

March 25, 2014

ABEL ACOSTA, CLERK

**NO. PD-1215-13
IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

**NO. 01-10-00341-CR
IN THE FIRST COURT OF APPEALS
HOUSTON, TEXAS**

**IN THE 178th DISTRICT COURT
HOUSTON, TEXAS**

THE STATE OF TEXAS

Petitioner

v.

CAMERON MOON

Respondent

**BRIEF FOR CHILDREN AT RISK AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

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Interest of Amicus

CHILDREN AT RISK is a Texas-based nonprofit organization that drives macro-level change on a local and state level through its research and education programs and data-driven advocacy. CHILDREN AT RISK is a leader in understanding the social indicators impacting children and educating public policy makers on their importance in improving the lives of children. CHILDREN AT RISK focuses on the well-being of the whole child, and concentrates its efforts on public education, parent education, child health, child trafficking, and the juvenile justice system. The mission of CHILDREN AT RISK is to serve as a catalyst to improve the quality of life for children through research, public policy analysis, education, collaboration, and advocacy. CHILDREN AT RISK is the author of the publications *The State of Juvenile Justice in Texas* (2012) and *Texas Juvenile Mental Health Courts: An Evaluation and Blueprint for the Future* (2011), and the forthcoming *Juvenile Specialty Courts: An Evaluation of Restorative Justice in Texas and Across the Nation* (2014).

CHILDREN AT RISK is committed to advocating for a humane and common sense approach to juvenile justice that prioritizes preventing juvenile delinquency and rehabilitating juvenile offenders while protecting public safety.

The waiver of a juvenile court's jurisdiction over children has profound implications for the children in our State. Research shows that children in adult facilities are often placed in solitary confinement, suffer high rates of mental health issues including anxiety, depression, and suicidal thoughts, and experience higher rates of physical and sexual abuse than adults while incarcerated. At the same time, our scientific understanding of the development of children's brains overwhelmingly supports what the case law has held, that children are less culpable for their acts and more amenable to rehabilitation. It is for these reasons that CHILDREN AT RISK is interested that children not be transferred to adult court without being afforded all the procedural protections required, including the juvenile court's full consideration of all of the §54.02(f) factors.¹

Summary of Facts and Case

Amicus adopts the summary of facts and case as articulated in the brief of respondent Cameron Moon.

¹ CHILDREN AT RISK did not accept any fee for the preparation of this brief.

Question Presented

Whether the intent of the waiver process is met when a juvenile court bases its decision to transfer a child solely on the nature of the crime alleged, rather than on full consideration of all the factors identified in TEX. FAM. CODE §54.02(f)?

Summary of the Argument

Just as the law requires, scientific findings regarding children’s brain development and research regarding the negative effects of adult incarceration on children necessitates strict adherence to the procedural protections of §54.02(f). In the decision below, the Court of Appeals found that the evidence supporting the juvenile court’s decision to transfer Cameron Moon to adult court was insufficient with regard to his “sophistication and maturity” and “the prospect of adequate protection of the public and the likelihood of Moon’s rehabilitation.” *State v. Moon*, No. 01-10-00341-CR, 2013 WL 3894867 at *24 (Tex. App.—Houston [1st Dist.] July 30, 2013). The court held that the only factor weighing in favor of certification was in relation to Moon’s alleged offense, and as such, the juvenile court abused its discretion in approving his transfer to adult court. *Ibid.* The decision of the Court of Appeals was correct, and the State is wrong in arguing that a juvenile court can certify a child as an adult based merely on the nature of the crime.

The overwhelming consensus of case law and academic research indicates that juveniles are less culpable for their offenses and more amenable to rehabilitation than adults and that these two characteristics of youth exist regardless of a juvenile's alleged offense. Adolescence is a time of important physiological changes in juveniles' brain development, resulting in increased propensity for risk-taking and greater susceptibility to peer pressure. While these characteristics of youth can lead to criminality, they also typically resolve with age, and most juvenile offenders do not go on to commit crimes as adults. To adequately address the juvenile's status as a child, a court must consider all the TEX. FAM. CODE §54.02(f) factors before making a decision to transfer. Certification as an adult has far-reaching consequences for a juvenile, as adult prisons and jails are profoundly dangerous places for children and are not equipped with the resources necessary for their rehabilitation. Children who are certified as adults are often held in solitary confinement at tremendous cost to their mental health. Furthermore, children who are incarcerated in adult facilities are at shockingly high risk for physical and sexual assault, and are much more likely to recidivate than children in juvenile facilities. As such, the welfare of society necessitates that certification must be reserved for truly extraordinary cases and cannot be based on the alleged crime alone.

Argument

I. Without Strict Adherence To The Requirements Of Tex. Fam. Code §54.02(f), The Recognition The Law Affords To Children As Less Culpable And More Amenable To Rehabilitation Than Adults Becomes Meaningless.

Our now well-established understanding of child development and the effects of incarcerating children in adult facilities underscores the importance of what the case law requires—that juvenile courts must maintain strict compliance with the transfer procedure identified in TEX FAM. CODE §54.02(f).² Contrary to the State’s assertion, the seriousness of the crime alone cannot be sufficient grounds for the certification of a juvenile as an adult. Such an argument would render the §54.02(f) factors meaningless. In determining, “after a full investigation and hearing . . . that because of the seriousness of the alleged offense or the background of the child the welfare of the community requires criminal proceedings,” the court must consider the four factors stipulated in §54.02(f). TEX. FAM. CODE ANN. §54.02(a) (West Supp. 2012). The status of the offender as a juvenile, regardless of the offense in question, makes the §54.02(f) factors

² The factors a court must consider in deciding whether waiver is appropriate are: “1. whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against people; 2. the sophistication and maturity of the juvenile; 3. the record and previous history of the juvenile; and 4. the prospects of adequate protection of the public and the likelihood of the rehabilitation of the juvenile by use of procedures, services, and facilities currently available to the juvenile court.” TEX. FAM. CODE ANN. §54.02(f) (West Supp. 2012).

“sophistication and maturity,” “the record and previous history of the juvenile,” and “the likelihood of rehabilitation” crucial to the decision of whether the welfare of society is best served by transferring a youth out of the juvenile system. TEX. FAM. CODE ANN. §54.02(f)(2), (3), (4) (West Supp. 2012). The law reflects the reality that, without strong protections in place prior to the approval of a waiver, children will unnecessarily suffer great harm in the adult criminal system and public safety will be undermined.

Recent case law from the Supreme Court reaffirms our common and growing understanding that children and adolescents differ from adults in significant respects. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012). While still accountable for their actions, juveniles are both less culpable for their offenses and more amenable to rehabilitation than adults. These two key characteristics of juveniles are fundamental to understanding why their offenses alone are not sufficient grounds for certification, but rather, a court must consider the §54.02(f) factors to make an informed and reasonable decision.

A. Juveniles Are Less Culpable Than Adults For Their Offenses

Juvenile offenders must be held accountable for their actions, but what the law has long recognized and what a well-established and growing body of research

affirms is that they are less culpable than adults for their offenses because of their youth. Just as we recognize and expect certain characteristics in young children—for instance a toddler’s temper tantrums or a preschooler’s incessant questions—we know that adolescence is a time of immaturity and heightened susceptibility to peer pressure. Because of their age, children also lack the ability to exert significant control over their environments, and are often powerless to extricate themselves from disturbing family situations or crime-ridden neighborhoods. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (holding that, due to the particular characteristics of youth, a mandatory sentence of life without parole for juveniles convicted of homicide violates the Eight Amendment). Juveniles’ environments, over which they have little control, often contribute to their criminality. *Ibid.* In *Roper v. Simmons*, the Supreme Court confirmed that juveniles lack maturity, have an underdeveloped sense of responsibility, and are more vulnerable to negative influences. 542 U.S. 551, 569-570 (2005); *see also Johnson v. Texas*, 509 U.S. 350, 367 (2005); *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982). Furthermore, these factors exist regardless of the specific crime committed by the juvenile and are relevant no matter how serious the offense. There is simply no reason why the understanding that juveniles are less culpable for their offenses than adults should vary based on the severity of their offense.

Expert research in developmental psychology and neuroscience has deepened our understanding of the unique features of adolescence. Just as the teenage body continues to grow and change throughout adolescence, so does the brain. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 *Am. Psychologist* 739, 742 (2009). Research has established “incontrovertible evidence of significant changes in brain structure and function during adolescence” which suggest a physiological basis for juvenile’s immaturity. *Ibid.* The most meaningful changes occur in the frontal lobes, areas of the brain responsible for functions such as planning, decision-making, judgment, evaluation of risk, and emotional and impulse control. *See* Brief for American Psychological Association et al. as *Amicus Curiae* in *Miller v. Alabama* at 26 (2012).

Four significant changes take place in the brain during adolescence. First, changes in the brain’s neurotransmitters influence the “reward-related regions” of the brain, leading to a spike in risk-seeking and peer-influenced behavior. Tamara Doremus-Fitzwater et al., *Motivational Systems in Adolescence: Possible Implications for Age Differences in Substance Abuse and Other Risk-Taking Behaviors*, 72 *Brain & Cognition* 114, 116 (2010). Second, during adolescence, the brain “prunes” a substantial number of unused synapses, which results in improved neural connections. B.J. Casey et al., *Structural and Functional Brain*

Development and its Relation to Cognitive Development, 54 *Biological Psychol.* 241, 242-243 (2000). This in turn improves executive functioning, such as planning and controlling inappropriate behavior. See Brief for American Psychological Association et al. as *Amicus Curiae* in *Miller v. Alabama* at 27. Third, a process called “myelination,” in which neural pathways are insulated with fatty tissue facilitating communication between different parts of the brain, is ongoing during adolescence into early adulthood. See Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23, 144 (2001); Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* at 743. Myelination influences facets of executive functioning such as “response inhibition, planning ahead, [and] weighing risks and rewards.” Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* at 743. Finally, well into late adolescence, the brain is improving its connections between and within cortical areas, a development that is crucial to emotional regulation. *Ibid.* This helps explain why adults are so much better at making “mature judgments related to risk and reward” and regulating their emotions, especially in socially-charged situations. Brief for American Psychological Association et al. as *Amicus Curiae* in *Miller v. Alabama* at 28; see also Jason Chein et al., *Peers Increase Adolescent Risk Taking By Enhancing Activity in the Brain’s Reward Circuitry*, 14 *Developmental Sci.* F1, F7-F8 (2011); Laurence Steinberg, A

Behavioral Scientist Looks at the Science of Adolescent Brain Development, 72 *Brain & Cognition* 160, 162 (2010). Thus the increase in reckless behavior, the vulnerability to peer pressure, and the lack of maturity that juveniles widely display, and which often influences their criminal behavior, has roots in the normal course of adolescent brain development. Crucially, these differences in the physiology of the adolescent brain exist regardless of the offense the juvenile has committed; they are part and parcel of the juvenile's status as a child. *See Graham*, 560 U.S. at 68.

B. Juveniles Are More Amenable To Rehabilitation Than Adults

Not only are juveniles recognized under the law and by developmental experts as less culpable for their offenses than adults, they are also known to be more amenable to rehabilitation. Even the most heinous crime committed by a juvenile is not necessarily evidence of an "irretrievably depraved character." *Roper*, 543 U.S. at 570. A function of youth is that juveniles' characters are less well-formed. *Ibid*. They are more malleable and capable of change than adults, and it is a mistake to conflate the character deficiencies of an adolescent with those of an adult, because it is much more likely that the adolescent's failings will be corrected with age. *Ibid*; *see also Graham*, 580 U.S. at 68; *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) (noting that "[i]ncorrigibility is inconsistent with youth"). A juvenile's offense is more likely to be attributable to

passing immaturity than entrenched criminality. *See Roper*, 543 U.S. at 572. Only a very small percentage of juvenile offenders continue to commit crimes into adulthood. Laurence Steinberg and Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014-1015 (2003). Importantly, this remains true even of juveniles who commit very serious crimes. Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 *Dev. & Psychopathology* 453, 468-470 (2010). A juvenile's antisocial behavior, even at an extreme level, is often simply an unfortunate manifestation of a normal and passing phase of immaturity and recklessness. *See Miller*, 132 S. Ct. at 2464; *Roper*, 543 U.S. at 570.

As detailed above, *supra* I.A., executive brain functioning continues to mature throughout adolescence. Adolescence is a time of “especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature.” Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development* at 162; *see also Graham*, 560 U.S. at 68 (recognizing that “parts of the brain involved in behavior control continue to mature through late adolescence”). As this maturation occurs, and neurological vulnerabilities of adolescence diminish, the prospect that the juvenile's failings

will be corrected increases. *Miller*, 132 S. Ct. at 2465. It is the rare juvenile offender for whom rehabilitation is not possible. *Id.* at 2464. Moreover, it is difficult for even experts to determine at the time of the offense which particular juveniles will be amenable to rehabilitation and which will never shed their penchant for criminality. *See Roper*, 543 U.S. at 572-573. Certainly, however, the juvenile court can only make an informed finding regarding the likelihood for rehabilitation with the benefit of expert testimony, which the State failed to provide here. *State v. Moon*, No. 01-10-00341-CR, 2013 WL 3894867 at *23-24.

C. Only Consideration Of The §54.02(f) Factors Allows The Court To Consider The Unique Characteristics Of The Juvenile

In crafting §54.02(f), the Legislature ensured that courts would consider the key characteristics of juveniles—their lessened culpability and their greater potential for rehabilitation, which exist regardless of the severity of their crime. Only by strict adherence to the protections of §54.02(f), including careful consideration of the juvenile’s “sophistication and maturity” and “likelihood for rehabilitation,” can a court make a determination that takes into account the status of the offender as a juvenile. It is crucial the court considers the circumstances and characteristics of the whole child before making a decision to transfer the youth, because as this court has noted, “[t]ransfer was intended to be used only in exceptional cases.” *Hidalgo v. State*, 983 S. W.2d 746, 754 (Tex. Crim. App.

1999). The purpose of adult certification is to separate those rare, serious juvenile offenders who are not amenable to rehabilitation from the vast majority of juveniles who may benefit from the services offered by the juvenile justice system. *Ibid.* As a class, juvenile offenders are both “most in need of and receptive to rehabilitation.” *Graham*, 560 U.S. at 74. However, transfer to the adult system substantially diminishes a juvenile’s prospects for rehabilitation, because the adult system is primarily focused on punishment and security. Robert Sanborn et al., CHILDREN AT RISK, *The State of Juvenile Justice in Texas* at 46 (2012). Therefore, the welfare of society is rarely, if ever, served by transferring a child out of the juvenile justice system. Moreover, certification has profound implications for the juvenile, making it essential that the court consider the mitigating attributes of youth. *See Johnson v. Texas*, 509 U.S. 350, 367 (1993). The “sophistication and maturity” and “likelihood of rehabilitation” of the juvenile are indispensable in assessing his culpability and the appropriateness of transfer. *See Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (noting that “just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered”). Both factors are complex determinations that juvenile courts cannot reliably make without the consideration of expert testimony, which was

sorely lacking in this case. *State v. Moon*, No. 01-10-00341-CR, 2013 WL 3894867 at *15-17.

II. Certification Must Remain Rare Because The Adult System Is Ill-Equipped To Deal With Juveniles

The ruling the State seeks, that transfer may be ordered based only on the seriousness of the crime, would erode the precautions the Legislature has put in place to ensure certification is reserved only for those infrequent cases where the youth is beyond the help of the juvenile justice system. Certification has serious consequences and must be used only in extraordinary circumstances because adult correctional facilities are not equipped to deal with adolescents. Not only do adult facilities lack the specialized programming that the juvenile system can provide, they are profoundly dangerous places for children.

A. Juveniles Certified As Adults Are Often Held In Solitary Confinement At Grave Cost To Their Mental Health

In Texas, as soon as a juvenile is certified as an adult, he or she may be housed in an adult facility, typically an adult county jail, awaiting trial. *See Michele Deitch, Juveniles in the Adult Criminal Justice System in Texas* at 1, THE UNIV. OF TEX. AT AUSTIN, LBJ SCHOOL OF PUBLIC AFFAIRS (2011). If convicted, the juvenile serves his or her entire sentence in an adult prison. *Ibid.* Adult county

jails are rarely equipped to house juveniles, and therefore youths are often held in administrative segregation for their own safety. Sanborn et al. at 36. This amounts to long term solitary confinement, as juveniles are held for up to 23 hours a day in a cell with no human interaction for as long as a year or more while they await trial. Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 8. As one would expect, this type of severe isolation has devastating effects on young people. Paranoia, anxiety and depression are common after just a short period of solitary confinement, and many youth experience suicidal thoughts and crushing mental agony. Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 8, 37; Sanborn et al. at 36. Because of their young age, juveniles seldom have the financial means of support to bail themselves out of jail, and therefore must endure these appalling conditions while still presumed innocent. Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 37. Furthermore, the lack of educational opportunities and programming, combined with the damage to their mental health, makes these juveniles much harder to rehabilitate when they are finally released from solitary confinement. See Sanborn et al. at 36; Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 37.

B. Juveniles Housed In Adult Facilities Suffer Alarming Rates of Physical and Sexual Abuse

As disturbing as the conditions in solitary confinement are, the alternative is just as troubling because adult prisons and jails are extremely dangerous places for children. Juveniles are subject to physical and sexual abuse at the hands of older prisoners at alarming rates due to their smaller size, lack of social networks to protect themselves, and susceptibility to intimidation. Michele Deitch, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System* at 55, THE UNIV. OF TEX. AT AUSTIN, LBJ SCHOOL OF PUBLIC AFFAIRS (2009). Research has shown juveniles in adult facilities to be 50% more likely to be attacked by fellow inmates with a weapon and five times more likely to be the victims of sexual abuse than youth in the juvenile justice system. *Ibid.* As one correctional officer put it, a juvenile in an adult prison “will get raped within the first twenty-four to forty-eight hours. That’s almost standard.” *Ibid.* This abuse has far-reaching consequences. Juveniles housed in adult facilities are 36% more likely to commit suicide than those in the juvenile justice system and display a greater propensity for subsequent violence than youth not housed with adults. Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 6-7. The psychological effects of the abuse juveniles so often endure while incarcerated with adult prisoners greatly diminishes their chances of successful reintegration with society upon release.

Deitch, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System* at 56.

C. Adult Facilities Lack The Rehabilitative Programming The Juvenile Justice System Provides

Apart from the inherent dangers of adult prisons and jails for juveniles, adult facilities do not have the educational, therapeutic, and recreational programming that the juvenile justice system can provide. The primary mission of the Texas Department of Criminal Justice (TDCJ) is security, not rehabilitation, in stark contrast to the juvenile justice system. Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 33. The TDCJ does offer the Youthful Offender Program (YOP), a specialized treatment program for juveniles housed in the adult prison. Sanborn et al. at 46. However, due to capacity limitations and other issues, the YOP only holds 68% of the eligible youth population. Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at xi. Juveniles who do not participate in the YOP are often held in solitary confinement for their own protection, rather than be housed with the general adult prison population. Sanborn et al. at 46. Furthermore, while the TDCJ attempts to provide age-appropriate programming through the YOP, only 38% of juveniles in the TDCJ are enrolled in educational classes, compared to 96% of juveniles in the juvenile justice system. Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 25-26. Juveniles in the

TDCJ also do not receive adequate vocational or recreational programming because of the difficulty in scheduling such programming while keeping them separated from the adult prisoners. *Id.* at 26. Finally, the TDCJ staff is not trained to care for children, and cannot adequately attend to the physical, emotional, social and safety needs of juvenile inmates. Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 36. The lack of rehabilitative programming for juveniles in adult prisons is reflected in a higher rate of recidivism for these youth compared with their counterparts in juvenile facilities, creating a risk to public safety. *Id.* at 33. National data has revealed that youth who spend a year or more incarcerated in an adult facility have a 100% higher rate of violent recidivism than youth held in juvenile facilities. *Ibid.*

In contrast to the TDCJ, the Texas Juvenile Justice Department (TJJD) offers extensive educational, vocational, therapeutic, and recreational opportunities, in a youth-only environment dedicated to rehabilitation. *See* Sanborn et al. at 49-51; Deitch, *Juveniles in the Adult Criminal Justice System in Texas* at 28-29. TJJD offers juvenile offenders the opportunity to earn either a high school diploma or a GED, as well as a chance to earn college credits. Sanborn et al. at 49. Juveniles at the TJJD's Giddings State School can choose from at least ten different vocational programs, such as Computer Applications, Welding, and Auto Collision Repair. *Ibid.* Youth who participate in Project Rio-Y

at Giddings may even go so far as to secure employment prior to their release through a partnership the TJJD has with the Texas Workforce Commission. *Ibid.* Finally, youth in the TJJD have the opportunity to participate in positive recreational activities, including football and basketball teams. *Ibid.* The rehabilitative programming and specially trained staff at the TJJD helps juveniles prepare for a successful reintegration into society upon their release.

D. Certification Must Be Limited To Those Rare Juveniles Who Are Beyond Rehabilitation, Which Is Impossible To Determine From Consideration Of Their Crime Alone

As this court has held, the certification of juveniles as adults should be reserved for only truly exceptional cases. *Hidalgo*, 983 S. W.2d at 754. Juveniles housed in adult prisons and jails face very real dangers and serious obstacles to rehabilitation, and therefore transfer is rarely, if ever, in the interest of public safety. Consideration of the crime alone cannot be sufficient grounds upon which a court can make this decision, because the facts of the crime do not reveal anything about the juvenile's capacity for rehabilitation, or the extent to which their culpability should be reduced based on their youth. Only full consideration of the TEX. FAM. CODE §54.02(f) factors allows a court to take into account the characteristics of the offender as a child and make a decision that protects the welfare of society.

Conclusion

For the reasons stated above, *Amicus* respectfully requests that the court affirm the judgment below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief meets the technical rules promulgated by the Texas Court of Criminal Appeals. This brief conforms to all page and word formulations set forth by this Court, and has a word count of 4,282 words based upon the representation provided by the word processing program that was used to create the document.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Amicus Brief on behalf of CHILDREN AT RISK was forwarded to all parties in compliance with TEX. CODE CRIM. PROC. art. 44.33(a), on this the 24th day of March, 2014.

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