

Case No. _____

IN THE COURT OF APPEALS FOR
THE _____ JUDICIAL DISTRICT OF TEXAS

IN RE C.M., A MINOR

APPEALED FROM THE 313TH JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS
CASE NO. 200806648J-AMENDED
JUDGE PAT SHELTON

Amicus Curiae Brief of Texas Appleeed;
In Support of Minor C.M.'s Petition for Writ of Mandamus

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case, in addition to those persons previously identified by the parties to the appeal. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF IDENTITY

Texas Appleseed is a non-profit corporation organized exclusively for charitable and educational purposes that focuses on systemic reform of broad-based social issues and has been a leader in the effort to assure that juveniles receive fair, appropriate treatment in the Texas juvenile justice system. Texas Appleseed's mission is to further the public interest in the development and application of the law and public policy by courts, agencies, legislative bodies, and others in Texas; assisting in the advancement and improvement of the administration of justice; advancing the cause of social, economic, and political justice in Texas. Texas Appleseed has assembled a Board of Directors that consists of distinguished legal practitioners from various sectors of the Texas Bar to pursue these goals. The Vernon Law Group, PLLC, represents Texas Appleseed pro bono for the purposes of filing this brief as *amicus curiae*.

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STATEMENT OF THE CASE

This is an amicus curiae brief filed in conjunction with a petition for writ of mandamus from the juvenile court's order granting the State's motion to waive jurisdiction over a sixteen-year-old minor and transfer him to adult criminal court for further criminal proceedings as an adult. C.M. prays that this Court reverse the juvenile court's order granting waiver of jurisdiction, remove him from Harris County Jail, and place him back in the Juvenile Justice Center.

STATEMENT REGARDING ORAL ARGUMENT

Texas Appleseed respectfully requests the opportunity to present oral argument in this case because the legal issues on appeal are complex and important to the proper administration of the Texas Family Code and involve the safety, welfare, Constitutional and statutory rights of C.M. as well as thousands of other minors in Texas.

ISSUE PRESENTED

Did the trial court abuse its discretion by waiving jurisdiction and allowing a sixteen-year-old to be transferred to an adult facility to await trial?

STATEMENT OF FACTS

C.M., a sixteen-year-old minor, is accused of causing the death of Christopher Seabrook (“Decedent”) on July 18, 2008, by shooting Decedent with a handgun. (App. 1). C.M. was detained in the Harris County Juvenile Justice Center (“JJC”) on July 20, 2008. (RR 1). Over the last five months while in the JJC, C.M. was allowed to attend school, and have meaningful visits with his family, religious personnel, and defense counsel. (App. 2). None of this is now available to C.M. in the Harris County Jail where he sits in solitary confinement. (App. 2).

The State sought waiver of the juvenile court’s jurisdiction and to transfer C.M. from the juvenile facility to Harris County Jail pending the outcome of adult criminal proceedings against C.M. (App. 1). On December 17, 2008, the 313th District Court held a hearing on the State’s motion to waive jurisdiction over C.M. and transfer him to Harris County Jail to await adult criminal proceedings. (RR 1).

The State’s sole witness was Detective Jason Meredith. Detective Meredith acknowledged that all eyewitness accounts confirmed that Decedent was enraged after demanding to see marijuana that C.M. did not possess. (RR 30, 38). Detective Meredith testified that Decedent began screaming at the vehicle occupants, that the Decedent lunged into the car at C.M., opened the passenger car door, and attempted to pull C.M. from the vehicle when shots were fired. (RR 31, 38, 39, 45). Detective Meredith also testified that both C.M. and Emmanuel Hernandez, an eighteen-year-old also charged in connection with the incident, confessed to shooting the Decedent. (RR 41-44). Mr. Hernandez was picked up by police the same night in possession of the gun linked to the

shooting, and the gun residue kit was positive on Mr. Hernandez and inconclusive on C.M. (RR 46, 54).

The State put forth no evidence that C.M. represented a danger to the community. (App. 2). To the contrary, three JJC employees voluntarily testified that C.M. is a good kid, non-aggressive, obedient, and polite. (RR 89-92, 97-101). C.M.'s best friend since the first grade testified that C.M. always made her feel better, was never aggressive, and is a good person. (RR 111, 113, 116). Forensic psychiatrist Seth Silverman submitted a report attesting that C.M. "has little inclination towards violence" and that C.M. is not sophisticated, "does not fit the mold of individuals treated and assessed who have been charged with similar offenses, and he does not appear to be a flight risk or prone to aggressive behavior." (RR at R7, Forensic Report of Dr. Seth Silverman). Dr. Silverman also noted that C.M. had responded to therapy and was "mild mannered, polite, and dependent almost to the point of being fearful, easily influenced and confused." (*Id.*) Dr. Silverman also concludes, and his testimony is uncontroverted, that the juvenile system is best suited to rehabilitate C.M. because the adult system may actually harm C.M. (*Id.*)

At the conclusion of the transfer hearing, the Court granted the State's motion, removing C.M. from the JJC (where he was attending school) and placing him in the Harris County Jail. (App. 3). C.M., a sixteen-year-old, is now in solitary confinement in a cell illuminated by a night light for 23 hours a day and is not allowed to attend school or religious services, while presumed innocent. (App. 2).

SUMMARY OF ARGUMENT

The trial court abused its discretion when it entered an order to waive its jurisdiction over C.M., a juvenile, and grant jurisdiction to the Harris County Criminal Court. The trial court's order goes against the purposes of the Family Code, i.e., to provide for the best interests of a child, the systems established to effectuate the Family Code's purposes, and the established reasons for different treatment of juveniles and adults. Juveniles and adults are inherently different, and the Juvenile Justice Center offers rehabilitative and protective benefits for juveniles like C.M. while adult incarceration at Harris County Jail would only be detrimental.

This Court should remove C.M. from solitary confinement at Harris County Jail and place him back in the protections of Juvenile Justice Center, where he can receive proper rehabilitative therapy suitable for a juvenile offender.

ARGUMENT

A. Standard of Review

The standard of review in this case is whether the trial court abused its discretion. Mandamus will issue to correct a clear abuse of discretion or violation of a duty imposed by law when that abuse cannot be remedied by appeal.¹ “[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion.”² To determine whether a court abused its discretion, the reviewing court must consider whether the challenged ruling was compelled by the facts and circumstances or was “arbitrary, unreasonable, or reached without reference to any guiding rules or principles.”³ A trial court also commits an abuse of discretion when it fails to analyze or apply the law correctly.⁴ Under these standards, the trial court’s actions qualify as an abuse of discretion appropriate for mandamus relief.

The court’s transfer order is a “significant rulin[g] in [an] exceptional cas[e]” for which mandamus review is “essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, [or] spare private parties and the public time and money utterly wasted enduring eventual

¹ *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992).

² *Id.* (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

³ *In re Home State Co. Mut. Ins. Co.*, 2007 WL 1429584 (Tex. App.—Tyler 2007, orig. proceeding) (not designated for publication).

⁴ *Walker*, 827 S.W.2d at 840.

reversal of improperly conducted proceedings.”⁵ The benefits to mandamus review here far outweigh the detriments⁶ as the fundamental due process rights of a child are at stake.

The incarceration of C.M., a juvenile, in an adult facility pending trial will result in irreparable harm that makes a remedy by appeal after an adult criminal trial inadequate. No adequate remedy at law exists where a party is in real danger of permanently losing substantial rights. Thus, mandamus should issue here due to the “compelling circumstances” of this case.⁷ As former Chief Justice Phillips observed, “an appellate remedy is inadequate if it comes too late to cure the trial court’s error.”⁸ This case presents an issue so important that mandamus review is appropriate.

With respect to fact issues, an abuse of discretion is shown when the record establishes that “the trial court could reasonably have reached only one decision.”⁹ However, “[a] trial court has no ‘discretion’ in determining what the law is or applying the law to the facts. Thus a clear failure by the court trial court to analyze or apply the law correctly will constitute an abuse of discretion.”¹⁰

B. The trial court misunderstood and misapplied the statutory provisions under the Family Code for granting waivers, and in doing so will expose C.M. to irreparable harm in the adult prison system

⁵ See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).

⁶ See *id.*

⁷ See *In re TXU Elec., Inc.*, 67 S.W.3d 130, 132 (Tex. 2001) (Phillips, C.J. concurring) (citing *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)).

⁸ *In re Prudential*, 148 S.W.3d at 141 (Phillips, C.J. dissenting).

⁹ *Walker*, 827 S.W.2d at 840.

¹⁰ *Id.*

The “consequences of waiver are sufficiently serious to require important procedural protections.”¹¹ There is “no place in our system of law for reaching a result of such tremendous consequences without ceremony.”¹² The risk associated with an arbitrary transfer is very high because it results in the “virtual destruction” of a child who can still turn his life around and benefit society.¹³ The Family Code allows a juvenile court to waive its exclusive jurisdiction if, after full investigation and hearing, it determines there is probable cause to believe the child committed the offense alleged and that because of the seriousness of the offense or the background of the child, the welfare of the community requires it.¹⁴ As the San Antonio Court of Appeals has noted,

If, despite the gravity of the charged offense, the child can be successfully rehabilitated by resort to the facilities available to juvenile court, it is clear that such rehabilitation will promote the "welfare of the community" at least as effectively as criminal prosecution with no prospects of rehabilitation, while, at the same time, it accords to the child the beneficial results which our Legislature has concluded can be achieved by protecting youthful offenders from the stigma and demoralizing effects of criminal prosecution.¹⁵

In determining whether the community welfare requires adult criminal proceedings, the trial court is required to take into consideration: (1) whether the alleged offense was against person or property; (2) the sophistication and maturity of the child;

¹¹ *Kent v. U.S.*, 383 U.S. 541, 554 (1966).

¹² *Id.*

¹³ Ellen Marrus and Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 San Diego L. Rev. 1151,1182 (Fall 2005) (hereinafter Marrus and Rosenberg).

¹⁴ Tex. Fam. Code Ann. § 54.02(f).

¹⁵ *R.E.M. v. State*, 541 S.W.2d 841, 847 (Tex.App.—San Antonio 1976, writ refused n.r.e.).

(3) the record and previous history of the child; and (4) the prospects of the adequate protection of the public and likelihood of rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile court.¹⁶ Twenty years ago, the Texas Court of Criminal Appeals observed that:

Our juveniles are being thrust into a precarious system where all personnel are presumed to consider the child's best interests, yet none has the time...or...even the inclination to do so...loose procedure, high-handed methods, and crowded court calendars have resulted in "arbitrariness" and assembly line dispositions.¹⁷

Unfortunately, little has changed in two decades. The "assembly line dispositions" frowned upon by the *Lanes* court are shockingly evident by the fact that *Kent* set forth binding guidelines on juvenile transfer proceedings, but it has been cited in Texas cases only 95 times in 42 years. (App.4).

The problem in the misapplication or misunderstanding of these mandatory factors is depicted in the chart below showing the staggering numbers of transfers to adult court in Harris County, Texas, in the last eleven years.

YEAR	NUMBER OF CERTIFICATIONS	NUMBER OF CERTIFICATIONS DENIED
1997 ¹⁸	223	20
1998 ¹⁹	105	15
1999 ²⁰	64	4

¹⁶ *Id.*

¹⁷ *Lanes v. State*, 767 S.W.2d 789, 799 (Tex. Crim. App. 1989).

¹⁸ See Harris County Juvenile Probation Department 1997 Annual Report at 16, available at http://www.hcjpd.org/annual_reports/1997.pdf.

¹⁹ See Harris County Juvenile Probation Department 1998 Annual Report at 17, available at http://www.hcjpd.org/annual_reports/1998.pdf.

2000 ²¹	73	3
2001 ²²	71	2
2002 ²³	123	7
2003 ²⁴	49	3
2004 ²⁵	55	0
2005 ²⁶	56	0
2006 ²⁷	90	4
2007 ²⁸	81	7
TOTAL	1,441	65

In the past 11 years, less than seven percent of adult certifications were denied (in other words, over 93 percent of motions requesting waiver of juvenile court jurisdiction to the adult criminal system were granted), another sign of the “assembly line” dispositions frowned upon by the *Lanes* court.

²⁰ See Harris County Juvenile Probation Department 1999 Annual Report at 17, available at http://www.hcjpd.org/annual_reports/1999.pdf.

²¹ See Harris County Juvenile Probation Department 2000 Annual Report at 19, available at http://www.hcjpd.org/annual_reports/2000.pdf.

²² See Harris County Juvenile Probation Department 2001 Annual Report at 18, available at http://www.hcjpd.org/annual_reports/2001.pdf.

²³ See Harris County Juvenile Probation Department 2002 Annual Report at 17, available at http://www.hcjpd.org/annual_reports/2002.pdf.

²⁴ See Harris County Juvenile Probation Department 2003 Annual Report at 14, available at http://www.hcjpd.org/annual_reports/2003.pdf.

²⁵ See Harris County Juvenile Probation Department 2004 Annual Report at 14, available at http://www.hcjpd.org/annual_reports/2004.pdf.

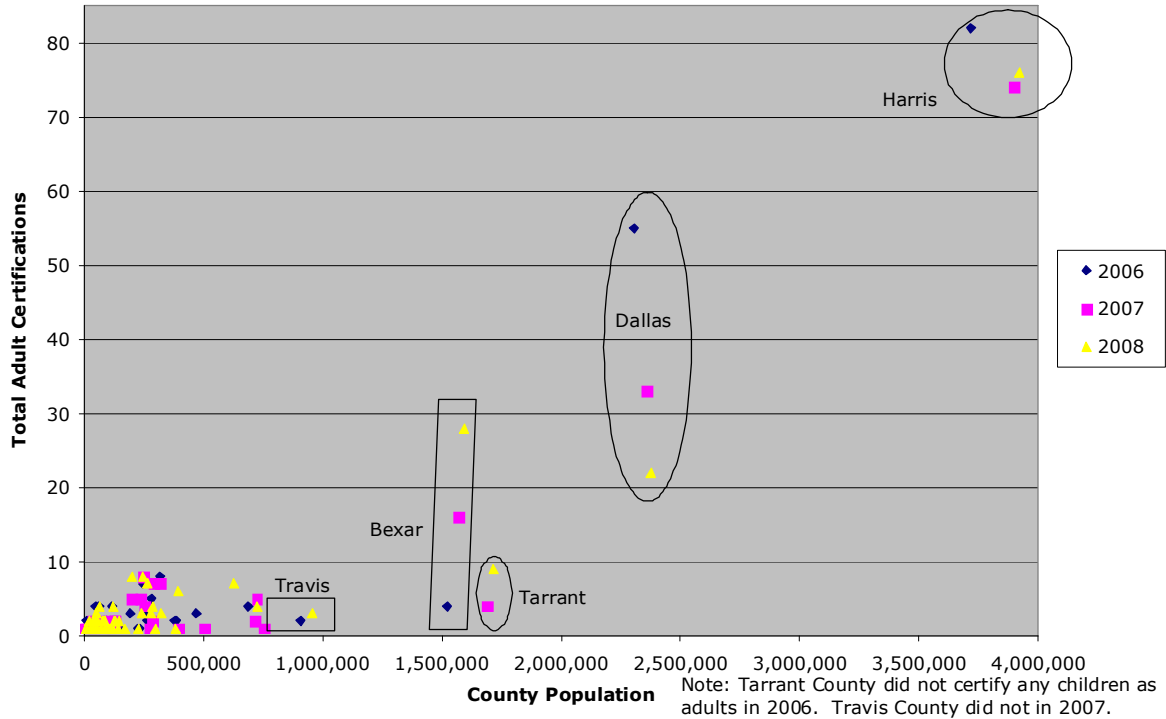
²⁶ See Harris County Juvenile Probation Department 2005 Annual Report at 14, available at http://www.hcjpd.org/annual_reports/2005.pdf.

²⁷ See Harris County Juvenile Probation Department 2006 Annual Report at 17, available at http://www.hcjpd.org/annual_reports/2006.pdf.

²⁸ See Harris County Juvenile Probation Department 2007 Annual Report at 15, available at http://www.hcjpd.org/annual_reports/2007.pdf.

This problem is further illustrated by the chart below, showing the relationship between adult certifications and county populations in Texas between 2006 and 2008.²⁹

Adult Certifications by County Population, per Year



In 2008, the number of children in Texas certified to stand trial as adults increased 30.9 percent, the largest increase since 1999.³⁰ Harris County leads all counties in Texas by continuing to certify more children to stand trial as adults than any other county in Texas, and moreover, certifies more children than the next five largest counties combined.³¹

²⁹ See *OIO Special Report: SB 103 and Rising Adult Certification Rates in Texas Juvenile Courts* (January 12, 2009), available at http://www.tyc.state.tx.us/ombudsman/SB103_AdultCert_SpecialReport.pdf (hereinafter OIO Report).

³⁰ *Id.* at 10.

³¹ *Id.* at 21.

The gross misunderstanding of how to apply the mandatory factors is found in the juvenile court's use of boiler plate, form orders transferring children to adult criminal court and the Courts of Appeals' rubberstamping of the same. In its 2004 annual report, Harris County Juvenile Probation Department claims that Harris County officials "realized years ago that we must, indeed, step up to the plate."³² Rubber stamping a boiler plate transfer order is not "stepping up to the plate." The problem arises because of case law holding that the trial court must consider all of these factors before transferring the case to district court, but not requiring the trial court to find that each factor is established by the evidence.³³ The trial court is not required to give each factor equal weight so long as each is considered.³⁴ However, "the fact that a court *may* undertake an act, but is not required to do so, does not mean that a court is free to do as it pleases."³⁵ The juvenile court "must act with reference to guiding rules and principles, reasonably, not arbitrarily, and in accordance with the law."³⁶ Courts with responsibility for the welfare of children and the Courts charged with reviewing their decisions must be required to think more deeply about the transfer statute than they have been doing.

There is undoubtedly a split of authority in Texas appellate courts as to how the standards should be applied. For example, in *The Matter of T.L.C.*, the Fourteenth Court

³² See Harris County Juvenile Probation Department 2004 Annual Report at 2, available at http://www.hcjpd.org/annual_reports/2004.pdf.

³³ Tex. Fam. Code Ann. § 54.02(f).

³⁴ *Id.* (citing *In re J.I.*, 916 S.W.2d 532, 535 (Tex. App.—Dallas 1995, no writ)).

³⁵ *In the Matter of T.D.*, 817 S.W.2d 771, 773 (Tex. App.—Houston [1st Dist.] 1991). (citing *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 789 S.W.2d 373, 374 (Tex. App.—Houston [1st Dist.] 1990, no writ)).

³⁶ *Id.*

of Appeals overruled a juvenile’s challenge to a form order parroting the statutory considerations.³⁷ Specifically, the juvenile challenged the waiver of jurisdiction over him by alleging that the juvenile court violated the U.S. and Texas Constitutions and Family Code by failing to specifically state the reasons for the waiver.³⁸ The Court of Appeals noted that *Kent* required a juvenile court to accompany its waiver order with a statement of reasons or considerations sufficient to demonstrate that the statutory requirement of “full investigation” had been met and that the court gave careful consideration to the question.³⁹ The Court stated that *Kent* was complied with by a form order if it is supported by the record.⁴⁰ The record in that case showed that the juvenile court had before it evidence of the alleged crimes, the juvenile’s conduct while in confinement, his school record, and several psychiatric examinations.⁴¹ The opinion, however, does not identify or describe what any of this evidence showed. The Court rubber stamped the juvenile court’s order by holding that the juvenile court carefully considered all the required factors and that the order was sufficient.⁴² This is not the meaningful review meant by the *Kent* Court.

Similarly, the juvenile court here filled out a form order stating that all the required factors were considered, but the record plainly reveals that the judge was only

³⁷ *In the Matter of T.L.C.*, 948 S.W.2d 41, 43 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 44.

⁴¹ *Id.*

⁴² *Id.*

concerned with punishing C.M. and facilitating judicial convenience by having C.M. tried in the adult system with his older co-defendant.⁴³ A child may not be deprived of the rights conferred by the juvenile system, tried as an adult, and subjected to adult punishment for the mere convenience of the courts.

While the order here does use the words “specifically finds,” the court, again, fails to enumerate what exactly it considered in its specific findings when it stated that C.M. “is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights” and that “the evidence and reports...presented to the court demonstrate to the court that there is little, if any, prospect of...reasonable rehabilitation of [C.M.]”⁴⁴ The standard is not that C.M. be of “sufficient sophistication and maturity;” it requires, instead, that C.M. be more sophisticated and mature than the average juvenile. Otherwise, there would be no basis for the requirement of the *Kent* factors. The State offered no evidence of this point. Further, the order’s reference to a waiver of rights bears no relation to anything in the record, as there was never any contention in the record that any rights were waived.⁴⁵ The San Antonio Court of Appeals in *R.E.M. v. State* was especially troubled by the sophistication prong and held that this prong refers to the question of culpability and responsibility for the juvenile’s conduct, not to the waiver of rights.⁴⁶ Culpability has

⁴³ Rep. R. at 131-2.

⁴⁴ App. 3.

⁴⁵ App. at 3.

⁴⁶ *R.E.M.*, S.W.2d at 846.

already been addressed by the Supreme Court, which held in *Roper* that juveniles are less culpable than adults.⁴⁷ The form order issued here clearly contradicts the evidence presented to the court, as expert witness Dr. Silverman specifically stated that C.M. “lacks sophistication which is indicative of immaturity.”⁴⁸

As for the rehabilitation prong, the court again goes completely against the evidence presented and stated in the record. Several witnesses from the Harris County Juvenile Probation Department “went out of [their] way”⁴⁹ to voluntarily testify that C.M. is amenable to rehabilitation.⁵⁰ There is no evidence in the record to support the court’s finding that C.M. has “little, if any, prospect of...reasonable rehabilitation,” again, indicating the court did not conduct a meaningful investigation and merely rubberstamped the waiver. As Justice O’Connor from the First Court of Appeals of Texas states in his dissent in *In the Matter of T.D.*, “[t]o reproduce the statutory requirements as the findings, makes a mockery of the entire proceeding.”⁵¹

In contrast to opinions accepting boilerplate orders, the San Antonio Court of Appeals performed a meaningful review of a juvenile court’s form order in *R.E.M.*⁵² It held that nothing in the transfer statute suggests that it is acceptable to deprive a child of the benefits of the juvenile court system merely because he is accused of committing a

⁴⁷ *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

⁴⁸ See Resp’t Ex. 7 at 4.

⁴⁹ Rep. R. at 99.

⁵⁰ Rep. R. at 98, 100-101.

⁵¹ *In the Matter of T.D.*, 817 S.W.2d at 783.

⁵² *R.E.M. v. State*, 541 S.W.2d 841, 847 (Tex. App.—San Antonio 1976, writ refused n.r.e.).

serious crime since doing so is a presumption that such child cannot be successfully rehabilitated.⁵³ If an appellate court finds the evidence “factually or legally insufficient to support the juvenile court's order transferring jurisdiction of a youth to the criminal district court, it will necessarily find that the juvenile court has abused its discretion.”⁵⁴ The trial court here abused its discretion when it failed to consider the factors mandated by the Supreme Court in *Kent* and the Family Code and refused to acknowledge that C.M. could be rehabilitated despite overwhelming and uncontroverted testimony from Dr. Seth Silverman, Detention Officer Ulysess Galloway, Juvenile Probation Department Employees (Michael Merritt and Warren Broadneaux), and Probation Officer Mary Guerra. These individuals testified that C.M. was in fact amenable to rehabilitation and posed no threat to the community, satisfying the fourth factor listed in the Family Code.⁵⁵ Dr. Silverman specifically noted in his forensic report that C.M. “had no history of aggressive or violent behavior” and interviews with Juvenile Justice personnel and staff indicate that “Respondent was motivated, sincere, and distinctly well-behaved.”⁵⁶ Psychological therapy and placement in a therapeutic environment for adolescent offenders would be in the best interest of C.M.⁵⁷

⁵³ *Id.*

⁵⁴ *In the Matter of T.D.*, 817 S.W.2d at 774.

⁵⁵ Rep. R. at 98, 100-101. *See also* Resp't Ex. 7 at 3.

⁵⁶ Resp't Ex. 7 at 2.

⁵⁷ *Id.* at 3 and 4.

Due to the impressionability of juveniles, even the most minimal experience of incarceration is extremely injurious, and such injury is compounded where confinement is unfounded.⁵⁸ A rubber-stamped judgment that a minor is unamenable to treatment without further support can have serious repercussions throughout the rest of the young offender's life.⁵⁹ The experienced "isolation associated with incarceration may breed mental illness or reinforce existing feelings of anger and alienation, and adult prisons lack treatment facilities that juvenile centers may be able to provide."⁶⁰ One court has noted that:

It is difficult for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty and has to spend the night or several days or weekends in a cold, impersonal cell or room away from home or family....The experience tells the youngster that he is no good and that society has rejected him. So he responds to society's expectation, sees himself as a delinquent, and acts like one.⁶¹

The court concludes that "such negative self-labeling is clearly counter-rehabilitative and can easily lead to self-fulfilling prophecy."⁶² Dr. Silverman agrees that C.M. "might be harmed by placement in an adult criminal justice jail due to its untoward influences and

⁵⁸ *Lanes* 767 S.W.2d at 796. ("Pre-trial detention can be extremely destructive to a child's life and act as the determinative factor toward recidivism").

⁵⁹ Kimberly S. Mays, *Shifting Away from Rehabilitation: State v. Ladd's Equal Protection Challenge to Alaska's Automatic Waiver Law*, 15 Alaska L. Rev. 367, 385 (December 1998).

⁶⁰ *Id.* (citing Kenneth Wooden, *Weeping in the Playtime of Others: America's Incarcerated Children* at 110 (1976)).

⁶¹ *Lanes*, 767 S.W.2d at 796 (citing *In re M*, 3 Cal.3d 16 (1970)).

⁶² *Lanes*, 767 S.W.2d at 797. See also MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Adult Criminal Court*, available at http://www.adjj.org/downloads/3582issue_brief_5.pdf (hereinafter MacArthur Foundation) ("prosecution in an adult court communicates to the adolescent that he or she is unsalvageable, and hence repeat offenses become a self-fulfilling prophecy") at 4.

lack of rehabilitative intent,” but he would benefit from “placement in a therapeutic environment specifically designed for adolescent offenders.”⁶³

C. The trial court abused its discretion by waiving jurisdiction and transferring C.M. to an adult facility to await trial.

1. The trial court’s order flies in the face of the purpose of the Family Code, systems established to effectuate this purpose, and established reasons why juveniles and adults should be treated differently.

a. Benefits of JJC versus detriments of adult incarceration

The Family Code is designed to protect the best interests of a child⁶⁴. One of the main purposes of Title 3 of the Family Code is “to provide for the care, the protection, and the wholesome moral, mental, and physical development of children” as well as “to provide a simple judicial procedure...in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.”⁶⁵

There has been some disagreement on how to properly handle the adjudication of juvenile delinquents, especially those that commit capital offenses in their teenage years. As early as 1909, Judge Julian Mack advised that juvenile offenders should be treated “as a wise and merciful father handles his own child.”⁶⁶

⁶³ Resp’t Ex. 7 at 4.

⁶⁴ A “child” is “a person who is ten years of age or older and under 17 years of age; or seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.” Tex. Fam. Code. Ann. § 51.02(2).

⁶⁵ Tex. Fam. Code. Ann. §51.01(3) and (6).

⁶⁶ Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909).

Children...retain ‘rights,’ to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind. It is in this way that paternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the fully rational and considered task of shaping his or her own life.⁶⁷

The Juvenile Court Act was intended to guide and direct juveniles, with the State serving as *parens patriae*, not to convict and punish them.⁶⁸ The juvenile court is

[T]heoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child...not to fix criminal responsibility, guilt and punishment.⁶⁹

The Texas Youth Commission provides such services to these children, with a program of constructive training aimed at rehabilitation and reestablishment in society.⁷⁰ In fact, under Senate Bill 103 enacted by the Texas Legislature in 2007, “providing appropriate treatment to our youth is a **requirement**, not an exception.”⁷¹ The Harris County Juvenile Probation Department’s Mission Statement also reflects its commitment to this belief, stating that:

As mandated in the Texas Juvenile Justice Code, the department provides services including treatment, training, rehabilitation and incarceration while emphasizing responsibility and accountability of both parent and child for

⁶⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 825, n.23 (1988) (citing Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756 (1981)).

⁶⁸ *State v. Thomasson*, 275 S.W.2d 463, 464 (Tex. 1955). See also *Lanes* at 795 (Rehabilitation and child protection remains as the pervasive and uniform themes of the Texas juvenile system).

⁶⁹ *Kent*, 383 U.S. at 555.

⁷⁰ Tex. Human Resources Code Ann. § 61.002.

⁷¹ See *Final Report on the Progress & Impact of Senate Bill 103, Executive Summary and Future Outlook*, December 1, 2008, available at http://www.tyc.state.tx.us/reform/SB103_Final_Report.pdf. (emphasis added).

the child's conduct and offering the most opportunities for those youth who demonstrate the greatest potential for positive change.⁷²

C.M. has great potential for positive change. Forensic psychiatrist Seth Silverman submitted a report attesting that C.M. “does not fit the mold of individuals treated and assessed who have been charged with similar offenses, and he does not appear to be a flight risk or prone to aggressive behavior.”⁷³ In fact, he would “benefit from placement in a therapeutic environment specifically designed for adolescent offenders.”⁷⁴

The Texas juvenile system further seeks to avoid the taint of criminality in order to prevent recidivism and promote rehabilitation.⁷⁵ Whenever possible, “children should be protected and rehabilitated rather than subjected to the harshness of the criminal system because children, all children, are worth redeeming.”⁷⁶ A study conducted by the Texas Youth Commission found that youth were 68% less likely to be arrested again for a violent offense after completion of the Capital and Serious Violent Offender Treatment Program.⁷⁷ Furthermore, “an aggressive skills and motivation component develops

⁷² See *Harris County Juvenile Probation Department Mission Statement*, available at <http://www.hcjpd.org/mission.asp>. See also Harris County Juvenile Probation Department 2007 Annual Report at 2 (stating “The Commissioners Court, judges, law enforcement and the community want the best decisions made for rehabilitation whenever possible”).

⁷³ Resp't Ex. 7 at 4.

⁷⁴ *Id.*

⁷⁵ *Lanes*, 767 S.W.2d at 796.

⁷⁶ *Hidalgo v. State*, 983 S.W.2d 746, 754 (Tex. Crim. App. 1999) (citing President's Commission on Law Enforcement and Administration of Justice (1967)). See also Harris County Juvenile Probation Department 2003 Annual Report at 3, available at http://www.hcjpd.org/annual_reports/2003.pdf (stating that “any youth can be helped”).

⁷⁷ Cheryl K. Townsend, *Review of Agency Treatment Effectiveness, Fiscal Year 2008*, available at http://www.tyc.state.tx.us/research/TxmtEffect/2008_Treatment_Effectiveness.pdf (hereinafter Treatment Effectiveness), p.11.

appropriate attitudes and values necessary to change delinquent and criminal behavior.”⁷⁸

The Capital and Serious Violent Offender Treatment Program at Giddings State School provides such treatment and is an internationally recognized program known for its effectiveness in reducing recidivism among violent youth.⁷⁹ Contrary to the juvenile court’s belief that there is “insufficient time to work with the case,”⁸⁰ this program requires five months to complete, which can be done well before C.M. reaches 19.

There is evidence that imprisonment (in an adult system rather than detention in a juvenile center) “undermines social maturation and educational progress and likely contributes to recidivism.”⁸¹ This should not be a surprise, as:

Adolescence is a critical developmental stage during which youths acquire competencies, skills, and experiences essential to success in adult roles. If a youth’s experience in the correctional system disrupts educational and social development severely, it may irreversibly undermine prospects for gainful employment, successful family formation, and engaged citizenship—and directly or indirectly contribute to re-offending.⁸²

C.M. has undoubtedly come from a broken family – his mother is serving life imprisonment for suffocating his newborn sister shortly after birth; his older brother (to whom he looked for support and guidance) left home; his father separated from his third wife; and C.M. was sent to live with his grandmother. All of these factors, taken

⁷⁸ *Id.* at 16.

⁷⁹ See Giddings State School Specialized Treatment Programs, available at <http://www.tyc.state.tx.us/programs/giddings/treatment.html>.

⁸⁰ Rep. R. at 130.

⁸¹ Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, The Future of Children, at 27 (2008) (hereinafter Scott and Steinberg).

⁸² *Id.*

together, indicate a failure to provide a stable and nurturing environment for C.M. during one of the most critical life stages of his mental development.

There is increased research indicating that “juvenile offenders are more likely to desist from criminal activity and to make a successful transition to adulthood if they are sanctioned as juveniles in a separate system.”⁸³ In fact, studies have shown that transfer to an adult system does not deter violent juvenile offenders from offending again, but rather increases rates of violence among transferred youth.⁸⁴ A 2007 report by the Center for Disease Control and Prevention found that transfer of juveniles to adult systems resulted in increased arrest for subsequent crimes as compared with those retained in the juvenile system.⁸⁵ Another study of juveniles in adult prison found that juveniles reported spending “much of their time...learning criminal behavior from the inmates and proving how tough they were.”⁸⁶ It is therefore “clear beyond dispute that the waiver of

⁸³ Scott and Steinberg at 28.

⁸⁴ Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 Am. Crim. L. Rev. 175, 183 (Winter 2007) (hereinafter *Children as Adults*) (“Various studies have indicated that transfer actually increases recidivism among these offenders. This increased recidivism manifests a failure to deter, a failure to rehabilitate, and most significantly, a failure to protect society”); *see also* Mary R. Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. Crim. L. & Criminology 449, 490-91 (1996) (finding a larger percentage of transfers committing additional crimes as compared to juveniles kept in juvenile court); *See also OIO Report* at 35 (finding that particularly for violent offenders, adult certification *substantially increases* the risk of recidivism).

⁸⁵ *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm> (finding that transferring juveniles to the adult system is counterproductive as a strategy for preventing or reducing violence and that available evidence indicates transfer policies do more harm than good, as they are “counterproductive to reducing juvenile violence and enhancing public safety”).

⁸⁶ *See OIO Report* at 34.

jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile.”⁸⁷

b. Juveniles differ from adults

This separate system of handling juveniles exists because of the fundamental differences between juveniles and adults. The United States Supreme Court in *Roper v. Simmons* recognized three factors as to why juveniles are less culpable than adult criminals, and therefore should not be punished as severely as adults.⁸⁸ First, a lack of maturity and underdeveloped sense of responsibility are more prevalent in youth than in adults.⁸⁹ These qualities often result in “impetuous and ill-considered actions and decisions.”⁹⁰ Researchers have found that most juvenile crime stems from adolescents trying to discover their identities rather than from “moral deficiencies reflecting bad character.”⁹¹ As the Supreme Court pointed out in *Roper*, because juveniles are struggling to define their identity, it is impossible to conclude that “even a heinous crime

⁸⁷ *Kent*, 383 U.S. at 556.

⁸⁸ *Roper*, 543 U.S. at 569. *See also Thompson*, 487 U.S. at 835 (holding that “inexperience, less education, and less intelligence made a juvenile less able to evaluate the consequences of his or her conduct while at the same time he or she was much more apt to be motivated by emotion or peer pressure than an adult).

⁸⁹ *Roper*, 543 U.S. at 569.

⁹⁰ *Id.*; *see also Roper v. Simmons*, 543 U.S. 551 (2005) Brief of Amici Curiae American Psychological Association and the Missouri Psychological Association at 2 (Jul. 19, 2004) (hereinafter American Psychological Amici Curiae) (In a recent study, adolescents were found to be overrepresented among defendants who had falsely confessed to crimes).

⁹¹ *See Steinberg and Scott* at 24. *See also American Psychological Association Amici Curiae* at 2 (“Adolescent risk-taking often represents a tentative expression of adolescent identity and not an enduring mark of behavior rising from a fully formed personality. Most delinquent adolescents do not engage in violent illegal conduct through adulthood”).

committed by a juvenile is evidence of irretrievably depraved character.”⁹² C.M. was a lonely and depressed child looking for a way to fit in, as most teenagers do, in his new school. He was unfortunate enough to fall into a crowd of older students at his school and was “at the wrong place at the wrong time.” There is no indication that that C.M. has any tendencies towards bad character. On the contrary, he has been described by juvenile justice personnel who have interacted with him as “one of the best kids” and not at all mean-spirited or mean.⁹³

Secondly, juveniles are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure.⁹⁴ In *Eddings v. Oklahoma*, the court stated that:

Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.⁹⁵

Dr. Silverman, who is board certified in adult, addiction and forensic psychiatry, specifically pointed out that C.M. “is a dependent, easily influenced individual who might have a biologic psychiatric illness and who has responded to therapy.”⁹⁶ As the *Eddings* court noted:

⁹² *Roper*, 543 U.S. at 570.

⁹³ Rep. R. at 98, 100-101.

⁹⁴ *Roper* 543 U.S. at 569.

⁹⁵ *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

⁹⁶ Resp’t Ex. 7 at 4; *See also* Rep. R. at 98 (testimony that C.M. is amenable to treatment, obedient and willing to follow rules).

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.⁹⁷

Dr. Silverman also concurs that C.M. “had been subjected to multiple significant psychosocial stressors.”⁹⁸

Finally, the character of a juvenile is not as well formed as that of an adult.⁹⁹ There is scientific evidence that the adolescent brain (in particular the frontal lobes responsible for decision-making) has not fully developed and reached maturity until after a person has reached adulthood.¹⁰⁰ Not only does a juvenile have a neurodevelopmentally immature adolescent brain, the juvenile is, as the Supreme Court has also stated, going through a period “well recognized as a time of great physiological and psychological stress.”¹⁰¹ Scientific research shows that “deficiencies in the adolescent mind and emotional and social development are especially pronounced when other factors – such as stress, emotions, and peer pressure – enter the equation. These

⁹⁷ *Eddings*, 455 U.S. at 116, n. 11.

⁹⁸ Resp't Ex. 7 at 2.

⁹⁹ *Roper*, 543 U.S. at 570.

¹⁰⁰ See American Psychological Association Amici Curiae at 9 (“One hallmark of frontal lobe dysfunction is difficulty in making decisions that are in the long-term best interests of the individual.”) (citing Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes*, in *Clinical Neuropsychology* 404, 434). See also Marrus and Rosenberg at 1166.

¹⁰¹ *Thompson*, 487 U.S. at 835, n.41.

factors affect everyone’s cognitive functioning, but they operate on the adolescent mind differently and with special force.”¹⁰² These adolescents “cannot be expected to transcend their own psychological or biological capabilities.”¹⁰³ As Harris County Judge Ed Emmett stated in Harris County Juvenile Probation Department’s 2007 Annual Report, “[t]he Commissioners Court, judges, law enforcement and the community want the best decisions for rehabilitation whenever possible.”¹⁰⁴

The juvenile justice system perceives adolescents to have greater rehabilitative possibilities than adults.¹⁰⁵ In fact, “[y]outh implies flexibility and adaptability, and consequently juveniles may be more likely to learn from their mistakes and become responsible community members.”¹⁰⁶ Given that C.M. has still not attained the decision-making skills exhibited by mature adults, the court should allow the juvenile justice system to perform its services as provided by the Family Code to C.M., as evidence presented to the court has demonstrated he is amenable and responsive to rehabilitation.

2. The trial court’s order ignored the evidence adduced at C.M.’s hearing and the *Kent* criteria for transfers of jurisdiction in juvenile cases

¹⁰² *Roper v. Simmons*, 543 U.S. 551 (2005) Brief of Amici Curiae American Medical Association at 7-8 (Jul. 16, 2004) (hereinafter American Medical Association Amici Curiae).

¹⁰³ American Medical Association Amici Curiae at 20.

¹⁰⁴ See Harris County Juvenile Probation Department 2007 Annual Report at 2, available at http://www.hcjpd.org/annual_reports/2007.pdf.

¹⁰⁵ See Mays at 380.

¹⁰⁶ *Id.*

Juvenile transfer hearings are “the only available avenue by which the state may seek to prosecute a child as an adult.”¹⁰⁷ Consequently,

The stakes involved in such proceedings are high: “the result of a fitness hearing is not a final adjudication of guilt; but the certification of a juvenile offender to an adult court has been accurately characterized as ‘the worse punishment the juvenile system is empowered to inflict.’”¹⁰⁸

The Supreme Court has also unequivocally stated that “the determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal processes of the District Court is ‘critically important.’”¹⁰⁹ Transferring a juvenile to the adult criminal system exposes him to capital punishment, and punishment of this severity “is the kind of judgment that, if it can be made at all, must be made rarely and only on the surest and soundest of grounds.”¹¹⁰ At least two other courts have stated that a transfer to criminal district court for adult prosecution is “the single most serious act the juvenile court can perform...because once waiver of jurisdiction occurs, the child loses all protective and rehabilitative possibilities available.”¹¹¹ The Court further noted the potential for “procedural arbitrariness”¹¹² and set out standards limiting the juvenile court’s discretion. The Court stated that the decision to transfer jurisdiction can only be made after “meaningful review,” including a statement of reasons for the waiver of

¹⁰⁷ *R.H. v. State*, 777 P.2d 204, 210 (Alaska Ct. App. 1989).

¹⁰⁸ *Id.* (quoting *Ramona R. v. Superior Court*, 693 P.2d 789, 795 (Cal. 1985)).

¹⁰⁹ *Kent*, 383 U.S. at 560.

¹¹⁰ *Naovarath v. State*, 779 P.2d 944, 947 (Nev. 1989).

¹¹¹ *Id.* (citing *State v. R.G.D.* 108 N.J. 1, 527 (1987)) (“Once transferred, a child will be subject to the retributive punishment of the criminal justice system instead of the rehabilitative goals of the juvenile justice system”).

¹¹² *Kent*, 383 U.S. at 555.

jurisdiction, supported by a statement of the relevant facts.¹¹³ The reviewing court may not “assume” adequate reasons exist or that a full investigation has been made, but rather it must “set forth the basis for the order with sufficient specificity to permit meaningful review.”¹¹⁴ Failure of a juvenile court to apply these standards “cannot be said to be harmless error.”¹¹⁵

The trial court did not follow the *Kent* standard of conducting a meaningful review and taking into consideration all relevant facts when it granted waiver of jurisdiction. The only reasons the court listed for transfer were “judicial economy” and that this was a “sheer punishment case” in which “there is a wide range of punishment available...in the adult system.”¹¹⁶ The juvenile court prematurely decided to punish C.M. by placing him in an adult jail while he is still presumed innocent and awaiting trial. The State acquires the right to punish an individual only *after* it has tried and convicted him as a criminal.¹¹⁷ C.M. has not been convicted of a crime – he has only been accused of a crime. By transferring C.M. to a Harris County Jail with adults and placing him in solitary confinement for 23 hours a day while awaiting trial, the judge has essentially convicted and punished C.M., potentially causing irreparable harm to the child.

¹¹³ *Id.* at 561.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 564.

¹¹⁶ Rep. R. at 130-31.

¹¹⁷ *Jones v. United States*, 463 U.S. 354 (1983). (emphasis added).

The judge in a juvenile court is not administering law in the normal meaning of criminal law; he is to “diagnose, investigate, counsel and advise.”¹¹⁸ The juvenile court has been given broad discretion “in order to provide optimal flexibility in diagnosis and treatment with the constant focus being the child’s lifestyle and character rather than whether he committed the crime.”¹¹⁹ The trial court judge failed to do any of these things. Instead, he was more concerned with convenience when he entered the transfer order, finding that because there was a co-respondent, they should be put together,¹²⁰ despite the United States Supreme Court’s admonishment that “non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases.”¹²¹ For the reasons stated above, the trial court abused its discretion by waiving jurisdiction and ordering C.M. transferred to adult jail to await trial rather than sending him to JJC.

¹¹⁸ *Lanes*, 767 S.W.2d at 792.

¹¹⁹ *Id.* at 793.

¹²⁰ Rep. R. at 131-2.

¹²¹ *Kent*, 383 U.S. at 560-561 (citing *Harling v. U.S.*, 295 F.2d 161, 164-65 (U.S. App. D.C. 1961)).

PRAYER

WHEREFORE, Texas Appleseed prays that this Court reverses the decision of the trial court granting waiver of jurisdiction and that C.M. be removed from Harris County jail and placed in an appropriate juvenile justice center where he can receive rehabilitative treatment appropriate for a juvenile offender.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of February, 2009, a true and correct copy of the above and foregoing *Amicus Curiae* Brief of Texas Applesed has been forwarded by U.S. Mail, postage prepaid, to:

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