

Case No.: 05-20-00920-CV

**In the Fifth Court of Appeals for the State
of Texas**

IN RE: J.R.

On Direct Appeal from the trial court in cause numbers JD-20-00313-X, 305th
Judicial District Court, the Honorable Cheryl Lee Shannon, presiding.

Appellant's Opening Brief

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**ORAL ARGUMENT
REQUESTED.**

ACCELERATED APPEAL.

1. IDENTITY OF PARTIES, COUNSEL, AND JUDGES

In accord with Rule 38.1 of the Texas Rules of Appellate Procedure, Appellant provides this Court with this complete list of all interested parties.

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COUNTY, TEXAS

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2. CITATION TO THE RECORD

The reporter's record is cited to as: [10 RR 23] this hypothetical citation would be to volume 10, page 23. The clerk's record is cited to as: [CR 23] this hypothetical citation would be to page 23 of the one volume clerk's record.

3. STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument, but Appellant recognizes that this is an accelerated appeal, and that oral argument may not be feasible.

4. TABLE OF CONTENTS

TABLE OF CONTENTS

1. IDENTITY OF PARTIES, COUNSEL, AND JUDGES ii

2. CITATION TO THE RECORD..... iv

3. STATEMENT CONCERNING ORAL ARGUMENT iv

4. TABLE OF CONTENTSv

5. TABLE OF AUTHORITIES vii

6. STATEMENT OF THE CASEx

7. ISSUES PRESENTED.....11

8. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED11

 A. Background.....11

 B. Halloween 2019.....13

 C. Investigation15

 i. Psychological Evaluation15

 ii. Social Evaluation.....15

 D. Certification Hearing: The State’s Case Focuses on the Charge17

 E. The District Court’s Order.....19

9. SUMMARY OF THE ARGUMENT.....21

10. STANDARD OF REVIEW AND LAW FOR JUVENILE CERTIFICATION24

 I. Standard of Review24

 II. The Law Related to Waiver of juvenile court Jurisdiction.....27

11. ARGUMENT29

FIRST ISSUE PRESENTED.....29

 I. Standard of Review29

 II. Law.....29

III. Facts	35
IV. Application of Law to Fact.....	38
V. Conclusion and Prayer	44
APPELLANT’S SECOND ISSUE	45
I. Standard of Review	45
II. Law.....	45
III. Facts	46
IV. Application of Law to Facts	50
A. What This Court May Consider in this Review.....	50
B. Factual Sufficiency Analysis.....	52
1. The Charge is Not Factually Sufficient on its Own	52
2. The Evidence was Factually Insufficient to Support the Order	54
V. Abuse of Discretion.....	57
VI. Conclusion	59
12. CONCLUSION AND PRAYER	61
CERTIFICATE OF COMPLIANCE.....	62
CERTIFICATE OF SERVICE	62
APPENDIX.....	63

5. TABLE OF AUTHORITIES

CASES

Davis v. State,

Nos. 05-16-01341-CR, 05-16-01342-CR, 05-16-01343-CR, 2018 Tex. App.
LEXIS 5920, at *8 (Tex. App.—Dallas July 31, 2018, no pet.)48

Hidalgo v. State of Texas,

983 S.W.2d 746, 755 (Tex. Crim. App. 1999) 29, 30, 33

In re A.K.,

No. 02-19-00385-CV, 2020 Tex. App. LEXIS 2801, at *21 (Tex. App.—Fort
Worth Apr. 2, 2020, no pet.)..... 31, 42

In re J.G.,

495 S.W.3d 354, 367 (Tex. App.-Houston [1st Dist.] 2016, pet denied).....31

In re K.M.D.,

No. 05-17-01284-CV, 2018 Tex. App. LEXIS 4985, at *8 (Tex. App.—Dallas
July 3, 2018, no pet.).....44

In re L.W.,

No. 05-19-00966-CV, 2020 Tex. App. LEXIS 1262, at *27-28 (Tex. App.—
Dallas Feb. 13, 2020, no pet.) 26, 41, 42, 44

Johnson v. State,

954 S.W.2d 770, 771 (Tex. Crim. App. 1997) 27, 61

Johnson v. State,

975 S.W.2d 644, 649 (Tex. App.—El Paso 1998, pet. ref'd).....61

Kelly v. Brown,

851 F.3d 686, 688-89 (7th Cir. 2017)..... 48, 59

<i>Kent v. United States</i> , 383 U.S. 541, 556, 86 S. Ct. 1045 (1966).....	passim
<i>Khalifa v. Cash</i> , 594 F. App'x 339, 342 n.1 (9th Cir. 2014).....	48, 58
<i>LMC Complete Automotive, Inc. v. Burke</i> , 229 S.W.3d 469, 483 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).....	26
<i>Miller v. Alabama</i> , 567 U.S. 460, 472 n.5, 132 S. Ct. 2455, 2464 (2012)	48, 57
<i>Moon v. State</i> , 410 S.W.3d 366, 375 (Tex. App.—Houston [1st Dist.] 2013), <i>aff'd</i> , 451 S.W.3d 28 (Tex. Crim. App. 2014)	32
<i>Moon v. State</i> , 451 S.W.3d 28, 42 (Tex. Crim. App. 2014)	passim
<i>NRA of Am. v. Bureau of Alcohol</i> , 700 F.3d 185, 210 n.21 (5th Cir. 2012)	48, 58
<i>R.E.M. v. State</i> , 541 S.W.2d 841, 846 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.)... 34	32, 34
<i>Roper v. Simmons</i> , 543 U.S. 551, 570, 125 S. Ct. 1183, 1196 (2005)	48, 58
<i>Walker v. Packer</i> , 827 S.W.2d 833, 840 (Tex. 1992)	26
OTHER	
ANGUS STEVENSON AND MAURICE WAITE, CONCISE OXFORD ENGLISH DICTIONARY 378 (12th ed. 2011).....	42

<i>Deliberation</i> , BLACK’S LAW DICTIONARY (7th ed. 1999).....	42
CODES	
Tex. Fam. Code § 54.02.....	54
Tex. Fam. Code § 54.02(a)(1).....	31
Tex. Fam. Code § 54.02(a)(2).....	31
Tex. Fam. Code § 54.02(a)(3).....	31, 32, 55
Tex. Fam. Code § 54.02(d).....	32, 55
Tex. Fam. Code § 54.02(f).....	30, 31, 33, 48
Tex. Fam. Code § 54.02(f)(2).....	60
Tex. Fam. Code § 54.02(h).....	34, 44, 60, 62
Tex. Penal Code § 19.02(c).....	10

Case No.: 05-20-0920-CR

In the Fifth Court of Appeals for the State of
Texas

IN RE: J.R.

To the Honorable Judges of the Fifth Court of Appeals:

J.R., Appellant, presents this opening brief.

6. STATEMENT OF THE CASE

The State of Texas charged Appellant, a juvenile, with Murder. Tex. Penal Code § 19.02(c). [CR 6]. The State filed its first petition for discretionary transfer on March 5, 2020. [CR 13]. The State filed an amended petition for discretionary transfer on March 24, 2020. [CR 25]. The juvenile court held a certification hearing on October 5, 2020. [CR 11]. The Court certified Appellant. [CR 92]. The case was transferred to the adult system. [CR 96]. This accelerated appeal follows. [CR 106].

7. ISSUES PRESENTED

Appellant presents two issues for appeal.

Issue One: Section 54.02(h) and *Moon* require a juvenile court to specifically explain the facts that underly a decision to certify a juvenile. This requirement demands that a juvenile court show that the court engaged in a deliberative effort and made a reasoned decision. Here, the trial court's order failed to include any mention of J.R.'s low intellect, his mental disorders, his Autism Spectrum Disorder, his Bipolar Disorder, or his exceptional conduct when in juvenile custody resulting in placement in the Honors dorm. Did the trial court honor § 54.02(h) and *Moon*?

Issue Two: In his second issue, Appellant contends that the evidence is factually insufficient to find that Appellant was sufficiently sophisticated and mature to certify him as an adult. Specifically the overwhelming preponderance of the evidence showed that Appellant was unsophisticated and immature. Did the trial court err in finding that Appellant was mature and sophisticated and belongs in the adult criminal system to face a charge for Murder?

8. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED

A. Background

J.R. was born on September 1, 2003. [CR 34]. J.R. and his younger sister split time living with their mother, Theresa, and their maternal grandparents. [CR 45]. J.R. maintains a relationship with his father, Shaun. [CR 47].

J.R. last attended W.W. Samuell High School. [CR 44]. He is not grade appropriate. [CR 44]. He scored in the below-average range of intellectual performance on the Kaufman Brief Intelligence Test, Second Edition (KBIT-2), with a composite IQ score of 81, putting him in the bottom-ten percent. [CR 36]. His verbal score fell in the well-below-average range, putting him in the bottom-four percent. [CR 36]. J.R.'s performance on the Wide Range Achievement Test-Fifth Edition (WRAT-5) ranges from very-low range to average. [CR 36]. His reading composite, sentence comprehension, and word reading scores all fall below the bottom-ten percent, putting him below fifth-grade equivalency. [CR 36]. His highest rank is spelling, with an eighth-grade equivalency. [CR 36].

Diagnostic impressions from the psychological evaluation are that J.R. has Conduct Disorder, Unspecified Bipolar and Related Disorder, Unspecified Attention Deficit/Hyperactivity Disorder, Mild Cannabis Use Disorder, and academic and educational problems. [CR 37]. J.R. has been diagnosed and takes medication for Autism Spectrum Disorder. [RR 104].

J.R. has two prior arrests, one for Graffiti in 2017, and one for Aggravated Robbery in 2019. [CR 42]. He was placed in Dallas County Youth Village in May of 2019 for the robbery and was discharged less than four months later on September 11, 2019. [CR 43]. While in placement at Dallas Youth Village, J.R.

made significant progress, earned all points, and complied with all of the rules. [CR 43].

B. Halloween 2019

On October 31, 2019, Gloria Roque was at home on her couch watching the late-night news when an unknown person(s) fired multiple rounds into her home. [CR 39]. A bullet hit Gloria and the resulting injury killed her. [CR 39]. There were no witnesses. [CR 39].

Detectives got a tip that led to the discovery of social media accounts of people whom the detectives eventually believed were involved in the shooting. [RR 17]. After seeking warrants and securing returns, data from social media accounts led detectives to J.R. [RR 20]. The police executed a search warrant on the two residences where J.R. lived. [CR 40]. The police found a gun, but ballistic-markings tests established that the gun was not the gun used in the shooting. [CR 40]. In addition to J.R., detectives identified three additional suspects: David Alvarado, Kimberly Garcia, and R.C. [RR 18; 25].

The police interviewed J.R. twice. [RR 29]. During the first interview J.R.'s mother was present. [RR 29]. J.R. admitted to being with David, Kimberly, and R.C. on the date of the offense. [RR 30]. J.R. told detectives that the reason the incident occurred was because Kimberly had a "beef" with an ex-boyfriend. [CR 41]. J.R.'s mother, Teresa, ended the interview and requested a lawyer on J.R.'s behalf. [RR

46]. J.R. was arrested less than twenty-four hours later—in front of his attorney’s office—and brought to police headquarters to be interviewed again. [RR 47]. Neither of his parents was present, nor was his lawyer. [RR 48]. At the beginning of the interview J.R. told detectives, “[y]ou know, I think I want to talk to a lawyer.” [RR 48]. The detective declined to stop the interview and told J.R., “we’re not going to play those games.” [RR 48]. J.R. denied shooting a gun. [CR 41].

Kimberly also submitted to a police interview and initially denied all involvement. [RR 32]. She then changed her story and blamed David and J.R.; Kimberly claimed that David and J.R. each fired shots. [RR 32]. Kimberly conceded that they were looking for a boy named Tommy Gouch, whom she used to date, not Gloria Roque. [RR 32]. Kimberly could not explain why she thought Tommy lived on that street, or why she sent a map of that area to the boys. [RR 32]. David was interviewed and pointed the finger at Kimberly and J.R. as the two who fired shots. [CR 42].

R.C. was thirteen-years old at the time of the offense, was on probation, and was in the vehicle at the time of the offense. [CR 46]. R.C. was arrested but not charged. [RR 58]. Kimberly was seventeen at the time of the offense and was charged as an adult with Murder. [CR 46]. David was eighteen, was on probation, was in the vehicle at the time of the offense, and was charged with Murder. [CR 46].

C. Investigation

i. Psychological Evaluation

J.R.'s psychological evaluation emphasized his learning disabilities and his low-academic performance. [CR 34-38]. It also identified his various psychological and mental disorders. [CR 35]. The report concluded stating that “[h]is sophistication and maturity levels appear commensurate to his same aged peers.” [CR 38].

ii. Social Evaluation

J.R.'s Social Evaluation Report is ten-pages long and it includes nearly four pages on the underlying offense. [CR 39-42]. The limited portions of the report that are devoted to J.R. include:

- “the subject appears to be of below-average intelligence, with no apparent physical or mental impairments.” [CR 43].
- “he has maintained a positive attitude toward the officer during each contact.” [CR 43].
- “[t]he subject did not commit any new law violations while completing the Deferred Prosecution Program” [CR 43].
- “[t]he subject consistently earned all points and complied with the rules of the facility. He learned to accept responsibility for his actions by accepting consequences and redirection.” [CR 43].

- “On November 22, 2019, the subject was admitted to Hickory Trails Behavioral Health Center for stabilization.” [CR 44].
- “the subject’s level of sophistication is excessive for a person of his age, due to the subject’s continued decisions to engage in criminal activity, the subject’s exposure to gang periphery, the subject’s history of possessing firearms, the subjects continued use of marijuana, and the escalation of the subject’s aggressive behavior.” [CR 45].
- The report indicated that the prior arrest occurred when “the subject and accomplice pulled-out handguns on the complainant.” [CR 46].
- “The subject reportedly associates with peers seventeen and eighteen years old. He reported that the peers have been referred to both the Juvenile and Adult Justice Systems. . . . The mother reported that the subject has invited older male peers to the home, stating that those peers encouraged negative behaviors and the smoking of marijuana.” [CR 46].
- “It is this officer’s opinion, that he subject’s level of maturity is age appropriate. The subject has not demonstrated the ability to live independently of adult supervision. The subject is not expected to provide for any household member. . . . He is reliant on his motion and grandparents for his basic needs.” [CR 46]. And,
- J.R.’s father “has five [juvenile] referrals.” [CR 47].

The First Addendum to the Social Evaluation indicated that on July 8, 2020 that the Lyle B. Medlock Residential Treatment Center agreed to house J.R. [CR 59]. The Lyle B. Medlock Residential Treatment Center is a residential setting that provides juvenile services in a safe and secure environment. As a resident in this program, J.R. would attend the Dallas County Juvenile Justice Charter School. Outside of school hours, activities include individual, group and family counseling, substance-abuse education, recreational activities, spiritual support, and life-skills training in a cooperative learning format. [CR 59].

The Second Addendum explained that “[t]he subject continues to maintain Honor status without any infractions to note.” [CR 79].

D. Certification Hearing: The State’s Case Focuses on the Charge

J.R. was sixteen-years old at the time of the offense. [RR 37]. A petition was filed for the offense of Murder in juvenile court and the State sought to certify J.R. as an adult. [CR 6-14]. During the hearing, the evidence could not link any one person (and certainly not J.R.) to the gun. [RR 54]. It was clear that no one intended for Gloria Roque to be shot. [RR 77]. And, Shannon Wright, from juvenile probation, testified that J.R.’s diagnoses of Bipolar and Autism Spectrum Disorder were not known to probation prior to this offense. [RR 103-104].

After the evaluations were completed, J.R. matched with a placement, Medlock. [RR 103]. Medlock was willing to accept J.R. and provide services that

would meet his needs. [RR 103]. Ms. Wright did not know whether an adult prison could provide services to J.R., but she did testify that J.R. would be at risk in an adult prison. [RR 105; 106]. No other witness testified about the mental-health services available in adult prisons. Ms. Wright testified that there would be no danger to the community if J.R. were sentenced to the Texas Juvenile Justice Department (TJJD). [RR 110]. She also testified that all the recommendations from the psychological assessment could be treated in TJJD. [RR 110]. It is clear from his record that while in detention J.R.'s conduct was exemplary. [RR 112].

Tami Coy, the TJJD/TDCJ liaison, testified that there is a Capital Offender Unit in TJJD for capital and serious violent offenders. [RR 120]. This program is located at the Giddings State School. [RR 120]. If not certified, then J.R. would be evaluated for this high restriction facility and likely placed there. [RR 121]. This placement has specialized treatment programs, high school, and college classes as well as vocational courses. [RR 121]. The “dorms” are individual-locked rooms, and the inmates have only an hour of exercise each day. [RR 122]. The inmates at Giddings must ask permission even to leave their rooms to use the restroom. [RR 122]. There is a redirect program that is stricter than the normal program. [RR 122].

The Texas Family Code has a minimum length stay of three years for youth adjudicated of Murder. [RR 119]. If the child is unable to complete the minimum stay due to “aging out,” then the child will return to the committing court and either

be transferred to adult prison or released on parole. [RR 119-120]. There is nothing that prevents the juvenile court from sentencing J.R. to up to forty years while in the juvenile system. [RR 129].

The juvenile court completed a form entitled “Certification Considerations.” [CR 103-105]. This pre-printed form directed the juvenile court only to the factors that support certification. [CR 103-105].

The Court entered a Waiver of Jurisdiction and Order of Transfer to a Criminal District Court on October 7, 2020. [CR 96].

E. The District Court’s Order

The juvenile court made rote findings that followed the standard for certification. [CR 96-99]. The laborious findings read:

The reasons for this disposition are that: The Respondent is charged with Violating penal law of the grade of felony; the Respondent was fourteen (14) years old or older at the time he is alleged to have committed the offense; no adjudication hearing has been conducted concerning this alleged offense; the Respondent’s conduct was willful and Violent; a deadly weapon, to wit: a firearm, was used during the course of the offense; personal injury and death resulted to the victim, Gloria Roque; the offense was so serious that transfer to a District Court with criminal jurisdiction must be granted; the Respondent has not accepted or responded to supervision; the Respondent refuses to remain away from associates in the community who habitually violate the law; the sophistication of the child is excessive for his age; and his level of maturity is sufficient; the background of the Respondent indicates that the welfare of the community requires criminal prosecution; the previous history of the Respondent indicates a present need for placement of the child in a controlled, structured facility; the public

needs protection from the Respondent; the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court is remote; and it is desirable that all parties to the offense be tried in one court since the accomplices are adults.

The specific factual findings made to support the transfer decision are that: the Respondent is charged with the offense of Murder, a grade of felony; a firearm was used during the course of the offense; the child has not accepted or responded to supervision as he had several violations of probation after release from placement at the Dallas County Youth Village; the child refused to remain away from associates in the community who habitually violate the law as evidenced by the fact that the accomplice in the alleged offense was an accomplice in a previous offense; the previous history of the child indicates a present need for placement of the child in a controlled structured facility as the Respondent was on probation for Aggravated Robbery when this offense committed; the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court is remote as the Respondent was previously adjudicated of Aggravated Robbery and placed at the Dallas County Youth Village; the Respondent was on probation at the time the offense was committed and the offense was committed 6 (six) weeks after the Respondent was released from Dallas County Youth Village. (Emphasis added).

[CR 97-98].

Appellant timely filed his notice of appeal and this appeal follows. [CR 106].

9. SUMMARY OF THE ARGUMENT

The easiest resolution to this appeal is to recognize that the State charged J.R. with Murder, to acknowledge that he committed a prior robbery, and to find that he should be tried as an adult. But § 54.02 of the Family Code prevents this sort of easy resolution. Instead, § 54.02 requires a juvenile court to conduct an individualized and meaningful investigation into a juvenile before certifying him or her as an adult. And the caselaw specifically prohibits using only the alleged offense as a basis to certify. Strong evidence of this prohibition on the charge being determinative of certification is the fact that TJJD has a special unit for capital offenders. [2 RR 120]. If a capital offense automatically justified transfer, then there would be no need for a special unit within TJJD for capital offenders.

The Court of Criminal Appeals' opinion in *Moon* was transformative. It required, among other things, for a juvenile court to set out its deliberative process in a written order (§ 54.02(h) order) when the juvenile court has decided to certify a juvenile as an adult. Further, *Moon* limited a sufficiency review to the facts set out in the § 54.02(h) order. In requiring the juvenile court to set out its deliberative process and then limiting a sufficiency review to that order, *Moon* required the § 54.02(h) order to include deliberation on the evidence that supported and weighed against certification. Here the § 54.02(h) order includes none of the evidence related to:

- J.R.’s exemplary conduct when in a rigidly structured environment.
- J.R.’s serious-mental health disorders (including Autism Spectrum Disorder, Bipolar Disorder, and a variety of developmental problems).
- J.R.’s low intelligence.
- J.R.’s age at the time of the offense (close to the minimum to be certified as an adult).
- J.R.’s exceedingly low performance on aptitude and intelligence tests.
- etc.

Instead, the § 54.02(h) order contained a rote iteration of J.R.’s bad acts. In failing to include the Court’s deliberative process on the evidence that weighed against certification, the Court failed to honor § 54.02(h) or *Moon*.

If this Court disagrees and finds that the juvenile court’s § 54.02(h) order was sufficient, then the evidence is factually insufficient to support a finding that J.R. was sufficiently mature or sophisticated to certify as an adult. Here the overwhelming proportion of the evidence was that J.R. is an unsophisticated and immature youth who suffers from meaningful intellectual, emotional, and developmental problems.

For these reasons, the juvenile court erred in certifying J.R. as an adult. J.R. asks this Court to vacate the certification order and to remand this case to juvenile court where J.R. faces up to forty years in TJJD (and possible transfer to TDCJ after

J.R.'s eighteenth birthday) instead of a potential life sentence for an act he allegedly committed as a juvenile.

If convicted, J.R. belongs in TJJD because he has shown that he is open to rehabilitation and well suited to it. The evidence in the certification hearing was of one voice; when J.R. is in a highly structured environment—like TJJD—he excels. Indeed, J.R.'s conduct has been so good in custody that he has been moved to the Honors dorm. J.R.'s impulsive conduct should dissipate with age as J.R.'s brain develops. Accordingly, J.R. will ask this Court to remand this case back to the juvenile court where J.R., if convicted, can get the rehabilitation he needs, and which will serve him and society.

10. STANDARD OF REVIEW AND LAW FOR JUVENILE CERTIFICATION

The standard of review for Appellant’s two issues is identical. To avoid unnecessary repetition, Appellant provides one standard of review that applies to all of his issues.

I. Standard of Review

This Court recently explained the standard of review, writing:

Our review of a transfer order is two-pronged. First, we review the juvenile court’s specific findings of fact concerning the section 54.02(f) factors under a ‘traditional sufficiency of the evidence review.’ *Moon*, 451 S.W.3d at 47. When reviewing the legal sufficiency of the evidence, we credit evidence favorable to the challenged finding and disregard contrary evidence unless a reasonable fact finder could not reject the evidence. *In the Matter of S.G.R.*, 496 S.W.3d 235, 239 (Tex. App.—Houston [1st Dist.] 2016, no pet.). If there is more than a scintilla of evidence that supports the finding, then the proof is legally sufficient and the challenge fails. *Id.* When reviewing the factual sufficiency of the evidence, we consider all of the evidence presented to determine if the juvenile court’s findings are so against the great weight and preponderance of the proof as to be clearly wrong and unjust. *Id.* But our review of the sufficiency of the evidence supporting waiver is limited to the facts the juvenile court expressly relied on in its transfer order. *Moon*, 451 S.W.3d at 50; *In the Matter of S.G.R.*, 496 S.W.3d at 239.

Second, we review the juvenile court’s ultimate waiver decision for an abuse of discretion. *In the Matter of S.G.R.*, 496 S.W.3d at 239 (citing *Moon*, 451 S.W.3d at 47). A juvenile court abuses its discretion when its decision to transfer is essentially arbitrary, given the evidence upon which it was based. *Moon*, 451 S.W.3d at 47. ‘As with any decision that lies within the discretion of the trial court, the salient question is not

whether we might have decided the issue differently.’ *In the Matter of S.G.R.*, 496 S.W.3d at 239. ‘Instead, we consider in light of our review of the sufficiency of the evidence whether the juvenile court’s decision represents a reasonably principled application of the Section 54.02(f) factors or was essentially arbitrary or made without reference to the statutory criteria for waiver.’ *Id.* (citing *Moon*, 451 S.W.3d at 47). As long as the juvenile court correctly applies these statutory criteria and complies with the requirement to specifically state its supporting findings, its waiver decision generally will pass muster under this standard of review. *Moon*, 451 S.W.3d at 49. ‘[A] juvenile court that shows its work should rarely be reversed.’ *Id.*

In re L.W., No. 05-19-00966-CV, 2020 Tex. App. LEXIS 1262, at *27-28 (Tex. App.—Dallas Feb. 13, 2020, no pet.).¹

Related to the abuse of discretion standard, if a court fails to correctly analyze the law, makes an error of law, or misapplies the law to the facts, it commits an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). The abuse of discretion standard is equivalent to a *de novo* review because the court has no discretion to misapply the law. *Id.*

A court also commits an abuse of discretion if it makes findings of fact supported by legally or factually insufficient evidence. *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 483 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Where, as here, a court’s decision necessarily involves the balancing of

¹ Lexis and Westlaw paginate unpublished opinions differently. Appellant uses the pagination from Lexis.

multiple factors “[r]eview of these individual factors necessarily involves fact determinations and legal conclusions. The balancing test as a whole, however, is a purely legal question. Legal questions are reviewed de novo.” *Johnson v. State*, 954 S.W.2d 770, 771 (Tex. Crim. App. 1997). Reversal is required if the court below engages in a flawed analysis of any one of the balancing factors. *Id.*

In *Moon*, the Court of Criminal Appeals explained that there is some dispute about what it means for a juvenile court to abuse its discretion in certifying a juvenile. *Moon v. State*, 451 S.W.3d 28, 42 (Tex. Crim. App. 2014). The Court wrote:

The courts of appeals have also uniformly agreed that, absent an abuse of discretion, a reviewing court should not set aside the juvenile court’s order transferring jurisdiction. What they mean by ‘abuse of discretion’ in this context is not altogether clear. Some courts of appeals have declared that the juvenile court’s decision must simply be a guided one, not arbitrary or capricious. Even so, the courts of appeals have entertained various challenges to the legal and/or factual sufficiency of the evidence presented at the transfer hearing to support the juvenile court’s decision to waive its jurisdiction. Some courts of appeals (like the court of appeals in this case) have examined the evidence to determine its sufficiency to support specific findings of fact with respect to the Section 54.02(f) factors, while mindful that not every factor must support transfer before the juvenile court may exercise its discretion to waive jurisdiction. Other courts of appeals have accepted the juvenile offender’s invitation to measure the sufficiency of the evidence to support the juvenile court’s ultimate conclusion, pursuant to Section 54.02(a), that the seriousness of the offense or background of the child indicated the need for transfer in order to ensure the welfare

of the community. No court of last resort in Texas, insofar as our research reveals, has yet spoken on these matters.

Id. at 42-44.

The Court explained:

As long as the appellate court can determine that the juvenile court's judgment was based upon facts that are supported by the record, it should refrain from interfering with that judgment absent a scenario in which the facts identified in the transfer order, based on evidence produced at the transfer hearing as it relates to the non-exclusive Subsection (f) factors and beyond, bear no rational relation to the specific reasons the order gives to justify the conclusion that the seriousness of the offense and/or the juvenile's background warrant transfer. The appellate courts should conduct appellate review of the juvenile court's discretionary decision to waive jurisdiction in essentially the same way that the El Paso Court of Appeals has said that the juvenile court's discretion in determining juvenile dispositions should be scrutinized on appeal, to wit:

We apply a two-pronged analysis to determine an abuse of discretion: (1) did the [juvenile] court have sufficient information upon which to exercise its discretion; and (2) did the [juvenile] court err in its application of discretion? A traditional sufficiency of the evidence review helps answer the first question, and we look to whether the [juvenile] court acted without reference to any guiding rules or principles to answer the second.

Id. at 47.

II. The Law Related to Waiver of juvenile court Jurisdiction

The United States Supreme Court in *Kent v. United States*, 383 U.S. 541, 556, 86 S. Ct. 1045 (1966), stated “[i]t is clear beyond dispute that the waiver of

jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile.” The Court characterized the “decision as to waiver of jurisdiction and transfer of the matter to the District Court [as] potentially as important to petitioner as the difference between five years imprisonment and a death sentence.” *Id.* at 557. The very act of a transfer to a criminal district court carries with it the deprivation of the right to be detained in the protective environment of the Juvenile Justice Center pending trial, and after trial once convicted, and the rehabilitative and educational programs that would be available under the Family Code if the proceeding were in a juvenile court.

The Texas Court of Criminal Appeals echoed *Kent*, stating: “transfer to criminal district court for adult prosecution is ‘the single most serious act the juvenile court can perform . . . because once waiver of jurisdiction occurs, the child loses all protective and rehabilitative possibilities available.’” *Hidalgo v. State of Texas*, 983 S.W.2d 746, 755 (Tex. Crim. App. 1999). The *Hidalgo* Court noted that “transfer was intended to be used only in exceptional cases” and that “[t]he philosophy was that, whenever possible, children should be protected and rehabilitated rather than subjected to the harshness of the criminal system because children, all children are worth redeeming.” *Id.*

11. ARGUMENT

FIRST ISSUE PRESENTED

Section 54.02(h) and *Moon* require a juvenile court to specifically explain the facts that underly a decision to certify a juvenile. This requirement demands that a juvenile court show that the court engaged in a deliberative effort and made a reasoned decision. Here, the trial court's order failed to include any mention of J.R.'s low intellect, his mental disorders, his Autism Spectrum Disorder, his Bipolar Disorder, or his exceptional conduct when in juvenile custody resulting in placement in the Honors dorm. Did the trial court honor § 54.02(h) and *Moon*?

I. Standard of Review

Appellant incorporates the standard of review from the start of this brief into this issue in full.

II. Law

Section 54.02 of the Family Code conditions a juvenile court's discretion to waive jurisdiction. Tex. Fam. Code § 54.02(f).

While the juvenile court does not demand that a Court find that every factor in § 54.02(f) support transferring the case, *Moon*, 451 S.W.3d at 28, 47 & n.78 (citing *Hidalgo*, 983 S.W.2d at 754), the Court of Criminal Appeals and § 54.02 require the juvenile court to consider, at a minimum,

- (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
- (2) the sophistication and maturity of the child;
- (3) the record and previous history of the child;
- and (4) the prospects of adequate

protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

Id. at 38 (quoting § 54.02(f)). The juvenile court must also “make specific findings of fact regarding each of the section 54.02(f) factors.” *In re J.G.*, 495 S.W.3d 354, 367 (Tex. App.—Houston [1st Dist.] 2016, pet denied); *see Moon*, 451 S.W.3d at 47; 49-50.

Mitigation evidence falls within those factors and the juvenile court is required to consider this evidence. *In re A.K.*, No. 02-19-00385-CV, 2020 Tex. App. LEXIS 2801, at *21 (Tex. App.—Fort Worth Apr. 2, 2020, no pet.). Mitigation evidence must be included in a § 54.02(h) opinion because a sufficiency review is limited to “the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under Section 54.02(h).” *Moon*, 451 S.W.3d at 50.

Section 54.02 establishes that a court has no discretion to waive jurisdiction except when the alleged offense is a felony and the child is at least a certain age—14 or 15, depending on the specific type of felony alleged. Tex. Fam. Code §§ 54.02(a)(1), (2). The Court must then decide whether there is probable cause to believe the child committed the alleged offense. *Id.* § 54.02(a)(3). But even a finding of probable cause that a juvenile committed a first-degree felony under § 54.02(a) does not justify automatic waiver because such an approach would render

§§ 54.02(d) and (f) superfluous. *See Moon v. State*, 410 S.W.3d 366, 375 (Tex. App.—Houston [1st Dist.] 2013), *aff'd*, 451 S.W.3d 28 (Tex. Crim. App. 2014) (citing *R.E.M. v. State*, 541 S.W.2d 841, 846 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.)) (“We find nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a ‘serious’ crime.”).

If the steps in §§ 54.02(a)(1) and (2) are met, then § 54.02(a)(3) specifies two additional requirements before a court may waive jurisdiction. Tex. Fam. Code § 54.02(a)(3).

Section 54.02(d) requires that, in all cases, “[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.” Tex. Fam. Code § 54.02(d). The “full investigation” requirement “prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.” *Kent*, 383 U.S. at 553 n.15.

In addition to a “full investigation of the child [and] his circumstances,” the statute requires in all cases, even those involving a “capital felony”—the highest level of offense—that the juvenile court consider at least four-other-enumerated-

limiting factors derived from *Kent. Hidalgo*, 983 S.W.2d at 754 (explaining that the factors in *Kent* and the Family Code are intended “[t]o limit the juvenile court’s discretion in making the transfer determination”); Tex. Fam. Code § 54.02(f). Specifically, § 54.02(f) states:

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:

- (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
- (2) sophistication and maturity of the child;
- (3) the record and previous history of the child; and
- (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedure, services, and facilities currently available to the juvenile court.

Tex. Fam. Code § 54.02(f).

These factors go directly to whether the welfare of the community requires criminal proceedings or whether that welfare is better served by rehabilitation:

We find nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a “serious” crime. . . . If, despite the gravity of the charged offense, the child can be successfully rehabilitated by resort to the facilities available to juvenile court, it is clear that such rehabilitation will promote the “welfare of the community” at least as effectively as criminal prosecution with no

prospects of rehabilitation, while, at the same time, it accords to the child the beneficial results which our Legislature has concluded can be achieved by protecting youthful offenders from the stigma and demoralizing effects of criminal prosecution.

R.E.M., 541 S.W.2d at 846.

Section 54.02(h) requires a juvenile court to specifically explain the facts underlying a decision to certify, so that appellate courts can thoroughly review the juvenile court's decision. Tex. Fam. Code § 54.02(h). The Family Code requires the court to "state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court . . ." Tex. Fam. Code § 54.02(h).

This requirement originated in *Kent*, in which the Supreme Court wrote:

Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly, we hold that it is incumbent upon the juvenile court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the juvenile court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

Kent, 383 U.S. at 561.

In *Moon*, the Court of Criminal Appeals explained § 54.02(h) further. The

Court wrote:

There is an inherent tension between the broad discretion that the juvenile court is afforded in making the normative judgment of whether to waive jurisdiction, on the one hand, and *Kent's* insistence upon the primacy of appellate review in order to assure that the juvenile court's broad discretion is not abused, on the other. The legislative response to this inherent tension was to mandate, in Section 54.02(h), that the juvenile court 'shall state specifically in its order its reasons for waiver and certify its action, including the written order and findings of the court[.]' Although the committee that drafted the Juvenile Justice Code had recommended a version of this provision that would have required no more than a 'brief' statement of the reasons justifying transfer, the Legislature deemed this insufficient: 'The fact that the Legislature changed 'briefly state' to 'state specifically' indicates that it contemplated more than merely an adherence to printed forms and, indeed, contemplated a true revelation [*sic*] of reasons for making this discretionary decision.'

...

In this way the Legislature has required that, in order to justify the broad discretion invested in the juvenile court, that court should take pains to 'show its work,' as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable—in short, that it is a decision demonstrably deserving of appellate imprimatur even if the appellate court might have reached a different result.

...

Section 54.02(h) requires the juvenile court to do the heavy lifting in this process if it expects its discretionary judgment to be ratified on appeal. By the same token, the juvenile court that shows its work should rarely be reversed.

Moon, 451 S.W.3d at 50.

III. Facts

The juvenile court heard testimony and received evidence and completed a form entitled “Certification Considerations.” [CR 103-105]. This pre-printed form directed the juvenile court only to the factors that support certification. [CR 103-105].

Unsurprisingly, the trial court’s order laboriously explained:

The reasons for this disposition are that: The Respondent is charged with Violating penal law of the grade of felony; the Respondent was fourteen (14) years old or older at the time he is alleged to have committed the offense; no adjudication hearing has been conducted concerning this alleged offense; the Respondent’s conduct was willful and Violent; a deadly weapon, to wit: a firearm, was used during the course Of the offense; personal injury and death resulted to the victim, Gloria Roque; the offense was so serious that transfer to a District Court with criminal jurisdiction must be granted; the Respondent has not accepted or responded to supervision; the Respondent refuses to remain away from associates in the community who habitually violate the law; the sophistication of the child is excessive for his age; and his level of maturity is sufficient; the background of the Respondent indicates that the welfare of the community requires criminal prosecution; the previous history of the Respondent indicates a present need for placement of the child in a controlled, structured facility; the public needs protection from the Respondent; the prospects of adequate

protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court is remote; and it is desirable that all parties to the offense be tried in one court since the accomplices are adults.

The specific factual findings made to support the transfer decision are that: the Respondent is charged with the offense of Murder, a grade of felony; a firearm was used during the course of the offense; the child has not accepted or responded to supervision as he had several violations of probation after release from placement at the Dallas County Youth Village; the child refused to remain away from associates in the community who habitually violate the law as evidenced by the fact that the accomplice in the alleged offense was an accomplice in a previous offense; the previous history of the child indicates a present need for placement of the child in a controlled structured facility as the Respondent was on probation for Aggravated Robbery when this offense committed; the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court is remote as the Respondent was previously adjudicated of Aggravated Robbery and placed at the Dallas County Youth Village; the Respondent was on probation at the time the offense was committed and the offense was committed 6 (six) weeks after the Respondent was released from Dallas County Youth Village.

[CR 97-98].

The trial court's order did not reflect any deliberation of:

- J.R.'s chronological, emotional, or developmental age at the time of the shooting² [2 RR 81].

² J.R. disputes being part of any shooting, but for purposes of this appeal concedes that the shooting occurred.

- J.R.’s mental-health issues including: Bipolar Disorder, Autism Spectrum Disorder, and Attention Deficit Hyperactivity Disorder [2 RR 92-93; 104].
- J.R. responded exceptionally well to a highly structure environment and was placed in the Honors dorm while in Juvenile Detention [CR 35].
- J.R. “maintained a positive attitude, since being in detention. He has continued to display positive behavior and has earned full points each shift. The subject currently lives in the Honors Dorm.” [CR 44].
- J.R. “did not commit any new law violations while completing the Deferred Prosecution Program.” [CR 43].
- J.R. “consistently earned all points and complied with the rules of the facility. He learned to accept responsibility for his actions by accepting consequences and redirection. [J.R.] completed [courses in] Family Training, Concord, Anger Management, Drug Group, and Gang Intervention.” But that as soon as J.R. returned home and was no longer in the structured environment he relapsed and fell back into his bad habits [CR 43].
- That in November 2020 (shortly after the shooting) that J.R. had to be taken to Hickory Trails Health Center “for stabilization” [CR 44].
- That around the time of the shooting that J.R.’s medications were not proper [CR 44].

- J.R. suffers from hallucinations when his medications are not precisely administered [CR 35].
- J.R.’s exceptionally low intelligence tests (including scores in the bottom-four percent and a best score of in the bottom thirty-fourth percentile) [CR 36; 38].
- The Social Evaluation’s conclusion that J.R. has a “below-average intelligence with no apparent physical or mental impairments” [CR 43].
- J.R. suffers from depression and feels the need to cry but cannot [CR 37].
- J.R. has used marijuana since age eleven and has been recommended for “supportive outpatient drug treatment;” [CR 45].
- J.R.’s problems occur when he associates with older “friends” who “encourage[] negative behavior and the smoking of marijuana” [CR 46].
- J.R. is unable to live on his own; is not expected to provide for anyone else; and is dependent on his mother and grandmother “for his basic needs.” [CR 46].
- Medlock accepted J.R. but TJJD would have been acceptable. [CR 59]. And,
- J.R.’s father had five referrals to the Juvenile Justice System [CR 47].

IV. Application of Law to Fact

Here the juvenile court’s “Waiver of Jurisdiction and Order of Transfer to a Criminal District Court” failed to illustrate the deliberative process that § 54.02(h) and *Moon* require. [CR 97-98]. Instead, the juvenile court’s order provides only a

rote listing of J.R.'s troubled history and the facts of this case. [CR 97-98]. The order does not show any deliberation, nor does it show that the juvenile court considered the substantial evidence that showed J.R.'s positive response to a rigidly structured environment. [CR 97-98]. And, in a troublesome omission, the trial court's order does not show that the Court considered J.R.'s serious-mental-health problems, his Autism Spectrum Disorder, his Bipolar Disorder, or his developmental problems. [CR 97-98].

Moon explained “the Legislature has required that, in order to justify the broad discretion invested in the juvenile court, that court should take pains to ‘show its work,’ as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable—in short, that it is a decision demonstrably deserving of appellate imprimatur even if the appellate court might have reached a different result.” *Moon*, 451 S.W.3d at 49.

Here the “Waiver of Jurisdiction and Order of Transfer to a Criminal District Court” is a thin iteration of J.R.'s worst acts. [CR 97-98]. The order provides no indication that the Court considered J.R.'s low intelligence, his miserable academic aptitudes, his well-established-mental-health problems, his Autism Spectrum Disorder, his Bipolar Disorder, or his astonishingly good behavior in a rigidly

structured environment (including the completion of several courses). [CR 97-98]. The juvenile court's order does not reflect a "deliberative process," but instead an insipid, bureaucratic response to *Moon's* requirement that juvenile courts "show their work." *Id.* The order is much less a careful and deliberative decision of what would be best for J.R. and society, and is much more a tepid effort to "tick the boxes" and satisfy § 54.02(h) and *Moon*; the order satisfied neither. *Id.* [CR 97-98].

This Court has held that an order like the one here can satisfy § 54.02(h). *See In re L.W.*, 2020 Tex. App. LEXIS 1262, at *31. In *L.W.* the juvenile court's findings included the following:

adult pattern of living; the sophistication of the child is excessive for his age; and his level of maturity is excessive; the background of the Respondent indicates that the welfare of the community requires criminal prosecution; the previous history of the Respondent indicates a present need for placement of the child in a controlled, structured facility; the public needs protection from the Respondent; the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court is remote;

Id. at 30-31.

This Court found that these reasons were adequate to satisfy § 54.02(h) and *Moon*. *Id.* at 31-32. But in *L.W.*, unlike here, there is no indication that the juvenile court was presented with factors that weighed against certification. *Id.*

Black's Law Dictionary defines the term "deliberation" as "[t]he act of carefully considering issues and opinions before making a decision or taking some action; esp., the process by which a jury reaches a verdict, as by analyzing, discussing, and weighing the evidence." *Deliberation*, BLACK'S LAW DICTIONARY (7th ed. 1999). The Concise Oxford English Dictionary defines "deliberate" as "fully considered." ANGUS STEVENSON AND MAURICE WAITE, CONCISE OXFORD ENGLISH DICTIONARY 378 (12th ed. 2011). Indeed, a trial court has a duty to consider mitigation evidence when contemplating the factors in § 54.02(f) of the Family Code. *In re A.K.*, 2020 Tex. App. LEXIS 2801, at *21. And these factors must be in the § 54.02(h) order because, after *Moon*, an appellate court must limit its sufficiency review to the evidence in the order. *Moon*, 451 S.W.3d at 49-50. If the juvenile court is allowed to not include the evidence that weighed against certification in the § 54.02(h) order, then appellate courts are precluded from a meaningful sufficiency review. *Id.*

Here there was considerable and important evidence to justify a decision to retain jurisdiction. The order does not reflect this evidence and thus does not show deliberation by the court. [CR 97-98]. Indeed the Court appears to have decided to grant the petition because "the offense was so serious that transfer to a District Court with criminal jurisdiction must be granted." [CR 97]. This determination fails to account for:

- J.R.’s exemplary conduct when in a rigidly structured environment.
- J.R.’s serious-mental health disorders.
- J.R.’s age at the time of the offense (close to the minimum to be certified as an adult).
- Medlock accepted J.R. and that TJJD could have housed J.R. Or,
- J.R.’s exceedingly low performance on aptitude and intelligence tests.

The juvenile court may have considered these important factors and deliberated carefully on whether to certify J.R. as an adult. [CR 97-98]. Or the juvenile court may not have considered any of these factors.³ It was incumbent upon the Court to show that it weighed these factors; it did not. [CR 97-98]. Further, *Moon* requires the Court to include this evidence in its § 54.02(h) order because a sufficiency review is limited to “the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under Section 54.02(h).” *Moon*, 451 S.W.3d at 50.

The juvenile court’s opinion does include the statement that its order issued after “considering all the testimony, diagnostic study, social evaluation, and full investigation,” but the report provides no indication that the juvenile court deliberated on the evidence that weighed against certification. [CR 97-98]. Instead

³ The form “Certification Considerations” suggests that the trial court did not consider the factors that weighed against certification. [CR 103-105].

the language in the order suggesting the juvenile court considered “all the testimony, diagnostic study, social evaluation, and full investigation,” is meaningless boilerplate that is perfectly identical with that in *L.W.* and other cases. *In re L.W.*, 2020 Tex. App. LEXIS 1262, at *30 (“The Court finds the Respondent is of excessive sophistication and the Respondent’s level of maturity is excessive to be tried as an adult and to aid an attorney in his defense. After considering all the testimony, diagnostic study, social evaluation, and full investigation, the Court finds it is contrary to the best interest of the public to retain jurisdiction.”); *In re K.M.D.*, No. 05-17-01284-CV, 2018 Tex. App. LEXIS 4985, at *8 (Tex. App.—Dallas July 3, 2018, no pet.) (same). This boilerplate should not substitute for a § 54.02(h) order that explains the Court’s deliberative process and which shows that the Court considered the evidence that weighs against certification. Tex. Fam. Code § 54.02(h). Without including the evidence that weighed against certification in an order certifying a juvenile as an adult, the trial court’s order does not honor either § 54.02(h) or *Moon* and precludes meaningful appellate review. *Moon*, 451 S.W.3d at 50.

When the opinion does not honor § 54.02(h) and *Moon*, the remedy is to find the evidence insufficient and to reinstate the juvenile court’s jurisdiction. *Id.* at 51. Accordingly, J.R. asks this Court to find that the juvenile court did not follow either

§ 54.02(h) or *Moon* and that the order is insufficient to support the trial court's surrender of its jurisdiction and to remand for trial in juvenile court.

V. Conclusion and Prayer

Here the juvenile court—based on the § 54.02(h) order—abused its discretion in finding that J.R. was sufficiently sophisticated and mature to certify. And in failing to consider the substantial evidence that showed that J.R. is both unsophisticated and immature—based on the § 54.02(h) order—the trial court acted without reference to guiding principles. *Id.* at 47. The trial court, acting as the finder of fact, had the right to disbelieve the evidence that J.R. has Autism Spectrum Disorder, Bipolar Disorder, that he behaved spectacularly in rigidly controlled environments, that his intellectual abilities are remarkably low, etc. But the juvenile court did not have the discretion to simply ignore this evidence without finding it to lack credibility. The only way for this Court to exercise its oversight and appellate responsibilities is to rely on the § 54.02(h) order. *Id.* at 50. But here the juvenile court structured the § 54.02(h) order to prevent that oversight. Accordingly, the juvenile court acted without reference to any guiding principles, the juvenile court abused its discretion, and the order should be reversed.

For the reasons stated above, J.R. asks this Court to vacate the trial court's order and to reinstate this case on the trial court's docket under the juvenile court's jurisdiction.

APPELLANT'S SECOND ISSUE

In his second issue, J.R. contends the evidence is factually insufficient to support a finding that J.R.'s sophistication and maturity supported the certification.

I. Standard of Review

J.R. incorporates the standard of review from his first issue, but adds this paragraph from *Moon*:

Given this legislative regime, we think it only fitting that a reviewing court should measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. The appellate court should *not* be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. We therefore hold that, in conducting a review of the sufficiency of the evidence to establish the facts relevant to the Section 54.02(f) factors and any other relevant historical facts, which are meant to inform the juvenile court's discretion whether the seriousness of the offense alleged or the background of the juvenile warrants transfer for the welfare of the community, the appellate court must limit its sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under Section 54.02(h). (Underlining added; italics original).

Moon, 451 S.W.3d at 49-50.

II. Law

In determining whether to surrender jurisdiction, a juvenile court must weigh:
“(1) whether the alleged offense was against person or property, with greater weight

in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.” Tex. Fam. Code § 54.02(f).

This Court’s precedent does not treat the phrase “sophistication and maturity of the child” as a term of art, but instead applies the plain meaning of the words. *See Davis v. State*, Nos. 05-16-01341-CR, 05-16-01342-CR, 05-16-01343-CR, 2018 Tex. App. LEXIS 5920, at *8 (Tex. App.—Dallas July 31, 2018, no pet.).

Courts universally recognize that a juvenile brain is not fully developed. *Miller v. Alabama*, 567 U.S. 460, 472 n.5, 132 S. Ct. 2455, 2464 (2012); *NRA of Am. v. Bureau of Alcohol*, 700 F.3d 185, 210 n.21 (5th Cir. 2012); *Khalifa v. Cash*, 594 F. App’x 339, 342 n.1 (9th Cir. 2014) (Pregerson, J. dissenting); *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 1196 (2005); *Kelly v. Brown*, 851 F.3d 686, 688-89 (7th Cir. 2017) (Posner, J. dissenting).

III. Facts

The juvenile court’s opinion lists J.R.’s bad acts and includes the boilerplate statement that the Court issued its order after “considering all the testimony, diagnostic study, social evaluation, and full investigation,” but the report provides

no indication that the juvenile court deliberated on the evidence that weighed against certification. [CR 97-98].

Here the psychological report explained that “J.R.’s sophistication and maturity levels appear commensurate to his same aged peers.” [CR 38]. The Social Evaluation uses a strange construction and found “that the subject’s level of sophistication is excessive for a person of his age, due to the subject’s continued decisions to engage in delinquent and/or criminal conduct, the subject’s association with individuals who engage in criminal activity, the subject’s exposure to gang periphery, the subject’s history of possessing firearms, the subject’s continued use of marijuana, and the escalation of the subject’s aggressive behavior.” (Emphasis added). [CR 45; 48]. The Social Evaluation found “the subject’s level of maturity is age appropriate. The subject has not demonstrated the ability to live independently of adult supervision. The subject is not expected to provide for any household member. In the home, the subject is expected to complete chores and adhere to the established household rules. He is reliant on his mother and grandparents for his basic needs.” [CR 46]. The testimony at the certification hearing was similar and the determination of sophistication and maturity turned on J.R.’s possession of a gun. [RR 92-93; 94].

The trial court’s oral pronouncement was uninformative. The Court announced “[t]he Court does find that the child is of sufficient sophistication and

maturity to be tried as an adult. The Court finds his sophistication is acceptable for his age.” The juvenile court’s written findings state: 1) “the sophistication of the child is excessive for his age; and his level of maturity is sufficient;” 2) “The Court finds the Respondent is of excessive sophistication and the Respondent’s level of maturity is sufficient to be tried as an adult and to aid an attorney in his defense.” (Emphasis added). [CR 96; 97].

But the balance of the evidence established that J.R. remains an immature and unsophisticated youth who is far from prepared for the responsibilities of adulthood. The evidence that supported a finding that J.R. should not have been implicated included:

- Discussion of the alleged offense in publicly accessible “Instagram chat[s]” [2 RR 18].
- Posting a news article concerning the shooting to a publicly accessible page on the social media website “Instagram” [2 RR 24].
- Proposing to burn the grandmother’s car that was used in the shooting; [2 RR 33].
- The use of a movie’s theme of a “purge.” [2 RR 33].
- That J.R. was fifteen at the time of the shooting [2 RR 81].
- J.R.’s mental-health issues including: Autism Spectrum Disorder, Bipolar Disorder and Attention Deficit Hyperactivity Disorder [2 RR 92-93].

- J.R. responded exceptionally well to a highly structure environment and was placed in the Honors dorm while in Juvenile Detention [CR 35].
- J.R. “maintained a positive attitude, since being in detention. He has continued to display positive behavior and has earned full points each shift. The subject currently lives in the Honors Dorm.” [CR 44].
- J.R. “did not commit any new law violations while completing the Deferred Prosecution Program.” [CR 43].
- J.R. “consistently earned all points and complied with the rules of the facility. He learned to accept responsibility for his actions by accepting consequences and redirection. [J.R.] completed [courses in] Family Training, Concord, Anger Management, Drug Group, and Gang Intervention.” But that as soon as J.R. returned home and was no longer in the structured environment he relapsed and fell back into his bad habits [CR 43].
- That in November 2020 that J.R. had to be taken to Hickory Trails Health Center “for stabilization” [CR 44].
- That around the time of the shooting that J.R.’s medications were not proper [CR 44].
- J.R. suffers from hallucinations when his medications are not precisely administered [CR 35].

- J.R.’s exceptionally low intelligence tests (including scores in the bottom-four percent and a best score of in the bottom thirty-fourth percentile) [CR 36; 38].
- The Social Evaluation’s conclusion that J.R. has a “below-average intelligence with no apparent physical or mental impairments” [CR 43].
- J.R. suffers from depression and feels the need to cry but cannot [CR 37].
- J.R. has used marijuana since age eleven and has been recommended for “supportive outpatient drug treatment;” [CR 45].
- J.R.’s problems occur when he associates with older “friends” who “encourage[] negative behavior and the smoking of marijuana” [CR 46].
- J.R. is unable to live on his own; is not expected to provide for anyone else; and is dependent on his mother and grandmother “for his basic needs.” [CR 46]. And,
- J.R.’s father had five referrals to the Juvenile Justice System [CR 47].

IV. Application of Law to Facts

A. What This Court May Consider in this Review

Moon explained that this Court’s review is limited “to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under Section 54.02(h).” *Moon*, 451 S.W.3d at 49-50.

The juvenile transfer order includes the boilerplate statement that the order was issued after “considering all the testimony, diagnostic study, social evaluation,

and full investigation,” but the report provides no indication that the juvenile court deliberated on the evidence that weighed against certification. [CR 97-98]. Arguably, because the boilerplate statement is in the order, this Court may consider “the testimony, diagnostic study, social evaluation, and full investigation.” *Id.* But allowing this boilerplate statement to be used in a sufficiency review—without having the facts of the testimony, diagnostic review, social evaluation and “full investigation” set out in the order as required by § 54.02(h)—defeats the Court of Criminal Appeal’s instructions in *Moon*. In *Moon* the Court wrote:

Given this legislative regime, we think it only fitting that a reviewing court should measure sufficiency of the evidence to support the juvenile court’s stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. The appellate court should *not* be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. (Underlining added; italics original).

Moon, 451 S.W.3d at 49-50.

Appellant contends that the evidence in favor of denying certification should have been included in the trial court’s order. If this Court disagrees and is satisfied with the boilerplate language that the trial court considered “the testimony, diagnostic study, social evaluation, and full investigation,” then *Moon* allows this Court to “rummage through the record for facts that the juvenile court might have

found,. . . but did not include in its written transfer order.” *Id.* If, however, this Court believes that the juvenile court erred in not including the evidence that weighed against certification in the § 54.02(h) order, then the evidence in the order is sufficient to defeat this issue, the order is deficient under § 54.02(h), this Court need not consider the sufficiency issue further, and the Court should sustain Appellant’s first issue. [CR 97-98].

B. Factual Sufficiency Analysis

Because the juvenile court used the boilerplate language that it considered “the testimony, diagnostic study, social evaluation, and full investigation,” this Court must decide whether to disregard *Moon* and look to the entire record. *Id.*

1. The Charge is Not Factually Sufficient on its Own

Section 54.02 establishes that no specific crime can be sufficient, on its own, to justify certification. *See* Tex. Fam. Code § 54.02. Section 54.02(a)(3) requires the court “after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.” Tex. Fam. Code § 54.02(a)(3). A literal reading of this statute could result in any “serious” offense such as Murder being transferred to adult Court. *Id.* But the Court of Criminal Appeals, in *Moon*, explained that the severity of the offense is not

determined by the name of the alleged offense but by the circumstances of the offense. *Moon*, 451 S.W.3d at 56 (“The Court also errs when it concludes that the second and fourth statutory factors are relevant only to the ‘background of child’ reason for transfer. The statutory language does not limit the purpose for which the four statutory factors may be considered, and the second and fourth factors in particular may well be relevant to the ‘seriousness of the offense’ reason for transfer. The second factor—the sophistication and maturity of the child—relates to the seriousness-of-the-offense reason for transfer in two ways. First, the more sophisticated and mature the child, the more blameworthy his conduct is likely to be. Blameworthiness is a legitimate factor in determining the seriousness of an offense.”) (Emphasis added).

Further, Section 54.02(d) requires that, in *all* cases (without regard for the specific charge), “[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.” The “full investigation” requirement “prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.” *Kent*, 383 U.S. at 553 n.15.

Accordingly, the charge itself cannot be sufficient evidence to support a certification.

2. The Evidence was Factually Insufficient to Support the Order

Here the evidence presented a conflicting story but ultimately the evidence was factually insufficient to support the Court's findings. The psychological evaluation found "J.R.'s sophistication and maturity levels appear commensurate to his same aged peers." [CR 38]. The Social Evaluation went further and claimed that J.R.'s sophistication was "excessive."

But the record establishes the opposite. The record establishes that J.R. is far behind his peers academically, emotionally, developmentally, and intellectually, that he suffers from serious-mental-health problems, Autism Spectrum Disorder, Bipolar Disorder, that when J.R.'s medication is not balanced correctly that he hallucinates, that he is negatively influenced by older peers with whom he associates, and that when he is in an unstructured home that he has no sense of responsibility. And, by contrast, that when J.R. is in a highly structured environment and he is under nearly constant direction (such as while he is in custody) that he performs superbly. The enormous difference between his exceptional conduct while in rigidly structured environments and his troubling conduct while in unstructured environments is attributable to his lack of sophistication and maturity.

This connection between a lack of a highly structured environment and J.R.’s problems is predictable. In 2012, the Supreme Court wrote “[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance” and that “[n]umerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency.” (cleaned up). *Miller*, 567 U.S. at 472 n.5. And the Fifth Circuit recently wrote:

Furthermore, even putting aside deference, modern scientific research supports the commonsense notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over. *See, e.g., Brief for the Am. Med. Ass’n et al. as Amici Curiae in Support of Neither Party, Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (Nos. 10-9646, 10-9647), 2012 WL 121237, at 19-20 (‘The brain’s frontal lobes are still structurally immature well into late adolescence, and the prefrontal cortex is ‘one of the last brain regions to mature.’ This, in turn, means that ‘response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.’” (citations omitted)); Lawrence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *CHILD DEV.* 28, 40-41 (2009) (‘[C]hanges in impulse control and planning are mediated by a ‘cognitive control’ network . . . which matures more gradually and over a longer period of time, into early adulthood.’).

NRA of Am., 700 F.3d at 210 n.21.

The Ninth Circuit has explained that, “[t]he brain of a fifteen year old is ‘not yet fully mature in regions and systems related to higher-order executive functions

such as impulse control, planning ahead, and risk avoidance.” *Khalifa*, 594 F. at 342 n.1.

And the Supreme Court has opined that “[i]ndeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” (cleaned up). *Roper*, 543 U.S. at 570.

And Judge Posner of the Seventh Circuit explained:

In 2015 the Department of Justice released data from a 7-year longitudinal study of more than 1,300 ‘serious juvenile offenders’—those who had committed felony-level violent, property, or drug crimes. *See* Laurence Steinberg et al., ‘Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders,’ Office of Juvenile Justice and Delinquency Prevention, March 2015, www.ojjdp.gov/pubs/248391.pdf ; Melissa Sickmund and Charles Puzzanchera, eds., “Juvenile Offenders and Victims: 2014 National Report,” Ch. 3, National Center for Juvenile Justice, December 2014, www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf. The Justice Department study revealed that more than 90 percent of juvenile offenders grow out of such antisocial behavior by young adulthood and do not re-offend after their first contact with a court—and that regardless of the sanction imposed on the child. Even after matching the subjects with the gravity of their offenses—whether they were incarcerated, placed in residential facilities, put on probation, or received community-based services—the vast majority did not re-offend; instead they grew up. Thomas A. Loughran et al., ‘Studying Deterrence Among High-Risk Adolescents,’ August 2015, Office of Juvenile Justice and Delinquency Prevention, www.ojjdp.gov/pubs/248617.pdf. Researchers conclude that ‘most juvenile offending is, in fact, limited to adolescence’ and that ‘the

process of maturing out of crime is linked to the process of maturing more generally, including the development of impulse control and future orientation.’ Steinberg et al., *supra*, at 1. The ‘signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside,’ and generally does. *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), quoting *Johnson v. Texas*, 509 U.S. 350, 368, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993).

Kelly, 851 F.3d at 688-89.

Here, the evidence conclusively showed a teenaged young man, with low intelligence, mental-health problems, Autism Spectrum Disorder, Bipolar Disorder, and with a lack of maturity and sophistication that manifest itself in a lack of impulse control and poor decision-making faculties. But the evidence also established that when J.R. is not given choices and his environment is structured for him that he makes very good decisions and excels. This is the mark of a lack of maturity and sophistication, but the trial court found that J.R. is “excessively” sophisticated and mature. The evidence is factually insufficient to support these findings.

V. Abuse of Discretion

Section 54.02(f) (2) requires the court to consider the sophistication issue in making its evaluation and ultimate decision. Tex. Fam. Code § 54.02(f)(2). Had the juvenile court failed to consider this issue, then it would be obvious that the court violated the statute and that its waiver order must be reversed. Here, the juvenile court purported to consider this factor, but its finding makes clear that the court did

not engage in the required deliberative effort. *Id.* § 54.02(h); *Moon*, 451 S.W.3d at 49-50. The trial court's disregard of § 54.02(h) and *Moon* perhaps even more clearly requires reversal. Had the court simply failed to consider this factor, at least the omission would not have tainted the juvenile court's weighing of the remaining statutory factors. Where, however, as here the juvenile court misapplied a factor and wrongly concludes that the factor weighs in favor of waiving jurisdiction when it actually weighs against, the court's entire weighing process is flawed.

In a similar situation involving a four-part balancing test applicable to the issue of whether a defendant had been improperly denied a speedy trial, the Court of Criminal Appeals reversed where the court below engaged in a flawed analysis of *one* of the balancing factors:

We hold that the Court of Appeals erred in (1) recognizing a 'community right' to a speedy trial and (2) considering the concept of community interest in the abstract during its analysis of the third *Barker* factor. We reverse and remand this cause to the Court of Appeals in order to analyze appellant's speedy trial claim in a manner consistent with this opinion.

Johnson, 954 S.W.2d at 773. On remand, the court of appeals held:

We further note that the Court concluded that this Court's application of the balancing test itself was flawed. In considering a speedy trial claim, a reviewing court must balance four factors. If we are to appropriately consider the contention, we must not only review the third prong to weigh the competing considerations, but we must also balance it against the other factors. Indeed, none of the four factors is a necessary or sufficient condition the finding of a speedy trial violation.

“Rather, they are related factors and must be considered together with such other circumstances as may be relevant.”

Johnson v. State, 975 S.W.2d 644, 649 (Tex. App.—El Paso 1998, pet. ref’d).

Error on the sophistication prong cannot be said to be harmless, when out of the four statutory factors the juvenile court was required to consider sophistication and maturity are arguably the most important. Error especially cannot be harmless, where a child is subsequently made to stand trial as an adult and convicted and the preponderance of the evidence weighed against such a result. Thus, it cannot be presumed that the court’s ultimate conclusion regarding the welfare of the community would have been the same.

VI. Conclusion

Here the juvenile court—based on the § 54.02(h) order—did not have enough information to decide whether J.R. was sufficiently sophisticated and mature to certify. Instead the order focused only on J.R.’s troubled young life. The trial court—based on the 54.02(h) order—disregarded all of the evidence to the contrary.

And in failing to consider the substantial evidence that showed that J.R. is both unsophisticated and immature the trial court acted without reference to guiding principles. *Id.* The trial court, acting as the finder of fact, had the right to disbelieve the evidence that J.R. has Autism Spectrum Disorder, Bipolar Disorder, that he behaved spectacularly in rigidly controlled environments, that his intellectual

abilities are remarkably low, etc. But the juvenile court did not have the discretion to simply ignore this evidence without finding it to lack credibility. The only way for this Court to exercise its oversight and appellate responsibilities is to rely on the § 54.02(h) order. But here the juvenile court structured the § 54.02(h) order to prevent that oversight. Accordingly, the juvenile court acted without reference to any guiding principles and the order should be reversed.

Because the evidence is factually insufficient to support the verdict, J.R. asks this Court to vacate the juvenile court's order surrendering jurisdiction and to remand the case for proceedings in the juvenile court.

12. CONCLUSION AND PRAYER

J.R. asks this Court to:

- Find that the trial court abused its discretion and failed to honor either § 54.02 or *Moon* and their requirement that the juvenile court explain its deliberative process in a § 54.02(h) opinion;
- Find that the evidence was factually insufficient to support the findings that J.R. was sufficiently mature and sophisticated to certify and that the trial court abused its discretion in certifying J.R.;
- Vacate the certification order; and,
- Any for and all other relief to which Appellant might be entitled.

Respectfully Submitted,

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This is to certify that this brief complies with Rule 9.4 of the Texas Rules of Appellate Procedure because it is computer generated and includes 14,402 words as counted by the word count feature included with Microsoft Word. Appellant has not used the exception in Rule 9.4(i)(1). This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

/s/ Niles Illich
Niles Illich

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This is to certify that on December 9, 2020 that a true and correct copy of this brief was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service and electronic mail as follows:

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/s/ Niles Illich
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APPENDIX

Table of Contents for Appendix:

1. Trial Court's Order under Rule 54.02(h).
2. Text of Statutes and Rules

Tab 2

Relevant Portions of Section 54.02 of the Texas Family Code

Sec. 54.02. Waiver of Jurisdiction and Discretionary Transfer to Criminal Court.

(a) The juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if:

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

(2) the child was:

(A) 14 years of age or older at the time he is alleged to have committed the offense, if the offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and no adjudication hearing has been conducted concerning that offense; or

(B) 15 years of age or older at the time the child is alleged to have committed the offense, if the offense is a felony of the second or third degree or a state jail felony, and no adjudication hearing has been conducted concerning that offense; and

(3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.

(b) The petition and notice requirements of Sections 53.04, 53.05, 53.06, and 53.07 of this code must be satisfied, and the summons must state that the hearing is for the purpose of considering discretionary transfer to criminal court.

(c) The juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings.

(d) Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.

(e) At the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. At least five days prior to the transfer hearing, the court shall provide the attorney for the child and the prosecuting attorney with access to all written matter to be considered by the court in making the transfer decision. The court may order counsel not to reveal items to the child or the child's parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future.

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

(2) the sophistication and maturity of the child;

(3) the record and previous history of the child; and

(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

(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.

(g-1) A child may be subject to criminal prosecution for an offense committed under Chapter 19 or Section 49.08, Penal Code, if:

(1) the offense arises out of a criminal transaction for which the juvenile court retained jurisdiction over other offenses relating to the criminal transaction; and

(2) on or before the date the juvenile court retained jurisdiction, one or more of the elements of the offense under Chapter 19 or Section 49.08, Penal Code, had not occurred.

(h) If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings and cause the results of the diagnostic study of the person ordered under Subsection (d), including psychological information, to be transferred to the appropriate criminal prosecutor. On transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure, except that if detention in a certified juvenile detention facility is authorized under Section 152.0015, Human Resources Code, the juvenile court may order the person to be detained in the facility pending trial or until the criminal court enters an order under Article 4.19, Code of Criminal Procedure. A transfer of custody made under this subsection is an arrest.

Texas Penal Code § 19.02

Sec. 19.02. Murder.

(a) In this section:

(1) “Adequate cause” means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(2) “Sudden passion” means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.

(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

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