

No. 08-25-00259-CR

IN THE COURT OF APPEALS
FOR THE STATE OF TEXAS
EIGHTH JUDICIAL DISTRICT

MICHAEL ANTHONY HOWARD

v.

STATE OF TEXAS

Transferred from the Third Court of Appeals,
On Direct Appeal from the
426th District Court of Bell County, Texas
Trial Court No. 22DCR85949

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

Jessica S. Freud
FREUD LAW P.C.
415 W. 10th Street
Georgetown, Texas 78626
Tel: (254) 307-3384
Fax: (254) 765-2739
SBN: 24095303
Email: Jessi@FreudLaw.com
Attorney for Appellant

IDENTITY OF JUDGE, PARTIES AND COUNSEL

Judge Presiding: The Honorable Steven J. Duskie

Appellant: MICHAEL ANTHONY HOWARD

Appellate Counsel: Jessica S. Freud
Freud Law P.C.
415 W. 10th Street
Georgetown, Texas 78626

Trial Counsel: Michael White, *assisted by* Bobby Barina
100 Kasberg Drive Ste A
1411 West Avenue, Suite 100
Temple, Texas 76502
SBOT: 00785231, 1738480

Appellee: STATE OF TEXAS

Appellate Counsel: Stephanie Newell, District Attorney
Brendan Guy, Assistant District Attorney
Bell County District Attorney's Office
P.O. Box 540
Belton, Texas 76513

Trial Counsel: Tanner Barnes & William Torrey
Bell County District Attorney's Office
P.O. Box 540
Belton, Texas 76513
SBN: 24096230, 20144700

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STATEMENT OF THE CASE

This is an appeal of a judgment of conviction for murder, arising out of the shooting death of J.D.¹, following a jury trial in Bell County's 426th District Court, the Honorable Steven Duskie presiding. CR 160-162; *see* Tex. Penal Code § 19.02(b)(1). Appellant was 15 on the day of the offense and thus initially charged in juvenile court. CR 8. He was 16 when the certification proceeding was held. 2 RR 1; 3 RR 1. On April 6, 2022, the juvenile court signed a waiver of jurisdiction and transfer order. CR 7.

Following transfer to adult court, Appellant was indicted for murder on June 15, 2022. CR 5; § 19.02(b)(1). Trial began on August 18, 2025, and ended on August 22, 2025. 4 RR1, 8 RR 1. The jury found him guilty as alleged in the indictment and assessed punishment at 70 years, which the trial court imposed. CR 137; 8 RR 72.

The trial court certified his right to appeal, and a notice was timely filed. CR 132, 138. A motion for new trial was also timely filed, and hearing

¹ Because J.D. was a minor, his initials will be used. TEX. R. APP. P. 9.8.

requested and held on October 2, 2025. CR 167, 219. Thereafter, the motion was overruled by operation of law.

This brief is timely filed on or before March 10, 2026, after two extensions of time were granted.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument unless the Court finds it would not aid in the decision-making process.

ISSUES PRESENTED

- I. Point of Error One: Whether the evidence is legally insufficient to sustain the conviction. *Jackson v. Virginia*, 443 U.S. 307 (1979).
- II. Point of Error Two: Whether the de facto life sentence of 70 years violates the Eighth Amendment to the United States Constitution.
- III. Point of Error Three: Whether the de facto life sentence of 70 years violates Article 1, Section 13 of the Texas Constitution.
- IV. Point of Error Four: Whether the mandatory requirement of 30 years before parole consideration for life sentences and de facto equivalents, as required by Texas Government Code Section 508.145(d)(1)-(2), is unconstitutional as applied to Appellant, and similarly situated juveniles, under Article 1, Section 13 of the Texas Constitution.

STATEMENT OF FACTS

This case arises out of the May 31, 2021, shooting death of 16²-year-old J.D. in the driveway of 2214 Dickens Drive in Killeen, Bell County. CR 5; 4 RR 150; *see also* State Ex. 63-64, 100. J.D. was shot six times with a firearm³; J.D. was wearing light-blue jeans and a white Nike hoodie with black text on it. 5 RR 32.

There was no eyewitness to the shooting. 4 RR 151. No weapon was recovered. *Id.* There was no motive theory presented nor was there any established connection between Appellant and J.D.

At guilt-innocence, the defense called no witnesses, presented one exhibit (Dx 2) through cross-examination, and otherwise rested behind the State. 7 RR 60.

State's Case

The State called 23 witnesses and presented just over 100 exhibits.

The State's case began with the presentation of four 911 calls. *See*

² The medical examiner testified J.D. was 16; however, at other points it is said J.D. was 15. 5 RR 31; 4 RR 149:18 (prosecutor opening stating he was 15).

³ Based on an analysis of shell casings from the scene, Austin DPS firearm and toolmark examiner, Ryan Christopher, testified he determined the firearm was possibly a glock. 7 RR 36; *see* State Ex. 83 (laboratory report). The medical examiner also testified the cause of death was gunshot wounds and manner of death homicide. 5 RR 40-41.

State Ex. 1-4. Thereafter, Killeen Police Department (“KPD”) Officer Givonchie Emeana, the State’s second witness, testified to Appellant’s arrest in the backyard of 1404 North 42nd Street which was captured on body cam; Appellant was found sleeping under a barbeque pit, wearing only orange shorts. 5 RR 19, 24, 6 RR 36; *see also* State Ex. 5 (footage), 108 (map showing home location). The resident of the home did not know how long he may have been there. 6 RR 40.

Officer Emeana described the distance between where Appellant was found and where the deceased was shot as, “[i]t would be less than a mile the way the crow flies in a straight line it would be less than a mile. . . [i]n a straight line the way the crow flies, less than a mile.” 5 RR 17; *see also* 5 RR 24. Officer Emeana admitted there was no blood on Appellant nor any other evidence of significance. 5 RR 23-24. As he was taken into custody, Appellant repeatedly asked what was happening and shared that he was homeless. *See* State Ex. 5.

After he was in custody, Appellant gave a brief interview. *See* State Ex. 78 at 27:33-48:47. In his interview, Appellant was told that witnesses saw him run from the scene and strip down to his orange shorts, and that this information was reliable because the police dog tracked his scent from

the “incident” to where he was found. *Id.* at 46:09-47:20. The interview ended after Appellant asked the interviewers if they wanted to play rock-paper-scissors. *Id.* at 47:37.

At the time of arrest, Appellant’s hands were bagged for collection of a gunshot residue kit. 5 RR 21-22; *see also* State Ex 22. (body cam footage of bagging hands). KPD Detective Joshua Plowick testified concerning, among other things, the gunshot residue kit collection process. 5 RR 129-30. While reviewing State’s Exhibit 22 on cross-examination, Plowick admitted that the officer who initially bagged Appellant’s hands handled Appellant in multiple places and then returned to the patrol car with the same gloves, which were “search gloves” not the required latex or nitrile gloves that are designed to minimize contamination. 5 RR 132-33. He also admitted that the inside of the bag was touched and gloves were not changed between hands, all of which he agreed could cause contamination. 5 RR 134-35, 137⁴.

Forensic Scientist Rebeckah Lloyd of the Austin DPS lab’s trace evidence section testified to her analysis of the gunshot residue kit

⁴ KPD Officer Regan Vanvanlkenburg also testified to her process of collecting the gun shot residue kit, which was her only work on the case. 5 RR 139-40:24-24, 140:3-5, 9-10. She admitted the importance of using nitrile or latex gloves as such are “more sterile” and “less likely to be contaminated” as opposed to nylon or cloth or cotton gloves. 5 RR 150.

collected from Appellant's hands and "stubs collected from the jacket." 7

RR 7, 11, 13; *see* State Ex. 81 (GSR Report). As to the GSR kit from

Appellant, Lloyd testified the result was (*id.*):

One characteristic and one indicative gunshot primer residue particle(s) were confirmed on the GSR kit. This result is consistent with a person having recently: A. Fired a weapon. B. Been in immediate proximity of a weapon as it is being fired. C. Come into contact with a surface containing gunshot primer residue particles.

As to the black hooded jacket from scene, Lloyd testified the result was (*id.*):

Four characteristic gunshot primer residue particles were confirmed on the GSR stub collected from the front of the jacket. Two characteristic gunshot primer residue particles were confirmed on the GSR stub collected from the hood of the jacket. No gunshot primer residue particles were detected on the GSR stubs collected from the back, left sleeve, inside right pocket, inside left pocket or inner waistline of the jacket.

This result is consistent with the item having: A. Been in immediate proximity of a weapon as it is being fired. B. Come into contact with a surface containing gunshot primer residue particles.

Other characteristic and indicative gunshot primer residue particles were detected on the GSR stub collected from the right sleeve of the jacket but were not confirmed.

Six neighbors from the Dickens Drive-area testified.

The first was the resident of neighboring home 2212 Dickens, Michelle Perry. 5 RR 45. She testified about what she saw that day around

1:15pm as she was leaving her house. *Id.* She saw two people and explained:

And I pulled out, went to the end of the street I think it was the 2214. And I looked to my right, looked to my left saw one person on my right on the opposite side of the street. And saw nothing out of the ordinary. And then went to the -- made my left hand turn then I saw another person on the same side of the street.

5 RR 46.

She described both people as having a "darker skin color", "potentially black," and recalled one was wearing jeans but could not recall what the other was wearing. *Id.* The prosecutor then asked her if she recalled telling the police four or five years ago that one was wearing a hoodie, to which she said, "I believe so." 5 RR 47. Over objection, the prosecutor further used her statement to "rehabilitate" her (5 RR 48) and had her read what her written statement said concerning the clothing description: "One was black wearing jeans. And then the other was wearing a hoodie, no shirt. And then I cannot recall the pants." 5 RR 49. She could not recall the color of the hoodie either. *Id.*

Perry estimated her opportunity to view was 30 seconds "at most." *Id.* She said these two people were "maybe" a block apart at the time she saw them. *Id.* There was no communication between them. *Id.* Three to five

minutes later, her significant other, who was still at their home, called her.

5 RR 48.

Perry's significant other, Joey Cumbee, testified after her; he was inside their home at 2212 Dickens playing video games when he heard someone outside say, "you not gone do shit." 5 RR 54-53, 56. He had no further identifying information concerning who said that. 5 RR 57. After he heard gunshots, he called 911. 5 RR 60. He saw nothing and had no other information of evidentiary value. 5 RR 58-60.

The neighbor at 2207 Dickens, Eliecer Rosario, was the third neighbor-witness to testify. 5 RR 61. 2207 Dickens is "down the street" on the "opposite" side of the street to 2214 Dickens. 5 RR 62-63. Rosario was renovating this property when he heard five or six gunshots and told his wife, who was with him, to get down. 5 RR 63. He waited 10 seconds and then went to the window and said he saw, "[a] young man running from the Westcliff side where the incident happened, toward -- in my view it would have been toward the right hand side." 5 RR 63, 70.

He described the individual he saw as "[r]oughly six foot tall, roughly about my height[,] [w]earing black with the bright neon color, like the liner." 5 RR 64. He could not recall the pants he was wearing. *Id.* He

saw this person from a “side view” and as to whether he could identify this person “today” he said, “[f]rom the side view, I would say a good 85 percent.” *Id.* Rosario said he watched the person run “all the way past the end of the road where it curves into the field and continued running across the field.” 5 RR 65.

After Rosario, Leo Seastrunk from 2021 Dickens Drive, testified. 5 RR 77. Seastrunk was at home at 1pm but did not hear or see anything. 5 RR 78. Law enforcement showed up at his door asking about security camera, and he provided the footage his home surveillance camera captured from the front, exterior part of his property. 5 RR 80; *see* State Ex. 6. As to the video timestamp of 13:25:52, he said it is “maybe accurate” or an hour off. 5 RR 82. The footage shows a person walking in the street in dark colored clothing. *See* State Ex. 6. Seastrunk described the direction the person was walking as, “toward the creek at the end around the corner before he gets to a little way to go down to a creek.” 5 RR 81.

Yvonne Sheil of 2102 Dickens Drive testified following Seastrunk. 5 RR 85. Sheil’s home had a Ring camera which captured the front, exterior of her property, street-facing view. *See* State Ex. 7. The video shows a person in dark clothing running into the frame, from the right, before

slowing down and walking out of frame. *Id.* The video has no timestamp and Sheil did not give any information concerning the time frame of the footage. *Id.*

After Sheil, Swayzee Rook of 2017 Dickens Drive testified that she was out of her home on May 31 and, when she arrived back at an unspecified time, she saw a man walking by “briskly.” 5 RR 95. She described what the person was wearing: “[b]lack pants, not sure if he was wearing a shirt[,] [h]e was wearing a black hoodie or sweater with lime green shoulder and face mask covering the nose down.” 5 RR 96. She did not get a “good picture” of his face. *Id.* The person and Rook’s husband made “eye contact” and then, Rook said, the person “took off” between her neighbor’s house into an “open area.” *Id.* Rook testified she thinks this area is a “like a little creek, woody area.” 5 RR 97. Rook also said she saw that, “he was holding something in the waistband with his right hand[,] [o]n the left side of his waistband across his body, he was holding something in there.” *Id.* She said it “seemed to be like a handgun.” *Id.*

The day after Appellant’s arrest, KPD Sergeant David Cole testified

to the discovery of clothing. 6 RR 23; *see also* State Ex. 10-11⁵, 16-20. Cole found the clothing because another assisting officer's⁶ K-9, Eddy⁷, "pulled [them] behind some backyards on Copperfield Circle," (6 RR 21). In describing where in relation to Dickens Drive the clothes were found, Cole estimated it was an eighth to a quarter of a mile away. 6 RR 28. Three articles of clothing were located: a pair of pants (Sx 10), a "black sweatshirt" (Sx 11) and "with the pants, located a medical mask," (Sx 12). 6 RR 22, 33⁸. Cole said the pants were found "at the base of the hill, the black spot" and the sweatshirt was "behind the shed and retaining wall." 6 RR 23. He said the sequence in which the clothes were collected was the pants, then sweatshirt, and then the medical mask. 6 RR 32-33. The same gloves were used to collect all three items. 6 RR 33. There is no footage of the collection of the clothing. 6 RR 30.

DPS DNA technical leader, Charity Hubbard, testified concerning

⁵ Clothing labels marked as "found by K9."

⁶ Officer Ache.

⁷ There was a second K-9 working the day prior, Merlin.

⁸ Q: Did you see the black face mask?
A: Yes, sir, it was with the pants.
Q: Where in the pants was the face mask?
A: Next to the pants.

the DNA results for the clothing. 7 RR 39; *see* State Ex. 82 (report).

Hubbard testified the swab from the medical mask was interpreted as a single source profile, and that the result was: “The probability of obtaining this profile if the DNA came from Michael Howard is 2,580,000,000,000,000,000.000.000.000 (2.58 octillion) times greater than the probability of obtaining the profile if the DNA came from an unrelated, unknown individual. This likelihood ratio indicates support for the proposition that Michael Howard is the possible contributor of the profile.”

As to the swabbing from the black hooded jacket, the profile was interpreted as a three-person mixture with the result stated as: “The probability of obtaining this profile if the DNA came from Michael Howard and two unrelated, unknown individuals is 96,200,000,000,000,000,000 (96.2 sextillion) times greater than the probability of obtaining this profile if the DNA came from three unrelated, unknown individuals. This likelihood ratio indicates support for the proposition that Michael Howard is a possible contributor to the profile.” As to the swabbing from black jeans from the scene, the profile was interpreted as a four-person mixture with the result stated as: “The probability of obtaining this profile if the DNA came from Michael Howard and three unrelated, unknown individuals is

39,100,000,000,000 (39.1 trillion) times greater than the probability of obtaining this profile if the DNA came from four unrelated, unknown individuals. This likelihood ratio indicates support for the proposition that Michael Howard is a possible contributor to the profile.” Thereafter, the State rested. 7 RR 60.

After a two-hour deliberation, the jury found Appellant guilty as alleged in the indictment. 7 RR 105.

Punishment

The State called five witnesses and presented 11 exhibits. *See* State Ex. 83 (jail disciplinary records), 115-124 (photos of deceased). The defense called one witness, Appellant’s mother, and presented one exhibit, a September 2021 pre-certification diagnostic study of Appellant. *See* State Ex. 85. The parties rested and closed, and court charged the jury on punishment. 8 RR 51.

The State asked for a life sentence, and the defense asked for 15 to 20 years. 8 RR 69, 66. The jury assessed sentence at 70 years, with no fine, which the trial court imposed on August 22, 2025. 8 RR 72, 75.

Motion for New Trial

A Motion for New Trial was timely filed on September 19, 2025. CR

167. The Motion raised four grounds: (1) sufficiency of the evidence, (2) that the de facto life sentence of 70 years violates the Eighth Amendment to the United States Constitution, (3) that the de facto life sentence of 70 years violates Article 1, Section 13 of the Texas Constitution, and (4) that the mandatory requirement of 30 years before parole consideration for life sentences and de facto equivalents, as required by Texas Government Code Section 508.145(d)(1)-(2), is unconstitutional as applied to juveniles, including Appellant, under Article 1, Section 13 of the Texas Constitution. CR 170, 173, 175.

At the hearing, Appellant presented two witnesses: first, board-certified defense attorney, Amber Vasquez, who has a statewide trial-level practice with an active murder caseload, including in Bell County; and second, chair of the juvenile law section of the State Bar and founder of non-profit organization Lonestar Justice Alliance (“LSJA”), Elizabeth Henneke. 9 RR 15, 31. The affidavit of a criminal defense attorney in private practice who carries a felony practice in Bell County and surrounding areas, Brad Vinson, that was filed with Appellant’s Motion was also admitted. *See* Def MFNT Ex. 1 at 10 RR 665-67.

Board-certified Attorney Vasquez testified that a 70-year sentence for a 15-year-old convicted of murder without any unique aggravating circumstances is an “outlier” in her 20-plus years of experience. 9 RR 21.

After Vasquez, Henneke testified to her opinion that the 70-year sentence in this case was grossly disproportionate and supported that opinion with three sets of data from the Texas Department of Criminal Justice (“TDCJ” or “the agency”). Henneke’s organization, LSJA, has an agreement with the agency in which it shares its “high value data” concerning every individual, including all certified juveniles, sentenced in Texas. 9 RR 41. LSJA began collecting this data from TDCJ in 2018, and the first part of Henneke’s analysis was based on data from 2012 through March 5, 2025. 9 RR 41-42. From this first data set, Henneke determined how many individuals were currently incarcerated statewide for murders committed at 15 years old, and the sentence lengths; there are currently eight (8) individuals serving a sentence for murder committed when the individual was 15 with the highest sentence of those eight individuals being 45 years 9 RR 42-43. In comparing Appellant’s sentence, Henneke opined that Appellant’s 70-year sentence is grossly disproportionate. 9 RR 43.

In addition to the agency's "high value data" set, Henneke looked at a second set of agency data that captured all noncapital juvenile individuals under 18⁹ (not just 15-year-olds) for the period of 2012 to 2019. 9 RR 44. Henneke said this second data set revealed that, "out of 238 juveniles sentenced to noncapital murder, 16 were given life sentences. . . So essentially out of 214 out of 218 were given shorter sentences than the 70 years which amounts to 89 percent of them." 9 RR 44-45. Lastly, Henneke's third set of data took the second set and limited it to 15-year-olds.¹⁰ 9 RR 45. Of this third set, looking at 15-year-olds from 2012 to 2019, there were 18 individuals sentenced to noncapital murder. 9 RR 45. Henneke explained, "[o]ut of that, [1]7 out of the 18 within that period had got a sentence of less than 70 years" which she said translated to a percentage of 94 percent of similarly situated individuals got a sentence of less than 70 years. 9 RR 45. Thus, the two latter data sets further supported her opinion that the 70-year sentence is grossly disproportionate.

⁹ This included 17-year-olds who were not certified. 9 RR 45.

¹⁰ "We pulled out just the 15 years old." 9 RR 45.

Relevant to Appellant's parole statute challenge, Henneke's testimony concluded with her opinion that the Texas state parole process does not provide a meaningful opportunity to consider maturity or rehabilitation for youth. 9 RR 56. This opinion was also based on data from TDCJ; in 2016, LSJA obtained data from TDCJ and the Texas Board of Pardon and Parole regarding over 300 parole reviews for individuals under 18 convicted of capital murder. 9 RR 56. The last statistic based on this data was from 2018 and reflected that of 364 capital murder defendants reviewed for parole, "only 17 of them actually have ever been paroled which accounted to about 4.6 percent." 9 RR 62. Statistically, she explained that youth played no role in the opportunity for parole and that there is some "slight" statistical variation to indicate that youth may make it less likely. 9 RR 61. She also explained that the Texas parole guidelines still currently in effect were not designed to be applied to juveniles. 9 RR 59.

The State called no witnesses but presented 33 exhibits of Bell County adult murder convictions and five other convictions for certified juveniles (one for capital murder, two for murder and two for a non-homicide felony). *See* State MFNT Ex. 1-7 at 10 RR 300-606.

The trial court took the Motion under advisement, and it was overruled by operation of law.

SUMMARY OF THE ARGUMENT

There is legally insufficient evidence of identity to sustain the conviction. The evidence is insufficient to show Appellant was the sole, principal perpetrator responsible for intentionally or knowingly causing the death of J.D. by shooting him. The hypothetically correct jury charge does not include a party liability instruction; the court's charge correctly did not include such instruction. Thus, the State was required to prove Appellant was the principal shooter and, considering the cumulative force of the circumstantial evidence, there was legally insufficient evidence to do so without engaging in impermissible speculation.

As preserved by Appellant's Motion for New Trial, Appellant additionally contends that his 70-year sentence is a de facto life sentence that violates both the Eighth Amendment to the United States Constitution and Section 1, Article 13 of the Texas Constitution, and that the Government Code provision that requires him to serve 30-years before being eligible for parole is unconstitutional as-applied to him, and similarly situated juveniles, in violation Section 1, Article 13 of the Texas Constitution.

ARGUMENT AND AUTHORITIES

I. **Point of Error One: The evidence of identity is legally insufficient to sustain the conviction.**

A. Relevant Law: Legal Sufficiency & Identity

Every criminal conviction must be supported by legally sufficient evidence as to each element of the offense that the State is required to prove beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *Adams v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011). To determine whether this standard has been met, the evidence is reviewed in the light most favorable to the verdict and decided whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010) (plurality op.). Circumstantial evidence is as probative as direct evidence in establishing an actor's guilt, and an actor's guilt can be established with circumstantial evidence alone. *Davis v. State*, 413 S.W.3d 816 (Tex. App. – Austin 2013, pet. ref'd). An appellate court's role is not to sit as a thirteenth juror but to guard against the "rare occurrence when the factfinder does not act rationally." *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018). Every case will have its own

unique set of facts, and a court must carefully review the evidence presented in each case independently to determine if the cumulative force of all the incriminating circumstances can support a murder conviction.

Marquez v. State, 697 S.W.3d 485, 504 (Tex. App. – El Paso 2024, pet. ref’d).

The sufficiency of the evidence is measured by reference to the elements of the offense as defined by a hypothetically-correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically-correct jury charge does four things: (1) accurately sets out the law; (2) is authorized by the indictment; (3) does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability; and (4) adequately describes the particular offense for which the defendant was tried. *Id.* Here, the elements are, (1) Appellant, (2) on or about the 31st day of May, 2021; (3) in Bell County, Texas; (4) intentionally or knowingly (5) caused the death of J.D. (6) by shooting him with a firearm. CR 5; Tex. Penal Code § 19.02(b)(1).

To obtain a conviction, the State must prove, inter alia, that the defendant is the person who committed the charged offense. *Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *McCullen v. State*, 372 S.W.2d 693, 694 (Tex. Crim. App. 1963). The State may prove a defendant's

identity by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *See Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009); *Earls v. State*, 707 S.W.2d 82 (Tex. Crim. App. 1986)(op. on rehear'g).

B. Analysis

There is legally insufficient evidence that Appellant was the sole, principal perpetrator responsible for intentionally or knowingly causing the death of J.D. by shooting him. *Jackson v. Virginia*, 443 U.S. 307 (1979). The court's charge correctly did not authorize the jury to convict Appellant as a party, and the State's theory in no part invoked a party liability theory of responsibility. *See* Tex. Penal Code § 7.01, 7.02; CR 116-18. Thus, applying the hypothetically correct jury charge, the State was required to prove Appellant was the lone principal shooter and, considering the cumulative force of the circumstantial evidence, there is legally insufficient evidence to do so. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007)(juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation); *see also Winfrey v. State*, 323 S.W.3d 875, 883-84 (Tex. Crim. App. 2010); *Winfrey v. State*, 393 S.W.3d 763 (Tex. Crim. App. 2013).

No neighborhood witness identified Appellant in court, and no weapon was recovered or otherwise connected to him. Neighbor Rook's testimony that she may have seen the outline of a handgun in the waistband of the person she briefly encountered in her driveway, at an unknown time, is insufficient to establish that connection. 5 RR 97; *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007)(juries are permitted to draw reasonable inferences but not permitted to draw conclusions based on speculation). At best, it is only a mere modicum of evidence which is insufficient to sustain the conviction beyond a reasonable doubt. *Winfrey v. State*, 323 S.W.3d 875, 883-84 (Tex. Crim. App. 2010); *Winfrey v. State*, 393 S.W.3d 763 (Tex. Crim. App. 2013). It is impermissible speculation, not a reasonable inference, that Appellant is the same individual the neighborhood witnesses saw. *Hooper*, 214 S.W.3d at 15; *Oliver v. State*, 613 S.W.2d 270 (Tex. Crim. App. 1979)(identity evidence insufficient due to no positive witness identification nor evidence connecting accused to weapon).

It is further improper speculation to conclude that the persons neighbors saw at various times was the shooter of J.D. *Id.*; *Phillips v. State*, 297 S.W.2d 134, 135 (1957)(stating there should be proof to a degree of

certainty greater than a mere probability or strong suspicion tending to establish that the party charged was the person who committed it or was a participant in its commission). Neighbor Rosario testified that the estimated height of the person he saw was 6 feet, which is inconsistent with Appellant's height of 5'6. 5 RR 64; CR 59; State Ex. 21. Rosario also testified that he had an 85 percent degree of confidence that he could identify this person from a "side view" yet did not identify Appellant. *Id.*

There is also no evidence of motive. *Nisbett*, 552 S.W.3d at 265 (opportunity, when coupled with motive, is indicative of guilt but not sufficient to prove identity in a murder case); CR 13 (characterizing the offense as an encounter by "chance" with no motive or purpose). There is also no evidence of suspicious conduct that is indicative of consciousness of guilt after the shooting. *Winfrey*, 323 S.W.3d at 882 ("[i]f the evidence at trial raises only a suspicion of guilt, even a strong one, then that evidence is insufficient"). The location at which Appellant was discovered was overwhelmingly consistent with his undisputed status as homeless; but even if were not, the location he was arrested only raises a suspicion of guilt which is insufficient. *Id.*; see also *Schmidt v. State*, No. 03-22-00444-CR, 2024 WL 735176 at *7 (Tex. App. — Austin Feb. 23, 2024, pet. ref'd)(not

designated for publication)(evidence is legally insufficient if “the record contains no evidence, or merely a ‘modicum’ of evidence, probative of an element of the offense” or if “the evidence conclusively establishes a reasonable doubt).

Thus, in properly considering the cumulative force of the inculpatory evidence, the evidence of identity is insufficient to rationally sustain the conviction beyond a reasonable doubt. Thus, Appellant asserts he is entitled to a judgment of acquittal.

II. Points of Error Two and Three: Appellant is entitled to a new punishment trial.

Appellant is entitled to a new punishment trial because his de facto life sentence of 70-years violates both the state and federal constitutions. *See* U.S. CONST. AMENDS. VIII, XIV; TEX. CONST. ART. 1 § 13.

A. Preservation

A Motion for New Trial was timely filed, presented and raised the same grounds presented here. CR 167-218. The Motion also included an interest of justice ground based on disproportionality. *State v. Stewart*, 282 S.W.3d 729, 739 (Tex. App. — Austin 2009, no pet.)(raising claim that interest of justice warranted new trial because sentence disproportionate to

similarly situated defendants). A hearing was held and the motion was overruled by operation of law. 9 RR 1; CR 167.

Thus, these issues are preserved for review. TEX. R. APP. P. 33.1; *see also* CR 70, n. 1 (preservation analysis in motion).

B. Analysis: The sentence is unconstitutional.

1. Point of Error Two: The de facto life sentence of 70 years violates the Eighth Amendment to the United States Constitution.

The de facto life sentence in this case violates the Eighth Amendment of the United States Constitution's prohibition on cruel and unusual punishment as it is grossly disproportional to the offense. *See* U.S. Const. amends. VIII, XIV. In determining whether a particular punishment is cruel and unusual, “courts must look beyond historical conceptions to ‘the evolving standards of decency that mark the progress of a maturing society.’” *Meadoux v. State*, 325 S.W.3d 189, 193 (Tex. Crim. App. 2010). In accordance with contemporary national standards of decency, the Eighth Amendment prohibits the imposition of punishments that are inherently barbaric or grossly disproportionate to the offense. *Id.*

Generally, if a sentence is legal and assessed within the legislatively determined range, it will not be considered excessive, cruel, or unusual. *Ex*

parte Chavez, 213 S.W.3d 320, 323–24 (Tex. Crim. App. 2006) (noting that “the sentencer’s discretion to impose any punishment within the prescribed range is essentially unfettered”). However, a sentence that is within the applicable range of punishment may nevertheless be cruel or unusual in the “exceedingly rare” or “extreme” case in which the sentence is grossly disproportionate to the offense. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)). “The gross disproportionality principle reserves a constitutional violation for only the extraordinary case.” *Lockyer*, 538 U.S. at 77. This is such a case.

To determine whether a noncapital sentence qualifies for this uncommon and “somewhat amorphous” exception, the threshold analysis comparing the gravity of the offense to the severity of the sentence. *Bolar v. State*, 625 S.W.3d 659, 675 (Tex. App. – Fort Worth 2021, no pet.). “To determine whether a sentence for a term of years is grossly disproportionate for a particular defendant’s crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender’s prior adjudicated

and unadjudicated offenses.” *State v. Simpson*, 488 S.W.3d 318 (Tex. Crim. App. 2016)(citing to *Graham v. Florida*, 560 U.S. 48, 60 (2010)).

“In the rare case in which the threshold comparison leads to an inference of gross disproportionality, the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.” *Cisneros v. State*, 622 S.W.3d 511, 522 (Tex. App. — Corpus Christi–Edinburg 2021, no pet.) (citing *Graham*, 560 U.S. at 60). If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual. *Simpson*, 488 S.W.3d at 323 (citing to *Graham*).

Threshold Comparison: Case-Specific Considerations

Assessing the gravity of the offense requires us to consider the defendant's culpability, the defendant's prior adjudicated and unadjudicated crimes, and the harm caused or threatened to the victim and to society. *Bolar v. State*, 625 S.W.3d at 675; *Cross v. State*, No. 11-23-00102-CR, 2026 WL 110396 (Tex. App. — Eastland Jan. 15, 2026, no pet. h.)(not designated for publication).

As to this threshold comparison, the State argued the following:

- “Threat to victim, culpability of offender and offender's prior adjudicated and un-adjudicated offenses. That's the threshold before we start considering any of the other factors. We have to look at how the sentence stacks up with the harm caused and the culpability of the offender. The harm caused in this case could not be any higher. The harm caused, he killed an innocent person and took it away forever. Nothing the defendant does can ever undo that, that's a permanent loss that by itself warrants a very heavy punishment.” 9 RR 86:25-87:1-10.
- “As I stated in my opening, basic proportionality on murder a life for a life. Anything less than a life sentence, cannot be grossly disproportionate.” 9 RR 89.
- “The defendant taking responsibility for his actions would justify a lower sentence than one that has not shown that remorse does not show any rehabilitative potential.” 9 RR 91¹¹.
- “The psychological report that was admitted, indicates that this defendant was identified as high risk to re-offend, shown to have little or no compassion for others. No discomfort about ignoring their needs and sensitivities. Lack of empathy, that may lead him to serve only himself. That's a description of a psychopath and a psychopath that is going to keep re-offending,” 9 RR 92.
- “The evidence they heard about all the defendant's violations while in custody.” 9 RR 92.

In summary, the evidence the State relied on was the offense itself, the diagnostic study from juvenile court, and Appellant's pre-trial

¹¹ Appellant advised that it should be improper to consider the exercising of one's right to a jury trial as a culpability consideration. 9 RR 96:4-6.

detention disciplinary history. While the State was correct that the offense is grave, it is not dispositive and is outweighed by the other considerations of his history and culpability. As the *Graham* Court noted, “[e]ven if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered.” *Graham*, 560 U.S. at 72. Of note, having contemplated similar considerations, the juvenile guardian ad litem’s recommendation to the court was to not transfer to adult court which indicates lower concerns for threat to society. *See State. Pretrial Ex. 2.*

Thus, the threshold comparison leads to an inference of gross disproportionality. Next, a comparison of Appellant's sentence with the sentences received for similar crimes in Bell County and sentences received in other jurisdictions is required.

Comparative Evidence of Gross Disproportionality

In *Simpson*, the Court of Criminal Appeals said that *Simpson’s* evidence at his motion for new trial hearing was mitigation evidence rather than evidence of an Eighth Amendment disproportionality violation. *Id.* at

324¹². In contrast, at the motion for new trial hearing in this case, Appellant developed a unique record¹³ demonstrating the 70-year sentence, for a murder said to have been committed when Appellant was 15-years old, was a grossly disproportionate sentence comparatively to offenders in Bell County and surrounding jurisdictions based upon both an analysis of TDCJ data, opinions of experienced attorneys who practice in and around the jurisdiction, and the relevant¹⁴ judgments admitted at the hearing. 9 RR 38.

Henneke testified to her review of three sets of TDCJ data. Henneke's organization, LSJA, has an agreement with TDCJ in which the agency shares its "high value data" concerning every individual, including all juveniles, sentenced in Texas. 9 RR 41. LSJA began collecting this data from the agency in 2018, and the first part of her analysis was based on this data which is from 2012 through March 5, 2025. 9 RR 41-42. From this first data

¹² "Simpson sought to use an Eighth Amendment claim to develop additional evidence relevant to sentencing that was not introduced at the trial court's punishment hearing, even though it was available to him. . . In this case, Simpson articulated a valid legal claim in his motion for new trial, but he did not produce evidence or point to evidence existing in the record that substantiated this legal claim."

¹³ Henneke agreed that, to her knowledge, the presentation of evidence based on this data and accompanying arguments had not yet been raised at the motion for new trial stage of a case.

¹⁴ Excluding adult judgments.

set, Henneke determined how many individuals statewide were currently incarcerated for noncapital murder committed at 15 years old, and the length of their sentence. 9 RR 42. She testified that there are currently eight (8) individuals serving a sentence for noncapital murder committed when the individual was 15. 9 RR 42. In looking at the sentences of those eight individuals, Henneke testified the highest sentence is 45 years. 9 RR 43. In comparing Appellant's sentence, Henneke opined that Appellant's 70-year sentence is grossly disproportionate. 9 RR 43.

In addition to the agency's "high value data" set, Henneke also looked at a second set of data from the agency that looks at all noncapital juvenile murder offenders under 18¹⁵ (not just 15-year-olds) for the period of 2012 to 2019. 9 RR 44. Henneke said the data revealed that, "out of 238 juveniles sentenced to noncapital murder, 16 were given life sentences. . . So essentially out of 214 out of 218 were given shorter sentences than the 70 years which amounts to 89 percent of them." 9 RR 44-45. Lastly, the third set of agency data Henneke reviewed took the second data set and limited

¹⁵ This included 17-year-olds, who are not certified. 9 RR 45.

it to 15-year-olds.¹⁶ 9 RR 45. Of this third set, looking at 15-year-olds from 2012 to 2019, there were 18 individuals sentenced to noncapital murder. 9 RR 45. As to this set, Henneke explained, “[o]ut of that, []17 out of the 18 within that period had got a sentence of less than 70 years” which translated to a percentage of 94 percent of similarly situated individuals got a sentence of less than 70 years. 9 RR 45. Thus, in her review of these other two data sets, Henneke maintained the opinion that Appellant’s sentence is grossly disproportionate.

In addition to the two-witnesses’ testimony, Appellant introduced judgments from similarly situated juveniles from Bell County that confirmed his sentence is grossly disproportionate when compared. *See* Def. MFNT Ex. 2-6¹⁷. Appellant also introduced judgments from

¹⁶ “We pulled out just the 15 years old.” 9 RR 45.

¹⁷ Def. MFNT Ex. 2 is a judgment reflecting a 20-year sentence for a 2019 murder, imposed in July 2023, following certification in which the defendant was 15 at the time of the offense. Def. MFNT Ex. 3 is a judgment reflecting a 20-year sentence, imposed in January 2024, following certification in which the defendant was 16 at the time of the offense. Def. MFNT Ex. 4 is a judgment reflecting a 36-year sentence, imposed in June 2011, following certification in which the defendant was 16 at the time of the offense. Def. MFNT Ex. 5 is a judgment reflecting a 15-year sentence, imposed in November 2022, following certification in which the defendant was 16 at the time of the offense. Def. MFNT Ex. 6 is a judgment reflecting a 16-year sentence, imposed in December 2021, following certification in which the defendant was 16 at the time of the offense. Of note, this defendant shot someone in their sleep. 10 RR at 771.

surrounding counties for similarly situated individuals (17 and under) that further confirmed his sentence is grossly disproportionate. *See* Def. MFNT Ex. 7; *see also* Def. MFNT Ex. 11-13.¹⁸ The noncapital judgments for individuals 17 and younger offered by the State were consistent with Appellant's evidence in that Appellant's sentence was still the highest sentence. *See* State MFNT Ex. 1-7 at 10 RR 300-606. Thus, in properly comparing individuals similarly situated to Appellant¹⁹, Appellant showed that his sentence is the rare instance of a grossly disproportionate sentence that violates the Eighth Amendment to the United States Constitution.

For these reasons, the remedy is to grant him a new punishment trial.

2. Point of Error Three: The de facto life sentence of 70 years violates Article 1, Section 13 of the Texas Constitution.

Article 1, Section 13 of the Texas Constitution provides:

¹⁸ Def. MFNT EX. 7 is a judgment reflecting a 30-year sentence for a 2021 murder, imposed in June 2024, following certification in which the defendant was 15 at the time of the offense. Def. MFNT Ex. 11 is a McLennan County judgment (the county north of Bell County) reflecting a 12-year sentence for the offense of aggravated assault, reduced from capital murder, for a defendant who was 17 at the time of the offense. Def. MFNT Ex. 12 is a McLennan County judgment for a sentence of deferred adjudication on the offense of deadly conduct, reduced from aggravated assault from a vehicle causing serious bodily injury, following certification for a defendant who was 16 at the time of the offense. Def. MFNT Ex. 13 reflects a series of judgments of 20-year concurrent sentences for six violent aggravated offenses, committed across multiple dates, following certification for a defendant who was 16 at the time of the offenses.

¹⁹ Excluding adults.

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

In the event the Court finds that the sentence does not violate the federal constitution as argued in Point One, Appellant contends the Texas Constitution provides greater protection than the federal constitution and thus, the sentence violates the state constitution. CR 173-74 (expressly arguing in Motion that state constitution provides greater protection than federal); 9 RR 52; *see also Forcey v. State*, No. PD-0963-10, 2011 WL 198992 (Tex. Crim. App. Jan. 12, 2011)(not designated for publication)(observing appellant's failure to raise argument that the Texas Constitution's prohibition against cruel and unusual punishment provides any greater protection than the Eighth Amendment).

As stated in the Motion for New Trial, where the U.S. Constitution has failed to provide juveniles protections from grossly disproportionate sentences, several states across have found state constitutions provide greater protection. Michigan is one such state. *Id.*; *People v. Parks*, 987 N.W.2d 161 (Mich. 2022). So is North Carolina. *State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (N.C. 2022) (holding that a sentence that requires juvenile offenders to serve more than 40 years before parole eligibility was

a de facto life sentence that violated the state constitution and federal constitutions).

Like the Texas Constitution, the Michigan and North Carolina state constitutions prohibit cruel *or* unusual punishment. This case presents an opportunity to find, as these other jurisdictions did, that the state constitution provides greater protection than the federal constitution. In 2022, New Jersey's high court extended *Miller* to sentences that are the de facto equivalent of a life without parole sentence. *State v. Comer*, 249 N.J. 359 (N.J. 2022)(a statute requiring a minimum of 30 years in prison with no possibility of parole was unconstitutional when applied to children).

Greater Protection Under State Constitution

States are free to provide greater protection in their criminal justice system than the Federal Constitution requires. *California v. Ramos*, 463 U.S. 992, 1013-114 (1983). State courts have thus been considered "laboratories" of constitutional law. *Heitman v. State*, 815 S.W.2d 681, 686 (Tex. Crim. App. 1991). The Texas Constitution will be interpreted independently. *Hulit v. State*, 982 S.W.2d 431 (Tex. Crim. App. 1998)(citing to *Heitman*).

To determine whether the Texas Constitution provides greater protection than its federal counterpart, the Court of

Criminal Appeals has said the following factors are helpful, but not “independently” dispositive: (A) a textual examination of the constitutional provision; (B) the Framer's intent; (C) history and application of the constitutional provision; (D) comparable jurisprudence from other states; and, (E) the practical policy considerations behind the constitutional provision. *Autran v. State*, 887 S.W.2d 31, 37 (Tex. Crim. App. 1994); *see also Randig v. State*, No. 03-19-00176-CR, 2021 WL 386427 (Tex. App.—Austin Feb. 4, 2021, no pet.)(not designated for publication)(citing to *Holder v. State*, 595 S.W.3d 691, 697 n.15 (Tex. Crim. App. 2020) and stating the Court of Criminal Appeals has since declined to follow *Autran*, bringing Texas “caselaw back into line with the Supreme Court's interpretations of the Fourth Amendment” but otherwise does not disavow the factors).

Textual Examination & Framer's Intent

The drafters of the 1876 Texas Constitution relied on the wisdom of other states' constitutions in doing so. *Heitman*, 815 S.W.2d at 688. The Texas Bill of Rights derived from “multiple sources such as the Spanish civil law, the Magna Charta, the English Bill of Rights, the Virginia Bill of Rights, the Declaration of Independence, the United States Constitution, and the early constitutions of other states, particularly those of Virginia,

North Carolina, Pennsylvania, Kentucky and Tennessee.” Autran, 887

S.W.2d at 39 (emphasis added). North Carolina is a state that has construed its state constitution in the way Appellant requests here and specifically reasoned that the framers use of “or” versus “and” must have been intentional since the conjunctive “and” was in the federal constitution and that was not followed. *Kelliher*, 381 N.C. 558 at 579-80 (discussing article 1, section 27 of North Carolina’s state constitution); William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 Am. Crim. L. Rev. 1627, 1653 (2021) (“In many cases ... the state constitutional language is different from the Eighth Amendment, and often in significant ways.... [T]hese linguistic differences provide the basis for broader, or at least different, coverage of state punishments.”).

States should thus give these differences some meaning. *Id.* For readers who deem themselves constitutional originalists, recognizing the intentional distinction in words would be consistent with an originalist’s perspective.

History & Application of Provision

The Texas Constitution "bears the distinction of being one of the few state constitutions that were derived from its own independent, national

constitution."²⁰ This history legitimizes further an examination of the history of the Texas Constitution when interpreting its provisions. *Cf.*, Juarez Jr. The framers of the Texas Constitution intended to include a right that arose, not from the English experience with tyrannical kings, but from the Texas experience with a government that did not provide its newest residents with sufficient access to governmental services in a language they understood. *Cf.*, Juarez Jr. The word “and” in the 1845 version of the Texas Constitution was changed to “or” in the 1876 version. *Anderson v. State*, 932 S.W.2d 502, 509 (Tex. Crim. App. 1996).

Recently, Presiding Judge Schenck of the Court of Criminal Appeals has discussed recognizing increased protections under the state constitution in the post-conviction death penalty context. *Ex parte Wood*, No. WR-45,746-04, 2025 WL 2148862 (Tex. Crim. App. July 30, 2025) (not designated for publication) (Schenck, P.J., concurring). After *Wood*, and outside of the death penalty context, Judge Schenck reiterated a similar sentiment again in *Ex parte Martinez*, No. WR-97,185-01, 2026 WL 388257

²⁰ Jose R. Juarez Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a Known Tongue*, 13 L. & INEQUALITY 443 (1995). Available at: <https://scholarship.law.umn.edu/lawineq/vol13/iss2/6>; see also *Davenport v. Garcia*, 834 S.W.2d 4, 15 (Tex. 1992).

(Tex. Crim. App. Feb. 12, 2026)(not designated for publication)(Schenck, P.J., concurring). In *Martinez*, he questioned whether our State Constitution permits a mandatory life sentence for a juvenile offender. *Id.* at *1.

Appellant suggests that the question here of whether our state constitution permits a de facto life sentence for a 15-year-old is a similar question to that posed last month by Judge Schenck in *Martinez*.

Comparable Jurisprudence from Other States

As discussed above, there is a trend of comparable jurisdictions finding greater protection under state constitutions for juveniles sentenced to life and de facto life sentences. 9 RR 48-50. To the extent courts in the past have said the provisions should be read without distinction, continued emerging science-based understanding of childhood development supports abandoning past reasoning that limits a reading of Article 1, Section 13 of the Texas Constitution as only identical to the Eighth Amendment. *Kelliher*, 381 N.C. 558 at 583.

In *State v. Null*, the Iowa Supreme Court observed that it was an opinion by Justice Kennedy where the United States Supreme Court first noted a distinct trend in the states away from imposing the death penalty on juveniles. 836 N.W.2d 41, 61 (Iowa 2013). This Court has such an opportunity

here; to acknowledge the nationwide trend in state appellate courts finding greater protection in state constitutions for juveniles like Appellant.

Practical Policy Considerations

By extending *Graham* and *Miller* to bar de facto life sentences under their state constitutions, this Court would not only protect juveniles from cruel and unusual punishment, but also create the basis for more expansive Supreme Court juvenile sentencing jurisprudence in the future.²¹ And, as Henneke said in her testimony, the explicit statement from the United States Supreme Court in *Jones* clarified that its decision did not preclude states from expanding protections in this area further supports shifting efforts toward state courts. *Id.*; 9 RR 48-52. Thus, Appellant's request is not inconsistent with the existing state of United States Supreme Court jurisprudence. *Jones v. Mississippi*, 593 U.S. 98 (2021).

This would also continue the commitment to nurturing the potential of all our state's children. *Kelliher*, 381 N.C. 558 at 586. It is cruel to sentence

²¹ Ellen Brink. *Children Are Constitutionally Different, But Life Without Parole and De Facto Life Sentences Are Not: Extending Graham and Miller to De Facto Life Sentences* (note), Fordham Law Review (Oct. 1, 2023), available at: <https://tinyurl.com/y8t2sh2m>.

a juvenile who has the potential to be rehabilitated to a sentence which deprives him or her of a meaningful opportunity to reenter society and contribute to this state. *Id.*

Borrowing the sentiment from the Iowa Supreme Court's decision in *Null*, if Article 13, section 1 of our State Constitution is not judicially enforceable, it would amount to "'little more than good advice.' 836 N.W.2d 41, 58 (Iowa 2013).

III. Point of Error Four: The mandatory requirement of 30 years before parole consideration for life sentences and de facto equivalents, as required by Texas Government Code Section 508.145(d)(1)-(2), is unconstitutional as applied to juveniles, including Appellant, under Article 1, Section 13 of the Texas Constitution.

As stated above, Article 1, Section 13 of the Texas Constitution prohibits cruel or unusual punishment.

Texas Government Code Section 508.145 (d)(1)-(2) states:

(d)(1) This subsection applies only to an inmate who is serving a sentence for:

(A) an offense described by Article 42A.054(a), Code of Criminal Procedure, other than an offense under Section 19.03, Penal Code, or an offense under Chapter 20A, Penal Code, that is described by Subsection (a)(1) or (2);

(B) an offense for which the judgment contains an affirmative finding under Article 42A.054(c) or (d), Code of Criminal Procedure;

or

(C) an offense under Section 71.02 or 71.023, Penal Code.

(2) An inmate described by Subdivision (1) is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less, but in no event is the inmate eligible for release on parole in less than two calendar years. Article 42A.054(a)(2), Code of Criminal Procedure lists "Section 19.02, Penal Code (Murder)."

When analyzing similar "categorical" challenges to statutory punishment schemes in Texas, the Court of Criminal Appeals has interpreted *Graham* as requiring the consideration of four factors: (1) whether there is a national consensus against imposing the particular punishment at issue; (2) the moral culpability of the offenders at issue in light of their crimes and characteristics; (3) the severity of the punishment; and (4) whether the punishment serves legitimate penological goals. *Glover v. State*, 406 S.W.3d 343, 347 (Tex. App. – Amarillo 2013, pet. ref'd) (citing to *Meadoux* which relied upon *Graham*); *McCain v. State*, 582 S.W.3d 332, 338 (Tex. App. – Fort Worth 2018, no pet.); *DeLeon v. State*, No. 03-13-00202-CR, 2015 WL 3454101 (Tex. App. – Austin May 29, 2015, pet. ref'd)(not designated for publication). In *Comer*, which will be discussed next, the

New Jersey Supreme Court used the same considerations in its analysis. *Id.* at 383²².

Appellant relies on the argument and reasoning from *State v. Comer*, 249 N.J. 359, 369 (N.J. 2022)²³. *Comer*, 17, and two others participated in four aggravated robberies. *Id.* at 371. During the second robbery, *Comer*'s accomplice shot and killed a robbery victim. *Comer* was convicted of felony murder, among other things. *Id.* This sentence included a term of 30 years imprisonment without the possibility of parole for first-degree felony murder, consistent with the state murder statute, N.J.S.A. 2C:11-3(b)(1). The question before the New Jersey Supreme Court was whether a mandatory sentence of at least 30 years without parole, which N.J.S.A. 2C:11-3(b)(1) required, violated the state and federal prohibitions against cruel and unusual punishment as applied to juveniles. *Id.* at 382; U.S. Const. amend VIII; Art. I, Sec. 12 of the New Jersey Constitution.

²² “The test under both Constitutions is ‘generally the same: ‘First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?’” Under the second prong, culpability was included.

²³ According to WestLaw, as of the date of filing this Brief, no Texas case cites to *Comer*. WestLaw reflects that there are 90 state citations to *Comer*, 11 of which are published, from Alaska, Iowa, New Jersey and Tennessee.

Like Texas Government Code Section 508.145(d)(1)-(2), N.J.S.A.

2C:11-3(b)(1) required:

b. (1) Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in paragraphs (2), (3) and (4) of this subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

National Consensus

A mandatory minimum period of 30 years in jail - with no discretion for a court to assess the details of the offense or the circumstances of the juvenile – does not reflect contemporary standards of decency. There is a growing trend in other states to allow juveniles an opportunity for release before they spend three decades in jail. *Comer*, 249 N.J. at 396 (citing to *Atkins v. Virginia*, 536 U.S. 304, 213 (2002)). We know children are different. *Miller*, 567 U.S. at 480; *Roper*, 43 U.S. at 551. The qualities of youth matter in everyday life, just as they matter under the Constitution. *Comer*, 249 N.J. at 371. As discussed above, there is a nationwide trend in courts finding de facto life sentences are unconstitutional because sentences exceed natural life expectancies, the lack of meaningful opportunities for release via

parole, among other reasons. *Parks*, 987 N.W.2d at 161; *Kelliher*, 381 N.C. at 558. Henneke also briefly discussed this in her testimony. 9 RR 51.

When a juvenile is sentenced to a 30-year term under Government Code 508.145(d)(1)-(2) no consideration can be given to the person's youthful status. And, in fact, as Appellant established at the motion for new trial hearing, the available data from TDCJ reflects that a juvenile's age or youth is not a criterion that increases the likelihood of parole. It either has no effect, or perhaps a slight negative impact. 9 RR 61 ("youth played no statistical role in the [parole] outcome").

Thus, there is a national consensus that has found that the mandatory nature of the punishment – which here is 30 years - establishes the constitutional violation. *State v. Lyle*, 854 N.W.2d 378, 401 (Iowa 2014), *as amended* (Sept. 30, 2014). As the New Jersey Supreme Court said in 2022, the sources and trends all suggest that a 30-year parole bar does not conform to contemporary standards of decency. *Comer*, 249 N.J. at 396.

Moral Culpability & Severity of the Punishment

Children lack maturity and responsibility, which can lead to "ill-considered actions," because they "are more vulnerable to negative influences and outside pressures," and because their character "is not as

well formed” as an adult's, their misconduct is not as morally culpable as an adult's. *Roper*, 543 U.S. at 569-70. A 30-year parole bar under this Government Code statute does not leave room for adequate consideration of youth and in fact, under the current parole guidelines which were not designed to apply to juveniles, may hinder rather than encourage consideration. 9 RR 57, 61. The available statistics for a comparable group of individuals (capital murder) suggest parole is granted rarely, and that is because the offense and length of sentence are the two statistically most important considerations. 9 RR 60-62.

The diminished culpability of juveniles suggests that the severity of a 30-year parole bar for juveniles is grossly disproportionate to the underlying offense. *Comer*, 249 N.J. at 397.

Penological Goals

The traditional penological justifications of retribution, deterrence, incapacitation, and rehabilitation “apply ... with lesser force than to adults.” *Roper*, 543 U.S. at 571. The threat of a lengthy jail sentence is less of a deterrent for juveniles than adults. *Comer*, 249 N.J. at 399. “Rehabilitation cannot justify mandatory minimum sentences of 30 years for juveniles regardless of the individual facts and circumstances of a case.” *Id.* at 400.

This is because juveniles are more capable of change, apt to mature upon full brain development, and long-term incarceration is inconsistent with both change and growth as it only makes reintegration to society harder. *Id.*

The core rationale for incapacitation is the need to protect the public. *Id.* Yet even experts cannot predict whether a juvenile's criminal behavior “reflects unfortunate yet transient immaturity” or the “rare” situation of a minor who is “irreparabl[y] corrupt[].” *Roper*, 543 U.S. at 573. As Henneke testified at the hearing, research reveals that most juveniles stop committing crime before 30 years have passed from the time of their offense. 9RR 59 (discussing the “age-crime curve”); *Comer*, 249 N.J. at 399. The “‘age-crime curve’ is at odds with the notion that juveniles, as a category of offenders, must be incapacitated for several decades to protect the public.’” *Id.* at 400.

Punishment which does not correspond to penological functions is cruel.

Greater Protection Afforded Under State Constitution

Appellant relies on, and incorporates by reference, the argument above regarding why the Texas Constitution provides greater protection

than the federal constitution and such greater protection should be applied here. *But see Shalouei v. State*, 524 S.W.3d 766, 767 (Tex. App. — Houston [14th Dist.] 2017, pet. ref'd) (unsuccessful facial constitutional challenge to 508.145(b) under Eighth Amendment).

Appellant would also note that in *Cantu v. State*, 939 S.W.2d 627 (Tex. Crim. App. 1997), the Court of Criminal Appeals said it rejected this argument of greater protection and cited *Anderson v. State*, 932 S.W.2d 502, 509 (Tex. Crim. App. 1996) as support. Courts still often cite *Cantu* as support for rejecting the argument for affording greater protection under the state constitution. *Valdez v. State*, No. 10-12-00410-CR, 2014 WL 505306 at *3 (Tex. App. — Waco Feb. 6, 2014, pet. ref'd)(not designated for publication); *Duran v. State*, 363 S.W.3d 719 (Tex. App. — Houston [1st Dist.] 2011, pet. ref'd). However, the Court of Criminal Appeals expressly said in *Anderson* that, “[w]e do not decide whether the state constitutional provision is broader than its counterpart.” 932 S.W.2d at 509. For this reason, Appellant suggests that the question has still not been directly answered and has not been directly answered with facts and a record such as this.

For these reasons, Defendant urges this Court to follow *Comer* when deciding whether the Texas parole statute is unconstitutional as applied to juveniles in violation of Article 1, Section 13 of the Texas Constitution, as the Texas statute proscribes the same consequence to a juvenile-defendant's parole eligibility as the New Jersey statute, including consideration of the remedy. *Comer*, 249 N.J. at 399 (adding a look-back provision here to preserve the statute).

CONCLUSION

Children are different than adults in ways that matter for sentencing purposes. *Miller v. Alabama*, 567 U.S. 460, 480 (2012); *Roper v. Simmons*, 43 U.S. 551 (2005). “[O]ur system of justice always has recognized that appellate courts *do* have a responsibility – expressed in the proportionality principle – not to shut their eyes to grossly disproportionate sentences that are manifestly unjust.” *State v. Null*, 836 N.W.2d 41 (Iowa 2013)(citing to *Hutto v. Davis*, 454 U.S. 370, 377 (1982) (Powell, J., concurring)).

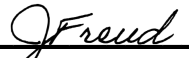
PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant asks the Court to: (1) find that the evidence is legally insufficient to sustain the conviction and render a judgment of acquittal; or alternatively, (2) find that his

sentence is unconstitutional as set forth in Points Two or Three, and order a new trial on punishment, and (3) find that the challenged parole eligibility statute requiring him, and other similarly situated certified juveniles, to wait 30-years before being reviewed is unconstitutional under the state constitution as set forth in Point Four, and (4) any other relief to which he may show himself justly entitled.

Respectfully submitted,

Jessica S. Freud

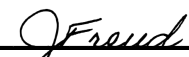


Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Brief was e-served to the District Attorney's Office of Bell County, Texas, on March 10, 2026.

Jessica S. Freud



Attorney for Appellant

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF TEXAS
EL PASO, TEXAS

MICHAEL ANTHONY HOWARD

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v.

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No. 08-25-00259-CR

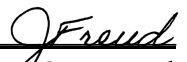
STATE OF TEXAS

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), we hereby certify that the Appellant's Brief contains 11,702 words. The document was prepared using Microsoft Word, and the word count was generated using that program.



Jessica S. Freud