

CERTIFICATIONS IN TEXAS A GENERAL OVERVIEW

**29TH ANNUAL JUVENILE LAW CONFERENCE
ROBERT O. DAWSON JUVENILE LAW INSTITUTE
SAN ANTONIO, TEXAS
FEBRUARY 22, 2016**

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Certifications in Texas a General Overview

I. Introduction

On September 2, an intruder entered a woman's apartment took her wallet and raped her.¹ The police found in the apartment latent fingerprints. They were developed and processed. They matched the fingerprints of Morris Kent, taken when he was 14 years old. At about 3 p.m. on September 5, Morris Kent was taken into custody by the police. Morris was then 16. Upon being apprehended, Morris was taken to police headquarters where he was interrogated by police officers. It appears that he admitted his involvement in the offense which led to his apprehension and volunteered information as to similar offenses involving housebreaking, robbery, and rape. His interrogation proceeded from about 3 p.m. to 10 p.m. the same evening. On September 25, Morris was indicted by a grand jury. The indictment contained eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery. Morris' case was taken to trial and a jury found Morris "not guilty by reason of insanity" as to the rape charges and guilty on the burglary and robbery charges. Morris was sentenced to serve five to fifteen years on each count or a total of 30 to 90 years in prison. Morris appealed his case which eventually was litigated all the way to the United States Supreme Court.

In reversing Morris' conviction the Supreme Court in a landmark decision opined "It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile."² The Court's decision in *Kent*

was landmark in that for essentially for the first time the Supreme Court applied principles of fundamental fairness and due process to juvenile proceedings.

II. *History of Juvenile Courts*

Beginning in the late nineteenth century juvenile justice reform took place nationwide which established separate criminal justice systems for children and adults. In Texas the first schools for juvenile offenders was established beginning in 1889. The genesis of the Texas juvenile schools was based on the principal that "[c]hildren who are in danger of maturing into adult criminals should be rescued – not by imposing on them the disabilities that result from criminal conviction, but by placing them in protective environments and teaching them about discipline, morality, values and productive work."³ Prior to 1889 most states treated children over the age of seven the same as they treated adults in criminal prosecution. During this period children were sentenced to lengthy periods of incarceration in prisons along with adults. Beginning in the late nineteenth century juvenile justice reform was enacted that established separate juvenile courts. The country's first distinct juvenile court was established in Chicago in 1899 with the statutory purpose that the court would handle children under the age of sixteen and would serve a rehabilitative, rather than punitive purpose. Separate juvenile courts have operated in the United States for well over 100 years however every state has a procedure for trying juveniles as

¹ *Kent v. United States*, 383 U.S. 541, 543-44, 86 S. Ct. 1045, 1048 (1966).

² *Kent v. United States*, 383 U.S. at 556.

³ See generally, Michele Deitch, Rebecca Breeden & Ross Weingarten, *Seventeen, Going on Eighteen: An Operational and Fiscal Analysis of a Proposal to Raise the Age of Juvenile Jurisdiction in Texas*, 40 Am. Crim. L. Rev. 1 (2012).

adults or transferring their cases to adult court. Here in Texas, in 1918, the legislature raised the age of juvenile court jurisdiction from thirteen to seventeen years old. Essentially, meaning that beginning at the age of seventeen individuals are treated as adults for all purposes in the criminal justice system.

The process of trying juveniles as adults is available in every state in the country. States vary on the requirements of trying juveniles as adults however there exist three basic types of procedures or hearings to transfer juveniles to adult court. The most prevalent type of statute to transfer juveniles to adult court is judicial waiver. Judicial waiver is the process which a juvenile court judge makes the determination to transfer a child to adult court after a hearing. By far judicial waiver is the most common type of transfer or certification.⁴

Automatic waiver, legislative waiver or sometimes referred to as statutory exclusion is the transfer process where certain offenses alleged to have been committed by juveniles are statutorily excluded from juvenile court

⁴ Currently, forty-six states have a *judicial waiver* provisions, in which juvenile court judges clear the way for criminal court prosecutions by waiving jurisdiction over individual juveniles. Under a waiver law, a case against an offender of juvenile age must at least originate in juvenile court; it cannot be channeled elsewhere without a juvenile court judge's formal approval. While all states prescribe standards that must be consulted in waiver decision-making, most leave the decision largely to the judge's discretion (45 states). However, some set up presumptions in favor of waiver in certain classes of cases (15 states), and some even specify circumstances under which waiver is mandatory (15 states). See, Patrick Griffin, National Center for Juvenile Justice "National Overviews," State Juvenile Justice Profiles, http://www.ncjj.org/stateprofiles/overviews/transfer_state_overview.asp (current through 2004 legislative session) (last visited June 25, 2006).

and original jurisdiction rests with the criminal court. Over half of the states in the country have this process. Commonly referred to as automatic waiver because these statutes remove juvenile court jurisdiction "automatically" and no motion or request from the State or even a decision by the juvenile court judge is required.⁵ This is the general practice in Texas for youth who commit criminal offenses beginning at the age of seventeen. year old youth who are automatically charged in the adult system for offenses.⁶

Direct file, is the transfer process which gives the prosecution the discretion to determine whether to proceed in juvenile court or criminal court against the juvenile. Direct files places sole discretion with the prosecutor to determine if proceedings will be initiated in juvenile court or criminal court.⁷

In 1973 the Texas legislature promulgated Title III of the Family Code. The enactment of Title III was in response in part to U.S. Supreme Court decisions, increases in juvenile crime and an overall desire for Texas officials to be progressive.⁸ The initial goals of Title III were to provide for the care, the protection, and the wholesome moral, mental and physical development of children coming within its provisions; to protect the welfare of the community and

⁵ Twenty-nine states have *statutory exclusion* provisions that grant criminal courts original jurisdiction over certain classes of cases involving juveniles. Legislatures in these states have essentially predetermined the question of the appropriate forum for prosecution-taking the decision out of both prosecutors' and judges' hands. *Id.*

⁶ Tex. Penal Code §8.07.

⁷ Fifteen states have *direct file* laws, which leave it up to prosecutors to decide, at least in specified classes of cases, whether to initiate cases in juvenile or criminal courts. *Id.*

⁸ 29 THOMAS S. MORGAN, TEXAS PRACTICE, JUVENILE LAW AND PRACTICE §1 (1985).

to control the commission of unlawful acts of children; consistent with the protection of the public interest, to remove from children committing unlawful acts the taint of criminality and the consequences of criminal behavior and to substitute a program of treatment, training, and rehabilitation; to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety and when a child is removed from his family, to give him the care that should be provided by parents; to provide a simple judicial procedure through which the provisions of Title Three are executed enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.⁹

In Texas the judicial waiver process is used in removing juveniles to adult criminal court and is referred to as discretionary transfer, waiver of jurisdiction or most commonly certification. Discretionary transfer to criminal court or certification allows a juvenile judge to make the determination whether a juvenile respondent is transferred from the juvenile system to the adult criminal system. Although certifications account for a relatively small percentage of proceedings in juvenile court they are extremely important hearings in that the juvenile court is making a decision to transfer a respondent to adult criminal court.¹⁰

⁹ See original TEX. FAM. CODE §§51.02 (1-5). Amended.

¹⁰ The number of certification proceedings has shown an overall decrease over the last decade; Texas Juvenile Justice Department data show 589 actual certifications occurred in 1996 compared to 212 certifications in 2012. *See generally*, Robert O. Dawson, Texas Juvenile Law § 10 (8th ed. 2012). See also, “Who Gets Certified? An Empirical Study of Discretionary Transfers from Juvenile to Criminal

Proceedings in juvenile court are considered civil in nature and have been designed to remove the “taint of criminality from children” and to focus on treatment, training and rehabilitation of the child¹¹. Once a juvenile is certified to stand trial as an adult all of the protections available in the juvenile system are lost and the adult system takes over.

Texas law establishes basically three types of transfer or waiver of jurisdiction proceedings: hearings where the juvenile respondent is under the age of eighteen at the time of the hearing; hearings where the respondent is an adult or over the age of eighteen at the time of the commencement of the hearing; and the mandatory certification where a person has previously been certified and commits a new eligible offense.

III. *Certification Eligibility*

The certification proceedings are initiated by the State filing a motion or petition for discretionary transfer and the issuance of a summons. The minimal requirements necessary for certification bestow on State prosecutors a wide range of discretion in determining which cases to seek certification. However, certifications are usually limited to, the more serious offenses, juveniles with chronic delinquent history, or individuals over eighteen who are accused of committing offenses when they were younger than seventeen.

The juvenile court has exclusive jurisdiction over nearly all criminal offenses committed by juveniles.¹² Texas

Court” Robert O. Dawson, Juvenile Law Section Report December 2002.

¹¹ TEX. FAM. CODE § 51.01.

¹² *See generally*, TEX. PEN. CODE 8.07(a)(1)-(5). TEX. PEN. CODE § 8.07(a)(7) was enacted in 2001 to eliminate a potential defense to prosecution under TEX. FAM. CODE § 54.02(j)(2)(A), and now permits prosecution in criminal court of a person

Penal Code §8.07(b) states: [u]nless the juvenile court waives jurisdiction under Section 54.02, Family Code, and certifies the individual for criminal prosecution or the juvenile court has previously waived jurisdiction under that section and certified the individual for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age except an offense described by Subsections (a)(1)-(5).¹³

It is important to note that the age limitation is considered jurisdictional.¹⁴ Article 4.18 requires that a defendant or underage child raise the issue of being underage by written motion and the issue must also be presented to the district court judge.¹⁵ If the issue of underage is not raised by written motion in district court then the issue will be considered waived.

IV. *Perjury*

Generally the age limits for juvenile court to have original jurisdiction of a child exists between the ages of ten and seventeen.¹⁶ However a general exception to this provision deals with perjury offenses.¹⁷ The Family Code

eighteen or older charged with murder or capital murder allegedly committed between the ages of ten and fourteen. TEX. FAM. CODE § 51.03(c) (providing exception for perjury). TEX. FAM. CODE § 51.04(a); *In the Matter of N.J.A.*, 997 S.W.2d 554 (Tex. 1999).

¹³ TEX. PEN. CODE 8.07(b).

¹⁴ See generally, TEX. CODE CRIM. PROC. Art. 4.18.

¹⁵ *Id.*; *Rushing v. State*, 85 S.W.3d 283,286 (Tex. Crim. App. 2002); *Adams v. State*, 161 S.W.3d 113 (Tex. App.—Houston [14th Dist.] 2004); *Mays v. State*, No. 01-03-01345-CR, 2005 Tex. App. Lexis 3842 (Tex. App.—Houston [1st Dist] 5/19/05 unpublished).

¹⁶ See, TEX. FAM. CODE § 51.03.

¹⁷ TEX. PEN. CODE § 8.07(a)(1); *See also.*, *Ponce v. State*, 985 S.W.2D 594 (Tex. App.—Houston [1st Dist.], *no pet.*) (affirming a criminal conviction for

§51.03 states “[n]othing in this title prevents criminal proceedings against a child for perjury.”¹⁸ Texas Penal Code §8.07 provides that perjury and aggravated perjury cases may be prosecuted in adult court even against defendants under the age of fifteen.¹⁹

V. *Under Age Eighteen*

Section 54.02 of the Family Code establishes when a child under eighteen may be transferred to adult court Section 54.02 generally sets forth three requirements for transfer to adult court:

1. the child is alleged to have violated a penal law of the grade of felony and meets the minimum age for the charged offense;
2. no adjudication hearing has been conducted concerning that offense;
3. after a full investigation and a hearing, the juvenile court finds that: there is probable cause to believe that the child committed the offense, and because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires criminal proceedings.²⁰

VI. *Eighteen Or Older*

The Texas Family Code establishes when a respondent age eighteen or over may be certified or transferred to adult criminal court as follows:

aggravated perjury committed by 13 year old without court having conducting a certification hearing).

¹⁸ TEX. FAM. CODE § 51.03

¹⁹ TEX. PEN. CODE § 8.07.

²⁰ TEX. FAM. CODE § 54.02(a).

1. the person is eighteen or older;
2. the person was ten or older and under seventeen at the time he or she allegedly committed a capital felony or murder; fourteen or older and under 17 at the time he or she allegedly committed an aggravated controlled substance felony or a first degree felony other than murder, or fifteen or older and under seventeen at the time he or she allegedly committed a second or third degree felony or a state jail felony;
3. no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
4. the juvenile court finds from a preponderance of the evidence that: for a reason beyond the control of the State, it was not practicable to proceed before the person's eighteenth birthday, or after due diligence of the State, it was not practicable to proceed before the person's eighteenth birthday because the State did not have probable cause to proceed and new evidence has been found since the person's eighteenth birthday; the person could not be found; or a previous transfer order was reversed on appeal or set aside by a district court; and the juvenile court determines that there is probable cause to believe that the person before the court committed the offense alleged.²¹

In certification hearings involving respondents over the age of eighteen the court only has authority to either waive its jurisdiction or if jurisdiction is not waived to dismiss the State's petition, or motion

²¹ TEX. FAM. CODE § 54.02(j).

to transfer, and any petition seeking to adjudicate the respondent delinquent.²²

One of the primary elements of the State's burden in these hearings is providing justification for the delay beyond the respondent's eighteenth birthday.²³ In these types of transfer hearings where the State is initially proceeding after the eighteenth birthday of the respondent demonstrating due diligence is mandatory for the State to meet its burden of transfer. If the State cannot justify the delay in proceeding prior to the juvenile turning eighteen the juvenile court has no jurisdiction to transfer.²⁴ Establishing due diligence is a jurisdictional matter and no harm analysis is necessary.²⁵

²² Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8th ed. 2012).

²³ In justifying a delay the court in *In the Matter of N.M.P.*, stated [w]e find no authority ... holding that the State must search out and use new, unproven scientific theories or test to meet the due diligence requirement. To the contrary, the law requires the State to show that novel scientific evidence is reliable, and thus probative and relevant.... The State would be in an untenable position if it were required to prove that a cutting edge scientific test was reliable when the experts were still developing and refining the technology. *In the Matter of N.M.P.*, 969 S.W.2d 95 (Tex. App.—Amarillo 1998).

²⁴ See generally, *Moore v. State*, 2014 Tex. App. LEXIS 8098 (Tex. App. Houston 1st Dist. July 24, 2014) *In the Matter of N.M.P.*, 969 S.W.2d 95 (Tex. App.—Amarillo 1998)(new DNA testing became available after the respondent turned eighteen); *In the Matter of J.C.C.*, 952 S.W.2d 47 (Tex. App.—San Antonio 1997)(State unable to provide justification for not proceeding against respondent before turning eighteen when it proceeding against his twin brother for the same offense prior to the twin brother turning eighteen).

²⁵ See, *Webb v. State*, unpublished, No. 08-00-00161-CR, 2001 WL 1326894, Juvenile Law Newsletter 01-4-45 (Tex. App.—El Paso 10/25/01). In *Webb*, the State did not establish that the delay in proceeding in juvenile court before the defendant's eighteenth birthday was not beyond its control. In reviewing the decision the court vacated the murder conviction following

The court in *Webb*, held it is incumbent upon the State to file and conclude the certification hearing before the respondent's eighteenth birthday.²⁶ In *Webb*, the court opined that the meaning of "proceeding" in juvenile court, meant concluding the hearing before the respondent's eighteenth birthday, agreeing with the trial court.²⁷

The certification provisions establish four justifications for the delay as follows:

- not practicable to proceed before age eighteen;
- new evidence discovered;
- respondent could not be found;
- appellate reversal of certification order

VII. Certifications For Capital Murder And Murder

Only individuals eighteen or over who are alleged to have committed either Capital Murder or Murder while between the ages of ten and fourteen can be considered for waiver of jurisdiction or certification to adult court.²⁸ This provision of the family code was promulgated by the legislature with the 1999 amendments to the Texas Family Code. The rationale for this provision is that Capital Murder and Murder have no statute of limitations and the juvenile court would have been able to impose a sentence of commitment to the Texas Juvenile Justice Department with a possible transfer to the Texas Department of Criminal Justice for up to a forty year

certification and dismissed the juvenile proceedings for want of jurisdiction. The defect was held to be jurisdictional and no harm analysis was necessary.

²⁶ *Webb v. State*, unpublished, No. 08-00-00161-CR, 2001 WL 1326894, Juvenile Law Newsletter 01-4-45 (Tex. App.—El Paso 10/25/01).

²⁷ *Id.*

²⁸ TEX. FAM. CODE § 54.02(j)(2)(A).

term.²⁹ Before this legislative change, these offenses would not have been eligible for certification if the person was under fourteen at the time the offense allegedly was committed.

If the State, however, was unable to proceed before the eighteenth birthday of the juvenile the juvenile system could not handle the case because the person was over eighteen, and the adult criminal system would also have no jurisdiction since the offense has original jurisdiction with juvenile court.³⁰

VIII. Due Process and Constitutional Safeguards

The Supreme Court articulated minimum levels of constitutional protections and due process necessary in juvenile certification proceedings in a landmark series of cases beginning in 1966 with *Kent v. United States*.³¹ In *Kent* the Court stated "the waiver hearing must measure up to the essentials of due process and fair treatment." Prior to *Kent*, the states enacted various legislation to set procedures for juvenile proceedings. However, since juvenile courts were operating under the doctrine of "parens patriae" and hearings were deemed civil and not criminal procedural safeguards afforded adults were vastly lacking in juvenile courts. Beginning in *Kent* and following immediately with *Gault* the Supreme Court for the first time promulgated constitutional protections applicable to juvenile proceedings. In *Gault* the Court stated "[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and

²⁹ Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8th ed. 2012).

³⁰ See TEX. PEN. CODE § 8.07.

³¹ *Kent v. United States*, 383 U.S. 541 (1966).

procedure.”³²

Title III of the Texas Family Code has adopted the constitutional mandates of *Kent*, and its progeny in affording procedural protections to respondents in certification hearings.³³ Respondents are entitled to due process in that notice of the charges or allegations are required; the right to counsel is not waivable; the right of confrontation is guaranteed; and the privilege against self-incrimination as spelled out in *Kent*.³⁴

IX. Notice Of Petition Or Motion For Discretionary Transfer

Section 54.02(b) states: “[t]he petition and notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 of this code must be satisfied, and the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court.”³⁵

The requirements of Section 53.04, mandate that the motion for transfer or petition must state:

with reasonable particularity the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts;
the name, age, and residence address, if known, of the child who is the subject of the petition; the names and residence addresses, if known, of the parent, guardian, or custodian of the child and of the child’s spouse, if any; and if the

child’s parent, guardian, or custodian does not reside or cannot be found in the state, or if their places of residence are unknown, the name and residence address of any known adult relative residing in the county, or, if there is none, the name and residence address of the known adult relative residing nearest to the location of the court.

Notice to the juveniles parents has been considered mandatory.³⁶ In *Carlson v. State*, the court reversed a conviction for Aggravated Assault were the juvenile plead guilty; the court opined that “although service upon a parent is a ‘waivable right’ pursuant to the waiver provisions in Section 53.06(e), no such waiver occurred in this case. Neither of appellant’s parents attended the hearing or waived service of the summons in writing. Since the right to service of the summons was not waived, service upon a parent was mandatory.”³⁷ However in 2012 legislative amendments were enacted which excluded parents as a necessary party in cases where the respondent is over eighteen³⁸. Additionally, the motion must state “that the hearing is for the purpose of considering discretionary transfer to criminal court.”³⁹

X. Criminal Transaction

Multiple felony offenses pending against the Respondent for which there is probable cause can and should be alleged in the same petition to transfer. If the

³² *In Re Gault*, 387 U.S. at 541.

³³ *See generally*, TEX FAM. CODE § 54.02.

³⁴ *Id.*

³⁵ TEX. FAM. CODE § 54.02(b); *See also* Texas Fam. Code § 54.02 (k)(addressing certifications when respondent over eighteen); *See also McBride v. State*, 655 S.W.2d 280 (Tex.App.—Houston [14th Dist.] 1983, no writ).

³⁶ *Carlson v. State*, 151 S.W.3d 643 (Tex. App.—Eastland 2004).

³⁷ *Id.*

³⁸ Tex. Fam. Code § 54.02(k)([t]he person’s parent, custodian, guardian, or guardian ad litem is not considered a party to a proceeding under Subsection (j) and it is not necessary to provide the parent, custodian, guardian, or guardian ad litem with notice.

³⁹ TEX. FAM. CODE § 54.02(b).

State files a petition which alleges multiple offenses that constitute more than one criminal transaction, the juvenile court may either retain or transfer all offenses relating to a each transaction. It is important to note that the juvenile court waives jurisdiction over a transaction, not a specific statutory offense, so the court may transfer or retain different criminal transactions.⁴⁰ Section 54.02(g) states “[i]f the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction. A child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction.”

Accordingly, if the court retains jurisdiction over any criminal transaction the respondent is not subject to prosecution for any offense for which the court retains jurisdiction.⁴¹ The State upon receiving the transferred case in criminal court may charge any offense or offenses supported by probable cause as long as the offense arose out of a criminal transaction that was transferred by the juvenile court.⁴² In *Allen*, the Court established the principal that the juvenile court in deciding to waive or transfer its jurisdiction assesses the underlying conduct in the waiver hearing. Accordingly, if a respondent is transferred the adult court not only has jurisdiction over the offense transferred and any lesser included offenses but any conduct that resulted from the same criminal transaction.⁴³ As a result of the *Allen*

principal a defendant transferred to adult court can be prosecuted for any offense the State can prove as long as the offense charged is based on conduct from the criminal transaction from which the juvenile court waived jurisdiction.

However, the offense charged by the State must have been an offense for which the respondent was eligible for certification. For example if a respondent is certified for a criminal transaction which occurred at the age of fourteen only the first degree felony may be prosecuted. These situations would prevent the State from charging any lesser included offenses.⁴⁴

XI. *Diagnostic Study*

Prior to the actual certification hearing the juvenile court is required to order and have completed various evaluations and reports.⁴⁵ Section 54.02(d) provides:

“[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.”⁴⁶

The legislature has not established or expressly stated what must be included in a diagnostic study.⁴⁷ However the purpose of this diagnostic study is to assist the court in determining whether to exercise its discretion to either retain or waive its jurisdiction.

Opinions vary regarding the contents of the diagnostic examination

⁴⁰ TEX. FAM. CODE § 54.02(g).

⁴¹ *Id.*

⁴² *Ex parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981).

⁴³ See, e.g., *Ex Parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981); *Livar v. State*, 929 S.W. 2d 573 (Tex. App.—Fort Worth 1996, pet. ref'd); *Brosky v.*

State, 915 S.W.2d 120 (Tex. App.—Fort Worth, pet. ref'd)

⁴⁴ TEX. CRIM. PROC. CODE § 4.18.

⁴⁵ TEX. FAM. CODE § 54.02(d).

⁴⁶ *Id.*

⁴⁷ *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975).

but generally the report is a forensic examination by a clinical psychologist or psychiatrist and social investigation by the juvenile probation department. The report generally addresses such issues as the child's sophistication, maturity, background and family history.⁴⁸

The provisions of Section 54.02(d) are mandatory and apply to transfer hearings regardless of the age of the respondent. The only exceptions are certifications where the Respondent is over eighteen or the state is seeking automatic or "mandatory" transfer proceedings conducted pursuant to the Texas Family Code.⁴⁹ Effective since 2013 the Court may conduct a certification hearing without a diagnostic study if the State is seeking a transfer pursuant to Texas Family Code 54.02(j) or when the transfer hearing occurs after the Respondent's eighteenth birthday. However if the Respondent requests a diagnostic study then the court is required to order an evaluation.⁵⁰ If the court fails to order the diagnostic study, evaluation or investigation or to consider the reports in the discretionary transfer hearing the certification hearing is subject to being reversed by a reviewing court.⁵¹ In *R.E.M. v. State*, the court stated:

Section 54.02(d) is mandatory.... It is impossible to read Title 3 of the Family Code...without reaching the conclusion that its effect is to give to a juvenile offender the right not to be treated as an adult offender unless he is divested of that right by judicial order entered after

⁴⁸ For a discussion of what information should be included in the report, see Hays & Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 Hous. L. Rev. 709 (1972).

⁴⁹ TEX. FAM. CODE §§ 54.02(l)(n).

⁵⁰ TEX. FAM. CODE §54.02.(l).

⁵¹ *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975).

complying with the requirements set forth in Section 54.02. The necessary conclusion is that, in the absence of an effective waiver by the child, he can be subjected to treatment as an adult only if there has been compliance with the mandatory provisions of Section 54.02.⁵²

Although it is mandatory for the court to order a diagnostic evaluation, the respondent may choose to exercise his Fifth Amendment right and not answer questions. Further, the use of the examination results have limited results in a adult criminal proceeding if a juvenile is certified to stand trial as an adult. When the psychological examination is used both as the basis of the examiner's determination that the juvenile should be transferred and as a source of incriminating evidence introduced at trial, it requires additional constitutional safeguards.⁵³ When used only for its intended purpose, the examination has been held not to be considered a custodial interrogation; however, when the State seeks to use the examination in a subsequent criminal proceeding then the examination serves a dual purpose. In *Cantu v. State*, the court held that notwithstanding the neutral nature of the psychological examination, the statements a juvenile utters during the examination are not automatically removed from the reach of the Fifth Amendment, if a juvenile is not adequately informed of his Fifth Amendment rights with respect to the diagnostic examination or that his testimony during that examination would be used against him in an adjudicatory proceeding, a waiver of his rights is ineffective.⁵⁴

⁵² Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8th ed. 2012)(citing *R.E.M. v. State*, 532 S.W.2d 645 (Tex. Civ. App.—San Antonio 1975)).

⁵³ *Cantu v. State*, 994 S.W.2d 721 (Tex. App.—Austin 1999).

⁵⁴ *Id.* at 735; *See also, Estelle v. Smith*, 451 U.S. 454,

XII. *Investigation*

Also not defined in certification statutes is the term “full investigation of the child, his circumstances, and the circumstances of the alleged offense.”⁵⁵ In looking at this provision one Texas court opined

“[t]he phrase ‘full investigation of the circumstances of the offense’ is not defined in section 54.02. We believe that for good reasons the legislature did not attempt to define the phrase. Of necessity, any inquiry into the circumstances of an offense must be one of degree. It is a matter of common knowledge that the course and scope of an investigation will vary according to the circumstances surrounding the event.”⁵⁶

The certification statutes allow the juvenile court judge to consider and admit written reports from probation officers and other professionals.⁵⁷ The mandatory procedures enunciated in Section 54.02(d) are established with the purpose of providing the court information sufficient enough to make an informed decision regarding waiving jurisdiction. Although mandatory these procedures must be balanced against the constitutional

protections afforded respondents facing transfer to criminal court.. Section 54.02(e) seeks to strike a balance by requiring disclosure to counsel for the Respondent prior to the certification hearing⁵⁸. Accordingly, an attorney for a child facing transfer or certification must make appropriate and informed decisions regarding when to invoke such rights as privilege against self-incrimination.⁵⁹ What various courts do seem to suggest is that counsel for defense can assert constitutional protections but cannot then complain on appeal that the required studies or evaluations are incomplete because of his or her own actions.⁶⁰

⁵⁸ TEX. FAM. CODE § 54.02(e) requires one day notice to the attorney representing the child to written reports that will be considered by the court. Act of June 19, 2009, 81st Leg., S.B. 518 (to be codified at TEX. FAM. CODE § 54.02(e) will provide for five (5) days notice effective September 1, 2009.

⁵⁹ See e.g., *In K.W.M. v. State*, 598 S.W.2d 660 (Tex. Civ. App.—Houston[14th Dist.] 1980, no writ) (the court stated that section 54.02(d) does not require a court to order that the child discuss his involvement in the offense, no self-incriminatory statements are required, and if any custodial statement will be used in a later criminal trial, then the Family Code protections must be provided.

⁶⁰ In *R.E.M. v. State*, 541 S.W.2d 841 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.), the respondent refused to cooperate with the professionals who tried to interview him, then claimed on appeal that the report was incomplete. The court stated: “[w]e are not inclined to hold that the statute requires the accomplishment of that which is impossible due to appellant’s attitude.” *R.E.M.*, 541 S.W.2d at 845. The court in *R.E.M.* held that Texas Family Code 51.09 precluded a waiver of the diagnostic study where the child asserted his right to remain silent, but did not waive his right to the study. Later cases hold that the respondent’s failure to cooperate does not waive the right to the study, but will prevent the child from arguing on appeal that the study was incomplete. See *Ortega v. State*, unpublished, No. 05-00-00086-CR, 2002 WL 14163 (Tex. App.—Dallas 2002); *In the Matter of J.S.C.*, 875 S.W.2d 325 (Tex.App.—Corpus Christi 1994, writ dismissed); and *In the Matter of C.C.*, 930 S.W.2d 929 (Tex. App.—Austin 1996, no writ).

465, 101 S. Ct. 1866, 1874, 68 L. Ed. 2d 359 (1981).

⁵⁵ See e.g., *In re I.B.*, 619 S.W.2d 584 (Tex.Civ.App.—Amarillo 1981).

⁵⁶ *In re I.B.*, 619 S.W.2d 584 (Tex. Civ. App.—Amarillo 1981, no writ). See also *Price v. State*, unpublished, No. 05-01-00588-CR, 2002 WL 664129, 2002 Tex. App. Lexis 2852 (Tex.App.—Dallas 4/24/02)(appellant argued that a “full investigation” required the probation department to personally interview the victims or include the respondent’s version of the circumstances of the offense in the report. The appellate court rejected this argument, finding that the court did not abuse its discretion in concluding that a full investigation was performed.)

⁵⁷ TEX. FAM. CODE § 54.02(d).

XIII. *The Hearing*

Certification hearings in Texas are conducted by the court without a jury.⁶¹ Specifically, §54.02(c) provides: “[t]he juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings.”⁶² The absence of a jury trial is consistent with the dictates of both state and federal law, since it has been held that juveniles are not constitutionally entitled to jury trials in juvenile proceedings.⁶³ No deprivation of any constitutional right should be construed in the absence of juries in the certification hearing. Although a right to jury is not available in certification hearings, a waiver hearing before the court is mandatory prior to a court exercising its jurisdiction and transferring a respondent to adult criminal court.⁶⁴

Further it has been well settled that certification proceedings are not trials on the merits, but hearings to determine whether the juvenile court will waive its original jurisdiction and transfer the case to adult criminal court for trial or retain its jurisdiction and keep the proceedings in juvenile court.⁶⁵

Right Of Counsel

An attorney can not be waived in a certification proceeding.⁶⁶ It has been held that proceeding with the transfer hearing without the presence of counsel

for the juvenile is reversible error.⁶⁷ It is well established that a juvenile is entitled to the effective assistance of counsel at a certification hearing.⁶⁸ In *Kent*, the court stated “[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.”⁶⁹ The ineffectiveness of counsel in juvenile cases is measured by the *Strickland v. Washington*,⁷⁰ standard just as in adult criminal cases.

XIV. *Evidence*

The certification statutes do not expressly promulgate the evidentiary procedures which must be adhered to in waiver hearings, however, the Texas Rules of Evidence provides in pertinent part “[e]xcept as otherwise provided by statute, these rules govern civil and criminal proceedings (including examining trials before magistrates) in all courts of Texas, except small claims courts.”⁷¹

Many courts have opined that the Texas Rules of Evidence are not applicable in certification proceedings; the primary rationale for this position was that the court needed to make a determination as to whether a grand jury would indict. However with the amendments to the

⁶¹ TEX. FAM. CODE § 54.02(c)

⁶² *Id.*

⁶³ See, generally, *McKeiver v. Pennsylvania*, 403 U.S. 528, 533, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *Strange v. State*, 616 S.W.2d 951 ; *In the Matter of P.B.C.*, 538 S.W.2d 448 (Tex. Civ. App.—El Paso 1976, no writ).

⁶⁴ *Id.*

⁶⁵ *M.A.V., Jr. v. Webb County Court at Law*, 842 S.W.2d 739 (Tex. App.—San Antonio 1992, writ denied).

⁶⁶ TEXAS FAM. CODE § 51.10(b)(1).

⁶⁷ *In the Matter of D.L.J.*, 981 S.W.2d 815 (Tex.App.—Houston [1st Dist.] 1998, no writ).

⁶⁸ See *Kent v. United States*, 383 U.S. 541, 561-62 (1966); *In re K.J.O.*, 27 S.W.3d 340, 342 (Tex. App.—Dallas 2000, pet. denied).

⁶⁹ *Kent v. United States*, 383 U.S. at 561.

⁷⁰ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)(whether counsel’s performance fell below an objective standard of reasonableness and, if so, whether a reasonable probability exists that, but for counsel’s unprofessional errors, a different outcome would have resulted.); See also, *In re K.J.O.*, 27 S.W.3d at 343.

⁷¹ TEX. RULES EVID. 101(b). See also TEX. FAM. CODE § 51.17(c) which apply the Texas Rules of Evidence applicable to criminal cases in juvenile proceedings.

statute effective in 1996 the grand jury provision was repealed.⁷² The issue of hearsay as well as the application of the Sixth Amendment Confrontation clause in certification hearings have been addressed by some appellate courts.⁷³ However neither of the state's highest courts, the Texas Supreme Court or Court of Criminal Appeals, have yet to address this issue. It is settled that Texas Rules of Evidence applicable to criminal cases are to be used in certification proceedings.⁷⁴

XV. Factors To Be Considered By The Court

In the seminal case, *Kent v. United States*, the Supreme Court articulated factors which were determinative in addressing whether a judge should waive its jurisdiction and transfer a case to adult criminal court.⁷⁵ The factors articulated by the Court were

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.⁷⁶

⁷² TEX. FAM. CODE § 54.02(f)(3) repealed.

⁷³ See generally, *Milligan v. State*, No. 03-04-00531-CR, 2006 Tex. App. Lexis 1356, (Tex. App.—Austin 2/16/06) (Neither Sixth Amendment or Crawford confrontation rights apply at the juvenile certification hearing); *In the Matter of S.M.*, No. 2-05-262-CV, 2006 Tex. App. Lexis 9056 (Tex. App.—Fort Worth, 10/19/06) (Crawford v. Washington does not apply to determinate sentence transfer hearings since they are not a critical stage of a criminal prosecution) *c.f.* *In the Matter of M.P.*, No. 10-06-00008-CV, 2007 Tex. App. Lexis—Waco, 2/7/07 (Court held that a juvenile has no Sixth Amendment or Article I, Section 10 of the Texas Constitution right of confrontation during a disposition hearing however, he does have a limited right of confrontation under the Due Process Clause of the Fourteenth Amendment, which requires a balancing test).

⁷⁴ TEX. FAM. CODE § 51.17 (c).

⁷⁵ *U.S. v. Kent* 383 U.S. at 566-567.

⁷⁶ *Id.*

The Texas provision of the certification statute §54.02(f) adopts and incorporates the *Kent*, factors which were promulgated to provide constitutional safeguards to juvenile respondents in transfer hearings.⁷⁷ Section 54.02(f) requires the juvenile court to consider the following factors in making the decision to waive jurisdiction:

1. whether the alleged 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.⁷⁸

This list is not exhaustive, in that the court may consider other factors which it deems appropriate in determining whether to transfer a case to criminal court. However the court must “consider” the statutory factors in making its determination.⁷⁹

⁷⁷ *Kent v. United States*, 383 U.S. 541, 561-62 (1966)

⁷⁸ TEX. FAM. CODE § 54.02(a). The legislative changes which took effect in January 1, 1996, eliminated two factors: whether the offense was committed in an aggressive and premeditated manner and whether there was evidence on which a grand jury could be expected to return an indictment.

⁷⁹ See e.g.; *Moon v. State*, 410 S.W.3d 466 (Tex. App.—Houston [1st Dist] (2013) (holding “In sum, we find the evidence legally insufficient to support the juvenile court’s finding related to Moon’s sophistication and maturity. We also find the evidence factually insufficient to support the court’s finding regarding the prospect of adequate protection of the public and the likelihood of Moon’s rehabilitation. Thus, the first factor—whether the offense was against person or

XVI. *Moon v. State*

Cameron Moon was sixteen years old when he was detained and charged with murder. The prosecuting attorney sought certification and transfer to adult court. In a contested transfer hearing the State called one witness at the hearing: the detective who investigated the case. The detective’s testimony outlined his investigation of the murder and his interrogation of Cameron. Additionally the State introduced an offense report for a referral for a criminal mischief offense and a report from the juvenile probation department which detailed a physical exam of Cameron.⁸⁰ Cameron was certified and transferred to adult court where he was tried and convicted of murder and sentenced to thirty years in the Texas Department of Corrections (TDCJ). Cameron appealed his conviction and in 2013 the First District Court of Appeals in Houston reversed his conviction and held that the juvenile court’s finding that there was little, if any, prospect of rehabilitation of Cameron or adequate protection of the public was so against the evidence introduced at the transfer hearing as to be manifestly unjust and an abuse of the juvenile court’s discretion. In 2014 the Court of Criminal Appeals affirmed the appellate court decision and issued its opinion in *Moon v. State*.⁸¹ In *Moon* the Court of Criminal Appeals opined that in deciding the ultimate issue of determining whether the seriousness of the offense alleged or the background of the juvenile requires criminal proceedings a juvenile court must

property—is the only factor weighing in favor of Moon’s transfer. *In the Matter of J.R.C.*, 551 S.W.2d 748 (Tex.Civ.App.—Texarkana 1977, writ ref’d n.r.e.)

⁸⁰ *Moon v. State*, 451 S.W.3d 28, 31(Tex. Crim. App. 2014)

⁸¹ *Moon v. State*, 451 S.W.3d (Tex. Crim. App. 2014).

have some evidence to support its findings regarding transfer.⁸² The Court of Criminal Appeals revisited the United Supreme Court's decision in *Kent v. United States* where the Court opined "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children...permitted this procedure. We hold that it does not."⁸³

XVII. Required Findings

There are five basic requirements that must be established before the juvenile court may waive its jurisdiction. Prior to transfer the court must make the following findings:

the child is alleged to have committed a felony;

the child was:

fourteen or older at the time he or she allegedly committed a capital felony, an aggravated controlled substance felony, or a first degree felony, or

fifteen or older at the time he or she allegedly committed any other felony;

no adjudication hearing has been conducted concerning the offense;

there is probable cause to believe that the child before the court committed the alleged offense; and

because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings.⁸⁴

If the court is proceeding under a

⁸² *Id.* At 57.

⁸³ *Kent v. United States*, 383 U.S. 541, 554 (1966).

⁸⁴ TEX. FAM. CODE § 54.02(f).

hearing where the respondent is over eighteen the court must make the additional findings regarding due diligence.⁸⁵ The burden is on the State to prove the allegations in the petition or motion for discretionary transfer by a preponderance of the evidence.

XVIII. Community Welfare Provision

Of most important in a court's consideration to transfer a juvenile to adult court is whether the evidence dictates that the welfare of the community requires transfer to adult criminal court.⁸⁶ This finding will be reviewed by an appellate court on legal and factual sufficiency grounds.⁸⁷ If the evidence is deemed legally insufficient on appellate review the respondent may not be transferred to adult court since judgment should be rendered for the respondent and the waiver petition dismissed with prejudice.⁸⁸

XIX. Criminal Transaction

When a juvenile court waives its jurisdiction and transfers a juvenile respondent to adult criminal court it is not actually transferring the respondent for all purposes. In essence what the juvenile court is waiving jurisdiction for a particular criminal conduct or transaction.⁸⁹ Section 54.02(g) of the Family Code states [i]f the petition alleges

⁸⁵ TEX. FAM. CODE § 54.02(j)(4).

⁸⁶ TEX. FAM. CODE § 54.02(a)(3).

⁸⁷ *Green v. State*, unpublished, No. 05-97-01176-CR, 1999 WL 783734, 1999 Tex. App. Lexis 7328, Juvenile Law Newsletter 99-4-14 (Tex.App.—Dallas 10/4/99).

⁸⁸ See generally, *In the Matter of A.T.S.*, 694 S.W.2d 252 (Tex. App.—Fort Worth 1985 (Appellate Court held evidence did not support transfer hearing since offense committed was crime of "juvenile nature").

⁸⁹ See, *Ex Parte Allen*, 618 S.W.2d 357 (Tex. Crim. App. 1981).

multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction. A child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction⁹⁰.

XX. Mandatory Certification

The third basic type of certification in Texas is often referred to as “mandatory certification.”⁹¹ The mandatory provisions were enacted with the advent of the legislative changes in 1995. The provisions of the code establishing the mandatory transfer proceedings basically codifies the doctrine or practice of “once certified always certified.” Although the statute is commonly referred to as mandatory certification the process is not automatic and not all inclusive. The prosecutor has discretion whether to seek a mandatory transfer or not. However, if the State does seek transfer under this provision and the requirements of the statute are complied with, the juvenile court must transfer the case. Mandatory transfer requires:

1. the child was previously transferred to criminal court for criminal proceedings; and
2. the child has allegedly committed a new felony offense before becoming seventeen years old.

The mandatory transfer provision do not apply if at the time of the transfer hearing:

1. the child was not indicted by the grand jury in the matter transferred;

2. the child was found not guilty in the matter transferred;
3. the matter transferred was dismissed with prejudice; or
4. the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final.⁹²

Of major importance to this provision is the requirement that the respondent was previously certified to adult court and a valid transfer order exists and a new felony offense is alleged.⁹³ Additionally, the case which the respondent was previously certified to adult court must be final and not have resulted in an acquittal, dismissal prior to indictment, no billed or reversed on appeal.⁹⁴

Once the statutory provisions are met transfer to adult court is mandatory; hence the term “mandatory certification.” These procedures were designed to expedite the transfer process and increase judicial economy.⁹⁵ This streamlined process does away with the requirements of obtaining a complete diagnostic study, social investigation and investigation of the child and the circumstances of the alleged offense. Although the statute calls for an extremely streamlined process and does not address additional proof requirements it should be concluded that probable cause demonstrating the respondent committed a felony offense would still be necessary to be shown by the State.⁹⁶

⁹⁰ TEX. FAM. CODE §54.02(g).

⁹¹ TEX. FAM. CODE §54.02(m).

⁹² TEX. FAM. CODE § 54.02(m).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See generally, TEX. FAM. CODE § 54.02(n).

⁹⁶ TEX. FAM. CODE § 54.02(a)(3); *Kent v. United States* 557; Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8th ed. 2012).

XXI. Order

Although courts are required to give its reasons for transfer in its order it is well settled that juvenile courts have wide latitude in determining whether to retain or waive jurisdiction in a certification proceeding⁹⁷. In reviewing a court's order to transfer a reviewing court will defer to the trial court's findings.

XXII. Miscellaneous Transfers

Two essentially identical provisions of the juvenile mental health statutes allow for "automatic" transfer of certain cases to adult criminal court.⁹⁸ These statutes state that the juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the eighteenth birthday of a child for whom the juvenile court or a court to which the child's case is referred under Section 55.12(2) has ordered inpatient mental health services if:

- a. The child is not discharged or furloughed from the inpatient mental health facility before reaching eighteen years of age; and
- b. The child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 and no adjudication concerning the alleged conduct has been made.⁹⁹

These provisions require transfer to adult court juveniles charged with offenses under the Determinate Sentence Act who remain confined under a commitment order at the age of eighteen. Section 55.44 permits adult criminal

⁹⁷ See generally, TEX. FAM. CODE §54.02(h).

⁹⁸ See, TEX. FAM. CODE §§ 55.19, 55.44; Robert O. Dawson, TEXAS JUVENILE LAW § 10 (8th ed. 2012).

⁹⁹ *Id.*

proceedings when the respondent is competent to stand trial after age eighteen and is charged with an offense under the Determinate Sentence Act. There has been minimal use or litigation of these provisions however the juvenile court has no discretion in its application¹⁰⁰.

XXIII. Appeals

A juvenile respondent has a right to appeal the decision of a juvenile court transferring jurisdiction to adult court. Prior to the 1995 legislative changes to the Family Code direct appeals to the Court of Appeals, then possible review by the Texas Supreme Court were available.¹⁰¹ Effective with offenses occurring after January 1, 1996, the right to take a direct appeal from a certification order was eliminated.¹⁰² Beginning in September 1, 2015, Texas law will again allow direct appeal of juvenile certifications.¹⁰³ The Texas Supreme Court is currently adopting rules to accelerate the appeals.¹⁰⁴

XXIV. Conclusion

Juvenile courts in Texas have original jurisdiction of offenses committed by juveniles over the age of ten and younger than seventeen. Texas does however for procedures to have certain cases removed or transferred from juvenile court to a criminal district court. Certifications or discretionary transfer of juveniles in Texas account for roughly one

¹⁰⁰ TEX. FAM. CODE §55.44.

¹⁰¹ TEX. FAM. CODE § 56.01(c)(1).

¹⁰² TEX. FAM. CODE § 56.01(c)(1)(A), which had authorized a direct appeal from an order of transfer, was repealed. See e.g., *Silva v. State*, ___ S.W.3d___, No. 01-06-00031-CR, 2007 Tex. App. Lexis 3698 (Tex. App.—Houston [1st Dist.] 5/10/07), *Rodriguez v. State*, 191 S.W.3d 909 (Tex. App.—Dallas 2006).

¹⁰³ See TEX. FAM. CODE §56.01.

¹⁰⁴ TEX. FAM. CODE §56.01 (h-1).

percent of all juvenile referrals; although this total comprises a relatively small number of juvenile proceedings, these hearings are of utmost importance. Upon transfer to adult court the juvenile protections and safeguards which have been mandated in Texas law since the *Gault* decision are lost and adult provisions and statutes become applicable.

APPENDIX



CAMERON MOON, Appellant v. THE STATE OF TEXAS

NO. PD-1215-13

COURT OF CRIMINAL APPEALS OF TEXAS

451 S.W.3d 28; 2014 Tex. Crim. App. LEXIS 1918

December 10, 2014, Decided

NOTICE: PUBLISH

PRIOR HISTORY: **[**1]** ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS HARRIS COUNTY.

Moon v. State, 410 S.W.3d 366, 2013 Tex. App. LEXIS 9345 (Tex. App. Houston 1st Dist., 2013)

COUNSEL: FOR APPELLANT: Jack G. Carnegie, Attorney at Law, Houston, TX; David Adler, Bellaire, TX; John Hagan, Jackson Gilmour & Dobbs, PC, Houston, TX; Christine Wood, Thompson, Coe, Cousins & Irons, LLP, Houston, TX.

FOR THE STATE: Dan McCrory, Assistant District Attorney, Houston, TX.

JUDGES: PRICE, J., delivered the opinion of the Court in which WOMACK, JOHNSON, KEASLER, COCHRAN and ALCALA, JJ., joined. KELLER, P.J., filed a dissenting opinion in which HERVEY, J., joined. MEYERS, J., dissented.

OPINION BY: PRICE

OPINION

[*31] We granted the State's petition for discretionary review in this case in order to address several questions related to the appellate review of a juvenile court's waiver of its otherwise-exclusive jurisdiction over a person alleged to have committed a murder at the age of sixteen. What, exactly, is the appellate court's appropriate role in reviewing the adequacy of the juvenile court's statutorily required written order

transferring the child to a criminal district court for prosecution as an adult? Ultimately, we hold that the court of appeals conducted an appropriate review of the juvenile court's transfer order, and we affirm its judgment.

I. FACTS AND PROCEDURAL POSTURE

A. State's Motion to Waive Jurisdiction and Trial

On November 19, 2008, the State filed a petition in the 313th Juvenile Court in Harris County alleging that the appellant engaged in delinquent conduct by committing an intentional **[**2]** or knowing murder. On the same date, the State also filed a motion for the juvenile court to waive its exclusive jurisdiction and transfer the appellant to criminal district court for prosecution as an adult, alleging as grounds for the transfer that, because of the seriousness of the offense alleged, ensuring the welfare of the community required waiver **[*32]** of juvenile jurisdiction. The juvenile court granted the State's request for a hearing on the motion and, pursuant to *Section 54.02(d)* of the Juvenile Justice Code in the Texas Family Code,¹ ordered that the Chief Juvenile Probation Officer obtain a complete diagnostic study, social evaluation, and full investigation of the appellant's background and the circumstances of the alleged offenses.² The juvenile court also ordered the Mental Health and Mental Retardation Authority of Harris County to conduct an examination and file its report.

1 TEX. FAM. CODE title 3, Juvenile Justice Code (hereinafter, "the Juvenile Justice Code").

2 TEX. FAM. CODE § 54.02(d). The appellant complains that "[p]rior to the hearing, the State failed to conduct the statutorily mandated diagnostic or social evaluation[.]"

Appellant's Response to the State's Brief on Discretionary Review at 1. But the [**3] appellant did not raise this issue as grounds for reversal on direct appeal, and we have no occasion to speak to it. *See* Appellant's Brief on Direct Appeal at 16.

At the hearing, the State called a single witness to testify: Detective Jason Meredith, the Deer Park Police officer who investigated the crime scene and interviewed a number of potential suspects, including the appellant. Meredith's testimony on direct examination took the form of a non-chronological account of his investigation of the murder, up to and including his interrogation of the appellant. At the end of his testimony, over no objection from the appellant, the State introduced the following documents: (1) a juvenile offense report revealing the appellant's "Previous Referral" for "MISCHIEF-\$500/\$1499.99," which, subsequent testimony would show, resulted from the appellant's alleged "keying" of another student's vehicle; (2) a "Juvenile Probation Certification Report" detailing the positive and negative behaviors, as well as the academic history, of the appellant while he was under the observation of the juvenile-justice system; and (3) a "Physician's Medical Assessment" prepared by the Harris County Juvenile Probation [**4] Health Services Division, which listed the findings of the appellant's physical--but not any psychological or behavioral--examination.

For his part, the appellant elicited testimony from seven witnesses. Various family members, friends, and acquaintances testified both generally and specifically about the appellant's disadvantaged upbringing, fractured family life, and positive personal qualities, including politeness and pliability to adult supervision. Various actors within the juvenile-justice system testified both generally and specifically about the appellant's constructive conduct within, and positive progression through, the juvenile-justice system, characterizing him as "one of the best kids [to] come through as far as his intelligence and obedience and the way he carries himself in the facility." The appellant also introduced into evidence, among other things, forensic psychiatrist Dr. Seth W. Silverman's detailed and thorough

recommendation as to whether [the] facilities currently available to the juvenile court will provide adequate protection to the public, and . . . the likelihood that the respondent will be rehabilitated should the court decide to use the facilities available [**5] to the juvenile court as well as the sophistication, maturity, and aggressiveness [of the appellant].

It was Dr. Silverman's ultimate opinion that the appellant, as a "dependent, easily influenced individual" whose "thought process lacks sophistication" (a characteristic Silverman considered "indicative of immaturity") "would probably benefit from placement in a therapeutic environment [**33] specifically designed for adolescent offenders[.]" Silverman contrasted this environment to the "adult criminal justice programs[.]" which he deemed to have "few constructive, and possibly many destructive, influences to offer" the appellant. Silverman also noted that the appellant had, during his stint within the juvenile-justice system, already "responded to therapy."

At the close of evidence, and after both parties delivered closing arguments, the juvenile court granted the State's motion to waive jurisdiction. At the behest of the appellant's counsel, the court also made the following oral findings: (1) "that there is insufficient time to work with the juvenile in the juvenile system"; (2) "that the seriousness of the offense, murder, makes it inappropriate to deal with in this system"; (3) that "the [**6] respondent did have a prior criminal mischief probation"; (4) that the instant offense "actually occur[ed] at the time respondent was on probation which . . . makes the services and resources of the juvenile system look to be inadequate"; (5) "that because there is a co-respondent [certified to stand trial in the adult criminal courts], there is a logic in putting respondents, where they are a year apart or two years apart, together"; and (6) that "judicial economy, although not the driving factor, is an issue" because "sometimes it's more convenient to hear the same matter, even though there are different people involved, in the same court for the convenience of the witnesses, the attorneys, and the system in general."

The following day, the juvenile court signed and entered a written order waiving its jurisdiction. Closely following the language of the juvenile transfer statute, the order affirmed that the juvenile court had determined "that there is probable cause to believe that the child committed the OFFENSE alleged and that because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding."³ The juvenile court again simply recited from the statute when [**7] it stated that:

[I]n making that determination, the Court . . . considered among other matters:

1. Whether the alleged OFFENSE WAS against person or property, with the greater weight in favor of waiver 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 reasonable rehabilitation of the child by use of procedures, services and facilities currently available to the Juvenile Court.⁴

The juvenile court also specifically found in its written order: (1) that the appellant "is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived[,] . . . to have aided in the preparation of HIS defense and to be responsible for HIS conduct;" (2) that the alleged offense "WAS against the person of another;" and that (3) "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of" the appellant "by use of procedures, services, and facilities currently available to the Juvenile Court."

3 *TEX. FAM. CODE* § 54.02(a).

4 *Id.* § 54.02(f).

Per the trial [**8] court's order, the appellant's case was transferred to the jurisdiction of the 178th District Court in Harris County, where he stood trial, certified as [**34] an adult, against the first-degree felony charge of murder. The jury convicted the appellant and sentenced him to thirty years' confinement in the penitentiary.

B. The Appeal

Before the First Court of Appeals, the appellant complained that the juvenile court's stated "reasons for waiver" were supported by insufficient evidence and that the juvenile court therefore abused its discretion by waiving jurisdiction over the appellant.⁵ Specifically, the appellant contended that, by focusing on the appellant's ability to "intelligently, knowingly, and voluntarily waive[] all constitutional rights heretofore waived," the juvenile court "misunderstood and misapplied the 'sophistication and maturity' element" of *Section 54.02(f)*--and that, even if it did not, there was still "no evidence to support the [juvenile] court's sophistication and maturity finding" as expressed.⁶ Indeed, given that this Court opined in *Hidalgo* that the purpose of the *Section 54.02(d)* "psychological examination" is to "provide[] insight on the juvenile's sophistication, maturity, potential for rehabilitation, [**9] decision-making ability, metacognitive skills, psychological development, and other sociological and cultural factors[.]" the appellant found it troubling that "the State presented no evidence of *this* type whatsoever."⁷ The appellant also maintained that there was "no evidence

supporting the juvenile court's findings relating to adequate protection [of] the public and likelihood of rehabilitation,"⁸ since "the only evidence was that" the appellant "is amenable to rehabilitation" and the "State presented no contrary evidence."⁹

5 *See Tex. Fam. Code* § 54.02(h) ("If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver[.]").

6 Appellant's Brief on Direct Appeal at 27.

7 *Id.* (emphasis added) (quoting *Hidalgo v. State*, 983 S.W.2d 746, 754 (*Tex. Crim. App.* 1999)).

8 *Id.* at 30.

9 *Id.* at 34.

In a published opinion, the court of appeals agreed with the appellant that the evidence supported neither the juvenile court's "sophistication-and-maturity" finding nor its "adequate-protection-of-the-public-and-likelihood-of-rehabilitation" finding.¹⁰ The court noted that an "appellate court reviews a juvenile court's decision to certify a juvenile defendant as an adult . . . under an abuse of discretion standard" and cited another of its own opinions for the proposition that [**10] "if an appellate court finds the evidence factually or legally insufficient to support the juvenile court's order . . . it will necessarily find the juvenile judge has abused his discretion."¹¹ At the same time, the court of appeals recognized that "the juvenile court may order a transfer on the strength of any of the criteria listed in" *Section 54.02(f)*.

10 *Moon v. State*, 410 S.W.3d 366 (*Tex. App.--Houston [1st Dist.]* 2013).

11 *Id.* at 370-71 (citing *In re G.F.O.*, 874 S.W.2d 729, 731-32 (*Tex. App.--Houston [1st Dist.]* 1994, *no writ*)).

Regarding the juvenile court's sophistication-and-maturity finding, while the State argued that "[the appellant]'s efforts to conceal the crime and avoid apprehension demonstrate that he knew the difference between right and wrong and that his conduct was wrong," the court of appeals pointed out that the "finding of the juvenile court . . . was based on [the appellant]'s ability to waive his rights and assist counsel in preparing his defense, not an [**35] appreciation of the nature of his actions[.]"¹² And since the State's evidence of the appellant's "efforts to conceal the crime" consisted primarily of the appellant's "text messages instructing [a compatriot] to not 'say a word,' [and to] '[t]ell them . . . you don't know where I live,'" the court of appeals determined that there was "no evidence supporting the juvenile court's finding that [the appellant] [**11] was sufficiently sophisticated and mature to waive his rights and assist in his defense."¹³

12 *Id.* at 374.

13 *Id.*

With respect to the juvenile court's finding that "there is little, if any, prospect of adequate protection of the public and likelihood of rehabilitation . . . by use of procedures, services, and facilities currently available to the Juvenile Court[.]" the court of appeals found it significant that the appellant "had a sole misdemeanor conviction for 'keying' a car, and while locked up in the juvenile facility was accused of four infractions."¹⁴ The court of appeals took this to be "more than a scintilla of evidence" to "support the court's finding" in this regard, and thus found the evidence to be at least "legally sufficient to support the court's determination" that the lack of "adequate protection of the public and likelihood of reasonable rehabilitation" weighed in favor of waiver.¹⁵ "However," the court of appeals continued, "careful consideration of *all* of the evidence[.]" including Dr. Silverman's report, led to the "further . . . conclusion that the evidence is factually insufficient to support the juvenile court's finding."¹⁶ Responding to the State's argument to the contrary, the court [**12] of appeals described the appellant's act of "keying a car" as "an undeniably low level misdemeanor mischief offense" and "hardly the sort of offense for which 'there is little, if any, prospect of adequate protection of the public.'"¹⁷ The court of appeals was also influenced by the fact that the appellant's juvenile custodial officers testified that "he followed orders, attended classes, and was not aggressive or mean-spirited."¹⁸ Finally, the court of appeals was clearly influenced by Dr. Silverman's assessment that the appellant "would probably benefit from placement in a therapeutic environment specifically designed for adolescent offenders[.]"¹⁹

14 *Id. at 376.*

15 *Id. at 377.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id. at 376-77.*

Thus, of the three "reasons for waiver" that the juvenile court specifically gave in its written order, the court of appeals determined that one reason, sophistication and maturity, was supported by legally insufficient evidence. It determined that another reason, the protection of the public and likelihood of rehabilitation, was supported by factually insufficient evidence. With respect to the juvenile court's third reason for waiving jurisdiction--that the appellant's offense constituted a crime against the person of another, [**13] and not a mere property crime--the court of appeals regarded this as an inadequate justification, by itself, for waiver. To transfer jurisdiction to the criminal court for this reason alone was, the court of appeals ultimately concluded, an abuse

of discretion.²⁰ The court of appeals reasoned that, "[i]f, as the State argues, the nature of the offense alone justified waiver, [**36] transfer would automatically be authorized in certain classes of 'serious' crimes such as murder, and the *subsection (f)* factors would be rendered superfluous."²¹ Concluding that the juvenile court abused its discretion to waive jurisdiction, the court of appeals vacated the district court's judgment of conviction, dismissed the criminal proceedings, and declared the case to be still "pending in the juvenile court."²²

20 *Id. at 378.*

21 *Id. at 375* (citing *R.E.M. v. State*, 541 S.W.2d 841, 846 (Tex. Civ. App.--San Antonio 1976, writ ref'd n.r.e.), for the proposition that there is "nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a 'serious' crime.").

22 *Id. at 378.*

C. The Petition for Discretionary Review

The State now challenges the court of appeals's ruling on four fronts. It argues that the court of appeals erred:

- o to apply factual-sufficiency [**14] review to any aspect of its analysis of the question whether the juvenile court abused its discretion to waive jurisdiction.

- o in failing to consider whether the seriousness of the offense could, by itself, justify the juvenile court's discretionary decision to waive jurisdiction.

- o in limiting its abuse-of-discretion analysis to the reasons for waiver set forth in the juvenile court's written order, and failing to consider the reasons that the juvenile court proclaimed orally from the bench at the conclusion of the hearing.

- o in limiting its abuse-of-discretion analysis to a review of the specific reasons the juvenile court gave (whether written or oral), rather than to assay the entire record for any evidence that would support a valid reason to waive jurisdiction, regardless of whether the juvenile court purported to rely on that evidence/reason.

Review of these various assertions necessitates a fairly global exegesis of the statutory scheme for the waiver of juvenile-court jurisdiction in Texas, as well as the abundant case law that has been generated in the courts of appeals over the past half a century.

II. THE LAW AND THE STANDARD OF APPELLATE REVIEW

A. *Kent v. United States*

The transfer [**15] of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be "protected and rehabilitated rather than subjected to the harshness of the criminal system[.]"²³ Because the waiver of juvenile-court jurisdiction means the loss of that protected status, in *Kent v. United States*, the United States Supreme Court characterized the statutory transfer proceedings in the District of Columbia as "critically important," and held that any statutory mechanism for waiving juvenile-court jurisdiction must at least "measure up to the essentials of due process and fair treatment." Among²⁴ the requisites of a minimally fair transfer process, the Supreme [**37] Court tacitly assumed in *Kent*, is the opportunity for meaningful appellate review.²⁵ The appellate court

must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not assume that there are adequate reasons, nor may it merely assume that full investigation has been made. Accordingly, we hold that it is incumbent [**16] upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the [relevant District of Columbia] statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of full investigation has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.²⁶

In an appendix to its opinion in *Kent*, the Supreme Court included a policy memorandum promulgated by the District of Columbia Juvenile Court that describes "determinative factors" for guiding the juvenile court's discretion in deciding whether waiver of its jurisdiction over a particular juvenile offender is appropriate.²⁷ The Texas Legislature soon incorporated those factors, albeit non-exclusively, into our own statutory scheme.²⁸ Missing from the Supreme Court's *Kent* opinion, however, is any detailed description of a standard for appellate review of the juvenile court's transfer decision.

23 *Hidalgo*, 983 S.W.2d at 754. See TEX. FAM. CODE § 51.01(2) [**17] (Juvenile Justice Code is to be construed to balance "the concept of punishment for criminal acts" with the ideal "to remove, where appropriate, the taint of criminality from children committing certain unlawful acts"--all "consistent with the protection of the public and public safety").

24 383 U.S. 541, 560-62, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

25 See *id.* at 561 ("Meaningful review requires that the reviewing court should review.").

26 *Id.* (internal quotation marks omitted).

27 *Id.* at 565-67.

28 Acts 1967, 60th Leg., ch. 475, § 4, p. 1083-84, eff. Aug. 28, 1967 (currently codified at TEX. FAM. CODE § 54.02(f)). See Robert O. Dawson, *Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code*, 5 TEX. TECH. L. REV. 509, 562 (1974) ("Most of the procedural safeguards incorporated in [§ 54.02] are probably required as a matter of federal constitutional law by the Supreme Court's decision in *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966)."). But see, *contra*: *Galloway v. State*, 578 S.W.2d 142, 143 (Tex. Crim. App. 1979) ("*Kent* did not purport to do more than construe the District of Columbia juvenile statutes, and it is not clear that it sets constitutional requirements.").

B. The Statutory Scheme

The Juvenile Justice Code of the Texas Family Code specifically provides that the designated juvenile court of each county has "exclusive original jurisdiction over proceedings [**18] in all cases involving . . . delinquent conduct . . . engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct."²⁹ "Delinquent conduct" includes "conduct . . . that violates a penal law of this state . . . punishable by imprisonment or by confinement in jail;"³⁰ and a "child," as defined by the Juvenile Justice Code, is any "person . . . ten years of age or older and under 17 years of age[.]"³¹ Thus, any person accused of committing a felony offense between his tenth and seventeenth birthdays is subject to the exclusive original jurisdiction of a juvenile court, meaning that the juvenile court has the "power to hear and decide" matters pertaining to the juvenile offender's case [**38] "before any other court[.]" including the criminal district court, can review them.³²

29 TEX. FAM. CODE § 51.04(a).

30 *Id.* § 51.03(a)(1).

31 *Id.* § 51.02(2)(A).

32 BLACK'S LAW DICTIONARY 982 (10th ed. 2014) (defining "original jurisdiction" as "[a] court's power to hear and decide a matter before any other court can review the matter"). *See also id.* at 981 (defining "exclusive jurisdiction" as "[a] court's power to adjudicate an action or class of actions to the exclusion of all other courts").

The right of the juvenile [**19] offender to remain outside the jurisdiction of the criminal district court, however, is not absolute. *Section 54.02* of the Juvenile Justice Code provides that, if certain conditions are met, the "juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court . . . for criminal proceedings[.]"³³ Before it may exercise its discretion to waive jurisdiction over an alleged child offender, the juvenile court must find that

(1) the child is alleged to have violated a penal law of the grade of felony; (2) the child was . . . 14 years of age or older at the time [of the alleged] offense, if the offense is . . . a felony of the first degree[;] and (3) after a full investigation and a hearing, the juvenile court determines 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

in the proper adult criminal court.³⁴ "In making the determination required by *Subsection [54.02](a)*"--that is, whether the "welfare of the community" indeed requires adult criminal proceedings [**20] to be instituted against the juvenile,

the [juvenile] court shall consider, among other matters: (1) whether the alleged 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.³⁵

These non-exclusive factors serve, we have said, to facilitate the juvenile court's balancing of "the potential danger to the public" posed by the particular juvenile offender "with the juvenile offender's amenability to treatment." Finally,³⁶ should the juvenile court choose to exercise its discretion to waive jurisdiction over the child, then the Juvenile Justice Code directs it to "state

specifically" in a written order "its reasons for waiver and [to] certify its action, including the written order and findings of the court."³⁷

33 *TEX. FAM. CODE* § 54.02(a).

34 *Id.*

35 *Id.* § 54.02(f). These are the factors that derive from the *Kent* appendix. *See* note 27, *ante*. They are "intended to guide [**21] the [juvenile] court's discretion in making the determination to transfer." Dawson, 5 *TEX. TECH. L. REV.* at 564. Initially, *Section 54.02(f)* embraced all six of the *Kent* factors, but the statute was amended in 1996 to remove two of them. Acts 1995, 74th Leg., ch. 262, § 34, p. 2533, eff. Jan. 1, 1996.

36 *Hidalgo*, 983 S.W.2d at 754.

37 *TEX. FAM. CODE* § 54.02(h)

For the juvenile, there are a number of advantages to remaining outside of the jurisdiction of the adult criminal courts. Not the least of these advantages is that, with but a few exceptions, a "child may not be committed or transferred to a penal institution or other facility used primarily for the execution of sentences of persons [**39] convicted of crime, *except* . . . after transfer for prosecution in criminal court under *Section 54.02*[.]"³⁸ Indeed, a juvenile offender may not even be handed a sentence--"no disposition may be made"--upon his being "found to have engaged in delinquent conduct" unless and until the juvenile court or a jury determines that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made."³⁹ And we ourselves have acknowledged the goals of the criminal justice system and the juvenile-justice system to be fundamentally different, describing the former as more [**22] "retributive" than its "rehabilitative" juvenile counterpart.⁴⁰

38 There are other exceptions to this general rule not implicated in this case, including an exception for "temporary detention in a jail or lockup pending juvenile court hearing," *id.* § 51.13(c)(1), as well as one for "transfer . . . under *Section 245.151(c)*, *Human Resources Code*." *Id.* § 51.13(c)(3); *see also TEX. HUM. RES. CODE* § 245.151(c) (the Texas Juvenile Justice Department "shall transfer" an adjudicated juvenile offender "to the custody of the Texas Department of Criminal Justice for the completion of the person's sentence" when, pursuant to court order under *TEX. FAM. CODE* § 54.11(i)(2) and *TEX. HUM. RES. CODE* § 244.014(a), the juvenile court determines that "the child's conduct" while under State supervision "indicates that the welfare of the community requires the transfer").

39 *See TEX. FAM. CODE* § 54.04(c) ("If the court or jury does not so find, the court shall dismiss the child and enter a final judgment without any disposition."). In keeping with the Juvenile Justice Code's stated purpose

to "remove, where appropriate, the taint of criminality from children committing certain unlawful acts[.]" *TEX. FAM. CODE* § 51.01(2)(B), the juvenile-justice equivalent of a "conviction" for delinquent conduct is referred to instead as an "adjudication," [**23] *TEX. FAM. CODE* § 54.03, and the juvenile-justice equivalent of a "sentence" for an adjudication is instead referred to as a "disposition." *TEX. FAM. CODE* § 54.04.

40 *Hidalgo*, 983 S.W.2d at 755.

Prior to January 1, 1996, *Section 56.01* of the Juvenile Justice Code provided, in one phrasing or another, that an appeal "from an order entered under . . . *Section 54.02* of this code respecting transfer of the child to criminal court for prosecution as an adult" could be taken "by or on behalf of a child" directly from the juvenile court to the proper court of appeals.⁴¹ What this meant in practical terms was that an alleged juvenile offender could complain immediately of the juvenile court's order waiving its jurisdiction, and, if appropriate, seek discretionary review from the Texas Supreme Court "as in civil cases generally."⁴² In 1995, however, the Legislature approved an amendment to the Juvenile Justice Code, effective January 1, 1996, in which the portion of *Section 56.01(c)* that provides for the direct, civil appealability of *Section 54.02* waivers was struck.⁴³ Contemporaneous with this amendment, the Legislature added *Article 44.47 to the Texas Code of Criminal Procedure*, providing in *Section (b)* thereof that a "defendant may appeal a transfer under [*Section 54.02, Family Code*] only in conjunction with the appeal of a conviction of . . . the offense for which the defendant [**24] was transferred to criminal court."⁴⁴ What this means in practical terms is that an alleged juvenile offender may no longer immediately appeal from the juvenile court's waiver of jurisdiction; instead, he must wait until such time as he may be convicted in an adult criminal court to complain, on appeal, of some error in the [*40] juvenile court's transfer ruling. Although the Legislature designated an appeal from a juvenile court's *Section 54.02* order to be a "criminal matter . . . governed by [the Code of Criminal Procedure] and the Texas Rules of Appellate Procedure that apply to a criminal case[.]" it nevertheless expressly provided, in *Article 44.47(d)*, that an appeal under *Article 44.47(b)* "may include any claims under the law that existed before January 1, 1996, that could have been raised on direct appeal in a transfer under *Section 54.02, Family Code*."⁴⁵

41 See Acts 1973, 63d Leg., ch. 544, § 1, p. 1483, eff. Sept. 1, 1973.

42 *Id.*

43 Acts 1995, 74th Leg., ch. 262, § 48, p. 2546, eff. Jan. 1, 1996.

44 *Id.* at § 85, p. 2584 (emphasis added).

45 *Id.*

What is lacking in our statutory scheme--as is lacking in *Kent*--is any express statement of the applicable standard of appellate review of the juvenile court's transfer order. In the absence of an explicit statutory standard of appellate review, [**25] the courts of appeals have filled the void with decisional law spelling out how they will go about providing the "meaningful review" contemplated by *Kent*.

C. The Consensus in the Courts of Appeals

In the absence of explicit provisions in the Juvenile Justice Code that define a standard for appellate review of juvenile transfer orders, the general consensus of the various courts of appeals has been as follows. The burden is on the petitioning party, the State, to produce evidence to inform the juvenile court's discretion as to whether waiving its otherwise-exclusive jurisdiction is appropriate in the particular case.⁴⁶ Transfer of a juvenile offender to criminal court is appropriate only when the State can persuade the juvenile court, by a preponderance of the evidence,⁴⁷ that the welfare of the community requires transfer of jurisdiction for criminal proceedings, either because of the seriousness of the offense or the background of the child (or both).⁴⁸ In exercising its discretion, the juvenile court must consider all of the *Kent* factors as currently codified in *Section 54.02(f)* of the Juvenile Justice Code;⁴⁹ "it is from the evidence concerning [the *Section 54.02(f)*] factors that a [juvenile] court makes its final determination." [**26]⁵⁰ But it need not find that each and every one of those factors favors transfer before it may exercise its discretion to waive jurisdiction.⁵¹ It may transfer the juvenile so long as it is satisfied by a preponderance of the evidence that the seriousness of the offense or the back [*41] ground of the child (or both) indicates that the welfare of the community requires criminal proceedings.⁵²

46 *Matter of Honsaker*, 539 S.W.2d 198, 201 (Tex. Civ. App.--Dallas 1976, *ref'd n.r.e.*); *B.R.D. v. State*, 575 S.W.2d 126, 131 (Tex. Civ. App.--Corpus Christi 1978, *writ ref'd n.r.e.*); *Matter of M.I.L.*, 601 S.W.2d 175, 177 (Tex. Civ. App.--Corpus Christi 1980, *no writ*); *Matter of E.D.N.*, 635 S.W.2d 798, 800 (Tex. App.--Corpus Christi 1982, *no writ*); *Moore v. State*, 713 S.W.2d 766, 768 (Tex. App.--Houston [14th Dist.] 1986, *no writ*).

47 *Matter of P.B.C.*, 538 S.W.2d.448, 453 (Tex. Civ. App.--El Paso 1976, *no writ*).

48 *Faisst v. State*, 105 S.W.3d 8, 11 (Tex. App.--Tyler 2003, *no pet.*).

49 See *In re J.R.C.*, 522 S.W.2d 579, 584 (Tex. Civ. App.--Texarkana 1975, *ref'd n.r.e.*) (juvenile court's "findings should show an investigation in every material field [listed in *Section 54.02(f)*] was undertaken and the result thereof").

50 *Matter of M.I.L.*, 601 S.W.2d at 177.

51 *E.g., Matter of J.R.C.*, 551 S.W.2d 748, 753 (Tex. Civ. App.--Texarkana 1977, *ref'd n.r.e.*); *D.J.R. v. State*, 565 S.W.2d 392, 395 (Tex. Civ. App.--Fort Worth 1978, *no writ*); *Matter of G.B.B.*, 572 S.W.2d 751, 756 (Tex. Civ. App.--El Paso 1978, *ref'd n.r.e.*); *Casiano v. State*, 687 S.W.2d 447, 449 (Tex. App.--Houston [14th Dist.] 1985, *no writ*); *Matter of K.D.S.*, 808 S.W.2d 299, 302 (Tex. App.--Houston [1st Dist.] 1991, *no writ*); *C.M. v. State*, 884 S.W.2d 562, 564 (Tex. App.--San Antonio 1994, *no writ*).

52 *See, e.g., Matter of J.R.C.*, 551 S.W.2d at 753 ("Section 54.02 does not require that, in order for the juvenile court to waive its jurisdiction, all of the matters listed in Subsection (f) must be established. * * * The statute only directs that the juvenile court consider the matters listed under Subsection (f) in making its determination. * * * They are the criteria by which it may be determined if the juvenile court properly concluded that the seriousness of the offense or the background of the child required a transfer to criminal court."); *In re Q.D.*, 600 S.W.2d 392, 395 (Tex. Civ. App.--Fort Worth 1980, *no writ*) ("[T]he [juvenile] court is bound only to consider all [of the Subsection (f)] factors. It need not find that each factor is established by the evidence."); [**27] *P.G. v. State*, 616 S.W.2d 635, 639 (Tex. Civ. App.--San Antonio 1981, *ref'd n.r.e.*) ("The [juvenile] court need not find that all the factors in subdivision (f) have been established, but it must consider all these factors and state the reasons for its transfer so that the appellate court may review the basis on which the conclusion was made and can determine whether the evidence so considered does in fact justify that conclusion."); *Matter of E.D.N.*, 635 S.W.2d at 800 ("If the evidence establishes enough of the factors in subdivision (f) to convince the [juvenile] court that a transfer is in the best interest of the child and community, we will not disturb that order."); *McKaine v. State*, 170 S.W.3d 285, 291 (Tex. App.--Corpus Christi 2005, *no pet.*) (While the juvenile court must consider all of these factors before transferring the case to district court, it is not required to find that each factor is established by the evidence. * * * The court is also not required to give each factor equal weight as long as each is considered.").

With respect to the adequacy of the written order mandated by Section 54.02(h), the courts of appeals have generally agreed, first of all, that the written order must reflect the juvenile court's "reasons" for waiving jurisdiction.⁵³ Despite the express edict of the statute (i.e., the written order "shall state specifically [the juvenile court's] reasons for waiver"), [**28] the courts of appeals have sometimes sanctioned orders that recited the reasons for transfer in terms no more specific than the bare statutory language, namely, that because of the seriousness of the offense or the background of the child,

transfer is required to ensure the welfare of the community.⁵⁴ In addition to specifying "reasons," [**42] the order should also expressly recite that the juvenile court actually took the Section 54.02(f) factors into account in making this determination.⁵⁵ But it need make no particular findings of fact with respect to those factors,⁵⁶ notwithstanding Section 54.02(h)'s pointed requirement that the juvenile court "certify its action, including the . . . findings of the court[.]"

53 *See e.g., In re J.R.C.*, 522 S.W.2d at 584 ("The reasons motivating the Juvenile Court's waiver of jurisdiction must expressly appear."); *P.G.*, 616 S.W.2d at 639 (juvenile court must "state the reasons for its transfer").

54 *Matter of Honsaker*, 539 S.W.2d at 200, 201-02 (construing *In re J.R.C.* and holding that a transfer order that recited the statutory criteria for waiver of juvenile jurisdiction and found them to be satisfied provided "sufficient specificity . . . to allow an appellate court to review and understand the reason for the juvenile court's determination"); *D.L.C. v. State*, 533 S.W.2d 157, 159 (Tex. Civ. App.--Austin 1976, *no writ*) (order stating in conclusory terms that the Subsection (f) [**29] factors were satisfied, without going into detail, was nevertheless sufficient to comply with the requirement of written "reasons" in Subsection (h)); *In re W.R.M.*, 534 S.W.2d 178, 181 (Tex. Civ. App.--Eastland 1976, *no writ*) ("In the instant case, the order discloses that the matters listed in Subsection (f) were considered, and the order states specific reasons for waiver. The fact that some of the recitations constitute conclusions does not require a reversal of the court's order."); *Q.V. v. State*, 564 S.W.2d 781, 784 (Tex. Civ. App.--San Antonio 1978, *ref'd n.r.e.*) (written transfer order that merely stated conclusorily that Subsection (f) factors were satisfied, *sans* any detailed description of the evidence, was nevertheless "sufficiently specific as to the 'reasons' for" the juvenile court's decision to waive jurisdiction); *In re C.L.Y.*, 570 S.W.2d 238, 239, 241 (Tex. Civ. App.--Houston [1st Dist.] 1978, *no writ*) (same); *Appeal of B.Y.*, 585 S.W.2d 349, 351 (Tex. Civ. App.--El Paso 1979, *no writ*) ("Reversible error is not present here by the fact that the [juvenile court's] order seems to parrot the Section 54.02 list of factors the [juvenile court] should consider in making a transfer; the enumerated reasons are supported by evidence. The order is sufficient."); *In re I.B.*, 619 S.W.2d 584, 587 (Tex. Civ. App.--Amarillo 1981, *no writ*) (same); *Matter of T.D.*, 817 S.W.2d 771, 775-77 (Tex. App.--Houston [1st Dist.] 1991, *writ denied*) (same).

55 *In re W.R.M.*, 534 S.W.2d at 182 (order is sufficient if it "discloses that the matters listed in Subsection (f) were considered"); *In re C.L.Y.*, 570 S.W.2d at 239 (transfer order stated that the juvenile court "has considered" the Subsection 54.02(f) factors); *P.G.*, 616

S.W.2d at 638-39 (juvenile court's order "listed [****30**] the . . . factors of *section 54.02(f)* and stated that each had been considered in making a determination" that waiver of jurisdiction was appropriate); *Casiano*, 687 S.W.2d at 449 ("An order is sufficient which states [*inter alia*] that all factors listed in § 54.02(f) were considered by the [juvenile] court[.]").

56 See note 54, *ante*. Early case law seemed to contemplate that greater specificity might be necessary to satisfy Kent's emphasis on meaningful appellate review. See *In re J.R.C.*, 522 S.W.2d at 583-84 ("To sum up, besides giving reasons for waiver in its order the Juvenile Court has a mandatory duty to file findings covering matters actually considered, including all matters mentioned in Subsection (f), and to certify such order and findings to the appropriate district court."). This insistence on "rigid adherence to the governing statutes . . . in proceedings of this nature[.]" *id.* at 584, however, soon gave way to a laxer attitude that, so long as the juvenile court's order identified the relevant factors (however conclusorily) and the evidence would support a transfer based on those factors, the order would be regarded as sufficient. See Douglas A. Hager, *Does the Texas Juvenile Waiver Statute Comport with the Requirements of Due Process?*, 26 TEX. TECH. L. REV. 813, 838-45 (1995) (tracing the retreat of the [****31**] courts of appeals from "the procedural safeguards inherent in the *J.R.C.* holding"); Robert O. Dawson, *Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code*, 5 TEX. TECH. L. REV. 509, 564-65 (1974) ("The committee's draft [of *Section 54.02(h)*] stated that if the juvenile court waives jurisdiction 'it shall briefly state in the order its reasons for waiver.' The fact that the Legislature changed 'briefly state' to 'state specifically' indicates that it contemplated more than merely an adherence to printed forms and, indeed, contemplated a true revelation [sic] of reasons for making this discretionary decision.").

The courts of appeals have also uniformly agreed that, absent an abuse of discretion, a reviewing court should not set aside the juvenile court's order transferring jurisdiction.⁵⁷ What they mean by "abuse of discretion" in this context is not altogether clear. Some courts of appeals have declared that the juvenile court's decision must simply be a guided one, not arbitrary or capricious.⁵⁸ Even so, the courts of [****43**] appeals have entertained various challenges to the legal and/or factual sufficiency of the evidence presented at the transfer hearing to support [****32**] the juvenile court's decision to waive its jurisdiction.⁵⁹ Some courts of appeals (like the court of appeals in this case) have examined the evidence to determine its sufficiency to support specific findings of fact with respect to the *Section 54.02(f)* factors,⁶⁰ while mindful that not every factor must support transfer

before the juvenile court may exercise its discretion to waive jurisdiction.⁶¹ Other courts of appeals have accepted the juvenile offender's invitation to measure the sufficiency of the evidence to support the juvenile court's ultimate conclusion, pursuant to *Section 54.02(a)*, that the seriousness of the offense or background of the child indicated the need for transfer in [****44**] order to ensure the welfare of the community.⁶² No court of last resort in Texas, insofar as our research reveals, has yet spoken on these matters.

57 E.g., *Matter of Honsaker*, 539 S.W.2d at 201; *C.M.*, 884 S.W.2d at 563; *Matter of J.P.O.*, 904 S.W.2d 695, 698 (Tex. App.--Corpus Christi 1995, writ denied); *Matter of K.B.H.*, 913 S.W.2d 684, 687-88 (Tex. App.--Texarkana 1995, no pet.); *In re J.J.*, 916 S.W.2d 532, 535 (Tex. App.--Dallas 1995, no writ); *State v. Lopez*, 196 S.W.3d 872, 874 (Tex. App.--Dallas 2006, pet. ref'd); *Faisst*, 105 S.W.3d at 12. Cf. *T.P.S. v. State*, 590 S.W.2d 946, 953-54 (Tex. Civ. App.--Dallas 1979, ref'd n.r.e.) (observing that *Kent* "recognizes that the statute of the District of Columbia there in question gave the juvenile court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached") (internal quotation marks omitted).

58 See, e.g., *Matter of M.D.B.*, 757 S.W.2d 415, 417 (Tex. App.--Houston [14th Dist.] 1988, no writ) ("In reviewing the [juvenile] court's action for an abuse [****33**] of discretion, this court must determine if the [juvenile] court acted without reference to any guiding rules and principles."); *Matter of T.D.*, 817 S.W.2d at 773 ("The [juvenile] court must act with reference to guiding rules and principles, reasonably, not arbitrarily, and in accordance with the law.").

59 See, e.g., *Matter of I.J., Jr.*, 546 S.W.2d 110, 111 (Tex. Civ. App.--Eastland 1977, no writ) (finding the evidence to support "the findings in the transfer order" to be both legally and factually sufficient); *Matter of T.D.*, 817 S.W.2d at 777 ("The [juvenile] court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the legal or factual sufficiency of the evidence supporting the jury's answers to special issues."); *Matter of G.F.O.*, 874 S.W.2d 729, 731-32 (Tex. App.--Houston [1st Dist.] 1994, no writ) ("If an appellate court finds the evidence factually or legally insufficient to support the juvenile court's order transferring jurisdiction of a youth to the criminal district court, it will necessarily find the juvenile court has abused its discretion."); *Matter of J.P.O.*, 904 S.W.2d at 699-700 ("The juvenile court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards as are applied in reviewing the legal or factual sufficiency of

the evidence supporting a jury's answers to a charge."); *Matter of K.B.H.*, 913 S.W.2d at 688 ("Under [**34] an abuse of discretion standard, the legal sufficiency of the evidence is not an independent ground of error, but is a relevant factor in assessing whether the [juvenile] court abused its discretion."); *Faisst*, 105 S.W.3d at 12 ("Relevant factors to be considered when determining if the [juvenile] court abused its discretion include legal and factual sufficiency of the evidence."); *Bleys v. State*, 319 S.W.3d 857, 861 (Tex. App.--San Antonio 2010, no pet.) (same).

60 See, e.g., *Matter of P.A.C.*, 562 S.W.2d at 916-17 (finding that the evidence was factually sufficient to support the juvenile court's findings with respect to several of the subsection (f) factors); *Moore*, 713 S.W.2d at 768-70 (reviewing both the legal and factual sufficiency of the evidence to support the juvenile court's findings with respect to various subsection (f) factors); *Matter of T.D.*, 817 S.W.2d at 777-79 (conducting legal and factual sufficiency analysis of the last subsection (f) factor); *In re J.J.*, 916 S.W.2d at 537 ("Additionally, there was legally and factually sufficient evidence before the [juvenile] court supporting affirmative findings regarding each of the . . . factors set forth in section 54.02(f) of the family code."); *Matter of D.D.*, 938 S.W.2d 172, 174-76 (Tex. App.--Fort Worth 1996, no writ) (reviewing the factual sufficiency of the evidence to support the juvenile court's finding regarding two of the subsection (f) factors); *Bleys*, 319 S.W.3d at 862-63 (reviewing the factual sufficiency of the evidence to support the juvenile court's finding under Section 54.02(f)(4)).

61 See, [**35] e.g., *L.M. v. State*, 618 S.W.2d 808, 813 (Tex. Civ. App.--Houston [1st Dist.] 1981, ref'd n.r.e.) ("Although all of the factors enumerated in section 54.02(f) must be considered by the [juvenile] judge, each one need not be present in a specific case."); *Matter of E.D.N.*, 635 S.W.2d at 800 ("While the court must consider all of these factors, it need not find that they have all been established."); *C.W. v. State*, 738 S.W.2d 72, 75 (Tex. App.--Dallas 1987, no writ) ("The [juvenile] court is bound to consider, as it did in this case, all [of the] statutory factors, among other matters. It need not find that each of the . . . factors is established by the evidence."); *Matter of M.D.B.*, 757 S.W.2d at 417 ("[W]hile the juvenile court is required to consider all [of the] factors of § 54.02(f) . . . , it is not required to find that each factor is established by the evidence."); *Matter of C.C.G.*, 805 S.W.2d 10, 15 (Tex. App.--Tyler 1991, writ denied) (same); *In re J.J.*, 916 S.W.2d at 535 (same); *Matter of D.D.*, 938 S.W.2d at 176 (same); *Bleys*, 319 S.W.3d at 862 (same).

62 See, e.g., *Moore*, 713 S.W.2d at 767-68, 770 (reviewing the legal and factual sufficiency of the evidence to support the juvenile court's determination

that the seriousness of the offense and the child's background justified transfer); *Matter of T.D.*, 817 S.W.2d at 777 (at least nominally reviewing legal and factual sufficiency of the ultimate question of whether there is "probative evidence that the welfare of the community required a waiver of jurisdiction of the juvenile court and criminal proceedings against appellant"); *Matter of J.P.O.*, 904 S.W.2d at 700-02 (Reviewing both the legal and factual sufficiency of the evidence to support [**36] the juvenile court's bottom-line conclusion that transfer was appropriate); *In re J.J.*, 916 S.W.2d at 536-37 (finding the evidence sufficient to support the juvenile court's determination that both the seriousness of the offense and the child's background merited waiving jurisdiction); *Matter of D.D.*, 938 S.W.2d at 176-77 (reviewing the factual sufficiency of the evidence to support the juvenile court's subsection (a) determination whether the seriousness of the offense or the child's background warranted transfer); *Bleys*, 319 S.W.3d at 862-63 (reviewing the factual sufficiency of the evidence to support the juvenile court's conclusion under Section 54.02(a)(3)).

The State argues that the court of appeals in this case erred in four respects. First, the court of appeals erred to conduct a factual-sufficiency review, since appeal from a juvenile transfer order is now "a criminal matter" that is "governed" by the Texas Code of Criminal Procedure and the rules of appellate procedure that apply to criminal cases.⁶³ After all, this Court, in *Brooks v. State*, rejected factual sufficiency for purposes of criminal appeals.⁶⁴ Second, the court of appeals erred to conclude that the seriousness of the offense could not, by itself, justify the juvenile court's transfer order. Third and fourth, the court of appeals [**37] erred by failing to take into account the reasons for waiver of jurisdiction that the juvenile court gave orally on the record, and, for that matter, any other justifications for transfer that may appear in the record, regardless of whether the juvenile court purported to rely on them, either orally on the record or in its written order. These are questions that the courts of appeals have never explicitly addressed.

63 TEX. CODE CRIM. PROC. art. 44.47(c).

64 *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010).

III. ANALYSIS

A. Factual Sufficiency Under Section 54.02

The State argues that the court of appeals erred to apply a factual-sufficiency standard to the Section 54.02(f)(4) factor, regarding "the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services, and facilities currently

available to the juvenile court."⁶⁵ Indeed, in a supplemental brief filed after oral argument in this Court, the State argues that the appropriate standard of appellate review ought to be a bare abuse-of-discretion standard, unencumbered by any inquiry into the sufficiency of the evidence, either legal or factual, to support the juvenile court's transfer order. We disagree.

65 *TEX. FAM. CODE* § 54.02(f)(4). *See Moon*, 410 S.W.3d at 377 (holding that the evidence was legally sufficient [**38] to establish this factor, but factually insufficient).

That the appeal of a transfer order is now regarded as a "criminal matter," under *Article 44.47(c)*, does not in itself control the question of whether factual-sufficiency review is available on direct [*45] appeal.⁶⁶ The juvenile transfer proceeding remains civil in character, governed by the Juvenile Justice Code; the proceedings do not become criminal unless and until the juvenile court waives its exclusive jurisdiction and transfers the child to a criminal court for prosecution as an adult. More to the point, the availability of factual-sufficiency review is, in any event, not so much a function of the character of the proceeding--civil versus criminal--as it is a function of the applicable burden of proof. As we have already pointed out, 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. Facts which must be proven by a preponderance of the evidence are ordinarily susceptible to appellate review for factual sufficiency.⁶⁷ In arguing that factual-sufficiency review is unavailable, the State analogizes [**39] to the juvenile-adjudication proceedings.⁶⁸ In that context, the courts of appeals have declined to conduct factual-sufficiency review, noting that adjudication proceedings are "quasi-criminal" in nature.⁶⁹ But the burden of proof in a juvenile-adjudication proceeding is beyond a reasonable doubt,⁷⁰ not a preponderance of the evidence. In that context, it is certainly arguable that our holding in *Brooks* applies.⁷¹ In the review of any issue that is subject to a burden of proof less than beyond a reasonable doubt, however, the Texas Supreme Court has authorized the courts of appeals to conduct a factual-sufficiency review.⁷² The particular appellate standard for factual sufficiency depends upon the level of [*46] confidence applicable to the burden of proof--whether preponderance of the evidence or clear and convincing evidence--in the trial court.⁷³ But the courts of appeals have continued to address issues of factual sufficiency when they are raised on appeal in all but the juvenile-adjudication context. Indeed, even in criminal cases, we have said that the courts of appeals may conduct factual-sufficiency reviews when confronted with fact issues for which the burden of proof is by a preponderance of

[**40] the evidence.⁷⁴ The court of appeals did not err to address the appellant's contention that the evidence was factually insufficient to support the juvenile court's finding with respect to *Section 54.02(f)(4)*.⁷⁵

66 Indeed, in light of *Article 44.47(d)*, it is arguable that factual sufficiency remains a viable claim on appeal from a transfer order, notwithstanding that it is now a "criminal matter." After all, factual sufficiency was a "claim[]" under the law that existed before January 1, 1996, that could have been raised on direct appeal of a transfer under *Section 54.02, Family Code*.⁷⁶ *TEX. CODE CRIM. PROC. art. 44.47(d)*.

67 *Matlock v. State*, 392 S.W.3d 662, 667 (*Tex. Crim. App.* 2013).

68 State's Brief on the Merits at 12-13.

69 *See In re R.R.*, 373 S.W.3d 730, 734 (*Tex. App.--Houston [14th Dist.] 2012, writ denied*) ("Although juvenile [adjudication] proceedings are civil matters, the standard applicable in criminal matters [*i.e.*, proof beyond a reasonable doubt] is used to assess the sufficiency of the evidence a finding the juvenile has engaged in delinquent conduct."); *In re A.O.*, 342 S.W.3d 236, 239 (*Tex. App.--Amarillo 2011, writ denied*) (same). *Cf., In re B.L.D.*, 113 S.W.3d 340, 351 (*Tex. 2003*) (juvenile delinquency cases are considered to be "quasi-criminal"). The State cites only one case which suggests, and then only in obvious dicta, that factual-sufficiency review may likewise be inappropriate for appellate review of juvenile transfer proceedings after the enactment of *Article 44.47*. *See In re M.A.V.*, 88 S.W.3d 327, 331 n.2 (*Tex. App.--Amarillo 2002, no pet.*).

70 *See TEX. FAM. CODE* § 54.03(f) ("The child shall be presumed [**41] to be innocent of the charges against the child and no finding that a child has engaged in delinquent conduct or conduct indicating a need for supervision may be returned unless the state has proved such beyond a reasonable doubt.").

71 *In re R.R.*, 373 S.W.3d at 734; *In re A.O.*, 342 S.W.3d at 239; *In re C.E.S.*, 400 S.W.3d 187, 194 (*Tex. App.--El Paso 2013, no writ*).

72 *See In re C.H.*, 89 S.W.3d 17, 25 (*Tex. 2002*) (announcing the appropriate appellate standard for review of factual-sufficiency claims in cases of termination of parental rights, in which the State must satisfy a clear and convincing evidence burden of proof); *In re J.F.C.*, 96 S.W.3d 256, 266-67 (*Tex. 2002*) (same). And, indeed, in *In re A.O.*, the Amarillo Court of Appeals, having refused to subject the juvenile-adjudication proceeding to factual-sufficiency review, in the next breath did conduct a factual-sufficiency review of the evidence proffered at the juvenile disposition hearing. 342 S.W.3d at 240.

73 *See In re C.H.*, 89 S.W.3d at 25 (distinguishing appropriate appellate standard for factual sufficiency

depending upon whether the trial-level burden of proof is preponderance of the evidence or clear and convincing evidence); *In re J.F.C.*, 96 S.W.3d at 267 (same). See also *Southwestern Bell Telephone Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004) ("In sum, we think that whenever the standard of proof at trial is elevated, the standard of appellate review must likewise be elevated.").

74 See *Matlock*, 392 S.W.3d at 667, 670 ("Prior to *Brooks*, we used the traditional Texas civil burdens of proof and standards of review [**42] in the context of affirmative defenses where the rejection of an affirmative defense is established by a 'preponderance of the evidence.' Our decision in *Brooks* did not affect that line of cases. * * * A criminal defendant might also raise a factual-sufficiency challenge to the jury's adverse finding on his affirmative defense.") (footnotes omitted).

75 The State does not take issue with the court of appeals's formulation of the difference, under current law, between legal- and factual-sufficiency analyses:

Under a legal sufficiency challenge, we credit evidence favorable to the challenged finding and disregard contrary evidence unless a reasonable fact finder could not reject the evidence. * * * Under a factual sufficiency challenge, we consider all of the evidence presented to determine if the [juvenile] court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust."

Moon, 410 S.W.3d at 370-71 (citations omitted).

Having said that, we do agree with the State's contention to the limited extent that it may argue that sufficiency review should *not* apply to appellate review of the ultimate question under *Section 54.02(a)(3)*, that is, whether "because of the seriousness of the offense [**43] alleged or the background of the child the welfare of the community requires criminal proceedings." The discretion of the juvenile court is at its apex when it makes this largely normative judgment.⁷⁶ As long as the appellate court can determine that the juvenile court's judgment was based upon facts that are supported by the record, it should refrain from interfering with that judgment absent a scenario in which the facts identified in the transfer order, based on evidence produced at the transfer hearing as it relates to the non-exclusive *Subsection (f)* factors and beyond, bear no rational relation to the specific reasons the order gives to justify the conclusion that the seriousness of the offense and/or the juvenile's [**47] background warrant transfer. The appellate courts should conduct appellate review of the juvenile court's discretionary decision to waive jurisdiction in essentially the same way that the El Paso

Court of Appeals has said that the juvenile court's discretion in determining juvenile dispositions should be scrutinized on appeal, to wit:

We apply a two-pronged analysis to determine an abuse of discretion: (1) did the [juvenile] court have sufficient information upon which [**44] to exercise its discretion; and (2) did the [juvenile] court err in its application of discretion? A traditional sufficiency of the evidence review helps answer the first question, and we look to whether the [juvenile] court acted without reference to any guiding rules or principles to answer the second.⁷⁷

Similarly, we hold that, in evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the *Section 54.02(f)* factors under "traditional sufficiency of the evidence review." But it should then review the juvenile court's ultimate waiver decision under an abuse of discretion standard. That is to say, 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, [**45] given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? And, of course, reviewing courts should bear in mind that not every *Section 54.02(f)* factor must weigh in favor of transfer to justify the juvenile court's discretionary decision to waive its jurisdiction.⁷⁸

76 Whether the offense is serious enough, and/or the juvenile's background demonstrates, that waiver of the juvenile court's jurisdiction is warranted to ensure the welfare of the community is, in many respects, similar to the question of whether the non-exclusive *Keeton* factors warrant a jury's prediction, at the punishment phase of a capital-murder trial, that the accused will probably commit criminal acts of violence that would constitute a continuing threat to society. Even before *Brooks* was decided, we insisted that this special issue, while not "wholly normative in nature," is nevertheless too "value-laden" to be amenable to a factual-sufficiency review. *McGinn v. State*, 961 S.W.2d 161, 169 (Tex. Crim. App. 1998); *Keeton v. State*, 724 S.W.2d 58, 61-64 (Tex. Crim. App. 1987); TEX. CODE CRIM. PROC. art. 37.071 §2(b)(1).

77 *In re J.R.C.S.*, 393 S.W.3d 903, 914 (Tex. App.--El Paso 2012, no writ). See also *In re M.A.C.*, 999 S.W.2d 442, 446 (Tex. App.--El Paso 1999, no writ).

78 See *Hidalgo*, 983 S.W.2d at 754 n.16 ("The juvenile court is not required to find each criterion before it can transfer a case to district court. The court may order a transfer on the strength of any combination [**46] of the criteria.").

B. The Seriousness of the Offense

The State complains that the court of appeals should not have concluded that the juvenile court abused its discretion for waiving jurisdiction based upon the seriousness of the offense. The State points out that the juvenile court made an explicit finding of fact in its transfer order that the appellant's alleged offense was committed against the person of another, under *Section 54.02(f)(1)*. This finding of fact was amply supported by the record, the State contends, and was sufficient by itself to provide a legitimate basis for the trial court's discretionary decision to waive jurisdiction. The court of appeals rejected this contention because "[i]f, as the State argues, the nature of the offense alone justified waiver, transfer would automatically be authorized in certain classes of 'serious' crimes such as murder, and the subsection (f) factors would be rendered superfluous."⁷⁹ In support of the court of appeals's observation, the appellant reminds us that the Supreme Court in *Kent* seems to have disfavored the "routine [**48] waiver [of juvenile-court jurisdiction] in certain classes of alleged crime."⁸⁰

79 *Moon*, 410 S.W.3d at 375.

80 Appellant's Response to the State's Brief at 13 (citing *Kent*, 383 U.S. at 553 n.15). [**47]

The courts of appeals have long held that the offense that the juvenile is alleged to have committed, so long as it is substantiated by evidence at the transfer hearing and of a sufficiently egregious character, will justify the juvenile court's waiver of jurisdiction regardless of what the evidence may show with respect to the child's background and other *Section 54.02(f)* factors.⁸¹ This is different from holding that the mere *category* of offense the juvenile is alleged to have committed, without more, will serve to justify transfer. If that is the only consideration informing the juvenile court's decision to waive jurisdiction--the category of crime alleged, rather than the specifics of the particular offense--then we agree with the Supreme Court's intimation in *Kent* that the transfer decision would almost certainly be too ill-informed to constitute anything but an arbitrary decision.

81 The earliest case to so hold was *In re Buchanan*, 433 S.W.2d 787, 789 (Tex. Civ. App.--Fort Worth 1968, *ref'd*

n.r.e.). Almost eight years later, another court of appeals reversed a juvenile transfer order, *inter alia*, because of a lack of evidence substantiating a bare recitation in the transfer order that "the offense was murder, committed against the person of another[.]" *R.E.M.*, 541 S.W.2d at 846-47. The San Antonio Court of Appeals [**48] distinguished *Buchanan*, observing that there, "the 'evidence introduced at the hearing show[ed] without dispute that appellant shot and killed a man without provocation or cause.' 433 S.W.2d at 789. Here there is no admissible evidence to that effect." *R.E.M.*, *supra*, at 847. Later cases have likewise found the evidence sufficient to support waiver of juvenile jurisdiction based on the seriousness of the offense alone, as established by evidence presented at the transfer hearing. See *e.g.*, *Matter of C.C.G.*, 805 S.W.2d at 14-15 ("[A]ssuming, arguendo that there is insufficient evidence concerning the background of appellant, the juvenile court's determination that the seriousness of the offense, as substantiated by the evidence, is alone sufficient."); *C.M.*, 884 S.W.2d at 564 ("The [juvenile court] is free to decide to transfer the case due to the seriousness of the crime, even if the background of the child suggests the opposite."); *Matter of D.D.*, 938 S.W.2d at 177 ("The seriousness of the offenses D.D. is charged with [capital murder, murder, aggravated kidnapping, among others] is sufficient to support his transfer despite his background."); *Faisst*, 105 S.W.3d at 11 ("[C]ourt does not abuse its discretion by finding the community's welfare requires transfer due to the seriousness of the crime [intoxication manslaughter] alone, despite the child's [**49] background."); *McKaine*, 170 S.W.3d at 291 (same).

The transfer order in this case made no findings about the specifics of the capital murder, finding no more than probable cause to believe that the appellant committed "the OFFENSE alleged." It gave as the juvenile court's sole reason for waiving jurisdiction that, "because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceedings[.]" and then it simply recited "that the OFFENSE allege [sic] to have been committed WAS against the person of another[.]"⁸² The evidence at the hearing, of course, painted a much more graphic picture of the appellant's charged offense. Whether the court of appeals should have [**49] taken that evidence into account in evaluating the juvenile court's exercise of discretion depends upon whether the abuse-of-discretion evaluation must be limited to a review of the "specific reasons" and facts in support thereof that are expressly set out in the juvenile court's written transfer order as per *Section 54.02(h)*, or whether the court of appeals may take into account *other* reasons and *other* facts not explicitly set out in the transfer order. We turn to that question next.

82 The other two *Subsection (f)* findings of fact, stated equally [**50] conclusorily in the juvenile court's transfer order, corresponded to the sophistication-and-maturity factor (*Section 54.02(f)(2)*) and the prospects-for-adequate-public-protection-and-rehabilitation-of-the-juvenile factor (*Section 54.02(f)(4)*). Both of these factors seem far more relevant to the background-of-the-child reason for concluding that the welfare of the community requires criminal proceedings than to the seriousness-of-the-offense reason--the latter of which was the only *Section 54.02(a)(3)* reason that the juvenile court actually provided in its transfer order to justify the waiver of jurisdiction.

C. Appellate Review of the Reasons/Facts Cited in the Transfer Order

There is an inherent tension between the broad discretion that the juvenile court is afforded in making the normative judgment of whether to waive jurisdiction, on the one hand, and *Kent's* insistence upon the primacy of appellate review in order to assure that the juvenile court's broad discretion is not abused, on the other. The legislative response to this inherent tension was to mandate, in *Section 54.02(h)*, that the juvenile court "shall state specifically in its order its reasons for waiver and certify its action, including the written order and findings of the court[.]"⁸³ Although [**51] the committee that drafted the Juvenile Justice Code had recommended a version of this provision that would have required no more than a "brief" statement of the reasons justifying transfer, the Legislature deemed this insufficient: "The fact that the Legislature changed 'briefly state' to 'state specifically' indicates that it contemplated more than merely an adherence to printed forms and, indeed, contemplated a true revelation [sic] of reasons for making this discretionary decision."⁸⁴ Moreover, *Section 54.02(h)* obviously contemplates that both the juvenile court's reasons for waiving its jurisdiction and the findings of fact that undergird those reasons should appear in the transfer order.⁸⁵ In this way the Legislature has required that, in order to justify the broad discretion invested in the juvenile court, that court should take pains to "show its work," as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable--in short, that it is a decision demonstrably deserving of appellate imprimatur even [**52] if the appellate court might have reached a different result. This legislative purpose is not well served by a transfer order so lacking in specifics that the appellate court is forced to speculate as to the juvenile court's reasons for finding transfer to be appropriate or the facts the juvenile court found to substantiate those

reasons.⁸⁶ *Section 54.02(h)* requires the juvenile court to do the heavy lifting in this process if it expects its discretionary judgment to be ratified on appeal. By the same token, the juvenile court that shows its work should rarely be reversed.

83 *TEX. FAM. CODE* § 54.02(h).

84 Dawson, 5 TEX. TECH. L. REV. at 564-65.

85 *In re J.R.C.*, 522 S.W.2d at 583-84.

86 *Cf. State v. Cullen*, 195 S.W.3d 696, 698 (*Tex. Crim. App.* 2006) (requiring trial courts to enter explicit findings of fact in the pre-trial motion to suppress context because "courts of appeals should not be forced to make assumptions (or outright guesses) about a trial court's ruling on a motion to suppress"; thus ensuring "a resolution [on appeal] that is based on the reality of what happened rather than on assumptions that may be entirely fictitious").

Given this legislative regime, we think it only fitting that a reviewing court [**50] should measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of [**53] the evidence to support the facts as they are expressly found by the juvenile court in its certified order. The appellate court should *not* be made to rummage through the record for facts that the juvenile court *might* have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. We therefore hold that, in conducting a review of the sufficiency of the evidence to establish the facts relevant to the *Section 54.02(f)* factors and any other relevant historical facts, which are meant to inform the juvenile court's discretion whether the seriousness of the offense alleged or the background of the juvenile warrants transfer for the welfare of the community, the appellate court must limit its sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under *Section 54.02(h)*.

D. Application of Law to Fact

The juvenile court did not "show its work" in the transfer order in this case. The only reason specifically stated on the face of the transfer order to justify waiver of juvenile jurisdiction is that the offense alleged is a serious one. The only fact specified in the written transfer [**54] order in support of this reason is that the offense that the appellant is alleged to have committed is an offense against the person of another. We agree with the court of appeals's conclusion that a waiver of juvenile jurisdiction based on this particular reason, fortified only by this fact, constitutes an abuse of discretion.

It is true that the juvenile court found other facts that would have been relevant to support transfer for the alternative reason that the appellant's background was

such as to render waiver of juvenile jurisdiction appropriate. First, without going into any relevant detail, the juvenile court's order found that the appellant was sophisticated and mature enough to have been able to waive his constitutional rights effectively and assist in the preparation of his defense at trial, just as an adult would.⁸⁷ Second, again without elaboration, the juvenile court found "little, if any" prospect of protecting the public and [*51] rehabilitating the appellant given its available resources. But, because the juvenile court did not cite the appellant's background as a reason for his transfer in its written order, these findings of fact are superfluous.

87 In any event, it is doubtful [**55] that the Legislature meant for the sophistication-and-maturity factor to embrace the juvenile's ability to waive his constitutional rights and assist in his defense. It is true that a great many of the courts of appeals seem to think that it does. The juvenile court's transfer order in the early case of *In re Buchanan* included such a finding. 433 S.W.2d at 788. So did the juvenile court's orders in *In re W.R.M.*, 534 S.W.2d at 181-82, *Matter of Honsaker*, 539 S.W.2d at 200, P.G., 616 S.W.2d at 639, *Casiano*, 687 S.W.2d at 449, and *Matter of D.D.*, 938 S.W.2d at 175. Another relatively early case, however, found this emphasis on the juvenile's ability to waive his rights and assist in his defense "somewhat difficult to understand." *R.E.M.*, 541 S.W.2d at 846. The San Antonio Court of Appeals "believe[d] that the requirement that the juvenile court consider the maturity and sophistication of the child refers to the question of culpability and responsibility for his conduct, and is not restricted to a consideration of whether he can intelligently waive rights and assist in the preparation of his defense." *Id.* Later, the Houston 1st Court of Appeals observed that "[o]ur courts have held that the requirement that the [juvenile] court consider the child's sophistication and maturity refers to the question of culpability and responsibility of the child for his conduct, as well as the consideration [**56] of whether he can intelligently waive his rights and assist in his defense." *Matter of S.E.C.*, 605 S.W.2d at 958 (emphasis added). Thus did the latter view of the relevance of a juvenile's ability to waive his rights and assist in his defense as an adult creep into our jurisprudence. No case has ever undertaken to explain, however, exactly *how* the juvenile's capacity (or lack thereof) to waive his constitutional rights and assist in his defense is relevant to whether the welfare of the community requires transfer, and we fail to see that it is. Other courts of appeals have rightly declared "the purpose of an inquiry into the mental ability and maturity of the juvenile [to be] to determine whether he appreciates the nature and effect of his voluntary actions and whether they were right or wrong." *Matter of E.D.N.*,

635 S.W.2d at 801 (citing *L.W.F. v. State*, 559 S.W.2d 428, 431 (Tex. Civ. App.--Fort Worth 1977, *ref'd n.r.e.*)). In our view, the juvenile's capacity to waive his constitutional rights and help a lawyer to effectively represent him is almost as misguided as the juvenile court's logic in the present case when it orally pronounced that the appellant should be transferred, *inter alia*, merely for the sake of judicial economy, so that his case could be consolidated with that of his already-certified-as-an-adult co-defendant. Such [**57] a notion is the very antithesis of the kind of individualized assessment of the propriety of waiver of juvenile jurisdiction that both *Kent* and our statutory scheme expect of the juvenile court in the exercise of its transfer discretion.

Moreover, even were we to regard the recitation of these conclusory facts in the written transfer order to constitute an acceptably implicit indication that the juvenile court *also* considered the appellant's background as a reason for the transfer, we would nonetheless uphold the court of appeals's judgment. First, with respect to the appellant's sophistication and maturity, we agree with the court of appeals that the evidence was legally insufficient to support such a finding, since the State offered no evidence at the juvenile hearing to inform the juvenile court's consideration of that *Section 54.02(f)* factor.⁸⁸ Second, with respect to the prospects for protecting the public and rehabilitating the appellant, we are not at liberty to second-guess the court of appeals's conclusion that the juvenile court's finding regarding this *Section 54.02(f)* factor was supported by factually insufficient evidence in that it was so against the great weight and preponderance of the evidence as to [**58] be manifestly unjust.⁸⁹

88 See *Moon*, 410 S.W.3d at 375 ("[T]here must be some evidence to support the juvenile court's finding that [the appellant] was sufficiently sophisticated and mature for the reasons specified by the court in order to uphold its waiver determination. Our review finds no evidence supportive of the court's finding that [the appellant] was 'of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived . . . [and] to have aided in the preparation of [his] defense.'"). We find no such evidence in the record either.

89 *Id.* at 377-78. See *Cain v. State*, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997) ("Our inability to decide questions of fact precludes *de novo* review of courts of appeals[s] factual decisions."); *Laster v. State*, 275 S.W.3d 512, 519 (Tex. Crim. App. 2009) ("We do not conduct a *de novo* factual sufficiency review."); *Villarreal v. State*, 286 S.W.3d 321, 328 (Tex. Crim. App. 2009) ("Once a court of appeals has determined such a claim of 'factual' insufficiency, this Court may not

conduct a de novo review of the lower court's determination.").

IV. CONCLUSION

The court of appeals did not err to undertake a factual-sufficiency review of the evidence underlying the juvenile court's waiver of jurisdiction over the appellant. Because the juvenile court made no case-specific findings of fact with respect to the [**59] seriousness of the offense, we agree with the court of appeals that the evidence fails to support this as a valid reason for waiving juvenile-court jurisdiction. Even had the juvenile court cited the appellant's background as an alternative basis to justify his transfer, the court of appeals was correct to measure the sufficiency of the evidence to support this reason against the findings of fact made in the transfer order [**52] itself and to conclude that the evidence was insufficient to support those findings. We affirm the judgment of the court of appeals.⁹⁰

90 Neither the State nor the appellant has contested the propriety of the court of appeals's ultimate disposition; neither party argues that the court of appeals erred, even in light of its holding that the juvenile court abused its discretion to waive jurisdiction, to declare that the cause remains "pending in the juvenile court." *Moon*, 410 S.W.3d at 378. The question nevertheless ineluctably presents itself: Pending for what? We leave that question for the juvenile court, but we do note that at least one legislatively provided alternative would seem to be for the juvenile court to conduct a new transfer hearing and enter another order transferring the appellant [**60] to the jurisdiction of the criminal court, assuming that the State can satisfy the criteria under *Section 54.02(j)* of the Juvenile Justice Code. *See TEX. FAM. CODE* § 54.02(j) ("(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: (1) the person is 18 years of age or older; (2) the person was: (A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed . . . an offense under *Section 19.02, Penal Code*; . . . (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted; (4) the juvenile court finds from a preponderance of the evidence that: . . . (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because: . . . (iii) *a previous transfer order was reversed by an appellate court* or set aside by a district court; and (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged." (emphasis supplied)).

It has been suggested that, rather than affirm [**61] the court of appeals's reversal of the juvenile court's transfer order, we should first remand the cause to the court of appeals with an order that the court of appeals remand the cause to the juvenile court for additional specific findings of fact to determine retroactively whether its original transfer order was valid. In *State v. Elias*, 339 S.W.3d 667, 675-77 (*Tex. Crim. App. 2011*), for example, we held that the court of appeals should not have affirmed the trial court's grant of a motion to suppress without first remanding the case to the trial court to supply missing but critical findings of fact to inform appellate review of the ruling on that motion, under the aegis of *Rule 44.4 of the Texas Rules of Appellate Procedure*. *Subsection (a)* of this rule provides that "[a] court of appeals must not affirm or reverse a judgment or dismiss an appeal if: (1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and (2) the trial court can correct its action or failure to act." *TEX. R. APP. P. 44.4 (a)*. *Subsection (b)* requires the appellate court to "direct the trial court to correct the error." *TEX. R. APP. P. 44.4(b)*. There are at least two problems with such a remand here. First of all, it is far from clear that *Rule 44.4* can be read to authorize [**62] an appellate court to direct a *juvenile* court (not "the trial court") to supply a missing finding of fact. Secondly, and more fundamentally, there is a jurisdictional impediment to applying *Rule 44.4* in the present context--a kind of chicken-and-egg paradox. The juvenile court has either validly waived its exclusive jurisdiction, thereby conferring jurisdiction on the criminal courts, or it has not. We cannot order the court of appeals to remand the cause to the juvenile court unless and until we affirm its judgment that the juvenile court's transfer order was invalid and that the criminal courts therefore never acquired jurisdiction. Unless and until the transfer order is declared invalid, the criminal courts retain jurisdiction, and the juvenile court lacks jurisdiction to retroactively supply critical findings of fact to establish whether or not it has validly waived its jurisdiction.

DELIVERED: December 10, 2014

PUBLISH

DISSENT BY: KELLER

DISSENT

KELLER, P.J., filed a dissenting opinion in which HERVEY, J., joined.

For almost forty years, the tendency among the courts of appeals has been to hold that a juvenile transfer order need not specify in detail the facts supporting the order. The court of appeals in this [**63] case broke rank with the weight of that [**53] authority, and this Court now

goes along with the court of appeals's unconventional holding. I would, instead, stick with the conventional path followed by most of the courts of appeals. In the present case, the transfer order complied with the statute by listing the reason for the transfer. Moreover, the order was effective if the reason given for transfer--seriousness of the offense--was supported by sufficient evidence. The evidence clearly supports the reason given.

A. What the Statute Requires

1. The Text

The Family Code provides that, for a child above a certain age who commits one of the types of offenses listed, a juvenile court may waive its jurisdiction if,

after a full investigation and a hearing, the juvenile court determines 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.¹

In making this determination, the juvenile court must consider, among other matters:

- (1) whether the alleged offense was against person or property, with greater weight [**64] 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.²

A juvenile court order waiving jurisdiction must "state specifically . . . its reasons for waiver and certify its action."³

1 TEX. FAMILY CODE § 54.02(a)(3).

2 *Id.* § 54.02(f).

3 *Id.* § 54.02(h).

2. The Transfer Order Need not Detail the Facts

In construing a statute, we give effect to the plain meaning of its text unless the language of the statute is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended.⁴

None of the provisions quoted above require the juvenile court to recite the *facts* upon which its transfer holding is based. Rather, the statutory scheme merely directs the juvenile court to state the *reasons* for the waiver. And as the Court's opinion makes clear, the weight of authority in the courts of appeals suggests that the reasons in support of transfer may be conclusory, and transfer orders may simply recite the statutory [**65] language.⁵ The legislature's failure to change the statutory wording in light of this authority is some indication that the legislature approves of the construction given.⁶ Moreover, if the legislature had wanted to require the juvenile court to recite the facts that support its decision to transfer, the legislature could have easily drafted language to that effect.⁷

4 *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

5 See Court's op. at n.54.

6 *State v. Colyandro*, 233 S.W.3d 870, 878 (Tex. Crim. App. 2007).

7 See e.g. TEX. CODE CRIM. PROC. art. 11.07, § 4(a) (requiring a subsequent application to contain sufficient "specific facts" establishing circumstances that would constitute an exception to the general rule prohibiting subsequent habeas applications).

[*54] And even assuming the Supreme Court's pronouncements in *Kent v. United States*⁸ influenced the statutory scheme before us, that case did not hold that a juvenile court was required to set forth in its order the facts that supported its transfer decision. Rather, the Supreme Court simply held that the federal statute before it required the juvenile court "to accompany its waiver order with a statement of the reasons or considerations therefor."⁹ The Supreme Court expressly stated that it did not read the federal statute to require that the statement of reasons "be formal or [**66] that it should necessarily include conventional findings of fact."¹⁰ The Supreme Court did suggest that a "statement of relevant facts" was necessary for appellate review, but that suggestion was made in the context of a case in which no hearing was held,¹¹ and, so, no evidence would have been heard on the matter. In the present case, there was a hearing, the record of which can be reviewed on appeal to determine whether the facts elicited at the hearing support the juvenile court's stated reason for the transfer.

8 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

9 *Id.* at 561.

10 *Id.*

11 *Id.*

3. The Four Statutory Factors are not Individually Subject to a Sufficiency Review

The court of appeals treated the four statutory factors outlined above as individually subject to a sufficiency review,¹² and the Court upholds this approach as legitimate. But this approach artificially constrains a court's analysis beyond what the statute requires. If the legislature had wanted the factors listed to be supported by sufficient evidence and subject to a sufficiency review, it could have made them special issues, imposed a burden of proof with respect to the individual factors, or required that a finding be made on a particular factor or factors.¹³ But the statute does not require **[**67]** the juvenile court to find any particular factor true, and the factors are not exclusive. The juvenile transfer statute's closest analogues to a special issue are the "seriousness of the offense" and "background of the child" reasons for transfer. The four statutory factors appear to be mere nonexclusive guides in deciding whether one of those two reasons for a transfer exists. In that respect, the four statutory factors appear to play a role similar to that of the Keeton factors with respect to the future-dangerousness special issue in capital murder cases.¹⁴

12 See *Moon v. State*, 410 S.W.3d 366, 372-78 (Tex. App.--Houston [1st Dist.] 2013, pet. granted).

13 See TEX. CODE CRIM. PROC. arts. 37.071, § 2(b) (special issues in a death penalty case), 42.12, § 3g(a)(2) (deadly-weapon finding).

14 See *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987) (setting forth a list of factors that may be considered in assessing a defendant's future dangerousness).

Attempting to conduct a sufficiency review on the four factors individually creates myriad problems, especially when a factual sufficiency review is involved. If one conducts a factual sufficiency review of each factor individually, how does one account for the possible cumulative effect of multiple factors? That is, if two or more factors are supported by legally sufficient but factually insufficient evidence, must all **[**68]** of the factors be disregarded as insufficient, or can multiple factors that are individually **[*55]** supported by factually insufficient evidence nevertheless add up to sufficient evidence as a whole?

And conducting a sufficiency review of individual factors is not enough to resolve the transfer question because, at least in the Court's estimation, proof of an individual factor is not necessarily enough to support a transfer. If it were, appellant's transfer would clearly be supported because the first factor, whether the alleged offense is against a person or property, has been definitively established in the State's favor. Under the Court's reasoning, because proof of an individual factor is not necessarily enough, the appellate court must still decide whether the factors as a whole, and any other

relevant factors, are sufficient to justify either the "seriousness of the offense" or "background of the child" reasons for transfer (or both). This results in a two-tiered approach to sufficiency: first analyzing the sufficiency of the individual factors, and then assessing the sufficiency of the factors as a whole. The closest analogue to this two-tiered approach is the test for constitutional **[**69]** speedy-trial violations, in which the individual factors are subject to a bifurcated standard of review and the balancing of those factors is subject to *de novo* review.¹⁵ But in that context, the factors are exclusive and, once a threshold showing is made, they must all be balanced against each other¹⁶--neither of which is true of the statutory factors in the juvenile transfer context.

15 See *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008); *Johnson v. State*, 954 S.W.2d 770, 771 (Tex. Crim. App. 1997).

16 See *Gonzales v. State*, 435 S.W.3d 801, 808-15 (Tex. Crim. App. 2014).

Moreover, the nature of at least two of the four statutory factors suggests that a sufficiency review of the individual factors is inappropriate. The first statutory factor--whether the alleged offense was against person or property--is just a question of law. The question is simply whether the offense alleged is a crime against a person, a crime against property, or a crime that falls within neither of those categories. The answer to that question can be resolved by looking solely to the State's charges. The fourth statutory factor--the prospects of protecting the public and rehabilitating the child--calls for predictions, and as such, would not seem to be the sort of issue that would be subject to a factual sufficiency review.¹⁷

17 See *McGinn v. State*, 961 S.W.2d 161, 168 (Tex. Crim. App. 1998) ("But, predictions are not right or wrong at the time of trial--they **[**70]** may be shown as accurate or inaccurate only by subsequent events [O]nce the rationality of the prediction is established, attempting to determine whether a jury's prediction of the probability of future dangerousness is nevertheless wrong or unjust because of countervailing evidence is an impossible task.").

Finally, the non-exclusivity of the four statutory factors also raises the issue of the juvenile court importing its own factors and how we would conduct a sufficiency review in that context. This is not a mere hypothetical question because, in the present case, the transfer order included two factual conclusions that are not covered by the four statutory factors: (1) that appellant was charged with murder and (2) that there was probable cause to believe the offense had been committed. The first is undeniably true as a legal matter and the second is

supported by legally and factually sufficient evidence. The fact that a trial court can import its own factors suggests that conducting a sufficiency review of an individual factor is myopic at best. The real, relevant question is whether the matters considered by the trial court are sufficient to justify a transfer on [*56] the basis of [**71] the seriousness of the offense or of the background of the child.

4. Factors Two and Four are Relevant to the Seriousness-of-the-Offense Reason for Transfer

The Court also errs when it concludes that the second and fourth statutory factors are relevant only to the "background of child" reason for transfer. The statutory language does not limit the purpose for which the four statutory factors may be considered, and the second and fourth factors in particular may well be relevant to the "seriousness of the offense" reason for transfer. The second factor--the sophistication and maturity of the child--relates to the seriousness-of-the-offense reason for transfer in two ways. First, the more sophisticated and mature the child, the more blameworthy his conduct is likely to be.¹⁸ Blameworthiness is a legitimate factor in determining the seriousness of an offense.¹⁹ Second, the circumstances of the offense can be used to assess the sophistication and maturity of the child, at least in some respects.²⁰

18 See *Roper v. Simmons*, 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). [**72]

19 See *Penry v. Lynaugh*, 492 U.S. 302, 322-28, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (defendant's moral culpability constitutionally relevant to whether he should receive the death penalty and jury must be given a vehicle to give effect to evidence of facts that would reduce the defendant's blameworthiness).

20 See *Ex parte Sosa*, 364 S.W.3d 889, 894 (Tex. Crim. App. 2012) ("We cannot agree that the facts of the offense are categorically irrelevant to the determination of mental retardation for *Eighth Amendment* purposes. The capital offense for which an *Atkins* claimant was convicted will generally be one of the best documented events in his life, and certain facts will have been proven to a jury beyond a reasonable doubt. In some cases--and we believe this is one of them--the complexity of the offense and the applicant's role in the offense need to be squared with a finding of mental retardation."); *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004) (circumstances of offense may show forethought, planning, and complex execution of purpose).

With respect to the fourth factor, the circumstances of the crime and the background of the child are both relevant to determining whether society can be protected and the child can be rehabilitated. As we have explained in the capital murder context, the circumstances of the offense are highly relevant to determining whether a defendant poses a future [**73] danger to society, and sometimes are sufficient by themselves to do so.²¹ The protection-of-public/rehabilitation issue in the juvenile context is much like the inquiry into the future-dangerousness special issue.

21 *Devoe v. State*, 354 S.W.3d 457, 462 (Tex. Crim. App. 2011) ("The circumstances of the offense and the events surrounding it may be sufficient in some instances to sustain a 'yes' answer to the future dangerousness special issue."); *Druery v. State*, 225 S.W.3d 491, 507 (Tex. Crim. App. 2007) ("But the circumstances of the offense itself can be among the most revealing evidence of future dangerousness.") (internal quotation marks omitted).

B. The Statute Was Satisfied

The juvenile court's transfer order states that "because of the seriousness of the offense, the welfare of the community requires criminal proceeding."²² Under [*57] § 54.02(a)(3), this by itself was a sufficient reason to justify a transfer, if it is adequately supported by the record.

22 The exact wording of this portion of the juvenile court's order is as follows:

After full investigation and hearing at which hearing, the said CAMERON MOON, FATHER, MICHAEL MOON were present; the court finds that the said CAMERON MOON, is charged with a violation of a penal law of the grade of felony, if committed by an adult, to wit: MURDER committed on or about the 18TH [**74] day of JULY, 2008; that there has been no adjudication of THIS OFFENSE; that he was 14 years of age or older at the time of the commission of the alleged OFFENSE having been born on the 26TH day of FEBRUARY, 1992; that there is probable cause to believe that the child committed the OFFENSE alleged and that because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding.

Moreover, the transfer order stated that the juvenile court had considered the four statutory factors, and the transfer order found three of those factors in the State's favor. With regard to the first factor, the court found and that this offense was one against the person. With regard

to the second statutory factor, the juvenile court found that appellant was "of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived[,] . . . to have aided in the preparation of his defense *and to be responsible for his conduct.*"²³ And with regard to fourth statutory factor, the juvenile court stated that, based on the evidence and reports presented, "there is little if any, prospect of adequate protection of the public **[**75]** and likelihood of reasonable rehabilitation of [appellant] by use of procedures, services, and facilities currently available to the Juvenile Court." The transfer order also pointed out that appellant was charged with murder and concluded that there was probable cause to believe that the offense had been committed.

23 Emphasis added.

The evidence presented at the hearing demonstrates the seriousness of appellant's offense. Appellant pretended to be a drug seller and set up a fake drug deal in order to accomplish a robbery. He pursued and shot the victim as the victim fled. Appellant sent instructions by text message to a co-conspirator both before and after the offense. Text messages sent before the crime asked a coconspirator if he was ready to begin and to bring a gun. In text messages after the crime, appellant attempted to cover up his involvement, saying: "Don't say a word." "Tell them my name is Crazy, and you don't know where I live."

The offense appellant was charged with--murder--is one of the most serious crimes in the Penal Code, but under the evidence presented, appellant's conduct--a murder in the course of a robbery--could have been charged as capital murder, the offense that carries **[**76]** the most serious punishment in this state.²⁴ Appellant showed forethought in planning a robbery by setting up a fake drug deal and giving instructions to his accomplice. He showed aggressiveness in pursuing the fleeing victim. And he attempted to cover up his involvement in the crime by admonishing his accomplice to refer to appellant only by a nickname and say he was unaware of where appellant lived. This evidence showed a crime that was serious, not only because of its effect, but also because of how it was conducted--with aggression and forethought and without apparent remorse.

24 See *TEX. PENAL CODE* § 19.03(a)(2).

This Court and the court of appeals not only arrive at the wrong result by applying the wrong standards; there are other flaws in those courts' analyses. In analyzing the sophistication-andmaturity factor, the court of appeals and this Court focus on appellant's ability to waive his constitutional rights and assist in his defense. But **[*58]** that was not the only aspect of sophistication and

maturity described in the juvenile court's order. Overlooked by the court of appeals and this Court is the fact that the juvenile court also found appellant to have sufficient sophistication and maturity to be **[**77]** responsible for his conduct. That latter conclusion is amply supported by the evidence in the record. And in connection with the fourth statutory factor, the court of appeals gave short shrift to the State's legitimate arguments regarding the circumstances of the offense and inaccurately accused the State of conflating various subsections of the statute.²⁵ Given the flaws in the court of appeals's opinion and its clearly erroneous conclusions, we should not be affirming its decision today.

25 See *Moon*, 410 S.W.3d at 375 (acknowledging that the State pointed to the offense itself, to evidence showing that it was committed during a drug transaction, and to the fact that appellant repeatedly shot the victim while he fled and acknowledging the State's contention that "based on the seriousness of the offense alone, the evidence sufficiently demonstrated that appellant's transfer was consistent with the public's need for protection" but concluding that the State conflated subsections (a)(3) and (f) of the statute); *id.* at 376-78 (only discussion of the circumstances of the offense or the State's arguments was a passing reference to "the nature of the charged offense" as helping to establish the legal sufficiency (but not factual **[**78]** sufficiency) of the evidence to show the fourth statutory factor). Even if a factual sufficiency review could apply to the fourth statutory factor, the court of appeals's analysis would be inadequate for failing to "detail all the relevant evidence and . . . explain in exactly what manner the evidence is factually insufficient." *Steadman v. State*, 280 S.W.3d 242, 247 (*Tex. Crim. App.* 2009).

C. Conclusion

I would hold that the court of appeals improperly overturned the juvenile court's decision and that the juvenile court did not err in transferring appellant to adult criminal court. I respectfully dissent.

Filed: December 10, 2014

Publish

451 S.W.3d 28, *; 2014 Tex. Crim. App. LEXIS 1918, **