

State of Michigan
In the Supreme Court

In re NDD

The People of the State of Michigan

Petitioner-Appellee,

v.

NDD

Respondent-Appellant.

MSC No.

COA No. 370602

Livingston County Circuit Court –
Family Division

Case No. 2019-015969-DL

**Respondent-Appellant NDD's
Application for Leave to Appeal**

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Judgment Appealed From and Relief Sought

NDD was a child¹ acting like a child when he and a friend took go-karts that didn't belong to them. He dealt with instability within his home and still managed to deescalate his behaviors while previously on probation. Yet NDD now faces adult prosecution and the threat of prison despite the relatively unserious nature of his offense and the testimony of a witness who was mostly unfamiliar with NDD and his experience in the juvenile legal system. The validity of the juvenile court's waiver of jurisdiction and the constitutionality of the waiver statute itself are now called into question.

On August 15, 2025, the Court of Appeals affirmed the juvenile court's order waiving its jurisdiction over NDD. *In re NDD*, unpublished per curiam opinion of the Court of Appeals (docket no. 370602). NDD appeals from that opinion and seeks reversal. This case presents two unique issues for this Court. First, the Court of Appeals affirmed the juvenile court's findings in such a way that it effectively held that every felony offense a child commits is serious enough to justify waiver,

¹ Throughout this brief, when not referring to specific statutory or case law language, counsel uses the word "child" to refer to those who meet the legal definition of "juvenile". "Juvenile" is a harmful word for children who are part of the legal system. See Pease, *Regarding the Word "Juvenile"*, Michigan Family Law Journal, Vol. 52 No. 6 at 16-17 (June/July 2022).

regardless of the facts of the case. Second, and in an issue of first impression for this Court, the Court of Appeals found that a waiver decision under MCL 712A.4 does not violate the right to trial by jury despite the juvenile court judge making a decision that increases the maximum possible penalty for the child based on facts which are not elements of the offense. NDD seeks reversal on both issues.

Statement of the Questions Presented

- I. Did the Court of Appeals err by effectively holding that a 17-year-old should be waived on every felony charge and by failing to enforce the requirements of *People v Dunbar*?

Court of Appeals answered: No.

NDD answers: Yes.

- II. Did the Court of Appeals wrongly hold that the right to trial by jury as interpreted by *Apprendi v New Jersey* does not apply to the waiver decision?

Court of Appeals answered: No.

NDD answers: Yes.

Statement of Facts

In 2023, acting on teenage immaturity and impulse, NDD and a friend went joyriding on go-karts that did not belong to them. The go-karts were quickly recovered without any damage, and no one was harmed or threatened during the incident. NDD, who was only 17 years old at the time, did not have a weapon. Despite the childlike nature of his conduct, NDD now faces prosecution as an adult.

A. NDD was released from probation shortly before the instant offense.

NDD first came to the juvenile court's attention in 2019 around the time he turned 13 years old, though the charges were dismissed the same year after he was found not competent to stand trial. Transcript of Hearing to Waive Jurisdiction dated November 1, 2023 ("Tr. 11/01/23") at 39; see also Petition dated May 9, 2019; see also Order After Hearing on Competency dated November 5, 2019. He was placed under the court's jurisdiction in 2020 when he pled guilty to disorderly person. See Order of Adjudication dated 11/18/2020. He was 14 years old at the time. In 2021, he was charged with multiple counts of criminal sexual conduct and firearms offenses on separate petitions. Tr. 11/01/23 at 39-40; see also Petition dated 04/05/2021; see also Petition dated 04/12/2021. The CSC petition listed the date of offense as 09/24/2020, which was prior to

the juvenile court taking jurisdiction over NDD, and the firearms petition lists the date of offense as 12/19/2020, which is three days after the initial order of disposition. Both of those petitions were resolved by pleas to reduced charges. See Order of Adjudication dated 08/20/2021; see also Order of Adjudication dated 08/20/2021. NDD was discharged from probation in August 2023. See Supplemental Order of Disposition dated 08/03/2023.

B. The prosecution moved for waiver to adult court.

NDD was charged with the instant offense, unlawfully driving away an automobile (“UDAA”)² a month later See Petition dated 09/18/2023. The automobile in question was a go-kart. See Motion for Traditional Waiver dated 09/15/2023. Along with the Petition, the prosecutor filed a motion asking the juvenile court to waive its jurisdiction for NDD to be tried as an adult under MCL 712A.4. See Motion for Traditional Waiver dated 09/15/2023. The juvenile court appointed Attorney Paige Favio to represent NDD. The waiver took place in November 2023.

² MCL 750.413.

C. At the waiver hearing, a DHHS agent with limited knowledge of NDD's history provided key testimony that formed the basis of waiver.

At the waiver hearing, NDD waived the phase-one probable cause portion. Tr. 11/01/23 at 5-7. During the phase-two portion, Jennifer Weinman of the Department of Health and Human Services testified about NDD's history on probation with DHHS.

Weinman was not NDD's probation officer (PO) and was testifying because his actual PO, Laura Ketelhut, was on medical leave. *Id.* at 13. Weinman had only seen NDD one time prior to the waiver hearing. *Id.* at 27. She acknowledged that, despite reviewing the file and speaking with Ketelhut, she lacked information about NDD's case. *Id.* at 28.

The orders from NDD's time on probation show that the juvenile court first committed him to DHHS in April 2021. See Supplemental Order of Disposition dated 04/22/2021. He was moved to a residential placement about a month later. See Ex Parte Order Regarding Qualified Residential Treatment Program Placement dated 05/19/2021. While he was under DHHS's supervision, NDD was placed at Bethany Christian Services residential program for 18 to 24 months. *Id.* at 14. He returned home in August 2022 and was supervised by Ketelhut. *Id.* at 15. He was

released back into his parents' care in January 2023. See Supplemental Order of Disposition dated 01/17/2023. While placed in his home, NDD was offered drug and alcohol testing, Wraparound,³ individual therapy, and Midcourse Correction.⁴ Tr. 11/01/23 at 16. The Wraparound may not have been implemented, though. *Id.* at 54. Weinman testified that she was not familiar with all of NDD's drug screen results, though she was aware from Ketelhut that he had tested positive for marijuana at least once. *Id.* at 18. She was unaware of whether NDD had received a substance abuse evaluation or psychological evaluation. *Id.* at 20.

Weinman did not know whether NDD was on a waiting list for a new residential placement at the time he was discharged from probation in August 2023. Tr. 11/01/23 at 21-22. She assumed that he was on a waiting list given his history of services. *Id.* She indicated that children are generally on these waiting lists for three to six months. *Id.* at 22. Weinman claimed that NDD had exhausted all the services DHHS could offer and that the UDAA charge coming within a week of NDD being

³ Wraparound is a holistic, collaborative team approach to providing services to children with heightened needs by including family members, services providers, social workers, and mental health providers in the rehabilitation process.
<https://www.michigan.gov/mdhhs/keep-mi-healthy/mentalhealth/mentalhealth/childrenandfamilies/eb-pp-offered/wraparound>

⁴ Midcourse Correction is an intense, structured weekend program for children to help them build discipline.
<https://www.midcoursecorrection.org/challenge-camp>

released from probation indicated that he had not benefited from services. *Id.* at 25. She acknowledged, though, that a one-size-fits-all approach is not appropriate for cases such as NDD's. *Id.* at 30. She was unsure of what mental health and substance abuse services NDD had been offered. *Id.* at 32.

Livingston County juvenile court intake officer David Trudeau testified regarding his contacts with NDD. Trudeau had some familiarity with NDD, having been the intake officer on earlier petitions. He believed that, based on Weinman's testimony, the only service available to NDD which had not been offered was the juvenile drug treatment court. *Id.* at 41. Relatedly, Trudeau noted that, while this case was pending, NDD tested positive for THC once and also missed a drug screen. *Id.* at 37.

Two probation violations (PVs) were filed against NDD during his nearly three years on probation. In March 2021, his PO filed a PV for NDD allegedly failing to turn over his PlayStation to probation as ordered by the court. See Supplemental Petition dated 03/30/2021. His PO filed a second PV in May 2023 because NDD tested positive for marijuana and was suspended from school for possession of marijuana. See Supplemental Petition dated 05/08/2023. The record does not indicate whether he was ever adjudicated on either PV. The juvenile

court also held numerous review hearings for NDD while he was on probation.

D. The juvenile court had information and testimony mitigating NDD's culpability.

NDD experienced serious adversity, both at home and at school, long before this petition was filed. He has a learning disability and has struggled with his schoolwork, despite trying to perform well. Tr. 11/01/23 at 49. He has also been diagnosed with ADHD. *Id.* He and his older sister have had a very contentious relationship, which resulted in the police being called to their home. *Id.* at 64. This sister facilitated NDD's negative behaviors while he was on probation. See Supplemental Petition dated 03/30/2021. Issues with the family as a whole resulted in Children's Protective Services interventions. See Motion and Order for Supplemental Disposition dated 01/20/2021. NDD has heightened mental health needs and was living in a volatile home environment.

NDD's father saw improvement in NDD while he was on probation, particularly after he was released from residential placement. *Id.* at 51-52. NDD responded more positively to discipline. *Id.* at 53. And altercations within the home ended once NDD's sister moved out. *Id.* at 64.

E. The juvenile court waived jurisdiction, and the Court of Appeals affirmed the waiver.

At the conclusion of the proofs, the juvenile court found that all the statutory waiver criteria⁵ weighed in favor of the court waiving its jurisdiction. *Id.* at 72-77. It found that waiver was in the best interests of both NDD and the public and granted Petitioner's waiver motion. *Id.* at 77.

In February 2024, NDD timely filed a request for the appointment of appellate counsel and appealed the waiver order by right. In August 2025, the Court of Appeals issued an unpublished opinion affirming the juvenile court on all raised issues. *In re NDD*, unpublished per curiam opinion of the Court of Appeals, issued August 15, 2025 (Docket No. 370602). NDD now appeals from that opinion.

⁵ MCL 712A.4(4).

Arguments

- I. The Court of Appeals erred by effectively holding that a 17-year-old should be waived on every felony charge and by failing to enforce the requirements of *People v Dunbar*.**

Issue Preservation and Standard of Review

Trial counsel for NDD preserved this issue by arguing against waiver at the phase-two hearing in November 2023. A juvenile court's decision to grant a motion waiving jurisdiction is reviewed for an abuse of discretion. *People v Fultz*, 453 Mich 937 (1996). A trial court abuses its discretion when it makes an error of law or when its decision falls outside the range of reasonable outcomes. *People v Oslund*, ___ Mich ___ (2024) (Docket No. 165544) (slip op at 4-5). Its factual findings are reviewed for clear error. MCR 3.902(A); MCR 2.613(C). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that an error has been made. *In re JK*, 468 Mich 202 (2003). "A court's order waiving jurisdiction will be affirmed whenever that court's findings, based on substantial evidence and thorough investigation, show either that the juvenile is not amenable to treatment or that, despite his potential for treatment, the nature of his difficulty is likely to render him dangerous to the public, if released at age nineteen or twenty-one, or to disrupt the

rehabilitation of other children.” *People v. Fowler*, 193 Mich App 358, 363 (1992), citing *People v. Dunbar*, 423 Mich 380 (1985).

Discussion

There is a presumption that children younger than 18 will be tried as children in the family division of circuit court. In limited circumstances, though, the Juvenile Code⁶ allows the prosecutor to file a motion requesting the court to waive its jurisdiction and have the child tried as an adult in the criminal division of circuit court. MCL 712A.2(a); MCL 712A.4. Such a motion is permitted if the child was at least 14 years old at the time of the alleged offense, and the charge must be a felony. MCL 712A.4(1). Prior to waiving jurisdiction, the juvenile court must hold a waiver hearing. MCL 712A.4.

The waiver proceeding is broken into two phases. In the first phase, the juvenile court must determine whether there is probable cause to believe that a felony offense was committed and that the child was the person who committed that offense. MCL 712A.4(3).

After finding probable cause during the first phase, the juvenile court then proceeds to a second phase: the best interests hearing. At this hearing, the court must determine if the best interests of the youth and the public would be served by granting the prosecutor’s motion to waive

⁶ MCL 712A.1 *et seq.*

jurisdiction. MCL 712A.4(4); MCR 3.950(D)(2). The prosecutor has a preponderance of the evidence burden at the waiver hearing. MCR 3.950(D)(2)(c). In making the best interests determination, the court is required to consider six factors:

- A) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim;
- B) The culpability of the youth in committing the alleged offense, including, but not limited to, the level of the youth's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines;
- C) The youth's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior;
- D) The youth's programming history, including, but not limited to, the youth's past willingness to participate meaningfully in available programming;
- E) The adequacy of the punishment or programming available in the juvenile justice system; and
- F) The dispositional options available to the juvenile.

*Id.*⁷ The court must give greater weight to the seriousness of the offense and the youth's prior record of delinquency. *Id.* In addition to the

⁷ Both MCL 712A.4(4) and MCR 3.950(D)(2) were amended effective October 1, 2024. The factors analyzed in this brief were those listed in the statute at the time of NDD's waiver hearing.

statutory factors, when making its determination regarding waiver of jurisdiction, the juvenile court must refer to evidence on the record regarding the relative suitability of programs and facilities available to the child in the juvenile and adult correctional systems. *Dunbar*, 423 Mich at 388. If the court finds that it is in the best interests of both the youth and the public to waive jurisdiction, it must enter an order granting the waiver motion. MCL 712A.4(4); MCR 3.950(D)(2).

A. Both the juvenile court and the Court of Appeals erred in how they weighed the statutory waiver criteria.

At the conclusion of NDD’s phase-two waiver hearing, the juvenile court found that, based on the criteria of MCL 712A.4(4), it was “in the best interest of the juvenile and the public to waive jurisdiction over the juvenile.” Tr. 11/01/23 at 77. The court analyzed each of the six waiver criteria, but its analysis of those factors and the weight given to them was flawed. The Court of Appeals compounded those errors, particularly as to Factors A and B.

1. Factor A: seriousness of the offense

Factor A, which is one of the two factors to be given greater weight, should have weighed against waiver. The strict language of MCL 712A.4(4)(a) requires the juvenile court to look at the “seriousness of the alleged offense in terms of community protection, including, but

not limited to, *the existence of any aggravating factors* recognized by the sentencing guidelines, *the use of a firearm or other dangerous weapon*, and the *impact on any victim*” (emphasis added). Here, there were no aggravating factors where NDD was unarmed, and no damage was done to the go-karts. The lower courts both erred by considering NDD’s age in their analysis of the seriousness of the offense.

The juvenile court failed to explicitly state whether the first factor weighed in favor of or against waiver. When analyzing the Factor B, though, the court found that “Factor B favors a waiver in adult circuit court *as well*”, implying that Factor A had weighed in favor of waiver. *Id.* at 74. It noted that UDAA is a five-year felony but otherwise gave very little discussion to the statutory components of Factor A. *Id.* at 72.

The Court of Appeals found that the juvenile court did not err in its findings on Factor A. Despite agreeing that “theft of a vehicle without other aggravating factors is not the most serious of offenses[,]” the Court still concluded that “the offense combined with respondent’s age is sufficiently serious that we cannot say that the circuit court clearly erred by weighing this factor in favor of waiver.” *NDD*, unpub op at 6. The age of the respondent, though, is not a listed consideration in the statute, nor is it an aggravating circumstance recognized by the sentencing guidelines.

While UDAA is a felony, it is not a particularly serious felony. The Legislature has laid out which offenses are serious enough that children can automatically be tried as adults,⁸ and UDAA is not on that list. For criminal sentencing purposes, it is a Class E property crime. MCL 777.16u. Based on nothing more than the possible penalty for the offense, the seriousness of UDAA itself does not weigh in favor of waiver.

Beyond the maximum possible penalty for the offense, there was no record created regarding the seriousness of the offense. There was no weapon involved, no significant loss (or loss of any sort) to the alleged victim, and no other information which could lead the juvenile court to find that this was a particularly serious offense requiring adult prosecution. It was clear error for the juvenile court to weigh this factor against NDD.

The Court of Appeals opinion as to Factor A compounds the errors from the juvenile court's findings. It is difficult to fathom a felony *less* serious than taking a go-kart, particularly when the go-kart was not damaged and the owner did not suffer any financial loss. And considering that NDD was not armed with a weapon, the actual seriousness of the offense was as minimal as imaginable for a felony charge.

⁸ MCL 764.1f(2).

By stating that NDD's age (17) at the time of the offense was sufficiently aggravating to make an otherwise unserious offense serious enough to warrant waiver, the Court of Appeals has signaled that *all* felony offenses are serious enough that Factor A will weigh in favor of waiver for 17-year-olds. If the benign facts of this case are enough to say Factor A favors waiver, then Factor A will *always* favor waiver. This is particularly troublesome due to the juvenile court's obligation to give greater weight to Factor A. The Court of Appeals opinion not only pushes juvenile courts to weigh Factor A against every 17-year-old; it also pushes them to grant the waiver motion for every 17-year-old. This Court can, and should, push back against that harmful black-and-white encroachment.

2. Factor B: the child's culpability

The juvenile court weighed Factor B in favor of waiver because NDD had a co-respondent and both boys had marijuana in their system at the time of arrest. Tr. 11/01/23 at 74. The Court of Appeals essentially adopted this reasoning, finding that the juvenile court did not err because "Respondent was 17 years old, and allegedly used marijuana and stole a go-cart." *NDD* at 7. The Court then noted that "[t]here is no indication of any facts mitigating respondent's culpability." *Id.*

Neither the participation of a co-respondent nor the presence of marijuana indicates that NDD was particularly culpable in the

commission of the alleged crime. The language of MCL 712A.4(4)(b) tells the court to look to “the level of the juvenile’s participation in planning and carrying out the offense....” The record here, though, is deplete of any evidence that NDD planned or had an outsized role in carrying out the alleged offense and instead suggests that this was the result of teenage impulse and immaturity, not criminal calculation. Petitioner’s sole argument that NDD was the leader of the two co-respondents was that he lived closer to the home of the alleged victim than the co-respondent. Tr. 11/01/23 at 66-67. This “evidence” was flimsy at best and nonsensical at worst.

There is no case law analyzing Factor B and what constitutes culpability under the waiver statute. The statute, though, does refer to “aggravating or mitigating factors recognized by the sentencing guidelines”. Therefore, analogy to Offense Variable 14 of the Michigan Sentencing Guidelines may be useful. Under OV 14, a person is scored 10 points if they were the leader in a multiple offender situation. MCL 777.44(1)(a). Case law regarding OV 14 has consistently required a finding that the person in question has played a particularly active role in the commission of the offense as compared to the other participants. See, e.g., *People v Ackah-Essein*, 311 Mich App 13 (2015) (OV 14 was properly scored at 10 points where the defendant was the first to suggest the idea of a robbery, telling codefendants of previous home delivery

robberies he had committed; he persuaded a reluctant co-defendant to participate; he selected the target pizza company; he directed a female friend to place the pizza order to be delivered to an abandoned house; and where he initiated the robbery via verbal signal to the others and held a BB gun to the victim's face); *People v Lockett*, 295 Mich App 165 (2012) (OV 14 was properly scored at 10 points where the defendant was 35, the co-defendant was 18, the defendant owned and drove the van that was used to pick up the victims and used as the location for the crimes, and defendant presumably was the one who purchased liquor used during the offense); *People v Apgar*, 264 Mich App 321 (2004) (overruled in part on other grounds by *People v White*, 501 Mich 160 (2017)) (OV 14 was properly scored at 10 points where the defendant was the first of the three co-defendants to force the victim into sexual relations, he had the most sexual contact with her, and he was the oldest of the three offenders); *People v Hayes*, unpublished per curiam opinion of the Court of Appeals, issued May 11, 2023 (Docket No. 359543) (OV 14 was erroneously scored at 10 points where the defendant's actions did not show, by a preponderance of the evidence, that he guided, directed, or was otherwise a primary causal or coordinating agent in the criminal transaction).

Between the lack of evidence that NDD took any leading role in the alleged offense and the persuasive case law regarding OV 14, there

simply was not a basis to find that NDD played a unique role in planning or carrying out the alleged offense. It was clear error for the juvenile court to find that this factor weighed in favor of waiver.

The Court of Appeals comments on Factor B are troublesome, particularly about there being “no indication of any factors mitigating respondent’s culpability.” *NDD*, at 7. Firstly, the statute requires the juvenile court to look at “the existence of any aggravating or mitigating factors recognized by the sentencing guidelines”, but the sentencing guidelines do not recognize any mitigating factors and are solely aggravating in nature. By stating that there was “no indication of any factors mitigating respondent’s culpability[,]” the Court has weaponized the incongruity between MCL 712A.4(4)(b) and the sentencing guidelines against NDD. No child can demonstrate that the mitigating circumstances recognized by the sentencing guidelines in arguing against Factor B because there are no mitigating circumstances recognized by the sentencing guidelines.

Secondly, the Court appears to have engaged in some degree of burden shifting. It held against NDD that there was no mitigating evidence when it is in fact the prosecutor’s burden to show that Factor B should weigh in favor of waiver. This is particularly erroneous when, as discussed in the paragraph above, the statutory mitigating

circumstances which NDD presumably was expected to demonstrate are non-existent.

Finally, the Court appears to have found that NDD's age at the time of the offense in and of itself somehow makes him more culpable without any further support from the record for that assertion. As with Factor A, the Court of Appeals found that the fact that NDD was 17 at the time of the offense bolstered the juvenile court's findings. This insistence by the Court that NDD's age pushed multiple waiver factors in the prosecutor's favor bends the law in such a way that all but forces juvenile courts to waive jurisdiction over 17-year-olds when the prosecutor makes that request.

3. Factor C: prior record of delinquency

The juvenile court delineated NDD's history with the juvenile legal system and noted other uncharged conduct before finding that Factor C weighed in favor of waiver. Tr. 11/01/23 at 74-75. The Court of Appeals held that the juvenile court did not err in its findings. *NDD* at 7.

While Factor C is not limited to conduct for which a child was charged or adjudicated, the juvenile court here erred when it considered a case that was dismissed due to incompetency. By using the 2019 case that was dismissed due to lack of competency as a basis to waive juvenile

court jurisdiction, the court effectively held NDD's youthfulness and his history of mental health needs against him. More egregiously, the court seemed to hold against NDD uncharged conduct related to altercations within his home for which there was "inconclusive proof of lack of defense or of who was the initial aggressor." *Id.* at 75. Finally, the court seemed to weigh against NDD that there was potentially domestic violence in the home, without any finding that NDD perpetrated domestic violence. The juvenile court seemed to hold against NDD that his home environment was volatile, which appears to be blaming him for his volatile family situation.

Missing from both the juvenile court's and the Court of Appeals' analyses is an evaluation of how NDD's conduct has evolved over time. He was charged with criminal sexual conduct in 2019 and again in 2021, though the latter occurred in 2020 before he was placed on probation. He was also charged with weapons offenses in 2021 based on conduct in 2020, right around the time he started probation. These are serious charges, though he was still very young at the time, not turning 15 until after those petitions had been filed. Yet there were no further petitions for new criminal behavior while NDD was on probation, and his only two probation violations were for refusing to turn over a PlayStation and having marijuana at school. His serious criminal behavior was concentrated in a short period, around the time he first was adjudicated

by the court. The de-escalation of NDD's conduct over time counsels against waiver.

Some guidance regarding Factor C was provided in *People v Fowler*, 193 Mich App 358 (1992). In *Fowler*, the child had initially been brought to court for property and traffic offenses. *Id.* at 365. By the time was he waived to adult court, though, he was charged with much more serious offenses (breaking and entering an occupied dwelling house with intent to commit larceny, felony-firearm, felonious assault, and possession of a short-barreled rifle). *Id.* at 364. The Court found that the waiver was sound because the child “had committed various offenses, *increasing in severity*, despite his exposure to increasingly extensive juvenile-treatment programs over a period of time.” *Id.* (emphasis added). NDD, on the other hand, demonstrated a de-escalation in his behaviors, going from sexual offenses and weapons offenses to childish property crimes. Under the Court's logic in *Fowler*, Factor C should weigh in NDD's favor.

NDD had a history of juvenile court involvement, and consideration of that history is allowed under the statute. Assuming he is responsible for the volatility of his home environment, though, is not a valid consideration under Factor C. And failing to take into consideration the decline in the seriousness of his criminal behavior was a disservice to NDD. Regardless of whether NDD's actual record of

delinquency would have favored waiver, the juvenile court did not make appropriate or supportable findings on this factor, and the Court of Appeals should have held that it did not weigh against NDD.⁹

4. Factor D: programming history

The juvenile court also held Factor D against NDD, noting his unsuccessful discharge from probation in August 2023. Tr. 11/01/23 at 75-76. It relied on Weinman's testimony that NDD had achieved maximum benefit from the residential placement and that there were no further services to offer him. *Id.* The Court of Appeals affirmed this finding "[i]n light of the record[.]" *NDD* at 7. Both courts erred in weighing this factor in favor of waiver when Weinman was unable to accurately describe NDD's programming.

During his time on probation, NDD participated in a variety of services. His participation was a mixed bag, and he was discharged unsuccessfully from probation shortly before this case arose. He was on a waiting list for another residential placement, and it is unknown

⁹ While not mentioned by the juvenile court or any parties, it is worth noting that Black children, such as NDD, are petitioned into juvenile court at double the rate of white children and are 1.5 times as likely to be adjudicated once they are in court. See Report and Recommendations of the Michigan Task Force on Juvenile Justice Reform, page 10 (July 22, 2022) (<https://micounties.org/wp-content/uploads/Michigan-Taskforce-on-Juvenile-Justice-Reform-Final-Report.pdf>). For that reason, Factor C may be more likely to favor waiver of Black children than white children.

whether he would have benefited from that placement had he been kept on probation and allowed to participate in it. It was also erroneous not to consider whether NDD could benefit from participating again in services he had previously completed.

When considering what services a child has been offered and their level of participation, it is also worthwhile to consider the relevant research. Most children age out of delinquent behavior naturally with minimal intervention. Steinberg, Cauffman, and Monahan, “Psychosocial Maturity and Desistence from Crime in a Sample of Serious Juvenile Offenders”, *Juvenile Justice Bulletin*, March 2015. There is reason to believe that NDD would have aged into a more responsible person even if he was given no further services. And the decrease in the severity of his charges (CSC and weapons charges in 2020 to UDAA in 2023) show that he was on that trajectory of naturally aging out of delinquent behavior and/or benefiting some from the services he had been offered.

While NDD’s participation in services was imperfect, there simply was not enough to say that he could not benefit from the same services or from the residential placement he had been waiting for, such that waiver was necessary. The testimony from NDD’s father, the person who saw him the most, was that NDD’s behavior in the home was in fact improving. There also was not enough to say that he would not age out

of his behaviors regardless of services, and there was some indication that he *was* aging out of them. Factor D was, at most, neutral toward waiver.¹⁰

5. Factor E: adequacy of available programming

Regarding Factor E, the juvenile court found that there was not adequate programming available in the juvenile court for NDD based on him having reached maximum benefit on all available services. Tr. 11/01/23 at 76. Therefore, the court found that this factor weighed in favor of waiving jurisdiction. *Id.* The Court of Appeals found that the juvenile court did not clearly err “[i]n light of the juvenile services provided to respondent and respondent’s failure to comply with and benefit from many of the services provided[.]” *NDD* at 7.

¹⁰ Similar to the racial disparities in charging in the above footnote, data from 2016-2020 shows that Black children in Michigan are six times more likely to be held in detention than white children, and their average length of stay in detention was a full week longer than that of detained white children. See Report and Recommendations of the Michigan Task Force on Juvenile Justice Reform, page 10 (July 22, 2022) (<https://micounties.org/wp-content/uploads/Michigan-Taskforce-on-Juvenile-Justice-Reform-Final-Report.pdf>). Black children are also placed as state wards at three times the rate of white children. *Id.* As with Factor C, there may be racial disparities with the application of Factor D due to the disparities in what it is assessing.

Factor E is intended to consider the child's amenability to treatment and likelihood of rehabilitation.¹¹ The US Supreme Court has noted "the great difficulty...of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate but transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Miller v Alabama*, 567 US 460, 479-80 (2012) (citations omitted). Neither the juvenile court nor the Court of Appeals elaborated on how the juvenile court was able to adequately predict whether NDD falls into that category of being irreparably corrupted.

6. Factor F: dispositional options

In finding that Factor F favored waiver, the juvenile court simply noted that it did "not find that there are dispositional options available...in the juvenile justice system which would be beneficial to this juvenile that have not already been provided to him." Tr. 11/01/23 at 77. As discussed above, there were potential services available, namely a different residential placement for which NDD had already been on the waiting list. The court could also refer NDD to repeat his participation in one or more programs. The Court of Appeals agreed with

¹¹ In fact, the amendments to MCL 712A.4(4)(e), effective October 1, 2024, seem to clarify this. This factor now reads: "The adequacy of the programming available to rehabilitate and hold accountable the juvenile in the juvenile justice system and *the juvenile's amenability to treatment*" (emphasis added).

the juvenile court but undermined its own reasoning by noting that “the circuit court opined that a short-term or long-term secured or non-secured residential treatment program would be more beneficial than the options available in the adult justice system[.]”

B. The Court of Appeals failed to enforce the requirement of People v Dunbar that the juvenile court compare services between the juvenile and adult systems.

The Court of Appeals also addressed NDD’s argument that the juvenile court erred by failing to comply with the requirements of *People v Dunbar*, 423 Mich 380 (1985). In *Dunbar*, this Court held that there must be evidence on the record, to which the juvenile court must refer, regarding the relative suitability of programs and facilities available in the juvenile and adult correctional systems. *Id.* at 388. The Court of Appeals acknowledged that, despite subsequent changes to the waiver statute, this provision of *Dunbar* has not been overruled. *NDD* at 8.

The Court of Appeals also acknowledged that the “circuit court did not explicitly state the services available to defendant in criminal court[.]” *Id.* However, the Court continued by finding that “the circuit court discussed in detail that no services available in the juvenile system would be adequate.” *Id.* Therefore, “the trial court did not clearly err by failing to enumerate the services available in criminal court in

comparison to the non-existent services available for respondent in the juvenile system.” *Id.*

The comparison requirement of *Dunbar* is not merely some procedural box for the court to check. It is a critical part of the investigation into whether waiver is in the best interests of the child and the public. Traditional waiver is inherently a decision about whether a child should be sentenced as an adult.¹² Adult sentencing is mandatory for a child who is waived and convicted, while adult sentencing is not available for a child adjudicated in juvenile court. Because it is strictly a sentencing decision, it necessarily invites a comparison between a juvenile disposition and an adult sentence. Which option better rehabilitates the child, and which better protects society? How can the court know that there are adequate services available in the adult criminal legal system without taking testimony about those services? And what if the services available in the adult system are actually *less* adequate than those in the juvenile system? The presumption that the alleged inadequacy of juvenile court services (which, as argued above,

¹² “While there are no doubt instances where it is necessary to waive jurisdiction over certain juvenile offenders, the decision to waive cannot be characterized as being consistent with the philosophy underlying the juvenile court system. In reality, the decision to waive juvenile court jurisdiction is not a decision to *rehabilitate*, but, rather, a decision to *punish* the juvenile upon conviction.” *People v Hana*, 443 Mich 202, 228 (1993) (CAVANAGH, CJ, dissenting) (emphasis in original).

may not have been true) automatically makes adult court services more appropriate effectively renders the *Dunbar* requirement null.

As it pertains to the *Dunbar* requirement, the Court of Appeals also wholly failed to consider the entire philosophy of the Juvenile Code. MCL 712A.1(3) reads:

This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents.

Former Justice McCormack referred to MCL 712A.1(3) as “the first principle of the Juvenile Code....” *In re Hill*, 501 Mich 1047 (2018) (McCORMACK, J., dissenting). A child’s welfare and the care, guidance, and control they receive will inherently differ in the adult criminal legal system than in the juvenile legal system. Because the philosophy of juvenile court mandates consideration of those factors, it naturally follows that the court cannot waive its jurisdiction without first considering the actual impact of such a waiver. The Court of Appeals failed to adhere to this philosophy and failed to properly apply *Dunbar* to NDD by excusing the juvenile court from making the necessary comparison between juvenile and adult court services.

II. The Court of Appeals wrongly held that the right to trial by jury as interpreted by *Apprendi v New Jersey* does not apply to the waiver decision.

Issue Preservation and Standard of Review

This constitutional error is unpreserved and therefore is reviewed for plain error. *People v Carines*, 460 Mich 750, 764 (1999). Plain error exists when 1) an error occurred; 2) the error was plain, i.e., clear or obvious; and 3) the error affected substantial rights. *Id* at 763. Additionally, this Court must find that the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings....” *Id* at 763-64 (citation omitted).

Discussion

MCL 712A.4 violates the right to a jury trial under the Federal Constitution and Michigan Constitution as interpreted by *Apprendi v New Jersey*, 530 US 466 (2000) and its progeny.

A. Facts increasing the maximum possible sentence implicate the right to trial by jury.

The right to a trial by jury is sacrosanct. It is a fundamental right in American criminal procedure and has been since our nation’s infancy. Both the Federal and Michigan constitutions guarantee those accused of crimes “the right to a speedy and public trial by an impartial jury....”

US Const, Am VI; Const of 1963, art 1, § 20. A defendant in a criminal proceeding has the absolute right to a jury determination upon all essential elements of the charge. *People v Goodard*, 82 Mich 424 (1982), on rehearing 86 Mich App 537. The right to a jury trial may not be whittled away by the legislature or by a too-liberal constitution of statutes. *People v Polhamus*, 59 Mich App 609 (1975).

In *Apprendi*, the Supreme Court of the United States held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 US at 490. The Court clarified this ruling in *Blakely v Washington*, 542 US 296 (2004), stating that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.” *Blakely*, 542 US at 303 (emphasis in original). The Court went even further in *Alleyne v United States*, 570 US 99 (2013), when it held that “a fact increasing either end of the [sentencing] range produces a new penalty and constitutes an ingredient of the offense.” *Alleyne*, 570 US at 112. “When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to a jury.” *Id.* at 114-15. “If a State makes an increase in a defendant's authorized

punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.” *Ring v Arizona*, 536 US 584, 602 (2002).

B. Traditional waiver is a sentencing decision and therefore subject to the Apprendi rule.

MCL 712A.4 allows for a child to be tried and sentenced as an adult after the juvenile court judge makes specific factual findings about the child and the case. Michigan is unique among states in its sheer variety of ways in which a child may be tried as an adult. As in this case, the prosecutor may file a petition in juvenile court and then file a motion for the juvenile court to waive its jurisdiction (MCL 712A.4 (traditional waiver)). For certain specified offenses, the prosecutor may forgo juvenile court entirely and file a complaint in district court (MCL 769.1f (automatic waiver)). And the prosecutor may instead opt for the case to stay in juvenile court and either designate the case as one in which the child is to be tried as an adult (MCL 712A.2d(1) (prosecutor-initiated designation)) or move the court to designate the case as such (MCL 712A.2d(2) (court-initiated designation)). Traditional waiver is the only of these options with both a waiver decision by the court and mandatory adult sentencing. A child who is convicted following a traditional waiver *must* be sentenced as an adult.

If NDD were to be tried in juvenile court and found guilty of UDAA, he would be subject to juvenile court jurisdiction until his 20th birthday¹³ with no possibility of a prison sentence. On the other hand, if he is subjected to an adult sentence, he could serve up to five years in prison.¹⁴ And this maximum turns on findings made solely by the juvenile court judge. Because those findings are unreviewable by a jury, using them to increase the prescribed maximum penalty results in a jury trial violation under the Federal and Michigan constitutions as interpreted by *Appendi*.

These findings, of course, are not elements of the offense. A jury can only determine whether a person is guilty beyond a reasonable doubt based on the elements of the offense. See, e.g., *Mullaney v Wilbur*, 421 US 684 (1975) (the due process clause of the Fourteenth Amendment requires that the state prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged). A prior record of delinquency, the services a child has previously participated in, and the services which may otherwise be available to the child fall outside of the enumerated elements of UDAA.

¹³ MCL 712A.2a(1).

¹⁴ MCL 750.413.

The Supreme Judicial Court of Massachusetts applied *Apprendi* to waiver decisions in *Commonwealth v Quincy Q*, 753 NE2d 781 (Mass 2001) (overruled in part on other grounds by *Commonwealth v King*, 834 NE2d 1175 (Mass 2005)). Massachusetts allows a court to try a child as an adult using a “youthful offender indictment” if the child is alleged to have committed an offense that, for an adult, would carry a prison sentence and if at least one aggravating factor is present. Mass Gen Laws ch 119, § 54. One possible aggravating factor is whether the offense involves infliction or threat of serious bodily harm. *Id.* In *Quincy Q*, the Massachusetts Supreme Court held that the youthful offender indictment should have been dismissed because the prosecutor had not proven the serious bodily harm factor to a grand jury, and the case should have proceeded as a juvenile complaint. *Quincy Q*, 753 NE2d at 788. In discussing *Apprendi*’s applicability to the state’s youthful offender statute, the Court noted that “once the Legislature enacted a law providing that the maximum punishment for delinquent juveniles is commitment to the [state] for a defined time period...any facts, including the requirements for youthful offender status, that would increase the penalty for such juveniles must be proved to a jury beyond a reasonable doubt.” *Id.* at 789. The Court further stated that the prosecutor must prove the facts underlying the youthful offender status beyond a reasonable doubt to allow for an adult sentence. *Id.* at 789-90.

Other states, such as Kansas,¹⁵ have held that *Apprendi* is not applicable to waiver decisions.

The prosecution in *Quincy Q* violated *Apprendi* because there was insufficient evidence of the serious bodily harm factor necessary for an indictment. The Court bent over backwards to explain, though, that a youthful offender indictment could survive an *Apprendi* challenge *if the prosecutor can prove the aggravating factor beyond a reasonable doubt to a jury*. In this regard, the Massachusetts statute provides greater insulation from a constitutional violation than MCL 712A.4. Both Mass Gen Laws ch 119, §54 and MCL 712A.4 allow for trying a child as an adult for reasons unrelated to the elements of the offense (aggravating facts in Massachusetts, waiver criteria in Michigan). However, in *Quincy*, Massachusetts specifically found that the statute requires that youthful offender status be presented to the jury and be found beyond a reasonable doubt. The Michigan statute has no such protections, and the prosecutor has no obligation to prove anything at trial other than the elements of the offense. The Massachusetts statute, unlike the Michigan statute, is drafted such that it does not violate *Apprendi*.

¹⁵ *State v Jones*, 47 P3d 783 (Kan 2002). The statute at issue in *Jones* created a presumption that a child be tried as an adult if charged with certain offenses. This is more akin to Michigan's automatic waiver statute, MCL 764.1f, than the traditional waiver statute, which starts with a presumption of juvenile court jurisdiction.

Additionally, in Massachusetts, if the jury finds that the prosecutor has not proven youthful offender status beyond a reasonable doubt, the child cannot be sentenced as an adult, and the case proceeds as a juvenile delinquency. This further insulates the statute from violating *Apprendi*. Michigan law has no such protections as our statutes do not provide any reverse waiver provisions. Once a waiver happens, the damage has been done, and the child has been permanently waived into adult court based solely on judge-found facts.

C. Subsequent case law has expanded the right to trial by jury.

Since Massachusetts decided *Quincy*, the US Supreme Court has continued to expand the *Apprendi* doctrine. As noted above, the Court in *Alleyne* in 2013 expanded to include mandatory minimums. Specifically, the Court held that “[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to a jury.” *Alleyne*, 570 US at 114-15. This same doctrine has been extended to find that a jury, not a judge, must find each fact necessary to impose a sentence of death. *Hurst v Florida*, 577 US 92 (2016). Similarly, the Court has held that a federal statute governing revocation of supervised release, authorizing a new mandatory minimum sentence based on a judge's fact-finding by a preponderance of the evidence, is a Sixth Amendment violation. *United States v Haymond*, 588 US 634 (2019). As

recently as last year, the Court found that a jury, not a judge, must unanimously determine beyond a reasonable doubt whether a criminal defendant's past offenses were committed on separate occasions for an Armed Career Criminal Act sentencing enhancement. *Erlinger v United States*, 602 US 821 (2024). In *Erlinger*, the Court emphasized that “the Fifth and Sixth Amendments sought to ensure that a judge’s power to *punish* would derive wholly from, and remain always controlled by, the jury and its verdict. *Id* at 831 (citation and quotations omitted) (emphasis added). The continued extension of *Apprendi* to other considerations undermines the validity of the pre-*Alleyne* decisions which the prosecutor has relied on.

Further, the *Erlinger* Court’s focus on the judge’s authority to punish is particularly important in determining whether the *Apprendi* doctrine applies to traditional waiver proceedings. Again, as noted by Chief Justice Cavanagh in his *Hana* dissent, a waiver decision is a decision to punish rather than rehabilitate the child. *Hana*, 443 Mich at 228. The purpose of juvenile delinquency proceedings is to rehabilitate a child and provide them with the guidance and care necessary for their best interests. See MCL 712A.1(3) and MCR 3.902(B)(1). The juvenile court places “an emphasis on rehabilitation rather than retribution.” *In re Whittaker*, 239 Mich App 26, 29 (1999). Because the purpose of juvenile court is rehabilitation and because a child waived to criminal

court under MCL 712A.4 must be sentenced as an adult, the decision to waive cannot be construed as anything other than as a decision to allow a judge to punish the child. Under the Sixth Amendment and the *Apprendi* line of cases, that authority to punish can only derive from the jury, not the juvenile court judge.

D. Only the punishment changes with waiver, not trial.

A child's trial rights do not alter by being tried as an adult. They have the same right to be presumed innocent until proven guilty beyond a reasonable doubt, right to remain silent, right to testify on their own behalf, and right to counsel. They even have the right to jury trial in both juvenile and adult court, even if the right in juvenile court is statutory rather than constitutional. The only meaningful difference between being tried as a child and being tried as an adult is what happens after a finding of guilt. The traditional waiver decision only truly impacts whether the child will receive a juvenile disposition or an adult sentence, which means that a waiver order serves to increase the maximum punishment a child may face if found guilty. The judicial fact-finding necessary to increase the maximum possible punishment under MCL 712A.4 is precisely what *Apprendi* and its progeny are intended to stop.

E. The Court of Appeals opinion wrongly found that the right to trial by jury does not apply to waiver decisions.

The Court of Appeals reasoned that MCL 712A.4 does not violate the *Apprendi* doctrine because “[t]he family division’s waiver of respondent to the criminal court...is not a *fact*.” *NDD* at 9 (emphasis in original). It continued that “[t]he waiver determination has no bearing on any element of the offense and is not a ‘factual determination’ that increases respondent’s penalty ‘beyond the prescribed statutory maximum.’” *Id.*

The waiver of a juvenile respondent to criminal court is a procedural mechanism by which jurisdiction is transferred from the family division of the circuit court to the general criminal court; it is not a finding of any fact bearing on any element of the offense, nor is it a determination of guilt or the imposition of a sentence.

Id. The Court of Appeals has effectively held that the waiver decision is not based on findings of fact.

The Court of Appeals rationale is wrong. The waiver decision is *inherently* based on fact finding. The juvenile court makes findings of fact and uses those findings to waive jurisdiction, which is precisely what goes into a “factual determination”. The prior record of delinquency is based on facts. The services the child has participated in and their benefit from those services are facts. Whether the child was armed with a weapon is a fact. Additional services available in the

juvenile legal system is a fact. And all of that fact finding forms the basis for the decision on whether to waive jurisdiction and thereby the decision on whether the maximum penalty is juvenile court jurisdiction or commitment to the Michigan Department of Corrections.

The Court of Appeals relied on the idea that the waiver fact finding “has no bearing on any element of the offense....” Yet under the holding in *Alleyne*, facts which are used to increase the maximum possible penalty constitute *new* elements of the offense. So even if the juvenile court’s findings in this case are not themselves statutory elements of UDAA, they are new elements under *Alleyne* because they are used to increase the maximum possible penalty for NDD. Contrary to the Court of Appeals opinion, this triggers the Sixth Amendment protections as stated in *Apprendi* and *Alleyne*.

F. It was plain error for the juvenile court to waive jurisdiction due to the Apprendi violation.

Traditional waiver is a serious constitutional violation affecting one of the most fundamental rights of our legal system. Subjecting children to a system which deprives them of their right to trial by jury under the Federal and Michigan Constitutions is plain error. Because NDD did not challenge the constitutionality of traditional waiver in the juvenile court, he is left with an unpreserved claim of constitutional

error. Such a claim is reviewed for plain error. *Carines*, 460 Mich at 764. To establish plain error, NDD must show that 1) an error occurred, 2) the error was plain (i.e., clear or obvious), and 3) the plain error affected substantial rights. *Id* at 763. Michigan courts have applied the plain error standard of review to appeals from juvenile court proceedings. *In re Ferranti*, 504 Mich 1, 29 (2019).

A clear or obvious error is one “that is not subject to reasonable dispute.” *People v Randolph*, 502 Mich 1, 10 (2018). Michigan’s traditional waiver statute unambiguously puts the decision on whether a child should be tried as an adult into the hands of a judge, not a jury. And due to the differences between dispositional options in juvenile court and the maximum prison sentence in adult court, it cannot be disputed that a child’s maximum possible sentence is increased when he is waived into adult court. There is no reasonable dispute that judicial fact finding increases a child’s maximum sentence via traditional waiver, not a finding by a jury. A constitutional error occurred here, and it is clear and obvious.

“The third requirement [of plain error] generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Carines* at 763. The error must have “seriously affected the fairness, integrity or public reputation of judicial proceedings....” *Id*. The failure to challenge the constitutionality of

traditional waiver affected the very framework within which the case progresses because, but for the error, the case would have remained in juvenile court, and NDD would not be facing potential prison time if he is convicted of UDAA. All three prongs of the *Carines* plain error test are met in this case.

Once all of the prongs of the plain error test are met, the reviewing court must still consider whether the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings....” *Carines* at 763-64 (citation and quotation marks omitted). A juvenile court’s decisions regarding a child’s future “require the most thoughtful and reasoned solicitude....” *People v Petty*, 469 Mich 108, 116-17 (2003). Perhaps no decision is more deserving of this solicitude than the decision on whether to try a child as an adult and subject him to a prison sentence rather than a juvenile disposition. A statutory procedure which violates a child’s Sixth Amendment right to trial by jury and subjects him to mandatory adult sentencing cannot be said to one of “thoughtful and reasoned solicitude” and naturally affects the fairness of the proceedings. NDD is in the adult legal system based on a violation of his constitutional rights; that cannot be said to be fair.

Michigan’s traditional waiver statute is an unconstitutional violation of the right to trial by jury under both the federal and state constitutions, and it was plain error for the juvenile court to waive NDD

via that statute. The waiver order in this case, and the Court of Appeals opinion affirming that order, must be reversed.

Conclusion and Relief Requested

For the reasons stated above, NDD respectfully requests that this Honorable Court grant leave to appeal or any other peremptory relief the Court deems just and appropriate.

Respectfully submitted,

State Appellate Defender Office

**Joshua
Pease**

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