

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

NAZEER TAYLOR,
Appellee.

**BRIEF FOR *AMICUS CURIAE*
PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION
IN SUPPORT OF THE COMMONWEALTH OF PENNSYLVANIA**

Appeal from the Order dated July 29, 2021, of the Superior Court, No. 856 EDA 2017, vacating the judgment of sentence entered January 31, 2017, in the Court of Common Pleas, Montgomery County, at CP-46-CR- 0003166-2014.

MAUREEN FLANNERY SPANG
LEGAL RESOURCE PROSECUTOR
Pennsylvania District Attorneys
Association

MICHAEL PIECUCH
Immediate Past PRESIDENT
Pennsylvania District Attorneys
Association

Pennsylvania District Attorneys Association
2929 North Front Street
Harrisburg, PA 17110

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STATEMENT OF AMICUS CURIAE

The Pennsylvania District Attorneys Association is the only organization representing the interests of its member District Attorneys and their assistants in the various counties in the Commonwealth of Pennsylvania. This Court's review of issues involving the jurisdiction of the Courts of Common Pleas and/or the application of the harmless error doctrine is of special interest to district attorneys throughout Pennsylvania.

CERTIFICATION PURSUANT TO Pa.R.A.P. 531(b)(2)

No other person or entity has authored any portion of the within brief, in whole or in part, nor have any funds been expended by any person or entity in the preparation and filing of this brief outside of the Association.

STATEMENT OF THE QUESTIONS PRESENTED

(1) 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?

(2) 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 vests 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?

STATEMENT OF THE CASE

The Commonwealth has set forth the facts and relevant procedural history and *Amicus* joins in those recitations.

SUMMARY OF ARGUMENT

The Superior Court erred in holding that the harmless error doctrine did not apply in the instant matter. It further in erred in finding that original jurisdiction was not vested in the Court of Common Pleas and that dismissal was the appropriate remedy.

The lower court's error in considering Appellee's failure to accept responsibility as a factor in granting certification to the criminal division of the Court of Common Pleas is subject to harmless error analysis. A careful review of the cases relied upon by the Superior Court panel demonstrates that the error is not structural in nature. The cases wherein structural error, or a finding akin to that, has been found are cases where the error had an actual, direct impact on the liberty of the defendant by influencing the finding of guilt or the sentence itself. While granting certification had the potential to expose Appellee to a greater penalty, the certification itself was not a determination of guilt and was an error in the process of the trial. The Superior Court should have conducted a harmless error analysis.

Original jurisdiction in this matter is vested in the Court of Common Pleas. By passing the Juvenile Act, the General Assembly did not create a

new court, thus divesting the Court of Common Pleas from jurisdiction over matters that involve a minor who commits a criminal offense. A review of the applicable statutory law, and the Pennsylvania Constitution, makes clear that the members of the General Assembly were cognizant that original jurisdiction was vested in the Court of Common Pleas and that the Juvenile Act was not intended to alter that jurisdiction. The appropriate remedy in the instant matter is a remand for a new certification hearing.

ARGUMENT

A panel of the Superior Court reversed Appellee's convictions for numerous sexually based offenses, including Rape of a Child, finding that the lower court's violation of Appellee's Fifth Amendment right against self-incrimination¹ during a certification hearing was a structural error which precluded a harmless error analysis. The panel went on to find that dismissal was the appropriate remedy when a reversible error occurs during a certification hearing and the defendant has turned 21 years of age during the pendency of the appeal. The panel's conclusions are, respectfully, in error. In support of said conclusion, and in support of the Commonwealth and their reasons advocating the same, *Amicus* offers the following argument.

I. The error in the instant matter is not structural and the harmless error doctrine is applicable

The harmless error doctrine is applicable to the error in this matter, that being the consideration of Appellee's failure to accept responsibility in determining whether to certify the matter for trial in the

¹ This Honorable Court found said violation in *Commonwealth v. Taylor*, 230 A.3d 1050 (Pa. 2020). The current appeal is the result of the Superior Court's rulings on the issues remanded for consideration by this Honorable Court.

criminal division of the Court of Common Pleas. The Superior Court's holding otherwise should be reversed.

[T]he doctrine of harmless error is a technique of appellate review designed to advance judicial economy by obviating the necessity for a retrial where the appellate court is convinced that a trial error was harmless beyond a reasonable doubt. Its purpose is premised on the well-settled proposition that “[a] defendant is entitled to a fair trial but not a perfect one.”

Commonwealth v. Allshouse, 36 A.3d 163, 182 (Pa. 2012)(citing

Commonwealth v. Thornton, 431 A.2d 248, 251 (Pa. 1981).

[A]n error may be deemed harmless “only if the appellate court is convinced beyond a reasonable doubt that the error is harmless.”... “[A]n error cannot be held harmless unless the appellate court determines that the error could not have contributed to the verdict. Whenever there is a reasonable possibility that an error might have contributed to the conviction, the error is not harmless.”... Further the burden to establish harmlessness is placed on the Commonwealth.... The assignment of the burden and the beyond-reasonable-doubt standard obviated any need to distinguish between errors of a constitutional dimension from other types of error.

In the Interest of: J.M.G., 229 A.3d 571, 580 (Pa. 2020). An error can be found harmless if: 1) the prejudicial impact of the erroneous evidence is *de minimus*; or 2) the prejudicial impact may not be *de minimus*, but the evidence is cumulative of properly admitted evidence; or 3) the untainted evidence of guilt is so overwhelming that the prejudicial impact of the erroneously admitted evidence cannot have influenced the verdict. *Id.* If

relying on the third option, only the uncontradicted evidence of guilt can be considered. *Id.*

An error can be considered “structural” and not subject to harmless error review when the right at issue protects some other interest than protecting a defendant from an erroneous conviction or if the errors effects are “...too hard to measure[,]” or if the error may “...inevitably signal fundamental unfairness[.]” *McCoy v. Louisiana*, 584 U.S. ____, 138 S.Ct. 1500, 1511 (2018). The right to counsel of one’s choice or the failure to tell a jury that it must convict beyond a reasonable doubt have been considered structural errors. *Id.*

As set forth by the Superior Court in its opinion, Pennsylvania courts have found structural errors, or what might be deemed akin to structural error, in the following types of cases:

- *Commonwealth v. Lewis*, 528 Pa. 440, 598 A.2d 975, 982 (Pa. 1991): holding that the failure to give a “no adverse inference” jury instruction could never be harmless and remanding for a new trial
- *Commonwealth v. Edwards*, 535 Pa. 575, 637 A.2d 259 (Pa. 1993): holding that it was *per se* reversible error to give an instruction about a defendant’s right not to testify if the

defendant requests that no such charge be given. New rule not applied to Defendant and judgment of sentence affirmed.

- *Commonwealth v. Kelly*, 555 Pa. 382, 724 A.2d 909 (Pa. 1999): harmless error not applicable when jury instruction impermissibly created a mandatory presumption about the charged crime. Matter remanded for a new trial.
- *Commonwealth v. Bethea*, 474 Pa. 571, 379 A.2d 102 (Pa. 1977): impermissible to sentence a defendant more severely because defendant opted to have a trial. Matter remanded for resentencing. Harmless error not discussed.
- *In the Interest of: J.M.G.*, supra: harmless error not applicable to violations of psychotherapist-patient privilege in an Act 21 proceeding. Matter remanded for a new hearing/review.

Upon review of the above cases, it is clear that the common thread wherein a harmless error analysis was not applied is the actual impact of the error on the defendant's liberty. In *Lewis*, *Edwards* and *Kelly*, the jury instruction errors had an actual impact on the liberty of the defendants in each case. The instruction at issue in *Lewis* meant that the jury never heard that no inference could be drawn against the defendant for his choice not to testify. In *Edwards*, the jury was told about the

defendant's right not to testify in contravention of the defendant's wishes. The jury in *Kelly* was allowed to find an element of the offense without the Commonwealth meeting its burden. Thus, these errors could be said to have a direct, actual impact on liberty of each defendant.

The same can be said for the errors in *Bethea* and *J.M.G.* In *Bethea*, this Honorable Court found that the defendant was punished with a greater sentence for taking a trial. In *J.M.G.*, the impermissible consideration of privileged information led to the involuntary commitment of the juvenile. Again, the liberty of the defendant/juvenile was directly impacted by the error.

In the instant matter, the error occurred during a certification hearing. The outcome of said hearing would determine whether Appellee was subject to the Juvenile Act or would face criminal penalties if ultimately convicted of the charged offenses. While *Amicus* acknowledges that the impact on Appellee's liberty had the potential to be greater if certification was granted, possible impact does not equate to actual impact. The purpose of the certification hearing was to determine the appropriate track for Appellee's case. The certification finding was not a determination of Appellee's guilt. Thus, the impact of the error was on the process by which Appellee's case was tried in the criminal division of

the Court of Common Pleas. See *Kent v. United States*, *infra*. Given that the impact of the error was on the process of the trial, the error is not structural, and the Superior Court erred in failing to conduct a harmless error analysis.

Assuming, *arguendo*, that this Honorable Court were to determine that the error is structural in nature, the appropriate remedy, as discussed below, is remand for a new certification hearing.

II. Original Jurisdiction in this matter is vested in the Court of Common Pleas and remand for a new certification hearing is the appropriate remedy

The Courts of Common Pleas maintain original jurisdiction over all criminal offenses, including those that are committed by persons under the age of 18. The creation of juvenile divisions within the Courts of Common Pleas is not akin to divesting original jurisdiction. The General Assembly has not set up separate courts for those who are subject to the Juvenile Act nor, alternatively, enacted any statute which purports to divest original jurisdiction from the Courts of Common Pleas.

“In deciding issues of statutory interpretation, [this Honorable Court is] guided by the Statutory Construction Act, 1 Pa.C.S. §§ 1501-1991, which directs [the Court] to ascertain and effectuate the intent of the General Assembly....Generally, the plain language of the statute itself

provides the clearest indication of legislative intent.” *Commonwealth v. Griffin*, 207 A.3d 827, 830 (Pa. 2019)(internal citations omitted). When reading a statute, “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage...” 1 Pa.C.S. § 1903(a). Further, “[t]he singular shall include the plural, and the plural, the singular. Words used in the masculine gender shall include the feminine and neuter. Words used in the past or present tense shall include the future.” 1 Pa.C.S. § 1902. The objective of interpreting a statute is to give effect to the intention of the legislature. 1 Pa.C.S. § 1921(a). “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). It should be presumed that the legislature did “...not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S. § 1922(1).

If a statute is not explicit, the intent of the legislature may be determined by considering the following factors, which are not exclusive:

- (1) The occasion and necessity for the statute[;]
- (2) The circumstances under which it was enacted[;]
- (3) The mischief to be remedied[;]
- (4) The object to be attained[;]
- (5) The former law, if any, including other statutes upon the same or similar subjects[;]
- (6) The consequences of a particular interpretation[;]
- (7) The contemporaneous legislative history[; and]
- (8) Legislative and administrative interpretations of such statute.

1 Pa.C.S. § 1922(c)

Pennsylvania has a unified judicial system. Pa. Const. Art. 5, § 1, 2016; Pa. Const. Art. 5, § 1, 1968. This unified judicial system was established in 1968 pursuant to the adoption of the 1968 Pennsylvania Constitution (“1968 Constitution”). The 1968 Constitution reorganized the judiciary with statewide courts – the Pennsylvania Supreme Court, Superior Court and Commonwealth Court – and, as relevant to the instant matter, reorganized the minor judiciary, establishing Courts of Common Pleas in the various judicial districts. Pa. Const. Art. 5, §§ 1-5, 1968.

Regarding the Courts of Common Pleas, the text reads as follows:

There shall be one court of common pleas 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. 5, § 5, 1968. The 1968 Constitution specifically, and unequivocally, sets forth that these Courts of Common Pleas: 1) have original jurisdiction in all cases absent some other provision in the law; and 2) that there can be different divisions of the Courts of Common Pleas, but these divisions are still a part of one Court of Common Pleas in that judicial district within which original jurisdiction is vested in almost all

cases.

The General Assembly has further codified the dictates of Article 5, § 5 in 42 Pa.C.S. §§ 931, 951-952. Section 931 sets forth that the Courts of Common Pleas have original jurisdiction in all matters, except those that have been specifically vested in another court of the Commonwealth. 42 Pa.C.S. § 931(a). Sections 951 and 952 address the divisions of the Courts of Common Pleas. Notably, these sections address different parts of one court, the Court of Common Pleas, with original jurisdiction and not separate courts.

When the General Assembly enacted the Juvenile Act, 42 Pa.C.S. § 6301, *et. seq.*, it made specific choices with respect to language based upon the Pennsylvania Constitution and an order of this Honorable Court. In Section 6301, the General Assembly set forth that the short title of the legislation would be the “Juvenile Act.” 42 Pa.C.S. § 6301(a). The comment to the section sets forth that the title “Juvenile Act,” instead of “Juvenile Court Act,” was specifically chosen because the 1968 Constitution made original jurisdiction solely in the Courts of Common Pleas. 42 Pa.C.S. § 6301(a), *Comment*. The comment then directs the reader to 42 Pa.C.S. § 6302, Definitions; the definition of “court;” and the comment related to that specific definition.

In Section 6302, the term “court” is specifically defined as “[t]he court of common pleas.” 42 Pa.C.S. § 6302. As with Section 6301(a), a comment is included which specifically address why the term “court” was defined in this manner. Pursuant to the comment, this definition was chosen because of the 1968 Constitution which had established the original jurisdiction of the Courts of Common Pleas and the ability for these courts to have divisions if needed. 42 Pa.C.S. § 6302, *Comment*. The comment further addresses that this Honorable Court had issued an order in 1969 setting forth that the Courts of Common Pleas (except in Philadelphia and Allegheny counties) would exercise jurisdiction through “Juvenile Court Division[s].” *Id.*

When looking at the interplay of the Pennsylvania Constitution and the statutes enacted by the General Assembly, it is clear that the Courts of Common Pleas maintain original jurisdiction over cases which involve those individuals who commit criminal offenses when they would be subject to the Juvenile Act – namely persons who commit an offense when they are under 18 years of age and have not yet reached the age of 21. 42 Pa.C.S. § 6032 (definition of “Child” under the Juvenile Act).

Pursuant to Article 5, § 5 of the 1968 Constitution, which remains in full force and effect, absent another constitutional provision divesting

the Courts of Common Pleas of original jurisdiction in specific instances, the General Assembly would be required to pass specific legislation placing original jurisdiction for any law or claim in a court other than the Courts of Common Pleas. The General Assembly went a step further and codified this requirement in 42 Pa.C.S. § 931. In order for the Courts of Common Pleas to have been divested for original jurisdiction over criminal offenses committed by minors, which is the group of people covered by the Juvenile Act, either the Pennsylvania Constitution or legislation passed by the General Assembly would have to specifically set forth the intent to strip the Courts of Common Pleas of original jurisdiction in such matters. This has not been done.

A careful review of the relevant portions of the Juvenile Act demonstrates that the General Assembly did not divest the Courts of Common Pleas of original jurisdiction over criminal offenses committed by minors. To the contrary, the General Assembly specifically selected language with the knowledge that Pennsylvania was operating under a unified judicial system that specifically vested original jurisdiction over almost all matters, including those that fall under the Juvenile Act, in the Courts of Common Pleas. The term “Juvenile Act” was specifically chosen, over the term “Juvenile Court Act,” to denote that original jurisdiction was

not being stripped from the Courts of Common Pleas. The General Assembly did not create a new court and did not vest jurisdiction in a different Pennsylvania court. To the contrary, the General Assembly was explicitly setting forth that original jurisdiction for matters under the Juvenile Act remained in the Courts of Common Pleas.

This interpretation of the relevant statutes is also evident when looking at the definition of “court” in Section 6302. The definition chosen by the General Assembly is “court of common pleas.” The definition was chosen because of the original jurisdiction vested in the Courts of Common Pleas by the 1968 Constitution. The General Assembly could have defined “court” as used in the Juvenile Act as an entirely new court or, had it deemed fit, another existing Pennsylvania Court. It did not do that. Instead, the members of the General Assembly made the choice to retain original jurisdiction of matters that fall under the Act within the Courts of Common Pleas. Thus, the Courts of Common Pleas remain fully vested with original jurisdiction in said matters.

As is also addressed in the comment to Section 6302, this Honorable Court issued an order in 1969 that juvenile matters would be handled by what was termed the “Juvenile Court Division” of the Courts of Common Pleas. The language used by this Honorable Court does not mean,

however, that an entirely new court was established, or that one needed to be established. Rather, the words “Juvenile Court” modify the word “Division.” “Division” is a direct reference to Article 5, § 5 of the Pennsylvania Constitution – which allows for divisions of the Courts of Common Pleas while maintaining original jurisdiction of almost all matters in the Courts of Common Pleas as a whole. The divisions referenced by the Constitution, and by this Honorable Court’s 1969 order, remain a part of the Courts of Common Pleas and are not separate entities that act to divest original jurisdiction from the entire court.

Having established that the Courts of Common Pleas maintain original jurisdiction over matters address in the Juvenile Act, the question as to whether the charges brought against Appellee must be dismissed can be answered by the United States Supreme Court’s holding in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966).

In *Kent*, the defendant had been charged with Rape and other serious offense in the District of Columbia. Defendant was 16 years of age at the time of his arrest. *Id.* at 543. Pursuant to the D.C. Code, exclusive jurisdiction over defendant’s offenses was vested in the Juvenile Court. *Id.* The Juvenile Court, however, could waive jurisdiction to the District Court. *Id.* at 544. Defendant’s counsel expressed that he would oppose any such

waiver. *Id.* Counsel took numerous steps to prepare for the Juvenile Court's waiver determination, including filing motions to obtain records which would have been available to the court. *Id.* at 545-546. The Juvenile Court judge, however, did not hold a hearing on the waiver issue and entered an order waiving the matter to the District Court. *Id.* at 546. Defendant was tried and convicted in the District Court. *Id.* at 550.

The Supreme Court found the waiver to be invalid as there was nothing in the statute that permitted the Juvenile Court to enter an order granting the waiver without the participation of, or any representation of, the child. *Id.* at 553-554. Defendant had been entitled to have a hearing on the issue of waiver, to be represented by counsel and to have a statement of reasons given as to why waiver was, or was not, granted. *Id.* at 557.

During the pendency of the proceedings, including appeal, defendant had passed the age of 21 which meant that he was no longer subject to the jurisdiction of the Juvenile Court.

Ordinarily we would reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. If on remand the decision were against waiver, the indictment in the District Court would be dismissed.... However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In 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 this drastic relief. Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing *de novo* on waiver, consistent with this opinion. If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make and such further proceedings, if any, as may be warranted, to enter an appropriate judgment.

Id. at 564-564.

While there is no issue in this case about transferring jurisdiction, the remedy is the same. Here, as in *Kent* with the remand to the District Court, the instant matter can be remanded to the Court of Common Pleas in Montgomery County for a new hearing to take place to determine if certification was proper. While Appellee is no longer under the age of 21, the record from the original certification hearing remains intact and any references to Appellee's failure to accept responsibility can be redacted.

Jurisdiction over this matter has always been vested in the Court of Common Pleas as a whole. The General Assembly has not enacted any statute which divests original jurisdiction over Appellee's offenses from the Court of Common Pleas. The Pennsylvania Constitution has not been amended in a manner to strip the Court of Common Pleas of jurisdiction. There is no vacant space in which Appellee's situation falls and the remedy

set forth in *Kent* is appropriate. As such, this Honorable Court should vacate the order of the Superior Court and remand this matter for reconsideration of certification issue.

Certification

I hereby certify pursuant to Pa.R.A.P. 531 (b)(3) that this amicus brief does not exceed the 7,000-word count limit.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

 /s/ Maureen Flannery Spang
Maureen Flannery Spang
Legal Resource Prosecutor
Pennsylvania District Attorneys
Association

Date: June 3, 2022

PROOF OF SERVICE

I, Maureen Flannery Spang, hereby certifies that on June 3, 2022, the foregoing amicus brief was filed through this Court's PACFILE electronic filing system and thereby served the following parties:

Todd N. Barnes, Esq.
Assistant District Attorney
Montgomery County District Attorney's Office
PO Box 311
Norristown, PA 19404-0311

Rachel Ilana Silver, Esq.
Ferreira Law
8100 Castor Avenue
Philadelphia, PA 19152

Katherine Elizabeth Ernst, Esq.
Wiseman Schwartz
718 Arch Street
Ste. 702
Philadelphia, PA 19106

/s/ Maureen Flannery Spang

Maureen Flannery Spang
Attorney ID No. 94045
Legal Resource Prosecutor
Pennsylvania District
Attorneys Association
2929 North Front Street
Harrisburg, PA 17110
(717) 238-5416