

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

IN RE NDD, Minor.

Supreme Court No.: 169064

Court of Appeals No.: 370602

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

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**APPELLEE'S SUPPLEMENTAL BRIEF**

**\*\*ORAL ARGUMENT REQUESTED\*\***

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**Counterstatement of Questions Presented**

- I. Did the family court clearly err in finding that it was in the best interests of the juvenile and the public to waive jurisdiction over Appellant where all six statutory criteria individually weighed in favor of waiver, especially where Appellant had a serious prior record of delinquency, continuously displayed problems over a probationary period spanning several years, and was charged with promptly committing a 5-year felony after being discharged without success?

Appellant says, “Yes.”

Appellee says, “No.”

- II. Did the family court clearly err by failing to apply a holding of this Court that clearly appears to have been abrogated by statutory amendment decades ago, and did any error affect Appellant’s substantial rights where the error would at most affect one of the six criteria—and a minor one at that—which the family court found invariably weighed in favor of waiver?

Appellant says, “Yes.”

Appellee says, “No.”

- III. Does the United States Supreme Court decision in *Apprendi* render the traditional waiver statute unconstitutional where (1) the family court does not engage in “factfinding” in the *Apprendi* sense during a phase 2 waiver hearing, (2) any “factfinding” by the family court is not of the type constitutionally required under *Apprendi*, and (3) juveniles do not enjoy a constitutional right to a jury trial at any point in the juvenile court system, and the rights afforded a juvenile during the phase 2 hearing are diminished even more than at other points in the juvenile court process?

Appellant says, “Yes.”

Appellee says, “No.”

### **Introduction**

“The definition of insanity is doing the same thing over and over again and expecting different results.” This statement is often falsely attributed to Albert Einstein, and furthermore, is not a true definition of “insanity;” nonetheless, while doing the same thing over and over again and expecting different results may not be “insanity,” it certainly is folly. And it is precisely the type of folly NDD would have the Livingston County Family Court engage in.

NDD has a long history. He was suspended six times in the fourth grade for fighting and bringing matches and a knife to school. He was diagnosed with attention deficit disorder (ADD) and is believed to have a learning disability. In 2019, NDD was charged as a juvenile with fourth-degree criminal sexual conduct (CSC) and assault and battery. The juvenile court granted NDD’s request for a full competency hearing with an independent evaluator. The court found that NDD was not competent to proceed. The court also found there is not a substantial likelihood NDD will be competent and dismissed with prejudice.

A new case arose in 2020 and NDD’s attorney requested another competency evaluation. The juvenile court ordered another evaluation and asked that mental health records, individual education program (IEP), and med review be provided. Later, the parties stipulated to competency and NDD agreed to plead to disorderly conduct, MCL 750.167(1)(l), and the charge of domestic violence was dismissed. NDD put the factual basis for his plea on the record: he was 14 years old, and he got into an argument with his father whom he pushed and shoved without permission. The court accepted NDD’s plea. NDD was staying with his biological mother who had a warrant for her arrest. The court wanted her to take care of the warrant if NDD was going to stay with her. There were concerns about the biological mother and drugs. Because that issue could not be

resolved, NDD went back with his legal parents, and he was not allowed to go to the home of his biological parents.

In December of 2020, it was learned that NDD had access to guns through a friend, but weapons charges were not filed. The prosecution requested house arrest and electronic monitoring. There was a concern about social media because NDD was speaking to people about getting guns or bragging about having guns.

In January of 2021, the prosecution expressed concern for NDD's positive marijuana screen. NDD's father said he has no idea how NDD got marijuana. There was a concern with violence in the home. Disputes over a PlayStation console led to physical aggression, which worsened by March of 2021 as NDD threatened to physically harm his sister. The court was concerned about lack of compliance, THC, and nicotine, although there was one negative drug screen. Later screens in the month of March included a 3/19 positive screen for marijuana.

PlayStation was always at the root of aggression in the home. The court ordered that the PlayStation be turned over to the court. NDD directed belligerent and aggressive behavior towards a probation officer and police who went to pick up the PlayStation. NDD violated his probation by refusing to turn over the PlayStation; furthermore, there was an additional positive drug screen showing continued use and there were problems with NDD's tether (not keeping the battery charged and a missing charger). The court recommended placement in Washtenaw Detention.

In May of 2021, NDD was referred to Bethany Christian Services for residential placement. The court still had concerns with safety issues in the home or community. Remaining in detention was the least restrictive placement appropriate for him. In June of 2021 came a report that NDD was bullying other kids at Bethany Christian.

In August of 2021, NDD entered a plea to accosting for immoral purposes, MCL 750.145a, and assault and battery, MCL 750.81. The factual basis for NDD's plea was that he digitally penetrated (finger in vagina) a girl under the age of 13 and when police arrived NDD had a concealed weapon on his person. In September of 2021, word came from Bethany Christian that NDD was part of a group bullying other kids. NDD was released from Bethany Christian after approximately 18 to 24 months, having reached maximum benefit.

In January of 2023, the prosecution noted that if it saw NDD again, waiver should be considered. In August of 2023, NDD was discharged from probation without success. In September of 2023, the Livingston County Prosecutor filed a petition on NDD for Motor Vehicle – Unlawful Driving Away, MCL 750.413, and sought a traditional waiver. In November of 2023, the Family Division waived jurisdiction under MCR 3.950(D)(2) and the juvenile file was closed. The Court considered NDD's lengthy juvenile record and his age (17) when the UDAA occurred. Another individual was involved. NDD had marijuana on his person when he was arrested. The juvenile services offered to NDD were not beneficial and there was not sufficient programming available in the juvenile system that NDD could benefit from. The Court could not find disposition options available that had not already been provided to NDD. All these factors favored waiver. The Family Court issued orders dated November 1, 2023 regarding the first- and second-phase hearings.

In February of 2024, the Circuit Court denied NDD's motion to remand for a preliminary examination and the defendant immediately filed an interlocutory application for leave to appeal. He then filed a motion to remand for a *Ginther* hearing, arguing that his attorney for the phase two hearing should have challenged the constitutionality of the traditional waiver statute. The Court of Appeals denied leave "for failure to persuade the Court of the necessity of a remand at this

time.” See *In re NDD*, unpublished order of the Court of Appeals issued October 11, 2024 (Docket No. 370602). After this, NDD proceeded with his appeal, raising the same issues now before this Court. The Court of Appeals affirmed in a per curiam opinion. See *In re NDD*, unpublished opinion of the Court of Appeals issued August 15, 2025 (Docket No. 370602).

### **Counterstatement of Facts**

On November 1, 2023, Hon. Matthew J. McGivney conducted a hearing to waive Family Court jurisdiction. The parties acknowledged on the record that Respondent had already waived his right to the phase one hearing. Traditional Waiver Hearing Transcript, Respondent-Appellant's Appendix C, at 3. The Court would move forward with the phase two hearing after being satisfied that NDD had made a valid waiver of his right to a preliminary examination. *Id.* at 14-15. After colloquy, the court found that the first phase of the waiver hearing had been satisfied and that it was appropriate to move on to phase two. *Id.* at 20-21. The parties presented witness testimony for phase two of the hearing.

**Jennifer Weinman** is employed by the Michigan Department of Health and Human Services as both a probation officer in the juvenile justice arena and a foster care worker. Juveniles are assigned to a probation officer under Public Act 150. *Id.* at 23. Ms. Weinman reviewed NDD's history with the Department and what services had been offered to him. *Id.* at 24-25. For a period of approximately 18 to 24 months, NDD was placed with Bethany Christian Services' in-patient setting for rehabilitation. During that time, NDD was unsuccessful in completing their program and was ultimately discharged due to reaching max benefit. NDD was not engaging in their services and/or not in compliance with following their rules. The program usually runs from 9 to 15 months on a case-by-case basis given the compliance and participation and engagement of each individual youth that is there. If a juvenile engages as much as possible, they may proceed through the program faster. *Id.* at 25. When there's not as much engagement or benefit, the terms at Bethany Christian are longer. *Id.* at 25-26.

There was a reintegration and reentry plan for NDD, entering him back into a community setting; he was returned home to his mother and father in August of 2022. This process involved

a safety plan, rules, expectations, programs, and services with the intention of successful completion at the end of the program. Essentially, services, safety planning, and expectations are the terms of probation that will be in place. *Id.* at 26-27. Substance abuse was a primary concern for NDD, so drug and alcohol testing was implemented. There was a referral for home-based, wraparound services, providing both NDD and the family supports within the home. There was a referral for Mid-Course Corrections and for individual as well as potentially family therapy. These were all terms of probation along with a tether. *Id.* at 27.

During a home visit, a probation agent named Laura Ketelhut obtained two grams of marijuana from NDD's person. She had also been involved with NDD's school due to NDD being suspended for possession of either controlled substances or substance paraphernalia. *Id.* at 27-28. Bethany Christian addressed substance use and sobriety and they offer substance abuse therapy, which was something that NDD was to be engaging in while he was there. After NDD left Bethany Christian, NDD's individual therapy was to address substance use. Ms. Ketelhut's home visit was in July of 2023, and even at that time with those services, there was still marijuana found physically on NDD's person. Ms. Ketelhut's involvement with the school was not only related to suspension because of substances but also to ensure that NDD was ultimately going to school. *Id.* at 28.

NDD was expected to complete community service through his probation. Ms. Weinman did not know the particulars of NDD's community service. Ms. Weinman knew there was at least one probation violation due in part to NDD's school suspension back in May of 2023. Ms. Weinman believed there was also a report from the Fowlerville Police Department involving marijuana paraphernalia. Ms. Weinman knew there were at least one or two instances where NDD's drug and alcohol testing results were positive. Ms. Weinman knew that NDD was positive for marijuana. *Id.* at 29.

Ms. Ketelhut continued to try to work with the family to help NDD be successful on probation. Ms. Weinman testified, “She was conducting monthly home visits where she would not only have conversations with [NDD] but also his parents. I know she would have had to get releases signed for wraparound services that would recall – or require the consent of either mom or dad signing those releases so we can go ahead and get that referral process started. But I know there was also ongoing conversations from what Ms. Ketelhut and king of, kind of helping her to empower them in making – in kind of maintaining the rules of the home that were even set forth in the safety plan. *Id.* at 30. NDD presented as a youth that was “very much” going to do what he wanted to do. *Id.*

Ms. Weinman received information about the services provided through the county: “Typically the youth is still receiving a tether, they’re still asked to do the random drug and alcohol testing, as well as they’re meeting with their probation officer at the county level.” *Id.* at 30-31. Multisystemic Therapy (MST) is a county service typically provided prior to a youth becoming an “Act 150” case. Ms. Weinman considered the Department’s probation supervision intensive in regards to hoping for a successful outcome and successful discharge from the court’s jurisdiction. Ms. Weinman did not know whether a substance abuse evaluation and psychological evaluation had been done for NDD through his supervision. *Id.* at 31. Other than Bethany Christian Services, Ms. Weinman was not aware of any detention or out-of-home placements for NDD. Ms. Weinman did not know if there were any other resources from the Department such as CPS complaints or investigations related to NDD’s family during NDD’s probation. NDD was discharged from probation as reaching max benefit on August 1, 2023. *Id.* at 32.

When asked if she knew if NDD was on a wait list for another residential program, Ms. Weinman said, “We have multiple kids that will remain on wait lists even if they’re returned back

to the community, just as, ultimately as a backup plan should the worst-case scenario happen of them violating the terms of their probation and we have to send them back to either detention, secured or non-secured facility.” *Id.* Even if a youth was on a wait list for a residential program, discharge from probation as reaching max benefit could occur because “when [NDD] was placed in Bethany Christian Services, given the length of time he was there, there’s a strong correlation that if he was not successful and not compliant with the terms of his probation, putting him back in one of those residential type settings, he would continue along those same lines of not engaging in services and, and not ultimately reaching max benefit.” *Id.* at 33. There is a lack of placement options for youth needing services and rehabilitation. Wait lists are three to six months, if not longer. *Id.*

Weinman testified that probation officers “try to look at best interest of the youth if they’re showing benefit in their services, they’re engaging, they’re successfully completing the programs within their current placement, maybe that next stepdown level’s not appropriate. Maybe instead of going from a secure to a non-secure, they go from a secure right back into the parental home, again with that developed safety plan in place, you’re potentially cutting out a step that may prove to be non-beneficial if they are truly engaging and you’re already seeing that change in their current placement. Kind of cutting out a middle step has potentials for greater success sooner.” *Id.* at 33-34.

With the current lack of placement options, there must be a balancing between not only the needs but also the benefit that the youth can achieve through the programming. There was noncompliance with NDD’s tether. Asked if there were any further services that could have been offered to NDD through probation, Ms. Weinman said, “Not that I believe would have proven beneficial for a successful completion[.]” *Id.* at 35. She elaborated: “All the services that the

Department has at their disposal were offered in regards to wraparound services, tether, drug and alcohol testing with the, the potential of mobile testing being offered as well should transportation be a barrier. Individual services for therapy, family therapy services if that's a need, and something that the family would agree to engage in as well. It's – it proves challenging if there's not buy in from the people that are being offered the services, to get them to successfully complete or even engage if they don't want to. *Id.* Ms. Weinman testified that were NDD to be placed on probation again in the juvenile system, there were no new services not previously available when NDD was on probation. When asked if NDD's newly charged conduct was alleged to have occurred within one week of NDD's discharge from probation, does that indicate anything to her as a probation officer, Ms. Weinman answered, "That would indicate to me at a surface level that there was no benefit of prior services. That I, ultimately there's no fear of consequence or repercussion of your choices." *Id.* at 36. As for potential success with another juvenile probation term, Ms. Weinman said, "I wouldn't perceive that to be a successful completion of probation, just given past practice." *Id.*

Re-integration planning for NDD's family occurred in approximately August of 2022. NDD was on probation through the Department at least those 18 to 24 months prior to that time. That was prior to NDD entering Bethany Christian Services. *Id.* at 37. Ms. Weinman believed that NDD was assigned to the Department for supervision in 2021. *Id.* at 38.

Although Ms. Weinman had not met with NDD or his family, she consulted with Ms. Ketelhut, the prior worker, and reviewed parts of the case file. *Id.* at 38-39. Ms. Weinman did not have "all the information" about the file, such as whether a substance abuse assessment or psychological assessment had been done. *Id.* at 39. Ms. Weinman had taken on all of Ms. Ketelhut's cases since the latter went on medical leave, giving her a total of six or seven cases.

Prior to coming to the Department, Ms. Weinman worked for a private agency as a foster care specialist. In that capacity, Ms. Weinman also coordinated individuals with services to address identified needs and she had “[a] great deal of . . . experience in that.” Ms. Weinman agreed that not all services are effective for every individual. She agreed that there is more than one residential treatment facility available to Livingston County Juvenile Court residents. *Id.* at 40.

In her experience, Ms. Weinman had found some programs to be beneficial for some juveniles and some programs not to be beneficial. *Id.* at 40-41. Ms. Weinman did not know how many petitions NDD had had through the Livingston County Juvenile Court, but she had seen as many as 11 before for one juvenile. *Id.* at 41. She agreed that the juvenile justice system is crafted in such a way that, regardless of the number of prior offenses, there’s a potential for the youth to continue to receive services in the hopes of rehabilitation. *Id.* at 41-42.

Ms. Weinman agreed that it is not uncommon when an individual has substance abuse issues, there is also a mental health component. She was not sure whether NDD had been provided any mental health services. She also did not know whether NDD had availed himself of services available through the Livingston County Juvenile Treatment Court. *Id.* at 43. Ms. Weinman was not sure if NDD was provided any substance abuse therapy services upon release from Bethany Christian, but her understanding was that he received such services either at Bethany Christian or upon his return home. *Id.* at 44.

In Ms. Weinman’s experience, a youth’s number of petitions does not correlate to success or rehabilitation. *Id.* at 44-45. A youth with many petitions can be successfully rehabilitated, and a youth with fewer petitions may not be successfully rehabilitated. The services available and referrals made do not change based on the number of petitions; if NDD were at petition number 11, he would have received the same services previously described by Ms. Weinman. *Id.* at 45.

**David Trudeau** is employed as the intake hearing officer and referee for the Livingston County Juvenile Court. *Id.* at 46-47. Mr. Trudeau's duties include supervising youth prior to adjudication. Mr. Trudeau was made familiar with NDD in that capacity. He met with NDD on a petition for unlawful driving away of an automobile alleged to have occurred on August 6, 2023. After meeting with NDD, Trudeau put in place bond conditions to drug test randomly as arranged by the juvenile probation department. The reasons for this bond condition are because it was alleged in the police report that NDD was found to be in possession of marijuana and because Trudeau knew from NDD's prior cases that he's had substance abuse issues in the past. NDD was expected to test pursuant to that order. *Id.* at 47.

Trudeau testified that as of that date, NDD was supposed to have tested twice, but he had only tested once. The test was on October 12 and was positive for THC. The second test—which NDD had missed—was scheduled for October 17. Trudeau attempted to contact NDD but learned that the phone number for NDD he obtained from the police report was incorrect. Trudeau contacted NDD's father, who stated he would ask NDD to test, but Trudeau does not know if that conversation took place. NDD never provided a make-up test. *Id.* at 48.

Trudeau was the intake referee for NDD as early as May of 2019. At that time, NDD was charged with criminal sexual conduct and assault and battery. NDD was referred for a competency evaluation and was found not competent. In July of 2020, a second petition was filed against NDD for domestic violence against his father. Trudeau was also familiar with an April of 2021 petition for another criminal sexual conduct complaint. *Id.* at 50. Also in April of 2021 were allegations against NDD of receiving or concealing firearms and carrying concealed weapons. Trudeau was aware of other physical altercations NDD had been involved in, but he was not sure if they'd all resulted in petitions with the court. *Id.* at 51. Trudeau was asked whether any other services or

additional resources he would recommend for NDD. *Id.* at 51-52. Trudeau answered, “It’s my recollection that all services that we have available right now except for the juvenile drug treatment court have been provided to [NDD] and the family.” *Id.* at 52.

Trudeau had read the police report and was aware of another youth from either Brighton or Howell was involved as a co-defendant in NDD’s latest incident. The alleged crime took place closer to NDD’s home than to that of the co-defendant. *Id.* at 52-53.

NDD’s attorney questioned whether NDD may have missed a test while on bond due to an incorrect phone number. Trudeau prepared the paperwork for NDD’s testing, which included NDD’s phone number. *Id.* at 54-55. Trudeau was confident that the form did not have an incorrect phone number. *Id.* at 55. It is the juvenile’s responsibility to call the testing facility to see if he needs to test that day; Trudeau did not think the facility would reach out to NDD to tell him if he missed a test. *Id.* at 55-56. Trudeau was notified of the missed test the day after. *Id.* at 56. Trudeau did not know whether NDD has a driver’s license or whether he could get himself to testing. *Id.* at 56-57. However, NDD could have called Trudeau if he needed assistance and never did so. *Id.* at 57.

**NDD’s adoptive father (“MD”)** also testified on NDD’s behalf. NDD had been in MD’s care and custody since he was six months old. *Id.* at 59. MD testified that NDD has been diagnosed with ADHD and does not read at grade level. *Id.* at 60. NDD has had individualized education plans (IEPs) throughout school, which include accommodations such as giving him extra time to read instructions and extra chances to answer assignment questions properly. *Id.* at 61.

MD felt as though some of the services offered NDD through juvenile court probation had had a positive impact on him; specifically, the counseling he received at Bethany Christian had improved NDD’s “impulse control and just his general outlook on life, behaviors, respect for

authority.” *Id.* at 62. MD testified that he dealt with much less disobedience from NDD after he came home from Bethany; furthermore, when MD or his wife had to discipline NDD, he would respond more positively than he previously did. *Id.* at 63-64. NDD continued to receive counseling after coming home, but the relationship between him and the therapist deteriorated and those sessions became less useful. *Id.* at 64. MD also testified that “wraparound services” were promised but never put into place, and that he does not know why. *Id.* at 66. MD testified that he thought the best course of action would be to keep NDD in the juvenile system. *Id.* at 67.

MD acknowledged that NDD had behavioral issues that led to struggles with raising him. MD and his wife had done everything they could think of that they could reasonably implement to gain compliance from him. *Id.* at 68. He also testified that NDD does not have any difficulty with verbal comprehension. *Id.* at 69. When asked if there were any other services through the juvenile justice system that he knew of that he believed should be offered to NDD, MD said that he thought NDD would benefit from counseling. *Id.* at 71-72.

MD has house rules which includes no alcohol, marijuana, or other substances. NDD “has at times come into the house high.” MD testified that those times were prior to August 1; however, he was also aware of the allegation that NDD had marijuana on his person as part of the current charges. *Id.* at 73. There’s also a curfew rule for NDD where he has to tell his parents where he is going and he usually has to be home by 10 o’clock, though sometimes they extend it to midnight. *Id.* at 73-74. MD thought NDD was home at midnight on August 6, so if NDD was out driving a go-cart, that would be a violation of the curfew rule. *Id.* at 74.

MD testified that NDD and his sister “get along right now.” But he also agreed that in 2023, there had been two police contacts for incidents between NDD and his sister and/or her boyfriend. *Id.* NDD’s sister also had not been living at home for the past three or four months.

MD denied knowing about a police report alleging NDD had violated the controlled substances act on or about September 20, 2023. *Id.* at 75. Finally, MD attributed NDD's continued substance use against house rules as "momentary lapse of reason." *Id.* at 76.

**After testimony**, the People asked the court to waive NDD into adult court to address his continued criminal behavior. The People addressed the factors that the court must consider. *Id.* at 77-80. NDD's attorney asked the court not to waive jurisdiction, arguing that some services existed but had not been provided to NDD in his previous case. *Id.* at 80-81. She also argued that, while NDD was "charged with a very serious offense," the nature of the offense—unlawful driving away of a go-cart—"is something more indicative of decision-making by juveniles, not something we would necessarily see in adult court." *Id.* at 81. NDD's attorney argued that his brain was still functioning at a juvenile level and urged the court to continue to attempt to rehabilitate him through the juvenile court system. *Id.* at 81-82.

The Court placed its findings on the record with regard to the six relevant factors, placing extra weight on the seriousness of the alleged offense and the juvenile's prior record of delinquency. *Id.* at 83. The first factor is the seriousness of the alleged offense in terms of community protection, including but not limited to the existence of any aggravating factors. The Court recognized that NDD was 17 years old and was charged with unlawful driving away of a motor vehicle—specifically, a go-cart—and that that offense carries a maximum penalty of up to five years. No weapon was involved. *Id.* The Court found that this factor weighed in favor of waiver to circuit court.<sup>1</sup>

The second factor considers the culpability of the juvenile in committing the alleged offense. The Court again noted that NDD was 17 at the time, that another individual was involved

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<sup>1</sup> While the Court did not specifically state that the first factor weighed in favor of waiver, it would go on to find that the second factor weighed in favor of waiver "as well." *Id.* at 85.

in the offense, and that they both allegedly stole go-carts. They also were each in possession of marijuana at the time of arrest. The Court found that this factor weighed in favor of waiver to circuit court. *Id.* at 85.

The third factor is the juvenile's prior record of delinquency. The first petition against NDD included a CSC fourth degree charge and an assault and battery charge, but the petition was dismissed when NDD was found not competent. NDD had also been charged with possession of marijuana on school property. *Id.* A second petition charged NDD with domestic violence against his father, and he was adjudicated as responsible for the offense of disorderly person. *Id.* at 85-86. NDD was charged with three counts of CSC third degree with a person under 13 years of age in petition number three. Then, petition number four carried with it two counts of receiving and concealing [stolen] firearms and carrying a concealed weapon. Other alleged incidents of domestic violence against NDD's sister which did not result in a petition were acknowledged in testimony. The Court found that this factor favored waiver to circuit court. *Id.* at 86.

The fourth factor considers the juvenile's programming history including but not limited to past willingness to participate meaningfully in available programming. NDD was on probation from December 16, 2020 until August 1, 2023, at which time he was discharged without success. *Id.* NDD had been provided a multitude of services and he was on a waitlist for a second residential program at the time he was discharged. *Id.* at 86-87. Ms. Weinman had testified that NDD had been placed with Bethany Christian Services for 18 to 24 months and that he reached max benefit in that placement before being discharged. The Court found that the fourth factor weighed in favor of waiver to circuit court. *Id.* at 87.

The fifth factor weighs the adequacy of punishment or programming available in the juvenile justice system. The Court noted that NDD had already been discharged from probation

for having received the maximum benefit he could achieve therefrom. The Court thus found that this factor weighed in favor of waiver into circuit court. *Id.*

The sixth factor weighs the dispositional options available for the juvenile system, including detention or residential treatment programs. *Id.* at 87-88. The Court did not find that there were dispositional options available for NDD that had not already been provided to him. This factor, then, also favored waiver into circuit court. *Id.* at 88.

The Court concluded that the People had met their burden based upon the preponderance of the evidence presented and granted the motion for traditional waiver. *Id.* As stated *supra*, NDD unsuccessfully sought remand for a preliminary examination and then appealed, raising new legal arguments which the Court of Appeals unanimously rejected. NDD then sought leave to appeal to this Court, which ordered MOAA and supplemental briefing. *See In re NDD*, order of the Supreme Court issued April 3, 2026 (Docket No. 169064).

### Argument

- I. **The Livingston Circuit Court Family Division did not err 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 for traditional waiver where the Court properly weighed and considered all six factors and found that each individually and all collectively weighed in favor of waiver to the circuit court.**

Standard of review: A decision of the family division of the circuit court to waive jurisdiction on a juvenile matter is reviewed for an abuse of discretion. *See People v Fultz*, 453 Mich 937; 554 NW2d 725 (1996). An abuse of discretion occurs when the court chooses an outcome falling outside the range of principled outcomes, *Nowacki v Department of Corrections*, 319 Mich App 144, 148; 900 NW2d 154 (2017), or when the court’s decision “is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias.” *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000).

Related findings of fact are reviewed for clear error, with the reviewing court giving regard to the lower court's "special opportunity ... to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with a definite and firm conviction that a mistake has been made." *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002). Any error in a ruling or order by the lower court is not ground for vacating, modifying, or otherwise disturbing a judgment or order unless refusal to do so is inconsistent with substantial justice. MCR 2.613(A).

Analysis: Generally, the family division of the circuit court has exclusive jurisdiction of a juvenile criminal offender. *People v Oslund*, \_\_\_ Mich \_\_\_, \_\_\_; \_\_\_ NW3d\_\_\_ (2024) (Docket No. 165544); slip op. at 6, citing MCL 712A.2(a)(1) and MCL 764.27. However, under MCL 712A.4(1), the prosecution may move for the family division of the circuit court to waive jurisdiction over the juvenile to be tried in the circuit court if the juvenile is 14 years of age or older and is accused of an act that, if committed by an adult, would be a felony.<sup>2</sup> Traditional waiver occurs in two phases; first, in a hearing akin to a preliminary examination, the court determines whether there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony and if there is probable cause to believe that the juvenile committed the offense. MCL 712A.4(3). Second, the court conducts a hearing to determine 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. At the time of the traditional waiver hearing,<sup>3</sup> the relevant portion of MCL 712A.4(4) read as follows:

Upon a showing of probable cause ... the court shall conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a

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<sup>2</sup> This is commonly referred to as a "traditional waiver," as opposed to "automatic waiver" pursuant to MCL 764.1f.

<sup>3</sup> The act was subsequently amended effective October 1, 2024 by 2023 PA 291.

waiver of jurisdiction to the court of general criminal jurisdiction. In making its determination, the court shall consider all of the following criteria, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria:

- (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, and the use of a firearm or other dangerous weapon.
- (b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile'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 juvenile'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 juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
- (e) The adequacy of the programming available in the juvenile justice system.
- (f) The dispositional options available for the juvenile.

MCL 712A.4(4), as amended by 1996 PA 409.

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).

*a. Seriousness of the offense in terms of community protection*

NDD is charged with unlawful driving away of a motor vehicle (sometimes abbreviated "UDAA") in violation of MCL 750.413, which carries with it a maximum possible penalty of five years' imprisonment. As the Court of Appeals noted, while not the most heinous of offenses,

UDAA is also not the least serious; it carries a heavier penalty even than assault with a dangerous weapon. See MCL 750.82(1). A person charged with UDAA may, but need not, have an intent to permanently deprive the owner of the property taken. *Landon v Titan Ins Co*, 251 Mich App 633, 640; 651 NW2d 93 (2002). “Joyriding,” by contrast, requires no intent to steal and is a high court misdemeanor with a maximum penalty of only two years’ imprisonment, and for a first offense may be further reduced to only a 3-month misdemeanor. MCL 750.414. UDAA is an offense which can cause serious economic harm if the offender does not return the property; furthermore, great economic *and* physical harm may occur if the offender becomes involved in a crash. It was not clear error for the family court to find that the seriousness of the charged offense weighed in favor of waiver to the circuit court.

NDD may wish to frame his offense as merely a bit of childish fun. But such an approach is contrary to the statutory language: “aggravating factors *recognized by the sentencing guidelines* and the use of a firearm or other dangerous weapon” (emphasis added), while being silent about mitigating factors or any aggravating factors *not* considered by the sentencing guidelines. *Expressio unius est exclusio alterius*. See *People v Carruthers*, 301 Mich App 590, 604; 837 NW2d 16 (2013). This approach is also consistent with at least one Court of Appeals opinion. See *People v Fowler*, 193 Mich App 358, 364-365; 483 NW2d 626 (1992) (“We agree with the lower court that [the charged] offenses are of a serious nature, especially considering the fact that a weapon was involved ... *The fact that no one was actually hurt does not negate the seriousness of the offenses.*”) (emphasis added).

Furthermore, to the extent this Court finds that the family court *should have* considered alleged mitigating facts, it did so to the extent allowable by the evidence presented, alongside aggravating factors likewise not enumerated in the statute. The Court noted NDD’s age at the

time—17 years old—which is old enough to operate a motor vehicle but likely not experienced enough to operate it safely. The Court also acknowledged that NDD was specifically alleged to have taken a go-cart—a motor vehicle not as valuable and likely not as capable of causing harm as, say, a minivan, but nonetheless capable of considerable economic or physical harm in the wrong hands. No evidence was presented that NDD and his co-conspirator were merely joyriding as opposed to stealing the go-carts in question. Consideration of the particular facts alleged in this case does not tip the balance in favor of the family court retaining jurisdiction. Furthermore, to the extent this Court would find that the family court erred in its finding with regard to this factor, the People would suggest a remand to more fully develop the record with regard to community protection is appropriate rather than outright reversal.

*b. The culpability of the juvenile in committing the alleged offense*

The family court noted that NDD had a co-conspirator (also a juvenile) in this case. NDD was 17 years old at the time of offense—not someone much younger than and subject to disproportionate influence by the co-conspirator. Both NDD and the co-conspirator were in possession of marijuana. All signs pointed to them being equal partners in this endeavor. As the Court of Appeals noted, “There is no indication of any facts mitigating respondent’s culpability.” [cite]. The family court did not clearly err by finding that this factor weighs in favor of waiver.

*c. The juvenile’s prior record of delinquency*

NDD has a considerable history of serious criminal conduct including multiple counts of criminal sexual conduct (two counts first-degree), assault and battery, domestic violence, and weapons charges. Some of this conduct did not result in petitions but was nonetheless testified to at the phase 2 hearing. Some conduct resulted in charges that were dismissed after NDD was found not to be competent to proceed. And some conduct resulted in NDD being adjudicated

responsible. Regardless of the final disposition, the family court was entitled to consider all of this alleged conduct to determine whether waiver was appropriate. In light of NDD's lengthy history of violent and dangerous delinquent behavior, the family court did not clearly err by finding that this factor weighs in favor of waiver.

*d. The juvenile's programming history*

NDD was on probation for nearly three years before being discharged without success just days before committing the present offense. During that time, he served numerous services that at best provided limited benefit. Drug use continued during the time of NDD's probation, and he repeatedly failed to keep his tether charged. NDD was sent to residential treatment at Bethany Christian Services, where he stayed for approximately 18 to 24 months before being discharged for having received max benefit. The program typically only lasts 9 to 15 months. NDD was not compliant with the rules or engaging with services for at least part of his time there. NDD was still using marijuana and possessing it in the home against his parents' rules after being released from Bethany, and incidents of domestic violence with his sister persisted until she eventually moved out of the house. NDD was provided extensive and intensive programming but violated both court order and law continually throughout his time on probation regardless. The family court did not clearly err in finding that this factor weighs in favor of waiver.

*e. The adequacy of the punishment or programming available in the juvenile justice system*

By the time he was discharged from probation, NDD had received all, or nearly all, available juvenile services and that he was no longer benefitting from juvenile programming. Further programming would not be beneficial given NDD's noncompliance with juvenile services and his age. The family court did not clearly err by finding that this factor weighs in favor of waiver.

f. *The dispositional options available for the juvenile*

The family court acknowledged that a short-term or long-term secured or non-secured residential treatment program might be more beneficial than the options available in the adult justice system; however, it was unlikely that these options would be beneficial to NDD because of his history at Bethany Christian Services. Additionally, Ms. Weinman testified that there is a waiting list for such programs. NDD should not be given placement in a residential program at the expense of another juvenile who is more likely to benefit. The court must consider the waiver factors in light of the interests not only of the juvenile, but of the public. The family court did not clearly err in finding that this factor weighs in favor of waiver.

**II. The family court was not required to compare the relative suitability of programs and facilities available in the juvenile and adult correctional systems in deciding whether to waive jurisdiction over NDD; alternatively, if the family court erred in this respect, it is not reversible error because the balance of the factors nonetheless weighed in favor of waiver.**

Standard of review: Whether the family court was required to apply *Dunbar* in its analysis of factor (f) of the traditional waiver factors is a question of law which is reviewed de novo.

*Dunbar* presented a question of statutory construction, not constitutional right. Furthermore, issues are considered preserved for appellate review if they are raised in the trial court and pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). When a new argument is raised for the first time on appeal, it is not considered preserved. See *George v Allstate Insurance Co*, 329 Mich App 448, 454; 942 NW2d 628 (2019). A party must at least bring the issue to the trial court's attention to properly preserve it for appeal, because "[t]he purpose of the appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice." *Glasker-Davis v Auvenshine*, 333 Mich App 222, 228; 964 NW2d 809

(2020).

Because this argument alleges nonconstitutional error and was not preserved, it is reviewed under a plain error analysis. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). “To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *Id.* (citations omitted). “Once the defendant establishes these three elements, the appellate court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant’s innocence. *Id.* (citation omitted).

Analysis: MCL 712A.4(4)(d), as amended by 1972 PA 265, listed as one of the traditional waiver factors, “The relative suitability of programs and facilities available to the juvenile and criminal courts for the child.” See *People v Dunbar*, 423 Mich 380, 386; 377 NW2d 262 (1985). In *Dunbar*, this Court held that under the contemporary version of the statute, “[T]here 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.” The Court of Appeals noted that the statutory language has since been amended, though this holding in *Dunbar* had never been specifically overruled. *In re NDD*, unpublished opinion of the Court of Appeals issued August 15, 2025 (Docket No. 370602), slip op at 6.

A panel of the Court of Appeals considered a similar question to the one raised now by Appellant in *People v Moore*, unpublished per curiam opinion of the Court of Appeals issued March 8, 2005 (Docket No. 257118).<sup>4</sup>

March 8, 2005 (Docket No. 257118).<sup>4</sup> In *Moore*, the respondent relied on *Dunbar* for the standard governing review of the lower court's waiver decision. However, the Court of Appeals stated that this reliance was in error for several reasons: (1) the earlier version of the statute required the court to consider five criteria; (2) pursuant to a former court rule, the court was required at the time of *Dunbar* to conduct a full investigation into the interests of the child and the public; and (3) the earlier version of the statute required that no single criterion be given preeminence over the others. *Id.*, slip op at 1. After 1997, the lower court was required to consider *six* criteria and give greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria. *Id.* Thus, instead of the *Dunbar* standard,<sup>5</sup> the Court of Appeals reviewed the lower court's findings for clear error. *Id.*

If the Court in *Moore* had good reason to depart from the holding in *Dunbar*, better reason exists here. The standard of review adopted in *Dunbar* but rejected in *Moore* was based on the *Dunbar* Court's perception of the Legislature's "intention that the juvenile's prospects for rehabilitation be seriously considered" and on an attempt to balance "the often competing interests of the juvenile and society." 423 Mich at 387. "[T]his Court must assume that an express legislative change denotes either a change in the meaning of the statute itself or a clarification of the original legislative intent of the statute." *Bush v Shabahang*, 484 Mich 156, 169-170; 772 NW2d 272 (2009). With the 1996 amendment, the Legislature stated that the court must give greater weight to the seriousness of the offense and to the juvenile's prior record of delinquency

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<sup>4</sup> Unpublished opinions are not precedentially binding under the rule of stare decisis but may be considered instructive or persuasive. MCR 7.215(C)(1); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citations omitted). The People here cite an unpublished opinion as there is no binding authority which discusses the applicability of *Dunbar* post-1996, when MCL 712A.4 was amended from the form considered in *Dunbar*.

<sup>5</sup> The standard of review in *Dunbar* was whether "the judge's findings, based upon substantial evidence and upon 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 to disrupt the rehabilitation of other children in the program prior to his release." 423 Mich at 387-388 (cleaned up).

than to the other factors. A strong argument may be made that this amendment reflected a conscious decision to shift the court's attention more toward society's interest and away from the juvenile's interest, which would justify invalidating the standard articulated in *Dunbar*.

The issue in this case involves a different portion of the holding in *Dunbar*—not the standard of review to be employed by the higher court, but the rule that “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. 423 Mich at 388. This language is ripped directly from MCL 712A.4(4)(d) as it existed at the time. See *Id.* at 386. The holding made sense at the time; the language of a statute is the best evidence of legislative intent and the policy choices made by the Legislature. *People v Harris*, 499 Mich 332, 345; 885 NW2d 832 (2016) (citation omitted). But when the Legislature *removed* the statutory language relied on in *Dunbar*, that holding lost its logical grounding. Not only that—the natural inference from the change is that the Legislature made a deliberate decision to change the meaning of the statute and thus depart from this holding in *Dunbar*. *Bush, supra*. The fact that the specific language relied on in *Dunbar* was deliberately removed by the Legislature creates an even stronger argument to depart from this rule in *Dunbar* than the argument in *Moore* because the inference to the Legislature's intent is much more direct. Because the rule in *Dunbar* regarding the relative suitability of programs and facilities available in the juvenile and adult correctional systems has been superseded by statute, the family court did not err failing to specifically mention these programs on the record.

Even if this Court agrees with NDD and holds that this procedural requirement in *Dunbar* still applies, reversal is not warranted under plain error review for several reasons. First, for the reasons argued above, there is strong evidence from which to conclude the Legislature *did* intend

to supersede *Dunbar*, as the panel in *Moore* unanimously found. The family court’s error therefore was not “plain,” so NDD cannot satisfy the second necessary criterion of plain error review. Nor can he satisfy the third—that the error “affected substantial rights.” Supposing the family court instead followed the requirements of *Dunbar* and found that factor (f) weighed in favor of the family court retaining jurisdiction, the other five factors—including (a) and (c), which weigh most heavily—weighed in favor of waiver. In short, the outcome of the hearing would have been the same.

**III. Michigan’s discretionary waiver statute does not violate *Apprendi* because *Apprendi* is not applicable to jurisdictional questions which *may* ultimately result in an individual facing the default statutory maximum sentence.**

Standard of review: The constitutionality of a statute presents a question of law which is reviewed de novo. *League of Women Voters of Michigan v Secretary of State*, 339 Mich App 257, 272; 981 NW2d 538 (2021). A statute is presumed to be constitutional, and courts will construe a statute as constitutional unless its unconstitutionality is plainly apparent. *People v Lawhorn*, 320 Mich App 194, 198; 907 NW2d 832 (2017). The party challenging the statute’s constitutionality has the burden of proving its invalidity. *People v GR*, 331 Mich App 58, 68; 951 NW2d 76 (2020).

This issue was not raised in the family court or preserved for appeal. Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Analysis: In *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348 (2000), the appellant fired bullets into the home of an African-American family which had recently moved into a previously all-white neighborhood. Apprendi was promptly arrested and admitted that he was the shooter and that he did not want the victims in the neighborhood because they are black. A grand jury indicted Apprendi on 23 counts (based on alleged shootings on four different dates), none of

which referred to the hate crime statute or alleged that Apprendi acted with a racially biased purpose. *Id.* at 469. Pursuant to a plea deal, Apprendi pled guilty to three counts, including possession of a firearm for an unlawful purpose in connection with the shooting of the African-American home (count 18). *Id.* at 469-470. The prosecutor dismissed the remaining 20 counts but reserved the right to request the court to impose an enhanced sentence on the ground that count 18 was committed with a biased purpose according to an existing New Jersey statute. Apprendi, correspondingly, reserved the right to challenge the hate crime sentence enhancement as unconstitutional. *Id.* at 470. The plea agreement also provided that the sentence on the least serious offense would run concurrently to the other two, each of which carried a penalty range of 5 to 10 years. This meant that Apprendi's statutory maximum penalty would amount to 20 years in aggregate; however, if the judge enhanced the sentence on count 18, the maximum penalty for that count alone would be 20 years, and the maximum for the two counts in aggregate would be 30 years. *Id.*

The trial judge accepted Apprendi's guilty pleas, held an evidentiary hearing on the sentencing enhancement, found by a preponderance of the evidence that the hate crime enhancement applied, and gave Apprendi a 12-year term of imprisonment on count 18, with shorter concurrent sentences on the other two counts. The judge also rejected Apprendi's constitutional challenge to the sentence enhancement. Apprendi appealed, arguing that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt. *Id.* at 471. Split state courts affirmed before the case made its way to the United States Supreme Court.

The Court clearly identified the "narrow issue that we must resolve"—whether the sentence imposed above the statutory maximum for the charged offense was constitutionally permissible.

*Id.* at 474. Thus, the state’s argument that the 12-year sentence Appendi actually received was within the aggregated range he could have gotten for counts 3 and 18 was irrelevant. Other issues unrelated to the Fifth Amendment Due Process right and Sixth Amendment jury trial right were also waved away as irrelevant. *Id.* at 474-476. The Court then began its legal analysis.

The constitutional rights to due process of law and to trial by jury, taken together, “entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.* at 476-477 (quotation marks and citations omitted). These rights come from the recognition of principles developed through centuries of common law. *Id.* at 477. Trial by jury requires that “*the truth of every accusation ... should afterwards be confirmed by the unanimous suffrage of twelve of the defendant’s equals and neighbors.*” *Id.* (emphasis in original), quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). Furthermore, “Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt,” which “reflects a profound judgment about the way in which law should be enforced and justice administered.” *Id.* at 478 (quotation marks and citation omitted).

The Court’s analysis was deeply rooted in history and common law. “Any possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” *Id.* *Before being submitted to a jury*, criminal proceedings were initiated by indictment which gave the defendant notice not only of the allegations against him but also the possible penalty—established as a matter of law—that he faced. *Id.* at 478-479. Furthermore, judges historically and today may exercise such “discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within*

*the range* prescribed by statute.” *Id.* at 481 (emphasis in original). Several other cases were quoted in support of this limitation on sentencing discretion. The Court summed up its reasoning: “The historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” *Id.* at 482-483 (emphasis in original). And the Court’s explicit holding: “Other 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.” *Id.* at 490.

In a series of subsequent cases, the Supreme Court further defined the contours of the due process and jury trial rights implicated in *Apprendi*. In *Ring v Arizona*, 536 US 584; 122 S Ct 2428 (2002), the Court invalidated a statute pursuant to which—after a defendant had been convicted of first-degree murder—a judge alone would be factfinder of aggravating factors required by state law for imposition of the death penalty. *Blakely v Washington*, 542 US 296; 124 S Ct 2531 (2004), applied the *Apprendi* rule not only to the statutory maximum penalty for the offense, but also to an unusual statutory scheme in Washington State that established standard sentencing ranges and allowed for an “exceptional sentence” only if the sentencing court explicitly took into account other factors. The Court in *Blakely* considered the top end of the standard sentencing range to be the “statutory maximum” for *Apprendi* purposes because it reflected “the maximum [the judge] may impose *without* any additional findings.” *Id.* at 304. In *United States v Booker*, 543 US 220; 125 S Ct 220 (2005), the Court invalidated legislation that made the federal sentencing guidelines mandatory for similar reasons. In *Alleyne v United States*, 570 US 99; 133

S Ct 2151 (2013), the Court held that any fact that increased the mandatory *minimum* sentence for a crime must also be submitted to a jury. But in *Oregon v Ice*, 555 US 160; 129 S Ct 711 (2009), the Court declined to extend *Apprendi*, holding that *in light of historical practice and States' authority over administration of their criminal justice systems*, the Sixth Amendment does not require juries rather than judges to find facts necessary to imposition of consecutive, rather than concurrent, sentences for multiple offenses.

The question before *this* Court now is whether to extend *Apprendi* to require a jury determination beyond a reasonable doubt of the factors considered in the traditional waiver statute. Application of *Apprendi* to Michigan's traditional waiver statute is inapposite because the statute does not implicate a juvenile's right to a jury trial and because juveniles do not have a constitutional right to a jury trial.

- a. *Whether the family court should retain or waive jurisdiction over a juvenile is a jurisdictional question, which is a legal question for the court—not a factual question for a jury.*

*Apprendi* recognized that the core of the right to a jury trial is to determine the truth of criminal accusations. 530 US at 477. *Apprendi* effectively treated those factors that increase the actual punishment for a crime as additional elements of the crime to be added. See also *People v McBurrows*, 504 Mich 308, 320; 934 NW2d 748 (2019), quoting *Apprendi*, 530 US at 490 (“An ‘element’ of a crime is any fact[ ] that increase[s] the prescribed range of penalties to which a criminal defendant is exposed.”). Indeed, New Jersey and several other states had passed statutes creating independent substantive offenses where a person acts with a purpose to intimidate a person or group on the basis of race or other protected category. *Apprendi* at 495-496. The Court rejected a form-over-substance approach.

Waiver of a juvenile into adult circuit court presents an entirely different category of

question—a question of which court has jurisdiction rather than what, if anything, the juvenile will be sentenced to. This is apparent even from a relatively shallow reading of *Apprendi* and its progeny listed *supra*—all of these cases have to do with determining the penalty to which a criminal defendant may be subject *after being convicted*. The case in which *Apprendi* is implicated is one in which the jury’s job is curtailed and the judge makes postconviction findings to raise the defendant’s criminal exposure. See also *People v Hana*, 443 Mich 202, 220; 504 NW2d 166 (1993) (“In cases where a juvenile is waived to an adult criminal court, the juvenile is still afforded a right to jury trial and the presumption of innocence, and he is therefore not truly subjected to a harsher penalty *because guilt is not yet established*.”) (emphasis in original). Applying *Apprendi* to a juvenile waiver situation also creates an additional oddity: the Court in *Apprendi* noted that a “companion right” to the right to trial by jury is the “right to have the jury verdict based on proof beyond a reasonable doubt.” 530 US at 478. Were *Apprendi* applied to the phase 2 waiver hearing, a respondent would be entitled to this heightened burden of proof for the “seriousness of the offense” factor. It would be difficult to distinguish the jury’s finding on this factor from a determination of guilt—something it was never intended to be. Such a system swallows up the entire criminal justice process in a single hearing and would make the trial at the end of the process essentially irrelevant.

The fact that the phase 2 waiver hearing presents a jurisdictional rather than guilt-and-punishment question is further highlighted by the fact that severity of the offense is just one of the now *nine* factors that the jury would have to determine. The blending of these questions presents additional problems. Factor (c) considers the juvenile’s prior record of delinquency that would be a crime if committed by an adult. The prosecution would *have* to be permitted to admit highly inflammatory and often unfairly prejudicial evidence into the record because it would be necessary

for the jury's consideration on this factor. NDD's case is an excellent example—presumably he would not desire for a jury in a phase 2 waiver hearing to be aware of his multiple recurring domestic violence and CSC offenses. It is all too easy for a jury to hear such evidence and draw improper character inferences or have their passions or prejudices aroused against a respondent. This is the type of result MRE 403 and 404 are intended to prevent.<sup>6</sup> A legally educated and trained judge can hear all relevant evidence at the phase 2 waiver hearing and consider this evidence only for proper purposes and with appropriate weight. A jury may not be able to, even with proper instruction. Factor (g)—the juvenile's developmental maturity, emotional health, and mental health—severely complicates the matter further. Every waiver decision would likely turn into a complex battle-of-the-experts for this factor alone. No juvenile could be tried as an adult through the traditional waiver process for even the simplest felony offense without months elapsing to decide just the waiver issue. In the meantime, the juvenile is placed under the stress of going through a lengthy and unresolved criminal process without receiving the post-judgment services by which our system would hope to rehabilitate them should the adult system be found inappropriate. This cannot be what the Legislature envisioned when it enacted and subsequently amended the statutes which established the juvenile court and traditional waiver processes. These issues demonstrate well why such jurisdictional questions are ill-suited for (and not historically reserved for) jury determinations.

This Court's decision in *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018), is instructive. The issue in that case was “whether [*Apprendi*] and its progeny require jury findings beyond a reasonable doubt before a sentence of life without parole may be imposed on a person

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<sup>6</sup> MRE 403 permits the trial court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. MRE 404 generally prohibits admission of a person's other acts in order to prove the person's character or character trait.

under the age of 18 under MCL 769.25.” *Id.* at 100. The Court held that it did not “because neither the statute nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole.” *Id.* at 97. The Court distinguished *Ring, supra*, which “expressly required the finding of an aggravating circumstance before the death penalty could be imposed.” *Id.* at 103 n 1. By contrast, MCL 769.25 expressly does no such thing. *Id.* at 112. Likewise, the traditional waiver statute requires the family court to consider certain factors but does not require a particular finding with regard to any of them.

The defendants argued that the statute nonetheless *implicitly* requires a finding of fact because the trial court must specify the aggravating and mitigating circumstances considered and its reasons supporting the sentence imposed. *Id.* at 113-114. This Court found this argument to be “not unreasonable” but ultimately rejected it. One of the reasons for this is because the jury’s verdict alone—without any aggravating or mitigating factors—is sufficient in order to sentence a juvenile to life without parole. *Id.* at 116-117. Here, too, is a point of similarity to the traditional waiver statute, which does not require any particular aggravating or mitigating factors to be found by the court.

But perhaps the most consequential part of the Court’s analysis came in a footnote. This Court recognized that when a trial court engages in analyses that involve, for instance, the weighing of aggravating and mitigating circumstances, it is not engaging in “factual finding, but a moral judgment.” *Id.* at 116 n 11. Crucially, this Court quoted with approval the following language from *United States v Gabrion*, 719 F3d 511, 532-533 (CA 6, 2013):

*Apprendi* findings are binary—whether a particular fact existed or not. [18 USC] 3593(e), in contrast, requires the jury to “consider” whether one type of “factor” “sufficiently outweigh[s]” another so as to “justify” a particular sentence. Those terms—consider, justify, outweigh—reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like

saying that Beethoven was a better composer than Brahms. Here, the judgment is moral—for the root of “justify” is “just.” What § 3593(e) requires, therefore, is not a finding of fact, but a moral judgment.

*Skinner*, 502 Mich at 116 n 11. This is very similar to what the family court engages in during the phase two hearing: the court “*considers*” several criteria and weighs them, “giving greater *weight*” to some than to others, and ultimately makes a decision in accordance with the “best *interests* of the juvenile and the public.” MCL 712A.4(4) (emphasis added). Under *Skinner*, therefore, there is good precedent for the proposition that *Apprendi* is wholly inapplicable to a phase 2 waiver hearing because there are no “facts” that the jury must find.

- b. Even if the traditional waiver statute requires the family court to make factual findings, they are not the type of factual findings which must be made by a jury under Apprendi.*

Suppose this Court were to now hold that jurisdictional questions are simply a subset of factual questions. And suppose also this Court decides to reject the language it previously endorsed in *Skinner* and found it appropriate to consider the phase 2 hearing decision and relevant factors as more akin to “factfinding” than the passing of moral judgment. The Constitution still does not require this type of factfinding to be done by a jury. The traditional waiver statute requires the court to consider several factors, only one of which is the seriousness of the offense, in making the traditional waiver determination. Under *Apprendi*, the crucial question is whether the factfinding at issue is, in substance if not in form, an element of the offense. *Apprendi* itself recognizes at least one category of judicial factfinding that may increase the penalty for a crime without running afoul of the Constitution: whether a defendant has prior convictions. *Id.* at 490. Part of the reason for this is historical practice—“recidivism ... is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.” *Id.* at 488, quoting *Almendarez-Torres v United States*, 523 US 224, 243; 118 S Ct 1219 (1998). Historical practice is perhaps the single strongest factor in determining the principles behind—and thus defining the

contours of—the right to a jury trial. See, e.g., *Apprendi*, 530 US at 477-483; See also *Ice*, *supra*, 555 US at 163 (“[*Apprendi* and its progeny] are rooted in the historic jury function—determining whether the prosecution has proved each element of an offense beyond a reasonable doubt.”).

There is no historical basis on which to extend *Apprendi* to the waiver decision in a juvenile case. Even if jurisdictional questions are considered a subset of factual questions, they do not relate to guilt or punishment and thus do not implicate *Apprendi*. A close analogy would be to the bindover decision. There is no constitutional right to a grand jury in state prosecutions. In Michigan, persons charged with felony offenses typically begin their case in district court, where a preliminary examination (which is also not constitutionally required, *People v McGee*, 258 Mich App 683; 672 NW2d 191 (2003)) is held. If the court finds probable cause, the defendant is bound over to circuit court for trial. MCR 6.110(E). This action vests the circuit court with jurisdiction, where the defendant faces a greater possible penalty than they would in district court.<sup>7</sup> Even though the district court makes findings of fact at the preliminary examination which results in the defendant being exposed to a greater possible penalty, this sort of pretrial jurisdictional determination has never been considered to require a jury. The phase 2 waiver hearing is not meaningfully distinguishable.

Relatedly, the Court in *Almendarez-Torres* emphasized that the fact of recidivism “does not relate to the commission of the offense...” 523 US at 244. The traditional waiver statute likewise is not focused on the commission of the offense, instead concerning itself with “the best interests of the juvenile and the public.” MCL 712A.4(4). One of the nine factors considered the seriousness of the *alleged* offense, not whether it was actually committed. Another considers the

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<sup>7</sup> The comparison is especially clear where the district court must make a finding of fact that distinguishes a felony from a lesser-included misdemeanor; for instance, the district court may retain jurisdiction for an assault and battery, but the defendant is bound over if the court finds that a dangerous weapon was used.

juvenile's culpability in committing the alleged offense, which is akin to a sentencing factor, not an element of the offense. Cf MCL 777.44. A third, like the recidivism question addressed in *Almendarez-Torres*, considers the juvenile's prior record of delinquency. The rest are entirely unrelated to any alleged criminal conduct by the juvenile. In short, the questions which a family court must answer under the traditional waiver statute are not the kinds of questions which historically must be answered by a jury. There is therefore no basis to find that the statute violates *Appendi*.

- c. *Appendi also does not apply to the traditional waiver statute because juveniles have no constitutional right to factfinding by a jury.*

"It is well settled that 'the full panoply of constitutional rights' does not apply to juvenile proceedings." *In re Whittaker*, 239 Mich App 26, 28; 607 NW2d 387 (1999), citing *Hana*, *supra*, 443 Mich at 225. Historically, the constitution has never required that juries be utilized within the juvenile court system. The nation's first juvenile court was established in Illinois in 1899, with most of the rest of the states following suit within the next 30 years. *Hana*, 443 Mich at 210-211. Michigan first authorized probate court jurisdiction over juveniles in 1905 and passed its first waiver statute in 1907. *Id.* at 213.

The US Supreme Court gave no consideration to any constitutional problems involved in the states' juvenile court systems for over sixty-five years, and when it did so, it enumerated only a few specific due process rights which it held applicable to in juvenile proceedings. *McKeiver v Pennsylvania*, 403 US 520, 538; 91 S Ct 1976 (1971), quoting *In re Terry*, 438 Pa 339, 343, and 344-345; 265 A2d 350 (1970). The due process standard in juvenile proceedings is fundamental fairness with an emphasis on factfinding procedures. *Id.* at 543. The specific due process requirements to which a juvenile is entitled are notice, counsel, confrontation, cross-examination, and standard of proof. *Id.* A jury, by contrast, is *not* a necessary component of accurate

factfinding. *Id.*

When the time came, the US Supreme Court held that a juvenile does not have a constitutional right to a jury trial. Aside from the lack of precedent, several reasons were given, a few of which are recited here: The juvenile court system is intended to operate with “informality, flexibility, [and] speed. *Id.* at 534, citing *In re Winship*, 397 US 358, 366; 90 S Ct 1068 (1970). The constitutional rights which *have* been afforded juveniles reflect an “attempt[ ] to strike a judicious balance by injecting procedural orderliness into the juvenile court system.” *Id.* at 545. There is at least a possibility that requiring a jury trial as a matter of constitutional precept “will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding,” while doing little, if anything, to strengthen the fact-finding function. *Id.* at 545, 547. Additionally, juvenile court proceedings are somewhere between civil and criminal in nature. *See Id.* at 541. The Supreme Court had previously recognized by dictum that a jury is not a necessary part even of every criminal process that is fair and equitable. *Id.* at 547, citing *Duncan v Louisiana*, 391 US 145, 149-150 n 14, and 158; 88 S Ct 1444 (1968). The Court also perceived that imposing a jury trial requirement would impede the states’ experimentation with “new and different ways” to solve “the problems of the young”—something it was reluctant to do. *Id.*

*McKeiver* held only that a juvenile did not have a constitutional right to a trial at the adjudicative phase. But in *Hana, supra*, this Court was asked to extend those rights which were afforded juveniles (or, at least, the privilege against self-incrimination) to the phase 2 hearing. This the Court declined to do, noting that the US Supreme Court had confined its extension of Fifth and Sixth Amendment rights to the adjudicative phase only. 443 Mich at 226. Further, in a prescient statement seven years before *Apprendi*, the Court held, “In cases where a juvenile is

waived to an adult criminal court, the juvenile ... is not truly subjected to a harsher penalty *because guilt is not yet established.*”<sup>8</sup> *Id.* at 220 (emphasis in original). Extending the usual constitutional protections to the phase 2 hearing would also frustrate the purposes of the Probate Code and the applicable court rule, which favor a “full investigation” into the interests of the juvenile and the public. *Id.* at 221-223. Perhaps most succinctly, the Court stated that the constitutional protections afforded at the phase 1 hearing are not applicable during phase 2 because “we are unaware of a constitutional right to be treated as a juvenile.” *Id.* at 220.

Therefore, under *McKeiver* and *Hana*, even if questions of jurisdictional waiver could conceivably implicate *Apprendi*, it is well established that juveniles do not have a constitutional right to a jury trial, and that even fewer constitutional rights are afforded juveniles at the phase 2 hearing than at trial.<sup>9</sup> NDD argues that he is entitled to extension of the jury right under *Apprendi* to have any fact which may increase his possible penalty be determined by a jury. But the issue in *Apprendi* is somewhat peripheral to the essence of the right—to have the jury determine the question of guilt—that a juvenile does not have under the constitution. It would be nonsensical for the peripheral protection to exist where the core does not.

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<sup>8</sup> Indeed, the *Apprendi* line of cases all appear to involve judicial factfinding *after* the establishment of guilt.

<sup>9</sup> The constitutional protections afforded juveniles are, however, applicable to the phase 1 hearing. *Hana* at 225 n 62.

## CONCLUSION

NDD's three claims on appeal should be rejected. The family court did not err in finding that the (often competing) best interests of the juvenile *and the public* ultimately weighed in favor of waiver of the family court's jurisdiction. The court did not clearly err with respect to any of the six criteria, each of which individually weighed in favor of waiver. NDD's prior record of delinquency (even while on probation) in particular is egregious and is one of the criteria that is given greater weight. Even if the family court erred in part of its analysis, the balance of the interests weighed so heavily in favor of waiver that such error is not reversible.

The family court also did not err in failing to follow the *Dunbar* holding that the court must compare the relative suitability of the programs and facilities available in the juvenile and adult correctional systems. This holding, like much of *Dunbar*, has been defunct now for decades since MCL 712A.4 has been amended multiple times. In *Moore*, the Court of Appeals held that the *Dunbar* standard of review (a separate holding) no longer applies because changes in the statutory language signified a shift in the principles on which the *Dunbar* standard was built. In the present case, the argument is even more direct—the *Dunbar* holding on which NDD relies was taken directly from statutory language which the Legislature intentionally removed. The family court did not err by failing to follow an abrogated rule. Furthermore, any error in this regard was not plain, and the issue not preserved for appeal. NDD is not entitled to any relief for this issue.

Finally, the traditional waiver statute does not run afoul of *Apprendi*. This is true for many reasons, each of which is dispositive. To state them succinctly, (1) the phase 2 hearing raises a jurisdictional question in which the court engages in moral judgment, not a guilt or punishment question that requires factfinding; (2) even if what the court does during the phase 2 hearing is considered “factfinding,” it is not the type of factfinding which *Apprendi* or the constitution

requires be done by a jury; and (3) a juvenile does not have a constitutional right to have *any* question decided by a jury, including the questions of guilt and punishment which form the very core of the jury right as articulated in *Apprendi*.

WHEREFORE, the People would respectfully request that this Court DENY the application for leave to appeal.

Date: June 23, 2026

Respectfully submitted,

/s/ *Brandon Ciciotti*  
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Assistant Prosecuting Attorney

Certification of Word Count

As required by MCR 7.312(A)(1) and 7.212(B)(1), this application contains less than 16,000 words. The word count as calculated by Microsoft Word is 13,217 words. MCR 7.212(B)(3).

To the best of my knowledge and belief, I certify that the foregoing is true and correct.

Date: June 23, 2026

Respectfully submitted,

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