HOWARD JIMMY DAVIS, Petitioner v. STATE OF MARYLAND, Respondent	IN THE COURT OF APPEALS OF MARYLAND September Term, 2020 No. _____

PETITION FOR WRIT OF CERTIORARI

Petitioner, Howard Jimmy Davis, was charged by indictment in the Circuit Court for Baltimore County (Case 03-K-17-001763) with 14 counts, including first degree assault, arising from an incident that occurred less than three weeks after his 16th birthday. Judge Nancy M. Purpura denied his motion to transfer jurisdiction to the juvenile court. After entering a conditional guilty plea, Mr. Davis was convicted of use of a firearm in a crime of violence and two counts of first degree assault, and sentenced by Judge Kathleen G. Cox to concurrent terms of fifteen years, with all but ten years suspended, for each assault conviction, and a concurrent five years without parole for the firearm offense. The Court of Special Appeals affirmed: *Davis v. State*, September Term, 2018, No. 2014, unreported, filed October 9, 2020, mandate issued November 12, 2020. Petitioner, by counsel, Kiran Iyer, Assigned Public Defender, petitions this Court pursuant to Maryland Rule 8–303 to issue a writ of

certiorari to review that Court's decision. The docket entries (App.1–13), trial court's ruling (App.14–16), and Court of Special Appeals' opinion (App.17–45) are attached.

QUESTION PRESENTED

As a matter of first impression, does a trial court determining whether to transfer jurisdiction of a criminal case to the juvenile court discharge its responsibility under Maryland Code (1974, 2013 Repl. Vol., 2016 Supp.), Criminal Procedure Article ("CP"), § 4-202(d)(3) to consider the "amenability of the child to treatment in an institution, facility, or program available to delinquent children" by considering the child's eligibility for services in the juvenile system, or does the court also need to consider the child's rehabilitative potential?

STATEMENT OF FACTS

A. The offense.

The Court of Special Appeals summarized the relevant facts:

> Davis and two other persons participated in a home invasion in Baltimore County during the early morning hours of March 22, 2017. At approximately 1:40 a.m., the home invaders broke down a sliding glass door to enter the kitchen while the occupants were asleep.[1] Sleeping in the home were a man and woman (who were described as fiancé and fiancée), and their children (an 11-year-old boy and two teenage girls). When the adults were awakened by the sound of the break-in, the man went downstairs to investigate, and was confronted by masked men, who fled briefly, but then returned, armed with at least one assault rifle. By the time police arrived in response to a 911 call, the invaders had fired shots in the house and had bludgeoned[2] the man who had confronted them. Police arrested suspects who led them to Davis. …

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[1] The Department of Juvenile Services ("DJS") Reverse Waiver Report notes that the men were wearing "masks, gloves, and all dark clothing."

[2] The DJS report notes the man's statement that he was "struck in the face with the butt of the [rifle]" and "suffered injuries." The defense's clinical psychologist

> Dr. Zygala [a clinical psychologist at Spring Grove Hospital Center] testified that Davis "really hadn't exhibited any emotional and behavioral problems" until the months preceding the home invasion, when he believed—mistakenly, it turned out—that he had "potentially lost two children with [his girlfriend] due to a rape." … Dr. Zygala explained that Davis's girlfriend had "fabricated an elaborate lie that she was pregnant with [Davis's] twins (even sending fake ultrasound pictures). She then told [Davis] that she was raped by a family friend and lost one of the babies."

(App.18–19, 27); *see also* App.20–22 (quoting the police report summary in the DJS report).

The prosecutor proffered, as support for the conditional guilty plea, that:

> [Mr. Davis] did write an apology letter, wherein he indicated that he was essentially operating under the belief that his girlfriend, at the time, had been sexually assaulted. … He thought … the person responsible for the sexual assault lived at this address … Ultimately, it was determined that [the man] and his wife had absolutely nothing to do with … an alleged … sexual assault. The Defendant and two Co-Defendants simply got the wrong address. And it turned out that the story about the sexual assault had been made up by someone and forwarded to Mr. Davis.

(App.31).

B. Mr. Davis's childhood and pre-offense history.

Mr. Davis was born on March 4, 2001 in Baltimore. Dr. Zygala testified that there was "no indication" that he had "significant

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acknowledged at the transfer hearing that there was evidence that the man had "teeth knocked out" and "suffered a graze wound from a bullet."

behavioral problems" or "emotional problems" as a child, despite suffering the trauma of seeing one man shot and another stabbed when he was seven or eight years old, and the shooting deaths of his uncle and cousin when he was 11 years old.[3] He had three prior contacts with DJS, all for non-violent offenses. First, in May 2010 (when he was nine years old), he was charged with fourth degree burglary (the case was resolved at intake). Second, in June 2014 (when he was 13 years old), he was charged with offenses related to breaking and entering a motor vehicle, placed on probation, and required to complete a victim awareness program. Finally, in November 2015 (when he was 14 years old and still on probation), he was charged with motor vehicle theft and placed on informal supervision.[4] Before this case, Mr. Davis had never received any DJS services other than "victim awareness," which Dr. Zygala described as a non-intensive "hour or two a week [for] a couple of weeks."

The defense introduced evidence that there was a marked change in Mr. Davis in the months leading up to the offense. Jenna Conway, a forensic social worker for the Office of Public Defender who testified as an expert, reported in her assessment that in late 2016, Mr. Davis's then-girlfriend told him she was pregnant with his twins. Mr. Davis was

[3] Dr. Zygala diagnosed Mr. Davis with an "unspecified trauma and stressor related disorder," as well as various substance abuse disorders.
[4] He was also suspended once in the ninth grade for fighting.

shocked but excited: he picked out names for his children, started buying diapers, and dreamed about what he would teach them when they were older. In February 2017, Mr. Davis's girlfriend told him that she had been raped and beaten, and lost one of the children. Dr. Zygala reported that Mr. Davis's mother saw a "decline" in her son's mood, "crying," and "increase[d] drug use." He became "withdrawn and depressed," and started using Xanax to cope. The next month, he participated in the home invasion of the person he thought was responsible for the rape.

C. Mr. Davis's exemplary behavior in DJS custody and amenability to treatment.

Mr. Davis spent over nine months in the Charles H. Hickey, Jr. School ("Hickey") awaiting his transfer hearing. He wrote the victims an apology letter, which Dr. Zygala testified was evidence of his "empathy and remorse … traits necessary for … improved behavior." Dr. Zygala noted that Mr. Davis had "cut off" ties with his ex-girlfriend, and was "back to his level of optimal functioning" now that that "stimulus … [had] been removed."

Mr. Davis's record at Hickey was exemplary. Chashelle Warren, his DJS case manager, reported in her Reverse Waiver Report in May 2017 (the month after Mr. Davis entered Hickey) that he and his mother were "willing to participate" in DJS services. In a Detention

Court Report prepared around October 2017, she noted that he "maintained a respectful attitude towards staff," "consistently follow[ed] directions," asked "often to assist staff with unit duties," behaved positively toward his peers, and enjoyed participating in peer-based programs. Earlene Williams, a mental health clinician at Hickey, spoke glowingly of him in a December 2017 Mental Health Summary Form:

> *Youth Davis' behavior at Hickey has been consistently positive.* Davis was always willing to participate in individual and group therapy sessions to discuss his moods and behaviors. Davis regularly attends group and individual sessions, community meetings, Boys-to-Men (a male mentoring group) where he actively and thoughtfully contributes, to the group discussions. Davis has successfully … earned [various] certificates of completion. Davis consistently earns 100% of his daily points for his compliance with the Challenge program. … *Davis is very amenable; he is cooperative, he has an easy-going disposition, and he is very tolerant of others.* Davis has expressed that he wants to return to school in the community to complete high school and attend his graduation with his family present.

(Emphasis added).

Dr. Zygala noted that a Hickey correctional officer had told her that Mr. Davis was their "*best youth*," "does not engage in any altercations," "stays to himself," and is "respectful to everyone." (Emphasis added). Dr. Zygala observed that Mr. Davis was "engaging in therapy," "trying to improve himself," and had "a positive attitude towards intervention and authority." Ms. Conway testified that she had done around 70 transfer cases, and did not think that she had ever "had

a youth that … had 100% of their [daily behavioral] points," other than Mr. Davis. She noted that he had no Behavioral Reports for misconduct, and was selected to be the "Student Advisory" for his unit, tasked with meeting the superintendent biweekly to discuss his cohort's needs. Kim Turner, the program director for Uncuffed Ministries, a faith-based organization that works with youths charged as adults, testified that Mr. Davis actively participated in voluntary weekly bible studies classes throughout his stay at Hickey. She said he was "extremely personable," "un-defensive in his posturing and really willing to look at his life," helpful in recruiting others to the program, and "growing throughout."

Mr. Davis's adjustment to juvenile detention was so remarkable that the sentencing judge, Judge Cox, wrote a letter after sentencing "strenuously" recommending his admission to the Patuxent Institution:

> Mr. Davis was barely sixteen when this incident occurred. *He has no prior offense history, or significant juvenile justice involvement.* Mr. Davis spent over nine months at the Charles Hickey School pending hearing on his motion to transfer … *I can't recall a time in the past twenty years when I received a more glowing report on the adjustment of a youth in a detention setting.* He completed a number of programs, did well in school, had no behavioral incidents, and *was described as a leader* … Ms. Walley, who currently heads the educational department at Hickey, appeared at sentencing. *She indicated this was the first time she appeared in court to testify for a youth.* She noted Mr. Davis' positive attitude, his hard work, the depth of his devotion to his family and their support of him, and described Mr. Davis as *one of her favorite kids who has ever come through her program.*

(App.32) (emphasis added).

The defense introduced extensive evidence about the specific "treatments" available to Mr. Davis in the juvenile system, and his amenability to those treatments. Dr. Zygala testified, based on two separate risk assessments, that he had a "low risk" of reoffending. Noting that it would be "extremely damaging" to his "personal development if he remained in the adult judiciary system," she concluded that he was "amenable to treatment" in the juvenile system, and would benefit from "individual therapy with a trauma-focused cognitive behavioral approach," substance abuse treatment, mentoring, family therapy, and tutoring to improve his below-average reading skills. Ms. Conway testified that Mr. Davis was not excluded from in-state or out-of-state placements based on his charges. She noted his "willing[ness] to be committed to DJS" and interest in the programs offered in detention, and recommended that he be placed in a hardware secure facility where he could receive behavioral modification interventions, education in positive coping skills, and vocational training. She specified in her report that Mr. Davis could be eligible for placement in two secure facilities in Maryland: the Rite of Passage Silver Oak Academy, and the Victor Cullen Center. The DJS Reverse Waiver Report stated that if Mr. Davis "was transferred to juvenile jurisdiction, evaluations would be requested

to help determine appropriate services … he will be eligible for behavior modification programs[s] in state and out of state." The report noted that Mr. Davis and his mother were "willing to participate" in DJS services. Seven months later, Ms. Williams, the Hickey Mental Health Examiner, reported that Mr. Davis was "very amenable" and would benefit from "individual counseling," "family therapy," "group counseling … with his peers in a structured setting," and substance abuse treatment.

D. The trial judge's ruling.

Judge Purpura denied the transfer motion in a bench ruling. The ruling is set out in the Appendix (App.14–16), and the relevant portions are discussed below.

E. The Court of Special Appeals' opinion.

The Court of Special Appeals concluded that this was not "one of the rare cases warranting reversal of the denial of a reverse waiver[.]" (App.45). The relevant portions of the opinion are discussed below.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY, AS A MATTER OF FIRST IMPRESSION, THAT TRIAL COURTS REQUIRED TO CONSIDER THE "AMENABILITY OF THE CHILD TO TREATMENT" IN JUVENILE TRANSFER CASES MUST NOT ONLY CONSIDER THE CHILD'S ELIGIBILITY FOR SERVICES IN THE JUVENILE SYSTEM, BUT MUST ALSO CONSIDER THE CHILD'S REHABILITATIVE POTENTIAL.

A. Introduction.

Under CP § 4-202(b)(3), a circuit court may transfer a criminal case involving a child to the juvenile court if, *inter alia*, "the court determines by a preponderance of the evidence that a transfer of its jurisdiction is in the interest of the child or society." The court "shall consider" five factors in making that determination:

> (1) the age of the child;
> (2) the mental and physical condition of the child;
> (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children;
> (4) the nature of the alleged crime; and
> (5) the public safety.

CP § 4-202(d).[5]

Judge Purpura addressed each factor individually. (App.14–16). She stated regarding amenability:

> With regard to amenability, amenability to treatment in the juvenile system-- but the report from Juvenile Services indicates that they would, *they would need to conduct another evaluation*

[5] The juvenile court must also consider the child's "amenability to treatment" in determining whether to waive jurisdiction to the circuit court. Maryland Code (1974, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 3-8A-06(e)(3).

> and that he, *he would be eligible for behavioral modification*. They don't mention that he could be held in a *secure facility, although we know that and certainly that the experts testified to that*.

(App.15) (emphasis added).

In sum, the trial judge, albeit briefly, noted "treatment[s] … available to" Mr. Davis in the juvenile system: "behavioral modification" and placement in a "secure facility." She did not, however, address his "amenability" to those treatments: his rehabilitative potential. She did not acknowledge the overwhelming evidence that Mr. Davis was *capable* of reforming his behavior when given DJS services and *willing* to participate in treatment, including the Hickey Mental Health Clinician's statement that he was "very amenable."

Against that backdrop, this case presents an important question: Does a trial court satisfy its obligation to consider a child's *amenability* to treatment by considering the child's *eligibility* for treatment? Petitioner's position is that eligibility is a relevant consideration (as it defines the available treatment options), but that the central amenability inquiry is whether the child is capable and willing to reform. This Court should grant certiorari and hold that the trial court's "failure to consider the proper legal standard" was an abuse of discretion. *Faulkner v. State*, 468 Md. 418, 460–461 (2020) (citation omitted).

B. This Court should clarify that the "amenability" factor requires the trial court to consider the child's rehabilitative potential.

"Amenability to treatment" is a "vague" concept. *See* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. Contemp. Legal Issues 299, 317, 330 (1999) (identifying eight factors that might be relevant to amenability, but favoring a rehabilitative-focused definition that considers the "capability" and "willingness" of the child). The Legislature has not defined the term "amenability" in CP § 4-202(d)(3) and CJP § 3-8A-06(e)(3), or in any other statute. Neither this Court, nor the Court of Special Appeals, has expounded the meaning of "amenability to treatment." Both courts have, however, connected this concept to the child's rehabilitative potential. *See, e.g., Smith v. State*, 399 Md. 565, 579 (2007) (rejecting the State's argument that a juvenile's actions after his case was transferred to juvenile court meant that he was not amenable to treatment as "rehabilitation of a juvenile is not a single event; it is an on-going process."); *Crosby v. State*, 71 Md. App. 56, 63 (1987) ("at the circuit court level the burden is on the juvenile to demonstrate he or she is *suitable for rehabilitation* in the juvenile system.") (emphasis added); *Wiggins v. State,* 22 Md. App. 291, 298 n.5 (1974) (the question of

amenability in waiver cases is whether the child "would have been *receptive to a rehabilitation program*") (emphasis added).

This Court should grant certiorari and hold, for three reasons, that a trial court must consider a child's rehabilitative potential in determining amenability to treatment. First, the natural and ordinary meaning of the term "amenable" encompasses the subject's willingness to participate in the treatment, and capability to benefit. Black's Law Dictionary defines "amenable" as "[a]cknowledging authority; *ready and willing to submit* <an amenable child>" and as *"[s]uitable for a particular type of treatment* <a condition amenable to surgical intervention>." *Amenable*, Black's Law Dictionary (11th ed. 2019) (emphasis added). Merriam-Webster defines "amenable" as "capable of submission … suited," "readily brought to yield, submit, or cooperate," and "willing [inclined or favorably disposed in mind]." *Amenable*, Merriam-Webster (2020), https://www.merriamwebster.com/dictionary/amenable. The "concept of treatment is somewhat more ambiguous," but in this context connotes "medical or psychiatric modalities designed to reduce recidivism." *Slobogin*, 10 J. Contemp. Legal Issues at 330–331. Accordingly, the term "amenability to treatment" requires the court to ask: Is the child willing to participate in the available rehabilitative treatments? And are such treatments likely to succeed based on the

child's capabilities? *See* Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders,* 6 Va. J. Soc. Pol'y & L. 389, 410 (1999) ("[i]n legal practice, amenability to treatment refers to the likelihood of an individual being rehabilitated when treated with some sort of intervention that is actually available within the community at the time of adjudication.").

Second, a circuit court that grants a transfer motion is transferring jurisdiction to a juvenile system whose "overriding goal … is to rehabilitate and treat delinquent juveniles so that they become useful and productive members of society." *In re Keith W.*, 310 Md. 99, 106 (1987). It would be illogical for the court to transfer jurisdiction if the child could not be rehabilitated in the juvenile system. *See* Steinberg & Cauffman, 6 Va. J. Soc. Pol'y & L. at 399 ("[a]menability to treatment is a factor in most waiver or transfer determinations … because if an individual is deemed not to be amenable to treatment, a rehabilitative disposition will serve no useful purpose."). Accordingly, the child's rehabilitative potential is *essential* to the amenability inquiry, and a trial court errs in failing to consider it.

Finally, courts in other jurisdictions have concluded that "amenability to treatment" refers to the child's rehabilitative potential.

See, e.g., People v. Cardona, 177 Cal. App. 4th 516, 532 (2009) ("the question of a minor's amenability to treatment … is concerned with the child's prospects for rehabilitation, not the degree of his or her criminal culpability"); *Matter of J.H.B.*, 578 P.2d 146, 149 (Alaska 1978) (by statute, a minor is unamenable to treatment if he probably cannot be rehabilitated by treatment before he is 20 years old); *see also Kent v. United States*, 383 U.S. 541, 566–567 (1966) (including, in its transfer criteria, "the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court."); Vanessa L. Kolbe, *A Cloudy Crystal Ball: Concerns Regarding the Use of Juvenile Psychopathy Scores in Judicial Waiver Hearings*, 26 Dev. Mental Health L. 1, 10 (2007) ("[t]he question of a juvenile's amenability to treatment requires an inquiry into the prospects for rehabilitation of the youth, focusing on the youth's treatability and the juvenile justice system's resources.").

C. This Court should reverse the Court of Special Appeals' judgment.

The Court of Special Appeals affirmed for four reasons. First, the Court stated that the trial court "demonstrated its consideration of Davis's amenability by expressly crediting his exemplary track record in the various programs he participated in while awaiting trial at both

Hickey and the Baltimore County Detention Center." (App.35). But the record does not support this statement: Judge Cox, the *sentencing* judge, expressly credited Mr. Davis's exemplary record at those facilities (App.32); Judge Purpura, the *transfer* judge, did not.

Second, the Court noted that the trial court observed (based on the DJS Reverse Waiver Report) that "Davis could participate in DJS behavior modification programs … although further evaluation was necessary to determine which specific programs" would be available and appropriate. (App.35). As explained above, Mr. Davis's eligibility for DJS programs was different from his amenability.[6] And the DJS report was submitted only a month into his time at Hickey. The trial court did not address his exemplary conduct in the eight months that followed, or ask DJS to conduct a "further evaluation" addressing these developments.

Third, the Court stated that the trial court "pointed out … that, after having three previous contacts with the juvenile system, this fourth contact represented a significant 'escalation of violence[,]' which the court viewed as an indication he had not been 'amenable to treatment in

[6] DJS has facilities available for all delinquent children, regardless of their charges. *See* DJS: Data Resource Guide FY 2019, https://djs.maryland.gov/Documents/DRG/Data_Resource_Guide_FY2019_.pdf (noting placements for children found to have committed murder). A child's eligibility for DJS programs can generally be assumed: the real question is amenability.

the juvenile system during his prior contacts.' " (App.35). These statements were made by the *prosecutor*, not the trial judge.

Finally, the Court relied on the trial court's observation that "when this young man is in custody, he does well, . . . he doesn't commit any offenses, . . . he's engaged . . . in treatment, but when he's not in custody he has committed an offense, a very grave, violent offense." (App.36). Tellingly, however, this statement was made during the trial court's discussion of the "nature of the offense" and "public safety" factors. The court was required to conduct a forward-looking inquiry into amenability (how likely was Mr. Davis to be rehabilitated by the treatments available in the juvenile system), but instead conducted a backward-looking inquiry into his offense (which occurred before he received DJS services).

CONCLUSION

This Court has never clarified the specific inquiry required by the "amenability to treatment" factor in the transfer and waiver statutes. This case presents an opportunity to clarify that courts must consider the child's rehabilitative potential. Petitioner respectfully requests that this Court grant certiorari, hold that the trial court abused its discretion in failing to consider amenability, and remand for proper consideration of the amenability factor.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This petition contains 3900 words.

2. This petition complies with the font, spacing, and type size requirements stated in Rule 8-112.

Kiran Iyer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of November, 2020, a copy of this petition and appendix were emailed to:

Peter R. Naugle
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Criminal Appeals Division

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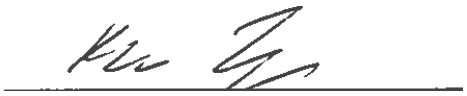

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