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IN THE
SUPREME COURT OF INDIANA

COURT OF APPEALS CASE NO. 22A-CR-457

Nickalas Kedrowitz Appellant (Defendant Below)	)	Appeal from the Ripley Circuit Court
v.	)	Cause No. 69C01-1909-MR-1
State of Indiana Appellee (Plaintiff Below)	)	The Honorable Ryan J. King, Judge

BRIEF OF *AMICUS CURIAE* IPDC

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BRIEF OF THE AMICUS CURIAE INDIANA PUBLIC DEFENDER COUNCIL

"*Because that's the way we've always done it is a poor excuse for continuing to do something wrong."*

Fry v. State, 990 N.E.2d 429, 442 (Ind. 2013) (cleaned up).

STATEMENT OF INTEREST BY AMICUS CURIAE

The Indiana Public Defender Council (IPDC) shares common interests with this court regarding the fair administration of justice in Indiana, and recognition and promotion of the distinctions of juvenile defense that make it a specialized area of law. IPDC is a state agency mandated by our legislature to "maintain liaison contact with study commissions, organizations, and agencies of all branches of local, state, and federal government that will benefit criminal defense as part of the fair administration of justice in Indiana." Ind. Code § 33-40-4-5. Specifically, regarding juveniles, IPDC maintains contact with several

state and national governmental agencies, university law centers, and nonprofit advocacy groups focused on juvenile-specific issues. Applying adult criminal sanctions upon persons who commit their offense before the age of 18, and the distinctions and considerations that the characteristics of youth deserve fall squarely within these goals and objectives. For these reasons, IPDC has been recognized as *Amicus Curiae* and briefed those issues in *M.H. v. State*, 22S-JV-251; *Conley v. State*, Indiana Court of Appeals Case No. 19A-PC-3085; *Newton v. Indiana*, U.S. Supreme Court docket No. 17-1511; and *State v. Stidham*, Court of Appeals Case No. 18A02-1701-PC-68 (*trans. granted, vacated*), and previously, in this appeal as well. Participation from the IPDC can aid in carefully considering the distinctions inherent to youth and provide insight as to how they can be protected under the fair administration of justice.

BACKGROUND OF AMICUS ARGUMENT

Nickalas Kedrowitz (Nick) was alleged to be a delinquent child for two delinquent acts that would have been, if he were an adult, the murders of his two younger siblings that occurred when he was thirteen years old. The juvenile court waived jurisdiction and the State filed a criminal case in the circuit court, where Nick was tried by a jury, convicted of two counts of murder, and sentenced to 100 years in the Indiana Department of Correction.

After the sentencing hearing, and while this appeal was already pending, the Indiana Supreme Court issued its decision in *State v. Neukam*, 189 N.E.3d 152 (Ind. 2022), which held that a delinquent act is separate and distinct from an offense or criminal act, and there is no process in Indiana law by which a delinquent act can ripen into a criminal act. The Court of Appeals refused to follow the rationale of the *Neukam* decision, however, because: (1) there is an entire chapter providing for the waiver of juvenile court jurisdiction; (2) waiver of juvenile court jurisdiction has routinely resulted in criminal prosecutions for the past several decades; and (3) *Neukam's* suggestion that its rationale applied to circumstances such as Nick's was *obiter dictum*, which the Court refused to follow. *Kedrowitz v. State*, 199 N.E.3d 386, 401-04 (Ind. Ct. App. 2022), *reh'g denied*.

SUMMARY OF ARGUMENT

The act of a child committing the otherwise elements of a crime is a delinquent act, which is defined to the exclusion of a crime due to the actor being a child. Because there is no provision in Indiana law to ripen or morph a delinquent act into a crime, courts of criminal jurisdiction do not possess the subject matter jurisdiction to hear cases waived pursuant to Indiana Code chap. 31-30-3.

The Court of Appeals held that the statements from the *Neukam* Court calling into question the jurisdiction of the circuit court over acts by children was *obiter dictum*. However, the reality that when a child

commits an act that "would be an offense if committed by an adult" it is a delinquent act—not a crime—and that no provision of Indiana law ripens a delinquent act into a crime was not dictum. The *Neukam* decision's rationale leads to one conclusion—that the acts committed by Nick are delinquent acts that could neither be prosecuted as crimes nor heard by Courts of criminal jurisdiction. This is not a usurpation of judicial power, but simply the judiciary fulfilling its responsibility of interpreting statutes as they are written.

ARGUMENT

I. The Circuit Court did not have subject matter jurisdiction to hear the prosecution of Nick or order his conviction and sentence because he committed delinquent acts, not crimes.

A. A delinquent act is not a crime.

In *Neukam v. State*, 189 N.E.3d 152 (2022), the Indiana Supreme Court held that the circuit court did not possess subject matter jurisdiction to hear the prosecution of a person who had aged out of juvenile court jurisdiction but had been charged with a crime of child molest that occurred before the person reached the age of eighteen. *Id.* at 152--3, 157. The reasoning that supported the holding is a delinquent act is an act that *would be an offense* (which is synonymous with a crime) had the child been an adult. "The phrase 'would be [a crime]' suggests a delinquent act is not a crime—and in fact 'would be' a crime only if an adult did it—in which case it would no longer be a delinquent

act because only a child can commit such an act." *Id*. at 154. There is no process in Indiana law that could ripen a delinquent act into a criminal act once the child becomes an adult. And because circuit courts have jurisdiction over criminal cases, and juvenile courts have jurisdiction over delinquency cases, the circuit/adult court has no subject matter jurisdiction. *Id.* at 153.

The implications of this reasoning—as identified by the Court—go beyond the context of a person who committed a delinquent act as a child but aged out of juvenile court jurisdiction. It also means that the circuit court lacks jurisdiction over delinquency cases waived by the juvenile court pursuant to Ind. Code § 31-30-3-4, such as Nick's case:

> We also recognize our decision today raises questions about circuit-court jurisdiction vis-à-vis the juvenile court's waiver statutes and the criminal court's transfer statute. For instance, the waiver statutes allow a juvenile court to waive its exercise of jurisdiction. See, e.g., I.C. § 31-30-3-1. The effect of this waiver is a criminal court may then exercise its own jurisdiction. But it cannot do so without jurisdiction over the alleged conduct in the first place. [] The dissents would allow [the waiver statutes] to control here. Post, at 160 n.3 (Goff, J., dissenting). But to do so, they bypass the import of the key phrase in the delinquent-act statute: "would be an offense if committed by an adult." And the delinquent act statute, unlike the [] waiver statutes [], is dispositive here on its plain terms.

Id. at 157.

B. The fundamental rationale in *Neukam* that a delinquent act is not a crime is precedent which should be followed.

The Court of Appeals refused to extend the clear and cohesive rationale laid out in the *Neukam* decision stating that it declined "to rely on *obiter dictum* to essentially nullify almost an entire chapter of the Indiana Code." *Kedrowitz*, 199 N.E.3d at 404. However, the reality that a delinquent act is distinct from a criminal act, and that there is no provision in Indiana law which ripens a delinquent act into a crime, is not *obiter dictum*.

Statements not necessary to determine an issue presented are *obiter dictum*. *In re Adoption of J.T.D.*, 21 N.E.3d 824, 830 (Ind. 2014). "They are not binding and do not become law." *Koske v. Townsend Engineering Co.*, 551 N.E.2d 437, 443 (Ind. 1990). The Illinois Supreme Court has explained: "*Obiter dictum* refers to a remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule." *Exelon Corp. v. Dep't of Revenue, et al.*, 917 N.E.2d 899, 907 (Ill. 2009).

The fundamental question addressed in *Neukam* was "whether a delinquent act committed before the age of eighteen could ripen into a crime once Neukam became an adult." *Neukam*, 189 N.E.3d at 154. The answer reached was 'no', because a delinquent act is not a crime: "a delinquent act by a juvenile cannot 'be' a crime because it 'would be' a crime only if committed by an adult." *Id.* at 156. This holding, analysis, statement (whatever it may be), was essential to *Neukam*'s holding.

While *Neukam* addressed the jurisdiction over a person who had aged out of juvenile court jurisdiction, the reality that a delinquent act is not a crime applies equally to the question of whether a delinquent act can ripen into a crime by the act of the juvenile court waiving jurisdiction. Thus, absent statutory language causing the metamorphosis of a delinquent act into a crime upon waiver of jurisdiction from the juvenile court, prosecuting Kedrowitz for criminal acts in a court with criminal jurisdiction was improper.

Essentially, the starting point of the Court of Appeals' analysis was flawed in light of *Neukam*'s holding. The Court noted, "as a general rule, circuit courts in Indiana have subject-matter jurisdiction to adjudicate criminal cases, including murder charges such as those filed against Kedrowitz." *Kedrowitz*, 199 N.E.3d at 402. By assuming that the Kedrowitz was properly charged with murder as a criminal act, the Court of Appeals rejected the core rationale and necessary foundation of the *Neukam* decision, which was not *obiter dictum*.

This Court should follow the *Neukam* precedent. *Stare decisis* is a maxim of judicial restraint supported by compelling policy reasons of predictability. *State v. Timbs*, 169 N.E.3d 361, 369 (Ind. 2021). Under the maxim, a court will overturn its prior precedent only when there are urgent reasons and a clear manifestation of error. *Id*. Here, *Neukam* carefully crafted its decision with forethought of how it would apply to other cases, such as Kedrowitz's. "We also recognize our decision today

raises questions about circuit-court jurisdiction vis-à-vis the juvenile court's waiver statutes[.]" *Neukam*, 189 N.E.3d at 157. Indeed, *Neukam* issued a rare acknowledgement from a court that routinely addresses substantial and important matters: "we are not blind to the weighty and far-reaching policy concerns implicated by today's decision." *Id.* However, despite this Court making abundantly clear that the legislature must fix the jurisdictional problem and how consequential of a problem it was, the General Assembly chose not to address this circumstance during a special session which took place shortly after *Neukam* was decided—as was its prerogative.[1] Until the General Assembly fixes the problem, *Neukam* should be followed.

C. A juvenile court waiving jurisdiction does not ripen a delinquent act into a crime, although historically it has been treated as doing so.

Despite Indiana's juvenile code having an entire chapter dedicated to the process for the juvenile court 'waiving jurisdiction' of a case, nothing in existing law transforms a delinquent act when committed into a criminal act. Indiana juvenile law defines "waiver of jurisdiction" circularly by using the term "waives" itself: "Waiver of jurisdiction refers to an order of the juvenile court that waives the case to a court that would have jurisdiction had the act been committed by an adult. Waiver is for the offense charged and all included offenses." Ind.

[1] The Indiana General Assembly held a special session in late summer of 2022, where multiple bills were filed, but only legislation concerning tax refunds and abortion advanced. See, https://iga.in.gov/legislative/2022ss1/bills/ (last checked, March 3, 2023).

Code § 31-30-3-1. "Waive" is defined by Black's Law Dictionary 1611 (8th ed. 2004), as a verb which means: "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily. [] To refrain from insisting on (a strict rule, formality etc.); to forgo." By using the phrase "waives the case to a court that would have jurisdiction," the juvenile court is renouncing its jurisdiction over the case while pushing the case towards a court that would have jurisdiction over the case "had the act been committed by an adult." Nothing about this procedure transforms a "delinquent act" into a "crime."

To be sure, the waiver chapter of the juvenile code provides several scenarios where the juvenile court "may" or "shall" "waive jurisdiction" over children as young as twelve. *See*, Ind. Code § 31-30-3-2—6. If the motion to "waive jurisdiction" [I.C. § 31-30-3-7] is granted, the "prosecuting attorney shall file a copy of the waiver order with the court to which the child has been waived when the prosecuting attorney files the indictment or information." Ind. Code § 31-30-3-11. But yet again, there is no statutory language to make the transformative step from "delinquent act" to "crime."

The Court of Appeals accepted that the history of appellate court acceptance of cases waived from the juvenile court prosecuted as crimes is sufficient to overcome the gap: "the Indiana Supreme Court has repeatedly and consistently upheld the validity of juvenile court waivers and the criminal convictions of the waived juveniles tried in criminal

courts." *Kedrowitz*, 199 N.E.3d at 402-03. But, "[b]ecause that's the way we've always done it is a poor excuse for continuing to do something wrong." *Fry v. State*, 990 N.E.2d 429, 442 (Ind. 2013) (cleaned up). If the ruts dug by prior appellate decisions alone controlled the interpretations of the law, then we would have no *Brown v. Board of Ed. of Topeka, Shawnee Co., Kan.,* 347 U.S. 483 (1954); no *Roper v. Simmons*, 543 U.S. 551 (2005); and no *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022).

D. *Neukam* was not a form of fantastical judicial activism. It was a recognition of a flaw in Indiana law that cannot be fixed by the judiciary.

The State contended to the Court of Appeals: "Only by stepping through the looking-glass into Wonderland could the doctrine of separation of powers and the command to give effect to the plain language of statutes enacted by the legislature be claimed as the ground for judicially nullifying all of the waiver statutes enacted and repeatedly affirmed by the General Assembly for decades." Appellee's Br. at 43. To reach this critique of the *Neukam* decision, the State ignores the foundational distinction between delinquent acts and crimes, and imposes false notions of statutory interpretation to promote the spirit of the law over its letter, and advancing a quest to seek justice through its interpretation.[2] However, this Court should be "bound to operate within

[2] A. Scalia & B. Garner, Reading the Law: The Interpretation of Legal Texts, 343-48 (2012).

the framework of the words chosen by [the General Assembly] and not to question the wisdom of the latter in the process of statutory interpretation." A. Scalia & B. Garner, Reading the Law: The Interpretation of Legal Texts, 347 (2012) (quoting, *Richards v. United States*, 369 U.S. 1, 10 (1962) (per Warren, C.J.)).

Presumption against ineffectiveness or invalidity—

As quoted above, the Court of Appeals declined "to essentially nullify almost an entire chapter of the Indiana Code." *Kedrowitz*, 199 N.E.3d at 404. It is true that a presumption against ineffectiveness[3] should encourage this Court to seek an interpretation of the interrelated statutes to give effect and meaning to the various provisions, which includes the waiver chapter, I.C. § 31-30-3. *See*, *State v. Clark*, 247 Ind. 490, 217 N.E.2d 588 (1966) ("[I]t is a general rule that a statute on the books at any given time [] is presumed to be valid until the contrary clearly appears[.]"). But that presumption cannot salvage the legislative scheme here. The plain language of the delinquent act statute, I.C. § 31-30-1-2, makes clear that an act that would be otherwise criminal, but for the reality that the actor was a child, is not a crime. The primary reason that the presumption against ineffectiveness or invalidity cannot control is the plain and simple language of the delinquent act statute is not susceptible to two meanings—prosecuting a child actor for a crime is not

[3] A. Scalia & B. Garner, Reading the Law: The Interpretation of Legal Texts, 63—65 (2012).

a permissible interpretation. Additionally, the State's assertion fails because the purpose and goals of the juvenile code as a whole—promotion of public safety while simultaneously providing for treatment of children and families—is distinct from the goals and policy of adult criminal proceedings. *See*, Ind. Code § 31-10-2-1.

This is not the first time in recent history that this Court has looked to the plain language of statutes to determine that another aspect of the statutory scheme was impossible to fulfill. In *K.C.G. v. State*, 156 N.E.3d 1281, 1283 (Ind. 2020), this Court held that the dangerous possession of a firearm statute, which was an offense that could only be committed by a child, could not also be a delinquent act, which at the time was limited to an act "that would be an offense if committed by an adult." This Court noted that the legislature likely intended for the act of dangerous possession to be included as a delinquent act, as noted by the State, but "[e]ven if the State were correct about legislative intent, we decline to ignore the clear jurisdictional mandate [] based on an inference from an entirely separate statute." *Id*. at 1284.

Moreover, the textualist interpretation approach, which recognizes the rigid definition of a delinquent act that prevents waiver of a delinquent act to a court of criminal jurisdiction for prosecution as a crime is not a form of judicial advocacy, or interference with legislative authority. As this Court noted long ago when considering the validity of a statute: "if we confine ourselves within settled rules of construction

and interpretation, we may hope to escape the charge of judicial tyranny and usurpation." *Rice v. State*, 7 Ind. 332, 335 (1855). The *Neukam Court* did not 'step through the looking-glass,' but rather looked to plain statutory language. This is not a form of judicial usurpation of power. "The legislature is the active encroaching power; the judiciary is passive, except in defence; it enacts nothing; it effectively vetoes occasional void enactments of the legislature." *Rice,* 7 Ind. At 335. (quoting *Marbury v. Madison*, 1 Cranch 38, 5 U.S. 137 (1803)).

II. Until the General Assembly acts, the reach of applying *Neukam* to cases involving waiver from juvenile court is unknown.

The General Assembly is currently working on a legislative response to the *Neukam* decision. Senate Bill 464, which is colloquially referred to on the General Assembly's website as "Adult court jurisdiction over delinquent acts,"[4] has passed out of the Senate and been referred to Committee in the House of Representatives. The currently designated effective date, if passed, is July 1, 2023. The bill has already been significantly amended from its initial form and will potentially be amended again during the legislative process. The legislation is not guaranteed to pass.

This Court cannot predict what the fix will ultimately be, whether it will adequately address the problem identified, or whether the fix

[4] See, https://iga.in.gov/legislative/2023/bills/senate/464 (last checked, March 3, 2023).

implemented will be designed to have retroactive effect—if it can. What this Court can know is that Nick has raised a claim attacking the jurisdiction of the court that heard his prosecution and imposed his sentence, and he has raised that claim timely on direct appeal.

The pool of other juveniles whose pending cases have been waived from juvenile court, and who are intending to challenge any resulting conviction and sentence on appeal is unknown. The Indiana Criminal Justice Institute issues an annual report on "Juveniles Under Adult Court Jurisdiction,"[5] as it has been tasked to do under Ind. Code § 5-2-6-24(E). As reported, there has been a total of 172 juveniles waived from juvenile court jurisdiction since the initial report was issued in 2018. This is the far—lesser number of juveniles who are subjected to adult court jurisdiction. The number of juveniles reported as 'directly filed' into adult court under Ind. Code § 31-30-1-4 for this same time period is 557. Neither Kedrowitz's arguments, nor the *Neukam* decision, call into question criminal court jurisdiction over directly filed cases.

CONCLUSION

Based on the foregoing arguments and authority, Amicus IPDC encourages this Court to apply the rationale articulated in *State v. Neukam*, 189 N.E.3d 152 (Ind. 2022). A delinquent act is not a crime. Until the General Assembly enacts proper statutory language that

[5] See, https://www.in.gov/cji/grant-opportunities/reports/ (last checked, March 3, 2023).

provides the circumstances, considerations, and pathway by which a delinquent act can be treated as crime, acts that were delinquent acts when committed cannot be prosecuted as crimes, and courts without jurisdiction over delinquent acts cannot adjudicate those proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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