HOWARD JIMMY DAVIS,	IN THE
Petitioner	COURT OF APPEALS
v.	OF MARYLAND
STATE OF MARYLAND,	September Term, 2020
Respondent	No. 51

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of April, 2021, a copy of the Petitioner's Reply Brief was delivered via the MDEC system to:

Peter R. Naugle
Assistant Attorney General
Criminal Appeals Division
Office of the Attorney General
200 Saint Paul Place, 17th Floor
Baltimore, Maryland 21202

Nadia Mozaffar
Counsel for Amici Curiae
Juvenile Law Center
1800 JFK Blvd
Suite #1900B
Philadelphia, PA 19103

Kevin B. Collins
Counsel for Amicus Curiae
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001

/s/

Kiran Iyer

IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2020

NO. 51

HOWARD JIMMY DAVIS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S REPLY BRIEF

PAUL B. DEWOLFE
Public Defender

KIRAN IYER
Assigned Public Defender
CPF # 1806190077

Office of the Public Defender
Appellate Division
6 Saint Paul Street, Suite 1302
Baltimore, Maryland 21202
P: (617) 230-8264
F: (410) 333-8801
kiran.r.iyer@gmail.com

Counsel for Petitioner

INDEX

TABLE OF CONTENTS

PETITIONER'S REPLY BRIEF

Page

TABLE OF CITATIONS

Page

Cases

Statutes

Rules

Other Authorities

IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2020

NO. 51

HOWARD JIMMY DAVIS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S REPLY BRIEF

INTRODUCTION

This case presents a simple issue. The trial court must consider the child's "amenability … to treatment in an institution, facility, or program available to delinquent children." Maryland Code (2001, 2008 Repl. Vol., 2017 Supp.), Criminal Procedure Article, § 4-202(d)(3). The State concedes that this provision requires the court to consider the child's "rehabilitative potential in the juvenile system." (Resp. Br. at

49). The court has broad discretion in determining a child's likelihood of rehabilitation, but no discretion to disregard this consideration.

This Court is left to speculate whether the trial court considered Mr. Davis's rehabilitative potential in the juvenile system. The court addressed his *eligibility* for juvenile treatment—"what's available"—but not his individualized *amenability* to that treatment—"will it work." (E.145). The court noted that he was "engaged" in treatment (E.146), but did not make any finding about the likelihood that this treatment would rehabilitate Mr. Davis and prevent future offences. As the court did not set forth reasons regarding amenability with "sufficient specificity to permit meaningful review," *Kent v. United States*, 383 U.S. 541, 561 (1966), the case should be remanded.

ARGUMENT

I. The trial court must expressly consider the child's rehabilitative potential in the juvenile system, and make a finding about the child's likelihood of rehabilitation.

Transfer denials are extremely consequential—the difference, for some children, between decades in prison and a few years' specialized rehabilitative treatment.[1] Black youth like Mr. Davis, who account for

[1] The State asserts that transfer grants are "exceptional." (Resp. Br. at 35, 41). Not true: "[O]ver three quarters of cases [charged in adult court] are transferred down to juvenile court or dismissed." *See* Maryland Juvenile

"73% of youth charged as adults in MDEC counties, and 94% of youth charged as adults in Baltimore City," are disproportionately harmed by these denials. Maryland Juvenile Justice Reform Council, *Final Report: January 2021*, at 42; *see also* Juvenile Law Center ("JLC") Amic. Br. at 25 (studies show an "adultification bias" against black youth—a perception that they are "older, less innocent, and more culpable.").

Given the stakes, trial courts must expressly consider the child's rehabilitative potential in the juvenile system, and make a finding regarding the child's likelihood of rehabilitation. Without these requirements, meaningful review would be next to impossible. An appellate court could only speculate whether the trial court: (1) "actually considered" the child's rehabilitative potential, *In re Johnson*, 17 Md. App. 705, 712 (1973); (2) made a (non-clearly erroneous) finding that the child was likely to be rehabilitated, unlikely to be rehabilitated, or somewhere in between; (3) "resolved" that issue on "unreasonable or untenable grounds," *Levitas v. Christian*, 454 Md. 233, 243 (2017) (citation omitted); and (4) properly weighed the statutory factors. *See* 18 U.S.C. § 5032 (in determining whether a transfer to adult court would be in the interest of justice, the district

---

Justice Reform Council, *Final Report: January 2021*, at 43, http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnJuvRefCncl/JJRC-Final-Report.pdf.

court must consider and make findings "with regard to each factor … in the record"); *Commonwealth v. O'Brien*, 673 N.E.2d 552, 557 (Mass. 1996) ("A judge has wide discretion in determining whether a juvenile should … be tried as an adult," but "must make written findings regarding the juvenile's dangerousness and amenability to rehabilitation."); JLC Amic. Br. at 13–14 (collecting cases requiring consideration of each statutory factor).

The State expects very little of trial judges. It asserts that criminal courts need not make "on the record findings as to each factor." (Resp. Br. at 47). It warns of a parade of horribles: an "impossible onus on trial judges," a "looming threat" of reversal, and an exacting "template terminology" for transfer decisions. (Resp. Br. at 62–64). None of these "horribles" will come to pass: All trial courts must do (in transfer *and* waiver cases) is address each statutory factor with "sufficient specificity to permit meaningful review." *Kent*, 383 U.S. at 561. A trial court has broad discretion to decide the child's amenability to treatment, but must expressly consider the child's rehabilitative potential, and state its finding to permit meaningful review. The court does not need to recite any "magic words," but must address the "concept" of rehabilitative potential. *See Nalls v. State*, 437 Md. 674, 689 (2014) (trial court need not recite any "magic words" in its

announcement under Maryland Rule 4-246(b), but must "capture the concepts" of the words "knowingly" and "voluntarily").

A. The trial court must consider each of the statutory transfer factors on the record.

The State points out that there is an express requirement in the waiver statute, but not the transfer statute, that the court consider the statutory factors "individually and in relation to each other on the record," Maryland Code (1974, 2013 Repl. Vol., 2017 Supp.), Courts & Judicial Proceedings Article, § 3-8A-06(e),[2] and a requirement in Maryland Rule 11-113(g) that the waiving court "state the grounds for its decision on the record."[3] (Resp. Br. at 47). It urges the Court to "bear [this] in mind" in assessing Judge Purpura's reasons. *Id*. at 48.

The State's premise is wrong: Trial courts must consider each of the transfer factors on the record. *First*, the child has a due process right to reasons that are "sufficient[ly] specific[]." *See Kent*, 383 U.S. at 561. In *Kent*, a waiver case, the Supreme Court explained that the decision to waive jurisdiction was a "critically important action determining vitally important statutory rights of the juvenile." *Id*. at 556. Even though the applicable waiver statute "provide[d] only for full

[2] The express consideration language was added to the waiver statute by Acts of 1977, ch. 490, and was "obviously taken" from *In re Johnson*, a waiver case. *In re Ricky B.*, 43 Md. App. 645, 648 n.4 (1979).

[3] The Rules Committee has never promulgated a Rule governing transfer.

investigation," and did not even "state standards" to govern the court's decision, the "statute read in the context of constitutional principles relating to due process" required a statement of reasons "sufficient to demonstrate" the court's "careful consideration." *Id.* at 547, 557, 561. The same applies here: Transfer cases are "critically important" actions determining whether the child is prosecuted or adjudicated, and the child is entitled to reasons "sufficient to demonstrate" the court's "careful consideration" of each factor.[4] *Second*, as the *Kent* Court explained, reasons set forth with "sufficient specificity" are necessary for "meaningful review." *Id.* at 561; *see also* Maryland Criminal Defense Attorneys' Association ("MCDAA") Amic. Br. at 16–19. *Finally*, it is implausible that the Legislature intended to require reasons: (1) in waiver cases but not transfer cases, even though they involve essentially the same hearing, the same evidence, and the same factors; and (2) for decisions to hold a child in adult jail *pending* their transfer hearing, but not for the *ultimate* transfer decision.[5] CP § 4-202(h)(2).

---

[4] It is especially important that the court provides reasons demonstrating its "careful consideration" of the "amenability" and "public safety" factors: The child's "age," "mental and physical condition," and "alleged crime" are usually not contested at transfer hearings.

[5] As a practical matter, trial judges, like Judge Purpura in this case, *do* address each statutory transfer factor on the record. *See, e.g., Gaines v. State*, 201 Md. App. 1, 18, *cert. denied*, 424 Md. 55 (2011).

The State's conclusion is also wrong: Even if reasons are not required in transfer cases, where reasons are provided, they must not be "untenable" or "unreasonable." *Levitas*, 454 Md. at 243. The trial court's statement of reasons reveals that the court improperly conflated the eligibility and amenability inquiries, and did not "apply the correct legal standard" for amenability. *Id*. at 244. *See* Rep. Argument II, *infra*.

B. The trial court must expressly consider the child's rehabilitative potential, and make a finding regarding the child's likelihood of rehabilitation.

The State concedes that the trial court must consider the child's "rehabilitative potential in the juvenile system." (Resp. Br. at 49).[6] This case turns on the proper application of that legal standard. *First*, what does it mean to "consider" the child's rehabilitative potential? *Second*, what, if anything, must the trial court state on the record regarding this consideration?

Petitioner's position is modest, and does not depart from the standard practice of Maryland trial courts. A trial court has broad discretion to determine the child's rehabilitative potential, and is not

[6] The State postures that it has never "suggested that CP § 4-202(d)(3) contemplates anything other than the child's rehabilitative potential in the juvenile system." *Id*. To be clear: The State asserted in the Court of Special Appeals that Petitioner's proposed distinction between his eligibility for treatment and his amenability to treatment was a "semantic argument." (E.245–246). And the State did not take a position on the meaning of amenability in its response to the petition for writ of certiorari. So its indignation is somewhat misplaced.

statutorily required to consider specific traits.[7] The court must, however, consider the "likelihood of … rehabilitation of the juvenile" by the use of treatment available in the juvenile system. *Kent*, 383 U.S. at 546 n.4; Pet. Br. at 26–27. Put simply, the court must consider whether juvenile treatment will work for *this* child. To permit meaningful review of the court's consideration of amenability, the court must expressly consider the child's rehabilitative potential (though it is not required to use any particular language). And to permit meaningful review of the court's weighing of the statutory factors, the court must make a finding regarding the child's likelihood of rehabilitation (though once again, no particular language is necessary).

The State proclaims that Petitioner places an "impossible onus" on trial courts. (Resp. Br. at 62). But trial judges *do* consider the child's rehabilitative potential in the juvenile system, and *do* make findings regarding the child's amenability to treatment. *See, e.g., In re Ricky B.*, 43 Md. App. at 647 (trial court found appellant was "well beyond the amenability of the Juvenile Court to treat, or rehabilitate" appellant); *Brown v. State*, 169 Md. App. 442, 449, *cert. denied*, 395 Md. 56 (2006)

---

[7] *But c.f.* JLC Amic. Br. at 11 (surveys of psychologists and juvenile court judges reveal a "high degree of similarity in the specific traits" considered relevant to amenability, including "motivation for treatment," "insight about the youth's own problems," "ability to empathize or express remorse," "understanding of right from wrong," and a "supportive family.").

(trial court found that it was "difficult to predict whether [appellant] could be treated successfully in the juvenile system."); *Goloko v. State*, Case No. 441, Sept. Term 2018, slip. op. at 4 (unreported opinion) (filed Mar. 14, 2018) (trial court found juvenile's "unwillingness" to engage in juvenile services over a 4-year period "demonstrate[d] a lack of amenability to juvenile services."); *Wilkins v. State*, Case No. 1945, Sept. Term 2014, slip. op. at 8 (unreported opinion) (filed Nov. 19, 2015) (trial court found juvenile was not amenable to treatment because he was "under the supervision of the court, and … continued to commit criminal acts."). Judge Purpura's decision departed from this norm.

II. The trial court did not expressly consider Mr. Davis's rehabilitative potential in the juvenile system, or make a finding regarding his likelihood of rehabilitation.

This is an unusual transfer case. Mr. Davis, unlike many children charged as adults, had never received "treatment" in the juvenile system before this case. (Pet. Br. at 44). When afforded that opportunity, he kept an "exemplary" record (E.246) across *nine* months in juvenile detention. *Cf.* Maryland Juvenile Justice Reform Council, *Final Report: January 2021*, at 43 (youth "currently spend about 3.5 months detained … pending transfer hearing."). He was Hickey's "best youth," according to a correctional officer, "very amenable," according to

the facility's mental health examiner, and represented his unit in meetings with the Superintendent. (E.47, 82). And even though DJS does not recommend specific "treatment" at the transfer stage (Pet. Br. at 21), there was unchallenged evidence of available interventions that were suitable for Mr. Davis. (Pet. Br. at 10–11).[8]

Amenability is thus central to this case. Yet the trial court's consideration of Mr. Davis's "amenability to treatment in the juvenile system" addressed his eligibility for treatment, rather than his rehabilitative potential. (E.145). And the court did not elsewhere address the likelihood that Mr. Davis would be rehabilitated by the available treatment. This Court is left to guess whether the court found: (1) that Mr. Davis was unamenable to treatment given his alleged offense; (2) that Mr. Davis was amenable to treatment, but the nature of the alleged offense trumped that consideration; or (3) that it

[8] The State asserts that the defense did not establish "precisely what Davis would be receiving treatment *for*, in terms of 'rehabilitating' the antecedent causes of his criminal conduct." (Resp. Br. at 59). Quite the contrary: Dr. Zygala reported that Mr. Davis's already low "potential for risk would … decrease" if he was provided with "substance abuse treatment" to prevent him from "cop[ing] in self-destructive ways," "individual therapy with a trauma-focused cognitive behavioral approach" to improve his "judgment" and "decision-making skills," and "prosocial activities with peers to develop a more constructive outlet for his distress." (E.38, 40–42). The Hickey mental health clinician recommended "individual counseling" to address Mr. Davis's "poor decision making skill[s]," and "anger management to help with self-regulation." (E.55). Ms. Conway outlined "multiple programs" that would target Mr. Davis's "behaviors [and] mental health needs," and thereby "decrease his chance of recidivism." (E.49–52).

was not persuaded either way.[9] The matter should be remanded for sufficiently specific reasons to permit meaningful review.

A. This Court should not presume that the trial court knew the law and applied it correctly.

This is the first transfer or waiver case in Maryland to turn on the meaning of "amenability" to "treatment."[10] Neither this Court, nor the Court of Special Appeals, has specified that the correct legal standard for amenability is the child's rehabilitative potential in the juvenile system, or required trial courts to consider the likelihood that treatment would rehabilitate the child. A trial court cannot be presumed to know and apply law that has not been settled.[11] Furthermore, this record does not warrant any confidence that the trial court silently applied the correct standard: The court appeared to conflate Mr. Davis's eligibility for treatment with his amenability to

---

[9] Each finding would give rise to a different appellate challenge. The trial court's failure to specify its finding frustrates meaningful review.

[10] There have been two waiver cases in the Court of Special Appeals that used the word "rehabilitation," in passing, in relation to amenability. *See* Pet. Br. at 32 (citing *In re Johnson*, 17 Md. App. at 712; *Wiggins v. State*, 22 Md. App. 291, 298 n.5 (1974), *aff'd*, 275 Md. 689 (1975)). Neither of these cases elucidated a *standard* for courts to apply in waiver or transfer cases.

[11] Not surprisingly, this Court has applied this presumption where the law is clear. *See, e.g.*, *State v. Chaney*, 375 Md. 168, 179–184 (2003) (judge alleged to be unaware of statutorily-granted discretion); *Gilliam v. State*, 331 Md. 651, 673 (1993), *cert. denied*, 510 U.S. 1077 (1994) (judge "did not need to be reminded" confession must be "voluntary beyond a reasonable doubt")

treatment, and did not even implicitly suggest that it had considered Mr. Davis's likelihood of rehabilitation in the juvenile system.

B. The trial court did not expressly consider Mr. Davis's rehabilitative potential, or make a finding regarding his likelihood of rehabilitation.

The trial court's express consideration of the child's "amenability to treatment in the juvenile system" addressed Mr. Davis's eligibility for treatment, but not his amenability to treatment. (E.145). The State does not suggest otherwise, but points out that eligibility is "germane" to amenability. (Resp. Br. at 61). True, but beside the point: Eligibility and amenability are different inquiries, just as consent to search and probable cause to search are "germane" to each other but different. *See* MCDAA Amic. Br. at 8 (amenability "calls for an evaluation of a *characteristic of the child*—his rehabilitative potential—not simply *characteristics of the juvenile system* available to the child") (emphasis added).

The State is thus forced to look beyond the trial court's express consideration of amenability to treatment. It emphasizes the trial judge's statement that she "review[ed]" the reports admitted into evidence, "hear[d] the testimony of experts," and "consider[ed] argument of counsel." (Resp. Br. at 58) (E.144). To break this down: The "reports" and expert testimony addressed Mr. Davis's outstanding

adjustment to juvenile custody, and the treatment available. The prosecutor and defense counsel contested Mr. Davis's amenability to treatment, but did not address the applicable legal standard. *Compare* E.138 (Mr. Davis was "amenable to treatment" because he was "cooperative" and had an "agreeable personality") *with* E.142 (Mr. Davis was not "amenable to treatment" because of this "escalation of violence."). This Court can safely assume that the trial court considered the evidence and the arguments, but can only speculate whether it applied the correct legal standard.

The State also relies on the trial court's statement in its reasons addressing the "nature of this offense": "It's clear, 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." (Resp. Br. at 61–62) (E.146). Petitioner does not dispute that the court acknowledged his positive record in juvenile detention. But the court stopped short of addressing his rehabilitative *potential*: whether, if he was transferred to juvenile jurisdiction and adjudicated delinquent, the available

services would rehabilitate him and prevent future offending.[12] Absent such consideration, and absent any finding, this Court cannot conclude, with any confidence, that the trial court: (1) applied the proper legal standard for amenability to treatment; (2) made an amenability finding (that was not clearly erroneous); and (3) exercised its discretion on reasonable grounds. A remand is necessary.[13]

CONCLUSION

Petitioner respectfully requests that this Court vacate the trial court's decision and remand for further proceedings.

Respectfully submitted,

Paul B. DeWolfe,
Public Defender

Kiran Iyer
Assigned Public Defender

Counsel for Petitioner

---

[12] Instead, the court immediately pivoted to the "grave, violent" offense committed *before* he entered DJS custody, reinforcing the conclusion that it was not actually considering the likely effectiveness of juvenile treatment.

[13] On remand, the trial court should not "bas[e] its decision entirely on the nature of the alleged offense." JLC Amic. Br. at 16–17; *see also* MCDAA Amic. Br. at 15 (the trial court "misapplied the law" by "assigning undue weight to the nature of the alleged crime."). Transfer hearings are *not* sentencing proceedings, and transfer denials are *not* punishments. Considerations of "individual punishment" and "general deterrence" (Resp. Br. at 41) have no role prior to an adjudication of guilt. Pet. Br. at 36.

CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3156 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

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

/s/

_____

Kiran Iyer