State of Michigan
In The Court of Appeals

IN RE NDD

Court of Appeals No. 370602

Livingston County Circuit Court
Case No. 19-015969-DL

Hon. Matthew J. McGivney

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AMICUS CURIAE BRIEF OF THE CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN

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STATEMENT OF JURISDICTION

Amicus Curiae Children's Law Section[1] concurs in the statement of jurisdiction contained in the Appellant-Child's principal brief. (Appellant's Brief, p. 6). Amicus Curiae filed a motion for leave to participate as amicus in this matter on February 14, 2025, which this Court granted on February 28, 2025. (02/28/2025 COA Order).

[1] Pursuant to MCR 7.212(H)(3), the undersigned certifies that no counsel for a party authored this brief in whole or in part and no party, or other person outside of the amicus curiae, made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF THE QUESTIONS INVOLVED

First Question:

Did the Trial Court err in finding that it was in the best interests of the Appellant-Child and the public to waive jurisdiction where it failed to give appropriate weight to the waiver factors and failed to comply with the requirements of *People v Dunbar*, and therefore abused its discretion?

Amicus Curiae answers: Yes.

The trial court answered: No.

Second Question:

Is Michigan's traditional waiver process a violation of the right to trial by jury, unquestionably harmful to children, and violative of children's rights by affording them less rights than adults charged with crimes?

Amicus Curiae answers: Yes.

The Trial Court did not answer this question.

STATEMENT OF INTEREST OF AMICUS CURIAE CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN

The Children's Law Section ("the Section" or "CLS") is a recognized section of the State Bar of Michigan, with over 400 members who are attorneys and judges working in Michigan's child welfare system. The Section works to advance the rights and protect the interests of children and families who become involved in matters before the Probate Courts and Family Divisions of the Circuit Courts, in the State of Michigan. The Section strives to improve the courts and agencies serving children and their families, through regular meetings among peers, organizing and attending relevant training events, active engagement by members on multi-disciplinary task forces convened by the Section itself, as well as by the Michigan Department of Health and Human Services ("DHHS"), the State Court Administrative Office ("SCAO"), Michigan Courts, and others. The Section provides services to its membership in the form of educational seminars, and advocating for and commenting on proposed legislation relating to child welfare law topics. The Section also files amicus curiae briefs in selected cases with the potential for widespread impact in the field of children's law, such as the one before this Court.

The Section concurs with the Appellant-Child, NDD, in this matter that the Trial Court erred by granting the Appellee's motion to waive NDD into the adult criminal system, as the Trial Court's order was premised on procedural error and a lack of evidence that such an order was not in Appellant-Child's and the public's best interests. The Section also concurs with Appellant-Child that Michigan's traditional waiver procedure violates a child defendant's right to trial by jury. The Section sought leave to file the instant amicus brief to further educate this Court on the harmful nature of the traditional waiver process on children such as the Appellant-Child in the present matter, as well as to encourage this Court to prevent further violations of the rights of children in the State of Michigan by crafting solutions to some of the constitutional violations presented by the case law of this State regarding the traditional waiver process.

STATEMENT OF FACTS

The Section concurs with the Statement of Facts as presented by the Appellant-Child in this matter. (Appellant's Brief, pp. 9-13).

LEGAL STANDARD

The Section concurs with the standards of review as presented by the Appellant-Child. (Appellant's Brief, pp. 14-15, 28).

ARGUMENT

I. The Trial Court erred in finding that it was in the best interests of the Appellant-Child and the public to waive jurisdiction where it failed to give appropriate weight to the waiver factors and failed to comply with the requirements of *People v Dunbar*, and therefore abused its discretion.

The Section concurs with Appellant-Child's arguments regarding this issue, would respectfully direct this Court to Appellant-Child's brief on the same, and respectfully requests this Court reverse the Trial Court's order, as it is clearly violative of the law and not supported by the facts of this mater, therefore the Trial Court unquestionably abused its discretion. (Appellant's Brief, pp. 15-28).

II. Michigan's traditional waiver process is a violation of the right to trial by jury, unquestionably harmful to children, and violative of children's rights by affording them less rights than adults charged with crimes.

The Section concurs with Appellant-Child's arguments regarding the constitutionality of MCL 712A.4, as it violates children's right to a trial by jury under the Michigan and Federal Constitution. (Appellant's Brief, pp. 28-34). The Section further argues that Michigan's traditional waiver process is violative of children's rights by affording them significantly less

rights than adult defendants and is unquestionably harmful to children who find themselves caught in the traditional waiver process, despite the goals of the juvenile court system to rehabilitate and support children accused of crimes.

A. Any procedure allowing children to be tried and sentenced as adults is unquestionably harmful to children, particularly when the goal of the juvenile court system was to rehabilitate and support children in a way the adult criminal system cannot.

Perhaps the most seminal case in Michigan's jurisprudence regarding waiving a child defendant into the adult criminal system (after *People v Dunbar*, 423 Mich 380; 377 NW2d 262 (1985)) is *People v Hana*, 443 Mich 202; 504 NW2d 166 (1993). In *Hana*, the Michigan Supreme Court established that children accused of crimes do not have the constitutional right to be treated as children, as well as curtailing other rights during the "dispositional" phase of the waiver process. *Hana*, 443 Mich at 225-226. Justice Cavanagh, in his dissenting opinion, expressed serious concerns regarding the constitutionality of the waiver procedure, as well as the *Hana* majority's ruling to curtail the child defendant's rights (such as a right to have counsel appointed for the dispositional phase of the waiver procedure). *Id*. at 227-239 (Cavanagh, J. dissenting). Justice Cavanagh specifically noted that the decision to waive juvenile into adult criminal court "is not consistent with the rehabilitative ideal underlying the creation of the juvenile courts" and that a child should enjoy the traditional due process considerations during the waiver procedures. *Id*. at 227-228.

Justice Cavanagh (joined by Justice Kelly) expressed further concern regarding Michigan's waiver procedures six years after *Hana* in his dissenting opinion from the order denying leave to appeal in *In re Abraham*, 461 Mich 851, 851-852; 596 NW2d 836 (1999), a case where an 11-year-old child was waived into the adult system under the automatic waiver procedure. After the child in *Abraham* was convicted of second degree murder in adult criminal court, Judge Fitzgerald of the Michigan Court of Appeals noted in his concurring opinion that, although he agreed with the majority that Michigan's waiver statute is not unconstitutional and that the child's conviction should be affirm, he was "disturbed by the fact that the statute does not specify any minimum age under which the

prosecutor does not have unrestricted discretion to try a juvenile as an adult." *People v Abraham*, 256 Mich App 265, 284-285; 662 NW2d 836 (2003) (Fitzgerald, J. concurring). These jurists are not alone in their concerns, as problems with the waiver procedure have been recognized for almost half a century.

In their May 1980 article, John Gasper and Daniel Katkin noted "arbitrary procedures and idiosyncratic decision-making" as some of the hallmarks of the waiver procedure in juvenile courts around the country, even after the "landmark" United States Supreme Court decisions in *Kent v United States*, 383 US 541 (1966) and *In re Gault*, 387 US 1 (1967). John Gasper & David Katkin, *A Rationale for the Abolition of the Juvenile Court's Power to Waive Jurisdiction*, 7 Pepp L Rev 4, 939 (1980). Potential causes of arbitrary or unfair waiver decisions were highlighted, including "the political nature of the prosecutor's office coupled with the lack of procedural safeguards" (something Judge Fitzgerald found quite "disturbing" in *Abraham*), as well as the philosophy of the judge deciding the waiver motion, pressure from the police or to be reelected (in the case of both judges and prosecutors), or even administrative convenience. *Id*. at 942-947. Gasper and Katkin further examined the rationale for maintaining waiver procedures, finding that "[t]he central assumption upon which the justifications for permitting waiver of jurisdiction are based is that it is possible to distinguish accurately between ordinary delinquents and the truly dangerous and/or intractible. Unless this distinction can be proven, the waiver process will inevitably be arbitrary and unfair." *Id*. at 942.

Ultimately, Gasper and Katkin provided three rationale for abolishing the waiver procedure:

(1) it may be impossible to devise a system for waiving jurisdiction which is not likely to result in discretionary and unfair decisions;

(2) waiver of jurisdiction is fundamentally at odds with the philosophy on which the existence of juvenile justice systems is based (as Justice Cavanagh noted), coupled with the fact that incarcerating children with adults "cannot achieve anything worthwhile;" and

(3) preventing juvenile courts from waiving jurisdiction would force the system to purge those children whose crimes are relatively minor in

> comparison to those who would have otherwise been waived into the adult criminal system.

Id. at 947-948, 950. Although Gasper and Katkin's findings and arguments are based on more than 50-year-old evidence, unfortunately, those problems highlighted by Gasper and Katkin are still very much prevalent today.

Angela Collins and Maisha Cooper summarized the "erosion of the juvenile system" in 2024, noting that a significant shift in the way child defendants were viewed occurred in the 1970s and 1980s in conjunction with the "get tough era" seen nation-wide in law enforcement started the dismantling of the ideals of the juvenile justice system. Angela Collins & Maisha Cooper, *Juvenile Waiver as a Mechanism in the Erosion of the Juvenile Justice System*, 13 Soc Sci 367, 370-371 (2024). In Collins' and Cooper's view, the juvenile justice system during this time changed from focusing on protecting and treating one of the most vulnerable populations to a far more punitive approach. *Id.* This was largely fueled not by data but rather by public misconceptions regarding the rates of children committing crimes (particularly growing fears of so-called juvenile "super predators"), as well as by criticisms that rehabilitating juvenile offenders did not actually work. *Id.* at 371. These misconceptions lead to a 50% increase in children being "locked up" despite a 19% decrease in the number of crimes being committed by children between 1978 and 1988. *Id.* "[P]rior to the ideological shift from treatment to punishment, juvenile transfer [also know as waiver] was a rarity, and the process of transferring juvenile offenders was much more difficult." *Id.* Collins and Cooper also highlight the effect that cases like *Kent* and *Gault* had in the increase of rights to child defendants. *Id.*

Despite the "get tough" era occurring over half a century ago, the damaging effects that era had on the juvenile justice system are still being felt to this day. *Id.* at 372. As noted by Collins and Cooper, and Appellant-Child, black children (like NDD) are significantly more likely to have their cases waived into adult criminal court than white or Hispanic children committing the same crimes. *Id.*; Appellant's Brief, pp. 22 n 11, 24 n 12. "Between 1992 and 1997, 45 states passed laws to make juvenile waivers easier, 31 states created laws for expanded sentencing options, and 47 states removed or modified confidentiality provisions for juvenile proceedings."

Collins, 13 Soc Sci at 372. Collins and Cooper noted that current legislation reflected a focus on punishment, rather than rehabilitation, as it "is based on doing what is best for the victim in the juvenile justice system instead of what is best for the juvenile." *Id*. at 373.

Further, while noting that child crime and the use of juvenile waivers had largely decreased since the 1990s, "a trend is beginning to emerge that is potentially concerning," regarding courts viewing juvenile waiver as a way to lighten juvenile court case loads (called "administrative convenience" by Gasper and Katkin) or to be rid of particularly problematic children or children on the cusp of legal adulthood (like NDD). *Id*. at 373; Gasper, 7 Pepp L Rev at 946. This trend is clearly the opposite of Gasper and Katkin's proposed solution that preventing waivers would actually result in more resources for those problematic children, with those who need less resources being phased out. Gasper, 7 Pepp L Rev at 950. States, beginning in that same "get tough" era of the 1980s and 1990s, begun lowering the minimum age requirement to be waived into the adult system from between 16 and 18 to as young as 10 years old in Wisconsin (Michigan's current statute provides that children as young as 14 years old may be waived into the adult criminal court). Collins, 13 Soc Sci at 374; MCL 712A.4(1); MCL 600.606(1).

Taken together, all of these erosions of the integrity of the juvenile court system have resulted in the same thing: more children ending up in adult prisons, "which can cause a lot of harm" to children. Collins, 13 Soc Sci at 374-375. "Juveniles are 8 times more likely to commit suicide, 5 times more likely to be sexually assaulted, twice as likely to be beaten by staff, and 50% more likely to be attacked with a weapon in adult prisons, even when separated by sight and sound from adult inmates as required by law." *Id*. Children have less access to treatment programs, education, and job training in the adult system, if the children are even aware that those programs exist in the first place. *Id*. at 375. Children waived into adult court have a higher recidivism rate than their counterparts in juvenile court and waiver has not been found to have a significant effect on crime deterrence (which is again something Gasper and Katkin noted in **1980**). *Id*. at 375; Gasper, 7 Pepp L Rev at 941-942.

This is all without taking into account the significant increases in the science surrounding children that have occurred over recent decades. Dylan

Raymond, *25 is the New 18: Extending Juvenile Jurisdiction and Closing Its Exceptions*, 2023 Utah L Rev 727 (2023). In 2014, the term "emerging adult" was first used to describe a person between the ages of 18 and 25, meaning someone whose brain had not yet fully developed. *Id*. at 728. Critically, the last and final portion of the brain that matures during this period of "emerging adulthood" is the area of the brain "which regulates impulse control and reasoning. As a result, when compared to adults, emerging adults take more risks, are more prone to emotional outbursts, and disregard future consequences." *Id*. These "emerging adults" are actually **more** likely to take unnecessary risks than children due to the reward center of the brain in an "emerging adult" being far more hyperactive than that of a child, yet their prefrontal cortexes (or rather their ability to make reasoned and logical decisions) are on relatively the same level. *Id*. at 730-731. This explains why a 17-year-old is far more likely to do something like borrow a neighbor's go-kart than say a 10-year-old is; the driving force is the need for "immediate gratification" that a younger child simply does not have. *Id* at 731. However, the literature is consistent in the fact that older children, particularly those 16 years or older (like NDD) and falling within the "emerging adult" context, are far more likely to be waived into the adult system. *Id*. at 743, 747-749.

It is unclear what, exactly, the procedure of waiving children into the adult criminal system actually accomplishes other than failing to deter children from committing crimes and harming (in some cases irrevocably) those children that unfortunately fall within its scope. Appellant-Child's case is yet another example of this broken system; a system where a 17-year-old can be tried and eventually sentenced as an adult for taking a go-kart out for a joyride and causing no damage other than wasting the gasoline in the tank. Although over 30 years have passed since Justice Cavanagh's dissent in *Hana*, and despite further scientific understanding regarding the developing minds of children, the problems he highlighted remain. This is due, at least in part, to this State's laws regarding the rights child defendants are afforded during waiver proceedings.

B. The traditional waiver process affords child defendants significantly less rights than their adult counterparts.

MCL 712A.4(3) States:

> Before the court waives jurisdiction, the court shall determine on the record if 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. Before a juvenile may waive a probable cause hearing under this subsection, the court shall inform the juvenile that a waiver of this subsection waives the preliminary examination required under chapter VI of the code of criminal procedure, 1927 PA 175, MCL 766.1 to 766.18.

The following rights are granted to adults in MCL 766.1 through 766.18 which **are not** also afforded to children who are charged as juveniles and then waived to the adult court under MCL 712A.4(3):

- The right to a probable cause conference within 7 to 14 days of arraignment. MCL 766.4(1). *Hana* determined that the first phase of the traditional or permissive waiver process serves as the probable cause hearing and preliminary examination for a child who has been waived into adult criminal court. *Hana*, 443 Mich at 219.

- The right to a preliminary examination within 21 days of arraignment. MCL 766.4(1).

- The right for the date of the Probable cause conference and preliminary examination to be set at arraignment. MCL 766.4(1).

- The right to enter a felony plea before the circuit court judge. MCL 766.4(3).

- The right for a preliminary examination, where a magistrate shall examine the complainant and the witnesses in support of the prosecution, on oath and, in the presence of the defendant, concerning the offense charged and in regard to any other matters connected with the charge that the magistrate considers pertinent. MCL 766.4(6).

Each of these rights children do not have access to fundamentally undermine the fairness of the proceedings.

Value of a probable cause conference to child defendants being tried as adults

Children who are waived to the circuit court through permissive waiver lose the benefits of the probable cause conference. First, MCL 766.4(1)(a) grants adult criminal defendants the right to discussions as to a possible plea agreement among the prosecuting attorney, the defendant, and the attorney for the defendant. Many cases are settled at probable cause, sometimes with pleas to a misdemeanor offense. Children waived via MCL 712A.4(3) lose the right to this discussion between the prosecution and defense. As a result they lose an opportunity to negotiate a favorable plea in a timely manner. They lose the ability to plea and sentence at the initial hearing and keep an adult matter in district court via a misdemeanor plea.

Second, MCL 766.4(1)(b) grants adult defendants the right to discussions regarding bail and the opportunity for the defendant to petition the magistrate for a bond modification at the probable cause conference. However, once an adult criminal matter is before the circuit court, most jurisdictions require the defense to file a motion to modify bond and for a hearing to be set. Depending on the docket of a particular court, this process can take weeks to months. While some jurisdictions may allow parties to address bond at the circuit court pretrial conference, again it may be several weeks before that hearing is set. As a result of permissive waiver, a child defendant is subjected to the requirements of bond in the adult criminal system, but that child was not afforded the same opportunity as other defendants to argue bond terms.

Value of a preliminary examination

At a preliminary examination, the defendant has the benefit of most rules of evidence. MCL 766.11b. In addition, the defendant has the right to subpoena witnesses to testify on his behalf at the preliminary examination. MCL 766.11b(2).

From a trial strategy standpoint, the preliminary examination is key opportunity for defense attorneys to cross examine key witnesses under oath and establish a story on the record which can be used for impeachment, it is also an opportunity for defense counsel to question witnesses as to other discoverable information, and finally it offers defense counsel an

opportunity to argue that charge be reduced to misdemeanor offense or dropped entirely for failure to show probable cause as to all elements of the felony offense charged. However, because this phase occurs in juvenile court under permissive waiver, *Hana*, *supra*, child defendants do not get the benefit of having their preliminary examination (outside of the probable cause hearing) be subject to the rules of evidence. *See* MCR 3.901(A)(3); *see also* MCR 3.950(D)(1)(b), (2)(b).

MIDC standards do not apply to juvenile defense attorneys in many counties

In many counties, court appointed probate and family matters are handled by court appointed attorneys through contracts with the specific court. They are not handled by the local public defender's office or by MIDC overflow roster attorneys[2]. As a result, MIDC standard requirements currently do not apply to juvenile defense attorneys. While individual courts may have individual standards for their court appointed attorney, there is no general requirement that an attorney practicing juvenile defense be versed in adult criminal defense. As a result, these attorneys are not aware of or able to employ important trial strategies involved in adult criminal defense.

Clearly, a child defendant waived to the adult court via permissive waiver has fewer rights than a defendant charged as an adult at the outset. Permissive waiver subjects child defendants to all of the possible consequences of the adult system, but does not afford the defendant the same rights they would enjoy if charged as an adult from the outset. In this sense the child is in a worse situation when their matter is waived via permissive waiver than if they were simply charged as an adult originally. When viewed through the lens of the instant matter, the Trial Court's legal errors in granting the prosecutor's motion to waive NDD into the adult system not only clearly perpetuated harm against NDD that he would not otherwise have suffered in the juvenile justice system, but it also strips NDD of several rights enjoyed by adult criminal defendants in this State.

[2] MIDC standards and requirements. https://michiganidc.gov/standards/

RELIEF REQUESTED

Amicus Curiae, the Children's Law Section of the State Bar of Michigan, respectfully requests this Court grant the relief requested by the Appellant-Child, NDD, in this matter.

Respectfully submitted,

The Children's Law Section of the State Bar of Michigan

By:

/s/ Jordan M. Ahlers-Smith (P84538)

/s/ Taylor Ann Fiorvento (P83709)

Date: March 21, 2025

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212(B). I certify that this document contains 3,582 countable words. The document is set in Georgia Pro, and the text is in 12-point type with 18-point line spacing and 12 points of spacing between paragraphs.

/s/ Jordan M. Ahlers-Smith
(P84538)