

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 Reply Brief

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**ORAL ARGUMENT
REQUESTED.**

ACCELERATED APPEAL.

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To the Honorable Justices of the Fifth Court of Appeals:

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

First Reply Issue:

The kernel of the dispute between Appellant and Appellee is whether § 54.02(h) and *Moon* require the Juvenile Court to consider both the evidence in favor of waiver of jurisdiction and the evidence against waiver of jurisdiction. The answer is uncomplicated, but requires consideration of the standard of review for factual sufficiency in a civil case.

In a civil case, this Court reviews the factual sufficiency of the evidence under the following standard: “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 evidence as to be clearly wrong and unjust. 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.” (internal citations removed). *In re D.A.D.*, No. 05-17-00294-CV, 2017 Tex. App. LEXIS 8603, 2017 WL 3976585, at *3 (Tex. App.—Dallas Sept. 11, 2017, pet. denied) (mem. op.) (citing *Moon v. State*, 451 S.W.3d 28, 50 (Tex. Crim. App. 2014)).

Thus a factual sufficiency review requires a consideration of “all of the evidence presented,” but is limited to “the facts the Juvenile Court expressly relied on for its transfer order.” *Id.* To honor both requirements necessitates that the

Juvenile Court include a deliberation of the factors that weigh in favor and against certification in the Court's § 54.02(h) order. If the Juvenile Court does not include the factors that weigh against the certification in the § 54.02(h) order, then the factors that weigh against the certification cannot be considered in a factual sufficiency review. *Id.*; *Moon v. State*, 451 S.W.3d 28, 50 (Tex. Crim. App. 2014). If the Juvenile Court was not required to include the factors that weighed against certification, and if this Court cannot now review those factors, then there is no meaningful distinction between a factual sufficiency review and a legal sufficiency review.

Here the trial court did not include any factors that weighed against certification in its opinion.

At the best, the Juvenile Court's order included the boilerplate promise that the Court made its decision after "considering all the testimony, diagnostic study, social evaluation, and full investigation." [CR 97-98]. But this indifferent assurance should not substitute for a deliberate consideration of all of the factors that weigh in favor and against certification. Indeed, in *Moon*, the Court wrote, "[t]he 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." (emphasis original). *Moon*, 451 S.W.3d at 50. By using the boilerplate promise that the Juvenile Court reached its decision after "considering all the testimony, diagnostic study, social evaluation, and full

investigation,” the Juvenile Court disregarded *Moon’s* express instruction against requiring the appellate court to “rummage through the record for facts that the Juvenile Court might have found...” *Id.*

For these reasons, the § 54.02(h) order must include the factors that weigh against certification. Here the order did not include the factors that weight against certification and therefore was deficient.

Second Reply Issue:

As a preliminary matter it is unsettled whether this Court can look to the record as a whole for evidence that would weigh against certification. *Moon* was clear that the review should be limited to the face of the § 54.02(h) order. *Id.* at 49-50.

The problem for this Court, however, is that the § 54.02(h) order is deficient. The deficient order flagrantly leaves out all of the evidence that weighed against certification. And *Moon* limits a sufficiency review to the text of the § 54.02(h) order. If the Court relies on the boilerplate promise that the Juvenile Court reached its decision after “considering all the testimony, diagnostic study, social evaluation, and full investigation,” then the Juvenile Court disregarded *Moon’s* express instruction against requiring the appellate court to “rummage through the record for facts that the Juvenile Court might have found...” *Id.*

But if this Court finds that it can rummage through the record, then the record overwhelmingly supports the conclusion that Appellant should not have been certified.

Appellee discounts the evidence that supported the conclusion that Appellant should not have been certified as an adult. But Appellee's arguments concerning Appellant's low intellect, Appellant's serious mental-health problems, Appellant's problems with balancing his psychiatric medicine, and Appellant's exceptional conduct while in a structured environment all strongly weighed against a finding that Appellant should be certified as an adult. Indeed the social evaluation (if this Court can consider evidence in the record that is outside of the § 54.02(h) order) found that Appellant "has not demonstrated the ability to live independently of adult supervision" and "is reliant on his mother and grandparents for his basic needs." All of these factors support a conclusion that Appellant should not have been certified as an adult.

Here, when this Court considers all of the evidence, the evidence conclusively shows 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 this finding.

Finally, the trial court abused its discretion by finding that the sophistication prong supported a finding that the Juvenile Court should waive its jurisdiction. Arguably, the sophistication prong is the most important prong and the factor that most distinguishes a criminal act by a juvenile and a criminal act by an adult. By misapplying the factor, the Juvenile Court abused its discretion and reversal is warranted.

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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CERTIFICATE OF COMPLIANCE

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 January 12, 2021 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

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