

No. 40 MAP 2022

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

Commonwealth of Pennsylvania,

Appellant,

v.

Nazeer Taylor,

Appellee.

On Appeal from an Order of the Superior Court of Pennsylvania,
Case No. 856 EDA 2017, July 29, 2021, Reversing the Judgment of Sentence in
the Court of Common Pleas of Montgomery County, January 13, 2017 at No.
CP-46-CR-0003166-2014

**BRIEF OF JUVENILE LAW CENTER, THE YOUTH ART & SELF-
EMPOWERMENT PROJECT, AND THE YOUTH SENTENCING &
REENTRY PROJECT AS AMICI CURIAE SUPPORTING APPELLEE
NAZEER TAYLOR AND AFFIRMANCE**

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INTERESTS OF THE AMICI CURIAE¹

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

The Youth Art & Self-empowerment Project works to end the incarceration of youth, including particularly the common practice of prosecuting and incarcerating young people as adults. YASP is led by young people who have had cases in the adult criminal court system and been housed in adult jails and prisons. As part of its work, YASP has observed firsthand the pernicious effects of pretrial and other detention on youth, including how those effects fall even more heavily when youth are incarcerated in adult facilities.

The Youth Sentencing & Reentry Project is a nonprofit organization based in Philadelphia that uses direct service and policy advocacy to transform the

¹ Pursuant to Rule 531, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

experiences of children charged and prosecuted in the adult criminal justice system, and to ensure fair and thoughtful resentencing and reentry for individuals who were sentenced to life without parole as children (“juvenile lifers”). YSRP partners with court-involved youth and juvenile lifers, their families, and lawyers to develop holistic, humanizing narratives that mitigate the facts of each case; get cases transferred to the juvenile system or resentenced; and make crucial connections to community resources providing education, healthcare, housing, and employment. YSRP also provides trainings on mitigation, and recruits, trains, and supervises students and other volunteers to assist in this work. YSRP’s ultimate goals are to keep children out of adult jails and prisons and to enhance the quality of representation juvenile lifers receive at resentencing as they prepare to reenter the community.

SUMMARY OF ARGUMENT

As this Court has already held, Nazeer Taylor suffered a grievous violation of his Fifth Amendment right against self-incrimination. *Commonwealth v. Taylor*, 230 A.3d 1050, 1053 (Pa. 2020). That error suffused his experience of the criminal system and altered it in ways that both harmed his liberty interests and undermined the Commonwealth’s own interests.

Applying harmless error to sanction an otherwise lawless certification to adult court for children like Nazeer a) causes affirmative injury by incarcerating youth in adult jails and prisons that substantially harm their mental health and physical well-being; b) restricts liberty by increasing likelihood of confinement and sentences

length; and c) prevents children from receiving age-appropriate services and education that can help them in the future, and as contemplated by the Juvenile Act. In exchange, the Commonwealth receives no countervailing benefit. Because youth deterrence does not work the same way as adult deterrence, certification does not reduce recidivism and confining children in adult jails and prisons actually worsens long-term outcomes for them. Furthermore, data demonstrate that transfers of youth to criminal court and sentencing of children in criminal court remains beset by troubling racial disparities.

Given these consequences and the inability to reverse them, as three Justices of this Court and the Superior Court have already recognized, release is the only appropriate remedy. In support of the reasons discussed by Nazeer in his briefing, Amici urge this Court to recognize that release is consistent with the U.S. Supreme Court and this Commonwealth's precedents about children's diminished culpability and capacity for change and redemption. Under the circumstances—where a person like Nazeer cannot benefit from a new certification hearing—release is the only remedy that incentivizes protection of children's Fifth Amendment rights at the certification hearing. Holding such an error to have been harmless and providing no recourse for clear violations of constitutional rights opens the door to further violations of those rights in the future.

ARGUMENT

I. Under any analysis, a certification error that pushes a child into adult detention is not “harmless.”

The Fifth Amendment violation Nazeer suffered at his certification hearing “redound[ed] to [his] detriment,” 230 A.3d at 1073, because, as three Justices recognized, there was “at least a reasonable possibility” that the violation “might have contributed to [the] decision to certify Taylor” to criminal court. *Id.* at 1074 (Baer, J., concurring). On remand, the Superior Court considered whether the error was structural or, if not, whether it was harmless; and what the remedy should be. Slip Op. at 10. *Amici* urge this Court to recognize that under *any* analysis, children wrongfully certified to adult court suffer numerous and substantial harms—simply put, wrongful certification is never harmless. The error changes a child’s entire experience of the criminal legal process. It results in incarceration in adult jails or prisons, longer sentences, and associated substantial and unique harms, including mental health challenges and sharply increased suicide risk, disproportionate use of psychologically-damaging solitary confinement, and the lack of access to education, support, and other programming they could have accessed at an age-appropriate juvenile facility. Moreover, the racial disparities in youth who get transferred to criminal court compound the error’s harm because wrongfully-certified children of color face even greater restrictions to their liberty than other wrongfully-certified children.

A. Children detained in adult facilities experience substantial and unique harms.

Certification to criminal court imposes serious harms on youth by exposing them to the harsh features of the adult correctional system and preventing them from tapping into their unique capacity for rehabilitation that the Juvenile Act is meant to foster. Carceral facilities are dangerous for children. Children incarcerated in jails and prisons often face brutal conditions. As compared to those in juvenile facilities, youth in adult facilities are five times more likely to be sexually assaulted, eight times more likely to commit suicide, and nearly twice as likely to be beaten by staff or attacked with a weapon by another incarcerated individual. Richard E. Redding, U.S. Dept. Just., Off. Juv. Just. & Delinq. Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* 7 (June 2010), ojp.gov/pdffiles1/ojjdp/220595.pdf.²

Even mechanisms meant to “protect” children from assault often harm them. Youth are often subjected to and kept in solitary confinement for long periods, in part, to protect them from victimization in prison. Hum. Rts. Watch & ACLU, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* 2, 20 (2012), <https://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf>. Solitary confinement, however, fails to protect youth and instead plays a role in the increased

² A 2011 report revealed that 66 percent of youth 16 and 17 years old who reported being sexually abused while in prison were victimized more than once. Just. Pol’y Inst. & Campaign for Youth Just., *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety* 14 (2020), campaignforyouthjustice.org/images/child_not_the_charge_report5.26_2.pdf.

risk of suicide among youth in adult prisons. *Id.* at 30. These increased risks spurred the United States Congress in 2018 to update the Juvenile Justice & Delinquency Prevention Act, calling for all youth—even those charged as adults—to be removed from adult jails by 2021. See Coal. for Juv. Just., *JJDPA Reauthorization: Updated Protections to Ensure Equity for Youth* (Sept. 23, 2019), juvjustice.org/blog/1138.

Indeed, prisons were not developed to meet the needs of children.³ Youth who are certified to criminal court often experience harmful developmental disruption because jails and prisons lack the academic, vocational, and social skill building education that adolescents need. See generally Equal Justice Initiative, *All Children are Children: Challenging Abusive Punishment of Juveniles* (2017), <https://eji.org/wp-content/uploads/2019/10/AllChildrenAreChildren-2017-sm2.pdf>. “[E]xposure to multiple or prolonged traumatic events,” such as the trauma children experience in the adult system, “increases the likelihood and severity of a reaction to the trauma” and, “[t]rauma may cause children to act in ‘survival mode,’ causing maladaptive coping behaviors” Supreme Court of Ohio, *Juvenile Court Trauma-Informed Practices* (2017), supremecourt.ohio.gov/JCS/CFC/resources/traumaInformedCourt.pdf.

³ This is not to say that juvenile detention facilities actually meet the needs of children. They do not, but as compared to adult prisons, they at least were designed for children. See Lisa Pilnik, Robert G. Schwartz, Karen Lindell, Jessica Feierman & Christina Sorenson, Juvenile Law Center, *Transforming Justice: Bringing Pennsylvania’s Young People Safely Home from Juvenile Justice Placements* (2019), https://jlc.org/sites/default/files/attachments/2019-10/Transforming_Justice_final.pdf.

Longer confinement in adult facilities also intensifies the crushing collateral consequences that accompany a criminal record. Beyond the trauma experienced within prison over the course of a lengthy sentence, a criminal conviction can adversely affect education, housing, public benefits, employment, professional licensure, property rights, mobility, and other opportunities which hinder successful reintegration into society. Am. Bar Ass’n, *Collateral Consequences of Criminal Convictions: Judicial Bench Book 4* (2018), ojp.gov/pdffiles1/nij/grants/251583.pdf. The longer a person remains away from civil society—less able to build employment references, a credit history, a housing record, attain education, or participate in civic life—the harder it can be to overcome these collateral consequences.

By contrast, if this Court affirms the Superior Court’s opinion on remedy, Nazeer would be released from prison and would have greater access to education and supportive services to ensure his effective rehabilitation. Affirming would also discourage future wrongful certifications, *see* Section II.b., *infra*, and give youth access to an individualized case plan pursuant to the Bureau of Juvenile Justice Services’ balanced and restorative justice framework specifically “designed to further develop job readiness, to ensure that effectively rigorous academic standards are provided to the adjudicated population and to significantly enhance employability skills for those youth involved within the affiliate programs.” *Juvenile Justice Services*, Dept. Hum., Servs., <https://www.dhs.pa.gov/Services/Children/Pages/Juvenile-Justice.aspx> (last visited May 12, 2022).

B. Lawless certifications that strike at core constitutional rights restrict liberty by increasing likelihood of confinement and sentence length.

Certified youth are also likely to have greater restrictions on their liberty. The adult criminal legal system differs in numerous ways from the juvenile justice system, and virtually all of them implicate individual liberty interests.

Lawless certifications by their nature harm children’s liberty interests because the very purpose of adult prosecution includes punishment by incarceration, while the purposes of juvenile proceedings prioritize rehabilitation rather than incarceration. *See* 42 Pa. C.S. § 6301. As mentioned, the juvenile court must reach a disposition “consistent with the protection of the public interest and best suited to the child’s treatment, supervision, rehabilitation, and welfare.” 42 Pa. C.S. § 6352(a). The Court “shall” balance community protection with “the development of competencies to enable the child to become a responsible and productive member of the community.” *Id.* That balance requires “separating the child from parents only when necessary for his welfare, safety, or health or in the interests of public safety,” including by using “the least restrictive intervention that is consistent with the protection of the community.” 42 Pa. C.S. § 6301(b)(3) & (b)(3)(i). Adult proceedings involve no such safeguards, and by their very nature expose children to a legal system that puts their liberty at substantially greater jeopardy. Given these protections, many children who remain in juvenile court are not confined at all, where a certification to adult court would likely result in the substantial harm of incarceration, and in Nazeer’s case, did. *See, e.g.,* Penn. Juvenile Court Judges’ Commission, 2021 Annual Report, *available at:*

<https://www.jcjcdashboards.pa.gov/idashboards/viewer?guestuser=guest&dashID=507> (listing, for 2021, 12,290 delinquency dispositions and just 3,612 detention admissions).

Lawless certifications also expose youth—like then-fifteen-year-old Nazeer—to substantially longer sentences for the same conduct, when they are confined at all. The Pennsylvania Juvenile Act sets forth the parameters under which a child may be confined. As an initial matter, children may be subject to “confinement only if necessary and for the minimum amount of time that is consistent with the purposes” of the juvenile system. 42 Pa. C.S. § 6301(b)(3)(ii). The cross-referenced provision setting out those purposes explicitly includes “care, protection, safety and wholesome mental and physical development of children” in the system and “development of competencies to enable children to become responsible and productive members of the community.” *Id.* at § 6301(b)(1.1); (b)(2). To effectuate the “care, protection, safety, and wholesome mental and physical development” of children before them, juvenile court judges are able to draw from dispositional options that exist in the delinquency and child welfare system. *See* 42 Pa. C.S. § 6352. As such, children who are processed through the juvenile court system have access to treatment alternatives and rehabilitative programming not available to youth certified to the adult criminal system. Indeed, most children adjudicated delinquent are placed on probation with supportive services, rather than confinement. *See, e.g.,* Penn. Juvenile Court Judges’ Commission, 2021 Annual Report, *available at:* <https://www.jcjcdashboards.pa.gov/idashboards/viewer?guestuser=guest&dashID=5>

07 (listing, for 2021, 12,290 delinquency dispositions and just 3,612 detention admissions).

Even for children who are detained, that may involve “committing the child 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.” 42 Pa. C.S. § 6352(a)(3). While confinement in general causes harm whether it is in a juvenile facility or a prison designed for adults, the goal of the confinement in juvenile court is rehabilitation and the juvenile court must provide age-appropriate programming and education. *See, e.g.*, 42 Pa. C.S. § 6352(a); 42 Pa. C.S. § 6341(b.1)(3). The juvenile custody format not only differs substantially in character from an adult prison, *see* Section I.a., *supra*, but also necessarily limits confinement because children may only remain confined until the juvenile court no longer has jurisdiction over them. A child is certified to adult court and ultimately sentenced for conduct that would receive much less time in juvenile custody, the sentence can last years or even decades longer. For a child adjudicated delinquent of any offense where an adult would face a substantially longer sentence, the lawless certification restricts that child’s liberty. Additionally, most children adjudicated delinquent face fewer collateral consequences than if they receive a conviction in criminal court and are eligible for expungement after five years. *See* 18 Pa. C.S. § 9123. If eligible, a child adjudicated delinquent can have their records expunged, helping insulate them from collateral consequences as adults.

C. Lawless certifications are especially harmful because they rely on a misunderstanding of youth deterrence.

The Commonwealth's interest in deterrence of future criminal conduct—both by the individual in question and by others who might see the sentence imposed—provides an especially poor basis for greater restrictions on children's liberty because deterrence is an ineffective tool for children. Proponents of transfer laws rely on deterrence as a key justification for the prosecution of children as adults. *See Redding, supra*, at 2. Yet research largely fails to support this policy goal. *Id.* Deterrence theory is “based on a rational choice model of decision-making: that is, prior to commission of a crime, an individual consciously weighs the risks and rewards of commission.” Karen Miner-Romanoff, *Juveniles Sentenced and Incarcerated as Adults: Findings from a Qualitative Analysis of Their Knowledge, Understanding, and Perceptions of Their Sentences*, 9 *Just. Pol'y J.* 1, 5 (2012) (citing Michele Peterson-Badali, Martin D. Ruck & Christopher J. Koegl, *Youth Court Dispositions: Perceptions of Canadian Juvenile Offenders*, 45 *Int'l J. Offender Therapy & Compar. Criminology* 593 (2001)), cjcj.org/uploads/cjcj/documents/Juveniles_Sentenced.pdf. This model also “assumes that youths' perceptions and understandings of such punishment must be thorough enough and abhorrent enough to them to deter them from committing the crime.” *Id.* at 12. As the Supreme Court recognized in a series of decisions, however, young people simply do not engage in the kind of cost/benefit analysis deterrence is predicated on. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005) (recognizing that “[a] lack of maturity and an underdeveloped sense of responsibility” in youth “often result

in impetuous and ill-considered actions and decisions” (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012) (recognizing among the “hallmark features” of youth, “immaturity, impetuosity, and failure to appreciate risks and consequences.”). Several studies have found that overwhelming majorities of youth do not know or believe that they could be certified to adult court. Miner-Romanoff, *supra*, at 7-8, 21-22. While youth are already unlikely to do cost/benefit analysis before engaging in delinquent behavior, the idea that they should be able to foresee all the possible negative outcomes from such behavior is far-fetched.

Moreover, there is no correlation, let alone causation, between transfer laws and reductions in juvenile violent crime rates. Just. Pol’y Inst. & Campaign for Youth Just., *supra*, at 12.⁴ In fact, research has shown that certifying youth to criminal court actually increases the likelihood of re-offense. *See, e.g.*, Redding, *supra*, at 6. Studies consistently show higher recidivism rates for certified youth compared to their peers retained in the juvenile system, even for those charged with the same offenses.⁵ *Id.*

⁴ A study compared Tennessee and Texas and found vastly different transfer rates for violent offenses (54% and 80%, respectively), yet, nearly identical juvenile arrest rates for violent crimes (7.2% and 7.1%, respectively). Just. Pol’y Inst. & Campaign for Youth Just., *supra*, at 12.

⁵ The results of these six large-scale studies funded by the Office of Juvenile Justice and Delinquency Prevention are particularly compelling given the varying methodologies (natural experiments across two jurisdictions, matched groups within the same jurisdictions, and statistical controls), sample sizes (between 494 and 5,476 participants), and across jurisdictions (Florida, New Jersey, New York, Minnesota, Pennsylvania) with varying types of transfer laws (automatic, prosecutorial, or judicial). Redding, *supra*, at 1, 6.

This finding holds even for certified youth subsequently sentenced in criminal court to adult probation. *Id.* Another report concluded that among youth who did not experience any incarceration for their crimes, certified youth were 39% more likely to be arrested again later for a violent offense than youth retained in the juvenile court system. U.S. Ctrs for Disease Control & Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services* 6 (2007), cdc.gov/mmwr/pdf/rr/rr5609.pdf. Thus, merely processing a child in the adult criminal system can result in an increase in recidivism.

This research has been bolstered by an analysis of juvenile transfer in Washington State that found youth who were transferred to adult court had higher recidivism rates than youth who were not transferred. Elizabeth Drake, Wash. State Inst. for Pub. Pol’y, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youth*, 6 (2013), wsipp.wa.gov/ReportFile/1544/Wsipp_The-Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth_Final-Report.pdf. In addition, the study found that overall this increase in recidivism cost a total of over \$10,000 per youth to taxpayers and crime victims. *Id.* at 11-12.

D. Racial disparities in charging, transferring, and sentencing youth in adult court underscore the stakes of the error.

At every stage of the legal system, from interrogation through arrest, prosecution and plea negotiation, trial, and sentencing, people of color—particularly Black males—are treated more harshly than white individuals, even when controlling for

offense severity. *See, e.g.,* Marc Mauer et al., *Addressing Racial Disparities in Incarceration*, 91 *Prison J.* 87S, 91S-95S (2011).

The racial disparities are particularly pronounced for youth prosecuted in the adult criminal system. Nationally, Black and Hispanic youth account for over 60 percent of cases judicially waived from juvenile to adult court, with Black youth representing 54 percent and Hispanic youth 12 percent. Sarah Hockenberry & Charles Puzanchera, Office of Juvenile Justice and Delinquency Prevention, *Characteristics of Cases Judicially Waived from Juvenile Court to Criminal Court* (2019), ojjdp.gov/ojstatbb/snapshots/DataSnapshot_Waiver2017.pdf (accessed Nov. 4, 2021). Native youth are 1.84 times more likely to receive an adult prison sentence than are White youth. Campaign for Youth Justice, *Children in Adult Courts* at 1, citing Liz Ryan, Campaign for Youth Justice, *Youth in the Adult Criminal Justice System* (2012) cfyj.org/images/policybriefs/policyreform/FR_YACJS_2012.pdf (accessed Nov. 4, 2021).

These disparities are prevalent at the state level. In the Commonwealth, Black youth account for 14% of the state's youth population and make up 55% of youth certified to criminal court. The Pennsylvania Juvenile Justice Task Force, *Report & Recommendations* (June 2021) at https://www.pacourts.us/Storage/media/pdfs/20210622/152647-pajuvenilejusticetaskforcereportandrecommendations_final.pdf, at 27. For Black boys, the numbers are even more stark. Only 7% of the Commonwealth's youth population are Black boys, but they account for 56% of adult prosecution convictions. *Id.* at 28. Likewise, in neighboring Ohio, Black youth comprise the overwhelming

majority of mandatory transfer each year, even though white youth vastly outnumber Black youth in the general population. In 2020, 71.9 percent of young people transferred to adult court were Black, Ohio Dept. of Youth Services, *Statewide Reports Maintained by DYS* (May 18, 2020), dys.ohio.gov/wps/portal/gov/dys/about-us/communications/reports/statewide-reports-maintained-by-dys (accessed Nov. 4, 2021), while only approximately 13 percent of Ohio's population is Black. United Census Bureau, QuickFacts Ohio, census.gov/quickfacts/fact/table/OH/PST045219 (accessed Nov. 4, 2021).

Disparities in the criminal system are not the product of higher crime rates, but rather stereotypes, implicit racial bias, and structural racism related to racial segregation and the over-policing of neighborhoods with high numbers of people of color. *See, e.g.*, The Sentencing Project, *Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System* 3-6, sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/ (accessed Nov. 4, 2021), citing Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *Law & Hum. Behav.* 483, 485 (2004); Lauren Krivo & Ruth Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 *Soc. F.* 619, 642 (1996) (discussing arrest rates); Michael Siegel et al., *The Relationship between Racial Residential Segregation and Black-White Disparities in Fatal Police Shootings at the City Level, 2013-2017*, 111 *J. Natl. Med. Ass'n* 580, 585-86 (2019) (discussing effect of neighborhood segregation on racial disparities in police shootings); Kristin Henning, *The Reasonable Black Child:*

Race, Adolescence, and the Fourth Amendment, 67 AM. U. L. REV. 1513, 1554-56 (2018), citing Ronald Weitzer & Rod K. Brunson, *Strategic Responses to the Police among Inner-City Youth*, 50 Socio. Q. 235, 235-36 (2009) (Black youth often experience extensive surveillance and harmful police encounters in their communities, including constant police presence and frequent pedestrian or vehicle stops); Patricia Foxen, *Perspectives from the Latino Community on Policing and Body Worn Cameras*, Medium (May 4, 2017), medium.com/equal-future/perspectives-from-the-latino-community-on-policing-and-body-worn-cameras-47f150f71448 (accessed Nov. 4, 2021) (documenting reactions to the hyper-policing of Latino communities).

The now debunked “super-predator” myth has been a particularly pernicious stereotype resulting in the transfer of Black boys to the criminal system. The discredited theory not only shifted the legal landscape, but also “amplified the American public’s predisposition to associate adolescents of color, and in particular young black males, with violence and moral depravity.” Perry L. Moriearty and William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. Gender Race & Just. 281, 283 (2012), available at scholarship.law.umn.edu/faculty_articles/384 (accessed Nov. 4, 2021). Young Black men were dissociated from their youth, and the super-predator imagery allowed the public to “suspend our feelings of empathy towards young people of color.” *Id.*; Carroll Bogert & Lynnell Hancock, The Marshall Project, *The Media Myth That Demonized a Generation of Black Youth* (Nov. 20, 2020), [16](http://themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-</p></div><div data-bbox=)

a-generation-of-black-youth (accessed Nov. 4, 2021) (quoting New York University law professor Kim Taylor-Thompson). These changing perceptions and laws had disastrous consequences, *id.*; of the thousands of youth who were incarcerated as a result of the changing transfer laws, the majority of them were Black boys.

In response to the racist misconceptions underlying the super-predator myth, nearly one-third of states enacted laws “to redefine the purpose of [the] juvenile courts to ‘emphasize public safety, certain sanctions, and/or the accountability of offenders.’” Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. Civ. Rts. & Econ. Dev. 765, 780 (2015), quoting Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 Harv. C.R.-C.L. L. Rev. 511, 521 (2009). Between 1992 and 1997, almost all states broadened juvenile jurisdiction, increased sentences, and made it easier to transfer youth to adult court, subjecting them to harsher penalties, including sentences of life without parole. Southerland, *supra*, at 780. Indeed, in response to this public panic, in 1995 the Pennsylvania General Assembly passed Act 33, which newly provided for direct file of youth to criminal court.

Many people have continued to internalize—often unconsciously—these and other false stereotypes, and they affect treatment of youth in the justice system. Studies show that, compared to similarly situated white children, people are likely to perceive Black children as older, less innocent, and more culpable. See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526, 540 (2014). The “adultification” of Black youth dates back to forced child labor during slavery, and “is a form of dehumanization, robbing

Black children of the very essence of what makes childhood distinct from all other developmental periods: innocence.” Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood* 4, 6, 12 (2017), law.georgetown.edu/poverty-inequalitycenter/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf (accessed Nov. 4, 2021) (adultification bias contributes to more punitive treatment Black girls receive in juvenile justice system). Another study found that people presented with a scenario involving a Black juvenile defendant are significantly more likely to view children to be as culpable as adults, and to favor more severe sentencing, than those presented with the same scenario involving a white juvenile defendant. See Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLOS ONE 1, 2 (2012), journals.plos.org/plosone/article?id=10.1371/journal.pone.0036680 (accessed Nov. 4, 2021).

All of these dynamics compound the problem of lawless certification to adult court. Black youth and other youth of color are certified to the criminal system at disproportionate rates compared to their white peers because of explicit and implicit biases and other harmful stereotypes that pervade the criminal system. As a result, not only is the error not harmless, but Black children and other children of color experience that harm at greater rates. Affirming the Superior Court opinion affirms this Court’s commitment to reducing racial disparities in the criminal system.

II. Release as remedy fulfills the purposes of certification and serves important interests in young people’s capacity for change and redemption.

“[W]here there is a legal right there is also a legal remedy.” 3 William Blackstone, *Commentaries* *23. Remedies are vital because “a large part of a right’s effectiveness rides on the remedies available for its violation.” Paulo C. Alves, “*Taking the Fifth*” *Beyond Trial: § 1983 Claims for Pre-Trial Use of Coerced Statements Affirms One’s Right Against Self-Incrimination*, 26 J. CIV. RTS. & ECON. DEV. 253, 276 (2012). Here, declining to affirm the Superior Court would offer no remedy for a violation of a bedrock Fifth Amendment right, and undermine it at a moment of great import—the certification hearing. Declining to allow a remedy also contravenes the U.S. Supreme Court’s holdings about children’s well-established diminished culpability and capacity for redemption.

A. Protection against wrongful certification serves the Commonwealth’s interest in recognizing diminished culpability and greater capacity for redemption of youth.

Even without juvenile court intervention, as young people mature into adulthood, their behavior matures as well. The U.S. Supreme Court and this Court have recognized that children are different from adults, and that these differences are relevant to public safety and to the public’s interest in the decision to certify a youth to adult court. Significantly, the U.S. Supreme Court has recognized that “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].” *Miller*, 567 U.S. at 471 (alteration in original) (quoting *Roper*, 543 U.S. at 570). Children “are more capable

of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.” *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. at 570). As a result, “a greater possibility exists that a minor’s character deficiencies will be reformed.” *Id.* (quoting *Roper*, 543 U.S. at 570). Youth must be given the opportunity to demonstrate their capacity for rehabilitation and change. *Miller*, 567 U.S. at 478 (finding that “mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it”).

This Court has adopted the central premise established by *Roper*, *Graham*, and *Miller* “that as a matter of law, juveniles are categorically less culpable than adults.” *Commonwealth v. Batts*, 163 A.3d 410, 452 (Pa. 2017).⁶ This Court further affirmed that “[t]his central premise arises from ‘a conclusion firmly based upon the generally known results of wide human experience,’ which is that the vast majority of adolescents change as they age and, despite their involvement in illegal activity, do not ‘develop entrenched patterns of problem behavior.’” *Id.* (first quoting *Watkins v. Prudential Ins. Co. of America*, 173 A. 644, 648 (Pa. 1934); and then quoting *Miller*, 567 U.S. at 471).

⁶ While this Court recently held that the U.S. Supreme Court’s decision in *Jones v. Mississippi* abrogated *Commonwealth v. Batts*, see *Commonwealth v. Felder*, 269 A.3d 1232, 1235 (Pa. 2022), the underlying principle in *Batts*—that children are less culpable than adults—is rooted in the constitutional guarantees set forth in *Roper*, *Graham*, *Miller*, and *Montgomery*, and the *Jones* decision does not upend this fundamental constitutional principle.

These precedents are supported by a large body of social science research into adolescent development that confirms that youth can become productive and law-abiding citizens, even without intervention. Indeed, “many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.” Marsha Levick, Jessica Feierman, Sharon Messenheimer Kelley, Naomi E. S. Goldstein & Kacey Mordecai, *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285, 297 (2012). “[T]he period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Only a small percentage of youth who engage in risky experimentation persist in their problem behavior into adulthood.” Nat’l Rsch. Council, *Reforming Juvenile Justice: A Developmental Approach*, 90 (2013) (citations omitted), http://www.njjn.org/uploads/digital-library/Reforming_JuvJustice_NationalAcademySciences.pdf; see also Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, 53 (2008) (explaining that “[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment.”).

“Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features.” Scott & Steinberg, *supra*, at 31; see also Laurence Steinberg, Dustin Albert, Elizabeth Cauffman, Marie Banich, Sandra Graham & Jennifer Woolard, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 *Developmental*

Psych. 1764, 1774-76 (2008) (noting that rates of impulsivity are high during adolescence and early adulthood and decline thereafter). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. See Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011-13 (2003). As a result, “[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.” *Id.* at 1014.

Since *Miller* and *Montgomery*, statistics about the low recidivism rates and high success of individuals released from incarceration who previously were serving juvenile life without parole sentences have confirmed those studies. As resentencing hearings and parole grants have unfolded, people who have won their release have confirmed the social science research that predicted success outside of prison. Their recidivism rate has been almost nonexistent. Michigan recently announced that of 142 so-called “juvenile lifers” who had been released, there had been only one known arrest from within that group. Susan Samples, *Crime by ‘juvenile lifers’ after prison ‘very rare,’ state says*, Nexstar Media Group (Aug. 9, 2021). The same is true in Philadelphia, where researchers found a 1.14% recidivism rate among juvenile lifers released after *Miller*. Philadelphia District Attorney’s Office, *New Study Finds 1% Recidivism Rate Among Released Philly Juvenile Lifers* (Apr. 30, 2020) (describing two post-release convictions among 174 juvenile lifers, one of which was for Contempt). These extraordinary statistics are compelling evidence that children like

Nazeer and others in his position, with the right support, have extraordinary capacity for redemption and should not face long sentences as a result of lawless certification.

B. Release is the only remedy that can protect children’s rights and incentivize legal compliance at the key moment.

Release is the only remedy that will ensure that the juvenile court system protects children’s constitutional rights at a time when they matter most—the certification hearing. Declining to order release as a remedy would fatally undermine that right because of several practical factors. First, very few people will go to trial—as Nazeer did here—instead of resolving their cases by plea, which generally insulates future individual violations from review. In the modern American criminal system, the vast majority of cases resolve through plea deals rather than criminal trials. More than 97% of federal convictions and 94% of all state convictions come by plea bargain. *See* Clark Neily, *Prisons Are Packed because Prosecutors Are Coercing Plea Deals. And, Yes, It’s Totally Legal*, The Cato Institute (Aug. 8, 2019). As the U.S. Supreme Court observed a decade ago, plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.” *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (emphasis in original). In all of those cases, the plea bargain limits the child’s ability to seek review—on either direct appeal or in collateral proceedings—of the wrongful transfer to adult court. This is especially true in states like Pennsylvania that allow prosecutors to condition pleas on the defendant waiving any appeal of denials of pretrial motions. *See* Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871 (2010). If this Court does not affirm a remedy where Nazeer exercised his right to trial, it will not have many other

opportunities to ensure the right against self-incrimination has force as a certification hearing.

Second, for those who do go to trial, the appellate and collateral review timeline virtually ensures that this exact timing problem will arise—any remedy must acknowledge that context. Simply put, the average timeline of direct appeals and collateral review mean that even the youngest children accused of crimes—Nazeer was charged when he was just 15—will almost certainly age out of the juvenile court system before they experience a wrongful certification, prosecution in adult court, plea/conviction and sentencing, direct appeal, and collateral review. Cases vary in important ways, but across the Commonwealth in 2020, more than 23.5% of open criminal cases had already been pending for more than a year. *See Pennsylvania Statewide Common Pleas Caseload Statistics, Caseload Highlights of the Unified Judicial System of Pennsylvania (2020)*. Appeals can take years on top of that. Virtually any child who establishes a wrongful certification will have taken so long to do so that they will have aged out of a possible return to a juvenile facility—as such release is the only appropriate remedy.

Third, declining to order release or any alternative remedy not only fails to redress a key harm, but it penalizes children for the violation they suffered. As discussed in Section I.a., *supra*, children encounter incredible hardships when confined in adult facilities, both because of the dangers that they face and because of the lack of access to age-appropriate developmental programming. That is to say, when confined in adult facilities children both suffer directly, and pay an opportunity cost by not having access to programs and rehabilitation targeted for youth. *See id.* Those harms

associated with wrongful certification also directly impede the child’s ability to be paroled out of adult custody later, if they must serve the adult sentence. Despite the above-referenced studies that show low recidivism rates after lengthy prison sentences, prisoners who spend their adolescence in jails and prisons may be less likely to be granted parole because of a number of factors related to their youth—disciplinary records that reflect impulsivity and context, less age-appropriate education and programming, and increased experiences with trauma and trauma-related symptoms. Failing to redress the error that pushed them into those adult facilities at all not only offers no remedy for the direct harms, but also exposes them to that harm being compounded on the back end of their sentence.

Finally, none of the other typical remedies for violations of constitutional rights apply in this context. Although there is no “deterrent more formidable than that inherent in the award of compensatory damages,” *Carey v. Piphus*, 435 U.S. 247, 256 (1978), absolute immunity for judges (and immunity for prosecutors who would invite such violations) bars civil rights claims for Fifth Amendment violations in this context. Another common Fifth Amendment remedy, the exclusionary rule, serves no remedial purpose here because, as noted, most cases resolve by plea. Even if they did not, the exceptions that riddle the exclusionary rule mean someone in Nazeer’s position could not receive serious assistance.⁷ Especially where, as here, any

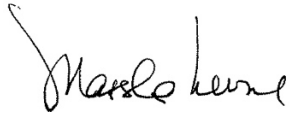
⁷ Among the exceptions most applicable here: one allows officers to use information gathered during coerced interrogations that violate the Fifth Amendment to develop separate leads, seek out other witnesses, and collect additional evidence—without any of that additional information subject to exclusion. See *Michigan v. Tucker*, 417 U.S. 433, 443 (1974). Both litigation and empirical

testimony wrongfully elicited at a transfer hearing precedes the entire prosecution in adult court, allows for further investigation of leads, and can at least impeach the child at the adult prosecution, suppression is especially toothless.

CONCLUSION

For the foregoing reasons, in addition to those set out by Nazeer Taylor, we urge this Court to affirm the Superior Court.

research demonstrate how this actually incentivizes Fifth Amendment violations. *See* Michael Avery, *You Have a Right to Remain Silent*, 30 Fordham Urb. L. J. 571, 613 (2003). Another exception allows prosecutors to use coerced statements against defendants at pretrial proceedings. *See Harris v. New York*, 401 U.S. 222, 226 (1971); *Oregon v. Hass*, 420 U.S. 714, 727 (1975). And as late as trial, even information a judge has adjudicated as coerced and accordingly excluded as direct evidence may still be used for impeachment purposes, limited only by Fourteenth Amendment due process protections. Avery, *supra*, at 614 (quoting Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 133-34 (1998)).



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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 531 and 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 6,387 words. In preparing this certificate, I relied on the word count feature of Microsoft Word. I further certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Jim Davy

Jim Davy