

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. 169064

COA No. 370602

Livingston County Circuit Court –
Family Division

Case No. 2019-015969-DL

**Respondent-Appellant NDD's
Supplemental Brief**

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Statement of the Questions Presented

- I. Did the juvenile court reversibly err when it found, by a preponderance of the evidence, that waiver was in the best interests of both NDD and the public?

Court of Appeals answered “no”.

NDD answers “yes”.

- II. In deciding whether to waive its jurisdiction over NDD, did the juvenile court fail to compare the relative suitability of programs and facilities available in the juvenile and adult correctional systems as required by *People v Dunbar*?

Court of Appeals answered “no”.

NDD answers “yes”.

- III. Does Michigan’s traditional waiver statute, MCL 712A.4, violate *Apprendi v New Jersey* because it authorizes an increase in NDD’s maximum punishment without a jury determination, beyond a reasonable doubt, of the factors considered in the waiver decision?

Court of Appeals answered “no”.

NDD answers “yes”.

Introduction

“[T]he decision to waive cannot be characterized as being consistent with the philosophy underlying the juvenile court system.” *People v Hana*, 443 Mich 202, 228 (1993) (CAVANAGH, CJ, dissenting). The decision to waive juvenile court jurisdiction, as Justice Cavanagh recognized, “is not a decision to *rehabilitate*, but, rather, a decision to *punish* the juvenile upon conviction.” *Id.* (emphasis in original). That warning finds its fullest and most troublesome expression in this case.

In 2023, the Family Division of the Livingston County Circuit Court decided that NDD, a 17-year-old child¹, was deserving of punishment, not rehabilitation, for joyriding on a go-kart. No person was harmed, no property was damaged, and no weapon was present. Yet the juvenile court found that NDD committed a serious offense sufficient to justify casting him out of the juvenile court entirely and delivering him to the adult criminal court, where rehabilitative options are more limited and where he is exposed to far harsher punishment.

That outcome is particularly unjust where NDD had a demonstrated history of de-escalating behavior. This history is tangible evidence that the rehabilitative promise of the juvenile system was working. Rather than build on that promise, the court found, paradoxically, that NDD had not benefited from services offered by the juvenile court and that, despite the possibility of juvenile court services that had not yet been tried, there were no services which could benefit

¹ Throughout this brief, when not citing 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 within the legal system. See Pease, *Regarding the Word “Juvenile”*, Michigan Family Law Journal, Vol. 52 No. 6 at 16-17 (June/July 2022).

NDD. Without conducting the comparative analysis of the juvenile and adult legal systems required by *People v Dunbar*, 423 Mich 380 (1985), the court waived its jurisdiction over NDD and relegated him to the adult criminal legal system for a classically childish, non-violent offense. The juvenile court's decision and the Court of Appeals' affirmance communicated that courts can simply give up on children.

This case also presents a constitutional error that is occurring in juvenile courts throughout the state. The juvenile court's waiver decision violated NDD's right to have a jury decide any facts which increase his maximum possible punishment in violation of his rights under the Sixth Amendment and Article 1, Section 20 of the Michigan Constitution. See *Apprendi v New Jersey*, 530 US 466 (2000). MCL 712A.4 permits a judge alone to decide the facts required to expose a child to the increased punishment of the adult legal system and is therefore unconstitutional.

NDD asks this Court to find that Michigan's traditional waiver statute is a violation of the right to a jury trial under the federal and Michigan constitutions, reverse the waiver order, and restore him to the jurisdiction of the juvenile court. This Court must also make clear that the Juvenile Code's promise of rehabilitation extends to *every* child in Michigan and cannot be discarded absent the protections of the federal and state constitutions, and certainly for joyriding in a go-kart.

Statement of Facts

In 2023, out of teenage immaturity and impulse, NDD and a friend went joyriding on go-karts that did not belong to them.² 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 or engage in any assaultive conduct. Despite the childlike nature of his conduct, NDD is now being prosecuted as an adult and faces up to five years in prison.

A. NDD discharged from probation shortly before the instant offense.

The prosecution first filed a petition against NDD in 2019, around the time he turned 13 years old. However, he was found incompetent to stand trial, and the charges were dismissed. Appendix C, 050; see also Appendix D, 091-92; see also Appendix E, 093. He was placed under the court's jurisdiction in 2020 when he pled guilty to disorderly person. See Appendix F, 094-95. He was only 14 years old at the time. In 2021, NDD was charged with criminal sexual conduct and firearms offenses on separate petitions. Appendix C, 050-51; see also Appendix G, 096-97; see also Appendix H, 098-99. The CSC petition listed the date of offense as September 24, 2020, which was prior to the juvenile court taking jurisdiction over NDD, and the firearms petition lists the date of offense as December 19, 2020, which is three days after the initial order of disposition. Both of those petitions were resolved by pleas to reduced

² All statements regarding NDD's participation in the charged offense are based on a probable cause finding made by the juvenile court. This case remains pending with the Livingston County Circuit Court in a pretrial stage, and nothing in this brief should be construed as an admission of guilt by NDD.

charges. See Appendix I, 100-01; see also Appendix J, 102-03. NDD discharged from probation in August 2023. See Appendix K, 104-06.

B. The prosecution moved for waiver to adult criminal court for the go-kart incident.

NDD was charged with the instant offense, unlawfully driving away an automobile (UDAA),³ a month after he discharged from probation. See Appendix L, 107-08. The automobile in question was a go-kart. See Appendix M, 110. 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. Appendix M, 109-12. The waiver proceedings took place in November 2023.

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

At the waiver hearing, NDD waived the probable cause portion. Appendix C, 018-20. During the best interests portion, probation officer 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 assigned PO, Laura Ketelhut, was on medical leave. Appendix C, 024. Weinman had only seen NDD one time prior to the waiver hearing. Appendix C, 038. She acknowledged that, despite reviewing the file and speaking with Ketelhut, she lacked information about NDD's case. Appendix C, 039.

³ MCL 750.413.

The orders from NDD's time on probation show that the juvenile court first committed him to DHHS for supervision while he was on probation in April 2021. He was moved to a residential placement about a month later. See Appendix N, 113. While he was under DHHS's supervision, NDD was placed at Bethany Christian Services residential program for 18 to 24 months. Appendix C, 025. He returned home in August 2022 and was supervised by Ketelhut. Appendix C, 026. Once back in his home, NDD was offered drug and alcohol testing, Wraparound,⁴ individual therapy, and Midcourse Correction.⁵ Appendix C, 027. Wraparound may not have been implemented, though. Appendix C, 065.

Two probation violations (PVs) were filed against NDD during his nearly three years on juvenile 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 Appendix P, 118-19. 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 Appendix Q, 120-22. 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 juvenile probation.

⁴ 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>

⁵ Midcourse Correction is an intense, structured weekend program for children to help them build discipline.
<https://www.midcoursecorrection.org/challenge-camp>

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. Appendix C, 029. She was unaware of whether NDD had received a substance abuse evaluation or psychological evaluation. Appendix C, 031. She was also unsure of what mental health and substance abuse services he had been offered. Appendix C, 043.

Weinman believed that NDD may have been on a waiting list for a new residential placement leading up to his discharge from juvenile probation in August 2023, she did not know with certainty. Appendix C, 032-33. She indicated that children are generally on these waiting lists for three to six months. Appendix C, 033. Weinman claimed that NDD had exhausted all the services DHHS could offer and speculated that the UDAA charge coming within a week of NDD being released from juvenile probation was an indication that he had not benefited from services. Appendix C, 036. She acknowledged, though, that a one-size-fits-all approach is not appropriate for cases such as NDD's. Appendix C, 041.

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 his earlier petitions. Trudeau believed that, based on Weinman's testimony, the only service available to NDD which had not been offered was juvenile drug treatment court. Appendix C, 052. Relatedly, Trudeau noted that, while this case was pending, NDD tested positive for THC once and also missed a drug screen. Appendix C, 048.

D. The juvenile court heard information that mitigated 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. Appendix C, 060. He has also been diagnosed with ADHD. Appendix C, 060. He and his older sister had a very contentious relationship, which resulted in the police being called to their home. Appendix C, 075. NDD's older sister facilitated his negative behaviors while he was on juvenile probation, such as encouraging him not to turn over his PlayStation when ordered to do so, which resulted in one of his probation violations. See Appendix P, 118-19. Issues with the family as a whole resulted in Children's Protective Services interventions. See Appendix R, 123. 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 juvenile probation, particularly after he was released from residential placement. Appendix C, 062-63. NDD responded more positively to discipline after rehabilitative interventions. Appendix C, 064. And altercations within the home ended once NDD's sister moved out. Appendix C, 075.

E. The juvenile court waived jurisdiction in the go-kart case.

At the conclusion of the proofs, the juvenile court found that all the statutory waiver criteria⁶ weighed in favor of the court waiving its jurisdiction. Appendix C, 083-88. The court found that waiver was in the

⁶ MCL 712A.4(4).

best interests of both NDD and the public and granted Petitioner's waiver motion. Appendix C, 088.

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) (Appendix A, 001-010). NDD filed an application for leave to appeal in this Court.

In April 2026, this Court granted oral argument on the application as to three questions: 1) whether the Livingston Circuit Court Family Division reversibly erred in finding, by a preponderance of the evidence, that the best interests of the juvenile and the public would best be served by granting the prosecution's motion to waive the court's jurisdiction over the respondent; 2) whether, in deciding whether to waive its jurisdiction over the respondent, the juvenile court was required to compare the relative suitability of programs and facilities available in the juvenile and adult correctional systems; and (3) whether the discretionary waiver statute, MCL 712A.4, violates *Apprendi v New Jersey*, 530 US 466, 490 (2000), because it authorizes an increase in the respondent's maximum punishment without a jury determination, beyond a reasonable doubt, of the factors considered in the waiver decision. Appendix B, 011.

Arguments

- I. The juvenile court reversibly erred when it found, by a preponderance of the evidence, that waiver was in the best interests of both NDD and the public.**

Issue Preservation and Standard of Review

NDD's trial counsel preserved this issue by contesting waiver at NDD's phase-two best interests 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). An abuse of discretion necessarily occurs when a trial court makes an error of law. *People v Feeley*, 499 Mich 429, 434 (2016).

A trial court's 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, 209-10 (2003). An appellate court will affirm an order waiving jurisdiction the juvenile court's findings show either that the child 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 to disrupt the rehabilitation of other children. *People v Fowler*, 193 Mich App 358, 363 (1992), citing *People v Dunbar*, 423 Mich 380, 387 (1985).

Discussion

Michigan law recognizes what social science and common sense confirm: children are different from adults, and the legal system must treat them that way. There is therefore a presumption that children

under 18 will be tried as children in the family division of circuit court. In limited circumstances, though, the Juvenile Code⁷ allows the prosecutor to file a motion requesting the juvenile 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). Given the consequential and irreversible nature of waiver to adult court, the juvenile court must hold a hearing to determine whether waiver is appropriate. MCL 712A.4; see also *Kent v US*, 383 US 541, 553-54 (1966).

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 child and the public would be served by granting the prosecutor's motion to waive jurisdiction. MCL 712A.4(4); MCR 3.950(D)(2). The prosecutor has the burden to prove by a preponderance of the evidence that waiver is appropriate. MCR 3.950(D)(2)(c). In making the best interests determination, the court must 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

⁷ MCL 712A.1 *et seq.*

use of a firearm or other dangerous weapon, and the impact on any victim;

- B) The culpability of the child in committing the alleged offense, including, but not limited to, the level of the child'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 child'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 child's programming history, including, but not limited to, the child'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.

MCL 712a.4(4); MCR 3.950(D)(2).⁸ The court must give greater weight to Factors A and C. *Id.*

In addition to the statutory factors, this Court has required that the juvenile court evaluate, based on record evidence, 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 child and the public to waive jurisdiction, it must enter an order granting the waiver motion. MCL 712A.4(4); MCR 3.950(D)(2).

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

⁸ 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.

“in the best interest of the juvenile and the public to waive jurisdiction over the juvenile.” Appendix C, 088. 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 made similar 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), a clear focus on the facts of the offense rather than characteristics of the child himself. Here, there was nothing aggravating about NDD’s childish joyride on a go-kart, which the prosecutor essentially conceded at the phase-two hearing. Appendix C, 077. The courts below erroneously considered NDD’s age in analyzing the severity of the offense. Where there were no aggravating factors, Factor A weighs against waiver.

The juvenile court failed to explicitly state whether the first factor weighed in favor of or against waiver. When analyzing 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. Appendix C, 085. It noted that UDAA is a five-year felony but otherwise gave very little discussion to the statutory components of Factor A. Appendix C, 083.

Despite the juvenile court’s lack of factual findings, the Court of Appeals found no error as to Factor A. While the court acknowledged

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* at 6 (emphasis added). The age of the respondent, though, is not a listed consideration in MCL 712A.4(4), nor is it an aggravating circumstance recognized by the sentencing guidelines.⁹

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,¹⁰ and UDAA is not on that list. For criminal sentencing purposes, it is a Class E property crime. MCL 777.16u. The seriousness of UDAA itself does not counsel in favor of waiver.

Beyond the five-year maximum possible penalty for UDAA, the prosecutor did not present any evidence to suggest that NDD’s offense was particularly serious. The record reflects the absence of any aggravating circumstances. 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. With this record, it was clear error for the juvenile court to weigh Factor A against NDD.

⁹ In a similar context, age is a factor to be considered when determining whether a child convicted of 1st degree murder should receive a sentence of life without parole. See *Miller v Alabama*, 567 US 460, 477 (2012). At a *Miller* hearing, age can only be considered as mitigating, never aggravating. *People v Boykin*, 510 Mich 171, 189 (2022).

¹⁰ MCL 764.1f(2).

The Court of Appeals opinion as to Factor A repeats the juvenile court's error. By stating that NDD's age (17) at the time of the offense was sufficiently aggravating to justify waiver for a non-serious offense, the Court of Appeals has signaled that *all* felony offenses are serious enough to warrant waiver where the child is 17 years old. 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' misapplication of MCL 712A.4(4)(a) encourages juvenile courts to weigh Factor A against every 17-year-old. This Court must push back against that erroneous application.

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. Appendix C, 085. 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 devoid of any evidence that NDD planned or had an outsized role in carrying out the alleged offense. Instead, the facts as alleged suggest that this was the result of teenage impulse and immaturity, not criminal calculation. The prosecutor's sole argument that NDD may have been the leader of

the two co-respondents was that he lived closer to the home of the alleged victim. Appendix C, 077-78. This unsupported allegation was not nearly enough to tip the scales on Factor B.

There is no case law analyzing Factor B and what constitutes culpability under the waiver statute. MCL 712A.4(4)(b) refers to “aggravating or mitigating factors recognized by the sentencing guidelines”. Therefore, analogy to Offense Variable 14 of the Michigan Sentencing Guidelines may be useful. OV 14 is scored 10 points if the person being sentenced was 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 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 years old while 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 the victim; 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 was no 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. First, 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.

Second, MCL 712A.4(4)(b) 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 the mitigating circumstances recognized by the sentencing guidelines in arguing against Factor B because there are no mitigating circumstances recognized by the sentencing guidelines.

Finally, the Court of Appeals appears to have found that NDD's age at the time of the offense in and of itself 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 on Factor B. This insistence by the Court that NDD's age pushed multiple waiver factors in the prosecutor's favor bends the law to encourage juvenile courts to waive jurisdiction over 17-year-olds whenever the prosecutor makes that request.

3. Factor C: Prior record of delinquency

The juvenile court discussed NDD's history with the juvenile legal system, including the petition that was dismissed for lack of competency, and noted other uncharged conduct before finding that Factor C weighed in favor of waiver. Appendix C, 085-86. 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 NDD's 2019 case that was dismissed due to incompetency. By using that case 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 held against NDD conduct related to altercations within his home for which there was "inconclusive proof of lack of defense or of who was the initial aggressor." Appendix C, 086. The juvenile court held against NDD that his home environment was volatile, which appears to be blaming him for his volatile family situation with any record supporting that he was at fault.

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 for offenses which occurred in 2019 and 2020. He was also charged with weapons offenses in 2021 based on conduct in 2020, right around the time he started probation. Although these are serious charges, NDD 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 the juvenile court first adjudicated him. The de-escalation of NDD's conduct over time counsels against waiver.

A child's prior juvenile record favors waiver where the "various offenses[] increas[e] in severity, despite exposure to increasingly extensive juvenile-treatment programs over a period of time." *People v Fowler*, 193 Mich App 358, 367 (1992). In *Fowler*, the child was initially charged with property and traffic offenses. *Id.* at 365. By the time he was 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 warranted because the child's conduct continued to increase in severity despite receiving services and supports from probation. *Id.* 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 consider the decline in the seriousness of his criminal behavior was an error. Regardless of whether NDD's actual record of delinquency would have favored waiver, the juvenile court did not make appropriate or supportable findings as to Factor C.¹¹

4. Factor D: Programming history

The juvenile court also held Factor D against NDD, noting his unsuccessful discharge from probation in August 2023. Appendix C, 086-87. 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. Appendix C, 086-87 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 by relying on testimony from an individual who lacked sufficient knowledge of NDD's programming history.

During his time on juvenile probation, NDD participated in a variety of services. He was first committed to DHHS in April 2021 and was moved to a residential placement almost a month later. He returned home in August 2022 and returned to the care of his parents in January 2023. Appendix O, 114-17. While with his parents, NDD was

¹¹ While not mentioned by the juvenile court or the Court of Appeals, 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.

offered drug and alcohol testing, Wraparound, individual therapy, and Midcourt Correction, though the Wraparound may not have been implemented.

NDD's participation was strong at times and weak at others. He appears to have been on a waiting list for another residential placement when he was discharged from probation, and it is unknown whether he would have benefited from that placement had he been kept on probation and allowed to participate in it. The lower courts erred when they failed to consider that NDD had not exhausted services available in the juvenile system, such as juvenile drug treatment court or a new residential treatment program. They also erred by not considering 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 social science. Most children age out of delinquent behavior naturally with minimal intervention.¹² There is reason to believe that NDD would have aged into a more responsible person even without further services. And the decrease in the severity of his charges (CSC and weapons charges in 2020 to UDAA in 2023) shows 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, this was not enough to support the juvenile court's conclusion that he could not

¹² Steinberg, Cauffman, and Monahan, "Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders", *Juvenile Justice Bulletin*, March 2015. <https://www.ojp.gov/library/publications/psychosocial-maturity-and-desistance-crime-sample-serious-juvenile-offenders>

benefit from additional juvenile court services or from the residential placement he had been waiting for. The testimony from NDD's father, the person who saw him the most, was that NDD's behavior at home was improving. There also was not enough to say that he would not age out of his behaviors, and there was some indication that he *was* aging out of them. The prosecutor failed to demonstrate by a preponderance of the evidence that NDD's programming history favored waiver. Factor D was, at most, neutral toward waiver.¹³

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 its conclusion that he already received the maximum benefit from available juvenile court services. Appendix C, 087. Therefore, the court found that this factor weighed in favor of waiving jurisdiction. Appendix C, 087. 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.

¹³ Similar to the racial disparities in charging, 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 in the application of Factor D.

Factor E is intended to consider the child's amenability to treatment and likelihood of rehabilitation.¹⁴ 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 the category of children who are incapable of benefitting from the rehabilitative services available in juvenile court. For the same reasons regarding Factor D above, Factor E is at worst neutral.

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." Appendix C, 088. The Court of Appeals pointed out that the juvenile 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[.]" *NDD* at 7. Despite this, the juvenile court found that this factor weighed in favor of waiver.

As discussed above, there were potential services available, including a different residential placement for which NDD had already

¹⁴ 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).

been on the waiting list. The court could also refer NDD to repeat one or more programs, and there was no evidence placed on the record that NDD could not benefit from repeating any of those services. The juvenile court failed to consider the different residential programs or the possibility of repeating prior services, and the prosecution failed to prove by a preponderance of the evidence that the adult system was more appropriate than these options. The contradiction in the trial court's finding and the holes in its analysis render its findings clearly erroneous.

The juvenile court must give greater weight to Factors A and C. NDD is charged with a low-level, non-violent offense. The joyriding incident reflected childlike, impulsive behavior – precisely the type of conduct best addressed in the juvenile legal system. There was no reported loss to the complainant. There was no evidence that NDD was the ringleader. Factor A weighs against waiver. Factor C, despite NDD's history with the juvenile court, does not weigh in favor of waiver. The juvenile court's findings were based on uncharged conduct and did not reflect the de-escalation in NDD's behavior. The six factors, taken together, weigh against the juvenile court waiving its jurisdiction. The juvenile court's decision to waive its jurisdiction fell outside the range of reasonable outcomes and was an abuse of discretion. It must be reversed.

- II. In deciding whether to waive its jurisdiction over NDD, the juvenile court failed to compare the relative suitability of programs and facilities available in the juvenile and adult correctional systems as required by *People v Dunbar*.

Issue Preservation and Standard of Review

NDD's trial preserved this issue by arguing that juvenile court was the more appropriate setting for NDD as opposed to the criminal legal system. Appendix C, 081. A juvenile court's decision to grant a motion waiving jurisdiction is reviewed for an abuse of discretion. *Fultz*, 453 Mich at 937. An abuse of discretion necessarily occurs when a trial court makes an error of law. *Feeley*, 499 Mich at 434.

A juvenile court's 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 at 209-10.

Discussion

NDD was waived into adult court based on an incomplete record. The juvenile court failed to conduct the comparative services analysis required by *People v Dunbar*, 423 Mich 380 (1985). Since the record lacks the factual foundation necessary to justify waiver, reversal is required. While the juvenile court discussed the suitability of juvenile court services for NDD, it never mentioned or heard evidence about any services that may be available in the adult correctional system.

In *Dunbar*, this Court interpreted MCL 712A.4 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. *Dunbar*, 423 Mich at 388. Although that statute has been amended since *Dunbar* was decided, those changes did not overrule its holding. See *NDD* at 8.

By the Court of Appeals' own admission, the "circuit court did not explicitly state the services available to defendant in criminal court[.]" *Id.* However, the Court ultimately concluded that "the circuit court discussed in detail that no services available in the juvenile system would be adequate" and therefore "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 a procedural box for the juvenile 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. 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. Therefore, the waiver decision requires a comparison between a juvenile disposition and an adult sentence. Which option better rehabilitates the child and 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 legal system? Here, the juvenile court and the Court of Appeals presumed that the juvenile court services were unavailable or inadequate for *NDD*. This assumption, without evidence, renders the *Dunbar* requirement

null. And indeed, as discussed in Issue I above, that unsupported finding was incorrect.

Dunbar is consistent with the purpose of the Juvenile Code. The Court of Appeals' refusal to properly enforce that *Dunbar* undermines that purpose. 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 Chief 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. Former Chief Justice Cavanagh's dissent in *Hana* draws the direct line between this philosophy and the waiver decision.¹⁵

The Court of Appeals failed to adhere to the Juvenile Code's philosophy and failed to properly apply *Dunbar* to NDD by excusing the juvenile court from making the necessary comparison between juvenile

¹⁵ “[T]he 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.” *Hana*, 443 Mich at 228 (1993) (CAVANAGH, CJ, dissenting) (emphasis in original).

and adult court services. Failing to follow the requirements of *Dunbar* is an error of law and therefore an abuse of discretion. *Feeley*, 499 Mich at 434.

- III. Michigan’s traditional waiver statute, MCL 712A.4, violates *Apprendi v New Jersey* because it authorizes an increase in NDD’s maximum punishment without a jury determination, beyond a reasonable doubt, of the factors considered in 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, to warrant reversal, the error must have “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings....” *Id* at 763-64 (citation omitted).

Discussion

MCL 712A.4 violates the Sixth Amendment right to a jury trial and Const 1963 Art. 1, § 20. See *Apprendi v New Jersey*, 530 US 466 (2000).

- 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 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 Reed*, 393 Mich 342, 351 (1975). The right to a jury trial may not be whittled away by the legislature or by a too-liberal construction 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 later clarified 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 v Washington*, 542 US 296, 303 (2004) (emphasis in original). The Court went further in *Alleyne v United States*, 570 US 99 (2013), where 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 has a unique 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. See MCL 712A.4 (setting forth traditional waiver procedure). For certain specified offenses, the prosecutor may forgo juvenile court entirely and file a complaint in district court See MCL 769.1f (setting forth automatic waiver procedure). 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) (setting forth prosecutor-initiated designation procedure), or move the court to designate the case as such, MCL 712A.2d(2) (setting forth court-initiated designation procedure). Traditional waiver is the only of these options that entails 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. *People v Veling*, 443 Mich 23, 39 (1993), citing *People v Cosby*, 189 Mich App 461, 464 (1991).

If NDD were tried in juvenile court and found guilty of UDAA, he would be subject to juvenile court jurisdiction until his twentieth birthday¹⁶ with no possibility of a prison sentence. On the other hand, if he is convicted and sentenced as an adult, he could serve up to five years

¹⁶ MCL 712A.2a(1).

in prison.¹⁷ This five-year maximum is triggered solely by the juvenile court judge's factual findings. Because those findings are unreviewable by a jury, using them to increase the maximum possible penalty violates the federal and state constitutional rights to a jury trial.

At least one state supreme court has concluded that discretionary waiver can violate *Apprendi*.¹⁸ 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 and proven by the prosecutor. 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 alleged 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

¹⁷ MCL 750.413.

¹⁸ Other states, such as Kansas, have held that *Apprendi* is not applicable to waiver decisions. *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.

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 prosecution in *Quincy Q* failed 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. 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. 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*.

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 applied *Apprendi* to 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. And the *Apprendi* doctrine requires a jury, not a judge, to 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, violates the Sixth Amendment. *United States v Haymond*, 588 US 634 (2019). As recently as 2024, 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.

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. 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); 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

into adult criminal court under MCL 712A.4 must be sentenced as an adult, the decision to waive is a decision 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; trial procedure does not.

Being tried as an adult does not alter a child's trial rights. At trial in both juvenile court and adult criminal court, children 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. *McKeiver v Pennsylvania*, 403 US 528, 533 (1971). The only meaningful difference between being tried as a child and being tried as an adult is what happens after a finding of guilt. Traditional waiver impacts whether the child will receive a juvenile disposition or an adult sentence. A waiver order increases the maximum punishment a child faces 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 prohibit.

E. Michigan's traditional waiver statute is unique compared to other states and clearly implicates Apprendi.

MCL 712A.4 allows the increase in a child's maximum punishment based solely on judicial-fact finding, which triggers the constitutional protections delineated in *Apprendi*. In the Court of Appeals, the prosecutor relied on case law from other states to argue that *Apprendi* was inapplicable to the waiver decision under MCL 712A.4. They primarily cited a Wyoming case, *Gomez v State*, 237 P3d 393 (2010). The prosecutor pointed out that the *Gomez* decision itself relied on and cited cases from Illinois, Washington, Kansas, and

Kentucky. Each of these cases can be distinguished from Michigan's law as follows:

- *Gomez v State*, 237 P3d 393 (2010): Wyoming's waiver statute (Wyo Stat Ann § 14-6-203(f)) gives the prosecutor discretion as to which court the case will be filed in, and the burden is on the child to file a motion in the criminal court requesting transfer of the case to juvenile court. The statute does not include any criteria for the criminal court to weigh when considering such a motion. In Michigan's traditional waiver scheme, the prosecutor must initiate such a case in juvenile court, the trial court has the sole discretion on whether to grant the waiver request, and there is no procedure for requesting transfer back to juvenile court once waived.
- *In re JW*, 804 NE2d 1094 (Ill App, 2004): Illinois's extended jurisdiction juvenile prosecution statute (Il Stat Ch 705 § 405/5-810) requires both a juvenile sentence and an adult sentence, but the adult sentence may be stayed. This is most similar to Michigan's delayed imposition of sentence provision for a designation proceeding (MCL 712A.18(1)(o)). Designation proceedings are distinct from traditional waiver proceedings. Michigan's traditional waiver statute mandates adult sentencing with no possibility of a juvenile disposition.
- *State v HO*, 81 P3d 883 (Wash App, 2003): Washington's transfer statute (Wa St 13.40.110) does not delineate factors which the court must consider and does not specifically base the decision to transfer on criteria other than elements of the offense. Michigan's traditional waiver statute expressly requires the juvenile court to consider criteria other than the elements of the offense when determining whether to waive jurisdiction.

- *State v Mays*, 85 P3d 1208 (Kan, 2004): The statute at issue in *Mays* (Ks St 38-1636) was renumbered in 2006 as Ks St 38-2347. The statute has since undergone significant amendments. At the time *Mays* was decided, the statute allowed for a child to be adjudicated as a child rather than convicted as an adult even when tried as an adult. It also allowed (and still allows) extended juvenile jurisdiction similar to the Illinois statute and Michigan's designation procedure. Again, this is dissimilar to Michigan's traditional waiver, which triggers strictly an adult criminal prosecution and sentence.
- *Caldwell v Commonwealth*, 133 SW3d 445 (Ky, 2004), overruled on other grounds by *Hall v Commonwealth*, 551 SW3d 7 (Ky, 2018): The statute at issue in *Caldwell* (Ky St § 635.020) mandated transfer if the juvenile court found probable cause that 1) the child committed a felony, 2) the child was over 14 years old at the time of the offense, and 3) a firearm was used in the commission of the offense. This statute effectively eliminates the juvenile court's discretion to determine waiver under specific circumstances, which makes it substantially different than Michigan's traditional waiver statute.

None of the cases which the prosecutor relied on below to argue that MCL 712A.4 is not an *Apprendi* violation were based on statutes substantially similar to Michigan's traditional waiver statute.

It is also notable that the latest of these cases was decided in 2010, three years before *Alleyne*, six years before *Hurst*, and 14 years before *Erlinger*. The US Supreme Court's continued expansion of the *Apprendi* doctrine demonstrates that these other state court cases have limited importance

F. The Court of Appeals wrongly found that the right to jury trial 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, for all intents and purposes, 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. 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. The existence of 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 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 still require a jury determination, similar to the youthful offender aggravation in *Quincy Q*. Contrary to the Court of Appeals opinion, this triggers the Sixth Amendment protections set forth in *Apprendi* and *Alleyne*.

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

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 fact-based decision on whether a child should be tried as an adult into the hands of a judge, not a jury. 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 punishment is increased when he is waived into adult court. 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*, 460 Mich at 763. The unconstitutional

traditional waiver here 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 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 criminal system based on a violation of his constitutional rights; that cannot be said to be fair.

Michigan’s traditional waiver statute violates children’s rights 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.

Relief Requested

For the reasons stated above, NDD respectfully requests that this Honorable Court reverse the opinion of the Court of Appeals, reverse the juvenile court's order waiving NDD into adult criminal court, and hold that MCL 712A.4 is unconstitutional.

Respectfully submitted,
State Appellate Defender Office

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