# Juvenile Law Section
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**NEWSLETTER EDITOR**

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

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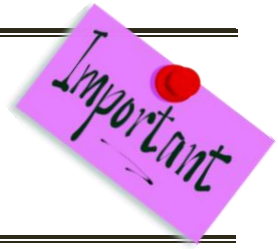


The "Review of Recent Cases" includes cases that are hyperlinked to Casemaker, a free service provided by TexasBarCLE. To access these opinions, you must be a registered user of the TexasBarCLE website, which requires creating a password and log-in. If you do not wish to receive emails from TexasBarCLE,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

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## EDITOR'S FOREWORD By Associate Judge Pat Garza

This year I will be attending my 45th High School Reunion. For those of you who don't know, I graduated from San Antonio Jefferson High School. Now, my high school isn't just another high school. It was built at a time when putting people to work was a national obligation.

The school was completed in 1932, in the middle of the depression, at a cost of $1,250,000. An exorbitant amount of money for the time. But what it did, was put people to work. The building itself, in Spanish-Moorish design, is built around two large patios with a large silver doomed tower and a sub-tower. The roof is made of red Spanish tile and wrought iron balconies protruded from the windows. The columns of the entryway at the main entrance have very fine elaborate carvings. The ornamental concrete was made in sections using concrete molds that were then transported to the site. The interior of the school and a special hexagonal pond located in an interior patio are all decorated with decorative tile in Spanish motif.

The Auditorium has a capacity of 2,000 students, an inclined floor which led to a sunken orchestra pit and an enclosed movie projection booth. A large proscenium arch in a half circle design crowns the auditorium stage. In 1932, this was more than state-of-the-art.

In 1937, Jefferson High School became nationally known when it was chosen out of 1,500 schools as the most outstanding high school in America. The following year, March 1938, Life Magazine featured the story of Jefferson High School in pictures. Twentieth Century Fox filmed two movies on the Jefferson campus: "High School" starring Jane Withers in 1938 and its sequel "Texas Girl" also with Jane Withers in 1939. On March 14, 1938, Paramount Pictures began making a special newsreel of Jefferson as America's most modern high school. By the close of 1938, Jefferson had appeared in Life, The American Weekly and several European publications and in 1947 it also appeared in National Geographic magazine.

Thomas Jefferson High School is not only listed as a Texas State Landmark but is also on the National Register of Historic Places. At a time when new cookie-cutter high schools are being built to resemble college campuses, Jefferson stands out as a unique and special endorsement of what men and women during the depression could do. And by the way, it still looks beautiful. If you're ever in San Antonio, I invite you to check it out.

**9th Annual Juvenile Law Conference**. The Juvenile Law Section of the Houston Bar Association will be hosting the 9th Annual Juvenile Law Conference on September 14-15, 2018. After last year's cancelled conference because of Hurricane Harvey, Brian Fischer is really gearing up in putting together a top-notch event. This year's conference will once again be held at the Council on Recovery, in Houston, Texas. Registration information is available online at http://www.juvenilelaw.org/.

**32nd Annual Robert Dawson Juvenile Law Institute**. The Juvenile Law Section's Juvenile Law Institute will be held on February 24- 27, 2019, at the Doubletree Hotel in Austin, Texas. Chair-Elect Mike Schneider and the planning committee are working hard to make this an outstanding conference. Registration information will be sent out and available online at www.juvenilelaw.org in October.

***Education would be much more effective if its purpose was to ensure that by the time they leave school every boy and girl should know how much they do not know, and be imbued with a lifelong desire to know it.***

William Haley

## CHAIR'S MESSAGE By Kaci Singer

I am honored and excited to be serving as the Chair of the Juvenile Law Section for the 2018-2019 Bar Year and am looking forward to a great year for the Section. One thing I would like to do this year is to get Section members involved in Section work. The best way for you to get involved is for you to join a standing committee. We have a publications, social, and legislative committee, each with its own responsibilities. If you are interested in joining a committee, please let me know at kaci.singer@tjjd.texas.gov. We could really use people to help update forms.

Speaking of forms, they are available on our website, which is http://www.juvenilelaw.org/. Another thing that was added to our website fairly recently is a directory of Section members. You can search by name and access contact information for Section members, as available on the State Bar's website.

In other news, the Council has started planning for the 32nd Annual Juvenile Law Conference, which will be February 24 – 27, 2019, in Austin. The agenda is shaping up to be a great mix of advanced legal, practical, and philosophical juvenile justice topics. We will again be holding a half-day Nuts and Bolts Conference on Sunday afternoon. We also have several social events planned in order to create opportunities for you to network with your colleagues from around the state. Look for information on registration soon.

The Texas Juvenile Justice Department is putting the finishing touches on the 9th Edition of Texas Juvenile Law (commonly referred to as the *Dawson Book*). This edition will be made available electronically and will have the option to print on demand. The anticipated release date is September 2018. Expect to hear more details then.

If you have any ideas for ways the Section can help benefit Section members, we would love to hear from you.

## REVIEW OF RECENT CASES

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## RECENT CASES

### JUDICIAL DISQUALIFICATION

**RECUSAL JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING DEFENDANT'S MOTION, WHERE PRESIDING JUDGE KNEW VICTIM'S BROTHER IN MURDER TRIAL.**

¶ 18-3-4. **Knox v. State**, MEMORANDUM, No. 02-17-00232-CR, 2018 WL 3385862 (Tex.App.—Dallas, July 12, 2018).

**Facts:** This case began in 1973 with the murder of Donald Rodgers in Knox's home.2 At the time of the murder, Donald was fourteen years old and Knox was fifteen years old. Although the State filed a petition against Knox for Donald's murder in 1973, it was dismissed for insufficient evidence and the case went cold.

In 2015, Jeff Rodgers, Jr., Donald's older brother, contacted the Fort Worth Police Department to inquire about Donald's case. The FWPD reopened the investigation into Donald's murder, and after obtaining new evidence, the State arrested Knox and charged him with murder.

On June 28, 2017, Knox pleaded guilty to the offense of murder without an agreement as to punishment. The trial court held a sentencing hearing on July 10, 2017. The State called five witnesses and Knox called three witnesses, and the trial court admitted sixteen exhibits into evidence.

One of the State's witnesses was Jeff. Following Jeff's testimony, the trial judge had the following exchange with Jeff:

THE COURT: Let me ask you something. Now, I'm only asking you this because I know you --
THE WITNESS: Yes, sir.
THE COURT: -- and that you've spent a lot of time over there with the juveniles.
THE WITNESS: That's correct.
THE COURT: This incident happened when both your brother and Mr. Knox were juveniles.
THE WITNESS: That's correct.
THE COURT: I think your brother was 14.
THE WITNESS: That's correct.
THE COURT: Mr. Knox was 15. Which was a long time ago, you're right. It was almost 44 years ago and it was tragic. What do you feel justice is in your mind?
THE WITNESS: My family and I have talked about this in depth for the last several months and we've essentially determined that justice would be at least 30 years. I understand the law allows for two to 99 years. I understand there's circumstances that may not allow for all of that. But, you know, it was a juvenile -- it was a juvenile crime back then and it is my belief that it did not have to happen the way it did. Had he come forward at that time and done the right thing, based on my knowledge of the juvenile justice system, this matter would probably be all resolved by now. You know, it wasn't. And there was a series of [sic] lasts for 44 years that covered this up, so ...
THE COURT: Did you believe back then, after you heard the story, that Mr. Knox was guilty back then, even back in '73 or did you actually believe that someone had broke into the home?
THE WITNESS: Frankly, Judge, I wasn't aware of the details until later. I disconnected myself very quickly, went back home and it wasn't until many years later that I found out -- I was under the impression that somebody had been arrested. I didn't follow through with it and my parents didn't share a lot with me because right after I graduated I was commissioned and went away to the Air Force. I wish it had been handled earlier, that way my parents would have known that somebody was held accountable for the loss of their son, their fifth child, and that still hasn't happened yet.
THE COURT: All right. Thank you, Mr. Rodgers. Appreciate it.
THE WITNESS: Sure. Uh-huh.

After hearing the remainder of the punishment evidence, the trial court sentenced Knox to forty years in the Institutional Division of the Texas Department of Criminal Justice. The trial court indicated that the factors that supported its sentencing determination were Knox's use of a bolt-action shotgun, then stabbing Donald seven times and staging the scene to look like there was a break-in. According to the trial court, these actions clearly demonstrated that Knox knew what he was doing. The trial court also noted that Knox's six subsequent convictions for various offenses coupled with Knox's admission that he had been a drug dealer demonstrated a life marked by criminal activity during the years since Donald's murder. Indeed, when pointedly asked by the trial court whether Knox honestly believed that he deserved probation as an appropriate punishment for Donald's murder, Knox conceded, "Not really, sir."

On August 7, 2017, Knox filed a motion for new trial and motion to recuse the trial judge, Judge Wayne Salvant, based solely on the above-quoted exchange between Judge Salvant and Jeff. Judge Salvant forwarded the motion to recuse to Judge David Evans, presiding judge for the Eighth Administrative Judicial Region of Texas. The State filed a response to the motion to recuse, which included affidavits from a prosecutor and Jeff. The prosecutor indicated that she "personally heard Judge Salvant state he knew Mr. Jeff Rodgers ('Mr. Rodgers'), the victim's brother[,]" and that "[a]t first, it concerned me[.]" However, the prosecutor stated that by the time Judge Salvant finished his question and explained how he knew Jeff, she was no longer concerned. The prosecutor further stated that Judge Salvant later communicated to the prosecutors and Knox's counsel in chambers that he

does not know Mr. [Jeff] Rodgers personally. When Judge Salvant saw Mr. Rodgers in the courtroom, he recognized him but did not know from where. It was only when Mr. Rodgers testified he retired from Tarrant County juvenile services that Judge Salvant realized from where he recognized Mr. Rodgers.

Jeff's affidavit likewise confirmed that during his employment with Tarrant County Juvenile Services, he had known Judge Salvant professionally through brief interactions during yearly tours that Jeff would lead for Tarrant County judges. But Jeff stated that other than brief interactions to answer questions on those tours (of which Jeff could recall no specific conversations), he had no other interactions with Judge Salvant.

After conducting a hearing, Judge Evans denied Knox's motion to recuse. This appeal followed.

Knox raises four points of error asserting an abuse of discretion by Judge Evans in denying the motion to recuse Judge Salvant because (1) Judge Salvant is a material witness, (2) Judge Salvant's impartiality might be reasonably questioned, (3) Judge Salvant has a personal bias or prejudice concerning the subject matter or Knox, and (4) Judge Salvant has personal knowledge of disputed evidentiary facts.

**Held:** Affirmed

**Memorandum Opinion:** To determine whether the court hearing the motion to recuse abused its discretion, we must determine whether it acted without any guiding rules or principles. Abdygapparova v. State, 243 S.W.3d 191, 197–98 (Tex. App.—San Antonio 2007, pet. ref'd); Mosley v. State, 141 S.W.3d 816, 834 (Tex. App.—Texarkana 2004, pet. ref'd) (adding that the "mere fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate judge does not demonstrate [an abuse of discretion]"). In other words, "an appellate court should not reverse a trial judge whose ruling on the motion was within the zone of reasonable disagreement." Kemp, 846 S.W.2d at 306. In reviewing the denial of the motion, we must consider the totality of the evidence elicited at the recusal hearing. Id.

A. Points One and Four

In his first point, Knox alleges that Judge Salvant should be recused because he is a material witness concerning Knox's motion for new trial. Knox contends that the extent of the relationship between Judge Salvant and Jeff remains unknown. In his fourth point, Knox similarly alleges that Judge Salvant has personal knowledge of disputed facts.

Texas Rule of Civil Procedure 18b states, in relevant part, that "[a] judge must recuse in any proceeding in which: the judge has personal knowledge of disputed evidentiary facts concerning the proceeding." Tex. R. Civ. P. 18b(b)(3). Knox fails, however, to identify any knowledge of a disputed evidentiary fact possessed by Judge Salvant. Indeed, our review of the record reveals nothing to support Knox's bare assertion to the contrary. See Yorkshire Ins. Co. v. Seger, 279 S.W.3d 755, 774 (Tex. App.—Amarillo 2007, pet. denied) (refusing to "find recusal appropriate solely on the basis of speculation regarding facts that may or may not be known by the presiding judge" when the party seeking recusal "fail[ed] to identify any specific knowledge of disputed evidentiary facts" purportedly held by judge).

We also cannot agree with Knox's assertion that "the extent of the relationship between the trial court and Mr. Rodgers remains unknown." The State's response to Knox's motion to recuse provided affidavit testimony from a prosecutor and Jeff Rodgers explaining that Judge Salvant only knew Jeff from brief, unremarkable, professional interactions when Jeff would lead Tarrant County judges on yearly tours of Tarrant County Juvenile Services facilities. Moreover, Knox did not object to the admission of these affidavits at the recusal hearing or put on any testimony or evidence contradicting them.3

Gentry v. State, an unpublished case in which recusal was required due to a judge's personal knowledge of disputed evidentiary facts, is instructive here. No. 06-05-00237-CR, 2006 WL 932057, at *1 (Tex. App.—Texarkana Apr. 12, 2006, no pet) (mem. op., not designated for publication). Gentry had been arrested after walking in and out of traffic. Id. The trial judge denied Gentry's motion to suppress the evidence that was obtained following the arresting officer's decision to stop and frisk Gentry. Id. At the conclusion of the motion to suppress hearing, the trial judge stopped the prosecutor during closing argument and stated he would deny the motion to suppress because he had personally witnessed Gentry's actions before Gentry was arrested:

*You can stop. Because I'm going to be honest with you, I remember this day. I live on that road. This Motion is going to be denied because I'm one of them that almost hit them. I'm going to deny this Motion to Suppress. I'm not so sure that I wasn't one of them who called Officer Dreesen to be honest with you. I remember this day and I remember the situation. I'm going to deny the Defendant's Motion today; it's not going to be granted.*

*....*

*Like I say, I've got firsthand knowledge of the situation ... and I believe he has the right to do this [search the defendant].*

*....*

*To be honest with you, my decision is based on what I saw that day.*

Id. (emphasis added).

Thus, the court of appeals concluded that the trial judge based his ruling on personal knowledge rather than on evidence adduced at trial and in so doing committed an error requiring disqualification. See id. at *3; see also Gaal v. State, 332 S.W.3d 448, 543 (Tex. Crim. App. 2011) (identifying Gentry as "[a] clear

instance of 'personal knowledge of disputed evidentiary facts' requiring recusal").

Judge Salvant's comments here are nothing like those in Gentry. Unlike the trial court judge in Gentry, Judge Salvant indicated his specific reasons for assessing punishment at forty years—none of which concerned Jeff's testimony and all of which were derived from the testimony and evidence presented at the sentencing hearing. Judge Salvant's comment that he knew Jeff from Jeff's time working with juveniles simply does not indicate that Judge Salvant possessed knowledge of disputed evidentiary facts that he attained outside of the judicial proceedings and on which he based his sentencing determination.

Therefore, we hold that the recusal judge did not abuse his discretion because it is within the zone of reasonable disagreement to conclude based on the totality of the recusal-hearing evidence that Judge Salvant did not have personal knowledge of disputed evidentiary facts and that he is thus not a material witness. Accordingly, we overrule Knox's first and fourth points.

B. Points Two and Three
In his second and third points of error, Knox argues that Judge Salvant should have been recused based on his on-the-record exchange with Jeff, because Judge Salvant's impartiality may be reasonably questioned and because Judge Salvant has a personal bias or prejudice concerning Knox or the subject matter of the sentencing hearing.

The bias or lack of impartiality of a trial judge may be a ground for judicial disqualification when it is of such a character as to deny the defendant due process. Tex. R. Civ. P. 18b(b)(1)–(2); Gaal, 332 S.W.3d at 453 (recognizing one subsection concerns bias and the other concerns impartiality but that there is "much overlap between these two subsections"); Kemp v. State, 846 S.W.2d at 305–06. A judge's remarks during trial "usually will not support a bias or partiality challenge, although they may do so if they reveal an opinion based on extrajudicial information, and they will require recusal if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Gaal, 332 S.W.3d at 454 (internal quotation marks omitted).

Judge Salvant's comments "I'm only asking you this because I know you" and "you've spent a lot of time over there with the juveniles" may, at first blush, seem to indicate some bias or lack of impartiality. Indeed, the prosecutor agreed that "[a]t first, [the comments] concerned me[.]" However, as explained above, the evidence adduced at the recusal hearing demonstrated that Judge Salvant's knowledge of Jeff was limited to once-yearly, brief, professional exchanges during tours conducted by Jeff of the Juvenile Services Facilities and that the two had no relationship outside of these interactions. And, the record from the sentencing hearing demonstrates that the trial court based the sentencing decision, not on Jeff's recommendation or any prior interaction with Jeff, but on the evidence and testimony adduced at the sentencing hearing.

**Conclusion:** Thus, we hold that the recusal judge did not abuse his discretion because when considering the totality of the evidence presented at the recusal hearing, it is within the zone of reasonable disagreement to conclude Judge Salvant's comments that "I'm only asking you this because I know you" and that "you've spent a lot of time over there with the juveniles" do not reveal a high degree of favoritism toward the victim and his family based on extrajudicial information so as to make a fair judgment impossible. See id. Accordingly, we overrule Knox's second and third issues. Having held that the recusal judge did not abuse his discretion in denying Knox's motion to recuse, we affirm the trial court's judgment.

## DETERMINATE SENTENCE TRANSFER

**A JUVENILE COURT'S ORDER TRANSFERRING DETERMINATE SENTENCE PROBATION TO A CRIMINAL DISTRICT COURT IS NOT AN APPEALABLE ORDER.**

¶ 18-3-2. **In the Matter of D.M.**, MEMORANDUM, No. 01-17-00950-CV, No. 01-17-00951-CV, No. 01-17-00952-CV, No. 01-17-00953-CV, 2018 WL 3059738 [Tex.App.—Houston (1st Dist.), 6/21/2018].

**Facts:** In each juvenile court proceeding, the State filed a petition alleging delinquent conduct against appellant, charging her with delinquent conduct by committing the offense of aggravated robbery with a deadly weapon. And, in each proceeding, the juvenile court found that appellant engaged in delinquent conduct and assessed a determinate sentence of probation for a period of ten years. On April 19, 2017, the juvenile court held a hearing on the State's "motion to transfer these probations" and signed orders transferring appellant's determinate sentence probations from juvenile court to criminal district court. See TEX. FAM. CODE ANN. § 54.051(d) (West Supp. 2017). Appellant filed a notice of appeal of each trial court order.

**Held:** Appeal dismissed

**Memorandum Opinion:** Section 56.01 of the Texas Family Code sets out a juvenile's right to appeal a juvenile court's orders and specifically lists those orders. See TEX. FAM. CODE ANN. § 56.01(a), (c) (West Supp. 2017); In re J.H., 176 S.W.3d 677, 679 (Tex. App.—Dallas 2005, no pet.). A juvenile may appeal an order under:
(A) Section 54.02 respecting transfer of the child for prosecution as an adult;

(B) Section 54.03 with regard to delinquent conduct or conduct indicating a need for supervision;
(C) Section 54.04 disposing of the case;
(D) Section 54.05 respecting modification of a previous juvenile court disposition; or
(E) Chapter 55 by a juvenile court committing a child to a facility for the mentally ill or intellectually disabled. TEX. FAM. CODE ANN. § 56.01(c)(1).

Further, an appeal may be taken "by a person from an order entered under Section 54.11(i)(2) transferring the person to the custody of the Texas Department of Criminal Justice." Id. § 56.01(c)(2). An order under section 54.051 to transfer a determinate sentence probation to a criminal district court is not an order enumerated in section 56.01. See id. § 56.01(c)(1), (2); In re J.H., 176 S.W.3d at 679. Thus, the trial court's orders transferring appellant's determinate sentence probation to criminal district court are not appealable orders. See In re V.T., 479 S.W.3d 517, 518 (Tex. App.—Amarillo 2015, no pet.); In re T.D.S., No. 14-11-00005-CV, 2011 WL 2474056, at *1 (Tex. App.—Houston [14th Dist.] June 23, 2011, pet. denied) (mem. op.); In re J.H., 176 S.W.3d at 679.

After we notified her of our intent to dismiss the appeals unless she demonstrated that we have jurisdiction, appellant responded with a motion to retain the appeals. In her motion, she asserts that the list of appealable orders set out in section 56.01 is not exclusive and "the transfer of a determinate sentence probation from juvenile court to adult district court is akin to modification of a previous juvenile court disposition," which is an appealable order under section 56.01(c)(1)(D) of the Family Code. Appellant further asserts that the proceedings here are distinguishable from those in In re V.T. and In re T.D.S. because "they both involved technical complaints prior to the transfer hearing, and not a complete loss of jurisdiction to even hold a transfer hearing," as in appellant's proceedings.

Appellant has not demonstrated that we have jurisdiction over her appeals. "The right of appeal in juvenile proceedings is specifically controlled by Section 56.01 of the Texas Family Code." C. L. B. v. State, 567 S.W.2d 795, 796 (Tex. 1978). Section 56.01 enumerates which orders are appealable, and "there is no right to appeal orders not so included." In re J.H., 176 S.W.3d at 679. Under "the plain language of the statute," a juvenile court's order transferring determinate sentence probation to a criminal district court is not an appealable order. In re J.M., No. 03-14-00027-CV, 2015 WL 3393819 at *3 (Tex. App.—Austin May 21, 2015, no pet.) (mem. op.). And, we do not have jurisdiction over appellant's appeals even though she contends that the juvenile court lost jurisdiction to hold a transfer hearing. A claim of lack of jurisdiction "must be brought to a court through an appropriate vehicle and ... an order transferring determinate sentence probation to district court is not appealable." In re V.T., 479 S.W.3d at 518–19; see In re J.M., 2015 WL 3393819 at *3 (dismissing attempted appeal of order transferring determinate sentence probation to criminal district court when appellant contended trial court erred because it did not hold hearing before appellant's eighteenth birthday).

**Conclusion:** Accordingly, we dismiss the appeals for want of jurisdiction. We dismiss all pending motions as moot.





## WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

**PRIOR TO SEPTEMBER 1, 2013, IF A DISCRETIONARY TRANSFER WAS HEARD AFTER THE CHILD'S 18TH BIRTHDAY, THE PROSECUTOR MUST SHOW, NOT THAT THEY EXERCISED DUE DILIGENCE IN AN ATTEMPT TO COMPLETE THE TRANSFER, BUT THAT IT WAS NOT PRACTICABLE TO PROCEED BEFORE THE JUVENILE'S 18TH BIRTHDAY FOR A REASON BEYOND THE CONTROL OF THE STATE.**

¶ 18-3-8. **In the Matter of A.M.**, MEMORANDUM, No. 01-18-00017-CV, 2018 WL 3150700 [Tex.App.—Houston (1st Dist.), 6/28/2018].

**Facts:** This case involves the interpretation and application of a since-amended statute concerning the transfer of minors to criminal district court to be tried as adults. The statute has been amended in a manner that may have avoided the result we are bound to reach here, but the disposition of this appeal must be resolved under the earlier version of the statute.

When Antonnyer Morrison was a minor, he was indicted for murder. In June 2012, after Morrison had turned 18, the juvenile court heard and granted the State's petition for discretionary transfer from juvenile court to criminal district court. The case was transferred, and Morrison was tried as an adult, convicted of murder, and sentenced to 45 years' confinement.

Our sister court subsequently vacated the criminal district court's judgment because the juvenile court did not make the requisite findings under Section 54.02(j) of the Family Code. Morrison v. State, 503 S.W.3d 724, 725, 728 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). Relying on a recently-issued opinion by the Court of Criminal Appeals, our sister court explained that when a transfer occurs after a juvenile's 18th birthday, Section 54.02(j)(4) requires the State to prove that it was not practicable to proceed to certification before the juvenile's 18th birthday. Id. at 727 (citing Moore v. State, No. PD-1634-14, 2016 WL 6091386 (Tex. Crim. App. Oct. 19, 2016)). At the June 2012 transfer hearing, the State presented no evidence that it was not practicable to proceed before Morrison turned 18. The State instead argued that Section 54.02(j) required only that the transfer petition be filed—but not ruled on—before Morrison turned 18. Our sister court rejected this argument, remanded the case to the juvenile court to afford the State an opportunity to satisfy its burden

of proof, and ordered that the juvenile court file findings of fact in support of its ruling. Morrison, 503 S.W.3d at 728.

On remand, the State filed an amended petition, and the juvenile court held a hearing at which the State presented testimony from the lead investigator, firearms examiner, and probation officer, among others. However, none of the district attorneys involved in the investigation or prosecution testified. The juvenile court found that the State proved by a preponderance of the evidence that, for reasons beyond its control, it was not practicable to proceed in the juvenile court before Morrison's 18th birthday. The juvenile court entered 50 fact findings detailing the murder investigation's chronology, Morrison's arrest, and the transfer proceedings. None of the fact findings addressed whether it was practicable for the State to take certain actions during various stages of its investigation to expedite the transfer hearing or whether the State's failure to take such actions was caused by the prosecutor's erroneous interpretation of Section 54.02(j). Instead, the juvenile court simply stated in a conclusion of law that it was not practicable for the State to have proceeded before Morrison's 18th birthday.

In a single issue, Morrison argues that the juvenile court erred in waiving its jurisdiction because the State failed to prove by a preponderance of the evidence that, for a reason beyond the State's control, it was not practicable to proceed to certification before Morrison turned 18. See TEX. FAM. CODE §§ 54.02(j)(4)(A), 56.01(c)(1)(A); TEX. PENAL CODE § 19.02(b).

**Held:** Juvenile court transfer order vacated, case dismissed.

**Memorandum Opinion:** After Morrison's 18th birthday, the Legislature amended the statute governing a juvenile court's jurisdiction over incomplete proceedings. Acts 2013, 83rd Leg., ch. 1299 (H.B. 2862), § 7, eff. Sept. 1, 2013. Under the current statutory scheme, when the State files a petition to transfer before the juvenile turns 18, the juvenile court retains jurisdiction to rule on the petition after the juvenile turns 18 so long as the juvenile court finds that the prosecutor exercised due diligence in an attempt to complete the transfer proceeding before the juvenile's 18th birthday. TEX. FAM. CODE § 51.0412. But under the scheme in effect at the time of June 2012 transfer hearing—which is the version that continues to apply to this appeal—the juvenile court had to find that it was not practicable to proceed before Morrison's 18th birthday for a reason beyond the control of the State for the juvenile court to retain jurisdiction. Id. § 54.02(j)(4)(A). The former scheme imposes a higher burden on the State because impracticability is more difficult to prove than due diligence and because "the State" includes not only the prosecution but law enforcement as well.

Bound by the earlier version of the statute, we consider the evidence of impracticability for reasons beyond the State's control. The evidence demonstrates a lack of urgency at several points during the criminal investigation and while the State petitioned for transfer. To begin, no one expedited the firearms analysis, and the State waited for that analysis before proceeding against Morrison. While Morrison was charged and apprehended approximately 8 weeks before his 18th birthday, there is no evidence that the prosecutor attempted to expedite the transfer hearing after his arrest. Nor is there any evidence that the juvenile court was unable to hear the petition before Morrison's 18th birthday. Morrison's psychological evaluation and social home study report, both of which were needed for the transfer hearing, were not completed until after Morrison turned 18—but the evidence shows that both reports could have been completed earlier had the State not delayed in providing the psychiatrist and juvenile probation officer the necessary information for the reports.

**Conclusion:** In other words, the evidence shows that it was practicable to proceed before Morrison's 18th birthday. But, as shown by the prosecutor's statements during the June 2012 transfer hearing, before Moore was decided, the prosecutor believed it was necessary only to file—but not resolve—the transfer motion before the defendant turned 18. Moore held otherwise, and we are bound by that ruling.

We hold that the State failed to prove that it was not practicable to proceed before Morrison's 18th birthday for a reason beyond the State's control and that the juvenile court erred in transferring the case. Accordingly, we must vacate the juvenile court's order and dismiss the case.

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**REPEALED STATUTE PROVIDES THAT A DEFENDANT MAY APPEAL A DISCRETIONARY TRANSFER FROM JUVENILE COURT IN CONJUNCTION WITH THE APPEAL OF A CONVICTION … OR AN ORDER OF DEFERRED ADJUDICATION…. AND, AS A RESULT, MAY APPEAL THE TRANSFER DECISION WHEN APPEALING THE CONVICTION RESULTING FROM HIS DEFERRED ADJUDICATION VIOLATION. CASE REVERSED BASED ON *MOON.***

¶ 18-3-6. **Bell v. State,** --- S.W.3d ----, NO. 01-15-00510-CR, 2018 WL 3150851 (Tex.App.—Houston (1st Dist., 6/28/2018).

**Facts:** The State asked the juvenile court to waive jurisdiction. At the hearing on the State's motion, the juvenile court admitted three exhibits: proof that Bell had been served, a stipulation of Bell's birth date, and a probation report. The juvenile court also heard

testimony from three witnesses, including Deputy A. Alanis of the Harris County Sheriff's Office.

After the hearing, the juvenile court waived jurisdiction and transferred the case to the criminal district court. The juvenile court concluded that, because of the seriousness of Bell's offense, the welfare of the community required criminal proceedings.

In the criminal district court, Bell pleaded guilty without an agreed recommendation. The court entered an order of deferred adjudication, deferred a finding of guilt, and placed Bell on community supervision for six years. The State later moved to adjudicate, alleging that Bell had violated the terms of his supervision. In May 2015, the district court granted the motion, found Bell guilty of aggravated robbery, and sentenced Bell to 20 years' imprisonment. Bell appealed.

We consider the State's new argument that this Court lacks jurisdiction to hear Bell's complaint about the juvenile transfer because he did not raise his challenge when trial court entered its order of deferred adjudication.

**Held:** Court retains jurisdiction

**Opinion:** Bell's appeal of the juvenile court's transfer order is governed by now-repealed article 44.47 of the Code of Criminal Procedure.1 Article 44.47 provided in relevant part:
(a) A defendant may appeal an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02, Family Code.
(b) A defendant may appeal a transfer under Subsection (a) only in conjunction with the appeal of a conviction of or an order of deferred adjudication for the offense for which the defendant was transferred to criminal court.
Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 85, 1995 TEX. GEN. LAWS 2517, 2584 (adding TEX. CODE CRIM. PROC. art. 44.47), amended by Act of June 2, 2003, 78th Leg., R.S., ch. 283, § 30, 2003 TEX. GEN. LAWS 1221, 1234–35 (amending TEX. CODE CRIM. PROC. ANN. art. 44.47(b) ) (hereinafter "TEX. CODE CRIM. PROC. art. 44.47").

Article 44.47 is straightforward. It provides that a defendant may, as here, appeal a transfer from juvenile court "in conjunction with the appeal of a conviction ... or an order of deferred adjudication...." Id. The statute uses the disjunctive "or." Its plain meaning, therefore, is that a defendant transferred to adult court may appeal the transfer when appealing either a conviction or an order of deferred adjudication. Because Bell appealed the transfer when appealing his conviction, we have jurisdiction over the appeal.

The State challenges our jurisdiction, contending that Bell should have attacked the transfer order in an appeal from his 2013 order of deferred adjudication. According to the State, because Bell did not do so—and instead waited to attack the transfer order on appeal from his conviction—he waived his right to challenge the transfer order.

The statute does not support the State's argument. The statute simply states that a defendant may challenge a juvenile transfer on appeal from a conviction or an order of deferred adjudication. It does not require a defendant to challenge the transfer at the first opportunity—on the earlier of a conviction or deferred adjudication. Nor does the statute otherwise limit one's ability to challenge a transfer order on appeal from a conviction. It provides, without limitation, two options for when one can challenge a juvenile transfer.

The State points us to Eyhorn v. State, 378 S.W.3d 507 (Tex. App.—Amarillo 2012, no pet.), where the Amarillo Court of Appeals concluded that the appellant waived his right to challenge the juvenile transfer by not appealing his order of deferred adjudication and instead challenging the juvenile transfer later, on appeal from his conviction. That case is not binding on us, and we are unpersuaded by its reasoning. There, the court noted the general, well-established rule in criminal cases that non-jurisdictional complaints that arise before an order of deferred adjudication must be raised on appeal of that order or are waived. Id. at 509–10. The Eyhorn court then stated, "We see no logical reason why art. 44.47(b) should be read as jettisoning that rule simply because the accused was initially subject to being tried as a juvenile." Id. at 510. We respectfully disagree in light of the statutory text. Article 44.47 gives a defendant the right to challenge a transfer on appeal of a conviction "or" an order of deferred adjudication. TEX. CODE CRIM. PROC. art. 44.47(b). The statute could have limited the ability to appeal in conformance with this background principle. But the Legislature did not do so.2

We also reject the argument that this case is governed by article 4.18 of the Code of Criminal Procedure, which imposes a procedural requirement that was not met in this case. By its own terms, article 4.18 does not apply "to a claim of a defect or error in a discretionary transfer proceeding in juvenile court." TEX. CODE CRIM. PROC. art. 4.18(g); see also ROBERT O. DAWSON, TEXAS JUVENILE LAW, 534 (Nydia D. Thomas et al. eds., 8th ed. 2012).

Moreover, article 4.18(a) is expressly limited in its application. It provides:
A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.TEX. CODE CRIM. PROC. art. 4.18(a) (emphasis added).


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In simple terms, article 4.18 applies in only two scenarios: (1) when a party asserts that the district court lacks jurisdiction because the juvenile court could not waive jurisdiction because the defendant was under 15 (and the case did not involve certain enumerated offenses) (8.07(a) ), or (2) when the party asserts that the district court lacks jurisdiction because the juvenile court did not waive jurisdiction and the person is under 17 (8.07(b) ). TEX. PENAL CODE ANN. § 8.07(a), (b).3 This case presents neither of those scenarios.

Bell makes no argument that the district court lacks jurisdiction because the juvenile court could not waive jurisdiction under Penal Code section 8.07(a). And he makes no argument that the juvenile court did not waive jurisdiction under Penal Code section 8.07(b). See TEX. CODE CRIM. PROC. art. 4.18(a). Indeed, Bell does not argue that he was under 15 and thus could not be tried as an adult or that he was under 17 and no juvenile court waived jurisdiction over him4—the challenges contemplated by the plain terms of article 4.18. See id.

To the contrary, Bell is arguing that the juvenile court waived jurisdiction but abused its discretion by doing so and transferring the case to district court without making adequate case-specific findings in the transfer order. On these facts, article 4.18's plain terms render it inapplicable. See id.; see also Delacerda v. State, 425 S.W.3d 367, 379 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (article 4.18 did not apply where defendant did not raise challenge based on Texas Penal Code section 8.07(a) or (b) ).

By contrast, article 44.47 expressly applies to an "appeal [of] an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02, Family Code." TEX. CODE CRIM. PROC. art. 44.47(a). That is what we face here.

Article 44.47 controls and gives us jurisdiction to hear Bell's challenge.

**Conclusion**: We conclude that our Court possesses jurisdiction over this case. As to the remaining issues at stake, we adopt this court's prior opinion, available at Bell v. State, 512 S.W.3d 553 (Tex. App.—Houston [1st Dist.] 2016), vacated on other grounds, 515 S.W.3d 900 (Tex. Crim. App. 2017). [Discretionary Transfer reversed based on *Moon*.]

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**REPEALED STATUTE PROVIDES THAT A DEFENDANT MAY APPEAL A DISCRETIONARY TRANSFER FROM JUVENILE COURT IN CONJUNCTION WITH THE APPEAL OF A CONVICTION … OR AN ORDER OF DEFERRED ADJUDICATION…. AND, AS A RESULT, MAY APPEAL THE TRANSFER DECISION WHEN APPEALING THE CONVICTION RESULTING FROM HIS DEFERRED ADJUDICATION VIOLATION. CASE REVERSED BASED ON MOON.**

¶ 18-3-7. **Davis v. State,** MEMORANDUM, No. 05-16-01341-CR, No. 05-16-01342-CR, No. 05-16-01343-CR, 2018 WL 3629085 (Tex.App.—Dallas, 7/31/2018).

**Facts:** In April, 2014, when appellant was sixteen, the State filed a petition for discretionary transfer in a Dallas County juvenile court which alleged that appellant engaged in delinquent conduct by committing two separate offenses of aggravated sexual assault. Pursuant to the State's petition, the juvenile court waived its jurisdiction and transferred the matter to criminal district court. See TEX. FAM. CODE ANN. § 54.02 (West 2014).

Appellant was subsequently indicted for two separate offenses of aggravated sexual assault in cause numbers F14-15543-Q and F14-15544-Q. When appellant was seventeen, he was also indicted for aggravated robbery in cause number F15-45428-Q.

In November 2015, pursuant to a plea bargain agreement, appellant pled guilty to all three offenses and was placed on deferred community supervision for a period of ten years. In February 2016, the State filed a motion to revoke appellant's community supervision or proceed with an adjudication of guilt in all three cases. After a hearing, the trial court granted the State's motion, found appellant guilty as charged in each indictment, and sentenced him to twenty years' imprisonment in all three cases. In the aggravated robbery case, the trial court also made a deadly weapon finding. This appeal followed.

In his second issue, appellant contends that the judgments adjudicating guilt in the aggravated sexual assault cases are void because the district court never properly acquired jurisdiction. Appellant argues that under Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014), the juvenile court abused its discretion by waiving jurisdiction without making adequate case-specific findings in the transfer order. The State argues that under former article 44.47(b) of the Code of Criminal Procedure, this Court lacks jurisdiction to hear appellant's complaint about the juvenile transfer because he did not raise his challenge when the trial court entered its order of deferred adjudication. Secondly, the State cites article 4.18 of the Code of Criminal Procedure and argues that the issue has not been properly preserved for review. Lastly, the State argues that the transfer order was sufficient. We are not persuaded by the State's arguments and conclude that under the holding in Moon, the juvenile court abused its discretion by failing to include case-specific findings in the order waiving jurisdiction.

**Held:** Judgement reversed in the aggravated sexual assault cases (transfer from juvenile court). Judgement modified and affirmed in the aggravated robbery case.

**Memorandum Opinion**: Appellant's appeal of the transfer order is governed by former article 44.47 of the Code of Criminal Procedure. Article 44.47 provided in relevant part:
(a) A defendant may appeal an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02, Family Code.
(b) A defendant may appeal a transfer under Subsection (a) only in conjunction with the appeal of a conviction of or an order of deferred adjudication for the offense for which the defendant was transferred to criminal court.
Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 85, 1995 Tex. Gen. Laws 2517, 2584 (adding Tex. Code Crim. Proc. art. 44.47), amended by Act of June 2, 2003, 78th Leg., R.S., ch. 283, § 30, 2003 Tex. Gen. Laws 1221, 1234–35 (amending Tex. Code Crim. Proc. Ann. art. 44.47(b)), repealed by Act of May 12, 2015, 84th Leg., R.S., ch. 74, §§ 4–6, 2015 Tex. Gen. Laws 1065, 1066 (emphasis added).

The statute uses the disjunctive "or" and by its plain language, provides, without limitation, two options for when a defendant can challenge a juvenile transfer: when appealing either a conviction or an order of deferred adjudication. See Bell v. State, No. 01-15-00510-CR, 2018 WL 3150851, at *2 (Tex. App.—Houston [1st. Dist.] June 28, 2018) (not yet reported); see also State v. Lopez, 196 S.W.3d 872, 875 (Tex. App.—Dallas 2006, pet. ref'd) (noting article 44.47(b) does not allow juvenile to appeal transfer order until after he is either convicted or receives deferred adjudication for offense in criminal court).

The State relies on Wells v. State, No. 12-17-00003-CR, 2017 WL 3405317 (Tex. App.—Tyler Aug. 9, 2017, no pet.) (mem. op., not designated for publication) and Eyhorn v. State, 378 S.W.3d 507 (Tex. App.—Amarillo 2012, no pet.) to support its argument that appellant was required to challenge the transfer order in an appeal from the order originally imposing community supervision and urges this Court to follow the holding in Wells "because the procedural facts in both cases are nearly identical." The court in Wells held that "for transfer orders issued before September 1, 2015, concerning conduct occurring after January 1, 1996, a non-jurisdictional challenge to a transfer order must be made in an appeal from the order deferring adjudication of guilt" and cited to both Eyhorn, 378 S.W.3d at 510, and Felix v. State, No. 09-14-00363-CR, 2016 WL 1468931, at *1 (Tex. App.—Beaumont Apr. 13, 2016, pet. ref'd) (mem. op., not designated for publication). Wells, 2017 WL 3405317 at *2. The State's reliance on these cases is misplaced as the courts' holdings are based on a faulty premise. As pointed out in Bell, the court of appeals in Eyhorn noted the general, well-established rule in criminal cases that non-jurisdictional complaints that arise before an order of deferred adjudication must be raised on appeal of that order or are waived, and then stated, "We see no logical reason why art. 44.47(b) should be read as jettisoning that rule simply because the accused was initially subject to being tried as a juvenile." Bell, 2018 WL 3150851, at *3. Like the court in Bell, we too must disagree with the reasoning in Eyhorn and the cases that follow it. The statutory text of article 44.47 provides a defendant the right to challenge a transfer on appeal of a conviction "or" an order of deferred adjudication. The Legislature could have limited the ability to appeal in conformance with this background principle but it did not do so. Id.

In this case, appellant appealed the transfer order when appealing his convictions. Therefore, we have jurisdiction over the appeal.

**Conclusion:** We conclude that the juvenile court abused its discretion by failing to make case-specific findings when waiving its jurisdiction and transferring appellant to the criminal district court for criminal proceedings in the aggravated sexual assault cases. Because of the juvenile court's error, the criminal district court lacked jurisdiction over appellant's cases. We therefore vacate the judgments of the criminal district court in cause numbers F14-15543-Q and F14-15544-Q and dismiss the cases in that court. The cases remain pending in the juvenile court.6 Accordingly, we need not reach appellant's fourth and fifth issues challenging the inclusion of fines and court costs7 in the judgments adjudicating guilt.

We modify the trial court's judgment in cause number F15-45428-Q to reflect the date of the original community supervision order as November 16, 2015 and that appellant pleaded "not true" to the motion to adjudicate. As modified, we affirm the judgment.

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**JUVENILE COURT DID NOT ABUSE ITS DISCRETION BY WAIVING JURISDICTION AND TRANSFERRING JUVENILE FOR TRIAL AS AN ADULT.**

¶ 18-3-3. **In the Matter of K.M.D.**, MEMORANDUM, No. 05-17-01284-CV, 2018 WL 3238142 (Tex.App.—Dallas, July 3, 2018).

**Facts:** KMD, a fourteen-year-old, was charged with intentionally and knowingly causing the death of an individual by shooting him with a firearm in violation of section 19.02 of the penal code.

On August 3, 2017, the State filed its Petition for Discretionary Transfer to Criminal Court, asking the juvenile court to waive its jurisdiction and transfer KMD's case to adult criminal court. See TEX. FAM. CODE ANN. § 54.02 (West 2014). As required by family code section 54.02(d), the trial court ordered a complete diagnostic study, social evaluation, and full investigation of KMD, his circumstances, and circumstances of the alleged offense.

After the evaluations were completed, the juvenile court conducted a hearing regarding the State's motion to transfer. Two witnesses testified at the hearing:

Detective Shelton, the lead investigator, and Kendrick Smith, a juvenile probation officer. Smith prepared the social evaluation and investigative report. The juvenile court took judicial notice of the reports without objection. Smith recommended the juvenile court grant the State's petition for discretionary transfer.

At the conclusion of the hearing, the juvenile court made oral findings on the record. On October 16, 2017, the court signed its waiver of jurisdiction and order of transfer to a criminal district court. The order stated the court considered "all the testimony, diagnostic study, social evaluation, and full investigation" and found "it is contrary to the best interest of the public to retain jurisdiction." This interlocutory appeal followed.

**Held:** Affirmed

**Memorandum Opinion:** KMD challenges the trial court's failure to "show its work" as required by Moon. He argues the transfer order does not include specific, concrete facts supporting (1) KMD's "refusal to remain away from associates who habitually violate the law," (2) his "actions and conduct as a principal or party in the commission of the offense," (3) his "sophistication and maturity is excessive for his age," and (4) his "likelihood of reasonable rehabilitation ... is remote" and "contrary to the best interest of the public." We interpret KMD's arguments as challenging only the legal sufficiency of the evidence to support the juvenile court's findings.

We begin by analyzing the trial court's order for its specific findings. The relevant portion of the order states as follows:

**The Court finds that said offense is a felony under the penal law of the State of Texas. The Court finds that the alleged offense was against a person; and the Court finds that there is probable cause to believe that the Respondent committed the offense alleged in the State's Petition for Discretionary Transfer.**
**The Court finds the Respondent is of excessive sophistication and the Respondent's level of maturity is excessive to be tried as an adult and to aid an attorney in his defense. After considering all the testimony, diagnostic study, social evaluation, and full investigation, the Court finds it is contrary to the best interest of the public to retain jurisdiction.**
**The Court finds for the welfare of the community, the seriousness of the alleged offense and the background of the Respondent, that criminal proceedings are required.**

Thus, the order indicates the juvenile court concluded the welfare of the community required criminal proceedings because of both the seriousness of the offense and KMD's background.

We first consider the seriousness of the offense. In Moon, the court concluded the juvenile court abused its discretion by waiving jurisdiction when the transfer order found only that "because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceedings" without any specific findings about the murder except that it was committed against another person. 451 S.W.3d at 48. The order at issue in the present case does not suffer from the same fatal flaw. Rather, the court's order provides "the reasons for this disposition are that: ... the Respondent's conduct was willful and violent; a deadly weapon, to wit: a firearm, was used during the course of the offense; [and] death resulted to the victim." Thus, the court "showed its work" and provided specific facts regarding its finding that transfer was appropriate because of the seriousness of the offense.

Our review of the record likewise indicates the evidence is legally sufficient to support the trial court's specific finding regarding the seriousness of the offense. The court heard testimony that KMD circled the park twice before shooting decedent twice in the head killing him. He then fled the scene. When officers were in pursuit, he continued to drive away until he finally ended the chase and was captured. Smith, the probation officer, testified the offense was committed in "an aggressive, violent, and premeditated manner." Thus, there is more than a scintilla of evidence supporting the court's determination that the circumstances of this particular murder was "willful and violent." See Moon, 451 S.W.3d at 48 (distinguishing between generic findings related to the "category of crime alleged" and findings concerning "the specifics of a particular offense").

We now consider the juvenile court's finding that criminal proceedings are required because of KMD's background. In its order, the court explained "the reasons for its disposition" were in part because of KMD's "refus[al] to remain away from associates in the community who habitually violate the law; the sophistication of the child is excessive for his age; and his level of maturity is excessive; ... and the previous history of the Respondent."

The court heard and reviewed the following testimony regarding KMD's background. KMD's parents had extensive criminal histories and substance abuse issues. After their parental rights were terminated, KMD was raised by his paternal grandmother. She described his behavior as "fair to poor." He had little regard for her authority and instead was influenced by negative peers to engage in delinquent behavior. KMD told Smith that some of his peers used drugs, had criminal histories, and were affiliated with gangs. He also admitted he was not responsive to Grandmother's supervision.

KMD's psychological evaluation indicated a severe level of depression and the profile of an individual who is unhappy, emotionally labile, and quite angry. He admitted to using guns, stealing food, and setting fires. He believed he was antisocial and struggled to manage his behavior. KMD admitted difficulty with anger and

explained his outbursts "may" cause him to "black out" sometimes. He never hurt anyone during these episodes, but recalled hurting his hands by punching a wall during a "black out" and holding a knife to his throat during another episode.

Although Grandmother denied that KMD physically assaulted her, she admitted he had a history of violence and aggression in the home. Grandmother tried her best to keep KMD enrolled in school, but he regularly left campus after she dropped him off. A school resource officer reported KMD attended school under the influence of marijuana and smoked on campus. KMD told Smith he began smoking marijuana when he was seven and had used it to some extent ever since then. He tested positive for marijuana and Xanax the day of the offense.

Smith described KMD as having a level of sophistication higher than those similar to other fourteen-year-olds. Smith described the offense as "extremely sophisticated in nature" and "reflective of an individual much older than himself," who "demonstrates a lack of respect for authority and a person's life." Smith ultimately concluded, in part, the following:
Due to the subject's pending offense, his current age, his drug history, and his association with older and negative peers who have criminal histories, who use drugs, and who have gang affiliations, rehabilitation of the subject within the Juvenile Justice System is remote. Due to the aggressive, violent, and deadly-nature of the pending offense, which resulted in loss of human life, this case warrants transfer to the Adult Criminal Court.

Thus, there is more than a scintilla of evidence supporting the court's determination that KMD's background supported transfer to criminal court. See, e.g., In re S.G.R., 496 S.W.3d 235, 241–42 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (juvenile's admission to criminal activity and frequent possession and use of drugs weighed in favor of waiver of jurisdiction and transfer to criminal district court).

Finally, the trial juvenile court determined the likelihood of reasonable rehabilitation was remote and retaining jurisdiction was contrary to the best interests of the public. KMD admitted to anger issues, drug use, and associating with negative influences. Because of these issues, Smith testified KMD's likelihood of rehabilitation with the services available through the juvenile system was remote. Thus, there is more than a scintilla of evidence supporting transfer to criminal court because rehabilitation was remote and retaining jurisdiction was contrary to the best interests of the public.

**Conclusion:** The juvenile court considered each of the section 54.02(f) factors and stated specific reasons and findings in support of its decision to waive its jurisdiction and transfer KMD for trial as an adult. Its findings are supported by legally sufficient evidence. The court of criminal appeals has advised that "the juvenile court that shows its work should rarely be reversed." Moon, 451 S.W.3d at 49. "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 in the transfer order, based on evidence produced at the transfer hearing ... bear no rational relation to the specific reasons the order gives" to justify transfer. Id. at 46. Given the juvenile court's board discretion, we hold that this is not the rare case in which reversal is warranted in spite of the juvenile court's adherence to the statutory criteria. In light of the juvenile court's findings and our review of the record, which supports those findings, we conclude the juvenile court did not abuse its discretion by waiving jurisdiction and transferring KMD for trial as an adult. We overrule KMD's sole issue. The juvenile court's certification and transfer order is affirmed.

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**ARGUMENT THAT A DISCRETIONARY TRANSFER REVERSAL WHICH WOULD ALLOW THE JUVENILE COURT TO CONSIDER TRANSFER UNDER A MORE LENIENT STATUTORY PROVISION AND AS SUCH A POSSIBLE DUE PROCESS VIOLATION CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.**

¶ 18-3-1. **Taylor v. State,** --- S.W.3d ----, No. 14-16-00583, 2018 WL 2306740 [Tex.App.—Houston (14th Dist.), 5/22/2018].

**Facts:** Appellant Daron Taylor was charged with committing capital murder when he was a juvenile. The juvenile court waived jurisdiction and transferred appellant to the criminal district court, where he was convicted by a jury and sentenced to life in prison. On appeal, appellant argues the criminal court lacked jurisdiction because the juvenile court erred in waiving its jurisdiction. The juvenile court's order stated that because of the seriousness of the offense, the welfare of the community required criminal proceedings, but it made no case-specific findings of fact with respect to the seriousness of the offense. Under recent precedent from the Court of Criminal Appeals, therefore, the juvenile court abused its discretion in waiving jurisdiction. We vacate the judgment of the criminal district court, dismiss the case in that court, and return the case to the juvenile court.

In appellant's reply brief, he argues that this Court should render a judgment dismissing the case in its entirety because it would violate due process to remand the case to the juvenile court, which would apply a lower transfer standard now that appellant is an adult.2 In appellant's original brief, however, he asked us to vacate his conviction and remand to the juvenile court for further proceedings. We need not consider arguments raised for the first time in a reply brief. See Tex. R. App. P. 38.3; Morales v. State, 371 S.W.3d 576, 589 n.15 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (citing Barrios v. State, 27 S.W.3d 313,

321–22 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd)).

**Held:** Discretionary transfer reversed, judgment of the criminal district court is vacated and dismissed, jurisdiction returned to the juvenile court. (Substitute Opinion)

**Opinion:** On rehearing, appellant argues that he simply modified his request for relief in his reply brief, which is permissible because the appropriate relief is a subsidiary question fairly included in his issue challenging the juvenile court's waiver of jurisdiction. We disagree that appellant simply changed the relief sought in his reply brief. Appellant asked this Court to hold that allowing the juvenile court to consider transfer under a more lenient statutory provision would violate his due process rights. This constitutional challenge to a different transfer statute that has not yet been applied to appellant cannot be raised for the first time on appeal, much less in a reply brief. See Karenev, 281 S.W.3d at 434. We therefore do not address it, though the juvenile court may do so if it is raised on remand. See, e.g., In the Matter of J.G., 495 S.W.3d 354, 362, 364–69 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (addressing constitutional challenges to application of Tex. Fam. Code § 54.02(j) raised by defendant in juvenile court following vacatur of transfer order under Moon).

**Conclusion:** We conclude that the juvenile court abused its discretion by waiving its jurisdiction and transferring appellant to the criminal district court for criminal proceedings. Because of the juvenile court's error, the criminal district court lacked jurisdiction over appellant's case. We therefore sustain appellant's first issue, vacate the judgment of the criminal district court, dismiss the case in that court, and declare that the case is still pending in the juvenile court. See Tex. R. App. P. 43.2(e).

## WAIVER OF RIGHTS

**JUVENILE ON DETERMINATE SENTENCE PROBATION CAN STILL INVOKE HIS FIFTH AMENDMENT RIGHT TO SELF-INCRIMINATION IN CO-DEFENDANT'S TRIAL.**

¶ 18-3-5. **Tugler v. State**, MEMORANDUM, No. 05-17-00429-CR, No. 05-17-00430-CR,
2018 WL 3387383 (Tex.App.—Dallas, July 12, 2018).

**Facts:** At a convenience store at 1:20 a.m. on June 18, 2016, a night manager had just finished with a transaction involving a female customer. A delivery driver was also present making a delivery. At that moment, two individuals ran into the store brandishing guns. Both gunmen had their faces covered, one with black-and-white fabric and the other with a mask. The assailants took the female customer's wallet, cell phone, and purse. Then the two robbers demanded the delivery driver open the registers. When the robbers collected the money (approximately $30) from the registers, they questioned the delivery driver about the store's safe. The delivery driver responded that he did not know how to open the safe, and the robbers fled the store. The driver's assistant had remained in the parking lot to close up the trailer and, from his vantage point, observed a white Dodge driven by a black female speeding from the scene. The driver's assistant then went into the store and learned that there had just been an armed robbery. The night manager dialed 9-1-1 to report the incident.

K.N.H., who had been on the phone with the female customer, heard someone say, "this is a M_____ F_____ robbery; open up the register now." K.N.H. heard the female customer ask, "is this for real?" K.N.H. screamed the female customer's name, but the female customer did not respond. K.N.H. maintained the connection with the female customer's phone and dialed 9-1-1 on her son's phone.

The police used a description of the robbers' car and the location of the female customer's phone to locate the robbers' vehicle. When the police stopped the suspect car, appellant and the two robbers got out. After obtaining a search warrant, the police discovered a black-and-white shirt, a gray skull mask, a revolver, an air-soft toy gun, a plastic bag of cash, the female customer's purse, and the female customer's phone in the back seat of the car.

Appellant was indicted for the offense of aggravated robbery in two separate cause numbers. She pleaded not guilty in both cases, which were tried concurrently before a jury. The jury found appellant guilty, and after appellant pleaded true to the enhancement paragraph identified in each cause, the jury assessed her punishment in each cause number at 37 years' confinement.

**Held:** Affirmed

**Memorandum Opinion:** In her sixth issue, appellant argues the trial court erred improperly denied her right to due process and a fair trial by refusing to allow appellant to call as a witness a co-defendant who had already disposed of his case. At trial and out of the presence of the jury, appellant attempted to call one of her co-defendants to testify. Her co-defendant C.B. was represented by counsel who asserted C.B. intended to invoke his Fifth Amendment right to refrain from self-incrimination. C.B.'s counsel stated that C.B. was "under what's called a determinate sentence[,] ... [which] means that his sentence is to be determined by, among other things, how he performs while on probation." Appellant contends C.B. waived his Fifth Amendment right not to testify in this case when he pleaded guilty to the same offense because he cannot further incriminate himself, as he has already admitted his guilt.

The Sixth Amendment right to compulsory process assures the defendant of her ability to offer the testimony of witnesses, and to compel their attendance, if necessary, so that the defendant may present her version of the facts to the jury. See U.S. CONST. amend. VI; Washington v. Texas, 388 U.S. 14, 19 (1967). The State may not arbitrarily deny her the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material to the defense." Washington, 388 U.S. at 23.

However, an individual's constitutional privilege against self-incrimination overrides a defendant's constitutional right to compulsory process of witnesses. Bridge v. State, 726 S.W.2d 558, 567 (Tex. Crim. App. 1986). Therefore, a trial court cannot compel a witness to answer unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken in asserting the privilege, and that the answer cannot possibly tend to incriminate the witness. See Walters v. State, 359 S.W.3d 212, 216–17 (Tex. Crim. App. 2011); Boler v. State, 177 S.W.3d 366, 371 (Tex. App.—Houston [1st Dist.] 2005, pet ref'd.). The court is required to make an inquiry into the reasonableness of a witness's assertion of the Fifth Amendment privilege against self-incrimination. Walters, 359 S.W.3d at 216. We review a trial court's decision to uphold a witness's claim of privilege for an abuse of discretion. See id. at 216–17.

The record reflects that, although they were not admitted into this record, both the State and defense counsel were in possession of a copy of C.B.'s juvenile records, including his plea. The record also contains testimony that C.B. was sixteen at the time of the offense. When a juvenile is given a determinate sentence, upon the request of the Texas Juvenile Justice Department (TJJD) to transfer the juvenile to the penitentiary, the trial court is required to hold a hearing and that at that hearing, the trial court has wide latitude and discretion to consider, among other factors, "the experiences and character of the person before and after commitment to [TJJD], the nature of the penal offense that the person was found to have committed, and the manner in which the offense was committed." See TEX. FAM. CODE ANN. § 54.11(k); Reese v. State, 03-14-00409-CR, 2016 WL 806704, at *2 (Tex. App.—Austin Feb. 25, 2016, no pet.) (mem. op., not designated for publication).

The district court may have reasonably inferred that C.B. believed that any answers he provided in his testimony could implicate him in greater or different offenses than he had already implicated himself in by pleading true to the State's allegations, and that such answers might be used against him at a subsequent transfer hearing. If C.B. had testified, he would have been subject to cross-examination not only by the State but also by counsel for appellant, both of whom, the district court could have reasonably inferred, would have had an incentive to undermine C.B.'s credibility by implicating him in greater or different offenses. Moreover, appellant's defense counsel had indicated to the trial court he intended to establish appellant drove the getaway car under duress from her co-defendants thus potentially implicating him in further, serious offenses.

**Conclusion:** We cannot conclude the trial court abused its discretion by upholding C.B.'s claim of privilege on this record. We overrule appellant's sixth issue. We affirm the trial court's judgment.



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