JUVENILE CASELAW UPDATE
2017
2/9

Pat Garza
Associate Judge
386TH District Court
Bexar County, Texas
patgarza386@sbcglobal.net

Mitchell v. State
Tex. App.—Houston (1st Dist.), 7/28/2016

AN INEFFECTIVE ASSISTANCE OF COUNCIL CLAIM WILL FAIL WHERE THE RECORD IS SILENT AS TO WHY TRIAL COUNSEL DID NOT OBJECT TO THE ADMISSION OF DEFENDANT'S JUVENILE PROBATION RECORDS. *

Ineffective Assistance of Counsel

Two-part test:

1. **whether the attorney's performance was deficient, i.e., whether counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and if so,**
2. **whether that deficient performance prejudiced the party's defense.**

A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and the <u>appellant</u> bears the burden to overcome the presumption that, under the circumstances, the challenged action was a result of sound trial strategy.

Gentry v. State
Tex.App.—Houston (1st Dist.), 1/21/16

WRITTEN STATEMENT HELD ADMISSIBLE WHERE VIDEO RECORDED STATEMENT TAKEN AT THE SAME TIME WAS NOT.

Ex Parte Enger
Tex.App.—Houston (14th Dist.), 12/8/16

THE TEXAS FAMILY CODE AND THE TEXAS CODE OF CRIMINAL PROCEDURE EXCLUDE AN ADULT WITH A JUVENILE DETENTION RECORD FROM THE REMEDY OF EXPUNCTION.

Douglas-Myers v. State
Tex.App.—Houston (1st Dist.), 5/12/2016

JUVENILE'S DEFERRED PROSECUTIONS FOR TERRORISTIC THREAT AND ASSAULT OF A PUBLIC SERVANT WERE ADMITTED AS PART OF ADULT PSI REPORT BECAUSE AN ACCURATE STATEMENT OF APPELLANT'S JUVENILE CRIMINAL AND SOCIAL HISTORY IS RELEVANT TO THE TRIAL COURT'S ASSESSMENT OF PUNISHMENT. *

TEXAS CODE CRIMINAL PROCEDURE
Art. 37.07 § 3(a)

Evidence of prior criminal record in all criminal cases after a finding of guilt.

(a)(1) Regardless of the plea and whether the punishment be assessed by the judge or the jury, **evidence may be offered** by the state and the defendant as to **any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character,** an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other **evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt** by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. A court may consider as a factor in mitigating punishment the conduct of a defendant while participating in a program under Chapter 17 as a condition of release on bail. **Additionally, notwithstanding Rule 609(d), Texas Rules of Evidence, and subject to Subsection (h), evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of:**

(A) a felony; or

(B) a misdemeanor punishable by confinement in jail. *

TEXAS CODE CRIMINAL PROCEDURE
Art. 42.12 § 9(a)

PRESENTENCE INVESTIGATIONS. (a) Except as provided by Subsection (g), **before the imposition of sentence by a judge** in a felony case, and except as provided by Subsection (b), before the imposition of sentence by a judge in a misdemeanor case the **judge shall direct a supervision officer to report to the judge in writing on the circumstances of the offense with which the defendant is charged, the amount of restitution necessary to adequately compensate a victim of the offense, the criminal and social history of the defendant, and any other information relating to the defendant or the offense requested by the judge.**

Hood v. Davis
U.S. Dist, N.D. Texas, Dallas, 12/12/16

***MILLER V. ALABAMA*, DID NOT HOLD THAT MANDATORY LIFE SENTENCES FOR JUVENILE OFFENDERS WITH THE POSSIBILITY FOR PAROLE VIOLATED THE EIGHTH AMENDMENT.**

Adams v. Alabama
U.S. Sup.Ct., 5/23/16

JUVENILE SENTENCED TO LIFE WITHOUT THE POSSIBLITY OF PAROLE, AFTER DEATH PENALITY RULED UNCONSTITUTIONAL:

SUPREME COURT REMANDS, BUT IS SPLIT ON WHAT A LOWER COURT MUST DO WHEN, IN LIGHT OF *MONTGOMERY V. LOUISIANA*, AGE HAD BEEN CONSIDERED DURING THE ORIGINAL SENTENCING.*

Adams v. Alabama
Remand to Lower Court

JUSTICE SOTOMAYOR AND GINSBURG:

THE LOWER COURT IS REQUIRED TO DETERMINE WHETHER A JUVENILE'S CRIMES REFLECTED "TRANSIENT IMMATURITY" OR "IRREPARABLE CORRUPTION"

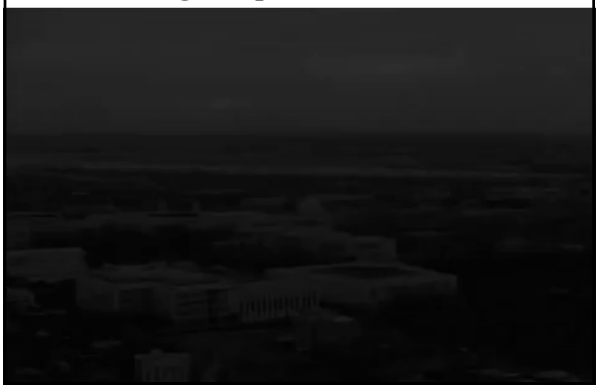
JUSTICE THOMAS AND ALITO:

WHEN A JURY USED AGE AS A MITIGATING FACTOR IN DECIDING TO GIVE THE DEATH PENALTY, IS ANY FURTHER INDIVIDUALIZED CONSIDERATION NECESSARY.

Tatum v. Arizona
U.S. Sup.Ct., 10/31/16

WHEN A JUVENILE HAS BEEN SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, THE CASE SHOULD BE REMANDED TO DETERMINE WHETHER THE JUVENILE IS A CHILD "WHOSE CRIMES REFLECT TRANSIENT IMMATURITY" OR IS ONE OF "THOSE RARE CHILDREN WHOSE CRIMES REFLECT IRREPARABLE CORRUPTION."

West Wing – Supreme Court Interview



In the Matter of R.D.
Tx.App.-Fort Worth, 2/11/2016

IN A PROSECUTION FOR THE OFFENSE OF *EXHIBITION OF FIREARMS*, WHERE AN ELEMENT OF THE OFFENSE IS "THE INTENT TO CAUSE ALARM," A JUVENILE'S WORDS AND ACTIONS MAY GIVE RISE TO A REASONABLE INFERENCE THAT HE KNEW HIS WORDS AND ACTIONS WOULD BE COMMUNICATED TO HIS VICTIM.

In the Matter of J.C.
Tex.App.—Houston (14th Dist.), 12/1/16

PROBABLE CAUSE FOR DETENTION FOLLOWED BY FRISK, ALLOWED EVEN WHERE RUNAWAY WAS GONE FOR LESS THAN 24 HOURS. *

FACTORS IN DETERMINING A RUNAWAY

A CINS offense includes the voluntary absence of a child from the child's home without the consent of the child's parent or guardian for a substantial length of time.

Factors for PC that a child is a runaway:

duration of absence; time of day; the intent of the child in returning; authorization to leave; child's age; child's motive for running away; the child's activity during the absence; the child's distance from home; and the number, age, maturity, and experience of the persons, if any, accompanying or assisting the child during the absence.

In the Matter of E.O.E.

Tex.App. – El Paso., 5/5/2016

POLICE OFFICER'S INVESTIGATIVE STOP WAS HELD PROPER WHERE OFFICER'S SUSPICION WAS NOT BASED ON ANY SINGLE FACTOR OR MERE HUNCH, BUT A COLLECTIVE ASSESSMENT OF THE SCENE AS HE OBSERVED IT AND THE INFORMATION HE RECEIVED WHEN HE ENCOUNTERED THE JUVENILE.

(TERRY STOP)

Tex. AG Op. KP-0064

2/16/16

A JUVENILE PROSECUTOR MAINTAINS DISCRETION TO PROSECUTE A CHILD REFERRED FROM TRUANCY COURT FOR DELINQUENT CONDUCT EVEN ON A CHILD'S INITIAL REFERRAL TO JUVENILE COURT.

TITLE 3A: TRUANCY COURT PROCEEDINGS
TFC Sect. 65.003

(a) A child engages in truant conduct if the child is required to attend school under Section 25.085, Education Code, and fails to attend school on 10 or more days or parts of days within a six-month period in the same school year.

(b) Truant conduct may be prosecuted only as a civil case in a truancy court. *

TRUANCY COURT PROCEEDINGS
TFC Sect. 65.251

(a) If a child fails to obey an order issued by a truancy court under Section 65.103(a) or a child is in direct contempt of court, the truancy court, after providing notice and an opportunity for a hearing, may hold the child in contempt of court and order either or both of the following:

(1) that the child pay a fine not to exceed $100; or

(2) that the Department of Public Safety suspend the child's driver's license or permit or, if the child does not have a license or permit, order that the Department of Public Safety deny the issuance of a license or permit to the child until the child fully complies with the court's orders.

(b) If a child fails to obey an order issued by a truancy court under Section 65.103(a) or a child is in direct contempt of court and the child has failed to obey an order or has been found in direct contempt of court on two or more previous occasions, the truancy court, after providing notice and an opportunity for a hearing, may refer the child to the juvenile probation department as a request for truancy intervention, unless the child failed to obey the truancy court order or was in direct contempt of court while 17 years of age or older. *

TITLE 3: JUVENILE JUSTICE CODE
TFC Sect. 51.03 Delinquent Conduct

(a) Delinquent conduct is:

(1) conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail;

(2) conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court in:

(A) a justice or municipal court; or

(B) a county court for conduct punishable only by a fine; or

(C) a truancy court;

(3) conduct that violates Section 49.04, 49.05, 49.06, 49.07, or 49.08, Penal Code; or

(4) conduct that violates Section 106.041, Alcoholic Beverage Code, relating to driving under the influence of alcohol by a minor (third or subsequent offense).

In the Matter of H.C., III
Tex.App.-Fort Worth, 1/28/2016

TRANSFER HEARING STATUTE IS NOT UNCONSITUTIONAL AND AS A RESULT JUVENILE HAS NO RIGHT OF CONFRONTATION AT A DISCRETIONARY TRANSFER HEARING. *

RELEASE OR TRANSFER HEARING
TFC SECT. 54.11

(d) At a hearing under this section the court may consider written reports and supporting documents from probation officers, professional court employees, professional consultants, or employees of the Texas Juvenile Justice Department, or employees of a post-adjudication secure correctional facility in addition to the testimony of witnesses. On or before the fifth day before the date of the hearing, the court shall provide the attorney for the person to be transferred or released under supervision with access to all written matter to be considered by the court. All written matter is admissible in evidence at the hearing.

In the Matter of J.R. Jr
Tex.App.-Corpus Christi-Edinburg, 1/28/2016

BETWEEN 1995 AND SEPTEMBER 2015 AN APPEAL OF A JUVENILE COURT ORDER CERTIFYING A JUVENILE TO ADULT CRIMINAL COURT COULD BE MADE ONLY AFTER THE COMPLETION OF THE ADULT CRIMINAL TRIAL.

In the Matter of R.D.G., Jr.,
Tex.App.—Dallas, 9/12/2016

DISCRETIONARY TRANSFER TO ADULT COURT UPHELD WHERE JUVENILE COURT ADDRESSED EACH OF THE FACTORS SET OUT IN SECTION 54.02(F). *

In the Matter of R.D.G., Jr.,
Findings by the Court

The trial court's order contained the following specific findings under section 54.02(f):

1. **The offense alleged to have been committed was against the person of another.**
2. **The sophistication and maturity of the Respondent are sufficient to transfer the child to the appropriate district court for criminal proceedings.**
3. **The record and previous history of the Respondent indicate a higher degree of supervision is indicated and that transfer to the appropriate district court is required.**
4. **The prospects of adequate protection of the public and the likelihood of the rehabilitation of the Respondent by use of the procedures, services, and facilities currently available to this Court are remote.**

Discretionary Transfer to Adult Court
Fact Situation

The State charged appellant and filed a petition for a discretionary transfer from juvenile court to criminal court before the juvenile turned eighteen years old; however, the juvenile court heard the petition and transferred the case after the juvenile had reached his eighteenth birthday.

Which provision applies? Sect. 54.02(a)[Under 18 C&T] Sect. 54.02(j)[Over 18 C&T]?

Section 54.02(j) Applies
(Over 18 C&T)

WHEN DISCRETIONARY TRANSFER HEARING TAKES PLACE AFTER THE CHILD'S 18TH BIRTHDAY, THE FINDINGS UNDER SECTION 54.02(J) [Over 18 C&T] MUST BE MET.*

Morrison v. State

Tex.App.—Houston (14th Dist.), 11/10/2016

In this case no evidence was submitted and no finding made, either that "for a reason beyond the control of the state it was not practicable to proceed in juvenile court before" appellant's eighteenth birthday or "after due diligence of the state it was not practicable to proceed in juvenile court before" appellant's eighteenth birthday. **TFC Sect. 54.02(j)(4)**

QUERY

In August of 1973, M.K. a fifteen-year-old juvenile shoots and kills his friend. He stages the scene to appear that a burglary has taken place and there is not enough evidence at the time to prosecute him. Forty-three years later, new evidence is discovered and the now fifty-eight-year-old M.K. is charged with murder.

Which court has jurisdiction over M.K.?
Juvenile or Adult?

ADULT

Before September 1973 (when the current Family Code took effect), the terms of article 2338–1 controlled. Under that provision, the term "child" was determined by when a person was brought to court, not at the time of the offense, as we do today. Since M.K. is being brought to court now, as an adult, the case needs to be filed in adult court.

In the Matter of M.K.
Tex.App.—Ft. Worth, 1/23/2017

In the Matter of A.F.

Tex.App.—Houston (14th Dist), 9/8/2016

THE FAILURE TO FOLLOW THE PROCEDURE FOR A JUVENILE JURY WAIVER IS SUBJECT TO A HARM ANALYSIS.

JUVENILE CASELAW UPDATE

30th ANNUAL JUVENILE LAW CONFERENCE
February 27-March 1, 2017
Sponsored by the Juvenile Law Section
Of the State Bar of Texas
Horseshoe Bay, Texas

Pat Garza
Associate Judge/Referee
386TH District Court
Bexar County, Texas
(210)335-1154

PAT GARZA
Associate Judge
386th District Court
600 Mission Rd.
San Antonio, Texas 78210

EDUCATION

2001: Juvenile Law: Board Certified – by the Texas Board of Legal Specialization
1980: Admitted to the Texas Bar.
1980: Jurist Doctor, South Texas College of Law, Houston, Texas.
1977: B.A., University of Texas at Austin, Texas.

PROFESSIONAL

Life Fellow of the Texas Bar Foundation
2005 – Present: Editor, State Bar of Texas Juvenile Law Section Newsletter.
2009 – 2015: Texas Board of Legal Specialization Juvenile Law Exam Commissioner
2007: Franklin Jones Best Continuing Legal Education Article Award by the State Bar College Board of Directors. Police Interactions with Juveniles.
2004: Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation. Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent.
2001 – 2006: Texas Board of Legal Specialization Juvenile Law Advisory Commissioner
1999 – Present: Juvenile Court Associate Judge/Referee, 386th Judicial District Court.
1997 – 1999: Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.
1989 – 1997: Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.
Fall 1997: Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

In his 27 years as an Associate Judge and Referee Judge Garza has presided over 57,000 juvenile hearings. He has been published 27 times and this will be his 100th juvenile law presentation.

SPEECHES AND PRESENTATIONS
(last two years only)

- Juvenile Law: Caselaw Update; Fifth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, December, 2016.
- Caselaw Update; Juvenile Delinquency Advanced Topics Seminar, Presented by the DBA Juvenile Justice Committee, Dallas, Texas, October 6, 2016.
- Caselaw Update; Seventh Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2016.
- Arrest, Confessions, and Search and Seizure; Seventh Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2016.
- Juvenile Law; 2016 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2016.
- Caselaw Updates; 29th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2016.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2016.
- Juvenile Law: Caselaw Update; Fourth Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2015.
- Juvenile Law Update: Caselaw Update, Legislation, and other Things; 52nd Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, April, 2015.
- Caselaw Updates; 28th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Ft. Worth, Texas, February, 2015.

- Juvenile Law: Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Third Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2014.
- Caselaw Update; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
- Arrest, Confessions, and Search and Seizure; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
- Caselaw Updates; Nuts and Bolts of Juvenile Law, Sponsored by the Texas Juvenile Justice Department and the Juvenile Law Section of the State Bar of Texas, August, 2014.
- Police Interactions with Juveniles; Nuts and Bolts of Juvenile Law, Sponsored by the Texas Juvenile Justice Department and the Juvenile Law Section of the State Bar of Texas, August, 2014.
- Juvenile Law; 2014 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2014.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 51st Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, April, 2014.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 27th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2014.
- Caselaw Updates; 27th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2014.

PUBLICATIONS

- Caselaw Update. Sixth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2015.
- Privacy Policy, Riley v. California and Cellphone Searches in Schools. Texas Bar Journal, Volume 78, Number 2, February, 2015. An article discussing the Supreme Court's holding in Riley v. California and its impact on school cell phone searches.
- Riley v. California and Cell Phone Searches in School. Texas Juvenile Law Reporter, Volume 28, Number 3, September, 2014. An article discussing the Supreme Court's holding in Riley v. California and its impact on school cell phone searches.
- "Any Detectable Amount of Alcohol": Taking a Breath or Blood Specimen of a Juvenile. Texas Bar Journal, Volume 75, Number 2, February, 2012. A legal article analyzing the taking of a Breath or Blood Specimen of a Juvenile.
- Police Interactions with Juveniles. 20th Annual Juvenile Law Conference Article, February, 2007. This article won the Franklin Jones Best Continuing Legal Education Article for 2007, as voted on by the State Bar College Board of Directors, February 2, 2008.
- Juvenile Legislation. The San Antonio Lawyer, Sept–October 2007. An article hi-lighting the 2007 legislative changes in juvenile law.
- TYC and Proposed Legislation. State Bar Section Report Juvenile Law, Volume 21, Number 2, June 2007. An article discussing the proposed juvenile legislative changes from the 2007 legislative session.
- Mandatory Drug Testing of All Students, It's Closer Than You Think. State Bar Section Report Juvenile Law, Volume 20, Number 3, September 2006. An article discussing the Supreme Court's decisions on mandatory drug testing in schools.
- Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent. The San Antonio Lawyer, July–August 2003. An article discussing the requirements of parental presence during juvenile confessions. This article received a 2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation.
- Juvenile Law: 2003 Legislative Proposals. The San Antonio Defender, Volume IV, Issue 9, April 2003. An early look at proposed Juvenile Legislation for this 2003 session.
- A Synopsis of Earls. The San Antonio Defender, Volume IV, Issue 9, April 2003. A synopsis of the Supreme Court's decision in *Board of Education v. Earls* and the random drug testing of students involved in extracurricular activities.

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CASELAW UPDATE

ADJUDICATION PROCEEDINGS—

Nash v. State, MEMORANDUM, No. 11-13-00340—CR, 2016 WL 368353, Tex.Juv.Rep. Vol. 30, No. 2 ¶ 16-2-2 (Tex.App.-Eastland, 1/28/2016).

A TRIAL COURT DOES NOT HAVE A DUTY TO ADMONISH A DEFENDANT THAT A GUILTY PLEA HAS THE CONSEQUENCE OF POTENTIALLY ENHANCING HIS PUNISHMENT IN A SUBSEQUENT CASE.

Facts: On June 12, 2012, three armed men robbed a 7–Eleven convenience store in Wichita County. Surveillance video depicted three men in masks entering the 7–Eleven convenience store with a long rifle or shotgun, taking money from the cashier, and taking DVDs from the front counter. Appellant's half-brother, Kadeem Emmers, admitted to participating in the robbery. He identified Appellant and Appellant's cousin, Quawannocci Moore, as his accomplices. Emmers was given a plea deal, which involved a twenty-three-year sentence for aggravated robbery, in exchange for his testimony at Appellant's trial. Appellant's mother, Michelle Nash, testified that the three men were at her home before the robbery, left around midnight, and returned two hours later with money and DVDs.

In his third issue, Appellant challenges the use of his prior juvenile felony adjudication to enhance the applicable punishment range for his conviction for a first-degree felony. See Thompson v. State, 267 S.W.3d 514, 517 (Tex.App.–Austin 2008, pet. ref'd) (explaining how a juvenile felony adjudication can be used to enhance the minimum punishment range for a first-degree felony). He asserts that the trial court in the juvenile proceeding failed to admonish him that a juvenile plea could be used against him in a subsequent adult adjudication. Appellant contends that the prior juvenile felony adjudication deprived him of the right to have the jury grant him community supervision because his minimum term of confinement was a term of fifteen years. See id.

At the punishment phase, the State offered into evidence various documents from the juvenile proceeding, including the stipulation of evidence, waiver of jury trial, judgment, waiver of appeal, and order of commitment. These documents indicate that Appellant was represented by counsel in the juvenile proceeding and that he did not contest the State's allegation of delinquent conduct or the trial court's imposition of the sentence.

Held: Affirmed

Memorandum Opinion: On appeal, Appellant is essentially making a collateral attack on his prior juvenile felony adjudication. A prior conviction used to enhance a subsequent offense may only be collaterally attacked on direct appeal of the subsequent conviction if the prior conviction is void. Rhodes v. State, 240 S.W.3d 882, 887 (Tex.Crim.App.2007). When prior convictions are collaterally attacked, the judgments reflecting those prior convictions are presumed to be regular, and the accused bears the burden of overcoming that presumption by making an affirmative showing that error occurred. Breazeale v. State, 683 S.W.2d 446, 450 (Tex.Crim.App.1985) (op. on reh'g). The presumption of regularity applies to a collateral attack of a judgment of conviction for an offense committed as a juvenile when that judgment is used to prove an enhancement allegation. Johnson v. State, 725 S.W.2d 245, 247 (Tex.Crim.App.1987).

Appellant contends that the trial court in the juvenile proceeding should have admonished him about the potential effect of his guilty plea on a subsequent criminal proceeding. However, Appellant did not provide the trial court or this court with a reporter's record from the juvenile proceeding. Furthermore, in Green v. State, the Court of Criminal Appeals held that a trial court does not have a duty to admonish a defendant that a guilty plea has the consequence of potentially enhancing his punishment in a subsequent case. 491 S.W.2d 882, 883 (Tex.Crim.App.1973).

Conclusion: Thus, the fact that Appellant was, possibly, not warned by the trial court in the juvenile proceeding prior to entering a guilty plea that the adjudication might later be used for enhancement did not preclude the State from later using the adjudication for enhancement purposes. Id. We conclude that the trial court did not abuse its discretion by its implicit determination that Appellant's prior juvenile adjudication was not void. We overrule Appellant's third issue. We affirm the judgment of the trial court.

APPEALS—

Mitchell v. State, MEMORANDUM, No. 01-15-00397-CR, 2016 WL 4055433, Tex.Juv.Rep. Vol. 30, No. 4 ¶ 16-4-1 [Tex. App.—Houston (1st Dist.), 7/28/2016].

AN INEFFECTIVE ASSISTANCE OF COUNCIL CLAIM WILL FAIL WHERE THE RECORD IS SILENT AS TO WHY TRIAL COUNSEL DID NOT OBJECT TO THE ADMISSION OF DEFENDANT'S JUVENILE PROBATION RECORDS.

Facts: Two off-duty police officers were working a private security job patrolling an apartment complex in west Houston. As they drove through the parking lot, they encountered Mitchell, who was standing between two parked vehicles. Both officers saw Mitchell take a handgun from his pocket and place it on the ground. When they stopped to investigate and secure the weapon, Mitchell told them that he did not live at the apartment complex and that he had a prior felony conviction. He was arrested and charged with unlawful possession of a firearm.

Both officers identified Mitchell at trial, and both testified that it was daylight, they had a clear view of him, and they saw him remove a gun from his pocket and put it on the ground. The gun was loaded. Mitchell testified and denied having any connection to the gun. He testified that he was present and that the officers discovered the gun hidden under a bush near where he had been standing. Mitchell stipulated that he previously had been convicted of the felony offense of attempted possession of a prohibited weapon. On cross-examination, he also admitted that he previously had been convicted of burglary of a habitation. The jury found Mitchell guilty of possession of the weapon.

During the punishment phase of trial, the State introduced additional evidence of Mitchell's criminal history, including acts committed as a minor. In May 2008, when he was 16 years old, he committed the felony offense of burglary of a habitation with intent to commit theft. He was placed on probation for one year, which had been scheduled to end in June 2009. In September 2008, he was placed in boot camp after violating the conditions of probation, and after several rules infractions, he was transferred to the Texas Youth Commission in January 2009. The juvenile probation records also included references to gang involvement.

In April 2009, when he was 17 years old, Mitchell was convicted of illegally carrying a weapon, a class A misdemeanor. In May 2009, he evaded detention, a class B misdemeanor, to which he pleaded guilty. In July 2009, he committed burglary of a habitation. In April 2010, he pleaded guilty to that offense and was sentenced to two years in prison. In June 2011, he attempted to possess a prohibited weapon, a state jail felony for which he was sentenced to one year in jail. In July 2012, he pleaded guilty to the class B misdemeanor of possession of less than two ounces of marijuana.

In July 2014, Mitchell committed the offense charged in this case. He was 22 years old. Mitchell's brother, a security guard and volunteer firefighter, testified that two months later, Mitchell stole a handgun from his truck. He also testified that he tried to have the charges against Mitchell dropped.

Mitchell did not introduce any evidence during the punishment phase of trial. However, in closing argument, his trial counsel encouraged the jury to consider the probation records for evidence of the social, emotional, and educational factors that affected Mitchell's childhood. His parents separated when he was 12 years old, after which his family life became chaotic. His relationship with his father was strained, and he did not see his mother often. Child Protective Services was involved twice with the family due to outcries made by his sister, however Mitchell denied there was any abuse and stated that his sister had fabricated the allegations. When he was in the seventh grade, Mitchell saw a man shot to death. He also began associating with "Crips" gang members, though a gang assessment showed that both Mitchell and his father denied that he was a member of a gang. Mitchell had no tattoos, and his father said that he had not observed anything that showed his son was a member of a gang. In addition, despite a "high average" IQ, Mitchell had fallen far behind in school. By tenth grade, he read at a third-grade level and performed at a sixth-grade level for math. While in custody, he was diagnosed with a reading disorder and an unspecified learning disorder.

The jury found the enhancement allegation true, and it assessed punishment at 12 years in prison, which is within the statutory penalty range of two to 20 years. Mitchell appealed.

Held: Affirmed

Memorandum Opinion: Claims that a defendant received ineffective assistance of counsel are governed by the standard announced by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Strickland mandates a two-part test: (1) whether the attorney's performance was deficient, i.e., whether counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and if so, (2) whether that deficient performance prejudiced the party's defense. 466 U.S. at 687, 104 S. Ct. at 2064. "The defendant has the burden to establish both prongs by a preponderance of the evidence; failure to make either showing defeats an ineffectiveness claim." Shamim v. State, 443 S.W.3d 316, 321 (Tex. App.–Houston [1st Dist.] 2014, pet. ref'd) (citing Lopez v. State, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011)); accord Mitchell v. State, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and the appellant bears the burden to overcome the presumption that, under the circumstances, the challenged action was a result of sound trial strategy. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. An accused is not entitled to perfect representation, and a reviewing court must look to the totality of the representation when gauging trial counsel's performance. Frangias v. State, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

A claim of ineffective assistance of counsel must be "'firmly founded in the record and the record must affirmatively demonstrate the meritorious nature of the claim.'" Menefield v. State, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting Goodspeed v. State, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)); accord Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "It is a rare case in which the trial record will by itself be sufficient to demonstrate an ineffective-assistance claim." Nava v. State, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013). The record's limitations often render a direct appeal inadequate to raise a claim of ineffective assistance of counsel, as trial counsel is unable to respond to any articulated concerns. See Goodspeed, 187 S.W.3d at 392. Ordinarily, trial counsel should be given "an opportunity to explain his actions before being denounced as ineffective." Rylander v. State, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). Therefore, when the record is silent as to trial counsel's strategy, a reviewing court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." Goodspeed, 187 S.W.3d at 392 (quoting Garcia v. State, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). Rather, when direct evidence of trial counsel's strategy is unavailable, "we will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined." Lopez v. State, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

In his ineffective assistance of counsel claim, Mitchell challenges counsel's failure to object to statements made on ten of the more than 200 pages admitted from his juvenile record:

1. A reference to an affidavit not included in the records, which stated that Mitchell violated the rules of his juvenile placement 33 times in less than three months. These violations include disruption, verbal and physical altercations, failure to follow instructions, and disrespect.
2. An allegation that Mitchell had stolen his father's company vehicle and run away.
3. An allegation that Mitchell was arrested for participating in a "gang fight."
4. An allegation of truancy from school.
5. An allegation that neither Mitchell's father nor his probation officer trusted him.
6. Assertions that Mitchell had a history of "suspensions from school, anger and aggression, gang involvement, substance abuse, and run away."
7. A psychological evaluation stating that Mitchell is in the "Crips" gang, failed ninth grade, and is combative with his father.
8. A statement that Mitchell admitted being a Crip.
9. A report signed by a clinician and clinical supervisor stating that Mitchell admitted to witnessing a murder, playing with fire, smoking marijuana, and becoming "aggressive."
10. More than 14 references to gang affiliation, failure to cooperate in school, and poor grades.

On appeal, he complains that these statements were testimonial in nature and that he had no opportunity to cross-examine the witnesses who made the observations, allegations, or conclusions stated in the records that were admitted without objection. Because this information was "unflattering," Mitchell reasons that his trial counsel could have had no possible strategy.

Anticipating an argument that his counsel's strategy might have been to abstain from objecting because the juvenile record in documentary form would be "less harmful than insisting that live witnesses testify," he notes that the State had not subpoenaed any witnesses and there was no sign that witnesses were prepared to testify. This argument does not overcome the presumption of reasonable professional assistance and a sound trial strategy. The absence of subpoenas is not proof that witnesses were unavailable to testify, especially when the witnesses were aligned with the prosecution and might not require a subpoena to compel their testimony at trial. Moreover, a claim of ineffective assistance must be firmly founded on what evidence appears in the record, not on speculative inferences from what may be absent from it. See Lopez, 343 S.W.3d at 142–43.

The record is silent as to why trial counsel did not object to the admission of Mitchell's juvenile probation records. The record could have been supplemented by a hearing on a motion for new trial, but no motion for new trial was filed. Mitchell has failed to meet his burden under the first prong of Strickland to show that his allegations of ineffective assistance of counsel are firmly founded in the record. See Menefield, 363 S.W.3d at 592. This record is inadequate to overcome the presumption of reasonable performance by Mitchell's trial counsel, who has had no opportunity to respond to the complaints made for the first time on appeal. See Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Moreover, it is not difficult to imagine reasonably sound motivations for trial counsel to have refrained from objecting to the admission of the juvenile probation records, including that they contained other evidence of Mitchell's troubled childhood that he used to plead for leniency from the jury during closing arguments in the punishment phase of trial. See Lopez, 343 S.W.3d at 143.

Mitchell argues that Smith v. State, 420 S.W.3d 207 (Tex. App.–Houston [1st Dist.] 2013, pet. ref'd), compels reversal of his conviction. He contends his case is factually similar to Smith, which held that the admission of disciplinary records from the Texas Youth Commission that contained subjective observations about the defendant from witnesses who did not testify at trial, violated the defendant's rights under the Confrontation Clause, and required reversal. Smith, 420 S.W.3d at 225–26.

Smith is procedurally distinguishable and inapposite because it was not a case involving a claim of ineffective assistance of counsel.

Conclusion: When the issue on appeal is ineffective assistance of counsel, we cannot reverse unless both prongs of Strickland are satisfied. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. We conclude that Mitchell has not satisfied the first prong of the Strickland analysis, and we need not consider whether he has satisfied the requirements of the second prong. See Lopez, 343 S.W.3d at 143. Accordingly, we overrule Mitchell's sole issue. We affirm the judgment of the trial court.

COLLATERAL ATTACK—

In re Texas Board of Pardons and Paroles, No. 14-16-00223-CV, --- S.W.3d ----, 2016 WL 3134315, Tex.Juv.Rep. Vol. 30, No. 3 ¶ 16-3-7 [Tex.App.—Houston (14th Dist.), 6/2/2016].

BOARD OF PARDONS AND PAROLES REQUEST FOR MANDAMUS ON JUVENILE COURT TO VACATE HABEAS ORDER GRANTED BY APPELLATE COURT.

Facts: The real party-in-interest is Z.Q. When Z.Q. was a juvenile, he received an adjudication of delinquent conduct for committing both a capital murder and an attempted capital murder in Cause No. 86,707, for which he received two determinant sentences of 40 years. Z.Q. was initially placed in the custody of the Texas Youth Commission (TYC).

In October of 1997, the juvenile court determined that Z.Q. should be transferred from the TYC to the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ–CID) to complete his sentences. Z.Q. is currently serving his 40–year determinate sentences in the custody of TDCJ–CID.

His initial parole review date was in May of 2014. In conducting its parole vote, the Board used the extraordinary vote provisions of section 508.046 of the Government Code, which, for release, requires that at least two-third of the members of the Board vote in favor of release. None of the seven board members voted to release Z.Q. The Board set his next parole review for June of 2017.

On July 2, 2015, Z.Q. filed an original application for writ of habeas corpus in the original juvenile court, pursuant to Article V, § 8 of the Texas Constitution (the Application). In the Application, Z.Q. asserted that the Board violated his constitutional right to due process by misapplying the Government Code provisions governing parole panels and votes. He argued that the Board erred in determining his parole under section 508.046, which requires a two-thirds majority vote of the entire Board if the inmate was convicted of an offense under certain sections of the Penal Code. See Tex. Gov.Code § 508.046 (West 2012). Z.Q. argued that section 508.046 did not apply to him because he was not convicted of capital murder and is not a convicted capital felon. Z.Q. argued that he instead is entitled to have his parole determined by a simple majority vote of a three-member panel as provided for by section 508.045.

The Application contains a "Certificate of Service" that a copy of the Application has been served on the District Attorney for Harris County. Counsel for Z.Q. also sent the Application by certified mail to Bettie Wells, the General Counsel for the Board, along with a letter dated January 13, 2016 stating "A hearing is set on February 2, 2016, at 9:30 am on the application in the 315th District Court."

The Board filed an affidavit with this court stating that (1) it has no record of receiving service of citation for the Application, as provided for by Rule 99 of the Texas Rules of Civil Procedure, (2) it has never filed a waiver of citation, and (3) neither the Board, nor its authorized attorneys appeared in the habeas litigation.

On February 4, 2016, the juvenile court heard the Application and signed an "Order on Application for Writ of Habeas Corpus" that ordered the Board to: (1) not subject Z.Q.'s parole determination to the inapplicable extraordinary vote provisions of Texas Government Code § 508.046; (2) proceed to have his parole determination made by a standard three member parole panel as statutorily required under Texas Government Code § 508.45, and (3) re-review Z.Q.'s consideration for parole consistent with the provisions of Texas Government Code § 499.053(d) (the "Habeas Order").

The Board's petition for writ of mandamus seeks to vacate the Habeas Order.

The Board's petition states three issues or arguments for vacating the Habeas Order:

1. The Order is void because the juvenile court had no personal jurisdiction over the Board—a non-party to the civil proceeding below—to compel prospective and permanent actions of the Board.
2. The Order is void because it exceeded both the habeas and mandamus power of the juvenile court.
3. In the alternative, the Order should be vacated because the juvenile court failed to identify a constitutionally protected liberty interest upon which a cognizable habeas application might be granted, and no such liberty interest exists.

Opinion: A. Z.Q. was not required to serve the Board with citation for the juvenile court to acquire habeas jurisdiction.

In its first issue, the Board argues that the juvenile court lacked jurisdiction to issue the Habeas Order because Z.Q. was allegedly required to, but did not, obtain issuance and service of citation as provided for by Rules 99 and 106 of the Texas Rules of Civil Procedure. It is true that in a normal civil suit, in order to issue a binding order against a person, a court must possess personal jurisdiction through service and citation over that person. See In re E.R., 385 S.W.3d 552, 563 (Tex.2012) (orig.proceeding); CSR Ltd. v. Link, 925 S.W.2d 591, 594 (Tex.1996).

An application for a writ of habeas corpus is not a normal civil suit, however. See McFarland v. Johnson, 27 Tex. 105, 107 (1863) (a procedure by habeas corpus can in no legal sense be regarded as a suit or controversy between private parties.) For example, a respondent in a habeas proceeding has no right of appeal. Id. In Ex parte Ramzy, 424 S.W.2d 220, 223 (Tex.1968) (orig.proceeding), the court held: "A procedure by habeas corpus to be relieved of imprisonment ... can in no legal sense be regarded as a suit or controversy between private parties. In such a proceeding the petition for a writ of habeas corpus is for the relief of the Prisoner and the Prisoner only." Id. The writ of habeas corpus is "designed for the purpose of giving a speedy remedy to one who is unlawfully detained." Id.

Neither party has cited any case that outlines the service requirements in a habeas action in a juvenile trial court. In a habeas action stemming from a felony judgment, service of the application can be by certified mail or personal service. See Tex.Code Crim. Proc. Ann. art. 11.072 § 5(a) (West 2015). Article 11.07 does not apply to this habeas action, however: "Because juvenile proceedings are civil matters, the Court of Criminal Appeals has concluded that it lacks jurisdiction to issue extraordinary writs in such cases, even those initiated by a juvenile offender who has been transferred to the Texas Department of Criminal Justice because he is now an adult." In re Hall, 286 S.W.3d 925, 927 (Tex.2009) (orig.proceeding) (citing Ex parte Valle, 104 S.W.3d 888, 889 (Tex.Crim.App.2003)).

When a party files an application for a writ of habeas corpus in the appellate court, service of the application is governed by the normal rules of appellate procedure. Nothing in the rules of appellate procedure requires the issuance and service of citation. See Tex.R.App. P. 9.5; Tex.R.App. P. 52. Rather, the rules of appellate procedure only require that at the time of a document's filing, the filing party must serve a copy on all parties to the proceeding: (1) electronically, if the document is filed electronically, and (2) by mail, fax, or email if the document is not filed electronically. See Tex.R.App. P. 9.5. Thus, in other analogous habeas proceedings, service of the application by mail is sufficient; issuance and service of citation are not required.

Moreover, the Board's position that it must become an actual party to the action by the issuance and service of citation is belied by the actions of the Court of Criminal Appeals, which has granted habeas relief against the Board even when the Board was not made a party to the action through issuance and service of citation. See e.g., Ex parte Geiken, 28 S.W.3d 553, 560–61 (Tex.Crim.App.2000) (issuing habeas order that required the Board to again consider the applicant for mandatory release and provide him with timely notice that such consideration will occur); Ex parte Retzlaff, 135 S.W.3d 45, 51 (Tex.Crim.App.2004) (issuing habeas order that required the Board to provide the applicant with a new review for mandatory release along with certain notices at certain times); Ex parte Shook, 59 S.W.3d 174, 176 (Tex.Crim.App.2001) (same).

Z.Q. served both the State and the Board with the Application by certified mail.1 Thus, the Board had notice and the option of either relying on the district attorney to oppose the Application on its behalf or appearing at the hearing and opposing the Application.2 We conclude that this is sufficient service.

B. The Habeas Order did not exceed the power of the juvenile court for the reasons argued by the Board.
In its second issue, the Board makes a number of different arguments. First, the Board argues that the Habeas Order is void because it goes beyond the relief that may be granted under article 11.44 of the Code of Criminal Procedure. The Board argues that in a habeas proceeding, article 11.44 limits the court to only three remedies: (1) remanding the party to custody, (2) admitting him to bail, or (3) discharging him from custody. See Tex.Code Crim. Proc. art. 11.44 (West 2016).

Although article 11.44 provides for certain remedies, it does not state that these are the only remedies that a court may grant in a habeas proceeding. In fact, on several occasions, the Court of Criminal Appeals has granted habeas relief against the Board other than that specified in article 11.44. See, e.g., Ex parte Geiken, 28 S.W.3d at 560–61 (issuing habeas order that required the Board to again consider the applicant for mandatory release and provide him with timely notice that such consideration will occur); Ex parte Retzlaff, 135 S.W.3d at 51 (issuing habeas order that required the Board to provide the applicant with a new review for mandatory release along with certain notices at certain times); Ex parte Shook, 59 S.W.3d at 176 (same).

Second, the Board argues that the juvenile court had no authority to issue habeas relief against the Board because Z.Q. is not in the custody of the Board, but is in the custody of TDCJ–CID. This argument is misplaced because Z.Q.'s Application did not seek an order requiring the Board to release him from custody, but an order

requiring the Board to make his parole determination by the simple majority vote of a three-member panel as provided by section 508.45, which is a permissible habeas order under the cases cited above.

Finally, the Board argues that the Habeas Order is void to the extent that it grants mandamus relief because only the Texas Supreme Court has authority to issue a writ of mandamus against an executive department of the State such as the Board. See Tex. Gov't Code § 22.002(c) (West 2016). This argument is also misplaced because the Habeas Order does not grant mandamus relief and the Board has cited no cases that would compel us to consider this order a mandamus.

C. Z.Q. failed to identify a constitutionally protected liberty interest on which a cognizable habeas application might be granted.

The Board argues that the juvenile court abused its discretion in granting habeas relief because Z.Q. did not establish that the Board violated any of Z.Q.'s constitutional rights. We agree.

"Habeas corpus is reserved for those instances in which there is a jurisdictional defect in the trial court which renders the judgment void, or for denials of fundamental or constitutional rights." Ex parte Carmona, 185 S.W.3d 492, 494 (Tex.Crim.App.2006). "A writ of habeas corpus is available only for relief from jurisdictional defects and violations of constitutional or fundamental rights." Ex parte Douthit, 232 S.W.3d 69, 71 (Tex.Crim.App.2007).

In his Application, Z.Q. argued that the Board violated his constitutional right to due process by misapplying the statues governing parole panels and votes. He argued that the Board erroneously applied the supermajority vote provision of section 508.046 of the Government Code, when instead it should have applied the simple majority vote provision of section 508.045.

However, a writ of habeas corpus generally is not a proper remedy for a violation of a procedural statute, even a "mandatory" statute. Ex parte McCain, 67 S.W.3d 204, 206 (Tex.Crim.App.2002). Not all government decisions implicate constitutional rights, and not all such decisions are subject to review by habeas corpus. Ex parte Geiken, 28 S.W.3d at 556. Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision-making must comply with standards that assure error-free determinations. Id. "Many decisions simply are not cognizable on habeas corpus review." Id. at 557.3

The test for determining whether a claim is cognizable on habeas corpus is explained by the Court of Criminal Appeals in Geiken. First, the Court held that an applicant can mount a due process challenge to the procedures used by the parole board in considering whether to release the applicant under the mandatory supervision statute, section 508.149 of the Government Code. Ex parte Geiken, 28 S.W.3d at 557. The Court then turned to the next question: whether the procedures used by the Board in deciding whether to release an eligible offender to mandatory supervision provide sufficient procedural due process safeguards in light of any liberty interest created under the statute. Id. at 558. "This is a two-step inquiry. First, we must decide if any liberty interest is created by the Texas statute. If not, then no procedural due process safeguards are required." Id.

The statute at issue in Geiken provides that a prisoner shall be released to mandatory supervision when his actual time served and accrued good conduct time add up to his total sentence. Tex. Gov't Code Ann. § 508.147(a). Unlike parole, which requires that the Board vote in favor of release, the mandatory supervision statute requires that the offender be released absent Board action to the contrary. Id. The Court of Criminal Appeals noted: "The Supreme Court has determined that a liberty interest is created when state statutes use such mandatory language." Ex parte Geiken, 28 S.W.3d at 558 (citing Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 11–12 (1979)). In Greenholtz, the United States Supreme Court held that statutory language directing that an inmate shall be released unless certain reasons were found to deny release gave rise to a presumption that parole release would be granted, requiring some constitutional protection. Id. at 558. Accordingly, the Court of Criminal Appeals held in Geiken that "there is a protectable liberty interest in mandatory supervision release" because the statute requires that the offender be released absent Board action to the contrary. Id. at 558–59.

Thus, under Geiken and Greenholtz, a statute pertaining to parole only creates a protectable liberty interest if the statute contains language mandating the release of the inmate absent contrary action by the Board. Sections 508.045

and 508.046 of the Government Code relied upon by Z.Q., unlike section 508.147 at issue in Geiken, do not contain any language that mandates release of the inmate if certain conditions are met. Rather, sections 508.045 and 508.046 merely state the voting requirements for parole panels and do not impose any obligation on the members of the panel to grant parole and release the inmate. Accordingly, under Geiken and Greenholtz, sections 508.045 and 508.046 do not create any liberty interest that is cognizable on habeas corpus. The juvenile court abused its discretion by misapplying the law to implicitly hold otherwise.

This conclusion is supported by federal case law. In Garcia v. Stephens, No. 2:13–CV–222, 2014 U.S. Dist. LEXIS 78764 (S.D.Tex. Apr. 9, 2014), the court was presented with the same issue presented in this case. The petitioner argued, like Z.Q., that the plain language of the Texas Government Code required review for parole by a three-member panel in accordance with section 508.045, and that the Board wrongly reviewed his parole eligibility under the super-majority provisions of section 508.046. Id. at *17. The district court held that any misapplication of these statutes is not cognizable on habeas review because the petitioner has no liberty interest in obtaining parole. Id. at *18–19. "States have no duty to establish a parole system and a prisoner has no constitutional right to be released before the expiration of his sentence." Id.; see also Johnson v. Rodriguez, 110 F.3d 299, 308 (5th Cir.1997) ("It is therefore axiomatic that because Texas prisoners have no protected liberty interest in parole they cannot mount a challenge against any state parole review procedure on procedural (or substantive) Due Process grounds."). The Fifth Circuit has repeatedly recognized that the Texas parole statutes create no constitutional right to release on parole. See Williams v. Briscoe, 641 F.2d 274, 277 (5th Cir.1981); Allison v. Kyle, 66 F.3d 71, 74 (5th Cir.1995); Orellana v. Kyle, 65 F.3d 29 (5th Cir.1995); Gilbertson v. Tex. Bd. of Pardons & Paroles, 993 F.2d 74, 75 (5th Cir.1993); Creel v. Keene, 928 F.2d 707, 712 (5th Cir.1991); see also Blassingame v. Stephens, CV H–16–0478, 2016 WL 828149, at *2 (S.D.Tex. Feb. 29, 2016) ("Because [the inmate] cannot demonstrate that he was denied parole in violation of a constitutionally protected liberty interest, he is not entitled to habeas corpus relief on this issue").

None of the decisions cited by Z.Q. in his response hold that the Board's alleged misapplication of section 508.046 constitutes a violation of his constitutional rights for which habeas relief is available. Because section 508.045 of the Government Code (which provides for a simple majority vote by a three-member parole Board panel) does not create a liberty interest that is cognizable on habeas corpus review, the juvenile court's Habeas Order is an abuse of discretion.

Conclusion: Because the Habeas Order is an abuse of discretion for which there is no remedy by appeal, the Board is entitled to mandamus relief. We therefore direct the juvenile court to vacate its "Order on Application for Writ of Habeas Corpus" signed on February 4, 2016.

CONFESSIONS—

Gentry v. State, MEMORANDUM, No. 01-14-00335-CR, NO. 01-14-00336-CR, 2016 WL 269985, Tex.Juv.Rep. Vol. 30, No. 2 ¶ 16-2-1B [Tex.App.—Houston (1st Dist.), 1/21/16].

WRITTEN STATEMENT HELD ADMISSIBLE WHERE VIDEO RECORDED STATEMENT TAKEN AT THE SAME TIME WAS NOT.

Facts: Around 3:00 a.m. on January 19, 2012, Masario Garza was driving to work on Highway 90 in Fort Bend County. Highway 90 has four lanes, with two on each side of the road. Garza was in the outside lane. As he approached the intersection with FM359, Garza slowed down for a red light. Garza noticed that a gray truck was to his left in the inside lane. The truck was being driven by 22–year–old Daniel Desantiago–Caraza. Fourteen-year-old Damion Gentry was in the passenger seat. The truck stopped at the intersection, and Gentry got out of the passenger side.

Initially, Garza thought that Gentry had gotten out of the truck to ask him directions or to check something in the back of the truck. But then, Garza saw that Gentry was holding gun in his right hand. When he saw the gun, Garza immediately stepped on the gas to get away from the scene. Garza later testified that he fled because he thought that Gentry was "going to rob me or something."

As Garza left the scene, Gentry shot into the driver's side window of Garza's car, shattering the glass. The glass

cut Garza's cheek and hand.

Traveling at a high rate of speed, Garza continued down Highway 90 in the outside lane. When he looked in his rearview mirror, Garza saw that the truck was in the inside lane and was getting closer. After a couple of miles, the truck, still in the inside lane, caught up to Garza and passed him. As the truck passed, Garza heard two more gunshots. The truck then made a U-turn through the grassy median and headed in the opposite direction on the highway. As the truck passed him heading in the other direction, Garza heard two more gunshots.

Garza pulled into a restaurant's parking lot at the direction of the 9–1–1 operator, with whom Garza had been speaking during the incident. The police soon arrived, and Garza told them what had occurred.

At that same time, Nelson Alberto Mejia Escobar was performing his job of cleaning the parking lot of an Academy store in the Brazos Shopping Center. Around 3:30 a.m., Desantiago–Caraza and Gentry pulled into the Academy parking lot in the gray truck and approached Escobar. While still in the truck, Gentry spoke to Escobar in English. Escobar told Gentry in Spanish that he did not speak English. Gentry then got out of the truck and pointed a gun at Escobar's head. In Spanish, Gentry told Escobar to give him $150. When Escobar indicated that he did not have any money, Gentry told him to empty his pockets. The only item that Escobar had in his pockets was the keys to his truck. Gentry demanded Escobar's keys, and Escobar gave him the keys. While he was emptying his pockets, Gentry continued to point the gun at different parts of Escobar's body. During this time, Escobar repeatedly begged Gentry not to shoot him and asked Gentry "[to] have mercy on me" and "[to] have pity on me."

Gentry then lowered the gun, but Desantiago–Caraza told Gentry to shoot Escobar. Gentry turned the gun around with the grip facing outward. Gentry raised his arm to strike Escobar with the gun, but Escobar lifted his arm to deflect the blow. Escobar hit Gentry's hand holding the gun, pushing the gun to the side.

Escobar turned and ran, and Gentry ran after him. As he chased Escobar, Gentry shot at Escobar's back. Escobar continued to run, and Gentry continued to shoot at him. Gentry shot at Escobar three or four times. As he ran, Escobar tripped and fell to the ground. Gentry stopped shooting. Escobar heard Gentry say to Desantiago–Caraza, "I already killed him." Gentry and Desantiago–Caraza then left the parking lot in the gray truck.

Meanwhile, around 3:30 a.m., Rosenberg Police Officer J. Thompson had gone to the Summer Lakes Subdivision to assist the fire department with a car fire. Officer Thompson was not needed at the scene of the fire but was asked by an arson investigator to check on a suspicious vehicle that had been seen at a nearby apartment complex that was under construction. The apartment complex was behind the Brazos Shopping Center where the Academy was located. Officer Thompson determined that the suspicious vehicle was the construction crew working at the building site. While at the construction site, Officer Thompson heard three or four gunshots coming from the parking lot in front of the Academy. He also heard tires squealing. Officer Thompson saw the gray pickup truck, being driven by Desantiago–Caraza, leaving the Academy parking lot. He then saw the truck run through a stop sign and turn into the Summer Lakes Subdivision.

Officer Thompson followed the truck into the subdivision. As the truck was stopping in front of a residence, Officer Thompson activated his emergency lights to initiate a stop, which also activated the patrol car's video-recording equipment.

The truck stopped in front of a house. Officer Thompson instructed Desantiago–Caraza to get out of the truck. Officer Thompson was talking to Desantiago–Caraza when he heard over the police radio that there had been a shooting at Academy. Officer Thompson then ordered Gentry out of the truck, and he made both Gentry and Desantiago–Caraza lie on the ground. Officer Thompson drew his duty weapon and decided that he would wait for backup officers to arrive. Desantiago–Caraza and Gentry began conversing in Spanish. Officer Thompson told them to be quiet. Gentry suddenly stood up, ran to the front of the truck, and then fled the scene.

Rosenberg Police Detective R. Leonhardt then arrived at the scene. He viewed the video taken from Officer Thompson's patrol car, showing the stop of truck, the detention of Desantiago–Caraza and Gentry, and Gentry's flight from Officer Thompson. When he saw the video, Detective Leonhardt recognized Gentry.2 The police searched their records and determined Gentry's last known address. Detective Leonhardt and other officers went to the address and found that Gentry still lived there.

Gentry's step-father gave his consent to search the home. The officers searched the home for the gun that had been used in the robberies but did not find it. Gentry overheard the officers talking about the gun and told them that the gun had been thrown from the truck at the front of the subdivision.

The officers took Gentry to a juvenile processing office where he was read his statutory Miranda-style rights by Justice of the Peace Mary Ward, acting as a magistrate. Gentry then gave both an oral, recorded statement and a written statement to the police. Gentry reviewed the written statement with Judge Ward and signed it in her presence.

In the written statement, Gentry acknowledged that he been present during the incidents with Garza and Escobar; however, Gentry minimized his involvement, indicating that Desantiago–Caraza had been the primary actor with regard to each. Gentry claimed that it had been Desantiago–Caraza who had fired the gun at Garza. He also claimed that it had been Desantiago–Caraza who had struck Escobar and had first fired the gun at Escobar. Gentry admitted that, after Desantiago–Caraza had fired the gun one time, he also had fired it; but Gentry claimed that he had fired the gun only at the ground.

In his written statement, Gentry also admitted involvement in the car fire in the Summer Lakes Subdivision, which Officer Thompson had been dispatched to investigate. Gentry claimed that Desantiago–Caraza had set the fire with a lighter and that they stayed to watch the car bum. Gentry stated this had been before "the other events occurred."

The State filed a petition for waiver of the juvenile court's jurisdiction and discretionary transfer to criminal court for the aggravated-robbery offenses committed against Garza and Escobar. In November 2012, the juvenile court conducted a transfer hearing to determine whether it should waive its jurisdiction and transfer Gentry to criminal district court for prosecution as an adult.

During the three-day transfer hearing, the State presented the testimony of 11 witnesses. Shane Marvin, the court-liaison officer from the Fort Bend County Juvenile Probation Department, testified regarding Gentry's history in the juvenile system. Marvin had been assigned to supervise Gentry since February 2012. Over the months, Marvin had met with Gentry one or two times a week. Marvin also conducted a social history and home study evaluation for Gentry, ordered by the juvenile court and filed in the record.

Marvin stated that Gentry's first referral to the juvenile system was for running away in 2007 when Gentry was only 10 years old. Over the next five years, Gentry had 11 other referrals to the juvenile system. One of the referrals, in 2009, was for assault on a public servant. Gentry was placed on formal probation for that referral. Marvin testified that Gentry successfully completed that probation, but, during the term of the probation, Gentry had two violations, including a threat by Gentry to blow up his school.

Marvin testified that another of Gentry's referrals was for "Class C gang affiliation membership." Gentry was placed on formal probation for six months for that referral. Gentry ultimately completed that probation, but Marvin testified that, during the probationary term, Gentry received three violations and "an additional Class C citation for destruction of school classes."

With respect to Gentry's gang affiliation, Marvin testified that "over the course of a little bit less than 300 days since I supervised his case and reading his files, I've come to learn he's associated, affiliated, or a member of the Southwest Cholos." When asked what indicated Gentry was in a gang, Marvin explained that, in the past, Gentry had been found to possess certain indicia of gang association. For example, while he was on probation for gang affiliation, Gentry wore certain gang-related items such as a black and white bandana and an extra-long belt. He was also caught tagging textbooks and flashing gang signs in school in front of his teachers. In addition, Gentry had been found to have other indicia of gang affiliation such as writings, taggings, and drawings on his backpack and the number 13 on his belt. Marvin stated that Gentry also has three dots tattooed on his knuckle, which Marvin believed indicated gang affiliation.

At the November 2012 hearing, Marvin indicated that Gentry had been in a juvenile detention facility since the occurrence of the instant offenses in January 2012. Marvin testified that Gentry had been written up for 14 separate infractions since he has been in detention. These include write-ups for fighting and for assault of another child in the

facility. Marvin stated that, following the assault, Gentry had to be physically restrained.

In addition, Marvin testified regarding the numerous services that the juvenile system has provided Gentry over the years, prior to the commission of the instant aggravated-robbery offenses. These services included individual, group, and behavior-modification counseling, probation, substance abuse counseling, including inpatient treatment, mental health services, boot camp, and a mentorship program. Marvin agreed that Gentry has had "access to every type of rehabilitation program the [juvenile] department offers." Marvin testified that "at this point, you know, I think, it's fair to say that as a department, we have exhausted everything."

Marvin indicated that, if the court found that Gentry should remain in the juvenile system, Gentry was "absolutely not" a candidate for probation. With respect to why probation was not a good option for Gentry, Marvin testified:

[Gentry's] Being on probation two times, formal probation, having 12 referrals, having been placed by this department. You know, we talked about services, we talked about probably not even half of the services that he's actually received.
This child received—he's participated in the TCOOMMI turnaround program, male mentor program which I refer to as Ramp, acronym for that is Ramp. When he was at JJAEP, he was in life skills training. You know, where they pull kids and they try to give them simple, basic understanding of money, or balancing a checkbook.
JJAEP itself, you know, there's a component there, for lack of a better word, watered-down boot camp. So you know, he's been there. He's participated, he's had teachers, he's had drill instructors, he's had probation officers, he's had individual counseling, he's had family counseling, he's had grief counseling.
He has had multiple alcohol/drug assessments. He has had multiple sessions with alcohol drug counselors. He has had psychiatric evaluations; he has had psychological evaluations.
We have tried in hopes of keeping him at the house and not violating his terms of probation, we've attempted to place an electronic monitor on his ankle to keep him there; which, obviously, does not keep a person physically at the house. We've done anger management.
So when you ask me in reference to him being a candidate for probation, my personal opinion—and, I think, that the department would support me 100 percent that he is nowhere near being a candidate for probation.

Marvin also testified that Gentry could not be placed in one of the juvenile system's programs. He explained,

The child has been placed; and the child has been with us since 2007, age 10, up until 2012. That is a five-year span. One thing, and a really strong point is in regards to him being a candidate for placement, I want to go back to the protection of the public and the weapon being used in the commission of this alleged offense.
I don't think that a placement and let me just hit on that as far as not being a candidate for placement. Our placements have supervisors that have called around to the most severe, most restricted places that we have with regards to boot camp. He has called Grayson, he's called Hayes County, and he's called Nueces.
Based on the nature of this offense, based on the child's now pending arson charges, they're not going to accept a child into the facility like that. So that's just not departmental. There's not a placement that's going to take him.

Marvin testified, "Our department's recommendation is if [Gentry] remains in the juvenile system, that he be committed to the TJJD [Texas Juvenile Justice Department]" for confinement. With regard to how long Gentry would be committed to the TJJD, Marvin indicated that, given the nature of the instant offenses, the minimum amount of time Gentry would be committed to the TJJD was three years, though he could stay in the TJJD until he was 19 years old. Marvin testified that the TJJD, not the juvenile court, determined whether, after three years, Gentry could be released on parole. The juvenile court would not make that decision.

The State also offered the testimony and report of court-appointed forensic psychologist Dr. Karen Gollaher, who had interviewed and evaluated Gentry. Dr. Gollaher testified that testing showed Gentry's IQ to be 107, which is in the average range. Dr. Gollaher indicated that Gentry had a history of depression. She opined that Gentry did not suffer from any mental deficit or psychosis that would have affected his ability to know right from wrong when he committed the instant offenses. Dr. Gollaher indicated that she had seen nothing to indicate that Gentry was under any type of duress or coercion when he committed the offenses.

Dr. Gollaher testified that she had diagnosed Gentry with conduct disorder. She explained that conduct disorder

manifests itself by the individual "engaging in a pattern of defiance that's usually a cross environment that can be at school, legal, and at home which is a precursor to antisocial personality disorder." With regard to his behavior at home, Dr. Gollaher stated that Gentry had a history of running away.

Gentry had also displayed defiant behavior at school. Gentry told Dr. Gollaher that he had been suspended from school 10 to 15 times. At first, the suspensions were for acting out in class but later the suspensions were for fighting. Dr. Gollaher had learned that Gentry had been involved in numerous individual and gang-related fights. Dr. Gollaher testified that she had also learned that Gentry had been accused of choking a teacher, resulting in a referral to the juvenile system for assault on a public servant. Also taking the instant charges into consideration, Dr. Gollaher indicated that Gentry's history demonstrated a pattern of increasingly violent, aggressive, and escalating behaviors, which were of concern. Dr. Gollaher testified, "[C]ertainly when you see someone who's already engaged in a pattern of violent behavior, you're wondering, okay, what's next?"

Dr. Gollaher agreed that Gentry could benefit from rehabilitation, indicating that Gentry "needs help." But she also indicated that probation or other treatment based programs, such as boot camp, would not be appropriate for Gentry. She stated that Gentry had done well in the past when placed in a structured environment.

With regard to the length of time Gentry should be removed from society, the following exchange occurred between the State and Dr. Gollaher:

[The State:] Knowing then that the minimum length of commitment for the offense of aggravated robbery, and there were two of them, that the minimum length of commitment is three years; and that after three years, he could be released back into society, but that's the minimum.
What's your opinion as to whether or not that is the kind of timeframe that is appropriate for him to be in a structured environment and not risk the public or risk the greater community with this [escalation] of violent behavior?
[Dr. Gollaher:] I would be concerned about just three years.
[The State:] Does his history suggest a need for structure, you know, unfortunately in an incarcerated setting much longer than that of a three-year period?
[Dr. Gollaher:] Yes, ma'am.

In addition to expert evidence, the State presented the testimony of the following witnesses at the transfer hearing: (1) the complainants, Garza and Escobar; (2) the investigating police officers, including Officer Thompson, the detectives involved in arresting Gentry and taking his statements, and the arson investigator who investigated the car fire in which Gentry was involved; and (3) Judge Mary Ward, the magistrate who informed Gentry of his statutory rights before he made his statements to the police. The State has offered the following tangible evidence at the transfer hearing: (1) Gentry's written statement; (2) the video taken from Officer Thompson's patrol car during Gentry's and Desantiago- Caraza's detention, showing Gentry fleeing from Officer Thompson; and (3) the security video from the Academy parking lot, depicting the events surrounding the robbery of Escobar.

To defend against the waiver of jurisdiction, Gentry presented the testimony and report of forensic psychiatrist Dr. A. David Axelrad, who had been appointed by the juvenile court to aid the defense. In forming his opinions, Dr. Axelrad had relied on a neuropsychological evaluation of Gentry conducted by Dr. Larry Pollock. Dr. Pollock's report was included as part of Dr. Axelrad's report.

Dr. Axelrad testified that, after he had met with Gentry, he had requested Dr. Pollock to conduct a neuro-psychic examination because he had noticed that Gentry "was exhibiting some cognitive difficulties." In addition, Dr. Axelrad had learned that Gentry had a history of head injuries and substance abuse. Dr. Axelrad testified that this information was sufficient "to suggest to me that he might have some neuropsychological deficits that may be relevant for the Court to be aware of as it approaches this decision on adult certification." Dr. Axelrad stated that Dr. Pollock had concluded from the evaluation that [Gentry] has significant neuropsychological deficits, and intelligence processing speed, and executive functioning. He also found that his executive functioning deficits would affect his information processing, and make it difficult for him to comprehend and respond quickly. [Dr. Pollock] also arrived at conclusions that these deficits would have added an impact on his behavior at the time of the commission of these offenses.

Dr. Pollock also stated in his report that he had concerns about Gentry's "ability to survive in an adult prison

because of neuropsychological deficits, and his psychiatric problems." Dr. Axelrad testified that Dr. Pollock also "indicated that the kinds of cognitive difficulties that Damion Gentry is experiencing is amendable to cognitive rehabilitation," which should be done in a "juvenile setting." One of the programs that Dr. Pollock suggested in his report to rehabilitate Gentry was an outpatient program run by Dr. Pollock called "Project Reentry." Dr. Axelrad testified that the program would provide Gentry the cognitive treatment that he needs.

Dr. Axelrad further testified that he had consulted with Gentry's treating psychiatrist, Dr. Nithi, who, since Gentry had been in juvenile detention for the instant offenses, had diagnosed Gentry with bipolar disorder. Dr. Axelrad stated that bipolar disorder is a treatable condition. He testified that Dr. Nithi had placed Gentry on two medications for his bipolar disorder and that Gentry was doing well on the medications. Dr. Axelrad stated that Gentry's behavior had improved.

Dr. Axelrad pointed out Gentry was not being treated for either his bipolar disorder or his neuropsychological deficits when the instant offenses were committed. Dr. Axelrad also pointed out that Gentry had "been abusing alcohol and marijuana at the time this occurred" and had history of abusing alcohol and marijuana.

With respect to Gentry's "maturity and sophistication," Dr. Axelrad testified as follows:

Damion Gentry is an adolescent who has a significant or relatively severe bipolar disorder. He has this disorder, and he has had this disorder probably for the past five to seven years, just based upon the history he shared with me. He has a history of several head injuries. And those head injuries may very well be the reason in part for the neuropsychological deficits that Dr. Pollock has diagnosed in this case, that he has incorporated in two reports to me and to the Court. So because of the problems that he's experiencing neuropsychiatrically, he is impaired. He is psychiatrically and psychologically impaired. So if you're going to utilize the word maturity and sophistication in a medical context or clinical context, he has a brain that has been injured, so he doesn't have a mature brain because of that. And he certainly has problems involving his neuropsychological functioning. The evidence is very clear in that; and it's in my report and Dr. Pollock's report.

When asked his opinion regarding whether Gentry "fully understood the circumstances surrounding the incidents that he's charged with" Dr. Axelrad testified as follows:

Upon the information that I have reviewed, as well as the psychological testing by Dr. Gollaher and Dr. Pollock, it is my opinion that Damion Gentry was impaired at the time of the commission of these alleged offenses. And that that impairment involved significant cognitive problems that he was experiencing that has been documented by Dr. Pollock's neuro-physiological testing that he had an active bipolar disorder, bipolar-one disorder that significantly impaired his ability to control his behavior. In children and adolescents who experience bipolar disorder, whether it's mixed hypomanic or manic, it does produce significant impairment in their behavioral control.

At the conclusion of the transfer hearing, the juvenile court stated as follows on the record:

I'm going to make the following findings: That the offense was against the person. That you are sufficiently sophisticated and mature enough to be tried as an adult. You are sufficient and mature enough to help your attorney in your defense. That you have a record, and your previous history is such that you should be certified to stand trial as an adult. The public cannot be protected if you remain in the juvenile system. And there's a likelihood that the juvenile system could rehabilitate you is very remote. I think juvenile has tried just about everything they could to help you.

The fact that the alleged offenses were felonies of the first degree, and that you were 14 years of age when you committed those felonies. There has been no adjudication of the two felonies. And because of the seriousness of the alleged offenses, the public cannot be protected if you remain in the juvenile system. Because of the background, the public cannot be protected if you remain here. What I find based on your social evaluation and investigative report, and your psychological evaluations, that you should be certified and stand trial as an adult.

Since the petition has multiple accounts [sic], I am certifying you on both counts of aggravated robbery; both with a deadly weapon, and one was a victim who was over 65 years of age.

In each case, the juvenile court signed a "Waiver of Jurisdiction and Order of Transfer to A Criminal District Court" in which the juvenile court waived its jurisdiction, and ordered that Gentry be transferred to criminal district "for proper criminal proceedings." In its order, the juvenile court made findings to support the waiver of its jurisdiction and its transfer of Gentry to criminal district court for prosecution.

Once transferred, Gentry moved to suppress the oral and written statements he gave to police after he was taken into custody. Among Gentry's assertions was that the statements had not been taken in compliance with Juvenile Justice Code Section 51.095 and Code of Criminal Procedure Article 38.22. Gentry asserted that both his audio-recorded statement and his written statement should be suppressed because the audio recording did not contain the warnings required by Juvenile Justice Code Section 51.095 and by Code of Criminal Procedure Article 38.22(3)(a)(2). The trial court granted Gentry's request to suppress the oral statement but denied his request to suppress his written statement.

The two aggravated-robbery offenses were tried together in criminal district court. The jury found Gentry guilty in each case. It assessed Gentry's punishment at 50 years in prison for each offense.

Gentry now appeals both judgments of conviction. In each appeal, Gentry challenges the juvenile court's order waiving jurisdiction and transferring him to criminal court for prosecution as an adult. Also in each appeal, he contends that the trial court abused its discretion by denying his request to suppress his written statement. In his appeal involving the aggravated robbery of Escobar, Gentry contends that the evidence was insufficient to support the judgment of conviction.

Held: Affirmed

Memorandum Opinion: In his second issue raised in each appeal, Gentry asserts, "The trial court committed reversible error and abused its discretion in denying [Gentry's] motion to suppress his written statement." Gentry argues that, because his oral statement was suppressed for non-compliance with Family Code Section 51.095, his written statement likewise should have been suppressed.

Section 51.095 of the Juvenile Justice Code governs the admissibility of custodial statements made by a juvenile.6 See TEX. FAM.CODE ANN. § 51.095 (Vernon 2014). Section 51.095(a)(5) requires that a juvenile's oral statement be recorded by an electronic recording device. Id. § 51.095(a)(5). This section also requires a magistrate to give the juvenile the warning described in Section 51.095(a)(1)(A) before the juvenile makes the statement.7 Id. The warning must be part of the recording, and the child must knowingly, intelligently, and voluntarily waive each right stated in the warning. Id.

The audio-recording of Gentry's statement, admitted for purposes of the suppression hearing, did not contain the statutory warning. Judge Ward testified that she gave the required statutory warning to Gentry before he gave his oral statement. And Gentry's written statement reflects that Judge Ward informed him of his statutory rights. Judge Ward acknowledged, however, that the statutory warning was not part of the recording of Gentry's oral statement.

At the suppression hearing, Gentry asserted that his oral statement should be suppressed because it did not comply with Juvenile Justice Code Section 51.095's requirement that the statutory warning be part of the recording. Gentry also indicated that his recorded statement did not comply with Code of Criminal Procedure Article 38.22, Section 3(a)(2), which is similar to Juvenile Justice Code Section 51.095(a)(5). Under Article 38.22, Section 3(a)(2), before an oral recorded statement may be admitted into evidence, the State must show that "prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning."8 TEX.CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(2) (Vernon Supp.2014).

In addition, Gentry asserted at the hearing that his written statement was involuntary. He claimed that the audio recording revealed that the police officers taking his statement had directed him to write certain statements. Because it was involuntary, Gentry argued that the written statement should be excluded under Code of Criminal Procedure article 38.23(a), which prohibits the admission of evidence obtained in violation of the constitution or laws of the State of Texas. See TEX.CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005).

The trial court granted Gentry's request to suppress his oral recorded statement. From the context of the record, it is clear that the trial court suppressed that statement because the oral recorded statement had not been taken in compliance with Section 51.095's requirement that the magistrate provide the statutory warnings as part of the recording. See TEX. FAMILY CODE ANN. § 51.095(a)(5).

The trial court denied Gentry's request to suppress his written statement and made the following findings of fact and conclusions of law: (1) "the written statement complied with Article 38.22"; (2) the written statement complied with Family Code section 51.095 "to the degree necessary"; and (3) Gentry, "prior to and during the making of the written statement[,] knowingly, intelligently and voluntarily waived the rights set out in the warning prescribed by Subsection A of Section 2 of Article 38.22."

On appeal, Gentry argues that his written statement should have been suppressed because "[the] written statement derives from the illegally obtained audio recording which was suppressed during a motion to suppress hearing." Gentry asserts that "testimony from the suppression hearing clearly shows that the written statement was taken simultaneously during the recording of the audio statement, which was suppressed. The audio recording was obtained in violation of Section 51.095 of the Texas Family Code." Gentry argues that the written confession should be suppressed because it "was the fruit of the tainted oral, audio confession." In other words, Gentry asserts that the written statement was not admissible because it was made at the same time he gave his oral, audio-recorded statement, which was suppressed due its non-compliance with Section 51.095.

On appeal, Gentry does not make an express argument that the written statement was involuntary due to any overreaching by the police. In his brief, he does point out that, in his audio recorded statement, "The police are [heard] talking with the Appellant ... for a lengthy period of time, discussing with Appellant what Appellant should include in his written statement. Appellant never had a period of time to reflect before providing his written statement." Gentry makes this statement to support his assertion that his written statement should be suppressed because it was not made separately from his oral statement, which was not taken in compliance with Section 51.095.

We find the Court of Criminal Appeals's opinion in Heiselbetz v. State, 906 S.W.2d 500, 512 (Tex.Crim.App.1995) to be instructive. There, the appellant signed a transcription of his oral, audio-recorded statement. Id. The signed transcription was introduced against the appellant at trial over his objection. Id. The appellant argued, "because the audio recording did not contain the warnings required by [Code of Criminal Procedure] Article 38.22(3)(a)(2), the transcription of that statement, even though it does contain the required written warning, is infirm and should have been suppressed." Id.

Overruling the appellant's claim, the Court of Criminal Appeals wrote:
We note that there are no allegations of involuntariness, or coercion, or of lack of warnings regarding either the original recorded statement or the signing of the transcribed statement; appellant alleges merely that the recording did not comply with statutory requirements. Under these facts, we agree with the State that the transcription of the oral statement stands on its own. As long as the confession is voluntary, law officers are currently permitted to reduce defendants' oral statements into writing; they are even allowed to paraphrase the statements.... And as long as the warnings appear on the written statement, it is admissible. The trial court did not err in allowing appellant's written statement into evidence. Id.

From Heiselbetz, we learn that a written statement, taken in compliance with the requirements for its admissibility, will not be rendered inadmissible on the basis that it was derived from an oral, recorded statement that is inadmissible due to simple statutory noncompliance. See id.

Here, the State agrees that Gentry's oral statement was inadmissible because it did not comply with Section 51.095's provisions governing the admissibility of oral statements. At the same time, the State correctly points out that Section 51.095 has separate provisions governing the admissibility of written statements. The State asserts that Gentry's written statement was taken in compliance with those provisions, as found by the trial court, and was therefore admissible. We agree.

With respect to written statements, as it applies in this case, Section 51.095(a)(1) provides that "the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if ... the statement is made in writing [while the child is in police custody] and
(A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:
(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;
(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and
(iv) the child has the right to terminate the interview at any time;
(B) and:
(i) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and
(ii) the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and if a statement is taken, the magistrate must sign a written statement verifying the foregoing requisites have been met;
(C) the child knowingly, intelligently, and voluntarily waives these rights before and during the making of the statement and signs the statement in the presence of a magistrate; and
(D) the magistrate certifies that the magistrate has examined the child independent of any law enforcement officer or prosecuting attorney, except as required to ensure the personal safety of the magistrate or other court personnel, and has determined that the child understands the nature and contents of the statement and has knowingly, intelligently, and voluntarily waived these rights[.]
See TEX. FAMILY CODE ANN. § 51.095(a)(1).

Here, the record, including Judge Ward's testimony and the form on which Gentry made his written statement, shows that the written statement was taken in compliance with these provisions, and Gentry does not contend otherwise. Of particular relevance, Judge Ward testified that, before Gentry gave his oral and written statements, she informed him of the statutory rights listed in Section 51.095(a)(1). The juvenile statement form on which Gentry made his written statement also contains the statutory warnings. Judge Ward testified that she placed a checkmark by each right as she read it to Gentry. She then had Gentry place his initials by each right when he indicated to her that he understood it. Judge Ward indicated that she told Gentry that he was not required to talk to the police, but Gentry indicated to Judge Ward that he wanted to give a statement.

Conclusion: When he had finished making his statements, Judge Ward read the written statement to Gentry. Gentry indicated to Judge Ward that it was his statement and that he had made it voluntarily. Judge Ward gave Gentry the opportunity to make any corrections or changes to his statement, but Gentry made no changes to it. In the form, Judge Ward indicated that she was "fully convinced" that Gentry had "knowingly, voluntarily, and intelligently" waived his statutory rights both before and during the making of his written statement. Judge Ward also indicated that Gentry voluntarily signed the statement in her presence with no law enforcement present. Judge Ward signed the form certifying and verifying that the requisites of Section 51.095 had been met. Based on the record, we hold that the trial court did not abuse its discretion when it denied Gentry's request to suppress his written statement. We overrule Gentry's second issue in each appeal.

CRIMINAL PROCEEDINGS—

Ex Parte Enger, No. 14-15-00846-CV, 2016 WL 717731, Tex.Juv.Rep. Vol. 31 No. 1 ¶17-1-3 [Tex.App.—Houston (14th Dist.), 12/8/16]

THE TEXAS FAMILY CODE AND THE TEXAS CODE OF CRIMINAL PROCEDURE EXCLUDE AN ADULT WITH A JUVENILE DETENTION RECORD FROM THE REMEDY OF EXPUNCTION.

Facts: This appeal arises from the trial court's order denying J.S.E.'s petition for expunction. Appellant contends the trial court erred in construing section 52.01(b) of the Texas Family Code and article 55.01 of the Texas Code of Criminal Procedure to exclude an adult with a juvenile detention record from the remedy of expunction. See Tex. Fam. Code Ann. § 52.01(b) (West 2014); Tex. Code Crim. Proc. Ann. art. 55.01 (West Supp. 2016).1 Further, appellant contends section 52.01 and article 55.01, as applied to him, violate his right to equal protection. See U.S. Const. amend. XIV, § 1. For the reasons stated below, we affirm.

Expunction is a statutory privilege, not a constitutional or common-law right. Tex. Dep't of Pub. Safety v. J.H.J., 274 S.W.3d 803, 806 (Tex. App.–Houston [14th Dist.] 2008, no pet.). Because an expunction proceeding is civil rather than criminal in nature, the petitioner bears the burden to prove all statutory requirements have been satisfied. Id. A petitioner is entitled to expunction only after all statutory conditions have been met. Id. The trial court has no equitable power to extend the protections of the expunction statute beyond its stated provisions. Id. We review the trial court's decision to deny a petition for expunction for abuse of discretion. See Heine v. Tex. Dep't of Pub. Safety, 92 S.W.3d 642, 646 (Tex. App.–Austin 2002, pet. denied).

The record reflects that at the age of sixteen, appellant was detained at school for possession of a simulated controlled substance. In exchange for appellant's removal from the school, "the matter was dropped." As an adult, a background check and social study report revealed documents regarding the detention.2 Appellant then petitioned for expunction of those records.

Held: Affirmed

Opinion: We "construe a statute according to its plain language, unless the language is ambiguous or the interpretation would lead to absurd results that the legislature could not have intended." Williams v. State, 253 S.W.3d 673, 677 (Tex. Crim. App. 2008). Article 55.01(a) provides "[a] person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if ..." Tex. Code Crim. Proc. art. 55.01(a). Thus an arrest is a threshold requirement under the expunction statute. Quertermous v. State, 52 S.W.3d 862 (Tex. App.–Fort Worth 2001, no pet.) (citing Harris Cty. Dist. Attorney v. Lacafta, 965 S.W.2d 568, 570 (Tex. App.–Houston [14th Dist.] 1997, no pet.)). Pursuant to section 52.01(b) of the Texas Family Code, however, "[t]he taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search ..." Tex. Fam. Code § 52.01(b); see also Quertermous, 52 S.W.3d at 864 (citing Vasquez v. State, 739 S.W.2d 37, 42 (Tex. Crim. App. 1987)). A juvenile is not "arrested" until the juvenile court certifies him as an adult and signs a proper transfer order to district court. Tex. Fam. Code Ann. § 54.02(h) (West 2006); see also Quertermous, 52 S.W.3d at 864 (citing Vasquez, 739 S.W.2d at 43). It is the transfer of custody that constitutes an arrest. Tex. Fam. Code § 54.02(h); see also Quertermous, 52 S.W.3d at 864. Accordingly, for purposes of the expunction statute, appellant was never arrested.3 See id.; see also State v. J.B.C., 03–14–00034–CV, 2014 WL 4064412 (Tex. App.–Austin Aug. 13, 2014, no pet.) (mem. op.) (not designated for publication). Because appellant did not prove all statutory requirements were satisfied, we hold the trial court did not abuse its discretion in denying his petition for expunction. Appellant's first issue is overruled.

Conclusion: Appellant further claims that depriving him of the expunction remedy violates his right to equal protection. U.S. Const. amend. XIV, § 1. Appellant's argument, however, is that he is not being treated the same as people who were arrested when they were adults, not that he is being treated differently from others who were detained as juveniles. Because appellant is not claiming that people similarly situated to him are treated differently under the law, there is no equal protection violation. See Wesbrook v. State, 29 S.W.3d 103, 113 (Tex. Crim. App. 2000) (holding no equal protection violation from Legislature's decision to treat capital murder defendants differently from other murder defendants). We overrule appellant's second issue.
The order of the trial court is affirmed.

Douglas-Myers v. State, MEMORANDUM, No. 01-05-00610-CR, 2016 WL 2841087, Tex.Juv.Rep. Vol. 30 No. 3 ¶16-3-4 [Tex.App.—Houston (1st Dist.), 5/12/2016].

JUVENILE'S DEFERRED PROSECUTIONS FOR TERRORISTIC THREAT AND ASSAULT OF A PUBLIC SERVANT ADMISSIBLE IN ADULT PSI REPORT BECAUSE AN ACCURATE STATEMENT OF APPELLANT'S JUVENILE CRIMINAL AND SOCIAL HISTORY IS RELEVANT TO THE TRIAL COURT'S ASSESSMENT OF PUNISHMENT.

Facts: On Tuesday, June 10, 2014, Deputy L. Fernandez was dispatched to a Burglary of a Habitation. The Deputy spoke to Tanni Wortham and McKenna Hall who reported that appellant was one of three men who had robbed them at gunpoint. They knew appellant through their roommate and provided the Deputy with appellant's telephone number. After Wortham and Hall positively identified appellant as one of the perpetrators, appellant was charged

with aggravated robbery with a deadly weapon.

Appellant pleaded guilty without a plea bargain. Before resetting the case for a sentencing hearing, the trial court asked the appellant whether he acted on his own. Appellant responded "Yes, Sir."

The trial court requested a PSI. The PSI report detailed the charged offense, including statements from Wortham and Hall as well as a statement from appellant, appellant's criminal and social history, and a Texas Risk Assessment System ("TRAS") assessment. The PSI report relayed that appellant said he "did not do it" and pleaded guilty for reasons related to witness availability. The PSI report goes on to set out appellant's ascertainable prior court record, which apart from the charged offense, noted that appellant reported that he once "received a $100 ticket for cursing in school" and that he had been charged with two juvenile offenses.

In the first of these two juvenile offenses, according to the PSI report, appellant was charged in May 2009, with the offense of Terroristic Threat and sentenced to six-month's deferred prosecution. Appellant told the PSI investigator that he was so charged after threatening to stick his teacher with scissors and pointing scissors at the teacher. The second juvenile offense described in the PSI report occurred in December 2011, when appellant was charged for the offense of Assault of a Public Servant and sentenced to six month's deferred prosecution. Appellant told the PSI investigator that he was so charged after he accidentally hit an Assistant Principal while involved in a fight with another student at school. Appellant further stated that he was not under the influence of alcohol or drugs at the time of either offense. Ultimately, both cases were nonsuited, suggesting appellant successfully completed both terms of deferred prosecution.

During the sentencing hearing, appellant presented no witnesses but provided letters from himself, Tevia Douglas, Gwendyln Roy, and L. Williams. The State introduced testimony from Wortham and Hall, who both asked that appellant be sentenced to a term of confinement. The trial court stated that that it reviewed the PSI report, the TRAS assessment, and the letters submitted by appellant. The trial court found appellant guilty of aggravated robbery and assessed punishment at eight years' confinement.

Held: Affirmed

Memorandum Opinion: In his first issue, appellant argues that his trial counsel provided ineffective assistance in failing to object to the description of appellant's juvenile offenses in the PSI report. In particular, appellant complains that the PSI report's inclusion of appellant's juvenile charge for assault of a public servant and of appellant being fined $100 for cursing in school were unfairly prejudicial and thus objectionable under Texas Rule of Evidence 403.

In order to show ineffective assistance based on a failure to object, appellant must show that the trial judge would have committed error in overruling the objection had it been made. Ex parte White, 160 S.W.3d 46, 53 (Tex.Crim.App.2004). A defendant's criminal history is probative to a trial court's assessment of punishment. See TEX.CODE CRIM. PROC. art. 37.07 § 3(a) (providing that "evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant ..."); TEX.CODE CRIM. PROC. art. 42.12 § 9(a) (providing that PSI report may include "criminal and social history" as well as "any other information relating to the defendant or the offense requested by the judge").

Here, had defense counsel objected to the PSI report's inclusion of appellant's criminal history and an instance of cursing in school under Rule 403, the trial court would not have erred in overruling such an objection. Appellant has not alleged that the PSI report inaccurately represents appellant's ascertainable criminal or social history. An accurate statement of appellant's juvenile criminal and social history is relevant to the trial court's assessment of punishment. See TEX.CODE CRIM. PROC. art. 37.07 § 3(a); TEX.CODE CRIM. PROC. art. 42.12 § 9(a); Montgomery v. State, 810 S.W.2d 372, 389 (Tex.Crim.App.1990) ("Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial."). Though the inclusion of such information in the PSI report was prejudicial, it cannot be said to be unfairly prejudicial in the context of a sentencing hearing.

Conclusion: Thus, we conclude that trial counsel's representation did not fall below an objective standard of reasonableness by failing to object to descriptions of appellant's criminal and social history in the PSI report. We overrule appellant's first issue.

DISPOSITION PROCEEDINGS—

Hood v. Davis, No. 3:15-CV-1821-BK, 2016 WL 7188299, Tex.Juv.Rep. Vol. 31 No. 1 ¶ 17-1-4 (U.S. Dist, N.D. Texas, Dallas, 12/12/16).

MILLER V. ALABAMA DID NOT HOLD THAT MANDATORY LIFE SENTENCES FOR JUVENILE OFFENDERS WITH THE POSSIBILITY FOR PAROLE VIOLATE THE EIGHTH AMENDMENT.

Facts: In 1997, Petitioner was convicted of capital murder and sentenced to life imprisonment. See State v. Hood, No. F96-14800 (283rd Jud. Dist. Ct., Dallas County, Tex., 1997), aff'd, No. 05-97-01243-CR, 1999 WL 814296 (Tex. App. –Dallas 1999, no pet.). He later unsuccessfully challenged his conviction in state and federal habeas proceedings. See Hood v. Cockrell, No. 3:01-CV-02680-G, 2003 WL 22790858 (N.D. Tex. Nov. 21, 2003), recommendation accepted, 2003 WL 102621 (N.D. Tex. Jan. 8, 2003) (dismissing first federal habeas petition as time barred). In February 2015, he filed a second state application claiming that his mandatory life sentence, for a crime he committed as a juvenile offender, violated the Eighth and Fourteenth Amendments to the United States Constitution under Miller v. Alabama. The Texas Court of Criminal Appeals dismissed the application as successive, see Ex Parte Hood, No. WR-49,111-02 (Tex. Crim. App. May 6, 2015)1, and on May 27, 2015, Petitioner submitted this federal petition reiterating his Miller claim.2 Doc. 3 at 6-8. Subsequently, the Court of Appeals for the Fifth Circuit granted "tentative" authorization to file the successive application, directing this Court to consider whether the petition is time barred and whether Petitioner has made the showing required to file a successive application. Doc. 11 at 2-3.

Respondent argues that Miller is inapplicable because Petitioner was not sentenced to life imprisonment without the possibility of parole, therefore the petition is time barred and Petitioner also cannot make the requisite showing to file a successive application. Doc. 21 at 2-5. Petitioner replies that Miller is applicable because it prohibits mandatory life imprisonment for juvenile offenders who, like himself, ultimately may "not be eligible for parole" and, thus, face "the possibility of dying in prison." Doc. 28 at 2-3.

Held: Dismissed with Prejudice

Opinion: In Miller v. Alabama, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller v. Alabama, ––U.S. ––––, 132 S. Ct. 2455, 2469 (2012) (emphasis added). More recently, in Montgomery v Louisiana, –– U.S. ––––, 136 S. Ct. 718, 734-736 (2016), the Supreme Court held that the Miller opinion announced a new substantive rule of constitutional law that is retroactive on state collateral review. That notwithstanding, Petitioner's reliance on Miller is misplaced.

The Miller holding is not applicable here because Petitioner's 1997 sentence of life imprisonment is not without the possibility of parole. Doc. 21-1 at 3 (judgment). Indeed, Petitioner has never been subject to a sentence of life without the possibility of parole. At the time Petitioner was sentenced, an individual adjudged guilty of a capital felony in a case in which the State did not seek the death penalty received an automatic life sentence that permitted parole. TEX. PENAL CODE § 12.31(a) (1994). And while subsequent amendments to that statute provided for the imposition of a sentence of life without parole for a capital offense committed by a defendant at least 17 years of age, in response to Miller, the Texas legislature amended section 12.31(a) to provide that "[a]n individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for: (1) life, if the individual committed the offense when younger than 18 years of age; or (2) life without parole, if the individual committed the offense when 18 years of age or older. TEX. PENAL CODE § 12.31(a) (2013)." Id.

That notwithstanding, Petitioner maintains that Miller "forbids a sentencing scheme that mandates life imprisonment for juvenile offenders who commit nonhomicidal offenses.3" Doc. 3 at 8; see also Doc. 28 at 3. In his reply, Petitioner also argues that because "TEXAS 'does not guarantee ... parole to any offender' " he "faces the possibility of dying in prison," which he argues is "an Eighth Amendment violation" under Miller. Doc. 28 at 2-3 (emphasis in original). Petitioner misstates the scope of the rule announced in Miller, however.

Conclusion: As has been repeated here, Miller did not hold that mandatory life sentences for juvenile offenders with the possibility for parole violate the Eighth Amendment. Rather, Miller's holding is limited to juvenile offenders sentenced to life imprisonment without the possibility of parole. Miller, 132 S. Ct. at 2469. Petitioner's wholly unsupported extrapolation of Miller's reach is of no moment.

Tatum v. Arizona, No. 15-8850, 577 U. S. ____, 2016 WL 1381849, Tex. Juv. Rep. Vol. 30, No. 4 ¶ 16-4-5 (U.S. Sup.Ct., 10/31/16).

WHEN A JUVENILE HAS BEEN SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, THE CASE SHOULD BE REMANDED TO DETERMINE WHETHER THE JUVENILE IS A CHILD "WHOSE CRIMES REFLECT TRANSIENT IMMATURITY" OR IS ONE OF "THOSE RARE CHILDREN WHOSE CRIMES REFLECT IRREPARABLE CORRUPTION."

Facts: The petitioners in these cases were sentenced to life without the possibility of parole for crimes they committed before they turned 18. In this case the sentencing judge merely noted age as a mitigating circumstance without further discussion.

Held: The judgment is vacated, and the case is remanded to the Court of Appeals of Arizona, Division Two for further consideration in light of Montgomery v. Louisiana.

Opinion: Justice SOTOMAYOR, concurring in the decision to grant, vacate, and remand.*
This Court explained in Miller v. Alabama, 567 U.S. —— (2012), that a sentencer is "require[d] ... to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id., at —— (slip op., at 17). Children are "constitutionally different from adults for purposes of sentencing" in light of their lack of maturity and under-developed sense of responsibility, their susceptibility to negative influences and outside pressure, and their less well-formed character traits. Id., at —— (slip op., at 8). Failing to consider these constitutionally significant differences, we explained, "poses too great a risk of disproportionate punishment." Id., at —— (slip op., at 17). In the context of life without parole, we stated that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Ibid.

Montgomery v. Louisiana, 577 U.S. —— (2016), held that Miller "announced a substantive rule of constitutional law." 577 U.S., at —— (slip op., at 20). That rule draws "a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption" and allows for the possibility "that life without parole could be a proportionate sentence [only] for the latter kind of juvenile offender." Id., at —— (slip op., at 18).

The petitioners in these cases were sentenced to life without the possibility of parole for crimes they committed before they turned 18. A grant, vacate, and remand of these cases in light of Montgomery permits the lower courts to consider whether these petitioners' sentences comply with the substantive rule governing the imposition of a sentence of life without parole on a juvenile offender.

Justice ALITO questions this course, noting that the judges in these cases considered petitioners' youth during sentencing. As Montgomery made clear, however, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." Id., at ———— (slip op., at 16–17) (internal quotation marks omitted).

On the record before us, none of the sentencing judges addressed the question Miller and Montgomery require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 577 U.S., at —— (slip op., at 17).

Take Najar v. Arizona, No. 15–8878. There, the sentencing judge identified as mitigating factors that the defendant was "16 years of age" and "emotionally and physically immature." App. to Pet. for Cert. in No. 15–8878, p. A–51. He said no more on this front. He then discounted the petitioner's efforts to rehabilitate himself as "nothing significant," despite commending him for those efforts and expressing hope that they would continue. Id., at A–52. The sentencing judge did not evaluate whether Najar represented the "rare juvenile offender who exhibits such

irretrievable depravity that rehabilitation is impossible and life without parole is justified." Montgomery, 577 U.S., at —— (slip op., at 16).

Purcell v. Arizona, No. 15–8842, is no different. The sentencing judge found that Purcell's age at the time of his offense—16 years old—qualified as a statutory mitigating factor. App. to Pet. for Cert. in No. 15–8842, p. A–80. He then minimized the relevance of Purcell's troubled childhood, concluding that "this case sums up the result of defendant's family environment: he became a double-murderer at age 16. Nothing more need be said." Id., at A–83. So here too, the sentencing judge did not undertake the evaluation that Montgomery requires. He imposed a sentence of life without parole despite finding that Purcell was "likely to do well in the structured environment of a prison and that he possesses the capacity to be meaningfully rehabilitated." App. to Pet. for Cert. in No. 15–8842, at A–83.

The other petitions are similar. In Tatum v. Arizona, No. 15–8850, and DeShaw v. Arizona, No. 15–9057, the sentencing judge merely noted age as a mitigating circumstance without further discussion. In Arias v. Arizona, No. 15–9044, the record before us does not contain a sentencing transcript or order reflecting the factors the sentencing judge considered.

Conclusion: It is clear after Montgomery that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate. 577 U.S., at —— (slip op., at 18). There is thus a very meaningful task for the lower courts to carry out on remand.

Justice ALITO, with whom Justice THOMAS joins, dissenting from the decision to grant, vacate, and remand.[1]

The Court grants review and vacates and remands in this and four other cases in which defendants convicted of committing murders while under the age of 18 were sentenced to life without parole. The Court grants this relief so that the Arizona courts can reconsider their decisions in light of Montgomery v. Louisiana, 577 U.S. —— (2016), which we decided last Term. I expect that the Arizona courts will be as puzzled by this directive as I am.

In Montgomery, the Court held that Miller v. Alabama, 567 U.S. —— (2012), is retroactive. 577 U.S., at —— (slip. op., at 20). That holding has no bearing whatsoever on the decisions that the Court now vacates. The Arizona cases at issue here were decided after Miller, and in each case the court expressly assumed that Miller was applicable to the sentence that had been imposed. Therefore, if the Court is taken at its word—that is, it simply wants the Arizona courts to take Montgomery into account—there is nothing for those courts to do.

It is possible that what the majority wants is for the lower courts to reconsider the application of Miller to the cases at issue,[2] but if that is the Court's aim, it is misusing the GVR vehicle. We do not GVR so that a lower court can reconsider the application of a precedent that it has already considered.

In any event, the Arizona decisions at issue are fully consistent with Miller 's central holding, namely, that mandatory life without parole for juvenile offenders is unconstitutional. 567 U.S., at —— (slip op., at 2). A sentence of life without parole was imposed in each of these cases, not because Arizona law dictated such a sentence, but because a court, after taking the defendant's youth into account, found that life without parole was appropriate in light of the nature of the offense and the offender.

It is true that the Miller Court also opined that "life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' " Montgomery, supra, at —— (slip op., at 17) (quoting Miller, supra, at —— (slip op., at 17) (internal quotation marks omitted)), but the record in the cases at issue provides ample support for the conclusion that these "children" fall into that category.

For example, in Purcell v. Arizona, No. 15–8842, a 16–year–old gang member fired a sawed-off shotgun into a group of teenagers, killing two of them, under the belief that they had flashed a rival gang's sign at him. He was ultimately convicted of two counts of first-degree murder, nine counts of attempted first-degree murder, and one count each of aggravated assault and misconduct involving weapons. The trial court considered his youth, identified his age as a mitigating factor, and still sentenced him to life without parole. The remaining cases are in the same vein.

See Tatum v. Arizona, No. 15–8850 (17–year–old defendant convicted of first-degree murder, conspiracy to commit armed robbery, attempted armed robbery, and aggravated assault); Najar v. Arizona, No. 15–8878 (juvenile convicted of first-degree murder and theft); Arias v. Arizona, No. 15–9044 (16–year–old defendant pleaded guilty to two counts of first-degree murder, two counts of second-degree murder, two counts of kidnapping, four counts of armed robbery, and one count each of first-degree burglary, conspiracy to commit first-degree murder, and conspiracy to commit armed robbery); DeShaw v. Arizona, No. 15–9057 (17–year–old defendant convicted of first-degree murder, armed robbery, and kidnapping).

In short, the Arizona courts have already evaluated these sentences under Miller, and their conclusions are eminently reasonable. It is not clear why this Court is insisting on a do-over, or why it expects the results to be any different the second time around. I respectfully dissent.

* This opinion also applies to No. 15–8842, Purcell v. Arizona ; No. 15–8878, Najar v. Arizona ; No. 15–9044, Arias v. Arizona ; and No. 15–9057, DeShaw v. Arizona.

1 This opinion also applies to four other petitions: No. 15–8842, Purcell v. Arizona ; No. 15–8878, Najar v. Arizona ; No. 15–9044, Arias v. Arizona ; and No. 15–9057, DeShaw v. Arizona.

2 This is certainly Justice SOTOMAYOR'S explanation of the GVR. She faults the lower courts for failing to heed the statement in Miller that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." 567 U.S., at —— (slip op., at 17). If the others in the majority have a similar view, the Court should grant review and decide the cases on the merits.

Williams v. N. Burl Cain, Civ. Act. No. 15-404, 2016 WL 3877973, Tex. Juv. Rep. Vol. 30, No. 3 ¶ 16-3-8 (U.S. Dist. Ct. –E.D. Louisiana, 7/18/2016).

U.S. DISTRICT COURT ORDERS STATE TRIAL COURT TO RESENTENCE PETITIONER IN CONFORMITY WITH *MILLER V. ALABAMA*.

Facts: In August 1980, Petitioner, who was 17 years old at the time the crime was committed, was convicted of first degree murder under Louisiana law in Orleans Parish Criminal District Court.6 On September 12, 1980, the state trial court sentenced Petitioner to life imprisonment without benefit of parole, probation, or suspension of sentence. Petitioner went on to unsuccessfully challenge his conviction and sentence on direct appeal and through post-conviction and habeas proceedings in state and federal court.

On June 25, 2012, in Miller v. Alabama, the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Thereafter, Petitioner filed a motion to correct his sentence in the state trial court, arguing that his sentence was unconstitutional under Miller. The state trial court granted the motion, holding that Miller applied retroactively, and amended Petitioner's sentence to remove the bar on parole eligibility. The Louisiana Fourth Circuit Court of Appeal denied the State's related writ application. The Louisiana Supreme Court granted the State's related writ application, holding that Miller does not apply retroactively to Petitioner's case, and reinstated Petitioner's original sentence.

On February 4, 2015, Petitioner filed his federal petition. Petitioner filed an unopposed motion to stay the proceedings pending the United States Supreme Court's decision in Montgomery v. Louisiana. The Magistrate Judge granted the motion, and the case was stayed. On January 25, 2016, the United States Supreme Court decided Montgomery v. Louisiana, holding that Miller applies retroactively to cases on collateral review. On February 3, 2016, the Magistrate Judge reopened the case.

On April 29, 2016, the Magistrate Judge issued a Report and Recommendation, recommending that this Court grant the petition. The Magistrate rejected the State's argument that the petition should be denied as unexhausted because Louisiana courts have not had an opportunity to consider Petitioner's claims in light of Montgomery v.

Louisiana. The Magistrate found this argument unavailing as the state courts were given an opportunity to consider and apply Miller.

The Magistrate noted that Petitioner was under the age of 18 when the crime at issue was committed, and the state courts imposed a mandatory life sentence without the benefit of parole. Therefore, the Magistrate found that Petitioner's conviction was unconstitutional under Miller. Because the state courts denied relief under Miller based on a conclusion that it was not retroactive to cases on collateral review, a conclusion that was later directly contradicted by the United States Supreme Court in Montgomery, the Magistrate found that Petitioner is entitled to federal habeas corpus relief. Accordingly, the Magistrate found that Petitioner was entitled to be resentenced in conformity with Miller, and that the state courts were entitled to determine the appropriate sentence. Therefore, the Magistrate recommended that the sentence be vacated and that the state trial court be ordered to resentence Petitioner in conformity with Miller within 120 days or, in the alternative, release him from confinement.

The State objects to the Magistrate Judge's Report and Recommendation. The State submits that an order vacating Petitioner's sentence and ordering him to be resentenced would be premature. The State asserts that "[p]ost-Montgomery, there is no reason to doubt that state courts will be any less willing or able than their federal counterparts to grant relief on these claims. Unless and until they refuse to do so, Williams's claim is unexhausted." Further, the State notes that bills have been introduced in the Louisiana legislature to provide for Miller's retroactive application. Accordingly, the State asserts that federal habeas relief is unnecessary at this time, and the petition should be dismissed without prejudice. Alternatively, the State asserts that the proceedings should be stayed.

On June 10, 2016, the State filed a supplemental notice stating that the proposed legislation pending before the Louisiana legislature to remedy retroactive Miller violations had not passed during this session, and it did not except such legislation to be enacted this year. Further, the State asserted that it filed a motion in the state trial court asking that Petitioner be re-sentenced in conformity with Miller. Accordingly, the State asserts that federal action would be unwarranted as the state court is prepared to grant relief.

Held: State's objection overruled, Magistrate Judge's Report and Recommendation Adopted, Habeas petition granted and Motion for Appointment of Counsel denied as moot.

Opinion: On June 25, 2012, in *Miller v. Alabama*, the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Thereafter, Petitioner filed a motion to correct his sentence in the state trial court, arguing that his sentence was unconstitutional under *Miller*. The state trial court granted the motion, holding that *Miller* applied retroactively, and amended Petitioner's sentence to remove the bar on parole eligibility. The Louisiana Fourth Circuit Court of Appeal denied the State's related writ application. **The Louisiana Supreme Court granted the State's related writ application, holding that *Miller* does not apply retroactively to Petitioner's case, and reinstated Petitioner's original sentence**. Accordingly, the last state court to decide the issue found that *Miller* did not apply retroactively to cases on collateral review. Following the Louisiana Supreme Court's decision in this case, the United States Supreme Court decided *Montgomery v. Louisiana*, holding that *Miller* applies retroactively to cases on collateral review. Because *Montgomery* was decided after the Louisiana Supreme Court decided this case, the State contends that the claim is not exhausted and the principle of comity requires that this Court allow the state courts to decide the issue in light of *Montgomery*.

"A fundamental prerequisite for federal habeas relief under § 2254 is the exhaustion of all claims in state court prior to requesting federal collateral relief." The Fifth Circuit has recognized that "habeas corpus jurisprudence consistently underscores the central importance of comity, of cooperation and of rapport between the parallel systems of state and federal courts." "These concerns animate [the court's] strict adherence to the doctrine of exhaustion—i.e., the notion that federal courts will not consider a claim on habeas review if it has not been considered and finally rejected by the state courts."

If a prisoner has exhausted his state remedy unsuccessfully, but there is an intervening Supreme Court decision that might induce the state courts to give relief, the prisoner will be required to apply again for relief from the state courts so that they may have the first opportunity to apply the new Supreme Court decision. The only occasion in which the prisoner should not be returned to the state forum is when it is apparent that the state courts will not give

him relief, either because they have already held that the intervening Supreme Court decision is not to be applied retroactively or because of some state procedural doctrine that will preclude the prisoner from relying on the new decision.

In *Gomez v. Dretke*, the Fifth Circuit recognized that, although the petitioner had arguably exhausted his claim in state court, a subsequent decision of the International Court of Justice and a Presidential directive, counseled in favor of the petitioner returning to state court to pursue relief. The Fifth Circuit noted that "the Supreme Court has intimated that perhaps an 'intervening change in federal law casting a legal issue in a fundamentally different light' might make necessary the re-exhaustion of state court remedies before seeking federal review." Accordingly, the Fifth Circuit granted the petitioner's motion to stay the federal proceedings pending resolution of his state habeas corpus proceedings. However, *Gomez* is distinguishable from the instant case because there the petitioner requested a stay of his federal proceedings to return to state court, whereas here Petitioner asserts that he has exhausted his state remedies and the Court should not require him to return to state court.

The Louisiana Supreme Court decided this case prior to the United States Supreme Court's decision in *Montgomery v. Alabama*, which held that *Miller* applies retroactively to cases on collateral review. Petitioner presented this exact argument to the Louisiana Supreme Court, and it rejected his claim holding that *Miller* did not apply retroactively. The state courts were given an opportunity to consider and apply the Supreme Court's decision in *Miller*. The Supreme Court's decision in *Montgomery* merely removed any doubt that *Miller* must be applied retroactively to cases on collateral review. Accordingly, the Court finds that Petitioner exhausted his state court remedies as *Montgomery* was not an intervening change in federal law, but merely a clarification that *Miller* should apply retroactively.

The Court further finds that equity and judicial economy support granting the petition. Requiring Petitioner to return to state court to reassert the same arguments he previously made would create an unnecessary procedural obstacle. The case has been pending since February 2015, and the State does not dispute that Petitioner is entitled to relief from his unconstitutional sentence. Instead, the State argues that federal action is not warranted at this time because the state trial court is prepared to resentence Petitioner. However, the State has not presented any evidence that Petitioner has been resentenced in state court. Granting Petitioner's habeas petition does not deprive the state court of its right to determine the relief to which Petitioner is entitled. Accordingly, the Court overrules the State's objection and grants Petitioner's application for habeas corpus relief.

Conclusion: For the reasons stated above, the Court finds that Petitioner is entitled to relief from his unconstitutional sentence. Accordingly,

IT IS HEREBY ORDERED that the State's objection is OVERRULED;

IT IS FURTHER ORDERED that the Court ADOPTS the Magistrate Judge's recommendation;

IT IS FURTHER ORDERED that Petitioner Reginald Williams's application for habeas corpus relief is GRANTED, that his sentence of life imprisonment without benefit of probation, parole or suspension of sentence is VACATED, and that the state trial court is ORDERED to resentence Petitioner in conformity with Miller v. Alabama, 132 S.Ct. 2455 (2012), within one hundred twenty (120) days or, in the alternative, to release him from confinement.

Adams v. Alabama, No. 15-6289, 577 U.S. ___, 2016 WL 2945697, Tex. Juv. Rep. Vol. 30, No. 3 ¶ 16-3-6 (U.S. Sup.Ct., 5/23/16).

SUPREME COURT SPLIT ON WHETHER, TO SATISFY MILLER V. ALABAMA, A LOWER COURT IS REQUIRED TO DETERMINE WHETHER A JUVENILE'S CRIMES REFLECTED "TRANSIENT IMMATURITY" OR "IRREPARABLE CORRUPTION" OR IF WHEN A JURY USED AGE AS A MITIGATING FACTOR IN DECIDING THE DEATH PENALTY ORIGINALLY, WAS ANY FURTHER INDIVIDUALIZED CONSIDERATION REQUIRED.

Facts: In the present case, petitioner committed a heinous murder in 1997 when he was 17 years old. See 955 So.2d 1037, 1047–1049 (Ala.Crim.App.2003). Wielding a knife and wearing a stocking mask to conceal his face, petitioner climbed through a window into the home of Melissa and Andrew Mills. Petitioner demanded money, but the Mills family had only $9 on hand. While petitioner remained in the Mills home with Melissa Mills and her three young children, Andrew Mills raced to an ATM and withdrew $375, the maximum amount available. Petitioner then demanded more money, so Andrew went to a nearby grocery store to cash a check. While holding her at knife point, petitioner raped Melissa Mills, who was four months pregnant, before stabbing her repeatedly in the neck, upper and lower chest, and back. The stab wounds pierced her liver and lungs, and she eventually succumbed.

When police arrived at the Mills' home, summoned by the grocery store clerk, Melissa Mills was gasping for breath and bleeding profusely. Petitioner fled but was captured nearby 20 minutes later. His clothes were covered in Melissa Mills' blood, and he had in his possession the knife used to kill her, which was also covered in her blood. Nine blood-smeared dollar bills were located nearby. Petitioner's DNA matched the semen recovered from the rape kit performed as part of Melissa Mills' autopsy.

A jury found petitioner guilty of murder and then proceeded to decide whether he should be sentenced to death or life imprisonment without parole. Id., at 1048; see Ala. Code § 13A–5–45 (1982). Under the Alabama law then in force, "[t]he age of the defendant at the time of the crime" was one of the statutory "[m]itigating circumstances" that the jury was required to consider. § 13A–5–51(7). The jury nevertheless concluded that petitioner's age did not warrant a sentence of less than death. After Roper, however, petitioner's sentence was commuted to life without parole. See Ex parte Adams, 955 So.2d 1106 (Ala.2005).

Held: The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Criminal Appeals of Alabama for further consideration in light of Montgomery v. Louisiana, 577 U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

Opinion: Justice THOMAS, with whom Justice ALITO joins, concurring in the decision to grant, vacate, and remand.

In cases like this, it can be argued that the original sentencing jury fulfilled the individualized sentencing requirement that Miller subsequently imposed. In these cases, the sentencer necessarily rejected the argument that the defendant's youth and immaturity called for the lesser sentence of life imprisonment without parole. It can therefore be argued that such a sentencer would surely have felt that the defendant's youth and immaturity did not warrant an even lighter sentence that would have allowed the petitioner to be loosed on society at some time in the future. In short, it can be argued that the jury that sentenced petitioner to death already engaged in the very process mandated by Miller and concluded that petitioner was not a mere "'child'" whose crimes reflected "'unfortunate yet transient immaturity,'" post, at —— (SOTOMAYOR, J., concurring in decision to grant, vacate, and remand), but was instead one of the rare minors who deserves life without parole.†

Conclusion 1: In cases in which a juvenile offender was originally sentenced to death after the sentencer considered but rejected youth as a mitigating factor, courts are free on remand to evaluate whether any further individualized consideration is required.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, concurring in the decision to grant, vacate and remand.

The petitioners in these cases were sentenced to death for crimes they committed before they turned 18. In most of these cases, petitioners' sentences were automatically converted to life without the possibility of parole following our decisions outlawing the death penalty for juveniles. See Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). Today, we grant, vacate, and remand these cases in light of Montgomery v. Louisiana, 577 U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), for the lower courts to consider whether petitioners' sentences comport with the exacting limits the Eighth Amendment imposes on sentencing a juvenile offender to life without parole.

Justice ALITO suggests otherwise, noting that the juries that originally sentenced petitioners to death were statutorily obligated to consider the mitigating effects of petitioners' youth. "In cases like this," he writes, it can "be

argued that the original sentencing jury fulfilled the individualized sentencing requirement that Miller subsequently imposed." Ante, at —— (concurring opinion).

But Miller v. Alabama, 567 U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), did not merely impose an "individualized sentencing requirement"; it imposed a substantive rule that life without parole is only an appropriate punishment for "the rare juvenile offender whose crime reflects irreparable corruption." Montgomery, 577 U.S., at ——, 136 S.Ct., at 735 (internal quotation marks omitted). "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." Id., at —— – ——, 136 S.Ct., at 734 (same). There is no indication that, when the factfinders in these cases considered petitioners' youth, they even asked the question Miller required them not only to answer, but to answer correctly: whether petitioners' crimes reflected "transient immaturity" or "irreparable corruption." 577 U.S., at —— – ——, 136 S.Ct., at 734.

The last factfinders to consider petitioners' youth did so more than 10—and in most cases more than 20—years ago. (Petitioners' post-Roper resentencings were generally automatic.) Those factfinders did not have the benefit of this Court's guidance regarding the "diminished culpability of juveniles" and the ways that "penological justifications" apply to juveniles with "lesser force than to adults." Roper, 543 U.S., at 571, 125 S.Ct. 1183. As importantly, they did not have the benefit of this Court's repeated exhortation that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id., at 570, 125 S.Ct. 1183; see also id., at 573, 125 S.Ct. 1183; Miller, 567 U.S., at ——, 132 S.Ct., at 2475.

When petitioners were sentenced, their youth was just one consideration among many; after Miller, we know that youth is the dispositive consideration for "all but the rarest of children." Montgomery, 577 U.S., at ——, 136 S.Ct., at 726. The sentencing proceedings in these cases are a product of that pre-Miller era. In one typical case, a judge's sentencing order—overruling a unanimous jury verdict recommending life without parole instead of death—refers to youth only once, noting "the court finds that the age of the defendant at the time of the crime is a mitigating circumstance" and then that "[t]he [c]ourt rejects the advisory verdict of the jury, and finds that the aggravating circumstances in this case outweigh the mitigating circumstances and that the punishment should be death." Sentencing Order, Alabama v. Barnes, No. CC 94–1401 (C.C. Mobile Cty., Ala., Dec. 12, 1995), 2 Record 225. Other sentencing orders are similarly terse. In at least two cases, there is no indication that youth was considered as a standalone mitigating factor.3 In two others, factfinders did not put "great weight"4 on considerations that we have described as particularly important in evaluating the culpability of juveniles, such as intellectual disability, an abusive upbringing, and evidence of impulsivity and immaturity. Miller, 567 U.S., at ——, 132 S.Ct., at 2467.

Conclusion 2: Standards of decency have evolved since the time petitioners were sentenced to death. See Roper, 543 U.S., at 561, 125 S.Ct. 1183. That petitioners were once given a death sentence we now know to be constitutionally unacceptable tells us nothing about whether their current life-without-parole sentences are constitutionally acceptable. I see no shortcut: On remand, the lower courts must instead ask the difficult but essential question whether petitioners are among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Montgomery, 577 U.S., at ——, 136 S.Ct., at 734.

EVIDENCE—

In the Matter of R.D., No. 02-15-00115-CV, --- S.W.3d ----, 2016 WL 551906, Tex.Juv.Rep. Vol. 30 No. 2 ¶16-2-5 (Tx.App.-Fort Worth, 2/11/2016).

WHERE AN ELEMENT OF THE OFFENSE IS "THE INTENT TO CAUSE ALARM," A JUVENILE'S WORDS AND ACTIONS MAY GIVE RISE TO A REASONABLE INFERENCE THAT HE KNEW HIS WORDS AND ACTIONS WOULD BE COMMUNICATED TO HIS VICTIM.

In the Matter of R.D., No. 02-15-00115-CV, --- S.W.3d ----, 2016 WL 551906, Tex.Juv.Rep. Vol. 30 No. 2 ¶16-2-5 (Tx.App.-Fort Worth, 2/11/2016).

Facts: Darryl Brown, a teacher for the Fort Worth Independent School District, testified at the adjudication hearing that on October 16, 2014, he was serving as an on-campus intervention teacher, supervising students "who have behavior problems." According to Brown, the campus police officer, Deautric Sims, brought R.D. to his classroom. Brown said that Sims held R.D. by "both of his arms" as he brought him to the class and that R.D. declared to Sims, "I'm going to get you. I'm going to kill you." Brown testified that Sims "set [R.D.] down and then ... left." Brown averred that after Sims left, R.D. continued with his declarations by stating, "I swear on my momma. I'm going to bring something here, bring a gun here and kill him." Brown said that he told R.D., "Son, you don't want to say that." According to Brown, another student also stated to R.D., "No, man. You don't want to say that." Brown said that R.D.'s response was to continue making statements that he was going to "get" Sims and that R.D. then left the room. Brown said that R.D. ignored his repeated instruction to come back.

Brown said that he is required to report all threats, so he reported this incident to the assistant principal. In his report, Brown recalled that R.D. had stated, "I swear on my momma, you know. I'm going to bring a gun here. I'm going to shoot this place up. I'm going to kill that man." Brown said that although Sims heard R.D.'s initial statement that he was going to kill Sims, Sims was not present in the room when R.D. stated that he was going to bring a gun to school in order to do so. Brown averred that he was not afraid of R.D. and that he did not know whether R.D. was carrying a weapon when he made his declarations.

R.D. testified that on the day in question, Sims had taken him to the on-campus intervention room in error. By R.D.'s account, Sims had "said [he] was skipping" class, but he was not. R.D. said that Sims had restrained him by his arms and that Sims and "[t]he lunch ladies" were laughing at him. R.D. said that Sims's conduct upset him and that he began to cry. R.D. said that he never threatened Sims to his face and that he never said that he was going to bring a gun to school or that he was going to kill Sims; rather, R.D. said that he declared that he was going to tell his dad and uncle to come to school and fight Sims. R.D. averred that he did not have access to a gun and that he never intended for his comments to be heard by Sims. When asked why Brown said that R.D. had threatened to bring a gun to school and shoot Sims, R.D. said that Brown had "heard [him] wrong."

Based on the evidence presented regarding the threat charge, and based on stipulated-to evidence regarding charges of criminal trespass and failure to identify that the State had also alleged as delinquent conduct, the trial court adjudicated R.D. delinquent. After a disposition hearing, the trial court placed R.D. on probation for one year. This appeal followed.

Held: Affirmed

Opinion: In one point, R.D. argues that the evidence is insufficient to support the trial court's finding that he intended to alarm Sims when he threatened to bring a gun to school and shoot him. Specifically, R.D. argues that the evidence is insufficient to show that he intended to carry out his threat and that the evidence demonstrates that Sims was not present to hear R.D.'s threat to bring a gun to school and shoot him.

The State argues that Sims's presence was not necessary to prove that R.D. intended to alarm Sims and that when taking R.D.'s words in context, the evidence supports the trial court's finding that R.D. made his threats intending to alarm Sims. We agree with the State.

A. Standard of Review in Juvenile Proceedings

Although juvenile proceedings are civil matters, the standard applicable in criminal matters is used to assess the sufficiency of the evidence underlying a finding that the juvenile engaged in delinquent conduct. In re R.R., 373 S.W.3d 730, 734 (Tex.App.–Houston [14th Dist.] 2012, pet. denied); In re A.O., 342 S.W.3d 236, 239 (Tex.App.–Amarillo 2011, pet. denied). According to that standard, in our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); Dobbs v. State, 434 S.W.3d 166, 170 (Tex.Crim.App.2014). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Jackson, 443 U.S. at 319, 99 S.Ct. at 2789; Dobbs, 434 S.W.3d at 170.

The trier of fact is the sole judge of the weight and credibility of the evidence. See Tex.Code Crim. Proc. Ann. art. 38.04 (West 1979); Dobbs, 434 S.W.3d at 170. Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. Isassi v. State, 330 S.W.3d 633, 638 (Tex.Crim.App.2010). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. Sorrells v. State, 343 S.W.3d 152, 155 (Tex.Crim.App.2011); see Temple v. State, 390 S.W.3d 341, 360 (Tex.Crim.App.2013). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. Jackson, 443 U.S. at 326, 99 S.Ct. at 2793; Dobbs, 434 S.W.3d at 170.

We measure the sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge for the case, not the charge actually given. Byrd v. State, 336 S.W.3d 242, 246 (Tex.Crim.App.2011) (citing Malik v. State, 953 S.W.2d 234, 240 (Tex.Crim.App.1997)); see Crabtree v. State, 389 S.W.3d 820, 824 (Tex.Crim.App.2012) ("[T]he essential elements of the crime are determined by state law."). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. Byrd, 336 S.W.3d at 246. The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. See Daugherty v. State, 387 S.W.3d 654, 665 (Tex.Crim.App.2013); see also Rabb v. State, 434 S.W.3d 613, 616 (Tex.Crim.App.2014) ("When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence will be measured by the element that was actually pleaded, and not any alternative statutory elements.").

B. Evidence Supports the Trial Court's Finding

Under the Texas Education Code's "Exhibition of Firearms" statute, a person commits an offense if, in "a manner intended to cause alarm or personal injury to another person or to damage school property, the person intentionally exhibits, uses, or threatens to exhibit or use a firearm" on school property. Tex. Educ.Code Ann. § 37.125(a) (West 2007). Intent may be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant. Guevara v. State, 152 S.W.3d 45, 50 (Tex.Crim.App.2004).

In this case, the State specifically pleaded that R.D. intended to cause alarm to Sims when he threatened to bring a gun to school and shoot him. Thus, the law authorized by the State's charging instrument, as modified by the factual details pleaded by the State, required the State to prove that R.D. intended to cause alarm to Sims when he declared that he was going to bring a gun to school to "shoot this [school] up" and kill Sims. See Rabb, 434 S.W.3d at 616.

1. Whether R.D. Had the Capacity to Carry Out His Threat

In part of his sole point, R.D. argues that there is no evidence to support a finding that R.D. intended to or was capable of carrying out his threat to bring a gun to school and shoot Sims. But "it is immaterial to [a threat] offense whether the accused had the capability or the intention to carry out his threat." Walker v. State, 327 S.W.3d 790, 794 (Tex.App.–Fort Worth 2010, no pet.) (citing Dues v. State, 634 S.W.2d 304, 305 (Tex.Crim.App.1982)). Thus, we overrule this portion of R.D.'s point.

2. Whether R.D. Intended to Alarm Sims

In the remainder of his sole point, R.D. cites cases dealing with assault by threat and robbery by threat and argues that because "Sims was not present when" R.D. made his threat, there is insufficient evidence to support the trial court's finding that he intended to alarm Sims. See Boston v. State, 410 S.W.3d 321, 326 (Tex.Crim.App.2013) (analyzing robbery by threat); Olivas v. State, 203 S.W.3d 341, 345–46 (Tex.Crim.App.2006) (analyzing assault by threat). The State counters that exhibition of firearms is more akin to terroristic threat than other threat offenses and offers two example cases regarding terroristic threat in which the complainant did not immediately perceive the threat. See Zorn v. State, 222 S.W.3d 1, 3 (Tex.App.–Tyler 2002, pet. dism'd) (holding that terroristic threat "does not require the victim or anyone else to be actually placed in fear of imminent serious bodily injury"); Cook v. State, 940 S.W.2d 344, 349 (Tex.App.–Amarillo 1997, pet. ref'd) ("[I]t is of no consequence whether the [threat] was heard live, or recorded and heard later.").

Like R.D. and the State, this court has found no case analyzing the education code's exhibition-of-firearms statute. We agree, however, that the exhibition-of-firearms statute is similar to the terroristic threat statute in that both

statutes require that there be a threat and the intent to place another in a disturbed state of mind. Compare Tex. Penal Code Ann. § 22.07 (West 2011) (terroristic threat) with Tex. Educ.Code Ann. § 37.125(a) (exhibition of firearm by threat). That is, much like the terroristic threat offense element that the action intend to place another "in fear of imminent serious bodily injury" by a threat, the exhibition-of-firearms statute requires that the threat be made in such a manner that it intends to "alarm" another. Tex. Educ.Code § 37.125(a); Tex. Penal Code Ann. § 22.07.

Viewing the evidence in the light most favorable to the trial court's finding, we determine that a reasonable inference from the cumulative force of the evidence supports the trial court's finding that R.D. intended to alarm Sims when he repeatedly stated that he was going to "kill" Sims by bringing a gun to the school grounds and "shoot" him. Indeed, a reasonable inference to be drawn from R.D.'s comments is that he was angry with Sims because Sims had brought him to the detention hall in a manner that R.D. testified had upset him and caused him to cry. Brown testified that R.D. told Sims directly, "I'm going to kill you." Further, despite both a teacher and fellow student expressing to R.D. that he should not make such threatening statements, R.D. persisted in his statements that he was going to "get" Sims and that he was going to do so by bringing a gun to school to shoot him. R.D. followed his statements by leaving the classroom and ignoring Brown's pleas for him to return.

Conclusion: R.D.'s statements, coupled with the fervor in which he repeated them, followed by his flight from the classroom despite instruction that he return, give rise to a reasonable inference that he knew his actions and words would be communicated to Sims, the on-campus police officer. Thus, it is a reasonable inference that R.D. intended that his threats would be conveyed to Sims and that they were intended to cause alarm to Sims. Cf. In re C.S., 79 S.W.3d 619, 622 (Tex.App.–Texarkana 2002, no pet.) (holding evidence sufficient to support adjudication of juvenile for terroristic threat where evidence demonstrated that juvenile stated to multiple school employees that he was "going to blow up the school" because he believed that teachers had mistreated him and that evidence supported finding that he intended to prevent or interrupt the occupation of a building, room, or place of assembly).

While R.D. may be correct that it is also a reasonable inference that he never intended that Sims learn of his threats, we must resolve the conflict in these reasonable inferences in favor of the trial court's finding. Jackson, 443 U.S. at 326, 99 S.Ct. at 2793; Dobbs, 434 S.W.3d at 170. Thus, we overrule the remainder of R.D.'s sole point. Having overruled R.D.'s sole point on appeal, we affirm the trial court's judgment.

SEARCH & SEIZURE—

In the Matter of J.C., MEMORANDUM, No. 14-15-00696-CV, 2016 WL 7018207, Tex.Juv.Rep. Vol. 31 No. 1 ¶ 17-1-2 [Tex.App.—Houston (14th Dist.), 12/1/16].

PROBABLE CAUSE FOR DETENTION FOLLOWED BY A FRISK ALLOWED EVEN WHERE RUNAWAY WAS GONE FOR LESS THAN 24 HOURS.

Facts: The Riverside Drive-In was robbed at gunpoint on Friday, May 2, 2014. Mr. Matthew, the complainant and part-owner of the Riverside Drive-In, testified that the robber was a male, wearing a long-sleeved T-shirt, black pants or jeans, and his face was covered with a white cloth and a "red thing on the head."1 Complainant also testified that the robber pointed a black gun at his head, directed him to the register, and handed him a grocery bag. Complainant gave the robber all the paper money in the register, about $260 to $270. The robbery took less than a minute and occurred around 8:45 in the evening. The Riverside Drive-In's surveillance video confirmed this testimony.

On the same evening, an individual parked a truck in front of Mr. and Mrs. Macha's house. Mr. Macha testified that the individual's face was covered "with a kind of reddish hat and some kind of light-colored face mask." The individual ran in the direction of the Riverside Drive-In located a third of a mile away. Thinking this behavior odd, Mr. Macha recorded the truck's license plate number and provided it to the police. The police later confirmed that the plates were registered to appellant's father.

Appellant, a 16-year-old juvenile at the time of the offense, lived in East Bernard with D.C., his legal guardian and paternal grandmother. Around 7:40 p.m., D.C. told appellant to walk the dogs and take the trash to their burn pit. D.C. generally allowed appellant to use a truck, which belonged to his father, to take the trash. Appellant left to complete his chores and returned in time to watch a 9:00 p.m. television show. The next morning, Saturday,

May 3, 2014, D. C. noticed that both appellant and the truck were missing. Appellant did not have D.C.'s permission to leave home or take the truck.

D.C. tried contacting appellant, but he did not answer her calls. On Sunday, May 4, D.C. reported appellant as a missing runaway. Later on May 4, appellant contacted D.C. and told her he was with his girlfriend and on the river in New Braunfels. D.C. told appellant that he needed to come home with the truck. Appellant did not comply.

On May 5, Officer Bettice and Corporal Spence of the New Braunfels Police Department saw appellant sitting on the street curb wearing a white T-shirt wrapped around his head. Corporal Spence identified appellant and ran his name through dispatch. Corporal Spence learned that appellant was listed on the National Crime Information Center (NCIC) as a runaway child. The NCIC database described appellant as endangered because he was bipolar and off his medicine. Appellant was in possession of his father's truck. After officers made contact with appellant, they attempted to contact an adult responsible for him. After about forty minutes, officers decided to transfer appellant to the Juvenile Probation Office. Pursuant to a pat-down, the officers seized a black BB gun from appellant and testified that it looked like a realistic handgun. Detective White testified that the BB gun could be a deadly weapon and cause serious bodily injury if it discharged into a person's eye.

A jury found that appellant engaged in delinquent conduct by committing the offense of aggravated robbery. The trial court assessed appellant's sentence at eleven years' confinement in the Texas Juvenile Justice Department with the possibility of transfer to the Institutional Division of the Texas Department of Criminal Justice.

In his first point of error, appellant contends that the trial court erred in denying his motion to suppress the evidence, specifically appellant's BB gun that police seized following the pat-down.

Held: Affirmed

Memorandum Opinion: We review a motion to suppress for abuse of discretion. Lollie v. State, 465 S.W.3d 312, 314 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing Lujan v. State, 331 S.W.3d 768, 771 (Tex. Crim. App. 2011) (per curiam)). In conducting this review, we employ a bifurcated standard. State v. Kerwick, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013). We give almost total deference to the trial court's determination of historical facts and mixed questions of law and fact that rely on credibility or demeanor. Id. We review de novo pure questions of law and mixed questions of law and fact that do not rely on the trial court's credibility determinations. Martinez v. State, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011). The scenario here is a mixed question of law and fact, the resolution of which turns on an evaluation of credibility and demeanor. The proper standard of review is therefore the first category, "almost total deference" to the trial ruling.

Juvenile adjudication hearings proceed under Chapter 38 of the Code of Criminal Procedure and the Texas Rules of Evidence applicable to criminal cases. Tex. Fam. Code Ann. § 54.03(d) (West 2014). Evidence obtained by an officer in violation of the Constitution or laws of the State of Texas is inadmissible at trial. Tex. Crim. Proc. Code art. 38.23 (West 2015).

A child may be taken into custody by a law-enforcement officer if there is probable cause to believe that the child has engaged in conduct indicating a need for supervision. Tex. Fam. Code Ann. § 52.01(a)(3)(B) (West 2014).2 Conduct indicating a need for supervision includes the voluntary absence of a child from the child's home without the consent of the child's parent or guardian for a substantial length of time. Tex. Fam. Code Ann. § 51.03(b)(3) (West 2014). Probable cause "ripens at the moment facts and circumstances within the officer's knowledge ... are sufficient to warrant a prudent man in believing the suspect has committed or is committing an offense." Johnson v. State, 171 S.W.3d 643, 649 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing Beck v. Ohio, 379 U.S. 89, 91 (1964)).

In its ruling on appellant's motion to suppress, the trial court stated: "I find the stop proper. I find that they had information that this young man was a runaway. I do find that their taking the ... air pistol into custody, was lawful." Appellant asserts that the police officers had no probable cause to take appellant into custody, and therefore no authority to conduct the pat-down, because based on their knowledge appellant was not absent from his home for a substantial length of time. See Tex. Fam. Code Ann. § 51.03(b)(2) (West 2014).

We have found no cases construing the term "substantial length of time" in the context of Section 51.03(b)(2) of the Texas Family Code. However, the Penal Code contains the same term. Compare Tex. Penal Code § 25.06(a)(2) (West 2015) ("[A runaway child] is voluntarily absent from the child's home without the consent of the child's parent or guardian for a substantial length of time or without the intent to return.") with Tex. Fam. Code Ann. § 51.03(b)(2) (West 2014) (defining conduct indicating a need for supervision as "the voluntary absence of a child from the child's home without the consent of the child's parent or guardian for a substantial length of time or without intent to return"). We find the cases construing the term in the Penal Code instructive. The cases support the conclusion that the term could include a juvenile's absence for less than 24 hours. See Barrow v. State, 973 S.W.2d 764, 768 (Tex. App.—Amarillo 1998, no pet.) (5 hours); accord Urbanski v. State, 993 S.W.2d 789, 794–95 (Tex. App.—Dallas 1999, no pet.) (17 hours).

We adopt the reasoning as set forth in Urbanski to determine what period of absence is "substantial." The court in Urbanski reasoned that because the legislature did not assign a fixed number to the meaning of "substantial length of time," it left the issue to the fact finder to determine on a case-by-case basis. 993 S.W.2d at 794–95. To make this determination, the Urbanski court considered these factors: the child's duration of absence; time of day; the intent of the child in returning; authorization to leave; child's age; child's motive for running away; the child's activity during the absence; the child's distance from home; and the number, age, maturity, and experience of the persons, if any, accompanying or assisting the child during the absence.

Here, the police officers who seized appellant testified during the suppression hearing that they were made aware that appellant: was age 16; left his grandmother's home without her permission; took the truck without permission; was absent for at least one night; was located roughly 150 miles away from home; and, during his absence, was "off his meds and using drugs," and covered his face and head with a shirt or towel on a hot day. The police officers also knew appellant was in the NCIC runaway database.

Conclusion: Considering the evidence, we hold that the trial court would not have abused its discretion in finding that appellant was missing for a substantial length of time and that the police officers had probable cause to take appellant into custody under Section 52.01 of the Texas Family Code. The pat-down was therefore lawful and the BB gun was admissible. The trial court did not abuse its discretion in denying appellant's motion to suppress the BB gun.

In the Matter of E.O.E., No. 08-14-00144-CV, --- S.W.3d ----, 2016 WL 2609515, Tex.Juv.Rep. Vol. 30 No. 3 ¶ 16-3-3 (Tex.App. – El Paso., 5/5/2016).

POLICE OFFICER'S INVESTIGATIVE STOP WAS HELD PROPER WHERE OFFICER'S SUSPICION WAS NOT BASED ON ANY SINGLE FACTOR OR MERE HUNCH, BUT A COLLECTIVE ASSESSMENT OF THE SCENE AS HE OBSERVED IT AND THE INFORMATION HE RECEIVED WHEN HE ENCOUNTERED THE JUVENILE.

Facts: An altercation over alcohol arose between E.O.E. and Jorge Quinones at a house party on June 30, 2013. E.O.E. became argumentative and aggressive when Quinones denied him access to the ice chest containing the alcohol. He confronted Quinones, stating that "he didn't give a f* *k, he didn't care what anybody said and whoever got in his face, he was going to f* *k everybody up." This verbal exchange escalated into a physical fight when E.O.E. punched Quinones first, but missed. The fight began at the main entrance of the home, moved to the parking lot, and eventually into the street. Quinones testified that he was protecting his family when the fight began. Quinones noticed at some point during the fight that E.O.E. pulled a knife and began swinging it at him. Quinones told E.O.E. to put the knife down so that they could fight "hand in hand, no knifes [sic]," but E.O.E. continued swinging the knife at Quinones. When the party moved into the street, E.O.E. and his friends threw rocks at Quinones. Quinones explained that he continued chasing E.O.E. and his friends away from the house in order to protect his family. Once the fight was over, Quinones noticed that he had been stabbed in his abdomen. Quinones gave his statement to the police on September 13, 2013, in which he referred to E.O.E. as the "fat kid, six, one, heavy, dark skin, about 17 years old, very short hair." He was unable to make a positive identification in any photo lineups.

Officer Jesus Munoz received a call around midnight regarding a fight in progress and arrived at the scene shortly thereafter. The radio dispatch indicated that some of the individuals fled the scene. Officer Munoz spoke with

Quinones who indicated that he was involved in a physical altercation in which he was stabbed. Quinones gave Officer Munoz a description of his attacker. He described the person as a "Hispanic juvenile," of medium build, and provided Officer Munoz with a clothing description. Officer Munoz immediately dispatched this description over his radio to other officers in the surrounding area, but failed to later include the description in his written report. Officer Rodolfo Moreno received Officer Munoz's dispatch call concerning a fight involving weapons on the corner of Elm St. and Porter Ave. He was already in the vicinity of where the fight occurred when he received the call. The dispatch call he initially heard did not indicate that there had been a stabbing. As he approached the intersection, Officer Moreno encountered E.O.E. along with two other juveniles walking eastbound on Porter Ave. The trio were located only three or four houses away from the house where the fight occurred, and were walking away from the scene. When the two juveniles accompanying E.O.E. noticed Officer Moreno, they fled southbound while E.O.E. continued walking eastbound. As Officer Moreno approached E.O.E. in his vehicle, he noticed that E.O.E. kept looking over his shoulder and reaching for his back pocket with his left hand. Officer Moreno testified that he was concerned that E.O.E. might be carrying a weapon given the nature of the dispatch call. E.O.E. initially refused to stop at Officer Moreno's request, but finally did so after the third request. Once he stopped, he voluntarily raised his hands in the air and walked toward Officer Moreno, sweating profusely. According to Officer Moreno, the profuse sweating indicated that he was either running or had just finished doing something physical. When Officer Moreno asked E.O.E. what he was doing and where he was coming from, the juvenile responded: "[We] were just walking by some party and there were—some guys were trying to jump [us], like beat [us] up and that's why [we] were running away from the property." Officer Moreno testified both at the suppression hearing and at trial that E.O.E.'s response, his vicinity to the fight, the time of night, and his consistent efforts to reach for his back pocket caused him to become suspicious of his activities. Accordingly, Officer Moreno conducted a pat down and found a knife in the juvenile's back left pocket. When Officer Moreno asked E.O.E. what was in his pocket, he responded, "I think it's a knife." Officer Moreno secured the knife onto his belt and continued questioning. While attempting to contact E.O.E.'s mother, Officer Moreno received an update over the radio indicating that there was a stabbing where the fight took place. Another officer who was at the fight scene—Officer Argomedo—contacted Officer Moreno on the radio to ask him if he still had a subject detained, to which Officer Moreno responded in the affirmative. Officer Argomedo asked for a clothing description and Officer Moreno told him the suspect was wearing a "red top, black pants," and Officer Argomedo instructed Officer Moreno to "hold onto [the subject]." Officer Argomedo met Officer Moreno at the street location where Officer Moreno stopped E.O.

In his second issue, E.O.E. complains that the trial court erred in denying his motion to suppress. He contends that Officer Moreno stopped, detained, and ultimately arrested him based on a mere "hunch."

Held: Affirmed

Opinion: When reviewing a trial court's decision to deny a motion to suppress, we "afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). We also afford the same amount of deference to trial courts' rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those questions ultimately turns on an evaluation of credibility and demeanor. Montanez v. State, 195 S.W.3d 101, 106 (Tex.Crim.App.2006), quoting Guzman, 955 S.W.2d at 89; State v. Ross, 32 S.W.3d 853, 856 (Tex.Crim.App.2000). Finally, where the resolution of mixed questions of law and fact do not turn on an evaluation of credibility and demeanor, we conduct a de novo review. Montanez, 195 S.W.3d at 106, quoting Guzman, 955 S.W.2d at 89.

Generally, we consider only the evidence adduced at the suppression hearing because the trial court's ruling was based on it rather than evidence introduced later at trial. Rachal v. State, 917 S.W.2d 799, 809 (Tex.Crim.App.1996); Hardesty v. State, 667 S.W.2d 130, 135 n. 6 (Tex.Crim.App.1984). However, this general rule is inapplicable where, as in this case, the parties subsequently re-litigated the suppression issue during the trial on the merits. Hardesty, 667 S.W.2d at 135 n. 6. In such an instance, it is appropriate that we consider all evidence, from both the pre-trial hearing and the trial, in our review of the trial court's determination. Rachal, 917 S.W.2d at 809 ("Where the State raises the issue at trial either without objection or with subsequent participation in the inquiry by the defense, the defendant has made an election to reopen the evidence, and consideration of the relevant trial testimony is appropriate in our review."); see also Webb v. State, 760 S.W.2d 263, 272 n. 13 (Tex.Crim.App.1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3202, 105 L.Ed.2d 709 (1989).

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution protect against unreasonable searches and seizures by government officials. See Wiede v. State, 214 S.W.3d 17, 24–25 (Tex.Crim.App.2007); Johnson v. State, 912 S.W.2d 227, 232–234 (Tex.Crim.App.1995); Martinez v. State, 72 S.W.3d 76, 81 (Tex.App.–Amarillo 2002, no pet.). Our decision here turns on whether Officer Moreno had a reasonable suspicion that E.O.E. was engaged in wrongdoing when he encountered him on the sidewalk. In Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884–85, 20 L.Ed.2d 889 (1968), the United States Supreme Court held that a police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even is the officer lacks probable cause. U.S. v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). The officer, of course, must still be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" Terry, 392 U.S. at 27, 88 S.Ct. at 1883. The level of suspicion required for a Terry stop is obviously less demanding than that for probable cause. Sokolow, 490 U.S. at 7, 109 S.Ct. at 1585.

Like probable cause, the concept of reasonable suspicion is not "readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Reasonable suspicion is established if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the police officer's intrusion into the suspect's constitutionally protected interests. Terry, 392 U.S. at 21, 88 S.Ct. at 1880. We consider the totality of the circumstances when evaluating the validity of a Terry stop. United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981); Moore v. State, 760 S.W.2d 808, 809–10 (Tex.App.-Austin 1988, pet. ref'd). The "totality of the circumstances" analysis requires us to respect "the common-sense, reasonable judgments of law enforcement officers, as informed by all surrounding facts and circumstances and the rational inferences and deductions officers may draw from them based on their experience and familiarity and the areas they serve." In re R.S.W., No. 03–04–00570–CV, 2006 WL 565928, at *3 (Tex.App.-Austin, Mar. 9, 2006, no pet.); Ford v. State, 158 S.W.3d 488, 494 (Tex.Crim.App.2005)(law enforcement training or experience can factor into a reasonable suspicion analysis); see also United States v. Cortez, 449 U.S. 411, 417–18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

Here, Officer Moreno identified numerous objective facts that could have led him to reasonably conclude that E.O.E. had engaged in criminal activity. He stopped and detained E.O.E. due to the suspicious circumstances surrounding the encounter. Collectively, these circumstances included: (1) the juvenile's continuous behavior of reaching toward his back pocket; (2) the time of night (it was past the City's 11 p.m. curfew for juveniles); (3) the location where he encountered E.O.E. and its proximity to the location where the fight with weapons occurred; (4) E.O.E.'s juvenile companions who fled the scene as soon as he approached them in his vehicle; (5) and E.O.E.'s response that he had just come from the direction of the fight. In re R.S.W., 2006 WL 565928 at *11; Woods v. State, 956 S.W.2d 33, 38 (Tex.Crim.App.1997); State v. Bryant, 161 S.W.3d 758, 762 (Tex.App.–Fort Worth 2005, no pet.)(time of night and area's crime rate supported a reasonable suspicion that defendant was, or would soon be, engaged in criminal activity); Alexander v. State, 879 S.W.2d 338, 342 (Tex.App.–Houston [14th Dist.] 1994, pet. ref'd)(being in a park hours past curfew and acting as if one were trying to hide something are facts sufficient to constitute reasonable suspicion).

Officer Moreno's stop was not based on any single factor or mere hunch, but a collective assessment of the scene as he observed it and the information he received when he encountered E.O.E. Moreover, upon encountering E.O.E., Officer Moreno was permitted to ask him, with or without reasonable suspicion, what he was doing and where he was going. Florida v. Royer, 460 U.S. 491, 497–98, 103 S.Ct. 1319, 1323–24, 75 L.Ed.2d 229 (1983); Johnson v. State, 912 S.W.2d 227, 235 (Tex.Crim.App.1995). Appellant's profuse sweating and response indicating that he had just come from the direction of where the fight occurred provided Officer Moreno with an additional reasonable basis for the stop. See Balentine v. State, 71 S.W.3d 763, 769 (Tex.Crim.App.2002). We do note, however, that in isolation, each factor individually would not be sufficient to establish reasonable suspicion. See Horton v. State, 16 S.W.3d 848, 853–54 (Tex.App.–Austin 2000, no pet.)(finding that nervous behavior alone was not enough to establish reasonable suspicion); Gamble v. State, 8 S.W.3d 452, 454 (Tex.App.–Houston [1st Dist.] 1999, no pet.)(explaining that walking away from police in a residential neighborhood at night without any other factors giving rise to suspicion was not sufficient to justify a frisk).

Conclusion: In sum, Officer Moreno's suspicion that Appellant had engaged in criminal activity was based on far more than a mere "hunch" that Appellant alleges. Accordingly, we overrule Appellant's second issue on appeal.

TRANSFER FROM JUSTICE OF THE PEACE COURT—

Tex. AG Op. KP-0064, Tex.Juv.Rep. Vol. 30 No. 2 ¶ 16-2-7A, 2/16/16.

A TRUANCY COURT MAY REFER A CHILD TO THE JUVENILE PROBATION DEPARTMENT FOR EITHER FAILURE TO OBEY A TRUANCY ORDER OR DIRECT CONTEMPT; HOWEVER, SUCH A REFERRAL REQUIRES TWO PRIOR INSTANCES OF CONTEMPTUOUS CONDUCT REGARDLESS OF FORM-EITHER FAILURE TO OBEY A TRUANCY ORDER OR DIRECT CONTEMPT.

Re: Circumstances under which a truancy court may refer a child to the juvenile probation department, and circumstances under which a child may be prosecuted for delinquent conduct (RQ-0046-KP)

Query: You ask us to construe two provisions in newly-added chapter 65 of the Family Code, which now governs court jurisdiction and procedures relating to truancy. You first ask about a truancy court's referral of a child to a juvenile probation department. Request Letter at 1-3.
Subsection 65.251(b) of the Family Code provides, in relevant part, that [i]f a child fails to obey an order issued by a truancy court under Section 65.103(a) or a child is in direct contempt of court and the child has failed to obey an order or has been found in direct contempt of court on two or more previous occasions, the truancy court ... may refer the child to the juvenile probation department .... TEX. FAM. CODE § 65 .251 (b). You explain that this provision could be interpreted in a number of ways depending on the grammatical construction of the phrases beginning with the words "or" and "and" in the sentence. Request Letter at 2. Thus, you ask this office for assistance in determining the meaning of subsection 65.251(b} Ii at 2-3.

Opinion: As with any statute, our goal in construing subsection 65.251(b) is to give effect to the Legislature's intent. Lippincott v. Whisenhunt, 462 S.W.3d 507, 509 (Tex. 2015). "[W]hen
statutory language is susceptible to more than one reasonable interpretation, [a court] look[s] beyond its language for clues to the Legislature's intended meaning." In re Smith, 333 S.W.3d 582, 586 (Tex. 2011). One such clue comes from another subsection of section 65.251. See Tex. Student Hous. Auth. v. Brazos Cty. Appraisal Dist., 460 S.W.3d 137, 141(Tex.2015) (stating that when construing a statute, a court will focus "not on isolated words or phrases but on the statute as a cohesive, contextual whole"). Subsection 65 .251 (a) provides that "[i]f a child fails to obey an order issued by a truancy court ... or a child is in direct contempt," a truancy court may impose a fine, restrict driving privileges, or both. See TEX. FAM. CODE§ 65.25l(a). Subsection 65.251(a)'s imposition of these penalties upon a single occurrence of either truancy order defiance or direct contempt suggests that subsection 65 .251 (b) requires something more than a single occurrence of either behavior to trigger its provisions. Otherwise, there would be no reason to express the penalty for a single occurrence in a separate subsection. See City of Dallas v. TC! West End, Inc., 463 S.W.3d 53, 55-56 (Tex. 2015) (stating that "an interpretation that renders any part of the statute meaningless" should be avoided).

The grammatical structure of subsection 65.251(b) can thus be read to pivot on the conjunctive word "and," requiring the occurrence of some additional condition expressed after the conjunction. The question then is whether either of the additional conditions (i.e., the child failing to obey an order or engaging in direct contempt) must have occurred "on two or more previous occasions" or whether that phrase refers only to direct contempt. Again, we seek clarity from the surrounding text by examining subsection 65 .251 (c), which sets forth the documentation required when a referral to a juvenile probation department is made. That subsection, in relevant part, requires a truancy court to provide documentation of all truancy orders for each of the child's previous truancy referrals, including: (A) court remedies and documentation of the child's failure to comply with the truancy court's orders, if applicable, demonstrating all interventions that were exhausted by the truancy court; and (B) documentation describing the child's direct contempt of court, if applicable[.]
TEX.FAM. CODE § 65.251 (c)(2) (emphasis added).

Thus, subsection (c) suggests that, regardless of the category, there must have been two or more previous occurrences of an offending behavior before the truancy court may refer the child to a juvenile probation department. No language in chapter 65 appears to limit the prior contemptuous behavior requirement to the same category. Thus, one instance of truancy order defiance together with one instance of direct contempt would constitute the requisite "two or more previous occasions" of offending behavior for purposes of subsection 65 .251 (b). This construction also simplifies the execution of the statute because it results in a child's eligibility for juvenile probation department referral upon the third commission of any combination of the offending behaviors, thus making it consistent with the Legislature's express purpose in "creating simple civil judicial procedures" for holding a child accountable for excessive school absences. Id. § 65.00l(b). In sum, a court would likely conclude that under subsection 65.251(b) of the Family Code, a truancy court may refer a child to the juvenile probation department for either failure to obey a truancy order or direct contempt; however, such a referral requires two prior instances of contemptuous behavior regardless of form-either failure to obey a truancy order· or direct contempt.

Summary: A court would likely conclude that under subsection 65.251(b) of the Family Code, a truancy court may refer a child to the juvenile probation department for either failure to obey a truancy order or direct contempt; however, such a referral requires two prior instances of contemptuous conduct regardless of form-either failure to obey a truancy order or direct contempt.

Tex. AG Op. KP-0064, Tex.Juv.Rep. Vol. 30 No. 2 ¶ 16-2-7B, 2/16/16.

A JUVENILE PROSECUTOR MAINTAINS DISCRETION TO PROSECUTE A CHILD REFERRED FROM TRUANCY COURT FOR DELINQUENT CONDUCT EVEN ON A CHILD'S INITIAL REFERRAL TO JUVENILE COURT.

Re: Circumstances under which a truancy court may refer a child to the juvenile probation department, and circumstances under which a child may be prosecuted for delinquent conduct (RQ-0046-KP)

Query: Your second question concerns prosecutorial discretion under section 65.252 of the Family Code. See Request Letter at 3-4. Under section 65.252, after a child is referred to a juvenile court, "the juvenile court prosecutor shall determine" whether there is probable cause to believe the child engaged in direct contempt or failed to obey a truancy order under circumstances that would constitute contempt of court. TEX. FAM. CODE§ 65.252(a). If there is no probable cause, the juvenile court must order the child to continue his or her compliance with the truancy order and must notify the truancy court. Id. § 65.252(c). On a finding of probable cause, "the prosecutor shall determine whether to request an adjudication" from the juvenile court. Id. § 65.252(a). Subsections 65.252(a) and (b) describe this particular adjudication process, which would involve "a hearing to determine if the child engaged in conduct that constitutes contempt of the order issued by the truancy court or engaged in direct contempt of court." Id. § 65.252(a)-(b). During this hearing, if the juvenile court makes a finding of either such behavior, the court, among other things, "shall ... admonish the child ... of the consequences of subsequent referrals to the juvenile court, including ... a possible charge of delinquent conduct for contempt of the truancy court's order or direct contempt of court." Id. § 65.252(b). Subsection 65.252(d), however, expressly states that section 65 .252 "does not limit the discretion of a juvenile prosecutor or juvenile court to prosecute a child for conduct under Section 51.03." Id. § 65.252(d).

Opinion: House Bill 2398 amended the definition of "delinquent conduct" in subsection 51.03(a) to include "conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court in ... a truancy court." Act of May 30, 2015, 84th Leg., R.S., ch. 935, § 18, Tex. Gen. Laws 3224, 3233 (codified at TEX. FAM. CODE§ 51.03(a)(2)(C)) (emphasis added). Thus, you ask "whether a prosecutor and juvenile court must comply with Section 65.252(a)-(c) of the Texas Family Code in the first instance of a child's referral ... to juvenile court, or whether a prosecutor and juvenile court maintain discretion under Section 65.252(d) to prosecute the child for delinquent conduct at any time." Request Letter at 4.

Although the mandatory admonishments to be given by the juvenile court in subsection 65 .252(b) do refer to a possible delinquent conduct charge in future terms upon "subsequent" referrals, suggesting that such a prosecution would not be the consequence of a child's initial referral to juvenile court, subsection (b) must be read in conjunction with subsection (a). Subsection 65.252(a) gives a juvenile prosecutor the discretion to "determine whether to request" the adjudication process described by subsections (a) and (b) in the first instance. TEX. FAM. CODE § 65.252(a) (emphasis added). Only if the prosecutor requests an adjudication under subsection 65.252(a) does a juvenile court proceed to "adjudicate" on the question of contempt, and only upon an affirmative finding does the juvenile court admonish the child regarding a "possible" future charge of delinquent conduct. By expressly stating that section 65.252 does not limit the prosecutor's discretion to prosecute the child on a formal delinquent conduct charge under other law, the Legislature has indicated that the adjudication process of 65.252 is at the discretion of the juvenile prosecutor. Thus, the prosecutor maintains discretion under subsection 65.252(d) to prosecute a child for delinquent conduct as set forth in subsection 5 l .03(a)(2)(C) even on a child's initial referral to juvenile court. This construction affords a juvenile prosecutor the flexibility to handle a child's defiance of a truancy order with the level of severity most appropriate for that child. See id § 65.012 (authorizing the Texas Supreme Court to promulgate "guidelines [for] the informal disposition of truancy cases"); see also id § 65.00l(c) (stating that in adjudicating a child's truant conduct, "[t]he best interest of the child is the primary consideration").

Summary: A court would likely conclude that a juvenile prosecutor maintains discretion under subsection 65.252(d) of the Family Code to prosecute a child for delinquent conduct as set forth in subsection 51.03(a)(2)(C) of the Family Code even on a child's initial referral to juvenile court.

TRIAL PROCEDURE—

In the Matter of M.I.S., No. 01-14-00684-CV, --- S.W.3d ----, 2016 WL 2944148, Tex.Juv.Rep. Vol. 30 No. 3 ¶16-3-5 [Tex.App.—Houston (1st Dist.), 5/19/2016]

NO REVERSIBLE ERROR WHERE TRIAL COURT'S INSTRUCTIONS WHICH TOLD THE JURY TO ANSWER "WE DO NOT" IF IT COULD NOT UNANIMOUSLY FIND THAT JUVENILE USED OR EXHIBITED A DEADLY WEAPON DURING THE AGGRAVATED ROBBERY SINCE THE JUVENILE DID NOT ELECT FOR THE JURY TO DETERMINE PUNISHMENT AND THE TRIAL COURT DID NOT CONSIDER A DEADLY WEAPON FINDING IN CONNECTION WITH THE PUNISHMENT ACTUALLY ASSESSED.

Facts: Around nine in the evening in October 2013, Orlando Caval waited in a Marshall's store parking lot for his wife, who worked at the store. He sat inside his car in a lighted area near the store entrance. As he waited, another car pulled into the parking space on the passenger side of Caval's car. The female driver and the two male passengers, one wearing a hoodie sweatshirt with the hood pulled up, attracted Caval's attention. Caval rolled down his window, and the driver asked Caval for directions. In an effort to assist them, Caval began to search for a location on his cell phone. While Caval was looking at his phone, the passenger wearing the hoodie, later identified as M.I.S., exited the car and headed for Caval's car door. M.I.S. tried to open the door, but it was locked. Caval told M.I.S. to wait while Caval continued to search for directions.

M.I.S. went back to the other car and returned with a shotgun. He pushed the gun's barrel through the open window and held it, with his finger on the trigger, no more than 12 inches from Caval's head. The female driver then ordered Caval to leave his wallet and walk away from the car. As Caval walked away from his car and toward the store, he heard both cars drive away.

Caval called 9–1–1. A police officer arrived, and Caval described the three individuals involved. The day after the robbery, a witness identified Brenda Flores as a suspect. Sergeant S. Ashmore, the lead investigator in the case, proceeded to the district attorney's office to secure a warrant for Flores's arrest. On his way home from the district attorney's office, Sergeant Ashmore overheard some "radio traffic" about a burglary in progress nearby and headed to the scene. When Sergeant Ashmore arrived, he found that officers had taken M.I.S., Flores, and Neiman Gasper into custody for suspected commission of that burglary.

Sergeant Ashmore transported the three suspects to a police substation. He placed M.I.S. in a juvenile holding area while he conducted separate interviews with Flores and Gasper. Both Flores and Gasper identified M.I.S. as the gunman in the Caval carjacking. Later that day, Sergeant Ashmore showed Caval a photo array containing images of six men. Caval selected the photo of M.I.S. from the array and identified him as the person who held the gun to Caval's head. Caval recounted that he was "very positive" of the identification. He also identified the other two assailants from photo arrays.

At trial, Caval testified that M.I.S. held the shotgun during the incident. The jury also heard testimony, however, that Gasper lied to police in stating that M.I.S. held the gun. On the witness stand, Gasper testified that he was the one who had the gun:

> Q. So on October 20th of 2013, you told Sergeant Ashmore that [M.I.S.], in Petitioner's Exhibit 149, which you were looking at the time, is the person who carjacked the man with the red car, right?
> A. I was lying.
> Q. Oh okay. So why is it that you were lying?
> A. Just talking.
> Q. You were pissed off?
> A. No, I was just talking. I was high.
> Q. So who did carjack the man in the red car?
> A. I jacked him.
> Q. So you had the gun that day?
> A. Yep.
> Q. And this is what you looked like that day, Petitioner's Exhibit 121?
> A. I don't know. Look like me.

The jury also heard testimony that the shotgun belonged to Brenda Flores.

M.I.S. raised no objection to the court's charge to the jury, which contained two questions. Question 1 asked for a finding of guilt or innocence on the aggravated robbery charge. It instructed the jury to find that M.I.S. engaged in delinquent conduct if, beyond a reasonable doubt, it unanimously concluded either that:

> [M.I.S.] ... while in the course of committing theft of property owned by ORLANDO CAVAL and with intent to obtain and maintain control of the property, intentionally OR knowingly threatened OR placed ORLANDO CAVAL in fear of imminent bodily injury OR death, and [M.I.S.] did then and there use or exhibit a deadly weapon, to wit: A FIREARM
> or alternatively, that:
> BRENDA FLORES AND/OR NEIMAN GASPER, did then and there unlawfully, while in the course of committing theft of property owned by ORLANDO CAVAL and with intent to obtain and maintain control of the property, intentionally OR knowingly threaten OR place ORLANDO CAVAL in fear of imminent bodily injury OR death, and BRENDA FLORES AND/OR NEIMAN GASPER did then and there use OR exhibit a deadly weapon, to wit: A FIREARM, and that the respondent, [M.I.S.], with the intent to promote or assist the commission of the offense of AGGRAVATED ROBBERY, solicited, encouraged, directed, aided or attempted to aid to the other person or persons to commit the offense of AGGRAVATED ROBBERY, then you will find the respondent did engage in delinquent conduct of the offense of AGGRAVATED ROBBERY as charged in the petition.

Question 1 thus allowed the jury to affirmatively find that M.I.S. had committed the offense of aggravated robbery either as a primary actor or under the law of parties.

Question 2 asked the jury:

> Do you find from the evidence beyond a reasonable doubt that the respondent [M.I.S.] did then and there use or exhibit a deadly weapon, namely a firearm, during the commission of or during the immediate flight from the commission of the aggravated robbery alleged in the petition?

After the jury retired to deliberate, it reported that it was Hopelessly deadlocked on Question No. 2.
A, should we leave it blank; B, say deadlocked?"

In response, the trial court instructed the jury to refer to the general instruction concerning a unanimous verdict.

After the jury resumed deliberations the next day, the State moved the trial court to withdraw Question 2; M.I.S. moved for a mistrial. The trial court denied both motions. The State then asked for a supplemental instruction in connection with Question 2, which read:

> You are further instructed that if you cannot unanimously agree on an answer to this question, then you will state in your answer for Question No. 2, "We do not."

Over M.I.S.'s objection, the trial court submitted this supplemental instruction. Fifteen minutes later, the jury returned its verdict, finding M.I.S. guilty of aggravated robbery and answering "we do not" to whether it found that M.I.S. used or exhibited a deadly weapon. A poll of the jury revealed that the 12 jurors unanimously found M.I.S. guilty of aggravated robbery in response to Question 1, and one out of the 12 jurors refused to find that M.I.S. had used or exhibited a deadly weapon in response to Question 2.

M.I.S. contends that the supplemental instruction to Question 2—which told the jury to answer "we do not" if it could not unanimously find that M.I.S. used or exhibited a deadly weapon during the aggravated robbery—allowed the jury to reach a verdict based on a non-unanimous finding and caused harmful error.

Held: Affirmed

Opinion: Texas Family Code section 54.03(c) requires that "[j]ury verdicts under this title must be unanimous." TEX. FAM.CODE ANN. § 54.03(c) (West 2014); In re L.D.C., 400 S.W.3d at 573. To meet the jury unanimity requirement, the jury must agree that the defendant committed one specific crime. Landrian v. State, 268 S.W.3d 532, 535 (Tex.Crim.App.2008). The jury need not, however, find that the defendant committed that crime in one specific way or even with one specific act. Id.; see Leza v. State, 351 S.W.3d 344, 357 (Tex.Crim.App.2011) (explaining that alleged theories of culpability as principal or party are merely alternate methods or means by which defendant committed one charged offense, which does not require juror unanimity); Martinez v. State, 129 S.W.3d 101, 103 (Tex.Crim.App.2004) (explaining that unanimity requirement is not violated when jury is instructed on alternative theories, or manner and means, of committing same offense); Kitchens v. State, 823 S.W.2d 256, 258 (Tex.Crim.App.1991) (jury need not reach unanimous agreement on preliminary factual issues that underlie verdict, such as manner and means by which one offense was committed); see also Richardson v. United States, 526 U.S. 813, 817, 119 S.Ct. 1707, 1710, 143 L.Ed.2d 985 (1999) (noting by example that disagreement about means of offense of robbery "would not matter so long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force").

The challenged instruction specifically directed the jury to answer "no" if it could not find unanimously that M.I.S. used or exhibited a deadly weapon during the aggravated robbery. We agree with M.I.S. that the trial court erred in directing a verdict based upon a non-unanimous answer.

M.I.S. contends that the error was harmful because he would have been entitled to a mistrial. But this contention assumes that Question 2 affected the jury's adjudication of delinquency for having committed the offense of aggravated robbery. On this record, it did not.

First, M.I.S. concedes that he could be adjudicated delinquent for the crime of aggravated robbery based on an affirmative response to Question 1, standing alone. A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property being stolen, such person (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02 (West 2011). That person commits aggravated robbery if he or she "uses or exhibits a deadly weapon" during the robbery. Id. § 29.03(a)(2). "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." Id. § 7.01(a). "A person is criminally responsible for an offense committed by the conduct of another if ... acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." Id. § 7.02(a)(2). "Each party to an offense may be charged with commission of the offense." Id. § 7.01(b). Question 1 contains all of the elements necessary to support a finding that M.I.S. committed aggravated robbery.

Second, M.I.S. has not shown that the supplemental instruction, which focused solely on Question 2, had any harmful influence on the jury's answer to Question 1, the guilt-innocence question. The jury was polled after the verdict; each juror individually confirmed that the jury's verdict to Question 1 was unanimous. M.I.S. contends that the jury's answers are in conflict because the overwhelming evidence at trial was that M.I.S. used or exhibited the shotgun; the jury's negation of that in answer to Question 2, he contends, calls into question the jury's answer to Question 1. But the jury could answer Question 1 affirmatively for M.I.S. either as the primary actor or as a party. Although most of the evidence at trial supported a finding that M.I.S. used the shotgun during the commission of the robbery, Gasper recanted his statement implicating M.I.S. and testified that he held the shotgun during the robbery. Because the court charged the jury on the law of parties, a juror could find that M.I.S. committed aggravated robbery either as the person who used or exhibited the firearm or as an accomplice. The jury need not have been unanimous as to the manner in which he committed the offense, that is, whether he was a primary actor or a party to the offense. See Leza, 351 S.W.3d at 357.

Finally, although the record does not elucidate Question 2's intended purpose, it does show that the jury's answer to Question 2 did not affect the disposition or punishment based on the finding of delinquency. Because M.I.S. did not elect for the jury to determine punishment, the jury's answer to Question 2 did not affect any punishment determination. See TEX. FAM.CODE ANN. § 54.04(a) (West Supp.2015) (requiring disposition hearing to "be separate, distinct, and subsequent to" adjudication hearing). The record also shows that the trial court did not consider a deadly weapon finding in connection with the punishment actually assessed. In its order of commitment to the Texas Juvenile Justice Department, the trial court left blank the box provided for a deadly weapon finding and the space for the type of weapon used.

Conclusion: Accordingly, we hold that the trial court's error in providing supplemental instruction to the jury does not require reversal. TEX.R.APP. P. 44.2; see L.D.C., 400 S.W.3d at 575–56 (applying both criminal and civil standards to conclude that error did not warrant reversal).

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—

In the Matter of M.K., __S.W.3d.__, No. 02-16-00291-CV, 2017 WL 281036, Tex.Juv.Rep. Vol. 31 No. 1 ¶17-1-5 (Tex.App.—Ft. Worth, 1/23/2017).

WHERE OFFENSE WAS COMMITTED BY FIFTEEN-YEAR-OLD IN AUGUST, 1973, THE NOW FIFTY-EIGHT-YEAR-OLD, IS NOT A "CHILD" UNDER THE TERMS OF ARTICLE 2338–1, BECAUSE UNDER THAT PROVISION THE DETERMINATION OF A CHILD IS MADE AT THE TIME THE PERSON IS BROUGHT TO COURT, NOT AT THE TIME OF THE OFFENSE.

Facts: Appellant M.K. is now fifty-nine years old. The State alleges that on August 7, 1973—when Appellant was fifteen years old—he murdered fourteen-year-old D.R.. The State previously filed a delinquent-child petition in juvenile court against Appellant in 1973 alleging that he murdered D.R., but the juvenile court ultimately dismissed the case at the State's request because of insufficient evidence. According to the State, the case went cold until 2015, when investigators discovered previously unknown evidence implicating Appellant in D.R.'s murder.
In reviewing the case file, Detective McCormack further learned that the State filed a delinquent-child petition against Appellant in juvenile court on August 24, 1973, alleging that he had murdered D.R. with a shotgun. The State amended its petition twice, filing its third and final amended petition on January 7, 1974, in which it alleged Appellant (1) had murdered D.R. on August 7, 1973 "by shooting him with a gun and stabbing and cutting him with a knife"; (2) had committed aggravated assault with a deadly weapon against R.H. on August 6, 1973; and (3) had committed aggravated assault with a deadly weapon against M.P. on August 6, 1973.

Held: Order Vacated, Appeal Dismissed.

Opinion: The arguments raised in Appellant's first issue, the State's reliance on subsection 54.02(j)(4)(A) for the efficacy of the juvenile court's amended waiver and transfer order, and our review of the record and governing legal authorities in light of the particularly unique facts of this case have led us to conclude that we must first consider (1) whether the juvenile court had subject-matter jurisdiction to conduct the waiver and transfer proceeding and render the amended waiver and transfer order that is the subject of this appeal and, consequently, (2) whether we have

jurisdiction to decide this appeal. See Freedom Commc'ns, Inc. v. Coronado, 372 S.W.3d 621, 623–24 (Tex. 2012) (stating that appellate courts have no authority to consider the merits of an appeal from an order rendered by a trial court that lacked jurisdiction). Although neither party raised this issue during the juvenile court's certification hearing or in their briefing before this court, subject-matter jurisdiction may not be waived, and we are obliged to consider it sua sponte. Id. (stating that jurisdiction must be considered, even if that consideration is sua sponte); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 445 (Tex. 1993) (stating that subject-matter jurisdiction may not be waived). In undertaking that inquiry, we begin with an examination of the history of subsection 54.02(j)(4). As it exists today, the Juvenile Justice Code is codified as Title 3 of the Texas Family Code. See Tex. Fam. Code Ann. §§ 51.01–61.107 (West 2014 & Supp. 2016). The legislature did not add the current version of subsection 54.02(j)(4) to Title 3 until 1995. See Act of May 25, 1973, 63rd Leg., R.S., ch. 544, § 1, 1973 Tex. Gen. Laws 1460, 1476–1477, amended by Act of May 19, 1975, 64th Leg., R.S., ch. 693, § 16, 1975 Tex. Gen. Laws 2152, 2156–57, amended by Act of May 8, 1987, 70th Leg., R.S., ch. 140, § 3, 1987 Tex. Gen. Laws 309, 309, amended by Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 34, 1995 Tex. Gen. Laws 2517, 2533–34. Before the current version of subsection 54.02(j)(4) went into effect, subsection 54.02(j)(4) of the Texas Family Code provided as follows:

> (j) The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:
> (4) the juvenile court finds from a preponderance of the evidence that after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
> (A) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person; or
> (B) the person could not be found.

Act of May 8, 1987, 70th Leg., R.S., ch. 140, § 3, 1987 Tex. Gen. Laws 309, 309; see In re P.L.G., No. 05–95–00002–CV, 1995 WL 591208, at *2 n.1 (Tex. App.–Dallas Oct. 3, 1995, writ denied) (not designated for publication) (setting forth the text of subsection 54.02(j)(4) as it existed prior to the changes the 74th Legislature made to that subsection in 1995). In 1995, the legislature enacted H.B. 327, which amended the 1987 version of subsection 54.02(j)(4) to its current form. See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 34, sec. 54.02, 1995 Tex. Gen. Laws 2517, 2533–34.

When comparing the current version of subsection 54.02(j)(4) with the previous version, it is evident that one change H.B. 327 made to subsection 54.02(j)(4) was to add for the first time the language that the State relies upon for the efficacy of the juvenile court's amended waiver and transfer order in this case—that is, it added the language authorizing a juvenile court to waive jurisdiction and transfer a person who is eighteen years of age or older and who committed an offense when he was a child to criminal district court by finding, by a preponderance of the evidence, that "for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person." See id.

H.B. 327 expressly provided that the changes it made to the law, which included the addition of this new provision, became effective January 1, 1996. See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 105, 1995 Tex. Gen. Laws 2517, 2590–91. However, while the amended subsection became effective January 1, 1996, H.B. 327 also expressly limited the applicability of the changes it made in the following way:

> (a) Except as provided by Subsection (b)[7] of this section, this Act applies only to conduct that occurs on or after January 1, 1996. Conduct violating a penal law of this state occurs on or after January 1, 1996, if every element of the violation occurs on or after that date. Conduct that occurs before January 1, 1996, is governed by the law in effect at the time the conduct occurred, and that law is continued in effect for that purpose. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 106(a), 1995 Tex. Gen. Laws 2517, 2591.

It is undisputed that the conduct forming the basis of the State's waiver and transfer petition in this case occurred on August 7, 1973. Thus, under the plain terms of section 106 of H.B. 327, the changes made by that Act—which, as noted above, include the addition of the current subsection 54.02(j)(4)(A) language—do not apply to this case. Id. Rather, H.B. 327 mandates that because this case involves conduct that occurred before January 1, 1996, it is governed by the law in effect at the time the conduct occurred.8 Id. Accordingly, we conclude that this case is governed by the law in effect on August 7, 1973, the date on which Appellant allegedly killed D.R. See id.; In re N.M.P., 969 S.W.2d 95, 98 (Tex. App.–Amarillo 1998, no pet.) (applying version of Texas Family Code in effect on September 2, 1987 notwithstanding fact that H.B. 327 became effective January 1, 1996, because September 2, 1987 is when the defendant allegedly engaged in the conduct at issue); In re N.J.A., 991 S.W.2d 868, 869–70, 870 n.2 (Tex. App.–Houston [1st Dist.] 1997) (applying statute in effect at the time the conduct occurred and noting that

"certain portions of the Family Code were amended in 1995, but they do not apply to the current case because the alleged delinquent conduct occurred in 1994." (citations omitted)), rev'd on other grounds, 997 S.W.2d 554 (Tex. 1999); In re J.E.V., No. 04–96–00125–CV, 1996 WL 591928, at *1 & n.1 (Tex. App.–San Antonio Oct. 16, 1996, no pet.) (not designated for publication) (applying law that existed on June 28, 1993, the date the conduct occurred, to allow interlocutory appeal of juvenile court's waiver and transfer order under subsection 54.02(j) even though H.B. 327 removed the provision in the Family Code that had previously permitted such interlocutory appeal and took effect on January 1, 1996, because conduct at issue occurred prior to January 1, 1996).

THE LAW IN EFFECT ON AUGUST 7, 1973

Title 3 was first enacted by the 63rd Legislature on May 25, 1973, but it did not become effective until September 1, 1973. See Act of May 25, 1973, 63rd Leg., R.S., ch. 544, §§ 1, 4, 1973 Tex. Gen. Laws 1460, 1460–85; Ex parte Morgan, 595 S.W.2d 128, 129 (Tex. Crim. App. 1980) (stating that Title 3 did not go into effect until September 1, 1973). Thus, Title 3 was not in effect on August 7, 1973. The predecessor statute to Title 3 was Article 2338–1 of the Revised Civil Statutes of Texas. See Act of Apr. 21, 1943, 48th Leg., R.S., ch. 204, 1943 Tex. Gen. Laws 313, amended by Act of June 9, 1949, 51st Leg., R.S., ch. 368, 1949 Tex. Gen. Laws 702, amended by Act of Apr. 26, 1951, 52nd Leg., R.S., ch. 156, 1951 Tex. Gen. Laws 270, amended by Act of May 5, 1953, 53rd Leg., R.S., ch. 165, 1953 Tex. Gen. Laws 475, amended by Act of May 8, 1959, 56th Leg., R.S., ch. 431, 1959 Tex. Gen. Laws 934, amended by Act of May 26, 1965, 59th Leg., R.S., ch. 577, 1965 Tex. Gen. Laws 1256, amended by Act of May 24, 1967, 60th Leg., R.S., ch. 475, 1967 Tex. Gen. Laws 1082, amended by Act of April 24, 1969, 61st Leg., R.S., ch. 171, 1969 Tex. Gen. Laws 505, amended by Act of May 27, 1969, 61st Leg., R.S., ch. 492, 1969 Tex. Gen. Laws 1598, amended by Act of May 28, 1969, 61st Leg., R.S., ch. 663, 1969 Tex. Gen. Laws 1963, amended by, Act of Oct. 13, 1972, 62nd Leg., 4th C.S., ch. 20, 1972 Tex. Gen. Laws 43, repealed by Act of May 25, 1973, 63rd Leg., R.S., ch. 544, § 3, 1973 Tex. Gen. Laws 1460, 1485; Morgan, 595 S.W.2d at 129 (noting that predecessor statute to Title 3 was Article 2338–1 of the Revised Civil Statutes of Texas); Ex parte Trahan, 591 S.W.2d 837, 838–39 (Tex. Crim. App. 1979) (same). Accordingly, we conclude that Article 2338–1, as effective on August 7, 1973, is the law that governs this case. Having so concluded, the jurisdictional question presented here is whether, under that law, the juvenile court in this case had jurisdiction to conduct the waiver and transfer proceeding that is the subject of this appeal. We conclude that it did not.

As effective on August 7, 1973, section 5 of Article 2338–1 vested the juvenile courts with "exclusive original jurisdiction in proceedings governing any delinquent child." See Act of May 24, 1967, 60th Leg., R.S., ch. 475, § 3, sec. 5(a), 1967 Tex. Gen. Laws 1082, 1083; Morgan, 595 S.W.2d at 129; Trahan, 591 S.W.2d at 841. Section 3 of Article 2338–1 defined the term "child" as "any person over the age of ten years and under the age of seventeen years." See Act of Oct. 13, 1972, 62nd Leg., 4th C.S., ch. 20, § 1, sec. 3, 1972 Tex. Gen. Laws 43, 43; Trahan, 591 S.W.2d at 841. The term "delinquent child" included any child who "violate[d] any penal law of this state of the grade of a felony[.]" See Act of Oct. 13, 1972, 62nd Leg., 4th C.S., ch. 20, § 1, sec. 3(a), 1972 Tex. Gen. Laws 43, 43. Under these provisions of Article 2338–1, "[t]he juvenile court is one of limited jurisdiction, and it is confined to those persons 'over the age of ten years and under the age of seventeen years.' " Miguel v. State, 500 S.W.2d 680, 681 (Tex. Civ. App.–Beaumont 1973, no writ) (quoting Article 2338–1, § 3). In stark contrast to Title 3, which mandates that the jurisdiction of the juvenile courts is determined by a person's age at the time he allegedly engaged in the delinquent conduct at issue rather than his age at the time of trial, see Tex. Fam. Code Ann. § 51.04(a); Moon v. State, 451 S.W.3d 28, 37–38 (Tex. Crim. App. 2014), the settled law in applying Article 2338–1 provided the opposite: under Article 2338–1, the jurisdiction of the juvenile courts was determined by the person's age at the time of trial, not his age at the time he allegedly engaged in the delinquent conduct. See, e.g., Morgan, 595 S.W.2d at 130 (holding that although defendant was a child at the time he committed the alleged offense, he was not charged with the offense until after he turned seventeen years of age and was no longer a juvenile; thus, the juvenile court never acquired jurisdiction under Article 2338–1); see also id. at 131 (Roberts, J., concurring) (stating that "the long–standing judicial rule ... [was] that the jurisdiction of the juvenile court was to be determined [by the defendant's age] as of the time of trial") (citing Salazar v. State, 494 S.W.2d 548 (Tex. Crim. App. 1973); Boyett v. State, 487 S.W.2d 357 (Tex. Crim. App. 1972); Dearing v. State, 151 Tex.Crim. 6, 204 S.W.2d 983 (1947); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944); Dillard v. State, 439 S.W.2d 460 (Tex. Civ. App.–Houston [14th Dist.] 1969, writ ref'd n.r.e.)). Thus, for the juvenile court to obtain jurisdiction over a proceeding under Article 2338–1, two elements must be present: "[f]irst, [the person] must be within the age limits set by Section 3 of [Article 2338–1], and second, he or she must have committed one of the enumerated acts." Miguel, 500 S.W.2d at 681 (quoting Steed v. State, 143 Tex. 82, 183 S.W.2d 458, 459–60 (1944)); see also Morgan, 595 S.W.2d at 130 n.1 (explaining same and stating that "if a person had already turned 17 by the time criminal charges were initiated against him, he was not charged as a child

but as an adult[;] [h]e was not made subject to the jurisdiction of the juvenile court because the first requirement [that he be a person over the age of ten years and under the age of seventeen years] was lacking").

At the time the State filed its waiver and transfer petition in the juvenile court, Appellant was fifty-eight years of age. He therefore was not a "child" under the terms of Article 2338–1. See Act of Oct. 13, 1972, 62nd Leg., 4th C.S., ch. 20, § 1, sec. 3, 1972 Tex. Gen. Laws 43, 43; Morgan, 595 S.W.2d at 130 n.1. For that reason, in light of the authorities discussed above, we are compelled to conclude that the juvenile court lacked subject-matter jurisdiction to conduct the waiver and transfer proceeding and to render the amended waiver and transfer order that is the subject of this appeal.

When a court lacks subject-matter jurisdiction over a proceeding, any orders it renders in that proceeding are void. See State ex rel. Latty v. Owens, 907 S.W.2d 484, 485 (Tex. 1995) (stating that a judgment is void when "the court rendering the judgment had no jurisdiction over the parties or subject matter, no jurisdiction to render judgment, or no capacity to act as a court"). Accordingly, because the juvenile court lacked subject-matter jurisdiction, its amended waiver and transfer order is void. Id. Our jurisdiction in an appeal from a void order is limited to only "determin[ing] that the order or judgment underlying the appeal is void and mak[ing] appropriate orders based on that determination." Freedom Commc'ns, Inc., 372 S.W.3d at 623. When an appealed-from judgment or order is void, we must declare it void, vacate it, and dismiss the appeal. See Mann v. Denton Cty., No. 02–13–00217–CV, 2014 WL 5089189, at *4 (Tex. App.–Fort Worth Oct. 9, 2014, pet. denied) (mem. op.) (citing Freedom Commc'ns, Inc., 372 S.W.3d at 623–24; Owens, 907 S.W.2d at 486; In re T.D.S.T., 287 S.W.3d 268, 272 n.8 (Tex. App–Amarillo 2009, pet. denied); Waite v. Waite, 150 S.W.3d 797, 800 (Tex. App.–Houston [14th Dist.] 2004, pet. denied)).

Conclusion: Having concluded that the juvenile court lacked subject-matter jurisdiction, we declare its August 24, 2016 amended waiver and transfer order void, vacate that order, and dismiss this appeal.

Morrison v. State, No. 14-15-00773, --- S.W.3d ----, 2016 WL 6652734, Tex.Juv.Rep. Vol. 31 No. 1 ¶17-1-1 [Tex.App.—Houston (14th Dist.), 11/10/2016]

WHEN DISCRETIONARY TRANSFER HEARING TAKES PLACE AFTER CHILD'S 18TH BIRTHDAY, THE FINDINGS UNDER SECTION 54.02(J) MUST BE MET.

Facts: The State charged appellant and filed a petition for a discretionary transfer of the case from juvenile court to criminal district court before appellant turned eighteen years old; however, the juvenile court heard the petition and transferred the case after appellant had reached his eighteenth birthday. The jury in district court returned a guilty verdict and assessed punishment at 45 years' confinement.

Appellant contends that the juvenile court did not make the requisite statutory findings to waive its jurisdiction and transfer the case to district court and thus jurisdiction never vested in the district court. The State contends that appellant waived his complaint by failing to object at the transfer hearing.

Held: Vacated and Remanded

Opinion: A juvenile court has exclusive original jurisdiction in all cases involving delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child at the time of the conduct. Tex. Fam. Code § 51.04(a). The statute defines "child" as a person aged ten to sixteen or a person aged seventeen who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before turning seventeen. Id. § 51.02(2). A juvenile court may waive its jurisdiction and transfer the child to a district court under certain circumstances. Id. § 54.02. However, without such a waiver and transfer, notwithstanding certain exceptions inapplicable here, "a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age." Tex. Penal Code § 8.07(b).

In a juvenile transfer proceeding, the burden is on the State to produce evidence that persuades the juvenile court, by a preponderance of the evidence, that waiver of its exclusive jurisdiction is appropriate. Moon v. State, 451 S.W.3d 28, 45 (Tex. Crim. App. 2014). We first review the juvenile court's factual findings for legal and factual

sufficiency of the evidence, and then review the court's ultimate waiver decision for an abuse of discretion. See id. at 47 (applying "traditional sufficiency of the evidence review" to juvenile court's fact findings under section 54.02(f)). We must answer the following question: was the juvenile court's transfer decision arbitrary, i.e., without reference to any guiding rules or principles, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? See id.

In this case, we address first whether appellant preserved his jurisdictional challenge for our review. Then, we determine whether the juvenile court abused its discretion by transferring the case to district court.

I. Did appellant preserve his jurisdictional challenge for review?

The State argues that appellant waived his jurisdictional challenge by failing to object to the jurisdiction of the juvenile court at the discretionary transfer hearing. Under Texas Family Code section 51.042:

> (a) A child who objects to the jurisdiction of the court over the child because of the age of the child must raise the objection at the adjudication hearing or discretionary transfer hearing, if any.
> (b) A child who does not object as provided by Subsection (a) waives any right to object to the jurisdiction of the court because of the age of the child at a later hearing or on appeal.
> Tex. Fam. Code § 51.042. See In re J.G., 495 S.W.3d 354, 364 (Tex. App.–Houston [1st Dist.] 2016, pet. filed) ("A child who objects to the jurisdiction of the juvenile court must raise the objection at the discretionary transfer hearing.").

As an initial matter, we note that section 51.042 uses the term "court" and not "juvenile court." Tex. Fam. Code § 51.042 ("A child who objects to the jurisdiction of the court over the child ..."). "Juvenile court" is defined in the statute as "a court designated under section 51.04 of this code to exercise jurisdiction over proceedings under this title." Id. § 51.02(6). As discussed, juvenile courts have exclusive original jurisdiction over illegal conduct engaged in by a child. Id. § 51.04(a). The plain meaning of section 51.042 read in context indicates that the section applies to juvenile courts because only they preside over adjudication hearings and discretionary transfer hearings. See id. §§ 54.02(a) (regarding discretionary transfer hearings: "[t]he juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if ... after a full investigation and hearing ...."), 54.03 ("A child may be found to have engaged in delinquent conduct or conduct indicating a need for supervision only after an adjudication hearing conducted in accordance with the provisions of this section.").

Appellant does not challenge the jurisdiction of the juvenile court. He challenges the jurisdiction of the district court.[2] Accordingly, under the plain language of section 51.042, appellant was not required to object to the jurisdiction of the juvenile court under section 51.042 to preserve error on his complaint that the juvenile court's transfer of the case did not vest jurisdiction in the district court. See id. § 51.042.

The State argued during oral argument, however, that appellant was required to object under Rule of Appellate Procedure 33.1 even if section 51.042 did not apply. Appellant objected to the district court's jurisdiction by filing a "Motion to Set Aside the Indictment and Dismiss for Lack of Subject Matter Jurisdiction" in the district court. In the motion, appellant complained that "subject matter jurisdiction never vested in the District Court, [so] the Indictment should be set aside and the case dismissed." This complaint tracks appellant's jurisdictional challenge on appeal. We conclude that appellant has preserved this issue for our review.[3] See Tex. R. App. P. 33.1(a)(1) (establishing that timely request, objection, or motion sufficiently specific to apprise the trial court of basis for request, objection, or motion generally will preserve error).

II. Did the juvenile court abuse its discretion in transferring the case without making the statutorily mandated findings under Family Code section 54.02(j)?

Appellant argues that the juvenile court abused its discretion in failing to make the statutorily mandated findings that would allow a waiver of the juvenile court's jurisdiction and transfer of appellant's case to district court after appellant's eighteenth birthday. As a result, according to appellant, the district court was never vested with jurisdiction over the case. The State does not dispute that the juvenile court was required and failed to make the

requisite findings. The State posits only that appellant failed to object to the juvenile court's jurisdiction and thus waived its objection to the transfer, an argument we have rejected.

Appellant was not yet eighteen years old when the State filed its petition to transfer. The State moved for a transfer under Family Code section 54.02(a). Section 54.02(a) sets forth the findings a trial court must make to waive its jurisdiction and transfer a child who is under the age of eighteen, including, among other things, that "there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." Tex. Fam. Code § 54.02(a). However, appellant was eighteen years old at the time of the transfer hearing.

The juvenile court had jurisdiction only to transfer the case or dismiss it after appellant turned eighteen.[4] Moore v. State, No. PD–1634–14, —— S.W.3d ——, ——, 2016 WL 6091386, at *—— (Tex. Crim. App. Oct. 19, 2016). To transfer a respondent who is eighteen years old or older, a juvenile court must find, among other things, either that "for a reason beyond the control of the state it was not practicable to proceed in juvenile court before" appellant's eighteenth birthday or "after due diligence of the state it was not practicable to proceed in juvenile court before" appellant's eighteenth birthday. See Tex. Fam. Code § 54.02(j)(4).[5]

The juvenile court did not make these findings. The Court of Criminal Appeals recently confirmed that a juvenile court abuses its discretion when it transfers a case involving a respondent who is over eighteen years old without a showing that the factors under section 54.02(j) have been met. See Moore, —— S.W.3d at ——, 2016 WL 6091386, at *——.

The State has the burden of proof on these issues under 54.02(j). Id. But the State affirmatively argued at the transfer hearing that section 54.02(j) did not apply and failed to present evidence to support any findings under that section. Thus, even if the juvenile court had made the requisite findings, such findings would not have been supported by legally or factually sufficient evidence.

Conclusion: We conclude that the juvenile court abused its discretion in transferring the case to district court without making the requisite findings under section 54.02(j), thus failing to waive its jurisdiction and preventing jurisdiction from vesting in the district court. See id. at ——, 2016 WL 6091386 at *——. We sustain appellant's first issue. We vacate the district court's judgment and remand the case to juvenile court for proceedings consistent with this opinion.[6]

Footnotes

2 We note that the issue of whether the juvenile court was required to make findings under Family Code section 54.02(j), discussed in more detail below, was before the juvenile court. During the transfer hearing, appellant's counsel repeatedly asked the court to examine the issue of due diligence. State's counsel responded that she did not need to prove due diligence "because this is not a proceeding under [section] 54.02–J."

3 Because we conclude that appellant did not waive this issue, we need not address the State's argument that jurisdiction in this context involves personal jurisdiction that can be waived, rather than subject matter jurisdiction that cannot.

4 Family Code section 51.0412, which addresses jurisdiction over incomplete proceedings, was amended after the transfer hearing to include "petition[s] for waiver of jurisdiction and transfer to criminal court under Section 54.02(a)." Tex. Fam. Code § 51.0412 (added by Acts 2013, 83rd Leg., ch. 1299 (H.B. 2862), § 7, eff. Sept. 1, 2013). Under the current version of the statute, when a petition to transfer is filed before a respondent turns eighteen and the proceeding is not completed before the respondent's eighteenth birthday, the juvenile court retains jurisdiction over the transfer proceeding if it makes a finding that "the prosecuting attorney exercised due diligence in an attempt to complete the proceeding before the respondent became 18." Id.

5 As in section 54.02(a), the juvenile court also must find that "there is probable cause to believe that the child before the court committed the offense alleged." Tex. Fam. Code § 54.02(a)(3), (j)(5).

6 In Moore, the First Court of Appeals vacated the district court's judgment and dismissed the case because the State's reasons for the delay—the State's heavy caseload and mistakes as to the juvenile's age—were not reasons beyond the States' control. —— S.W.3d at ——, 2016 WL 6091386, at *——, . Here, because the State did not present evidence of its reasons for delay, appellant seeks only a reversal and remand for the State to attempt to meet its burden under section 54.02(j). See In re M.A.V., 954 S.W.2d 117, 119 (Tex. App.–San Antonio 1997, pet. denied).

In the Matter of R.D.G., Jr., MEMORANDUM, No. 05-16-00678-CV, 2016 WL 4743698, Tex.Juv.Rep. Vol. 30 No. 4 ¶16-4-3 (Tex.App.—Dallas, 9/12/2016).

DISCRETIONARY TRANSFER TO ADULT COURT UPHELD WHERE JUVENILE COURT ADDRESSED EACH OF THE FACTORS SET OUT IN SECTION 54.02(F).

Facts: Appellant, who was fifteen years old at the time of the offense, was charged with the delinquent conduct of capital murder. The State filed a petition asking the juvenile court to waive jurisdiction and transfer the case to criminal district court. On the State's motion, the trial court ordered a psychological examination of appellant and ordered the probation department to prepare an investigation of appellant and the circumstances of the offense, a diagnostic study and social evaluation. Once the reports were completed, the trial court conducted an evidentiary hearing. The State and defense each called three witnesses to testify. The evidence showed that the Kaufman County Sheriff's Office responded to a call at a house in Forney at 11:30 a.m. on November 28, 2015. On arrival, a deputy found the homeowner lying face down in the doorway. He had been shot in the neck and had no pulse. The front door was wide open and the doorframe smashed as if kicked or forced open. The scene was consistent with a home invasion burglary.

Kaufman County Sheriff's Deputy Forest Frierson was the lead investigator on the case. Frierson said a neighbor reported seeing a black car with a broken back passenger window parked in front of the residence that morning. Frierson obtained a license plate number for the car from surveillance recordings installed in a nearby new construction site. The car had been reported stolen nine days earlier and recovered by Dallas police the day after the offense. The FBI searched the vehicle and recovered potential DNA evidence as well as .38-caliber and .22-caliber rounds.

Investigators passed out Crime Stoppers fliers in the area where the car was found. A tipster came forward identifying appellant, Jarvis "Big Bro" Kimbel, Henry Davis, and Deion Young as persons involved in the crime. The tipster said appellant told him he was sleeping in the car and "woke up in the middle of everything happening" and saw a "puddle of blood."

Based on the tip, law enforcement officers spoke to appellant and the three men. Davis, appellant's cousin, told the officers he "rented" the car and picked up appellant, who then drove and to pick up Young and Kimbel. According to Davis, Kimbel wanted to go "hit a lick," or "commit a theft or a burglary." Although Davis said no one else wanted to "hit a lick," Kimbel drove from Dallas to a Buc-ees store in Terrell and then to the house in Forney. Frierson also talked to Young, who said appellant was in the car at the time of the murder and was not asleep.

Frierson and another deputy interviewed appellant at the middle school where he was a student. Appellant initially denied any knowledge of the crime but later told deputies he was sleeping in the car when it happened. He also said Kimbel had a .38 Special. Four days later, law enforcement talked to appellant again. This time, appellant said he was in the car with the other three men, went to sleep and woke up when they stopped at a Buc-ees store in Terrell. Appellant said he went inside to get a sandwich, returned to the car, and went back to sleep. He woke up right before being dropped off, and Kimbel told him he would " be okay."

After talking to appellant, Frierson went to Buc-ees and viewed a surveillance video, which showed Davis and appellant entering the store about fifteen minutes before the murder, appellant buying a sandwich, and Davis at the checkout counter. The two returned to the car seen in the construction site video. Frierson said although the view of the car on the Buc-ees video was partially obscured by a truck, he believed appellant got in the car on the driver's side and was driving when the group left Buc-ees for the Forney residence. He said fifteen minutes would have been

enough time to drive to the location. After viewing the video, Frierson arrested appellant. At the time of his arrest, appellant had marijuana in his pocket.

Frierson acknowledged no evidence shows appellant had a "leadership role" in the offense, exited the vehicle at the scene, or knew anyone was likely to be harmed. He agreed it appeared to be "nothing more than a burglary plot" and that the suspects believed no one was home. And while he testified appellant knew Kimbel had a gun, he did not know whether appellant had that knowledge before the incident. But, Frierson said appellant was in the car when Kimbel suggested they go "hit a lick."

In addition to the witnesses' testimony, the trial court also admitted the psychological evaluation prepared by Dr. Kennedy, who concluded appellant's level of maturity and sophistication and his past history indicate he is capable of functioning in the adult criminal justice system. Based on the seriousness of the alleged offense and appellant's ability to understand the charges at a "mature level," Kennedy concluded appellant met the "minimum standards" necessary to be transferred to criminal district court. In addition to Kennedy's evaluation, the court had the written social evaluation and investigative report and addendum prepared by the Kaufman County Juvenile Department. After considering the testimony and the various documents, the trial court granted the petition to waive jurisdiction and transfer appellant's case to the criminal district court. This appeal followed.

Because children 10 years of age or older and under 17 years of age are not subject to prosecution in adult court for criminal offenses, the juvenile court has exclusive original jurisdiction over cases involving what would otherwise be criminal conduct. See TEX. FAM. CODE ANN. §§ 51.02(2), 51.03(a)(1), 51.04(a) (West Supp. 2015). But if a juvenile court determines after a full investigation and hearing that certain conditions are met, it may waive jurisdiction and transfer a child to the district court for criminal proceedings. See id. § 54.02(a), (c) (West 2014); Matter of S.G.R., No. 01-16-00015-CV, 2016 WL 3223675, at *1 (Tex. App.–Houston [1st Dist.] June 9, 2016, no pet.). The State initiates this process by filing a petition and meeting the notice requirements. See TEX. FAM. CODE ANN. § 54.02(b).

At the transfer hearing, the State bears the burden of proving, by a preponderance of the evidence, that waiver of the juvenile court's jurisdiction is appropriate. Moon v. State, 451 S.W.3d 28, 40–41 (Tex. Crim. App. 2014). The hearing is not a trial on the merits, and the court does not consider guilt or innocence; rather, it considers only whether the juvenile's and society's best interests would be served by maintaining custody of the child in the juvenile system or by a transfer to a district court for trial as an adult. Lopez v. State, 196 S.W.3d 872, 874 (Tex. App.–Dallas 2006, pet. ref'd).

To transfer a child who is alleged to have committed a capital felony to the criminal district court, a juvenile court must first find (1) the child was 14 years of age or older at the time of the alleged offense, (2) probable cause exists to believe the child committed the alleged offense and (3) because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal rather than juvenile proceedings. TEX. FAM. CODE ANN. § 54.02(a); Lopez, 196 S.W.3d at 874.

When determining whether there is a preponderance of the evidence to satisfy the third requirement, the juvenile court shall consider, among other matters: (1) whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court. See TEX. FAM. CODE ANN. § 54.02 (f); Lopez, 196 S.W.3d at 874. All four of these factors need not weigh in favor of transfer for the juvenile court to waive its jurisdiction; any combination may suffice. Moon, 451 S.W.3d at 47 & n.78.

On appeal, in evaluating a juvenile court's decision to waive jurisdiction, we first review the juvenile court's specific findings of fact regarding the section 54.02(f) factors under "traditional sufficiency of evidence review." Moon, 451 S.W.3d at 47. But, we review the juvenile court's ultimate waiver decision under an abuse of discretion standard. Id. As the court of criminal appeals has explained:

> ... in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the

Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?
Id.

In his second issue, appellant contends he was improperly certified as insufficient evidence supports the section 54.02(f) factors. We review section 54.02(f) factors for "traditional" sufficiency but then review the ultimate waiver decision for an abuse of discretion. Moon, 451 S.W.3d at 47.

The trial court's order contained the following specific findings under section 54.02(f):

1. The offense alleged to have been committed was against the person of another.
2. The sophistication and maturity of the Respondent are sufficient to transfer the child to the appropriate district court for criminal proceedings.
3. The record and previous history of the Respondent indicate a higher degree of supervision is indicated and that transfer to the appropriate district court is required.
4. The prospects of adequate protection of the public and the likelihood of the rehabilitation of the Respondent by use of the procedures, services, and facilities currently available to this Court are remote.

Held: Affirmed

Memorandum Opinion: When reviewing the legal sufficiency of the evidence, we credit evidence favorable to the challenged finding and disregard contrary evidence unless a reasonable factfinder could not reject the evidence. Matter of B.C.B., 2016 WL 3165595, at *3. If there is more than a scintilla of evidence to support the finding, the no evidence challenge fails. Faist v. State, 105 S.W.3d 8, 12 (Tex. App.–Tyler 2003, no pet.). Under a factual sufficiency review, we consider all the evidence presented to determine if the court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Id.

Beginning with the first factor, appellant agrees the offense alleged to have been committed was against a person. With respect to the second factor, appellant asserts insufficient evidence establishes he has the sophistication and maturity appropriate for transfer. Here, he relies on the testimony of Jackson, Smith, and Ambers to show he lacked sophistication and maturity. Ambers did not give an opinion on appellant's level of sophistication and maturity at the time of the hearing; he testified only that appellant lacked sophistication while in his facility months earlier. To the extent Jackson and Smith testified as such, the juvenile court had other evidence establishing the contrary. Moss testified at length about appellant's attempt to escape during his four months under her supervision and the sophistication of the plan he hatched. Likewise, Gardner believed appellant's conduct in planning the escape was sophisticated. He believed, after reviewing all the information, that appellant's sophistication level for his age was elevated and his maturity level was "age appropriate." Although appellant asserts no evidence shows he developed the escape plan, the record belies his claim. The juvenile court could have reasonably inferred appellant concocted the plan because detailed written notes were found in his possession. A witness identified appellant as the "master mind behind the escape." Having reviewed the record, we conclude the evidence was legally and factually sufficient to support the trial court's finding that appellant's sophistication and maturity justified transfer.

The third factor is the record and previous history of the child. Here, appellant acknowledges he has a criminal history but asserts it is "non-violent." He argues that when in an environment with access to his medications, his criminal activities decreased.

Gardner testified at length about appellant's criminal history and we disagree with appellant's assertion that it is non-violent. Prior to this offense, from September 2011 to October 2014, appellant had many run-ins with the law: age 11, resisting arrest; age 13, assault; age 13, unlawfully carrying a weapon; age 14, robbery; and age 14, theft from a person. As a result, he had been ordered to attend many non-residential programs and had previously been placed at the Dallas County Youth Village. While in the juvenile system, officials tried family therapy, electronic monitoring, substance abuse treatment, intensive supervision, and detention alternative daily reporting, all without any apparent lasting effect. At the time of this offense, he was on probation for theft from a person. Then, after his arrest, he was placed in the Hunt County juvenile facility, where he picked up additional charges related to an assault of a younger, smaller boy, attempted escape, and assault on a public servant. Finally, both Gardner and Dr. Kennedy

believed transfer was appropriate. Considering the evidence, we conclude it is legally and factually sufficient to support the juvenile court's finding that appellant's record and previous history indicate a "higher degree of supervision" is required.

The last factor is "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court." Here, appellant relies on testimony from Ambers that appellant did well in his program, followed the rules, and presented no problems. He argues Ambers was the "most informed person" to provide an assessment and directs us to his testimony that if a juvenile has the history that appellant does and had been through other programs, he would look to the "most least restrictive" well-structured environment possible. However, Ambers also acknowledged some situations merit transfer to the adult system. And, as stated previously, while appellant had established an extensive criminal history, his efforts at rehabilitation were littered with failure. Legally and factually sufficient evidence support the court's finding that the prospects of protecting the public and rehabilitating appellant through the juvenile system are remote.

Conclusion: The juvenile court addressed each of the factors set out in section 54.02(f) in deciding to waive its jurisdiction and transfer appellant to criminal court. Having reviewed the record, we conclude the juvenile court made a "reasonably principled application of the legislative criteria" in determining the statutory factors all weighed in favor of transfer and that transfer in this case is appropriate due to both the serious nature of the alleged offense and the background of the appellant. We overrule the second issue. We affirm the trial court's order waiving jurisdiction and transferring appellant to criminal district court.

In the Matter of J.R. Jr, MEMORNADUM, No. 13-15-00201-CV, 2016 WL 354554, Tex.Juv.Rep. Vol. 30 No. 2 ¶16-2-3 (Tex.App.-Corpus Christi-Edinburg, 1/28/2016).

BETWEEN 1995 AND SEPTEMBER 2015 AN APPEAL OF A JUVENILE COURT ORDER CERTIFYING A JUVENILE TO ADULT CRIMINAL COURT COULD BE MADE ONLY AFTER THE COMPLETION OF THE ADULT CRIMINAL TRIAL.

Facts: Appellant, J.R., Jr., a juvenile, has filed an appeal herein from the trial court's order transferring his case to adult court. As stated herein, we dismiss the appeal for want of jurisdiction.

The date of the trial court's order of transfer to adult criminal court was March 20, 2015. Appellant's notice of appeal was filed on April 17, 2015. The State has filed a motion to dismiss this appeal on grounds that we lack jurisdiction. This Court requested, but did not receive, a response to the motion to dismiss from the appellant.

Held: Dismissed for want of jurisdiction.

Memorandum Opinion: According to the State, the law in effect at the time that the trial court signed the order transferring the cause to the adult criminal court does not afford this Court jurisdiction over an immediate appeal from such a certification order. This matter was discussed by the parties during remand, and the trial court issued findings including, inter alia:
The issue is whether an appeal is timely. The court rules that an appeal is not timely. Under the law in effect at the time of the transfer hearing, an appeal of the juvenile court's ruling in a discretionary transfer case is allowed only after the completion of the criminal case in district court. Therefore, the appellate court should dismiss the appeal as untimely until such time as the district court concludes with the trial of the criminal case.

In 1995, the Legislature repealed Section 56.01(c)(1)(A) of the Texas Family Code which had authorized the immediate appeal of a juvenile court order certifying a juvenile to criminal court. After the effective date of this amendment to the Texas Family Code, an appellate court no longer had jurisdiction over an attempted immediate appeal from a certification order, and any such attempted appeal was dismissed for want of jurisdiction. See Rodriguez v. State, 191 S.W.3d 909, 910 (Tex.App.—Dallas 2006, no pet.); Small v. State, 23 S.W.3d 549, 550 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd); see also In re R.A., No. 08–09–00073–CV, 2009 WL 4146768, *1 (Tex.App.—EI Paso 2009, no pet.) (not designated for publication). However, in 2015 the Legislature once again amended Section 56.01 of the Texas Family Code, this time adding section 56.01(c)(1)(A), which once again allows

the appeal of certification orders. See Tex. Fam.Code Ann. § 56.01(c)(1)(A) (West, Westlaw through 2015 R.S.). Nevertheless, the Legislature stated that the effective date of this 2015 amendment was September 1, 2015, and that: The change in law made by this Act applies only to an order of a juvenile court waiving jurisdiction and transferring a child to criminal court that is issued on or after the effective date of this Act. An order of a juvenile court waiving jurisdiction and transferring a child to criminal court that is issued before the effective date of this Act is governed by the law in effect on the date the order was issued, and the former law is continued in effect for that purpose. Acts 2015, 84th Leg., ch. 74 (S.B.888), § 5, eff. Sept. 1, 2015.

Conclusion: Because the transfer order which appellant attempts to appeal was signed on March 20, 2015, it was made before the effective date of the 2015 amendment, and therefore, this case is governed by the law in effect on the date the order was issued. Accordingly, this Court is without jurisdiction to hear this appeal. We grant the State's motion to dismiss and we dismiss the appeal for want of jurisdiction.

In the Matter of H.C., III, MEMORANDUM, No. 02-15-00149-CV, 2016 WL 354297, Tex.Juv.Rep. Vol. 30 No. 2 ¶16-2-4 (Tex.App.-Fort Worth, 1/28/2016).

JUVENILE HAS NO RIGHT OF CONFRONTATION AT A DISCRETIONARY TRANSFER HEARING.

Facts: After a plea bargain, a visiting judge adjudicated Appellant H.C. Ill delinquent and committed him to the Texas Juvenile Justice Department (TJJD) for five years with a possible transfer to the Texas Department of Criminal Justice Correctional Institutions Division (TDCJ–CID). Less than three years later, upon the recommendation of the TJJD and after a hearing, the trial court ordered that Appellant be transferred to the TDCJ–CID to serve the remainder of his sentence. In three issues, Appellant complains of the trial court's transfer order. He contends that (1) section 54.11 of the Texas Family Code is unconstitutional because in its operation, it violated his right to confront and cross-examine adverse witnesses, (2) his right to cross-examination and confrontation of multiple adverse witnesses was violated when the trial court was allowed to consider hearsay statements contained within a written record, and (3) the evidence is insufficient to support a finding of transfer. Because we hold that Appellant had no right of confrontation at the transfer hearing and that the trial court did not abuse its discretion by ordering his transfer to the TDCJ–CID, we affirm the trial court's order.

Held: Affirmed

Memorandum Opinion: Section 54.11(d) of the family code allows a trial court faced with the issue of transferring a youth from the TJJD to the TDCJ–CID to "consider written reports and supporting documents from probation officers, professional court employees, professional consultants, employees of the [TJJD], or employees of a post-adjudication secure correctional facility in addition to the testimony of witnesses" and expressly provides that "[a]ll written matter is admissible in evidence at the hearing." In his first issue, Appellant contends that section 54.11 is unconstitutional because in its operation, it violated his right to confront and cross-examine adverse witnesses. In his second issue, he complains that his right to the cross-examination and confrontation of multiple adverse witnesses was violated when the trial court was allowed to consider hearsay statements contained within a written record. This court, however, has repeatedly held that a juvenile has no right of confrontation at a discretionary transfer hearing. We therefore overrule both issues.

In his third issue, Appellant challenges the sufficiency of the evidence supporting the transfer. Initially, he contends that his transfer was unauthorized because the evidence did not meet both prongs of the test for transfer set out in human resources code section 244.014(a). That section provides that the TJJD may refer a juvenile offender aged sixteen to nineteen years old serving a determinate sentence to the committing court for approval of transfer to the adult prison system if "the child has not completed the sentence" and his "conduct ... indicates that the welfare of the community requires the transfer." The statute does not address the trial court's decision to transfer the child to the adult prison system. Instead, it concerns the TJJD's decision to refer the child for transfer. We overrule this part of Appellant's issue.

Appellant also contends that the evidence is insufficient to support the trial court's transfer order. We review the trial court's transfer order for an abuse of discretion. In appropriate cases, legal and factual sufficiency of the

evidence are relevant factors in assessing whether the trial court abused its discretion. In determining whether the trial court abused its discretion, we review the entire record.

A trial court abuses its discretion when it acts without reference to any guiding rules or principles, that is, when the act is arbitrary or unreasonable. An appellate court cannot conclude that a trial court abused its discretion merely because the appellate court would have ruled differently in the same circumstances. A trial court also abuses its discretion by ruling without supporting evidence. But an abuse of discretion does not occur when the trial court bases its decision on conflicting evidence and some evidence of substantive and probative character supports its decision.

Section 54.11(k) of the family code provides a list of nonexclusive factors that a trial court may consider in reaching its transfer decision:
the experiences and character of the person before and after commitment to the [TJJD] or post-adjudication secure correctional facility, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the [TJJD], county juvenile board, local juvenile probation department, and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Within its discretion, the trial court may assign different weights to the factors it considers, and the court need not consider every factor.

Appellant points to some positive evidence: he had completed some vocational courses while confined that would make him more employable; if released on parole, he would live with his father under strict conditions; and he was compliant with his psychiatric medication. Further, most of his behavioral problems occurred before he received psychiatric treatment.

But the trial court also was privy to the facts of the conduct for which Appellant had been adjudicated. Along with an adult, Appellant committed three aggravated robberies in a period of three days in August 2012, using a firearm in each. Appellant shot one of the complainants; his accomplice shot another.

Further, according to Leonard Cucolo, the TJJD court liaison, after his commitment to the TJJD, Appellant performed poorly behaviorally while he[was] confined. He[was] involved in 120 documented incidents of misconduct. Of the 120, 62 of the incidents were actual referrals to the security unit. The security unit is basically [the] detention center within a highly structured facility, high-restriction facility, and of the 62, he had 24 admissions into the security unit. He engaged in over 20 major rule violations, which are basically new offenses that a youth can commit while confined.

There's major and minor rule violations. Major rule violations are basically ... offenses that a youth would be arrested for if they were committed in the free, such as assault, which he was involved in, assault on staff, assault on youth, fleeing apprehension.

Additionally, less than three months before the transfer hearing, Appellant, along with six other confined youths, sought out a teacher who Appellant had announced was "his girl" and from whom Appellant had been ordered to stay away. The pack of youths went to the wrong classroom.

Cucolo also testified about Appellant's lack of progress while confined. Cucolo stated that twelve to eighteen months is a reasonable period of time for a confined youth to reach Stage 5, which indicates "parole readiness." After twenty-nine months of confinement, Appellant was on Stage 1, the entry stage of the TJJD's treatment program. Cucolo reported that Appellant's "risk to ... students and staff within TJJD appear[ed] high and his prognosis for a successful treatment outcome appear[ed] low."

The prosecutor and the TJJD both recommended Appellant's transfer to the TDCJ–CID. The complainants of Appellant's three aggravated robberies did not appear at the transfer hearing.

Conclusion: Given the evidence, particularly the nature of the delinquent conduct and Appellant's major violations while at the TJJD facility, we cannot conclude that the trial court abused its discretion by ordering Appellant's

transfer to the TDCJ–CID. We overrule his third issue. Having overruled Appellant's three issues, we affirm the trial court's transfer order.

WAIVER OF RIGHTS—

In the Matter of A.F., MEMORANDUM, No. 14-15-00709-CV, 2016 WL 4705165, Tex.Juv.Rep. Vol. 30 No. 4 ¶16-4-4 [Tex.App.—Houston (14th Dist), 9/8/2016].

THE FAILURE TO FOLLOW THE PROCEDURE FOR A JUVENILE JURY WAIVER IS SUBJECT TO A HARM ANALYSIS UNDER RULE 44.2(B) OF THE TEXAS RULES OF APPELLATE PROCEDURE, REASONING THAT "A COURT'S FAILURE TO FOLLOW STATUTORY PROCEDURES FOR WAIVING A DEFENDANT'S RIGHT TO A JURY TRIAL IS NOT STRUCTURAL ERROR."

Facts: The State petitioned for A.F.'s commitment to the Texas Juvenile Justice Department, alleging that A.F. engaged in delinquent conduct by committing an aggravated robbery. After a bench trial, the court found that A.F. engaged in delinquent conduct as alleged, and the court ordered A.F. committed to the Department for ten years.

Section 54.03(c) states that an adjudication trial "shall be by jury unless jury is waived in accordance with Section 51.09." Tex. Fam. Code Ann. § 54.03(c). Section 51.09 states that any right granted by the Juvenile Justice Code or the Texas or United States Constitution may be waived if "(1) the waiver is made by the child and the attorney for the child; (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded." Id. § 51.09. The parties agree that the fourth requirement has not been met in this case. The record does not contain a written or recorded waiver of a jury trial.

It is also undisputed that the trial court's judgment, which A.F. signed, states that all parties waived a jury trial:

> Be it remembered that this cause being called for trial, came on to be heard before the above Court with the above numbered and entitled cause and came the State of Texas by her Assistant District Attorney ... and came in person the Respondent, [A.F.], with his/her defense attorney ... and the Respondent's parent(s), guardian(s), or custodian(s), and pursuant to the Texas Family Code all parties waived a jury ....

Held: Affirmed

Memorandum Opinion: A.F. contends he did not "affirmatively waive" his right to a jury trial guaranteed by the Texas Constitution, resulting in structural error immune from a harm analysis. A.F. acknowledges that this court held in In re R.R. a juvenile does not have a constitutional right to a jury trial: "The Family Code—not the Texas constitution—creates a juvenile's right to a jury trial." 373 S.W.3d at 737. A.F. has not cited any controlling authority or statutory change to undermine In re R.R., and as noted above, we are bound by the In re R.R. decision under these circumstances. See Chase Home Fin., 309 S.W.3d at 630.

Further, as this court held in In re R.R., a recitation in a judgment that "all parties waived a jury" is "binding in the absence of direct proof of its falsity." 373 S.W.3d at 738 (citing Breazeale v. State, 683 S.W.2d 446, 450 (Tex. Crim. App. 1985) (op. on reh'g)). Acknowledging that a defendant's waiver of a jury trial must be shown in the record, Breazeale held that a recitation in the judgment that the defendant waived his right to a jury trial carried "the presumption of regularity and truthfulness," and "the burden is then on the accused to establish otherwise, if he claims that the contrary is true." 683 S.W.2d at 451–51.

A.F. has not met this burden to overcome the presumption that he waived any right to a jury trial because the record contains nothing to refute the judgment's recitation that "all parties waived a jury." See id. at 450; In re R.R., 373 S.W.2d at 738. Thus, even if A.F. had a constitutional right to a jury trial, he waived it.

Failure to Comply with Sections 54.03(c) and 51.09 of the Family Code Subject to a Harm Analysis

A.F. contends that the failure to comply with Section 54.03(c), and by reference Section 51.09, is "immune from a harmless error analysis." A.F. attempts to distinguish In re R.R., claiming that unlike the juvenile in that case, A.F. "was never admonished of his right to a jury trial and he did nothing to affirmatively waive that right."

In In re R.R., the record showed that the trial court informed the juvenile of his right to a jury trial and the juvenile waived that right in open court. See 373 S.W.2d at 733. However, those facts were immaterial to the court's holding that the failure to follow the procedure for waiver in Sections 54.03(c) and 51.09 was subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. See id. at 737. Instead, this court relied on Johnson v. State, reasoning that "a court's failure to follow statutory procedures for waiving a defendant's right to a jury trial is not structural error." In re R.R., 373 S.W.3d at 736–37 (citing Johnson v. State, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002)). In Johnson, the Court of Criminal Appeals presumed that the defendant understood his right to a jury trial because the judgment recited the defendant "waived trial by jury." 72 S.W.3d at 349.

Accordingly, consistent with In re R.R., the trial court's failure to comply with Sections 54.03(c) and 51.09 is subject to a harmless-error analysis under Rule 44.2(b).

Harmless Error: Failure to Make Waiver in Writing or Open Court

Because the judgment recites that A.F. and his attorney "came on to be heard" and that "all parties waived a jury," we presume that A.F. and his attorney knew about his right to a jury trial and knowingly relinquished that right. See Johnson, 72 S.W.3d at 349; see also In re R.R., 373 S.W.3d at 738. Thus, in the absence of direct proof of the falsity of the recitation in the judgment, we presume that A.F. and his attorney voluntarily waived the right to a jury trial with information and understanding of that right and the possible consequences as required by Section 51.09(1)–(3). See Johnson, 72 S.W.3d at 349; In re R.R., 373 S.W.3d at 738.

The State concedes error regarding Section 51.09(4), however, because the waiver was not made in writing or in court proceedings that are recorded. A.F. contends he was harmed because the evidence at trial was "unconvincing" and "it is probable that other reasonable fact finders would have found the evidence factually insufficient."

In conducting a harm analysis of this error, we must determine whether A.F.'s substantial rights were affected. See In re R.R., 373 S.W.3d at 737 (citing Tex. R. App. P. 44.2(b)). "In a non-jury case, an error does not affect substantial rights if the error does not deprive the complaining party of some right to which he was legally entitled." Id. "A substantial right is affected when the error has a substantial and injurious effect or influence." Mason v. State, 322 S.W.3d 251, 255 (Tex. Crim. App. 2010). In making this determination, we consider the entire record. In re R.R., 373 S.W.3d at 737–38.

This case fits squarely within Johnson. Adult defendants may waive a jury trial, but according to statute, the waiver must be made in person by the defendant in writing and in open court. Johnson, 72 S.W.3d at 347 (citing Tex. Code Crim. Proc. Ann. art. 1.13(a)). Johnson held that a defendant is not harmed under Rule 44.2(b) from the lack of a written waiver when (1) the judgment recites that the defendant waived a jury trial, and (2) there is no direct proof of the falsity of the recitation. See id. at 349. Under these circumstances, the court presumes that the defendant was aware of his right to a jury trial and opted for a bench trial, and the failure to comply with the statute is harmless. Id.

Conclusion: The rationale from Johnson applies to this case. The failure of the waiver to be in writing or recorded did not deprive A.F. of a substantial right when the record otherwise indicates that he and his attorney in fact waived the right to a jury trial. See Johnson, 72 S.W.3d at 349; In re R.R., 373 S.W.3d at 738. The strength of the evidence is not a factor that either this court or the Court of Criminal Appeals has considered for similar error. See Johnson, 72 S.W.3d at 349; In re R.R., 373 S.W.3d at 738. Thus, although a reasonable fact finder could have reached a different conclusion in this case, the record as a whole does not show that the error had a substantial and injurious effect or influence on the proceedings. Having overruled both of A.F.'s issues, we affirm the trial court's judgment.