

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE NDD,

Supreme Court No.: 169064

Court of Appeals No.: 370602

Livingston County Family Court
Juvenile Division No.: 19-015969-DL

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Prosecutor/Appellee's Answer Opposing

Respondent/Appellant's Application for Leave to Appeal

Plaintiff-Appellee, the People of the State of Michigan, through the Livingston County Prosecuting Attorney, opposes Respondent-Appellant's Application for Leave to Appeal pursuant to MCR 7.305(D), and states:

1. Respondent is appealing the Court of Appeals' per curiam opinion affirming the family court order waiving jurisdiction in this matter to the court of general criminal jurisdiction for arraignment of respondent as an adult.¹

¹ *In re NDD*, Minor. *People v NDD*, unpublished per curiam opinion of the Court of Appeals issued August 15, 2025 (Docket No. 370602), submitted as a separate exhibit.

2. The factual and procedural history of this case is as follows:

- In 2019, respondent, then age 12, was the subject of a petition in the family division of the circuit court in which he was alleged to have perpetrated fourth-degree criminal sexual conduct and assault and battery. He was found incompetent to stand trial and the charges were dismissed.

- In 2020, a petition was filed in the family division of the circuit court charging respondent with domestic violence involving his father; respondent pleaded guilty to a charge of disorderly person, MCL 750.167(1)(l).

- In 2021, at age 14, respondent was charged in separate petitions with two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a), two counts of receiving and concealing stolen firearms, MCL 750.535b, and carrying a concealed pistol, MCL 750.227. Respondent was placed in a residential treatment program in May 2021. The petitions charging criminal conduct were resolved by respondent pleading guilty to reduced charges in August 2021.

- After more than a year, respondent was discharged from the residential treatment program after it was determined that he no longer was benefiting from the program. Respondent returned home in August 2022 and was released from probation in August 2023 without successfully completing the terms of probation.

- In September 2023, the prosecution petitioned the family division of the circuit court for delinquency proceedings alleging that respondent and another person unlawfully had driven away go-carts, contrary to MCL 750.413, and had marijuana in their possession. At that time, respondent was 17 years old. The prosecution moved the family division of the circuit court to waive its jurisdiction and transfer the proceedings to the criminal court for arraignment of respondent on criminal charges. After conducting the required waiver proceedings, the family division of the circuit court waived its jurisdiction, transferring the matter to the circuit court's general criminal jurisdiction.

- Challenging the waiver of jurisdiction, Respondent appealed to the Michigan Court of Appeals. Respondent argued: **(a)** the family division incorrectly evaluated the statutory factors when determining whether to waive its jurisdiction; and **(b)** the waiver is a violation of

Respondent's constitutional right to trial by jury. The Court of Appeals disagreed with Respondent's arguments and affirmed the family court's waiver of jurisdiction. (See *In re NDD*, Slip Op.)

- Respondent now appeals to the Michigan Supreme Court, arguing: (a) 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*; and (b) 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.

3. The Court of Appeals reviews for abuse of discretion the decision of the family division of the circuit court to waive jurisdiction on a juvenile matter alleging criminal conduct. See *People v Fultz*, 453 Mich 937, 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 ___, ___; ___ NW3d ___ (2024) (Docket No. 165544); slip op at 4-5. The Court of Appeals reviews for clear error the factual findings of the family division of the circuit court. MCR 2.613(C). A finding is clearly erroneous if, after reviewing the entire record, the appellate court is firmly convinced that the trial court made a mistake. *People v Swenor*, 336 Mich App 550, 564; 971 NW2d 33 (2021). The Court of Appeals reviews de novo the interpretation and application of a statute. *Oslund*, ___ Mich at ___; slip op at 5. The appellate court will not reverse or vacate a trial court's order unless refusing to do so appears inconsistent with substantial justice. MCR 2.613(A).

4. Generally, the family division of the circuit court has exclusive jurisdiction over a juvenile criminal offender. *Oslund*, ___ Mich at ___; slip op at 6, citing MCL 712A.2(a)(1) and MCL 764.27. Under MCL 712A.4(1), however, upon the prosecutor's motion, the family division of the circuit court may waive

jurisdiction of a juvenile to the criminal division of the circuit court if the juvenile is 14 years old or older and is accused of an act that would be a felony if committed by an adult. *Oslund*, ___ Mich at ___; slip op at 6.

5. To determine whether to waive its jurisdiction, the family division of the circuit court conducts a waiver hearing in two phases. MCL 712A.4(3) and (4); MCR 3.950(D). In the first phase, the family division of the circuit court determines whether the prosecution has demonstrated probable cause to believe that the juvenile committed the offense. MCR 3.950(D)(1). During the second phase of the waiver proceeding, the family division of the circuit court determines whether waiver is in the best interests of the juvenile and the public by considering the criteria of MCL 712A.4(4). MCR 3.950(D)(2); *People v Williams*, 245 Mich App 427, 432; 628 NW2d 80 (2001). In making this determination, the circuit court is required to give greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria. MCL 712A.4(4); see *People v Whitfield (After Remand)*, 228 Mich App 659, 662 n 1; 579 NW2d 465 (1998).

6. The prosecuting attorney has the burden to establish by a preponderance of the evidence that waiver is in the best interests of the juvenile and the public. MCR 3.950(D)(2)(c). A preponderance of the evidence is evidence that, when weighed against the opposing evidence, "has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008) (quotation marks and citation omitted).

7. At the relevant times in this case, MCL 712A.4(4),² provided the criteria for determining if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria.

8. The statutory criteria for a traditional waiver included: (a) the seriousness of the alleged offense in terms of community protection; (b) the culpability of the juvenile in committing the alleged offense, including the level of the juvenile's participating in planning and carrying out the offense; (c) the juvenile's prior record of delinquency; (d) the juvenile's programming history, including past unwillingness 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 for the juvenile. MCL 712A.4(4), as amended by 1996 PA 409.

9. In this case, respondent waived the first phase of the waiver hearing. In the second phase, after considering the testimony and the entirety of respondent's juvenile record, the family division of the circuit waived its jurisdiction under MCR 3.950(D)(1)(c)(ii), finding waiver to be in the best interests of respondent and the public.

² This is referred to as a traditional waiver. The family division of the circuit court also may waive jurisdiction over a juvenile to the criminal division under MCL 764.1f, referred to as an automatic waiver. *Oslund*, ___ Mich at ___; slip op at 6. The order of waiver in this case was issued November 1, 2023, before the October 1, 2024 effective date of the amendment of MCL 712A.4(4) by 2023 PA 291.

10. On November 1, 2023, Judge Matthew J. McGivney conducted a hearing to waive jurisdiction and heard testimony from three witnesses, two for the People and one for the Respondent. Following the testimony, the Court considered at length each of the six factors on the record before concluding that upon the preponderance of the evidence presented, the prosecution had met its burden for a traditional waiver.³

11. The Court of Appeals considered the lower court's findings regarding each factor, concluding "the circuit court thoroughly addressed the statutory factors, including the inadequacy of programming options in the juvenile system, made findings based upon the record, and correctly gave the greatest weight to factor (a), the seriousness of the offense, and factor (c) the juvenile's prior record of delinquency."⁴

12. The Court of Appeals also considered the Respondent's *Dunbar* argument,⁵ writing: "At the time *Dunbar* was issued, the statute relevant to juvenile waiver required the circuit court to consider '[t]he relative suitability of programs and facilities available to the juvenile and criminal courts for the child.' *Id.* at 386, quoting MCL 712A.4(4)(d), as amended by 1972 PA 265. Although that language found in the earlier version of MCL 712A.4(4) since has been amended, the statement of the Court in *Dunbar* applying that version of the statute that

³ See Prosecutor-Appellant's Court of Appeals Brief on Appeal, submitted as a separate Exhibit, for specific testimony of the witnesses (pages 7-23) and the Court's findings (pages 26-29).

⁴ See *In re NDD*, submitted as separate Exhibit, slip op at pages 6-8.

⁵ *People v Dunbar*, 423 Mich 380, 388; 377 NW2d 262 (1985).

‘there must be evidence on the record, to which the probate court must refer, regarding the relative suitability of programs and facilities available in the juvenile and adult correctional systems’ has not been specifically overruled. See *Dunbar*, 423 Mich at 388. In this case, the circuit court did not explicitly state the services available to defendant in criminal court, but the circuit court discussed in detail that no services available in the juvenile system would be adequate. Under these circumstances, the trial court did not clearly err by failing to enumerate the services available in criminal court in comparison with non-existent services available for respondent in the juvenile system.”⁶

13. The Court of Appeals concluded that the trial court did not err by finding that the statutory factors favored waiver, and that the family court therefore did not abuse its discretion by waiving jurisdiction in this matter. See *Fultz*, 453 Mich at 937.⁷

14. Relying upon *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), Respondent contends that waiver into the adult criminal system increases his maximum potential punishment without the benefit of trial by jury and without the elements required for waiver being demonstrated beyond a reasonable doubt. However, the Court of Appeals found that the waiver determination has no bearing on any element of the offense and is not a factual determination that increases the respondent’s penalty beyond the prescribed statutory maximum.

⁶ See *In re NDD*, submitted as separate Exhibit, slip op at page 8.

⁷ *Id.*

15. The Court of Appeals wrote: “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. By waiving its jurisdiction over respondent in this case, the circuit court did not stray into the realm of fact-finding addressed by the Court in *Apprendi*, nor did the circuit court otherwise violate respondent’s right to a jury trial on whatever charge he may face in criminal court. Rather, the circuit court followed the procedure mandated by statute when a prosecutor seeks traditional waiver of a juvenile respondent to general criminal court, which does not include a jury trial on the issue of waiver.”⁸

16. This case does not present a basis for discretionary review under MCR 7.305(B)(3) (“the issue involves a legal principle of major significance to the state’s jurisprudence”) or (B)(5)(a) or (b) (“the decision is clearly erroneous and will cause material injustice” or “the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals”).

For the foregoing reasons, and the facts and legal reasoning found in the separate exhibits submitted by Appellee, the Prosecution asks this Court to **deny** Respondent’s application for leave to appeal.

⁸ *Id.*, slip op at 9-10.

Respectfully submitted,

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LIVINGSTON COUNTY PROSECUTOR

Dated: 09/25/2025

/s/ William M. Worden

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Certification of Word Count

As required by Amendments to MCR 7.212, 7.215, 7.305, 7.311 and 7.312, effective September 1, 2022, I certify that, according to my Microsoft Word Count function, the Plaintiff / Appellee's Motion for Immediate Consideration contains 2,314 words, excluding the parts of the document that are exempted by court rule.

Executed on September 25, 2025

/s/ William M. Worden

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