Denial of pretrial habeas corpus affirmed for seventeen-year-old charged with capital murder, even where no constitutional sentence for a conviction of said charge existed.[Ex parte Jacob Ryan Evans](13-5-2)

On August 22, 2013, the Fort Worth Court of Appeals affirmed a denial of a pretrial writ of habeas corpus because the trial court's order could have been sustained on a theory that the legislature is amending the capital murder sentencing statute.

¶ 13-5-2. **Ex parte Jacob Ryan Evans**, --- S.W.3d ----, No. 02–13–00037–CR., 2013 WL 4473872 (Tex.App.-Fort Worth, 8/22/13).

Facts: In the first count of a December 2012 three-count indictment, a grand jury charged appellant with committing capital murder in October 2012 by intentionally or knowingly killing Jami Evans and Mallory Evans in the same criminal transaction.FN1The other two counts of the indictment charged appellant with murdering Jami and Mallory individually. The trial court appointed counsel to represent appellant.

FN1. See Tex. Penal Code Ann. § 19.02(b)(1) (West 2011), § 19.03(a)(7)(A) (West Supp.2012).

In January 2013, appellant filed an application for a writ of habeas corpus, alleging that his incarceration for the capital murder count of the indictment was unconstitutional because he was seventeen years old upon allegedly committing the offense FN2 and because two decisions by the United States Supreme Court had established that "neither of the two statutorily authorized punishments for this offense [could] be applied to him."FN3Appellant contended that under such circumstances, his continued detention, "and the continued restraint of [his] liberty in order to compel [him] to answer to such charge ... [was] unlawful." Thus, appellant urged the trial court to "immediately discharge[ ]" him from any further restraint under the capital murder allegation. Appellant also argued that the trial court had violated his constitutional and statutory rights by refusing to set a bond.

FN2. Appellant attached his birth certificate to his application. The birth certificate establishes that appellant was born in May 1995.

FN3.See Miller v. Alabama, 132 S.Ct. 2455, 2463, 2469 (2012) (holding that mandatory life without the possibility of parole for defendants under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition of cruel and unusual punishment); Roper v. Simmons, 543 U.S. 551, 568, 578, 125 S.Ct. 1183, 1194, 1200 (2005) (holding that the imposition of the death penalty on offenders who committed a crime before turning eighteen years old is unconstitutional).

The trial court set a hearing on appellant's application. In responding to the application and in urging the trial court to deny relief on part of it, FN4 the State principally contended that appellant was making pretrial as-applied challenges to the constitutionality of the Texas capital murder sentencing statutes and that such challenges were not cognizable through an application for a writ of habeas corpus.FN5 The State noted that appellant had not challenged the constitutionality of the penal code provision that defined capital murder and asserted, in part,

FN4. The State did not contest appellant's request for the trial court to set a bond.

FN5. The State relied on a decision by the court of criminal appeals in which that court held that a pretrial habeas corpus application "can be used to bring a facial challenge to the constitutionality of the statute that defines the offense but may not be used to advance an 'as applied' challenge."Ex parte Ellis, 309 S.W.3d 71, 79 (Tex.Crim.App.2010) (citing Ex parte Weise, 55 S.W.3d 617, 620–21 (Tex.Crim.App.2001)).

The state's capital murder sentencing statutes are not keeping [appellant] in confinement or otherwise restraining his liberty. Rather, it is the fact he was indicted with an allegation of violating the capital murder statute which has caused the present "restraint" of his liberty. It is not until [appellant] is actually convicted of the offense of capital murder after a trial that it can be said those statutes are "restraining" [appellant's] liberty interests.
In summary, the State argued that appellant's challenges to the constitutionality of any sentence that he could receive under Texas's capital murder sentencing statutes could be properly resolved only in the event of, and subsequent to, his conviction.

Appellant replied to the State's response by reiterating that no Texas statute provided a constitutional punishment that could be applied to appellant in the event of his conviction. Although appellant recognized that as-applied constitutional challenges could not generally be litigated in pretrial habeas corpus applications, he contended that he was not bringing such a challenge because the unconstitutional application of the Texas capital murder sentencing statutes to him had already been clearly established by the Supreme Court's precedent, which, according to appellant, affected the trial court's power to proceed on the capital murder charge.

The trial court heard arguments from both parties at a brief hearing on the writ application. During the hearing, the State conceded that at the time of the hearing, there was no constitutional sentence for a seventeen-year-old person convicted of capital murder. The State explained, however, that a "lot of things could happen" regarding the sentencing statutes before the trial of the case, and the State specifically referred to a bill that was pending in the legislature that could "fix" the constitutional problem.

Held: Affirmed

Opinion: In his first point, appellant argues that the trial court erred by denying his primary requested relief—discharge from custody on the capital murder charge against him—on the ground that as a result of the holdings in Miller and in Roper, no constitutional punishment could be applied to him if he was convicted of that offense.

The sole purpose of an appeal from a trial court's habeas corpus ruling is to "do substantial justice to the parties," and in resolving such an appeal, we may "render whatever judgment ... the nature of the case require[s]."Tex.R.App. P. 31.2, 31.3; see Ex parte Idigbe, No. 02–12–00561–CR, 2013 WL 772891, at *5 (Tex.App.-Fort Worth Feb. 28, 2013, pet. ref'd) (mem. op., not designated for publication). We review the trial court's decision to deny habeas corpus relief for an abuse of discretion. Kniatt v. State, 206 S.W.3d 657, 664 (Tex.Crim.App.),

cert. denied, 549 U.S. 1052 (2006). We will uphold the trial court's judgment as long as it is correct on any theory of law applicable to the case. Ex parte Murillo, 389 S.W.3d 922, 926 (Tex.App.-Houston [14th Dist.] 2013, no pet.); Ex parte Primrose, 950 S.W.2d 775, 778 (Tex. App .-Fort Worth 1997, pet. ref'd).

Because appellant was seventeen years old at the time that he allegedly committed capital murder, he cannot be tried as a juvenile. SeeTex. Fam.Code Ann. § 51.02(2)(A) (West Supp.2012), § 51.04(a) (West 2008). At all points from the date of appellant's alleged offense through the date of the submission of this appeal, two Texas statutes relating to sentencing of a capital felony offense provided that an adult (such as appellant) found guilty of such an offense could be punished only by mandatory imprisonment for life without parole or by death. See Act of May 29, 2009, 81st Leg., R.S., ch. 765, § 1, 2009 Tex. Gen. Laws 1930, amended by Act of July 11, 2013, 83rd Leg., 2d C.S., S.B. 2, § 1 (to be codified at Tex. Penal Code Ann. § 12.31); Act of May 28, 2005, 79th Leg., R.S., ch. 787, § 1, 2005 Tex. Gen. Laws 2705, amended by Act of July 11, 2013, 83rd Leg., 2d C.S., S.B. 2, § 2 (to be codified at Tex.Code Crim. Proc. Ann. art. 37.071). Under Miller and Roper, neither of these two punishments could be constitutionally applied to appellant.FN7See Miller, 132 S.Ct. at 2463, 2469; Roper, 543 U.S. at 568, 125 S.Ct. at 1194;Ex parte Ragston, Nos. 14–12–01127–CR, 14–12–01128–CR, 2013 WL 2489965, at *1–2 (Tex.App.-Houston [14th Dist.] June 11, 2013, pet. filed); Henry v. State, No. 05–11–00676–CR, 2012 WL 3631251, at *6 (Tex.App.-Dallas Aug. 24, 2012, no pet.)(mem. op., not designated for publication).

FN7. Furthermore, under Texas law, no person may “be punished by death for an offense committed while the person was younger than 18 years.”Tex. Penal Code Ann. § 8.07(c) (West 2011).

Recognizing the problem created in cases similar to appellant's case, the legislature has recently amended the capital murder sentencing statutes to provide that if a defendant commits capital murder before turning eighteen years old and is convicted of that offense, the defendant shall be punished for life, rather than life without the possibility of parole. See Act of July 11, 2013, 83rd Leg., 2d C.S., S.B. 2, §§ 1–2. The new sentencing statutes take effect immediately and expressly apply to a pending criminal action, to one currently on appeal, or to one commenced on or after the day of their enactment, regardless of whether the criminal action is based on an offense before that date. Id. §§ 3–4.

The legislature's action has removed Texas's capital murder sentencing statutes from the express holdings of Miller and Roper. See Miller, 132 S.Ct. at 2463, 2469 (prohibiting the imposition of mandatory life without the possibility of parole for offenders under eighteen years old but expressly leaving open a “sentencer's ability” to impose life without the possibility of parole after considering competing factors in in appropriate cases); Roper, 543 U.S. at 568, 125 S.Ct. at 1194. Thus, appellant's argument, which hinges on his contention that the explicit, specific holdings in Miller and Roper preclude any constitutional punishment that can be applied to him and that his restraint for capital murder is therefore illegal, cannot now succeed, if it ever could have.FN8

FN8. In the State's brief, which was filed before the legislature amended the sentencing statutes, it argued that the trial court had correctly denied relief because appellant had impermissibly brought an as-applied constitutional challenge in his writ application. We note that in a habeas corpus appeal in which the facts and legal issues were strikingly similar to the facts and issues involved in this appeal, one of our sister courts held, in accord with the State's argument here, that an applicant was not entitled to relief, reasoning in part,

[A] pretrial writ of habeas corpus may not be used to address an as-applied constitutional challenge to a statute....

Here, Ragston does not contend that he is making a facial challenge to the constitutionality of the capital-felony sentencing statute. Nor does he challenge the capital-murder statute under which he is charged. Ragston argues only that neither death nor life in prison without parole "may be applied" to him because he was under the age of 18 at the time of the offense. But this claim, even if successful, would not result in Ragston's immediate release because it is directed to the sentence to be imposed after conviction, not the validity of the present indictment. At this stage of the proceedings, Ragston merely stands accused of violating the penal laws. The constitutionality of the sentencing statute will become an issue only if Ragston is found guilty of the capital offense and unconstitutionally sentenced, at which time he may raise his complaint on direct appeal. Ragston, 2013 WL 2489965, at *1–3 (emphasis added) (citations omitted).

Apparently anticipating on appeal the amendment to the capital murder sentencing statutes that has now occurred, appellant also contends in his brief that such an amendment cannot be constitutionally applied to him because of the ex post facto clause in the United States Constitution. SeeU.S. Const. art. I, § 10 (stating that no state shall pass any ex post facto law). But appellant did not raise this argument in his application for a writ of habeas corpus that he filed in the trial court; FN9 thus, we will not consider it in this appeal. See State v. Romero, 962 S.W.2d 143, 144 (Tex.App.-Houston [1st Dist.] 1997, no pet.)("We may not consider grounds not raised before the trial court."); Ex parte Torres, 941 S.W.2d 219, 220 (Tex.App.-Corpus Christi 1996, pet. ref'd); Greenville v. State, 798 S.W.2d 361, 362–63 (Tex.App.-Beaumont 1990, no pet.); see also Ex parte Fuertes, No. 02–11–00536–CR, 2013 WL 362763, at *4–5 (Tex.App.-Fort Worth Jan. 31, 2013, no pet.)(mem. op., not designated for publication).FN10

FN9. Appellant did not raise an ex post facto argument in his written application for a writ of habeas corpus. In the hearing on his application, his counsel stated, "[I]f [the legislature passes a statute amending the capital murder sentencing statutes], they might as well go ahead and stamp ex post facto on the bottom of it because that's the second writ we're going to file." [Emphasis added.].

FN10. Also, two of our sister courts have held that an ex post facto argument is an as-applied constitutional challenge that cannot be raised in a pretrial application for a writ of habeas corpus but must be litigated in the trial court and reviewed on direct appeal. See Ex parte Howard, 191 S.W.3d 201, 203 (Tex.App.-San Antonio 2005, no pet.); Ex parte Woodall, 154 S.W.3d 698, 701 (Tex.App.-El Paso 2004, pet. ref'd).

Because the trial court's order denying habeas corpus relief may be sustained on a theory of law applicable to this case-the legislature's amendment of the capital murder sentencing statutes-we must affirm the trial court's order denying habeas relief. See Primrose, 950 S.W.2d at 778. We overrule appellant's first point.

Conclusion: Having overruled appellant's points, we affirm the trial court's order that set his bond at $750,000 and that denied the remainder of the relief that he sought in his application for a writ of habeas corpus.