Received 8/5/2022 9:25:24 PM Supreme Court Middle District

Filed 8/5/2022 9:25:00 PM Supreme Court Middle District
40 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA

---

40 MAP 2022

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

NAZEER TAYLOR,
Appellee

BRIEF FOR APPELLEE

Appeal from the Opinion of the Superior Court of Pennsylvania, at No. 856 EDA 2017, Dated July 29, 2021, Reversing the Judgment of Sentence Imposed by the Honorable William R. Carpenter and Remanding for Dismissal in the Court of Common Pleas of Montgomery County at No. CP-46-CR-3166-2014, dated January 13, 2017

Rachel I. Silver, Esquire
Palladino, Isbell and Casazza, LLC
1528 Walnut St, Suite 1701
Philadelphia, PA 19102
(215) 576-9000
silver@piclaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes

Other Sources

I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the harmless error doctrine applies where a certification transfers a case from the juvenile division to the adult criminal division of the Court of Common Pleas based on the violation of a fundamental constitutional privilege?

   Suggested answer: no.

2. Whether the constitutional and statutory structure and authority of Pennsylvania's unified courts permits remand to a division of the Courts of Common Pleas when that division only had jurisdiction due to improper certification and, therefore, no longer has jurisdiction?

   Suggested answer: no.

II. COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This appeal centers around a certification hearing which occurred in two parts on April 2, 2014, and April 25, 2014, before the Honorable Joseph A. Smyth. Testimony and argument were split between the two dates, with the Commonwealth advocating for the then-17-year-old Nazeer Taylor to be certified to stand trial as an adult in criminal court for acts which occurred when Taylor was 15-years-old. Defense counsel argued that, per the standards of the certification hearing, Taylor was amenable to treatment and would have ample time in treatment afforded by the juvenile system – more than three years. On April 25, 2014, the Honorable Judge Smyth granted the Commonwealth's motion to certify, and the matter was moved to the adult criminal court.

Taylor was ultimately tried before a jury, and on January 31, 2017, was sentenced by the Honorable Judge William R. Carpenter to an aggregate sentence of 10-25 years imprisonment followed by 10 years' probation.

Taylor appealed his conviction to the Superior Court. On September 10, 2018, the Superior Court, in a memorandum opinion and order, affirmed the judgment of sentence.

On October 9, 2018, Taylor petitioned the Pennsylvania Supreme Court to permit an appeal. The High Court granted that petition by Order dated March 12,

2019. Briefs from both parties were timely filed. Oral argument occurred on November 19, 2019, and the Pennsylvania Supreme Court entered judgment reversing and remanding on May 19, 2020.

The matter was remitted to the Superior Court on June 4, 2020, and was remanded on June 11, 2020, “for a determination, in the first instance, and with developed advocacy of the parties, of whether the harmless error doctrine is applicable to the juvenile court's constitutionally deficient misapplication of the Juvenile Act's transfer provisions and, if it is not or if the error is not harmless, for consideration of the available relief under these circumstances.”

On June 25, 2020, this Honorable Court ordered “pursuant to the Pennsylvania Supreme Court's May 19, 2020 Opinion in this case, the parties are ordered to file in this Court, and serve on the opposing party, briefs regarding "whether the harmless error doctrine is applicable to the juvenile court's constitutionally deficient misapplication of the Juvenile Act's transfer provisions and, if it is not or if the error is not harmless, for consideration of the available relief under these circumstances." Briefs from both parties were timely filed in the Superior Court.

On July 29, 2021, the Superior Court issued its opinion holding that the constitutional error at issue in the case was not amenable to harmless error analysis and that, because of the limitations of the jurisdiction of the juvenile court,

dismissal was the appropriate relief. The Superior Court reversed the judgment of sentence, remanded the case and relinquished jurisdiction.

The Commonwealth then filed, on August 12, 2021, an application for reargument *en banc*. Taylor, through the Montgomery County Public Defender's Office, sent a letter in lieu of answer to the Commonwealth's petition on August 25, 2021. On October 13, 2021, the Superior Court denied this application and declined to rehear the matter.

The Commonwealth filed its Petition for Allowance of Appeal to this Honorable Court on November 12, 2021. This Honorable Court granted the Petition for Allowance of Appeal on March 22, 2022. The Commonwealth timely filed its Brief of the Appeallant.

This timely Brief of the Appellee now follows.

B. FACTUAL HISTORY

Nazeer Taylor was born on September 12, 1996, to Dominae Taylor ("Dominae"), and Larry Kemp ("Mr. Kemp"). Certification Hearing Exhibit D-3, Dr. Machinski Psychological Evaluation ("D-3"), pp. 1, 3. Dominae was just 15-years-old when she gave birth to Taylor, and she soon lost custody of her son due to overwhelming neglect, including an incident when she over-medicated the then-infant Taylor in order to keep him quiet. *Id.* Dominae was an inconsistent figure throughout Taylor's childhood and early teen years, coming in and out of his life at

random without ever taking on a more maternal, caretaking role. *Id.* His father, Mr. Kemp, was not present, nor did he have any other children with Dominae. *Id.*

Instead, Taylor lived with his maternal grandmother, his maternal uncle, and his step-grandfather, Jader King ("Mr. King") until he was approximately 13-years-old. *Id*. Throughout his time at his grandmother's house, Taylor was abused and molested. *Id.* His grandmother and uncle regularly punched Taylor and hit him with objects until he would bleed, and his grandmother even threw Taylor down a flight of stairs. *Id*. Taylor's uncle also sexually abused Taylor. (N.T. 04/24/14, Certification Hearing p. 14).

Mr. King moved out of the home after he divorced Taylor's grandmother, and a new man, Reginald Sharpe ("Mr. Sharpe") moved in and took his place. D-3, p. 4. However, the change did not bring any relief for Taylor, who instead butted heads with Mr. Sharpe, who sold drugs and was aggressive and antagonistic toward the young Taylor. *Id.* Soon after Mr. Sharpe moved into the home, Taylor was arrested and adjudicated delinquent for burglary and related offenses. (N.T. 04/24/14, Certification Hearing p. 19). It is worth noting that Taylor did not receive any treatment or supervision as result of that adjudication. *Id*.

Tension between Taylor and Mr. Sharpe reached new heights when Taylor was 14-years-old and Mr. Sharpe accused Taylor of being involved in a robbery of their shared home. D-3, p. 4. Mr. Sharpe swore Taylor colluded with the man who

stole Mr. Sharpe's money. *Id*. He put a gun to Taylor's head and threatened to kill him if Taylor did not get the money back. *Id*. Police were, unsurprisingly, called in response to this very real and dangerous threat. *Id.* Yet, rather than defend her grandson or throw out her latest abusive partner, Taylor's grandmother told police that she would not accept Taylor in her home any longer. *Id*.

Taylor was placed in the custody of the Department of Human Services ("DHS"), which placed and moved Taylor through numerous emergency shelters. *Id.* Taylor was ultimately transferred to St. Michael's School for Boys/EIHAB Human Services ("EIHAB") in February of 2011. *Id.*; *see also,* (N.T. 04/25/14, Certification Hearing, p. 82-83). During this placement, Taylor attended school and met with an individual therapist regularly. D-3, p. 4. He had structure, treatment and support for perhaps the first time ever, and he did well. *Id.*

Taylor's caseworker tried to find him placement with family members, but he was failed time and again. *Id.* Taylor's grandmother chose her partner over her grandson yet again and refused to take Taylor back. *Id.* Mr. Kemp, Taylor's father, never returned phone calls to DHS. *Id.* Taylor's mother at least considered taking Taylor in, but she could not keep her own demons at bay long enough to do so; she tested positive for opiates, failed to attend counseling sessions and eventually disappeared from the shelter where she was living. *Id.* Taylor briefly went to stay

with an aunt when he was 15, but she threatened to send him "back to DHS" when he broke the rules, and he ran away and stayed with a friend. *Id.*

Taylor, understanding his precarious situation and the stability he needed, asked his DHS worker to send him back to EIHAB. *Id*. Taylor emphasized to his case worker that he felt comfortable at EIHAB and would do well there. *Id*. Unfortunately, the DHS case worker declined to respect Taylor's wishes and perspective, instead deciding that Taylor did not need that much structure. *Id*.

Taylor was instead placed in a foster home with Gloria and Tyrone Parker ("Ms. and Mr. Parker," respectively) and A.O. *Id.* A.O. was 11-years-old and also a foster child taken in by the Parkers. (N.T. 06/02/14, Certification Hearing, p. 39). Taylor and A.O. engaged in sexual activity, described in various ways at different hearings. *Compare* A.O's testimony (N.T.06/20/16, Trial pp. 6-88) and A.O's testimony (N.T. 04/02/14, Certification Hearing pp. 6-77). Despite the inconsistent descriptions of the sexual contact between Taylor and A.O., Taylor was charged with rape of a child and related crimes, resulting in the two-part certification hearing discussed *supra* . He was 16-years-old.

On April 2, 2014, during day one of the certification hearing, the Commonwealth put on its case in chief, calling A.O. and Mrs. Parker to testify to the underlying facts and establish a *prima facie* case. (N.T. 04/02/14, Certification Hearing, p. 112). The Commonwealth also moved three exhibits into evidence,

including the psychiatric evaluation of Taylor by Dr. Michael Buxbaum ("C-3"). It is important to note that Dr. Buxbaum never testified during the certification process but his report was entered into evidence with no objection from defense counsel. *Id*. The report was extremely limited in scope, focusing on whether Taylor was committable to a mental institution. *Id.* at 113.

On April 25, 2014, the second day of the certification hearing, Dr. Nicole Machinski testified as an expert psychologist[1] regarding Taylor's amenability to treatment within the juvenile system. (N.T. 04/25/14, Certification Hearing, p. 4). Dr. Machinski opined that this was not a particularly sophisticated offense. *Id.* at

[1] In its Appellant's brief, the Commonwealth paints Dr. Machinski as unqualified and her perspective and expertise as somehow lacking. *See Appellant's Brief*, p 3. However, the Commonwealth made no objection to Dr. Machinski's qualification as an expert at the time of the certification hearing. *See* N.T. 04/25/14, p. 11. Further, it describes the juvenile court as having found Dr. Machinski's testimony as "riddled with inconsistencies." *See* Appellant's Brief p. 3. This severely overstates the court's actual description of the testimony: "I think the defense makes a distinction, and so does the defendant – or they make a good point, not necessarily a distinction – when they say, look, the sex offense is totally different than the burglary. And because someone was successful in a burglary, that's not at all related to the sexual offense, and he never really got treatment for the sexual offense. That's basically the argument as I understand it. And I don't necessarily disagree with that, but then I think the defense expert becomes a little bit inconsistent and sort of goes back and forth where she counters that particular Commonwealth with you can't compare these other matters to a sex offense, but then she goes back and forth and says but because he did well in treatment in the other matters, he will do well for treatment as a sex offender. So in one sense, she tries to separate the two, and then in another sense, she tries to blend the two, and I find that testimony to be inconsistent." That is the totality of the court's discussion of "inconsistencies" in Dr. Machinski's testimony and was not the basis of the court's decision to certify.

20-21 ("there is nothing in the allegations that I read that suggest that this is a particularly adultlike crime, that there is something about this that was particularly different than typical cases of juveniles with inappropriate sexual behavior"); *see also id.* at 63-64. Dr. Machinski further testified that, given Taylor's age and the three-and-a-half years available through the juvenile system's jurisdiction, there was sufficient time for Taylor to receive treatment. *Id.* at 21-22. She testified that treatment programs for someone in Taylor's situation typically last "about 12 months," or less than a third of the time still available under the supervision of the juvenile court. *Id.* at 22. Dr. Machinski testified that the juvenile treatment model "is generally largely effective" and backed this assertion with research which shows that "recidivism rates for juveniles who have not had any treatment is about 18 percent" whereas for those who are treated "the recidivism rate is somewhere between 5 and 7 percent. So that's a significant reduction." *Id.* at 26.

Judge Smyth, who presided over the certification hearing, pointed out that what he wanted to know was "would **this particular juvenile** benefit from treatment" rather than statistics about juveniles generally. *Id.* (emphasis added). The doctor then discussed the factors that led her to believe that Taylor, **specifically**, would be amenable to treatment. *Id.* at 27. She noted that while Taylor had previously been adjudicated delinquent, he never received any services

or supervision based on that adjudication; Taylor had no history of being resistant or failing treatment. *Id.*at 27; *see also, id.* at 64.

In fact, the counseling Taylor was provided at EIHAB, the same facility he had specifically requested to be returned to when yet another home situation fell apart, showed that Taylor responded positively to "regular therapy, structure, and supervision." *Id.* at 27. Dr. Machinski testified that Taylor showed a willingness to participate in treatment and was cooperative. *Id.* This conclusion is buttressed by the Commonwealth's competency evaluation in which Dr. Buxbaum noted that Taylor was "cooperative." C-3, p. 1.

During cross-examination, the Commonwealth for the first time brought up the notion that during treatment, Taylor would need to admit guilt:

> Q. And you would agree with me that if he [Taylor] committed these acts of forcible rapes, he would need sex offender specific treatment, correct?
>
> A. I agree, yeah.
>
> Q. And isn't the first step in sex offender treatment admitting guilt?
>
> A. Yeah. Usually.

Id. at 58.

In response, the Commonwealth called Mike Yoder ("Mr. Yoder"), a supervisor with Montgomery County Juvenile Probation, as an expert in "amenability and the options available in the juvenile and adult systems." *Id.* at 72,

76. Mr. Yoder has a master's degree in criminal justice but has no education, certifications, training, or experience in psychology. *Id.* at 76-77. Mr. Yoder testified that there was a measure of "boldness" with Taylor's alleged behavior because he did it while his foster mother and father were home. *Id.* at 89. However, he later acknowledged that while the crime was "bold," it was clearly not very well thought out. *Id.* at 100.

Further, Mr. Yoder was unable to explain why Taylor would not be amenable to treatment given that the treatment programs within the juvenile system for sexual offenders last two years and there were more than three years remaining for supervision. *Id.* at 90-91. "[I]f he were to do well in placement and be released after a 2-year commitment to a residential placement, if in fact he's adjudicated of the charges, that would leave us just a year of supervision after a release from placement." *Id.* at 90-91. That answer acknowledges that the juvenile system would have had enough time to treat Taylor, but as a probation officer, naturally, Mr. Yoder would have liked more supervision after the treatment was completed.

On cross-examination, Mr. Yoder made it clear that he did, in fact, believe that the juvenile system's treatment modality would work for Taylor:

> Q. Okay. And it is your testimony that the juvenile sex offender placements most commonly used by this Court would not be effective for Mr. Taylor?

A. **I'm not saying that they wouldn't be effective**; what I'm saying is that they wouldn't be effective in the time that we have left to—the duration of our exposure time with him; three and a half years, I don't feel, is a sufficient amount of time.

Id. at 99 (emphasis added). When pressed as to why more than three years would be an insufficient period of supervision for Taylor, particularly in light of the standard treatment employed time and again by Mr. Yoder lasting just two years, Mr. Yoder's response was limited. *Id*. at 99. Mr. Yoder made it clear that his opinion was squarely and solely based on the fact that Taylor had not admitted to the crime charged. *Id.* at 99.

Q. Okay and the relevant factors that we've talked about, Mr. Antonacio [attorney for the Commonwealth] was talking about, the fact that he's actually polite with authority figures and forward-looking and open to discussing treatment or his future programs, that sort of thing, and you said that doesn't necessarily make someone amenable; is that your testimony?

A. According to the statute, that's not one of the points that is looked at; not to say that that's not a good trait to have. But I also had reference, you know, the report that indicated that he has a willingness to participate in treatment, although in Dr. Buxbaum's report, he indicated that he's angry for being here because he doesn't feel like he did anything wrong.

So apparently, over the course of a number of weeks, the attitude has changed from not doing anything to deserve

> to be here, to now he's willing to participate in treatment.[2]

Id. at 99. Mr. Yoder, like the lower court, incorrectly focused on Taylor's willingness to admit guilt or self-incriminate[3]. This then became the crux of the Commonwealth's argument in closing, despite no testimony being adduced in the hearing that the juvenile treatment mode could not rehabilitate Taylor. *Id.* at 106. The Commonwealth argued:

> Your Honor, I would suggest to you none of the juvenile facilities are adequate at this point. Because he's going to be there, I would suggest—the fact that he's in denial, I'm bringing that up because, as Your Honor knows from the sex offender therapists that have testified, the reports that you've gotten in the past, that the first step toward treatment is admission. Even the defense expert said that. When somebody is in denial, things are going to take a lot longer for them to get through the program. And if he does get through the program before he's 21, he's still going to need supervision, and I would suggest adult court is more appropriately handled to give him the supervision.

Id. at 109.

---

[2] Dr. Buxbaum's report says specifically: "[Taylor] reports that he is angry about being here at the youth center because he feels he has been placed unfairly. He would rather be back at Pottstown High School working out to be on the track team. Even though he is angry, [Taylor] said he reads his Bible every day. He tries to make peace with himself and accept the situation as it presents itself to him."

C-3, p. 1.

[3] *See Commonwealth v. Taylor*, 204 A.3d 361 (Pa. 2019).

After argument, the juvenile court ruled in favor of the Commonwealth's motion to certify, unconstitutionally hinging its decision on Taylor's unwillingness to admit guilt:

> All right. Thank you. I think one of the Commonwealth's arguments is that the defendant has been in treatment for almost every issue that the defendant's expert has identified and, notwithstanding that treatment, within six months committed a series of forcible rapes, which is much more serious than the issue he was in treatment for.
>
> I think the defense expert makes a distinction, and so does the defendant—or they make a good point, not necessarily a distinction—when they say, look, the sex offense is totally different than the burglary. And because someone was successful in a burglary, that's not at all related to the sexual offense, and he never really got treatment for the sexual offense. That's basically the argument as I understand it.
>
> And I don't necessarily disagree with that, but then I think the defense expert becomes a little bit inconsistent and sort of goes back and forth where she counters that particular Commonwealth witness can't compare these other matters to a sex offense, but then she goes back and forth and says but because he did well in treatment in the other matters, he will do well for treatment as a sex offender. So in one sense, she tries to separate the two, and then in another sense, she tries to blend the two, and I find that testimony to be inconsistent.
>
> I think another dilemma or conundrum for the defense is that's their approach, he's had an unfortunate upbringing, through no fault of his own. To a certain extent, he is antisocial and damaged, and that's not his fault. But is he so damaged that he can't be rehabilitated for a sex offender, or can he be rehabilitated for a sex offender? And I think part of the dilemma is they don't distinguish sex offenders from burglary,

so now they blend their first argument and say because he's done well in the first, he can do well in the second.

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

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

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

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

And when Dr. Machinski in her report indicates the issues that he needs treatment in and the Commonwealth argues, well, none of this has to do with amenability within the statute, well, it might, when you have four other categories, it would certainly refer to amenability for a crime that's much less

> serious than this, but I don't know that it means anything with regard to somebody who's committed the type of act that he's alleged to have committed.
>
> So for all the reasons in the statute as enumerated by Mr. Antonacio and because it's defense burden of proof, I'm going to grant the Commonwealth's motion to certify him to adult court. Thank you.

Id. at 112-115 (emphasis added).

III. SUMMARY OF ARGUMENT

This Honorable Court is presented with two simple questions: whether the Fifth Amendment privilege violation that occurred at a certification hearing can be considered harmless error, and whether jurisdiction can remain vested in a court that never should have had jurisdiction of a matter in the first place. The answer to both is a resounding no.

Taylor was properly under the jurisdiction of the juvenile court at the time of his certification hearing as was legally a child. Had his constitutional rights not been violated by the juvenile court, which improperly considered Taylor's silence when deciding to whether to certify, there is reasonable probability that Taylor's case would not have been transferred to the adult criminal court. The fundamental constitutional right violated by the certifying court warrants a structural error analysis because the right against self-incrimination is so essential to the criminal justice system, that an error which violates that right can never be *de minimis*. *See, e.g., Commonwealth v. Lewis*, 598 A.2d 975, 982 (Pa. 1991). It is, therefore, a structural rather than harmless error, which merits reversal. If, *arguendo*, the harmless error analysis applies, the profound effect of the constitutional violation in the case at bar is beyond a reasonable doubt and can never be considered harmless. *See, e.g. Commonwealth v. Story*, 383 A.2d 155 (Pa. 1978). The outcome is therefore the same, requiring reversal.

Reversal necessitates remand, which in the instant matter would require the case to return to the juvenile court. The juvenile division, per the Superior Court's most recent holding in this matter on remand, and citing *Commonwealth v. Johnson* and *Commonwealth v. Kent*, has **exclusive** jurisdiction to determine whether a case should be transferred to the adult criminal division. *Commonwealth v. Taylor*, 2021 Pa. Super. Unpub. LEXIS 2024*, *34-35 (Pa. Super. Ct. 2021); *see also Commonwealth v. Johnson*, 669, A.2d 325, 321 (Pa. 1995); *Commonwealth v. Kent*, at 355 F.2d 541, 564 (1996); *see generally* 42 Pa.C.S.A. § 6303(a). However, because through no fault of Taylor's, the juvenile court no longer has jurisdiction over him because is over the age of 21 and is, therefore, not a child under the law. 42 Pa.C.S.A § 6303(a); 6302. This does not, as the Commonwealth suggests, then allow for the matter to be remanded to the adult court, which never properly had jurisdiction over Taylor, as he only appeared there due to improper certification. Instead, the only proper remedy is immediate discharge.

IV. ARGUMENT

a. Harmless Error Analysis is Not Applicable Where the Certifying Court Violates a Juvenile's Fifth Amendment Privilege and, in Doing So, Misapplies the Juvenile Act's Transfer Provisions

It is undisputed that the certifying court erred and violated Taylor's Fifth Amendment right when weighing his failure to admit guilt as a factor in whether to transfer the case to adult court. *See, generally*, *Commonwealth v. Taylor*, 230 A.3d 1050 (Pa. 2020)(hereinafter "Taylor I"); *see also Commonwealth v. Taylor*, 260 A.3d 171, 2021 Pa. Super. Unpub. LEXIS 2024* (Pa. Super. Ct. 2021)(hereinafter "Taylor II"). The High Court of this Commonwealth emphasized that the juvenile court's abuse of discretion was so egregious that it reached the level of being unconstitutional, holding:

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

Taylor I, 230 A.3d at 1072-73 (emphasis added). The Superior Court rightfully agreed and afforded similar weight to the seriousness of the violation, noting "The privilege against compulsory self-incrimination is **essential to the criminal justice system**, both for individuals and society…it serves not to prevent an erroneous

conviction, but "protects some other interest," that is, **the foundational principle** that a person should not face the 'cruel trilemma of self-accusation, perjury, or contempt." *Taylor II*, 2021 Pa. Super. Unpub. LEXIS at *23 (citations omitted). This is because the violation constitutes a structural rather than a normal trial error subject to harmless error analysis; the misapplication of law to deny a defendant's constitutional rights, as what occurred in the case at bar, can never be "the type of '*de minimis*' infraction which might form the basis for a 'harmless error' finding." *Commonwealth v. Lewis*, 598 A.2d 975, 982 (Pa. 1991).

The insistence that constitutional violations of this kind are structural rather than harmless error is consistent with longstanding policies and law at all levels, both within and outside of the Commonwealth. The United States Supreme Court and the Pennsylvania Supreme and Superior Courts recognize that when fundamental, constitutional rights have come under attack through error and misapplication of law that the errors require *per se* reversal.

In *Commonwealth v. Lewis*, the defense requested the jury be charged that it should draw no adverse inference from the defendant's failure to testify. *Commonwealth v. Lewis*, 598 A.2d 975, 978 (Pa. 1991). The trial court refused to give the instruction. *Id.* In its opinion, the *Lewis* Court first held that every defendant is constitutionally entitled to a "no-adverse-inference" instruction when a timely request is made. *Id.* at 979. The Court then addressed the issue of harmless

error. The District Attorney contended that "even if the defendant's constitutional right to a 'no-adverse-inference' charge was inadvertently denied in this case, such an oversight was 'harmless error' in view of the 'overwhelming evidence' presented by the Commonwealth with respect to the defendant's guilt." *Id.* at 980. The *Lewis* Court rejected that assertion holding:

> We further conclude and now hold that given the importance of this issue for courts and litigants throughout Pennsylvania, the failure to give such a "no-adverse-inference" charge, when requested to do so in a timely fashion, *can never amount to harmless error*. Given the strong constitutional underpinnings of the "no-adverse-inference" charge, its omission may never be treated lightly. As then Justice Nix, now Chief Justice Nix, stated in a similar context in *Commonwealth v. Bishop*, 472 Pa. 485, 372 A.2d 974 (1977):
>
> > The Commonwealth argues that even if the charge as a whole were defective it must be considered harmless error in view of the convincing evidence of guilt offered to support the verdict. We cannot accept this position. On prior occasions we have refused to ignore an incorrect, misleading, or incomplete charge on a matter as fundamental as the burden of proof in a criminal case, even where "the evidence of guilt piles as high as Mt. Everest on Matterhorn, even if the District Attorney conscientiously believes the defendant to be guilty as Cain, and no matter with what certainty the Judge views the culpability of the accused at the bar…" *Id.*, 472 Pa. at 491, 372 A.2d at 797, *quoting Commonwealth v. Edwards*, 394 Pa. 335, 338, 147 A.2d 313, 315 (1959).
>
> Because the right of a criminal defendant to decline to take the stand without adverse comment or inference is a fundamental one under Article I, Section 9, the failure of the trial court to give the "no-adverse-inference" instruction when so requested is far from the type of "*de minimus*" infraction which might form the basis for a "harmless error" finding. *See Story*, 476 Pa. at 410-11, 383 A.2d at 164-165.

Id. at 981-82 (emphasis in original).

The error made by the juvenile court in the present matter could not be more analogous to the error made in *Lewis*. Both were errors of law. Both errors of law involved a violation of the Fifth Amendment. Indeed, the error made in the present matter was even more serious than the error in *Lewis*. In *Lewis*, the jury simply was not charged on the defendant's right to no-adverse-inference. Whether the jury held the defendant's silence against him, however, is unclear. In the present matter, the juvenile court **expressly** and **explicitly** held Taylor's failure to incriminate himself against him. As in *Lewis*, this is an error implicating a fundamental right that is so far "from the type of '*de minimis*' infraction" that it could never "form the basis for a 'harmless error' finding." *Id.* at 982.

Two years later, in *Commonwealth v. Edwards*, the Pennsylvania Supreme Court held that it was also *per se* reversible error for a trial court to give a no-adverse-inference instruction when the defendant requested that no such instruction be given. *Commonwealth v. Edwards*, 637A.2d 259 (Pa. 1993).

> [W]e have no hesitancy in announcing for the future that it will be *per se* reversible error if a judge instructs the jury concerning a defendant's right to testify when the defendant has requested that no such instruction be given. A *per se* rule will avoid time consuming appeals arguing about harmless error and will clearly instruct trial judges as to how to proceed on this question.

Id. at 261. The same expedience and clarity is called for with regard to violations of the Fifth Amendment during certification hearings.

In *Commonwealth v. Kelly*, this Court held that it is inappropriate to utilize a harmless error standard when a jury instruction includes unconstitutional burden shifting in violation of the Due Process Clause. *Commonwealth v. Kelly*, 724 A.2d 909 (Pa. 1999).

> Applying the lessons of *Sandstrom* to the concept of "harmless error," the *Johnson* Court concluded that judicial assessment of the independent evidence of intent is irrelevant and unwarranted. *See id.* at 86, 103 S.Ct. 969. "To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury may never have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are made." *Id.* Thus, the Court determined that "harmless" error analysis was inappropriate in reviewing a jury instruction that had mandatorily shifted the burden to the accused to disprove a material element of the crime. *See id.*

Id. at 914.

More recently in *Interest of J.M.G.,* this Honorable Court concluded that the violation of psychotherapist-patient privilege in involuntary commitment proceedings pursuant to Act 21 constituted a constitutional error that was "so basic to a fair trial that application of harmless error doctrine is inappropriate." 229 A.3d 571, 583 (Pa. 2020)(cited by the Superior Court in *Taylor II*). The majority in *J.M.G.* relied, in part, on *Chapman v. California*, 386 U.S. 18 (1967) to analyze the types of exceptional constitutional rights that are so fundamental to our justice

system and a fair trial that their violation can never be treated as harmless error. *Id*. at 23. The *Chapman* list includes where (1) a person is coerced into a confession which is used against them at trial, (2) an accused person is deprived of the right to counsel, or (3) an accused person is deprived of the right to an impartial decision-maker, with *J.M.G.* adding where the psychotherapist-patient privilege in involuntary commitment proceedings to that list.

Adding instances where a certifying court violates a juvenile's Fifth Amendment privilege to the list started in *Chapman* is the next logical step following *J.M.G.* because of the similar level of harm. It is analogous to a person who is coerced into confession then having that confession used against them at trial, as the juvenile, in this case Taylor, was under similar coercive pressure: either admit to the underlying conduct to satisfy the certification court for the opportunity at staying within the juvenile system, knowing that admission would be used at trial by the Commonwealth, or remain silent and have that constitutional privilege used against them as a reason for certification. This type of no-win situation for Taylor is exactly the kind of constitutional violation that cannot be treated as harmless error, as "[w]here a juvenile court relies on a defendant's refusal to admit guilt and uses that refusal as a basis to decide to certify the case to a trial court, the error is a structural error. Such reliance is intertwined with the decision to certify the case, and, similar to a court's failure to inform a jury that it may not draw an

adverse inference from a defendant's silence, it can never be harmless." *Taylor II*, 2021 Pa. Super. Unpub. LEXIS at *24. In every case before the Pennsylvania Supreme Court in which the law was unconstitutionally misapplied,[4] the Court has held that a harmless error analysis is inappropriate and *per se* reversal is required.

Similarly instructive is the precedential holding in *Bethea*. There, the Court held that while the trial court relied partially on the improper (and unconstitutional) consideration of the demand for a jury trial when fixing the defendant's sentence, because the trial court also considered other proper factors, the judgment of sentence did not need to be reversed. *Commonwealth v. Bethea*, 379 A.2d 102 (Pa. 1977).

The Pennsylvania Supreme Court reversed holding:

> [T]he correct inquiry in a case such as this is not whether the trial court considered legitimate factors in fixing sentence, but whether it considered only such factors. … [I]t is sufficient to render a sentence invalid if it reasonably appears from the record that the trial court relied in whole or in part upon [an impermissible] factor.

Id. at 106-107. Here, the juvenile court not only relied "in part" upon an impermissible factor; the court primarily relied upon an erroneous and unconstitutional factor.

---

[4] Technically *Edwards* did not directly relate to a constitutional issue since giving a no-adverse-inference charge complies with the Constitution even if it is given over objection. *Commonwealth v. Edwards*, 637A.2d 259 (Pa. 1993). Still, it tangentially relates to the Fifth Amendment, and even that was enough for the Court to find it appropriate to make a rule of *per se* reversal.

The United States Supreme Court came to an identical result in an parallel context. Indeed, the nation's highest court has specifically held that a harmless error analysis should never be applied when a juvenile is improperly certified over to adult court:

> [W]e agree with the Court of Appeals in *Black*, that 'the waiver [i.e. certification] question was primarily and initially one for the Juvenile Court to decide and **its failure to do so in a valid manner cannot be said to be harmless error**."

Kent v. U.S., 383 U.S. 541, 563-64 (1966) (emphasis added) (internal citations omitted).

The Commonwealth clings to *Arizona v. Fulminante* and *McCoy v. Louisiana* but draws the wrong conclusion, as each actually supports a finding of structural error in the instant case. In *Fulminante*, the Court acknowledged that constitutional errors can be harmless and separates "trial error" from "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. 279, 309 (1991). The Court's non-exhaustive list of structural defects focuses on errors that affect "the framework within which the trial proceeds rather than simply an error in the trial process itself. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310; *see also McCoy*, 138 S.Ct. 1500, 1511 (2018)(where structural error "affect[s] the framework within

which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself.'") *McCoy* then divides the list of possible errors into three sub-categories of errors that "might" constitute structural errors, (1) where the right that is violated is one that protects the defendant's interest beyond an erroneous conviction, (2) where "the effects [of the error] are too hard to measure," or (3) "where the error will inevitably signal fundamental unfairness." *McCoy*, 138 S.Ct. at 1511 (internal citation omitted).

The keystone of *Fulminante*, which mirrors the finding described *supra* in *Lewis*, that some constitutional errors are so great that they simply cannot be analyzed by harmless errors standards is ignored by the Commonwealth. The constitutional violation in the instant case results in a structural error that impacts the jurisdiction, the type of penalties and the length of oversight available, clearly affecting the framework within which the trial proceeds. The framework of the juvenile system significantly departs from the framework of the adult criminal system: the juvenile system is predicated on adjudication rather than conviction; it offers no juries, only an impartial jurist as factfinder and sentencer; the scope of jurisdiction in which a case can originate in juvenile court ends at age 18, where it begins for adult criminal court, while supervision in the juvenile court can continue through age 21 whereas adult criminal court supervision contains no age cap; and the juvenile system focuses on supervision, care and rehabilitation through a litany

of resources over punishment, as is the case in the adult criminal system. *See, generally, The Juvenile Act* 42 Pa.C.S.A §§ 6301-6375. Thus, a certification founded on an improper basis, i.e. a violation of the defendant's Fifth Amendment rights, profoundly affects the framework in which the case proceeds.

Likewise, the violation in the instant case could fall into any of the three *McCoy* subcategories, warranting the violation to be deemed structural and not harmless. The Superior Court, citing to a recent Alaska Supreme Court case, acknowledged that the Fifth Amendment

> "privilege protects not only against a mistaken conviction **but also against the defendant 'suffering the indignity of being compelled to take the stand to provide information that is against their own interest.'** That same concern holds sway here, even though the certification court did not compel Taylor to take the stand, but rather held his silence against him. In the end, **Taylor was given a Hobson's choice: remain silent in the face of the certification judge's holding his silence against him, or admit guilt at the certification hearing and have the Commonwealth almost certainly use his admission against him at trial."**

Taylor II, 2021 Pa. Super. Unpub. LEXIS at *22-23. The Fifth Amendment rights, therefore, undoubtedly qualify as the type of fundamental legal principles described in *McCoy*'s first subcategory.

Likewise, the effects of the Fifth Amendment violation here fit the second subcategory as the effects are, indeed, too hard to measure. Within the juvenile system, Taylor had more than three years available for supervision; he could have received rehabilitation and therapy, **which he**

was amenable to, both related to his actions and the underlying trauma that marred his childhood. *See* N.T. 04/24/14, Certification Hearing, p. 21-27. He also could have received specialized treatment, as sex offender treatment programs typically lasted two years, and still would have had additional time available before aging out of the juvenile system to be supervised upon re-entry and in the community. *Id.* at 90-11, 99. Instead, he has endured years of imprisonment among serious adult offenders starting when he was still a child, and he faces 35 years of supervision, more than double the number of years he had been on this earth at the time of the underlying charges. The Commonwealth assumes that Taylor would have been certified regardless of the Fifth Amendment violation, but there was no guarantee that with a proper hearing this case would have been certified and no guarantee of what the outcome would have been in the juvenile court. Therefore, the constitutional rights were impinged by the certifying court in such a way that a harmless error analysis could never rightly be applied. The effects truly are too hard to measure.

This logic extends to the third *McCoy* subcategory, as the error here signals a fundamental unfairness that cannot be minimized as an error in process. The Commonwealth downplays the error as though Taylor's refusal to incriminate himself either prior to his certification hearing or in open

court were a minor inconvenience with *de minimis* harm or no impact on the outcome, a single point with equal value to the other considerations that the certifying court weighed in the "quantitative" assessment of whether to transfer the case to adult court. This Honorable Court criticized and firmly rejected this type of minimizing in this very matter in *Taylor I*, holding:

> Instantly, the Commonwealth has declined to contest this through analysis, opting instead to relegate its defense of the transfer proceedings below to the bare assertion that Taylor somehow 'opened the door' to the juvenile court's consideration of his silence by deigning to contest the petition filed against him. **That position, were it to prevail, would leave juveniles like Taylor with an impossible dilemma: either acquiesce to the transfer to adult court, or challenge it and effectively waive the Fifth Amendment privilege against self-incrimination by inviting the prosecution and the court to draw an adverse inference from the juvenile's silence. <u>We reject the Commonwealth's 'heads I win, tails you lose' proposition out of hand</u>**."

Taylor I, 230 A.3d at 1068(emphasis added)(citing *Cf. Garrity*, 385 U.S. 493, 498, 87 S.Ct. 616 (1967)("Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other.")). This is not an "analytical error" as the Commonwealth alleges, but rather a structural error that affected the fundamental fairness of the proceedings against Taylor. *See Brief of Appellant*, p 47.

Thus, based on Pennsylvania's precedent holding that fundamental, constitutional errors of law can never be deemed harmless and the United States Supreme Court's persuasive authority holding that certification errors *per se*

require reversal, this Court should not conduct a harmless error analysis in this case.

b. Even if, *Arguendo*, a Harmless Error Analysis Is Applied, the Standard Set by *Commonwealth v. Story*, 383 A.2d 155 (Pa. 1978) Suggests that the Error in the Instant Case is Not Harmless

This Honorable Court articulated the contours of the harmless error standard in *Commonwealth v. Story*, 383 A.2d 155 (Pa. 1978). The *Story* Court noted that "[a] federal constitutional error cannot be found harmless unless an appellate court is convinced beyond a reasonable doubt that the error was harmless." *Id.* at 162. Further, the Court held that "when an appellate court concludes 'beyond a reasonable doubt that the error could not have contributed to the verdict' the error is harmless and the appellate court is not required to grant relief." *Id.* The Court's definition of what constitutes a harmless error is instructive:

> We adopt the standard that an 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**.

Id. at 164 (quoting *Commonwealth v. Davis*, 305 A.2d 715, 719 (Pa. 1973) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967))).

There are two ways in which errors could be harmless: (1) if the improperly admitted evidence was *de minimis* or (2) the improperly admitted evidence was merely cumulative. *Id.* at 166. However, the Court cautioned against finding

harmless error based on "overwhelming evidence," warning that "a conclusion that the properly admitted evidence is "so overwhelming" and the prejudicial effect of the…error is "so insignificant" by comparison, that it is clear beyond a reasonable doubt that the error is harmless, is not to be arrived at lightly." *Id.* at 166 (omission in original) (quoting *Commonwealth v. Davis*, 305 A.2d 715, 720 (Pa. 1973).

The Court went on to hold that courts may **only** find evidentiary errors harmless when the **uncontradicted** evidence of guilt is "so overwhelming and the prejudicial effect of the improperly admitted evidence so insignificant by comparison, that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict." *Id*. at 168.

It is the Commonwealth's burden to prove that the error that occurred was harmless beyond a reasonable doubt. It has failed to meet that burden. Regardless of which party held the burden at the lower level, the burden shifted upon this Honorable Court's determination in *Taylor I* that Taylor's constitutional rights were violated by the certification court and that that violation was an abuse of discretion. Instead, the Commonwealth argues that Taylor failed to prove that he was amenable to treatment when, in fact, he has no such burden. Thus, the factual issue for which there would have to be overwhelming, uncontradicted evidence was whether Taylor was amenable to treatment in the juvenile system, not whether he was actually guilty of the charged offenses.

There was extensive testimony presented by the defense's expert that Taylor was amenable to treatment. Thus, none of the Commonwealth's evidence regarding amenability was uncontradicted. Therefore, by the very terms of the harmless error standard articulated in *Story*, the legal error made by the trial court could never be deemed harmless.

Indeed, the concurrence in *Taylor I* held that the error committed by the certifying court was so clearly not harmless that the remand to the Superior Court was unnecessary. *Taylor I*, 230 A.3d at 1074. Justice Baer (now Chief Justice), joined by Justices Donohue and Dougherty, laid this out clearly in the concurring/dissenting opinion in this matter, opining, "I would hold that the juvenile court in this matter committed **prejudicial error** by relying on Taylor's refusal to admit guilt against him in its decision to certify Taylor to be tried as an adult." *Id*. The Superior Court ultimately agreed. *See, e.g., Taylor II*, 260 A.3d 171, 2021 Pa. Super. Unpub. LEXIS 2024* (Pa. Super. Ct. 2021).

The Commonwealth has been prejudicially selective in its inclusion of quotes from the record and invited the Court to make credibility assessments in an attempt to distract from the plain fact that the juvenile court misapplied the law and did so in a way that violated Taylor's Fifth Amendment right. It downplays the weight given to the Taylor's lack of admission of guilt and insists that there was overwhelming evidence in favor of certification, but the record does not reflect

that. Of the ten paragraphs of the juvenile court's explanation for its ruling, nearly half are devoted to appellant's non-admission of culpability. Moreover, the juvenile court never explicitly gave any other reason for its certification decision, as noted in the Pennsylvania Supreme Court's concurring/dissenting opinion in this matter:

> "A review of the record reveals that the juvenile court stated that it relied on Taylor's refusal to self-incriminate when making its decision to certify Taylor to be tried as an adult. Indeed, the juvenile court repeatedly emphasized that Taylor would not admit that he committed the offense and opined that this refusal was problematic because, *inter alia*: (1) time was essential for treatment; (2) if Taylor's denial continued, it would prevent effective treatment; and (3) Taylor's refusal to admit guilt would make it difficult to identify the depth of Taylor's problem for purposes of treatment. Notes of Testimony, 4/2/2014, at 112-15. Based on the foregoing, it is apparent that the juvenile court believed that Taylor's refusal to admit guilt made him less amenable to treatment and, thus, that Taylor should be tried as an adult.
>
> I recognize that the juvenile court cited other permissible factors for its decision to certify Taylor to be tried as an adult, and that it is inherently difficult to determine the degree of emphasis that a fact-finding court places on a specific factor in making juvenile transfer decisions. Notwithstanding, in my view, the record sufficiently establishes that there is at least a "reasonable possibility" that the juvenile court's error "might have contributed" to its decision to certify Taylor to be tried as an adult; consequently, the error was prejudicial. *See Commonwealth v. Fulton,* 645 Pa. 296, 179 A.3d 475, 493 (2018)("Whenever there is a reasonable possibility that an error might have contributed to the conviction, the error is not harmless.")(quoting *Story*, 476 PA. 391, 383 A.2d 155, 164 (1978))."

Taylor I, 230 A.3d at 1074. The Court's reliance on *Story* is well placed, as the Court explicitly warned against reviewing courts reweighing evidence and inserting themselves as a fact finder.

> "The appellate court is limited to the mute record made below. Many factors may affect the probative value of testimony, such as age…intelligence, experience, occupation, demeanor, or temperament of the witness. A trial court or jury before whom witnesses appear is at least in a position to take note of such factors. An appellate court has no way of doing so. It cannot know whether a witness answered some questions forthrightly but evaded others. It may find an answer convincing and truthful in written form that may have sounded unreliable at the time it was given. A wellphrased sentence in the record may have seemed rehearsed at trial. A clumsy sentence in the record may not convey the ring of truth that attended it when the witness groped his way to its articulation. What clues are there in cold print to indicate where truth lies? What clues are there to indicate where the half-truth lies?

Story, 476 PA. 391, 383 A.2d 155, 168 (1978)(quoting Roger J. Traynor, *The Riddle of Harmless Error* 20-21 (1970)).

Taylor was 15 when the alleged offenses occurred, and the years leading up to that point were marred by trauma and abuse. His mother was an addict, and he was taken from her care after she had drugged him to keep him quiet as a baby. *See* Certification Hearing Exhibit D-3, Dr. Machinski Psychological Evaluation ("D-3"), p. 3. Thereafter he was repeatedly physically abused throughout his childhood by both his grandmother and maternal uncle. *Id.* Later, Taylor was sexually abused by his maternal uncle. (N.T. 04/24/14, Certification hearing, p. 14). The paramour

of Taylor's grandmother put a gun to Taylor's head in an incident that led to him leaving his grandmother's care. D-3, p. 4. All of this suggests that Taylor was in desperate need of treatment by the juvenile court, yet the court failed to provide that treatment or meaningful supervision following Taylor's previous adjudication. (N.T. 04/24/14, Certification hearing, p. 19).

After Taylor was removed from his grandmother's home, he became a dependent of the state and moved from temporary shelter to temporary shelter until he was finally placed in St. Michael's School for Boys/EIHAB Human Services ("EIHAB"). D-3, p. 4. During that placement, he attended school and met with an individual therapist regularly. D-3, p. 4. After a year he was placed with an aunt, but he ended up running away. *Id.* When his DHS worker got ahold of him, he begged to be sent back to EIHAB because he felt "comfortable" there. *Id.* Instead, the DHS worker placed him with the foster family at whose residence the alleged sexual behavior occurred. *Id.*

Immediately prior to being placed in state custody, Taylor had been on the track team at Pottstown High School. *See* Psychiatric Evaluation by Michael Buxbaum C-3 ("C-3"), p. 1. Moreover, the Commonwealth's psychiatric evaluator found Taylor to be "cooperative." *Id.* at 1. The Commonwealth's psychiatric evaluator also noted that Taylor "said he reads his Bible every day. He tries to make peace with himself and accept the situation as it presents himself to him." *Id.*

Indeed, nothing in the Commonwealth's psychiatric evaluation suggested that Taylor was not amenable to treatment in the juvenile system.

Additionally, the Commonwealth's sole witness on amenability, Juvenile Probation Office Mike Yoder ("Mr. Yoder"), who did not have education, training or experience in psychology, admitted that the juvenile system's treatment modality **would** work for Taylor. (N.T. 04/25/14, Certification Hearing, p. 99) ("I'm not saying that [juvenile treatment options] wouldn't be effective.") Mr. Yoder also admitted that typically the treatment Taylor needed lasts approximately two years, and the juvenile court still had three and a half years left for treatment. *Id.* at 90-91. Indeed, the only reason that Mr. Yoder claimed Taylor was not amenable to treatment was because of Taylor asserting his innocence.

> Q. Okay and the relevant factors that we've talked about, Mr. Antonacio [attorney for the Commonwealth] was talking about, the fact that he's actually polite with authority figures and forward-looking and open to discussing treatment or his future programs, that sort of thing, and you said that doesn't necessarily make someone amenable; is that your testimony?
>
> A. According to the statute, that's not one of the points that is looked at; not to say that that's not a good trait to have. But I also had reference, you know, the report that indicated that he has a willingness to participate in treatment, although in Dr. Buxbaum's report, he indicated that he's angry for being here because he doesn't feel like he did anything wrong.

> So apparently, over the course of a number of weeks, the attitude has changed from not doing anything to deserve to be here, to now he's willing to participate in treatment.

Id. at 99. It is this testimony that the Commonwealth's argument that the certifying court's constitutional error can be deemed as harmless error hinges on, yet this is evidence is not so overwhelming, and certainly is not uncontradicted, for the error to be harmless or for it not to have contributed to the outcome of certification.

Indeed, Taylor presented his own expert who testified in the strongest terms that he was amenable to treatment. Dr. Nicole Machinski ("Dr. Machinski") testified that there was a sufficient amount of time to treat Taylor in the juvenile system. (N.T. 04/25/14, Certification Hearing, pp. 21-22). She testified that the juvenile system would retain jurisdiction over Taylor for three and a half years and that treatment programs for someone in Taylor's situation typically last "about 12 months." *Id.* at 22. Dr. Machinski testified that the juvenile treatment model "is generally largely effective." *Id.* at 26. She backed this assertion with research which shows that "recidivism rates for juveniles who have not had any treatment is about 18 percent," whereas for those who are treated "the recidivism rate is somewhere between 5 and 7 percent. So that's a significant reduction." *Id.* at 26.

The doctor then discussed the factors that led her to believe that Taylor, specifically, would be amenable to treatment. *Id.* at 27. First, she noted that while

Taylor had previously been adjudicated delinquent, he had never received any services or supervision based upon his adjudication of delinquency, so it is not like he had previously received treatment that failed. *Id.* at 27; *see also id.* at 64.

On the other hand, the counseling he was provided at EIHAB when he was a dependent of the state shows that he can respond positively to "regular therapy, structure, and supervision." *Id.* at 27. She also testified that Taylor shows a willingness to participate in treatment and is cooperative. *Id.* This conclusion is buttressed by the Commonwealth's psychological evaluation in which Dr. Buxbaum also noted that Taylor was "cooperative." C-3, p. 1.

While other factors were admittedly considered, with an overwhelming amount of focus given to the impermissible Fifth Amendment consideration, the amenability factor carries extra weight. (Now Chief) Justice Baer explained this to the Commonwealth during oral argument in *Taylor I:*

> JUSTICE BAER: Pointedly, I think that your [the Commonwealth's] difficulty is that it's impossible to crawl into the mind of the trial court and know how much he weighed the impermissible Fifth Amendment violation and how much he weighed everything else. Because the reality is if you talk to any experienced juvenile court judge amenability is the be all and end all of cert or de-cert. So you may be right [regarding other factors supporting certification] but I don't know how we conclude that on the apparent record."

Oral Argument, 11/19/19.

Because the Commonwealth's evidence was not uncontradicted, as required by *Story*, and the defense presented evidence that Taylor was, in fact, amenable to treatment and should have been kept in the juvenile system, the outcome of the constitutional error was not harmless. Both psychologists—the defense's and the Commonwealth's—described Taylor as cooperative, and the only witness for the Commonwealth who asserted that Taylor was not amenable to treatment gave equivocal testimony and largely based his inexpert opinion on the impermissible and unconstitutional consideration of Taylor's refusal to self-incriminate. The Commonwealth seeks for the Court to ignore jurisprudence and instead reweigh the factors in the light most favorable to the Commonwealth, minimizing the certification court's impermissible consideration, the importance of amenability and the attention given to the other certification factors as they already exist in the record. The Commonwealth's evidence regarding amenability was contradicted, and its assertion that the constitutional error was an error in process that requires and meets a harmless error analysis fails. Thus, under the binding test articulated by the Supreme Court in *Story*, this Court is constrained to find that the error made by the juvenile court in this matter was not harmless, and thus Taylor's conviction must be reversed.

c. Pennsylvania's Courts Have the Constitutional and Statutory Authority to Hold Defendants Fully Accountable for Crimes Codes Violations, but Where Proper Remand is to the Juvenile

Division and the Defendant is no Longer Under Age 21, the Defendant Must be Discharged

The Commonwealth is correct that the Pennsylvania Constitution and corresponding statutes give the Court of Common Pleas of Montgomery County jurisdiction in this matter. *See Brief for Appellant*, p. 24. The Commonwealth is also correct that the Courts of Common Pleas have "unlimited original jurisdiction." *Id*. at 25 (citing Pa. Const. art. V, § 5). Where the Commonwealth errs is in its assertion the juvenile division[5] and the adult criminal division are wholly distinct courts rather than part of one greater "unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace…" Pa. Const. art. V, § 1. That is because there is no statutory authority establishing a "Juvenile Court" that is independent from the Court of Common Pleas. Rather, this is part of the bid to keep the instant matter within the adult criminal division on remand, as remand is the appropriate remedy where an abuse of discretion is found in a certification decision; however, remand becomes impossible when the adult court never properly had jurisdiction, and the juvenile

[5] It is curious that the Commonwealth refers to the juvenile court as the juvenile division of the Court of Common Pleas then argues that it is an entity separate from the Court of Common Pleas. *See Brief for Appellant,* pg 24 ("PENNSYLVANIA'S COURTS HAVE THE CONSTITUTIONANL AND STATUTORY AUTHORITY TO HOLD DEFENDNATS 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") and *passim*.

defendant aged out of the purview of the juvenile court. *In re Jones*, 246 A.2d 356 (Pa. 1968)("The Juvenile Court…loses jurisdiction over person when they attain majority [age 21]"); *Commonwealth v. Johnson*, 669 A.2d 315 (Pa. 1995)("Accordingly, we find that the transfer order in question is jurisdictional in every sense of the term. Hence, if the challenged order is improper, jurisdiction does not vest with the receiving court."); *see also Commonwealth v. Moyer*, 444 A.2d 101, 102 (Pa. 1982)("This issue of certification is jurisdictional and therefore not waivable"). Thus, if a juvenile court never properly certifies a juvenile to the receiving adult criminal court, then the adult criminal court never had jurisdiction over the defendant and any proceedings conducted by that court are null.

Commonwealth v. Johnson is instructive, and, as the Superior Court in *Taylor II* pointed out:

> "The *Johnson* Court rejected the argument the Commonwealth makes here, that is, that section 952 means that every division of the Court of Common Pleas has jurisdiction to hear any matter that could be bright in the Court of Common Pleas. The Court instead read Section 952 as granting 'every division of the [C]ourt of [C]ommon [P]leas the jurisdiction to transfer any case properly heard in the [C]ourt of [C]ommon [P]leas to the proper division division having subject matter jurisdiction over that particular matter.'
>
> Important for our purposes here, it concluded that 'the Juvenile Act is the type of legislation which exemplifies the legislature's desire to vest limited and **exclusive** jurisdiction in one division of the [C]ourt of [C]ommon [P]leas, in order to meet the special needs of our youth.'"

Taylor II, 2021 Pa. Super. Unpub. LEXIS at *34-35(citing *Commonwealth v. Johnson*, 669 A.2d 315 (Pa. 1995))(emphasis in original). The *Johnson* Court, in answering whether double jeopardy attaches to proceedings which occurred in the wrong venue due to an invalid decertification decision, held: "Accordingly, we find that the transfer order in question is **jurisdictional** in every sense of the term. Hence, if the challenged order is improper, jurisdiction does not vest with the receiving court." *Johnson*, 669 A.2d at 321.

The only way that the adult criminal court could obtain jurisdiction over Taylor would be pursuant to a valid certification order made by the juvenile court. However, the juvenile court no longer has jurisdiction over Taylor to enter such an order because of his age. Since the juvenile court no longer has jurisdiction over this matter and since the adult criminal court was never vested with jurisdiction over this matter, Taylor must be discharged.

The United States Supreme Court was faced with a similar issue in the landmark case of *Kent v. U.S.*, 383 U.S. 541 (1966).

> "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."

Id. at 564.

The Court ultimately held, citing *Black v. U.S.*, 355 F.2d 104 (U.S.App.D.C. 1965), that the appropriate remedy was to remand the case back to the District Court (the equivalent of the adult criminal court in the instant matter) for a *de novo* certification hearing.

However, the Court in *Kent* and the Court in *Black* both made it clear that such a remedy was only possible because the D.C. Juvenile Code contained a "safety valve" which allows the District Court to, at any time, exercise all the powers of the juvenile court.

> The Government urges that any impropriety in the waiver proceedings is not fatal since **the District Court is authorized to exercise the powers of the Juvenile Court**. D.C.CODE §11-914 (1961). **This is said to operate as a safety valve**.

Black v. U.S., 355 F.2d 104, 107 (U.S.App.D.C. 1965)(emphasis added).

Because a remand to the juvenile court was not possible in *Kent* due to the juvenile reaching the age of 21, and in light of the "safety valve" inherent in DC's juvenile statute, the court in *Kent* held:

> 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, supra, 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.

Kent v. U.S., 383 U.S. 541, 564 (1966).

There is no such safety valve in Pennsylvania's Juvenile Code. (Now Chief) Justice Baer acknowledged this in the concurring/dissenting opinion in *Taylor I*, stating,

> "As I would simply reverse the Superior Court's erroneous ruling, I turn to the proper remedy in this case. Taylor has already reached age 21 and was, for all the reasons explained herein, improperly certified to be tried as an adult. Taylor argues that he should be discharged, a position the Commonwealth did not challenge in its brief to this Court. *See* Appellant's Brief at 38-42. I am constrained to agree. **Taylor cannot be tried in criminal court because his alleged crimes occurred when he was a juvenile, and he was improperly certified. He cannot be transferred back to juvenile court for new certification proceedings because that court lost jurisdiction over this matter when Taylor reached age 21**."

Taylor I, 230 A.3d at 1074. (emphasis added).

Indeed, the Pennsylvania Supreme Court was plain in *Johnson* that when a matter is within the jurisdiction of the juvenile court it is **not** concurrently within the jurisdiction of the criminal court, hence why jeopardy does not attach if an adjudication occurs in the wrong court.

> We find that the term "jurisdictional," when used in this context, is best defined by its plain meaning—"the power, right, or authority to interpret and apply the law" or "the limits or territory within which authority may be exercised. WEBSTER'S NINTH COLLEGIATE DICTIONARY 655 (1986).

Commonwealth v. Johnson, 669 A.2d 315, 321 (Pa. 1995). The adult criminal court has no "power, right, or authority" over certification decisions[6], and the juvenile court lost its "power, right, or authority" when Taylor turned 21.

The authority to try a juvenile defendant as an adult was similarly considered in *Commonwealth v. Greiner*, where the Court vacated the judgment of sentence and remanded to the juvenile division after finding that the evidence presented at the certification hearing was not sufficient to show the defendant was not amenable to treatment or supervision within the juvenile system. 388 A.2d 698 (Pa. 1978). The *Grenier* Court did not have to sanction "drastic relief," as the Commonwealth describes it, because the defendant there was still under the age of 21 when the Court made its decision; "Appellant, was fifteen years old at the time of the incident…of July 26, 1973", with the case being decided almost exactly five years later on July 14, 1978, making the defendant at most 20-years-old and still within the jurisdiction of the juvenile court. *Id*. The error could be remedied by returning the case to the juvenile court because the defendant had not aged out of the system, whereas remand to the juvenile court here is impossible solely because of Taylor's age.

[6] The criminal court has jurisdiction over "decertification" decisions pursuant to §6322, but that section is not at issue in this case.

The Commonwealth's contention that the adult criminal court is just as appropriate a place for remand as the juvenile system when remand to there is barred by a defendant/appellant's age is incorrect. This point is key in the Commonwealth's own argument based on *In re Estate of Cantor* regarding the empowerment of the juvenile division, which it concedes has **power over the certification decision**, and that of the criminal division, which it similarly concedes has original jurisdiction **over adults**. *See Brief for Appellant*, pg 32 (citing *In re Estate of Cantor*, 621 A.2d 1021, 1023 (Pa. Super 1993)("such matter is not allocated by law…but rather, a transfer to the correct division.")). The distinctions between the jurisdiction of the divisions are clear, yet the Commonwealth would have this Honorable Court believe that they could be used interchangeably. This is simply not the case and is not part of the statutory framework of the Pennsylvania Constitution and related case law.

Relatedly, the Commonwealth's reliance on *Commonwealth v. Anderson* and *Commonwealth v. Monaco* is inapt because the underlying facts are so divergent from the facts in the case at bar. *Commonwealth v. Anderson*, 630 A.2d 47 (PA. Super. 1993); *Commonwealth v. Monaco*, 869 A.2d 1026 (Pa. Super. 2005). The Superior Court noted in *Taylor II* that "the *Anderson/Monaco* exception cannot apply here, as the Commonwealth did not first institute charges after Taylor turned 21. **The Commonwealth filed a delinquency petition while Taylor was a Child**

and when he remained subject to the Juvenile Act." *Taylor II*, 2021 Pa. Super. Unpub. LEXIS 2024 at *37(emphasis added). That Taylor is no longer a child and cannot be returned to the juvenile court's jurisdiction simply because of his age and the passage of time does not mean that he should then remain under the jurisdiction of the adult criminal court where his case never should have been sent; rather, the case should be remanded and, with nowhere to properly remand to, his sentence should be reversed, and Taylor discharged.

V. CONCLUSION

The Commonwealth's reliance on the descriptions of the underlying charges and conviction in this matter is a distraction. Neither the facts of the case nor Taylor's conviction are at issue in this appeal; the two issues before the Court are whether the constitutional error is a harmless error, which it is not, and whether the matter must be remanded to the adult or juvenile divisions of the Court of Common Pleas of Montgomery County. The juvenile division is the only appropriate place for remand, but because it is not an option due to Taylor's age, the only suitable remedy is discharge.

Wherefore, based upon the arguments raised herein, Taylor's judgment of sentence should be reversed, and he should be immediately discharged.

Respectfully submitted,

/s/ *Rachel Silver*_____

Rachel Silver, Esquire
Attorney for Appellee
Palladino, Isbell & Casazza
1528 Walnut Street Suite 1701
Philadelphia, PA 19102
Ph: (215) 576-9000
Fax: (215) 689-3531
silver@piclaw.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains fewer than 14,000 words and thuscomplies with the length limitations in Pa.R.A.P. 2135.

Respectfully submitted,

/s/ *Rachel Silver*

Rachel Silver, Esquire
Attorney for Appellee
Palladino, Isbell & Casazza
1528 Walnut Street Suite 1701
Philadelphia, PA 19102
Ph: (215) 576-9000
Fax: (215) 689-3531
silver@piclaw.com