

IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2020

No. 51

HOWARD JIMMY DAVIS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

BRIEF OF JUVENILE LAW CENTER, NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS, NATIONAL CENTER FOR YOUTH LAW, AND NATIONAL
JUVENILE DEFENDER CENTER AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER HOWARD JIMMY DAVIS

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INTEREST AND IDENTITY OF *AMICI CURIAE*

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of *amicus* briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential *amicus* briefs in state and federal cases across the country.

The **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S.

Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a strong interest in improving the quality of juvenile justice in every state.

The **National Center for Youth Law (NCYL)** is a non-profit organization that works to build a future in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves. For five decades, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need. One of NCYL's priorities is to reduce the number of youth subjected to harmful practices in the juvenile justice system, including the imposition of fines and fees on indigent youth and families and the collateral consequences from juvenile court debt. NCYL has litigated to end unnecessary referral to the juvenile justice system in numerous states, and advocated at the federal, state, and local levels to reduce reliance on the justice systems to address the needs of youth, including eliminating juvenile fines and fees, decriminalizing normal adolescent behavior and improving children's access to adequate developmentally-appropriate treatment. NCYL's juvenile justice advocacy seeks to ensure that youth in trouble with the law are treated as adolescents, and not as adults, and in a manner that is consistent with their developmental stage and capacity to change.

The **National Juvenile Defender Center (NJDC)** was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. NJDC has participated as *Amicus Curiae* before the United States Supreme Court, as well as federal and state courts across the country.

STATEMENT OF THE CASE

*Amici Curiae*¹ incorporate by reference Petitioner, Howard Jimmy Davis's Statement of the Case.

STATEMENT OF THE QUESTIONS PRESENTED

Amici Curiae incorporate by reference Petitioner, Howard Jimmy Davis's Statement of the Questions Presented.

STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

Amici Curiae incorporate by reference Petitioner, Howard Jimmy Davis's Statement of the Applicable Standard of Review.

STATEMENT OF THE FACTS

Amici Curiae incorporate by reference Petitioner, Howard Jimmy Davis's Statement of Facts.

SUMMARY OF THE ARGUMENT

Amenability to treatment is a foundational concept in juvenile justice jurisprudence generally and to transfer decisions in particular. Developed as a legal standard to define the scope of the juvenile court's jurisdiction, the amenability to treatment analysis has long been understood by both judges and psychologists alike to require an individualized assessment of a young person's rehabilitative potential. In recent years, the importance of

¹ Pursuant to Md. R. 8-511(a)(1), *Amici Curiae* have obtained written consent of all parties to file this brief in the Court of Appeals of Maryland. Consent is attached hereto.

the concept has only deepened, as the United States Supreme Court has repeatedly highlighted children’s “greater prospects for reform” and “capacity for change” as among the distinctive attributes of youth entitling them to heightened constitutional protections. *See Miller v. Alabama*, 567 U.S. 460, 471, 473 (2012).

The trial court’s transfer denial in this case ignored these characteristics of youth and failed to consider Howard Davis’s amenability to treatment as that concept is properly understood, in violation of Maryland’s transfer statute. Moreover, by effectively removing amenability to treatment from the discretionary transfer analysis, the trial court’s approach risks exacerbating the well-documented harms of denying youth who can be rehabilitated access to the juvenile justice system. As numerous studies now show, prosecution in the adult justice system subjects youth to significantly longer prison sentences, exposes them to harmful prison conditions, and leaves them with lasting collateral consequences even after their release. These harsh consequences disproportionately impact youth of color, particularly Black boys, as they are overrepresented among youth transferred to the adult court. *Amici* urge this Court to minimize the harms of adult prosecution of youth and counteract the insidious effects of racial bias by clarifying that a robust and individualized amenability to treatment analysis is required under Maryland law.

ARGUMENT

I. AMENABILITY TO TREATMENT IS A FOUNDATIONAL CONCEPT IN TRANSFER JURISPRUDENCE THAT REQUIRES COURTS TO CONDUCT AN INDIVIDUALIZED ASSESSMENT OF A CHILD’S REHABILITATIVE POTENTIAL

A. Amenability To Treatment Is A Critical Consideration In Determining Whether Or Not To Prosecute A Child In Criminal Court

The concept of amenability to treatment—critical to the decision about whether a child should be prosecuted as a child or an adult—has its roots in the founding principles of the juvenile justice system. The progressive reformers who created the first juvenile court designed the system to be rehabilitative, not punitive, “employ[ing] medical analogies” and drawing on new understandings of childhood “to rationalize *treating* rather than punishing offenders.” Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 194 (2007) (emphasis added). As the United States Supreme Court explained in *In re Gault*, its seminal case on juvenile due process protections, the premise was that “[t]he child was to be ‘treated’ and ‘rehabilitated,’ and the procedures . . . were to be ‘clinical’ rather than punitive.” 387 U.S. 1, 15-16 (1967). This rehabilitative purpose defined the scope and mission of the new juvenile courts and distinguished them from the adult criminal justice system. See Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 FUTURE CHILD. 81, 81-83 (2008) (describing the “sharply contrasting ideas about adolescents who break the law” reflected in purpose and structure of the juvenile and adult criminal courts).

Because the juvenile justice system was intended to provide rehabilitation and treatment, whether a child was “amenable” to such treatment emerged as a legal standard to define the parameters of the juvenile court’s jurisdiction. Children who were “amenable to treatment” were “proper persons to be handled by the juvenile court,” whereas those not deemed “amenable” might be subject to adult prosecution. *See* INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO TRANSFER BETWEEN COURTS 37-40 (1980), <https://www.ojp.gov/pdffiles1/ojjdp/82487.pdf>; *see also* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 302 (1999) (“Consonant with the initial rehabilitative premise of juvenile court, traditional theory posited that children who are amenable to treatment in the juvenile system should not be transferred to adult court.”). This notion of amenability to treatment was codified in state statutes across the country following the Supreme Court’s decision in *Kent v. United States*, which required due process protections before a child could be transferred from juvenile to adult criminal court. 383 U.S. 541, 553-54 (1966). Although the ruling was based on a challenge to Washington, D.C.’s transfer statute in particular, the so-called “*Kent* factors,” which were included in a policy memorandum attached to the decision, embraced the concept of amenability to treatment by requiring courts to assess “the likelihood of reasonable rehabilitation” of a child before transferring them to adult criminal court. *Id.* at 567. State legislatures responded by adopting discretionary transfer statutes based upon the

Kent factors—codifying the core principle that youth who are amenable to rehabilitation or treatment belong in the juvenile justice system, rather than the more punitive adult criminal court.² See PATRICK GRIFFIN ET AL., U.S. DEP’T OF JUSTICE, OFF. JUV. JUST. & DELINQ. PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 3-4 (1998), <https://www.ojp.gov/pdffiles/172836.pdf> (noting that 44 of 46 states with discretionary transfer statutes use standards based on the factors enumerated in *Kent*); see also Amanda NeMoyer, *Kent Revisited: Aligning Judicial Waiver Criteria with More than Fifty Years of Social Science Research*, 42 VT. L. REV. 441, 455 (2018) (describing statutory changes post-*Kent*).

In the decades following *Kent*, this principle faced substantial erosion as the now-debunked myth of the “super-predator” spread across the country in the 1990’s, prompting many states to remove discretion from juvenile court judges and mandate adult prosecution in certain cases without regard to the individual characteristics of the young offender. See David S. Tanenhous & Steven A. Drizin, “*Owing to the Extreme Youth of the Accused*”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 (2002); PATRICIA TORBET ET AL., U.S. DEP’T OF JUSTICE, OFF. JUV. JUST. & DELINQ. PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3-4, 6 (1996), <http://www.ncjj.org/pdf/statresp.pdf> (describing statutory changes). Although now

² *Amici* use the term “transfer” throughout this brief to refer generally to statutory mechanisms for trying young people under the age of eighteen in adult criminal court.

thoroughly discredited—and even renounced by the political scientist who coined the term “super-predator”—the myth of a class of “super crime-prone young males” who were especially depraved, immoral, and dangerous had a potent effect, and during the 1990’s and 2000’s it shifted the emphasis within juvenile justice jurisprudence away from its historic focus on the rehabilitative potential of youth. *See* Brief for Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners at 18-19, *Miller v. Alabama*, 567 U.S. 460 (No. 10-9646); *see also* Robin Walker Sterling, “Children Are Different”: Implicit Bias, Rehabilitation, and the “New” Juvenile Jurisprudence, 46 LOY. L.A. L. REV. 1019, 1054-60 (2013).

More recently, the focus on amenability to treatment has regained prominence, both because of the research discrediting the “super-predator” myth, and because of U.S. Supreme Court jurisprudence highlighting the developmental characteristics of adolescents, including their distinctive capacity for rehabilitation and change. Beginning with its 2005 decision in *Roper v. Simmons*, the Court has repeatedly emphasized that “the character of a juvenile is not as well formed as that of an adult,” and that “the personality traits of juveniles are more transitory, less fixed.” 543 U.S. 551, 570 (2005); *see also* *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“[I]t would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” (quoting *Roper*, 543 U.S. at 570)). Citing studies showing that very few adolescents “who engage in illegal activity ‘develop entrenched patterns of

problem behavior,” as well as developmental research describing the “transient rashness” of youth, the Court has concluded that children as a class have a “heightened capacity for change.” *Miller v. Alabama*, 567 U.S. 460, 471-72, 479 (2012) (quoting *Roper*, 543 U.S. at 570). Indeed, the Court has found that it is “the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible,” effectively creating a presumption that children are amenable to treatment. *See Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016).

Today, the concept of “amenability to treatment” is firmly embedded in the field of juvenile justice and transfer in particular. Assessments of a youth’s amenability to treatment are made “throughout the justice process,” from “deciding whether and how to charge a juvenile with an offense,” to deciding whether to detain them pre-trial, to determining the appropriate disposition. Edward P. Mulvey & Anne-Marie R. Iselin, *Improving Professional Judgments of Risk and Amenability in Juvenile Justice*, 18 *FUTURE CHILD*. 35, 38 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3586246/pdf/nihms439660.pdf/>.

Familiarity with the concept is a basic prerequisite to effective juvenile representation; national standards of juvenile defense require that attorneys representing children “be knowledgeable about key aspects of developmental science and other research” relevant to core legal concepts including “amenability to treatment.” NATIONAL JUVENILE DEFENDER CENTER, *NATIONAL JUVENILE DEFENSE STANDARDS* 21 (2012), <https://njdc.info/wp->

content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf. In short, the concept of amenability to treatment is “at the core of juvenile delinquency jurisprudence,” particularly as it relates to transfer. Slobogin, *supra*, at 299.

B. Determining Whether A Child Is Amenable To Treatment Requires An Individualized Assessment Of Characteristics Relevant To The Child’s Rehabilitative Potential

Analyses of the characteristics used to assess amenability to treatment reveal that, consistent with its origins, the concept requires an individualized assessment of the youth’s rehabilitative potential. Surveys of psychologists and juvenile court judges reveal “a high degree of similarity in the specific traits” each group considered relevant to an amenability to treatment determination. Dia N. Brannen et al., *Transfer to Adult Court A National Study of How Juvenile Court Judges Weigh Pertinent Kent Criteria*, 12 PSYCHOL. PUB. POL’Y & L. 332, 335 (2006). These traits include “motivation for treatment and an expectation of therapeutic gain,” insight about the youth’s own problems, ability to empathize or express remorse, understanding of right from wrong, and a supportive family. *Id.* See also Randall T. Salekin, et al., *Juvenile Transfer to Adult Courts: A Look at the Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment Through a Legal Lens*, 8 PSYCHOL. PUB. POL’Y & L. 373, 401 (2002). Other studies have similarly shown that judgments about amenability to treatment are typically “related to the adolescent’s offense history, environmental and personality characteristics, willingness to engage in treatment, past treatments, availability of services, and age.” Mulvey & Iselin, *supra*, at 38.

These studies demonstrate that judges and psychologists alike look to individual characteristics and experiences of the particular adolescent in assessing their amenability to treatment in the juvenile justice system.

II. THE TRIAL COURT’S FAILURE TO PROPERLY CONSIDER AMENABILITY TO TREATMENT LED TO A LEGALLY FLAWED TRANSFER DENIAL

Like most states, Maryland requires an amenability to treatment analysis whenever a court must decide whether a child can be prosecuted as an adult. Under Maryland law, a criminal court determining whether to transfer jurisdiction to the juvenile court “shall consider” five enumerated factors, including “the amenability of the child to treatment in an institution, facility, or program available to delinquent children.” Md. Code Ann., Crim. Proc. § 4-202(d) (West 2021); *see also* Md. Code. Ann., Cts. & Jud. Proc. § 3-8A-06(e) (West 2021) (enumerating the same factors for purposes of waiver of juvenile court jurisdiction). Here, the trial court violated this statutory requirement in two respects: (1) the court failed to consider the amenability to treatment factor as it is properly understood; and (2) the court erred in the balancing of the five factors by improperly relying entirely on the severity of the alleged offense.

A. The Trial Court Failed To Consider The Amenability To Treatment Factor

The plain language of Maryland’s transfer statute makes clear that courts must consider *each* of the factors required by law, including amenability to treatment, when deciding whether to transfer a youth to juvenile court. *See* Md. Crim. Proc. § 4-202(d). Indeed, basic due process protections require that each of the necessary factors be given

appropriate consideration during transfer proceedings. *See Bell v. Burson*, 402 U.S. 535, 542 (1971) (“It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet [the Due Process] standard.”). Such protections are particularly important in proceedings to determine whether a case should proceed in juvenile or adult court; as the Supreme Court stated in *Kent*, “there is no place in our system of law for reaching a result of such tremendous consequence” without proper procedural safeguards. 383 U.S. at 554. Maryland law defines the process required when a court makes a transfer determination, including the factors a court must consider; thus, as courts in states with similar statutes have held, the record must show that each required factor was in fact considered. *See, e.g., Commonwealth v. Jackson*, 722 A.2d 1030, 1034 (Pa. 1999) (“A juvenile court must consider all of the factors set forth” in the statutory provision governing transfer); *Commonwealth v. O’Brien*, 673 N.E.2d 552, 557 (Mass. 1996) (requiring judge to “make written findings” based on consideration of the “statutorily delineated factors” (quoting *Commonwealth v. Costello*, 467 N.E.2d 811, 814 (Mass. 1984))); *People v. Dunbar*, 377 N.W.2d 262, 265 (Mich. 1985) (concluding that “[t]he Legislature and the Supreme Court have indicated . . . that all of the waiver criteria shall be considered” and finding an abuse of discretion because the court did not consider one of those criteria); *In re Clatterbuck*, 700 P.2d 1076, 1081 (Utah 1985) (finding juvenile court violated statutory transfer

standard because there was no indication that “all of the required statutory factors were actually considered”).

Here, the trial court fundamentally misunderstood the meaning of the “amenability to treatment” factor, and so effectively failed to consider it. In discussing amenability to treatment, the court noted only that Howard “would be eligible for behavioral modification” and possibly for secure confinement. (Pet. Writ Cert. at App. 15.) Although eligibility for particular services through the juvenile justice system is a component of the amenability analysis, it does not end the inquiry. As discussed above, amenability to treatment requires an individualized assessment of the particular youth’s rehabilitative potential, not simply an acknowledgment that services exist. In today’s juvenile justice system—which offers an array of services to meet every level of need—a finding that a youth is “eligible” for services in the juvenile justice system is only part of the analysis; the court must also consider whether the young person should be transferred to that system to receive those services.³ Moreover, by failing to consider amenability to treatment as

³ Importantly, the fact that a youth’s eligibility for services might be part of the amenability to treatment analysis does not imply that an *absence* of available services renders a youth *unamenable*. Courts have recognized that, where the record supports a finding that a youth is amenable to treatment, there is “no legal authority” to deny access to the juvenile court solely because the services needed for treatment are not currently available. *United States v. Tillman*, 374 F. Supp. 215, 223 (D.D.C. 1974). *See also In re Welfare of J.E.C. v. State*, 225 N.W.2d 245, 249 (Minn. 1975) (“The reasons assigned by the juvenile court for reference to adult prosecution fall short of the statutory requirement The absence of rehabilitative facilities to treat appellant may not mean he is not amenable to treatment as a juvenile if such facilities were available.”). Indeed, the Supreme Court’s decisions in

properly understood, the Court ignored the factor most relevant to the ultimate transfer decision: the youth’s rehabilitative potential. Because the trial court equated eligibility for services with amenability to treatment, it failed to actually consider one of the required factors under Maryland law—abusing its discretion by applying an improper legal standard in its analysis. *See Levitas v. Christian*, 454 Md. 233, 244 (2017) (“A failure to consider the proper legal standard in reaching a decision constitutes an abuse of discretion.” (quoting *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 242 (2011))); *see also Clatterbuck*, 700 P.2d at 1081.

B. The Trial Court Improperly Based Its Transfer Denial Entirely On The Nature Of The Charges

The trial court further erred in its transfer analysis by basing its decision solely on the nature of the charges, undermining the carefully constructed statutory scheme enacted by the Maryland legislature. The transfer decision at issue here arose as part of Maryland’s “reverse waiver” mechanism, which allows cases directly filed in criminal court to be moved to the juvenile justice system in certain circumstances. Under Maryland law, while the juvenile court does not have original jurisdiction over certain cases, based on the age of the alleged offender and the nature of the charges, *see* Md. Code. Ann., Cts. & Jud. Proc. § 3-8A-03(d) (West 2020), several of these cases may still be considered for discretionary

Kent and *Gault* requiring fundamental due process protections for youth, including in transfer determinations, prevent a state from barring access to the juvenile court for a particular youth by failing to offer necessary services. *See In re Gault*, 387 U.S. at 27-29; *Kent*, 383 U.S. at 553-54.

transfer to juvenile court *see* Md. Crim. Proc. § 4-202(b)-(c). If a particular case is eligible for possible transfer due to the defendant’s age, charges, and offense history, a court must then review the enumerated factors to determine whether “a transfer of its jurisdiction is in the interest of the child or society.” *Id.* § 4-202(b)-(d). In addition to amenability to treatment, those factors include the age of the child; their “mental and physical condition”; the “nature of the alleged crime”; and public safety. *Id.* Similar to other states’ statutes, this mechanism provides a safety valve within an otherwise mandatory waiver process, granting judges discretion to return some youth to the juvenile system when warranted by their particular circumstances. *See* Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS AND VICTIMS: NAT’L REP. SERIES BULL. (U.S. Dep’t of Justice, D.C.), Sept. 2011, at 9, http://www.ncjj.org/pdf/Transfer_232434.pdf.

The trial court’s transfer denial in this case distorted this statutory scheme by basing its decision entirely on the nature of the alleged offense. The court candidly acknowledged that it viewed the nature of the offense as “the single most . . . concerning factor with regard to whether or not this young man should remain in the adult system,” and summarily concluded that, because Howard committed “a very grave, violent offense,” he remained a threat to public safety and could not be transferred. (Pet. Writ Cert. at App. 15-16.) With regard to amenability to treatment—the factor most relevant to defining the boundary between juvenile and adult criminal court—the court agreed that Howard was amenable,

in effect finding that he could be effectively rehabilitated through the juvenile justice system. The court's reasoning therefore effectively negated not only the other factors relevant to the transfer decision, but the entire statutory scheme. Maryland's transfer mechanism already accounts for the severity of the charges in the categorical elements of the statute, which determine eligibility for transfer. If the nature of the charges alone were sufficient to justify the transfer denial of an otherwise eligible youth, the legislature would not have provided judges the discretion to nevertheless send some of these cases to juvenile court for prosecution. The trial court's single-minded focus on the nature of the allegations effectively replaced a discretionary transfer regime with an automatic one based solely on the alleged offense, undermining the design and purpose of the statute. *See Commonwealth v. Kocher*, 602 A.2d 1308, 1315 (Pa. 1992) (concluding that juvenile court abused its discretion because finding one characteristic "dispositive of the entire amenability question is to distort the clear legislative scheme"); *In the Interest of J.K.M.*, 557 N.W.2d 229, 232 (N.D. 1996) (affirming that a child can be found amenable to treatment even when alleged to have committed a serious or violent crime).

III. IT IS ESSENTIAL THAT THE COURT CONDUCT A PROPER TRANSFER ANALYSIS GIVEN THE SEVERE CONSEQUENCES OF THE TRANSFER DECISION

Proper consideration of a young person's amenability to treatment is vital to the "critically important action" of prosecuting a child in adult court. *Kent*, 383 U.S. at 554. At the time of *Kent*, the transfer to adult court could be the "difference between five years'

confinement and a death sentence.” *Id.* at 557. Today, the differences between the juvenile and adult systems remain stark, and substantial social science research demonstrates that subjecting youth to adult prosecution and sentencing is both damaging to the young person and counterproductive to the public interest. Research has also shown that the harsh consequences of widespread expansion of transfer mechanisms are primarily borne by youth of color, particularly Black boys—exacerbating racial disparities in a criminal justice system already plagued by inequity. A robust amenability to treatment analysis focused on the young person’s rehabilitative potential will not only limit the number of young people who must suffer the harsh consequences of the adult justice system—as the statutory design contemplates—but may also protect youth of color from its structural inequities and biases.

A. There Are Grave Consequences For Youth Tried In Adult Court

In Maryland there are stark differences in sentences between the juvenile and adult systems. While the average length of stay in a Maryland juvenile justice placement in 2018 was 169 days, or less than six months, the average length of stay in an adult correctional facility in 2019 was almost seven years. Kelsey Robinson, *Juvenile in Justice: A Look at Maryland’s Practice of Incarcerating Children Without a Jury Trial* 79 MD. L. REV. ONLINE 14, 23 (2020); Maryland State Archives, Maryland Manual Online: A Guide to Maryland & Its Government, Maryland At A Glance: Criminal Justice (last visited April 8, 2021), <https://msa.maryland.gov/msa/mdmanual/01glance/html/criminal.html>. Indeed, in the present case, Howard faced a potential life imprisonment sentence for attempted

murder in an adult prison in contrast with four years of treatment in a juvenile facility. (Pet'r's Br. at 46 n.15).

Youth prosecuted as adults also face numerous collateral consequences that accompany criminal justice system involvement, including the heavy burden of an adult criminal record and the resulting impediments to employment, higher education, housing options, military involvement, and voting rights. Campaign for Youth Just., *Children in Adult Courts, Jails, and Prisons: Basic Facts* 1 (Mar. 23, 2020), http://www.campaignforyouthjustice.org/images/factsheets/BASIC_FACTS_032320.pdf. Youth in adult facilities are often held in solitary confinement and are five times more likely to die from suicide than are youth in juvenile facilities. *Id.* And the generally poor educational services in adult facilities set youth further behind in reaching their school and employment goals. *See, e.g.*, Mahari Simmonds, *Education behind Bars: Can Young People Be Taught in Adult Justice System?*, JUV. JUST. INFO. EXCHANGE (Jan. 2, 2019), <https://jjie.org/2019/01/02/education-behind-bars-can-young-people-be-taught-in-adult-justice-system/>.

Involvement in the adult criminal justice system hampers youth rehabilitation while undermining public safety. Youth prosecuted as adults are a third more likely to commit another, more violent crime than youth treated in the juvenile system. Campaign for Youth Just., *supra*, at 1 (citing Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: Report on*

Recommendations of the Task Force on Community Preventive Services, Ctr. for Disease Control & Prevention (2007), <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>). Nationwide, youth transfer laws have failed to reduce crime or otherwise have a deterrent effect. Patrick Griffin et al., *supra*, at 26.

Maryland law requires courts to consider both the interests of the child and the interests of society when determining whether to prosecute a young person in the adult or the juvenile justice system. *See* Md. Crim. Proc. § 4-202(b)(3) (court may transfer a case to juvenile court if it “determines by a preponderance of the evidence that a transfer of its jurisdiction is in the interest of the child or society”). Yet, the harms that arise from adult court prosecution are damaging to both these interests. In the adult criminal justice system Howard not only faces a lengthy prison sentence but may also experience conditions and consequences with lasting physical, psychological, and financial impacts. Criminal prosecution denies him the rehabilitative services of the juvenile justice system and puts him at risk for committing more violent crimes in the future. A careful amenability to treatment analysis that recognizes that young people, including Howard, have rehabilitative potential, can mitigate these harms by limiting the number of young people entering the adult justice system and therefore limiting the consequences to youth and their communities.

B. Prosecution Of Youth In The Adult System Disproportionately Impacts Youth Of Color, Particularly Black Youth

Maryland has a deeply racially disproportionate criminal justice system rooted in the over-policing of communities of color. JUST. POL'Y INST., *RETHINKING APPROACHES TO OVER INCARCERATION OF BLACK YOUNG ADULTS IN MARYLAND* 3 (2019), http://www.justicepolicy.org/uploads/justicepolicy/documents/Rethinking_Approaches_to_Over_Incarceration_MD.pdf. The racial disparities are particularly pronounced for youth prosecuted in the adult criminal justice system. In 2014 and 2015, a staggering 83 percent of youth charged as adults were Black. Maryland Department of Juvenile Services, *Youth Charged As Adults: Calendar Year 2014 and 2015 Update* 8 (2017), <https://djs.maryland.gov/Documents/publications/Youth%20Charged%20as%20Adults%20-%202014%20and%202015.pdf>. Similar racial disproportionality exists in the Maryland prison population, as data from as recently as 2018 shows that more than 70 percent of Maryland's prison population is Black as compared to 31 percent of the state population. JUST. POL'Y INST., *supra*, at 3. This racial disparity is higher than any other state and more than double the national average. *Id.*

These Maryland figures also align with national data about the racial disparities that pervade the criminal and juvenile justice systems. *See Criminal Justice Facts*, SENT'G PROJECT (last visited Apr. 8, 2021), <https://www.sentencingproject.org/criminal-justice-facts/>. Soberingly, data from 2001 forecasted that one of three Black males born that year could expect to go to prison. *Id.* Hispanic men are likewise more than twice as likely to go

to prison as non-Hispanic white men. *Id.* Black youth are more than five times as likely as white youth to be incarcerated and Native youth are three times as likely. THE SENT'G PROJECT, FACT SHEET: BLACK DISPARITIES IN YOUTH INCARCERATION 1 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf>; THE SENT'G PROJECT, FACT SHEET: NATIVE DISPARITIES IN YOUTH INCARCERATION 1 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/10/Native-Disparities-in-Youth-Incarceration.pdf>. Latino youth are 65 percent more likely than white youth to be detained or committed; this disparity is conservative given discrepancies in many states counting Latino or Hispanic youth as white. THE SENT'G PROJECT, FACT SHEET: LATINO DISPARITIES IN YOUTH INCARCERATION 1 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/10/Latino-Disparities-in-Youth-Incarceration.pdf>. Nationally, Black and Hispanic youth account for over 60 percent of cases judicially waived from juvenile to adult court, with Black youth representing 54 percent and Hispanic youth 12 percent. Sarah Hockenberry & Charles Puzzanchera, Off. Juv. Just. & Delinq. Prevention, *Characteristics of Cases Judicially Waived from Juvenile Court to Criminal Court*, (2019), https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_Waiver2017.pdf. Native youth are 1.84 times more likely to receive an adult prison sentence than are white youth. Campaign for Youth Just., *supra*, at 1 (citing LIZ RYAN, CAMPAIGN FOR YOUTH JUST.,

YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM, (2012), http://cfyj.org/images/policybriefs/policyreform/FR_YACJS_2012.pdf).

These disparities are not the product of higher crime rates, but rather stereotypes, implicit racial bias, and structural racism related to racial segregation and policing of neighborhoods with high numbers of people of color. *See, e.g.*, THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 3-6 (2013), <https://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> (citing, *e.g.*, Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 485 (2004)); Lauren Krivo & Ruth Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. F. 619, 642 (1996) (discussing arrest rates); Michael Siegel et al., *The Relationship between Racial Residential Segregation and Black-White Disparities in Fatal Police Shootings at the City Level, 2013-2017*, 111 J. NAT'L MED. ASS'N 580, 585-86 (2019) (discussing effect of neighborhood segregation on racial disparities in police shootings); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1554-56 (2018) (citing Ronald Weitzer & Rod K. Brunson, *Strategic Responses to the Police among Inner-City Youth*, 50 SOCIO. Q. 235, 235-36 (2009)) (Black youth often experience extensive surveillance and harmful police encounters in their

communities, including constant police presence and frequent pedestrian or vehicle stops); Patricia Foxen, *Perspectives from the Latino Community on Policing and Body Worn Cameras*, MEDIUM (May 4, 2017), <https://medium.com/equal-future/perspectives-from-the-latino-community-on-policing-and-body-worn-cameras-47f150f71448> (documenting reactions to the hyper-policing of Latino communities).

The now debunked “super-predator” myth has been a particularly pernicious stereotype impacting Black boys. The discredited theory not only shifted the legal landscape, but also “amplified the American public’s predisposition to associate adolescents of color, and in particular young black males, with violence and moral depravity.” Perry L. Moriearty and William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 283 (2012), available at https://scholarship.law.umn.edu/faculty_articles/384. Young Black men were dissociated from their youth, *id.*, and the super-predator imagery allowed the public to “suspend our feelings of empathy towards young people of color.” Carroll Bogert & Lynnell Hancock, *The Media Myth That Demonized a Generation of Black Youth*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth> (quoting New York University law professor Kim Taylor-Thompson). These changing perceptions and laws had disastrous consequences, *id.*; of the thousands of youth who were incarcerated as a result of the changing transfer laws, the majority of them were Black boys.

Many people have internalized—often unconsciously—these and other false stereotypes, and they affect treatment of these youth in the justice system. The research on “adultification bias” of Black youth is particularly well developed. Studies show that, compared to similarly situated white children, people are likely to perceive Black children as older, less innocent, and more culpable. See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 540 (2014). The adultification of Black youth dates back to forced child labor during slavery, and “is a form of dehumanization, robbing Black children of the very essence of what makes childhood distinct from all other developmental periods: innocence.” REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 4, 6, 12 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> (adultification bias contributes to more punitive treatment Black girls receive in juvenile justice system). Another study found that people presented with a scenario involving a Black juvenile defendant are significantly more likely to view children to be as culpable as adults, and to favor more severe sentencing, than those presented with the same scenario involving a white juvenile defendant. See Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLOS ONE 1, 2 (2012).

The implicit and explicit biases apparent in the super-predator myth, the adultification of Black children, and other harmful stereotypes are rooted in the idea that

youth of color, particularly Black youth like Howard, are incapable of reform and therefore should not be given the rehabilitative opportunities offered by the juvenile court. Careful analysis of a young person's amenability to treatment that specifically assesses their potential for rehabilitation can help combat these harmful stereotypes that contribute to the racial inequity of the justice system. Emphasis on a young person's amenability to treatment over other factors in the transfer analysis such as the seriousness of the charges or public safety is also important, as judicial perceptions of the seriousness of a child's actions or their threat to public safety can also be colored by implicit racial biases. Thus, a focus on a child's amenability to treatment as the central inquiry in a transfer case will allow courts to protect young people of color from problematic and racially motivated transfers to the adult system.

CONCLUSION

Wherefore, *Amici Curiae* respectfully request that for the foregoing reasons this Honorable Court vacate the trial court's ruling and remand for further consideration.

Respectfully Submitted,



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1. This brief contains 5,892 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
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Nadia Mozaffar

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I HEREBY CERTIFY that on this 13th day of April, 2021, an electronic copy of the foregoing was has been filed and served electronically via the Court's MDEC system, and two paper copies of the foregoing were served via United States First Class mail on each of the following:

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