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IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

40 MAP 2022

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

NAZEER TAYLOR, Appellee

BRIEF OF AMICUS CURIAE OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA IN SUPPORT OF THE COMMONWEALTH

Appeal by the Commonwealth from the July 29, 2021 decision of the Superior Court at 856 EDA 2017, reversing judgment of sentence for rape of a child and related offenses and instructing the Court of Common Pleas of Montgomery County, at CP-51-CR-0003166-2014, to dismiss with prejudice.

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Is a Fifth Amendment violation "structural error"?

(Answered in the affirmative by the Superior Court).

2. Does the Juvenile Act create a legal vacuum in which no court exists that has jurisdiction after a defendant has "aged out"?

(Answered in the affirmative by the Superior Court).

INTEREST OF AMICUS CURIAE

The Attorney General of Pennsylvania has a special interest in the ongoing development of the criminal law of the Commonwealth, including construction and application of constitutional and statutory law governing criminal offenses and prosecutions. The Attorney General is "the chief law enforcement officer of the Commonwealth," and is authorized "to investigate any criminal offense which he has the power to prosecute," as well as to "convene and conduct investigating grand juries." 71 Pa.C.S. § 732-206. In addition to directly investigating and prosecuting certain crimes, the Office of the Attorney General provides assistance and support to local District Attorneys upon request. Such assistance may include representation of the Commonwealth in any and all stages of criminal proceedings.

Certification pursuant to Pa.R.A.P. 531(b)(2):

No person or entity other than the amicus paid in whole or in part for the preparation of this brief, or authored this brief, in whole or in part.

STATEMENT OF THE CASE

Defendant, who repeatedly raped a child, seeks outright discharge due to a Fifth Amendment error in his juvenile certification proceeding. But contrary to the finding of the Superior Court, use-of-silence errors are not structural. The error was harmless, but if it was not, discharge is not the remedy. The Juvenile Act does not create a separate court with exclusive jurisdiction, such that a court with jurisdiction no longer exists after the Act ceases to apply. The Superior Court should be reversed.

Defendant, then age 15, repeatedly raped his 11-year-old foster brother. Whenever the child victim, A.O., was in his bedroom, defendant would enter and force him to perform oral or anal sex. When the child was in the bathroom defendant would enter and inflict oral sex, anal sex, or both. Defendant made sure his victim knew he would harm him if he told anyone. After defendant moved out, A.O. told his foster mother about the sexual abuse.

The Commonwealth moved to transfer defendant's case for criminal prosecution. The victim and his foster mother testified in the April 2014 certification hearing. Based on this testimony, the court made a threshold determination that a *prima facie* case was established that defendant—who was by now 17 years old—had committed the acts in question. Because he had a prior

adjudication and was charged with enumerated felonies, under the Juvenile Act the burden of proving his amenability to treatment in the juvenile system shifted to defendant.

Defendant's expert, Dr. Nicole Machinski, opined that he was amenable to treatment, but admitted she did not review all available evidence. The court found that Dr. Machinski's testimony was riddled with inconsistences. Moreover, she agreed that burglary, using drugs despite being under court supervision, and stealing from relatives—all conduct displayed by defendant—is antisocial behavior.

The Commonwealth's expert, Michael Yoder, relied on a psychiatric evaluation of defendant as well as interviews with probation officials and other professionals who had interacted with him. Mr. Yoder found that defendant's actions compared unfavorably with those of a typical juvenile sex offender in their seriousness and degree, and that his criminal behavior was increasing in severity. He opined that defendant could not be successfully treated within the remaining time afforded by the Juvenile Act. The court credited that testimony. It also concluded, however, at several points in its analysis, that defendant's failure to admit guilt weighed against his amenability.

On June 20, 2016, following trial, a jury convicted defendant of rape of a child and numerous related offenses. On January 31, 2017, the court sentenced him to an aggregate term of ten to twenty-five years' imprisonment followed by ten years' probation.

On appeal to the Superior Court defendant argued that the certification court violated his Fifth Amendment right against self-incrimination because it took into consideration his refusal to admit guilt. 2018 WL 4290127,*4. The Superior Court agreed ("This was error"), but concluded—albeit without using the term—that the error was harmless. It noted that certification is reviewed under an abuse of discretion standard, defendant had the burden of proof, and the court had properly weighed the remaining factors, all of which supported certification. *Id*., *6.

Defendant's appeal to this Court asked, again, whether his Fifth Amendment rights had been violated in the certification proceeding. *Commonwealth v. Taylor*, 230 A.3d 1050, 1053 (Pa. 2020). Though the Superior Court had already so held, this Court considered the question *de novo* and reached the same conclusion. It remanded for the Superior Court to determine if the error was "structural" and so could not be harmless, and if necessary to decide what relief is available. *Id*. at 1073.

On remand, the Superior Court ruled that the error was structural. In support of this conclusion it explained that the Fifth Amendment privilege is "essential to the justice system." It added that the privilege serves interests other than preventing an erroneous conviction, and that a certification hearing is "of great significance." 2021 WL 3206496, *8.

The Superior Court further found that the only possible remedy was complete discharge. It reasoned that "the juvenile division has exclusive jurisdiction to determine whether to transfer a matter to the criminal division." But that division "no longer has jurisdiction over Taylor, who is over the age of 21 and no longer a "child" under the [Juvenile] Act." At the same time, since he was certified erroneously, "the criminal court lacked jurisdiction to try Taylor." The result, the Court said, is that no court with jurisdiction exists, and "dismissal is the only available remedy." *Id*., *13.

The Superior Court is incorrect on both questions. Improper use of silence errors are not structural. Further, the court of common pleas clearly has jurisdiction, as established by the state constitution and the Juvenile Act itself.

The Superior Court should be reversed.

SUMMARY OF ARGUMENT

Fifth Amendment reference to silence errors may be harmless. For example, when an accused has freely given a written confession, noting his prior silence is harmless. In contrast, structural error is, by definition, categorical. Because improper references to silence have repeatedly been held to be harmless, they are not structural errors. The Superior Court erroneously relied on the importance of the right, but importance is not the issue—all constitutional errors are important, but few are structural. The error here was not structural, and may be harmless.

If the error was not harmless, the result would not be a jurisdictional dead end. The Superior Court posits a juvenile court with exclusive and perpetual jurisdiction, but in fact, in Pennsylvania there *is* no juvenile "court." And even if it existed, juvenile "jurisdiction" would be temporary. The Act itself specifies that it ceases to apply at age 21. Common pleas jurisdiction has no time limit. The appropriate remedies would be a retrospective certification hearing or a new trial.

The Superior Court should be reversed.

ARGUMENT

1. Fifth Amendment errors are not structural.[1]

All constitutional rights are highly important. They derive from the supreme law of the land. How can violating constitutional rights be harmless? Aren't *all* constitutional errors structural?

Once, every error was structural. Trials were "surrounded by booby traps." Appellate courts were "impregnable citadels of technicality" and litigation "a game for sowing reversible error in the record" only to repeat "the same matching of wits" on retrial. Only after decades of hard-won experience did appellate courts come to prefer "to substitute judgment for automatic application of rules." *Kotteakos v. United States*, 328 U.S. 750, 759-760 (1946).

This is the modern doctrine of harmless error. *See* Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 Mo. L. Rev. 965, 969-970 (2020) (herein, "Henderson"). This doctrine "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence" and "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on

[1] The Fifth Amendment guarantees multiple rights. In this brief all references to the Fifth Amendment concern improper use of silence under the self-incrimination clause.

the virtually inevitable presence of immaterial error." Further, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986), *citing* Traynor, *The Riddle of Harmless Error*, 50 (1970) (other citation omitted); *United States v. Roy*, 855 F.3d 1133, 1142 (11th Cir. 2017) ("The harmless error rule serves vital interests, chief of which is conserving scarce judicial resources by avoiding pointless retrials. Applying the rule to determine whether error, including constitutional error, affected the result of a trial is also essential to avoid a "sporting theory of justice" and a regime of gotcha review").

As late as 1963 the United States Supreme Court deemed harmless error "impermissible" when it came to constitutional rights. *Lynumn v. Illinois*, 372 U.S. 528, 537 (1963). But in 1967 the Court decided *Chapman v. California*, 386 U.S. 18, 21-23 (1967), and expressly rejected the view that "all federal constitutional errors … must always be deemed harmful." *Chapman* instead ruled that, while "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless,"[2] the harmless error doctrine should otherwise govern because it serves the "very useful purpose" of avoiding "setting aside convictions

[2] The Court gave three examples, *id*. at n.8: *Payne v. State of Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Tumey v. State of Ohio*, 273 U.S. 510 (1927) (impartial judge).

for small errors or defects that have little, if any, likelihood of having changed the result of the trial."

After *Chapman* application of the harmless error doctrine to constitutional issues became "robust." Henderson, 972. Two examples are significant. In *Milton v. Wainwright*, 407 U.S. 371, 372-373 (1972), the defendant argued that admitting statements he made to an investigator who posed as a fellow prisoner violated the Fifth Amendment. The Court held that the error was harmless because the jury "was presented with overwhelming evidence of petitioner's guilt, including no less than three full confessions that were made by [him] prior to his indictment." In *United States v. Hasting*, 461 U.S. 499, 512 (1983), the Court reversed the grant of a new trial where the prosecutor, in what the Circuit Court found was a "clear constitutional violation of the defendants' Fifth Amendment rights," relied on the defense failure to rebut the testimony of the victims. The Supreme Court found the error harmless based on the "overwhelming evidence of guilt and the inconsistency of the scanty evidence tendered by the defendants."[3]

[3] This Court applied the harmless error doctrine to a Fifth Amendment claim in *Commonwealth v. Henderson*, 317 A.2d 288, 291 (Pa. 1974). Citing *Chapman*, it conducted a harmless error analysis where the prosecutor "brought to the attention of the jury the appellant's failure to testify." Instantly, in the preceding appeal this Court applied the Fifth Amendment. There appears to be no claim that the defendant had greater rights under the state constitution. *See Commonwealth v. Bishop*, 217 A.3d 833, 841 (Pa. 2019) (parallel federal and state constitutional

In *Rose v. Clark*, 478 U.S. 570, 578-579 (1986), the Court explained that "while there are some errors to which *Chapman* does not apply," structural errors "are the exception and not the rule." To the contrary, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis … As we

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provisions are treated as coterminous where the appellant has done nothing to distinguish between them). Because this case concerns the Fifth Amendment, it is irrelevant—contrary to the Superior Court's analysis—that this Court excluded harmless error in applying the psychotherapist privilege statute in *Interest of J.M.G.*, 229 A.3d 571, 583 (Pa. 2020). *Commonwealth v. Lewis*, 598 A.2d 975, 983 (Pa. 1991) (mandating reversal for failure to give requested no adverse inference instruction), cited by the Superior Court, was explicitly based on the state constitution and not the federal constitution. Similarly, the Superior Court also erroneously relied on a state court decision that plainly relied on that state's constitution, *Alvarez-Perdomo v. State*, 454 P.3d 998, 1003 (Alaska 2019) ("Alaska's constitutional protections are not limited by the reach of their federal counterparts"). Moreover, courts should be highly reluctant to classify errors as structural. *See Sherman v. Smith*, 89 F.3d 1134, 1138 (4th Cir. 1996):

> Correctly applied, harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. Expanding the list of structural errors, however, is not mere legal abstraction. It can also be a dangerous endeavor. There is always the risk that a sometimes-harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk, judges should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby requires the reversal of every criminal conviction in which the error occurs), the court must be certain that the error's presence would render every such trial unfair.

have repeatedly stated, the Constitution entitles a criminal defendant to a fair trial, not a perfect one."

In *Arizona v. Fulminante*, 499 U.S. 279, 306-310 (1991), the Court elaborated upon the presumption that errors are not structural and reiterated that "most constitutional errors can be harmless." Trial errors may be reviewed for harmlessness because they can be "assessed in the context of other evidence." Structural errors, such as denial of counsel or a biased judge, cannot be so reviewed because they implicate the "entire conduct of the trial from beginning to end," amounting to a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Error does not become structural merely because the right involved is important, or because the proceeding is important, or even because the error could be "devastating." *Id*. at 312 (involuntary confession may have "a more dramatic effect" than other errors and be "devastating to a defendant," but such error is unlikely to be harmless).[4] Notably, the Court found it "evident," from comparing ordinary errors with structural errors, "that involuntary statements or confessions"—Fifth Amendment violations—"belong in the former [non-structural] category." *Id*. at 310.

[4] Even in the capital sentencing context the Supreme Court has applied a harmless error analysis. *See, e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (reversing death sentence for constitutional error where the state did not show that the error was harmless); *Skipper v. South Carolina*, 476 U.S. 1, 7-9 (1986) (same).

In other words, Fifth Amendment errors, such as the improper use of silence in this case, are not structural. Instead such improper use is a "trial error" similar to the erroneous admission of other types of evidence. *Id*.[5]

In *Neder v. United States*, 527 U.S. 1, 14 (1999), the Court explained that the structural error analysis does not proceed on a "case-by-case" basis. Rather, "a constitutional error is either structural or it is not," and structural errors are established under a "categorical approach." Because references to silence have readily been held to be harmless (such as when the accused has freely confessed guilt), such errors are not structural.

Recently the U.S. Supreme Court suggested more refined rationales for its structural error jurisprudence.[6] But it has never deviated from its ruling in *Neder*

[5] Here the "trial error" occurred at a certification hearing; but the interests involved in a certification hearing obviously are not greater than those at trial.

[6] *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), proposed three "broad rationales," *id*. at 1908, for classifying types of error as structural, but did so in *dicta*. The issue in that case was ineffective assistance. *See id*. at 1916 (Alito, J., with Gorsuch, J., concurring) (ineffective assistance "does not ask whether an error was harmless but whether there was an error at all, for unless counsel's deficient performance prejudiced the defense, there was no Sixth Amendment violation in the first place"); *see also State v. Ramos*, 478 P.3d 515, 524-525 (Or. 2020) ("*Weaver* does not hold that any of those conditions is sufficient to make an error structural. … although *Weaver* sets out important factors to consider, it does not offer a clear rubric for evaluating whether an error is structural"). *Weaver* also does not overrule any prior decisions.

that errors do not become structural on an *ad hoc* basis. "[A] constitutional error is either structural or it is not." *Id*. Nor has it departed from its decisions—*Milton v. Wainwright*, *United States v. Hasting*, *Arizona v. Fulminante*—holding that Fifth Amendment errors of the kind at issue in this case are not structural.

The facts here illustrate the point. The certification court credited expert testimony that defendant could not be rehabilitated in the time remaining under the Juvenile Act. Further, the error occurred only after a prima facie case had been established and the burden of proving amenability to treatment was on the defendant. Ordinary harmless error analysis assumes an error at trial, and so requires the prosecution to demonstrate harmlessness beyond a reasonable doubt. *Commonwealth v. Story*, 383 A.2d 155, 162 (Pa. 1978) (explaining that the harmless error standard "is commensurate with the standard of proof in criminal trials"). But where error occurred in a proceeding in which the burden was on the defendant, the central question should be whether the defense burden was met notwithstanding the error. A defendant has no constitutional right to be prosecuted within the juvenile system, which is a purely statutory creation. *Commonwealth v. Cotto*, 753 A.2d 217, 223 (Pa. 2000); *Commonwealth v. Williams*, 522 A.2d 1058, 1063 (Pa. 1987).

The error was not structural, and so could be harmless. The Superior Court's ruling to the contrary should be reversed.

2. The common pleas court has jurisdiction.

Having erroneously concluded that the error was structural, the Superior Court additionally erred in holding that the only possible remedy is discharge. It reasoned that the juvenile division had "exclusive jurisdiction" at the certification stage when Taylor was 17, but "no longer has jurisdiction" because he is now over 21. But since he was certified erroneously, the reasoning goes, the criminal court does not have jurisdiction either. The result, seemingly, is a legal vacuum in which no court with jurisdiction remains. Thus, if the error of the certification court was not harmless, the only possible result is dismissal.

The Superior Court's reasoning is flawed. First, it proceeds from the false premise that the Juvenile Act creates a separate juvenile court with its own exclusive jurisdiction. Second, even if separate juvenile and criminal jurisdictions existed, the court of common pleas would still have jurisdiction.

A. There is no separate juvenile court jurisdiction.

Article V § 5(b) of the state constitution establishes that the common pleas court has "unlimited original jurisdiction in all cases except as may otherwise be provided by law." Under Article V the common pleas court was "reconstituted" to include the former jurisdiction of "the former courts of common pleas," including "juvenile courts." *Commonwealth v. Wadzinski*, 401 A.2d 1129, 1132 (Pa. 1978).

Article V § 8 states that "The General Assembly may establish additional courts or divisions of existing courts, as needed, or abolish any statutory court or division thereof." 42 Pa.C.S. § 931(a) additionally provides that "[e]xcept 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[.]"

The question, then, is whether a statute modifies the unlimited jurisdiction of the court of common pleas by establishing a separate juvenile court and vesting it with its own exclusive jurisdiction.

There is no such statute. The Juvenile Act certainly is not. To the contrary, that provision makes clear that it creates no court or division. 42 Pa.C.S. § 6301(a) announces the creation of the Juvenile "Act." The accompanying statement of the Joint State Government Commission (that is, "[t]he entire membership of the House of Representatives and the entire membership of the Senate," 46 Pa.S. § 65) explains that the word "Act" and not "Court Act" was chosen "in view of the [then] recent consolidation of original jurisdiction solely in the several courts of common pleas" in Article V § 5. In other words, the General Assembly specifically intended that the Juvenile Act does *not* create a separate juvenile *court* in addition to, or within, the common pleas court.

Other parts of the Act confirm this. 42 Pa.C.S. § 6302, "Definitions," specifically defines "Court" as "The court of common pleas." 42 Pa.C.S. § 6322 and § 6355 respectively govern transfers to and from criminal "proceedings," not criminal "court." Under § 6322 the transfer goes "to the division or a judge of the court"—court is defined as the court of common pleas—"assigned to conduct juvenile hearings." Section 6355(b) specifies that transfer to criminal proceedings "terminates the applicability of this chapter over the child with respect to the delinquent acts alleged in the petition." It terminates "applicability" and not "jurisdiction" because the child remains in the jurisdiction of one and the same court—the court of common pleas—before and after the transfer. The transfer goes not to a different court but "to the division or a judge" of "the court," *i.e.*, the court of common pleas, "assigned to conduct criminal proceedings." Section 6355(f) states that "The decision of the court to transfer or not to transfer the case shall be interlocutory." Again, "the court," as defined in § 6302, is not the "juvenile court" but the common pleas court. The Juvenile Act does not create separate common pleas and juvenile courts. The juvenile court *is* the court of common pleas.

Under Article V, § 5(b), creating a separate juvenile court or division with its own jurisdiction requires an act of the General Assembly. Because no such act exists, under Article V the court of common pleas has "unlimited original jurisdiction" to apply the Juvenile Act *and* hear all criminal prosecutions.

The authority cited by the Superior Court for its finding of a supposed jurisdictional vacuum is not a statute, but a decision of this Court, *Commonwealth v. Johnson*, 669 A.2d 315, 320 (Pa. 1995). *Johnson* said that "the decision to transfer a case between the juvenile and criminal divisions is jurisdictional." But the jurisdictional discussion in *Johnson* is *dicta*.[7]

Johnson was 16 and was charged as an adult, but was granted decertification. The Commonwealth appealed that order, but did not do so until after Johnson had been adjudicated delinquent.[8] The Superior Court *en banc* affirmed and the Commonwealth appealed to this Court. Among the issues in the case was the Commonwealth's claim that it had properly waited to appeal the decertification order until after Johnson was finally adjudicated.

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[7] The Superior Court also cited *In re E.F.*, 995 A.2d 326 (Pa. 2010), but that case does not address jurisdiction. E.F. appealed the reversal of a decertification order. The Commonwealth argued that because E.F. had turned 21 the Juvenile Act no longer applied and his claim was moot. This Court rejected that argument, explaining that the issue was "not whether the trial court currently has jurisdiction to adjudicate Juvenile delinquent" but whether the Superior Court erred in its decertification ruling. *Id*. at 332. *E.F*. did not discuss the jurisdictional consequences of reinstating the certification order, or imply that doing so would terminate all jurisdiction.

[8] Precise dates were not given, but the Superior Court's opinion made clear that the resulting issue was "whether the Commonwealth has filed its appeal in a timely manner." *Commonwealth v. Johnson*, 645 A.2d 234, 237 (Pa. Super. 1994) (*en banc*).

Johnson held that the decertification order was interlocutory and "immediately appealable as of right" by the Commonwealth under Pa.R.A.P. 311(d). *Id*. at 323. But in *Johnson* the Commonwealth did *not* appeal "immediately." While it waited for a final adjudication order, its appeal time expired. *Johnson's* Rule 311(d) decision thus disposed of the entire case, because it made the Commonwealth's appeal in that case untimely. Pa.R.A.P. 903(a) (notice of appeal shall be filed "within 30 days after the entry of the order from which the appeal is taken"); *Commonwealth v. Williams*, 893 A.2d 147, 149 (Pa. Super. 2006) (interlocutory order appealable under Rule 311(d) must be appealed in 30 days). The appeal in *Johnson* was invalid from its inception.

The text in *Johnson* that deemed a transfer order under the Juvenile Act "jurisdictional in every sense" was therefore *dicta*. Johnson argued that the Commonwealth's appeal was barred by double jeopardy, a claim *Johnson* countered by treating the juvenile and criminal divisions of the court of common pleas as if they were separate courts, each with its own exclusive jurisdiction—since the transfer order was "jurisdictional in every sense," *Johnson* said, if the transfer order was invalid, jeopardy never attached. *Id*. at 321. But that statement was *dicta*, because the untimeliness of the Commonwealth's appeal meant there was no appellate jurisdiction to consider the double jeopardy argument in the first instance. Indeed, *Johnson* went on to say that the transfer order *was* valid. That

conclusion made discussion of the double jeopardy-jurisdictional argument entirely superfluous, and further confirms that it was *dicta*.

That *dicta*, moreover, was incorrect. As already noted, under Article V, § 5(b) modifying the "unlimited original jurisdiction" of the common pleas court requires a statute. The *Johnson dicta* identified no such statute.

In fact, the *Johnson dicta* cited a statute that does just the opposite. 42 Pa.C.S. § 952 states that "divisions of a court of common pleas are administrative units" and "each division of the court is vested with the full jurisdiction of the whole court[.]" Thus, while under § 952 the common pleas court may establish divisions—such as criminal and juvenile divisions—that does not subdivide its jurisdiction.

The *dicta* in *Johnson* posited a "more reasonable reading of section 952" in which each division has its own "subject matter jurisdiction." *Johnson* at 320. But that *contradicts* the statute. The divisions to which § 952 refers are "administrative," each having "the full jurisdiction of the whole court."

The *Johnson dicta* explained that its reading of § 952 recognized that common pleas jurisdiction "is defined and limited by legislation," citing (in footnote 10) Article V § 5(b). But in fact, Article V defines common pleas jurisdiction as "original and unlimited … *except* as may be provided by law," and §

952 is not such a law. It says divisions of the common pleas court are "administrative."

"Clearly," the *Johnson dicta* added, "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." But as already shown, the Juvenile Act establishes the opposite. The Act makes clear it is not creating a court, and instead defines "court" as the common pleas court. It says nothing about creating divisions or granting them jurisdiction, much less "exclusive" jurisdiction.

The *dicta* in *Johnson* also cited a series of prior decisions as supposed support for its assertion that application of the Juvenile Act is jurisdictional. But those cases do not withstand scrutiny. *Commonwealth v. Pyle*, 342 A.2d 101, 103 n.4 (Pa. 1975), held that a guilty plea does not waive decertification error because the Juvenile Act aims to "spare from adult punishment certain youths" notwithstanding guilt, and because decertification is interlocutory and not appealable before the plea. *Pyle* did not hold that the Juvenile Act created a juvenile court with exclusive jurisdiction. *Commonwealth v. Moyer*, 444 A.2d 101, 102 (Pa. 1982) stated that decertification could be appealed following a guilty plea because "certification is jurisdictional" based on footnote 4 of *Pyle*. But as already observed, that footnote said no such thing. Footnote 4 in *Pyle* did remark that a

plea waives "non-jurisdictional" defects "[a]bsent unusual circumstances," but then it *cited* unusual circumstances—that allowing the appeal was consistent with the purpose of the Juvenile Act. Thus, contrary to what *Moyer* assumed, *Pyle* did not imply that defects in a guilty plea are "jurisdictional" because the plea occurred in a delinquency prosecution. *Commonwealth v. Greiner*, 388 A.2d 698, 702 (Pa. 1978) ruled that Greiner should have remained in the "jurisdiction" of "the juvenile court" and that, being still under 21, he should return to "the juvenile court." But the existence of a separate juvenile "court" with its own jurisdiction was not an issue or a holding in that case. The same result would apply if the words "jurisdiction" and "court" were replaced with "authority" or "division."

The fundamental premise of the Superior Court's jurisdictional vacuum theory is wrong. The juvenile court and the common pleas court are one and the same. The common pleas court always had, and continues to have, jurisdiction.

B. Even if it once did not, the common pleas court has jurisdiction now.

Even if the *Johnson dicta* was right to treat divisions of the common pleas court as separate courts (though it was not), the common pleas court would still have jurisdiction. The *dicta* erroneously treated divisions of the common pleas court as if each had its own jurisdiction. But the *dicta* made no claim that these forms of jurisdiction were permanent or immutable.

Deeming the Juvenile Act jurisdictional does not alter the fact that, under 42 Pa.C.S. § 6302, the Act ceases to apply to an individual who reaches the age of 21. Nothing in the Act suggests that this age provision functions as a statute of limitations, or does anything other than set the termination point of the Act's applicability. Rather, as this Court explained in *Commonwealth v. Wadzinski*, 401 A.2d at 1132, under Article V "if the matter is justiciable, there is jurisdiction in the court of common pleas to hear it, and in a multi-division court the remedy for bringing the case in the wrong division is not a dismissal, but a transfer of the matter to the correct division." Thus, if one division is "wrong" there is another that is right; there is still "jurisdiction in the court of common pleas." The fact that the Juvenile Act provides for offenders to be transferred to and from the criminal domain confirms that juvenile "jurisdiction" is concurrent and subsumed within the jurisdiction of the common pleas court.[9]

[9] In two Superior Court cases, *Commonwealth v. Anderson*, 630 A.2d 47 (Pa. Super. 1993) and *Commonwealth v. Monaco*, 869 A.2d 1026 (Pa. Super. 2005), offenders committed crimes when under 21, but could not be charged until over 21. The Court correctly concluded that the Juvenile Act had simply ceased to apply, not that it created a jurisdictional vacuum. In this case, however, the Superior Court concluded that *Anderson* and *Monaco* did not control because here the charges were brought while defendant was under 21. *See* 2021 WL 3206496 at *13. But all that is proven when an under-21 offender is charged under the Juvenile Act is that the Act applies *while it applies*. Nothing in the Act suggests that when an under-21 offender is charged, the Act becomes controlling in perpetuity.

Not only does the Superior Court's construction of the Juvenile Act as a dead-end destination lack support in any of the Act's provisions; it denies the plainly-stated goals of the Act itself. 42 Pa.C.S. § 6301(b)(2) (purposes of the Act include "protection of the public interest," "protection of the community" and "the imposition of accountability for offenses committed"). Under the Act, the age of 21 is when adult accountability begins, not the age at which all accountability ends. States with separate juvenile courts have rejected the "home free" argument that termination of an offender's eligibility for juvenile treatment terminates all jurisdiction. *See State v. Barren*, 279 P.3d 182, 184 (Nev. 2012) ("some court always has jurisdiction over a criminal defendant").[10]

[10] *State v. Hodges*, 63 P.3d 66, 68-69 (Utah 2002) (statute giving juvenile court jurisdiction over person younger than 21 did "not limit the general grant of jurisdiction made to the district court ... so as to preclude its jurisdiction over proceedings against persons [21] years of age or older"); *State ex rel. Elliot v. Dist. Ct. of Sixth Jud. Dist., In & For Sweet Grass Cty*., 684 P.2d 481, 484 (Mont. 1984) (rejecting argument that because offender could no longer be prosecuted as a juvenile "no court has jurisdiction over the offenses and the charges must be dismissed"); *Matter of S. V.'s Welfare*, 296 N.W.2d 404, 407 (Minn. 1980) (rejecting "unreasonable and absurd" claim that because offender was over 21 "he now cannot be prosecuted anywhere"; "The legislature does not intend a result that is absurd"); *State v. Bradley*, 580 P.2d 640, 642 (Wash. App. 1978) ("Want of jurisdiction of the juvenile court merely precludes acts of that court. It does not invalidate an otherwise valid act of the superior court which properly had jurisdiction of the subject matter and the person"); *Trujillo v. State*, 447 P.2d 279, 280 (N.M. 1968) (district court had jurisdiction to try defendant who had reached 21 because "the district court is one of general jurisdiction" while juvenile court is limited by statute to persons under 21); *State v. Little*, 407 P.2d 627, 630 (Or. 1965) (rejecting "absurd" argument that "because a person over twenty-one cannot

In summary, in Pennsylvania there is no such thing as juvenile jurisdiction. The juvenile court and the court of common pleas are one and the same. Here, because the error is not structural, it could be harmless. Should the error not be harmless, the question would become what remedy is proper. The Superior Court was correct in deciding that a new certification hearing is not possible, because the Juvenile Act no longer applies. But that does not mean the case should be dismissed. The proper remedy would not be dismissal but a new trial.[11]

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be treated as a juvenile" defendant could "never be prosecuted as an adult for crimes committed before he turned sixteen"); *D'Urbano v. Commonwealth*, 187 N.E.2d 831, 835 (Mass. 1963) ("[t]he statute [did] not intend, for example, that a person who committed murder at [16] and is apprehended at [23] should be beyond the reach of criminal statutes").

[11] In *Commonwealth v. Armolt*, 86 MAP 2021, an amicus brief in support of the defendant-appellant raised a waived equal protection claim. In anticipation of a similar event, that claim is briefly addressed here. Armolt's amicus imagines a child being raped by three under-21 assailants. The first two are adjudicated under the Juvenile Act, deemed (however improbably) rehabilitated, and suffer no further penalty. The third is apprehended at age 40, prosecuted, and sentenced. The *Armolt* defense amicus argues there is "no rational basis to treat these identically situated children differently" (*Armolt* amicus brief of Philadelphia Public Defender in support of appellant, 11-12). But of course, these imaginary offenders are not "identically situated" at all. The Juvenile Act, by its plain terms, applies only until an accused reaches the age of 21. There is nothing in the Act to support the notion that its applicability is frozen in time based on age at the time of offense. The Juvenile Act results from a legislative judgment that the perishable state of youth facilitates rehabilitation. Thus, the Act applies to a 20-year-old and does not apply to a 40-year-old because their characteristics are different. Treating *different* individuals differently raises no equal protection issue. *Reed v. Reed*, 404 U.S. 71,

CONCLUSION

For these reasons, this Court should reverse the order of the Superior Court and affirm the judgment of sentence, or remand for further proceedings.

Respectfully submitted,

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75 (1971) ("the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways"). To claim that this denies equal protection is to say, in effect, that the temporary and changeable nature of youth must be ignored, that a juvenile justice system may be based only on age at the time of the offense, and that prosecution must be barred when the actor ages. If that were so, the likely legislative response would not be to discharge aged offenders, but to require all cases to be prosecuted in the adult criminal system, as was the practice before the juvenile system was enacted.

CERTIFICATE OF COMPLIANCE WITH RULE 531

This amicus brief complies with Pa.R.A.P. 531(b)(3) (length of amicus briefs), as it contains fewer than 7,000 words. *See* Pa.R.A.P. 2135(b) ("the cover of the brief and pages containing the table of contents, tables of citations, proof of service and any addendum containing opinions, signature blocks or any other similar supplementary matter … shall not count against the word count limitations").

CERTIFICATE OF COMPLIANCE WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*, which require that confidential information and documents be filed differently than non-confidential information and documents.

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