

*The Implications of  
Ex Parte Thomas on  
Certifications in Texas*

# Circumnavigating Moon



**LONE STAR**  
JUSTICE ALLIANCE



## Objective

To explore the implications of *Ex Parte Thomas* on *Moon* and certification case law in Texas.





## Circumnavigate

Defined...

- To proceed completely around; to maneuver around.



# Kent v. United States

383 U.S. 541, 556 (1966).

In *Kent v. United States*, the United States Supreme Court established that the waiver of juvenile court jurisdiction represents a “critically important’ action determining vitally important statutory rights of the juvenile.” 383 U.S. 541, 556 (1966).

- The juvenile was therefore entitled, under the Due Process clause, to a “**full investigation**” during transfer proceedings, as well as the opportunity to be heard, representation by Counsel, access to social records, and a **statement of reasons to accompany any transfer order.**

# Kent v. United States 383 U.S. 541 (1966).

Argued: January 19, 1966  
Decided: March 21, 1966  
Decision: 5 to 4  
Court: Warren Court  
Majority: Fortas  
Warren, Douglas, Clark, Brennan  
Dissent: Stewart  
Concur/Dissent: Black, Harlan, White  
Oral Argument: Myron G. Ehrlich





## Texas Adopts *Kent* Into Statute

In 1973, the Texas Legislature enacted Title 3 of the Family Code. Among the enacted provisions dealing with the transfer of juveniles to criminal court was Section 54.02(h):

- "If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action..."
- The Legislature also provided immediate appellate review in civil court until 1995 – after which juveniles could complain about their certification only after they had been convicted as an adult, in conjunction with their direct appeal.

## What happens in the next 60 years?

- Other State legislatures adopt Kent in statute
- The vast majority prescribe broad standards, factors to be considered, procedures to be followed, and shift the burden to the prosecution to prove waiver is appropriate
- The Texas Family Code would seem to suggest that Texas did the same, but the way the statutes were interpreted by the courts left them toothless.
- Often the juvenile court performs a boilerplate recitation of the 54.02(f) factors in the transfer order without any discussion of underlying facts

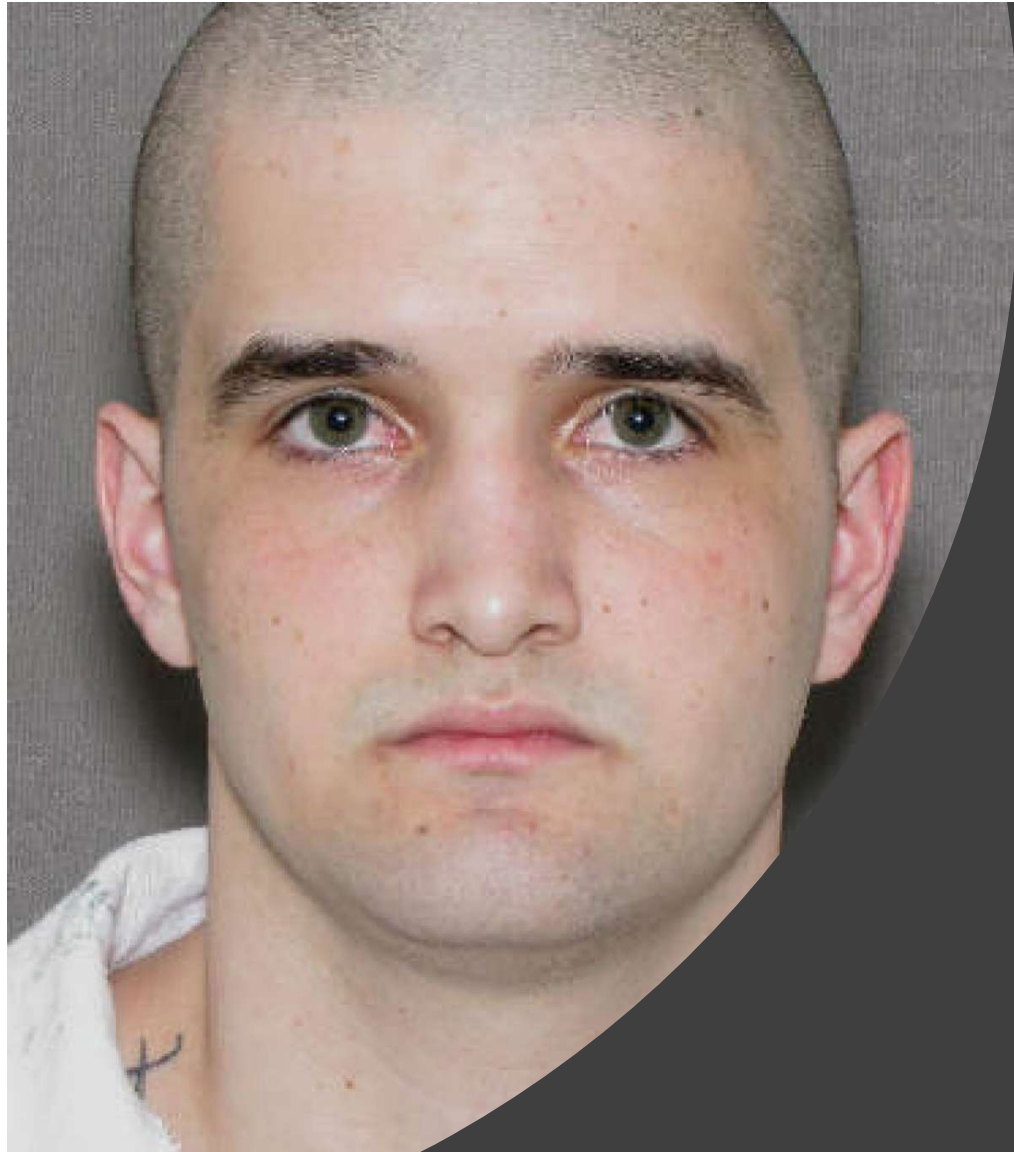


## Moon v. State

451 S.W.3d 28 (Tex. Crim. App. 2014).

- Cameron Moon faced 30 years in prison for the 2008 drug-related shooting and murder of Christopher Seabreak. After spending six years behind bars, Moon's conviction was **overturned**.
- In 2014, Texas Criminal Court of Appeals ruled that the juvenile **court erred in failing to conduct an individualized assessment** of the 16-year-old's circumstances before ordering that the youth be tried as an adult.
- Moreover, it opined that the juvenile **court must 'show its work'** in the transfer order.





## Cameron Moon

*Moon v. State* was the first certification overturned in a quarter-century in Texas and signaled a change in how courts and lawmakers should deal with juveniles charged with serious crimes. (2014)

*Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014) (overruled by *Ex Parte Thomas*, 623 S.W.3d 370 (Tex. Crim. App. 2021), reh'g denied (June 23, 2021)).



## After Moon...

### 2015 Legislative Reform

- Repealed Art. 44.47, CCP and conferred the right to **interlocutory appeal** of certifications under Sec. 56.01.
- Required certification appeals to be given **priority and expedited** under Tex. Sup. Ct. rules.
- Clarified that the juvenile court must conduct an **individualized assessment** of the statutory factors under 54.02(f) and **document the reasons** for certification in its order.



# Raising Moon *and related issues*

<b>Issue</b>	<b>Number of Times Raised</b>
54.02(f)(1)/ Moon <i>Greater weight to offenses against person over property</i>	3
54.02(f)(2)/ Moon <i>Sophistication and maturity of the child</i>	8
54.02(f)(3)/Moon <i>Record and previous history of the child</i>	5
54.02(f)(4)/ Moon <i>Prospect for public safety and rehabilitation of child</i>	14
54.02(f)(1)-(4) <i>All 4 issues</i>	33
54.02(f)(1)-(4) <i>Sufficient case-specific findings to support its waiver</i>	24



## Ex Parte Thomas

*Ex parte Thomas*, 623 S.W.3d 370 (Tex. Crim. App. 2021).

- Steven Thomas, committed capital murder at age 16. At 19, the juvenile court waived jurisdiction and transferred the case to the district court. Thomas pled guilty to the lesser charge of murder.
- After the ruling in *Moon*, Thomas appealed arguing that the juvenile court's failure to satisfy the requirements set out in *Moon* rendered the entire criminal proceeding void because the district court never had jurisdiction over him.
- The Texas CCA overruled *Moon* in *Ex parte Steven Thomas*, holding that "factually-supported, case-specific findings in the transfer order are **not required by the statute** to bestow jurisdiction or the constitution as a matter of fundamental, constitutional due process."



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## So, What Is Left of Moon?

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### *Nothing?* Really?

- The CCA opined that Moon was flawed from the outset, stating:
  - Neither the statute's text nor the Supreme Court's holding in Kent justified the Moon conclusion.
  - It was an unjustifiable, **court-created expansion**. ...It places unnecessary burdens on the system because individual sufficiency review of each factor can lead to internally inconsistent analysis of the reasons for transfer



## Ex Parte Navarro

538 S.W.3d 608, 613 (Tex. Crim. App. 2018)

- Notably, the court did not purport to overrule *Ex Parte Navarro* which held that:

In *Kent*, the Supreme Court held that due process requires juvenile courts to include within their juvenile-transfer orders “a statement of the reasons or considerations therefor” for waiving exclusive jurisdiction. *Id.*

The statement need not necessarily be formal or include “conventional findings of fact,” but *it must be sufficient to demonstrate that a full investigation has occurred, demonstrate that the waiver question was carefully considered by the juvenile court, and “set forth the basis for the order with sufficient specificity to permit meaningful review.”*

- Six of the Judges who joined in *Thomas*, also joined in *Navarro*.



# Supreme Court and the Court of Criminal Appeals

## *Sister Courts at Odds*

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*Ex Parte Thomas* case creates issues for juvenile law practitioners:

- A potential split on this issue within Texas between the CCA and the Tex. Sup. Ct.
- A lack of clear guidance as to the minimal due process and statutory standards a trial court must meet before surrendering its jurisdiction to an adult criminal court

Amici Curiae Brief of the Texas Criminal Defense Lawyers Association and Harris County Criminal Defense Lawyers, Accepted May 3, 2021





**In the Wake of Ex Parte  
Thomas**





## Matter of J.R.

*Matter of J.R.*, 05-20-00920-CV, 2021 WL 777090 (Tex. App.—Dallas Mar. 1, 2021).

- J.R. was involved with a drive-by shooting at the age of 16. The juvenile court certified him to stand trial as an adult, a decision he appealed.
- J.R. appealed on the basis that the **transfer order lacked specificity** because it **failed to include mitigating factors** and that the evidence was **factually insufficient to support a transfer**.
- J.R. lost his appeal before the 5th Court of Appeals, and sought rehearing en banc, which he also subsequently lost.

# Quotes from the Dissent of JR

## **J.R. v. State, 624 S.W.3d 851, 854 (Tex. App.—Dallas 2021, no pet.)**

In a compelling dissent opinion on the motion for en banc reconsideration, Justice Schenck argued that "[t]he question is ...

- what findings are necessary for the court to explain its reasons;
- whether the court can exercise discretion to remand when presented with a minimal justification of the result *but...*
- does not acknowledge competing evidence or attempt any explanation for weighing.

For Justice Schenk and dissenting judges...

### **The better practice --**

- provide a broad review on direct appeal;
- allow the reviewing court to insist on a record that affords a meaningful appellate review;
- require the juvenile court to explain how it got to the conclusion it did, not just cite the facts in support of its ultimate determination;

\*Pending reconsideration for petition for review before the Supreme Court.

**Failing to do so** may leave convictions after transfer vulnerable to collateral attack." *Id.* at 855.



## Matter of A.K.

2021 WL 1803774 (Tex.App.-Fort Worth, 2021, pet. filed).

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- A.K. was involved in an armed robbery which culminated in a homicide at the age of 14. The juvenile court certified him to stand trial as an adult, but the case was reversed on appeal due to insufficient evidence.
- The State must persuade the juvenile court by a **preponderance of the evidence that the community's welfare requires the transfer**, either because of the seriousness of the offense or the child's background, or both.
- On remand, the juvenile court again waived jurisdiction over A.K. Matter of A.K. II at \*23. A.K. appealed to the Court of Appeals and ultimately petitioned the Texas Supreme Court, but lost at each stage.



## Matter of Z.T.

*In re Z.T.*, 05-21-00138-CV (Tex. App. Aug. 17, 2021)

- Z.T. was 16 years old at the time she was allegedly involved in an armed robbery that escalated to a homicide with two adult co-defendants. Only months before turning age 18, her case was transferred to criminal district court for trial as an adult.
- Z.T. challenged the waiver of jurisdiction contending that the juvenile court:
  - failed to specifically explain its reasons for granting the transfer
  - failed to consider all the evidence
  - failed to admit critical evidence at the hearing,
  - based its decision on an improper factor, and
  - erroneously concluded that Z.T. was sufficiently sophisticated and mature to be transferred.



## Matter of Z.T.

*In re Z.T.*, 05-21-00138-CV (Tex. App. Aug. 17, 2021)

*Can the court conduct an adequate review without a discussion of the factors in Sec. 54.02 or competing evidence that weighs against transfer?*

- In Z.T.'s case, the Court of Appeals applied a standard of review that allowed it to review the entire record and then speculate as to why the juvenile court weighed the evidence as it did.
- The Court did not consider that the juvenile court:
  - excluded evidence of Z.T.'s own victimization at the hands of her alleged co-defendant and sex trafficker, and
  - ignored testimony from both the State's mental health expert and other experts on sex trafficking, indicating that Z.T. was only at the scene because she was there to be sold for sex.



## Matter of Z.T.

*In re Z.T.*, 05-21-00138-CV (Tex. App. Aug. 17, 2021)

The Fifth Court of Appeals AFFIRMED the juvenile court's order citing *Ex Parte Thomas*.

The court found that it was “unnecessary for the [juvenile] court to ‘show its work’ by including case-specific findings in the transfer order.”

**Z.T. APPEALS TO THE TEXAS SUPREME COURT**, LSJA’s Counsel for *Z.T.* contend that this was not sufficient under *Kent* and amounts to the very type of speculation that concerned the original *Moon* court.

*\*\*Supreme Court has asked the State to respond. Due December 20, 2021.*



Official  
Transcript

## Lingering Issue

**If the appellate courts are allowed to look beyond the order, then what happens when the record is not complete?**

Rule 34.6(f) states that an appellant is entitled to a new trial under the following circumstances;

- (1) if the appellant has timely requested a reporter's record;
- (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or – if the proceedings were electronically recorded – a significant portion of the recording has been lost or destroyed or is inaudible;
- (3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; and
- (4) if the lost, destroyed or inaudible portion of the reporter's record cannot be replaced by agreement of the parties, or the lost or destroyed exhibit cannot be replaced either by agreement of the parties or with a copy determined by the trial court to accurately duplicate with reasonable certainty the original exhibit.

# 8

*Prohibition Against Cruel & Unusual Punishment.* Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted**



*Miller v. Alabama (2012), Montgomery v. Louisiana (2016), and Jones v. Mississippi (2021)*

The U.S. Supreme Court establishes and upholds the fact that “children are constitutionally different from adults in their levels of culpability” when it comes to sentencing.



# Jones v. Mississippi

141 S. Ct. 1307 (2021).


- In 2021, the Supreme Court held that *Miller*, which prohibits the imposition of life without parole without the consideration of individual factors of youth, does not require a specific finding of incorrigibility and lack of amenability to rehabilitation but **states may continue to require such explicit findings.**



# Kent, Miller, and Jones

- An argument can be made that the Supreme Court's developmental jurisprudence also supports the right to an **individualized determination using the *Miller* factors** prior to transfer to adult court.
- Under this theory, statutory schemes that permit transfer to adult court must begin the process of **evaluating whether a particular youth is the "rare offender"** that requires an exceptional sentence.





## Rare Offender Exceptional Sentence

- The severest punishment must be reserved for the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.

*Montgomery*

- Adolescence is marked by “immaturity, impetuosity, and failure to appreciate risks and consequences” all factors that limit an adolescent’s ability to make sound judgments.

*J. Kagan in Miller.*

## Defending Youth Against Certification

*We can help!*

The Lone Star Justice Alliance and its national partners may be willing to provide amicus support in your juvenile case.

If you have a novel issue of law related to certification or transfer, please reach out to me at [ehenneke@lsja.org](mailto:ehenneke@lsja.org).



“O, swear not by the moon, the  
inconstant moon, that monthly  
changes in her circled orb....”

*William Shakespeare*





*Questions?*

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