

Nos. WR-82,264-03 AND WR-82,264-04

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

EX PARTE

MIGUEL ANGEL NAVARRO,

Applicant.

On Applications for Writs of Habeas Corpus Cause Nos. 08-DCR-050238 HC2 and
10-DCR-05236A-HC2 in the 240th District Court of Fort Bend County, Texas

BRIEF OF AMICUS CURIAE JUVENILE LAW CENTER IN SUPPORT OF APPLICANT

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INTEREST AND IDENTITY OF AMICUS CURIAE ¹

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare, criminal, and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Juvenile Law Center works to align juvenile justice policy and practice, including state laws and practices regarding the prosecution of children in the adult criminal justice system, with modern understandings of adolescent development and time-honored constitutional principles of fundamental fairness. Juvenile Law Center recognizes, as does the United States Supreme Court, that juveniles are different from adults and that individual youth develop and mature at different rates. Accordingly, Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children. In the instant matter, Juvenile Law Center writes to urge this honorable Court to apply the Texas Court of Criminal Appeals' decision in *Moon v. State of Texas*, 451 S.W.3d 28 (Tex. Crim. App. 2014) retroactively and grant habeas relief to defendants, who as juveniles, were charged in adult criminal court without any written evidence in the transfer order that waiver of juvenile court jurisdiction was necessary under Texas law.

¹ Pursuant to Rule 11, TEX. R. APP. PROC., no person or entity, other than *Amicus*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Moon v. Texas articulates a new rule requiring the juvenile court to “show its work” and provide evidence on the record regarding a juvenile’s sophistication, maturity, capability for rehabilitation, and other crucial factors before waiving juvenile court jurisdiction. 451 S.W.3d 28, 49 (Tex. Crim. App. 2014). Thus, the *Moon* rule is a new substantive rule that prohibits a category of punishments—punishments in the adult justice system—from a category of offenders based on their status—juvenile defendants for whom there is no evidence on the record that they meet waiver criteria. Because *Moon*’s rule protects a vulnerable group of juvenile defendants from the adult criminal justice system, the decision should apply retroactively per Supreme Court precedent in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) and *Penry v. Lynaugh*, 492 U.S. 302 (1989), *overturned on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Sending youth to the adult criminal justice system by waiver of juvenile court jurisdiction is a “‘critically important’ action” and can mean the difference between treatment and rehabilitation and severe punishment. *Kent v. U.S.*, 383 U.S. 541, 556 (1966). In light of the grave considerations at stake, this Court has held that juvenile courts must “show its work” and provide evidence on the record before waiving juvenile court jurisdiction. The decision is in accordance with numerous Supreme Court rulings and research on adolescent development that demonstrate that juveniles are less mature, more susceptible to outside influences, and have characteristics that are

amenable to rehabilitation. *Moon* ensures that vulnerable juvenile defendants, those that do not meet the Texas waiver statute factors, are protected from the punishments of the adult justice system.

ARGUMENT

Juvenile defendants, due to their age, level of maturity, and decision-making abilities, among other factors, require greater constitutional protections than those that are afforded to adults. These protections are particularly vital at the “critically important” step of transfer of jurisdiction. *Kent v. U.S.*, 383 U.S. 541, 556 (1966). In *Kent*, the Supreme Court noted that juveniles lose “special rights and immunities” offered by the juvenile court system after transfer, and the transfer determination can result in the difference between a few year’s confinement and the harshest sentences imposed on adults—a distinction that is plainly apparent in Applicant’s case. *Id.* at 556-57. *Kent* requires that juvenile court transfer proceedings satisfy due process and fairness. *Id.* at 553.

The Texas waiver statute attempts to effectuate the Supreme Court’s requirements by authorizing a juvenile court to waive its exclusive, original jurisdiction and transfer a child to a criminal district court only after a full investigation and hearing that considers the seriousness of the offense, the background of the juvenile, and the welfare of the community. Tex. Fam. Code. Ann. § 54.02(a)(3)(2013). The court must also “state specifically in the order its reasons for waiver.” Tex. Fam. Code. Ann. §

54.02(h). The *Moon* decision expands on the statutory requirements of the Texas waiver law and further explains the juvenile court’s responsibility in transfer proceedings. In *Moon*, this Court held that juvenile courts must explicitly show their work regarding the transfer decision. Juvenile judges must provide their deliberative process on the record so an appellate court can determine that the decision to transfer a juvenile was “appropriately guided by the statutory criteria, principled, and reasonable.” *Moon v. Texas*, 451 S.W.3d 28, 49 (Tex. Crim. App. 2014).

I. MOON V. TEXAS ARTICULATES A NEW RULE THAT SHOULD BE APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW

The United States Supreme Court has established a framework for applying new rules retroactively to cases on collateral review. In *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion), the Supreme Court held that new rules should be retroactively applied only in certain circumstances. The Court has recognized two such circumstances when retroactive application of a new constitutional rule is required: when the new rule is a substantive rule or when the new rule is a watershed rule of criminal procedure. See *Schiro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Substantive rules include those rules that prohibit a certain category of punishment for a class of defendants because of their status or offense. *Perry v. Lynaugh*, 492 U.S. 302, 329-330 (1989), *overturned on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). In *Montgomery v. Louisiana*, the Supreme Court found that an earlier decision prohibiting mandatory life without parole sentences for youth was a substantive rule that should apply

retroactively because it prohibited a category of punishment for a category of juvenile offenders: those whose “crimes reflect the transient immaturity of youth.” 136 S. Ct. 718, 734 (2016). State courts may also provide broader relief to applicants seeking retroactive application of rules; they are not restricted by the *Teague* framework. *See Danforth v. Minnesota*, 552 U.S. 264, 275 (2008).

Moon establishes a significant new rule that instructs juvenile court judges that they must explain their deliberative process on the record by specifically including the factual bases and evidence they considered to support the transfer order. *Moon*, 451 S.W.3d at 49. Requiring judges to explicitly show their work on their transfer orders ensures that juvenile court judges will adequately consider and provide evidence on the statutory considerations of waiver, including the seriousness of the offense, the background of the child, and the needs of the community. This also ensures appellate courts have adequate information to review transfer decisions and are not merely rubber-stamping them without appropriate review. Additionally, the new *Moon* requirement effectuates significant Supreme Court precedent that requires lower courts to consider the developmental differences between adolescents and adults before punishing juveniles. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (requiring that courts “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”). *See also Washington v. Houston-Sconiers*, 391 P.3d 409, 420 (Wash. 2017) (holding that courts must have complete discretion to consider mitigating factors outlined in *Miller* when sentencing

juveniles in the juvenile or the adult criminal justice system). Thus, the *Moon* rule creates significant new substantive protections for juveniles—when the factors in the Texas waiver statute and Supreme Court jurisprudence regarding adolescent development are appropriately considered, only the most mature, sophisticated, juveniles who are the least responsive to rehabilitation will be prosecuted in the adult criminal justice system.

Moon's new rule prohibits a category of punishment—punishments in the adult system for a category of defendants because of their status—vulnerable juvenile defendants for whom there is no evidence on the record that they meet the criteria of the Texas waiver statute. *See Penry*, 492 U.S. at 329-30. The framework is similar to the substantive rule in *Miller* that the Supreme Court applied retroactively in *Montgomery*. In *Montgomery*, the Supreme Court explained that although the *Miller* decision required courts to go through the procedure of considering a juvenile's age before condemning him to life in prison, the procedure results in a bar for life without parole sentences for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." 136 S. Ct. at 734.

Post *Moon*, Texas juvenile court judges must follow the procedure of putting their deliberative process regarding transfer and their evidence on the record, but the substantive result of this procedure is that only a limited category of defendants will be charged in the adult criminal justice system.

II. **MOON'S NEW RULE PROHIBITS PUNISHING THE MOST VULNERABLE YOUTH WITH ADULT PUNISHMENTS**

A. **Children Are Different From Adults In Constitutionally Relevant Ways**

This Court's decision in *Moon* follows a decade of Supreme Court decisions reaffirming the principle that youth are developmentally different than adults and that these differences are relevant to their constitutional rights, particularly in the justice system. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that imposing the death penalty on individuals who committed murders as juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that it is unconstitutional to impose life without parole sentences on juveniles convicted of non-homicide offenses); *J.D.B. v. North Carolina*, 564 U.S. 261, 271-72 (2011) (holding that a child's age must be taken into account for the purposes of the *Miranda* custody test); and *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding that mandatory life without parole sentence for juveniles convicted of homicide is unconstitutional).

The Supreme Court decisions each reiterate a fundamental concept of modern jurisprudence and commonsense knowledge that “youth is more than a chronological fact”—it is a “time and condition of life” marked by particular behaviors, perceptions, and vulnerabilities. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). These distinctions are also supported by a significant body of developmental research and neuroscience demonstrating significant psychological and physiological differences between youth

and adults. *See, e.g., Graham*, 560 U.S. at 68 (“developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”). As developmental research and neuroscience have deepened the understanding of the defining characteristics of youth, the Supreme Court has repeatedly emphasized three categorical distinctions between youth and adults: lack of maturity, susceptibility to outside influences, and capacity for change. *See Montgomery*, 136 S. Ct. at 733. These traits make children “constitutionally different from adults” and necessitate an individualized assessment of “an offender’s age and the wealth of characteristics and circumstances attendant to it” before exposing youth to the punishments of the adult criminal justice system. *See Miller*, 132 S. Ct. at 2464, 2467.

“First, children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 132 S. Ct. at 2464). The immaturity “often result[s] in impetuous and ill-considered actions and decisions.” *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Second, youth are also highly susceptible to external pressures. As the Supreme Court has explained, “children ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[ll] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.” *Miller*, 132 S. Ct. at 2464 (alterations in original) (quoting *Roper*, 543 U.S. at 569). Finally, youthful offenders have a greater capacity for change than adults because adolescence is a

transitional phase. “[A] child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].” *Id.* (second and third alterations in original) (quoting *Roper*, 543 U.S. at 570). As a result, “a greater possibility exists that a minor’s character deficiencies will be reformed.” *Graham*, 560 U.S. at 68.

Each of these developmental characteristics lead to the diminished culpability of juvenile defendants and means that their conduct “is not as morally reprehensible as that of an adult.” *Roper*, 545 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)). Because juveniles have characteristics that make them less culpable, courts must consider their adolescence in sentencing. In *Miller*, the Court specifically noted six characteristics of children that should be taken into consideration during sentencing: 1) the chronological age related to “immaturity, impetuosity, and failure to appreciate risks and consequences,” (2) the juvenile’s “family and home environment that surrounds him,” (3) the circumstances of the offense, including extent of participation in the criminal conduct, (4) the impact of familial and peer pressures, (5) effect of offender’s youth on the criminal justice process, and (6) the possibility of rehabilitation 132 S. Ct. at 2468.

B. Moon's New Rule Requires That Juvenile Courts Appropriately Consider The Ways In Which Children Are Developmentally Different From Adults Before Waiving A Child Into The Adult System

The Texas waiver statute requires courts to consider (1) whether the alleged offense was against person or property, (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 available to the juvenile court. Tex. Fam. Code. Ann. § 54.02(f). The statutory factors are similar considerations to those the Supreme Court highlighted in *Miller*. In reviewing these factors, juvenile courts must not only consider the Supreme Court precedent regarding juvenile developmental differences, but also the significant scientific research on adolescents. Two factors, the sophistication and maturity of the child and the likelihood of rehabilitation, must particularly be evaluated in light of significant scientific research demonstrating that juveniles are less mature and more amenable to rehabilitation than adults.

1. Children are less sophisticated and mature than adults

The immaturity of juveniles manifests in an inability to make good decisions, evaluate risk and the costs and benefits of their actions, and resist outside influences. Research demonstrates that adolescents, as compared to adults, are less capable of making reasoned decisions, particularly in stressful situations. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE

FUTURE OF CHILDREN 15, 20 (2008) (“Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices.”). Advances in neuroscience confirm the weaker decision-making capacities of youth as compared to adults. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Elizabeth S. Scott & Laurence Steinberg, *RETHINKING JUVENILE JUSTICE* 31, 46-68 (2008). *See also* Laurence Steinberg, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 9-11* (Boston: Houghton Mifflin Harcourt, 2014).

Juveniles are also more likely than adults to take risks in emotionally-charged or exciting situations. *See, e.g.*, Alexandra Cohen et al., *When Is An Adolescent An Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 *PSYCHOL. SCI.* 549, 555-559 (2016); Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 *J. EXPERIMENTAL PSYCHOL.* 709, 710 (2009). Although adolescents react impulsively to positive cues (i.e. happy facial expressions as opposed to neutral ones), Leah Somerville et al., *Frontostriatal Maturation Predicts Cognitive Control Failure to Appetitive Cues in Adolescents*, 23 *J. COGNITIVE NEUROSCI.* 2123, 2129 (2011), they also experience reduced self-control “in the presence of threat.” Michael Dreyfuss et al., *Teens Impulsively React Rather Than Retreat From Threat*, *DEVELOPMENTAL NEUROSCI.* 1, 7 (2014). Instead of “retreating or

withholding a response to threat cues, adolescents are more likely than adults to impulsively react to them, even when instructed not to respond.” *Id.*

Adolescents also demonstrate deficits in social and emotional maturity. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 47, 55-56 (2009). Although some teens may have reasoning skills that approximate that of adults, sound judgment requires both cognitive and social and emotional skills, and social and emotional skills develop later than cognitive skills. Thomas Grisso et al., *Juveniles’ Competence to Stand Trial*, 27 LAW & HUM. BEHAV. 333, 343-344 (2003) (16- to 17- year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on test of basic cognitive abilities).

Juvenile risk-taking and impulsiveness is especially heightened under peer influence. *See, e.g.*, Laurence Steinberg et al., *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known*, 50 DEVELOPMENTAL PSYCHOL. 1, 2 (2014); Christopher N. Cascio et al., *Buffering Social Influence: Neural Correlates of Response Inhibition Predict Driving Safety in the Presence of a Peer*, 27 J. Cognitive Neurosci. 83, 89 (2015); Nancy Rhodes et al., *Risky Driving Among Young Male Drivers: The Effects of Mood and Passengers*, TRANSP. RES. 65, 72-75 (2014); Anouk de Boer et al., *An Experimental Study of Risk Taking Behavior Among Adolescents: A Closer Look at Peer and Sex Influences*, J. EARLY ADOLESCENCE 1, 2 (2016).

Furthermore, “the presence of peers increases arousal, and increases sensitivity for social evaluation, a process specifically present in adolescents.” Anouk de Boer,

supra, at 11; *See, e.g.*, Leah Somerville, *The Teenage Brain: Sensitivity to Social Evaluation*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 121, 124 (2013); Leah Somerville et al., *The Medical Prefrontal Cortex and the Emergence of Self-Conscious Emotion In Adolescence*, 24 PSYCHOL. SCI. 1554, 1554 (2013). Indeed, in some situations, desire for peer acceptance may lead adolescents to decide that it is actually riskier for them to *not* go along with their peers. *See also* Scott & Steinberg, *Regulation of Youth Crime*, *supra*, at 23 (“In some high-crime neighborhoods, peer pressure to commit crimes is so powerful that only exceptional youths escape. As [other researchers] have explained, in such settings, resisting this pressure can result in loss of status, ostracism, and even vulnerability to physical assault.”).

Recent brain imaging studies further support the observation that adolescent behavior is greatly affected by peer influences. Adolescents’ risk-taking behavior in the presence of their peers coincides with “increased activation of brain regions specifically associated with the prediction and valuation of rewards, including the ventral striatum and orbitofrontal cortex.” Steinberg, *Peers Increase Adolescent Risk Taking*, *supra*, at 2. In other words, adolescents perceive higher reward, and thus greater incentive than adults to take risks in front of their peers. *Id.* at 8-9.

2. Youth have capacity for change and rehabilitation

Developmental research confirms Supreme Court precedent that youth are amenable to rehabilitation. It is well known that “[adolescence] is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology,

cognition, emotion, and interpersonal relationships.” Scott & Steinberg, *RETHINKING JUVENILE JUSTICE*, *supra*, at 32. The research confirms that “many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.” Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J. L. & SOC. CHANGE 285, 297 (2012). “[T]he period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Only a small percentage of youth who engage in risky experimentation persist in their problem behavior into adulthood.” Richard J. Bonnie et al., eds., *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* at 90 (2013) (citations omitted).

Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Youth are developmentally capable of change and research demonstrates that when given a chance, even youth with histories of violent crime can and do become productive and law-abiding citizens, even absent intervention. Levick, *The Eighth Amendment Evolves*, *supra*, at 298. In a study of juvenile offenders, “even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25.” Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop*. (2014) Chicago, IL: MacArthur Foundation, p. 3, available at

<http://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf>.

Most juvenile offenders would no longer be a public safety risk once they reached their mid-twenties, let alone later in life. Because most juveniles are likely to outgrow their antisocial and criminal behavior as they mature into adults, review of the juvenile's maturation and rehabilitation should begin relatively early in the juvenile's sentence, and the juvenile's progress should be assessed regularly. *See, e.g., Research on Pathways to Desistance: December 2012 Update, Models for Change, p. 4, available at* <http://www.modelsforchange.net/publications/357> (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts. The study also found that "it is hard to determine who will continue or escalate their antisocial acts and who will desist," as "the original offense . . . has little relation to the path the youth follows over the next seven years."). Rather, compelling evidence demonstrates that non-rehabilitative, punitive sanctions have negative effects on juveniles' normal development from childhood to adulthood. Studies have shown that punitive sanctions may actually promote reoffending rather than help rehabilitate the youth. Justice Policy Institute, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration*, (December 2014) at 21-22 available at www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

In reviewing the factors regarding sophistication, maturity, and ability for rehabilitation, Texas juvenile courts must start with the premise clearly established by the developmental research. The juvenile court's reasoned analysis, in consideration of the scientific evidence regarding the developmental characteristics of children will protect children from the harsh punishments of the adult justice system. It would only be the rare child whose character does not meet the scientific norms, for whom the juvenile court would waive jurisdiction. Therefore, the *Moon* rule ensures that a category of juveniles will be protected from the harshest punishments, making it a substantive rule that should apply retroactively.

PRAYER

For these reasons, *amicus* respectfully requests that this Court grant Navarro's application for writ of habeas corpus pursuant to *Moon v. Texas*."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served on all parties by first class U.S. mail and/or electronic service on May 24, 2017.

s/ Marsha L. Levick
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rules 73.1 and 11, TEX. R. APP. PROC. It was prepared on a computer using 14-point Garamond type. It contains 3,787 words.

s/ Marsha L. Levick
Marsha L. Levick