# Juvenile Law Section
STATE BAR OF TEXAS

**Volume 30, Number 4 November 2016**

*Visit us online at*
**www.juvenilelaw.org**

**NEWSLETTER EDITOR**
**Associate Judge Pat Garza**
**386th District Court**
**San Antonio, Texas**

## OFFICERS AND COUNCIL MEMBERS

**Riley Shaw, Chair**
Tarrant County District Attorney's Office
401 W. Belknap, Ft. Worth, TX 76196

**Kameron Johnson, Chair-Elect**
Travis County Public Defender's Office
P.O. Box 1748, Austin, TX 78767

**Kaci Singer, Treasurer**
Texas Juvenile Justice Department
P.O. Box 12757, Austin, TX 78711

**Kevin Collins, Immediate Past Chair**
Vogue Building, 600 Navarro, Ste. 250
San Antonio, TX 78205

**Mike Schneider, Secretary**
315th District Court
1200 Congress, Houston, TX 77002

***Terms Expiring 2017***
Patrick Gendron, Bryan
Jill Mata, Austin
Mike Schneider, Houston

***Terms Expiring 2018***
William "Bill" Cox, El Paso
Patricia Cummings, Dallas
Kim Hayes, Lubbock

***Terms Expiring 2019***
Cyndi Porter Gore, Allen
Elizabeth Henneke, Austin
Stephanie Stevens, San Antonio

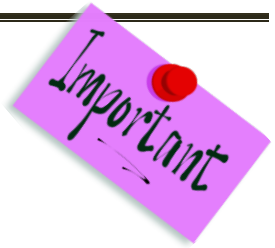
## QUICK LINKS

Juvenile Law Section Website
Nuts and Bolts of Juvenile Law
State Bar of Texas Website
State Bar of Texas Annual Meeting
Texas Bar CLE
Texas Bar Circle
State Bar of Texas Facebook

*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.




## TABLE OF CONTENTS

## EDITOR'S FOREWORD By Associate Judge Pat Garza

Now that the campaigns are over and presidential politics can be put to bed for another 3 years (that's when the campaigning starts), can we get back to caring about each other, about helping each other? For whatever reason, this campaign seemed more bitter and hostile than any other. But it's over. It's time to put our faith back in our democracy. From the President to the Justice of the Peace. Some people won and some people lost. But in the end, it's about the office, not the person. We've been doing this for two-hundred and thirty-seven years. And what makes us special and different from the rest of the world is how we believe in and except the will of the voter. It is part of our DNA to believe in our democracy. We understand the importance of a smooth transition from an incumbent to the newly elected office holder. What makes us special is that we don't sabotage the office when we lose, we don't refuse to leave or refuse to continue to do the job the office requires us to do out of bitterness. No pun intended, but the office trumps the person. The winner respects the office by preparing themselves to be ready on day one. The loser respects the office by preparing it for transition and continuing to do the job until the last day. That's what makes us Americans. Our faith in, our respect for, and our acceptance of, the electoral process.

Remember, Thanksgiving is the day we celebrate with friends and family, eat good food and give thanks for our blessings. We should never forget that. From the roof over our heads to the wonderful bounty before us, to our friends and family who have stood by us through good times and bad, we give thanks. Happy Thanksgiving to all and please stay safe during this holiday season.

**30th Annual Robert Dawson Juvenile Law Institute**. The Juvenile Law Section's 30th Annual Juvenile Law Conference will be held February 26 thru March 1, at the Horseshoe Bay Resort, in Horseshoe Bay, Texas. Horseshoe Bay Resort is an expansive hotel with golf, tennis & restaurants, plus a marina & a landing strip. Not only will this conference celebrate the 30th anniversary of the Juvenile Law Section Institute, Chair-Elect Kameron Johnson and his planning committee have been working hard to create many special activities celebrating the 50th anniversary of In re Gault. In re Gault, was a landmark U.S. Supreme Court decision that held that juveniles accused of crimes in a delinquency proceeding must be afforded many of the same due process rights as adults, such as the right to timely notification of the charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel. The conference flyer will be in your mailbox soon, but it may also be found online at www.juvenilelaw.org.

**Officer and Council Nominees**. The Annual Juvenile Law Section meeting will be held in Horseshoe Bay, Texas on February 27, 2017, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

**Officer Positions**
Kameron Johnson, Chair
Kaci Singer, Chair-Elect
Mike Schneider, Treasurer
Riley Shaw, Immediate Past Chair

**Council Members**: **Terms Expiring 2017**
Patrick Gendron, Bryan, TX
Kim Hayes, Lubbock, TX
Jill Mata, San Antonio, TX

**Nominees**:
Frank Adler, Dallas, TX
Dolores Esparza, Dallas, TX
Leslie Barrows, Dallas, TX
Katya Dow, Houston, TX
John Gauntt, Jr., Bell County
Larry McDougal, Richmond, TX
Ryan Mitchell, Houston, TX
Ambosio Silva, Austin, TX
Jana Jones, Huntsville, TX

Nominations from the floor during the meeting will be accepted. If you have someone that you would like to nominate from the floor, contact the Chair of the Nominations Committee, Kevin Collins, at (210) 223-9480 or kevin@kevincollinslaw.com.

Click Here to Return to Table of Contents





*Our flag is not just one of many political points of view. Rather, the flag is a symbol of our national unity.*

*Adrian Cronauer*

30TH ANNUAL

# JUVENILE LAW CONFERENCE

Robert O. Dawson Juvenile Law Institute

**FEBRUARY 26 – MARCH 1, 2017**

HORSESHOE BAY RESORT

Horseshoe Bay, Texas

## IMPORTANT DATES

**FEBRUARY 6**
Last day to receive discount hotel rate.

**FEBRUARY 13**
Last day to register and pay to receive early-bird discount. If you register or pay after this date, the onsite fee will apply.

**FEBRUARY 13**
Last day to cancel and receive partial refund.

## CONFERENCE, REGISTRATION, AND SOCIAL EVENTS AT A GLANCE

**SUNDAY, FEBRUARY 26**

| | |
|---|---|
| 2:00 p.m. | Juvenile Law Foundation Kick-Off Party and Fund-Raising Miniature Golf Tournament |
| 4:00 p.m. – 6:00 p.m. | Registration |
| 5:00 p.m. – 6:00 p.m. | Multi-Discipline Caucus |

**MONDAY, FEBRUARY 27**

| | |
|---|---|
| 7:30 a.m. – 5:00 p.m. | Registration |
| 8:55 a.m. – 4:45 p.m. | Conference |
| 4:15 p.m. – 4:45 p.m. | Section's Annual Meeting and Election of Officers |
| 7:00 p.m. | Juvenile Law Foundation Silent Auction and Reception |

**TUESDAY, FEBRUARY 28**

| | |
|---|---|
| 8:00 a.m. – 4:45 p.m. | Registration |
| 8:30 a.m. – 4:30 p.m. | Conference |
| 7:00 p.m. | Juvenile Law Section 30th Anniversary Party |

**WEDNESDAY, MARCH 1**

| | |
|---|---|
| 8:30 a.m. – 12:30 p.m. | Registration |
| 8:30 a.m. – 12:00 p.m. | Conference |

## ATTENDEE SCHOLARSHIPS AVAILABLE

The Juvenile Law Section is providing scholarships for the conference registration fee to deserving attorneys actively engaged in the field of juvenile justice who demonstrate a financial need. To be considered for a scholarship, an applicant must submit a written request with the following information:

- verification that the applicant is a licensed attorney;
- verification that the applicant is a member of the Juvenile Law Section;
- an explanation of the applicant's involvement in the field of juvenile justice; and
- demonstration of financial need.

A limited number of scholarships will be awarded, in the order received, to qualified applicants meeting all considerations above. The deadline to submit a request is Friday, January 20. Submit request to Kasi Singer at Kaci.Singer@tjjd.texas.gov. Incomplete or late requests will not be considered. Granting of scholarship requests is not guaranteed. Notification regarding whether a scholarship has been awarded will be made to applicants by January 27. If you are selected, you will receive a coupon code to use during the registration process to waive your registration fee.

These scholarships are limited to the conference registration fee only. Scholarship recipients will be required to pay for their own travel arrangements and all other expenses related to his or her participation in and attendance at the conference. Questions regarding the scholarships may be directed to Kristy Almager at 512.490.7125.

## PERSONS WITH DISABILITIES

Persons with disabilities who plan to attend this conference and are in need of auxiliary aids or services should contact Monique Mendoza at 512.490.7913 at least seven (7) working days prior to the conference so that appropriate arrangements may be made.

## CONTINUING EDUCATION CREDITS

The Juvenile Law Section has requested continuing education credits from the following agencies, organizations, or associations for approximately 15.50 hours (including 3.25 hours of ethics): State Bar of Texas, Texas Center for the Judiciary, Texas Association of Counties, Texas Juvenile Justice Department, and Texas Commission on Law Enforcement.

As the Conference approaches, you may contact Monique Mendoza at 512.490.7913 or check online at juvenilelaw.org/Events.aspx to see how many hours are approved.

## ONLINE VIDEO ACCESS FREE TO ATTENDEES

Online videos of the presentations will be available to registrants 6-8 weeks after the conference on TexasBarCLE. **A VALID email address must be included so we may alert you when these benefits are available and how to access them.** (Note: Presentation lengths may vary from times that were advertised.)

## CONFERENCE QUESTIONS AND CORRESPONDENCE

Juvenile Law Section
c/o Monique Mendoza
P.O. Box 12757
Austin, Texas 78711

Phone: 512.490.7913
Fax: 512.490.7919
Email: Monique.Mendoza@tjjd.texas.gov

# SOCIAL EVENTS

**Juvenile Law Foundation's Kick-Off Party and In Re: Golf Miniature Golf Tournament**
Sunday, Feb 26 at 2:00 pm

Come to the conference early to attend an inaugural party to kick-off the newly formed Juvenile Law Foundation, a 501(c)(3) organization created in 2015 for the purpose of providing scholarships to juveniles involved in the Texas juvenile justice system. Set around In Re: Golf, a miniature golf tournament to be held at the unique Whitewater Putting Course, an 18-hole putting course designed like a regulation golf course, complete with fairways, bunkers, water hazards, and fully landscaped Bermuda grass, the party will include live music by the Court Jesters and other activities.
Details on how to register for the golf tournament and how to be a sponsor at the event will be coming from the Juvenile Law Foundation soon.

**Movie by the Pool**
Sunday, Feb 26 at 8:00 pm

Join us for a fun-filled evening for a movie by (or in!) the heated pool. Movie title will be provided upon check-in.

**Juvenile Law Foundation's Silent Auction**
Monday, Feb 27 at 7:00 pm

Please join us for a Silent Auction sponsored by the Juvenile Law Foundation with live music and cash bar. Everyone is invited to attend and all proceeds raised at the silent auction are used to provide scholarships to juveniles who are continuing their education.

For more information, or If you are interested in making a tax-deductible donation of an item for the Silent Auction, please contact the Juvenile Law Foundation at juvenilelawfoundation@gmail.com or Susan Clevenger at 281.580.4501 or gtclevenger@yahoo.com. You may donate items prior to or at the conference upon arrival. Can't attend the Silent Auction but still want to contribute? Donations will be accepted on-site at the conference. Please see the registration table upon arrival for information. Please help us make this a successful event!

Note: This year's conference will allow conference participants to start bidding Monday afternoon. See the detailed agenda upon arrival to the conference for exact times and locations.

**Juvenile Law Section 30th Anniversary Party**
Tuesday, Feb 28 at 7:00 pm

The Juvenile Law Section started in 1987 and has spent the last 30 years bringing juvenile justice practitioners from around the state together to enhance services to children and their families. Please join us for an evening with music, dancing, photo booth, and a cash bar to celebrate all things past and present that have made this Conference so successful year after year.

# REGISTRATION FEES AND DEADLINES

| | **EARLY** Registration and Payment **RECEIVED BY FEB 13TH** | **LATE/ON-SITE** Registration or Payment **RECEIVED AFTER FEB 13TH** |
|---|---|---|
| Members of the Juvenile Law Section, Juvenile Probation Officers, Judges, Associate Judges, Referees, and Masters | **$250** | **$325** |
| Non-Members of the Juvenile Law Section | **$275** | **$325** |

- Conference fees are inclusive of attendance to any or all scheduled days. No special rate is available for partial attendance, students, or non-profit agencies.
- If you need clarification on whether or not you are a member of the Juvenile Law Section, please contact the State Bar of Texas Sections Division at 512.427.1420 or view your MyBarPage online at texasbar.com.
- Not a Juvenile Law Section member? If you are not a current member of the Juvenile Law Section, you may join here for $25 annually and get all the benefits of section membership, including the conference discount, quarterly newsletter, and legislative newsletter. Non-attorneys involved in the juvenile justice system are eligible to join the section. Law students and newly-licensed attorneys (two years or less) may join the Juvenile Law Section for free (in accordance with the State Bar of Texas rules), so join today with the SBOT to receive the discounted rate.
- NOTE: You cannot register for this conference through the State Bar or Texas Bar CLE.

## HOW TO REGISTER

You may register online here. If you need assistance with registering online, you may contact Monique Mendoza at 512.490.7913 or Monique.Mendoza@tjjd.texas.gov.

## PAYMENT

Payment can be made by credit card or by check or money order made payable to JUVENILE LAW SECTION. No purchase orders or vouchers are accepted. The Juvenile Law Section's Federal Tax ID is 74-6000148.

## REGISTRATION FEE INCLUDES

The registration fee includes the breakfast on Monday, Tuesday, and Wednesday, breaks for three days, access to electronic materials, and attendance to the scheduled social events (miniature golf tournament will be separate).

## MATERIALS EMAILED EARLY

Course materials will be distributed in electronic format. If registration AND payment information is received by February 20, you will receive an email with a link to all materials received to date approximately one week prior to the conference. You may then print the materials if you would like to bring a hard copy to the conference. The Section will have a limited number of electrical outlets for those wishing to bring a laptop or other mobile device.

## CONFIRMATION

You will receive an electronic confirmation that your registration was received. Please include a copy of your confirmation or a copy of your registration form if you mail in your payment.

## CANCELLATION, REFUNDS, AND NO-SHOWS

Conference cancellations and refund requests must be made in writing to Monique Mendoza, Conference Coordinator, at Monique.Mendoza@tjjd.texas.gov.

Cancellation requests must be received by **February 13** for a partial refund (less a $25 processing fee). **Verbal cancellations will not be accepted.**

Refunds will not be granted for no-shows; however, course materials will be provided electronically within one week after the conclusion of the Conference.

## SUBSTITUTIONS

Before the Conference, you may make a substitution request. Please contact Monique Mendoza at 512.490.7913 or Monique.Mendoza@tjjd.texas.gov and request that the substitution be made and the existing payment be transferred.

NOTE: Substitutions cannot be made for individual sessions and/or days.

## REGISTRATION CHECK-IN

When you check-in, you can pick up your name badge and related conference information. The registration desk will be open Sunday afternoon from 4:00 pm – 6:00 pm and then again on Monday morning at 7:30 am. The conference kicks off at 8:55 am on Monday morning. Registering on Sunday is not required.

# SCHEDULE OF EVENTS

15.50 HOURS (INCLUDING 3.00 HOURS OF ETHICS)

## SUNDAY, FEBRUARY 26

**2:00 pm** **Juvenile Law Foundation Kick-Off Party**
**In Re: Golf Miniature Golf Tournament**
Whitewater Putting Course
Live Music with The Court Jesters, Cash Bar, and Other Activities

**4:00 pm** **Early Registration (4:00 pm - 6:00 pm)**
**Granite Ballroom Foyer, 1st Floor**

**5:00 pm** **Multi-Discipline Caucus**
The Juvenile Law Section will host individualized caucuses based on your discipline for an opportunity to network, to discuss best practices and current issues, and share trends within the scope of your functional area. Each caucus is scheduled to last approximately one hour.

**Prosecutorial Caucus**
Limestone North (1st Floor)

**Defense Caucus**
Limestone South (1st Floor)

**Judicial Caucus**
Travertine North (1st Floor)

**Probation/State Agency Caucus**
Travertine South (1st Floor)

**8:00 pm** **Movie by the Pool**
Heated Pool and Seating Around Pool

## MONDAY, FEBRUARY 27

6.50 HOURS (INCLUDING 2.00 HOURS OF ETHICS)

**7:30 am** **Registration**
The registration table will be open throughout the duration of the conference.
Granite Ballroom Foyer, 1st Floor

**8:15 am** **Breakfast Buffet** (provided)

**8:55 am** **Welcoming Remarks**
Kameron Johnson, Chair-Elect
Juvenile Law Section

**9:00 am** **In Re Gault: Foundation for Juvenile Law Today** (.50 Hour)
Nydia Thomas, Special Counsel
Office of General Counsel
Texas Juvenile Justice Department

**9:30 am** **KEYNOTE ADDRESS**
**Making a Murderer: Zealous Advocacy and Best Practices** (1.25 Hour Ethics)
Laura Nirider, Clinical Assistant Professor of Law
Project Co-Director, Center on Wrongful Convictions of Youth
Northwestern Pritzker School of Law
Chicago, Illinois

**10:45 am** **BREAK**

**11:00 am** **The Legacy of *Roper, Graham* and *Miller*** (0.75 Hour)
Elizabeth Henneke, Policy Attorney
Texas Criminal Justice Coalition
Austin, Texas

**11:45 am** **Lunch** (on your own)

**1:00 pm** **Prosecution: Doing Justice** (0.75 Hour Ethics)
Katherine McAnally, First Assistant County Attorney
Burnet County Attorney's Office
Burnet, Texas

**1:45 pm** **Trouble to Triumph** (0.50 Hour)
Jason Wang, CEO and Founder
Byte Size Moments
Dallas, Texas

**2:15 pm** **Break**

**2:30 pm** **Certifications: *Kent* to *Moon*** (1.00 Hour)
Bexar County Contingency Prosecutor and Defense and Probation

**3:30 pm** **Mental Health Challenges: Diminished Culpability** (0.75 Hour)
Dr. Stephen Thorne, Clinical Psychologist
Austin, Texas

**4:15 pm** **Juvenile Law Section Annual Meeting and Election of Officers**

**4:45 pm** **Adjourn**

**7:00 pm** **Silent Auction Sponsored by the Juvenile Law Foundation**
Live Music and Cash Bar

## TUESDAY, FEBRUARY 28

6.00 HOURS (INCLUDING 1.00 HOUR OF ETHICS)

**7:45 am** **Breakfast Buffet** (provided)

**8:30 am** **Ethical Issues in High-Profile Cases** (0.50 Hour Ethics)

Patricia Cummings, Chief
Conviction Integrity Unit
Dallas County District Attorney's Office
Dallas, Texas

**9:15 am** **KEYNOTE ADDRESS**
**When it Hurts to Help a Child** (1.00 Hour)

Rebecca Brown Assistant Professor
Department of Family Medicine
Schulich School of Medicine
Western University
London, Ontario

**10:00 am** **Break**

**10:15 am** **Custody and Detention Hearings** (0.50 Hour)

Stephanie Stevens, Clinical Professor of Law
St. Mary's School of Law
San Antonio, Texas

**10:45 am** **Cheap, Dangerous, and Marketed to Kids: New Ways to Fight Synthetic Drugs** (0.75 Hour)

Paul Singer, Deputy Chief
Consumer Protection Division
Office of Attorney General

Patricia Stein, Senior Assistant Attorney General
Health Fraud Division
Office of Attorney General

**11:30 am** **Presentation of the Robert O. Dawson Visionary Leadership Award**

Riley Shaw, Chair
Juvenile Law Section

**11:45 am** **Lunch** (on your own)

**1:15 pm** **Equal Justice: Immigration Issues in Juvenile Law** (0.75 Hour)

Eric Tijerena, Policy Analyst
U.S. Citizenship and Immigration Services
Department of Homeland Security
Washington, DC

**2:00 pm** **Cross-Over Youth and Court** (0.50 Hour)

The Honorable Darlene Byrne
126th District Court
Austin, Texas

**2:30 pm** **Adjudications and Disposition Hearings** (0.50 Hour)

Leslie Barrows, Attorney at Law
Fort Worth, Texas

**3:00 pm** **Break**

**3:15 pm** **Determinate Sentence Cases: 0 to 40** (0.50 Hour)

Sharon Pruitt, Staff Attorney
Juvenile Crime Intervention
Office of the Attorney General
Austin, Texas

**3:45 pm** **Sex Offender Evaluation and Treatment** (1.00 Hour)

Matthew Ferrara, Ph.D.
Forensic and Clinical Psychology
Austin, Texas

**4:30 pm** **Adjourn**

**4:45 pm** **Juvenile Law Council Meeting**

**7:00 pm** **Juvenile Law Section 30th Anniversary Party**

Yacht Club
Music, Dancing, Photo Booth, and Cash Bar

## WEDNESDAY, MARCH 1

3.00 HOURS (NO ETHICS)

**7:45 am** **Breakfast Buffet** (provided)

**8:30 am** **TJJD Update: Intake, MLOS, Placement, Parole, Regionalization, and Other Initiatives** (0.75 Hour)

Jill Mata, General Counsel
Texas Juvenile Justice Department
Austin, Texas

**9:15 am** **KEYNOTE ADDRESS**
**Risk Assessment in Juvenile Justice: Enhancing Decision-Making, Case Planning, and Service Delivery** (1.00 Hour)

Dr. Gina Vincent, Associate Professor and Director of Translational Law & Psychiatry Research
University of Massachusetts Medical School
Worcester, Massachusetts

**10:15 am** **Break** 30 Minute Break to Allow Additional Time to Check-Out

**10:45 am** **Roadmap to the 85th Texas Legislative Session** (0.50 Hour)

Riley Shaw, Chief Juvenile Prosecutor
Tarrant County District Attorney's Office
Fort Worth, Texas

**11:15 am** **Case Law Update** (0.75 Hour)

The Honorable Pat Garza
Associate Judge, 386th District Court
San Antonio, Texas

**12:00 pm** **Adjourn**

Click Here to Return to Table of Contents

STATE BAR OF TEXAS
JUVENILE LAW SECTION
P.O. Box 12487
Austin, Texas 78711-2487

NON-PROFIT ORGANIZATION
U.S. POSTAGE
PAID
PERMIT NO. 1804
AUSTIN, TEXAS

# HOTEL ACCOMMODATIONS

## HORSESHOE BAY RESORT

**200 Hi Circle North**
**Horseshoe Bay, Texas 78657**

**Phone: 830.598.2511**
**hsbresort.com**

**Check-In is at 4:00 p.m. I Check-Out is at 11:00 a.m.**

### RATES AND RESERVATIONS

**The hotel is offering a discounted rate of $159 for a Standard Room.**

The deadline to make reservations is February 6, 2017. Reservations made after this deadline will only be honored based on availability.

Make your reservations online at http://bit.ly/2bJhezq. This is a customized website for attendees of the Juvenile Law Conference only; therefore, the rates listed should automatically be at the contracted rate. You may also contact Horseshoe Bay Reservation Line directly at 877.611.0112. If you call to make reservations, please specify that you are with the Juvenile Law Section to ensure the special conference rate.

### PARKING

Horseshoe Bay will have complimentary self-parking. Valet parking is available for approximately $16.00 per day.

### RESORT SHUTTLE

The Resort offers a complimentary on-site tram rotation to the Yacht Club, Spa, Marina, Cap Rock restaurant, and Slick Rock restaurant. Transportation is available off-site and is subject to a fee. If you are interested in obtaining a shuttle off-site, please contact the Resort's concierge desk.

### GROUP AIRPORT SERVICES/PICK UP/DROP-OFF (PER PERSON)

Horseshoe Bay Resort's fleet of vehicles will provide personalized chauffeured service to transport guests to the Resort starting at a rate of $45.00 per person with four or more people, one way. Please contact the front desk at 830.598.2511 for more information.

Click Here to Return to Table of Contents

## REVIEW OF RECENT CASES





*By Subject Matter*



*By Case*

## APPEALS

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

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

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

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

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

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

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

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

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

**Held:** Affirmed

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

accord Mitchell v. State, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

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

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

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

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

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

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

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

probation records, including that they contained other evidence of Mitchell's troubled childhood that he used to plead for leniency from the jury during closing arguments in the punishment phase of trial. See Lopez, 343 S.W.3d at 143.

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

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

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

## DISPOSITION PROCEEDINGS

### JUDGEMENT SENTENCING JUVENILE TO "LIFE WITHOUT PAROLE" REFORMED TO "LIFE."

¶ 16-4-2. **Alas v. State**, MEMORNADUM, No. 01-15-00569-CR, 2016 WL 4055580 [Tex.App.—Houston (1st Dist.), 7/28/2016].

**Facts:** Victor Alas, a minor, was convicted of capital murder and sentenced to life in prison without the possibility of parole for his role in the death of a teenage girl.

**Held:** Affirmed, judgement reformed to delete the phrase "without parole."

**Memorandum Opinion:** In his first issue, Alas argues that his sentence of life imprisonment without the possibility of parole violates Texas law. He argues that, because he was a juvenile at the time of the offense, Section 12.31(a)(1) of the Texas Penal Code requires that his life sentence include the possibility of parole. We agree.

Section 12.31 specifies the punishment for an individual convicted of capital murder when the State is not seeking the death penalty. See TEX. PENAL CODE ANN. § 12.31(a). The mandatory punishment is "life without parole, if the individual committed the offense when 18 years of age or older." Id. § 12.31(a)(2). It is "life, if the individual committed the offense when younger than 18 years of age." Id. § 12.31(a)(1); Lewis, 428 S.W.3d at 863 ("Life imprisonment, with the possibility of parole, is the mandatory sentence for defendants convicted of capital murder for crimes they committed as juveniles.").

Alas was 16 years of age at the time of the offense. After the jury found him guilty of capital murder, the trial court immediately pronounced punishment as "confinement in the Texas Department of Criminal Justice Institutional Division for life," consistent with Section 12.31(a)(1). But, contrary to the requirements of Section 12.31(a)(1), the trial court's written judgment reflects that Alas was sentenced to life imprisonment without the possibility of parole.

In its brief, the State "concurs that the judgment should be reformed to correct the clerical error and reflect that appellant is subject to review for parole." See TEX. R. APP. P. 43.2 (permitting court of appeals to modify trial court's judgment and affirm it as modified); Lewis v. State, 402 S.W.3d 852, 867 (Tex. App.—Amarillo 2013) (reforming judgment on capital murder conviction of juvenile from "life without parole" to "life"), aff'd, 428 S.W.3d 860 (Tex. Crim. App. 2014) (focusing on related issue of whether sentence of minor to life imprisonment without individualized sentencing hearing is cruel and unusual punishment).

**Conclusion:** Because the written judgment imposes a sentence on Alas that goes beyond what is allowed by statute, as the State concedes, we sustain Alas's first issue.

---

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

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

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

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

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

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

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

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

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

Take Najar v. Arizona, No. 15–8878. There, the sentencing judge identified as mitigating factors that the defendant was "16 years of age" and "emotionally and physically immature." App. to Pet. for Cert. in No. 15–8878, p. A–51. He said no more on this front. He then discounted the petitioner's efforts to rehabilitate himself as "nothing significant," despite commending him for those efforts and expressing hope that they would continue. Id., at A–52. The sentencing judge did not evaluate whether Najar represented the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." Montgomery, 577 U.S., at –— (slip op., at 16).

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

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

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

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

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

the Arizona courts will be as puzzled by this directive as I am.

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

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

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

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

For example, in Purcell v. Arizona, No. 15–8842, a 16–year–old gang member fired a sawed-off shotgun into a group of teenagers, killing two of them, under the belief that they had flashed a rival gang's sign at him. He was ultimately convicted of two counts of first-degree murder, nine counts of attempted first-degree murder, and one count each of aggravated assault and misconduct involving weapons. The trial court considered his youth, identified his age as a mitigating factor, and still sentenced him to life without parole. The remaining cases are in the same vein. See Tatum v. Arizona, No. 15–8850 (17–year–old defendant convicted of first-degree murder, conspiracy to commit armed robbery, attempted armed robbery, and aggravated assault); Najar v. Arizona, No. 15–8878 (juvenile convicted of first-degree murder and theft); Arias v. Arizona, No. 15–9044 (16–year–old defendant pleaded guilty to two counts of first-degree murder, two counts of second-degree murder, two counts of kidnapping, four counts of armed robbery, and one count each of first-degree burglary, conspiracy to commit first-degree murder, and conspiracy to commit armed robbery); DeShaw v. Arizona, No. 15–9057 (17–year–old defendant convicted of first-degree murder, armed robbery, and kidnapping).

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

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

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

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

## WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

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

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

**Facts:** Appellant, who was fifteen years old at the time of the offense, was charged with the delinquent conduct of capital murder. The State filed a petition asking the juvenile court to waive jurisdiction and transfer the case to criminal district court. On the State's motion, the trial court ordered a psychological examination of appellant and ordered the probation department to prepare an investigation of appellant and the circumstances of the offense, a diagnostic study and social evaluation. Once the reports were completed, the trial court conducted an evidentiary hearing. The State and defense each called three witnesses to testify. The evidence showed that the Kaufman County Sheriff's Office responded to a call at a

house in Forney at 11:30 a.m. on November 28, 2015. On arrival, a deputy found the homeowner lying face down in the doorway. He had been shot in the neck and had no pulse. The front door was wide open and the doorframe smashed as if kicked or forced open. The scene was consistent with a home invasion burglary.

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

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

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

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

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

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

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

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

At the transfer hearing, the State bears the burden of proving, by a preponderance of the evidence, that waiver of the juvenile court's jurisdiction is appropriate. Moon v. State, 451 S.W.3d 28, 40–41 (Tex. Crim. App. 2014). The hearing is not a trial on the merits, and the court does not consider guilt or innocence; rather, it considers only whether the juvenile's and society's best interests would be served by maintaining custody of

the child in the juvenile system or by a transfer to a district court for trial as an adult. Lopez v. State, 196 S.W.3d 872, 874 (Tex. App.–Dallas 2006, pet. ref'd).

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

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

On appeal, in evaluating a juvenile court's decision to waive jurisdiction, we first review the juvenile court's specific findings of fact regarding the section 54.02(f) factors under "traditional sufficiency of evidence review." Moon, 451 S.W.3d at 47. But, we review the juvenile court's ultimate waiver decision under an abuse of discretion standard. Id. As the court of criminal appeals has explained:
... in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?
Id.

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

The trial court's order contained the following specific findings under section 54.02(f):
1. The offense alleged to have been committed was against the person of another.
2. The sophistication and maturity of the Respondent are sufficient to transfer the child to the appropriate district court for criminal proceedings.
3. The record and previous history of the Respondent indicate a higher degree of supervision is indicated and that transfer to the appropriate district court is required.
4. The prospects of adequate protection of the public and the likelihood of the rehabilitation of the Respondent by use of the procedures, services, and facilities currently available to this Court are remote.

**Held:** Affirmed

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

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

the trial court's finding that appellant's sophistication and maturity justified transfer.

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

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

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

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

## WAIVER OF RIGHTS

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

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

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

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

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

**Held:** Affirmed

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

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

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

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

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

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

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

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

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

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

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

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

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