

**MOON V. STATE
ETHICAL ISSUES IN
JUVENILE CERTIFICATION**

Presented at the 29th Annual
Juvenile Law Conference
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THE BEGINNING



Cameron and Leslie had been friends since first grade.



**BEGAN RESEARCHING CERTIFICATION IN TEXAS
AND FOUND U.S. SUPREME COURT AUTHORITY**

- *Kent v. U.S.*, 383 U.S. 541 (1966)
- *Kent*—Court may not assume a “full investigation” has been made and Court must state the reasons or considerations for transfer and must be specific to allow meaningful review.
- Hearing must measure up to the essentials of due process and fair treatment.
- No assembly line dispositions.

**SUPREME COURT AUTHORITY DISCUSSING WHY
KIDS CANNOT BE DEEMED BEYOND HELP.**

- *Roper v. Simmons*, 543 U.S. 551 (2005)
- Juveniles are different than adults;
- Character is not fully formed;
- Irresponsible conduct is not as morally reprehensible as that of an adult;
- More capable of change than an adult;
- Actions are less likely to be evidence of irretrievably depraved character.

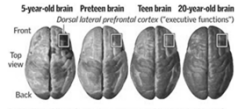
**EVEN THE CCA SAID CERTIFICATION
SHOULD NOT BE THE RULE.**

- *Hidalgo v. State*, 983 S.W.2d 746 (Tex. Crim. App. 1999).
- Waiver decision is critically important; single most serious act the juvenile court can perform;
- “Intended to be used only in exceptional cases.”

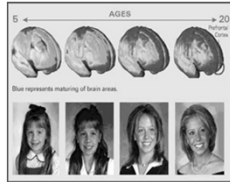
BRAIN SCIENCE SUPPORTED KEEPING KIDS IN THE JUVENILE SYSTEM.

Judgment last to develop

The area of the brain that controls "executive functions" — including weighing long-term consequences and controlling impulses — is among the last to fully mature. Brain development from childhood to adulthood.



Sources: National Institute of Mental Health; Paul Thompson, Ph.D., UCLA Laboratory of Neuro Imaging; Thomas McKey | The Denver Post



ARMED WITH THE LAW, I STARTED WORKING ON THE CHALLENGE TO THE CERTIFICATION.

- Every time I got excited about law I found, I was repeatedly told, "this is Harris County and he's going to be certified."



THE HEARING

- Prosecutor put on no evidence of his inability to be rehabilitated;
- No evidence of sophistication or maturity;
- No evidence that the welfare of society would be better if he was transferred;
- No evidence that transfer was in his best interest.
- Guards voluntarily testified on his behalf;
- Psychiatrist report that he was immature and easily susceptible to negative peer pressure;
- No history of violence;
- In school and compliant with orders from adults;
- Best kid that came through the detention center in 11 years;
- No criminal history except a mischief charge;
- History of significant stressors in his life prior to the incident.



Knowing the case would likely be appealed, I included a color photo of him in the record for justices to eventually see we were talking about a kid.

**THE EVIDENCE SHOWED HE WAS
THE “BOY NEXT DOOR.”**





- Prosecutor made objections to relevancy on evidence of his background and repeatedly asked how long we were going to take as these proceedings usually take 15 minutes.



- Closing argument consisted of Biblical support, U.S. Supreme Court authority, Court of Criminal Appeals authority, State Appellate Court authority, and evidentiary support that this kid and society would benefit by Moon staying in the juvenile system.

- "The heart of a child is bound in foolishness." Proverbs 22:15
- MRI technology now showing the medical community that children's brains are in fact different.

- The brief included articles on how solitary confinement affected juveniles, how certification was actually worse for recidivism; and law review articles in support of rehabilitation.

- Closed with a harm analysis asking the court, whose role it is to treat the child before it as if he were the court's own child, to err on the side of the child.



- 3 days before Christmas, Cameron was certified at 16 and sent to Harris County Jail. It was then I learned that certified kids were in solitary confinement.



THE NIGHT HE WAS CERTIFIED, I TOLD CAMERON THE CASE JUST BECAME BIGGER THAN HIM AND THAT THE PROCEEDING JUST VIOLATED THE CONSTITUTION AND TEXAS LAW.



- 1995 Code of Criminal Procedure 44.47 was passed which meant that kids could not appeal a certification but had to wait until a final conviction.
- A boy in jail with Cameron was 14 and had been in solitary for 13 months before the case was eventually dismissed against him.
- I contacted everyone I could think of and resulted in the Houston Press writing the article "For Their Own Good" which exposed the solitary confinement issue.



● Called Jack and asked him to read my petition for a writ of mandamus. He read it and asked "did this really happen?" Then we prepared the writ and got 3-4 amicus briefs in support. It was denied because of 44.47, so we waited for the trial.

● After trial, Cameron was appointed an appellate attorney. I sent her all of the briefs and repeatedly tried to call her to offer our help. She filed a cut and paste of our mandamus and waived oral argument. We moved to have her removed and us substituted in.

THE LAW WAS STACKED AGAINST US BUT WE WERE CONVINCED WE HAD TO TRY TO STOP THE ASSEMBLY LINE DISPOSITIONS.

- 1994 Harris County certified 125 kids and there were 7 appellate decisions on certification;
- 1995, 152 certifications in Harris County and only 16 appeals in all of Texas;
- Right of appeal taken away;
- 1996, 174 in Harris County;
- 1997, 223 in Harris County
- Hearings evolved into 15 minute proceedings.

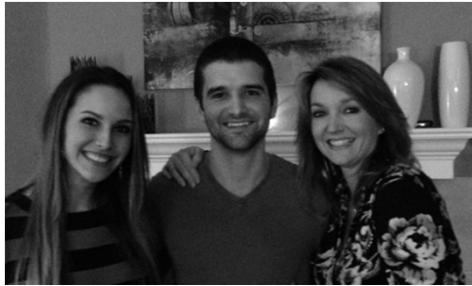
● Oral argument at the 1st Court of Appeals lasted almost 2 hours. The panel told us they had cleared their calendar for this important case.

● July 31, 2013, the 1st Court of Appeals vacated his conviction.
● State appealed to the CCA who ultimately upheld the Court of Appeals on December 10, 2014.

- The Texas Legislature revoked Article 44.47 and gave these kids the right to an immediate review of a certification effective September 1, 2015.



HE'S HOME BUT WAS RECERTIFIED IN MAY, SO THE FIGHT IS STILL GOING.



MAKE A STRONG RECORD EVERY TIME.

- Use the recent U.S. Supreme Court cases since *Roper* such as *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, *JDB v. North Carolina*, and *Montgomery v. Louisiana*.
- Hammer the State with the evidence cited in the Amicus Brief of the American Psychological Association, American Psychiatric Association, and National Association of Social Workers in *Miller v. Alabama*, 2012 WL 174239. Cross examine the State's psychological reports using the references in the amicus briefs. "...developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."

ONE PERSON CAN MAKE A DIFFERENCE.



**Never
Underestimate
The Power of
An Extremely
Pissed Off
Woman**

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Moon v. State

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95.6% Certification Rate In Harris County

YEAR	NUMBER OF CERTIFICATIONS HARRIS COUNTY	NUMBER OF CERTIFICATIONS DENIED HARRIS COUNTY
1997	223	20
1998	105	15
1999	64	4
2000	73	3
2001	71	2
2002	123	7
2003	49	3
2004	55	0
2005	56	0
2006	90	4
2007	81	7
TOTAL	1,441	65

The number of certifications statewide increased by 30.9% in 2008.

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The Certification Order

ORDER TO WAIVE JURISDICTION

IN THE MATTER OF CAMERON MOON

ON THE 17TH day of DECEMBER, 2008, a hearing was held in the above styled and captioned cause under

Section 54.02 of the Family Code, on the issue of waiver of jurisdiction. Prior thereto the Court had ordered and obtained a diagnostic study, social evaluation, a full investigation of the child, HIS circumstances, and the circumstances of the alleged OFFENSE; counsel, DAVID CUNNINGHAM was RETAINED more than ten (10) days prior to the hearing; the counsel for the child was given access to all written matter to be considered by the court in making the transfer decision more than one (1) day prior to the hearing; and said child CAMERON MOON, AND HIS FATHER, MICHAEL MOON had been served with citation more than two (2) days prior to the hearing. 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 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. In making that determination, the Court has considered among other matters:


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The Certification Order

the OFFENSE, the welfare of the community requires criminal proceeding. In making that determination, the Court has considered among other matters:

- Whether the alleged OFFENSE WAS against person or property, with the greater weight in favor of waiver given to offenses against the person;
- The sophistication and maturity of the child;
- The record and previous history of the child; and
- 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.

The Court specifically finds that the said CAMERON MOON is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived by the said CAMERON MOON to have aided in the preparation of HIS defense and to be responsible for HIS conduct; that the OFFENSE allege to have been committed WAS against the person L...ther, and the evidence and reports here...presented to the court demonstrate to the court that there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of the said CAMERON MOON by use of procedures, services, and facilities currently available to the Juvenile Court.



The Certification Order


Cameron Moon ... 17th ... December 2008 ... David Cunningham ... Retained ... Cameron Moon ... Father, Michael Moon ... Cameron Moon, Father, Michael Moon ... Cameron Moon ... Murder ... 18th ... July, 2008 ... 26th ... February, 1992 ... Cameron Moon ... His ... His ... Cameron Moon ... Cameron Moon ... Cameron Moon ... 18th ... December, 2008.



Certification is for Exceptional Cases

"Transfer was intended to be used only in exceptional cases. The philosophy was that, whenever possible, children 'should be protected and rehabilitated rather than subjected to the harshness of the criminal system' because 'children, all children are worth redeeming.'"

Hidalgo v. State of Texas, 983 S.W.2d 754 (Tex. Crim. App. 1999) (citing President's Commission on Law Enforcement and Administration of Justice (1967)).



Certification Increases Recidivism

- “On average and particularly for violent offenders, adult certification *substantially increases* the risk of recidivism. As of August 2008, six large-scale studies of different sample sizes, jurisdictions, methodologies and covering different legal regimes have all reached this conclusion. In fact, one study showed that violent juvenile offenders transferred to adult courts were 100% more likely to be re-arrested than non-certified children.”
- OIO Special Report: SB 103 and Rising Adult Certification Rates in Texas Juvenile Courts, January 12, 2009.

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Certification Impedes Rehabilitation

- “[I]f sent to a typical adult prison, [the child] is likely to be subjected to physical, and even sexual abuse by older inmates, and his chances for rehabilitation are likely to decrease significantly.”
- *Hidalgo v. State of Texas*, 983 S.W.2d 746, 755, n.18 (Tex. Crim. App. 1999).

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Standards for Certification

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Family Code Restricts Discretion to Certify

- The Family Code was designed to restrict the Juvenile Court's discretion to waive its jurisdiction and certify a child as an adult.
- *Hidalgo v. State of Texas*, 983 S.W.2d 746, 755, n.18 (Tex. Crim. App. 1999).

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Standard For Waiving Jurisdiction

The juvenile court may waive its exclusive original jurisdiction and certify the child if:

§ 54.02(a)(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.

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Factors The Court Must Consider

54.02(f)

- (1) whether the alleged offense was against person or property;
- (2) the sophistication and maturity of the child;
- (3) the record and previous history of the child;
- (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.

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Sophistication and Maturity

- As a group, children are not sophisticated and mature.
 - “In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.”
- *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 1195 (2005).

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The Diagnostic Study Requirement

54.02(d)

Prior 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.

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The Diagnostic Study Requirement

"[T]he law requires a psychological examination by a doctor with specialized training in adolescent psychology and forensic assessment. The exam provides insight on the juvenile's sophistication, maturity, potential for rehabilitation, decision making ability, metacognitive skills, psychological development, and other sociological and cultural factors."

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

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The Findings Requirement

54.02(h)

If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings...

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The Findings Requirement

"Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions."

Kent v. U.S., 383 U.S. 541, 561 (1966).

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The Moon Certification

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Diagnostic Study

"Prior [to the hearing] the Court had ... obtained a diagnostic study, social evaluation, an full investigation of the child ..."

No it didn't.

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Record and Previous History of the Child

No Finding.

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Sophistication and Maturity

"Cameron Moon is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived by the said Cameron Moon..."

- But no rights were waived.

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Sophistication and Maturity

"Cameron Moon is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived by the said Cameron Moon..."

- A child cannot, alone, waive statutory or constitutional rights no matter how "sophisticated and mature." Texas Family Code § 51.09, 53.06(e).
- *In the Matter of D.W.M.*, 562 S.W.2d 851, 853 (Tex. 1978).

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Sophistication and Maturity

"Cameron Moon is of sufficient sophistication and maturity to have ...aided in the preparation of his defense ...".

- So if you are competent to stand trial it is enough?
- "The due process right to a fair trial prevents the government from subjecting a person to trial whose 'mental condition is such that he lacks the capacity ... to assist in preparing his defense.'"

Drope v. Missouri, 420 U.S. 162 (1975).

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Rehabilitation

"There is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of the said CAMERON MOON by use of procedures, services, and facilities currently available to the Juvenile Court."

- Said who?

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The Law Before Moon

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Findings, What Findings?

- “This provision does not preclude ‘form’ orders and does not require a statement of the factual reasons for waiver. ... It is not reversible error for the court to ‘parrot’ the considerations set forth in section 54.02(f) as the ‘reasons’ for the transfer, so long as those reasons have evidentiary support.” *In re I. B.*, 619 S.W.2d 584 (Tex.Civ.App. —Amarillo 1981).

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Sophisticated and Mature (As a 9-Year Old)

- “While [the psychologist] claimed appellant’s I.Q. was just above the retarded range, he also placed her native intelligence at a higher level. ... [A]lthough [the psychologist] stated appellant had the maturity of a nine to 11-year old child, he also stated that she was capable of understanding the proceedings against her and assisting her attorney in her defense.”
- *Matter of K.D.S.*, 808 S.W.2d 299 (Tex.App. —Houston [1st Dist.] 1991).

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The Law After Moon

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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1215-13

CAMERON MOON, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY

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

OPINION

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 in-
exclusive jurisdiction over a person alleged to have committed a murder at the age of sixteen.

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No More Form Orders

- “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.”
- “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.”
- *Moon v. State*, 451 S.W.3d 28, 49 (Tex.Crim.App. 2014)

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Seriousness of the Offense

- It is not synonymous with the category of the crime alleged.
 - “If [the mere category of offense] 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.”
- *Moon v. State*, 451 S.W.3d 28, 48 (Tex.Crim.App. 2014)

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Sophistication and Maturity (Fn87)

- “[I]t is doubtful 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.”
- “No case has ever undertaken to explain ... 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.”
- Footnote 87.

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Sophistication and Maturity (Fn87)

- “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”
- “[This] 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.”
- Footnote 87.

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Likelihood of Rehabilitation

- No jurisdiction to review court of appeals’ factual sufficiency ruling.
- Not relevant to the stated reason for transfer:
 - “[A]gain without elaboration, the juvenile court found ‘little, if any’ prospect of protecting the public and 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.” [Dictum?]
 - Certainly relevant to the welfare of the community.
- *Moon v. State*, 451 S.W.3d 28, 51 (Tex.Crim.App. 2014)

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Standard of Review

- Courts of Appeals can review findings for factual sufficiency.
 - “[E]ven 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 the evidence. 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).”
- *Moon v. State*, 451 S.W.3d 28, 46 (Tex.Crim.App. 2014)

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Standard of Review

- Courts of Appeals can review findings for factual sufficiency.
- This has jurisdictional implications:
 - “[W]e are not at liberty to second-guess the court of appeals’s conclusion that the juvenile court’s finding regarding [likelihood of rehabilitation] was supported by factually insufficient evidence in that it was so against the great weight and preponderance of the evidence as to be manifestly unjust.”
- *Moon v. State*, 451 S.W.3d 28, 51 (Tex.Crim.App. 2014)

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Standard of Review

- The scope of review is limited to the juvenile court’s actual findings.
 - “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 ... 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).”
- *Moon v. State*, 451 S.W.3d 28, 50 (Tex.Crim.App. 2014)

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Standard of Review

- “[W]e 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.”
- *Moon v. State*, 451 S.W.3d 28, 47 (Tex.Crim.App. 2014)

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Standard of Review

- “**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.”
- *Moon v. State*, 451 S.W.3d 28, 47 (Tex.Crim.App. 2014)

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Standard of Review

- “**In other words**, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? 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.”
- *Moon v. State*, 451 S.W.3d 28, 47 (Tex.Crim.App. 2014)

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The Right to Appeal Restored

- Tex. Fam. Code § 56.01(c)(1)(A) (effective September 1, 2015).
- Juvenile courts must inform juveniles and their attorneys of the right to appeal.
- Appeal is governed by the rules applicable to accelerated appeals.
- Notice of appeal must be filed within 20 days of the certification order.

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More Remains to Be Done

- If a child is wrongly certified, contrary to the protections the child was entitled to receive under 54.02(a), can the State apply a different standard – effectively changing the rules of the game – in attempting to recertify the child after remand?

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The End

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JUVENILE JUSTICE

A look at how one case changed the certification process.

BY JACK CARNEGIE

Imagine if your child were arrested and interrogated without your knowledge, without being read his or her rights, or without being taken before a magistrate. Then imagine if your child were certified for trial as an adult and sentenced to 30 years in prison. You're probably thinking, *Not my child; only the worst of the worst—violent gang members, repeat offenders, or hardened criminals—are certified as adults.*

That's what I thought. Then I got a call from a former colleague, Christene Wood, that began six years of pro bono work culminating in a decision by the Texas Court of Criminal Appeals and significant legislative reforms to the juvenile certification system.¹

The call concerned a 16-year-old boy named Cameron Moon, a friend of Wood's daughter. Wood had known Moon for a number of years and described him as "a really nice kid." Unfortunately, he had gotten in "some trouble," and a few days earlier the juvenile court had certified him to be tried as an adult. The "trouble" turned out to be an alleged shooting during a drug deal. Moon, however, was not known as the type of child one would expect to be involved in that kind of incident. He was in school, passing his classes, and had no history of gang activity, violence, or disciplinary problems at school.

Moon was unable to afford bail. Like other children deemed "adults," he was now in jail, being kept in solitary confinement 23 hours a day until he turned 17 to "protect" him from the other prisoners. He had no right to appeal the certification order until after his criminal trial.² Moon was tried as an adult, convicted, and sentenced to 30 years in prison.

As lawyers, we should all want the judicial process to be applied fairly and with integrity; as parents, it is the minimum expectation we should have for our children. When I saw the realities of certification as applied by the juvenile courts in this case, it was clear the process was broken.

ADULT CERTIFICATION: THEORY AND PURPOSE AND THE REALITIES

Juvenile proceedings are civil matters generally governed by the Family Code and the Rules of Civil Procedure.³ The process commonly referred to as certification involves the juvenile court waiving its exclusive original jurisdiction and transferring the child to criminal court.⁴ It has been characterized as “the single most serious act the juvenile court can perform ... because once waiver of jurisdiction occurs, the child loses all protective and rehabilitative possibilities available.”⁵ Certification is intended to be reserved for “exceptional cases”; the legislative philosophy is that “*whenever possible*, ‘children should be protected and rehabilitated rather than subjected to the harshness of the criminal system. ...’”⁶

The Family Code is therefore designed to “limit the juvenile court’s discretion in making the transfer determination.”⁷ It prohibits courts from certifying children as adults based on the category of the crime alone. Instead, if the state seeks certification, certain objective factors concerning the child’s age and type of crime alleged must first be met.⁸ The juvenile court must then “order and obtain a complete diagnostic study, social evaluation, and full investigation of the child”⁹ and assess a list of statutory factors specific to the individual child to determine whether “the welfare of the community requires criminal proceedings.”¹⁰ Those include:

- whether the offense was against person or property;
- the sophistication and maturity of the child;
- the record and previous history of the child; and
- the prospects for adequate protection of the public and the likelihood of rehabilitation of the child.¹¹

If the juvenile court waives jurisdiction, the statute directs it to “state specifically” in a written order “its reasons for waiver ... and findings of the court.”¹²

That was the theory. The reality proved different. Between 1997 and 2008, juvenile courts in Harris County certified 1,524 children as adults and denied the state’s certification requests only 83 times—a certification rate of 95 percent. Courts typically held only abbreviated hearings and used form orders making the same stock findings in every case. Some of those findings had no apparent relation to the ultimate question of whether the welfare of the community required criminal proceedings. Far from being reserved for exceptional cases, certification—when requested by the state—was virtually automatic.

Despite this, appellate courts almost never reversed certifications. Children who had IQs in the 70s with an “overall maturity of a nine to 11-year-old child” had been held sufficiently “sophisticated and mature” based on nothing more than “some evidence” that they were capable of assisting counsel in their defense.¹³ Findings like these confuse bare competency to stand trial¹⁴ with the kind of sophistication and maturity that suggests this is the rare type of child for which the welfare of the community requires criminal proceedings rather than rehabilitation.

MOON’S CERTIFICATION AND LANDMARK APPEAL

In Moon’s case, the state never obtained the statutorily required diagnostic study and evaluation to assess factors like maturity and rehabilitation. During the certification hearing, it presented only one witness who testified solely about the circumstances of the alleged crime. The juvenile court made no finding that Moon’s “record and previous history” supported certification.

The remainder of the court’s order was much like the forms used many times before. It recited that Moon was “of sufficient sophistication and maturity to have ... waived all constitutional rights heretofore waived,” never mind that he had waived no rights and that, by statute, juveniles lack the capacity to waive rights regardless of their supposed sophistication.¹⁵

It also found Moon to be sophisticated and mature enough “to have aided in the preparation of HIS defense.” The state, however, introduced no such evidence. Even if it had, it is difficult to fathom why the welfare of the community requires adult criminal proceedings simply because a child can help his lawyer.

Parroting the language of the statute, it also found “little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation. ...” This was despite ample uncontroverted testimony that Moon presented no danger and was a prime candidate for rehabilitation. Officers who had supervised him in juvenile detention voluntarily came forward to testify on his behalf, stating that he was “one of the best kids” they had seen and that he was never “aggressive” or “mean-spirited.”¹⁶ Finally, the juvenile court said certification was more “convenient.”¹⁷

After Moon was convicted, we appealed the certification ruling. We had substantial amicus support from a number of juvenile justice organizations. The Court of Appeals held that the juvenile court had abused its discretion and reversed Moon’s certification—the first juvenile certification reversal in Texas in more than 25 years, according to the *Houston Chronicle*.¹⁸ It found that the state had presented no evidence of Moon’s sophistication and maturity and insufficient evidence on the protection of the public and rehabilitation issue.¹⁹

After granting the State’s Petition for Discretionary Review, the Court of Criminal Appeals went further. In addition to affirming the appeals court’s rulings, it rejected the use of printed form orders and required juvenile courts to “show their work” by making individualized fact findings to allow appellate courts to determine whether the juvenile court’s “decision was in fact appropriately guided by the statutory criteria, principled, and reasonable. ...”²⁰

It also held that the stock “sophistication and maturity” finding regarding “the juvenile’s capacity to waive his constitutional rights and help a lawyer to effectively represent him” was legally wrong and “almost as misguided as the juvenile court’s logic ... when it orally pronounced that [Moon] should be transferred ... merely for the sake of judicial economy. ...” It characterized this as “the very antithesis of the kind of individualized assessment ... expect[ed] of the juvenile court in the exercise of its transfer discretion.”²¹

In part because of the *Moon* case, the Legislature, in a law that became effective September 1, 2015, has restored the right to immediately appeal certification orders.²² In conjunction with that law, the Texas Supreme Court has issued an order requiring juvenile courts to inform juveniles and their attorneys of the right to appeal and specifying that the appeal is governed by the rules applicable to accelerated appeals.²³ This means the notice of appeal must be filed within 20 days of the certification order.²⁴

The Court of Criminal Appeals decision, and the Legislature's restoration of the right to appeal a certification order immediately, is real progress in ensuring that the certification statute is properly and fairly applied. Yet much remains to be done. Is a child who was wrongly certified subject to being recertified on remand and, if so, under what standard? As the statute is written, when a child turns 18, the same statutory certification requirements described above do not apply.²⁵ If subjected to those different procedures, a child who was wrongly certified will never receive the procedural and substantive protections that were originally due. Whether the state, on remand, can constitutionally change the certification rules after being unable to meet its original burden remains to be seen. **TBJ**

The author would like to acknowledge the great contributions of Christene Wood and John Hagan who worked with him on the Moon appeal.

NOTES

1. *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014).
2. Tex. Code Crim. Proc. art. 44.47(b) (repealed eff. Sept. 1, 2015).

3. See Tex. Fam. Code § 51.17(a).
4. See Tex. Fam. Code § 54.02.
5. *Hidalgo v. State of Texas*, 983 S.W.2d 746, 755 (Tex. Crim. App. 1999).
6. *Hidalgo*, 983 S.W.2d at 754 (emphasis added). See *Lanes v. State*, 767 S.W.2d 789, 795 (Tex. Crim. App. 1989). There is a great deal of science on juvenile brain development that demonstrates why juveniles are more disposed to impulsive acts and more amenable to rehabilitation than adults. This is why the U.S. Supreme Court has held that the Eighth Amendment bars capital punishment and mandatory life sentences without parole for juveniles. See *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Miller v. Alabama*, 132 S. Ct. 2455 (2012).
7. *Hidalgo*, 983 S.W.2d at 754.
8. Tex. Fam. Code § 54.02(a)(1), (2).
9. Tex. Fam. Code § 54.02(d). See *Hidalgo*, 983 S.W.2d at 754. Accord *In re B.T.*, 323 S.W.3d 158 (Tex. 2010).
10. Tex. Fam. Code § 54.02(a)(3).
11. Tex. Fam. Code § 54.02(f).
12. Tex. Fam. Code § 54.02(h).
13. See, e.g., *In the Matter of K.D.S.*, 808 S.W.2d 299, 300-303 (Tex. App.—Houston [1st Dist.] 1991, no writ).
14. See *Drope v. Missouri*, 420 U.S. 162 (1975).
15. Tex. Fam. Code § 51.09, § 53.06(e). See *In the Matter of D.W.M.*, 562 S.W.2d 851, 853 (Tex. 1978) (per curiam).
16. See *Moon v. State*, 410 S.W.3d 366, 376 (Tex. App.—Houston [1st Dist.] 2013).
17. Cause #2008-06648; Cert. Hearing Tr. at 128-132.
18. Lauren McGaughey, *Reversals of teens' move to adult court raise questions about process*, Houston Chronicle (January 2, 2015), available at <http://www.houstonchronicle.com/news/politics/texas/article/Reversals-of-teens-move-to-adult-court-raise-5990878.php>.
19. *Moon v. State*, 410 S.W.3d at 375-378.
20. *Moon v. State*, 451 S.W.3d 28, 49 (Tex. Crim. App. 2014).
21. *Moon v. State*, 451 S.W.3d at 50 n.87.
22. See 2015 Tex. Sess. Law Serv. ch. 74 (S.B. 888) (Vernon's); Tex. Fam. Code § 56.01(c)(1)(A).
23. See Misc. Docket No. 15-9156 (Tex. Aug. 28, 2015).
24. Tex. R. App. P. 26.1(b).
25. See Tex. Fam. Code § 54.02(j).



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