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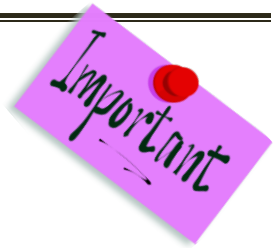
Dear Juvenile Law Section Members:

Welcome to the e-newsletter published by the Juvenile Law Section of the State Bar of Texas. Your input is valued so please take a moment to email us and tell us what you think of the new format.

The "Review of Recent Cases" includes cases that are hyperlinked to Casemaker, a free service provided by TexasBarCLE. To access these opinions, you must be a registered user of the TexasBarCLE website, which requires creating a password and log-in. If you do not wish to receive emails from TexasBarCLE, you can opt-out of their email list.



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EDITOR'S FOREWORD By Associate Judge Pat Garza

So now that the primaries are over and each party has selected their candidate, the focus shifts to the real competition. The quest for the gold. Interestingly, the Olympic philosophy advocates using sport not just as a physical activity but also as a means of educating people. According to this philosophy, the good sportsmanship, sense of fair play, and respect for fellow athletes that is developed through participation in sports is supposed to teach men and women of different races, religions, and nationalities to work peacefully together in competition toward common goals. It is the ideal of the Olympic Movement to expand such lessons beyond the sports arena in the hope of promoting peace and a sense of brotherhood throughout the world. It's a shame that some of those ideals are not a part of American politics. We could sure use them.

In my old age I've come to truly dislike politics. And even though, as an Associate Judge, I don't have to run, I don't have to campaign, and I don't have to ask for money, I hate the process. To get elected, a judge has to pick a political party to run for office. Why? A judge should not (and most that I know do not) have a "party agenda" in deciding cases. They do what they think is right, because they believe it to be. But by having to run under a particular party, the outcome of their election becomes a byproduct of a national or of a statewide agenda. By definition judges are to have no agenda. They are to be fair, impartial, and unbiased.

For me, when it comes to judicial races, I vote for the person not the party. I do not believe that any party holds a monopoly on wisdom or intellect or judicial temperament. When it comes to local judicial races, I vote for the person I feel is most qualified. But in Texas, judges run by party affiliation, and as a result may have their race determined by the single lever principle. If enough voters vote by pulling the parties lever so that all candidates of that party get the vote, candidates down the ballot can win simply because they are on a particular party's ballot.

Someone once said "all politics is local." Well, I don't see it. What I do see, in more elections than I would like to remember, is qualified individuals losing because they had to run with a political party, a political party which in the end, has absolutely no say in how they do their job. And that my friend just doesn't make sense to me. I only hope that maybe one day we will have judges run bipartisan. Not as a republican or as a democrat, but only as a judge. Where qualifications matter more than party affiliation.

7th Annual Juvenile Law Conference. The Juvenile Law Section of the Houston Bar Association will be hosting the 7th Annual Juvenile Law Conference on September 9-10, 2016. Brian Fischer, as always, has prepared a top notch agenda with important and current juvenile law topics. The conference will be held at the Council on Recovery, in Houston, Texas. Registration information is available online at www.juvenilelaw.org

30th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's Juvenile Law Institute will be held on February 27-March 1, at Horseshoe Bay Resort, Horseshoe Bay, Texas. Chair-Elect Kameron Johnson, and the planning committee are working hard to make this conference the best ever. This will be our first conference at Horseshoe Bay and I urge everyone to register early. Registration information will be sent out and available online at www.juvenilelaw.org in October.

I don't care if you're black, white, straight, bisexual, gay, lesbian, short, tall, fat, skinny, rich or poor.
If you're nice to me, I'll be nice to you. Simple as that.

Robert Michaels, MD

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CHAIR'S MESSAGE By Riley Shaw

Dear Juvenile Law Section Members:

It is an exciting time for Juvenile Justice practitioners – we have a legislative session coming up with potentially significant changes regarding age of juvenile court jurisdiction, confidentiality of juvenile records, juvenile sex offender treatment and registration, and regionalization. Please lend your voice as the changes are discussed during the upcoming legislative session. We promise to keep you informed.

In addition, the Juvenile Law Section Nominations Committee is currently seeking nominations for the following officer positions: Chair-Elect, Secretary, and Treasurer, for terms from July 1, 2017 – June 30, 2018. Only current Council Members may be nominated as an officer. The list of current council members may be found at www.juvenilelaw.org.

The Nominations Committee is also seeking nominations for individuals to serve as Council Member with a term beginning July 1, 2017 and expiring June 30, 2020. Three Council members are appointed each year. Nominees must be members of the Juvenile Law Section.

The Nominations Committee is composed of Kevin Collins, Riley Shaw, Michael O'Brien, and Cyndi Porter Gore. If you wish to nominate someone, please provide their name and a brief explanation of why you believe they should be on the Council to any of the Nominations Committee members no later than November 29, 2016.

Contact information for the committee members may be found at www.juvenilelaw.org.

Until next time, have a great Fall and continue doing your best for our communities and for our children.

30TH ANNUAL

JUVENILE LAW CONFERENCE

Robert O. Dawson Juvenile Law Institute

FEBRUARY 27-MARCH 1, 2017

Horseshoe Bay Resort

Horseshoe Bay, Texas

Conference details and registration information will be distributed and posted on **juvenilelaw.org** in late September.

SPONSORS AND EXHIBITORS

This conference brings together over 500 juvenile justice professionals statewide. This year, the Juvenile Law Section is offering a variety of opportunities for your organization to take part in the 30th Annual Juvenile Law Conference through exhibiting at or sponsoring of this great event. If you are interested and/or need additional information, please contact Susan Clevenger at gtclevenger@yahoo.com or (218) 580-4501.

For more information, contact Monique Mendoza, Professional Development Events Specialist, at (512) 490-7913 or monique.mendoza@texas.tjjd.gov.

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REVIEW OF RECENT CASES

By Subject Matter

By Case

COLLATERAL ATTACK

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

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

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

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

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

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

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

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

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

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

The Board's petition states three issues or arguments for vacating the Habeas Order:
1. The Order is void because the juvenile court had no personal jurisdiction over the Board—a non-party to the civil proceeding below—to compel prospective and permanent actions of the Board.
2. The Order is void because it exceeded both the habeas and mandamus power of the juvenile court.
3. In the alternative, the Order should be vacated because the juvenile court failed to identify a constitutionally protected liberty interest upon which a cognizable habeas application might be Louisiana, 7/18/2016

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

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

An application for a writ of habeas corpus is not a normal civil suit, however. See McFarland v. Johnson, 27 Tex. 105, 107 (1863) (a procedure by habeas corpus can in no legal sense be regarded as a suit or

controversy between private parties.) For example, a respondent in a habeas proceeding has no right of appeal. Id. In Ex parte Ramzy, 424 S.W.2d 220, 223 (Tex.1968) (orig.proceeding), the court held: "A procedure by habeas corpus to be relieved of imprisonment ... can in no legal sense be regarded as a suit or controversy between private parties. In such a proceeding the petition for a writ of habeas corpus is for the relief of the Prisoner and the Prisoner only." Id. The writ of habeas corpus is "designed for the purpose of giving a speedy remedy to one who is unlawfully detained." Id.

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

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

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

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

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

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

Second, the Board argues that the juvenile court had no authority to issue habeas relief against the Board because Z.Q. is not in the custody of the Board, but is in the custody of TDCJ–CID. This argument is misplaced because Z.Q.'s Application did not seek an order requiring the Board to release him from custody, but an order requiring the Board to make his parole determination by the simple majority vote of a three-member panel as provided by section 508.45, which is a permissible habeas order under the cases cited above.

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

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

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

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

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

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

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

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

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

This conclusion is supported by federal case law. In Garcia v. Stephens, No. 2:13–CV–222, 2014 U.S. Dist. LEXIS 78764 (S.D.Tex. Apr. 9, 2014), the court was presented with the same issue presented in this case. The petitioner argued, like Z.Q., that the plain language of the Texas Government Code required review for parole by a three-member panel in accordance with section 508.045, and that the Board wrongly reviewed his parole eligibility under the super-majority provisions of section 508.046. Id. at *17. The district court held that any misapplication of these statutes is not cognizable on habeas review because the petitioner has no liberty interest in obtaining parole. Id. at *18–19. "States have no duty to establish a parole system and a prisoner has no constitutional right to be released before the expiration of his sentence." Id.; see also Johnson v. Rodriguez, 110 F.3d 299, 308 (5th Cir.1997) ("It is therefore axiomatic that because Texas prisoners

have no protected liberty interest in parole they cannot mount a challenge against any state parole review procedure on procedural (or substantive) Due Process grounds."). The Fifth Circuit has repeatedly recognized that the Texas parole statutes create no constitutional right to release on parole. See Williams v. Briscoe, 641 F.2d 274, 277 (5th Cir.1981); Allison v. Kyle, 66 F.3d 71, 74 (5th Cir.1995); Orellana v. Kyle, 65 F.3d 29 (5th Cir.1995); Gilbertson v. Tex. Bd. of Pardons & Paroles, 993 F.2d 74, 75 (5th Cir.1993); Creel v. Keene, 928 F.2d 707, 712 (5th Cir.1991); see also Blassingame v. Stephens, CV H–16–0478, 2016 WL 828149, at *2 (S.D.Tex. Feb. 29, 2016) ("Because [the inmate] cannot demonstrate that he was denied parole in violation of a constitutionally protected liberty interest, he is not entitled to habeas corpus relief on this issue").

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

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

CRIMINAL PROCEEDINGS

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

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

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

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

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

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

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

Held: Affirmed

Memorandum Opinion: In his first issue, appellant argues that his trial counsel provided ineffective assistance in failing to object to the description of appellant's juvenile offenses in the PSI report. In particular, appellant complains that the PSI report's inclusion of appellant's juvenile charge for assault of a public servant and of appellant being fined $100 for

cursing in school were unfairly prejudicial and thus objectionable under Texas Rule of Evidence 403.

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

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

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

DISPOSITION PROCEEDINGS

DOES A LIFE WITHOUT PAROLE SENTENCE, AFTER AN UNCONSTITUTIONAL DEATH SENTENCE REMAND, CONSTITUTE A "MANDATORY" LIFE WITHOUT PAROLE UNDER *MILLER V. ALABAMA*, WHERE AGE WAS A FACTOR IN THE ORIGINAL SENTENCING? SUPREME COURT SPLIT ON WHETHER LOWER COURT NEEDS TO DETERMINE WHETHER JUVENILE'S CRIMES REFLECTED "TRANSIENT IMMATURITY" OR "IRREPARABLE CORRUPTION"?

¶ 16-3-6. **Adams v. Alabama**, No. 15-6289, 577 U.S., ___, ___S.Ct. ___, 2016 WL 2945697 (Sup.Ct., 5/23/16).

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

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

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

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

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

In cases like this, it can be argued that the original sentencing jury fulfilled the individualized sentencing requirement that Miller subsequently imposed. In these cases, the sentencer necessarily rejected the argument that the defendant's youth and immaturity called for the lesser sentence of life imprisonment

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

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

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

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

Justice ALITO suggests otherwise, noting that the juries that originally sentenced petitioners to death were statutorily obligated to consider the mitigating effects of petitioners' youth. "In cases like this," he writes, it can "be argued that the original sentencing jury fulfilled the individualized sentencing requirement that Miller subsequently imposed." Ante, at —— (concurring opinion).

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

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

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

Conclusion 2: Standards of decency have evolved since the time petitioners were sentenced to death. See Roper, 543 U.S., at 561, 125 S.Ct. 1183. That petitioners were once given a death sentence we now know to be

constitutionally unacceptable tells us nothing about whether their current life-without-parole sentences are constitutionally acceptable. I see no shortcut: On remand, the lower courts must instead ask the difficult but essential question whether petitioners are among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Montgomery, 577 U.S., at ——, 136 S.Ct., at 734.

_____

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

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

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

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

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

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

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

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

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

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

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

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

If a prisoner has exhausted his state remedy unsuccessfully, but there is an intervening Supreme Court decision that might induce the state courts to give relief, the prisoner will be required to apply again for relief from the state courts so that they may have the first opportunity to apply the new Supreme Court decision. The only occasion in which the prisoner should not be returned to the state forum is when it is apparent that the state courts will not give him relief, either because they have already held that the intervening Supreme Court decision is not to be applied retroactively or because of some state procedural doctrine that will preclude the prisoner from relying on the new decision.

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

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

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

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

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

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

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

SEARCH & SEIZURE

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

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

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

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

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

Held: Affirmed

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

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

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

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

Here, Officer Moreno identified numerous objective facts that could have led him to reasonably conclude that E.O.E. had engaged in criminal activity. He stopped and detained E.O.E. due to the suspicious circumstances surrounding the encounter. Collectively, these circumstances included: (1) the juvenile's continuous behavior of reaching toward his back pocket; (2) the time of night (it was past the City's 11 p.m. curfew for juveniles); (3) the location where he encountered E.O.E. and its proximity to the location where the fight with weapons occurred; (4) E.O.E.'s juvenile companions who fled the scene as soon as he approached them in his vehicle; (5) and E.O.E.'s response that he had just come from the direction of the fight. In re R.S.W., 2006 WL 565928 at *11; Woods

v. State, 956 S.W.2d 33, 38 (Tex.Crim.App.1997); State v. Bryant, 161 S.W.3d 758, 762 (Tex.App.–Fort Worth 2005, no pet.)(time of night and area's crime rate supported a reasonable suspicion that defendant was, or would soon be, engaged in criminal activity); Alexander v. State, 879 S.W.2d 338, 342 (Tex.App.–Houston [14th Dist.] 1994, pet. ref'd)(being in a park hours past curfew and acting as if one were trying to hide something are facts sufficient to constitute reasonable suspicion).

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

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

TRIAL PROCEDURE

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

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

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

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

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

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

At trial, Caval testified that M.I.S. held the shotgun during the incident. The jury also heard testimony, however, that Gasper lied to police in stating that M.I.S. held the gun. On the witness stand, Gasper testified that he was the one who had the gun:
Q. So on October 20th of 2013, you told Sergeant Ashmore that [M.I.S.], in Petitioner's Exhibit 149, which you were looking at the time, is the person who carjacked the man with the red car, right?
A. I was lying.

Q. Oh okay. So why is it that you were lying?
A. Just talking.
Q. You were pissed off?
A. No, I was just talking. I was high.
Q. So who did carjack the man in the red car?
A. I jacked him.
Q. So you had the gun that day?
A. Yep.
Q. And this is what you looked like that day, Petitioner's Exhibit 121?
A. I don't know. Look like me.
The jury also heard testimony that the shotgun belonged to Brenda Flores.

M.I.S. raised no objection to the court's charge to the jury, which contained two questions. Question 1 asked for a finding of guilt or innocence on the aggravated robbery charge. It instructed the jury to find that M.I.S. engaged in delinquent conduct if, beyond a reasonable doubt, it unanimously concluded either that:
[M.I.S.] ... while in the course of committing theft of property owned by ORLANDO CAVAL and with intent to obtain and maintain control of the property, intentionally OR knowingly threatened OR placed ORLANDO CAVAL in fear of imminent bodily injury OR death, and [M.I.S.] did then and there use or exhibit a deadly weapon, to wit: A FIREARM
or alternatively, that:
BRENDA FLORES AND/OR NEIMAN GASPER, did then and there unlawfully, while in the course of committing theft of property owned by ORLANDO CAVAL and with intent to obtain and maintain control of the property, intentionally OR knowingly threaten OR place ORLANDO CAVAL in fear of imminent bodily injury OR death, and BRENDA FLORES AND/OR NEIMAN GASPER did then and there use OR exhibit a deadly weapon, to wit: A FIREARM, and that the respondent, [M.I.S.], with the intent to promote or assist the commission of the offense of AGGRAVATED ROBBERY, solicited, encouraged, directed, aided or attempted to aid to the other person or persons to commit the offense of AGGRAVATED ROBBERY, then you will find the respondent did engage in delinquent conduct of the offense of AGGRAVATED ROBBERY as charged in the petition.

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

Question 2 asked the jury:
Do you find from the evidence beyond a reasonable doubt that the respondent [M.I.S.] did then and there use or exhibit a deadly weapon, namely a firearm, during the commission of or during the immediate flight from the commission of the aggravated robbery alleged in the petition?
After the jury retired to deliberate, it reported that it was
Hopelessly deadlocked on Question No. 2.
A, should we leave it blank; B, say deadlocked?"

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

After the jury resumed deliberations the next day, the State moved the trial court to withdraw Question 2; M.I.S. moved for a mistrial. The trial court denied both motions. The State then asked for a supplemental instruction in connection with Question 2, which read:
You are further instructed that if you cannot unanimously agree on an answer to this question, then you will state in your answer for Question No. 2, "We do not."

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

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

Held: Affirmed

Opinion: Texas Family Code section 54.03(c) requires that "[j]ury verdicts under this title must be unanimous." TEX. FAM.CODE ANN. § 54.03(c) (West 2014); In re L.D.C., 400 S.W.3d at 573. To meet the jury unanimity requirement, the jury must agree that the defendant committed one specific crime. Landrian v. State, 268 S.W.3d 532, 535 (Tex.Crim.App.2008). The jury need not, however, find that the defendant committed that crime in one specific way or even with one specific act. Id.; see Leza v. State, 351 S.W.3d 344, 357 (Tex.Crim.App.2011) (explaining that alleged theories of culpability as principal or party are merely alternate methods or means by which defendant committed one charged offense, which does not require juror unanimity); Martinez v. State, 129 S.W.3d 101, 103 (Tex.Crim.App.2004) (explaining that unanimity requirement is not violated when jury is instructed on alternative theories, or manner and means, of committing same offense); Kitchens v. State, 823 S.W.2d 256, 258 (Tex.Crim.App.1991) (jury need not reach unanimous agreement on preliminary factual issues that underlie verdict, such as manner and means by which one offense was committed); see also

Richardson v. United States, 526 U.S. 813, 817, 119 S.Ct. 1707, 1710, 143 L.Ed.2d 985 (1999) (noting by example that disagreement about means of offense of robbery "would not matter so long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force").

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

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

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

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

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

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

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

THE OVER 18 CERTIFICATION AND TRANSFER PROVISION [TFC 54.02(J)] WAS NOT CONSIDERED UNCONSTITUTIONAL NOR WAS IT APPLIED UNCONSTITUTIONALLY IN THIS CASE SINCE THE JUVENILE COURT IN MAKING ITS TRANSFER DECISION FOLLOWING REMAND, CONSIDERED THE UNDER 18 CERTIFICATION FACTORS AS THEY APPLIED TO APPELLANT'S PARTICULAR CASE.

¶ 16-3-2. **In the Matter of J.G.**, No. 01-15-01025-CV, --- S.W.3d ----, 2016 WL 2587118 [Tex.App. – Houston (1st Dist), 5/5/2016].

Facts: On January 17, 2012, the State filed a petition in the juvenile court alleging that appellant had engaged in delinquent conduct by committing aggravated robbery. Appellant was sixteen at the time the State filed its petition. On May 11, 2012, the State filed an amended petition, which also requested that the

juvenile court waive its exclusive original jurisdiction and transfer appellant to the criminal district court for further proceedings. On the same date, the State filed a separate motion to waive jurisdiction, arguing that because of the seriousness of the offense, "the welfare of the community requires criminal proceedings and it is in the best interest of the State of Texas" and appellant that the juvenile court waive its exclusive jurisdiction.

In advance of the certification hearing, the trial court had prepared a "return to court summary," which summarized the facts of the charged offense, appellant's behavior while in custody for the charged offense, his prior encounters with the juvenile court system, his behavior while on probation for prior offenses, and his educational history. The trial court also ordered a psychiatric evaluation, which was conducted in the presence of appellant's attorney approximately one month before the certification hearing, and an evaluation of his intellectual functioning. The latter evaluation specifically addressed factors relevant to the juvenile court's decision concerning certification, including the seriousness of the crime, appellant's level of sophistication and maturity, prior rehabilitation efforts, and risk of violence. The evaluator recommended that "[d]ue to [the] seriousness of the nature of his alleged offenses, if adjudicated, [appellant] will likely benefit from a highly structured environment that is instrumental in helping him regulate his involvement in negative activities," that appellant "would benefit from intensive substance abuse treatment," and that appellant "would benefit from participation in an independent living program and could benefit from training in a service trade."

On July 18, 2012, less than one month after appellant turned seventeen, the juvenile court held a certification hearing. The order waiving jurisdiction specifically stated that after a "full investigation and hearing," the court found that appellant
is charged with a violation of a penal law of the grade of felony, if committed by an adult, to wit:
AGGRAVATED ROBBERY committed on or about the 11th day of JANUARY, 2012 : 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 ...; 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 [a] criminal proceeding. In making that determination, the Court has considered among other matters:
1. Whether the alleged OFFENSE WAS against [a] 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.
The Court specifically finds that the said [appellant] is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived by the said [appellant], to have aided in the preparation of HIS defense and to be responsible for HIS conduct; that the OFFENSE allege[d] to have been committed WAS against the person of another; and the evidence and reports heretofore 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 [appellant] by use of procedures, services, and facilities currently available to the Juvenile Court.
The juvenile court thus waived its original jurisdiction and ordered appellant transferred to Harris County criminal district court.

Upon being transferred to the criminal district court, appellant pleaded guilty to the charged offense of aggravated robbery. Appellant appealed his conviction to the Fourteenth Court of Appeals.1 On appeal, appellant argued that the juvenile court abused its discretion when it waived jurisdiction over him, that the evidence was insufficient to support a waiver of jurisdiction, and that the juvenile court erred by not including specific evidentiary findings supporting its determination in the order waiving jurisdiction. See J.G. I, 471 S.W.3d at 4.

The Fourteenth Court of Appeals relied upon a recent Court of Criminal Appeals decision, Moon v. State, 451 S.W.3d 28 (Tex.Crim.App.2014), in holding that the juvenile court, in an order waiving its original jurisdiction, must state both the reasons for waiving its jurisdiction and the findings of fact that support those reasons. J.G. I, 471 S.W.3d at 4. The court noted that the transfer order in this case made "no findings about the specifics of the alleged offense" and found "no more than probable cause to believe that appellant committed 'the OFFENSE alleged.'" Id. The court also noted that "the only stated reason given for appellant's transfer was that 'because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding[s,]' and the only specific fact supporting this reason was that 'the OFFENSE allege[d] to have been committed WAS against the person of another [.]'" Id. Our sister court thus concluded that "the juvenile court's waiver of jurisdiction 'based on this particular reason fortified only by this fact' constitutes an abuse of discretion." Id. The court determined that the criminal district court never acquired jurisdiction over appellant, vacated the judgment of conviction, dismissed the case against appellant in the district court, and remanded the case to the juvenile court "for further proceedings." Id.

After the Fourteenth Court of Appeals remanded the case to the juvenile court, the State filed an amended petition against appellant on March 20, 2015. At that point, appellant was nineteen years old. The State again sought certification of appellant as an adult, and the juvenile court ordered a new round of psychological and intellectual evaluations of appellant.

The juvenile court held a certification hearing on November 2, 2015. At this hearing, Houston Police Department Officer C. Elder testified concerning the facts of the underlying aggravated robbery offense. Officer Elder testified that he was on patrol around 10:30 p.m. on January 11, 2012, in southwest Houston when he received a dispatch concerning a robbery. Officer Elder drove to a nearby apartment complex and spoke with Antonio Duran, the complainant, who informed him that he arrived at the complex and honked his horn at a car that was blocking the gate into the complex. The other car allowed Duran to pass through the gate, and after he did he parked in a parking space. As he started walking to an apartment, appellant walked up to him with another man who pointed a gun in Duran's face and demanded his money and any property he had with him. Appellant and the other man then drove away in their own vehicle.

Duran gave Officer Elder a description of the vehicle, and, after Elder gave that information to the dispatcher, another officer, Officer Gerard, observed the vehicle at the scene of a second robbery. Appellant and his companion fled the scene of the second robbery, but they crashed at a nearby apartment complex. Officer Elder discovered Duran's property in the car that appellant was driving, and Duran arrived at the scene of the crash and gave a positive identification of appellant as one of the men who had robbed him. Officers recovered a pistol from appellant's companion, who was twenty years old at the time of the offense and was therefore tried in criminal district court.

At the hearing, appellant raised several objections to the juvenile court's proceeding with a certification decision. Appellant argued that re-certification was not proper because, under Family Code section 54.02(j), which applies to certification decisions made after the individual turns eighteen, the State could not prove that there was no prior adjudication of the offense. Appellant also argued that the State could not prove that it had exercised due diligence to obtain an adjudication of the offense in the juvenile court before he turned eighteen. Appellant further argued that the State could not prove that probable cause existed that appellant himself committed the offense because the evidence reflected that appellant was a party to the offense of aggravated robbery, and the State could not seek certification based on the defendant's "participation as a party because there's a difference between criminal culpability for a party and commission of an offense." Appellant also argued that allowing the State to seek recertification under section 54.02(j), instead of section 54.02(a), which applies to certification decisions before the individual turns eighteen, and which was the subsection used to certify appellant the first time, violated the double-jeopardy clause.

The juvenile court found that appellant was over the age of eighteen; that he was at least ten years of age and younger than seventeen at the time of the alleged offense; that no adjudication concerning the offense had been made and no adjudication hearing concerning the offense had been conducted; that a preponderance of the evidence showed that despite due diligence by the State, it was not practicable to proceed in the juvenile court before appellant's eighteenth birthday because a previous transfer order, pending when appellant turned eighteen, had been reversed by an appellate court after appellant's eighteenth birthday; and probable cause existed to believe that appellant committed the alleged offense. The juvenile court incorporated by reference extensive findings of fact and conclusions of law concerning what the court specifically considered when making its certification determination. The juvenile court ultimately waived original jurisdiction and recertified appellant to stand trial as an adult.

This accelerated appeal followed. See TEX. FAM.CODE ANN. § 56.01(c)(1)(A), (h) (Vernon Supp.2015) (providing right to immediate appeal from order "respecting transfer of the child for prosecution as an adult" and providing that appeal from such order "has precedence over all other cases").

Held: Affirmed

Opinion: Juvenile Certification

The Juvenile Justice Code governs proceedings in all cases involving the delinquent conduct of a person who was a child at the time they engaged in the conduct. TEX. FAM.CODE ANN. § 51.04(a) (Vernon Supp.2015); id. § 51.02(2)(A) (Vernon Supp.2015) (defining "child" as a person who is "ten years of age or older and under 17 years of age"). The juvenile court has exclusive original jurisdiction over all proceedings governed by the Juvenile Justice Code. Id. § 51.04(a). Family Code section 54.02 provides that the juvenile court may waive its exclusive jurisdiction and transfer a child to the appropriate district court for criminal proceedings if:

(1) the child is alleged to have violated a penal law of the grade of felony;

(2) the child was:

(A) 14 years of age or older at the time he is alleged to have committed the offense, if the offense is ... a felony of the first degree, and no adjudication hearing has been conducted concerning that offense; [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.
TEX. FAM.CODE ANN. § 54.02(a) (Vernon 2014); see Moore v. State, 446 S.W.3d 47, 52 (Tex.App.–Houston [1st Dist.] 2014, pet. granted) (holding that section 54.02(a) applies to one who is "child" at time of transfer and section 51.02(2) defines "child" as person who is "ten years of age or older and under 17 years of age"). The State bears the burden to produce evidence that the waiver of jurisdiction is appropriate. Moon, 451 S.W.3d at 40. Before holding the transfer hearing, the juvenile court shall order and obtain a diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. TEX. FAM.CODE ANN. § 54.02(d).

A transfer hearing is not held for the purpose of determining guilt or innocence, but is instead held for "the purpose of establishing whether the child's and society's best interest are met by maintaining juvenile custody of the child or by transferring the child to district court for adult proceedings." In re A.A., 929 S.W.2d 649, 653 (Tex.App.–San Antonio 1996, no pet.). In making its determination concerning transfer, 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
*5 (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.
TEX. FAM.CODE ANN. § 54.02(f). If the juvenile court waives jurisdiction, "it shall state specifically in the order its reasons for waiver...." Id. § 54.02(h).

Juvenile courts are courts of limited jurisdiction, and, generally, maintain jurisdiction over a child who has turned eighteen only to transfer the case to the criminal district court pursuant to section 54.02(j) or dismiss the case. In re N.J.A., 997 S.W.2d 554, 556 (Tex.1999); In re B.R.H., 426 S.W.3d 163, 166 (Tex.App.–Houston [1st Dist.] 2012, orig. proceeding). The Juvenile Justice Code, however, provides statutory exceptions to this general rule. The juvenile court retains jurisdiction over a person, without regard to that person's age, for conduct engaged in by the person prior to turning seventeen if, as a result of an appeal by the person of the juvenile court's transfer order, the order is reversed and the case remanded to the juvenile court by the appellate court. TEX. FAM.CODE ANN. § 51.041(a) (Vernon Supp.2015). The juvenile court also retains jurisdiction over a person, without regard to that person's age, who is a respondent in a proceeding for waiver of jurisdiction and transfer to the district court under section 54.02(a) if: (1) the transfer motion was filed while the respondent was younger than eighteen or nineteen years of age; (2) the proceeding is not complete before the respondent becomes eighteen or nineteen years of age; and (3) the juvenile court enters a finding that the prosecuting attorney exercised due diligence in an attempt to complete the proceeding before the respondent turned eighteen or nineteen. Id. § 51.0412 (Vernon 2014); In re B.R.H., 426 S.W.3d at 166–67. A child who objects to the jurisdiction of the juvenile court must raise the objection at the discretionary transfer hearing. TEX. FAM.CODE ANN. § 51.042(a) (Vernon 2014).

Section 54.02(j) concerns waiver of jurisdiction when the person before the court is over the age of eighteen. See id. § 54.02(j). This subsection provides that the juvenile court may waive its original jurisdiction and transfer a person to the appropriate district court if:
(1) the person is 18 years of age or older;
(2) the person was:
....
(B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed ... a felony of the first degree other than 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:
(A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or
(B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
(i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;
*6 (ii) the person could not be found; or
(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.
Id.

The State bears the burden of demonstrating that proceeding in the juvenile court was not practicable because of circumstances outside the control of the State. Moore, 446 S.W.3d at 51. The State is not required to establish the guilt of the child, but instead is only required to "present evidence which will allow the juvenile court to exercise its sound discretion in making [a] transfer to [the] district court for criminal proceedings." In re A.A., 929 S.W.2d at 653.

Constitutionality of Section 54.02(j)

In his first issue, appellant challenges the constitutionality of Family Code section 54.02(j), the section on which the juvenile court based its waiver of its jurisdiction, as applied to him. Appellant argues that the application of the statute in his case violates the double jeopardy clause, the due process clause, the equal protection clause, and the cruel and unusual punishment clause and that the statute is an unconstitutional ex post facto law.

There are two types of challenges to the constitutionality of a statute: the statute is unconstitutional as applied to the defendant, or the statute is unconstitutional on its face. Fluellen v. State, 104 S.W.3d 152, 167 (Tex.App.–Texarkana 2003, no pet.). Statutes are presumed to be constitutional until it is determined otherwise. Karenev v. State, 281 S.W.3d 428, 434 (Tex.Crim.App.2009). A litigant who challenges the constitutionality of a statute has the burden of rebutting the presumption of constitutionality. State v. Rosseau, 398 S.W.3d 769, 778 (Tex.App.–San Antonio 2011), aff'd, 396 S.W.3d 550 (Tex.Crim.App.2013). In the absence of contrary evidence, we presume that the legislature acted in a constitutionally sound fashion, and we uphold the statute if we can ascertain a reasonable construction that will render the statute constitutional and will carry out the legislative intent. Lawson v. State, 283 S.W.3d 438, 440 (Tex.App.–Fort Worth 2009, pet. ref'd).

A. Double Jeopardy

The Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; see also TEX. CONST. art. I, § 14 ("No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction."); Ex parte Mitchell, 977 S.W.2d 575, 580 (Tex.Crim.App.1997) ("We have consistently held, however, that the Texas and United States constitutions' double jeopardy provisions provide substantially identical protections."). The Double Jeopardy Clause protects a defendant from three things: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Ex parte Milner, 394 S.W.3d 502, 506 (Tex.Crim.App.2013) (citing Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977)). Although the Double Jeopardy Clause precludes retrial of a defendant whose conviction is reversed on appeal on the basis of insufficient evidence, it does not preclude retrial when the defendant's conviction is reversed on appeal for trial error. See Lockhart v. Nelson, 488 U.S. 33, 39, 109 S.Ct. 285, 290, 102 L.Ed.2d 265 (1988).

Here, appellant argues that double jeopardy bars recertification in this case because, in J.G. I, the Fourteenth Court of Appeals determined that insufficient evidence supported the juvenile court's decision to waive jurisdiction and transfer his case to the district court. We conclude, however, that this is a mischaracterization of J.G. I. Although appellant is correct that the Fourteenth Court determined that the juvenile court erroneously certified him as an adult, it did not reach the question of whether insufficient evidence supported the juvenile court's decision. Instead, our sister court based its opinion on the fact that, under the Court of Criminal Appeals' decision in Moon, the transfer order was facially defective because it did not make any specific findings about the seriousness of appellant's alleged offense and did not support its ultimate conclusion that transfer was warranted with any facts found in the record. See J.G. I, 471 S.W.3d at 4. The court concluded that "the juvenile court's waiver of jurisdiction 'based on this particular reason fortified only by this fact' constitutes an abuse of discretion." Id. (quoting Moon, 451 S.W.3d at 50). The Fourteenth Court thus held that the transfer order itself was defective; it did not hold that the trial court's decision to waive jurisdiction and transfer appellant's case was not supported by sufficient evidence. See id.

We therefore conclude that, because appellant's prior conviction for the charged offense in this case was reversed due to trial error, and not due to insufficient evidence, double jeopardy does not preclude the juvenile court from waiving its jurisdiction, certifying appellant as an adult, and transferring the case to district court a second time.2 See Lockhart, 488 U.S. at 39, 109 S.Ct. at 290.

B. Ex Post Facto Law

Both the United States and Texas Constitutions contain prohibitions on enacting ex post facto laws. U.S. CONST. art. I, § 10, cl. 1; TEX. CONST. art. I, § 16. An ex post facto law: (1) punishes as a crime an act previously committed which was innocent when done; (2) changes the punishment and inflicts a greater punishment than the law attached to the criminal offense when committed; or (3) deprives a person charged with a crime of any defense available at the time the act was committed. Rodriguez v. State, 93 S.W.3d 60, 66 (Tex.Crim.App.2002). A law is also an impermissible ex post facto law if it "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Carmell v. Texas, 529 U.S. 513, 530, 120 S.Ct. 1620, 1631, 146 L.Ed.2d 577 (2000).

Appellant argues that section 54.02(j), as applied in this case, "changes the rules after the fact in a way that materially changes the state's substantive burden to certify and then convict the child, and subjects the child to adult criminal penalties to which he would not have

been subject under the applicable law when the alleged crime was committed." Section 54.02(j), however does not fit within any of the enumerated categories of ex post facto laws. It does not punish an act that was innocent when appellant committed it; it does not change the punishment and inflict a greater punishment than existed when appellant committed the criminal act, as he was always subject to the possibility of the trial court waiving its jurisdiction and transferring his case to the criminal district court, which would then impose an "adult" sentencing range; it does not deprive appellant of a defense that was available at the time he committed the alleged criminal act; and, while section 54.02(j) does involve the consideration of different statutory factors from section 54.02(a), and thus requires the consideration of different evidence when making the transfer decision, the decision to transfer appellant to the district court is not an adjudication or a "conviction" of the alleged offense. See Carmell, 529 U.S. at 530, 120 S.Ct. at 1631; Rodriguez, 93 S.W.3d at 66; see also In re D.M., 611 S.W.2d 880, 883 (Tex.Civ.App.–Amarillo 1980, no writ) (holding that transfer proceeding in juvenile court is not adjudicatory hearing to determine whether defendant committed alleged offense, but is instead hearing to determine whether defendant should remain in juvenile court system or be transferred to adult system "for criminal proceedings").

We conclude that section 54.02(j) is not itself an unconstitutional ex post facto law. Nor is it applied unconstitutionally in this case.

C. Due Process and Equal Protection

Appellant argues that recertification in this case under section 54.02(j) denies him due process because he "lost the protection of the equitable factors in Section 54.02(f)" that must be considered when the trial court certifies a juvenile respondent who has not yet turned eighteen under section 54.02(a), and he was instead certified a second time under "an entirely new set of standards." Appellant also argues that application of section 54.02(j) to him violates his equal protection rights because this subsection "does not apply to a juvenile who is certified at a younger age and has time to obtain a reversal of his original certification and return to juvenile court before age 18" and still have the subsection 54.02(a) and (f) factors applied to him.

The United States Supreme Court has held that "the waiver of [juvenile court] jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile." Kent v. United States, 383 U.S. 541, 556, 86 S.Ct. 1045, 1055, 16 L.Ed.2d 84 (1966). Due process requires, as a condition to a valid waiver order, "a hearing, including access by [the juvenile's] counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's [transfer] decision." Id. at 557, 86 S.Ct. at 1055. The Supreme Court held that juvenile courts must "accompany [their] waiver order[s] with a statement of the reasons or considerations therefor" and that transfer hearings must "measure up to the essentials of due process and fair treatment." Id. at 561–62, 86 S.Ct. at 1057.

Under Texas's statutory scheme, the juvenile court may waive its exclusive jurisdiction and transfer a child to the district court for criminal proceedings under section 54.02(a) if the child is fourteen years of age or older at the time he is alleged to have committed a first-degree felony offense. See TEX. FAM.CODE ANN. § 54.02(a)(2)(A); see also id. § 51.02(2) (defining "child" as "a person who is ... ten years of age or older and under 17 years of age"). To certify the juvenile as an adult under this section, the juvenile court must determine that there is probable cause to believe that the child committed the alleged offense and that, because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings. Id. § 54.02(a)(3). Prior to the transfer hearing, the juvenile court must order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. Id. § 54.02(d). The juvenile court must also consider the four factors enumerated by section 54.02(f): (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. Id. § 54.02(f). The juvenile court, in its transfer order, must make specific findings of fact regarding each of the section 54.02(f) factors. See Moon, 451 S.W.3d at 47.

If the person has turned eighteen, the juvenile court must determine whether to certify him as an adult under section 54.02(j). Under that subsection, the juvenile court must consider whether the person was between fourteen and seventeen years of age at the time he was alleged to have committed a first-degree felony, whether an adjudication concerning the alleged offense has been made or an adjudication hearing conducted, whether it was not practicable to proceed in juvenile court before the person's eighteenth birthday, and whether probable cause exists to believe the person committed the alleged offense. See id. § 54.02(j). A juvenile court conducting a transfer proceeding under subsection 54.02(j) is not required to conduct the diagnostic study, social evaluation, or full investigation of the child and his circumstances that subsection 54.02(d) requires for proceedings under subsection 54.02(a). See id. § 54.02(l).

Here, it is undisputed that when the juvenile court initially waived jurisdiction and transferred appellant's case, it did so pursuant to section 54.02(a), as appellant was seventeen at the time. When the court waived jurisdiction and transferred the case the second time following remand from the Fourteenth Court of Appeals, it did so pursuant to section 54.02(j), as appellant was twenty at the time of the second transfer hearing. In its second order waiving jurisdiction, in addition to making specific findings on each of the section 54.02(j) factors, the juvenile court also incorporated by reference extensive findings of fact and conclusions of law. These findings and conclusions not only contained facts supporting the section 54.02(j) factors, they also addressed the factors enumerated by section 54.02(a) and section 54.02(f), even though the court did not waive its jurisdiction under those subsections.

In the findings and conclusions, the juvenile court made findings that appellant committed an offense against the person of another, and the court found it compelling that appellant "and his co-actor placed the Complainant in fear of death or serious bodily injury with their actions in this offense." The juvenile court ordered a new round of psychological evaluations following remand of the case, and it found that it could not "adequately measure [ ]" appellant's "true and accurate level of intellectual based sophistication" because appellant is bilingual and the examiner had difficulties scoring appellant's answers on the Spanish version of one of the intellectual tests administered. The juvenile court also recited appellant's extensive history with the juvenile justice system prior to the offense at issue, which included a pattern of offenses escalating in seriousness to the alleged offense of aggravated robbery, and his numerous prior placements with rehabilitation programs offered by the juvenile system. The juvenile court found that appellant "previously exhibited a failure to engage in rehabilitation while under this court's supervision." The juvenile court also made findings concerning each of the statutory factors relevant to the decision to waive jurisdiction under section 54.02(j).

Even though the text of section 54.02(j) does not mandate consideration of the relevant factors under subsections (a) and (f), required to be considered for juveniles who have not yet turned eighteen, the record is clear that, in making its transfer decision following remand, the juvenile court considered the subsection (a) and (f) factors as they applied to appellant's particular case. In this case, therefore, the juvenile court essentially considered all of the relevant statutory factors for waiver of jurisdiction that the Legislature has specifically enumerated in section 54.02, despite the age-based distinction between subsections (a) and (f) and subsection (j). We therefore conclude that section 54.02(j), as applied to appellant in this case, did not deprive appellant of due process and equal protection.

D. Cruel and Unusual Punishment

Appellant argues that section 54.02(j) violates the Eighth Amendment's prohibition against cruel and unusual punishment because it "deprived him of his liberty interest in being treated differently [from adult offenders] when he was a child and gave the juvenile court on remand no opportunity to weigh the purposes of punishment when that court had to decide whether to transfer him a second time to adult court."

The Eighth Amendment provides that "cruel and unusual punishments" shall not be inflicted. U.S. Const. amend. VIII. "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." Montgomery v. Louisiana, —— U.S. ——, 136 S.Ct. 718, 732–33, 193 L.Ed.2d 599 (2016). The United States Supreme Court has noted that "children are constitutionally different from adults for purposes of sentencing" and, accordingly, has held, among other things, that the assessment of the death penalty and mandatory life sentences without parole against juveniles violates the Eighth Amendment. See id. (quoting Miller v. Alabama, —— U.S. ——, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012)). The Court noted that due to "children's diminished culpability and heightened capacity for change," the retributive and rehabilitative purposes of the criminal justice system ought to be weighed differently for juvenile offenders as opposed to adult offenders. Id.

Appellant argues that section 54.02(j) does not allow the juvenile court to consider the juvenile's greater need for rehabilitation and the lesser weight placed on retribution when making a transfer decision. However, as we have detailed above, in making its decision to waive jurisdiction a second time and transfer appellant's case to the district court, the juvenile court in this case clearly considered appellant's prior history with the juvenile justice system, the rehabilitative placements that were made, his lack of cooperation with those rehabilitative goals, and the escalation of his criminal conduct. We cannot conclude that, as applied to this case, section 54.02(j) constitutes cruel and unusual punishment violating the Eighth Amendment. We overrule appellant's first issue.

Conclusion: We conclude that the State presented sufficient evidence to support each of the statutory requirements for waiving jurisdiction under section 54.02(j). We hold that the trial court, therefore, did not abuse its discretion in waiving jurisdiction and entering a second order certifying appellant as an adult and transferring him to the criminal district court.

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IN DISCRETIONARY TRANSFER TO ADULT COURT, A TWO-PRONGED ANALYSIS IN DETERMINING THAT THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION WAS USED BY THE APPELLATE COURT: (1) THE JUVENILE COURT HAD SUFFICIENT INFORMATION UPON WHICH TO EXERCISE ITS DISCRETION; AND (2) THE JUVENILE COURT DID NOT ERR IN ITS APPLICATION OF ITS DISCRETION?

¶ 16-3-1. **In re K.J.**, NOS. 01–15–00947–CV, 01–15–00948–CV, 01–15–00949–CV --- S.W.3d ----, 2016 WL 1714886 [Tex.App.—Houston (1st Dist.), 4/28/16].

Facts: Appellant is charged with three counts of armed robbery against three different complainants in three separate incidents. At the time of the alleged offenses, appellant was 14 years old. The State filed a petition in all three cases asking the juvenile court to waive jurisdiction and transfer the cases to criminal district court.

Relying on evidence taken at an evidentiary hearing, as well as appellant's juvenile probation report and a psychological evaluation, the juvenile court granted the State's motions with the following November 5, 2015 order:

ORDER TO WAIVE JURISDICTION
ON THE 1ST DAY OF OCTOBER, 2015, this Court held a hearing in the above styled and numbered petitions pursuant to Section 54.02 of the Texas Family Code. After reviewing all the testimonial and documentary evidence admitted at the hearing, the Court's files under these cause numbers of which it took judicial notice, and the Respondent's demeanor and conduct before this Court at the hearing and during interactions with the Court before the hearing, the Court now decides to waive its exclusive, original jurisdiction and discretionarily transfer the Respondent to the Criminal District Court. The Court reaches this decision because the welfare of the community requires criminal proceedings based on the seriousness of the offenses alleged and the background of the child.
In reaching this decision, the Court makes the following findings of fact:
1. There is probable cause to believe the Respondent committed the offenses, as alleged in the petitions, namely the offenses of Aggravated Robbery, which are first degree felonies. The Respondent, having been born on November 22, 2000, was 14 years old on April 12 and 13, 2015, the dates of the commission of the alleged offenses.
2. The Respondent was properly served with the petitions and summons in compliance with the notice requirements of Section 53,04,53,05, 53.06, and 53.07 of the Texas Family Code including that the summons stated the purpose of the hearing was to consider discretionary transfer to Criminal District Court. Moreover, the Respondent received the petitions and summons at least two days before this Court conducted the hearing.
3. The Court ordered a complete diagnostic study, social evaluation, and full investigation of the Respondent, his circumstances, and the circumstances of the alleged offenses. The Court did receive a full investigation of the Respondent, his prior referrals, a social evaluation, diagnostic study, and his circumstances.
4. At least five days before this hearing, the attorney for the Respondent and attorney for the State received a copy of all reports this Court considered in reaching its decision, namely: the probation report, the Court Report Information Summary and 315th District Court Certification Report.

The Court then weighed, in addition to the above, the following factors and makes the below listed findings that support its decision, namely:
1. This Court reviewed and considered whether the alleged offenses were against person or property and finds in support of discretionary transfer specifically as follows:
There is probable cause to believe the Respondent committed multiple offenses against the person of another, and that because they are against the person it gives greater weight in favor of discretionary transfer under this factor.
More specifically, the Court finds the following aspects of the alleged offenses, and the Respondent's alleged participation in it, particularly egregious and aggravating:
The Respondent used and exhibited a deadly weapon, namely a firearm, during the commission of each of these offenses. On April 12, 2015, the Respondent stole a white SUV from a complainant in an apartment complex parking lot. The Complainant located pictures that had been taken with his stolen cellphone that were uploaded to his photo album on his iCloud account. The Respondent is in the pictures and is seen holding a .380 caliber pistol. The complainant identified the Respondent as the individual who held the gun to him and took his property. The Complainant stated to the officer that he was scared for his life. The Respondent later admitted in a recorded interview with police officers that he had driven a white SUV.
Further, on April 13, 2015, the Respondent threatened an eighty-year-old Complainant by pointing a firearm to her while demanding that she exit her vehicle. This action put the Complainant in fear of death or serious bodily injury. The Respondent then drove away in the complainant's vehicle. The Respondent was later identified by the complainant as the gunman in the aggravated robbery.
Additionally, on April 13, 2015, the Respondent approached a Complainant in her apartment complex and pointed a firearm to her face and demanded her keys, cellphone, and the passcode to her phone. The Complainant testified that she was terrified and was scared for her life. The Complainant identified the

Respondent as the person who held the gun up to her head. The Complainant's stolen cellphone was later recovered with a video of the Respondent on it, as well as, photos of the Respondent holding guns and displaying gang signs.

2. This Court reviewed and considered the sophistication and maturity of the Respondent and finds in support of discretionary transfer specifically as follows:

The Respondent's level of Sophistication–Maturity, according to Dr. John Webb, was in the middle range in comparison to most individuals his age. Dr. Webb stated that the Respondent exhibits an average level of intellectually based sophistication and an average level of criminal sophistication.

Additionally, the Respondent was found to be at a moderate risk for future offending. Dr. Webb listed out the following risk factors that are associated with reoffending that he saw present in the Respondent: Attention–Deficit/hyperactivity difficulties, a history of nonviolent offending, past supervision/intervention failures, poor school achievement, peer delinquency, stress and poor coping, community disorganization, risk taking/impulsivity, substance use difficulties, anger management problems, poor compliance, and low interest/commitment to school.

Further, the Respondent demonstrated that he clearly understands and is very aware that there are different consequences in the juvenile compared to the adult justice system.

3. This Court reviewed the Respondent's record and previous history and finds in support of discretionary transfer specifically as follows:

The Respondent had several prior referrals to the Harris County Juvenile System. The Respondent was placed on deferred adjudication probation for the misdemeanor offense of Criminal Trespass that was referred on August 5, 2013. On December 9, 2014, the Respondent was placed on probation for the felony offenses of Unauthorized Use of a Motor Vehicle and Criminal Mischief ($1,500–20,000) and the misdemeanor offense of Burglary of a Vehicle.

The Respondent was not compliant on his probation. In addition to being charged with three aggravated robbery charges, he violated his court ordered curfew, admitted to using marijuana while on probation, and failed to attend the Reality Oriented Physical Experience System program as directed by his probation officer. Additionally, the Respondent was reported as a runaway to his probation officer in March, 2015, and again in April, 2015.

The Respondent was placed in the Gang Supervision Program from December 9, 2014 to present.

The Respondent had fourteen (14) disciplinary write-ups while detained at the Harris County Juvenile Detention Center, including violations for refusal to attend school, assaulting staff/another resident, exhibiting behavior that poses a threat to the safety/security of the facility, inciting a riot, destroying/defacing county property, and disrespecting staff.

4. This Court reviewed and considered the prospects of adequate protection of the public and the likelihood, if any, of the rehabilitation of the Respondent by use of the procedures, services, and facilities currently available to the Juvenile Court and based on the above and its knowledge of the rehabilitative services that may be provided under Title III of the Texas Family Code and the age restrictions placed on under the Texas Human Resources Code, finds In support of discretionary transfer specifically as follows:

The Respondent's mother reported that while on probation, the Respondent brought a gun into her home and discharged the weapon. She also reported that the Respondent would leave for days while under her supervision and she did not know his whereabouts. She stated that she was frustrated with his noncompliance and negative behavior.

Further, the efforts of the Harris County Juvenile Probation Department to rehabilitate the Respondent for past criminal behavior have been unsuccessful, and instead the Respondent's criminal behavior escalated in the more serious offense of Aggravated Robbery,

Further, the crimes the Respondent is alleged to have committed are so egregious and aggravated that this Court determines that based on these offenses and his prior referral history, that he will not be amenable to this Court's additional efforts to rehabilitate him,

Further, the decision to seek a determinate petition is in the discretion of the prosecutor and the prosecutor chose not to seek grand jury approval in these cases. See TEX. FAM.CODE ANN. § 53.045(a)(West 2014).

Based on the above, as well as the totality of the evidence presented in the clerk's record, at the hearing, in the written reports, studies, and investigations, this Court ORDERS and CERTIFIES that its jurisdiction sitting as a Juvenile Court, be WAIVED, and that [K.J.] be hereby REMANDED to the custody of the Sheriff of Harris County, Texas and is hereby transferred to the Criminal District Court of Harris County, Texas, for criminal proceedings to be dealt with as an adult in accordance with the Texas Code of Criminal Procedure.

The Court further stated orally on the record on the 1ST day of OCTOBER, 2015, and in writing in this Order that the Juvenile may immediately appeal the certification decision under Family Code Section 56.01; and that by Order of the Texas Supreme Court, the appeal is accelerated under the Texas Rules of Appellate Procedure applicable to accelerated appeals.

Appellant timely brought this appeal.

Held: Transfer to Adult Court Affirmed

Opinion: 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 background warrant transfer." Moon, 451 S.W.3d at 46.

Until recently, the Texas courts of appeals were split in their approaches to reviewing a juvenile court's certification decision. The Court of Criminal Appeals recently resolved that split, explaining that "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." Id. at 47. In so doing, it approved of the El Paso Court of Appeals' approach:

We apply a two-pronged analysis to determine an abuse of discretion: (1) did the juvenile court have sufficient information upon which 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. Id. at 47 (quoting In re J.R.C.S., 393 S.W.3d 903, 914 (Tex.App.–El Paso 2012, no pet.)).

A. Sufficiency of the evidence to support section 54.02(f) findings?
We limit our 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, 451 S.W.3d at 50.

[The appellate court then went on a section by section analysis of 54.02(f) and the juvenile courts fact findings, which I have omitted here]

B. Did the juvenile court abuse its discretion?
In Moon, the Court of Criminal Appeals provided the following guidance about how we are to proceed once we determine that the juvenile court's findings are supported by sufficient evidence:
[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. 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, 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.
451 S.W.3d at 47.

Applying this standard, we conclude that the juvenile court did not abuse its discretion in waiving jurisdiction and transferring appellant's cases to criminal district court. Section 54.02(d) mandates the court "order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." The court must hold a hearing, § 54.02(c), during which the court may consider "written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." § 54.02(e). Finally, the court must state specifically in any transfer order the reasons for waiver.

Conclusion: The juvenile court set forth relevant and comprehensive reasons for its decision to waive jurisdiction and transfer appellant. Because appellant has not established that the court "acted without reference to guiding rules or principles," or that its transfer was "arbitrary, given the evidence on which it was based," Moon, 451 S.W.3d at 47, we conclude that the juvenile court's order was within its discretion.