

[View Case](#)[Cited Cases](#)[Citing Case](#)**MARINE v. STATE**

607 A.2d 1185 (1992)

Frederick M. MARINE, Defendant Below, Appellant, v. STATE of Delaware, Plaintiff Below, Appellee.

Supreme Court of Delaware.

Decided: May 15, 1992.

Bernard J. O'Donnell (argued), Brian J. Bartley and Duane D. Werb, Asst. Public Defenders, Wilmington, for appellant.

Richard E. Fairbanks, Jr., Chief of Appeals Div. (argued), Dept. of Justice, Wilmington, for appellee.

Before HORSEY, MOORE, WALSH, and HOLLAND, JJ., and ALLEN, Chancellor, constituting the Court en Banc.

[607 A.2d 1187]

HORSEY, Justice:

Defendant, Frederick M. Marine, was charged at the age of fourteen with murder in the second degree in the death of Amanda Hemphill, who was ten years old at the time of her death. Marine was later indicted by a grand jury for murder in the first degree. Following a reverse amenability hearing,² he was prosecuted as an adult in Superior Court and found guilty by a jury of murder in the second degree, and convicted and sentenced to life imprisonment. In his appeal, Marine raises four claims of error:

(1) That his incriminating oral statement made at his home during police questioning about his involvement in Amanda's death and his later taped confession at the police station were taken in violation of his Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and therefore erroneously admitted at trial;

(2) That Superior Court was without jurisdiction under 10 *Del.C.* § 921(2) to sentence him to the lesser included offense of murder in the second degree;

(3) That to otherwise construe the Delaware statutory scheme would deny him equal protection of the law by treating him differently from another juvenile guilty of the same conduct who, if originally charged with murder in the second degree, would be subject to Family Court's exclusive jurisdiction; and

(4) That Superior Court committed legal error in the reverse amenability proceeding, 10 *Del.C.* § 939(b).

We hold: (1) that Marine's Fifth Amendment rights under *Miranda* were not violated, either in the police questioning of him in his home, or in his later confession at the police station; (2) that the Delaware statutory scheme, 10 *Del.C.* § 921(2)a and b, confers jurisdiction on Superior Court to convict and sentence a juvenile such as Marine as an adult for any lesser included crime of murder in the first degree to which he may be found guilty; and (3) that the Delaware statutory scheme so construed does not deny Marine the equal protection of the laws. However, we conclude that Superior Court committed legal error in its consideration of the statutory factors relative to Marine's reverse amenability application under 10 *Del.C.* § 939(b). Therefore, we remand this case for a new reverse amenability hearing.



Search Decisions



Comments (0)  

FACTS

On Saturday, November 21, 1987, about 8:00 a.m., the Smyrna, Delaware, police found Amanda Hemphill's body in a local creek bed. The previous afternoon, Amanda had visited with girlfriends at the home of a classmate in an adjacent residential neighborhood. When Amanda failed to return home before dark for dinner, her mother called the Smyrna police to report her daughter missing. Due to weather conditions and darkness, the police were unable to locate Amanda's body until the next morning.

Amanda's body was found lying face down in shallow water in Providence Creek, a short distance from her home, and approximately 300 feet from where she had parted company with one of her girlfriends to walk the remaining distance home alone. She had been beaten about the face and head and had bruises on her upper body. Under her body was found a seven foot steel grate. In the vicinity, the police discovered

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what they described as a yellow "cool" shirt. An autopsy completed the following day found the cause of death to have been strangulation from a choke hold, neither manual nor ligature.

With little evidence and no suspects, the Smyrna Police brought in detectives of the Delaware State Police to lead the investigation. Later that day, State Detective Richard A. Ashley and Smyrna Police Detective William Wilson, surveyed the nearby residential areas, going from house to house seeking information and leads. The police learned that a young people's party had been held the previous evening at the home of Margaret and Bruce Leister. At the Leister home, the police spoke to Lisa Marine, Mrs. Leister's sixteen-year-old daughter. Lisa stated that Amanda Hemphill had not been at the party. The police then asked whether Lisa had seen anyone near the creek the previous day, and she stated that her brother Frederick Marine had been playing near the creek, which ran behind their house. Lisa also stated that she had noticed that her brother was wet and muddy when he returned home, and when she asked him what happened, he told her he had fallen into the creek while trying to catch a turtle. When the police asked if they could speak with her brother, Lisa informed them that he and their parents were away for the weekend on a camping trip and would return the following evening. The police asked Lisa to have her parents call them when they returned home.

Over the weekend, Detectives Ashley and Wilson continued their investigation. The detectives also contacted Smyrna Middle School for background information on both Frederick Marine and another student. Ashley and Wilson learned that Marine had attended special education classes in junior high school and that Marine was considered to be a problem child in eighth grade.

Sunday evening, about 8:00 p.m., Detectives Ashley and Wilson went to defendant's home after receiving a phone call that the family had returned home. By the time the police arrived, Mrs. Leister had been informed by her neighbors of Amanda Hemphill's death and she understood why the police were there. Mrs. Leister, or her nineteen-year-old son John Marine, invited the police to come in.

The Leisters were cooperative. The detectives assured them that their reason for wishing to question Mrs. Leister's son Frederick was that the victim had been found in the creek that ran behind their house. They assured everyone present, including defendant, that he was not a suspect — they simply wanted to know where he had been the previous Friday afternoon and whether he had seen anything unusual in the vicinity of the creek. The questioning of defendant began in the presence of his parents, brother and sister.

Defendant initially denied having been in the creek the previous Friday afternoon. Defendant stated that he had been in his backyard building a fort. The police then asked defendant's mother whether defendant owned a yellow "cool" shirt. Defendant's mother stated that he did, and she proceeded into defendant's bedroom to look for the shirt, with defendant and the detectives following.

Detective Ashley asked defendant what shoes he had worn when he was playing Friday afternoon. Defendant stated that he owned two pairs of shoes, both of which he pointed to near his bed. Detective Ashley noticed, at the foot of defendant's bed, a third pair of shoes, which appeared to be muddy and damp. Defendant immediately acknowledged them also to be his shoes. He then handed over the shoes, stating that he had worn them in the creek the previous week. Detective Ashley pointed out that the shoes appeared still to be damp and muddy.

Defendant also initially denied knowing the victim, whereupon his brother, John Marine, realizing that in fact Fred knew Amanda, told defendant to tell the truth. Detective Ashley then recounted to defendant his sister Lisa's statement the previous evening — that she had seen him coming from the direction of the creek on Friday afternoon. Defendant then admitted that he had been in the creek that afternoon,

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but denied having seen Amanda. He reiterated that he had been building a fort. Defendant's mother heatedly told her son to tell the truth and to tell the detective whatever he knew.

Detective Ashley then took defendant's stepfather aside. Ashley told Mr. Leister that he thought Fred was hiding something and that he thought Fred might know who had murdered Amanda Hemphill. Detective Ashley returned to defendant's bedroom and told him that he seemed to be hiding something and that he wasn't being completely truthful. Defendant began to cry. He then stated that he had seen a man with a gun running from the creek, but continued to deny having seen Amanda.

Detective Ashley then told defendant that something just didn't add up; that it "could have been an accident." Defendant's mother told defendant, "If you did something to the little girl and it was an accident, just say so." Defendant again began to cry. He asked everyone to leave his room except Ashley. Wilson also remained in the room, at Ashley's request. Ashley then put his arm around defendant. John Marine later testified that he overheard Detective Ashley assure defendant that Ashley was defendant's friend. John Marine further recalled the detective stating to defendant that nobody in the neighborhood liked defendant and that his neighbors thought that he had killed Amanda. Detective Ashley denied making any such statements. Defendant then confessed to Detective Ashley that he had killed Amanda, but that it had been an accident. Defendant explained that he had been playing with a steel grate in the creek and when Amanda came near it, the grate fell and accidentally hit Amanda in the head, knocking her down. When defendant couldn't pick her up, he became scared and ran.

Detective Ashley then called the Leisters back into the room and asked defendant to repeat before them the account he had just given the detectives. Detective Ashley then informed the parents that he was taking defendant to the State Police station for further questioning and requested that defendant's parents join them there. It was then 9:00 p.m.; the police questioning at defendant's home had lasted about 50 minutes.

At the police station, defendant was placed in a room, where his parents joined him a few minutes later. After ten or fifteen minutes, the police, including Detective Ashley, entered the room and read defendant his *Miranda* rights. When Detective Ashley asked defendant if he understood his rights, defendant responded that he was uncertain. Detective Ashley then repeated and explained to defendant each of his *Miranda* rights individually. Defendant then stated that he understood his rights. The police then asked defendant to repeat his account, which Marine did in a statement that was taped and lasted seventeen minutes. Defendant retold the account he had previously given at home, of having accidentally hit victim with the steel grate. The tape was then turned off, and the accounts differ as to what happened over the next thirty minutes.

Detective Ashley recalls telling defendant that the police knew how the girl was killed, and that defendant's version could not have happened. John Marine remembers Detective Ashley stating that the little girl had been beaten and then choked to death. When

defendant then said that his hand had slipped around Amanda's neck in the course of a shoving match, the detective told defendant that he was lying again. Defendant's stepfather, Mr. Leister, recalls that the detective told defendant that it had been a choke hold and then asked defendant if he had lifted her up, to which defendant replied, "I guess so." According to John Marine, Detective Ashley then proceeded to give a detailed explanation of how Amanda had been beaten and then lifted off the ground by a choke hold with an arm around her neck, after which defendant agreed with the detective's description. Detective Ashley states that defendant volunteered, without prompting, that there had been a fight between defendant and Amanda, and that defendant had picked her up from behind with his arm around her neck and held her until she stopped moving and then had dropped her

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in the creek. The detective denied telling defendant that Amanda had been strangled, but did admit telling defendant that they had found bruises on her chest and throat.

On further urging from defendant's step-father, as well as his brother John, defendant then gave a different statement. Defendant stated that he had been down by the creek building a bridge when Amanda Hemphill walked up to him. She told him he couldn't build a bridge there since it was on someone else's property. Defendant stated that he told her to leave him alone, but "she got in his face and he pushed her into a tree and she hit her chest and fell down." She got up and "got in his face" again. He hit her several more times and grabbed her from behind. He placed his arm around her neck, with the crook of his elbow at her throat. Defendant described how he lifted victim up off the ground and tightened his arm around her neck. When she stopped moving, defendant let her feet touch the ground and shoved her into the creek, face down. Defendant stated that he thought he saw her leg move. He then heard his sister calling him to the house so he ran home. Detective Ashley turned the tape recorder back on and defendant repeated on the tape what he had just said. Defendant was then placed under arrest and charged with murder in the second degree. Defendant was indicted on December 8, 1987 by a grand jury for murder in the first degree.

Prior to trial the defense moved to suppress both Marine's oral admission made at home and his taped confession at the police station. After an evidentiary hearing, Superior Court denied Marine's motions and admitted at trial both his oral admission at home and his taped confession at the police station. On appeal, Marine reasserts a three-fold argument against the trial court's rulings: (1) that his admission at home was obtained as a result of custodial interrogation without his having been previously *Mirandized*; (2) that his waiver of *Miranda* rights at the station was not knowingly and intelligently made; and (3) that both of his statements were involuntary and the result of police coercion through the use of manipulative and deceptive practices.

A.

As to his oral admission at home, Marine asserts that the police came to his home for the purpose of obtaining an incriminating statement from him because by then he was their primary, if not only, suspect. Marine further asserts that even if his initial questioning was "noncustodial" in nature, it became a custodial interrogation as soon as the police "caught Marine in a lie." Marine refers to his initial denial of having known Amanda Hemphill and his denial of having been in the creek within the past ten days. At that point in the interrogation, Marine argues, the police had probable cause to suspect him, if not to arrest him, for having caused her death. Therefore, the defense argues that the admission at trial of Marine's confession at home to having accidentally caused victim's death was erroneous due to the failure of the police to earlier *Mirandize* him.

The State concedes that by Sunday evening, Marine had become the "focus" of the investigation. The State further concedes that the questioning of Marine by Detectives Ashley and Wilson constituted "interrogation" as defined under *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). The State further concedes that the *Miranda* rule is fully applicable to juveniles. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1987). However, the State contends that *Miranda* warnings were not required because the interrogation was not "custodial" as defined under *Miranda*.

* * *

We turn to defendant's first argument, that his Fifth Amendment rights as extended by *Miranda* were violated by his interrogation at home. The Fifth Amendment to the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness

against himself."³ *Miranda* extended that right to in-custody interrogation of a person suspected or accused of a crime and established a procedure to assure that custodial interrogations do respect that right. More specifically, it established that law enforcement officials may not constitutionally subject citizens to custodial interrogation without their having been first advised of certain rights protective of their Fifth Amendment privilege against self-incrimination. *Miranda*, 384 U.S. at 436, 86 S.Ct. at 1602, 16 L.Ed.2d at 694.⁴ The obligation of police to duly warn a suspect of his Fifth Amendment rights before interrogation was crafted to address "the problem of confessions obtained from suspects in police custody."

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*Not only is custodial interrogation ordinarily conducted by officers who are acutely aware of the potentially incriminatory nature of the disclosures sought, but also the custodial setting is thought to contain inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. To dissipate the overbearing compulsion ... caused by isolation of a suspect in police custody, the *Miranda* Court required the exclusion of incriminating statements obtained during custodial interrogation unless the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it. We have consistently held, however, that this extraordinary safeguard does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.*

Minnesota v. Murphy, 465 U.S. at 429-30, 104 S.Ct. at 1143-44, 79 L.Ed.2d at 421 (quoting *Roberts v. United States*, 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622, 631 (1980)) (emphasis added) (citations omitted). Thus, such warnings are required only where (1) questioning of a suspect rises to the level of "interrogation"; and (2) the interrogation occurs while the suspect is either in "custody" or in a "custodial setting." *Miranda*, 384 U.S. at 460, 461, 86 S.Ct. at 1620-21, 16 L.Ed.2d at 715-16. *Miranda* describes a custodial interrogation as meaning "questioning initiated by law enforcement officers after the person has been taken into custody or otherwise deprived of his freedom in any significant way." *Id.* at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706.

The legal standard used to determine "custody" for *Miranda* purposes has been well defined. "[T]he ultimate test [is] simply whether there [was] ... 'restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 (1983). See *Minnesota v. Murphy*, 465 U.S. at 430-31, 104 S.Ct. at 1144, 79 L.Ed.2d at 421; *Berkemer v. McCarty*, 468 U.S. 420, 439-41, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317, 334-35 (1984); *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). *Miranda* rights have been extended beyond formal in-custody interrogation in a police station: to questioning of a suspect while in prison on a separate offense, *Mathis v. United States*, 391 U.S. 1,

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88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), and to questioning of a suspect in his home "after he has been arrested and is no longer free to go where he pleases." *Oregon v. Mathiason*, 429 U.S. 492,

495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714, 719 (1977) (citing *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969)). *Orozco* extended the ruling in *Miranda* to police questioning of a suspect in his home only where the defendant was then "under arrest and not free to leave when he was questioned." *Orozco*, 394 U.S. at 327, 89 S.Ct. at 1097, 22 L.Ed.2d at 315. Justice White, in a strongly worded dissent, joined in by Justice Stewart, found even this extension of *Miranda* to be "unwarranted," in ignoring *Miranda's* purpose: "to guard against what was thought to be the corrosive [sic] influence of practices which station house interrogation makes feasible." *Id.* at 329, 89 S.Ct. at 1098, 22 L.Ed.2d at 316 (White, J. dissenting). Also instructive is the Court's insistence in *Mathiason* that interrogation merely in a "coercive environment" cannot be equated with custodial interrogation. The Court stated:

[A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a coercive environment. Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him in custody. It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

Mathiason, 429 U.S. at 495, 97 S.Ct. at 714, 50 L.Ed.2d at 719 (emphasis in original).

The determination in a particular case of whether interrogation occurs in a custodial setting, so as to trigger the requirement of *Miranda* safeguards, must be made by applying an "objective reasonable man standard" to a totality of circumstances test. In *Torres v. State*, this Court recently quoted from *United States v. Phillips*, 11th Cir., 812 F.2d 1355, 1360 (1987):

[I]n order for a court to conclude that a suspect is in custody, it must be evident that, under the totality of the circumstances, a reasonable man in the suspect's position would feel a restraint on his freedom of movement fairly characterized as that 'degree associated with a formal arrest' to such an extent that he would not feel free to leave.

Christie, C.J. (Del.Supr.1992) 608 A.2d 731 (ORDER). The Court in *Phillips* further explained:

The Court has also expressly adopted an objective, reasonable man standard as the appropriate test in cases involving custody issues because, unlike a subjective test, it is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does [it] place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.' Berkemer v. McCarty, 468 U.S. 420, 442 n. 35, 104 S.Ct. 3138, 3152 [82 L.Ed.2d 317, 336] (1984) quoting People v. P., 21 N.Y.2d 1, 286 N.Y.S.2d 225 [232], 233 N.E.2d 255, 260 (N.Y.1967). In applying the objective test, therefore, the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Phillips, 812 F.2d at 1359-1360 (citation omitted). Here, following the suppression hearing, the trial court ruled:

The Court is persuaded that although the defendant was a suspect in the minds of the police there was no formal arrest or restraint on his freedom of movement to the degree associated with a formal arrest until after his last statement at approximately 9:00 p.m. Because the defendant was not in custody at his

residence, Miranda warnings were not required there. Our standard of review of the trial court's finding that Marine was not in custody during his interrogation at home is well established. A determination of whether a defendant is in custody for Miranda purposes, being a question of fact for a trial court to make, will be sustained by an appellate court unless clearly erroneous. *Albury v. State*, Del.Supr., 551 A.2d 53, 60 (1988); *Martin v. State*, Del.Supr., 433 A.2d 1025, 1032-33 (1981), cert. denied, 454 U.S. 1151, 102 S.Ct. 1018, 71 L.Ed.2d 306 (1982); *State v. Rooks*, Del.Supr., 401 A.2d 943, 949 (1979). The trial court, in concluding that Marine was not in custody while being interrogated at home, summarized the facts: The relevant facts for purposes of the motion are as follows: At approximately 8:00 p.m., on November 23, 1987 Detectives Ashley and Wilson arrived at the home of Mr. and Mrs. Bruce Leister for the purpose of interviewing the defendant Fred Marine, Mrs. Leister's son, regarding the death of Amanda Hemphill, age 10. The defendant at the time was fourteen years and five months old, in the eighth grade and of at least average intelligence. At school he was in special education classes for the socially and emotionally maladjusted. The defendant's 19 year old brother John Marine knew the police wanted to talk to the defendant and John had telephoned them earlier to advise that the defendant and his parents were home. They had returned from a trip out of state and had yet to eat dinner. The police were given permission to enter the home and the initial interview of the defendant occurred in Mr. and Mrs. Leister's bedroom in the presence of his mother and other family members at approximately 8:10 p.m. Discussions soon focused on items of the defendant's clothing and the place of the interview moved to the defendant's bedroom. During the course of the interview, Detective Ashley explained to the defendant's mother that the defendant was a suspect, but that he was not being accused. Both the defendant's brother and his mother told the defendant to tell the truth. In response the defendant said he was telling the truth and he did not know anything. Defendant then went with his mother to the kitchen where she strongly urged him to tell the truth in the presence of Detective Wilson. Meanwhile, in a bedroom Detective Ashley told Mr. Leister he did not believe the defendant and he explained some of his findings in the case. Mr. Leister agreed with Detective Ashley's assessment. The defendant, his mother, and Detective Wilson returned to the bedroom where the defendant's mother again urged him to tell the truth stating she could not believe he did it, but she thought he saw something. The defendant began to cry and then told of seeing a man running from the creek where the victim was found. Detective Ashley told the defendant that things did not add up; that he was only trying to find out what happened. He said that for all he knew it could have been an accident. Mrs. Leister then told her son: If you did something to that little girl and it was an accident, just say so. Defendant began to cry and he asked everyone to leave the bedroom except Detective Ashley. Ashley then sat on the bed next to the defendant and befriended him by placing his right arm around him. He asked the defendant to tell the truth. The defendant then explained that it was an accident giving various details of what happened to Amanda Hemphill at the creek. The detective then escorted the defendant out of the bedroom and told Mr. and Mrs. Leister to come to Troop 3. The detectives transported the defendant to Troop 3 without questioning him or discussing the case. The defendant was not handcuffed, but the detectives did consider him in custody. On appeal, Marine argues that the trial court abused its discretion and erred as a matter of law in failing to find Marine's Miranda rights to have attached as soon as the police caught the defendant in a lie, and especially once they found the muddy shoes, in view of Marine's original denial of having been in the creek the previous Friday afternoon and of having known Amanda Hemphill. Marine argues that the police at that point had probable cause to suspect the defendant was the culprit and indeed probable cause to place the defendant under arrest. We reject Marine's contention that his interrogation shifted as a matter of law from noncustodial to custodial the moment he was caught in a lie. The defense's contention that Marine thereby became a prisoner in his house

[and] ... it was no different than if he had been at the Troop, handcuffed and alone with the police, is erroneous for two reasons: one, it misstates the question; and two, it simply disputes the findings of the trial court to the contrary, without establishing them to be clearly erroneous. The fundamental flaw in Marine's contention is that he would have us determine the existence of custody from the perspective of the interrogator. See *State v. Roman*, 70 Haw. 351, 772 P.2d 113, 116 (1989). Such a rule is plainly at odds with the well-established standard and contrary to Miranda's *raison d'etre*. The evil which the Fifth Amendment and Miranda seek ultimately to eliminate is coercion. *Shipley v. State*, Del.Supr., 570 A.2d 1159, 1167 (1990). The existence of custodial interrogation is therefore to be determined from the perspective of a reasonable man in the position of the suspect, not from the perspective of the police. *United States v. Phillips*, 11th Cir., 812 F.2d 1355 (1987). B. Marine next contends that his confession at the station house was not established by the State to have been the product of a knowing and intelligent waiver of his Miranda rights. The general requirements for a suspect's waiver of his Miranda rights under the Fifth Amendment prior to in-custody interrogation are well established. [A] suspect may waive his Fifth Amendment privilege, 'provided the waiver is made voluntarily, knowingly and intelligently.' *Colorado v. Spring*, 479 U.S. 564, 573, 107 S.Ct. 851, 857, 93 L.Ed.2d 954, 965 (1987). The thrust of the fifth amendment is to prevent government coercion. *Shipley v. State*, Del.Supr., 570 A.2d 1159, 1167 (1990) (citing *Colorado v. Connelly*, 479 U.S. 157, 170, 107 S.Ct. 515, 523, 93 L.Ed.2d 473, 486 (1986)). That is, a suspect must be free from government compelled self-incrimination. Thus, the Miranda rule is clear. In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation. *Fare v. Michael C.*, 442 U.S. 707, 717, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197, 207 (1979). The record is clear that Detective Ashley carefully and fully delineated the requirements of Miranda. Nevertheless, Marine thereafter made inculpatory statements without benefit of counsel. The question therefore becomes whether the State met its burden of proving that this waiver by Marine of his privilege against self-incrimination and his right to retained or appointed counsel was knowing and intelligent. The State's burden is proof by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. at 168, 107 S.Ct. at 522, 93 L.Ed.2d at 485. The question of whether an accused has waived his rights is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case. This determination must also be made under a totality of the circumstances inquiry. *Fare*, 442 U.S. at 725, 99 S.Ct. at 2571-72, 61 L.Ed.2d at 212. A judicial inquiry into a valid waiver of a suspect's Miranda rights has two distinct dimensions: First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410, 421 (1986). The record reveals that before Detective Ashley advised defendant of his Miranda rights, Marine had been placed in an interview room at the station for approximately fifteen minutes. Marine's parents and his brother then joined him. According to Detective Ashley, Marine was then in custody, but had not been placed under formal arrest. The Detective then read Marine his rights for the first time.⁵ Asked whether he understood his rights, Marine responded, sort of. When asked, Is there anything in there that you don't understand, Marine responded, I don't know it that much. The Detective then turned to Marine's mother and asked her if she understood

the rights, to which she replied, yes. The Detective then stated to Marine's mother: At the house he wasn't in custody and he wasn't being accused. He was merely as a suspect at that point. Now he's in custody and before any formal interviews are taken we read Miranda warnings. Do you understand Miranda warnings? When Marine's mother replied, No, sir, I don't recall exactly, Detective Ashley stated to Marine: We'll go over them step by step, okay, just for you. I'm sure your mother and your stepfather, okay. You have the right to remain silent. The first part of the Miranda warnings merely stating that you have the right. You don't have to say anything if you don't want to say anything, okay. The second part says anything you say can and will be used against you in a court of law. It merely means what we say here in this statement will be used against you in a court if need be. The next thing, number three, you have the right to talk to a lawyer and have him present with you while you're being questioned. It states if you want a lawyer you can have one. I can't keep you from having a lawyer. The fourth one states if you can't afford to hire a lawyer one will be appointed to represent you before any questioning if you wish one. That merely states if you can't afford an attorney, that you're indigent or you don't have the funds to afford an attorney, that the State will appoint one to represent you before any questioning. If you don't want to talk now, you want an attorney, the State will appoint one for you if you can't afford one or if your parents can't afford one. The fifth one if you decide to answer any questions with or without an attorney present you may stop at any time during the questioning. This means whenever you feel like you don't want to say anymore, don't want to talk anymore, it's your right, your privilege to say I stop, I don't want to do anymore. Whether you have an attorney here with you or not if you're by yourself or with your parents. Is there anything in here you don't understand? According to Detective Ashley, Marine responded, I understand it now. On the record testimony before it, the trial court, after reviewing the tape recorded statement, found that defendant's Miranda rights had been carefully explained to him by Detective Ashley in the presence of defendant's mother, stepfather and brother; that defendant had expressly indicated that he understood his rights; and that Marine's waiver of his Miranda rights was voluntary and with no coercive police activity or overreaching by them. On appeal, the defense does not directly challenge the trial court's findings of waiver as clearly erroneous and not supported by the record. Nor does defendant argue that the trial court committed legal error by misapplying constitutional principles or controlling federal or state precedent. Rather, defendant seeks to enlarge the requirements of waiver applicable to a youth of Marine's age, and specifically as to Marine, by requiring the police, first, to inform Marine that any incriminating statement made could be admitted at trial if he were later prosecuted as an adult, as in fact occurred; and second, to require the giving of Miranda warnings to the parents as well, and to provide parents and child an opportunity to discuss the matter in private before the child reaches a decision whether to waive. Additionally, defendant argues that the trial court abused its discretion in failing to find Marine's waiver to have been procured by police duplicity and deception amounting to coercion by failing to give sufficient weight to Marine's age and limited intellect and maturity. Marine's arguments run counter to teachings of both the United States Supreme Court and the rulings of this Court, both with respect to the breadth of the warning to be given and the suspect's awareness of the consequences of a waiver. The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. The Fifth Amendment's guarantee is both simpler and more fundamental: A defendant may not be compelled to be a witness against himself in any respect. The Miranda warnings protect this privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The Miranda warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that

whatever he chooses to say may be used as evidence against him. *Colorado v. Spring*, 479 U.S. 564, 574, 107 S.Ct. 851, 857-58, 93 L.Ed.2d 954, 966 (citations omitted). See also *Oregon v. Elstad*, 470 U.S. 298, 316, 105 S.Ct. 1285, 1297, 84 L.Ed.2d 222 (1985). (This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.) This Court has recently endorsed this principle. The fifth amendment does not guarantee a fully informed choice or the adequacy of an attorney's advice, nor is the right to remain silent concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' *Shipley v. State*, Del.Supr., 570 A.2d 1159, 1168 (1990) (citing *Colorado v. Connelly*, 479 U.S. at 170, 107 S.Ct. at 523, 93 L.Ed.2d at 486, quoting *Oregon v. Elstad*, 470 U.S. at 305, 105 S.Ct. at 1291, 84 L.Ed.2d at 229)) (emphasis added). The question in each case is whether the defendant's will was overborne by official coercion when a statement was made. *Baynard v. State*, Del.Supr., 518 A.2d 682, 690 (1986) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 2047-48, 36 L.Ed.2d 854, 862 (1973)). The benefit of the *Miranda* rule, with its specificity and relative simplicity, would, we think, be undermined by the adoption of variations on the rule for minors depending upon the crime to be charged and the age and intellectual and emotional makeup of the particular minor. We see no reason not to determine a question of *Miranda* waiver under a totality of the circumstances test. See *Fare*, 442 U.S. at 725, 99 S.Ct. at 2572, 61 L.Ed.2d at 212. (This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.) In this case, the record reveals that the trial judge adhered to the previous admonitions of this Court that the confessions and admissions of a juvenile require special scrutiny, and did so in the context of applying the totality of the circumstances test. *Haug v. State*, Del.Supr., 406 A.2d 38, 43 (1979). The Court found: In this case, the defendant was fourteen years and five months old, of average intelligence and in the eighth grade. Although he was in special classes for the socially and emotionally maladjusted, his ability to understand his constitutional rights was not impaired. The questioning at his residence lasted only fifty minutes and the questioning at Troop 3 only forty-eight minutes all between the evening hours of 8:00 and 11:00 p.m. The defendant was provided soda and crackers at Troop 3 and made no other requests for food. At Troop 3 he was allowed time alone with his family before any questioning. At Troop 3 all questioning was preceded by a careful explanation of the defendant's constitutional rights and the defendant's unequivocal waiver of them. The detectives made no threats and engaged in no physical coercion. All of the questioning was in the presence of the defendant's family except for the brief period in his bedroom when the defendant asked to speak with Detective Ashley alone. Although Detective Ashley on various occasions urged defendant to be honest and tell the truth, adjurations to tell the truth unaccompanied by any threat, promise, trick or improper inducement sufficient to overbear the defendant's will do not make a statement involuntary. Defense counsel points to the several instances when the defendant's mother, stepfather or brother exhorted the defendant to tell the truth at circumstances which render the statements involuntary. These exhortations were not made on behalf of the police and in any event none of them was accompanied by any threat, promise, trick or improper inducement. I am satisfied by a preponderance of the evidence that the defendant's will was not overborne. Although each case must be decided on its own facts, I note cases in several other jurisdictions have refused to suppress a juvenile's statement as involuntary simply because a parent or guardian urged the juvenile to tell the truth to the police. * * * * * Furthermore, I am satisfied there was no coercive police activity in this case. In *Colorado vs. Connelly* 479 U.S. 157 decided in 1986 the United States Supreme Court held

that coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the due process clause. In reaching this conclusion, the Court has been guided by the rule that special consideration must be employed to determine the admissibility of statements made by a juvenile. Even when guided by this high standard, the Court must base its decision on the facts as I find them to be from the evidence. The Superior Court then denied the defendant's motion to suppress, reserving to defendant the right to argue before the jury the issues of voluntariness and the weight to be given to this evidence. In *Torres*, this Court addressed and rejected a contention that *Miranda* warnings to juveniles should be expanded to include an additional warning that the juvenile could be tried and convicted as an adult. *Torres v. State*, Del.Supr., No. 151, 1990, Christie, C.J. (Feb. 7, 1992) (ORDER), at 6. See *Haug*, 406 A.2d at 43 (rejecting the interested adult rule); *State v. Benoit*, 126 N.H. 6, 490 A.2d 295 (1985). Here, too, we find Superior Court to have conducted a careful evaluation of Marine's waiver in the context of a totality of the circumstances test. The record supports the court's finding that Marine's waiver of his rights was both knowing and voluntary and that his will was not overborne by police coercion or improper inducement. Indeed, the *Miranda* warnings given Marine included the explicit admonition of Detective Ashley that anything Marine said will be used against you in a court if need be. We decline to find those warnings to be deficient as a matter of law. Marine was thereby fully warned of the consequences of his failure to assert his *Miranda* rights after a full and adequate explanation of those rights. The record supports the required dual findings: (1) that the relinquishment of his right was the product of a deliberate choice, free of official intimidation, coercion or deception; and (2) that Marine's waiver was made with awareness of both the right being abandoned and the consequences of the abandonment. *Moran v. Burbine*, 475 U.S. at 421, 106 S.Ct. at 1141, 89 L.Ed.2d at 420-21.6 We therefore affirm Superior Court's refusal to suppress the admission of Marine's station house confession based on the contention that Marine's *Miranda* rights were not validly waived. C. We now turn to Marine's remaining contention that, apart from the requirements of *Miranda*, both his oral admission at home and his station house confession were inadmissible because they were involuntary. In support, he states that his will was overborne and concludes that none of his statements were the product of a rational intellect and free will. See *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 1154, 20 L.Ed.2d 77, 79 (1968); *Jackson v. Denno*, 378 U.S. 368, 390, 84 S.Ct. 1774, 1788, 12 L.Ed.2d 908, 923 (1964); *Shipley v. State*, Del.Supr., 570 A.2d 1159, 1167-68 (1990); *Baynard v. State*, Del. Supr., 518 A.2d 682, 690 (1986). The question of voluntariness of an admission is a question of fact to be determined from the totality of the circumstances. *Shipley*, 570 A.2d at 1168; *Baynard*, 518 A.2d at 690; *State v. Rooks*, Del.Supr., 401 A.2d 943, 949 (1979). Here also, Marine does not contend that the trial court committed legal error by applying an erroneous standard of review for determining whether his statements were voluntary. Conceding that the evidence must be viewed in a light most favorable to the State, Marine contends that the trial court's finding of lack of police coercion and intimidation at home and at the station was clearly erroneous. The defense argues that this is a clear case of police overreaching and coercive interrogation, requiring this Court to conclude that the trial court's determination that Marine's confessions were voluntary is not supported by substantial evidence. For an admission or confession to be found involuntary, the court must find that the admission or confession was the result of coercive government misconduct which is causally related to the confession. *Colorado v. Connelly*, 479 U.S. at 163, 107 S.Ct. at 520, 93 L.Ed.2d at 482 (absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law). Defendant contends that the record requires a finding that the free will of Marine was overborne by the police, acting in concert with Marine's family, to bully and intimidate Marine into

ultimately admitting his crime. However, defendant points to no evidence of police coercion of Marine rising to the level of overreaching or outrageous behavior. *Id.* Giving due consideration to defendant's age, we can find no evidence of excessive or inappropriate police conduct sufficient to rebut the trial court's findings. Nor does the defense point to any evidence that Marine was not competent in the sense of being unable to exercise his free will. *Id.* at 173, 107 S.Ct. at 525, 93 L.Ed.2d at 488 (Stevens, J., concurring). The trial court found all of defendant's statements to have been voluntary within the meaning of the due process clause. We affirm such findings as supported by competent evidence, and not clearly erroneous. *Albury v. State, Del.Supr.*, 551 A.2d 53, 60 (1988); *Baynard*, 518 A.2d at 690-91. II We next take up defendant's contention that Superior Court was without jurisdiction under 10 Del.C. § 921(2) to sentence him for his conviction of the lesser included offense of murder in the second degree. The question presented is whether Superior Court, having indisputably acquired jurisdiction over Marine to try him as an adult under an indictment of first degree murder, 11 Del.C. § 636(a)(1), lost jurisdiction for conviction or sentencing purposes when the jury found defendant not guilty of murder in the first degree and guilty only of the lesser included offense of murder in the second degree. If he had been tried originally only on a second degree murder charge, Marine could not have been subjected to Superior Court jurisdiction, and thus could not have been sentenced as an adult on conviction. Raising this issue on appeal,⁷ Marine contends that his sentence of life imprisonment and his conviction of murder in the second degree, must be set aside as jurisdictionally barred and the case returned to Family Court for civil proceedings against Marine as a delinquent, as if newly charged with second degree murder. Marine grounds his argument on statutory interpretation and legislative intent, and otherwise on a claim of denial of equal protection and due process. The question presented requires analysis of the pertinent Delaware statutes. The parties agree that the relevant statutes are found within 10 Del.C., subchapter II, defining the jurisdiction and powers of the Family Court of Delaware and, in particular, section 921, entitled *Exclusive original civil jurisdiction*, and within subchapter III, Part A, titled *PROCEEDINGS IN THE INTEREST OF A CHILD*, and, in particular, section 938, captioned *Proceeding against child as an adult; amenability proceeding; referral to another court*. These sections state, in pertinent part: § 921. *Exclusive original civil jurisdiction*. The [Family] Court shall have exclusive original civil jurisdiction in all proceedings in this State concerning: (1) Any child found in the State who is alleged to be dependent, neglected, or delinquent except as otherwise provided in this chapter; (2)a. Any child charged in this State with delinquency by having committed any act or violation of any laws of this State or any subdivision thereof, except: Murder in the first degree, rape, unlawful sexual intercourse in the first degree, kidnapping; any child 16 years of age or older charged with violating Title 21 of the Delaware Code, except as provided in § 927 of this title;⁸ or any other crime over which the General Assembly has granted or may grant jurisdiction to another court. b. Any child charged in this State with delinquency by having committed, after reaching his 16th birthday, murder in the second degree, manslaughter, robbery in the first or second, attempted murder (first or second degree), burglary in the first degree or arson in the first degree; provided, however, that such child shall, after his first appearance in the Court, be given a hearing as soon as practicable to determine his amenability to the processes of the Court. The Court shall give immediate notice of such hearing in writing to the Department of Justice and to the child's custodian, near relative, attorney or other interested person, if known, and then the Court shall proceed in accordance with the provisions of § 938 of this chapter. The Attorney General or one of his deputies shall be present at any such hearing. Superior Court shall retain jurisdiction for purposes of sentencing if any judge or jury shall find the child guilty of a lesser included crime following a trial of 1 of the crimes specifically defined in this subsection or any crime in the case where the child has been transferred to the Superior Court by the Family

Court pursuant to § 938 hereof; ... (emphasis added). * * * * * § 931. Delinquent child not criminal; prosecution limited. Except as provided in § 938, no child shall be deemed a criminal by virtue of an allegation or adjudication of delinquency, nor shall a child be charged with or prosecuted for a crime in any other court. In this Court the nature of the hearing and all other proceedings shall be in the interest of rather than against the child. Except as otherwise provided, there shall be no proceedings other than appellate proceedings in any court other than this Court in the interest of a child alleged to be dependent, neglected, or delinquent. * * * * * § 938. Proceeding against child as an adult; amenability proceeding; referral to another court. (a) A child shall be proceeded against as an adult where: (1) The acts alleged to have been committed constitute first degree murder, rape, unlawful sexual intercourse in the first degree or kidnapping; (2) The child has reached his 16th birthday and is not amenable to the rehabilitative processes available to the Court; (3) The General Assembly has heretofore or shall hereafter so provide. (b) In all cases specified in (a) the Court shall, upon application, hold a preliminary hearing and, if the facts warrant, thereafter refer the child to the Superior Court or to any other court having jurisdiction over the offense for trial as an adult. (c) When a child has reached his 16th birthday and is thereafter charged with being delinquent, the Court may, on motion of the Attorney General or upon its own motion ... defer further proceedings in the Family Court and conduct a hearing to determine whether the child is amenable to the rehabilitative processes of the Court. In determining whether the child is so amenable, the Court shall take into consideration, among others, the following factors which are deemed to be nonexclusive: (1) Whether, in view of the age and other personal characteristics of the child, the people of Delaware may best be protected and the child may best be made a useful member of society by some form of correctional treatment which the Family Court lacks power to assign; or (2) Whether it is alleged death or serious personal injury was inflicted by the child upon anyone in the course of commission of the offense or in immediate flight therefrom; or (3) Whether the child has been convicted of any prior criminal offense; or (4) Whether the child has previously been subjected to any form of correctional treatment by the Family Court; or (5) Whether it is alleged a dangerous instrument was used by the child; or (6) Whether other participants in the same offense are being tried as adult offenders. If it decides that the child is amenable, it may proceed to hear the case. If it decides that he is not amenable, it shall refer the child to the Superior Court or to any other court having jurisdiction over the offense for trial as an adult. Marine finds in section 938, in conjunction with section 931, a legislative intent to permit only two classes of children to be tried and convicted as adults in Superior Court: (1) children of any age charged and convicted of any of the crimes delineated in section 938(a)(1); and (2) children sixteen years of age or over charged with specified offenses and whom Family Court has found to be nonamenable to its rehabilitative processes pursuant to procedures and standards set forth in sections 921(2)b and 938(c). Because the Legislature has excluded children under sixteen from being subjected to the amenability process for trial as adults in Superior Court, Marine argues that Superior Court lost jurisdiction over him for both conviction and sentencing purposes for any found lesser included crime to murder in the first degree. Purporting to read the Delaware statutory scheme as a whole, Marine finds a clear legislative intent that all children under sixteen years of age whether originally charged or later found to have committed murder in the second degree shall be exclusively proceeded against civilly in Family Court as delinquents under section 931. Marine argues that neither section 921(2)a nor section 938(a)(1) includes murder in the second degree as an offense for which a child may be proceeded against criminally as an adult unless the child is sixteen years of age or older and has been first found to be nonamenable by Family Court. Marine submits the legislative design to be that Family Court is conferred exclusive jurisdiction over non-capital felonies committed by children under sixteen. Therefore, Marine

argues, we must conclude that the Legislature intended to divest Superior Court of jurisdiction to either convict or to sentence Marine on the jury's finding of guilty of murder in the second degree. Marine asserts that his discernment of legislative intent is confirmed by the explicit language of subsection b of section 921(2). Because subsection b states that Superior Court's lesser included sentencing jurisdiction is confined to trial of 1 of the crimes specifically defined in this subsection, Marine argues that the words this subsection clearly refer only to subsection b of section 921(2), and not to all of subsection (2) of 921. Thus, Marine concludes, Superior Court's conferred lesser included sentencing jurisdiction is confined to the sentencing of a child sixteen or over who has been referred to Superior Court from Family Court as nonamenable to its processes, and does not extend to a child of any age originally prosecuted as an adult under section 938(a)(1). The State counters with two basic arguments: (1) that jurisdiction, having been vested in Superior Court under sections 921(2)a and 938(a), may not be divested by implication; and (2) that the Legislature's provision that Superior Court shall retain jurisdiction for purposes of sentencing ... the child [found] guilty of a lesser included crime, 10 Del. C. § 921 (2)b, refers to any child prosecuted as an adult for any crime, regardless of whether Superior Court's jurisdiction is derived from section 921(2)a or 921(2)b. Thus, the State, in effect, argues that Superior Court's conferred jurisdiction to sentence for lesser included offenses is unqualified and applies to all charged and found offenses: (1) any criminal offense for which a child of any age originally charged under Superior Court's exclusive jurisdiction is ultimately convicted; and (2) any criminal offenses charged to a child sixteen or over who becomes subject to Superior Court's derivative jurisdiction through transfer from Family Court following a finding of nonamenability pursuant to sections 921(2)b and 938(c). The State also asserts that Marine's construction of the word subsection, found in the last unlettered subparagraph of section 921(2) (as evidencing legislative intent to limit Superior Court's lesser included sentencing jurisdiction to those crimes defined under subsection b of section 921(2)), leads to an absurd result: that Superior Court's jurisdiction to sentence for lesser included offenses of crimes to which that court has been conferred exclusive original jurisdiction would be more restrictive than that court's lesser included sentencing jurisdiction of crimes as to which Superior Court's jurisdiction is derived from Family Court through a nonamenability finding. The State concludes that the Delaware statutory scheme, when read as a whole, clearly supports a finding that Superior Court's lesser included sentencing jurisdiction applies to any child over whom Superior Court has been conferred jurisdiction, including those children charged with a section 938(a)(1) offense, and thus extends to Marine. * * * Delaware law is well settled that if statutes are plain and unambiguous, we must give effect to the clear legislative command without referring to any traditional aids of statutory interpretation. *Richardson v. Wile*, Del.Supr., 535 A.2d 1346, 1349 (1988). To determine whether a statute is ambiguous on its face requires reading the statute as a whole. *Id.* at 1350. [S]tatutory language is ambiguous only when it is reasonably susceptible to different conclusions or interpretations. *State v. Cooper*, Del.Supr., 575 A.2d 1074, 1076 (1990) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, Del. Supr., 492 A.2d 1242, 1246 (1985)) (emphasis in original). We conclude that the statutes in question are ambiguous. As the arguments of the parties make clear, the statutory language is susceptible on its face to different reasonable interpretations. In applying well-established constructional aids, our search is for legislative intent. *Spielberg v. State*, Del.Supr., 558 A.2d 291, 293 (1989). In seeking legislative intent, it is frequently helpful at the outset to trace the legislative history of the statutory scheme, here the disposition of a child charged with a violation of state law. With the creation in 1945 of the first Family Court of Delaware, 45 Del. Laws, c. 241, Family Court was conferred exclusive jurisdiction over any child charged with any state law violation except murder in the first degree, rape, kidnapping and certain motor vehicle offenses. See 10

Del. C. § 921(2) a; *State v. J.K.*, Del.Supr., 383 A.2d 283, 286 n. 5 (1977). In *J.K.*, this Court viewed the legislative history of the Family Court as evidencing a public policy determination that minors charged with violations of State law should be divided into two classes on the basis of the offenses charged. *Id.* at 287. Those charged with particularly defined crimes of the most serious nature (murder in the first degree, kidnapping and rape) should be prosecuted as adults in Superior Court, and all other minors charged with any lesser crimes should be proceeded against civilly in the interest of the child, and within the Family Court's exclusive jurisdiction. Thus, the jurisdictional line was originally clearly drawn. Thereafter, and since 1947, the Legislature has made a further exception, beyond section 938(a)(1), to Family Court's otherwise exclusive jurisdiction over a child charged with a violation of any State law. In 1947, the Legislature enacted 46 Del. Laws, c. 209, titled AN ACT CONCERNING CERTAIN CRIMES COMMITTED BY JUVENILES BETWEEN THE AGES OF SIXTEEN AND EIGHTEEN YEARS. Without defining the crimes to which the law applied, the Legislature, under section 1 of the Act, conferred authority over the then county Family Courts of Delaware to conduct a hearing, only with respect to children within that age category charged with violation of a State statute, to determine the child's amenability to the processes of the juvenile court. The Act authorized Family Court, with the approval of the Attorney General and the consent of the judge of the court to which the case would be transferred, to proceed against a child of such age as an adult. Under section 2 of the 1947 Act, the statute provided that upon the completion of the process of transferring the child for prosecution as an adult and the entry of an order by the court assuming jurisdiction ... the same shall constitute a deprivation of jurisdiction over the person and the offense of the said child of all inferior Courts of this State, and the sole and exclusive jurisdiction of the person and of the offense of the said child shall vest [in the court to which the child was transferred, then either the Court of General Sessions or the Court of Oyer and Terminer]. 46 Del.Laws, c. 209 § 2. In the 1953 recodification of the Delaware statute laws, section 1 and section 2 of the 1947 Act became respectively sections 2711 and 2712 of Title 11, subchapter II, titled Prosecution of Children as Adults. Under the then Delaware statutory scheme, the consequences of the criminal court assuming jurisdiction over a child charged with crimes less serious than those defined under section 938(a)(1) was not subject to dispute. The transfer to Superior Court of jurisdiction of a child for prosecution as an adult was final for all purposes. The court acquiring jurisdiction of the child acquired jurisdiction over both the person and the offense of the child. The acquiring court's jurisdiction thus extended beyond the offense charged. The then Delaware statutory scheme mirrored that of other jurisdictions. See *Dicus v. Second Judicial District Court*, 97 Nev. 273, 625 P.2d 1175 (1981) (criminal court which has jurisdiction over juvenile based on crime charged and may accept plea for lesser included charge); *Gray v. State*, 6 Md.App. 677, 253 A.2d 395, 399 (1969) (finding, under statute similar to Delaware's, that once jurisdiction vests in criminal court based on crime charged, jurisdiction is retained to pass sentence for conviction on lesser included crime); *People v. Davenport*, 43 Colo.App. 41, 602 P.2d 871, 872 (1979) (jurisdiction vested in district court based on indictment for first degree murder and retained jurisdiction to sentence fifteen-year-old for murder two conviction when statute provides, child is... alleged to have committed a crime) (emphasis added); see also *Lucas v. United States*, D.C. Ct.App., 522 A.2d 876, 878 (1987) (sixteen-year-old charged with first degree murder and convicted of lesser included offense of voluntary manslaughter; trial court retained jurisdiction to sentence under statutory scheme which explicitly excluded such juveniles from the definition of child). Thereafter, and until the creation of a statewide Family Court of Delaware in 1971, both sections remained in force, subject to periodic modifications of section 2711 concerning the amenability procedures and changes in the age limits of juveniles to which the process should apply. In 1971, the Legislature, by 58 Del.Laws, chapter 114,

established the first statewide Family Court of Delaware by merging into one court the previously separately constituted Family Court of the State of Delaware for New Castle County and the Family Court of Kent and Sussex Counties. By the 1971 Act, the Legislature also relocated the amenability procedures previously found in Title 11 to chapter 9, section 938 of Title 10, with the former provisions of section 2711 restated as subsection (c) of section 938. The Legislature then repealed both sections 2711 and 2712 of Title 11. 58 Del.Laws, c. 114 § 4. In lieu of the previously detailed provisions of section 2712 conferring jurisdiction on the criminal court over both the child and the offense charged, new section 938 simply stated, If [the Family Court] decides that [the child] is not amenable, it shall refer the child to the Superior Court or to any other court having jurisdiction over the offense for trial as an adult. The question thus becomes whether the Legislature's repeal in 1971 of 11 Del. C. § 2712 has substantive significance or simply represents a ministerial or housekeeping act to repeal a statutory provision rendered redundant by the 1971 legislation transferring § 2711 to § 938(c) of Title 10.9 The Legislature clearly did not disturb the amenability process beyond transferring the concept from 11 Del. C. § 2711 to 10 Del. C. § 938. Therefore, we see no reason to assume that the Legislature's repeal of section 2712 was intended to diminish the jurisdictional finality of a transfer of a child from Family Court's jurisdiction to Superior Court's. Indeed, we think the contrary conclusion is compelled by the Legislature's simultaneous grant to Superior Court under section 921 of jurisdiction to sentence a child found guilty of any lesser crime than that originally charged. We conclude that the Legislature's reason for repeal of section 2712 of Title 11 was that section 2712 was rendered redundant by the power conferred upon Superior Court under section 921. The Legislature's express grant under section 921(2)b to Superior Court of jurisdiction to sentence for any lesser included crimes directly accomplished precisely what section 2712 did indirectly. The Legislature's later, but nearly concurrent, enactment in 1971 of 58 Del.Laws, c. 116, reinforces the conclusion that the Legislature's conference of lesser included sentencing jurisdiction on Superior Court by section 921(2) encompassed all lesser included crimes of children over whom Superior Court acquired jurisdiction, either directly or indirectly. By the 1971 enactment, the General Assembly wrote into section 921 of Title 10 two exceptions to Family Court's exclusive original jurisdiction over children: (1) children charged with murder in the first degree, rape, and kidnapping; and (2) children sixteen years of age or over charged with violation of chapter 41 of Title 21, or any other crime over which the General Assembly has granted or may grant jurisdiction to another court, which were included under § 921(b)(1). The Legislature then wrote into § 921(b)(2) the amenability procedures for Family Court's discretionary jurisdiction to refer children sixteen or over found nonamenable to Superior Court for prosecution as adults. Most significantly, the Legislature then included within section 921(b) Superior Court's conferred lesser included sentencing jurisdiction over a child subject either to its exclusive jurisdiction under section 921(b)(1) or its derivative jurisdiction under section 921(b)(2), by providing: Superior Court shall retain jurisdiction for purposes of sentencing if any judge or jury shall find the child guilty of a lesser included crime following a trial of one of the crimes specifically defined in this subsection or any crime in the case where the child has been transferred to the Superior Court by the Family Court pursuant to § 938 hereof. 58 Del.Laws, c. 116 § 1 (emphasis added). Thus, within the originally carefully crafted section 921(b) was placed Superior Court's lesser included sentencing authority, which thereby applied to both crimes defined under (b)(1) and those defined under (b)(2). We think it fairly clear from the juxtaposition of these subsections that Superior Court's retained jurisdiction to sentence a child for any lesser found crime was thus intended to apply equally to children over whom Superior Court was granted exclusive jurisdiction under section 921(b)(1) as to those children over whom Superior Court's jurisdiction was derivative for crimes defined under (b)(2). The court's

lesser included sentencing jurisdiction extended to any one of the crimes specifically defined within subsection 921(b)(1) or (2). Section 921(2)b of Title 10, as presently written, may therefore only reasonably be construed as extending Superior Court's retained sentencing jurisdiction for lesser included offenses to all offenses within that court's conferred jurisdiction; that is, both its originally conferred exclusive criminal jurisdiction over children charged with the most serious criminal offenses defined under present section 921(2)a, and its derivative jurisdiction over children sixteen or over charged with present section 921(2)b offenses and found by Family Court to be nonamenable. *Slater v. State*, Del.Supr., 606 A.2d 1334 (1992). The word subsection originally found in 58 Del.Laws, c. 116, encompassed crimes committed by children over whom Superior Court had exclusive jurisdiction and as to whom Family Court was without jurisdiction. The fact that the Code Revisors later saw fit to redesignate (b)(1) of section 921 as (2)a, and to redesignate (b)(2), as well as the third unnumbered paragraph (conferring Superior Court's retained sentencing jurisdiction), as (2)b is not evidence of legislative intent to the contrary. Further, to accept defendant's construction of the limited meaning of the term subsection, so as to confine Superior Court's lesser included sentencing authority to its derivative jurisdiction (over offenses of children sixteen or over found to be nonamenable by Family Court), would also render redundant the remaining clause of that section, or any crime in the case where the child has been transferred to the Superior Court by the Family Court pursuant to § 938 hereof. Clearly, the quoted clause refers to crimes within Superior Court's derivative jurisdiction, whereas the preceding clause refers to crimes within Superior Court's original jurisdiction. Thus, we agree with the State that to reach any other construction of present § 921(2)b would lead to an absurd result, which we cannot find to have been intended by the Legislature. We are not persuaded by defendant's underlying thesis that the Legislature, by limiting Family Court's authority to apply the amenability process to children sixteen years of age or over, intended to divest Superior Court of its previously conferred original jurisdiction to convict and sentence Marine as an adult for the lesser included crime of murder in the second degree, to which a Superior Court jury found him guilty. *Slater*, 606 A.2d at 1337. See *Brooks v. Taylor*, Del.Supr., 154 A.2d 386, 392 (1959) (Family Court is a court of limited — not general — jurisdiction). Therefore, we reject Marine's contention that Superior Court's retained jurisdiction to sentence for lesser included offenses was intended by the Legislature to be limited to children subject to Superior Court's derivative jurisdiction for crimes defined under section 921(b)(2), now denominated as section 921(2)b. The Delaware statutory scheme must be read as conferring on Superior Court lesser included sentencing jurisdiction over all children charged with any crimes now defined under 10 Del. C. § 921(2), including murder in the first degree. *Slater*, 606 A.2d at 1337. III We take up the third issue raised on appeal, as to which this Court, by Order dated May 22, 1991, directed supplemental briefing: Assuming a found legislative intent to confer on Superior Court jurisdiction to sentence Marine as an adult for the lesser included crime of murder in the second degree, does the Delaware statutory scheme thereby deny Marine either due process or equal protection? Marine so contends because of his being under the age of sixteen when he was charged. Under the Delaware statutory scheme, a juvenile under sixteen charged with murder in the second degree is subject to Family Court's exclusive jurisdiction, and is to be proceeded against, pursuant to 10 Del. C. § 931, as a delinquent child and not as a criminal. Marine therefore argues that Superior Court's conferred lesser included sentencing jurisdiction denies him treatment equal to that of a child under sixteen who is guilty of the same crime, but who had been originally charged with murder in the second degree. The consequence, Marine contends, is that unless Superior Court is found to have been divested of its original jurisdiction over him upon the jury's return of a verdict of guilty of the lesser included offense of murder in the second degree, he will be subjected to much harsher

punishment than others guilty of the identical offense. This cannot be rationally justified, he claims. The State responds that under the Delaware legislative scheme age is only a qualifying factor that is relevant to the amenability process. The State asserts that Marine's claim of unequal treatment results only from Superior Court's exercise of its conferred lesser included sentencing jurisdiction, a hardly unique grant of authority. See *Self v. Blackburn*, 5th Cir., 751 F.2d 789 (1985) (describing Louisiana statute); *United States v. Bland*, D.C.Cir., 472 F.2d 1329, 1331 n. 7 (1972) (referring to similar provision in the District of Columbia Code). The State argues that the Delaware legislative distinction based on the seriousness of the offense and the charging decision does not violate due process or equal protection.¹⁰ The distinction drawn by the statutory scheme, based on the crime with which a defendant is charged, is not a suspect classification, nor does it involve a fundamental right.¹¹ In the area of equal protection especially, courts have traditionally afforded legislative classifications a presumption of reasonableness and constitutionality where discrimination is not based upon race, color, religion, ancestry, or other inherently suspect classification requiring a more strict scrutiny *Justice v. Gatchell*, Del.Supr., 325 A.2d 97, 102 (1974). This Court's standard of review of a statutory scheme challenged on due process or equal protection grounds not involving a suspect class or fundamental right is universal and well settled. In determining whether a statutory classification, not involving a suspect class or fundamental right, violates the equal protection clause, we presume that the distinctions so created are valid. A statutory discrimination or classification will not be set aside if any state of facts reasonably may be conceived to justify it. *Traylor v. State*, Del.Supr., 458 A.2d 1170, 1177 (1983) (citation omitted). In *Mills v. State*, Del.Supr., 256 A.2d 752 (1969), this Court also recognized that equal protection does not mandate identical treatment for all persons, but rather that in the event of distinctive treatment for persons within a class, there be a reasonable basis for the distinction. Equal protection of the laws does not require that all persons be dealt with identically; it does require that a distinction must have some relevance to the purpose for which the classification is made [and that] there is reasonable basis for the distinction made. *Id.* at 756 (citation omitted). For a legislative distinction to be found so unreasonable as to be discriminatory and a denial of a right of equal protection, the distinction must be found to be patently arbitrary and to bear no rational relationship to a legitimate governmental interest. *Gottlieb v. State*, Del.Supr., 406 A.2d 270, 275 (1979). This Court has spoken generally on the question of whether a direction to charge [juveniles] as adults is a violation of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. In *State v. Ayers*, Del.Supr., 260 A.2d 162 (1969), we stated: It is no novelty in our law to require that for certain crimes juveniles shall be tried as adults in the Superior Court. At the present time, juvenile offenders can be tried in the Superior Court for murder in the first degree, rape, kidnapping, and for the possession or use of molotov cocktails. * * * * * The matter, that of age classification for purposes of indictment and trial, has always been for the decision of the General Assembly, the policy-making branch of the State Government. The discretion of the General Assembly in setting policy under its police power is, however, not absolute. It may not be arbitrary or capricious; it must be reasonable. When the power is exercised to classify for purpose of trial for crimes, as this is, then the classification must be founded on differences reasonably related to the purposes of the statute in which the classification is made. *Id.* at 170-71 (citations omitted). See *United States v. Alexander*, D.D.C., 333 F.Supp. 1213 (1971).¹² The law is well settled that a legislative scheme vesting broad authority in the state or federal government through the charging process to determine whether a child shall be prosecuted as a juvenile or as an adult is not a denial of due process in the absence of suspect factors [race or religion] or other arbitrary classifications. *United States v. Bland*, D.C.Cir., 472 F.2d 1329, 1333-37 (1972). In *Albury v. State*, this Court stated: In our criminal justice system the State has broad

discretion as to whom to prosecute. [S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. *Del.Supr.*, 551 A.2d 53, 61 (1988) (quoting *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547, 556 (1985)) (citations omitted). See also *United States v. Quinones*, 1st Cir., 516 F.2d 1309, 1311, cert. denied, 423 U.S. 852, 96 S.Ct. 97, 46 L.Ed.2d 76 (1975) (Congress can lawfully vest in the Attorney General discretion to decide whether to proceed against a juvenile as an adult, the exercise of which does not require a due process hearing or implicate the equal protection clause). In *State v. J.K.*, *Del.Supr.*, 383 A.2d 283 (1977), we found the underlying purpose of the Delaware statutory scheme to be to classify minors charged with violations of State law — for purposes of proceeding against either as juveniles or as adults — on the basis of the seriousness of the offense charged. There, we also rejected an indirect challenge on constitutional grounds to sections 937 and 938. We found the classifications drawn by the amenability process to be reasonable, and [to] rest upon a basis of difference bearing a fair and substantial relation to legitimate goals. *Id.* at 289. Having found section 938 to be constitutionally sound, we also found the distinctive treatment of juveniles within Family Court and Superior Court, depending upon the outcome of an amenability proceeding, neither arbitrary nor irrational and not a denial of equal protection. *Id.* In *State v. Anderson*, *Del.Super.*, 385 A.2d 738 (1978), the Superior Court conducted a reverse amenability proceeding under 10 Del. C. § 939(b) involving juveniles charged with rape in the first degree seeking transfer to Family Court for civil proceedings against them as delinquents. The court referred to Delaware's two-tiered system of adjudication as being premised on the age of the offender determining the place of adjudication, civil or criminal, except for those offenses enumerated under sections 921(2)a and 938(a)(1), for which the Legislature preempts discretion and requires adjudication at the Superior Court level. *Id.* at 740. Marine's claim of denial of equal protection in sentencing is flawed because it confuses Delaware's allocation of exclusive original jurisdiction over a child charged with violation of state law on the seriousness of the offense alone, with Delaware's age classification for the purpose of limiting Family Court's jurisdiction to refer a child for prosecution as an adult on a finding of nonamenability. Thus, Marine erroneously relies on the age limitations imposed on Family Court's authority to find a child nonamenable to its processes as a basis for finding unequal treatment to result to him from Superior Court's clearly conferred lesser included sentencing jurisdiction. Moreover, the Legislature's 1971 enactment of a reverse amenability process eliminates the potential for arbitrary or capricious charging decisions to result in unequal treatment. By section 939, either the Attorney General or the Superior Court may conclude that the interests of justice would be best served by a transfer of the child from Superior Court's jurisdiction, to prosecute the child as an adult, to Family Court's jurisdiction, to proceed civilly in the interest of the child. 58 Del.Laws, c. 116, now 10 Del. C. § 939.13 The Legislature has thereby provided a judicial counterweight to any perceived prosecutorial charging excess. The Legislature has accorded a child in Marine's situation a right to seek transfer of the criminal charges against him from Superior Court to Family Court; and Marine exercised that right of recourse in a section 939 proceeding which we next review. We find no merit in Marine's assertion that the Delaware statutory scheme denies Marine either due process or equal protection. Indeed, Marine has failed even to rebut the presumption of the reasonableness and constitutionality of the Delaware statutory scheme, in particular the Legislature's conference upon the Superior Court of lesser included sentencing jurisdiction over a juvenile found guilty of a lesser included offense. See *Bland*, 472 F.2d at 1333-37; *United States v. Donelson*, D.C.Cir., 695 F.2d 583 (1982); *Alexander*, 333 F.Supp. at 1213. We further find that the distinctions drawn by the statutory scheme are not patently arbitrary and do bear a rational relationship to legitimate

governmental interests. See *Ayers*, 260 A.2d at 162; *Gotleib*, 406 A.2d at 270; *J.K.*, 383 A.2d at 283. IV We now address Marine's contention that Superior Court abused its discretion in refusing to transfer Marine to Family Court following the reverse amenability proceeding and again following Marine's acquittal of murder in the first degree. 10 Del. C. § 939(b). This Court, by Order dated May 22, 1991, directed the parties to submit supplemental briefing on the following question:¹⁴ Whether Superior Court in its order of July 26, 1988 correctly applied 10 Del. C. § 939(b) in denying Marine's application for transfer of the case to Family Court. The parties are directed to consider relevant decisional law in Delaware and other jurisdictions, including *State v. Anderson*, Del.Super., 385 A.2d 738 (1978). We summarize the relevant facts. On December 8, 1987, a Kent County grand jury returned an indictment charging Marine with murder in the first degree, in violation of 11 Del.C. § 636(a)(1). The indictment charged that Marine did intentionally cause the death of Amanda Hemphill by beating her and then strangling her until her death. On or about April 5, 1988, Marine filed a motion in Superior Court to conduct reverse amenability hearing, pursuant to 10 Del.C. § 939(b), for the purpose of determining whether the case should be transferred to the Family Court. The State opposed transfer. Beginning July 20, 1988, Superior Court conducted a three-day evidentiary hearing. By decision and order dated July 26, 1988, the court denied Marine's motion. Finding that Marine had not met his burden of overcoming the presumption that a need exists for adult discipline and legal restraint, the court concluded that Marine's transfer to Family Court was neither in the interests of society nor the defendant.¹⁵ The parties disagree as to our standard and scope of review. Defendant asserts that we review the trial court's failure to remand under section 939(b) for abuse of discretion, while the State contends our standard and scope of review is one of plain error due to defendant's failure to timely raise this issue on appeal. See *Younger v. State*, Del.Super., 580 A.2d 552 (1990). Addressing the threshold issue of waiver, we conclude that the interests of justice require us to address the merits. The question was fairly presented to the trial court and defendant's failure to address the issue in either his opening or his first supplemental brief does not, under the circumstances of this case, preclude addressing the issue on its merits. See *Marine v. State*, Del.Super., No. 180, 1989, *Horsey, J.* (May 22, 1991) (ORDER). An issue involving a court's subject matter jurisdiction, here timely raised below, will not be deemed to be waived. *Cane v. State*, Del.Super., 560 A.2d 1063 (1989); *Wainwright v. State*, Del.Super., 504 A.2d 1096 (1986); *Sergeson v. Delaware Trust Co.*, Del.Super., 413 A.2d 880 (1980). Marine asserts two claims: first, that the trial court abused its discretion under section 939(b) in refusing to remand Marine to Family Court immediately after the reverse amenability hearing; and second, that the trial court erred as a matter of law in failing to remand Marine to Family Court after his trial in Superior Court upon the jury's finding that Marine was not guilty of murder in the first degree. However, because we find an analytically prior error of law in the court's order dated July 26, 1988, denying Marine's request for transfer to Family Court, we do not reach these claims as denominated. The relevant statutory provision, 10 Del.C. § 939, lists three factors which may, inter alia, be considered by the court as relevant to transfer: (1) The nature of the present offense and the extent and nature of the defendant's prior record, if any; (2) The nature of past treatment and rehabilitative efforts and the nature of the defendant's response thereto, if any; and (3) Whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court. In *State v. Anderson*, Del.Super., 385 A.2d 738 (1978), the court transferred the several juvenile defendants to Family Court following a reverse amenability hearing. The court held that the inquiry mandated by section 939(b)(1) [i.e., 'the nature of the present offense'] is not limited to consideration of the type of offense but permits a weighing of the circumstances which surround the acts charged. *Id.* at 740. The Superior Court examined the evidence as then available and concluded that

given the infirmities in the State's case, there is no assurance that any defendant will be convicted in this Court.... *Id.* at 741. Finally, the Superior Court found that [t]he mitigating aspects of the offense and the weakness of identity¹⁶ incline the [Superior] Court to a transfer of jurisdiction. *Id.* Following *Anderson*, we construe the nature of the present offense provision of section 939 as requiring that Superior Court consider whether the State can establish a *prima facie* case against the defendant. We therefore hold that section 939 requires Superior Court to conduct an investigation akin to a proof positive hearing.¹⁷ We find the proof positive hearing to have a purpose analogous to the reverse amenability hearing. A proof positive hearing also involves a situation where important rights are determined by the degree of the capital offense charged. A defendant charged with murder in less than the first degree is constitutionally entitled to bail. Similarly, a juvenile defendant charged with murder in less than the first degree is statutorily entitled to Family Court proceedings in his interest. In each situation, a judicial examination of the evidentiary justification for the charging decision is required. See *In re Steigler*, Del. Supr., 250 A.2d 379, 383 (1969). In this case, the Superior Court stated, After careful consideration of the nature of the alleged offense, the surrounding circumstances, ... the [Superior] Court is not persuaded that no need exists for adult discipline. However, the Superior Court made no findings of fact relative to the nature of the offense. Moreover, the Superior Court rejected defendant's attempt to assert that the State had insufficient evidence to prove murder in the first degree: Defense counsel's contention that the State cannot prove murder in the first degree beyond a reasonable doubt misconstrues the nature of the Court's present inquiry. This is not a trial on the merits. While the Superior Court was correct that guilt or innocence must ultimately be determined following trial by the finder of fact, the Superior Court erred in summarily rejecting Marine's assertion that the State could not prove its case, and in failing to make factual findings in that regard. *Anderson*, 385 A.2d at 741; 10 Del.C. § 939(b)(1). The trial court focused exclusively on the factors contained in section 939(b)(2) and (3), while failing to make any specific findings as to section 939(b)(1). This was error. V Having found Superior Court to have erred in its application of 10 Del.C. § 939(b), we do not reach the correctness of its result. We conclude that we must vacate the judgment of Superior Court following its faulty reverse amenability hearing and remand to Superior Court, with jurisdiction retained, to grant Marine the reverse amenability hearing he was entitled to. At this hearing, Superior Court will give appropriate consideration to the nature and circumstances of the offense charged in accordance with the principles of *State v. Anderson*, Del.Super., 385 A.2d 738 (1978). However, except for good cause shown, the Superior Court's reconsideration of the matter should be limited to the record made before trial and at the first hearing. On return from remand, we will review Superior Court's exercise of its discretion following an appropriate reverse amenability hearing and determine whether to reinstate Marine's conviction and sentence, or to transfer Marine to the Family Court, in the interests of justice, for trial and disposition. 10 Del.C. § 939(b); 937. Principles of double jeopardy do not attach. See *State v. Wilson*, Del.Super., 545 A.2d 1178 (1988); *Bailey v. State*, Del.Super., 521 A.2d 1069, 1075 (1987). * * * Remanded, with jurisdiction retained, pursuant to Supreme Court Rule 19(c). FootNotes 1. Sitting pursuant to Supreme Court Rules 2(a) and (b) and 4(a) and (d) and Article IV, § 12 of the Delaware Constitution, to fill up the Court en Banc. 2. Pursuant to 10 Del.C. § 939(b), a juvenile defendant within the original jurisdiction of the Superior Court may apply for a transfer to Family Court for trial and disposition. Superior Court is then required to make a reverse amenability determination. *State v. Anderson*, Del.Super., 385 A.2d 738, 740 (1978). 3. This privilege applies to state action through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). 4. The requirements of *Miranda* are the exception to the general rule that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert

the privilege rather than answer if he desires not to incriminate himself. *Minnesota v. Murphy*, 465 U.S. 420, 429, 104 S.Ct. 1136, 1142, 79 L.Ed.2d 409, 420 (1984) (emphasis added). The general obligation of a witness to answer questions truthfully does not convert otherwise truthful and voluntary statements into compelled ones that must be suppressed. The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment. *Id.* at 427, 104 S.Ct. at 1142, 79 L.Ed.2d at 419 (quoting *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 410-11, 87 L.Ed. 376, 380 (1943)). 5. Detective Ashley stated: I initially read the rights. The first time I explained: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney. If you cannot afford one, one will be appointed to represent you before any questioning if you wish one. If you decide to answer any questions with or without an attorney present, you may stop at any time during the questioning. Do you understand each of these rights I have explained to you? 6. This Court reached a different result under the Delaware Constitution in *Bryan v. State*, Del. Supr., 571 A.2d 170 (1990). 7. This issue was not addressed by the court below because not raised by defendant, admittedly by oversight; nor was it raised in defendant's opening brief of the appeal. This Court, over the State's opposition, granted defendant leave to raise and brief the issue under plain error standards and in the interest of justice and judicial economy. *Marine v. State*, Del. Supr., No. 180, 1989, Horsey, J. (March 21, 1990) (ORDER). Issues of subject matter jurisdiction of the trial court may be raised at any stage of the proceedings. *Cane v. State*, Del. Supr., 560 A.2d 1063 (1989); *Scott v. State*, Del. Supr., 117 A.2d 831, 835 (1955). See *Government of the Canal Zone v. Burjan*, 5th Cir., 596 F.2d 690, 693 (1979). See also *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986). In any event, the issue, being one of law, would, if raised below, be reviewable de novo. 8. Title 21 relates exclusively to motor vehicles; § 927 otherwise confers exclusive jurisdiction on Family Court over all proceedings involving children charged with violating specified provisions of the motor vehicle code. 9. The parties, in their statutory analysis of the Delaware legislative scheme, do not discuss the consequences of the 1971 legislation's repeal of 11 Del. C. §§ 2711 and 2712. 10. The State relies largely on federal decisional law for sustaining the Delaware classification scheme as neither arbitrary or discriminatory and not a denial of due process or equal protection. *Woodard v. Wainwright*, 5th Cir., 556 F.2d 781 (1977); *Cox v. United States*, 4th Cir., 473 F.2d 334 (1973); *United States v. Bland*, D.C. Cir., 472 F.2d 1329 (1972); *United States v. Alexander*, D.D.C., 333 F.Supp. 1213 (1971). 11. *Marine* acknowledges the Legislature's power to legislate in this area consistent with due process and equal protection. If the Legislature had explicitly declared that a child, regardless of age, should be proceeded against as an adult for murder in the second degree, or that a child under 16 and so charged would also be subject to Family Court's amenability processes, *Marine* concedes that he would have no claim to denial of equal protection. Thus, *Marine* concedes that his claim is not based on a denial of a fundamental right. 12. At common law, a child under seven was conclusively presumed incapable of committing any crime whatever; and from age seven until age fourteen, the presumption, though not conclusive, continued but weakened as the age advances toward fourteen, with the presumption overcome by evidence of intelligence and malice if strong and clear beyond all reasonable doubt. *State v. George*, Del. Ct. Gen. Sess., 54 A. 745, 745 (1902). With a child fourteen years of age or over, the presumption was displaced, and the child was presumed in point of understanding, capable of committing any crime, until the contrary be proved. *Id.* at 745-46 (quoting 3 *Greenleaf on Evidence* § 4). With the enactment by the Legislature of acts establishing juvenile courts and setting forth their jurisdiction over children charged with non-capital crimes, the Legislature, acting pursuant to

Del. Const., Art. IV, § 28, displaced the common law with respect to trying and convicting a child of a crime. See *Brooks v. Taylor*, Del.Super., 154 A.2d 386, 389-90 (1959). The earliest such legislation dates from 1911, with the establishment of the Juvenile Court of the City of Wilmington by 26 Del.Laws, ch. 262, § 3; in 1933, the Juvenile Court of Kent and Sussex Counties was created by 38 Del.Laws, ch. 197; and in 1945, the first Family Court of Delaware was created by 45 Del.Laws, ch. 241. *Brooks*, 154 A.2d at 390-91. See II above.

13. 10 Del. C. § 939, Transfer of Cases from Superior Court to Family Court, provides: (a) In any case in which the Superior Court has jurisdiction over a child, the Attorney General may transfer the case to the Family Court for trial and disposition if, in his opinion, the interests of justice would be best served. (b) Upon application of the defendant in any case where the Superior Court has original jurisdiction over a child, the Court may transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of justice would be best served by such transfer. Before ordering any such transfer, the Superior Court may hold a hearing at which it may consider evidence as to the following factors and such other factors which, in the judgment of the Court are deemed relevant: (1) The nature of the present offense and the extent and nature of the defendant's prior record, if any; (2) The nature of past treatment and rehabilitative efforts and the nature of the defendant's response thereto, if any; and (3) Whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court. (c) In the event the case is transferred by the Superior Court under this section, the case shall proceed as if it had been initially brought in the Family Court, and the Family Court shall have jurisdiction of the case, anything to the contrary in this chapter notwithstanding.

14. This, and a related issue, were briefed, argued and taken under submission by this Court on October 29, 1991.

15. We set forth in full the court's order dated July 26, 1988: ORDER This 26th day of July, 1988, upon consideration of defendant's application for transfer of this case to the Family Court, the evidence presented, and the record in this case, it appears that: (1) Defendant Frederick Marine has been indicted by the Grand Jury on the charge of Murder in the First Degree, 11 Del. C. § 636(a)(1). At the time of the alleged offense, Marine was 14 years old, and the alleged victim, Amanda Hemphill, was 10 years old. The indictment alleges that Marine intentionally caused the death of the victim by beating her and then strangling her until her death. Marine has moved this Court to transfer his case to Family Court pursuant to 10 Del.C. § 939(b). The State opposes any transfer. (2) The historical background of dispositions involving juvenile offenders has been stated in *State v. Boardman*, Del.Super., 267 A.2d 592 (1970): Prior to the enactment of special status laws for juvenile offenders, juveniles were referred to the regular criminal court. The juvenile therefore has no special common law rights in regard to criminal jurisdiction and, if the legislature deems it reasonable to grant some special privilege to juveniles, it can generally do so on such terms and with such limitations as it deems fit. *Id.* at 595. The legislature has provided that a juvenile alleged to have committed first-degree murder shall be proceeded against as an adult unless a transfer to Family Court is made by the Attorney General or the Superior Court. 10 Del. C. § 938(a)(1); 10 Del.C. § 939. (3) When a juvenile seeks transfer to Family Court of a first-degree murder charge within the original jurisdiction of this Court, he must overcome the presumption that a need exists for adult discipline and legal restraint. *State v. Anderson*, Del.Super., 385 A.2d 738 (1978). Specifically, he must demonstrate that he belongs in the juvenile setting by showing his need and amenability to the program of supervision, care, and rehabilitation which he would receive as a juvenile. Compare *Commonwealth v. Pyle*, 462 Pa. 613, 342 A.2d 101 (1975). Thus, this Court has denied transfer to Family Court of first-degree murder and arson charges when a juvenile fails to discharge his burden of proof. *State v. Penuel*, Del.Super., No. IS86-04-0020, 1987 WL 47843 Chandler, J. (Letter Opinion) (Feb. 23, 1987) (burden of proving no need for adult discipline or legal restraint not met due to

seriousness of charges, surrounding circumstances, juvenile's propensities, and need for long-term therapeutic intervention). See also *Commonwealth v. Zoller*, Pa.Super., 498 A.2d 436 (1985) (transfer denied where no assurance could be given that juvenile's antisocial and aggressive behavior could be abated with treatment within maximum time available under juvenile-court jurisdiction). (4) The Court has heard extensive testimony concerning the nature of the offense charged. I have also considered the absence of any prior delinquency adjudications, the evidence of defendant's background in and outside of school, and the expert opinions of two psychologists, Irwin Weintraub, Ph.D. and Elizabeth Kingsley, Ph.D. In Dr. Weintraub's view, the defendant has severe psychological problems. Although Dr. Weintraub found no mental illness, he finds that Marine has such inability to exercise self-control under stress that intensive inpatient psychotherapy is required for an indefinite period. He cannot say how much improvement there will be from this treatment or when it will occur. It is his opinion that, at the time of the victim's death, Marine could not control his behavior. Dr. Kingsley also believes that intensive psychotherapy is needed. She also cannot say how effective this treatment will be by the time the defendant reaches his majority. (5) After careful consideration of the nature of the alleged offense, the surrounding circumstances, the defendant's background, and the expert testimony, the Court is not persuaded that no need exists for adult discipline and legal restraint. Defense counsel's contention that the State cannot prove murder in the first degree beyond a reasonable doubt misconstrues the nature of the Court's present inquiry. This is not a trial on the merits. The ultimate issue of guilt or innocence is for the jury to decide. The Court's focus at this stage is upon the need for adult discipline and legal restraint. No assurance has been given that the defendant's antisocial and aggressive behavior can be abated with treatment within the maximum available Family Court jurisdiction. See 31 Del.C. § 5109. The Court is satisfied that transfer to Family Court is neither in the interests of society nor the defendant. *State v. Frederick Marine*, Del.Super., No. IK87-12-0847, 1988 WL 91072 (Ridgely, J. (July 26, 1988) (ORDER). 16. Anderson involved nine juvenile defendants each charged with two counts of Rape First Degree. 385 A.2d at 739. The State relied solely on the testimony of codefendants to establish identity. *Id.* at 741. 17. Pursuant to constitutional and statutory provisions, capital defendants are entitled to require the State to show proof positive or presumption great in order to be denied bail. Del. Const., Art. I § 12; 11 Del.C. § 2103. In such a hearing, Superior Court is to avoid even the appearance of a determination of ultimate guilt or innocence. *In re Steigler*, Del.Super., 250 A.2d 379, 383 (1969). However, the defendant will be entitled to bail if the court in its discretion concludes from the evidence that the State does not have a fair likelihood of convicting the accused of the capital offense. *id.* Comment Name Email Comment Your Comments on this Decision 1000 Characters Remaining Leagle.com reserves the right to edit or remove comments but is under no obligation to do so, or to explain individual moderation decisions. User Comments Reply | Flag as Offensive

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Marine v. State

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624 A.2d 1181 (1993)

Frederick M. MARINE, Defendant Below, Appellant, v. STATE of Delaware, Plaintiff Below, Appellee.

Supreme Court of Delaware.

Originally Submitted Following Oral Argument: June 19, 1990.

Rehearing En Banc: October 3, 1990.

Resubmitted Following Supplemental Briefing: October 29, 1991.

Decision En Banc (Remanded): May 15, 1992.

Resubmitted Following Oral Argument on Return from Remand: January 12, 1993.

Decided: April 14, 1993.

Order Denying Reargument May 14, 1993.

Bernard J. O'Donnell (argued), and Brian J. Bartley, Asst. Public Defenders, Wilmington, for appellant.

Richard E. Fairbanks, Jr., Chief of Appeals Div. (argued), and Stephen M. Walther, Deputy Atty. Gen., Dept. of Justice, Wilmington, for appellee. [Log In](#) [Sign Up](#)

Before HORSEY, MOORE, WALSH and HOLLAND, JJ., and ALLEN, Chancellor,[1] constituting the Court En Banc.

Decision En Banc (Remanded) (Marine I): May 15, 1992.

*1182 HORSEY, Justice:

This case is again before us on return from remand to Superior Court, following this Court's decision and mandate in *Marine v. State*, Del.Sup., 607 A.2d 1185 (1992) (hereafter "Marine I".) In *Marine I*, decided May 15, 1992, we vacated the judgment of the Superior Court for the purpose of remanding the case to Superior Court to grant Marine "the reverse amenability hearing he was entitled to" and had not received in 1988. *Id.* at 1212. Because we found Superior Court to have "erred in its application of 10 Del.C. § 939(b), we [did] not reach the correctness of its result" in declining to find Marine amenable to the processes of Family Court. *Id.*[2]

On remand, Superior Court, in September 1992, reconsidered the record evidence presented at the original reverse amenability hearing[3] and applying the law to the facts concluded that Marine's application in 1988 for transfer of the case to the Family Court should have been granted. Superior Court, in a 14-page unreported memorandum opinion dated September 29, 1992, held:

After a careful review of the evidence and all of the circumstances surrounding the acts charged, the Court concludes that the State did not have a fair likelihood of convicting Marine of Murder in the First Degree. Because a prima facie case on that charge has not been established, the Court determines and reports to the Supreme Court that Marine's application for transfer of this case to the Family Court should have been granted.

State v. Marine, Del.Super., No. IK87-12-0847, slip op. at 1, 1992 WL 301993 Ridgely, P.J. (Sept. 29, 1992) (herein "Marine Mem. Op.").

I

Following return of the case to this Court, the parties, by stipulation and order of this Court, agreed that the issues remaining to be determined on appeal are:

A. Did the Superior Court apply the correct legal standard in evaluating the three factors to be considered by the Court as required by 10 Del.C. § 939(b)(1) through (3)? B. Does the record support the fact finding of the Superior Court? *1183 (Stipulation and Order of

this Court dated October 19, 1992). This is the Court's decision on those issues following supplemental briefing of the parties and oral argument. The pertinent facts of the case, the prior proceedings in this extended litigation and the previous rulings of this Court are found in Marine I and will not be repeated or summarized.

The parties assert that the two issues framed for decision raise mixed questions of fact and law. With regard to issue B, in Marine I we stated that, on return of this case from remand, "we will review Superior Court's exercise of its discretion following an appropriate reverse amenability hearing and [we will] determine whether to reinstate Marine's conviction and sentence or to transfer Marine to the Family Court..." Id. at 1212; 10 Del.C. §§ 937 & 939(b). If Superior Court had found, on remand, that the State did have a fair likelihood of convicting Marine of murder in the first degree, our ultimate standard of review would have been for abuse of discretion. That is because Superior Court, after addressing the first of the statutory factors enumerated in section 939(b), [4] would have been required to consider the two remaining statutory factors of section 939(b) and then balance or weigh its respective findings in reaching its ultimate decision on the application to transfer. However, since the court reached a contrary finding under subsection (1) of section 939(b), essentially a finding of fact, our standard of review on issue B involves solely a question of fact. Only if a trial court's findings of fact are clearly erroneous and justice requires their overturn are we free to make contradictory findings. *Levitt v. Bouvier*, Del.Supr., 287 A.2d 671, 673 (1972). Issue A, however, raises a question of law; that is, whether Superior Court properly construed and applied section 939(b). As to that issue, our standard of review is to determine whether Superior Court erred in formulating or applying legal precepts. *Moses v. Board of Education*, Del.Supr., 602 A.2d 61, 63 (1991) (quoting *Delaware Alcoholic Beverage Wholesalers, Inc. v. Ayers*, Del.Supr., 504 A.2d 1077, 1081 (1986)). As to an issue of law, our scope of review is plenary. *Fiduciary Trust Co. v. Fiduciary Trust Co.*, Del.Supr., 445 A.2d 927, 936 (1982).

For the reasons which follow, we conclude that both issues A and B must be answered in the affirmative. We find Superior Court to have correctly construed and applied 10 Del.C. § 939(b) under the "law of the case" of Marine I. We also find that the record fully supports Superior Court's findings that the State did not have a fair likelihood of convicting Marine of murder in the first degree. This ruling is tantamount to a finding by the court that the evidence presented in the hearing, viewed in its totality, is insufficient to establish, prima facie, the likelihood of a conviction of Marine of murder in the first degree. Marine I, 607 A.2d at 1209, 1212. These findings divest Superior Court of original or continuing jurisdiction over Marine. Since he never should have been tried in Superior Court as an adult, we may not reinstate Marine's previous conviction and

sentence by Superior Court the judgment of which we vacated in *Marine I*. Id. at 1212. This ruling of Superior Court, made previously, would have subjected Marine to the jurisdiction and processes of Family Court; but Marine is now over nineteen years of age, beyond the statutory jurisdiction of that court. This leaves us with no alternative but to direct Superior Court to vacate Marine's conviction and sentence and to order Marine to be released forthwith by the Department of Corrections.

Marine's release from further incarceration as an adult is necessary as a result of Superior Court's finding in its 1992 reverse amenability hearing that "a prima facie case [of murder in the first degree] has not been established...." *Marine Mem. Op.* at 1. This judicial finding may not be *1184 demeaned or fairly characterized as a "hypertechnical" finding. It is of constitutional dimension. A section 939 reverse amenability hearing properly conducted in accordance with legislative intent is of critical importance. This is self-evident from the fact that had Marine, after being originally charged by the arresting officers with murder in the second degree, been later indicted for murder in the second degree, rather than murder in the first degree, Family Court would have had, without question, exclusive jurisdiction over Marine to proceed against him as a delinquent.

II

On appeal, Marine contends that Superior Court, in construing and applying 10 Del.C. § 939(b), has applied the correct legal standards in the exercise of its discretion conferred by 10 Del.C. § 939(b). Marine also contends that Superior Court has complied with the directives of this Court in *Marine I*, which Marine asserts, and we agree, constitute the "law of the case" in our review of the 1992 reverse amenability hearing.[5] Hence, Marine contends there is no merit to the State's claim that Superior Court committed error of law with respect to issue A. Addressing issue B, Marine contends that we must affirm because Superior Court's ultimate finding, that the State did not have a "fair likelihood" of convicting defendant of the offense of murder in the first degree, is supported by substantial and legally sufficient evidence. Marine argues that this Court may neither substitute its judgment for that of the trial court nor set aside the court's findings of fact which are supported by competent evidence. *Flamer v. State*, Del.Supr., 585 A.2d 736, 754 (1990); *Albury v. State*, Del. Supr., 551 A.2d 53, 60 (1988).

The State takes a different position on appeal from that taken below with respect to the question of law posed by issue A. The State contends that Superior Court: (1) applied an erroneous standard of review in finding the State's evidence of murder in the first degree to be legally insufficient under section 939(b)(1); (2) committed legal or factual error in its construction and application of 10 Del.C. § 939; and (3) committed reversible error in its

evidentiary rulings admitting certain expert testimony. We take up these arguments

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A.

We first address the State's contention that Superior Court committed legal error by applying the wrong legal standard in its analysis of subsection (1) of section 939(b).[6] The State argues that Superior Court, in considering the first of the section 939(b) statutory factors, that is "the nature of the present offense" factor, applied an erroneous legal standard in determining the sufficiency of the State's evidence that Marine had committed murder in the first degree. The State reiterates its contention below that Superior Court should apply Superior Court Criminal Rule 29[7] in determining the sufficiency of the State's evidence. Applying a Rule 29 standard, the State argues that the State's evidence satisfied subsection (1) of section 939(b), stating:

... that there are objective facts before this Court which support an inference that Amanda Hemphill was killed intentionally. These facts include the infliction of blunt force injuries about the head, the choking of Amanda to death, and the dropping of her facedown into a stream.

Marine Mem. Op. at 12. Superior Court rejected use of a Rule 29 standard of review as "inappropriate" and foreclosed by the law of the case of Marine I. The court stated:

This Court reads the analysis prescribed on appeal as requiring more than a determination of whether some credible evidence exists tending to prove each element of the offense of Murder in the First Degree. Once the State has come forward with proof-positive evidence, the burden shifts to the defendant to convince the Court that the State does not have a fair likelihood of convicting the defendant of Murder in the First Degree. Marine, supra at p. 1211-1212. This inquiry necessarily involves a consideration of the totality of the circumstances and not just the inferences which can arguably be drawn from a portion of the evidence. In this context, a prima facie case of Murder in the First Degree is not established if there is not a fair likelihood of Marine being convicted on that charge. The issue here turns upon whether the evidence in its totality shows prima facie a conscious object or purpose to cause death as opposed to a reckless state of mind. A person acts recklessly with respect to death when he is aware of and consciously disregards a substantial and unjustifiable risk that death will result from his conduct. 11 Del.C. § 231.

Marine Mem. Op. at 13. We affirm.[8]

In *Marine I*, this Court stated that in the analogous "proof positive" hearing held to determine a defendant's right to bail when charged with a capital offense, a defendant prevails if the court "concludes from the evidence that the State does not have a fair likelihood of convicting the accused of the capital offense." *Id.* at 1212 n. 17 (quoting *In re Steigler*, Del.Supr., 250 A.2d 379, 383 (1969)). In *Marine I* we distinguished the process whereby a trial court, in determining whether the State has established a prima facie case against an accused sufficient to defeat a motion for judgment of acquittal, only looks at the evidence presented by the State. However, in the context of a reverse amenability hearing, the issue is whether the evidence in its totality (prosecution and defense) demonstrates, prima facie, that the State has a substantial likelihood of convicting the accused juvenile as charged. Such an examination of the evidence in its totality is necessary to provide a "judicial counterweight to any perceived prosecutorial charging excess," thereby reconciling the Delaware reverse amenability statute with the state and federal Constitutional guarantees of due process and equal protection. See *Marine I*, 607 A.2d at 1209-1212.

Applying our mandate, Superior Court properly reasoned that "a prima facie case of murder in the first degree is not established if there is not a fair likelihood of *Marine's* being convicted on that charge." *Marine Mem. Op.* at 13. We hold that Superior Court applied the correct legal standard in determining the sufficiency of the evidence.

We take up the State's alternative argument that Superior Court erred in rejecting a Rule 29 standard of review as "too high" or "too stringent" for application to a reverse amenability hearing under section 939(b)(1). On appeal, the State now contends that the proper standard for determining the sufficiency of the State's evidence in such a hearing is the standard controlling a state's burden of proof of the commission of an offense in a preliminary hearing. The State, seizing upon a parenthetical statement by this Court in *Blount v. State*, Del.Supr., 511 A.2d 1030 (1986) (a proof positive hearing "amounts to" a preliminary hearing), argues that the State's burden of proof in a section 939 hearing is no greater than the State's burden in a preliminary hearing. *Id.* at 1039.

At oral argument on appeal, however, the State conceded that it had not raised this argument (analogizing a proof positive hearing to a preliminary hearing)[9] before Superior Court. Having failed to do so, the State is foreclosed by Supreme Court Rule 8 from so arguing on appeal. More importantly, the State is equally foreclosed from making this argument by the "law of the case" doctrine of *Marine I*, which Superior Court correctly found to be controlling. See *Bailey v. State*, Del.Supr., 521 A.2d 1069, 1093 (1987); see also *supra* n. 5.

B.

We turn to the State's remaining contention, posed by issue A: whether Superior Court committed legal or factual error in its construction and application of 10 Del.C. § 939. More specifically, the State contends that Superior Court was required to reapply the second and third factors of section 939(b), as it had in its 1988 ruling, notwithstanding the court's finding under subsection (1). The State's argument is based not on statutory construction or legislative intent but on language in *Marine I*, which the State construes as requiring a trial court "to consider and balance all the factors."^[10] The State misreads *Marine I*.

In *Marine I* we stated that the trial court erred in its 1988 reverse amenability ruling by focusing "exclusively on the factors contained in section 939(b)(2) and (3), while failing to make any specific findings as to section 939(b)(1)." *Id.* at 1212. The predicate for our finding of error by Superior Court in the 1988 proceeding is the statutory entitlement of a juvenile defendant when "charged with murder in less than the first degree ... to Family Court proceedings in his interest." *Id.* We also held in *Marine I* that judicial examination of the evidentiary justification for trying a juvenile as an adult is a prerequisite for sustaining the constitutionality of the Delaware statutory framework. We stated:

A defendant charged with murder in less than the first degree is constitutionally entitled to bail. Similarly, a juvenile defendant charged with murder in less than the first degree is statutorily entitled to Family Court proceedings in his interest. In each situation, a judicial examination of the evidentiary justification for the charging decision is required. See *In re Steigler*, 250 A.2d at 379, 383 (1969).

Id. at 1212 (emphasis added). Thus, a proper judicial application of the Delaware reverse amenability statute is essential to sustain the legislative scheme against the contention that, in the context of the facts of this case, the proceeding was a denial of *Marine's* right to equal protection and due process.^[11] In *Marine I*, we stated:

*1187 Moreover, the Legislature's 1971 enactment of a reverse amenability process eliminates the potential for arbitrary or capricious charging decisions to result in unequal treatment.... The Legislature has thereby provided a judicial counterweight to any perceived prosecutorial charging excess....

Id. at 1209 (emphasis added). Relying principally on the Legislature's adoption in 1971 of section 939, we sustained the constitutionality of the Delaware legislative design as not being a denial of *Marine's* right to equal protection and due process. *Id.*

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Superior Court

The State concedes as it must that 10 Del.C. § 939 may not be read as supporting its argument that a trial court is required to address the statutory factors found in subsections (2) and (3) of section 939(b) regardless of its findings in applying subsection (1). Once Superior Court found that the evidence before it, viewed in its totality, was insufficient to establish a prima facie showing against Marine of murder in the first degree, the reverse amenability proceeding, as established by the Legislature, was at an end. Superior Court was not required to give any further consideration to subsections (2) and (3) of section 939(b). The court was not required either to address the remaining subsections or weigh the several statutory factors of section 939(b). A "negative" finding by the court under subsection (1) of section 939(b) rendered moot any consideration by the court of subsections (2) and (3).

As we have stated above, and previously held in *Marine I*, a juvenile defendant charged with less than murder in the first degree is statutorily entitled to Family Court proceedings in his interest. *Id.* at 1212. Thus, when a juvenile, such as Marine, is charged with murder in the first degree and seeks a reverse amenability hearing, the court must first consider the threshold question of whether the State has established a prima facie case of first degree murder under the totality of the evidence. This requirement is explicitly dictated by the General Assembly's adoption of subsection (1) of 10 Del.C. § 939(b). Our earlier holding, that a juvenile cannot be sentenced to life imprisonment as an adult if the State does not have a fair likelihood of convicting him or her of first degree murder, is the law of the case and entirely consistent with that statutory requirement. *Marine I*, 607 A.2d at 1212; see also *supra* note 5.

Therefore, we hold that Superior Court's finding under section 939(b)(1) that there was not a fair likelihood of Marine being convicted of murder in the first degree dispensed with any need for the court to proceed further with the reverse amenability hearing.

C.

We turn to the remaining issue B, whether the record supports the "fact finding of the Superior Court." [12] That issue subsumes the State's further contention that the court abused its discretion in taking into consideration testimony of psychological experts to negate the element of intent. As previously noted, Marine argues that Superior Court's ultimate finding, that the State did not have a "fair likelihood" of convicting Marine of the offense of murder in the first degree, is supported by substantial and legally sufficient evidence. The State responds by claiming error of law by Superior Court in "considering," i.e., presumably relying upon, the psychological testimony of Marine's experts that was offered to "reduce the murder from first to second degree." The State argues that

Marine's experts "showed nothing more than that he may have suffered from irresistible impulse [] that he was guilty but mentally ill of first degree murder." [13] The State further contends *1188 that since an intent to kill does not require premeditation, deliberation or any showing of malice, [14] a showing of intent is established simply by the State's offer of evidence that it was defendant's "conscious object to engage in conduct of that nature or to cause that result." 11 Del.C. § 231(a)(1). The State argues that testimony from Marine's expert witness of the absence of premeditation was not only irrelevant but "impermissible," because offered as a form of diminished responsibility defense. See *Gray v. State*, Del.Supr., 441 A.2d 209, 224-25 (1982); *Bates v. State*, Del.Supr., 386 A.2d 1139, 1142-44 (1978). The State asserts that such evidence was irrelevant because Marine did not raise a defense of guilty but mentally ill of first degree murder.

The Superior Court's evidentiary hearing in 1988 spanned three days. Marine, in support of his motion for reverse amenability transfer, presented the testimony of four employees of Ferris School; namely his youth care worker, his youth care worker's supervisor, his psychiatric social worker and his case manager. Marine also presented the testimony of two psychologists, the two police officers who led the homicide investigation, and several character witnesses. The State presented only the testimony of the assistant medical examiner who performed the autopsy and testimony from two of Marine's former elementary school teachers.

We have previously ruled that Superior Court correctly framed the issue before it as turning upon "whether the evidence in its totality shows prima facie a conscious object or purpose to cause death as opposed to a reckless state of mind." Marine Mem. Op. at 13. Addressing this question, the court stated:

In this case, the defense has shown that Marine had the social developmental age of a twelve-year-old and that there was no evidence of adult design or intention when he encountered Amanda. Marine became unexpectedly involved in a dispute and physical fight with her over whether he could build a bridge over a creek. The injuries inflicted were also consistent with the testimony that this event was the result of spontaneous juvenile anger accompanied by reckless conduct which manifested a cruel, wicked, and depraved indifference to human life. Although Marine ultimately admitted to causing the death of Amanda, his ultimate confession to the police did not reveal any conscious object or purpose to cause Amanda's death. The arresting officers assessed Marine's credibility, and they charged him with Murder in the Second Degree. A person is guilty of Murder in the Second Degree when he recklessly causes the death of another person under circumstances which manifest a cruel, wicked, and depraved indifference to

human life. 11 Del.C. § 625. Given the evidence presented at the reverse amenability hearing, and affording weight to all the circumstances surrounding the acts charged, the Court concludes that a prima facie case on that charge has not been established because the State did not have a fair likelihood of convicting Marine of Murder in the First Degree.

Marine Mem. Op. at 14. On appeal, this Court will not overturn a trial judge's finding of fact unless there is an evident abuse of discretion, see *Flamer*, 585 A.2d at 754; and the State acknowledges that this Court's review of factual findings is limited either to error of law or abuse of discretion.

We find no error of law or abuse of discretion in the Superior Court's evidentiary rulings. We find that the record, consisting of the totality of the evidence offered at the reverse amenability hearing, fully supports the court's findings that the State did not have a fair likelihood of convicting Marine of murder in the first degree. Section 939(b) expressly confers on a trial court broad discretion in determining what evidence is relevant to the objectives of a reverse amenability hearing. See 10 Del.C. § 939(b) (court "may consider evidence... deemed relevant"). Whether testimony is relevant is within the discretion of the trial judge and will not be reversed absent a plain abuse of that discretion. *Lampkins v. State*, Del.Supr., 465 A.2d 785, 790 (1983); see also *Robelen Piano Co. v. DiFonzo*, Del.Supr., 169 A.2d 240, 246 (1961) (admission of expert testimony within trial court's discretion).

We decline to find the trial court to have abused its broad discretion in admitting the testimony of the several expert witnesses called by Marine during the reverse amenability hearing. Indeed, one can only conclude from the Superior Court's above-quoted findings that the court not only viewed all the evidence in its totality but particularly relied on "the circumstances surrounding the acts charged" in reaching its ultimate finding. Again, that finding was that the State did not have a "fair likelihood of convicting Marine of murder in the first degree."

In sum, we are required to find that the totality of the evidence supports the Superior Court's holding that Marine should never have been indicted or tried for first degree murder. Its holding is consistent with the court's finding that Marine was originally properly charged by the arresting police officers with second degree murder. The holding is also consistent with the Superior Court jury's finding that Marine was guilty of murder in the second degree and not guilty of murder in the first degree.

* * * * *

For the foregoing reasons we affirm Superior Court's ruling that Marine's application in 1988 under 10 Del.C. § 939(b) for transfer of the case to the Family Court should have been granted. Had Marine been proceeded against originally in Family Court on a charge of murder in the second degree, as the Superior Court has determined was required, he would, under any circumstances, have been released from detention almost two years ago, on his attaining the age of eighteen years. Because Marine is now an adult over the age of nineteen years and no longer subject to Family Court's jurisdiction, we have no choice under the Delaware legislative framework but to remand the case to Superior Court with the direction that the court vacate Marine's conviction and sentence and order the Department of Corrections to release Marine.

* * * * *

The order below is AFFIRMED; and the case is REMANDED for execution of the foregoing directions.

UPON RESTATED MOTION FOR REARGUMENT [Filed May 14, 1993]

On April 29, 1993, the State filed a motion for reargument under Rule 18 of the Court en banc's decision dated April 14, 1993. By Order dated April 30, 1993, the Court directed the State to clarify and amplify its motion in a restated motion.[15]

The State's restated motion raises two issues, both of which are related to the State's proposed retrial of Marine, now that he is an adult, for having caused the death on November 21, 1987, of victim, and for which Marine was originally arrested *1190 the following day and charged with committing the crime of Murder in the Second Degree. First the State contends that because Marine is now an adult and not subject to the Family Court's jurisdiction, 10 Del.C. §§ 921 & 938, Marine can now again be charged with Murder in the First Degree and tried in Superior Court. Alternatively, the State contends that Marine can now be charged with Murder in the Second Degree and tried in the Superior Court. We find both of the State's contentions to be without merit.

The State's first contention is grounded in the premise that Marine may be retried for the death of victim because he has never been in jeopardy. Since we have voided Marine's conviction in Superior Court for that court's lack of jurisdiction to try Marine for the offense of Murder in the Second Degree, the State argues that the jury's verdict of guilt of Murder in the Second Degree is a nullity.

The United States Supreme Court has held that, in the criminal context, the Fifth Amendment guarantee against double jeopardy embodies the corollary doctrine of "collateral estoppel." *Ashe v. Swenson*, 397 U.S. 436, 444-45, 90 S. Ct. 1189, 1194-95,

25 L. Ed. 2d 469 (1970). According to the United States Supreme Court, the doctrine of collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future law suit." *Id.* at 443, 90 S. Ct. at 1194. Therefore, the doctrine of collateral estoppel may bar retrial in cases in which the Double Jeopardy Clause would not. *Id.* at 446, 90 S. Ct. at 1195. Delaware law generally coincides with federal law in the interpretation and application of principles of double jeopardy and collateral estoppel. See *Sudler v. State*, Del.Supr., 611 A.2d 945, 948 n. 6 (1992) (double jeopardy); *Columbia Casualty Co. v. Playtex FP, Inc.*, Del. Supr., 584 A.2d 1214, 1216 (1991) (collateral estoppel).

In Marine's case, the Superior Court's determination that the State did not have a substantial likelihood of convicting Marine of Murder in the First Degree has been affirmed by this Court and, therefore, becomes a valid and final judgment. Consequently, the issue of whether the facts presented in Marine's case properly warrant a charge of Murder in the First Degree cannot be litigated again between the State and Marine in any future law suit. Any future prosecution of Marine for Murder in the First Degree is therefore barred by the United States Supreme Court's construction of the doctrine of collateral estoppel in the criminal context. See *Ashe*, 397 U.S. at 446, 90 S. Ct. at 1195.

We turn to the State's alternate contention that Marine can now be prosecuted in the Superior Court for Murder in the Second Degree for causing the death of victim. As recently as a year ago, the State argued that the age of a defendant on the date of arrest (charge) is determinative of the question of whether the Superior Court or the Family Court has jurisdiction over the offense. See *Howard v. State*, Del.Supr., No. 385, 1991, Walsh, J., [612 A.2d 158 (Table)] (July 2, 1992) (Order). In *Howard*, this Court, relying upon *State v. Connors*, Del.Super., 505 A.2d 1301 (1986), held that the defendant's age at the time of his arrest for a given offense is determinative of the question of jurisdiction. Thus, in *Howard* we held that the defendant, who was eighteen years old at the time of his arrest, was subject to trial in Superior Court notwithstanding the fact that he was seventeen years old at the time of the commission of the alleged crime. See *Howard*, slip op. at 3. Having prevailed on the jurisdictional question raised in *Howard*, the State's argument to the contrary in *Marine* is not only inconsistent, but disingenuous and erroneous as a matter of law.

Marine was fourteen years old at the time of his arrest. Thus, under *Howard*, if he had been originally indicted for Murder in the Second Degree, under the Delaware statutory framework Family Court would have had exclusive original jurisdiction of Marine for trial of the offense of Murder in the Second Degree. Marine was fourteen years old at the time

of his arrest and the *1101 time of the offense. The Delaware statutory scheme makes the date of arrest and the crime charged determinative of whether Family Court or Superior Court has jurisdiction. See 10 Del.C. §§ 921, 931 & 938; see also Connors, 505 A.2d at 1302. Since Marine is now more than eighteen years of age, he cannot be tried in the Family Court for Murder in the Second Degree.

Under the law of the case of Marine II, Superior Court is also without jurisdiction to try Marine for Murder in the Second Degree. Therefore, Marine must be released from custody.

The State characterizes this Court's construction of the Delaware statutory framework as producing an "absurd result," stating "that [Marine] gets away with murder." The State makes this ad hominem argument in lieu of complying with this Court's directive that it address "all pertinent authorities and Delaware decisional law" on the question of Marine's availability for retrial.

It is well-established Delaware law that the prosecuting attorney represents all the people, including the defendant. *Bennett v. State*, Del.Supr., 164 A.2d 442, 446 (1960). The prosecutor has a duty to see that the State's case is presented with earnestness and vigor, but it is equally his duty to see that justice be done to the defendant. *Id.* Although the prosecutor operates within an adversary system, his duty is to seek justice, not merely convictions. *Sexton v. State*, Del.Supr., 397 A.2d 540, 544 (1979).

The office of prosecutor is an agency of the executive branch of government which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law.

Id. at 544 n. 1 (quoting ABA STANDARDS, THE PROSECUTION AND DEFENSE FUNCTIONS (Approved Draft, 1971)).

The rule of law defines the boundaries which preserve the freedom of all citizens in a civilized and democratic society. In accordance with the rule of law, the Delaware General Assembly has defined the jurisdictional boundaries of the Superior Court and the Family Court, based upon the nature of the crime and the date of the defendant's arrest. Those boundaries prohibit the State from retrying Marine, who is more than eighteen years of age, in the Superior Court for Murder in the Second Degree.

* * * * *

This 14th day of May, 1993, the State's Motion for Reargument is DENIED, and the mandate shall issue forthwith.

NOTES

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[1] Sitting pursuant to Supreme Court Rules 2(a) and (b) and 4(a) and (d) and Article IV, § 12 of the Delaware Constitution, to fill up the Court En Banc.

[2] Superior Court, by entry of its order of July 26, 1988, denied Marine's application for transfer of the case to the Family Court. See *Marine I*, 607 A.2d at 1210. Marine was then tried as an adult in Superior Court for murder in the first degree and was convicted of murder in the second degree and sentenced to life in prison. *Id.* at 1188.

[3] In *Marine I*, this Court also provided the following direction and guidance to Superior Court in its conduct of the hearing:

At this hearing, Superior Court will give appropriate consideration to the nature and circumstances of the offense charged in accordance with the principles of *State v. Andersen*, Del.Super., 385 A.2d 738 (1978). However, except for good cause shown, the Superior Court's reconsideration of the matter should be limited to the record made before trial and at the first hearing.

The Court understands that the parties further agreed that the court's redetermination of the matter should be based on the 1988 record, without enlargement.

[4] See *infra* note 6 for full text of 10 Del.C. § 939(b).

[5] The doctrine of "the law of the case" normally requires that matters previously ruled upon by the same court be put to rest. See *Bailey v. State*, Del.Supr., 521 A.2d 1069, 1093 (1987). Previous holdings of an appellate court constitute the law of the case and are conclusive as to litigated issues decided on remand and subsequent appeal. See *Kenton v. Kenton*, Del.Supr., 571 A.2d 778, 784 (1990); *Gamble v. Hoffman*, Mo.Supr., 732 S.W.2d 890, 895 (1987). Thus, in a second appeal of the same action, a court's decision in the first appeal is the law of the case on all questions involved and decided and will not be reconsidered. *Piambino v. Bailey*, 11th Cir., 757 F.2d 1112, 1119 (1985), cert. denied sub nom., *Hoffman v. Sylva*, 476 U.S. 1169, 106 S. Ct. 2889, 90 L. Ed. 2d 976 (1986).

[6] Delaware's so-called reverse amenability statute, 10 Del.C. § 939(b), provides:

(b) Upon application of the defendant in any case where the Superior Court has original jurisdiction over a child, the Court may transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of justice would be best served by such transfer. Before ordering any such transfer, the Superior Court may hold a hearing

at which it may consider evidence as to the following factors and such other factors which, in the judgment of the Court are deemed relevant: [Log In](#) | [Sign Up](#)

- (1) The nature of the present offense and the extent and nature of the defendant's prior record, if any;
- (2) The nature of past treatment and rehabilitative efforts and the nature of the defendant's response thereto, if any; and
- (3) Whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court.

[7] Superior Court Criminal Rule 29 provides, in pertinent part, as follows:

RULE 29. MOTION FOR JUDGMENT OF ACQUITTAL

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses....

[8] See *infra* section C.

[9] The record below reveals that on remand the State argued before Superior Court that, "The question presented on remand [is] the relatively narrow one of whether the evidence presented at the amenability hearing was sufficient to establish a prima facie case of murder in the first degree." That standard is precisely the one that Superior Court applied in its ruling, after reviewing the totality of the evidence, that "a prima facie case [of murder in the first degree] has not been established...." Marine Mem. Op. at 1.

[10] In particular, the State argues that Superior Court "ignored its [1988] findings that there was '[n]o assurance ... that the defendant's antisocial and aggressive behavior can be abated with treatment within the maximum available Family Court jurisdiction,' which had led the court to conclude that transfer to the Family Court was 'neither in the interest of society nor the defendant.' Because the Superior Court's latest analysis totally overlooks that factor, the case, at a minimum, must be returned to the Superior Court to expressly consider all of the statutory factors, including society's interest."

[11] Marine's claim of denial of equal protection and due process was principally based upon the State's inability to secure true bills charging authority and ability to secure true bills from a grand jury. We rejected Marine's claim that the Delaware legislative framework denied Marine equal protection and due process, in large part because of the Legislature's adoption in 1971 of a reverse amenability statute, the forerunner of section 939. See *Marine I* at 1209.

[12] See *supra* section I.

[13] More particularly, the State asserts:

In this case, there is no doubt that Marine was the actor. Marine's confession describing the strangulation of Amanda Hemphill establishes that fact. Although ultimately at trial, Marine denied being the killer, at least preliminarily, his confession showed a "fair likelihood" that he was the killer. Similarly, the nature of crime demonstrated a "fair likelihood" that Marine acted intentionally. The medical examiner demonstrated, contrary to Marine's claim in his confession, that Amanda's death was not accidental. Amanda had been slammed against a tree, struck by the back of the hand, and strangled to death. Plainly, under settled Delaware law, a trier of fact may infer that a defendant intended the natural and probable consequences of his act. *Winborne v. State*, Del.Supr., 455 A.2d 357, 360 (1982). The State established a prima facie case against Marine for first degree murder.

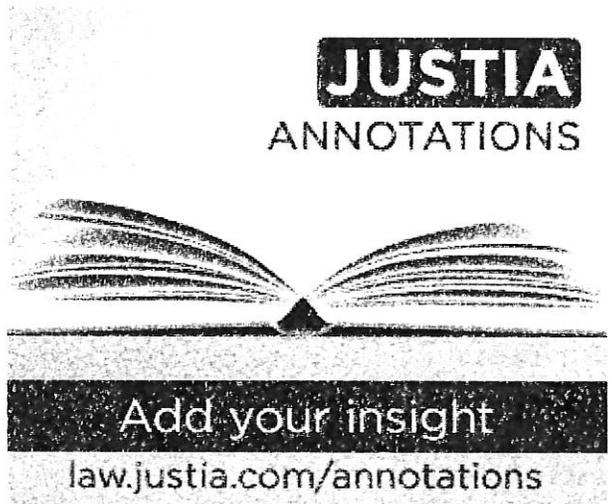
[14] See Delaware Criminal Code with Commentary (1973) at p. 194 (1973).

[15] By Order dated April 30, 1993, the Court directed the State to file an amended and restated motion with respect to one of the two questions raised by the State, "the availability of retrial" of defendant Marine. This Court's April 30th Order thereby granted the State's request to be heard on this Court's direction in *Marine v. State* (April 14, 1993) ("*Marine II*"), *supra*, at page 1181, that Marine be released from incarceration. The Court informed the State that:

it is unable to rule on the pending motion without the State first amplifying and clarifying its position concerning the following questions, among others: what specific charges or criminal offenses does the State propose; date of alleged commission thereof; the specifics of any proposed indictment; the court or courts arguably having jurisdiction over the offense(s); and the applicability of any statute of limitations to an arrest, indictment and trial for any such offenses.

Marine v. State, Del Supr No. 180, 1989 (April 30, 1993) (Order), slip op. at 2. The State filed an "amended and restated" motion for reargument on May 4, 1993, to which Marine filed a response on May 7, 1993; and the matter is now under submission under Rule 18. In its restated motion, the State confines its reargument to the one question stated above.

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NO. 168, 1994.

653 A.2d 241 (1994)

Craig HUGHES, Defendant Below, Appellant, v. STATE of Delaware, Petitioner Below, Appellee.

*Supreme Court of Delaware.**Order Clarifying Decision on Denial of Reargument January 30, 1995.*

Bernard J. O'Donnell, Asst. Public Defender, Office of the Public Defender, Wilmington, for defendant.

Richard E. Fairbanks, Jr., Chief of Appeals Div., Dept. of Justice, Wilmington, for petitioner.

Before VEASEY, C.J., WALSH, HOLLAND, HARTNETT, and BERGER, JJ., constituting the Court *En Banc*.

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WALSH, Justice:

This certification proceeding comes before the Court pursuant to Article IV, Section 11(9) of the Delaware Constitution and Supreme Court Rule 41. The Family Court has certified five questions of law which this Court accepted by order dated May 19, 1994. Briefing and oral argument before the Court *en Banc* followed. This is the decision of the Court on the certified questions.

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As required for certification proceedings, the facts underlying the certified questions are undisputed. The defendant, Craig Hughes ("Hughes"),¹ was arrested on November 6, 1993, for receiving stolen property worth over \$500 (11 *Del.C.* § 851) and second degree conspiracy (11 *Del.C.* § 512). The charges against Hughes would constitute felonies if he were an adult. Because Hughes was seventeen years old at the time of his arrest, he was subject to the jurisdiction of the Family Court. *State v. Connors*, Del.Super., 505 A.2d 1301, 1302 (1986). Accordingly, Hughes was arraigned in February, 1994, and his case scheduled for trial in the Family Court on November 1, 1994.

Under the statutory scheme in place at the time of his arrest, Hughes fell under the original jurisdiction of the Family Court with the possibility that he could be transferred to Superior Court if, following an amenability hearing, the Family Court determined that Hughes was not amenable to its processes.

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¹⁰ *Del.C.* § 1010(c)². This statutory scheme was altered subsequent to Hughes' arrest, however. On April 11, 1994, Senate Bill 140 was signed into law. Under the language of this amendment, "if a child reaches his eighteenth birthday prior to an adjudication on a charge of delinquency arising from acts which would constitute a felony," the Family Court must automatically transfer the matter to Superior Court. 69 *Del.Laws* c. 205.

Hughes turned eighteen years old on September 24, 1994, and is therefore subject to the statute as amended. In addition, at least forty-five other cases pending before the Family Court involve children who either have reached the age of eighteen or may reach that age before their cases are adjudicated in the Family Court. Because of the great number of cases affected by the statutory amendment, and its attendant consequences upon the jurisdiction of the Family Court, the following questions implicating the amendment's construction, application, and constitutionality were certified and accepted by this Court:



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1. Whether the amendment to 10 Del.C. § 1002, effective as of April 11, 1994, applies to all relevant cases in which the offenses are committed on or after the effective date of the amendment, or to all cases pending in the Family Court as of the effective date of the amendment in which the respondent has already turned 18 years of age or will turn 18 years of age while awaiting trial.
2. Whether extended jurisdiction of the Family Court over juveniles beyond the age of 17, pursuant to 10 Del.C. § 928, is applicable in cases where the juvenile turns 18 while awaiting trial in the Family Court or becomes moot pursuant to the recent amendment to 10 Del.C. § 1002.
3. Whether the Attorney General must obtain an indictment before proceeding to try the defendant on the charges once the case is transferred to the Superior Court pursuant to 10 Del.C. § 1002.
4. Whether the statutory amendment violates the constitutional guarantee of equal protection of the laws.
5. Whether the statutory amendment violates the constitutional guarantee of due process of law.

We have concluded that the statutory amendment violates the constitutional guarantees of equal protection of the laws under the Federal Constitution and due process of law under both the Federal and Delaware Constitutions. U.S. Const. amend. 14; Del. Const. art I, § 7.² Because we answer question numbers four and five in the affirmative, the remaining questions are rendered moot and, accordingly, we decline to answer them. See *State v. Ayers*, Del.Supr., 260 A.2d 162, 170 (1969).

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Before addressing the merits of Hughes' constitutional claims arising under the due process and equal protection clauses, a review of the statutory framework delineating the jurisdiction of the Family Court, and our prior case law interpreting that scheme, is necessary to appreciate the circumstances which precipitated the enactment of the statutory amendment at issue.

Since its inception in 1945, the Family Court has been conferred almost exclusive jurisdiction over those under the age of eighteen charged with violations of State law. 10 Del.C. § 921; *State v. J.K.*, Del.Supr., 383 A.2d 283,

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 285 (1977), *cert. denied*, 435 U.S. 1009, 98 S.Ct. 1882, 56 L.Ed.2d 392 (1978) ± Under section 921 (2)(a), the Family Court is vested with original jurisdiction over "[a]ny child charged in this State with delinquency or by having committed any act or violation of any law of this State...." The statutory scheme evidences a legislative intent, with some exceptions, to treat child offenders differently from adult offenders. *Fletcher v. State*, Del.Supr., 409 A.2d 1256 (1979). In its recognition that children generally require distinctive treatment, the General Assembly has established a dual judicial system so that children and adults are segregated and adjudicated separately. To that end, the Family Court Act was enacted to provide uniform jurisdiction, policies and procedure by creating a statewide Family Court system. *Wife, S. v. Husband, S.*, Del.Ch., 295 A.2d 768 (1972). The function of the Family Court in the Delaware dual system is expressly set forth in the Act:

§ 902. *Purpose; construction.*

(a) *In the firm belief that compliance with the law by the individual and preservation of the family as a unit are fundamental to the maintenance of a stable, democratic society, the General Assembly intends by enactment of this chapter that 1 court shall have original statewide civil and criminal jurisdiction over family and child matters and offenses as set forth herein. The court shall endeavor to provide for each person coming under its jurisdiction such control, care, and treatment as will best serve the interests of the public, the family, and the offender, to the end that the home will, if possible, remain unbroken and the*

family members will recognize and discharge their legal and moral responsibilities to the public and to one another.

(b) This chapter shall be liberally construed that these purposes may be realized. 10 Del.C. § 902.

Thus, in direct contrast to the criminal nature of an adult prosecution in the Superior Court, an adjudication of delinquency in the Family Court is a *civil* proceeding. *G.D. v. State*, Del.Supr., 389 A.2d 764, 765 (1978); *see also State v. Wilson*, Del.Supr., 545 A.2d 1178, 1181 (1988) ("By its creation of the Family Court, the General Assembly recognized the unique role that Court is called upon to play through the application of its civil processes in the resolution of offenses committed by children."). The civil nature of a proceeding in Family Court removes the stigma of *criminality* which is inherent in an adult prosecution in Superior Court. Accordingly, the Family Court Act provides that "no child shall be deemed a criminal by virtue of an allegation or adjudication of delinquency...." 10 Del.C. § 1002. We have previously summarized the statutory scheme as follows:

The proceedings against a child are not criminal in concept or in practice. Indeed, the child is not even charged with a 'crime' no matter what the conduct. See 10 Del.C. § [1002]. In the Family Court the charge is a general one of 'delinquency.' § 921(1)(2)a.... State policy in a proceeding against a child in the Family Court is to make it entirely a part of the Court's 'civil jurisdiction,' § 921....

State v. J.K., 383 A.2d at 286.

Notwithstanding the societal policy to proceed against children in a civil setting, the General Assembly has provided two statutory exceptions under which children may be criminally prosecuted at the adult level. 10 Del.C. § 1010. First, under section 1010(a)(1), children, regardless of age, who are charged with the most serious felonies, as designated by the statute, are prosecuted as adults. Second, under section 1010(a)(2), the Family Court has the discretion to transfer the case of a child over sixteen years of age to the Superior Court for trial as an adult if the court concludes that the child is not amenable to the Family Court processes. Under the statute, the Family Court conducts a so-called amenability hearing, initiated upon motion of the Attorney General or

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by the court *sua sponte*, to determine independently whether the child will benefit from the "rehabilitative processes of the Court." § 1010(c). In its inquiry, the Family Court may consider six enumerated, nonexclusive criteria. *Id.* If the Family Court finds that the child is amenable, the court retains jurisdiction over the child. Upon a finding of nonamenability by the court, however, the child is referred for trial as an adult in the Superior Court or any other court with jurisdiction over the offense.

The statutory scheme provides an additional judicial safeguard to children alleged to have either committed a designated felony or those found by the Family Court to be nonamenable. In 1971, the State Assembly created a mechanism, now known as the "reverse amenability" process, in which those children coming within the jurisdiction of the Superior Court may be transferred to the Family Court when adjudication in that forum is proper. 58 Del.Laws c. 116, now 10 Del.C. § 1011.⁵ Under section 1011(a), the Attorney General, without leave of Court, may transfer to the Family Court those cases involving either designated felony offenses or those children found nonamenable when a transfer would best serve "the interests of justice."

The defendant may exercise a concomitant right under section 1011(b) and may petition the Superior Court for a hearing to determine amenability. The statute permits, but does not require, an evidentiary hearing upon application of a child to consider several enumerated factors and other relevant considerations in deciding whether the interests of justice would best be served by the transfer of the child to Family Court. The reverse amenability hearing thus ensures a judicial determination of amenability which is premised upon the nature of the offense as well as the character of the child. *State v. Anderson*, Del.Supr., 385 A.2d 738, 741 (1978).

This Court explicitly upheld the constitutionality of the reverse amenability process in *Marine v. State*, Del.Supr., 607 A.2d 1185 (1992), cert. dismissed, ___ U.S. ___, 113 S.Ct. 28, 120 L.Ed.2d 952 (1992) ("*Marine I*"). In *Marine I*, we held that the reverse amenability process, which was required by legislative enactment, accords the defendant a judicial counterweight to any arbitrary charging authority by granting the Superior Court the power to evaluate the basis for the charge against the child. *Id.* at 1209. Our decision in *Marine*, which was based on the statute, apparently provided the impetus for the enactment of the statutory change now under review. Because the application of the statute in that decision appears to be misunderstood, the *Marine* holding bears analysis.

Factually, *Marine* involved a fourteen year old who was indicted for first degree murder. Because *Marine* was charged with a designated felony, he fell within the jurisdiction of the Superior Court. §§ 921(2)a, 1010(a). *Marine* sought transfer of his case to Family Court pursuant to the reverse amenability process under the present section 1011(b). The Superior Court conducted an evidentiary hearing on *Marine's* amenability after which it denied his motion for transfer. *Marine*

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was eventually convicted in the Superior Court of second degree murder — the charge for which he had been originally arrested. On appeal, *Marine* claimed, *inter alia*, that he was denied due process and equal protection of the law because of the unequal treatment he received when compared with other children found guilty of the same crime in the Family Court, i.e., he was charged with first degree murder as an adult but convicted of an offense (second degree murder) which was not transferrable to Superior Court under section 1010.⁶ *Marine* also claimed that the Superior Court erred in its analysis of the section 1011 factors.

After an exhaustive review of the Family Court Act, this Court held that the Delaware statutory scheme, which permitted the Superior Court to convict a child as an adult for an offense which would result in an adjudication of delinquency in the Family Court, did not violate the guarantees of due process or equal protection. *Marine I*, 607 A.2d at 1209. However, without reaching the correctness of its result, we found that the Superior Court erred in its application of the current section 1011 by failing to make specific factual findings into the "nature of the present offense" as expressly required by the statute. *Id.* at 1211.

Specifically, we held that section 1011 required the Superior Court, in a proceeding similar to a "proof positive" hearing at which a defendant's right to bail is determined when charged with a capital offense, to consider whether the State can establish a *prima facie* case against the defendant. *Marine I*, 607 A.2d at 1211-12. A *prima facie* case is established if the evidence demonstrates that there is a fair likelihood that the defendant may be convicted on the charge. *Id.* at 1212 n. 17. Accordingly, we vacated the judgment of the Superior Court and remanded, with jurisdiction retained, so that *Marine* would receive a reverse amenability hearing in which the court properly considered section 1011 (b)(1). *Marine I*, 607 A.2d at 1212. Essentially, our mandate required a "judicial examination of the evidentiary justification for the charging decision...." *Id.*

Upon remand, the Superior Court concluded that the State did not have a fair likelihood of convicting *Marine* of first degree murder and that *Marine's* request to have his case transferred to Family Court should have been granted as required by the statute upon such a finding. On appeal, this Court affirmed. *Marine v. State*, Del.Supr., 624 A.2d 1181 (1993) ("*Marine II*"). Because the statute provided that the Superior Court could not hold a trial over any fourteen year old child accused of second degree murder, the Superior Court was divested of jurisdiction of a criminal prosecution against *Marine* by its own finding. Moreover, because *Marine* was over nineteen years of age at the time of the *Marine II* decision, under the statute, the Family Court also lacked jurisdiction over *Marine* because he was then an adult. *Marine II*, 624 A.2d at 1189. Accordingly, this Court was required to direct the Superior Court to vacate *Marine's* sentence and conviction and to order his release from custody. *Id.*

The State then moved for reargument, contending that Marine could be retried for either first degree murder or second degree murder in the Superior Court. In denying reargument, we held that Marine could not be retried in the Superior Court for first degree murder because the Superior Court had determined, and this Court had affirmed, that the State did not have a fair likelihood of convicting him of that charge, thus precluding further litigation of the issue through the doctrine of collateral estoppel. 624 A.2d at 1190. Further, a second prosecution of Marine in the Superior Court for second degree murder was barred by the statute because the Family Court had exclusive jurisdiction over a fourteen year old child charged with that offense. *Id.* at 1190-91.

On April 11, 1994, Senate Bill 140 was signed into law to amend 10 *Del.C.* § 1002 by

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adding a paragraph to the existing statute. The statute, as amended, provides:

§ 1002. Delinquent child not criminal; prosecution limited.

Except as provided by § 1010, no child shall be deemed a criminal by virtue of an allegation or adjudication of delinquency, nor shall a child be charged with or prosecuted for a crime in any other court. In this Court the nature of the hearing and all other proceedings shall be in the interest of rather than against the child. Except as otherwise provided, there shall be no proceedings other than appellate proceedings in any court other than this Court in the interest of a child alleged to be dependent, neglected, or delinquent.

However, if a child reaches his eighteenth birthday prior to an adjudication on a charge of delinquency arising from acts which would constitute a felony were he charged as an adult under the laws of this State, then the Family Court shall retain jurisdiction for the sole purpose of transferring the matter to the Superior Court for prosecution as an adult. Any such transfer under this Section shall not be subject to § 1011 of this title.

69 *Del.Laws c.* 205 (emphasis added).

The statutory amendment was drafted in direct response to our ruling which denied the State's motion for reargument of the *Marine* decisions. *Marine II*, 624 A.2d at 1190-91. See 69 *Del.Laws c.* 205 (Synopsis). The stated purpose for the amendment is to ensure that a Delaware court will always have jurisdiction over felony child offenders. 69 *Del.Laws c.* 205 (Synopsis). The General Assembly apparently perceived that the *Marine* decisions had created a "jurisdictional gap" which it undertook to close by requiring that all children who are charged with a felony offense be tried in the Superior Court if they reach eighteen years of age before their cases are adjudicated in the Family Court.

The statute also alters the existing scheme by preventing the defendant from obtaining judicial review of an important aspect of the amenability process. First, by mandating that those offenders falling under its purview be automatically transferred to Superior Court, the statute clearly intended to dispense with the right of the accused to seek a judicial determination under section 1010. Moreover, the provision explicitly eliminates the reverse amenability process in the Superior Court under section 1011 for those children transferred to that court for trial as adults.

Hughes argues that the statutory amendment violates his rights of due process and equal protection because he has been deprived of the essential protection afforded by the reverse amenability process. U.S. Const. Amend. 14; Del. Const. art. I, § 7. Hughes claims that this procedure is designed to safeguard him from the unfettered authority of the State to impose potential arbitrary or capricious charging decisions, a practice viewed as unconstitutional by this Court in *Marine I*. The statutory amendment, it is argued, eliminates the independent examination into the basis of a felony charge against a child and vests the prosecution with the authority to determine jurisdiction over those children

who will reach age eighteen pending trial in Family Court. We agree with Hughes that the elimination of the reverse amenability process is violative of his constitutional rights.

III

Hughes concedes that the age-based distinction drawn by the amendment does not pertain to a fundamental right or suspect class. See *Marine I*, 607 A.2d at 1207. Hence, our standard of review for the statute's constitutionality is well settled.

In determining whether a statutory classification, not involving a suspect class or fundamental right, violates the equal protection [or due process] clause, we presume that the distinctions so created are valid. 'A statutory discrimination or classification will not be set aside if any state of facts reasonably may be conceived to justify it.'

Marine I, 607 A.2d at 1207 (quoting *Traylor v. State*, Del.Supr., 458 A.2d 1170, 1177 (1983)).

The General Assembly is endowed with broad authority as a policy-making body

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to classify child offenders based on their age for purposes of selecting the appropriate court for adjudication. "It is no novelty in our law to require that for certain crimes juveniles shall be tried as adults in the Superior Court." *Ayers*, 260 A.2d at 171. This power over classification is not without constitutional limits however. The legislative scheme must bear some rational relationship to the purpose for which it was enacted. We have previously described the State's discretionary authority to treat children as adults under the Constitution as follows:

The discretion of the General Assembly in setting policy under its police power is, however, not absolute. It may not be arbitrary or capricious: it must be reasonable. When the power is exercised to classify for purpose of trial for crimes, as this is, then the classification must be founded on differences reasonably related to the purposes of the statute in which the classification is made.

Ayers, 260 A.2d at 171.

Equal protection does not require identical treatment for all individuals within a class but, rather, when distinctive treatment for individual class members does occur, there must be a reasonable basis for the distinction. *Marine I*, 607 A.2d at 1207; *Mills v. State*, Del.Supr., 256 A.2d 752, 756 (1969). For the distinction to be so unreasonable as to be discriminatory and unconstitutional, the distinction must be "patently arbitrary and bear[] no rational relationship to a legitimate government interest." *Gottlieb v. State*, Del.Supr., 406 A.2d 270, 275 (1979); *Marine I*, 607 A.2d at 1207. Similarly, due process also requires that a statutory provision be rationally related to its purpose. *State v. Hobson*, Del.Supr., 83 A.2d 846, 847 (1951).

As noted earlier, the constitutionality of the Delaware statutory scheme establishing age-based distinctions among children was upheld by this Court in the *Marine I* decision. *Marine I*, 607 A.2d at 1209. The State thus contends that our holding in *Marine I* is controlling here, as well. It is argued that the amendment merely creates another age-based distinction to ensure that a Delaware court will always have jurisdiction over a felony offender. While this Court did uphold the constitutionality of the statutory scheme in *Marine I*, we explicitly based our holding on the ground that the amenability process provides the requisite constitutional safeguard for those children charged with a crime before the Superior Court.

We rejected Marine's claim that the Delaware legislative framework denied Marine equal protection and due process, in large part because of the

Legislature's adoption in 1971 of a reverse amenability statute, the forerunner of section [1011]. See Marine I at 1209.

Marine II, 624 A.2d at 1186 n. 11. Here, the amendment abrogates the constitutionally-required continuing existence of a judicial check on prosecutorial authority.

Prior to the amendment, the decision whether the Family Court or the Superior Court obtained jurisdiction over a child was premised upon specific factors subject to review by an independent judicial body in an amenability hearing or reverse amenability hearing. §§ 1010, 1011. The presumptive classification of children within the jurisdiction of the Family Court under section 1010 withstands constitutional scrutiny largely because an amenability hearing ensures an impartial judicial determination, which is informed by specific criteria, of whether a child is suitable to the rehabilitative processes available in Family Court. In *State v. J.K.*, we stated:

In our judgment, a distinction drawn by the Family Court Judge in the decisional process, after having properly applied the[] extensive criteria, cannot be said to be arbitrary or irrational. Only after it clearly appears to the Court that a reasonable difference exists between two juveniles so as to classify one as amenable and one as non-amenable, may the Court bind each of them over to different treatment.

383 A.2d at 289. We thus found "the classifications drawn by the amenability process to be reasonable, and [to] rest upon a basis of difference bearing a fair and substantial relation to legitimate goals." *Id.*

Similarly, the reverse amenability process under section 1011 protects children

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by assuring that they are adjudicated in the correct forum. The procedure "is of constitutional dimension." *Marine II*, 624 A.2d at 1184. Of critical importance, a reverse amenability hearing "provide[s] a judicial counterweight to any perceived prosecutorial charging excess." *Marine I*, 607 A.2d at 1209. This proceeding vests with the Superior Court the power to examine independently the evidentiary basis for the crime charged by which it considers whether the State can establish a *prima facie* case for the charge which subjected the child to the Superior Court. *Id.* at 1211. Thus, the reverse amenability process provides a constitutional minimum which "eliminates the potential for arbitrary or capricious charging decisions to result in unequal treatment." *Id.* at 1209.

Notwithstanding the pivotal constitutional safeguards inherent in the amenability and reverse amenability processes, the statutory amendment attempts to consign those children *charged* with felonies to the Superior Court, upon reaching age eighteen before adjudication in the Family Court, without independent judicial scrutiny into the basis of the alleged offenses. Under the new legislative scheme, neither the Family Court nor the Superior Court has the authority to review the charge against the child to weigh its evidential foundation and validity. Moreover, the courts have been divested of their discretion to transfer a case to another forum "in the interests of justice." Thus, every child *charged* with a felony who reaches age eighteen pending trial is subject to prosecution as an adult without regard to the factual basis which underlies the alleged offense.

Under this scenario, the fate of a child is entirely entrusted — without impartial judicial review — to the charging authority, which unilaterally decides whether to charge a child with a felony or misdemeanor, without a mechanism to challenge its charging decision or transfer the case to the appropriate forum. In essence, the statutory amendment has stripped the judiciary of its independent jurisdictional role in the adjudication of children by granting the charging authority the unbridled discretion to unilaterally determine which forum has jurisdiction over every child who will reach eighteen years of age before being adjudicated in Family Court. In theory, under the statutory amendment, the State could attempt to try all seventeen year olds as adults by including a felony charge in every case and delaying trial until the child reaches age eighteen. By abrogating the amenability

processes, the statute has deprived children, such as Hughes, the judicial counterweight which they are constitutionally entitled to receive.

The State responds that it has very broad discretion in determining whether or not to prosecute and what charge(s) to file against a defendant. We recognized the broad discretion of the charging authority in *Marine I*:

The law is well settled that a legislative scheme vesting broad authority in the state or federal government through the charging process to determine whether a child shall be prosecuted as a juvenile or as an adult is not a denial of due process in the absence of 'suspect' factors [race or religion] or other arbitrary classifications.

Marine I, 607 A.2d at 1208. Similarly, we noted in *Albury v. State*, Del. Supr., 551 A.2d 53 (1988), that:

... the State has broad discretion as to whom to prosecute. '[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision of whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'

id. at 61 (quoting *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985)) (citations omitted). The State notes that this Court has "recognized a rebuttable presumption that criminal prosecutions are undertaken in good faith and in a nondiscriminatory manner." *See id.* at 62. The State insists that it acted in good faith and did not selectively charge Hughes based upon a suspect or arbitrary classification. Rather, the fortuity of Hughes' date of birth, date of arrest, and charge indiscriminately determined the appropriate forum for his trial. The State contends that Hughes should bear the risk of this fortuitous combination so long as the State acted in good faith and did not discriminate by bringing charges against him.

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Despite the very broad discretion the State maintains in its decision to charge and prosecute child offenders, nonetheless, when children are prosecuted as adults, "a judicial examination of the evidentiary justification for the charging decision is required." *Marine I*, 607 A.2d at 1212. Independent judicial review to assess the basis for prosecuting a child as an adult is "a prerequisite for sustaining the constitutionality of the Delaware statutory framework." *Marine II*, 624 A.2d at 1186. The good faith of the charging authority in its decision to charge a child with a felony is not sufficient to protect a child's constitutional rights. *See, e.g., Hammond v. State*, Del. Supr., 569 A.2d 81, 87 (1989); *Bailey v. State*, Del. Supr., 521 A.2d 1069, 1091 (1987); *Deberry v. State*, Del. Supr., 457 A.2d 744, 752-53 (1983) (as matter of State Constitutional law, failure to preserve potentially exculpatory evidence requires the court to perform a tripartite analysis for due process violation in which the conduct (good faith) of the State's agents is a relevant but not determinative consideration); compare *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988) (as matter of Federal Constitutional law, failure to preserve potentially useful evidence does not constitute due process violation unless defendant can show bad faith).

The State's decision to charge a child with a felony implicates constitutional rights not present in the average charging decision of an adult. The consequences of over-charging an adult are limited. While an unfounded felony charge may implicate an adult's liberty interest and provide the State greater bargaining position in any plea negotiations with the adult, a trial buffers any prejudice suffered by the adult by compelling the State to prove the elements of the alleged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An adult acquitted of an alleged felony offense but convicted of a lesser included misdemeanor offense will be subject to the same penalties as if originally charged with the lesser offense. Thus, our judicial review of the charging decision is limited because the prosecution is accorded broad discretion when charging adults already in the adult system. *Albury*, 551 A.2d at 61.

Conversely, judicial review of the charging decision is essential for those children who are prosecuted as adults. While over-charging an adult is of little consequence, a groundless

felony charge against a child who reaches age eighteen pending trial in the Family Court results in a criminal prosecution with its grave attendant consequences. The child is subjected to a public trial in the Superior Court and, if found guilty, convicted of a *crime* with the attendant stigma of possessing a criminal record. Therefore, an unfounded felony charge may arbitrarily deprive a child of the many advantages of adjudication in the Family Court in which, regarding a misdemeanor: the child is afforded treatment in his own interest, 10 *Del.C.* § 902(a); the child is assured privacy, 10 *Del.C.* § 1063; the child may have certain delinquency adjudications expunged and arrest records destroyed, 10 *Del.C.* § 1001; and, most importantly, the child is never designated a *criminal*. 10 *Del.C.* § 1010. In view of these consequences, it is unconstitutional to grant unfettered discretion to the prosecution, whose unilateral charging decision can effectively establish the jurisdiction over a child. Some meaningful judicial review into the nature of the charge is essential to the constitutionality of such a scheme.

The State argues that the elimination of the reverse amenability process is not constitutionally offensive because adults have never been afforded an amenability procedure under this State's statutory scheme. Under the language of section 1011, only a child (person under the age of eighteen) can be subject to a reverse amenability hearing. Because the statutory amendment only applies to those who have reached *adulthood* prior to trial, the State argues that such children lost the benefit of reverse amenability upon reaching their eighteenth birthday. It is argued that these children — turned adults — cannot be deprived of that to which they are no longer entitled. The State claims that the amendment simply reiterates the basic principle that the Family Court loses jurisdiction over a child who reaches

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the age of eighteen. We find this argument disingenuous.

Every child who is under the age of eighteen when arrested for a crime is initially subject to the jurisdiction of the Family Court unless charged with a designated felony or found nonamenable by the Family Court. The reverse amenability process ensures that those children charged with a designated felony receive an independent evaluation into the merits of the alleged offense. In either case, the child is afforded a *judicial* determination of whether the Superior Court should assume jurisdiction over the child. It is of no consequence that adults are not entitled to an amenability or reverse amenability hearing. As a threshold matter, there must be some mechanism in which a child may seek a disinterested examination into the basis of the felony charge to be prosecuted as an adult.

It is now well established in Delaware that the defendant's age at the time of his *arrest* for a given offense is determinative of whether the Family Court or the Superior Court has jurisdiction over the offense. *Marine II*, 624 A.2d at 1190; *Connors*, 505 A.2d at 1303; *Howard v. State*, Del.Supr., No. 385, 1991, Walsh, J., 612 A.2d 158 (1992) (Order). Thus, it is the date of arrest and the seriousness of the crime charged which determines jurisdiction. *Marine II*, 624 A.2d at 1191; 10 *Del.C.* §§ 921, 1002, 1011. The reverse amenability process guarantees that jurisdiction in Superior Court is premised upon the nature of the *offense* rather than the nature of the *charge*.

The amendment alters this process by fashioning jurisdiction over certain children based upon the date of *adjudication* and the crime *alleged*. Under this scheme, a child arrested and charged with a nondesignated felony while under eighteen years of age is subject to the scheduling variables of the Family Court. As a consequence, children charged with felonies are literally at the "mercy of the call of the calendar" of the Family Court. We are informed that currently, the routine trial tract for a case within the Family Court may extend from one year from arrest date until trial date. Moreover, due to the inevitable complications inherent in an overburdened Family Court, even the most efficient caseload management is subject to prolonged adjudicative delays. Hence, jurisdiction over children becomes contingent upon the efficiency of the judicial system rather than the seriousness of the crime and the age and character of the child. Premising jurisdiction over children

upon the date their cases are adjudicated imposes an arbitrary deadline on a child's constitutional rights and compounds the risk of arbitrariness in the charging process. Such risks cannot withstand equal protection scrutiny.

Arbitrary treatment under the amendment is not difficult to envision. For example, two juveniles are arrested for delinquency arising from the joint theft of property. The value of the property is questionable, but the police or the prosecution decide to treat the property as subject to the felony level had the defendants been adults.⁷ One juvenile is 17 years and 10 months of age while the other has just turned 17. Both are referred to Family Court for trial. Since it clearly appears that, under normal Family Court scheduling, the older juvenile will "age out" while awaiting trial, his case will be automatically transferred to the Superior Court after two months. The other offender will likely be able to remain in the Family Court for processing and not run the risk of being convicted of a crime. The older offender, even if innocent, may be tempted to seek an expedited court date in order to plead guilty to a charge of "delinquency" in the Family Court. Under this scenario, there is no rational basis for distinguishing between the defendants in terms of their conduct, and both are arrested as "children." Nonetheless, under the recent amendment differing adjudicative results will surely occur. A law which produces such results plainly violates the right of equal protection. See *State v. Owens*, 103 N.M. 121, 703 P.2d 898, 901 (1984) ("[S]tatutes which permit the state to subject one person to the possibility of greater punishment than another who has committed

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an identical act violate the equal protection clauses of the state and federal constitutions.").

The amendment deprives children of the constitutional safeguard of judicial review into the charging decision which was mandated by this Court in the *Marine* decisions. Without an independent examination into the evidentiary basis of a felony charge, the prosecution has the unfettered authority, through its charging decision, to unilaterally determine the jurisdiction over a substantial number of seventeen year old defendants in the Family Court. In effect, Hughes, and other defendants approaching their eighteenth birthday, will be penalized under the statute, via an adult prosecution in Superior Court, upon the nature of the allegation rather than the nature of the offense. Thus, the statute is facially unconstitutional as a violation of the right to due process under the United States and Delaware Constitutions. U.S. Const. amend. 14; Del. Const. art. I, § 7. See also *People v. Drummond*, Ct.App., 40 N.Y.2d 990, 391 N.Y.S.2d 67, 359 N.E.2d 663 (1976), cert. denied, 431 U.S. 908, 97 S.Ct. 1706, 52 L.Ed.2d 394 (1977); *in the interest of D.D.*, Fla.App., 564 So.2d 1224, 1225 (1990). Further, under the statute, children unfairly charged with committing a felony but convicted of a misdemeanor are accorded disparate treatment from those children charged with a misdemeanor. The former are treated as criminals on the basis of an unproven accusation while the latter are treated as delinquents and receive proceedings in their best interest. Therefore, the distinction is patently arbitrary and bears no rational relationship to a legitimate government interest. *Gottlieb*, 406 A.2d at 275; see also *State v. Johnson*, La.Supr., 343 So.2d 705, 708 (1977). Accordingly, we conclude that the statutory elimination of a judicial investigation into the factual basis of a felony charge against a child violates the constitutional guarantees of due process and equal protection of the law. *Marine II*, 624 A.2d at 1184, 1186 n. 11.⁸

We note that there never existed the perceived jurisdictional gap between the Family Court and Superior Court over those children who reach age eighteen before adjudication in the Family Court. The *Marine* decisions did not establish that children who reach age eighteen pending trial in Family Court become liberated from the jurisdiction of the Delaware judicial system. Rather, the result in *Marine* simply originated from a flawed amenability process in which *Marine* should have never been before the Superior Court. *Marine* was incarcerated throughout his trial and the appellate process and had, by then, served the maximum time period allowed under the then-existing Family Court laws so that a retrial in that court was futile. *Marine* was released from custody not because of a

jurisdictional gap or loophole but, rather, his release was founded upon the traditional margins of jurisdiction between the Superior Court and Family Court.

Under the *Marine* decisions, a child who reaches age eighteen pending trial can be tried in either the Family Court or Superior Court depending upon a number of factors. For most offenses, the Family Court may elect to retain jurisdiction over the child or transfer jurisdiction to the Superior Court if it concludes that the child is not amenable to its processes. Those children charged with a designated felony are tried in the Superior Court unless the alleged felony lacks a factual predicate or a transfer to Family Court is "in the interests of justice."

Moreover, the General Assembly has recently granted the Family Court potential jurisdiction over children until they reach the age of twenty-one. Subsequent to the *Marine* decisions, the General Assembly enacted 10 *Del.C.* § 928, which permits the Attorney General, prior to a child's trial in Family Court, to petition the court to extend its jurisdiction over the child. 69 *Del.Laws*, c. 96. Consequently, if the child is adjudged delinquent by the Family Court, the court may decide, after considering the child's age and the seriousness of the offense, as well as

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the need for rehabilitation and the public's safety, to extend jurisdiction over the child until age twenty-one or until the child is discharged from jurisdiction by the court. § 928(c). Therefore, children do not "age-out" of the Family Court upon their eighteenth birthday. Any perceived "jurisdictional gap" had been closed previously by the General Assembly.

Finally, we note that the basic thrust of the statutory amendment would be constitutionally acceptable, if the reverse amenability process under 10 *Del.C.* § 1011(b) were retained. Since the State has argued that the provisions of the amendment are not severable, we have not attempted to preserve the constitutionality of the statutory amendment by invalidating only the last sentence of the amendment which precludes application of § 1011.

IV

We conclude that the statutory amendment under review violates the constitutional guarantees of due process and equal protection of the laws. The amendment divests the judiciary of its independent role in assessing the evidentiary basis of a charge against a child. Such a judicial check on the charging authority is mandatory to comply with the principles enunciated in the *Marine* decisions. The distinctions drawn by the amendment are patently arbitrary and bear no rational relationship to a legitimate government interest.

The policy reasons which prompt the enactment of legislation are solely the concern of the General Assembly and it is not the function of the judiciary to question the wisdom underlying the passage of a statute. *Ames v. Wilmington Housing Authority*, Del. Supr., 233 A.2d 453, 456 (1967). Our role is limited to a review for constitutionality, *i.e.*, does a particular statute contravene the rights or impair the guarantees which the Federal and Delaware Constitutions have established as bedrock principles limiting governmental power? *Opinion of the Justices*, Del. Supr., 385 A.2d 695 (1978). Where such departures are found to exist, it is the right, indeed the duty, of the judiciary to require conformity with the constitutional standards. Our action invalidating the statutory amendment is intended to ensure that the prosecution of minors is conducted in accordance with standards of equality and due process. One of the oldest and most cherished principles of constitutional due process in our nation is that when a person is arrested (charged), that person is presumed to be innocent until convicted by evidence beyond a reasonable doubt. *Goddard v. State*, Del. Supr., 382 A.2d 238, 240 (1977). That very same principle requires punishment to be based upon the crime for which a person is convicted and not the crime for which he or she was arrested or charged.

Certified questions numbers four and five are answered in the AFFIRMATIVE.

ORDER

This 30th day of January, 1995 it appears that:

(1) The State has moved for reargument asserting various grounds which we find to be without merit. To the extent the State's motion is intended to seek clarification for further guidance we note the following:

(a) *Because of its accusatory, ex parte function, a grand jury does not serve as an independent check on prosecutorial authority and is not viewed as a protector of a defendant's rights. See United States v. Williams, 504 U.S. 36, ___-___, 112 S.Ct. 1735, 1744-45, 118 L.Ed.2d 352 (1992).*

(b) *The certified questions in the case requested this court to pass upon the constitutionality of 10 Del.C. § 1002, not 11 Del.C. § 1447. This Court will decide only the case before us. Paramount Communications, Inc. v. QVC Network, Del.Supr., 637 A.2d 34, 51 (1991). Nor was the constitutionality of 11 Del.C. § 1447 before the Court in Cain v. State, Del. Supr., 639 A.2d 74 (1994) (ORDER), since the defendant in Cain did not seek a reverse amenability hearing under then-existing 10 Del.C. § 939 as to the section 1447 offense.*

(c) *In view of the State's explicit rejection at oral argument of a severability analysis as contrary to legislative intent, the State will not be permitted to advance a post-decision contention to the contrary. (d) As the decision of the Court makes clear, those children presently awaiting trial who are affected by 10 Del.C. § 1002 may be tried in either the Superior Court or the Family Court subject to the amenability process under 10 Del.C. § 1010(a)(2), and the Family Court may elect to retain jurisdiction over such persons under the recent amendment to 10 Del.C. § 928. NOW, THEREFORE, IT IS ORDERED that the motion for reargument be, and the same hereby is, DENIED.*

FootNotes

1. A pseudonym adopted to preserve the privacy of the minor defendant.

2. Pursuant to 69 Del.Laws, c. 335, effective July 8, 1994, former Part A of Subchapter III of the Family Court Act, containing §§ 930 to 939, was redesignated as present §§ 1001 to 1011. Accordingly, in this opinion, we will refer to the pertinent statutory provisions as currently designated.

3. Article I, section 7, of the Delaware Constitution provides that no person shall be deprived of property except "by the law of the land." We have previously held that the phrase "due process of law" as contained in the Federal Constitution and the phrase "law of the land" as used in our State Constitution have substantially the same meaning. *Goddard v. State*, Del.Supr., 382 A.2d 238, 340 n. 4 (1977) (citing *Opinion of the Justices*, Del.Supr., 245 A.2d 90 (1968)). In comparison, the Delaware Constitution contains no equal protection clause *per se*. We find it unnecessary, in this case, to determine whether the equal protection concept inures as a matter of due process under the Delaware constitution. *But see Attorney General of Md. v. Waldron*, Md. App., 426 A.2d 929, 940-41 (1981).

4. In the past, we have used the terms "children," "minors" and "juveniles" when referring to those persons who have not yet reached their eighteenth birthday. For purposes of this opinion, we refer to such individuals as "children" because this term is defined and used throughout the Family Court Act and the amendment in question uses the term "child." See 10 Del.C. § 901(3) "'Child' means a person who has not reached his 18th birthday."

5. The reverse amenability statute provides:

§ 1011: Transfer of cases from Superior Court to Family Court.

(a) *In any case in which the Superior Court has jurisdiction over a child, the Attorney General may transfer the case to the Family Court for trial and disposition if, in his opinion, the interests of justice would be best served.*

(b) *Upon application of the defendant in any case where the Superior Court has original jurisdiction over a child, the Court may transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of*

justice would be best served by such transfer. Before ordering any such transfer, the Superior Court may hold a hearing at which it may consider evidence as to the following factors and such other factors which, in the judgment of the Court are deemed relevant:

- (1) The nature of the present offense and the extent and nature of the defendant's prior record, if any;
 - (2) The nature of past treatment and rehabilitative efforts and the nature of the defendant's response thereto, if any; and
 - (3) Whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court.
- (c) In the event the case is transferred by the Superior Court under this section, the case shall proceed as if it had been initially brought in the Family Court, and the Family Court shall have jurisdiction of the case, anything to the contrary in this chapter notwithstanding.

6. As noted earlier, Marine was fourteen years old at the time of his arrest. Had Marine been tried on the charges for which he was arrested, murder second degree, the Family Court would have had exclusive jurisdiction over him. On the other hand, if Marine was sixteen years of age when charged with the same crime, he would have been subject to a transfer to Superior Court upon a finding of nonamenability by the Family Court under section 1010(c).

7. Under Delaware law, theft is a misdemeanor if the value of the property in question is less than \$500, otherwise the offense is deemed a felony. 11 Del.C. § 841.

8. Although we have concluded that the statutory amendment is violative of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, we emphasize that our holding could be sustained exclusively under the due process provision of the Delaware Constitution. Del. Const. art. I, § 7.

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Supreme Court of Delaware.

STATE of Delaware, Plaintiff Below, Appellant, v. Damond ANDERSON, Tyrone Reams, and Corey Wilson, Defendants Below, Appellees.

No. 314, 1996.

Decided: July 22, 1997

Before VEASEY, C.J., WAISH, HOLLAND, HARTNETT and BERGER, JJ., constituting the Court en Banc. Steven F. Wood (argued) Deputy Attorney General, Department of Justice, Wilmington, for Appellant. Edmund M. Hillis (argued) Assistant Public Defender, Office of Public Defender, Wilmington, for Appellees Damond Anderson and Corey Wilson. Joseph A. Gabay, Wilmington, for Appellee, Tyrone Reams. We have accepted four certified questions of law from the Superior Court pursuant to Supreme Court Rule 41 (a). These questions concern the application of 10 Del.C. § 1011, the reverse amenability statute, to the pending trials of certain juveniles in the Superior Court charged with possession of a firearm during the commission of a felony. Our answers to these questions, in effect, uphold the constitutionality of the legislative scheme that denies the reverse amenability process to juveniles above the age of 16 years who have been charged with a violation of the firearms statute. We further held that other offenses joined with firearms violations continue to be subject to the reverse amenability process under the usual standards governing the joinder of offenses.

I

The stipulation contained in the certification provides the following factual background underlying the questions posed.

On December 4, 1995, co-defendants Damond Anderson, Tyrone Reams, and Corey Wilson were indicted by the Grand Jury on charges of Robbery First Degree, Possession of a Firearm During the Commission of a Felony, and Conspiracy Second Degree. On the date of the offense, October 20, 1995, the three co-defendants were between the ages of 16 and 18. On January 23, 1996, defendant Anderson filed a Motion for an Amenability Hearing pursuant to 10 Del.C. § 939, which is now 10 Del.C. § 1011. The other co-defendants subsequently joined in the motion. The State opposed the joint motion and, alternatively, requested that the Superior Court certify to this Court certain questions implicated by the reverse amenability request.

The questions ultimately certified by the Superior Court are as follows:

- I. When a defendant between the ages of 16 and 18 is charged in Superior Court with possession of a firearm during the commission of a felony pursuant to 11 Del.C. § 1447A(e), is the case subject to transfer to Family Court pursuant to the reverse amenability process?
- II. When a defendant between the ages of 16 and 18 is charged in Superior Court with possession of a firearm during the commission of a felony pursuant to 11 Del.C. § 1447A(e) and assuming that the charge is not subject to transfer to Family Court pursuant to the reverse amenability process, may other offenses which have been properly transferred to Superior Court pursuant to 10 Del.C. § 921(16) be transferred back to Family Court pursuant to the reverse amenability process?
- III. If a reverse amenability hearing is permitted, is the hearing to be conducted in regards to all offenses or only those properly joined to the jurisdiction of the Superior Court?
- IV. If a reverse amenability hearing is not permitted, does the recent amendment to 10 Del.C. § 921 violate a defendant's right to due process and/or equal protection as afforded by the Delaware and United States Constitutions?

The questions directed to the availability of the reverse amenability process are prompted, in part, by a 1996 amendment to 10 Del.C. § 1447A, that became effective July 31, 1996. Prior to the 1996 amendment, the firearm statute provided in pertinent part:

§ 1447A. Possession of a firearm during Commission of a Felony; class B felony

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(a) A person who is in possession of a firearm during the commission of a felony is guilty of possession of a firearm during the commission of a felony. Possession of a firearm during the commission of a felony is a class B felony.

(b) A person convicted under subsection (a) of this section shall receive a minimum sentence of 3 years at Level V, notwithstanding the provisions of § 4205(b)(2) of this title.

* * * * *

(e) Every person charged under this section over the age of 16 years shall be tried as an adult, notwithstanding any contrary provisions or statutes governing the Family Court or any other state law.

The 1996 amendment substituted the age of 15 years for the prior age of 16 years but repeated the language which required trial as an adult "notwithstanding . any other state law." 70 Del.Laws c. 596, § 7.

Another statute, enacted by the General Assembly in 1995 bears upon the certified questions. That provision, 70 Del.Laws c. 261, § 2, now appearing as 10 Del.C. § 921(16), places a limitation on the exclusive original jurisdiction of the Family Court in the following language:

(16) Notwithstanding any provision of this title to the contrary, charges of delinquency based upon an alleged violation of any provision of Title 11, 16 or 21 of this Code which would otherwise be within the original civil jurisdiction of Family Court shall instead be within the original criminal jurisdiction of Superior Court if said charges may be joined properly with a felony pending against the same child in Superior Court, as determined pursuant to the relevant rules of the Superior Court.

The State advances a statutory construction argument seeking a restriction on the use of the reverse amenability process. It proceeds on the premise that the Family Court, as a creature of statute with its jurisdiction defined by the General Assembly, may be denied adjudication over such offenses as the legislature may from time to time decide. Thus, it is argued, if the General Assembly has determined that certain offenses must be adjudicated in the Superior Court, the reverse amenability process, whether applied to certain discrete felonies or to a combination of other offenses otherwise within the jurisdiction of the Family Court, does not apply. A corollary of this argument is that a defendant so charged in the Superior Court enjoys no constitutional entitlement to transfer the charges against him to Family Court.

The defendants, building upon the rulings of this Court in *Marine v. State*, Del.Supr., 607 A.2d 1185 (1992) ("Marine I"); *Marine v. State*, Del.Supr., 624 A.2d 1181 (1993) ("Marine II") and *Hughes v. State*, Del.Supr., 653 A.2d 241 (1994), contend that the reverse amenability process is a matter of constitutional entitlement as a judicial check on prosecutorial discretion and cannot be denied to the defendants in this case.

II

Preliminarily, we note that in addressing certified questions of law, as distinct from review of trial court rulings, the normal standards of review do not apply. This Court must review the certified questions in the context in which they arise. *Rales v. Blasband*, Del.Supr., 634 A.2d 927, 931 (1993). Here, the certified questions arise in the context of a motion for a reverse amenability hearing and thus we address these matters to the same extent as if the motion were presented to us in the first instance. The questions embedded in the motion require this Court to interpret statutory provisions and to determine whether the statutes in question infringe upon State and Federal Constitutional rights. We thus consider this question as posing matters of law.

Although we have accepted four separate questions, upon analysis it appears that they overlap conceptually and can be answered in two rulings. Thus Question I, concerning the denial of the reverse amenability process to certain minors poses a separate and discrete issue of entitlement to a reverse amenability hearing. Questions II, III, and IV are interrelated factually and conceptually. All deal with the entitlement to, and extent of, a reverse amenability hearing with respect to offenses joined for prosecution with a violation of the felony/firearms statute.

A.

Our answer to Question 1 requires that, as a prelude, we restate certain holdings in our decisional law concerning criminal law jurisdiction of juveniles. As the repository of legislative authority, the General Assembly is vested with broad authority to define criminal behavior and to classify child offenders "based on their age for purpose of selecting the appropriate court for adjudication." *Hughes*, 653 A.2d at 248. That discretion is not absolute, however, and classification "must be founded on differences reasonably related to the purposes of the statute in which the classification is made." *State v. Ayers*, Del.Supr., 260 A.2d 162, 171 (1969). Age-based distinctions do not pertain to fundamental rights or affect a suspect class and such classifications, when attacked on equal protection or due process grounds, are presumed to be valid. They "will not be set aside if any state of facts reasonably may be considered to justify it." *Marine I*, 607 A.2d at 1207 (quoting *Traylor v. State*, Del.Supr., 458 A.2d 1170, 1177 (1983)).

In *Marine I* this Court upheld the constitutionality of the Delaware statutory scheme for allocation of jurisdiction over children charged with criminal offenses. In *Marine I* and later in *Hughes*, we focused on two exceptions to the general policy in favor of proceeding against children in a civil setting by allowing juveniles to be prosecuted as adults. First, under 10 Del.C. §§ 1010(a)(1) and (a)(3), children, regardless of age, who are charged with certain serious felonies, are prosecuted as adults. Second, under 10 Del.C. § 1010(a)(2), the Family Court has the discretion to transfer the case of a child over nineteen years of age to the Superior Court for trial as an adult if the court concludes that the child is not amenable to the Family Court processes. This case appears to present a third category, or perhaps a subset of offenses committed by certain juveniles that have been classified as within the exclusive jurisdiction of the Superior Court-possession of a firearm during

the commission of a felony. In actuality, exclusive Superior Court jurisdiction conferred by the felony/firearm statute may be viewed as included in the prospective language of § 1010(a)(3). In any event, there is little doubt that by enacting 11 Del.C. § 1447A(e), the General Assembly intended that individuals over the age of 15 years charged with this offense be tried as adults.

Defendants contend that this Court's previous construction of the reverse amenability statute, 10 Del.C. § 1011, operates as a judicial check on prosecutorial arbitrariness, and that Marine I and Hughes require that process to be made available to juveniles charged under the felony/firearm statute as a matter of constitutional right. It is true that we have viewed both the amenability and reverse amenability processes as containing "pivotal constitutional safeguards" providing "independent judicial scrutiny" over the charging of juveniles. Hughes, 653 A.2d at 249; Marine II, 624 A.2d at 1186. But Marine II is distinguishable factually from the case sub judice and the statute under review in Hughes posed risks that are not present in prosecutions under the felony/firearm statute.

In Marine I, our ruling was directed to a situation in which a 14 year old defendant was arrested for murder second degree but indicted for murder first degree, placing him within the exclusive jurisdiction of the Superior Court. Marine was convicted in the Superior Court of murder second degree an offense for which, at that time, the Family Court would have had exclusive jurisdiction. In Marine I, this Court held that the Superior Court did not properly apply the reverse amenability process to insure against prosecutorial overcharging.

In Hughes, this Court invalidated a statute that, in effect, sought to deny the reverse amenability process to juveniles who reached 18, or "aged out," before their cases could be adjudicated in the Family Court. We ruled that an individual who was a juvenile when arrested but who is tried as an adult because of the "scheduling variables" of a court calendar should not be denied the benefit of an independent judicial evaluation, through the reverse amenability process, on the basis of the charge against him.

The defendants in this case are charged with a discrete offense-possession of a firearm during the commission of a felony. Unlike the defendant in Marine, there are no gradations or lesser included offenses within that charge and the defendants are not subject to disparate treatment when compared with other juveniles over the age of 16 so charged. We thus perceive no need for an independent judicial evaluation of the charge to determine if these defendants have been subject to overcharging. Moreover, the legislative concern over the increased use of firearms by juveniles in committing felonies is a matter which surely falls within its policy formation authority. This Court cannot turn a blind eye to the public harm that the statute seeks to prevent and we will not second-guess the obvious legislative purpose in extending adult jurisdiction to persons 16 and 17 years of age in possession of firearms. As this Court noted in Ayers: "An individual between the ages of 16 and 18 is as capable of violent action as is an older individual." Ayers, 260 A.2d at 171.

Our decision in Ayers preceded the adoption of the reverse amenability statute, but the teaching of Ayers remains viable: when a juvenile participates in violent action he may be viewed as forfeiting his special status and the General Assembly may act within its sound discretion in fixing the relationship between age and conduct. While the reverse amenability process continues to have utility in guarding against prosecutorial abuse and disparate treatment of juveniles, it is not required to sustain the jurisdiction of the Superior Court for individuals over the age of 16 years charged with violation of the felony/firearm statute. Accordingly, we answer Question I in the negative.

B.

As previously noted, Question II, III and IV all pertain to the entitlement of a juvenile who is charged in the Superior Court under the felony/firearm statute to a reverse amenability proceeding with respect to companion offenses. These questions were precipitated by a 1995 amendment to 10 Del.C. § 921 that defines the basic jurisdiction of the Family Court. That statute, enacted into law as 70 Del.Laws c. 261 and now appearing as 10 Del.C. § 921(16), provides as follows:

(16) Notwithstanding any provision of this title to the contrary, charges of delinquency based upon an alleged violation of any provision of Title 11, 16 or 21 of this Code which would otherwise be within the original civil jurisdiction of Family Court shall instead be within the original criminal jurisdiction of Superior Court if said charges may be joined properly with a felony pending against the same child in Superior Court, as determined pursuant to the relevant rules of the Superior Court.

The Synopsis accompanying the legislation recites that the bill is intended "to deter juvenile crime and promote judicial efficiency by allowing all criminal charges relating to a crime committed by a juvenile to be prosecuted in Superior Court whenever any of the charges are properly brought there." 70 Del.Laws c. 261. Drawing on the synopsis as revealing legislative intent, the State argues that the act mandates that any offense properly joined with a felony/firearm offense that would otherwise fall within the original civil jurisdiction of the Family Court shall instead fall within the original criminal jurisdiction of the Superior Court. Moreover, it is argued, the properly joined companion offenses must be prosecuted in the Superior Court without the possibility of transfer to the Family Court through the reverse amenability process.

The State's argument does not square with the plain language of § 921(16). To be sure, this section gives the Superior Court original jurisdiction over properly joined offenses that otherwise would be within the jurisdiction of the Family Court. Nothing in this statute, however, prohibits the Superior Court from transferring jurisdiction from itself to the Family Court with respect to charges not specifically designated by the General Assembly as those for which juvenile offenders must be proceeded against as adults. The State's attempt to construe the introductory language of the statute "Notwithstanding any provision of this title to the contrary" as indicative of legislative intent to eliminate the reverse amenability process on companion charges is unavailing. To begin with, the statute's primary purpose is the achievement of judicial efficiency. We are not inclined to ascribe to a statute that is designed to promote better case management, the intent to abolish a

transfer process which, with respect to certain offenses, has been viewed as providing a judicial check on prosecutorial overcharging—a function with implications of important equal protection and due process guarantees in the prosecution of certain offenses. *Marine I*, 607 A.2d at 1209-12; *Hughes*, 653 A.2d at 245.

The State's argument also exaggerates the legal effect of the plain language of the statute. Conferring original jurisdiction on the Superior Court with respect to particular offenses is materially different from providing that a juvenile charged with a given offense shall be tried as an adult, particularly if the companion offenses constitute misdemeanors, drug offenses or traffic violations. Adopting the State's position would require us to construe the statute as a mandate that the Superior Court must process the companion charges, no matter how innocuous, in its system, rather than give that court the preliminary decision whether or not to retain jurisdiction over certain companion offenses. A fixed mandate would be the antithesis of efficient case management.

A construction that views the statute as permissive permits the Superior Court to apply the usual standards which govern joinder and severance of offenses. See Superior Court Criminal Rules 8 and 14. In most cases, we envision that the Superior Court most likely will decide to retain jurisdiction over companion charges simply because the standards of joinder may so suggest. In the reverse amenability process decision as to other offenses, the Superior Court is free, of course, to take into consideration as a factor, perhaps a significant factor, the fact that the felony/firearm offense must be decided in the Superior Court and that the juvenile will not be spared adult court proceedings in any event, regardless of the merit of the companion charges and the prospect for rehabilitation. But, in our view, nothing in section 921(16) prohibits the Superior Court from holding a reverse amenability hearing and permitting transfer to the Superior Court of those companion charges over which the Family Court would otherwise have had jurisdiction. Accordingly, certified Question II is answered in the affirmative.

C.

The answer to Certified Question III is foreshadowed by our answers to Questions I and II. For the reasons previously stated, a reverse amenability hearing is permissible only for those charges properly joined under 10 Del.C. § 961(16) to the charge of possession of a firearm during the commission of a felony. By operation of 10 Del.C. § 1011(b) and 11 Del.C. § 1447A(e), no reverse amenability hearing is available for the charge of possession of a firearm during the commission of a felony.

D.

Certified Question IV, as phrased, is somewhat ambiguous and depends for its answer on the determination of whether the companion offenses, or the felony/firearm charge, or both, are subject to the reverse amenability process. We have concluded that juveniles over the age of 16 years charged with a violation of 11 Del.C. § 1447A(e) are not entitled to a reverse amenability hearing but, with respect to companion offenses a reverse amenability hearing is permissible.

In our answer to certified Question I we have concluded that as to the felony/firearm charge, we perceive of no equal protection or due process barrier to the denial of a reverse amenability hearing. Since under our answer to Question II, the entitlement to a reverse amenability hearing with respect to companion offenses remains intact, there is no need to pass upon defendants' constitutional arguments.

In sum, the Certified Questions are answered as follows:

Question I: No

Question II: Yes

Question III: Limited reverse amenability hearing permitted

Question IV: Answered by Question III.

FOOTNOTES

1. § 1010. Proceeding against child as an adult; amenability proceeding; referral to another court.(a) A child shall be proceeded against as an adult where:(1) The acts alleged to have been committed constitute first or second degree murder, unlawful sexual intercourse in the first degree or kidnaping in the first degree, or any attempt to commit said crimes; * * *(3) The General Assembly has heretofore or shall hereafter so provide.

WALSH, Justice:

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State v. Moore

Superior Court of Delaware, Kent

September 22, 2003, Submitted ; December 31, 2003, Decided

I.D. No. 0304018595

Reporter

2003 Del. Super. LEXIS 433

STATE OF DELAWARE v. JOSHUA MOORE, Defendant. The motion for transfer was granted.

Disposition: [*1] Defendant's Motion For Transfer of The Case To Family Court GRANTED.

Core Terms

prima facie case, prior record, transferred, offenses, programs, interests of society, alleged offense, present offense, sex offender, sex offense, rehabilitative, indictment, probation, exhibits, charges, cousins, factors, adult, rebut

Case Summary

Procedural Posture

Defendant juvenile moved to transfer his second-degree rape case to the Family Court (Delaware) pursuant to *Del. Code Ann. tit. 10, § 1011(b)*.

Overview

Defendant was charged with two counts of second-degree rape. Because he was between 14-15 years old at the time of the offenses, the State sought to try him as an adult under *Del. Code Ann. tit. 10, § 1010(a)*. The court found that the State established a prima facie case that defendant committed the charged offenses. Defendant's prior record consisted of delinquency adjudications for offensive touching and attempted second-degree robbery. However, defendant had not previously had the occasion to undergo any rehabilitative program relating to sex offenses. Therefore, the interests of society and defendant would be best served by transferring the pending charges to the family court pursuant to *Del. Code Ann. tit. 10, § 1011(b)*.

Outcome

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult > General Overview

HN1 *Del. Code Ann. tit. 10, § 1010(a)* provides that a child shall be proceeded against as an adult where the acts alleged to have been committed constitute rape in the second degree.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > General Overview

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult > General Overview

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Evidence > Inferences & Presumptions > Presumptions

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN2 A rebuttable presumption exists that a child charged with rape in the second degree should be tried as an adult and the burden is on a defendant to rebut that presumption.

Criminal Law & Procedure > Jurisdiction & Venue > Venue

HN3 In acting upon a defendant's application to transfer, a court is required to consider the following factors and such other factors as are relevant: (1) the nature of the present offense and the extent and nature of the defendant's prior record; (2) the nature of past treatment and rehabilitative efforts and the nature of the defendant's response thereto, if any; and (3) whether the interests of society and the defendant would be best served by trial in a family court or in a superior court.

Criminal Law & Procedure > Jurisdiction & Venue > Venue

HN4 In a juvenile's motion to transfer context, when considering the nature of an offense, a court must determine whether the State has established a prima facie case. A prime facie case is established if there is a fair likelihood that a defendant will be convicted. The evidence, both prosecution and defense, must be viewed in its totality, and a prima facie case is not proven if the evidence does not establish a fair likelihood of conviction. If a prima facie case has not been established, the case should be transferred to a family court.

Counsel: Stephen R. Welch, Jr., Esq., Department of Justice, Dover, Delaware. for the State of Delaware.

Deborah L. Carey, Esq., Public Defender's Office, Dover, Delaware. for the Defendant.

Judges: James T. Vaughn, Jr., Resident Judge.

Opinion by: James T. Vaughn, Jr.

Opinion

VAUGHN, Resident Judge

ORDER

Upon consideration of the Defendant's application to transfer the case to Family Court, the State's opposition, and the record of the case, it appears that:

1. By indictment filed in June 2003, the Defendant was charged with two counts of Rape in the Second Degree and one count of Unlawful Sexual Contact in the Second Degree. The indictment charges that the alleged offenses occurred between February 1, 2003 and April 28, 2003. The Defendant's birth date is February 28, 1988. Therefore, he went from 14 to 15 years of age during that period. The Defendant has filed an application pursuant to 10 Del. C. § 1011(b) requesting that the case be transferred to Family Court.

2. The case is brought in this Court pursuant to 10 Del. C. § 1010(a). The statute [***2**] **HN1** provides that a child shall be proceeded against as an adult where the acts alleged to have been committed constitute Rape in the Second Degree.

3. **HN2** A rebuttable presumption exists that a child charged with Rape in the Second Degree should be tried as an adult and the burden is on the defendant to rebut that presumption. ¹ [***5**] **HN3** In acting upon the Defendant's application, the Court is required to consider the following factors and such other factors as are relevant: (1) the nature of the present offense and the extent and nature of the defendant's prior record; (2) the nature of past treatment and rehabilitative efforts and the nature of the defendant's response thereto, if any; and (3) whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court. ²

4. **HN4** In considering the nature of the offense, the court must determine whether the State has established a *prima facie* case. ³ A *prima facie* case is established if there is a fair likelihood that the defendant will be convicted. ⁴ The evidence, both prosecution and defense, must be viewed in its totality, and a *prima facie* case is not proven if the evidence does not [***3**] establish a fair likelihood of conviction. ⁵ If a *prima facie* case has not been established, the case should be transferred to the Family Court.

5. The Defendant's alleged victims are his cousins, aged 13 and 10 at the time. The cousins' mother had become the Defendant's guardian and taken him in to her and her daughters' residence shortly before the alleged offenses occurred. After having considered the testimony and exhibits introduced at the hearing, I find that the State established a *prima facie* case that the Defendant committed the charged offenses.

6. The Defendant's prior record consists of Family Court adjudications of delinquency for Offensive Touching in 1999 and Attempted Robbery in the Second Degree in 2001. Family Court records, including probable cause

¹ State v. Mayhall, 659 A.2d 790, 795 (Del. Super. 1995); State v. Wyszynski, 1994 Del. Super. LEXIS 220 (Del. Super. 1994).

² 10 Del. C. Sec. 1011(b).

³ Marine v. State, Del. Supr., 607 A.2d 1185, 1211 (1992), cert. Dismissed, **505 U.S. 1247 (1992)** (Marine I); Marine v. State, Del. Supr., 624 A.2d 1181, 1185 (1993) (Marine II).

⁴ Marine II at 1185; State v. Mayhall, 659 A.2d 790, 791 (Del. Super. 1995).

⁵ Marine II at 1185; State v. Mayhall, 659 A.2d at 791.

affidavits describing the incidents, were introduced as exhibits and I have reviewed them. The Defendant was placed at Level II and Level III, respectively, for those offenses. The Defendant did not do everything that he was supposed to do while on Level III, but he was deemed to have successfully completed both probations.

7. The Defendant has not previously had the occasion to undergo any rehabilitative program [*4] relating to sex offenses. Through Family Court, several out-of-state, Level IV sex offender programs are available, generally ranging in length from nine to 18 months. It would appear that there is still time for the Defendant to be considered for entry into one of such programs and to complete such a program before he becomes 18 years of age.

8. After taking into account the nature of the present offense, the nature and extent of the Defendant's prior

record, the Defendant's age, his response to past probation through Family Court, which was at least adequate, the lack of any prior treatment for sex offenses, the availability of sex offender programs through Family Court for which this Defendant would seem to be eligible, and all other relevant facts and circumstances, I am persuaded that the interests of society and the Defendant would be best served by having the pending charges tried in Family Court.

9. Therefore, the Defendant's motion is *granted* and the case is transferred to Family Court for trial and disposition.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

Resident Judge

State v. Aaron L. Johnson

I.D. No. 1111008719

June 15, 2012

FACTS

Aaron Johnson (hereinafter “Defendant”) applied to this Court for reverse amenability to have his case transferred to Family Court so that he may be tried as a juvenile. His indictment includes five counts: first degree murder (non-capital), two counts of possession of a deadly weapon during the commission of a felony, assault second degree, and possession of a deadly weapon by a person prohibited.

At roughly 1:50 A.M. on November 12, 2011, Defendant was the rear driver’s side occupant in a vehicle stopped at a traffic light at the intersection of State Route 10 and U.S. Route 13. A second vehicle pulled up behind the first vehicle. Previously, the occupants of both automobiles had attended a party a short distance away, which was broken up by police. Tevin Perry, the decedent victim, exited the second vehicle and approached the rear of the first vehicle. The front passenger side occupant of the first vehicle, Josh Gordon, exited the first vehicle. Shortly thereafter, fighting broke out between the occupants of both vehicles, which lasted for roughly the time of the red to green to red cycle of the traffic light. During the altercation, Defendant allegedly stabbed Perry in the upper chest and stabbed Isaiah Barkley twice in the back. Both Perry and Barkley were treated at Kent General Hospital. Perry died during emergency surgery. Defendant was 17 years old at the time of these alleged offenses.

Reviewing Defendant’s criminal record, at age fifteen a charge of disorderly conduct was diverted to Teen Court and dismissed by way of *nolle prosequi*.

Defendant has former adjudications of delinquency for inattentive driving on January 20, 2011 and conspiracy second degree on April 21, 2011. The conspiracy second

State v. Aaron L. Johnson

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degree charge resulted in six months on Level III probation, which Defendant completed with one curfew violation. Defendant officially completed Level III probation on November 3, 2011. The incident at hand followed on November 13, 2011. The Court held a reverse amenability hearing on April 23 and 24, 2012.

Standard of Review

Reverse amenability proceedings for the transfer of cases from Superior Court to Family Court are generally governed by 10 *Del. C.* §1011. Part (b) states as follows:

Upon application of the defendant in any case where the Superior Court has original jurisdiction over a child, the Court may transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of justice would be best served by such transfer. Before ordering any such transfer, the Superior Court shall hold a hearing at which it may consider evidence as to the following factors and such other factors which, in the judgment of the Court are deemed relevant: (1) The nature of the present offense and the extent and nature of the defendant's prior record, if any; (2) The nature of past treatment and rehabilitative efforts and the nature of the defendant's response thereto, if any; and (3) Whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court.

The Delaware Supreme Court has stated:

[I]n the context of a reverse amenability hearing, the issue is whether the evidence in its totality (prosecution and defense) demonstrates, *prima facie*, that the State has a substantial likelihood of convicting the accused juvenile as charged. Such an examination of the evidence in its totality is necessary to provide a 'judicial counterweight to any perceived prosecutorial charging excess,' thereby reconciling the Delaware reverse amenability statute with the state and federal Constitutional guarantees of

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due process and equal protection.¹

DISCUSSION

Defendant allegedly stabbed two victims with a knife. Typically, a knife is considered a deadly weapon under 11 *Del. C.* § 222(5). In relation to Defendant's two counts of possession of a deadly weapon during commission of a felony, 11 *Del. C.* § 1447(d) states: "Every person charged under this section over the age of 16 years shall be tried as an adult, notwithstanding any contrary provision of statutes governing the Family Court or any other state law."

A related statute contains exactly the same provision as 11 *Del. C.* § 1447(d), and in the context of a reverse amenability hearing, the Delaware Supreme Court held that due to the legislature's clear legislative purpose of trying such defendants as adults and the legislature's sound discretion in doing so, the reverse amenability process "is not required to sustain the jurisdiction of the Superior Court for individuals over the age of 16 years charged with the violation of the felony/firearm statute."²

The State contends and Defendant concedes that, pursuant to 11 *Del. C.* § 1447(d), the two counts of possession of a deadly weapon during the commission of a felony must remain in Superior Court. The Court agrees.

¹*Marine v. State (Marine II)*, 624 A.2d 1181, 1185 (Del. 1993).

²*State v. Anderson*, 697 A.2d 379, 383 (Del. 1997). Although the "not required" language is somewhat murky in this portion of the opinion, the Court later explicitly rejects the availability of a reverse amenability hearing in the context of possession of a firearm during the commission of a felony. *Id.* at 385. The statute under which Defendant is charged contains exactly the same provision as the statute examined by the Delaware Supreme Court in *Anderson*.

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With regard to the remaining charges, in a situation analogous to the one at hand, the Delaware Supreme Court held that “other offenses joined with firearms violations continue to be subject to the reverse amenability process under the usual standards governing the joinder of offenses.”³ The Court went on to conclude:

In most cases, we envision that the Superior Court most likely will decide to retain jurisdiction over companion charges simply because the standards of joinder may so suggest. In the reverse amenability process decision as to other offenses, the Superior Court is free, of course, to take into consideration as a factor, perhaps a significant factor, the fact that the felony/firearm offense must be decided in the Superior Court and that the juvenile will not be spared adult court proceedings in any event, regardless of the merit of the companion charges and the prospect for rehabilitation. But, in our view, nothing in section 921(16) prohibits the Superior Court from holding a reverse amenability hearing and permitting transfer to the Superior Court of those companion charges over which the Family Court would otherwise have had jurisdiction.⁴

Indeed, Defendant will not be spared adult proceedings on two counts of possession of a deadly weapon during the commission of a felony. Ten *Del. C.* § 1010(a) provides the circumstances under which a child shall be tried as an adult. The pertinent circumstance in this case is the charge of first degree murder. The Court reviews the charge of first degree murder based on the evidence presented at the reverse amenability hearing in light of 10 *Del. C.* § 1011(b) and for “whether the evidence in its totality (prosecution and defense) demonstrates, *prima facie*, that the State has a

³*Id.* at 380.

⁴*Id.* at 384.

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substantial [or fair] likelihood of convicting the accused juvenile as charged.”⁵

Starting with the latter evaluation for the charge of murder in the first degree, Defendant was indicted under 11 *Del. C.* § 636(a)(1), which states: “A person is guilty of murder in the first degree when: (1) The person intentionally causes the death of another person” Such intent occurs when “it is the person’s conscious object to engage in conduct of that nature or to cause that result.”⁶ Several pieces of evidence lead the Court to believe that there is a fair likelihood of convicting Defendant of murder in the first degree. First, by the admission of Defendant, he had a knife, and he swung the knife at Perry, though he thought he just stabbed him in the hands. Second, according to Detective William Porter, the majority of the people in both cars said they saw Defendant exit vehicle one and fight by swinging his hand in a stabbing motion. Third, according to the driver of vehicle one, Alexia Lopez, when Defendant got back into the car he stated to her, “I got them for you.” Fourth, the fact that Perry was wounded directly in the chest is indicative of an intent to cause death.

Defendant presented evidence that there may have been a confrontation between the individuals in the two vehicles at the aforementioned party in the Camden-Wyoming area earlier that evening. Defendant also presented evidence that vehicle two may have followed vehicle one and that Perry may have been punching through the window of

⁵*Marine II*, 624 A.2d at 1185. “Substantial” and “fair” appear to be used interchangeably in this context to denote a real probability that a reasonable jury could convict based on the totality of the circumstances. See *State v. Waters*, I.D. No. 0910007308, at 2 (Del. Super. Apr. 14, 2010); *State v. Mayhall*, 659 A.2d 790, 792 (Del. Super. 1995).

⁶*Burrell v. State*, 766 A.2d 19, 25 (Del. 2000) (quoting 11 *Del. C.* § 231(a)(1)).

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vehicle one at Defendant before Perry was stabbed.

Viewing the evidence in its totality, the Court finds that the State has a fair likelihood of convicting the Defendant as charged. Further, for the lesser included offense, second degree murder, which requires that Defendant “recklessly cause[d] the death of another person under circumstances which manifest a cruel, wicked, and depraved indifference to human life,”⁷ the State has an even stronger case. Even if the State did not have a fair likelihood of convicting Defendant of first degree murder, a child must be proceeded against as an adult when “[t]he acts alleged to have been committed constitute first or second degree murder”⁸

Now that the Court has determined that Defendant was properly charged with first degree murder under *Marine I* and *II*, the Court considers the factors under 10 *Del. C.* § 1011(b). The nature of the present offense is second only to capital murder and is therefore very grave. The Court recounted Defendant’s prior record above. It is, by no means, the worst juvenile record that the Court has seen, but conspiracy in the second degree is a significant criminal offense. In terms of past treatment and rehabilitative efforts and the nature of Defendant’s response, Defendant has participated in Teen Court and has served six months on Level III probation. The alleged crimes at hand occurred less than a month after Defendant’s discharge from his Level III sentence. In short, Defendant has shown a trend of criminal activity, which at present appears to be unbroken.

⁷11 *Del. C.* § 635(1).

⁸10 *Del. C.* § 1010(a)(1).

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June 15, 2012

In reviewing whether the interests of society and Defendant would be best served by trial in Family Court or Superior Court, the Court heard from several witnesses. Testifying on behalf of Defendant, Dr. Abraham J. Mensch, a licensed psychologist, discussed his psychological evaluation of Defendant. Dr. Mensch testified that Defendant has a slight memory impairment, but does not suffer from any other notable mental health issues. Richard Callahan, a Division of Youth Rehabilitative Services Probation Officer, testified that, in his experience, his department could not provide services or placement to someone of Defendant's criminal background and age. Defendant does not need mental health treatment, nor could the Division of Youth Rehabilitative Services provide services or placement if he did. It is not in the interests of society to place the remaining charges in Family Court for treatment Defendant does not need and that the Division of Youth Rehabilitative Services cannot provide.

After careful review of the factors above, the Court finds that the interests of justice would not be best served by trial of the remaining charges in Family Court. Additionally, on the charge of murder in the first degree, and the remaining two charges, assault in the second degree and possession of a deadly weapon by a person prohibited, the principles of joinder militate against transfer to Family Court. Superior Court Criminal Rule 8(a) provides as follows:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

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Before the Court is one continuous incident. All five charges are based upon the alleged actions of Defendant during a fight that took place over the course of a few minutes. The Court finds that the charges are properly joined and should be heard in Superior Court.

CONCLUSION

Under 11 *Del. C.* § 1447(d), Defendant's two counts of possession of a deadly weapon during the commission of a felony must be heard in Superior Court. The Court finds that there is a fair likelihood of conviction on Defendant's first degree murder charge. After review of 10 *Del. C.* § 1010 (b)(1) - (3), the Court finds that the interests of justice are not best served by transfer of the first degree murder charge to Family Court. Moreover, the principles of joinder urge the Court to find that all of Defendant's charges should be heard together in Superior Court. Defendant's application is hereby *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

oc: Prothonotary

xc: Counsel

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : Criminal Action Nos.
 : 08-12-0844 thru 0848
V. : ID# 0811002568
 :
AN'DESHIA B. SATCHELL, : Decision
Defendant. :

T R A N S C R I P T
O F
P R O C E E D I N G S

Sussex County Courthouse
Georgetown, Delaware
Monday, December 14, 2009.

BEFORE:

THE HONORABLE RICHARD F. STOKES, Judge.

APPEARANCES:

MARTIN J. COSGROVE, Jr., Deputy Attorney General,
appearing on behalf of the State.

JOHN P. DANIELLO, Public Defender,
appearing on behalf of the Defendant.

* * * * *

DAVID WASHINGTON
Official Court Reporter

1 PROCEEDINGS

2

3

THE COURT: Good morning.

4

MR. COSGROVE: Good morning Your Honor.

5

MR. DANIELLO: Good morning, Your Honor.

6

7

THE COURT: This is the matter of the State of Delaware v. An'Deshia Satchell. This is my

8

decision in the case of An'Deshia Satchell, a juvenile

9

who has moved to have her case transferred to the

10

Family Court for adjudication. She is charged with

11

attempted murder first degree, possession of a deadly

12

weapon during the commission of a felony, assault

13

second degree, and criminal mischief related to an

14

incident that took place on November 1, 2008. An

15

unrelated criminal trespass third degree charge

16

relating to events occurring on October 25, 2008, was

17

also filed. The accused was 14 years old at the time

18

of the incidents and arrest, and is now 15 years old.

19

Since November 4, 2008, An'Deshia has been

20

held at the Stevenson House, a Level 5 detention

21

facility for juvenile females. I conducted a reverse

22

amenability hearing. And after thoroughly reviewing

23

the evidence and the law, I find that the juvenile is

DAVID WASHINGTON
Official Court Reporter

1 amenable to rehabilitative processes available through
2 the Family Court. Her case, therefore, will be moved
3 to the Family Court, as requested.

4 In Cain v. State, our Supreme Court
5 recognized that a person under the age of 18 and
6 charged with a crime is ordinarily within the
7 jurisdiction of the Family Court. However, a minor
8 alleged to have committed certain designated felonies,
9 including attempted murder in the first degree, shall
10 be proceeded as an adult. This is provided for by
11 statute in Title 10 Del. C. Section 1010(a).
12 Therefore, the defendant is subject to the
13 jurisdiction of the Superior Court. The jurisdiction
14 is not final because the Superior Court may transfer
15 the juvenile's case to the Family Court in the
16 interest of justice. In determining whether the
17 defendant would be amenable to Family Court
18 proceedings, I must take into consideration the three
19 factors set out in Title 10 Section 1011.

20 First, I address the nature of the present
21 offense and the extent and nature of the juvenile's
22 prior record. In this case, after hearing the
23 testimony of Detective Rex Mears, Jr., of the Delaware

DAVID WASHINGTON
Official Court Reporter

1 State Police, I find that the State has established a
2 prima facie case, meaning there is a fair likelihood
3 that An'Deshia will be convicted if the State's
4 evidence is not rebutted. The State's evidence fairly
5 established that An'Deshia attacked a 78-year-old man
6 with a knife and stabbed him two times in the back and
7 chest. The man was able to prevent a third and
8 probably life-threatening strike through defensive
9 maneuvers. The juvenile also sprayed the victim in
10 his eyes with bleach and damaged his cell phone
11 because the victim indicated he was going to call 911
12 for help. In addition to the knife wounds to the
13 body, the knife made cuts to the victim's right hand.
14 Fortunately, the victim did not have an extended stay
15 at the hospital.

16 This incident started when the juvenile lost
17 her temper when the victim refused to give her a ride
18 to pick up a friend. The juvenile acted wildly and
19 forced the victim to the ground when he attempted to
20 run away. When interviewed by the police, the
21 juvenile admitted she had a problem with anger and
22 needed help. This incident occurred on November 1,
23 2008.

DAVID WASHINGTON
Official Court Reporter

1 Several days earlier, on October 25, 2008,
2 the juvenile attempted to open a kitchen window on
3 another person's property. The juvenile admitted
4 doing this for fun. The charge is fairly established
5 as she did not have permission to be on the property.
6 The criminal trespass charge would likely be severed
7 before trial because it had nothing to do with the
8 more serious felony offenses occurring on November 1,
9 2008.

10 Under the first prong, I must take into
11 consideration the nature and extent of the juvenile's
12 past record. According to Hope Balerak, An'Deshia's
13 current probation officer, An'Deshia has a long
14 history of antisocial behavior. She was found
15 delinquent of the following charges: Theft under
16 \$1,000 and unauthorized use of a motor vehicle on
17 February 1, 2006; criminal trespass third degree on
18 October 4, 2006; offensive touching on May 16, 2007;
19 disorderly conduct on February 26, 2008; disorderly
20 conduct on May 14, 2008; an offensive touching and
21 noncompliance with bond conditions on June 10, 2008.
22 From June 10, 2008, and before, approximately 13
23 charges were nolle prosequi. Aside from the Superior

DAVID WASHINGTON
Official Court Reporter

1 Court charges, there are multiple charges pending
2 disposition in the Family Court, primarily theft and
3 unauthorized use of credit cards.

4 Ms. Balerak also testified at to the
5 sentences An'Deshia received for her crimes. She was
6 placed on probation for an adjudication of theft
7 misdemeanor in August 2006. At that time, rules were
8 set up and an electronic device was placed on her
9 ankle to monitor her movements. She was arrested
10 again in August of 2006 for offensive touching and
11 criminal trespass. These charges resulted in her
12 first admission to a probation program called Abraxas,
13 which has a general component, Level 3, and an
14 intensive component, Level 3A. An'Deshia was placed
15 on Level 3A, which included two to three visits per
16 week from the probation officer, urine screening and
17 an ankle bracelet.

18 In May of 2007, she was placed on Level 3
19 probation as a result of another adjudication of
20 offensive touching.

21 In February of 2008, she was adjudicated
22 delinquent on the charge of disorderly conduct and
23 received 12 months in Abraxas.

DAVID WASHINGTON
Official Court Reporter

1 In May 2008, she was adjudicated delinquent
2 on a charge of disorderly conduct. She was sentenced
3 to 30 days in Grace Cottage, the only Level-4 female
4 staff secured facility in the state. She served her
5 sentence from June 10 2008, through July 17, 2008.
6 When her sentence was completed, she was immediately
7 returned to Abraxas probation.

8 In November of 2008, she was arrested for the
9 instant offenses.

10 Edward Waples, the supervisor of Student
11 Services for Cape Henlopen School District testified
12 as to An'Deshia's school record, which shows a pattern
13 of antisocial behavior. After a hearing on October
14 21st and 22nd, 2008, the school found that the
15 juvenile engaged in a fight on school property. The
16 fight endangered students and staff of the ninth grade
17 campus, and caused injury to a teacher who tried to
18 intervene. The fight resulted in numerous violations
19 of the Student Code of Conduct. The fight was about a
20 boyfriend and it occurred on October 8, 2008. The
21 juvenile struck another student in the face. For
22 these reasons, An'Deshia was expelled from the Cape
23 Henlopen School District on October 13, 2008.

 DAVID WASHINGTON
 Official Court Reporter

1 Teachers reported that in ninth grade the
2 juvenile had poor academic performance, had disrupted
3 class and was often rude, permanently sad. The
4 juvenile had numerous in-and-out-of-school
5 suspensions. Disciplinary action was initiated on May
6 5, 2000, when the juvenile turned around in her seat
7 on the school bus and hit and pulled another student's
8 hair. From December 15, 2002, through October 8,
9 2008, the school records reflect 12 incidents of
10 disorderly conduct. There are numerous repeated
11 incidents of other inappropriate behavior, as well.

12 Since her arrest, An'Deshia has been housed
13 at Stevenson House, a Level 5-type detention facility.
14 Although her pattern of disruptive behavior has
15 continued for a while, many of the incidents involved
16 minor infractions such as talking during silent
17 periods. According to La'Vonne Singletary, a Family
18 Services Specialist with Youth Rehabilitative Services
19 or YRS person, An'Deshia's behavior has improved since
20 being in the Stevenson House.

21 The second topic I must consider is the
22 nature of past treatment and rehabilitative efforts
23 and the nature of the juvenile's response to the

DAVID WASHINGTON
Official Court Reporter

1 treatment. I agree with Dr. Teresa Dunbar, a
2 psychologist for the State of Delaware, who stated
3 that An'Deshia is a classic case of someone who
4 slipped through the cracks of our system. The
5 caseworkers as well as the psychological and mental
6 health professionals who testified at the hearing
7 agreed that this child needed more treatment and care
8 than she has received and that she responded, at least
9 partially, when she was treated.

10 According to Dr. Dunbar, An'Deshia's problems
11 began at an early age. She was born into an unstable
12 environment characterized by drugs, alcohol, illegal
13 activity and poor parenting. She was initially raised
14 by her maternal grandparents, then by
15 step-grandparents, then passed back and forth between
16 other caretakers and relatives. Her mother,
17 apparently, spent time in prison. In addition to
18 reports of physical abuse, An'Deshia asserted that she
19 had been sexually abused. As early as the age seven,
20 An'Deshia had learning disabilities and behavior
21 problems, which may have been caused by fetal alcohol
22 syndrome. Dr. Dunbar reported that the only record of
23 treatment from this period is a series of 12 therapy

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1 sessions with YRS from June 4, 2001, through April 30,
2 2003.

3 Dr. Dunbar testified that after an
4 investigation by the Division of Family Services,
5 referred to as DFS, in December of 2005, An'Deshia
6 spent court-ordered time in People's Place in
7 December of 2005 and again in March of 2006. This is
8 an unsecured residential facility that does not offer
9 any treatment plans. Because of numerous
10 delinquencies, starting in February of 2007, An'Deshia
11 was placed on Level 3 Abraxas, which was described
12 before. Abraxas includes home visits two or three
13 times per week, mental health evaluations, electronic
14 monitoring and rules of living at home, such as
15 curfew. When An'Deshia was first placed on Abraxas,
16 she did not fare well and was not cooperative. In
17 particular, she accrued three curfew violations and
18 showed a definite need for anger management classes,
19 which she did receive.

20 From June 10, 2008, through July 10, 2008,
21 An'Deshia was housed at Grace Cottage, a short-term
22 residential facility for delinquent girls. Her
23 placement was the result of an adjudication of

1 delinquency in May 2008. Grace Cottage is a Level-4
2 facility, but it does not include a therapeutic or
3 treatment component. An'Deshia did fairly well in the
4 structured environment of Grace Cottage, and she
5 expressed a desire to conduct herself in such a way as
6 to never have to return to a residential facility.
7 Her overall performance was good.

8 After a month-long stay at Grace Cottage, the
9 juvenile was again placed on Abraxas probation. The
10 juvenile was discharged from Abraxas in full
11 compliance on October 10, 2008, approximately two
12 weeks before the current charges were incurred.
13 Despite her infractions and arrests, she had been
14 given very little treatment to manage her
15 psychological problems or learn ways to manage her
16 anger.

17 As I stated previously, An'Deshia has resided
18 in the Stevenson House since her arrest on November 4,
19 2008. She has received psychological and psychiatric
20 testing, and has been diagnosed by Dr. Gitlin, a
21 treating psychiatrist at Stevenson House, as having
22 bipolar disorder, which he believes to be a
23 significant contributor to her disruptive, violent

1 behaviors. An'Deshia receives medication for this
2 condition and complies with taking the medication.

3 However, the counseling she receives is
4 minimal, and Dr. Gitlin believes she requires ongoing
5 intensive therapy, in addition to medication. For a
6 while she developed a pattern of minor infractions
7 such as talking, singing, cursing at teachers, and
8 throwing papers and pencils on the floor. She
9 sometimes refused to comply with a time-out. These
10 behaviors would be typical of someone in An'Deshia's
11 situation and she has improved.

12 Ruthie Weldon, a counselor at Stevenson
13 House, testified that An'Deshia is generally compliant
14 and has had few major problems. She consistently
15 achieves Phase 3 honor's status, which includes
16 academics as well as behavior components. This is not
17 easily achieved and reflects committed effort by
18 An'Deshia to improve herself.

19 Dr. Dunbar testified that An'Deshia's
20 behavior has gradually improved and, in fact, no
21 significant problems are noted in her record since
22 August. Dr. Dunbar also stated that the structured
23 nature of life at the Stevenson House is beneficial to

1 An'Deshia, who, in many ways, is still a child.

2 Previous psychological testing conducted by
3 the Division of Family Services showed that An'Deshia
4 has experienced feelings of anxiety, depression, not
5 belonging anywhere, and distress over conflicts with
6 her family. The testing has also indicated a moderate
7 to high risk for her to be in the community if she
8 does not have both medication and ongoing therapy.
9 Since she has been in Stevenson House and has been
10 receiving treatment, the testing shows that the
11 juvenile is not suffering from any significant
12 depressive symptoms.

13 In his notes, Dr. Gitlin wrote that going to
14 an adult prison would make An'Deshia's situation
15 hopeless as to her and dangerous as to society at
16 large, which I fully agree.

17 The third consideration is whether the
18 interests of society and An'Deshia would be best
19 served by trial in the Family Court or in Superior
20 Court. If An'Deshia spends a period of time in the
21 adult prison and does not receive treatment to address
22 her underlying problems, it is clear to me that she
23 would have problems immediately upon her release.

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1 An'Deshia's alleged crimes were serious, but after
2 considering everything presented to me, I find that
3 she would be better served by trial in the Family
4 Court than in Superior Court. Because of her young
5 age, the progress she has recently shown as the result
6 of getting the right treatment and the mental
7 condition that can best be treated through the Family
8 Court system, I conclude that An'Deshia is amenable to
9 the services available to her through the Family
10 Court.

11 If An'Deshia were tried and convicted as an
12 adult in Superior Court, she would serve her sentence
13 in Baylor Women's Correctional Facility, often
14 referred to as WCI. Patrick Ryan, Warden of WCI,
15 testified as to the conditions under which An'Deshia,
16 a juvenile, would serve her time in the adult prison.
17 In this facility, she would be housed in the maximum
18 security unit because the Department of Corrections
19 does not have a young offenders' program for females
20 as it has for males. Like the adult maximum security
21 inmates, like those prisoners convicted and sentenced
22 to death or capital punishment, An'Deshia would spend
23 23 of 24 hours every day locked in a small cell and

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1 eat her meals in that same cell. Her personal items
2 would be limited, and she would not have contact with
3 individuals her age, nor would her schooling be
4 conducted in the company of other young people, but
5 rather on a one-on-one basis with a teacher. Although
6 she would have a therapeutic program designed to fit
7 her individual needs as ordered by the Court or by the
8 on-site psychiatrist, WCI does not have any staff
9 trained specifically in the problems or someone
10 An'Deshia's age and condition. There are no programs
11 designed for younger females because so few are placed
12 in WCI.

13 An'Deshia would not have the necessary life
14 components of an individual of her age and condition.
15 According to Warden Ryan, she would not receive the
16 schooling, intensive therapeutic treatment, assistance
17 in learning about bipolar disorder, education about
18 the importance of staying away from drugs, and
19 cognitive behavioral intervention to help her control
20 her impulses, and socialization with her peer group.
21 Each of these factors is necessary to her success.
22 Instead, An'Deshia would spend most of her time in a
23 small cell with little to occupy body or mind. The

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1 warden testified that WCI does not offer any type of
2 organized programs for juveniles because so few are
3 sentenced to WCI. In his opinion, WCI does not offer
4 optimal conditions for a juvenile.

5 Testing has shown that An'Deshia is a bright
6 young woman with psychological problems that require
7 ongoing counseling if she is to win the difficult
8 battle against them. Counseling and treatment are
9 also necessary for her to gain an understanding of her
10 family's complex dynamic, especially in regard to her
11 mother.

12 If An'Deshia were returned to the Family
13 Court for trial and found guilty of the charges
14 against her, a plan has been approved by YRS for the
15 first phase of her treatment and housing. Her plan
16 was developed by Dr. Dunbar and Ms. Agosto, the
17 juvenile's previous probation officer. An'Deshia
18 would be placed in a facility called Southwest
19 Indiana, located in Vincennes, Indiana. According to
20 Dr. Dunbar, this residential program specializes in
21 working with juveniles who have a pattern of violent
22 behavior. It is based on providing antisocial,
23 defiant, troubled young people with the structure and

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1 counseling they need in order to learn new coping
2 abilities. An'Deshia has been accepted by Southwest
3 for entrance into this program. Participants who
4 become out of control are stepped up to a more
5 intensive level of confinement to work on conflict
6 resolution, including the issues An'Deshia needs to
7 address. The program includes both Level 4 and Level
8 5 confinement, and therapeutic treatment is an
9 inherent part of the program.

10 Residents usually stay no more than one year,
11 but An'Deshia has been approved to possibly stay
12 longer because of her age and the serious nature of
13 her charges. According to Dr. Dunbar, DYS can ensure
14 that An'Deshia has the structure she needs at
15 Southwest where she would be in a rigidly-structured
16 environment. Her mental health issues will always
17 require treatment to maintain an acceptable level of
18 stability, which Dr. Dunbar believes An'Deshia would
19 achieve at Southwest.

20 La'Vonne Singletary, the case manager for
21 youth detained in Stevenson House, has observed
22 numerous juvenile placements at Southwest with good
23 results. She believes that this is the type of

1 program that An'Deshia needs and that such a program
2 does not exist in Delaware. During her time at
3 Southwest, An'Deshia would be encouraged to maintain
4 healthy contact with her family, and when her period
5 of confinement is complete she would most likely
6 return to Delaware under the supervision of the
7 Serious Juvenile Offender Unit because of the serious
8 nature of her charges.

9 According to Ms. Agosto, An'Deshia could be
10 returned to Grace Cottage or the Stevenson House if
11 such supervision were deemed necessary. The decision
12 regarding her post-Southwest care would be made by the
13 Family Court Judge, and the parties could, indeed,
14 stipulate to extend the jurisdiction of the Family
15 Court to age 21 if the Family Court Judge found that
16 to be indicated.

17 An'Deshia is now 15 years old, and if she
18 were convicted in Family Court, the Court could extend
19 its jurisdiction until her 21st birthday on August 23,
20 2015. She could benefit from the various services of
21 the Family Court until that time, hopefully paving the
22 way to a healthy and constructive adulthood. This
23 outcome would serve the interests of not only

1 An'Deshia herself, but society as a whole.

2 In contrast, trial in Superior Court could
3 result in a verdict of guilty of attempted murder in
4 the first degree, a crime which carries a sentence of
5 15 years to life. She is also charged with a number
6 of other charges, which could extend her imprisonment
7 well into her adulthood. If An'Deshia received the
8 minimum of 15 years on the attempted murder charge, no
9 doubt in my mind, she would emerge from prison without
10 having had any of the services she needs and having
11 experienced instead a dearth of the programs and
12 services she so clearly requires.

13 The testimony from the psychological and
14 psychiatric witnesses is that An'Deshia would be an
15 angry, dangerous, and, perhaps, a mentally ill person
16 who would pose a significant threat to society and,
17 perhaps, herself. Fortunately, there is a better way.

18 Considering the foregoing, I find that
19 An'Deshia Satchell is amenable to the rehabilitative
20 processes of the Family Court. The defense motion is
21 hereby granted and jurisdiction is returned to Family
22 Court. I have signed an order to express that result.

23 I thank the parties for being here.

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1 MR. COSGROVE: Thank you, Your Honor.

2 MR. DANIELLO: Thank you, Your Honor.

3 (Whereupon, the proceedings in the
4 above-entitled matter concluded.)

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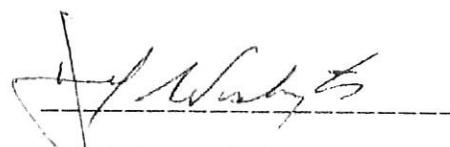
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C E R T I F I C A T E

I, DAVID WASHINGTON, an Official Court Reporter of the Superior Court of Delaware, Certification #121-PS, do hereby certify the above and foregoing pages, 2 through 20, to be a true and accurate transcript of the proceedings therein indicated on Monday, December 14, 2009, as was stenographically reported by me and reduced to computer-aided transcript under my direct supervision, as the same remains of record in the Sussex County Courthouse, Prothonotary's Office, Georgetown, Delaware.

This Certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.



David Washington

MARCH 8, 2010

Date

DAVID WASHINGTON
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE)
)
)
 v.) ID No. 1304002943
)
)
 JACKELINE H. PEREZ,)
 Defendant.)

MEMORANDUM OPINION

Upon Defendant's Motion to Be Transferred Back
to the Family Court of Delaware. Denied.

Date Submitted: January 31, 2014

Date Decided: March 31, 2014¹

Vincent H. Vickers III, Stumpf Vickers & Sandy, P.A., 8 West Market Street,
Georgetown, DE 19947, Attorney for Defendant

Melanie C. Withers, Esq. and Casey L. Ewart, Esq., Delaware Department of
Justice, 114 East Market Street, Georgetown, DE 19947, Attorneys for the State

STOKES, J.

¹ The Court publishes three separate opinions for the three separate defendants in this case. However, the Court publishes these opinions simultaneously.

Defendant Jackeline Perez (“Perez”), who was 15-years-old at the time of the charged crimes, will be tried as an adult in this Court. Her application to transfer her case from this Court to the Family Court pursuant to 10 *Del.C.* § 1011(b) is **DENIED**.

In April 2013, Perez was charged with Kidnapping in the First Degree, a class B felony, Carjacking in the First Degree, a class B felony, Robbery in the First Degree, a class B felony, and three counts of Conspiracy in the Second Degree, class G felonies. These charges stemmed from Perez’s alleged involvement in a criminal episode inflicted by Perez and her co-defendants upon Margaret Smith (“Mrs. Smith”), who, at the time of her encounter with the defendants, was 89-years-old.

Facts

Facts and Circumstances Hearing

A Facts and Circumstances hearing was held in this Court on July 18, 2013. The evidence presented pertained to the involvement of Defendants Rondaiges Harper (“Harper”),² Phillip Brewer (“Brewer”),³ Junia McDonald (“McDonald”),⁴ and

² Date of birth: March 31, 1995.

³ Date of birth: January 27, 1996.

⁴ Date of birth: November 1, 1998.

Perez⁵ in the charged crimes.⁶ Harper, Perez, and McDonald were all present at this hearing. The following facts were taken from that hearing and are common to all three defendants.

Margaret Smith (“Mrs. Smith”) is an 89-year-old widow living in her own home in Milford, Delaware. At the fact hearing, Mrs. Smith gave a full rendition of the criminal incident. Although she was sometimes forgetful or confused about incidentals, she provided a consistent version of the material facts.

On March 18, 2013, at about 2:00 p.m., Mrs. Smith left her home to get an ice cream cone and buy a gift for her sister. Mrs. Smith carried some money in her purse, and a larger amount rolled up and pinned to the strap of her brasier. As she sat in her 2001 tan Buick Le Sabre at a convenience store called the Chicken Man, two female juveniles, later identified as Perez and McDonald, approached her car. They tapped on the driver’s side window and asked Mrs. Smith if she would take them home. At the fact hearing, Mrs. Smith referred to the girls as “teenagers,” stating that one was

⁵ Date of birth: April 30, 1997.

⁶ On September 5, 2013, Brewer pled guilty to one count of Carjacking in the Second Degree, three counts of Kidnapping in the Second Degree, and four counts of Conspiracy in the Second Degree. As part of his plea agreement, Brewer was required to testify truthfully in all proceedings against his co-defendants. Brewer is currently being held at the Howard R. Young Correctional Institution. His sentencing date is to be determined, after the reverse amenability hearings and trials of his co-defendants take place. His cooperation will be given consideration at the time of his sentencing.

white and one was black, and that one was shorter and stockier than the other. Mrs. Smith did not observe any other physical traits.

At first Mrs. Smith hesitated, but then agreed to give the girls a ride home. One juvenile got in the front passenger seat, and the other in the back. Mrs. Smith assumed that the juveniles lived in Milford; but they directed her to a residence farther away. Upon arriving at that residence, Mrs. Smith was told that the mother was not home and was asked to go to a second residence. Once there, Mrs. Smith was told that the aunt was not home.

The juveniles directed Mrs. Smith to a third residence where they asked for her keys. Mrs. Smith adamantly refused. Both juveniles then grabbed her while she struggled to remain in the car. Mrs. Smith was yanked out of the car, resisting until the three were at the rear of the Buick. The shorter juvenile wrestled the keys from Mrs. Smith and the trunk door was opened. Mrs. Smith was then shoved inside the trunk, and the trunk door slammed. The juveniles then got back in the car and, with the shorter juvenile driving, took off at a fast pace. Mrs. Smith hollered and knocked on the back of the trunk but received no response. Perhaps this could have been, in part, because the car's radio was playing at full volume. According to Mrs. Smith, while in the trunk, she received no food or water and was given no bathroom breaks. She also was not given the medication she took for high blood pressure or arthritis,

which she carried with her.

During this episode, the two juveniles also took \$500 in cash from Mrs. Smith. They went to the Seaford Walmart to buy clothes and may have given some of the money to two male juveniles to buy a new battery for the car. That evening, the juveniles used stolen money to book a room at the Days Inn in Seaford, Delaware. Mrs. Smith spent the night in the trunk of her car. In the morning, she was taken to a cemetery and dumped out, along with her cane and a black Ace Hardware bag of prescription medications.

Having wet herself in the trunk, Mrs. Smith apparently removed her pants and left them on the ground. She crawled around the cemetery looking for a road. The surface of the cemetery being part dirt and part grass, Mrs. Smith scraped her knees, but attained no other observable injuries. The cold temperatures caused numbness in her hands and feet, which is not yet resolved.

At approximately 9:00 p.m. on March 19, 2013, Trooper John Wilson (“Trooper Wilson”), a member of the Delaware State Police Department (“DSPD”), received a missing person call. A woman who identified herself as Sabrina Carol (“Ms. Carol”) said that she had not seen her elderly aunt, Margaret Smith, since 2:00 p.m. the previous day. Ms. Carol went to her aunt’s house, but neither she nor her purse were there. The family was concerned because Mrs. Smith showed early signs

of either Alzheimer's Disease or some form of dementia. The previous day, a neighbor saw Mrs. Smith putting things in her car at approximately 11:00 a.m., and drive away about an hour later. Mrs. Smith's sister spoke to her on the phone at about 2:00 p.m. the previous day. Mrs. Smith was thought to be driving her tan 2001 Buick Le Sabre. Ms. Carol stated that her aunt often went to Milford to shop and to Rehoboth Beach to visit her sister.

Trooper Wilson entered Mrs. Smith's identification information into the national data base for missing persons and issued a Gold Alert which lists missing persons with mental conditions. He also filed a DSPD report.

On March 20, 2013, Corp. James Gooch, Jr. ("Corp. Gooch") received a call from a woman named Betty Edwards ("Ms. Edwards"). Ms. Edwards said that when she came to visit her son's tombstone at Mount Calvary Methodist Cemetery ("the cemetery") east of Seaford, she found a half-clothed, apparently disoriented elderly woman crawling on the ground. Corp. Gooch stated that the cemetery is not visible from King Road and is surrounded by trees. When Corp. Gooch arrived at the cemetery, Ms. Edwards told him that the elderly woman had initially tried to run from her, but Ms. Edwards reached her and convinced her to sit on one of the tombstones. Mrs. Smith was wearing brown spandex shorts and a coat, but no pants or shoes. Her hands were dirty and her knees were scratched.

Mrs. Smith initially told Corp. Gooch that she had walked from her home to the cemetery, but upon questioning, said that two girls in Milford asked her for a ride, and then took her money and keys and put her in the trunk of her car. She remained in the trunk for two days, without food, water, or medication. Mrs. Smith was also forced to urinate on herself because her requests to use a bathroom were ignored. When she was left in the cemetery she was not familiar with her surroundings. Hence, she got on her hands and knees and crawled around looking for an opening to get to a road. The night was cold. Ms. Edwards told Corp. Gooch that Mrs. Smith had money rolled up and pinned to the strap of her brasier.

Corp. Gooch drove Mrs. Smith to Nanticoke Hospital where Ms. Carol met them. Mrs. Smith was able to give her name, date of birth, and age, although she was still somewhat confused. When Corp. Gooch ran her information in the police system, he found the Gold Alert with a photograph and a reference to possibly being armed. Corp. Gooch gave Mrs. Smith a light pat down and found no weapon. A nurse, having found money pinned to the strap of Mrs. Smith's brasier, put the money in a hospital safe. Mrs. Smith then told Corp. Gooch the rest of the details of the incident. Mrs. Smith was treated and then released to the care of Ms. Carol.

Corp. Gooch returned to the cemetery to look for Mrs. Smith's car because Mrs. Smith told him that at one point, the two juveniles drove her car up to the top of

a hill and let it slide down so that she would meet her death. Corp. Gooch also hoped to find the wig that Mrs. Smith apparently wore in the Gold Alert photograph. Neither the car nor the wig was found. Corp. Gooch, however, found what looked like the tracks of someone crawling in the sand over a recent grave site. He also saw tire tracks indicating that a vehicle had made a U-turn in an area of soft sand. Even with the aid of a DSPD helicopter, the car was not found. Later that day, Corp. Gooch removed Mrs. Smith's name, but not her missing car, from the Gold Alert.

At approximately 7:00 p.m. on March 20, 2013, Trooper Patrick Schlimer ("Trooper Schlimer") of the DSPD was sitting at one of his routine patrol sites at the intersection of Coverdale Road and Seashore Highway when a tan Buick with five passengers passed him. Trooper Schlimer ran the car's tag number and found a flag to stop the vehicle. He then followed the car, stopping it on Chapel Chapman's Road. None of the vehicle's occupants had any form of identification. Two of the three female occupants each stated that the vehicle belonged to the other's grandmother. The occupants were identified as McDonald in the driver's seat, Brewer in the front passenger seat, Harper in the rear left passenger seat, Perez in the rear right passenger seat, and Deniaya Smith ("Deniaya")⁷ in the center rear passenger seat.

⁷ Upon being taken into custody, Deniaya stated that she had been picked up by the other four occupants on the afternoon of March 20, 2013, and that she discovered the car was stolen at the very last minute. Deniaya entered the scenario after Mrs. Smith was discovered in the

Trooper Schlimer learned from police dispatch that the car had been involved in a carjacking. When his back-up arrived, the officers took the individuals and the car to Troop 4 in Georgetown, Delaware. Trooper Schlimer had no further discussion with any of the suspects.

After a search warrant for the car was obtained, Det. Michael Maher (“Det. Maher”) from the Evidence Detection Unit photographed the vehicle as well as the contents of the trunk. Among other things, the trunk contained seven bags of clothing, an Ipod lamp, three jackets, five cans of unopened ginger ale, and a so-called egg crate mattress. These items were left in the trunk, which measured 3 feet by 9 inches from front to back, 5 feet wide but 3 feet by 6 inches in the area where the tires were located, and 1 foot by 6 inches high.

On March 29, 2012, Det. Maher and Det. Robert Truitt, Jr. (“Det. Truitt”), the chief investigating officer, went to the cemetery. A residence is located on each side of King Road at the turn onto Calvary Road; but there is no signpost indicating the presence of the cemetery. The distance from King Road to the cemetery at the end of Calvary Road is 133 yards. The area is heavily wooded. Trash and debris are found all along the unpaved road, which is in a wretched condition. A chain link gate leads into the cemetery; and a chain link fence runs its perimeter. The area is _____
cemetery.

surrounded by large trees, allowing for little light.

Det. Maher and Det. Truitt observed the tracks seen by Corp. Gooch indicating that someone had crawled over the sand. They did not observe shoe prints. To the right of the entrance, the detectives found a black metal cane, a black bag from Ace Hardware containing prescriptions, and a pair of urine-soaked blue jeans on the ground near the fence.

On March 20, 2012, after being released from the hospital, Mrs. Smith and Ms. Carol went to the authorities to report her stolen car. Mrs. Smith was interviewed by Det. Truitt. She had been without her medication and was somewhat confused in her thinking. Ms. Carol stated that her aunt was in the early stages of dementia. During the interview, Mrs. Smith described the incident with the two girls stealing her keys and money and keeping her in the trunk of her car for two days without food, water, or bathroom stops. She stated that she had been dropped off in a cemetery, and then crawled around, in the cold, trying to find a road. After Mrs. Smith's car was located, Det. Truitt returned it to her.

Harper, McDonald, Brewer, and Perez were all interviewed about the incident. The interviews of McDonald and Harper are addressed in their respective opinions. Perez's interview is addressed below.

On April 4, 2013, Det. Truitt interviewed Mrs. Smith at her home. She showed

him bruises and scrapes on her knees from crawling around the cemetery. She also stated that her hands and lower extremities were still numb from exposure to cold temperatures while in the trunk. She said that she had tried to talk to the kidnappers but was told to “shut up,” and that one of the girls said they would kill her if she reported the incident to the police.

At the hearing, Det. Truitt testified that he found a receipt for clothing from the Walmart in Seaford. He reported that the temperature on the night of the kidnapping ranged from the mid-to-upper 30’s to the mid-to-lower 40’s. Det. Truitt stated that the girls blamed one another for the car theft, and that Brewer told him the Buick was stolen.

Perez’s Interview⁸

Upon being arrested, Perez was interviewed by Det. Truitt. She stated that she and McDonald met Mrs. Smith at the Chicken Man in Milford, where they asked her for a ride. Perez stated that she told Mrs. Smith that the girls needed to go to Perez’s house. When they got there, Perez told Mrs. Smith that no one was home. They then

⁸ At the fact hearing, defense counsel discussed issues of admissibility relating to Perez’s statement under *Miranda v. Arizona*, 384 U.S. 436 (1966). Suppression issues are not to be decided at the amenability stage. *See State v. Woodlin*, 1999 WL 1241060, at *3 n.10 (Del. Super. Sept. 30, 1999) (“[A]ny issue concerning the suppression of a [juvenile-defendant’s] statement should be addressed prior to the trial [and] not at this stage.”). Reverse amenability proceedings are generally dispositional as to an appropriate forum and are not adjudicatory in nature.

went to a second house, and then told Mrs. Smith that they needed to use her car. McDonald asked for Mrs. Smith's keys. Perez stated that Mrs. Smith was a little hesitant to give the keys over, and then agreed that Mrs. Smith resisted in giving over the keys. The girls then put her in the trunk.

Perez then stated that the girls went to Coverdale for awhile, and then picked up Brewer and Harper. That night, Harper heard Mrs. Smith speaking from the trunk. After riding around smoking marijuana, the four rented a room at the Days Inn in Seaford. Perez indicated that they spent Mrs. Smith's money on clothes from Walmart, food, gas, and the hotel room. She claimed that she got \$500 from Mrs. Smith's purse. Perez also stated that Brewer and Harper got money from Mrs. Smith at some point, as well.

Perez stated that, once inside the cemetery, they opened the trunk and Mrs. Smith got out of the trunk. She claimed that all four were present for this. Perez claimed that Mrs. Smith got out of the trunk, fell, and was caught by Perez, who sat her down on the ground.

Brewer's October 16, 2013 Testimony

After being arrested, Brewer gave a statement to the police in which he claimed that he did not know that during this criminal episode, the youths were driving a stolen car with its owner locked in the trunk. He also stated that he was not in the

cemetery. As part of his agreement with the State, Brewer testified at one of Perez's subsequent reverse amenability hearings.⁹ At this hearing, he gave a much different account of events. The Court summarizes Brewer's testimony below because Brewer essentially provided a play-by-play account, albeit alleged, of what happened during the two days that Mrs. Smith was held captive by the defendants.¹⁰

At the time of Mrs. Smith's kidnapping and his testifying, Brewer was 17-years-old. He grew up in Coverdale, a part of Bridgeville, Delaware. He attended Woodbridge High School through the ninth grade. He also attended the Sussex County Opportunity Program in Education ("SCOPE"), an alternative school in Bridgeville, for six months. He was 16-years-old when he ultimately left school. In Coverdale, he lived with his mother.

Brewer knew Harper all of his life. He knew Perez and McDonald for only a few days before he was arrested. The first time he met the girls was in Coverdale. On that occasion, the girls were with Harper in a dark blue car that had the back

⁹ Defense counsel thoroughly explored Brewer's potential bias in testifying at these reverse amenability hearings.

¹⁰ Brewer also explained how, the year prior to this incident, he was arrested for a home invasion that involved six individuals, one of whom were armed. During the commission of this crime, the firearm was discharged. Brewer was not armed during this incident. Brewer could have had a reverse amenability hearing on this matter, but chose to be sentenced as an adult to Boot Camp, completion of which allowed him to return home. He was 16-years-old at the time. At the time of kidnapping Mrs. Smith, Brewer was on probation, facing up to 8 years incarceration for the home invasion incident. For his agreement with the state in this case, he faces an additional 22 years of incarceration.

windows smashed. McDonald was driving. Brewer asked them for a ride to Seaford; and they took him. Harper stayed behind. Brewer was around the girls that day for about a couple of hours. He did not strike a friendship with either girl in particular. Brewer was supposed to meet up with the girls later that night; but they did not arrive.

The girls said for Harper and Brewer to meet up the next night to go a party in Dover. The plan was for the girls to provide the transportation. The next night, the girls picked Harper and Brewer up in the same dark blue car. The four went to Dover, but could not find the party. They therefore returned to Coverdale, picked another person up, and went back to Dover. Once there, they still could not find the party. On the way back from the second trip to Dover, a policeman stopped the car. At some point, McDonald, who drove sometimes but not all of the time, had told Brewer that the car was her mother's, but when it was pulled over, stated that it was stolen.

That night, McDonald sent Brewer a message on Facebook asking him how he was and stating that they would meet up. The next day, around 12:00 p.m. or 1:00 p.m., McDonald and Perez showed up in what Brewer believed to be a tan Mercury. McDonald was driving. Brewer got in the car; and they went to pick up Harper. McDonald informed Brewer that the car was her aunt's.

The four then went to a community park in Coverdale. They sat in the parking

lot for about a half an hour talking, and then went to Royal Farms to get gas. McDonald and Perez paid for the gas in cash. Brewer did not see how much money the girls had on them, but knew they had money. They then went back to the park in Coverdale. They sat there for a couple of hours until the tan car died. While they had been sitting there, the engine was running, the heater was turned on, and the radio was playing.

Brewer told the group he would get his mother's car. He and Harper then left for his mother's house, which was around the corner from the park. Brewer drove his mother's car back to the park. Brewer told the group he was going to try and get some jumper cables, and left and brought someone back to jump start the tan car. The car's battery, however, could not be found. The person who was brought back to jump start the car¹¹ told the group to open the trunk. Brewer tried to do this, but McDonald and Perez would not let him. McDonald then said that her uncle was coming. The person brought to jump start the car then left.

Brewer's mother's car and the tan car sat side-by-side. Brewer and McDonald then got into Brewer's mother's car and had sex. Harper and Perez got into the tan

¹¹ Brewer identifies this person as "the lady." Reverse Amenity Hr'g, *State v. Perez*, I.D. No. 1304002943, at D-52:16 (Del. Super. Oct. 16, 2013) (TRANSCRIPT) [hereinafter October 16th Hearing].

car.¹² At some point, Harper came over to Brewer's mother's car and asked for Brewer's cell phone because Perez wanted to listen to some music. Brewer said no. Harper then came back a little later and said "Yo, I hear someone in the trunk. I hear someone in the car."¹³

Brewer testified that at that point, he had to check the trunk. He got out of his mother's car, and ordered that the trunk be opened. McDonald remained in Brewer's mother's car. Brewer also stated that one of the youths knocked on the trunk and asked if anyone was there. The voice inside responded by saying "This is my car."¹⁴ The trunk was opened, revealing an old African American woman. Because it was nighttime, Brewer could not see her face. He thought she was wearing something dark. According to Brewer, upon opening the trunk, Perez acted like she was surprised. Brewer stated that he was shocked.

Harper and Brewer then helped the woman, Mrs. Smith, out of the trunk.¹⁵ Harper and Brewer asked the girls why the woman was in the trunk. The girls claimed that she was an alcoholic, had traded them her car for liquor, and did not

¹² Brewer testified that Harper and Perez had oral sex. He knew this because Perez and McDonald teased Harper for how he performed oral sex.

¹³ October 16th Hearing at D-54:19-21.

¹⁴ *Id.* at D-55:23.

¹⁵ Apparently, all Mrs. Smith said during this time was the car was hers.

want to be in the backseat. Harper and Brewer placed Mrs. Smith back in the trunk. Brewer never asked her if she wanted to get back into the trunk. However, according to Brewer, Mrs. Smith did not try resist, which allowed him to believe the girls' story about the liquor. Mrs. Smith did not ask for help or to be released.¹⁶

The four then got into Brewer's mother's car and went to his grandmother's house. They left Mrs. Smith and the tan car in the park in Coverdale. They stayed at Brewer's grandmother's house for at least four or five hours. During the night, the four returned to the park in order to check to see if there were jumper cables in the trunk of the tan car. They opened its trunk a second time, with Mrs. Smith still there. They asked her if there were jumper cables in the trunk. She responded that she did not know, but that there should be. Mrs. Smith stayed in the trunk while it was searched for the cables. Also, according to Brewer, Mrs. Smith actually helped search for the cables.¹⁷ Brewer then found the cables; and Harper assisted Mrs. Smith out of the trunk a second time.¹⁸ The girls remained in Brewer's mother's car.

¹⁶ According to Brewer, "we just helped her back in the trunk. She ain't – she's just, like – she actually helped. I mean, she ain't refusing nothing. She just got back in the trunk." October 16th Hearing at D-106:19–22. When asked to confirm that Mrs. Smith simply gave Brewer her hand so that she could get back in the trunk, Brewer responded "Yeah, kind of. We thought she was drunk that night." *Id.* at D-108:15–16.

¹⁷ Brewer claimed that at this point, Mrs. Smith did not seem to injured or intoxicated. She also was not complaining about the cold.

¹⁸ Brewer did not actually see Harper assist Mrs. Smith out of the trunk. He did, however, see Harper assist her back into the trunk. He also could not hear if Harper spoke to Mrs. Smith

Brewer tried to jump start the car; but the cables did not work. Harper then assisted Mrs. Smith back into the trunk. The four returned to Brewer's grandmother's house for the rest of the night.¹⁹

In the morning, Brewer went to his uncle for assistance in jump starting the tan car. Brewer's uncle did not have jumper cables. Therefore, Brewer got cables from another person in Coverdale. Brewer then brought his uncle to the park to jump start the tan car using his mother's car.²⁰ The tan car started. Afterward, Brewer, McDonald, and Brewer's uncle got into Brewer's mother's car and drove to Brewer's uncle's house to drop his uncle off, with Harper and Perez following in the tan car. Brewer then drove his mother's car back to her house. The four all got into the tan car, and decided to get a hotel room.

during this time.

On cross-examination, Brewer agreed that, upon his discovery of Mrs. Smith in the trunk, the girls were, essentially, not involved in Mrs. Smith's removal and reentrance into the trunk during this time. Brewer also agreed that while he knew he was doing something wrong, he did not think anything bad would happen to Mrs. Smith; if he thought something bad would have happened, he would not have left her there. He would have removed Mrs. Smith from the trunk and not allowed her to be placed back inside it.

¹⁹ On cross-examination, Brewer claimed that on this night, the group made three or trips to Coverdale in his mother's car to buy marijuana. On all of these trips, Brewer drove because he knew where in Coverdale to buy the marijuana and he wanted to drive.

²⁰ Apparently, Brewer's uncle was never aware of Mrs. Smith's presence in the trunk of her Buick. No one mentioned her being in the trunk; and the trunk was never opened.

The youths went to the Days Inn in Seaford,²¹ but could not rent a room because none of them were of age. Therefore, the group went back to Coverdale to pick up Harper's cousin. They brought Harper's cousin back to the hotel; and the girls gave Harper and his cousin cash to rent the room. Harper and Brewer then drove Brewer's cousin back to Coverdale, and stopped at Harper's house for Harper to pick up some clothes. The girls stayed behind in the hotel room. Harper and Brewer were gone for about a half hour. They returned to the hotel room. The girls then took the car to the Walmart to buy some clothes. Harper and Brewer stayed behind in the hotel room. The girls were gone for about a half hour, and returned with purchased items, stating that they paid for them with their money. During all of this, Mrs. Smith remained in the trunk.

The group left the Days Inn to go back to Coverdale to buy marijuana. Harper paid for the marijuana in cash, apparently from a \$100 bill he claimed he received from Mrs. Smith. Harper said that Mrs. Smith gave it to him for jump starting her car. According to Brewer, the group bought a lot of marijuana, which all four smoked.

At some point in the two days that Mrs. Smith was in the trunk, the four stopped at a McDonald's restaurant. Each youth paid for his or her own food. While

²¹ When asked whose idea it was to rent a hotel room, or to pick the Days Inn, Brewer responded that he thought it was his and Harper's idea.

they were getting their food, McDonald pulled down the armrest in the back seat, which opened into the trunk, and asked Mrs. Smith if she was hungry and wanted any food. Mrs. Smith answered no and said she wanted to go home. Mrs. Smith was not given any food or anything to drink, nor was she given a chance to use a restroom.²²

In his testimony, Brewer was asked whether the group decided to do something with Mrs. Smith. He stated that the group left the hotel room during the night, and drove back to Coverdale. During this ride, the girls brought up the idea that the car should be taken back to Milford and burned with Mrs. Smith in it.²³ Brewer stated that he was not going to do that. Harper agreed with him.

The group was driving, with Brewer at the wheel, on a road where a cemetery was located. Harper suggested dropping Mrs. Smith off in the cemetery. Harper was familiar with the cemetery because his sister was buried there. Brewer initially disagreed with this plan. He wanted to be dropped off at the Days Inn instead because he did not like the idea of leaving Mrs. Smith in the cemetery. The others, however, “said, like, [m]ight as well drop her off now while we’re already here.”²⁴

²² Brewer testified that he and Harper were concerned about Mrs. Smith not eating. According to him, however, offering Mrs. Smith food was McDonald’s idea; and McDonald was the only one who actually made the offer.

²³ This fact takes on major significance *infra* in the Court’s decision denying this Motion.

²⁴ October 16th Hearing, at D-73:6–7. It is unclear from Harper’s testimony who said this. At point, he states that “they” said this. At another, he states that “he” said this, referring to

Brewer eventually capitulated and turned the car around, heading for the cemetery.

The cemetery was circular, with a dirt road with trees around it that went straight through it, and then curved at a loop. On the corner of a stone road which leads into the dirt road, there is a home with a security light on the outside of it.²⁵ The group drove the car to the back of the center road. According to Brewer, he did not get out of the car. Rather, McDonald, Harper, and Perez got out of the car and removed Mrs. Smith and her cane from the trunk.²⁶ During this time, the car's windows were up, with the heater running. Brewer could not hear what anyone in the group was saying. He could sort of hear Mrs. Smith through the car as the trunk was opened. All he heard was her kind of whimpering, perhaps crying.²⁷ Mrs. Smith was

Harper.

²⁵ Brewer did not know whether the house was occupied and the light lit when the group drove past it. When asked whether the distance from the house to where Mrs. Smith was left was the distance of a football field, Brewer responded that it was not that big. When asked whether it would take Brewer three minutes or less to walk that distance, he responded affirmatively.

²⁶ On cross-examination, Brewer stated that the cane was in the backseat of the car the entire time the group possessed the car. It was not, however, there the day the group left Mrs. Smith in the cemetery. Therefore, Brewer assumed that the cane was left with Mrs. Smith in the cemetery.

²⁷ On cross-examination, Brewer admitted that when he testified in McDonald's reverse amenability hearing, he first stated that he heard nothing, and then later stated that he heard whimpering and crying. Brewer was also directed to prior testimony where he claimed at first that he could not see Mrs. Smith as the group pulled away, and then later stated that he could see her.

When asked, Brewer denied that anyone in the group threatened Mrs. Smith or did anything to try and hurt her. At the point that she was on the ground, Brewer did not know Mrs. Smith's condition. He did not know if she was hurt, or if there was anything wrong with her.

placed somewhere on the outside of the passenger's side of the car. As the group drove away, Brewer saw Mrs. Smith laying on the ground.²⁸ Brewer could not tell if she was making any attempt to get to her feet.²⁹ He also did not know how some of her belongings got to the front gate of the cemetery. Brewer was also familiar with the cemetery and knew it was a dark place.³⁰ The time was around 9:00 or 10:00 p.m. The temperature was cold enough for the group to be wearing jackets.³¹ After they left her, the group had no thought to call 911, or drop Mrs. Smith off in a more well-lit, populated place.³²

The group returned to the Days Inn, staying there for the rest of the night. The

When asked on cross-examination whether he thought Mrs. Smith, upon being left in the cemetery, was intoxicated, insane, or suffering from a mental health issue that would make it difficult for her get herself of the cemetery and up to the road, Brewer responded negatively.

²⁸ Defense counsel thoroughly explored the fact that Brewer did not look to see where Mrs. Smith was actually placed. Brewer also affirmed that he did not know whether Mrs. Smith had her medicine bag or cane with her.

²⁹ Brewer admitted that he only saw Mrs. Smith for a few seconds.

³⁰ On cross-examination, Brewer agreed that although it was dark, the road could be seen and followed.

³¹ On cross-examination, Brewer agreed that the weather was chilly, but not freezing.

³² Brewer stressed that he did not want to leave Mrs. Smith there, but he was not thinking. He did not think Mrs. Smith would die in the cemetery; but he did state that anything could have happened to her. He was aware of this when the group left Mrs. Smith. Defense counsel, however, pointed out that Brewer knew a house was a short walk away from where Mrs. Smith was left, and that Brewer did not believe Mrs. Smith to be intoxicated or insane, or that someone was in the cemetery who would harm her. Brewer also knew that Mrs. Smith had gotten out of the trunk on two prior occasions without much assistance.

next day, the four checked out of the room and went to a nail salon in Seaford for the girls to get their nails manicured. Brewer was in the salon, as well, and saw them pay for their manicures in cash. After the nail salon, the group drove around Coverdale, and picked up Deniaya.

Brewer did not believe that Mrs. Smith wanted to be in the trunk of her car. Brewer also did not believe that she wanted to be left in the cemetery. When asked why he did not do things differently, Brewer responded “I don’t know if it was because of the girl, [McDonald]. I don’t know if I got feelings for her or what. I don’t know why I didn’t leave and tell somebody.”³³ When asked on cross-examination what he was thinking through all of this, Brewer responded “I wasn’t thinking.”³⁴

According to Brewer, Perez never drove the car, nor did she try to drive the car. The other youths, at one point or another, drove the car. Perez also never revealed her age to Brewer. Brewer also agreed that in terms of everything that happened in Coverdale, such as buying marijuana, Perez did not have any connections to or knowledge of Coverdale. Also, as far as Brewer knew, McDonald was responsible for the group getting together the day Mrs. Smith was kidnapped.

³³ October 16th Hearing at D-82:17–20.

³⁴ *Id.* at D-123:22. Brewer also stated that he and Harper knew it was wrong that Mrs. Smith was in the back of the car; but they were not afraid for her safety.

Discussion

Reverse Amenability

Juvenile crimes are usually a matter for the Family Court.³⁵ This Court, however, maintains original jurisdiction over a juvenile who commits specifically enumerated crimes.³⁶ But this Court's jurisdiction is not absolute.³⁷ Under 10 *Del.*

³⁵ *State v. Anderson*, 385 A.2d 738, 739 (Del. Super. 1978). See also *State v. Anderson*, 697 A.2d 379, 382 (Del. 1997) [hereinafter Delaware Supreme Court *Anderson*] (“Age-based distinctions do not pertain to fundamental rights or affect a suspect class and such classifications, when attacked on equal protection or due process grounds, are presumed to be valid. They will not be set aside if any state of facts reasonably may be considered to justify [them].” (citations omitted) (internal quotation marks omitted)).

³⁶ *Anderson*, 385 A.2d at 739–40 (citing 10 *Del. C.* § 938, which has been redesignated as 10 *Del. C.* § 1010 and amended by 69 Laws 1993, ch. 335, § 1, eff. July 8 1994). See also 10 *Del. C.* § 921 (“[Family] Court shall have exclusive original civil jurisdiction in all proceedings in this State concerning . . . [a]ny child charged in this State with delinquency by having committed any act or violation of any laws of this State or any subdivision thereof, except murder in the first or second degree, rape in the first degree, rape in the second degree, unlawful sexual intercourse in the first degree, assault in the first degree, robbery in the first degree, (where such offense involves the display of what appears to be a deadly weapon or involves the representation by word or conduct that the person was in possession or control of a deadly weapon or involves the infliction of serious physical injury upon any person who was not a participant in the crime, and where the child has previously been adjudicated delinquent of 1 or more offenses which would constitute a felony were the child charged under the laws of this State), kidnapping in the first degree, or any attempt to commit said crimes”); 10 *Del. C.* § 1010 (“A child shall be proceeded against as an adult where . . . [t]he acts alleged to have been committed constitute first- or second-degree murder, rape in the first degree or rape in the second degree, assault in the first degree, robbery in the first degree (where such offense involves the display of what appears to be a deadly weapon or involves the representation by word or conduct that the person was in possession or control of a deadly weapon or involves the infliction of serious physical injury upon any person who was not a participant in the crime and where the child has previously been adjudicated delinquent of 1 or more offenses which would constitute a felony were the child charged under the laws of this State) or kidnapping in the first degree, or any attempt to commit said crimes”).

³⁷ *Anderson*, 385 A.2d at 740 (citing 10 *Del. C.* § 939, which has been redesignated as 10 *Del. C.* § 1011 and amended by 69 Laws 1993, ch. 335, § 1, eff. July 8, 1994).

C. § 1011, (“Section 1011”)³⁸ this Court may transfer the original jurisdiction it maintains over a juvenile offender to the Family Court if this Court finds such a transfer to be in the interests of justice.³⁹ Before making this transfer, the Court must conduct what is known as a “reverse amenability hearing,” in which it considers evidence of statutorily specified factors.⁴⁰ The Court may consider other relevant factors as well.⁴¹ The purpose of this Court’s determining a juvenile’s amenability

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Upon application of the defendant in any case where the Superior Court has original jurisdiction over a child, the Court may transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of justice would be best served by such transfer. Before ordering any such transfer, the Superior Court shall hold a hearing at which it may consider evidence as to the following factors and such other factors which, in the judgment of the Court are deemed relevant:

- (1) The nature of the present offense and the extent and nature of the defendant's prior record, if any;
- (2) The nature of past treatment and rehabilitative efforts and the nature of the defendant’s response thereto, if any; and
- (3) Whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court.

10 *Del. C.* 1011(b).

³⁹ *See Anderson*, 385 A.2d at 740.

⁴⁰ 10 *Del. C.* 1011(b); *see also Anderson*, 385 A.2d at 740 (explaining how the Court may transfer jurisdiction back to the Family Court).

⁴¹ *State v. Doughty*, 2011 WL 486537, at *1 (Del. Super. Feb. 20, 2011).

is to place a judicial check on the prosecutorial charging of juveniles.⁴² Ultimately, though, “[s]ince a juvenile charged with a designated felony in the Superior Court has lost the benefit of Family Court adjudication by statutory pronouncement, there is [a] presumption that a need exists for adult discipline and legal restraint. Hence, the burden is upon the juvenile to demonstrate the contrary.”⁴³

In rendering its decision, this Court must preliminarily determine whether the State has made out a *prima facie* case against the juvenile, meaning whether there is a fair likelihood that Perez will be convicted of the crimes charged.⁴⁴ A real probability must exist that a reasonable jury could convict the juvenile based on the totality of the evidence, assuming that the evidence introduced at the hearing is unrebutted by the juvenile at trial.⁴⁵

Kidnapping in the First Degree (“kidnapping 1st”) is one of the crimes with which Perez is charged. Therefore, this Court maintains original jurisdiction over her case. Perez’s statutory reverse amenability hearings were held on September 5,

⁴² See Delaware Supreme Court *Anderson*, 697 A.2d at 383 (“It is true that we have viewed both the amenability and reverse amenability processes as containing pivotal constitutional safeguards providing independent judicial scrutiny over the charging of juveniles.” (citations omitted) (internal quotation marks omitted)).

⁴³ *Anderson*, 385 A.2d at 740.

⁴⁴ *Marine v. State*, 624 A.2d 1181, 1185 (Del. 1993).

⁴⁵ *State v. Mayhall*, 659 A.2d 790 (Del. Super.1995), *aff’d sub nom Holder v. State*, 692 A.2d 1181 (Del. 1997).

October 2, 3, and 16, 2013. The parties submitted memoranda for decision on January 31, 2014. In applying the Section 1011 factors in order to decide where Perez will best be tried, the Court considers evidence presented at both the fact hearing and Perez's subsequent reverse amenability hearings.

Section 1011 Factors

(1) Nature of the Present Offenses; Nature and Extent of Perez's Prior Record

Perez submits as a preliminary matter that the Court does not have jurisdiction over her because the State cannot establish a *prima facie* case for kidnapping 1st, the sole charge by which Perez can be tried in this Court. She first asserts that when this Court maintains jurisdiction over juvenile crimes, the crime usually involves death or threat of death, rape, or robbery involving a weapon.⁴⁶ A kidnapping charge, Perez claims, usually is concomitant to a more serious charge.

Perez next claims that the State cannot establish the elements of a kidnapping 1st charge. A kidnapping 1st charge requires that the victim not voluntarily be

⁴⁶ Perez provides a string of citations in which this Court maintained jurisdiction over a juvenile's crimes. The charges in those various cases ranged from Murder in the First Degree, Unlawful Sexual Penetration in the Second Degree, Murder in the Second Degree, and Unlawful Sexual Contact in the Second Degree. (citations omitted). In *State v. Caldwell*, 1999 WL 743925 (Del. Super. Sept. 17 1999), a case in which the Court denied the juvenile-defendant's Motion to Transfer to the Family Court, the juvenile-defendant was charged with one count of Kidnapping in the Second Degree. This charge, however, accompanied various other charges, including one count of Robbery in the First Degree and one count of Possession of a Firearm During the Commission of a Felony.

released “alive, unharmed and in a safe place prior to trial.”⁴⁷ The evidence established that Mrs. Smith was released voluntarily and alive. Furthermore, Perez claims that no evidence suggests that Mrs. Smith suffered any harm, with the exception of minor injuries, which occurred after her release and required minimal medical treatment. She cites *Tyre v. State*, a case in which the Delaware Supreme Court affirmed the defendant’s conviction for, *inter alia*, kidnapping 1st.⁴⁸ In that case, the Court found evidence of harm justifying the charge. In contrast, Perez argues that in her case, there was no evidence that Mrs. Smith was seriously injured. Mrs. Smith was not physically attacked or assaulted, with the exception of having her car keys pulled away from her and being lifted in and out of her trunk. Nor was a weapon ever used in handling her. Additionally, Perez argues that the kidnapping 1st charge cannot stand because Mrs. Smith was released in a safe place prior trial. The cemetery where she was left, while remote, sat directly next to a paved roadway with

⁴⁷ 11 *Del. C.* § 783A (“A person is guilty of kidnapping in the first degree when the person unlawfully restrains another person with any of the following purposes: (1) To hold the victim for ransom or reward; or (2) To use the victim as a shield or hostage; or (3) To facilitate the commission of any felony or flight thereafter; or (4) To inflict physical injury upon the victim, or to violate or abuse the victim sexually; or (5) To terrorize the victim or a third person; or (6) To take or entice any child less than 18 years of age from the custody of the child’s parent, guardian or lawful custodian; and the actor does not voluntarily release the victim alive, unharmed and in a safe place prior to trial.”).

⁴⁸ *See* 412 A.2d 326 (Del. 1980). Perez also points out that the Court in *Tyre* noted that both sides agreed that the defendant’s leaving the victim in a culvert, where he had dragged her before sexually assaulting her, constituted the defendant’s leaving the victim in a “safe place” for purposes of the kidnapping 1st charge.

an adjoining house, and other residences nearby.

Perez concedes that the alleged facts of this case are, viewed objectively, outrageous. She stresses, however, that her age deserves some consideration, arguing that young offenders do not fully appreciate the ramifications of their actions, and are considered, because of their age, capable of rehabilitation through maturity, regardless of the severity of their crimes.⁴⁹ Indeed, the United States Supreme Court has recognized this principle on multiple occasions in recent years.⁵⁰ Perez claims that her behavior was a fleeting example of her untamed youth, and not evidence that she is beyond help.

Regarding her prior record, Perez claims that her criminal history is minor,

⁴⁹ Perez accuses the State of overdramatizing the circumstances of Mrs. Smith's kidnapping and Perez's past disciplinary issues, yet oversimplifying her current needs and future.

⁵⁰ Perez cites *Miller v. Alabama*, 132 S.Ct. 2455 (2012) (“[C]hildren are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments. [*Roper v. Simmons* and *Graham v. Florida*] relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.” (citations omitted) (internal quotation marks omitted) (brackets omitted)); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) for this proposition.

These cases, while instructive, deal with the *sentencing* of a juvenile offender, rather than a juvenile offender's *amenability*. These are two separate issues.

especially in comparison to the current charges. She recites the relevant evidence of her troubled past, which was a mix of disciplinary problems and criminal behavior. Perez also explains the treatment, or lack thereof, that she has received. The Court summarizes Perez's iteration of her history below. This history is relevant to both this Section 1011 factor, and the Section 1011 factor dealing with her rehabilitative treatment and response thereto. For efficiency purposes, the Court mentions it only in this section of its opinion.

Perez came to the United States from Mexico illegally with her mother and other relatives when she was 8-years-old. She attended elementary school in Milford, but had to repeat the third grade because of trouble with the English language. She did, however, successfully complete the fourth and fifth grades. In the sixth grade, Perez became involved in disciplinary issues, including truancy and vandalism, although she completed that grade.

In the seventh grade, Perez was arrested for Burglary in the Third Degree and Theft for an incident in December 2010 in which a high school student's book bag and its contents were stolen from a car. In January 2011, Perez pled guilty to amended charges of Theft Misdemeanor and Criminal Trespass in the Second Degree, and was sentenced to one year supervised probation, which she successfully completed. Also during this time, Perez was investigated for a vandalism incident in

which she and some friends wrote their names in wet concrete on a new sidewalk on a school's property. No charges were brought against her for this.

Perez failed the seventh grade. Because of her continuing disciplinary problems in school and truancy, she attended SCOPE, the alternative school, in order to repeat the seventh grade. Although she completed the program, she remained at SCOPE because she was two grades behind where she should have been. Perez completed the seventh, but not the eighth grade. Her behavior was not stellar at SCOPE. She repeatedly ignored the school's cell phone policy, and argued with authority figures. On one occasion, Perez and another girl failed to place their cell phones in a lock box at the school's entrance, per a school rule. When confronted, the girls became disorderly and began cursing at teachers and staff. A police officer was called in to speak with the girls about the consequences of their behavior.⁵¹

While at SCOPE, Perez successfully completed programs dealing with anger management and emotional skills building. She also completed a conflict resolution program. Perez's mother, however, never followed through with an offer of individual counseling with a psychologist. At one of her reverse amenability hearings, a social worker who worked with Perez testified that she believed that Perez

⁵¹ The State notes that SCOPE officials calling the police about a student, which occurred in Perez's case, is a rare occurrence.

needed more intensive counseling based on the social worker's performance of a "Teen Screen," a test which, when performed on Perez, showed evidence of depression, anger, frustration, and low self-esteem. The counselor also implored probation officials to seek judicially-ordered treatment, but was unsuccessful.

In March 2012, Perez was arrested for Shoplifting. She pled guilty and was sentenced to a higher degree of probation than her 2011 conviction. Her probation officer performed an assessment on her, which showed that Perez had antisocial friends, lack of positive adult relationships outside of family, lack of close relationships within her family except with her mother, and inconsistent and insufficient discipline from her mother. The assessment also demonstrated Perez's depression, lack of self-esteem, and alcohol and drug abuse. Based on this assessment, Perez's probation officer referred her to Psychotherapeutic Children's Services ("PCS"). A social worker with PCS met with Perez bi-monthly. Eventually, however, Perez began to miss appointments and had a problem with doing her required community service hours. She was also having disciplinary and attendance problems at SCOPE. The PCS social worker also explained difficulty contacting and meeting with Perez and her mother. Perez points out that her mother is Spanish-speaking only. However, all attempts to contact and involve Perez's mother in her daughter's treatment were in English, with a translator rarely being involved.

The PCS social worker arranged for Perez to meet with a drug and alcohol counselor. The counselor met Perez in August 2012 and then scheduled counseling sessions in Perez's home. The counselor went to the Perez home and no one answered. She also tried unsuccessfully to contact Perez. She did not meet with Perez again until November 2012 at an after-school counseling program at SCOPE. At SCOPE, the counselor noticed a change in Perez for the worse. She "saw a broken child."⁵² The counselor recognized that Perez's issues were replete, including the tribulations of life as an illegal immigrant. According to the counselor, Perez was in need of intense treatment.

In November 2012, because of continual behavior problems, missed meetings, and failure to complete community service, the PCS social worker referred Perez back to her probation officer. Beginning in 2013, Perez's probation officer met with Perez three times. The probation officer also experienced language problems while working Perez's case, even though the probation officer herself spoke Spanish.

In November 2012, Perez was also arrested for a charge of Offensive Touching, involving a brawl with another girl at that girl's home. Perez pled guilty in February 2013 and received the same level of probation she had received for her 2012

⁵² Reverse Amenableity Hr'g, *State v. McDonald*, I.D. No. 1304002931, at B-61:14 (Del. Super. Oct. 2, 2013) (TRANSCRIPT).

Shoplifting conviction. For this conviction, she was transferred to a different probation officer who was intended to provide a higher degree of supervision. This probation officer also had difficulty reaching Perez's mother. He also did not have any contact with Perez until March 7, 2013, on which day Perez was arrested for Possession of Marijuana at Milford Central Academy ("Milford Central"), resulting in suspension.⁵³ The probation officer had no further contact with Perez. At one of Perez's reverse amenability hearings in this case, this probation officer testified not only as someone with experience with working with Perez, but also as a spokesman for the Delaware Division of Youth Rehabilitative Services ("DYRS"). He stated that, to date, Perez had not received the full benefits of DYRS's treatment, but that she would receive such benefits if her case was transferred to the Family Court. He also agreed that DYRS could provide Perez with the help that she needs.

The Court also heard testimony regarding two incidents involving both Perez and McDonald. The first incident occurred in February 2013. One day, Emna Alvarado ("Ms. Alvarado") brought her car to her friend Karen Perez's ("Ms. Perez's") house, left the keys on a shelf in the bathroom downstairs, and then got a ride to work. That day, Ms. Karen Perez was hosting a party at her house and had invited Perez's mother. During the party, Perez and McDonald showed up uninvited.

⁵³ This charge was apparently prosecuted by summons and eventually dismissed.

Ms. Karen Perez saw the girls go downstairs toward the bathroom where Ms. Alvarado had left her keys. Later in the day, Ms. Alvarado was informed that her car and car keys were missing from Ms. Karen Perez's house. Ms. Alvarado spoke to Perez's mother about the incident, and spoke to Perez herself at one point, who told Ms. Alvarado that she did not have the car but would instruct that it be returned quickly. At the time of her testimony, Ms. Alvarado's car had not been found. A woman named Brenda Castillo ("Ms. Castillo") testified that, subsequent to Ms. Alvarado's car going missing, Ms. Castillo was stopped at a stop sign in her own car when Perez and McDonald approached Ms. Castillo's car window. McDonald allegedly tossed the keys into Ms. Castillo's open window, said "sorry," and the girls left. Ms. Castillo returned the keys to Ms. Alvarado. In March 2013, Perez's mother gave Ms. Alvarado \$500 for towing and storing the car.

Perez identifies the theft of Ms. Alvarado's car as a missed opportunity for authorities to intervene in her life. She points out that the authorities had her identity. No steps were taken at this point, however.⁵⁴ A short time after this incident, the kidnapping of Mrs. Smith occurred.

The Court also heard testimony of an incident occurring after the theft of Ms.

⁵⁴ Perez was formally arrested for this incident in May 2013, and adjudicated delinquent for Theft of a Motor Vehicle, a class G felony, in June 2013. Sentencing awaits the Court's ruling on this Motion.

Alvarado's car. On March 15, 2013, an officer with the Milford Police Department received a report of a stolen dark blue 2003 Honda Accord, taken from a parking lot on McColley Street. At the scene, evidence of glass was found, indicating that the car's back window had been smashed. Early on March 17, 2013, a trooper with the Delaware State Police Department ("DSPD") pulled over the stolen Honda, which was being used to transport the passengers back from a party in Dover. The driver was one Jermaine Roberts ("Roberts"), who was 20-years-old. Harper, Perez, McDonald, and Brewer were all in the car as well. Because the crime began in Milford, the matter was turned over to the Milford Police Department. Ultimately, the four juveniles were released without consequence.⁵⁵ Perez labels this incident another missed opportunity for appropriate services to intervene in her life.

The State responds to Perez's preliminary claim that this Court lacks jurisdiction over her by pointing out that a kidnapping 1st charge requires that the victim not voluntarily be released "alive, unharmed *and* in a safe place prior to trial."⁵⁶ While Perez and her co-defendants may have released their captive voluntarily and alive, Mrs. Smith was neither unharmed nor in a safe place when she was released. She suffered both physically and mentally throughout her ordeal. The

⁵⁵ Roberts was the only individual eventually charged in relation to this incident.

⁵⁶ 11 *Del. C.* § 783A (emphasis added).

fact that very little physical force was used on Mrs. Smith only shows the ease by which the youths subdued her. Furthermore, she was essentially dumped in an isolated cemetery without sustenance or medication at night in 30-degree weather.⁵⁷ Such a scenario clearly justifies a kidnapping 1st charge.

Concerning the nature of the present offenses, the State provides a thorough recitation of the facts.

Concerning the nature of Perez's prior record, the State also iterates Perez's past criminal and behavior problems, including the incidents involving the theft of Alvarado's car and the Honda with the back window smashed out.⁵⁸ The State also mentions other past instances in which Perez got into trouble. For example, at around 3:00 a.m. on March 18, 2012, two officers with the Milford Police Department observed two females walking along the road, one female holding the other one up,

⁵⁷ Perez notes that Mrs. Smith's ordeal lasted approximately one and half days (from the afternoon of Sunday, March 18, 2013, to the evening of Monday, March 19, 2013). She also notes that Ms. Edwards, the woman who found Mrs. Smith in the cemetery, stated that she found Mrs. Smith wearing a winter coat. Additionally, Perez stresses that Mrs. Smith suffered no physical injury or harm throughout her ordeal.

As to whether Mrs. Smith was released in a safe place, Perez stresses that Mrs. Smith was left in the cemetery with her cane and medicine bag. Mrs. Smith was also fully clothed. Furthermore, a residence was located a short distance from where she was left. Mrs. Smith did not find the residence, which may be a result of her dementia; but Perez argues that the juveniles had no knowledge of her ailment when they released her.

⁵⁸ Perez counters that, with the exception of the 2010 incident involving the theft of the book bag, all of her encounters with the criminal justice system have been for misdemeanor offenses. She posits that this Court and the Family Court have in the past encountered juveniles who had much worse histories than herself.

keeping her from falling. The officers made contact with the girls. The one slumping down was 14-year-old Perez. Perez stated that she had been to a house party in the area, where she drank alcohol. She was asked to blow into a breathalyzer, revealing her blood alcohol level to be .072. She was therefore arrested and given a criminal summons for underage consumption, which was later dropped.

The State mentions another incident in July 2012. On a particular occasion, police were investigating a string of car break-ins and came in contact with Perez and two other juveniles, roaming the streets in the early hours of morning without adult supervision.⁵⁹ The State also refers to two other incidents in which a former friend of Perez's became the subject of Perez's negative attention.⁶⁰

The Court finds that the State can make out a *prima facie* case of kidnapping 1st against Perez, thus triggering its jurisdiction. As stated in the statute, kidnapping

⁵⁹ Perez counters that on cross-examination, the officer who described this event admitted that he was not the officer that had contact with Perez, did not know where or when this contact occurred, did not know Perez's demeanor or whether she had an explanation during this event, and did not know whether her mother was contacted.

⁶⁰ The girl, Chastity Mosely ("Chastity"), and her mother testified at one of Perez's reverse amenability hearings. According to Chastity's mother, she came home one day and found Perez and other juveniles in her front yard. They would not leave; and Perez, allegedly, threatened to go into the house and engage in fisticuffs with Chastity. The police were called; and Perez and the others were told to leave. Perez was also told not to walk on the same side of the street as Chastity's house.

A Milford police officer testified that on a different occasion, Chastity's older sister called the police to report that Perez was following Chastity down the street and harassing her. The Mosely family did not want Perez arrested, but told to leave Chastity alone or face being arrested. The police so warned Perez.

1st involves the defendants' "not voluntarily releas[ing] the victim alive, unharmed and in a safe place prior to trial."⁶¹ These requirements are inclusive, in that they *all* must be met. Mrs. Smith was released by her captors voluntarily and alive; but she most certainly was not unharmed and in a safe place, having been abandoned in a cemetery without food, water, or methods of communication or transportation. Perez seems to equate "harm" for purposes of a kidnapping 1st charge with the infliction or causation of physical injury. In *Tyre v. State*, to which Perez cites, the Delaware Supreme Court discussed the issue of "harm" in the context of a kidnapping 1st charge:

[T]he defendant claims the evidence at trial was insufficient to show the victim had been harmed and thus insufficient to justify the verdict of kidnapping in the first degree. We find the evidence was sufficient to justify the conclusion that the victim was harmed. Eliminating the charges rejected by the jury, the testimony is undisputed that the victim removed her clothes and her testimony was to the effect that this was done, after physical capture, at the defendant's order accompanied by a punch in the mouth corroborated by a cut lip. There was medical testimony as to definite emotional distress including crying and evidence of discoloration and scratches on the victim's back, discoloration to knees and a bruised hip. In short, we think there was evidence from which the jury could find substantial harm resulting from nonconsensual events on the victim's part. She was attacked from behind, dragged down a hill, forced into a culvert, forced to remove her clothing and then was assaulted in some degree sexually.⁶²

⁶¹ 11 *Del. C.* § 783A (emphasis added).

⁶² 412 A.2d 326, 329–30 (Del. 1980).

The *Tyre* holding did not rest on the infliction of physical injuries alone (*i.e.* on the cut lip, discoloration, and scratches on the victim's back). Rather, the Court looked at the entire set of circumstances surrounding the victim's ordeal, and determined that a jury could conclude that the nonconsensual events inflicted on the victim could constitute substantial harm. The nonconsensual events in this case are comparable to those endured by the victim in *Tyre*. The evidence shows that after a struggle with Perez and McDonald for her car keys, Mrs. Smith was physically captured and taken, or rather stored, in the trunk of her car against her will. During her captivity, she was provided nothing, and was forced to urinate on herself. Upon release, she supposedly cried or whimpered, thus showing that she suffered emotional distress. Therefore, Mrs. Smith suffered harm for purposes of a kidnapping 1st charge.

Additionally, the Court finds that even if Mrs. Smith could be considered unharmed, she was not released in a "safe" place prior to trial for purposes of the kidnapping 1st charge. In *Tyre*, the parties conceded that the culvert in which the victim was left constituted a safe place.⁶³ Here, the parties do not so concede. Mrs. Smith was released by her captors in an isolated, dimly-lit cemetery. Such cannot be

⁶³ *Id.* at 328 ("While there were differences in the testimony of the victim and the defendant as to the victim's departure from the scene, each version indicates the victim left the defendant's company on the night in question at the scene and there appears to be no dispute that it was a safe place in statutory terms.").

considered a safe area. The fact that a residence was located within a short walking distance of the cemetery is irrelevant. The fact that Mrs. Smith could have, theoretically, come into contact with another human being before being ultimately discovered the next morning does not render her drop-off point safe. Indeed, Mrs. Smith remained in the place where she was left until Ms. Edwards fortuitously encountered her. Because the State can make out a *prima facie* case of kidnapping 1st against Perez, the Court applies the Section 1011 factors.

Regarding the first Section 1011 factor, the alleged facts of Perez's offenses are, to say the least, troubling. Although perhaps the most passive, easily manipulated player in this episode, Perez, as impetuous and prone to peer pressure as she may have been, engaged in a course of conduct lasting over 24 hours that traumatized Mrs. Smith, who, fortunately, survived her ordeal. This case presents a clear example of utter disregard for the safety and well-being of others. Indeed, "[t]he potential for tragedy was high in th[ese] crime[s]."⁶⁴

Most significantly, during one of Perez's reverse amenability hearings, the Court learned from Brewer one alleged fact that it finds particularly shocking. According to Brewer, dumping Mrs. Smith in the cemetery was not the initial

⁶⁴ *State v. Roscoe*, 2000 WL 973132, at *5 (Del. Super. May 1, 2000) (adopting the Commissioner's Report and Recommendation to deny the defendant's Motion to Transfer to Family Court).

intention of Perez and McDonald for their prisoner:

Q: At some point, did you all decide to do something with [Mrs. Smith]?

A: *When we left the hotel – it was at night to go out to Coverdale – we was riding, like – we was riding through Concord. And, like, that’s when [Perez] and [McDonald] brought up the fact, like, we should burn the car while she was in it.*

Q: Did they have a specific plan that they talked about?

A: *I think they said they would take them to Milford, like, and burn the car while she was in it.*

Q: So when they went home to Milford, they would set the car on fire –

A: Yes.

Q: – and then leave her in the car when they did that?

A: Yes.⁶⁵

Brewer further discussed this topic in his direct examination:

Q: [D]o you specifically recall today who first mentioned the idea of setting the car on fire with M[r]s. Smith in it?

A: Yes, it was – *I think it was [Perez].*

Q: Where was everybody sitting in the car when this discussion was taking place?

⁶⁵ Reverse Amenity Hr’g, *State v. Perez*, I.D. No. 1304002943, at D-71:21–23; D-72:1–14 (Del. Super. Oct. 16, 2013) (TRANSCRIPT) (emphasis added).

A: I was in the driver's seat; [McDonald] was in the passenger's seat; and [Perez] and [Harper] were in the back.

Q: Did [McDonald] and [Perez] talk about this idea or – I mean, what was said?

A: I think it was just out of the blue. Like, *they just said, [w]hen we go back to Milford, we should set the car on fire with her in it.*

Q: Okay. What prompted that conversation, what was going on immediately before that was said?

A: I don't know. They just, like – they just said it.

.....

*I think they'd have never told us the lady was in there if the car hadn't died.*⁶⁶

Brewer further discussed this topic on his cross-examination:

Q: All right. Now, the version of events that you described to the Court today and in your taped statement, that version of the four people involved, you'll agree, it makes you look the best? It makes you look like the hero of the bunch, doesn't it?

A: I guess.

.....

Q: All right.
And it makes you look like the hero because you prevent [Perez] and [McDonald] from coming up with some sort of a plan – *some kiddy plan to hurt this old lady by burning up her car*; isn't that correct?

A: Yes.

.....

⁶⁶ October 16 Hearing, at D-80:21–23; D-81:1–20.

Q: And your relationship with . . . Perez, you really have no relationship with her at all, do you?

A: No.

Q: You've never met her before?

A: Besides this time, no.⁶⁷

Brewer further elaborated on this issue in his cross-examination:

Q: All right. Now, the discussion about, we should burn the car with her in it, when you're asked about that, you said "I think [Perez] said it."?

A: Yes.

Q: All right. Do you 100 percent remember [Perez] saying it; do you remember [McDonald] saying it; or they both came up with it at about the same time?

A: *I remember hearing [Perez] saying it.*

Q: Okay. And when it was said, it was in response to what, what was the conversation? What was going on?

A: *They just said it out of the blue, like, [w]hat should we do? That's when [Perez] was like, [w]e should take her to Milford and burn the car while she was in it.*

Q: All right. Now, did anybody do anything to try to accomplish that?

A: No.

⁶⁷ *Id.* at D-92:9–15; D-93: 1–2, 15–20 (emphasis added).

Q: All right. Did anybody even say it another time? Was it even brought up a second time?

A: No.

Q: In fact, immediately after that, the next thing that's said is, [h]ey, there's the cemetery. Let's stop over there. And that was Harper's idea; right?

.....

Did you see them plan anything; take any steps to make a plan; take any steps to accomplish that plan? Did they do anything besides, some kid said it and another kid agreed?

A: *I'm saying, if they can kidnap a lady, like what should stop them from burning her in the car?*

Q: All right. You kidnapped a lady. What's to stop you –

.....

– from burning her in the car?⁶⁸

Brewer was again asked about this topic on his re-direct examination:

Q: You testified that you believed it was [Perez] who, in fact, said that they should burn the car with M[r]s. Smith in it?

A: Yes.

Q: What makes you think it was [Perez] rather than [McDonald] who said it?

A: *Because I knew her voice. I just heard her say it.*

Q: *You heard her say it and you knew her voice?*

⁶⁸ *Id.* at D-146:13–23; D-147: 1–17, 23; D-148: 1–8, 11. A few moments later, Brewer was asked whether this was a fleeting idea, and he responded that he did not know.

A: Yes.⁶⁹

Brewer's alleged disclosures are appalling.⁷⁰ The supposed intentions of Perez and McDonald, if believed by the trier of fact, show them, individually and separately, capable of terrible depravity. They show impulses of attempted murder. There is a disturbing theme of thinly veiled force, coercion, and the total disregard for Mrs. Smith's safety during her kidnapping, where she was imprisoned in the trunk of her car for almost two days after being robbed. Indeed, these circumstances are like a war crime and were the worst possible nightmare for the victim. This particular Section 1011 factor is the most persuasive one. This, combined with the complete lack of care showed to Mrs. Smith from kidnapping her to releasing her,⁷¹ weighs heavily in favor of trying Perez in this Court.

Furthermore, as extensively demonstrated throughout her reverse amenability hearings, Perez's past is fraught with unruly behavior, some of which resulted in run-ins with the criminal justice system. The Court is not insensitive to the problems, both internal and external, which Perez has faced in the past and continues to face.

⁶⁹ *Id.* at D-155:4-14 (emphasis added).

⁷⁰ These disclosures are admissible as an admission by a party-opponent under D.R.E. 801(2). Perez's statements are admissions. Also, the statements of McDonald and Brewer as co-conspirators would bind Perez as well.

⁷¹ The Court notes the alleged offering of food to Mrs. Smith during the ordeal. As this was done by McDonald rather than Perez, the Court does not find it relevant here.

At some point, however, the culpability of Perez's own actions throughout this episode must be recognized. She was not a girl who did not know what she was doing. She might have had cognitive problems and a troubled past; but she was an equal participant throughout this ordeal. Moreover, according to Brewer, it was Perez who came up with the idea of burning Mrs. Smith alive in her car. Be that an admission resulting from cognitive underdevelopment and unstable external forces, the Court concludes that it strongly supports trying Perez in this Court. This is not a case involving a juvenile's immature, cognitively unstable childish misdeeds. This is a case involving a juvenile's immature, cognitively unstable violent criminal behavior.⁷²

⁷² Indeed, under Delaware law, kidnapping 1st is a violent crime, as is Robbery in the First Degree. 11 *Del. C.* § 4201(c). See generally *Holmes v. State*, 322 Ark. 574, 576–79 (Ark. 1995) (“[T]he serious and violent nature of an offense is a sufficient basis for denying a motion to transfer and trying a juvenile as an adult. No element of violence beyond that required to commit the crime is necessary [T]he trial court could have relied on the nature of the crime of aggravated robbery in denying appellant’s motion to transfer to juvenile court. No violence beyond that necessary to commit the offense of which the defendant is necessary.” (citations omitted) (internal quotation marks omitted)).

Even though Mrs. Smith was not beaten, the Court finds that her being stuffed in a trunk for two days without food, water, or medication, and then dumped in a desolate cemetery constitutes violence. *Cf. Holmes*, 322 Ark. at 577 (quoting the opinion of the trial court, which the appellate court affirmed (“Aggravated robbery–violence as such may not have occurred in the traditional sense. In other words, no guns were fired or no one was assaulted or battered but certainly when a citizen looks down the barrel of a loaded revolver in the process of being help up, in my judgement that is a violent act.”)).

(2) Nature of Perez's Past Treatment and Rehabilitative Efforts and the Nature of Perez's Response thereto

Perez stresses that all who have worked with her agree that she needs help, and that the circumstances of her life have not afforded her an adequate opportunity to receive the appropriate help that she needs.

The State points out that, according to a school resource officer in the Milford School District, Perez had visible disciplinary problems. The principal at SCOPE testified that Perez's performance while at the school varied, with the cell phone incident described above leading to the very infrequent measure of a three-day out-of-school suspension. Eventually, due to lack of progress, Perez left SCOPE. Perez also spent a lot of time with SCOPE's social worker, who referred Perez to the services of a psychologist which ultimately went unutilized. Perez also met with a drug and alcohol counselor once in August 2012, but never followed up with scheduled appointments. The counselor met with Perez again in November and December 2012, encouraging Perez's mother to contact a service which provided low-cost services to Hispanic people, to no avail. The Dean of Students at Milford Central testified that, while at that school, Perez's behavior would culminate in the issuance of over 100 demerits, well over the 30-demerit norm. In fact, Perez's behavior at Milford Central caused her to be sent to SCOPE. Upon returning from SCOPE back to Milford

Central, she continued to be a disciplinary problem, ultimately leading up to the March 2013 incident involving possession of marijuana in school.

The State iterates that Perez's 2011 convictions of Theft Misdemeanor and Criminal Trespass in the Second Degree placed her under the guise of DYRS, during which she completed the Project Redirect Program. Her 2012 conviction for Shoplifting caused her to be placed on probation again with DYRS. During that probation, her performance on an evaluation caused her to be referred to a program through a company contracted with DYRS which provides psychological services. Because of Perez's failure to perform her required community service hours, she was released from that program and returned to DYRS. Perez's 2013 conviction for Offensive Touching caused her again to be placed on probation with DYRS. Her probation officer that time tried to meet with Perez and her mother at home, but to no avail. He arrived at Milford Central to meet her on the very day Perez was arrested for the marijuana incident at the school.

The State points to the testimony of Perez's probation officer at Stevenson House, where Perez is currently placed. Perez's behavior there is average; and she is performing well academically. The probation officer did claim, however, that Perez may not take things seriously at times. The probation officer stated that Perez does not appear to appreciate the severity of her conduct or the resulting

consequences.

The Court finds that this factor also weighs against Perez. Perez has been on probation for various offenses several times, and is no stranger to the work of DYRS. As demonstrated at the reverse amenability hearings, however, it does not appear that past efforts to curb her behavior have been successful. Perez strenuously asserts that the treatment she has received has been inadequate, and that DYRS has committed itself to providing her the proper treatment if permitted. The Court is not convinced, however, that placing all of the blame on the inadequacy of her past treatment, while understanding her own efforts to respond to that treatment should sway this factor in Perez's favor. The simple fact is that in the last few years, prior to this incident, Perez found herself in trouble and never changed her ways. The principal blame must fall on the offender herself. Furthermore, it seems that Perez's biggest success to date comes from being incarcerated at Stevenson House as the result of being charged with five felonies.⁷³

(3) Interests of Society; Interests of Perez

Perez claims that this element weighs in her favor by explaining the logistical

⁷³ Cf. *State v. Doughty*, 2011 WL 486537, at *3 (Del. Super. Feb. 10, 2011) (“During his incarceration in NCCDC, [Defendant] has had no incident reports. Thus, Defendant functions well in a structured environment, which cannot be offered by the Family Court beyond [the date that court retains jurisdiction of Defendant].”).

The Court is aware that Perez will not remain at Stevenson House permanently.

problems with trying her as an adult. If the Court denies this Motion, DYRS immediately loses jurisdiction over her and she will be remanded to the auspices of the Delaware Department of Corrections (“DOC”). DOC, however, does not have a facility for housing female juveniles. Thus, if she were housed in an adult facility in Delaware pending her trial, or if convicted before her 18th birthday, DOC would be required, under federal law, to completely segregate Perez both visually and auditorily from the facility’s adult population. Essentially, she would be in solitary confinement for roughly a year, until she turns 18. For the period of overlap in which Perez is a juvenile but being housed as an adult, she should receive some treatment for her social and psychological issues; but in an adult facility, this is a secondary concern. Additionally, she will need to be educated and socialized, thus adding to the complexity of housing her in an adult facility.

The other option is to send Perez to a facility out-of-state that houses juveniles serving adult sentences. Perez notes that a facility in North Carolina appears to be an option, but stresses that her placement there is merely speculative. Even if she were sent there, Perez claims, she could be sent back to Delaware at the will of the North Carolina facility.

An adult conviction also presents Perez with problems because of her status as an illegal immigrant. The Court heard testimony from an immigration attorney who

explained the problems that an adult conviction would pose to her from an immigration standpoint. Her convictions in this case, which will constitute convictions of aggravated felonies, will cause Perez to face an administrative removal process, and face certain deportation to her home country of Mexico. The only way Perez could avoid this would be to successfully prove that she is entitled to protection under the United Nations Convention Against Torture, which would stay, but not eliminate her chances of deportation.⁷⁴ The chances are strong, however, that Perez would be deported to her home country of Mexico. This presents the possibility that Perez will fall victim to the drug and human trafficking which occurs in her home region of Mexico.

If Perez's case is transferred to the Family Court, however, she will receive the services promised to her by DYRS, which could very well include incarceration, albeit age-appropriate incarceration. Additionally, a juvenile adjudication would not render deportation a relative certainty. She still would be subject to it, as she is an illegal immigrant. However, without adult convictions for aggravated felonies there exists many pathways for her to avoid deportation. Furthermore, under 10 *Del. C.* § 928, the Family Court could maintain jurisdiction over Perez until her 21st birthday,

⁷⁴ Apparently, to be successful under the Convention, Perez would need to show that there existed a greater than 50% chance that she would be tortured upon her return to Mexico.

which can still include incarceration and extended treatment.

Lastly, Perez points to the testimony of Dr. Edward Wilson (“Dr. Wilson”), a psychologist who performed a comprehensive evaluation on her. According to Dr. Wilson, Perez has a slightly below average IQ, and scored very poorly in her ability to understand and use language and to think and reason through problems. Indeed, the results of one test demonstrated that Perez’s ability to understand and reason equated to that of a 10-year-old. From a behavioral standpoint, Dr. Wilson explained that, based on another test, Perez’s behavior is motivated by external influences, meaning that she is easily manipulated by peer pressure. This went along with her other issues, including depression and low self-esteem. Perez’s personality issues were also analyzed via psychological test, revealing Perez’s introversion, self-devaluation, identity issues, impulsivity, and substance abuse. Also, although mentally competent, Dr. Wilson stated that the ability to understand and reason the severity of the charges against her and the consequences therefrom was beyond her ability. While cognitively she should be able to think abstractly, currently, she can only think concretely in terms of the impulsive black and white and right and wrong, which equates to the cognitive subset of a 10 to 12-year-old. She is also socially and emotionally underdeveloped. Regarding the former, she must be told how to feel about successes and failures. Regarding the latter, she has a significantly

underdeveloped sense of identity, thus making her very susceptible to peer pressure. Her cognitive and moral development are that of a much younger child. Perez contends that her issues cannot be adequately addressed in the adult system.

The State asserts that prior to kidnapping Mrs. Smith, Perez was an out-of-control youth who did not respond to any external assistance offered to her. Dr. Wilson himself testified that the strictures of life in Stevenson House have been beneficial for her.⁷⁵ Placement in Stevenson House would be unavailable if Perez's case were transferred to the Family Court.

Additionally, the State points out that if Perez's case were transferred to the Family Court, she will not be facing a mandatory sentence of incarceration. Instead, she might be placed on probation, thereby reentering the community.⁷⁶ If she did receive a sentence of incarceration from the Family Court, DYRS would have to send her out-of-state. DYRS currently has a contract with a facility in Indiana, which has stated that it would not be able to meet Perez's needs.⁷⁷ An adult sentence of

⁷⁵ Perez notes that this fact is a sign that she is amenable to structured life with other juveniles.

⁷⁶ Perez counters that it is highly unlikely that a sentence from the Family Court would not contain any incarceration.

⁷⁷ The State also points out that the program in Indiana lasts for only six to nine months. Therefore, a juvenile who stays at the facility for a longer period simply repeats the program.

Perez counters that just because the facility in Indiana is reluctant should not dispose of the issue.

incarceration would result in two possibilities: (1) being housed in a Delaware facility, separate from adult inmates,⁷⁸ or (2) being sent out-of-state to a facility that houses juvenile offenders serving adult sentences. A facility in North Carolina is the currently the most promising option, as that facility is currently preparing a separate building solely for juveniles. The facility also offers educational opportunities, recreation, and mental health treatment, all of which, according to Dr. Wilson himself, would benefit Perez. Upon reaching the age of majority, Perez can be returned to Delaware to serve the remainder of her sentence.⁷⁹

Dr. Wilson stated that it would be beneficial for Perez to be confined, and that she should be confined with other juveniles. The State asserts that DYRS would need to conduct a nationwide search, as the Indiana facility will not accept Perez. The State also claims that, at best, DYRS would be able to supervise Perez until she turns 19, regardless of the progress in her treatment or whether it is safe to release her into society.

Regarding the issue of deportation, the State counters that her risk of deportation upon conviction in this Court is not too dissimilar from a her risk of

⁷⁸ Perez states that this option is not only impractical, but dangerous to her development.

⁷⁹ Perez counters and reminds the Court that her placement in North Carolina is not certain. On the other hand, according to Perez, DYRS has committed to finding a suitable placement for Perez if her case is transferred to the Family Court.

deportation upon conviction in the Family Court, given the nature of her current charges. The State urges the Court not to forget that regardless of the forum in which her case is tried, Perez is an illegal immigrant. Even if she was treated as a juvenile and applied for asylum in the United States, Perez would still face an 80% chance of being deported.⁸⁰ Furthermore, there is no evidence that Perez or her mother would attempt to seek asylum; rather, Perez's immigration attorney's testimony regarding the options available to them was complete conjecture. The theory that Perez might have a slightly better chance of not facing deportation if her case is transferred is, according to the State, too attenuated to be considered meritorious.⁸¹

The State additionally notes that DYRS has stated that, if found amenable, Perez will receive their services. DYRS has not stated, however, that it is their

⁸⁰ See Reverse Amenability Hr'g, *State v. Perez*, I.D. No. 1304002943, at B-162:15–16 (Del. Super. Oct. 2, 2013) (TRANSCRIPT) (“80% of asylum applications are denied.”). The State also notes that, according to Perez's immigration attorney expert, the chances of deportation proceedings being commenced stemming from convictions from the Family Court on her current charges are almost certain.

⁸¹ The State also notes the irony that, where Perez discusses the troubles that await a juvenile in her home region of Mexico, an adult sentence from this Court would keep Perez in the United States for a longer period than a Family Court sentence, thereby prolonging Perez's return to Mexico into adulthood.

Perez counters that the State fundamentally misunderstands the nature of the issue. If she is convicted in this Court, she will be convicted of aggravated felonies. Thus, deportation proceedings will begin without her being before an immigration judge. If, on the other hand, she is convicted of all charges in the Family Court, her convictions will not be considered aggravated felony convictions. Her deportation proceedings would be before an immigration judge; and she would have a great chance at staying in the United States.

recommendation that Perez be found amenable. This demonstrates, according to the State, that officials at DYRS themselves are not completely comfortable with Perez returning to them. Also, the State points out that finding Perez amenable will not vitiate many of the factors Perez herself attributes to causing her problems (*i.e.*, poverty and status as an illegal immigrant). By Perez's own admission, the services of DYRS have not helped her; yet she wishes to return to the auspices of DYRS.⁸²

The Court finds that the interests of both society and Perez will best be served by keeping Perez in the adult system. It cannot be denied that Perez needs help, which must entail intense supervision. Dr. Wilson, who advocated Perez's amenability, thoroughly explained how Perez's background and cognitive abilities led to her participation in this criminal episode. Dr. Wilson could not state, however, when Perez could re-enter society, although he believed she could re-enter at some point if her needs were met. Perhaps no expert could prudently make this prediction. Indeed, Dr. Wilson attested to this fact. The Court is convinced, however, that while

⁸² Perez urges the Court to conclude that Perez never received the *appropriate* services from DYRS. She reminds the Court that she successfully completed one year at SCOPE; and a SCOPE official noted that Perez needed intensive treatment, and that probation was not helping her. Perez also claims that her treatment for alcohol and drug abuse were inadequate. Indeed, while such inadequate treatment was being provided, Perez continued to experience both internal and external problems. Indeed, from February 2013 to March 2013, when she was arrested for the marijuana incident, Perez was essentially ignored; and after that incident she was provided no treatment.

Perez stresses that she has never received the highly intensive, yet age-appropriate help that she needs and that is available.

Perez may require incarceration, the time for her rehabilitation is beyond the purview of the Family Court. Allowing for the possibility of Perez's release upon reaching 18, 19, or 21-years-old, without being fully rehabilitated, is simply too troublesome a possibility for this Court to permit.⁸³ There is no concrete evidence that, more likely than not, Perez could be and would be fully rehabilitated by the time the Family Court relinquished its jurisdiction over her.

Lastly, the Court finds Perez's arguments regarding deportation unavailing. It is true that Perez faces immigration difficulties by remaining under the auspices of this Court. The Court agrees with the State that she faces similar difficulties if her case is transferred to the Family Court. Additionally, these concerns cannot take precedence over the nature of the charges which Perez faces.

After finding that the State can make out a *prima facie* case of kidnapping 1st and examining the Section 1011 factors, the Court's role in these reverse amenability

⁸³ Cf. *D.E.P. v. State*, 727 P.2d 800, 802–03 (Alaska Ct. App. 1986) (“The consensus of the expert testimony was that treatment in a juvenile setting would be preferable and would optimize the potential for rehabilitation. Under [prior precedent], however, *it is clear that the desirability of treating [the defendant] in a juvenile facility cannot be determinative on the issue of waiver unless the evidence further establishes a likelihood that rehabilitation of [the defendant] will be accomplished by his twentieth birthday.*” (emphasis added)). *But cf. State v. Moore*, 2003 WL 23274842, at *2 (Del. Super. Dec. 31, 2003) (“The Defendant has not previously had the occasion to undergo any rehabilitative program relating to sex offenses. Through Family Court, several out-of-state, Level IV sex offender programs are available, generally ranging in length from nine to 18 months. *It would appear that there is still time for the Defendant to be considered for entry into one of such programs and to complete such a program before he becomes 18 years of age.*” (emphasis added)).

proceedings is to “balance or weigh its respective findings in reaching its ultimate decision on the application to transfer.”⁸⁴ On balance, the seriousness of the crime, committed by a juvenile just as culpable as her co-defendants, against a person, rather than property, in an aggressive manner, tips the scale in favor of adjudicating Perez as an adult, along with the previously discussed considerations.⁸⁵

⁸⁴ See *Marine v. State*, 624 A.2d 1181, 1183 (Del. 1993).

⁸⁵ Cf. *J.S. v. State*, 372 S.W.3d 370, 374–75 (Ark. Ct. App. 2009) (affirming trial court’s adult disposition of a juvenile even though “appellant had no criminal history and that there were rehabilitation facilities available, the court also found that the alleged offenses were serious; that the alleged crimes were committed in an aggressive, willful, or premeditated manner; that the offenses were against persons rather than property; that appellant was as culpable as his codefendants; that appellant had the benefit of a supportive family willing to intervene directly when he was not making good choices; and that appellant participated in the planning of the offense shortly after this intervention.”).

Based on the foregoing, Perez's application to have her case transferred to the Family Court is **DENIED**.

IT IS SO ORDERED.

/s/ Richard F. Stokes

Richard F. Stokes, Judge

Original to Prothonotary

Cc: John F. Brady, Esq.

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE)
)
)
v.) ID No. 1303016992
)
)
RONDAIGES A. HARPER,)
Defendant.)

MEMORANDUM OPINION

Upon Defendant's Motion to Be Transferred Back
to the Family Court of Delaware. Denied.

Date Submitted: August 22, 2013

Date Decided: March 31, 2014¹

John F. Brady, Esq., Murray Law LLC, 109 North Bedford Street, Georgetown,
DE 19947, Attorney for Defendant

Melanie C. Withers, Esq. and Casey L. Ewart, Esq., Delaware Department of
Justice, 114 East Market Street, Georgetown, DE 19947, Attorneys for the State

STOKES, J.

¹ The Court publishes three separate opinions for the three separate defendants in this case. However, the Court publishes these opinions simultaneously.

Defendant Rondaiges Harper (“Harper”), who was 17-years-old at the time of the charged crimes, will be tried as an adult in this Court. His application to transfer his case from this Court to the Family Court pursuant to 10 *Del.C.* § 1011(b) is **DENIED**.

In April 2013, Harper was charged with Kidnapping in the First Degree, a class B felony, Carjacking in the First Degree, a class B felony, and two counts of Conspiracy in the Second Degree, class G felonies. He is currently incarcerated at the Stevenson House, a juvenile residence.

Facts

Facts and Circumstances Hearing

A Facts and Circumstances hearing was held in this Court on July 18, 2013. The evidence presented pertained to the involvement of Defendants Harper,² Phillip Brewer (“Brewer”),³ Jackeline Perez (“Perez”)⁴ and Junia McDonald (“McDonald”)⁵ in the charged crimes.⁶ Harper, Perez, and McDonald were all present at this hearing.

² Date of birth: March 31, 1995.

³ Date of birth: January 27, 1996.

⁴ Date of birth: April 30, 1997.

⁵ Date of birth: November 1, 1998.

⁶ On September 5, 2013, Brewer pled guilty to one count of Carjacking in the Second Degree, three counts of Kidnapping in the Second Degree, and four counts of Conspiracy in the Second Degree. As part of his plea agreement, Brewer was required to testify truthfully in all

The following facts were taken from that hearing and are common to all three defendants.

Margaret Smith (“Mrs. Smith”) is an 89-year-old widow living in her own home in Milford, Delaware. At the fact hearing, Mrs. Smith gave a full rendition of the criminal incident. Although she was sometimes forgetful or confused about incidentals, she provided a consistent version of the material facts.

On March 18, 2013, at about 2:00 p.m., Mrs. Smith left her home to get an ice cream cone and buy a gift for her sister. Mrs. Smith carried some money in her purse, and a larger amount rolled up and pinned to the strap of her brasier. As she sat in her 2001 tan Buick Le Sabre at a convenience store called the Chicken Man, two female juveniles, later identified as Perez and McDonald, approached her car. They tapped on the driver’s side window and asked Mrs. Smith if she would take them home. At the fact hearing, Mrs. Smith referred to the girls as “teenagers,” stating that one was white and one was black, and that one was shorter and stockier than the other. Mrs. Smith did not observe any other physical traits.

At first Mrs. Smith hesitated, but then agreed to give the girls a ride home.

proceedings against his co-defendants. Brewer is currently being held at the Howard R. Young Correctional Institution. His sentencing date is to be determined, after the reverse amenability hearings and trials of his co-defendants take place. His cooperation will be given consideration at the time of his sentencing.

One juvenile got in the front passenger seat, and the other in the back. Mrs. Smith assumed that the juveniles lived in Milford; but they directed her to a residence farther away. Upon arriving at that residence, Mrs. Smith was told that the mother was not home and was asked to go to a second residence. Once there, Mrs. Smith was told that the aunt was not home.

The juveniles directed Mrs. Smith to a third residence where they asked for her keys. Mrs. Smith adamantly refused. Both juveniles then grabbed her while she struggled to remain in the car. Mrs. Smith was yanked out of the car, resisting until the three were at the rear of the Buick. The shorter juvenile wrestled the keys from Mrs. Smith and the trunk door was opened. Mrs. Smith was then shoved inside the trunk, and the trunk door slammed. The juveniles then got back in the car and, with the shorter juvenile driving, took off at a fast pace. Mrs. Smith hollered and knocked on the back of the trunk but received no response. Perhaps this could have been, in part, because the car's radio was playing at full volume. According to Mrs. Smith, while in the trunk, she received no food or water and was given no bathroom breaks. She also was not given the medication she took for high blood pressure or arthritis, which she carried with her.

During this episode, the two juveniles also took \$500 in cash from Mrs. Smith. They went to the Walmart to buy clothes and may have given some of the money to

two male juveniles to buy a new battery for the car. That evening, the juveniles used stolen money to book a room at the Days Inn in Seaford, Delaware. Mrs. Smith spent the night in the trunk of her car. In the morning, she was taken to a cemetery and dumped out, along with her cane and a black Ace Hardware bag of prescription medications.

Having wet herself in the trunk, Mrs. Smith apparently removed her pants and left them on the ground. She crawled around the cemetery looking for a road. The surface of the cemetery being part dirt and part grass, Mrs. Smith scraped her knees, but attained no other observable injuries. The cold temperatures caused numbness in her hands and feet, which is not yet resolved.

At approximately 9:00 p.m. on March 19, 2013, Trooper John Wilson (“Trooper Wilson”), a member of the Delaware State Police Department (“DSPD”), received a missing person call. A woman who identified herself as Sabrina Carol (“Ms. Carol”) said that she had not seen her elderly aunt, Margaret Smith, since 2:00 p.m. the previous day. Ms. Carol went to her aunt’s house, but neither she nor her purse were there. The family was concerned because Mrs. Smith showed early signs of either Alzheimer’s Disease or some form of dementia. The previous day, a neighbor saw Mrs. Smith putting things in her car at approximately 11:00 a.m., and drive away about an hour later. Mrs. Smith’s sister spoke to her on the phone at about

2:00 p.m. the previous day. Mrs. Smith was thought to be driving her tan 2001 Buick Le Sabre. Ms. Carol stated that her aunt often went to Milford to shop and to Rehoboth Beach to visit her sister.

Trooper Wilson entered Mrs. Smith's identification information into the national data base for missing persons and issued a Gold Alert which lists missing persons with mental conditions. He also filed a DSPD report.

On March 20, 2013, Corp. James Gooch, Jr. ("Corp. Gooch") received a call from a woman named Betty Edwards ("Ms. Edwards"). Ms. Edwards said that when she came to visit her son's tombstone at Mount Calvary Methodist Cemetery ("the cemetery") east of Seaford, she found a half-clothed, apparently disoriented elderly woman crawling on the ground. Corp. Gooch stated that the cemetery is not visible from King Road and is surrounded by trees. When Corp. Gooch arrived at the cemetery, Ms. Edwards told him that the elderly woman had initially tried to run from her, but Ms. Edwards reached her and convinced her to sit on one of the tombstones. Mrs. Smith was wearing brown spandex shorts and a coat, but no pants or shoes. Her hands were dirty and her knees were scratched.

Mrs. Smith initially told Corp. Gooch that she had walked from her home to the cemetery, but upon questioning, said that two girls in Milford asked her for a ride, and then took her money and keys and put her in the trunk of her car. She remained

in the trunk for two days, without food, water, or medication. Mrs. Smith was also forced to urinate on herself because her requests to use a bathroom were ignored. When she was left in the cemetery she was not familiar with her surroundings. Hence, she got on her hands and knees and crawled around looking for an opening to get to a road. The night was cold. Ms. Edwards told Corp. Gooch that Mrs. Smith had money rolled up and pinned to the strap of her brasier.

Corp. Gooch drove Mrs. Smith to Nanticoke Hospital where Ms. Carol met them. Mrs. Smith was able to give her name, date of birth, and age, although she was still somewhat confused. When Corp. Gooch ran her information in the police system, he found the Gold Alert with a photograph and a reference to possibly being armed. Corp. Gooch gave Mrs. Smith a light pat down and found no weapon. A nurse, having found money pinned to the strap of Mrs. Smith's brasier, put the money in a hospital safe. Mrs. Smith then told Corp. Gooch the rest of the details of the incident. Mrs. Smith was treated and then released to the care of Ms. Carol.

Corp. Gooch returned to the cemetery to look for Mrs. Smith's car because Mrs. Smith told him that at one point, the two juveniles drove her car up to the top of a hill and let it slide down so that she would meet her death. Corp. Gooch also hoped to find the wig that Mrs. Smith apparently wore in the Gold Alert photograph. Neither the car nor the wig was found. Corp. Gooch, however, found what looked

like the tracks of someone crawling in the sand over a recent grave site. He also saw tire tracks indicating that a vehicle had made a U-turn in an area of soft sand. Even with the aid of a DSPD helicopter, the car was not found. Later that day, Corp. Gooch removed Mrs. Smith's name, but not her missing car, from the Gold Alert.

At approximately 7:00 p.m. on March 20, 2013, Trooper Patrick Schlimer ("Trooper Schlimer") of the DSPD was sitting at one of his routine patrol sites at the intersection of Coverdale Road and Seashore Highway when a tan Buick with five passengers passed him. Trooper Schlimer ran the car's tag number and found a flag to stop the vehicle. He then followed the car, stopping it on Chapel Chapman's Road. None of the vehicle's occupants had any form of identification. Two of the three female occupants each stated that the vehicle belonged to the other's grandmother. The occupants were identified as McDonald in the driver's seat, Brewer in the front passenger seat, Harper in the rear left passenger seat, Perez in the rear right passenger seat, and Deniaya Smith ("Deniaya")⁷ in the center rear passenger seat.

Trooper Schlimer learned from police dispatch that the car had been involved in a carjacking. When his back-up arrived, the officers took the individuals and the

⁷ Upon being taken into custody, Deniaya stated that she had been picked up by the other four occupants on the afternoon of March 20, 2013, and that she discovered the car was stolen at the very last minute. Deniaya entered the scenario after Mrs. Smith was discovered in the cemetery.

car to Troop 4 in Georgetown, Delaware. Trooper Schlimer had no further discussion with any of the suspects.

After a search warrant for the car was obtained, Det. Michael Maher (“Det. Maher”) from the Evidence Detection Unit photographed the vehicle as well as the contents of the trunk. Among other things, the trunk contained seven bags of clothing, an Ipod lamp, three jackets, five cans of unopened ginger ale, and a so-called egg crate mattress. These items were left in the trunk, which measured 3 feet by 9 inches from front to back, 5 feet wide but 3 feet by 6 inches in the area where the tires were located, and 1 foot by 6 inches high.

On March 29, 2012, Det. Maher and Det. Robert Truitt, Jr. (“Det. Truitt”), the chief investigating officer, went to the cemetery. A residence is located on each side of King Road at the turn onto Calvary Road; but there is no signpost indicating the presence of the cemetery. The distance from King Road to the cemetery at the end of Calvary Road is 133 yards. The area is heavily wooded. Trash and debris are found all along the unpaved road, which is in a wretched condition. A chain link gate leads into the cemetery; and a chain link fence runs its perimeter. The area is surrounded by large trees, allowing for little light.

Det. Maher and Det. Truitt observed the tracks seen by Corp. Gooch indicating that someone had crawled over the sand. They did not observe shoe prints. To the

right of the entrance, the detectives found a black metal cane, a black bag from Ace Hardware containing prescriptions, and a pair of urine-soaked blue jeans on the ground near the fence.

On March 20, 2012, after being released from the hospital, Mrs. Smith and Ms. Carol went to the authorities to report her stolen car. Mrs. Smith was interviewed by Det. Truitt. She had been without her medication and was somewhat confused in her thinking. Ms. Carol stated that her aunt was in the early stages of dementia. During the interview, Mrs. Smith described the incident with the two girls stealing her keys and money and keeping her in the trunk of her car for two days without food, water, or bathroom stops. She stated that she had been dropped off in a cemetery, and then crawled around, in the cold, trying to find a road. After Mrs. Smith's car was located, Det. Truitt returned it to her.

Harper, McDonald, Brewer, and Perez were all interviewed about the incident. The interviews of McDonald and Perez are addressed in their respective opinions. Harper's interview is addressed below.

On April 4, 2013, Det. Truitt interviewed Mrs. Smith at her home. She showed him bruises and scrapes on her knees from crawling around the cemetery. She also stated that her hands and lower extremities were still numb from exposure to cold temperatures while in the trunk. She said that she had tried to talk to the kidnappers

but was told to “shut up,” and that one of the girls said they would kill her if she reported the incident to the police.

At the hearing, Det. Truitt testified that he found a receipt for clothing from the Walmart in Seaford. He reported that the temperature on the night of the kidnapping ranged from the mid-to-upper 30’s to the mid-to-lower 40’s. Det. Truitt stated that the girls blamed one another for the car theft, and that Brewer told him the Buick was stolen.

Harper’s Interview

In Harper’s interview, he stated that Perez and McDonald told him that someone was in the trunk while they were driving. The girls told him that they asked the car’s owner for a ride, and then took her money for beer and put her in the trunk. Upon hearing someone in the trunk, the girls opened the trunk for Harper and Brewer. The woman inside the trunk told Harper what had happened. The trunk was then closed and the youths went to the Days Inn in Seaford. where they used stolen money to book a room for the night.

Discussion

Reverse Amenability

Juvenile crimes are usually a matter for the Family Court.⁸ This Court, however, maintains original jurisdiction over a juvenile who commits specifically enumerated crimes.⁹ But this Court's jurisdiction is not absolute.¹⁰ Under 10 *Del.*

⁸ *State v. Anderson*, 385 A.2d 738, 739 (Del. Super. 1978). *See also State v. Anderson*, 697 A.2d 379, 382 (Del. 1997) [hereinafter Delaware Supreme Court *Anderson*] (“Age-based distinctions do not pertain to fundamental rights or affect a suspect class and such classifications, when attacked on equal protection or due process grounds, are presumed to be valid. They will not be set aside if any state of facts reasonably may be considered to justify [them].” (citations omitted) (internal quotation marks omitted)).

⁹ *Anderson*, 385 A.2d at 739–40 (citing 10 *Del. C.* § 938, which has been redesignated as 10 *Del. C.* § 1010 and amended by 69 Laws 1993, ch. 335, § 1, eff. July 8 1994). *See also* 10 *Del. C.* § 921 (“[Family] Court shall have exclusive original civil jurisdiction in all proceedings in this State concerning . . . [a]ny child charged in this State with delinquency by having committed any act or violation of any laws of this State or any subdivision thereof, except murder in the first or second degree, rape in the first degree, rape in the second degree, unlawful sexual intercourse in the first degree, assault in the first degree, robbery in the first degree, (where such offense involves the display of what appears to be a deadly weapon or involves the representation by word or conduct that the person was in possession or control of a deadly weapon or involves the infliction of serious physical injury upon any person who was not a participant in the crime, and where the child has previously been adjudicated delinquent of 1 or more offenses which would constitute a felony were the child charged under the laws of this State), kidnapping in the first degree, or any attempt to commit said crimes”); 10 *Del. C.* § 1010 (“A child shall be proceeded against as an adult where . . . [t]he acts alleged to have been committed constitute first- or second-degree murder, rape in the first degree or rape in the second degree, assault in the first degree, robbery in the first degree (where such offense involves the display of what appears to be a deadly weapon or involves the representation by word or conduct that the person was in possession or control of a deadly weapon or involves the infliction of serious physical injury upon any person who was not a participant in the crime and where the child has previously been adjudicated delinquent of 1 or more offenses which would constitute a felony were the child charged under the laws of this State) or kidnapping in the first degree, or any attempt to commit said crimes”).

¹⁰ *Anderson*, 385 A.2d at 740 (citing 10 *Del. C.* § 939, which has been redesignated as 10 *Del. C.* § 1011 and amended by 69 Laws 1993, ch. 335, § 1, eff. July 8, 1994).

C. § 1011, (“Section 1011”)¹¹ this Court may transfer the original jurisdiction it maintains over a juvenile offender to the Family Court if this Court finds such a transfer to be in the interests of justice.¹² Before making this transfer, the Court must conduct what is known as a “reverse amenability hearing,” in which it considers evidence of statutorily specified factors.¹³ The Court may consider other relevant factors as well.¹⁴ The purpose of this Court’s determining a juvenile’s amenability

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Upon application of the defendant in any case where the Superior Court has original jurisdiction over a child, the Court may transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of justice would be best served by such transfer. Before ordering any such transfer, the Superior Court shall hold a hearing at which it may consider evidence as to the following factors and such other factors which, in the judgment of the Court are deemed relevant:

- (1) The nature of the present offense and the extent and nature of the defendant's prior record, if any;
- (2) The nature of past treatment and rehabilitative efforts and the nature of the defendant’s response thereto, if any; and
- (3) Whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court.

10 *Del. C.* 1011(b).

¹² *See Anderson*, 385 A.2d at 740.

¹³ 10 *Del. C.* 1011(b); *see also Anderson*, 385 A.2d at 740 (explaining how the Court may transfer jurisdiction back to the Family Court).

¹⁴ *State v. Doughty*, 2011 WL 486537, at *1 (Del. Super. Feb. 20, 2011).

is to place a judicial check on the prosecutorial charging of juveniles.¹⁵ Ultimately, though, “[s]ince a juvenile charged with a designated felony in the Superior Court has lost the benefit of Family Court adjudication by statutory pronouncement, there is [a] presumption that a need exists for adult discipline and legal restraint. Hence, the burden is upon the juvenile to demonstrate the contrary.”¹⁶

In rendering its decision, this Court must preliminarily determine whether the State has made out a *prima facie* case against the juvenile, meaning whether there is a fair likelihood that Harper will be convicted of the crimes charged.¹⁷ A real probability must exist that a reasonable jury could convict the juvenile based on the totality of the evidence, assuming that the evidence introduced at the hearing is unrebutted by the juvenile at trial.¹⁸

Because Kidnapping in the First Degree (“kidnapping 1st) is one of the crimes with which Harper is charged, this Court maintains original jurisdiction over his case. Harper’s statutory reverse amenability hearing was held on July 30, 2013. The parties

¹⁵ See Delaware Supreme Court *Anderson*, 697 A.2d at 383 (“It is true that we have viewed both the amenability and reverse amenability processes as containing pivotal constitutional safeguards providing independent judicial scrutiny over the charging of juveniles.” (citations omitted) (internal quotation marks omitted)).

¹⁶ *Anderson*, 385 A.2d at 740.

¹⁷ *Marine v. State*, 624 A.2d 1181, 1185 (Del. 1993).

¹⁸ *State v. Mayhall*, 659 A.2d 790 (Del. Super.1995), *aff’d sub nom Holder v. State*, 692 A.2d 1181 (Del. 1997).

submitted simultaneous briefs on August 22, 2013. In applying the factors of Section 1011 in order to decide where Harper will best be tried, the Court considers evidence presented at both the fact hearing and his reverse amenability hearing.

Section 1011 Factors

(1) Nature of the Present Offenses; Nature and Extent of Harper's Prior Record

The Court finds that the State can make out a *prima facie* case of kidnapping 1st against Harper, thus triggering its jurisdiction. Although Harper was not present at the time of the kidnapping of Mrs. Smith and the theft of her car, he admitted that he heard noises coming from the trunk and was told that the car was stolen. At some point, the car was stopped and Perez and McDonald opened the trunk. Harper then saw Mrs. Smith and heard her requests to be released from the trunk. The trunk was then closed; and the juveniles piled back into the car and continued on their way.

Additionally, as stated in the statute, kidnapping 1st involves the defendant's "not voluntarily releas[ing] the victim alive, unharmed *and* in a safe place prior to trial." 1st)¹⁹ When it came time to release Mrs. Smith, Harper suggested the cemetery

¹⁹ 11 *Del. C.* § 783A (emphasis added) ("A person is guilty of kidnapping in the first degree when the person unlawfully restrains another person with any of the following purposes: (1) To hold the victim for ransom or reward; or (2) To use the victim as a shield or hostage; or (3) To facilitate the commission of any felony or flight thereafter; or (4) To inflict physical injury upon the victim, or to violate or abuse the victim sexually; or (5) To terrorize the victim or a third person; or (6) To take or entice any child less than 18 years of age from the custody of the child's parent, guardian or lawful custodian; and the actor does not voluntarily release the victim alive,

as her drop off point, and may have “helped” her out of the trunk. Mrs. Smith was released by her captors voluntarily and alive. However, she most certainly was not released unharmed and in a safe place, having been abandoned in a cemetery without food, water, or methods of communication or transportation. Because the State can make out a *prima facie* case of kidnapping 1st against Harper, the Court applies the Section 1011 factors.

Regarding the first factor of Section 1011, the alleged facts of Harper’s offenses are, to say the least, troubling. The evidence shows that Harper was not an ignorant participant throughout this ordeal. Rather, at some point throughout the joyride, Harper learned that Mrs. Smith was in the car. Further, Harper was in a position to hear Mrs. Smith say things like the car was hers and that she wanted to go home. Thus, Harper’s culpability in this case is not slight.

Harper’s prior juvenile adjudications include Assault in the Second Degree in March 2011; Misdemeanor Theft in January 2013; and Conspiracy in the Third Degree in January 2013. The assault involved Harper and another individual throwing two paving stones into a residence in Lincoln, Delaware, during the night. The victim was injured by a stone striking him in the head and being covered with shards of glass. Harper stated that he threw one of the stones in retaliation for another

unharmed and in a safe place prior to trial.”).

incident. The theft adjudication involved Harper's theft of another student's watch, which occurred at the Sussex County Opportunity Program in Education ("SCOPE"), an alternative school in Bridegeville, Delaware. The conspiracy adjudication involved Harper's participation in joyriding in a stolen car with the same four teenagers involved in the kidnapping of Mrs. Smith a day before she was kidnapped.²⁰

Harper was also charged with assault resulting from an incident that occurred at Phyllis Wheatley Middle School. Harper approached another student from behind and choked him around the neck with both hands. The victim fell to the floor and cut his lip, almost losing consciousness. Harper admitted what he had done, but stated that it was done in jest.

In January 2013, Harper and another male were charged with shoplifting and conspiracy when they attempted to steal a car battery from the Walmart in Seaford.

When Harper was arrested on the instant charges, he was on probation with the Delaware Division of Youth Rehabilitative Services ("DYRS"). A plastic bag containing 0.3 grams of marijuana was found on his person.

The Court finds that the first Section 1011 factor weighs against Harper.

²⁰ On March 15, 2013, an officer with the Milford Police Department received a report of a stolen dark blue 2003 Honda Accord, taken from a parking lot on McColley Street. At the scene, evidence of glass was found, indicating that the car's back window had been broken out. Early on March 17, 2013, a DSPD trooper pulled over the stolen Honda, which was being used to transport the passengers back from a party in Dover. The driver was one Jermaine Roberts, who was 20-years-old. Harper, Perez, McDonald, and Brewer were all in the car as well.

Harper's participation in this criminal episode, coupled with his prior record, shows that he has little respect for the law or for other people. He is willing to conduct acts of violence when it suits him and shows no signs of remorse.

(2) Nature of Harper's Past Treatment and Rehabilitative Efforts and the Nature of Harper's Response thereto

The Court finds that this Section 1011 factor also weighs against Harper. In March 2011, Harper was sent to the Ferris School ("Ferris"), a juvenile detention center, on his assault adjudication. In September 2011, he successfully completed the program, which is both academic and rehabilitative. Harper then completed a step-down program at Mowlds Cottage ("Mowlds"), which is a required follow-up to Ferris. In October 2011, Harper completed the program at Mowlds, which consists of transitioning back into a community school and home visits. He was placed in SCOPE as preparation for entering Woodbridge High School. At SCOPE, Harper took academic classes, as well as programs such as anger management, conflict resolution, and addictions. Harper was scheduled to leave SCOPE at the end of the semester in January 2012 and begin the next semester at Woodbridge High School. However, Harper was removed from SCOPE prior to completion because of misconduct. Apparently, he took money from a younger student and threatened to beat him up. Harper was suspended for several days. Upon return to SCOPE, Harper

stole another student's watch, as stated above.

Several days later, a teacher overheard Harper talking to another student using violent and discriminatory language. After the teacher corrected him, Harper continued his unacceptable behavior. At this point, the administration took action. Harper's mother was contacted. She chose to remove him from school rather than have him expelled. Although Harper had the option to attend night school to obtain his GED, he did not do so. When he left SCOPE, he was failing three of his four academic classes and had achieved a passing grade of 74 in social studies.

Harper failed to keep appointments with his juvenile probation officer. Additionally, the Family Court issued a *capias* on him because he failed to make restitution payments stemming from his assault adjudication. Harper was released from probation as unimproved because of his arrest on the charges related to the kidnapping of Mrs. Smith.

The record thus shows that Harper failed to benefit from the programs and opportunities offered by Ferris and Mowlds. After his completion of these programs, he was removed from SCOPE and engaged in conduct leading to the instant charges. Testimonial evidence from Family Court probation officers confirms that Delaware has no other programs in which to place Harper, who is now 18-years-old.

A juvenile probation officer testified that DYRS does not seek extended

jurisdiction of the Family Court up to the age of 21.²¹

It is unclear that any out-of-state program with whom Delaware has a contractual relationship would accept Harper. It is also unclear whether such a program, if it did accept Harper, would benefit him. The recommendation of the Family Court is that Harper be tried as an adult in this Court because of his failure to show growth or maturation resulting from Family Court programs. The Court agrees with that recommendation.

(3 Interests of Society; Interests of Harper)

The Court finds that the interests of both society and McDonald will best be benefitted by keeping Harper in the adult system. If Harper were to be tried and convicted in the Family Court, he might be sent to Ferris, followed by Mowlds. Harper has already completed those programs without success, however. Sending him back to Ferris a second time as an older student, more experienced in criminal behavior, could harden him further and thus work against the interests of society. If he were tried and convicted in this Court, the Court would have jurisdiction over him for a longer period and he would have the benefit of rehabilitative programs not available in the Family Court system.

If Harper were returned to Ferris, it is unlikely that the rehabilitative

²¹ See 10 Del. C. § 928(a).

opportunities would help him become a productive citizen. A Family Court probation officer testified that it would be potentially punitive for Harper to go back to Ferris for a second time, knowing that no benefit would accrue.

Harper has not responded to the rehabilitative opportunities offered by the Family Court. There is nothing to suggest that his interests would be served to duplicate what he has already experienced. The better course for both Harper and society is to be tried as an adult in this Court. If convicted to serve an adult sentence, Harper can make use of the programs and opportunities available to an adult offender.

Based on the foregoing, Harper's application to have his case transferred to the Family Court is **DENIED**.

IT IS SO ORDERED.

/s/ Richard F. Stokes

Richard F. Stokes, Judge

Original to Prothonotary

Cc: John P. Daniello, Esq.

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE)
)
)
 v.) ID No.
) 1304002931
)
 JUNIA MCDONALD,)
 Defendant.)

MEMORANDUM OPINION

Upon Defendant's Motion to Be Transferred Back
to the Family Court of Delaware. Denied.

Date Submitted: January 6, 2014

Date Decided: March 31, 2014¹

John P. Daniello, Esq. Office of the Public Defender, Georgetown, DE 19947,
Attorney for Defendant

Melanie C. Withers, Esq. and Casey L. Ewart, Esq., Delaware Department of
Justice, 114 East Market Street, Georgetown, DE 19947, Attorneys for the State

STOKES, J.

¹ The Court publishes three separate opinions for the three separate defendants in this case. However, the Court publishes these opinions simultaneously.

Defendant Junia McDonald (“McDonald”), who was 14-years-old at the time of the charged crimes, will be tried as an adult in this Court. Her application to transfer her case from this Court to the Family Court pursuant to 10 *Del.C.* § 1011(b) is **DENIED**.

In April 2013, McDonald was charged with Kidnapping in the First Degree, a class B felony, Carjacking in the First Degree, a class B felony, Robbery in the First Degree, a class B felony, and three counts of Conspiracy in the Second Degree, class G felonies. These charges stemmed from McDonald’s alleged involvement in a criminal episode inflicted by McDonald and her co-defendants upon Margaret Smith (“Mrs. Smith”), who, at the time of her encounter with the defendants, was 89-years-old.

Facts

Facts and Circumstances Hearing

A Facts and Circumstances hearing was held in this Court on July 18, 2013. The evidence presented pertained to the involvement of Defendants Rondaiges Harper (“Harper”),² Phillip Brewer (“Brewer”),³ Jackeline Perez (“Perez”)⁴ and

² Date of birth: March 31, 1995.

³ Date of birth: January 27, 1996.

⁴ Date of birth: April 30, 1997.

McDonald⁵ in the charged crimes.⁶ Harper, Perez, and McDonald were all present at this hearing. The following facts were taken from that hearing and are common to all three defendants.

Margaret Smith (“Mrs. Smith”) is an 89-year-old widow living in her own home in Milford, Delaware. At the fact hearing, Mrs. Smith gave a full rendition of the criminal incident. Although she was sometimes forgetful or confused about incidentals, she provided a consistent version of the material facts.

On March 18, 2013, at about 2:00 p.m., Mrs. Smith left her home to get an ice cream cone and buy a gift for her sister. Mrs. Smith carried some money in her purse, and a larger amount rolled up and pinned to the strap of her brasier. As she sat in her 2001 tan Buick Le Sabre at a convenience store called the Chicken Man, two female juveniles, later identified as Perez and McDonald, approached her car. They tapped on the driver’s side window and asked Mrs. Smith if she would take them home. At the fact hearing, Mrs. Smith referred to the girls as “teenagers,” stating that one was

⁵ Date of birth: November 1, 1998.

⁶ On September 5, 2013, Brewer pled guilty to one count of Carjacking in the Second Degree, three counts of Kidnapping in the Second Degree, and four counts of Conspiracy in the Second Degree. As part of his plea agreement, Brewer was required to testify truthfully in all proceedings against his co-defendants. Brewer is currently being held at the Howard R. Young Correctional Institution. His sentencing date is to be determined, after the reverse amenability hearings and trials of his co-defendants take place. His cooperation will be given consideration at the time of his sentencing.

white and one was black, and that one was shorter and stockier than the other. Mrs. Smith did not observe any other physical traits.

At first Mrs. Smith hesitated, but then agreed to give the girls a ride home. One juvenile got in the front passenger seat, and the other in the back. Mrs. Smith assumed that the juveniles lived in Milford; but they directed her to a residence farther away. Upon arriving at that residence, Mrs. Smith was told that the mother was not home and was asked to go to a second residence. Once there, Mrs. Smith was told that the aunt was not home.

The juveniles directed Mrs. Smith to a third residence where they asked for her keys. Mrs. Smith adamantly refused. Both juveniles then grabbed her while she struggled to remain in the car. Mrs. Smith was yanked out of the car, resisting until the three were at the rear of the Buick. The shorter juvenile wrestled the keys from Mrs. Smith and the trunk door was opened. Mrs. Smith was then shoved inside the trunk, and the trunk door slammed. The juveniles then got back in the car and, with the shorter juvenile driving, took off at a fast pace. Mrs. Smith hollered and knocked on the back of the trunk but received no response. Perhaps this could have been, in part, because the car's radio was playing at full volume. According to Mrs. Smith, while in the trunk, she received no food or water and was given no bathroom breaks. She also was not given the medication she took for high blood pressure or arthritis,

which she carried with her.

During this episode, the two juveniles also took \$500 in cash from Mrs. Smith. They went to the Seaford Walmart to buy clothes and may have given some of the money to two male juveniles to buy a new battery for the car. That evening, the juveniles used stolen money to book a room at the Days Inn in Seaford, Delaware. Mrs. Smith spent the night in the trunk of her car. In the morning, she was taken to a cemetery and dumped out, along with her cane and a black Ace Hardware bag of prescription medications.

Having wet herself in the trunk, Mrs. Smith apparently removed her pants and left them on the ground. She crawled around the cemetery looking for a road. The surface of the cemetery being part dirt and part grass, Mrs. Smith scraped her knees, but attained no other observable injuries. The cold temperatures caused numbness in her hands and feet, which is not yet resolved.

At approximately 9:00 p.m. on March 19, 2013, Trooper John Wilson ("Trooper Wilson"), a member of the Delaware State Police Department ("DSPD"), received a missing person call. A woman who identified herself as Sabrina Carol ("Ms. Carol") said that she had not seen her elderly aunt, Margaret Smith, since 2:00 p.m. the previous day. Ms. Carol went to her aunt's house, but neither she nor her purse were there. The family was concerned because Mrs. Smith showed early signs

of either Alzheimer's Disease or some form of dementia. The previous day, a neighbor saw Mrs. Smith putting things in her car at approximately 11:00 a.m., and drive away about an hour later. Mrs. Smith's sister spoke to her on the phone at about 2:00 p.m. the previous day. Mrs. Smith was thought to be driving her tan 2001 Buick Le Sabre. Ms. Carol stated that her aunt often went to Milford to shop and to Rehoboth Beach to visit her sister.

Trooper Wilson entered Mrs. Smith's identification information into the national data base for missing persons and issued a Gold Alert which lists missing persons with mental conditions. He also filed a DSPD report.

On March 20, 2013, Corp. James Gooch, Jr. ("Corp. Gooch") received a call from a woman named Betty Edwards ("Ms. Edwards"). Ms. Edwards said that when she came to visit her son's tombstone at Mount Calvary Methodist Cemetery ("the cemetery") east of Seaford, she found a half-clothed, apparently disoriented elderly woman crawling on the ground. Corp. Gooch stated that the cemetery is not visible from King Road and is surrounded by trees. When Corp. Gooch arrived at the cemetery, Ms. Edwards told him that the elderly woman had initially tried to run from her, but Ms. Edwards reached her and convinced her to sit on one of the tombstones. Mrs. Smith was wearing brown spandex shorts and a coat, but no pants or shoes. Her hands were dirty and her knees were scratched.

Mrs. Smith initially told Corp. Gooch that she had walked from her home to the cemetery, but upon questioning, said that two girls in Milford asked her for a ride, and then took her money and keys and put her in the trunk of her car. She remained in the trunk for two days, without food, water, or medication. Mrs. Smith was also forced to urinate on herself because her requests to use a bathroom were ignored. When she was left in the cemetery she was not familiar with her surroundings. Hence, she got on her hands and knees and crawled around looking for an opening to get to a road. The night was cold. Ms. Edwards told Corp. Gooch that Mrs. Smith had money rolled up and pinned to the strap of her brasier.

Corp. Gooch drove Mrs. Smith to Nanticoke Hospital where Ms. Carol met them. Mrs. Smith was able to give her name, date of birth, and age, although she was still somewhat confused. When Corp. Gooch ran her information in the police system, he found the Gold Alert with a photograph and a reference to possibly being armed. Corp. Gooch gave Mrs. Smith a light pat down and found no weapon. A nurse, having found money pinned to the strap of Mrs. Smith's brasier, put the money in a hospital safe. Mrs. Smith then told Corp. Gooch the rest of the details of the incident. Mrs. Smith was treated and then released to the care of Ms. Carol.

Corp. Gooch returned to the cemetery to look for Mrs. Smith's car because Mrs. Smith told him that at one point, the two juveniles drove her car up to the top of

a hill and let it slide down so that she would meet her death. Corp. Gooch also hoped to find the wig that Mrs. Smith apparently wore in the Gold Alert photograph. Neither the car nor the wig was found. Corp. Gooch, however, found what looked like the tracks of someone crawling in the sand over a recent grave site. He also saw tire tracks indicating that a vehicle had made a U-turn in an area of soft sand. Even with the aid of a DSPD helicopter, the car was not found. Later that day, Corp. Gooch removed Mrs. Smith's name, but not her missing car, from the Gold Alert.

At approximately 7:00 p.m. on March 20, 2013, Trooper Patrick Schlimer ("Trooper Schlimer") of the DSPD was sitting at one of his routine patrol sites at the intersection of Coverdale Road and Seashore Highway when a tan Buick with five passengers passed him. Trooper Schlimer ran the car's tag number and found a flag to stop the vehicle. He then followed the car, stopping it on Chapel Chapman's Road. None of the vehicle's occupants had any form of identification. Two of the three female occupants each stated that the vehicle belonged to the other's grandmother. The occupants were identified as McDonald in the driver's seat, Brewer in the front passenger seat, Harper in the rear left passenger seat, Perez in the rear right passenger seat, and Deniaya Smith ("Deniaya")⁷ in the center rear passenger seat.

⁷ Upon being taken into custody, Deniaya stated that she had been picked up by the other four occupants on the afternoon of March 20, 2013, and that she discovered the car was stolen at the very last minute. Deniaya entered the scenario after Mrs. Smith was discovered in the

Trooper Schlimer learned from police dispatch that the car had been involved in a carjacking. When his back-up arrived, the officers took the individuals and the car to Troop 4 in Georgetown, Delaware. Trooper Schlimer had no further discussion with any of the suspects.

After a search warrant for the car was obtained, Det. Michael Maher ("Det. Maher") from the Evidence Detection Unit photographed the vehicle as well as the contents of the trunk. Among other things, the trunk contained seven bags of clothing, an Ipod lamp, three jackets, five cans of unopened ginger ale, and a so-called egg crate mattress. These items were left in the trunk, which measured 3 feet by 9 inches from front to back, 5 feet wide but 3 feet by 6 inches in the area where the tires were located, and 1 foot by 6 inches high.

On March 29, 2012, Det. Maher and Det. Robert Truitt, Jr. ("Det. Truitt"), the chief investigating officer, went to the cemetery. A residence is located on each side of King Road at the turn onto Calvary Road; but there is no signpost indicating the presence of the cemetery. The distance from King Road to the cemetery at the end of Calvary Road is 133 yards. The area is heavily wooded. Trash and debris are found all along the unpaved road, which is in a wretched condition. A chain link gate leads into the cemetery; and a chain link fence runs its perimeter. The area is

cemetery.

surrounded by large trees, allowing for little light.

Det. Maher and Det. Truitt observed the tracks seen by Corp. Gooch indicating that someone had crawled over the sand. They did not observe shoe prints. To the right of the entrance, the detectives found a black metal cane, a black bag from Ace Hardware containing prescriptions, and a pair of urine-soaked blue jeans on the ground near the fence.

On March 20, 2012, after being released from the hospital, Mrs. Smith and Ms. Carol went to the authorities to report her stolen car. Mrs. Smith was interviewed by Det. Truitt. She had been without her medication and was somewhat confused in her thinking. Ms. Carol stated that her aunt was in the early stages of dementia. During the interview, Mrs. Smith described the incident with the two girls stealing her keys and money and keeping her in the trunk of her car for two days without food, water, or bathroom stops. She stated that she had been dropped off in a cemetery, and then crawled around, in the cold, trying to find a road. After Mrs. Smith's car was located, Det. Truitt returned it to her.

Harper, McDonald, Brewer, and Perez were all interviewed about the incident. The interviews of Harper and Perez are addressed in their respective opinions. McDonald's statement is addressed below.

On April 4, 2013, Det. Truitt interviewed Mrs. Smith at her home. She showed

him bruises and scrapes on her knees from crawling around the cemetery. She also stated that her hands and lower extremities were still numb from exposure to cold temperatures while in the trunk. She said that she had tried to talk to the kidnapers but was told to “shut up,” and that one of the girls said they would kill her if she reported the incident to the police.

At the hearing, Det. Truitt testified that he found a receipt for clothing from the Walmart in Seaford. He reported that the temperature on the night of the kidnapping ranged from the mid-to-upper 30’s to the mid-to-lower 40’s. Det. Truitt stated that the girls blamed one another for the car theft, and that Brewer told him the Buick was stolen.

McDonald’s Interview

Upon being arrested, McDonald was interviewed by Det. Truitt, who summarized her interview at the fact hearing. Det. Truitt testified that McDonald was with Perez when the car was taken from Mrs. Smith, and that they did this approximately two days prior to her interview, which would have been on a Monday. She stated that they were in Milford at the Chicken Man convenience store when they came into contact with Mrs. Smith. Det. Truitt stated that McDonald initially claimed that Mrs. Smith gave them the keys to her car. When confronted with whether Mrs. Smith was left in the trunk of her car for two days, McDonald nodded and said “I

guess so.” When asked who dropped Mrs. Smith off in the cemetery, McDonald stated that she did not know because she was not in the car. McDonald also stated that Perez dropped Mrs. Smith off. When asked if anyone else was with Perez, McDonald responded in the negative. When asked why she placed Mrs. Smith in the trunk in the first place, McDonald responded that she did not know and that she was “tripping.”

At a later reverse amenability hearing, the Court watched McDonald’s videotaped interview with Det. Truitt. First McDonald stated that she thought the car belonged to Deniaya’s grandmother. She then stated that she and Perez got a ride from Mrs. Smith at the Chicken Man convenience store in Milford. According to McDonald, Mrs. Smith gave them the keys upon request. She then stated that she did not know how they got the keys to the car that McDonald was driving. McDonald denied knowing Mrs. Smith was in the trunk, but then stated that Mrs. Smith wanted to be in trunk. Regarding the location of where Mrs. Smith was left, McDonald first stated that Mrs. Smith was dropped off on a dark back road. She then stated that she did not know where and when Mrs. Smith was abandoned because Perez performed that action alone. McDonald, however, admitted to leaving Mrs. Smith in the trunk of her car for two days.

Brewer's September 18, 2013 Testimony⁸

After being arrested, Brewer gave a statement to the police in which he claimed that he did not know that during this criminal episode the youths were driving a stolen car with its owner locked in the trunk. As part of his agreement with the State, Brewer testified at one of McDonald's subsequent reverse amenability hearings. At this hearing, he gave a much different account of events. The Court summarizes Brewer's testimony below because Brewer essentially provided a play-by-play account, albeit alleged, of what happened during the two days that Mrs. Smith was held captive by the defendants.

Brewer testified that he had known Harper all of his life. He had not met the girls, however, until a few days before his arrest. Brewer met them because they were driving around with Harper in a black car with a smashed back window. McDonald, who told Brewer the car was her mother's, was driving. That day, the girls gave Brewer a ride to Seaford and back,⁹ with Harper staying behind.

⁸ Statements that Brewer testified McDonald made are admissible as admissions by a party-opponent under D.R.E. 801(2). Statements that Brewer testified that he made are admissible at this preliminary stage. *See In re J. H. B.*, 578 P.2d 146, 150 (Alaska 1978) ("Hearsay evidence and reports may in the discretion of the court be employed to accomplish a fair and proper disposition of a children's matter in the dispositive phase. Before such evidence is used, however, the child and his counsel should be clearly advised that it is being considered so that opposing evidence or explanations may be presented." (footnote omitted)). *See also United States v. Calandra*

⁹ Brewer stated that in Seaford, he went to a store called Gold for Cash and exchanged some necklaces for \$100 or \$102.

After meeting Brewer, McDonald texted him stating that she wanted to hang out with him. McDonald also contacted Brewer on Facebook.¹⁰ Brewer asked her how she would get to him, and, according to Brewer, McDonald said that she was going to get “her aunt’s car.”¹¹ The next day, the girls, with McDonald driving, went to pick up Brewer and then Harper. According to Brewer, they drove “[a] tan Mercury.”¹²

Brewer stated that once all four youths were in the tan car, they went to a park in Coverdale. They then went to a Royal Farms, where the girls paid for gas, and then returned to the park.¹³ The car’s battery then died, apparently because it had been running all night. Harper and Brewer, who did not have a driver’s license, left on foot to get his mother’s car in order to jump start the tan car. Brewer stated that once

¹⁰ According to Brewer, at some point in their interactions, McDonald told Brewer on Facebook that she was 16, instead of 14-years-old.

¹¹ Reverse Amenable Hr’g, *State v. McDonald*, I.D. No. 1304002931, at A-89:21, 23-A-90:1 (Del. Super. Sept. 18, 2013) (TRANSCRIPT) [hereinafter September 18th Hearing].

Brewer stated that he did not question McDonald’s representation that the car belonged to her aunt, even though the prior day, the four had been stopped in a car which Brewer knew to be stolen.

¹² *Id.* at A-91:3. Brewer was asked if this car was a four-door sedan. He stated that he did not know. He thought it was a Mercury because that is what it looked like to him. Assumedly, this car was Mrs. Smith’s tan Buick.

¹³ At one point in his testimony, Brewer stated that the group decided to get gas at Royal Farms on the afternoon of March 20, 2013, the day after they left Mrs. Smith in the cemetery. *See id.* at A-123:13–19.

the tan car died, he left to get his mother's car quickly because the girls rushed both he and Harper out of the car. Once he had his mother's car, Brewer drove it back to the park, having tried unsuccessfully to find someone in the area to render assistance. The tan car's battery could not be located under its hood; and according to Brewer, both girls told Harper and him not to check the back of the tan car. One girl then stated that her uncle would come and jump the car.¹⁴

Brewer and McDonald then got into Brewer's mother's car and had sex.¹⁵ Perez and Harper were in the tan car. A little later, Harper came over to Brewer's mother's car and asked if he could use Brewer's cell phone to play some music. Brewer said no. Harper went back to the tan car. Harper then returned to Brewer's mother's car, telling Brewer that he had just heard someone in the trunk of the tan car. Brewer then got out of his mother's car. Harper popped open the trunk, and Brewer saw an old, African American woman awake in the trunk. According to Brewer, the girls told him that the woman was an alcoholic, and that they had paid her in liquor for use of her car.¹⁶ The girls further told Brewer that the woman did not want to get

¹⁴ Assumedly, this girl was McDonald.

¹⁵ At one point in his testimony, Brewer affirmed that he had sex with McDonald before and after he learned that Mrs. Smith was in the trunk. September 18th Hearing at A-125:10-14.

¹⁶ Brewer stated that he guessed this use was "for a little bit, for a couple hours." *Id.* at A-98:15-16. Brewer also testified that the girls told him that Mrs. Smith was alcoholic who traded the car for liquor once they were at Brewer's grandmother's house, after he and Harper

into the backseat, and wanted to be placed in the trunk. Brewer stated that he was shocked to see this woman. He and Harper helped her climb out of the trunk. The woman stated that the car was hers. Harper and Brewer then put the woman back into the trunk.¹⁷ The four then got into Brewer's mother's car and, with Brewer as the driver, drove to Brewer's grandmother's house. At this time, it was evening. They left the tan car and the woman inside, who was Mrs. Smith, behind.

At Brewer's grandmother's house, the four "sat there and chilled."¹⁸ They stayed overnight, eventually noticing that it was almost daytime. Then, the four drove back to the tan car to see if they could jump start the car's battery. Harper helped Mrs. Smith out of the trunk in order to look for the battery. After discovering that the jumper cables would not work, Mrs. Smith got back in the trunk¹⁹ and the four left again, back to Brewer's grandmother's house. At some point, they picked up Brewer's uncle in Brewer's mother's car and brought him to the tan car in order to

discovered Mrs. Smith in the trunk.

¹⁷ Brewer's testimony is not exactly clear on how Mrs. Smith got back in the trunk. *E.g.*, *id.* at A-100: 8–9 ("I mean, she got back in. We put her back in the trunk."); A151:15–16 ("She just got in the trunk. She didn't refuse or nothing. She just got in the trunk.").

¹⁸ *Id.* at A-102:6.

¹⁹ According to Brewer, "Mrs. Smith got back in the trunk . . ." *Id.* at A-104:18–19.

jump start it, which he did.²⁰ Brewer, McDonald, and Brewer's uncle then drove Brewer's mother's car back to Brewer's house, with Harper and Perez following in the tan car. Brewer and McDonald then got into the tan car, with Brewer taking over as the driver. Harper produced a \$100 dollar bill and said "Yo, she gave me a hundred dollars."²¹ Brewer "asked him why she gave it. [Harper] said, '[s]he give it to me for the battery.' We left it at that."²²

The four then drove to the Days Inn in Seaford. Because none of them had identification, they could not rent a room. Therefore, they went and picked up Harper's cousin, bringing him to the hotel in the tan car. Harper's cousin assisted them in attaining a room. McDonald and Perez paid for the room in cash. Harper's cousin was then transported back to his house. All this time, Mrs. Smith was still in the trunk of the car.

After the group settled into their hotel room, McDonald and Perez took the tan car to the Walmart to buy some clothes. Harper and Brewer stayed behind. Brewer fell asleep. The four then stayed in the room for a few hours, and then left to go to

²⁰ Brewer did not clearly explain how Mrs. Smith's car got started. Ultimately, Brewer's uncle got the car started, but apparently never knew that Mrs. Smith was in the trunk.

²¹ September 18th Hearing at A-108: 7-8. Brewer testified that by "she," Harper meant Mrs. Smith.

²² *Id.* at A-109: 3-5.

Coverdale. Harper and Brewer believed it was “crazy” that a woman was in the trunk of the car that they were driving; but at no time did either say to the girls that the woman needed to be released.

The group went to Coverdale in order purchase marijuana, for which Harper paid in cash. In his testimony, Brewer affirmed that a fair amount of marijuana smoking occurred during this incident, including in the Days Inn hotel room. The group did not, however, consume any alcohol. At some point, the four made an additional trip to Coverdale to buy more marijuana. They were at the hotel all night.

After buying the marijuana, the four drove around, discussing what they should do with Mrs. Smith. According to Brewer, both girls discussed driving the car back to Milford and burning it with Mrs. Smith in the trunk.²³ Brewer and Harper disagreed with that plan. Harper then suggested leaving Mrs. Smith in the cemetery where his sister was buried. Brewer also knew of this cemetery, and knew it was rather isolated and not well lit at night. The road going into the cemetery is dirt, with trees around it.²⁴ At this point, it was roughly 9:00 p.m. on Tuesday, March 19, 2013.

²³ This fact takes on major significance *infra* in the Court’s decision denying this Motion.

²⁴ Brewer stated that the four were in the car, with Brewer driving, when they rode past or came along beside the cemetery. Harper then got the idea to dump Mrs. Smith there. Brewer stated that he was against the idea at first, and kept driving the car past the cemetery. He stated that the others in the car kept bringing up the cemetery; so they turned around and entered it.

On cross-examination, Brewer claimed that there was no discussion amongst the four to just abandon the car. Brewer also admitted that around this time, he knew he was in trouble, and

The cemetery was oval-shaped, with a road going through the center, and a loop that came around. Brewer drove the car through the center road to the back of the cemetery. He remained inside the car while the other three hopped out and “helped” Mrs. Smith out of the trunk.²⁵ With all four back in the car, Brewer then drove down the loop to exit the cemetery. On the way out, Brewer saw, but could not hear Mrs. Smith.²⁶ He stated that she “was, like, there. I mean, she couldn’t walk. You know what I mean? She was just, like, sitting there, laying there.”²⁷ Mrs. Smith was left in the very back of the cemetery, away from the entrance. When asked how her cane, bag, and some clothes were left with her, Brewer answered “[t]hey probably threw it out.”²⁸

Brewer had a cell phone, but no one called 911 or anyone else. They also did not discuss taking Mrs. Smith to a different place. When asked why the cemetery was

that he had been in trouble on prior occasions.

²⁵ September 18th Hearing at A-119:17–18 (“They took the lady out. They helped her out. You know what I mean?”).

²⁶ At one point in his testimony, Brewer contradicted this and stated that he heard Mrs. Smith say that she could not walk. She was not hysterical, but rather whining, although crying. *Id.* at A-129:21–23; A-130:1–22.

²⁷ September 18th Hearing at A-121: 1–3.

²⁸ *Id.* at A-129:3.

picked, Brewer answered “I guess they didn’t want her to be found.”²⁹

The group then went back to the hotel room, spent the night, and checked out the next day, March 20, 2013. Then, at the girls’ request, they went to a nail salon. Deniaya then joined the group.³⁰

Throughout the time Mrs. Smith was in the car, Brewer never saw anyone give her food, water, or take her out to use the bathroom. Nor did he hear her in the trunk because loud music was playing in the car. At some point in the two days in which Mrs. Smith was in the trunk, the four ate food from a McDonald’s restaurant. Around the time they ate this food, which was during the daytime, Brewer stated that “they” yelled from the interior of the car into the trunk, asking Mrs. Smith if she wanted food. Brewer clarified that the idea of offering Mrs. Smith food came up while the four were in the Days Inn hotel room. In the car, McDonald opened the backseat arm rest, which connected to the trunk, and through it, asked Mrs. Smith if she wanted anything to eat. Mrs. Smith was not offered an opportunity to use the bathroom, however. To the offer of food, Mrs. Smith replied that she wanted to go home.

²⁹ *Id.* at A-122: 8-9.

³⁰ Brewer did not clearly explain how Deniaya ended up with the group.

Discussion

Reverse Amenability

Juvenile crimes are usually a matter for the Family Court.³¹ This Court, however, maintains original jurisdiction over a juvenile who commits specifically enumerated crimes.³² But this Court's jurisdiction is not absolute.³³ Under 10 *Del.*

³¹ *State v. Anderson*, 385 A.2d 738, 739 (Del. Super. 1978). See also *State v. Anderson*, 697 A.2d 379, 382 (Del. 1997) [hereinafter Delaware Supreme Court *Anderson*] ("Age-based distinctions do not pertain to fundamental rights or affect a suspect class and such classifications, when attacked on equal protection or due process grounds, are presumed to be valid. They will not be set aside if any state of facts reasonably may be considered to justify [them]." (citations omitted) (internal quotation marks omitted)).

³² *Anderson*, 385 A.2d at 739–40 (citing 10 *Del. C.* § 938, which has been redesignated as 10 *Del. C.* § 1010 and amended by 69 Laws 1993, ch. 335, § 1, eff. July 8 1994). See also 10 *Del. C.* § 921 ("[Family] Court shall have exclusive original civil jurisdiction in all proceedings in this State concerning . . . [a]ny child charged in this State with delinquency by having committed any act or violation of any laws of this State or any subdivision thereof, except murder in the first or second degree, rape in the first degree, rape in the second degree, unlawful sexual intercourse in the first degree, assault in the first degree, robbery in the first degree, (where such offense involves the display of what appears to be a deadly weapon or involves the representation by word or conduct that the person was in possession or control of a deadly weapon or involves the infliction of serious physical injury upon any person who was not a participant in the crime, and where the child has previously been adjudicated delinquent of 1 or more offenses which would constitute a felony were the child charged under the laws of this State), kidnapping in the first degree, or any attempt to commit said crimes . . ."); 10 *Del. C.* § 1010 ("A child shall be proceeded against as an adult where . . . [t]he acts alleged to have been committed constitute first- or second-degree murder, rape in the first degree or rape in the second degree, assault in the first degree, robbery in the first degree (where such offense involves the display of what appears to be a deadly weapon or involves the representation by word or conduct that the person was in possession or control of a deadly weapon or involves the infliction of serious physical injury upon any person who was not a participant in the crime and where the child has previously been adjudicated delinquent of 1 or more offenses which would constitute a felony were the child charged under the laws of this State) or kidnapping in the first degree, or any attempt to commit said crimes . . .").

³³ *Anderson*, 385 A.2d at 740 (citing 10 *Del. C.* § 939, which has been redesignated as 10 *Del. C.* § 1011 and amended by 69 Laws 1993, ch. 335, § 1, eff. July 8, 1994).

C. § 1011, (“Section 1011”)³⁴ this Court may transfer the original jurisdiction it maintains over a juvenile offender to the Family Court if this Court finds such a transfer to be in the interests of justice.³⁵ Before making this transfer, the Court must conduct what is known as a “reverse amenability hearing,” in which it considers evidence of statutorily specified factors.³⁶ The Court may consider other relevant factors as well.³⁷ The purpose of this Court’s determining a juvenile’s amenability

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Upon application of the defendant in any case where the Superior Court has original jurisdiction over a child, the Court may transfer the case to the Family Court for trial and disposition if, in the opinion of the Court, the interests of justice would be best served by such transfer. Before ordering any such transfer, the Superior Court shall hold a hearing at which it may consider evidence as to the following factors and such other factors which, in the judgment of the Court are deemed relevant:

- (1) The nature of the present offense and the extent and nature of the defendant's prior record, if any;
- (2) The nature of past treatment and rehabilitative efforts and the nature of the defendant’s response thereto, if any; and
- (3) Whether the interests of society and the defendant would be best served by trial in the Family Court or in the Superior Court.

10 *Del. C.* 1011(b).

³⁵ See *Anderson*, 385 A.2d at 740.

³⁶ 10 *Del. C.* 1011(b); see also *Anderson*, 385 A.2d at 740 (explaining how the Court may transfer jurisdiction back to the Family Court).

³⁷ *State v. Doughty*, 2011 WL 486537, at *1 (Del. Super. Feb. 20, 2011).

is to place a judicial check on the prosecutorial charging of juveniles.³⁸ Ultimately, though, “[s]ince a juvenile charged with a designated felony in the Superior Court has lost the benefit of Family Court adjudication by statutory pronouncement, there is [a] presumption that a need exists for adult discipline and legal restraint. Hence, the burden is upon the juvenile to demonstrate the contrary.”³⁹

In rendering its decision, this Court must preliminarily determine whether the State has made out a *prima facie* case against the juvenile, meaning whether there is a fair likelihood that McDonald will be convicted of the crimes charged.⁴⁰ A real probability must exist that a reasonable jury could convict the juvenile based on the totality of the evidence, assuming that the evidence introduced at the hearing is unrebutted by the juvenile at trial.⁴¹

Kidnapping in the First Degree (“kidnapping 1st”) is one of the crimes with which McDonald is charged. Therefore, this Court maintains original jurisdiction over her case. McDonald’s statutory reverse amenability hearings were held on

³⁸ See Delaware Supreme Court *Anderson*, 697 A.2d at 383 (“It is true that we have viewed both the amenability and reverse amenability processes as containing pivotal constitutional safeguards providing independent judicial scrutiny over the charging of juveniles.” (citations omitted) (internal quotation marks omitted)).

³⁹ *Anderson*, 385 A.2d at 740.

⁴⁰ *Marine v. State*, 624 A.2d 1181, 1185 (Del. 1993).

⁴¹ *State v. Mayhall*, 659 A.2d 790 (Del. Super.1995), *aff’d sub nom Holder v. State*, 692 A.2d 1181 (Del. 1997).

September 18, 19, and 20, 2013. The parties submitted memoranda for decision on January 6, 2014. In applying the Section 1011 factors in order to decide where McDonald will best be tried, the Court considers evidence presented at both the fact hearing and McDonald's subsequent reverse amenability hearings.

Section 1011 Factors

(1) Nature of the Present Offenses; Nature and Extent of McDonald's Prior Record

McDonald submits as a preliminary matter that the Court does not have jurisdiction over her because the State cannot established a *prima facie* case for kidnapping 1st, the sole charge by which she can be tried in this Court. She argues that because by all accounts, including that of victim, Mrs. Smith was assisted out of the trunk and released voluntarily, thus precluding the kidnapping 1st charge.⁴²

McDonald next concedes that the alleged facts in this case are disturbing, but asserts that the Court should not overlook the United States Supreme Court's

⁴² 11 Del. C. § 783A ("A person is guilty of kidnapping in the first degree when the person unlawfully restrains another person with any of the following purposes: (1) To hold the victim for ransom or reward; or (2) To use the victim as a shield or hostage; or (3) To facilitate the commission of any felony or flight thereafter; or (4) To inflict physical injury upon the victim, or to violate or abuse the victim sexually; or (5) To terrorize the victim or a third person; or (6) To take or entice any child less than 18 years of age from the custody of the child's parent, guardian or lawful custodian; and the actor does not voluntarily release the victim alive, unharmed and in a safe place prior to trial.").

observation that juvenile offenders are different from adult offenders.⁴³ Also, McDonald notes that while the actions of she and Perez were troubling, the girls did not cause a direct infliction of harm to Mrs. Smith, nor did their actions stem from a desire to cause Mrs. Smith harm. Rather, McDonald claims that their conduct, while serious, was the result of childish lack of forethought, immature ignorance of the gravity of the situation, lack of ability to empathize with the victim, and intoxication from drugs and alcohol. As noted by the defense psychiatrist Dr. Susan Rushing (“Dr. Rushing”), the facts of this case are demonstrative of McDonald’s immaturity, puberty, and childlike need to satisfy desires without contemplation of consequences.

Regarding her prior record, McDonald stresses that, unlike her co-defendants, she has no prior criminal record at all. The State’s pointing to her alleged involvement in the theft of a motor vehicle in February 2013, a case which remains unadjudicated by the Family Court, exhibits her amenability to that Court.

The State responds to McDonald’s preliminary claim that this Court lacks jurisdiction over her by pointing out that the key factor of a kidnapping 1st charge is that the victim is not voluntarily released “alive, unharmed *and* in a safe place prior

⁴³ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (explaining how the “[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.”).

to trial.”⁴⁴ While McDonald and her co-defendants may have released Mrs. Smith voluntarily and alive, the State counters that Mrs. Smith was not released unharmed and in a safe place, as the defendants essentially dumped their victim in an isolated cemetery without sustenance or medication.

Concerning the nature of the present offenses, the State provides a thorough recitation of the facts.

Concerning McDonald’s prior record, or lack thereof, the State concedes her lack of prior arrests or convictions. The State, however, provides the string of events which it established at McDonald’s reverse amenability hearings, and argues that in the period prior to kidnapping Mrs. Smith, McDonald engaged in various forms of serious criminal conduct. In February 2012, McDonald allegedly left her house to go to a party with Perez against her mother’s orders, causing her mother to contact the police to locate her after she was missing for almost a day. In March 2012, McDonald’s mother again called the police, reporting that her daughter skipped school with Perez and had not returned home. Her mother claimed that she texted her daughter to come home, to which McDonald responded that she would be spending the night in Dover, Delaware. The authorities were notified the next day that McDonald had returned home, apparently having been found by her grandmother at

⁴⁴ 11 *Del. C.* § 783A (emphasis added).

a party, where some kind of verbal altercation took place.

In January 2013, McDonald's mother again contacted the police reporting that her daughter had run away, which she claimed was something that McDonald was doing frequently. McDonald also skipped school that day. Three days later, McDonald's mother contacted the authorities and reported that a family member had seen a picture on Facebook of McDonald and an 18-year-old man. Upon being questioned, this man stated that he did not know McDonald's whereabouts and that he wanted nothing to do with her because she had misrepresented her age to him. The next day, McDonald's mother reported that her daughter had returned home.

Less than two weeks after that incident, McDonald's mother again reported her daughter's absence. The officer who took this complaint was also investigating an incident involving another teenaged girl who alleged that McDonald grabbed her hair and hit her in the head multiple times.⁴⁵ A few days later, McDonald's mother reported that her daughter had returned home. An investigator tried to determine McDonald's whereabouts during her absence, but found her uncooperative. McDonald's mother told the investigator that her daughter was not listening, was using alcohol and drugs, and being truant from school. The investigator gave her

⁴⁵ The State also points out that this girl testified that on other occasions, McDonald and Perez taunted her and came over to her house trying to instigate an altercation.

mother information about a youth-assistance program.

This Court also heard testimony from several witnesses regarding an incident occurring in February 2013. One day, Emna Alvarado (“Ms. Alvarado”) brought her car to her friend Karen Perez’s (“Ms. Karen Perez’s”) house, left the keys on a shelf in the bathroom downstairs, and then got a ride to work. That day, Ms. Karen Perez was hosting a party at her house and had invited Perez’s mother. During the party, Perez and McDonald showed up uninvited. Ms. Karen Perez saw the girls go downstairs toward the bathroom where Ms. Alvarado had left her keys. Later in the day, Ms. Alvarado was informed that her car and car keys were missing from Ms. Karen Perez’s house. At the time of her testimony, Ms. Alvarado’s car had not been found. A woman named Brenda Castillo (“Ms. Castillo”), however, testified that, subsequent to Ms. Alvarado’s car going missing, Ms. Castillo was stopped at a stop sign in her own car when Perez and McDonald approached Ms. Castillo’s car window. McDonald allegedly tossed the keys into Ms. Castillo’s open window, said “sorry,” and the girls left. Ms. Castillo returned the keys to Ms. Alvarado.

The Court also heard testimony of an incident occurring a month later. On March 15, 2013, an officer with the Milford Police Department received a report of a stolen dark blue 2003 Honda Accord, taken from a parking lot on McColley Street. At the scene, evidence of glass was found, indicating that the car’s back window had

been smashed. Early on March 17, 2013, a trooper with the Delaware State Police Department (“DSPD”) pulled over the stolen Honda, which was being used to transport the passengers back from a party in Dover. The driver was 20-year-old Jermaine Roberts. Harper, Perez, McDonald, and Brewer were all in the car as well.

The Court finds that the State can make out a *prima facie* case of kidnapping 1st against McDonald, thus triggering its jurisdiction. As stated in the statute, kidnapping 1st involves the defendant’s “not voluntarily releas[ing] the victim alive, unharmed *and* in a safe place prior to trial.”⁴⁶ These requirements are inclusive, in that they *all* must be met. Mrs. Smith was released by her captors voluntarily and alive. However, she most certainly was not released unharmed. Despite the lack of an infliction of any serious physical injury, she was held captive in the trunk of her car for two days without food, water, or an opportunity to use a restroom.⁴⁷ Furthermore, she was not released in a safe place prior to trial, having been abandoned in a cemetery without food, water, or methods of communication or transportation. These were perilous circumstances for a person of her age and condition. Because the State can make out a *prima facie* case of kidnapping 1st

⁴⁶ 11 *Del. C.* § 783A (emphasis added).

⁴⁷ *See Tyre v. State*, 412 A.2d 326, 329–30 (Del. 1980) (listing the various factors that culminated into “harm” for purposes of a kidnapping 1st charge).

against McDonald, the Court applies the Section 1011 factors.

Regarding the first Section 1011 factor, the alleged facts of McDonald's offenses are, to say the least, troubling. Although the youngest player in this episode, McDonald engaged in a course of conduct which traumatized Mrs. Smith, who, fortunately, survived her ordeal. This case presents a clear example of utter disregard for the safety and well-being of others. Indeed, "[t]he potential for tragedy was high in th[ese] crime[s]."⁴⁸

Moreover, during one of McDonald's reverse amenability hearings, the Court learned from Brewer one alleged fact that is a particularly shocking overlay of the episode. According to Brewer, dumping Mrs. Smith in the cemetery was not the girls' initial intention for their prisoner:

Q: And then where do you go?

A: We went – after that, I mean we was driving. We was discussing what we were going to do with her. I don't know. *They were discussing what they were going to do with her. I mean, they was like – I mean, we should burn it. Burn the car.*

Q: *Who was saying that they should burn her and the car?*

A: *[McDonald] and [Perez].*

⁴⁸ *State v. Roscoe*, 2000 WL 973132, at *5 (Del. Super. May 1, 2000) (adopting the Commissioner's Report and Recommendation to deny the defendant's Motion to Transfer to Family Court).

Q: Where did this conversation take place, [Brewer]?

A: We was driving. I mean, we was on our way back to the hotel, and we was like cutting through Concord.

The Court: I want to be certain I understood what you said. Would you repeat that again? What was the discussion? Who said what?

A: [Perez] was, like, talking about burning the car.

Q: Burning the car or burning Mrs. Smith?

A: The whole thing.

Q: The whole thing?

A: Yes.

Q: What were the girls talking about doing?

A: *They just – when they go back to Milford, they were going to burn the car with her in it.*

Q: They were going to drive the car back to Milford?

A: Yes.

Q: With her in it?

A: Yes.

Q: *Did [McDonald] participate in that discussion?*

A: Yes.

Q: *Was she in favor of burning Mrs. Smith alive in the car?*

A: *Yes. They said it, yes.*

Q: What did you and . . . [Harper] say about that plan?

A: I said no.

Q: What did [Harper] say?

A: He was agreeing with me.

Q: You and [Harper] said, “No, not a good idea[?]”[]

A: Yes.

Q: Were there other discussions about ways of getting rid of Mrs. Smith?

A: After that, we was driving. I mean, that’s when [Harper] brought up the fact, you know, “Let’s drop her at the graveyard.” You know what I mean?⁴⁹

Later on in his direct-examination, Brewer further discussed the topic of burning the car with Mrs. Smith inside:

Q: Okay. When the idea to burn the tan car with Mrs. Smith in it came up, who first mentioned that idea?

A: I think it was – it was [Perez].

Q: Where was everybody sitting in the car when this discussion was going on?

⁴⁹ Reverse Amenity Hr’g, *State v. McDonald*, I.D. No. 1304002931, at A-114:18-A-117:4 (Del. Super. Sept. 18, 2013) (TRANSCRIPT) [hereinafter September 18th Hearing] (emphasis added).

A: I was in the driver's seat. [McDonald] was in the passenger seat. [Perez] and [Harper] was in the back.

Q: Do you specifically recall today who came up with the idea to burn the car?

A: It was [Perez]

Q: *And what did [McDonald] say about it, if anything?*

A: *They was, like, agreeing. They was agreeing.*

Q: *How did she agree? What did she say?*

A: *It was like they both kind of came up with the idea. I mean, as soon as, like – "I'm going to go back to Milford. I'm just going to set the car on fire."*

Q: Did they have any idea where they would do this in Milford?

A: I don't know.

Q: Did they have any idea how they would set the car on fire?

A: I don't know.

Q: *Why did they think that setting the car on fire was a good idea?*

A: *Probably so they would get away with it.*

Q: Did they discuss what they thought the fire would do?

A: I mean, everybody knows what it would have done.

Q: *What would it have done?*

A: *Probably killed her.*⁵⁰

Brewer also discussed this topic on his cross-examination:

Q: And then it's on that return trip that you indicate that the conversation came up about what they were going to do with her?

A: Yes.

Q: Precisely who initiated that conversation?

A: [Perez]

Q: What exactly did she say?

A: She said we can go out to Milford and just burn it. Burn the car.

Q: Out of the blue she said we're going to go to Milford and burn the car?

A: She said –

Q: Nobody said beforehand, what are we going to do? What should we do? Just [Perez] out of the blue says, "We're going to go burn the car?"

A: They was like, what are we going to do with her. That's when she was like, we can burn her. We can go back to Milford and burn her in the car. Go back to Milford and set the whole car on fire.

Q: Did she suggest anything else?

A: No. After that, we was going past the graveyard. That's when [Harper] was like just drop her off at the graveyard.

⁵⁰ *Id.* at A-126:3–23; A-127:1–18 (emphasis added).

Q: Do you think they were serious?

A: When they said drop her off at the graveyard?

Q: No. When they said to burn the car.

A: I don't know. I don't know if they were serious or not.

Q: I mean, did it seem to you that it was a thought out plan?

A: What do you mean?

Q: When they say, "Well, what are we going to do with her? We should burn the car."

Is it something that sounded to you like they had thought about it, that they had talked about it and that was the plan, or was it more of a statement out of frustration?

A: I don't know. They just – they just said it. Like, I don't know if they thought about it or not.

Q: But, you indicated that it was you and [Harper] that said "No, we're not going to do that[]"?

A: Right.⁵¹

Brewer again was asked about this topic on his re-direct examination:

Q: [W]hy did you object to the plan to burn her up in the car?

....

A: It wasn't – it wasn't – I wouldn't burn the car. I didn't – I don't know. I just didn't want – I think that was – I don't know. That's just not what I wanted to do.

⁵¹ *Id.* at A-161:12-23; A-162:1-23; A-163:1-13.

Q: You knew she'd been in the trunk for a couple days while you all were partying. You knew she didn't want to be in the trunk; right?

A: (No response.)

Q: So what was wrong with the idea of getting rid of her so that she couldn't tell anybody what happened to her by killing her?

A: That's – I don't know. I just wasn't doing that.⁵²

Brewer's alleged disclosures are appalling.⁵³ The supposed intentions of Perez and McDonald, if believed by the trier of fact, show them, individually and separately, capable of terrible depravity. They show impulses of attempted murder. There is a disturbing theme of thinly veiled force, coercion, and the total disregard for Mrs. Smith's safety during her kidnapping, where she was imprisoned in the trunk of her car for almost two days after being robbed. Indeed, these circumstances are like a war crime and were the worst possible nightmare for the victim. This particular Section 1011 factor is the most persuasive one. This, combined with the complete lack of care showed to Mrs. Smith from kidnapping her to releasing her,⁵⁴ weighs

⁵² *Id.* at A-172:7–8, 14–23; A-173 1–3.

⁵³ These disclosures are admissible as an admission by a party-opponent under D.R.E. 801(2). Perez's statements are admissions. Also, the statements of McDonald and Brewer as co-conspirators would bind Perez as well.

⁵⁴ The Court notes that, according to Brewer, McDonald allegedly offered food to Mrs. Smith while she was in the trunk, to which Mrs. Smith declined, stating that “[s]he wanted to go home.” September 18th Hearing, at A-161:4.

heavily in favor of trying McDonald in this Court.

The Court acknowledges that prior to this incident, McDonald had no formal involvement with the criminal justice system. A juvenile's lack of a prior record, however, does not *ipso facto* require transfer to the Family Court.⁵⁵ Furthermore, as the State extensively demonstrated at her reverse amenability hearings, McDonald's behavior prior to kidnapping Mrs. Smith was neither tamed nor disciplined. Unquestionably, McDonald has had a dysfunctional childhood. The Court acknowledges that her misbehavior followed the death of her father, the relocation of her half-sister, with whom McDonald was close, and McDonald's arrival in Delaware and introduction to Perez. The Court cannot ignore, however, the seriousness of the present offenses and how McDonald, immature and misguided as she might have been, participated in this violent episode.⁵⁶

⁵⁵ See, e.g., *State v. Dellaversano*, 1998 WL 1029291, at *3 (Del. Super. Dec. 21, 1998) ("This decision is a difficult one given the penalties the Defendant will face as an adult. However, the severity of the offenses, including the injuries inflicted on the victims, the extent of the Defendant's contact with the criminal justice system before and after the . . . incident, as well as the age of the Defendant and the lack of available treatment options in the Family Court and/or the juvenile correction, militate against a transfer to the Family Court. *While the Defendant's lack of a prior record weighs heavily*, it is overcome by the previously mentioned factors. There is little or no benefit gained from the limited period of supervision/treatment that would be available to the Defendant if this motion were granted." (emphasis added)).

⁵⁶ Indeed, under Delaware law, kidnapping 1st is a violent crime, as is Robbery in the First Degree. See generally *Holmes v. State*, 322 Ark. 574, 576-79 (Ark. 1995) ("[T]he serious and violent nature of an offense is a sufficient basis for denying a motion to transfer and trying a juvenile as an adult. No element of violence beyond that required to commit the crime is necessary [T]he trial court could have relied on the nature of the crime of aggravated

(2) Nature of McDonald's Past Treatment and Rehabilitative Efforts and the Nature of McDonald's Response thereto

McDonald begins by stating that because she lacks any prior involvement with the criminal justice system, she has had no contact with the Delaware Division of Youth Rehabilitative Services ("DYRS"). She acknowledges her escalating misconduct prior to the kidnapping of Mrs. Smith. McDonald asserts, however, that her multitude of problems were never addressed by anyone capable of helping her. She had a turbulent upbringing, and was then introduced to Perez, which coincided with McDonald's poor behavior and substance abuse. McDonald also claims that she might have undiagnosed Attention Deficit and Hyperactivity Disorder ("ADHD"), which, as Dr. Rushing explained, may have slowed her brain maturation by three years, thus rendering her with the maturity level of an 11-year-old at the time of the incident. Yet McDonald, as a 14-year-old girl, was left to fend for herself through all

robbery in denying appellant's motion to transfer to juvenile court. No violence beyond that necessary to commit the offense of which the defendant is necessary." (citations omitted) (internal quotation marks omitted)).

Even though Mrs. Smith was not beaten, the Court finds that her being stuffed in a trunk for two days without food, water, or medication, and then dumped in a desolate cemetery constitutes violence. *Cf. Holmes*, 322 Ark. at 577 (quoting the opinion of the trial court, which the appellate court affirmed ("Aggravated robbery—violence as such may not have occurred in the traditional sense. In other words, no guns were fired or no one was assaulted or battered but certainly when a citizen looks down the barrel of a loaded revolver in the process of being help up, in my judgement that is a violent act."))).

of this turmoil.⁵⁷

McDonald concedes that she undoubtedly needs help. She argues, however, that the Court cannot determine whether McDonald has had a positive response to past treatment because she has never received the assistance that she needs. Currently, she is performing well both academically and socially at the New Castle County Detention Center (“NCCDC”). Therefore, McDonald contends that she is amenable to appropriate, structured assistance. In fact, the psychologist at NCCDC commented on McDonald’s improvement and stated that no reason existed as to why McDonald would not be amenable to and benefit from the services of DYRS. For the State to argue that the Family Court is ill-equipped to oversee her future is unmeritorious.

The State begins by noting that McDonald has had opportunities for assistance in the past; but her own behavior caused her lack of success. While never having been incarcerated, in April 2012, McDonald’s discipline problems caused her to be sent to Parkway Academy Cental (“Parkway”), an alternative school in Dover. A counselor at the school testified at the reverse amenability hearings that from

⁵⁷ McDonald states that during this time, she received little help from her mother and the proper authorities. She points to the incident in January 2013, mentioned *supra*, in which she was seen in a Facebook picture with an 18-year-old man, and how no further investigations were conducted into this matter.

McDonald's entrance until June, when the school dismissed its students for the summer, McDonald's performance was mixed. Therefore, the school brought her back in the fall of that year. The counselor stated that when she returned, McDonald's behavior was noticeably worse. She was continuously truant, and disobedient when she did show up to school.⁵⁸ McDonald was doing poor academically; and her mother informed the counselor of her concerns with her daughter's substance abuse. Despite the counselor's referrals for assistance, McDonald's mother claimed that, despite trying, she could not get in contact with the referred professionals.

McDonald's lack of prior rehabilitative treatment due to lack of a prior record render this Section 1011 factor neutral.⁵⁹ The Court notes, however, that prior to her arrest, McDonald was not responding to any sort of structure. While her home-life, social influences, and psychological makeup could be to blame for this, the fact remains that voluntary treatment, even if only limited to her experience at Parkway,

⁵⁸ The State claims that from the end of Parkway's Christmas break in 2012-13 to McDonald's arrest in March 2013, McDonald only attended school on three dates. During McDonald's time at Parkway, she missed a total of 61 days, 4 of which were excused. She was also tardy on 10 occasions.

⁵⁹ This Court has before adjudicated cases involving juvenile defendants who lacked past rehabilitative treatments because of lack of a prior record, and yet still had their reverse amenability motions denied. *See, e.g., State v. Roscoe*, 2000 WL 973132, at *4 (Del. Super. May 1, 2000 (adopting the Commissioner's Report and Recommendation to deny the defendant's Motion to Transfer to Family Court).

was not the answer for her. Indeed, it took incarceration at NCCDC after being charged with five felonies for McDonald's behavior to alter.⁶⁰

(3 Interests of Society; Interests of McDonald)

McDonald asserts that, if convicted, she potentially faces a significant period of incarceration. She will, however, at some point be released back into society, having spent her formative years in an adult detention facility. Therefore, when released, she will be a dysfunctional burden on society. McDonald posits that treating her as a child and allowing her access to her the assistance of the Family Court, which she needs, as opposed to confining her as an adult offender only to be released years later, best serves the interests of society.

As far as her own interests, McDonald stresses the hardship involved in cutting her off from the resources of the Family Court and forcing her to endure life as an adult offender. She argues that the impracticality of life as an adult offender would be significant. The Chief of the Bureau of Prisons for the Delaware Department of Corrections ("DOC") testified that he would be concerned for the safety of an inmate

⁶⁰ Cf. *State v. Doughty*, 2011 WL 486537, at *3 (Del. Super. Feb. 10, 2011) ("During his incarceration in NCCDC, [Defendant] has had no incident reports. Thus, Defendant functions well in a structured environment, which cannot be offered by the Family Court beyond [the date that court retains jurisdiction of Defendant]."). The Court recognizes that the defendant in *Doughty* had a history of juvenile adjudications, whereas McDonald has had none. The Court believes, however, that supervision in a detention facility is beneficial for McDonald. In order to safely reenter society, structured supervision must extend beyond the period over which the Family Court will have jurisdiction over her.

as young as McDonald being housed in an adult facility. He also testified that if McDonald was adjudicated as an adult and sentenced to DOC, she would have to be sent to a facility out of state, and that currently a facility in North Carolina seemed to be the most promising option for placing her, although this placement is not certain. Additionally, outsourcing the placement of an adult offender of juvenile age is an alternative that has not before been performed in Delaware. Furthermore, if the Court finds McDonald non-amenable, she would have to be housed in an adult facility while her permanent placement is arranged. This would involve two impractical possibilities: (1) forcing her to stay in isolation at the facility, or (2) shutting down an entire unit at the facility and relocating the inmates so that McDonald could be housed alone.

Besides the issue of her placement, McDonald also points to the testimony of numerous individuals, all of whom have experience working with juvenile offenders, attesting that McDonald should remain in the juvenile system. The psychologist at NCCDC, the Chief of Community Services for the State of Delaware, McDonald's case worker at NCCDC, DYRS officials, and Dr. Rushing all believe that this Court is the wrong forum for her. To the extent the State contends that a transfer to Family Court would unduly depreciate the crimes and punishment, McDonald states that the Family Court continuously deals with troubled youths like herself; and points out that

if she were in the Family Court system, she would be incarcerated for a period of time.

The State asserts that for at least a year prior to her arrest, McDonald was an out-of-control teenager who did not respond in the slightest to authority figures. As McDonald points out, her current experience at NCCDC seems to be positive; but she could not remain at that facility if her case was transferred. The State chastises McDonald's harping on the impracticality of keeping her in the adult system by pointing out first that under the jurisdiction of the Family Court, McDonald could essentially be released back into the community without any incarceration at all.⁶¹ Second, just as a sentence requiring incarceration from this Court would necessitate sending McDonald out-of-state, the same type of sentence from the Family Court would also necessitate sending McDonald out-of-state. DYRS has a contract with a facility in Indiana for housing juveniles. That facility has informed DYRS, however, that it would not accept either McDonald or Perez. Thus, DYRS would need to conduct a nationwide search for McDonald's placement. On the other hand, the North Carolina facility, available to McDonald via sentencing from this Court, is the

⁶¹ McDonald counters that the State inappropriately assumes that the Family Court would not hand down an appropriate sentence.

more promising option.⁶² After reaching 18, McDonald could then return from North Carolina to Delaware to serve the remainder of her sentence. The State stresses that if McDonald's case is transferred back to the Family Court, the most DYRS can oversee her is until her 18th birthday. All parties agree that McDonald needs extensive care and supervision.⁶³ Indeed, Dr. Rushing herself noted that confinement will benefit McDonald. Thus, the State submits that it is imprudent to allow McDonald to enter a system where, at best, her treatment will only continue until she reaches the age of majority, regardless of her progress.

The State concedes that pondering McDonald's future in the criminal justice system is a complex ordeal, and that McDonald is a young offender who has not received much help throughout her life. The State argues, however, that McDonald, whose crimes "shock the conscience," is dangerous to society, and as such, should not be overseen by the auspices of the Family Court. Keeping her within the jurisdiction of this Court ensures that McDonald will receive the supervision and treatment she needs for the appropriate amount of time, serving both the interests of society and

⁶² The State points out that the facility in North Carolina is in the process of preparing a facility specifically for juveniles, separate from adult inmates.

⁶³ McDonald does not dispute this point, but notes that this Court should focus not only on incarceration, but on the age-appropriate treatment she will receive within that incarceration. McDonald contends that being incarcerated as an adult offender would not be beneficial to her at all. She claims that adult incarceration is a short-sighted, heavily complicated solution that denies her of the benefits she could receive from DYRS.

McDonald.

The Court finds that both the interests of society and McDonald will best be benefitted by keeping McDonald in the adult system. McDonald needs long-term help, which must entail intensely structured supervision. As McDonald points out, those with experience working with juvenile offenders believe McDonald to be amenable to the Family Court. Dr. Rushing advocated this point, extensively detailing how McDonald's cognitive and social immaturity, combined with peer pressure, and intoxication all contributed to a crime that was juvenile in nature.⁶⁴ Dr. Rushing also stated that, no matter what, confinement is appropriate for McDonald.

Significantly, Dr. Rushing did not specifically state that McDonald would be or could be rehabilitated by the time she reaches 18 or 21:

Q: Are you able to quantify how much time she needs in order to mature to a level where she's going to be safe if she's back out in society?

A: I think that's something that would have to be reassessed periodically. I would say on my assessment, she wasn't at a point where I would recommend her being released back into society.⁶⁵

Perhaps no expert could prudently place an exact time frame on the rehabilitation of

⁶⁴ See Reverse Amenability Hr'g, *State v. McDonald*, I.D. No. 1304002931, at A-239:5-7 (Del. Super. Sept. 18, 2013) (TRANSCRIPT) ("In terms of the actual offense that happened, the motivator and drivers here were incredibly juvenile.").

⁶⁵ *Id.* at A-250:2-10.

a juvenile offender. The Court is convinced, however, that while McDonald may require incarceration, the time for her rehabilitation is beyond the purview of the Family Court. She might be released at 18 or 21 without being fully rehabilitated. Thus, with this murky question unanswered, the Court finds that McDonald should be adjudicated as an adult, despite the fact that those with experience in working with juvenile offenders advocate otherwise.⁶⁶ Moreover, even if the Court were presented with concrete evidence that, more likely than not, McDonald could be and would be fully rehabilitated by the time the Family Court relinquished its jurisdiction over her, the Court still finds that McDonald should be tried as an adult. The first Section 1011 factor simply outweighs the other two factors.

After finding that the State can make out a *prima facie* case and examining the Section 1011 factors, the Court's role in these reverse amenability proceedings is to "balance or weigh its respective findings in reaching its ultimate decision on the

⁶⁶ *Cf. D.E.P. v. State*, 727 P.2d 800, 802–03 (Alaska Ct. App. 1986) ("The consensus of the expert testimony was that treatment in a juvenile setting would be preferable and would optimize the potential for rehabilitation. Under [prior precedent], however, *it is clear that the desirability of treating [the defendant] in a juvenile facility cannot be determinative on the issue of waiver unless the evidence further establishes a likelihood that rehabilitation of [the defendant] will be accomplished by his twentieth birthday.*" (emphasis added)). *But cf. State v. Moore*, 2003 WL 23274842, at *2 (Del. Super. Dec. 31, 2003) ("The Defendant has not previously had the occasion to undergo any rehabilitative program relating to sex offenses. Through Family Court, several out-of-state, Level IV sex offender programs are available, generally ranging in length from nine to 18 months. *It would appear that there is still time for the Defendant to be considered for entry into one of such programs and to complete such a program before he becomes 18 years of age.*" (emphasis added)).

application to transfer.”⁶⁷ On balance, the seriousness of the crime, committed by a juvenile just as culpable as her co-defendants, against a person, rather than property, in an aggressive manner, tips the scale in favor of adjudicating McDonald as an adult.⁶⁸

⁶⁷ See *Marine v. State*, 624 A.2d 1181, 1183 (Del. 1993).

⁶⁸ Cf. *J.S. v. State*, 372 S.W.3d 370, 374–75 (Ark. Ct. App. 2009) (affirming trial court’s adult disposition of a juvenile even though “appellant had no criminal history and that there were rehabilitation facilities available, the court also found that the alleged offenses were serious; that the alleged crimes were committed in an aggressive, willful, or premeditated manner; that the offenses were against persons rather than property; that appellant was as culpable as his codefendants; that appellant had the benefit of a supportive family willing to intervene directly when he was not making good choices; and that appellant participated in the planning of the offense shortly after this intervention.”).

The Court notes that throughout this criminal episode, the presence of intoxicants rendered McDonald dazed. Dr. Rushing testified that McDonald “did not have a sense of a time line for what happened there. [McDonald] describes the whole event seeming like one day. It’s all blurry, and that’s, you, typical of someone who is intoxicated.” September 18th Hearing, at A-240:22–23; A-241: 1–3. Detective Robert Truitt Jr., the chief investigating officer in this case, testified that upon interviewing McDonald after her arrest, he suspected her to be under the influence of “something,” and that McDonald “just didn’t act like someone that you would sit and have a conversation with about a very serious incident. She seemed to be somewhat – just, you know, not overly caring about what was going on.” Reverse Amenable Hearing, *State v. McDonald*, I.D. No. 1304002931, at B-126:17, 22–23; B127:1–3 (Del. Super. Sept. 19, 2013) (TRANSCRIPT). The Court reiterates, however, the well-settled principle that voluntary intoxication is not a defense to a criminal act. See, e.g., *Davis v. State*, 522 A.2d 342, 344–46 (Del. 1987) (quoting and citing 11 *Del. C.* § 421).

Based on the foregoing, McDonald's application to have his case transferred to the Family Court is **DENIED**.

IT IS SO ORDERED.

/s/ Richard F. Stokes

Richard F. Stokes, Judge

Original to Prothonotary

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