Juvenile Law Section
STATE BAR OF TEXAS

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NEWSLETTER EDITOR

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

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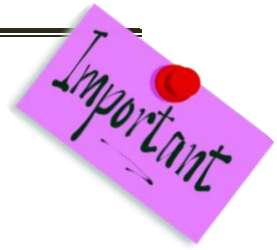
Dear Juvenile Law Section Members:

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



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

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EDITOR'S FOREWORD By Associate Judge Pat Garza

The real job of a juvenile judge or associate judge is to impact children enough to make them want to do better—to keep them from becoming "adult" delinquents, and most importantly to give them a sense of self-worth and value, so that they can recognize in themselves that they can be a productive member of society. How they view our system and the professionals they interact with may make all the difference.

While knowing the law is important, in juvenile court judges must be effective and successful motivators. Children do not care how much law the judge knows, or whether the judge can quote a statute off the top of his or her head; but in the relatively short period of time it takes to enter a plea, the right judge can have a lasting impression on that child. Often, what matter most in juvenile court is who the judge is, how he or she communicates and interacts with that child and that child's perception of him or her. The advent of the associate judges has provided the juvenile courts with a diverse group of judges from different backgrounds. These judges have the ability to gain the respect of the children who come before them, based on where they came from and how they relate to the situation the child is in. When a child believes that the judge they are before relates and cares—no matter what the decision is—the child will try harder to succeed.

Using associate judges in our juvenile courts has allowed all juvenile judges to be more productive, efficient, and successful, particularly by giving them the extra time needed to help each child feel special and unique. An impactful juvenile court experience before a judge, who cares "one child at a time," can make all the difference, and when we can make a difference, the children, community, county, and our entire juvenile system benefits.

33nd Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 33nd Annual Juvenile Law Conference will be held February 16 thru February 19, 2020, at the Galveston Island Convention center at the San Luis Resort in Galveston, Texas. This year's topics will include adverse childhood experiences and trauma-informed care, vaping, sexting, and other topical school offenses. The keynote address will be The Legislative Horizon for Juvenile Justice, delivered by Senator John Whitmire, the longest serving current members of the Texas State Senate.

We will have a welcome reception on Sunday and a Juvenile Law Foundation fundraiser with live music on Tuesday. The conference flyer has been sent electronically and is also available online at www.juvenilelaw.org.

Added Feature at the Conference. An added special feature of this year's conference will be discussions of high-profile cases, featuring multiple perspectives from those involved with the Central Park Five rape case. In that case five youths were convicted and sentenced for a rape in Central Park, New York. Later a convicted murderer and serial rapist serving life in prison, confessed that he had committed the rape. His DNA matched that found at the scene, and he provided other confirmatory evidence. The five sued the city and the State. The city of New York settled for $41 million and the State of New York settle for 3.9 million. The prosecutions were based primarily on confessions after police interrogations.

Officer and Council Nominees. The Annual Juvenile Law Section meeting will be held in the Galveston Island Convention Center at the San Luis Resort in Galveston, Texas at 5:15 p.m., Monday, February 17, 2020, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Officers
Chair: Patrick Gendron (College Station)
Chair-Elect: Bill Cox (El Paso)
Treasurer: Cyndi Porter Gore (Allen)
Secretary: Kim Dayton (Lubbock)

Council Members with terms ending 2023:
Frank Adler (Arlington)
Jana Jones (Decatur)
Molly Davis (Fort Worth)

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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, Kaci Singer (512) 490-7623 or at kaci.singer@tjjd.texas.gov

A torn jacket is soon mended; but hard words bruise the heart of a child.

Henry Wadsworth Longfellow (1807-1882)

"Drift Wood, A Collection of Essays: Table-Talk" Prose Works of Henry Wadsworth Longfellow, 1857

CHAIR'S MESSAGE By Mike Schneider

Yes, it is already February, and we know what that means: The Robert O. Dawson Juvenile Law Institute 33rd Annual Texas Juvenile Law Conference is just weeks away.

The Conference will be from Sunday, February 16-Wednesday, February 19, 2020 at the Galveston Island Convention Center at the San Luis Resort. Lodging is at the San Luis Resort, Spa and Conference Center and the Hilton Galveston Island Resort.

Not only will there be a host of excellent programming and speakers—and a chance to catch up with those of us who only see our statewide colleagues once a year—this year's conference will have an official conference app, Whova, for iOS and Android. The app should allow conference attendees to network, manage sessions, map the event, and provide mobile access to documents like PowerPoint, PDFs and Word documents provided by the presenters.

And the technology is far from the only innovation we will see in Galveston. Cutting edge topics like vaping, sexting, trauma-informed care, and adverse childhood experiences and their consideration in juvenile justice. Expect an overview of the Texas Juvenile Justice System on Sunday afternoon, followed by caucuses and a welcome reception. And we hope you will join us for a Juvenile Law Foundation fundraiser with live music on Tuesday.

A big thanks to Kaci Singer and Program Chair Patrick Gendron and the rest of the council for their amazing dedication to this conference and section. And special thanks to Judge (and Editor) Pat Garza for his review of recent caselaw in this issue.

See you on the 16th.

REVIEW OF RECENT CASES

By Subject Matter

By Case

RECENT CASES

DETERMINATE SENTENCE TRANSFER

**DETERMINATE SENTENCE TRANSFER—
IN GRANTING WRIT OF MANDAMUS, HOUSTON COURT OF APPEALS (1ST DIST.), VOIDED TRIAL COURT'S NUNC PRO TUNC ORDER CHANGING THE DURATION OF JUVENILE'S PROBATION FROM ENDING ON HIS 18TH BIRTHDAY TO ENDING ON HIS 19TH BIRTHDAY, AND HELD THAT ANY ORDERS ISSUED BY THE TRIAL COURT AFTER JUVENILE'S 18TH BIRTHDAY WERE BEYOND THE TRIAL COURT'S JURISDICTION, ARE VOID, AND MUST BE VACATED, INCLUDING THE ORDER TRANSFERRING JUVENILE'S DETERMINATE PROBATION TO ADULT COMMUNITY SUPERVISION.**

In Re X.A., MEMORANDUM, No. 01-19-00227, 2020 WL 237939, Tex. Juv. Rep. Vol 34 No. 1 ¶ 20-1-7 [Tex.App.—Houston (1st Dist.), 1/16/2020]

Facts: Relator, X. A., filed a petition for a writ of mandamus seeking to compel the trial court to: (1) vacate its March 26, 2019 order denying relator's "Motion to Dismiss for Lack of Jurisdiction and Objections to Proceedings;" (2) vacate the October 25, 2017 Nunc Pro Tunc Judgment; and (3) dismiss the State's petition to modify disposition and request to transfer X.A.'s probation to Adult Community Supervision.

This mandamus petition arises from a juvenile court proceeding in which the State filed a petition alleging that X.A. had engaged in the delinquent conduct of aggravated assault. X.A. signed a stipulation of evidence confessing to delinquent conduct in return for the State's recommendation of four years' probation. The trial court signed a determinate sentencing judgment on April 25, 2016 in accordance with the plea bargain, assessing four years' probation. The judgment also stated that appellant would be "under the jurisdiction of [the trial court] and shall continue its care, guidance, and control from 4/25/16 or until said Respondent becomes eighteen (18) years of age3 unless discharged prior to and subject to subsequent and additional proceedings under the provisions made by the statute ...."

In October 2017, the State moved for a nunc pro tunc order to change the original determinate sentencing judgment's three statements regarding the trial court's jurisdiction over X.A. until he became 18 years old. The State asked that each of these references to X.A.'s 18th birthday be changed to reference his 19th birthday. Attached to this motion was an affidavit by the district attorney stating that the plea bargain was for probation for 4 years or until X.A. turned 19 years old and thus, the district attorney asserted that the determinate sentence did not accurately reflect the plea agreement for the trial court to have supervision over X.A. until he turned 19. The trial court granted the State's motion on October 25, 2017 and signed a nunc pro tunc order changing all judgment references to X.A.'s 18th birthday to his 19th birthday.

On January 30, 2019, the State filed a petition to modify disposition, claiming that X.A. violated certain terms of his probation by failing to enroll or provide proof of enrollment in school and by failing to attend the Dapa Family Recovery Program as ordered by his juvenile probation officer. The State also noted that X.A. failed to complete a substance abuse assessment. The State also requested a transfer of X.A.'s probation to Adult Community Supervision.

X.A. filed a motion to dismiss the State's petition for lack of jurisdiction, claiming that the trial court lacked jurisdiction over X.A. because he was over 18 years old and the nunc pro tunc order was void under this Court's holding in In re J.A., No. 01-17-00645-CV, 2017 WL 6327356 (Tex. App.—Houston [1st Dist.] Dec. 12, 2017, orig. proceeding). After a hearing on the motion to dismiss, the trial court denied X.A.'s motion to dismiss. On April 1, 2019, the trial court signed an order transferring X.A.'s determinate probation to adult district court, noting that his probation ends on April 24, 2020.

Held: Petition Granted (conditionally)

Memorandum Opinion: Mandamus is an extraordinary remedy, available only when the relator can show both that: (1) the trial court clearly abused its discretion or violated a duty imposed by law; and (2) there is no adequate remedy by way of appeal. In re Ford Motor Co., 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding); Walker v. Packer, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). Mandamus relief is proper when the trial court issues a void order, and the relator need not demonstrate the lack of an adequate remedy by appeal. See In re Sw. Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding).

A. Jurisdiction to Enter a Nunc Pro Tunc Order

"A trial court retains jurisdiction over a case for a minimum of thirty days after signing a final judgment," during which time the trial court has plenary power to change its judgment. See Lane Bank Equip. Co. v. Smith So. Equip., Inc., 10 S.W.3d 308, 310 (Tex. 2000). A trial court may correct a judgment by nunc pro tunc even after plenary power has expired but only to correct a clerical error in the judgment. In re A.M.R., 528 S.W.3d 119, 122 (Tex. App.—El Paso 2017, no pet.) (citing TEX. R. CIV. P. 316, 329b(f)).

"A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered." Barton v. Gillespie, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.). The party claiming a clerical error in the judgment must show by clear and convincing evidence that "the trial judge intended the requested result at the time the original judgment was entered." In re Heritage Oper., L.P., 468 S.W.3d 240, 247 (Tex. App.—El Paso 2015,

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orig. proceeding). This steep burden of proof limits when a trial court may correct clerical mistakes and prevents the use of a judgment nunc pro tunc as "a vehicle to circumvent the general rules regarding the trial court's plenary power if the court changes its mind about its judgment." Id.

A judicial error is one occurring in the rendering, not the entering, of judgment and it "arises from a mistake of law or fact that requires judicial reasoning to correct." Hernandez v. Lopez, 288 S.W.3d 180, 184–85 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (op. on reh'g). An error in the rendition of the judgment is always judicial and may not be corrected by a nunc pro tunc order. See id. at 186. "[I]f the judgment entered is the same as the judgment rendered, regardless of whether the rendition was incorrect, a trial court has no nunc pro tunc power to correct or modify the entered judgment after its plenary jurisdiction expires." Id. at 187 (emphasis in original) (citing America's Favorite Chicken Co. v. Galvan, 897 S.W.2d 874, 877 (Tex. App.—San Antonio 1995, writ denied)).

B. The Trial Court Lacked Power to Enter the Nunc Pro Tunc

The trial court's original determinate sentencing judgment was signed on April 25, 2016, and thus, the October 25, 2017 nunc pro tunc order was signed beyond the juvenile court's plenary power, which ended thirty days after the determinate sentencing judgment was signed. See TEX. R. CIV. P. 329b(d) (holding that, if no motion for new trial is filed, trial court has plenary power to correct judgment thirty days after judgment is signed). Because the order was signed beyond the trial court's plenary power, the nunc pro tunc order was void unless it corrected clerical errors. See Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex. 1986); J.A., 2017 WL 6327356, at *4.

Whether an error is judicial or clerical is a question of law and the "trial court must make a factual determination regarding whether it previously rendered judgment and the judgment's contents before it may decide the nature of the error." In re A.M.C., 491 S.W.3d 62, 67 (Tex. App.—Houston [14th Dist.] 2016, no pet.). In this case, the trial court made no factual findings and did not state that it was correcting a clerical error based on personal recollection concerning rendition. The question whether the error corrected in the nunc pro tunc order was judicial or clerical "becomes a question of law only after the trial court factually determines whether it previously rendered judgment and the judgment's contents." Escobar, 711 S.W.3d at 232; Hernandez, 288 S.W.3d at 185. Because the trial court did not make a finding concerning the prior rendition and its contents, there is no need to determine if the correction was clerical or judicial.

Additionally, the record does not reveal a rendition different from the original determinate sentence entered in April 2016. In the hearing record on the stipulation of evidence, the trial court merely stated that it would follow the plea agreement. The record shows that X.A. bargained for and received "a disposition of 4 years CJPO7 probation on the Determinate Sentencing offense with a possible transfer to Harris County Community Supervision ...." The stipulation of evidence did not specify the date that supervision of probation would end. Furthermore, the hearing on the stipulation of evidence did not include any mention of the date that supervision of probation would end.

"[A] nunc pro tunc order can only be used to make corrections to ensure that the judgment conforms with what was already determined and not what should have been determined ...." In re Cherry, 258 S.W.3d 328, 333 (Tex. App.—Austin 2008, orig. proceeding). Unlike the trial court in J.A., the trial court in this case did not state a personal recollection that supervision of X.A.'s probation would continue until X.A. turned 19 years old. See J.A., 2017 WL 6327356 at *2. Because the record contains no proof and no finding of fact regarding a prior rendition or its contents, this is a case in which the signing of the original determinate sentence constituted the trial court's rendition of judgment. See Galvan, 897 S.W.2d at 878 (holding that, because the record contained no evidence or finding of fact regarding prior rendition of judgment, the original written judgment constituted rendition of judgment). Thus, the judgment entered in April 2016 was the judgment rendered and the trial court's entry of the judgment nunc pro tunc after plenary power expired was improper and void. See id. (holding that nunc pro tunc after plenary jurisdiction expired was improper because there was no difference between judgment as rendered and judgment as entered); Hernandez, 288 S.W.3d at 187–88 (holding that, because error was in rendition of judgment, nunc pro tunc was void).

The State argues that X.A.'s challenge to the nunc pro tunc order is an improper collateral attack. Because policy favors the finality of judgments, collateral attacks on final judgments are usually disallowed. See Browning v. Prostok, 165 S.W.3d 336, 345 (Tex. 2005). But a void judgment may be collaterally attacked. See id. at 346.

The State next contends that the trial court made an implicit finding that the parties' plea agreement included a condition that X.A.'s probation would continue until his 19th birthday and the pronouncement of sentence included that condition. Although the State presented an affidavit in which a district attorney stated that the plea agreement included supervision of X.A.'s probation until he turned 19 years old, neither the plea papers nor any statements made during the stipulation of evidence hearing concerned supervision of probation until X.A.'s 19th birthday.

The State also argues that, even if we find the nunc pro tunc order is void, X.A. is estopped from challenging it because he agreed to the nunc pro tunc and is now taking an inconsistent position. But X.A. did not take an

inconsistent position. He did not move the trial court for entry of a nunc pro tunc order—the State moved for the nunc pro tunc order. See Lott v. Lott, 605 S.W.2d 665, 667 (Tex. App.—Dallas 1980, writ dism'd) (holding that appellant was estopped from challenging nunc pro tunc because his position in trial court seeking nunc pro tunc order in his motion for new trial was inconsistent with his position in appellate court).

Finally, the State attempts to distinguish this Court's holding in J.A.. In J.A., this Court held that a nunc pro tunc order was void as a correction of a judicial error when the correction extended the duration of a trial court's supervision of a juvenile's probation. See J.A., 2017 WL 6327356, at *4–5. The State claims that J.A. is distinguishable because, unlike the juvenile in J.A., the parties here agreed that X.A.'s probation would continue until his 19th birthday and the trial court followed that agreement. Even if the parties agreed to the extension of the trial court's supervision of probation, mandamus is appropriate to vacate a void order. See, e.g., Dorchester Master Ltd. P'ship v. Anthony, 734 S.W.2d 151, 152 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding). Parties who agree to a void order have agreed to nothing. See In re Garza, 126 S.W.3d 268, 271 (Tex. App.—San Antonio 2003, orig. proceeding).

C. Relator Need not Establish that his Appellate Remedy is Inadequate

Mandamus relief is proper when the trial court issues a void order, and the relator need not demonstrate the lack of an adequate remedy by appeal. See In re Sw. Bell Tel. Co., 35 S.W.3d at 605. Even if there is an adequate remedy by appeal, a party can seek mandamus relief from a void judgment. See Dikeman v. Snell, 490 S.W.2d 183, 186 (Tex. 1973) ("In view of our policy for at least a decade of accepting and exercising our mandamus jurisdiction in cases involving void or invalid judgments of district courts, Relator had every reason to expect relief from the void judgment in this case without first attempting an appeal."). Because the trial court abused its discretion in signing the void nunc pro tunc order and the order denying X.A.'s motion to dismiss for lack of jurisdiction, X.A. need not show he lacks an adequate remedy by appeal. See In re Sw. Bell Tel. Co., 35 S.W.3d at 605; In re Dickason, 957 S.W.2d 570, 571 (Tex. 1998).

Conclusion: Because the trial court improperly entered a nunc pro tunc order changing the duration of the trial court's supervision over X.A.'s probation, the October 25, 2017 nunc pro tunc order is void. The trial court's supervisory power over X.A. ended on X.A.'s 18th birthday on April 2, 2018 by virtue of the original April 25, 2016 determinate sentencing order. We conditionally grant the writ of mandamus and order the trial court to set aside the void nunc pro tunc order signed on October 25, 2017. Any orders issued by the trial court after X.A.'s 18th birthday on April 2, 2018 were beyond the trial court's jurisdiction, are void, and must be vacated, including the April 24, 2019 order transferring X.A.'s determinate probation to adult community supervision. We are confident the trial court will promptly comply, and our writ will issue only if it does not.

DISPOSITION PROCEEDINGS

AN AUTOMATIC SENTENCE OF LIFE WITH THE POSSIBILITY OF PAROLE AFTER 40 YEARS IMPRISONMENT FOR A JUVENILE OFFENDER CONVICTED OF CAPITAL MURDER DOES NOT VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, EVEN THOUGH THE STATUTORY SCHEME MAY NOT ALLOW FOR THE CONSIDERATION OF THE MITIGATING EVIDENCE REGARDING MULTIPLE AND SEVERE MENTAL HEALTH ISSUES, OR ALLOW THE DISTRICT COURT TO CONDUCT "AN INDIVIDUALIZED SENTENCING HEARING."

Criner v. State, MEMORANDUM, No. 03-18-00528-CR, 2019 WL 6042277, Tex. Juv. Rep. Vol 34 No. 1 ¶ 20-1-4 (Tex.App.—Austin, 11/15/2019).

Facts: Criner was charged with the capital murder of H.W. for allegedly strangling her with a ligature while he was in the course of committing or attempting to commit aggravated sexual assault, kidnapping, or robbery. The following summary comes from the testimony and other evidence presented at the trial.

The offense allegedly occurred at night on April 3, 2016, on the campus of the University of Texas at Austin. H.W. was a student at the University. On the night in question, H.W. called her on-campus roommate at around 9:30 p.m. to tell her roommate that she was walking back to the dorm from the University's dance production lab. At that time, H.W. was wearing a black turtleneck, black pants or leggings, and black Doc Marten boots, and she was carrying a blue duffle bag that had red handles. The bag contained, among other items, a sweater, a book entitled "All the Light We Cannot See," and a silver Apple laptop. On prior occasions when H.W. walked home from the lab, she took a path along Waller Creek that ran behind the Alumni Center for the University. On her way to the dorm, H.W. was texting with a friend but stopped responding to the texts from her friend around 9:40 p.m. H.W. did not return to her dorm room that night. The following morning, H.W.'s roommate and friends reported her missing to the University's Police Department.

During their investigation, the police reviewed security footage of a loading dock from a building near Waller Creek. The footage from April 3 showed an African American man riding a bicycle down the loading dock at 9:20 p.m. The man was wearing an orange bandana around his neck, glasses, a backpack, and a dark jacket with patches on the shoulders. The bike was later described as a red bike with a woman's frame that had tape on the handlebars. The man left the area at 9:21 p.m. without his bike, returned at 9:32, left at 9:33 on his bike, and then returned again at 9:38. Around that

same time, another person who was wearing dark clothing walked to the area and headed for a path behind the Alumni Center. The other person was looking at the screen of an electronic device. After noticing the other person, the man got off his bike, followed the path of the other person, reached underneath his backpack, and pulled out an object. The man disappeared from view at 9:39 p.m.

After reviewing the footage summarized above, police officers searched the Waller Creek area and found H.W.'s naked body in the creek. She had been placed between two rocks and covered with branches. There was a strap around her neck, and she had sustained injuries to her head. An autopsy revealed that the cause of death was strangulation and blunt force trauma to the head and that H.W. had bruising on her vaginal wall that was consistent with sexual assault.

In addition to finding H.W.'s body, the police found at the scene a claw hammer with one claw broken off and a pair of prescription glasses. At trial, an optician and an optometrist testified regarding the glasses. The optician testified that Criner had purchased glasses from her store, that her store sold the style of frames for the glasses found in the creek, and that the pair of glasses that she sold to Criner had the same prescription and lens size as the glasses from the creek. In her testimony, the optician stated that she could not say for certain that glasses recovered from the creek were Criner's and that there was a 1.2 centimeter difference in "the pupillary distance" between the recovered glasses and Criner's prescription, but she also explained that it was normal for glasses to differ from the original prescription due to events that occur in production. The optometrist who wrote the prescription for Criner testified that the pupillary distance for the recovered glasses was consistent with that of a child and that a difference of 1.2 centimeters would be noticeable and could lead to double vision and dizziness, but he also explained that inaccuracies in pupillary distance can be caused by imprecise measurements, errors that occur in the production of the glasses, or bending in the frame. Moreover, the optometrist testified that the prescription for the recovered glasses was consistent under accepted standards of variation with the prescription that he wrote for Criner and that Criner had a "rare" prescription.

After H.W.'s body was found, two employees for the University were tasked with reviewing additional surveillance footage from other security cameras on the campus to look for evidence regarding the offense. The man seen on the loading dock security footage was not seen on surveillance footage again until 11:24 p.m. when he was seen at the north end of the University's football stadium. At that time, the man was carrying a blue bag that he did not have earlier, was no longer wearing glasses, and had retrieved his bike.

As will be detailed further below, the police eventually identified Criner as a suspect, and extensive evidence was presented at trial regarding his location before and after the offense in question. Late in March, Criner left his foster home in Killeen, Texas, and headed to Austin, Texas. Before leaving, Criner had been given eyeglasses. Shortly after he arrived in Austin, Criner began hanging around the University and neighboring areas. On March 30, a member of an athletic team for the University found some property inside what should have been the team's empty storage room in the football stadium, and the individual took photos of the items in the storage room, including ropes, straps, a claw hammer with one claw missing, and a lime green shirt. After the individual informed the University that there might be someone living in the storage room, a representative for the University went to the storage room, found Criner, and told him to gather his property and leave. When the representative returned later, Criner and all his belongings were gone.

On the day after the offense in question, firefighters received a call regarding a possible fire at a vacant building that was being remodeled in the Medical Arts Square near the University. When the firefighters arrived, they found Criner inside the building and also discovered that he had started a small fire inside. After learning that Criner was a minor and was homeless, the firefighters and the responding police officers made arrangements to have Criner stay at LifeWorks, which is a shelter for minors. Although the police officers and firefighters explained that Criner could take some of the items that he had in the building, they also told him that he could not take all of the property to the shelter.

Criner placed several of the items in two of his bags to take with him to the shelter. One of the bags was a backpack, and the other was a blue duffle bag with red straps. The firefighters and the police officers gathered up the remainder of the items, placed them inside a gray trash can, and set the trash can at the bottom of a cement staircase on the outside of the building that led to a door to the basement of the building. One of the firefighters also informed Criner that he would take one of the three bicycles inside the building to the firehouse for safekeeping and asked Criner to select which bike he wanted the firefighters to take. Criner chose a red bike with a woman's frame that had tape on the handlebars. After the police officers and firefighters secured Criner's belongings, one of the police officers drove Criner to LifeWorks.

As part of their investigation, the police released some surveillance footage of the loading dock at the University to the media. When the footage was shown on a local news station, one of the firefighters who responded to the call at the Medical Arts building and who interacted with Criner recognized Criner and the bicycle from the footage. After the firefighter informed his supervisor, his supervisor contacted the police, and police officers subsequently went to the Medical Arts building and to the LifeWorks shelter.

While at the Medical Arts building, police officers recovered several items from inside the building and

from inside the gray trash can that firefighters and police officers used to store some of Criner's property. Inside the firepit, the police found a piece of rubber appearing to be part of a boot that had been burned. In addition, the police found inside the building straps and ropes, including one strap that was described as an "exact match" to the strap that was used to kill H.W.

Inside the trash can, the police found straps, a portion of a Doc Marten boot that had been burned, and a black turtleneck and black pants that were sandy and resembled the clothes H.W. was last seen wearing. One of the straps appeared to be the same type of strap that had been used to strangle H.W. The police also found a sweater that had a receipt in the pocket with H.W.'s name on it. Further, the police recovered the following items that appeared to match the clothes that the suspect was wearing in the surveillance footage: an orange bandana and a black jacket with shoulder patches. The jacket was characterized as an "exact match" to the jacket seen on the surveillance footage. The police also found a lime green shirt. While the items were being inventoried, a hair was discovered on the lime shirt, and subsequent mitochondrial DNA testing performed on the hair excluded more than 99% of the population of North America, including Criner, as potential sources of the hair but could not exclude H.W. and her maternal relatives. During the trial, Criner made an oral motion to suppress the items recovered from the trash can, but the district court denied that motion.

At the LifeWorks shelter, the police searched Criner's room and found, among other items, a silver Apple laptop, a blue duffle bag with red straps, a nylon strap that was similar to the one found wrapped around H.W.'s neck, a backpack, and a copy of "All the Light We Cannot See." After Criner was arrested, the remainder of his possessions was placed in the custody of the Department of Family and Protective Services. The police seized some of those items later, including a gray calculator with H.W.'s name on it, a pencil bag with her name on it, Criner's Nextbook laptop, and several flash drives belonging to Criner.

During the trial, Manuel Fuentes testified that he performed a forensic extraction on Criner's Nextbook laptop and the flash drives. Fuentes explained that during the extraction, pictures of Criner from March 24, 2016, and March 27, 2016, were recovered showing him wearing glasses, an orange bandana, and a "yellowish" shirt, and those photos were admitted as exhibits. In his testimony, Fuentes also described various forensic reports that he ran on Criner's laptop and related that the reports showed the following computer activity on the night of the offense: using the Internet around 8:12 p.m., being turned on or rebooted at 8:26 p.m., "powering up" at 8:44 p.m., registering a USB device at 9:17 p.m., running various programs at 9:18 p.m. and 9:33 p.m., being "active" between 8:40 p.m. and 9:33 p.m., and displaying a text document at 11:54 p.m. Fuentes also testified that if the computer was bouncing around in a backpack, the computer might report some of the activity listed above.

Once the State rested and closed, Criner elected to testify. In his testimony, Criner explained that after he ran away from his foster home in Killeen, he stayed in a hospital parking garage in Austin for a few days before discovering the storage room at the University. Further, Criner related that he stayed in the storage room for several days, left two of his bags as well as his glasses in the storage room when he was asked to leave, and then moved into the Medical Arts building. Regarding the night in question, Criner testified that he went back to the hospital parking garage to charge his computer and cell phone, that he returned to the Medical Arts building before nightfall, that he did not leave the building that night, that he used his computer that night, and that he had to reboot the computer because it was malfunctioning. Regarding the morning after the offense occurred, Criner testified that he went through the contents of several dumpsters and found a red bike and multiple bags containing various items, including ropes, clothes, and a laptop. Additionally, Criner denied killing H.W. or ever seeing her, stated that he did not have a red bike on the day of the offense, discussed losing his hammer before he was kicked out of the storage room at the University, and explained that the glasses that the police found at the scene of the crime were not his.

After considering the evidence presented at trial, the jury found Criner guilty of capital murder, and the district court imposed a mandatory life sentence with the possibility of parole. Following his conviction, Criner filed a motion for new trial asserting that he discovered new evidence pertaining to his Nextbook laptop after the trial concluded. After convening a hearing on the motion for new trial, the district court denied the motion. Criner now appeals his conviction.

Held: Modified and Affirmed

Opinion: In his second issue on appeal, Criner challenges the constitutionality of the statutory scheme imposing a mandatory punishment for juvenile offenders who have committed a capital felony. Subsection 12.31(a) sets out the punishment options for an individual "adjudged guilty of a capital murder in a case in which the state does not seek the death penalty" and explains that the punishment options are as follows:

(1) life, if the individual committed the offense when younger than 18 years of age; or
(2) life without parole, if the individual committed the offense when 18 years of age or older.
Tex. Penal Code § 12.31(a).

Accordingly, for juvenile offenders, the Penal Code allows for the possibility of parole, see id., and subsection 508.145(b) of the Government Code states that juvenile inmates serving a life sentence for a capital murder are "not eligible for release on parole until the actual calendar time the inmate has served,

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without consideration of good conduct time, equals 40 calendar years," Tex. Gov't Code § 508.145(b). In light of those statutory provisions, Criner argues that "an automatic sentence of life with the possibility of parole after 40 years imprisonment for a juvenile offender convicted of capital murder violates the Eighth Amendment of the United States Constitution," which prohibits the imposition of "cruel and unusual punishments," see U.S. Const. amend. VIII. When presenting this issue on appeal, Criner contends that the statutory scheme is facially unconstitutional, but he also seems to argue that the statutory scheme is unconstitutional as it was applied to him because the statutory scheme did not allow for the consideration of the mitigating evidence that he presented regarding his "multiple and severe mental health issues" and, accordingly, because it did not allow the district court to conduct "an individualized sentencing hearing."

A determination regarding whether a statute is facially unconstitutional is a question of law subject to de novo review. Ex parte Lo, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). A facial challenge is essentially "a claim that 'the statute, by its terms, always operates unconstitutionally.' " Lebo v. State, 474 S.W.3d 402, 405 (Tex. App.—San Antonio 2015, pet. ref'd) (quoting Gillenwaters v. State, 205 S.W.3d 534, 536 n.2 (Tex. Crim. App. 2006)). When assessing a statute's constitutionality, reviewing courts "presume that the statute is valid and that the legislature has not acted unreasonably or arbitrarily" when enacting the statute. Rodriguez v. State, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). Moreover, the party presenting the statutory challenge has the burden of establishing that the statute is unconstitutional. Id. For as-applied challenges, appellate courts review the constitutionality of a criminal statute under a de novo standard of review. Modarresi v. State, 488 S.W.3d 455, 465 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (setting out standard for as-applied challenge). When presenting an as-applied challenge, a defendant "concedes the general constitutionality of the statute but asserts it is unconstitutional as applied to her particular facts and circumstances." Id. "The burden rests on appellant to establish the statute's unconstitutionality as applied to him." Eugene v. State, 528 S.W.3d 245, 249 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

As support for his arguments that the statutory scheme is unconstitutional, Criner refers to an opinion by the Supreme Court. See Miller v. Alabama, 567 U.S. 460 (2012). In Miller, the Supreme Court determined "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " Id. at 465 (emphasis added). Further, the Supreme Court explained that statutory schemes imposing life imprisonment without the possibility of parole prevent "those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' " id. (quoting Graham v. Florida, 560 U.S. 48, 68, 74 (2010)), and pose "too great a risk of disproportionate punishment" "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," id. at 479; see also id. at 477 (noting that hallmark features of youth include "immaturity, impetuosity, and failure to appreciate risks and consequences"). Moreover, the Supreme Court explained that these types of punishment schemes do not allow consideration of the defendant's "family and home environment ... no matter how brutal or dysfunctional," of "the circumstances of the homicide offense," or of "the possibility of rehabilitation even when the circumstances most suggest it." Id. at 477-78.

Although the Supreme Court concluded that statutes that automatically assess a juvenile's sentence at life without the possibility of parole are unconstitutional, the Supreme Court has not made a similar determination regarding a statutory scheme like the one at issue here, which involves the imposition of a mandatory life sentence but with the possibility of parole. See Tex. Penal Code § 12.31(a); Tex. Gov't Code § 508.145(b). However, the Court of Criminal Appeals has considered whether the current Texas statutory scheme is constitutional under Miller. See Lewis v. State, 428 S.W.3d 860 (Tex. Crim. App. 2014). In Lewis, the Court of Criminal Appeals explained that the holding from Miller "is narrow" and "does not forbid mandatory sentencing schemes" like the one in Texas, which leaves the possibility of parole and "a route for juvenile offenders to prove that they have changed" while serving a sentence "that the Legislature has deemed appropriate in light of the fact that the juvenile took someone's life under specified circumstances." Id. at 863 (citing Tex. Penal Code § 19.03(a)). Similarly, the Court of Criminal Appeals explained that the analysis from Miller does not require that "all juvenile offenders" be given "individualized sentencing" and only "requires an individualized hearing ... when a juvenile can be sentenced to life without the possibility of parole." Id.; see also Turner v. State, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014) (concluding that defendant was "not entitled to an individualized sentencing hearing" under Miller and was "only entitled to have his sentence reformed from life without parole to life with the possibility of parole").

Following Miller, several of the Texas intermediate courts of appeals, including this one, have rejected both facial and as-applied challenges to the statutory scheme imposing mandatory sentences of life with the possibility of parole for juvenile offenders convicted of capital murder. See McCardle v. State, 550 S.W.3d 265, 266, 269 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd) (concluding that juvenile defendant who was sentenced to life with possibility of parole "was not entitled to an individualized punishment hearing under the Eighth Amendment or Miller"); Guzman v. State, 539 S.W.3d 394, 402-06 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (rejecting facial challenge to subsection 12.31(a)(1) of Penal Code and subsection 508.145(b) of Government Code); Matthews v. State, 513 S.W.3d 45, 61 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (overruling defendant's appellate

issues asserting that subsection 12.31(a)(1) "is unconstitutional both facially and as applied to him"); Maxwell v. State, No. 03-14-00586-CR, 2016 WL 4177233, at *2-3 (Tex. App.—Austin Aug. 3, 2016, no pet.) (mem. op., not designated for publication) (relying on Miller and Lewis when overruling defendant's claim that his sentence violated Eighth Amendment because he was not given individualized punishment hearing and further rejecting claim that "life imprisonment with the possibility of parole amounts to a 'de facto life sentence' " because rationale from "Miller did not require that parole be 'probable,' " only that it "be 'possible' ").

Conclusion: In light of the prior precedent from the Court of Criminal Appeals and from this Court and of the guiding authority from other Texas intermediate courts of appeals addressing claims like those brought here, we must reject Criner's constitutional challenges to the punishment scheme under which he was sentenced and overrule his second issue on appeal. See McCardle, 550 S.W.3d at 269 (explaining that appellate courts are "bound in criminal cases to follow decisions of the Court of Criminal Appeals").

IN DENYING PETITION FOR WRIT OF HABEAS CORPUS, U.S. MAGISTRATE RULED THAT *MILLER* DID NOT CLEARLY ESTABLISH THAT A DISCRETIONARY LENGTHY TERM-OF-YEAR SENTENCE FOR JUVENILES WHO COMMIT MULTIPLE NONHOMICIDE OFFENSES IS UNCONSTITUTIONAL EVEN WHEN IT AMOUNTS TO THE PRACTICAL EQUIVALENT OF LIFE WITHOUT PAROLE (130 YEARS).

Grogan v. TDCJ-CID, MEMORANDUM ORDER, No. 1:17-CV-32, 2020 WL 289177, Tex. Juv. Rep. Vol 34 No. 1 ¶ 20-1-8 (U.S.D.C., E.D.—Beau. Div., 1/21/2020)

Facts: Petitioner, Kristoff Jamell Grogan, proceeding with counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The Court referred this matter to the Honorable Keith Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this Court. The Magistrate Judge recommends the petition be dismissed as barred by the applicable statute of limitations and as lacking in merit.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, and pleadings. Petitioner filed objections to the Report and Recommendation of United States Magistrate Judge. This requires a de novo review of the objections in relation to the pleadings and applicable law. See FED. R. CIV. P. 72(b).

Petitioner's Objections are two-fold: (1) whether Dodd v. United States, 545 U.S. 353 (2005) applies and bars review of an unconstitutionally void sentence and does the "miscarriage of justice" exception apply and (2) whether reasonable jurists would disagree that a term of years sentence of 130 years would violate the Eighth and Fourteenth Amendments to the United States Constitution and would the same proposition apply irrespective of whether "mandatory" or "discretionary." Amended Objections (docket entry no. 23).

Held: Magistrate Judge's Report and Recommendations Adopted

Opinion/Memorandum Order: A careful review of the Report and Recommendation, the record and case law reveals no error. As outlined by the Magistrate Judge, the Fifth Circuit recently addressed Miller's application to a term-of-years sentence. In United States v. Sparks, the Fifth Circuit explicitly stated "a term-of-years sentence cannot be characterized as a de facto life sentence." 941 F.3d 748 (5th Cir. 2019).

Miller dealt with a statute that specifically imposed a mandatory sentence of life. The Court distinguished that sentencing scheme from "impliedly constitutional alternatives whereby 'a judge or jury could choose, rather than a life-without-parole sentences, a lifetime prison term with the possibility of parole or a lengthy term of years.' " Lucero, 394 P.3d at 1133 (quoting Miller, 567 U.S. at 489). Given Miller's endorsement of "a lengthy term of years" as a constitutional alternative to life without parole, it would be bizarre to read Miller as somehow foreclosing such sentences. Id. at 754.

Miller did not clearly establish that a discretionary lengthy term-of-year sentence for juveniles who commit multiple nonhomicide offenses is unconstitutional when it amounts to the practical equivalent of life without parole. Cf., Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012) (finding Graham did not apply to consecutive, fixed-term sentences for multiple nonhomicide offenses which may end up being the functional equivalent of life without parole). On federal habeas review, the core inquiry is whether the state court's denial of the claim was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d) (emphasis added). Because the Supreme Court has not specifically address the constitutionality of a discretionary lengthy term-of-year sentence, the denial of petitioner's state habeas petition cannot be contrary to clearly established Federal law. The very fact that numerous state courts and some federal courts are split on whether Miller applies in this context demonstrates the relief petitioner seeks is not clearly established.

Conclusion: Because Miller does not apply, the petition is barred by the applicable statute of limitations under 28 U.S.C. § 2244(d)(1)(A). This Court simply declines to extend the precedent established in Miller to petitioner's lengthy term-of-year sentence. See Teague v. Lane, 489 U.S. 288 (1989); see also United States v. Walton, 537 F. App'x 430 (5th Cir. July 26, 2013) (declining to apply Graham and Miller to a discretionary

federal sentence for a term of years not in error as it raises a novel constitutional argument that would require the extension of precedent).

Accordingly, petitioner's objections are overruled. The findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is ADOPTED. A final judgment will be entered in this case in accordance with the Magistrate Judge's recommendations.

SEX OFFENDER REGISTRY

ORDER REQUIRING JUVENILE TO REGISTER AS A SEX OFFENDER WAS REVERSED AS AN ABUSE OF DISCRETION BECAUSE THE JUVENILE COURT REFUSED TO ALLOW JUVENILE (WHO HAS THE BURDEN OF PROOF) TO PUT ON ANY WITNESS TESTIMONY.

In the Matter of B.J.H.B., MEMORANDUM, No. 13-18-00135-CV, 2019 WL 5997505, Tex. Juv. Rep. Vol 34 No. 1 ¶ 20-1-5 (Tex.App.—Corpus Christi-Edinburg, 11/14/2019)

Facts: B.J.H.B. was born on March 18, 2000. On September 14, 2016, when B.J.H.B. was sixteen years old, the State filed its original petition alleging that he had engaged in delinquent conduct by committing the felony offense of sexual assault of a child when he was fourteen years old. See TEX. PENAL CODE § 22.011(a)(2)(A).

On October 17, 2016, the trial court, sitting as a juvenile court, signed an adjudication order, finding that B.J.H.B. had engaged in delinquent conduct. The juvenile court placed B.J.H.B. on probation for two years, subject to various conditions, and deferred a finding of whether sex offender registration would be required in this case. See TEX. CODE CRIM. PROC. art. 62.352(b)(1) (allowing the juvenile court to defer a registration decision).

B.J.H.B. was required, in part, to: (1) participate in intensive supervision probation; (2) abstain from any contact with the complaining witness4; (3) maintain a minimum grade of seventy in each class in school; (4) submit to random urinalysis testing; (5) perform eighty hours of community service; (6) complete the Teen Intervention and Prevention Program, Parents and Children Together Program, and Aggression Replacement Training; (7) attend counseling; (8) undergo a polygraph examination; and (9) abide by a curfew and all GPS monitoring restraints.

Following the State's submitted motion and request for judgment "requiring [B.J.H.B.] to register as a sex offender or excuse registration," the court held a registration determination hearing on March 1, 2018. See TEX. CODE CRIM. PROC. art. 62.351(b) (providing that the burden is on the juvenile at a registration determination hearing).

Although the juvenile carried the burden, the State was asked to proceed first. See id. Gloria Tanguma, B.J.H.B.'s juvenile probation officer, testified that B.J.H.B. had been placed at Pegasus School, a school for adjudicated juveniles, and B.J.H.B. had been successfully discharged from the program. B.J.H.B. completed all of his programs and therapy, passed his classes and a polygraph exam, reported as required, and was overall "doing very well." There were no probationary violations reported or concerns of reoffending risks articulated. However, Taguma testified it was probation's policy to "always recommend that [juvenile offenders] be registered as sex offenders" irrespective of a juvenile's individual successes.

The State also called B.J.H.B. to testify. B.J.H.B., seventeen years old and living in a foster home with other adjudicated sex offenders at the time of the hearing, briefly testified to his own history of sexual and physical abuse.5 B.J.H.B. also spoke about his progress and hopes to voluntarily remain in foster care after he turned eighteen. B.J.H.B. said he understood that remaining in foster care would subject him to the Department's rules and continued monitoring long after his probation expired, but he reasoned that this decision would provide him with the structure and financial support that he would not otherwise have to pursue a "career as a welder" and "get [his] associate's degree."

The court then asked B.J.H.B. to discuss the underlying offense and victim, inquiring into what B.J.H.B. disclosed during the polygraph exam and whether there were any other children that B.J.H.B. had reported "sexual contact with." B.J.H.B. testified that he had inappropriately touched twenty-two other children. According to B.J.H.B., the other children were "the same age" as he was, and the "sexual contact" occurred when B.J.H.B. was between the ages of eight and ten. B.J.H.B. reiterated that his therapy has had a "positive impact in [his] life," changing him "mentally and emotionally," and he urged the court to consider a registration exemption.

B.J.H.B.'s attorney requested to call B.J.H.B.'s caseworker, B.J.H.B.'s mother, and an individual from B.J.H.B.'s current placement at the Burke Center for Youth to testify on B.J.H.B.'s behalf. The juvenile court did not permit testimony from any of B.J.H.B.'s witnesses.

The State and B.J.H.B.'s attorney provided a joint recommendation, shared by B.J.H.B.'s treatment team, that B.J.H.B. be exempt from registration. The juvenile court maintained, given the number of children that had been "exposed to inappropriate behavior" by B.J.H.B., the court could not "in good conscience" find exemption from registration appropriate. The court ordered sex offender registration for a period of ten years and made the following written findings:

1. The interests of the public do not require public registration under Chapter 62 of the Texas Code of Criminal Procedure; and
2. The protection of the public would not be increased by public registration of the Respondent under Chapter 62 of the Texas of Criminal Procedure; or
3. Any potential increase in protection of the public resulting from public registration is clearly outweighed by any anticipated substantial harm to the Respondent and the Respondent's family that would result from public registration under Chapter 62 of the Texas Code of Criminal Procedure.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Respondent shall register as a sex offender pursuant to Chapter 62 of the Texas Code of Criminal Procedure; however, said registration shall be made nonpublic.
This appeal followed.

Held: Reversed and Remanded

Memorandum Opinion: A juvenile court is permitted to defer its decision "to require, or exempt the respondent from, registration." TEX. CODE CRIM. PRO. ANN. art. 62.352(c). However, once the respondent successfully completes sex offender treatment, "the respondent is exempted from registration under this chapter unless a hearing under this subchapter [62.351] is held on motion of the prosecuting attorney, regardless of whether the respondent is 18 years of age or older, and the court determines the interests of the public require registration." Id. (emphasis added). Moreover, "[t]he hearing is without a jury and the burden of persuasion is on the respondent to show by a preponderance of evidence that the criteria of Article 62.352(a) have been met." TEX. CODE CRIM. PRO. ANN. art. 62.351(b). Article 62.352(a) requires evidence (1) that the protection of the public would not be increased by registration of the respondent under this chapter; or (2) that any potential increase in protection of the public resulting from registration of the respondent is clearly outweighed by the anticipated substantial harm to the respondent. Id. art. 62.352(a)(1–2). In other words, should a respondent successfully complete treatment and the State nonetheless request a registration determination, the respondent then carries the burden in a registration determination hearing to prove that an exception is warranted. See id.

It is undisputed that (1) B.J.H.B. successfully completed sex offender treatment, (2) the determination hearing was held on the State's motion, and (3) B.J.H.B. was not permitted to produce evidence to shoulder his burden of proving by a preponderance of the evidence that he was exempt from registration. See TEX. CODE CRIM. PRO. ANN. art. 62.351(b); id. art. 62.352(c).

B.J.H.B. argues the juvenile court's disallowance of evidence on his own behalf was in violation of his Fifth and Fourteenth Amendment due process rights. Understanding that the United State Supreme Court and Texas Supreme Court's prior applications of constitutional protections to juveniles in juvenile court proceedings have been tenuous and nuanced, we find it unnecessary to comment on whether this disallowance amounts to a violation of a constitutionally protected right. See McKeiver v. Pennsylvania, 403 U.S. 528, 541–50 (1971) (delineating which constitutional protections apply to juveniles in juvenile court proceedings and evaluating whether and to what degree each constitutional protection extends to juvenile proceedings); but see Hidalgo v. State, 983 S.W.2d 746, 752 (Tex. Crim. App. 1999) (observing that the legislatives' "mandated the use of the Texas Rules of Criminal Evidence and the evidentiary provisions ... of the Code of Criminal Procedure instead of their civil counterparts for judicial proceedings involving juveniles" are but some examples of "recent legislative changes [which] continue to erode the original justifications for denying juveniles the same procedural protections as adults") (internal citations omitted). Instead, we find the juvenile court abused its discretion by prohibiting B.J.H.B. from presenting evidence—a burden and right conferred unequivocally by statute. See TEX. CODE CRIM. PRO. ANN. art. 62.351(b).

While the legislature intended to subject juveniles adjudicated for sexually-related offenses to the mandates of sex offender registration and notification provisions, the legislature also provided juveniles with an avenue for exemption from registration. See id. B.J.H.B., as the respondent seeking exemption, was statutorily burdened with the responsibility of "show[ing] by a preponderance of evidence that the criteria of Article 62.352(a) [had] been met," see id., which necessitates evidence that "the protection of the public would not be increased by registration of the respondent" or "that any potential increase in protection of the public resulting from registration of the respondent is clearly outweighed by the anticipated substantial harm to the respondent." Id. art. 62.352(a)(1–2). The juvenile court's refusal to allow B.J.H.B. to put on any witness testimony chilled B.J.H.B.'s ability to present any article 62.352(a) evidence. Because it is axiomatic in our jurisprudence that the party with the burden of proof be allowed to introduce some evidence, see generally JLG Trucking, LLC v. Garza, 466 S.W.3d 157, 164–65 (Tex. 2015), the juvenile court's failure to allow any evidence from B.J.H.B. was, at minimum, without regard to guiding rules and therefore, an abuse of discretion. See TEX. CODE CRIM. PROC. ANN. art. 62.357(b); In re Dunsmore, 562 S.W.3d at 733.

Conclusion: Moreover, because the juvenile court abused its discretion in making its determination without consideration of the statutory requirement, see TEX. CODE CRIM. PROC. ANN. art. 62.351(b)(1)–(4), the subsequent judgment cannot be said to have been proper. See In re Hall, 286 S.W.3d at 927; see also TEX. R. APP. P. 44.1(a)(1) (providing that judgment may be reversed where trial court "probably caused the rendition of an improper judgment"). We sustain appellant's dispositive second issue and find reversal

appropriate. See In re L.L., Jr., 408 S.W.3d at 385. We reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

THE JUVENILE COURT'S JURISDICTION TO RECONSIDER A DEFERRED REGISTRATION DECISION DOES NOT TERMINATE FOLLOWING THE COMPLETION OF TREATMENT, AND THE DELAY IN THIS CASE OF SEVEN-AND-A-HALF-MONTHS, WHILE NOT TO BE APPLAUDED, DID NOT DESTROY JURISDICTION.

In the Matter of D.K., No. 02-19-00119-CV, --- S.W.3d ---, 2019 WL 5608235, Tex. Juv. Rep. Vol 34 No. 1 ¶ 20-1-3 (Tex.App.—Fort Worth, 10/31/2019)

Facts: On September 24, 2013, appellant was found to be a child who engaged in delinquent conduct, namely, aggravated sexual assault of a child under the law of parties. The juvenile court placed appellant on probation for two years and ordered him to undergo sex offender treatment. At appellant's request, the juvenile court deferred its decision on whether to require appellant to register as a sex offender.

Appellant was unsuccessfully discharged from outpatient treatment, and after he committed a new offense—assault against his sister—the State moved to modify his probation. By agreement of the parties, appellant's community supervision was extended for an additional two years, and he was placed at Pegasus Schools for inpatient sex offender treatment. He successfully completed that program in April 2016, and his probation ended in August 2016. The juvenile court did not reconsider its previous deferral concerning sex offender registration.

But in 2018, appellant once again found himself before the juvenile court when he was charged with two new offenses: terroristic threat and assault against his brother-in-law. He was again placed on probation, which was to last until his eighteenth birthday. While on probation, appellant was alleged to have committed two more offenses: continuous family violence, for which he was jailed, and harassment of a public servant while in jail.

On January 10, 2019, the State filed a motion to require appellant to register as a sex offender. After hearing the evidence, the juvenile court granted the motion, required appellant to register, and entered detailed findings and conclusions.

In his first issue, appellant argues that the juvenile court lacked jurisdiction to revisit its deferred decision. He argues that the statute grants the juvenile court jurisdiction to reconsider a deferred registration only during treatment or "on the successful or unsuccessful completion of treatment"; appellant interprets this language to mean that jurisdiction terminates after completion of treatment. According to appellant, the juvenile court therefore lacked jurisdiction because appellant successfully completed treatment years beforehand.

Held: Affirmed

Opinion: Generally, a juvenile adjudicated delinquent for aggravated sexual assault is required to register as a sex offender with law enforcement authorities. Tex. Code Crim. Proc. Ann. arts. 62.001(5)(A), .051(a). But on a juvenile's request, the juvenile court must conduct a hearing to determine whether the juvenile's and the public's interests require an exemption from registration. Id. art. 62.351(a). After the hearing, the juvenile court may render an order deferring a decision on whether to require registration until the respondent has completed treatment for the sexual offense as a condition of probation. Id. art. 62.352(b)(1).

Appellant's argument hinges on the language of the statutory provision that sets the terms by which the juvenile court may reconsider registration following a deferral. The provision in question states that if the court defers a decision on registration,
the court retains discretion and jurisdiction to require, or exempt the respondent from, registration under this chapter at any time during the treatment or on the successful or unsuccessful completion of treatment, except that during the period of deferral, registration may not be required. Following successful completion of treatment, the respondent is exempted from registration under this chapter unless a hearing under this subchapter is held on motion of the prosecuting attorney, regardless of whether the respondent is 18 years of age or older, and the court determines the interests of the public require registration.
Id. art. 62.352(c).

To appellant, the first sentence creates a limitation on jurisdiction. As he reads it, the phrase "the court retains discretion and jurisdiction ... on the successful or unsuccessful completion of treatment" means that the court loses jurisdiction after the completion of treatment.

To reach the construction that appellant desires, though, we would need to replace one of two words: "retains" or "on." For instance, if we replaced the word "retains" with a word such as "loses," then this provision would clearly mean that the court loses jurisdiction on the completion of treatment. The same construction might be called for if we replaced the word "on" with "until," as in "the court retains discretion and jurisdiction ... until the successful or unsuccessful completion of treatment." But that is not what the statute says.

Rather, the statute uses the words "retains" and "on," and we presume that these words were used for a reason. See City of Richardson v. Oncor Elec. Delivery Co. LLC, 539 S.W.3d 252, 260 (Tex. 2018). In this context, the meaning of the word "retains" is self-

evident, and the word "on" is most likely a reference to what occurs when something is done, such as "on arriving home, I found your letter"; one dictionary defines "on" as a word used "to indicate a time frame during which something takes place or an instant, action, or occurrence when something begins or is done." On, Webster's Ninth New Collegiate Dictionary 823 (1991) (emphasis added). And the statute clearly specifies what is to occur when treatment is done: "the court retains discretion and jurisdiction." Tex. Code Crim. Proc. Ann. art. 62.352(c). Under its most natural reading, then, this provision is not a limitation upon jurisdiction, but an assurance of it.

This reading is reinforced by comparison with the next sentence, which, again, provides that "[f]ollowing successful completion of treatment," the juvenile is exempted from registration unless a hearing is held on the State's motion and the juvenile court determines that public interest requires registration. Id. If jurisdiction terminated after successful completion of treatment, as appellant suggests, that outcome could not be squared with the next sentence's provision that after successful completion of treatment, the court may hold a hearing to determine whether registration should be required. Courts without jurisdiction are not often called upon by the legislature to hold hearings.

In our view, this interpretation is also sound policy. The registration exemption for juveniles is a clemency, to be applied based on the competing equities of public safety and personal hardship. See id. art. 62.352(a). This clemency is a matter of discretion that may in some cases be best exercised with a full view of the youth's character and the case's substance as they are revealed over time—not, by necessity, immediately upon the completion of treatment. See id. art. 62.352(c). In this case, for instance, compelling the juvenile court to make its determination immediately following appellant's successful completion of treatment and seeming progress at Pegasus Schools might have yielded one resolution of the matter. But allowing the juvenile court to reserve judgment led the court to reach a different conclusion based on a more fully developed set of facts. Three years—and four offenses—later, that seems to have been the wiser course.

For these reasons, we hold as our sister courts have: the juvenile court's jurisdiction to reconsider a deferred registration decision does not terminate following the completion of treatment, and the delay in this case, while not to be applauded, did not destroy jurisdiction. See In re R.A., 465 S.W.3d 728, 738 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) ("Nonetheless, the statute does not provide a specific deadline for the State to file a motion or for a hearing to be held. We conclude that the seven-and-a-half[-]month delay did not cause the Juvenile Court to lose jurisdiction to determine whether R.A. should be required to register as a sex offender...."); In re J.M., No. 12-10-00159-CV, 2011 WL 6000778, at *1, *3 (Tex. App.—Tyler Nov. 23, 2011, no pet.) (mem. op.) (holding that the juvenile court had jurisdiction to require a juvenile to register as a sex offender, even though the State did not file its motion until four-and-a-half months after the juvenile completed treatment). We overrule appellant's first issue.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

THE LANGUAGE "PREVIOUSLY BEEN TRANSFERRED" AS CONTAINED IN SECTION 54.02(m) RELATES TO THE SECTION 54.02(m) TRANSFER ITSELF AND NOT THE CONDUCT AT ISSUE IN THE SECTION TRANSFER.

In the Matter of A.J.F., No. 14-19-00414-CV, No. 14-19-00415-CV, No. 14-19-00416-CV, --- S.W.3d ----, 2019 WL 5617624, Tex. Juv. Rep. Vol 34 No. 1 ¶ 20-1-2 [Tex.App.—Houston (14th Dist.), 10/31/2019]

Facts:
December 28, 2018 15-year-old Juvenile commits robbery (arrested and released)
January 11, 2019 Juvenile possesses methamphetamine (Subsequent Case)
January 14, 2019 Robbery Case petition filed
January 14, 2019 Drug Case petition filed
February 21, 2019 Juvenile spit on detention guard (Subsequent Case)
February 28, 2019 Harassment Case petition filed (for spitting)
March 19, 2019 Petition for discretionary transfer filed in Robbery Case
May 6, 2019 3:05 Discretionary Transfer Order for Robbery signed
May 6, 2019 4:30 Petition for mandatory transfer filed in Subsequent Cases
May 8, 2019 Mandatory Transfer Orders signed

Appellant appealed each order. Regarding his second issue, he contends the trial court erred as a matter of law by signing the Mandatory Transfer Orders because section 54.02(m) does not apply in this case.

Held: Affirmed

Opinion: Section 54.02(m) is Texas' codification of the "once an adult, always an adult" doctrine of juvenile certification law. As relevant here, section 54.02(m) mandates a juvenile court to waive jurisdiction and transfer a child to the appropriate adult court if the child has "previously been transferred." The question we must answer is one of first impression: must the "previous transfer" precede only the section 54.02(m) transfer, or must it also precede the conduct at issue in the section 54.02(m) transfer?

The answer to the question depends on the relative chronology of three events: the child's first delinquent act, the juvenile court's waiver of jurisdiction and transfer to adult court regarding the child's first delinquent act, and the child's second delinquent act. Appellant contends section 54.02(m) applies only if the

first transfer precedes—is previous to—the second delinquent act. The State contends section 54.02(m) makes no such requirement, and that the first transfer need precede only the 54.02(m) transfer, regardless of when the conduct at issue in the 54.02(m) transfer occurred.

Many states have some version of the "once an adult, always an adult" doctrine. Most explicitly apply only to transfers regarding conduct committed by the juvenile after the first transfer. Those statutes generally provide that once a juvenile is transferred for adult proceedings or, in some cases, convicted as an adult, the court must also transfer him with respect to any delinquent act he is alleged to have committed after the first transfer (or conviction). Two events are required: the first transfer (or conviction), and a delinquent act after that transfer (or conviction). For example, in the District of Columbia, "[t]ransfer of a child for criminal prosecution terminates the jurisdiction of the [Family] Division over the child with respect to any subsequent delinquent act...." D.C. Code § 16-2307(h) (boldface added). Alabama follows that concept but enlarges the scope of conduct covered; its transfer statute applies to both future acts and pending allegations of delinquency. Ala. Code § 12-15-203(i) ("A conviction ... of a child of a criminal offense ... shall terminate the jurisdiction of the juvenile court over that child with respect to any future delinquent acts and with respect to any pending allegations of delinquency which have not been disposed of by the juvenile court....") (boldface added).4

Other transfer statutes do not mention the child's conduct. Instead, the only required event is the first transfer (or conviction). The Michigan statute states, "[T]he [juvenile] court shall waive jurisdiction of the juvenile if the court finds that the juvenile has previously been subject to the jurisdiction of the circuit court under this section...." Mich. Comp. Laws § 712A.4(5). In Indiana, the juvenile court shall waive jurisdiction over a child upon motion by the prosecutor if, among other things, "the child has previously been convicted of a felony or nontraffic misdemeanor." Ind. Code § 31-30-3-6(2).5 An Indiana appellate court construed that statute in State v. C.K., 70 N.E.3d 900 (Ind. Ct. App. 2017). C.K. asserted the only conviction that invoked the transfer statute was one was imposed before the juvenile committed the act that led to the filing of the delinquency petition. Id. at 903. The State contended the statute was satisfied by any conviction imposed before the motion to transfer was filed. Id. The court of appeals agreed with the State, writing, "The plain language of the statute does not place any limits on when the prior ... conviction must have occurred. [It was sufficient that] C.K.'s felony conviction was imposed before the State filed its motion for waiver of juvenile court jurisdiction." Id.

Texas' mandatory transfer statute states:
(m) Not withstanding any other provision of this section, the juvenile court shall waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal court for criminal proceedings if:
(1) the child has previously been transferred to a district court or criminal district court for criminal proceedings under this section, unless:
(A) the child was not indicted in the matter transferred by the grand jury;
(B) the child was found not guilty in the matter transferred:
(C) the matter transferred was dismissed with prejudice; or
(D) the child was convicted in the matter transferred, the conviction was reversed on appeal, and the appeal is final; and
(2) the child is alleged to have violated a penal law of the grade of felony.
Tex. Fam. Code Ann. § 54.02(m).

Appellant asserts, "[T]he relevant time frame for 'previous' is the date the separate offense [the offense at issue in the request for mandatory transfer] is alleged to have been committed." He cites In re J.W.W., 507 S.W.3d 408 (Tex. App.—Houston [1st Dist.] 2016, no pet), a case in which the first transfer happened to occur before the delinquent acts that were the subject of the 54.02(m) motion to transfer, though nothing in the opinion suggests section 54.02(m) requires such a chronology. See id. at 415–16. Appellant effectively suggests section 54.02(m)(1) falls into the first category of transfer statutes discussed above—those that explicitly require the first transfer to precede the delinquent acts in question.

But section 54.02(m)(1) falls into the second category of transfer statutes, not the first. It does not mention the child's conduct. The only requirement is that child has previously been transferred for criminal proceedings. Just as in C.K., appellant's position could not be correct unless we were to "judicially amend [section 54.02(m)(1)] by adding words not contained in the language of the statute." Lippincott, 462 S.W.3d at 508.

Appellant relies on a statement in a learned treatise on juvenile justice regarding the Legislature's intent for section 54.02(m)(1):
Although the statutory language [of section 54.02(m)(1)] is somewhat unclear, the legislature's intent is that the transfer order must have been made by the juvenile court before the new felony was committed by the child.
ROBERT O. DAWSON, TEXAS JUVENILE LAW 199–200 (Tex. Juvenile Justice Dep't ed., 9th ed. 2018). No support is offered for this assertion.

Binding precedent requires us to ascertain intent from the plain meaning of the words used in the statute, because "[t]he plain language of a statute is the surest guide to the Legislature's intent." Prairie View A & M, 381 S.W.3d at 507. Many mandatory transfer statutes across the country explicitly apply only to "subsequent delinquent acts"—acts committed after the first transfer. Section 54.02(m)(1) does not. "The wisdom or

expediency of the law is the Legislature's prerogative, not ours." Smith v. Davis, 426 S.W.2d 827, 831 (Tex. 1968); accord City of Laredo v. Laredo Merchants Ass'n, 550 S.W.3d 586, 589–90 (Tex. 2018). "We are not empowered to substitute what we believe is right or fair for what the Legislature has written, even if the statute seems unwise or unfair." Vandyke v. State, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017).

Appellant urges us to characterize section 54.02(m) as being akin to an ex post facto law as it was applied to him. Ex post facto laws are prohibited by the U.S. and Texas Constitutions. U.S. Const. art. 1, § 10; Tex. Const. art. 1, § 16. An ex post facto law is one that (1) criminalizes an act previously committed that was innocent when done; (2) aggravates a crime, or makes it greater than it was when committed; (3) inflicts greater punishment than the law attached to the criminal offense when committed; or (4) deprives a person charged with a crime to any defense available at the time the act was committed. See Peugh v. United States, 569 U.S. 530, 538, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013); Rodriguez v. State, 93 S.W.3d 60, 66 (Tex. Crim. App. 2002). Appellant points out that the relevant point in time in an ex post facto analysis is the time the offense was committed, because that is the time that defines the offender's rights.

We need not decide as a general matter whether section 54.02(m) functions as an ex post facto law, because it does not so function in this case. The offenses alleged in the Subsequent Cases are third-degree felonies,7 and appellant was 15 years old when he allegedly committed each offense. As a result, the juvenile court could have transferred appellant under section 54.02(a), the discretionary transfer statute. See Tex. Fam. Code Ann. § 54.02(a)(2)(B) (permitting transfer for third-degree felony if child was 15 years of age or older at time of offense). At the time of the alleged offenses, appellant was subject to being treated as an adult charged with third-degree felonies, so there is no ex post facto violation. The vehicle used to affect his transfer to district court does not change that fact.

Finally, appellant contends that this construction of section 54.02(m)(1) would lead to absurd results. First, he says, section 54.02(g) would be rendered meaningless. Subsection (g) states:
(**g) If the petition alleges multiple offenses that constitute more than one criminal transaction, the juvenile court shall either retain or transfer all offenses relating to a single transaction. Except as provided by Subsection (g-1), a child is not subject to criminal prosecution at any time for any offense arising out of a criminal transaction for which the juvenile court retains jurisdiction.**
Tex. Fam. Code Ann. § 54.02(g).

Appellant argues that by waiting to seek to transfer the Subsequent Cases, the State has wrested away the trial court's discretion to transfer some but not all of his cases. We disagree under the facts of this case. The State did not file a "petition [that] alleges multiple offenses." It filed three petitions, each alleging one offense. Appellant does not suggest that the alleged robbery, possession, and spitting on the guard constituted a single criminal transaction or that those offenses should have been charged in one petition.

Second, he hypothesizes that previously untransferable juveniles would become transferable due solely to section 54.02(m). He conjures a 13-year-old child charged with an offense that would be a felony if committed by an adult. A child of that age may not be transferred under the discretionary transfer statute, section 54.02(a). But, if that child is discretionarily transferred at age 15 for another offense, appellant supposes, the State could subsequently seek mandatory transfer for the offense he committed at age 13, and the court would have no choice but to grant the request.

Appellant is effectively asserting the statute would be unconstitutional as applied to the hypothetical 13-year-old juvenile. An as-applied challenge concedes a statute is generally constitutional but claims it operates unconstitutionally as to the challenger because of his circumstances. Johnson v. State, 562 S.W.3d 168, 175 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd) (op. on reh'g).

Conclusion: We must evaluate the statute as it has been applied against the challenger. See State ex rel. Lykos v. Fine, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011). We do not entertain hypothetical claims or consider the potential impact of the statute on anyone other than the challenger. Lykos, 330 S.W.3d at 910. Appellant's hypothetical situation is not presented in this case, and therefore we do not consider it. We overrule appellant's sole issue and affirm each the Mandatory Transfer Orders.

WHEN IT COMES TO EVIDENCE SUPPORTING JUVENILE COURT'S AGE FINDING IN A CERTIFICATION AND TRANSFER TO ADULT COURT HEARING, AS LONG AS THERE IS MORE THAN A SCINTILLA OF EVIDENCE AND THE FINDING IS NOT SO CONTRARY TO THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE AS TO BE CLEARLY WRONG OR UNJUST, THE DECISION TO TRANSFER WILL BE AFFIRMED.

In the Matter of J.C.D., No. 12-19-00165-CV, --- S.W.3d ----, 2019 WL 5656479, Tex. Juv. Rep. Vol 34 No. 1 ¶ 20-1-1 (Tex.App.—Tyler, 10/31/2019)

Facts: Detective Taylor Rice of the Athens Police Department testified that on December 11, 2017, she attended a forensic interview of H.M.'s sister, R.M. After R.M. made an outcry during the interview, the children's mother was concerned that H.M. was also abused. H.M. was interviewed and made an outcry of sexual abuse by Appellant. He gave only approximate ages for himself and Appellant at that time. As far as Rice was aware, this was the first report of the

allegations that the Athens Police Department received. Appellant was twenty years old at the time.

Henderson County Chief Juvenile Probation Officer Bonny Turnage testified that the police sent her the case on January 19, 2018. She said that Appellant's date of birth is December 13, 1996, and he was twenty-one years of age at that time. Turnage reviewed her records and found that there were no prior referrals regarding Appellant.

H.M. testified that when he was seven or eight years of age, he and his family lived on South Wofford Street in Athens. He shared a bedroom with Appellant. On one occasion at that house, Appellant put his mouth on H.M.'s penis. This happened a couple of months before they moved from the house, when the weather was "[k]inda coldish, a little bit cold." The month was April or May 2011. H.M. knew that the year was 2011 because his brother was born shortly thereafter. He did not tell anyone that year because he "didn't know how to feel about it" or "how to respond to it" and was "kind of scared of it." The first time H.M. told anyone what happened was on December 11, 2017 after R.M. made her outcry against Appellant.

H.M.'s mother, E.T., testified that the family lived on Wofford Street from the end of 2009 until mid-April 2011. She was certain of the moving date because her younger son was born in July 2011. E.T. first heard of H.M.'s allegations against Appellant in December 2017.

Appellant's mother, H.D., testified that in 2009 or 2010, she participated in some meetings with the Texas Department of Family and Protective Services (the Department) regarding an allegation of physical abuse of H.M. by Appellant. In one of these meetings, H.D. brought up the fact that her children, their father, and E.T. told her there was a claim that Appellant sexually assaulted H.M. She understood that the allegation was subsequently found to be false.

Held: Affirmed

Opinion: Based on the foregoing evidence, we conclude that the evidence is sufficient to support the juvenile court's findings that Appellant was fourteen years of age or older at the time of the acts and it was not practicable to proceed before his eighteenth birthday. First, regarding Appellant's age at the time of the acts, H.M. testified that the acts occurred in April or May 2011. Based on Appellant's birthdate of December 13, 1996, we deduce that he was fourteen years of age at the time of the alleged acts. We find no contrary evidence in the record. Although Appellant contends that there is "no credible evidence" that he was fourteen, the juvenile court was the sole judge of the witness's credibility. See Powell v. State, 479 S.W.2d 685, 687 (Tex. Crim. App. 1972).

Conclusion: Because more than a scintilla of evidence supports the juvenile court's age finding and the finding is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust, Appellant's legal and factual sufficiency challenges regarding this finding fail. See J.G., 495 S.W.3d at 370.

IN A CERTIFICATION AND TRANSFER TO ADULT COURT, JUVENILE COURT, AS THE FACTFINDER, IS FREE TO REJECT INCONSISTENCIES IN TESTIMONY REGARDING JUVENILE'S AGE AT THE TIME OF THE OFFENSES, AND THE TRANSFER ORDER WILL BE AFFIRMED WHEN THERE IS MORE THAN A SCINTILLA OF EVIDENCE SUPPORTING THE JUVENILE COURT'S AGE FINDINGS.

In the Matter of K.W., MEMORANDUM, No. 02-19-00323-CV, Tex. Juv. Rep. Vol 34 No. 1 ¶ 20-1-6 (Tex. App. – Fort Worth, 1/9/2010).

Facts: At the outset of the hearing on the State's petition for discretionary transfer, the State offered two exhibits: Appellant's psychological evaluation and the "Case History" prepared by assistant chief juvenile probation officer Scott Gieger. The psychological evaluation states that in June 2019, during the administration of a polygraph examination, Appellant "admitted to having sexually abused [a relative] since age 12, when she was age 9." The case history specifically states that Appellant was born in August 2001 and that the relative was born in January 2004. The case history also contains a notice of unsuccessful discharge from the Parker County Juvenile Offender Treatment Program. The discharge notice states that "[i]n preparation for a sexual history polygraph in April 2019, [Appellant] disclosed that he had sexually abused [a relative], who is approximately 22[ ]months younger ... when she was aged nine to 12." The discharge notice also states that during the sexual- history polygraph in June 2019, Appellant stated that he had sexually abused a relative until she was 12 but that he had continued to expose himself to her after that in an attempt to get her to go along with sexual contact.

One witness testified during the hearing. Tara Ross, who serves as the therapist for juveniles in the Parker County Juvenile Probation Department and who had prepared the notice of unsuccessful discharge that is summarized above, testified that Appellant was adjudicated in 2018 for "a sexting offense." As a component of his plea agreement in that case, Appellant was placed in the sex-offender treatment program. While Appellant was in sex-offender counseling, Ross learned about the circumstances surrounding the four offenses that Appellant is charged with in this case.3 Appellant told Ross that he began sexually abusing a relative "when she was around 9 and ended around when she was 12." Ross believed that Appellant was approximately twenty-two months older than the relative. Based on that belief, Ross calculated that Appellant was "around 11 to 14" when he abused his relative. Ross testified that Appellant showed a level

of sophistication and maturity commensurate with a "normal 17-year-old."

At the conclusion of the hearing, the juvenile court granted the State's petition for discretionary transfer.

Held: Affirmed

Memorandum Opinion: Here, Appellant does not challenge any of the Section 54.02(f) factors, nor does he challenge the requirements in Section 54.02(a)(1) or (3). We therefore focus on the only findings that Appellant disputes—the minimum-age-requirement findings under Section 54.02(a)(2)(A) and (B).

The case history admitted during the transfer hearing reflects that Appellant was born in August 2001 and that his relative was born in January 2004. The difference between their ages is 29 months, not 22 months as Ross estimated. Moreover, using Appellant's date of birth and the dates alleged for the four offenses, we can calculate how old he was at the time each of the offenses was alleged to have been committed:

Count Count 1 Count 2 Count 3 Count 4 Offense alleged Aggravated sexual assault of a child Aggravated sexual assault of a child Aggravated sexual assault of a child Indecency with a child by contact Degree of offense First-degree felony First-degree felony First-degree felony Second-degree felony Date alleged 5/1/16 5/1/16 9/15/16 12/1/16 Appellant's age at time of offense 14 14 15 15

Under the governing statute set forth above, the juvenile court had discretion to transfer Appellant to criminal district court if he was 14 years or older at the time he was alleged to have committed a first-degree felony. See Tex. Fam. Code Ann. § 54.02(a)(2)(A). As set forth in the chart above, Appellant met this criteria for the first-degree felonies alleged in Counts 1, 2, and 3.

Under the governing statute, the juvenile court had discretion to transfer Appellant to criminal district court if he was 15 years or older at the time he was alleged to have committed a second-degree felony. See id. § 54.02(a)(2)(B). As set forth in the chart above, Appellant met this criteria for the second-degree felony alleged in Count 4.

Appellant, relying solely on Ross's testimony that Appellant was 22 months older than his relative, argues that "at his very oldest the Appellant was two months younger than 14 years of age and 14 months younger than 15 years of age," that "[t]here is not more than a scintilla of evidence that Appellant had reached 14 years of age," and that "[t]here is zero evidence in this record that Appellant had reached 15 years of age[ ] as to the allegation in Count 4." But as explained above, Ross miscalculated the age difference between Appellant and his relative by seven months. The correct calculation shows that Appellant was 29 months older than his relative. Even ignoring the offense dates alleged in the indictment, the trial court could have relied on Ross's testimony that Appellant had admitted that he had sexually abused his relative from the time she was "around 9 and ended around when she was 12" and thus calculated that Appellant would have been 14 when his relative was 11 years and 7 months and that he would have been 15 when she was 12 years and 7 months. [Emphasis added.] These calculations, which rely on testimony regarding the victim's approximate age range, also support the trial court's findings that Appellant had met the statutory minimum age for both the second-degree felony and the three first-degree felony offenses.

This court recently decided an opinion in which the minimum statutory age was challenged under the subsection of Section 54.02 that deals with whether a juvenile court may waive its jurisdiction and transfer a respondent who has turned 18 years old but was at least 14 years old on the date of the offense. See In re A.B., No. 02-18-00274-CV, 2019 WL 983751, (Tex. App.—Fort Worth Feb. 28, 2019, no pet.) (mem. op.) (focusing on Section 54.02(j)(2)(B)). Because the age analysis in that opinion is analogous to the age analysis we conduct here, we set forth the pertinent portion of the opinion's discussion of the appellant's age:

Despite the uncertainty surrounding [the appellant's] age at the time of the alleged offense and the possibility that he was under 14, and despite [the victim's] incomplete and contradictory recollections, the record contains some evidence ... that the alleged incident occurred after August 2010 and therefore after [the appellant] turned 14. We hold that there is more than a scintilla of evidence supporting the trial court's finding and thus that the evidence is legally sufficient.

Although [the appellant] correctly asserts that the evidence is contradictory and inexact, the trial court as the factfinder was free to accept or reject any or all of any witness's testimony. As the factfinder, the trial court was also free to reconcile any apparent inconsistencies in the testimony.... Moreover, the trial court was free to rely on [the detective's] testimony that she was able to determine that the offense most likely happened around January 1, 2011[,] "[f]rom the outcries" and because [the victim] was "pretty sure it happened around 2011." That 2011 timeframe, coupled with [the detective's] explanation that [the victim] "remembered that she was on winter break from school," provides some evidence that the offense likely occurred in the winter of 2011. Because [the appellant] turned 14 in the summer of 2010, the trial court's finding is supported by sufficient evidence. Thus, we hold that the evidence was not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust and was thus factually sufficient.

Appellant argues that A.B. is distinguishable because "there was at least testimony in that case from a detective and the victim that provided more cover to the age range." Although the juvenile court here did

not have testimony from a detective or a victim, the juvenile court did have before it Appellant's date of birth and the alleged dates of the offenses, which constituted some evidence to support the juvenile court's findings regarding Appellant's age on the alleged dates of the offenses. Accordingly, we hold that there is more than a scintilla of evidence supporting the juvenile court's age findings for each of the four offenses and thus that the evidence is legally sufficient. See id. (holding evidence legally sufficient to support juvenile court's finding regarding appellant's age on the date of the alleged offense).

Moreover, the juvenile court, as the factfinder, was free to reject any apparent inconsistencies between Ross's testimony about the age difference between Appellant and the victim and the actual age difference as calculated based on the case history.

Conclusion: Because the calculations based on Appellant's birthdate show that he had met the statutory minimum age for each of the four offenses, the juvenile court's age findings are supported by sufficient evidence. Thus, we hold that the evidence was not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust and was thus factually sufficient. See id. at *6 (holding evidence factually sufficient to support juvenile court's finding regarding appellant's age on the date of the alleged offense). Having concluded that the juvenile court's age findings under Section 54.02(a)(2)(A) and (B) are supported by legally and factually sufficient evidence, we overrule Appellant's four points. Having overruled Appellant's four points, we affirm the juvenile court's waiver and transfer order.