

to violations of psychotherapist-patient privilege in Act 21 proceedings, which relate to the involuntary commitment of certain sexually violent persons.[4] In ***J.M.G.***, the Sexual Offender Assessment Board ("SOAB") submitted an assessment to the trial court, that relied, in part, on a psychiatric evaluation that contained un-redacted, incriminating statements J.M.G. had made to his psychiatrist. ***Id.*** at 574-75. Based on the SOAB assessment, the trial court found there was a *prima facie* case to initiate civil commitment proceedings. ***Id.*** at 575. At the civil commitment hearings, a witness summarized the psychiatric evaluation, and following the hearing, the court ordered J.M.G.'s commitment. ***Id.***

The Supreme Court concluded that this was a violation of the privilege, and that in the context of an Act 21 proceeding, such a violation could not be treated as harmless. ***Id.*** at 583. It explained that "the harm to the therapeutic relationship and the efficacy of mental health treatment that Section 5944 is

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[4] "Act 21 governs situations where certain sexually violent persons may be involuntarily committed for treatment and applies under circumstances described in the Juvenile Act." ***In re H.R.***, 227 A.3d 316, 319 (Pa. 2020) (citing 42 Pa.C.S.A. §§ 6301-6375). "[T]he Juvenile Act provides that a child who is adjudicated delinquent may be . . . committed to 'an institution, youth development center, camp, or other facility for delinquent children operated under the direction or supervision of the court or other public authority and approved by the Department of Public Welfare[.]'" ***Id.*** (quoting 42 Pa.C.S.A. § 6352(a)(3)). A child so committed "and who remains committed upon reaching 20 years of age 'shall be subject to an assessment by the [Sexual Offender Assessment Board]' 42 Pa.C.S.[A.] § 6358(a), to determine 'whether or not the child is in need of commitment for involuntary treatment due to a mental abnormality . . . or a personality disorder, either of which results in serious difficulty in controlling sexually violent behavior.'" ***Id.*** (quoting 42 Pa.C.S.A. § 6358(c)).

designed to protect, is not entirely tangential to the factual burden in Act 21 proceedings." ***Id.*** at 582-83. It reasoned that "[a] primary purpose of Act 21 is to provide continued mental health treatment to a class of juvenile offenders[, and t]he success of mental health treatment, including the willingness of the juvenile to cooperate with treatment, to be open and candid in communicating with the psychotherapist, and to trust in treatment recommendations, is dependent on the confidentiality protected by the privilege set forth in Section 5944." ***Id.*** at 583. Therefore, the "[e]rosion of the privilege can only complicate and adversely affect the fundamental rehabilitative goals of the juvenile system and any treatment ordered under Act 21." ***Id.*** The Court therefore concluded that the constitutional error that was "so basic to a fair trial that application of the harmless error doctrine is inappropriate . . . ." ***Id.***

3. <u>The grant of certification based in part on the juvenile's failure to admit culpability is not subject to harmless error analysis.</u>

The constitutional error here – the juvenile court's violation of Taylor's Fifth Amendment right when deciding whether Taylor should be tried as adult – is a structural error and therefore cannot be declared harmless. The privilege against compulsory self-incrimination is essential to the criminal justice system, for both individuals and society. Like the right at issue in ***McCoy***, it serves not to prevent an erroneous conviction, but "protects some other interest," that is, the foundational principle that a person should not face the "cruel trilemma of self-accusation, perjury, or contempt." ***McCoy***, 138 S.Ct.

at 1511; ***Taylor***, 230 A.3d at 1064 (quoting ***Tehan v. United States ex rel. Shott***, 382 U.S. 406, 414 n.12 (1966).

The Alaska Supreme Court recently reached a similar conclusion. In ***Alvarez-Perdomo v. State***, 454 P.3d 998, 999 (Alaska 2019), the court concluded that compelling a defendant to testify in violation of the Fifth Amendment privilege was structural error. The court reached that conclusion because the privilege protects not only against a mistaken conviction, but also against the defendant "suffering the indignity of being compelled to take the stand to provide information that is against their own interest." ***Id.*** at 1008.[5] That same concern holds sway here, even though the certification court did not compel Taylor to take the stand, but rather held his silence against him. In the end, Taylor was given a Hobson's choice: remain silent in the face of the certification judge's holding his silence against him, or admit guilt at the certification hearing and have the Commonwealth almost certainly use his admission against him at trial.

A juvenile certification hearing is of "great significance" to a juvenile and determines whether the individual will benefit from the juvenile court system policies, or be subject to the criminal justice system. ***Taylor***, 230 A.3d at 1066 (quoting ***Breed v. Jones***, 421 U.S. 519, 535 (1975)). Where a juvenile court relies on a defendant's refusal to admit guilt and uses that refusal as a basis

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[5] ***See also City of Cleveland v. Mincy***, 118 N.E.3d 1163, 1172 (Ohio Ct. App. 2018) (holding trial judge's comment on defendant's failure to testify was structural error); ***cf. State v. Loher***, 398 P.3d 794, 815 (Haw. 2017) (finding structural error under state constitution).

to decide to certify the case to a trial court, the error is a structural error. Such reliance is intertwined with the decision to certify the case, and, similar to a court's failure to inform a jury that it may not draw an adverse inference from a defendant's silence, it can never be harmless.

B. Remedy

We must next determine the proper remedy. We conclude that the only available remedy is this case is dismissal.

1. The Parties' Arguments

Taylor argues that the proper remedy is his discharge. He acknowledges that, ordinarily, where a court abuses its discretion in ruling on a certification hearing, the proper remedy is remand for a new certification hearing. However, such relief is not possible here because Taylor is over the age of 21. He notes that the juvenile court lost jurisdiction over him after he turned 21, and that the trial court cannot obtain jurisdiction over him without a valid certification issued by the juvenile court. Taylor notes that the Commonwealth conceded before the Supreme Court that, if Taylor prevailed on the merits, the proper remedy would be his release. Taylor's Supp. Br. at 38 (quoting N.T., Nov. 19, 2019). He further notes that the concurring and dissenting Justices concluded that the only possible remedy was discharge, since the certification to criminal court was improper and he has aged out of the juvenile court's jurisdiction.

Taylor distinguishes ***Kent v. United States***, 383 U.S. 541, 565 (1966). There, the United States Supreme Court found the juvenile court had erred in

sending a case involving a juvenile to criminal court for trial. However, because the defendant had passed the age of 21, the juvenile court no longer had jurisdiction and the Supreme Court could not remand to juvenile court. Instead, in view of a Washington, DC statute that allowed the federal district court to exercise all of the powers of the District of Columbia juvenile court, the Court remanded to the federal district court.

Taylor argues that Pennsylvania does not have a comparable "safety valve" statute that would allow a case to be heard in the adult system when the defendant aged out of the juvenile system. Taylor's Supp. Br. at 42-43. Taylor notes that the Pennsylvania Supreme Court has found a transfer order to be jurisdictional and that "if the challenged order is improper, jurisdiction does not vest with the receiving court." Taylor's Reply Br. at 15 (quoting ***Commonwealth v. Johnson***, 669 A.2d 315, 321 (Pa. 1995)). He concedes that the Courts of Common Pleas have broad original jurisdiction, but argues that the juvenile division is the part of the Common Pleas to which this matter should be returned. He contends "[t]he Commonwealth does not get to select a different division simply because the constitutional error which led the case to be erroneously heard in the adult system now prevents the case from being returned to the juvenile system because of the happenstance of Mr. Taylor's age." ***Id.*** at 16.[6]

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[6] Taylor further argues that the Commonwealth had already conceded before the Supreme Court that remand and discharge was the only remedy, and it
(Footnote Continued Next Page)

The Commonwealth maintains that the appropriate remedy is to grant a new certification hearing. It claims that, contrary to Taylor's suggestion, ***Kent*** is not distinguishable and the Supreme Court's decision there did not use the phrase "safety valve." Rather, the Commonwealth says, the structure of District of Columbia and Pennsylvania laws in this regard are similar, and the statutes should be interpreted similarly. It further argues, regardless of whether there is a "safety valve," ***Kent*** does not support the limitation placed on it by Taylor. The Commonwealth argues that the Court there did not suggest that "without some 'safety valve' in the D.C. Code, it would have discharged the defendant rather than remand because he had somehow managed to escape accountability in the courts by aging his way into jurisdictional limbo." Commonwealth's Supp. Br. at 17.

The Commonwealth also states that if a "safety valve" were needed, Pennsylvania law provides one, in that the Court of Common Pleas of a judicial district has unlimited original jurisdiction. It points to Article V, Section 5 of the Pennsylvania Constitution, which provides, "There shall be one [C]ourt of [C]ommon [P]leas for each judicial district (a) having such divisions and

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cannot now change course. Taylor notes that this Court has previously admonished the Commonwealth "against the prosecution changing its stance at different stages in litigation in order to gain or maintain an upperhand over the defendant, as "[t]he high purpose of a prosecutor is to do justice, not to hand [sic] onto a conviction." Taylor's Reply Br. at 19 (quoting ***Commonwealth v. Johnson***, 456 A.2d 988, 993 (Pa.Super. 1983)). This argument lacks merit. There is no estoppel because the Supreme Court did not adopt the Commonwealth's alleged concession. Furthermore, the Pennsylvania Supreme Court directed us to determine the proper remedy, after receiving developed advocacy of the parties.

consisting of such number of judges as shall be provided by law . . . and (b) having unlimited original jurisdiction in all cases except as may otherwise be provided by law." ***Id.*** at 18 (quoting Pa.Const. art. V, § 5) (emphasis omitted). It also points to 42 Pa.C.S.A. § 952, which states that "each division of the [Court of Common Pleas] is vested with the full jurisdiction of the whole court." ***Id.*** at 19 (quoting 42 Pa.C.S.A. § 952).

The Commonwealth thus argues that unless the law provides otherwise, the Court of Common Pleas has unlimited original jurisdiction, and "if a specialized assignment of jurisdiction to a particular division is unavailable in that division for whatever reasons, the result is not jurisdictional limbo; the result is unlimited original jurisdiction in the Court of Common Pleas." ***Id.*** at 18. As applied to juvenile matters, it maintains that Pennsylvania law does not "contemplate a scenario where an individual can age into a jurisdictional limbo beyond the reach of the Court of Common Pleas despite breaking the laws of the Commonwealth and victimizing another person." ***Id.*** at 21. It further argues that, if the statutes are unclear, they should be interpreted such that the General Assembly did not intend a result that is absurd, impossible, or unreasonable, and it contends adopting Taylor's argument would achieve such a result.

2. Case Law and Applicable Statutes

The parties discuss ***Kent*** and ***Black***, where the United States Supreme Court and the United States Court of Appeals for the District of Columbia interpreted a Washington D.C. statute. In ***Kent***, a juvenile court waived a

juvenile to adult court without a hearing and without counsel. The United States Supreme Court found that the waiver proceeding violated the juvenile defendant's constitutional rights and that the juvenile court's failure to decide the waiver question "in a valid manner cannot be said to be harmless error." 383 U.S. at 564. The Court then stated that it would "[o]rdinarily . . . reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver." ***Id.*** However, the Court noted that, because he had passed the age of 21, so that he no longer was a juvenile, the defendant argued that the juvenile court no longer had jurisdiction. The Supreme Court stated that "[i]n the circumstances of this case, and in light of the remedy which the Court of Appeals fashioned in ***Black***, . . . we do not consider it appropriate to grant th[e] drastic relief." ***Id.*** at 564-65. Rather, the Court vacated the order and judgment and remanded "the case to the District Court for a hearing *de novo* on waiver." ***Id.*** at 565. If the District Court found waiver inappropriate, it would have to vacate the conviction. ***Id.*** However, if the waiver was proper, the court could proceed with further proceedings. ***Id.***

In ***Black***, which was decided shortly before ***Kent***, the Court of Appeals for the District of Columbia noted that the Government had argued that the "impropriety in the waiver proceedings is not fatal since the District Court is authorized to exercise the powers of the Juvenile Court." 355 F.2d at 107 (citing D.C. Code § 11-914 (1961)). It argued the Code was a "safety valve." ***Id.*** There, the Court stated that the waiver question was one for the Juvenile

Court, which had "the facilities, personnel and expertise for a proper determination of the waiver issue." ***Id.*** It therefore ordered the District Court to remand to the Juvenile Court for a new determination of waiver. ***Id.***[7] The opinion in ***Black*** does not state whether the defendant in that case was a juvenile at the time of remand.

In Pennsylvania, the Juvenile Act governs proceedings involving children. The Juvenile Act "shall apply exclusively to the following: (1) Proceedings in which a child is alleged to be delinquent or dependent. (2) Transfers under section 6322 (relating to transfer from criminal proceedings)." 42 Pa.C.S.A. § 6303(a)(1)-(2). A "child" under the Act includes: "An individual who: (1) is under the age of 18 years; [or] (2) is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years . . . ." 42 Pa.C.S.A. § 6302.

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[7] It provided the following to assist courts in the disposition of juveniles who challenge their waivers without counsel:

> If the juvenile has not yet been brought to trial, the indictment should be held in abeyance pending remand to the Juvenile Court for redetermination of waiver; and if jurisdiction is retained by the Juvenile Court, the indictment should be dismissed. As to all others whose convictions have not become final, the procedure required in the present case should be followed. Since the Government is hereafter on notice of the juvenile's right to counsel upon waiver, any future indictments of juveniles denied this right should be dismissed.

Black, 355 F.2d at 108.

In ***Commonwealth v. E.F.***, the defendant was arrested four months before his 21st birthday for acts he committed when he was between 12 and 14 years old. 995 A.2d 326, 327 (Pa. 2010). The juvenile court held a certification hearing and determined that the juvenile was amenable to treatment in juvenile court and therefore denied certification. ***Id.*** at 328. This Court reversed, concluding the denial of certification did not comport with the Juvenile Act.

The Pennsylvania Supreme Court concluded the juvenile court had not abused its discretion when denying certification. The Court concluded the case was not moot because the juvenile reached the age of majority. ***Id.*** at 332. Rather, "[t]he issue before [the Court] is not whether the trial court currently has jurisdiction to adjudicate [the j]uvenile delinquent; rather, the issue on appeal is whether the Superior Court erred by concluding that the trial court abused its discretion by denying the Commonwealth's certification petition." ***Id.*** The Court noted "[i]t is undisputed that [the j]uvenile was under the age of twenty-one when the trial court entered its order, and the fact that [the j]uvenile has passed the age of twenty-one during the pendency of the appeal does not render the instant case moot." ***Id.*** It reasoned that "[i]t is undeniable that [the j]uvenile will be affected by the outcome of this appeal, as our ruling will determine whether he is prosecuted for sexual assault in adult criminal court." ***Id.*** The Court concluded that the trial court acted within its discretion when it denied certification. ***Id.*** at 333. The Court then reversed the order the Superior Court and re-instated the order of the trial court denying the

Commonwealth's certification petition. ***Id.*** at 334. The Court did not address the steps the court should follow on remand, after re-instatement of the order denying the certification petition.

In ***Johnson***, a juvenile was charged as an adult for murder. 669 A.2d at 317. Following a de-certification hearing, the trial court granted the de-certification motion and transferred the case to the juvenile division. ***Id.*** at 317-18. Johnson was adjudicated delinquent. ***Id.*** at 318. The Commonwealth appealed, challenging the transfer to the juvenile division. The Pennsylvania Supreme Court first addressed whether the transfer order was interlocutory such that the Commonwealth could not appeal until after the adjudication and disposition was final. ***Id.*** The Court noted that a challenge to an order transferring a case from the criminal division to the juvenile division would be asserted by the Commonwealth and therefore the juvenile would not waive a right to be free from double jeopardy, as he would if he challenged the order. ***Id.*** It noted that "if a transfer to the juvenile division is proper, then jurisdiction would vest with the juvenile division, jeopardy would attach at the initiation of the adjudicatory hearing, and subsequent criminal prosecution would be barred." ***Id.*** The Court noted that "[a] problem arises . . . when the transfer is improper. In those instances, the case should have remained in the criminal division and no action should have been taken by the juvenile division." ***Id.*** The Court noted such a scenario raised "questions of whether jurisdiction ever vested with the juvenile division and whether jeopardy attached with the adjudication by that division." ***Id.*** at 318-19; ***see also id.***

at 319 (discussing ***Commonwealth v. Greiner***, 388 A.2d 698 (Pa. 1978) (vacating judgment of sentence and remanding to juvenile division, where certification to criminal court was improper and criminal division "acted without authority to convict and sentence the juvenile")).[8]

The ***Johnson*** Court noted that Section 952 of the Judicial Code governs the divisions of the Court of Common Pleas[9] and provides:

> The divisions of a [C]ourt of [C]ommon [P]leas are administrative units composed of those judges of the court responsible for the transaction of specified classes of business of the court. In a [C]ourt of [C]ommon [P]leas having two or more divisions each division of the court is vested with the full jurisdiction of the whole court, but the

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[8] The ***Johnson*** Court elaborated,

> [A] subsequent adjudicatory hearing would not have been barred, as the juvenile impliedly waived his claim to double jeopardy protection when he challenged the original conviction.
>
> Although a subsequent hearing would be permissible, such a hearing would seem to be unnecessary, as the criminal proceedings would have been more than sufficient to establish delinquency. It should be noted that the converse would not hold true. A juvenile adjudicatory hearing would not satisfy the standards required in a criminal proceeding; therefore, the juvenile would have to be retried, applying the more stringent rules of criminal procedure.

669 A.2d at 319 n.9.

[9] The Pennsylvania Constitution, Article V, Section 5 provides: "There shall be one [C]ourt of [C]ommon [P]leas for each judicial district (a) having such divisions and consisting of such number of judges as shall be provided by law, one of whom shall be the president judge; and (b) having unlimited original jurisdiction in all cases except as may otherwise be provided by law." Pa.Const. art. V, § 5.

> business of the court may be allocated among the divisions of the court by or pursuant to general rules.

Id. at 319 (quoting 42 Pa.C.S.A. § 952).

The ***Johnson*** Court rejected the argument the Commonwealth makes here, that is, that Section 952 means that every division of the Court of Common Pleas has jurisdiction to hear any matter that could be brought in the Court of Common Pleas. ***Id.*** at 320-21. The Court instead read Section 952 as granting "every division of the [C]ourt of [C]ommon [P]leas the jurisdiction to transfer any case properly heard in the [C]ourt of [C]ommon [P]leas to the proper division having subject matter jurisdiction over that particular matter." ***Id.*** at 320.

Important for our purposes here, it concluded that "the Juvenile Act is the type of legislation which exemplifies the legislature's desire to vest limited and **exclusive** jurisdiction in one division of the [C]ourt of [C]ommon [P]leas, in order to meet the special needs of our youth." ***Id.*** (emphasis added). The Court noted that it had previously found "the decision to transfer a case between the juvenile and criminal divisions is jurisdictional." ***Id.***[10] The Court defined "jurisdiction" in the context at issue to mean "the power, right, or authority to interpret and apply the law" or "the limits or territory within which

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[10] ***See Commonwealth v. Moyer***, 444 A.2d 101, 102 (Pa. 1982) (issue of certification is jurisdictional); ***Greiner***, 388 A.2d at 702 (criminal court acted without authority in trying appellant as adult); ***see also Commonwealth v. Leatherbury***, 568 A.2d 1313, 1315 (Pa.Super. 1990) (motion to transfer criminal proceedings to juvenile court presents jurisdictional issues); ***Commonwealth v. Zoller***, 498 A.2d 436, 438 (Pa.Super. 1985) (motion for transfer was jurisdictional issue).

authority may be exercised." ***Id.*** at 321 (citation omitted). In then held that "the transfer order in question is jurisdictional in every sense of the term. Hence, if the challenged order is improper, jurisdiction does not vest with the receiving court." ***Id.***

Alternately, a defendant who committed act as a juvenile, but is not charged until after achieving the age of 21, can be tried as an adult in the criminal court, "[a]bsent some improper motivation for the delay." ***See Commonwealth v. Monaco***, 869 A.2d 1026, 1029-30 (Pa.Super. 2005); ***see also Commonwealth v. Anderson***, 630 A.2d 47, 48-51 (Pa.Super 1993). In ***Monaco***, the defendant was charged when he was 22 years old with crimes he allegedly committed when he was a juvenile. 869 A.2d at 1028. The Commonwealth initiated the charges approximately two months after receiving notice from the victims of the allegations. We concluded that, because there was no improper motivation, the defendant could be tried as an adult. ***Id.*** at 1030.

3. Proper Remedy

Here, we are constrained to conclude the only available remedy is discharge. When deciding the remedy available in ***Kent***, the United States Supreme Court interpreted a Washington D.C. statute, and did not address what the proper remedy would be under Pennsylvania law.

In Pennsylvania, the juvenile division has exclusive jurisdiction to determine whether to transfer a matter to the criminal division. 42 Pa.C.S.A. § 6303(a); ***Johnson***, 669 A.2d at 321. The juvenile division, however, no

longer has jurisdiction over Taylor, who is over the age of 21 and no longer a "child" under the Act. 42 Pa.C.S.A. §§ 6303(a); 6302. Further, because certification was not proper, the criminal court lacked jurisdiction to try Taylor. ***See Johnson***, 669 A2d at 321; ***Greiner***, 388 A.2d at 702. Although it could have done so, the General Assembly did not provide a mechanism for a court to have jurisdiction to hold a certification hearing where a certification determination was reversed on appeal, but a juvenile turned 21 during the appellate process. We do not have the authority to create such jurisdiction.

Further, the ***Anderson***/***Monaco*** exception cannot apply here, as the Commonwealth did not first institute charges after Taylor turned 21. The Commonwealth filed a delinquency petition while Taylor was a Child and when he remained subject to the Juvenile Act.

III

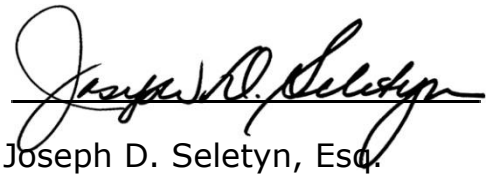
In sum, we conclude that the constitutional error at issue in this case—a juvenile court's reliance on the defendant's refusal to admit guilt when deciding to certify the case to the trial court—is not amenable to harmless error analysis. We further conclude that, under Pennsylvania's legal framework, where a reversible error occurs at the certification hearing, and the defendant turns 21 before the appellate process is complete, dismissal is the only available remedy.

Judgment of sentence reversed. Case remanded. Jurisdiction relinquished.

Judge Musmanno joins the memorandum.

Judge Bowes concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/29/2021

Appendix II

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, APPELLANT,	:	NO. 40 MAP 2022
v.	:	
	:	
NAZEER TAYLOR	:	
APPELLEE.	:	

CERTIFICATION OF COMPLIANCE

I, Todd N. Barnes, Montgomery County Assistant District Attorney, do hereby certify that the within brief in the above-captioned matter, filed today, contains 13,934 words, in compliance with Pa.R.A.P. 2135.

Respectfully submitted,

/S/ TODD N. BARNES

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TODD N. BARNES
ASSISTANT DISTRICT ATTORNEY

Appendix III

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, APPELLANT,	:	NO. 40 MAP 2022
v.	:	
	:	
NAZEER TAYLOR	:	
APPELLEE.	:	

CERTIFICATE OF COMPLIANCE

I, Todd N. Barnes, certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

/S/ TODD N. BARNES

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TODD N. BARNES
ASSISTANT DISTRICT ATTORNEY