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APPELLATE CASE NO. 01-15-01025-CV
REPORTER'S RECORD
VOLUME 2 OF 5 VOLUMES
CAUSE NO. 2012-00331J

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS

IN THE MATTER OF * IN THE DISTRICT COURT OF
* CHRISTOPHER A. PRINE
JORGE GUERRERO * HARRIS COUNTY, TEXAS
*
A CHILD * 314TH JUDICIAL DISTRICT

CERTIFICATION HEARING

On the 2nd day of November, 2015 the following
proceedings came on to be heard in the above-entitled
numbered cause before the Honorable John Phillips, Judge
presiding, held in Houston, Harris County, Texas.

Proceedings reported by Computerized Stenographic
Machine Method.

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VOLUME 2
(CERTIFICATION HEARING)

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1 P R O C E E D I N G S

2 MR. NIELSEN: This is petition number
3 2012-00331J, third amended, in the matter of Jorge Guerrero.
4 Representing the State of Texas for the petitioner is Hans
5 Nielsen. Respondent's attorney Dena Fisher is here along
6 with respondent, respondent's mother; is that correct?

7 MS. FISHER: And step mother.

8 MR. NIELSEN: And step mother. Before we
9 proceed, Judge, before we call the first witness, I just
10 want to offer into evidence several exhibits. P1, P2, P3,
11 P4, P5, P6 and P7. P1 is date of birth stipulation, Judge.
12 P2 is the most recent probation report in the case. P3 is
13 the first initial order to waive jurisdiction that was filed
14 in the 314th District Court. I don't have the date on that.

15 THE COURT: Okay.

16 MR. NIELSEN: P4 is the indictment out of the
17 338th District Court that was issued on October 12th, 2012.
18 P5 is the plea paperwork in which the respondent, when he
19 was the defendant in the 338th, pled guilty without an
20 agreed recommendation to the Court P.S.I. P6 is the
21 judgment in the case in which the respondent, defendant at
22 the time, received an eight year T.D.C. sentence. P7,
23 Judge, is the 14th Court of Appeal's opinion that was filed
24 December 23rd, 2014.

25 I'd also ask that the Court allow the clerks to

1 make a certified copy of what I'm gonna label as P8, which
2 is a copy of the proof of service of the respondent in the
3 third amended petition and I would label that P8. So if the
4 clerks could actually -- I'm not sure if we have a clerk
5 right here or not, Judge.

6 (Whereupon Petitioner's Exhibit Nos. 1 thru 8 are
7 offered into evidence.)

8 COURT REPORTER: She just walked in the back
9 right now.

10 THE COURT: Would you get Stephanie? Okay.

11 MR. NIELSEN: If we could have that
12 document --

13 THE COURT: Okay. Which document do you
14 need?

15 MR. NIELSEN: It's actually in the Court's
16 file. It was pulled out right here.

17 THE COURT: I don't know what she needs.

18 MR. NIELSEN: This is the proof of service of
19 the petition and summons.

20 THE COURT: And what did you want her to do?

21 MR. NIELSEN: If she could make a certified
22 copy of that and that could be introduced as P8, Judge.

23 THE COURT: Okay.

24 MR. NIELSEN: And then we could call our only
25 witness at this time, Judge, which is Officer Elder.

1 MS. FISHER: Judge, if I may. I reviewed
2 those, I have no objection to them. And Cheri Duncan with
3 the Public Defender's Office is to my left who handled the
4 appeal on this and she's also present.

5 (Whereupon Petitioner's Exhibit Nos. 1 thru 8 are
6 admitted into evidence.)

7 MR. NIELSEN: May we proceed?

8 THE COURT: Yeah.

9 CHRISTOPHER ELDER

10 Having first been duly sworn, testified as
11 follows:

12 D I R E C T E X A M I N A T I O N

13 BY MR. NIELSEN:

14 Q Would you tell the Judge your name, sir.

15 A My name's Christopher Elder.

16 Q And where do you work, sir?

17 A I work Houston Police Department, homicide
18 division.

19 Q And how long have you been a Houston Police
20 Department officer?

21 A Been a Houston Police Department officer for about
22 four and a half years.

23 Q And prior to being in the homicide division, were
24 you assigned anywhere else?

25 A I was originally assigned to midwest patrol where

1 I completed my field training and then my patrol time. From
2 there, I went to the investigator first responder division
3 over in southeast and then I transferred over to homicide.

4 Q Now back in January 11th of 2012, you were in
5 patrol division; is that correct?

6 A Yes, I was.

7 Q Okay. And back on that date, you were, you were
8 on duty, I presume at around 10:30 in the evening; is that
9 correct?

10 A Yes, sir.

11 Q All right. And first, so we're clear on this, you
12 have previously testified in this -- in a hearing against
13 Mr. Guerrero in this Court several years ago, correct?

14 A No, I have not.

15 Q You were not --

16 A I was not the witness.

17 Q Okay. Just so we're clear, you were not the
18 witness but you were involved in this offense; is that
19 correct?

20 A Yes, I was.

21 Q Okay. Now back on that date, were you working
22 with a partner that day in a, in a vehicle or were you
23 alone?

24 A I was working with a partner that day.

25 Q Okay. And since you were a patrol officer, I

1 assume you were in uniform, correct?

2 A Yes, sir.

3 Q And did you, did you and your partner respond to
4 an incident that occurred or had occurred in the City of
5 Houston?

6 A Yes, sir.

7 Q Where did that incident occur?

8 A It happened approximately the 2000 block of South
9 Gessner.

10 Q Okay. Is that a location in Harris County, Texas?

11 A It is a location in Harris County, Texas, yes.

12 Q Did you meet up with an individual by the name of
13 Antonio Duran?

14 A Yes, I did.

15 Q Did you later determine that he was your
16 complainant or your victim in this case?

17 A Yes, sir.

18 Q And when you talked to him, did you determine,
19 based on your interview with him and also from the
20 information you received from your regular dispatcher, that
21 this was an aggravated robbery call?

22 A Yes, sir.

23 Q All right. How long after the incident occurred
24 did you arrive, approximately?

25 A I don't remember the exact time we were

1 dispatched.

2 Q Well let me ask you this. What was the
3 approximate time of the offense according to the report?

4 A Approximately 10:30.

5 Q Okay. And did you all arrive within a short
6 period of time or a long period of time?

7 A It was a short period of time.

8 Q Within a few minutes?

9 A Within a few minutes.

10 Q Okay. When you arrived, what was the location?
11 You mentioned the address but what was this, was this a
12 business?

13 A It was an apartment complex.

14 Q Okay. And did you go to a particular unit or did
15 you go to a parking lot area?

16 A It was a parking lot area outside of a building.
17 I'm not sure of the building name offhand.

18 Q Okay. And did you meet up with Antonio Duran?

19 A Yes, I did.

20 Q Were there also two other individuals with him?

21 A There were two other females with him, yes, sir.

22 Q Okay. And Mr. Duran, at the time, he was a 23
23 year old white male; is that correct?

24 A Yes.

25 Q And did you talk to Mr. Duran --

1 A Yes, I did.

2 Q -- and discuss what happened?

3 A Yes, I did.

4 Q Did he indicate to you what happened? First of
5 all, why he was there at that apartment complex at the time?

6 A I'm not sure if he lived there or if he was just
7 visiting friends.

8 Q But he was there?

9 A He was there, yes, sir.

10 Q Okay. He was there on some sort of business that
11 it wasn't -- this wasn't a location that he didn't have
12 anything to do with, correct?

13 A Correct.

14 Q Okay. How did he say he got there? Did he walk
15 there? Did he have a vehicle?

16 A He drove there.

17 Q Okay. And what did he say happened when he got to
18 the apartment complex?

19 A He said he was arriving at the apartment complex,
20 there was a car blocking the gate and he had honked his horn
21 and got out and asked him to move their car so he could pull
22 in. So the vehicle backed up, allowed him to get in. As he
23 drove forward, he parked in a parking space, that's when the
24 defendant came out with another male, pointed a gun at his
25 face.

1 Q Okay.

2 A Or pointed a gun at him while he was turned around
3 and said, don't turn around until we leave. Just give me
4 everything you have.

5 Q Let me stop you and break you up a little bit.
6 You said the defendant. Obviously in the adult court, he's
7 a defendant. In the juvenile court, he's a respondent. So
8 we can clear this up, do you see the individual who was
9 later arrested and identified by the victim in this case
10 here in the courtroom today?

11 A Yes, I do.

12 Q Could you point to him and identify something he
13 is wearing today?

14 A He's wearing a white shirt and blue jeans.

15 Q Okay.

16 MR. NIELSEN: At this time, Your Honor, I'd
17 ask that the Court note that the witness has identified the
18 respondent in this case.

19 THE COURT: All right.

20 Q (By Mr. Nielsen) Before we get to that
21 point, did he indicate to you that the respondent
22 had a firearm, a weapon pointed at him?

23 A I don't believe -- I'm not sure if it was the
24 respondent or the -- or another individual who had a gun.

25 Q But one of the individuals --

1 A One of the individuals did, yes.

2 Q -- pointed a firearm; is that correct?

3 A Yes, sir.

4 Q Was it identified as like a rifle, shotgun,
5 handgun? What kind of weapon was it described to you as?

6 A I believe it was either a handgun or a rifle -- or
7 not a rifle, a revolver.

8 Q Okay. Did -- what happened after the weapon was
9 pointed at him?

10 A After the weapon was pointed at him, he was told,
11 give me everything you have in your car. Don't look at me
12 until we drive away.

13 Q Okay. Did he indicate that the -- well did he
14 indicate that there were more than two individuals involved
15 in this robbery?

16 A I believe it was just --

17 Q Just the two?

18 A -- two that he said.

19 Q Okay.

20 A Yes.

21 Q And did he indicate to you that the respondent
22 who's here was an active participant in this offense?

23 A Yes.

24 Q Okay. What happened after they demanded his
25 property, what did the individuals do?

1 A After they demanded his property, they got in
2 their car and they drove away.

3 Q Okay. Did they -- did they take his car at all?
4 If you know.

5 A I don't recall if they did or not. Okay. I tell
6 you what. Why don't -- go ahead. You have a copy of the
7 report?

8 A Yes, sir.

9 Q Just so we're clear. Let me move on.

10 A No. He didn't steal the car.

11 Q All right. I just want to make it clear to the
12 Court. When the property was taken though, they left in
13 their vehicle; is that correct?

14 A That's correct.

15 Q Was a description given of that particular
16 vehicle?

17 A It was a --

18 Q In other words --

19 A Yes.

20 Q -- did the victim --

21 A Yes.

22 Q The victim gave a description and that description
23 was of what type of vehicle?

24 A It was a, it was a blue or blue green Honda
25 Accord, older model.

1 Q Okay. A Honda make on the vehicle?

2 A Honda make.

3 Q Okay. And did that vehicle then get -- that
4 information about that vehicle get broadcast by you and
5 other officer, your partner, to the radio dispatcher to
6 be -- further officers to be on the look out for it?

7 A Yes, it did.

8 Q Okay. And was that vehicle later observed by
9 another officer, an Officer Gerard?

10 A Yes, it was.

11 Q Okay. And did that officer actually observe that
12 vehicle in a nearby location not too far away from where
13 this robbery occurred?

14 A That's correct.

15 Q And before I go any further, let me ask you. Did
16 the victim in this case, did he indicate to you that he was
17 in fear for his life as a result of the actions of the
18 respondent and the other individual in this case?

19 A Yes, he did.

20 Q Okay. Did he indicate to you that he felt that
21 the weapon that was pointed at him was actually a firearm?

22 A Yes, he did.

23 Q Okay. Based on your training and experience, did
24 you come to the conclusion that it was a firearm and it was
25 a deadly weapon?

1 A Yes.

2 Q Okay. Now Officer Gerard wrote a supplement to
3 this report; is that correct?

4 A Yes, he did.

5 Q And I believe he was working extra employment at a
6 nearby location, correct?

7 A Yes, sir.

8 Q 6550 Hillcroft.

9 A Yes, sir.

10 Q How far away was that from this location where
11 this robbery was?

12 A Approximately six or seven miles away.

13 Q Okay. And did he indicate that he actually
14 observed the vehicle that was involved in your offense at
15 the location?

16 A Yes, sir.

17 Q Okay. And did he indicate that he -- that he
18 observed two individuals robbing a complainant or
19 complainants at that location?

20 A Yes, he did.

21 Q And what did he indicate he tried to do? Did he
22 attempt to arrest them or do anything with them?

23 A He attempted to stop the robbery or apprehend the
24 suspects but they ran away and they were able to get into
25 their vehicle.

1 Q Okay. And when they got in their vehicle, did a
2 pursuit occur of that vehicle?

3 A Yes, it did.

4 Q And what happened in that pursuit?

5 A During the pursuit, the vehicle eventually crashed
6 at a nearby apartment complex.

7 Q Okay. And how -- do you know how far that pursuit
8 was and approximately how long it was? In other words was
9 it --

10 A Just a couple minutes, from what I remember.

11 Q Okay. Did it involve several blocks as far as you
12 know?

13 A I'm not sure how many blocks.

14 Q Okay. But in any event, the vehicle that was --
15 that the officers were following, lost -- the driver lost
16 control and the vehicle crashed; is that correct?

17 A Exactly. Yes.

18 Q Into an apartment complex?

19 A Into an apartment complex.

20 Q Did you arrive at the apartment, that location,
21 that apartment complex and see the accident scene?

22 A Yes, I did.

23 Q And was the apartment complex damaged as a result
24 of this crash?

25 A I believe it was a building that was damaged. I'm

1 not sure if it was a building or the apartment sign.

2 Q But in any event, did -- were you informed as to
3 who the -- who the driver of the vehicle was during the
4 chase?

5 A Yes.

6 Q And who was it?

7 A The respondent.

8 Q Okay. The juvenile respondent in this case?

9 A Yes.

10 Q Okay. Did you make any attempts to see if the
11 victim in your case could possibly identify the respondent?

12 A I did.

13 Q And what did you do?

14 A I called him and informed him of the location of
15 the vehicle and that we had found his belongings and asked
16 him if he could meet him at the scene for a show-up.

17 Q All right. And how long after the offense
18 occurred, as you say around 10:30, did the show-up occur?

19 A Less than two hours.

20 Q Okay. And when it occurred, did -- was -- were
21 you involved in the procedure in which he was asked to see
22 if he could identify the respondent?

23 A Yes, I was.

24 Q Okay. Did you suggest in any way that this was
25 the person who had robbed him?

1 A No.

2 Q Did you give him an opportunity to look at the
3 respondent in some manner?

4 A Yes, I did.

5 Q How did you do that?

6 A I kept him in the back of the patrol vehicle, we
7 brought the respondent out, put a spotlight on him so he
8 could see his face more clearly in the dark and he
9 positively identified him.

10 Q Okay. And the victim in the case, Antonio Duran
11 he was a Hispanic male; is that correct?

12 A Yes.

13 Q And obviously the respondent in this case was a
14 Hispanic; is that correct?

15 A Yes.

16 Q Did the complainant Mr. Duran, did he have any
17 problem identifying the respondent as the person who robbed
18 him?

19 A No.

20 Q Okay. And when he identified him, would you say
21 that his identification was positive?

22 A Yes, it was positive.

23 Q Okay. You also mentioned something about the
24 victim's property. What would -- what can you tell the
25 Court about the property of the victim that you were just

1 testifying to?

2 A He told me he had a Play Station Three that was
3 taken, couple movies that he named, a Tommy Hilfiger bag.

4 Q Okay.

5 A And that's all I can remember offhand.

6 Q Okay. If you look in the report, did you also
7 note that there was -- that that property was recovered from
8 the vehicle?

9 A Yes, it was.

10 Q Okay. Now there was another suspect, a suspect
11 named Ramos who was arrested; is that correct?

12 A Yes, it was.

13 Q And he was in -- at that time, he was arrested and
14 he was also identified; is that correct?

15 A Yes, he was.

16 Q Okay. His name was Rigoberto Ramos, correct?

17 A Yes, sir.

18 Q And he was an adult at the time?

19 A At the time, yes, he was.

20 Q Twenty years of age?

21 A Twenty.

22 Q All right. And when Mr. Ramos was arrested, was
23 there a pistol recovered on him? If you know.

24 A I don't know if there was or not.

25 Q Okay. In the property recovered though, in this

1 case, was there a pistol that was recovered as part of all
2 the property?

3 A Let me check.

4 Q Let me show you what's been marked -- I'm sorry.
5 What's -- part of the police report here. You might have a
6 different.

7 A Yes. There was a pistol that was recovered.

8 Q Okay. And it was recovered -- in fairness to the
9 respondent, it was recovered on suspect Ramos; is that
10 correct?

11 A Yes.

12 Q Okay. Now as far as property though, there was
13 property from the robbery that Officer Gerard witnessed that
14 was recovered; is that correct?

15 A Yes, it was.

16 Q So there were actually -- the robbery that
17 occurred that you were investigating happened prior to the
18 second robbery that Officer Gerard witnessed; is that
19 correct?

20 A Yes.

21 Q All right. And you didn't have anything to do
22 with investigating that case, correct?

23 A No, I did not.

24 Q All right. The -- as far as the property that was
25 recovered and you do have -- you have a notation in your

1 police report as to what all the different property items
2 that were recovered in this case, correct?

3 A Yes, I do.

4 Q Okay. It included a Play Station which was worth
5 approximately \$300; is that correct?

6 A That's correct.

7 Q Some -- a movie or couple of DVD movies; is that
8 correct?

9 A That's correct.

10 Q And a duffle bag, gym bag; is that correct?

11 A That's correct.

12 Q A driver's license and wallet; is that correct?

13 A That's correct.

14 Q Who's driver's license and wallet was that?

15 A The complainant.

16 Q Your complainant; is that correct?

17 A Correct.

18 Q And also a social security card?

19 A Yes.

20 Q Furthermore, was there an American Express credit
21 card?

22 A Yes, sir.

23 Q And also a Samsung telephone?

24 A Yes.

25 Q And then also a particular video game; is that

1 correct?

2 A Yes, there was.

3 Q Okay. And several of those items were from --
4 were items that were stolen from your victim; is that
5 correct?

6 A Yes, sir.

7 Q All right. I believe I asked you if this location
8 where your offense occurred and also where he was -- where
9 the respondent was arrested after the chase, was the -- was
10 in Harris County, correct?

11 A Yes, sir.

12 Q All right. And furthermore, when the respondent
13 was involved in the chase in the vehicle, did, did you all
14 note that he was injured at all in this? Did he have to be
15 hospitalized afterwards?

16 A He did have a head injury. We did have EMS come
17 check him out. I don't believe offhand if he was
18 transported or not.

19 Q Okay. But in any event --

20 A He was treated on the scene at least.

21 Q Okay. And then he was arrested and charged with
22 this aggravated robbery; is that correct?

23 A Yes, sir.

24 Q And you were involved in the filing of that
25 particular juvenile charge against Mr. Guerrero, correct?

1 A Yes, I was.

2 Q Were you also involved in booking him into the
3 juvenile detention facility or was that other officers who
4 did that?

5 A That was other officers who transported him.

6 Q Okay. All right.

7 MR. NIELSEN: Judge, I have the copy of the
8 service. I'm gonna go ahead and mark it as P8, Judge and
9 add it. And then the original, I'll leave with the Court
10 here.

11 THE COURT: All right.

12 MR. NIELSEN: But I pass the witness at this
13 time, Judge.

14 MS. FISHER: Thank you, Judge. May I
15 proceed?

16 C R O S S E X A M I N A T I O N

17 BY MS. FISHER:

18 Q Tell me your name again, sir.

19 A Christopher Elder.

20 Q Elder. Okay. And do you have the same offense
21 report in front of you that I have?

22 A Yes. I have the same offense report.

23 Q I want to ask you some questions --

24 A Okay.

25 Q -- about some statements that you made earlier

1 about when Duran pulled into the apartment complex.

2 A Yes.

3 Q You stated that he said that someone approached
4 him at the gate; is that correct?

5 A No. There was a vehicle that was blocking the
6 gate.

7 Q Okay. And where is that in the offense report?
8 And I'm looking specifically at this paragraph where it
9 talks about him.

10 A I got a different copy of everything.

11 MR. NIELSEN: Let me give you this one. It
12 might help.

13 A Okay. Well I have one under his complainant. I
14 was trying to get in the apartment complex and gray car was
15 blocking entrance.

16 Q (By Ms. Fisher) And so you didn't testify
17 in the first hearing?

18 A No, I did not.

19 Q Okay. And -- well so my offense report starts
20 when he's already walking to the apartment and he observes
21 Ramos with the black hoodie; is that correct?

22 A I think you got a different offense report. This
23 is the one that I have. This is Gerard's offense that he
24 wrote here. 48163.

25 MS. FISHER: Hans, can he use the one that

1 I'm referring to?

2 MR. NIELSEN: Sure. Which one is that?

3 MS. FISHER: It's the one you gave me.

4 MR. NIELSEN: Just give him both here.

5 Sorry.

6 Q (By Ms. Fisher) And I'm on page -- let me
7 show you what page I'm on. Sorry. I'm right here.

8 A Okay.

9 Q And so the -- Duran, Antonio Duran, the
10 complainant that you were involved in the investigation of.

11 A Uh-huh.

12 Q He stated that he was approached as he was walking
13 to some friend's apartment, correct?

14 A That's not what he told me. He said he was trying
15 to get into the gate.

16 Q Okay. But that's --

17 A That's what's in this report, yes.

18 Q Okay. And he stated that he was approached by a
19 Ramos who he later identified as Ramos, correct?

20 A Yes.

21 Q And that person was wearing a black hoodie?

22 A Yes.

23 Q And that person pointed a gun at him, right?

24 A Yes.

25 Q And told him to give him the bag and that he was

1 afraid for his life.

2 A Yes.

3 Q He said that at some point he saw a -- someone
4 sitting in a green Honda. I mean -- yeah. A green Honda
5 and the -- in the driver's seat wearing a baseball hat,
6 right?

7 A Yes.

8 Q And that's the person he later identified as Jorge
9 Guerrero, correct?

10 A Yes.

11 Q And at no time did he state that Jorge Guerrero
12 pointed a gun at him, did he?

13 A No, he didn't.

14 Q In fact, he wasn't even able to testify that Jorge
15 Guerrero had a gun at any time, was he?

16 A Correct.

17 Q And later on, you were present when -- or you had
18 Gerard's statement there as well, correct?

19 A Yes, I do.

20 Q And Officer Gerard was working and noticed a green
21 Honda pull up beside him, correct?

22 A Yes, he did.

23 Q And he identified this person, Jorge Guerrero, as
24 the driver of that vehicle?

25 A Yes, he did.

1 Q And Ramos as the passenger; is that correct?

2 A Yes.

3 Q Let me make another point with Ramos or with
4 Duran. He stated that there appeared to be people in the
5 back seat of that vehicle; is that correct?

6 A Yes, it is.

7 Q And he couldn't see them very good?

8 A Couldn't see them very good.

9 Q Okay. Did he say how many additional people were
10 in the vehicle?

11 A He said it appeared to be two.

12 Q Okay. Gerard saw the green Honda pass him up and
13 he visually saw Jorge driving the vehicle, correct?

14 A Correct.

15 Q And later -- that vehicle took off and later on he
16 saw it again, didn't he?

17 A Correct.

18 Q And it was backed up, parked against a wall, kind
19 of backed up against a wall --

20 A Correct.

21 Q -- is that fair? And at that time he identified
22 Jorge Guerrero as the driver sitting there in the vehicle?

23 A Correct.

24 Q And he actually on-viewed the robbery taking place
25 of Ramos, right?

1 A Yes, he did.

2 Q Or what he believed Ramos was robbing someone?

3 A Yes.

4 Q And what Gerard saw as he exited, was Ramos take
5 off -- take off running and this person, Jorge Guerrero take
6 off driving, correct?

7 A Uh-huh. Correct.

8 Q Ramos did not get in that vehicle?

9 A No.

10 Q Okay. And what Gerard saw was Ramos committing an
11 aggravated robbery; is that correct?

12 A Correct.

13 Q What he -- he didn't, at any time, see this
14 suspect or this defendant with a gun, right?

15 A Correct.

16 Q And he didn't see Gerard -- or I'm sorry --
17 Antonio Duran didn't see anything that Mr. Guerrero did but
18 drive a vehicle, correct?

19 A Correct.

20 Q And in fact, he was leaving the scene every time
21 that someone testified they saw him?

22 A Correct.

23 Q And later they caught Ramos as he was trying to
24 jump a fence and he threw his black hoodie, right?

25 A Correct.

1 Q And in that hoodie they found the gun? I am right
2 here. Black revolver.

3 A Yes.

4 Q Several cell phones?

5 A Three credit cards.

6 Q And some credit cards. And those were in the
7 hoodie that Ramos threw over the fence?

8 A Yes.

9 Q In the meantime, Gerard has put out a, be on the
10 look for this green Honda, correct?

11 A Yes.

12 Q And at some point, was it you who actually saw it
13 and chased it?

14 A No, it's not.

15 Q When did you come into this?

16 A I came in after the vehicle had already crashed.

17 Q Okay. And there was a -- there was a wreck and my
18 client was hospitalized, correct?

19 A Yes.

20 Q And did you bring those complainants back to that
21 scene?

22 A Yes, I did.

23 Q The wrecked scene?

24 A Yes, I did.

25 Q Okay. And at that time, was there anyone else in

1 the vehicle during the wreck?

2 A Not -- I don't believe there is. Let's see. I
3 don't recall if it was or not.

4 Q Okay. Do you recall if there was any attempts
5 to -- made to identify anyone else?

6 A They identified the respondent and Mr. Rigoberto.

7 Q Okay. But there weren't any other attempts --

8 A No.

9 Q -- to identify anyone else at the scene?

10 A No.

11 Q And was there a baseball cap found anywhere at the
12 scene? Do you recall?

13 A I don't recall offhand.

14 Q Do you --

15 A Let's see.

16 Q That's okay.

17 A I don't recall.

18 Q And so to summarize, this defendant drove the
19 vehicle that took Ramos to the scene?

20 A Correct.

21 Q Okay. And at no time was he involved in the
22 robbery in a face-to-face way?

23 A No.

24 Q Nor was he alleged to have a gun and use it on
25 anybody?

1 A No.

2 MS. FISHER: No further questions, Your
3 Honor.

4 MR. NIELSEN: Judge, I don't have any further
5 questions of this witness. I do have one other witness.
6 She's on her way, just for brief purposes, Dr. Chibueze. If
7 he could remain here, if you don't mind.

8 THE COURT: All right.

9 MR. NIELSEN: She should be here shortly, I
10 think. Yeah. And Judge, also I would ask the Court to
11 take --

12 MS. FISHER: Judge --

13 MR. NIELSEN: Just briefly. The Court to
14 take judicial notice of the fact that the respondent had
15 previously had a waiver of jurisdiction certification
16 petition filed prior to his 18th birthday with regards to
17 this offense. In fact, a hearing was held prior to his 18th
18 birthday. I don't think that that's in dispute. I think
19 that's clear from the Court's file but -- and from the
20 dockets, the docket entries, but I just would ask the Court
21 to make that finding on the record for any proper -- any
22 appeal purposes in the future.

23 THE COURT: All right. I will do that.

24 MR. NIELSEN: Okay.

25 UCHE CHIBUEZE

1 Having first been duly sworn, testified as
2 follows:

3 D I R E C T E X A M I N A T I O N

4 BY MR. NIELSEN:

5 Q Doctor, could you just state your name for the
6 Court.

7 A Uche Chibueze.

8 Q And where do you work, ma'am?

9 A For the Harris County Juvenile Probation forensic
10 department.

11 Q And what is your position there?

12 A I'm the chief psychologist of the department.

13 Q Okay. I'm just gonna ask you a few brief
14 questions concerning this case. You were asked to do an
15 evaluation of a Jorge Guerrero; is that correct?

16 A Yes.

17 Q Okay. And Mr. Guerrero, do you see him here in
18 the courtroom today?

19 A Yes, I do.

20 Q Could you identify him in some manner by pointing
21 to him or something?

22 A Wearing a gray polo and some jeans.

23 MR. NIELSEN: Your Honor, let the record
24 reflect she's identified the respondent.

25 THE COURT: Yes.

1 Q (By Mr. Nielsen) And you did an evaluation
2 of him pursuant to the Court's order for a waiver of
3 jurisdiction hearing; is that correct?

4 A Yes.

5 Q Now you noted that the respondent in this case is
6 what age?

7 A He is 20 years old.

8 Q Okay. And is he eligible for any type of programs
9 at the juvenile probation department or the Texas Juvenile
10 Justice Division department would have for him?

11 A No, he's not, based on his age.

12 Q Okay. And as far as any programs that he might
13 benefit from that might be rehabilitative in nature, those
14 programs would have to be accessed through the adult system;
15 is that correct?

16 A Yes, it would at this present time.

17 Q Okay. In fact, did you make some recommendations
18 on page 13 of your evaluation?

19 A Yes, I did.

20 Q And what are those? How many recommendations did
21 you make?

22 A Four recommendations.

23 Q And what are those recommendations?

24 A That he participate in a GED program. Also that
25 he participate in Revisions, which is a mentor program. And

1 then also that he participate in group counseling to address
2 coping skills and his limited frustration tolerance and his
3 continued participation with AA.

4 Q And these are all programs that the adult
5 probation department in Harris County would have or offer to
6 him as a certified juvenile, correct? Or as a individual
7 who had been certified; is that correct?

8 A He would have to access that there, he could not
9 access it here.

10 Q My question wasn't very clear. I guess what I'm
11 saying is, those things would have to be done in the adult
12 probation system because of his age, correct?

13 A Right.

14 Q In fact, just -- and I know the Court is -- it's
15 clear to the Court, but the Court's jurisdiction ends at age
16 18 for indeterminate petition and age 19 for a determinate
17 petition, correct?

18 A Correct. To my knowledge.

19 Q So in any event, any of the programs that would
20 possibly be available are unavailable to him at this time,
21 correct?

22 A Unavailable in juvenile court, correct.

23 Q And just so we're clear then. As far as your
24 recommendation, you didn't have any recommendations as to
25 whether or not he would be able to be rehabilitated in the

1 juvenile system because of that?

2 A I did not render that opinion because it's a
3 futile recommendation.

4 Q Okay.

5 MR. NIELSEN: Judge, I'll pass the witness.

6 MS. FISHER:

7 MS. FISHER: Thank you, Judge.

8 C R O S S E X A M I N A T I O N

9 BY MS. FISHER:

10 Q Ma'am, you didn't meet Jorge back the first time
11 that he was certificated in 2012, correct?

12 A I did the original evaluation in 2012.

13 Q Okay. My apologies. So in this interview, y'all
14 talked about the person that he was at 16; is that correct?

15 A So in the present interview or the original?

16 Q The present interview.

17 A We talked about some of the things that happened
18 when he was 16 and then how he's doing now that he's 20
19 years old.

20 Q Okay. And he's been released from prison pending
21 the appeal of this, correct?

22 A Correct.

23 Q And did he talk to you about how he used to be a
24 follower?

25 A Yes. He did mention that.

1 Q And that he hung around with gang members because
2 he was a follower?

3 A Yes. He did say that.

4 Q He did tell you that he -- any of the disputes
5 that he has as a gang member, he never carried a weapon when
6 he did that?

7 A Yes. He did deny that. Let me make sure. Yes.
8 He denied using weapons during these disputes.

9 Q Okay. And that -- he told you that he's no longer
10 a member of a gang?

11 A He did assert that, yes.

12 Q He's grown up and he doesn't feel like he's a
13 follower, correct?

14 A Correct.

15 Q He spends his time, since he got out of TDC,
16 working?

17 A Yes, he did say that.

18 Q He's living with his family?

19 A Yes.

20 Q And he's hoping to participate in a program
21 sponsored by Revision that supports adolescents who have
22 been certified; is that correct?

23 A Correct.

24 Q Talked to you about that?

25 A Correct.

1 Q And he talked to you about his education, that his
2 English was not that good when he was younger so he wasn't
3 very good in school?

4 A Yes.

5 Q And that he's now researching programs to go to
6 Lone Star College or community college?

7 A He did say that.

8 Q And he talked about his drug use when he was
9 younger?

10 A Uh-huh.

11 Q That he feels like that was a large part of why he
12 was such a follower, or why -- he wanted to party and be
13 young and that he's not abused drugs since he was detained
14 in 2013?

15 A Correct.

16 Q He shared that with you?

17 A Yes.

18 Q And did he share with you that he has attended AA
19 meetings to try to stay sober --

20 A Yes.

21 Q -- since he's been released from prison?

22 A Yes, he has.

23 Q And on page six, at the bottom, you talk about --
24 what is his full scale IQ?

25 A His full scale IQ, and this is based on an

1 evaluation done in English, is 67.

2 Q And that's fairly low, correct?

3 A Yes. That's in the lower extreme range.

4 Q And did he tell you that when he -- since he's
5 been released from prison, waiting the outcome of this Court
6 to make a decision, that his family supported him?

7 A Yes. He did mention he has a very supportive
8 family.

9 Q Okay. And he's residing with them, correct?

10 A Yes.

11 Q He's working with his family as well?

12 A Yes.

13 Q They have a business that he can work in?

14 A Yes.

15 MS. FISHER: No further questions, Your
16 Honor.

17 R E D I R E C T E X A M I N A T I O N

18 BY MR. NIELSEN:

19 Q Just so we're clear. Was there any issues with
20 the taking of his IQ test way back in -- what year was that
21 done?

22 A So his IQ initially was done in 2012. That was
23 when the initial certification evaluation was conducted.

24 Q Right.

25 A We did try and do another one because the original

1 one was done in English, so we wanted to see if the IQ would
2 be different if it was done in Spanish. So Dr. Tellez did
3 attempt to do the IQ in Spanish but we did not get very far
4 with that. Partly because he is truly bilingual and also he
5 has very poor frustration tolerance to complete the test.

6 Q Okay. So it's possible that the IQ test that was
7 done in 2012 is -- has some reliability issues because of
8 his -- he's bilingual and any other factors that might go
9 into this?

10 A No. The one thing that it would affect most would
11 be his verbal comprehension because that is very laden based
12 on his language. The ones that are not as affected by the
13 language would be his perceptual reasoning and working
14 memory and process and speed and those were still low. But
15 the main thing that really we were looking at was that
16 verbal and that was his low score and that would be
17 impacted.

18 Q Right. So because that was described as lower
19 extreme and so in essence then, this IQ score when that was
20 done in 20 -- or IQ test that was done in 2012 though, you
21 would call into question some of the reliabilities of that
22 test; would you agree with me?

23 A I would say it would reflect his functioning in
24 English. I wouldn't say it's not reliable but just his
25 function in English, it would be that level.

1 Q So his function in Spanish could indicate that he
2 has a higher IQ?

3 A It could. We didn't get a score but it could
4 potentially be different.

5 Q Okay.

6 MR. NIELSEN: Judge, I'll pass the witness at
7 this time.

8 MS. FISHER: No further questions, Your
9 Honor.

10 MR. NIELSEN: I have no further questions of
11 her. She can be excused.

12 THE COURT: All right.

13 MR. NIELSEN: Judge, the State would rest at
14 this time.

15 MS. FISHER: Judge, I would ask -- well first
16 of all, we have a motion that we'd like to argue. You have
17 a copy of it in your file, objection to jurisdiction and
18 response to motion to waive jurisdiction. May we argue
19 that?

20 THE COURT: Yeah.

21 MS. FISHER: Cheri Duncan's gonna do that.

22 MS. DUNCAN: Good morning, Your Honor. As we
23 point out in the motion to waive jurisdiction, first of all,
24 just for purposes of the appellate record, we are objecting
25 to the Court's jurisdiction under 54.021 because

1 Mr. Guerrero is now 20 years old and of course that's the
2 purpose of this certification hearing under 54.02(J) to see
3 if, as an adult, he can still be certified to the adult
4 court. But we would appreciate a ruling on record on the
5 motion to dismiss under 54.021.

6 THE COURT: Your motion's denied.

7 MS. DUNCAN: Second, Your Honor, we would
8 like to move to dismiss based on the State's failure to
9 prove the elements required to obtain certification under
10 subsection (J). First of all, the State could not prove and
11 did not try to prove that there was no prior adjudication in
12 this case. There absolutely was. Mr. Guerrero was found
13 guilty and assessed a prison term when he was transferred to
14 adult court; therefore, this case is not appropriate for
15 recertification under subsection (J).

16 Second --

17 THE COURT: Well wait a minute. Let's stay
18 on that for a minute. Now tell me exactly what your point
19 is. You're -- so you're saying that his conviction, his
20 plea of guilty and ultimate conviction is a valid
21 conviction, that he has a record of conviction, that it was
22 not dismissed, that he has not been -- that that case has
23 not been, in any way, reversed or set aside. Is that what
24 you're telling me?

25 MS. DUNCAN: Of course not, Your Honor.

1 THE COURT: Okay. Then tell me what your
2 point is.

3 MS. DUNCAN: The point is that under --

4 THE COURT: You know, you seem, you seem like
5 you're trying to argue double jeopardy or prior conviction,
6 but the conviction was set aside. Tell me how this is any
7 different than if a person's case is reversed and remanded
8 for new trial. Why is this case different than a situation
9 like that?

10 MS. DUNCAN: Judge, in fact, we are making a
11 double jeopardy argument but that's a different issue,
12 rather the State has satisfied its burden under the statute,
13 the Family Code statute.

14 THE COURT: Well answer my question so we're
15 not here all morning, all right?

16 MS. DUNCAN: Of course.

17 THE COURT: Okay.

18 MS. DUNCAN: And the question about double
19 jeopardy is --

20 THE COURT: No, no, no. That's not the
21 question right now. The question is, how is this case any
22 different than a case where a conviction is reversed and
23 remanded for new trial?

24 MS. DUNCAN: The difference is subsection
25 (J), Your Honor, sets out very specific requirements that

1 have to be satisfied for recertification.

2 THE COURT: Okay. Let's be specific about
3 what my question --

4 MS. DUNCAN: And the first requirement that
5 we're alleging the State hasn't proven is that there was no
6 prior adjudication. There was, in fact, in this case. Yes,
7 it was reversed but subsection (J) also addresses that in
8 subsection 5, which deals with what to do after there has
9 been a reversal on appeal. And State still has to satisfy
10 the burden that there was no prior conviction.

11 THE COURT: Okay. What are you saying they
12 have to do after a, after a reversal?

13 MS. DUNCAN: The statute says, Your Honor,
14 that they have to be able to prove five elements under
15 subsection (J) that are different from the original ones.

16 THE COURT: Okay.

17 MS. DUNCAN: And the first one is, of course,
18 that he's over 18 years old.

19 Second, that he committed the offense within the
20 time period the juvenile court had jurisdiction, between the
21 ages of 12 and 18, I guess, for a felony.

22 THE COURT: Okay.

23 MS. DUNCAN: Third is the one that I'm
24 alleging right now the State hasn't satisfied.

25 THE COURT: That what?

1 MS. DUNCAN: And that is no adjudication.
2 The State has to prove there was no adjudication or prior
3 adjudicative hearing. There was an adjudicative hearing in
4 this case because there was a certification. There was,
5 however, an adjudication in the adult court that was
6 ultimately set aside as you point out.

7 MR. NIELSEN: Judge, could I briefly respond
8 to that?

9 THE COURT: Go ahead.

10 MR. NIELSEN: That totally ignores section
11 51.0412, the Court's jurisdiction over incomplete
12 proceedings, which is really we have here and what the
13 legislature intended for situations where a case is
14 reversed. I mean that particular case --

15 THE COURT: Yeah. No, I totally agree. I
16 totally agree. I was just trying to figure out what
17 section -- what she was going to use to try to justify. But
18 she still hasn't answered the question why this is different
19 than a case that was reversed and remanded for new trial.
20 And I don't think -- what I'm hearing so far doesn't answer
21 that question for me. So do you have something else along
22 those lines?

23 MS. DUNCAN: Yes. In response to the point
24 about 52.041, that's exactly right. There is a provision
25 for the Court's jurisdiction on remand and it's very

1 specific. However, it doesn't supersede or contradict the
2 requirements in 54.02(J). Those still exist and that's the
3 problem. Yes. The Court has jurisdiction on remand,
4 there's no dispute about that.

5 THE COURT: Are you saying this is not a
6 remand?

7 MS. DUNCAN: Yes, it is a remand, Your Honor.

8 THE COURT: Okay. So you agree that the
9 Court has jurisdiction over this case because this is a
10 remand.

11 MS. DUNCAN: It has limited jurisdiction --

12 THE COURT: Well no, no.

13 MS. DUNCAN: -- under 54.02(J), Your Honor.

14 THE COURT: No, no, no. You just agreed that
15 this Court has jurisdiction over this case because this case
16 is being remanded to this Court.

17 MS. DUNCAN: That was not my argument, Your
18 Honor.

19 THE COURT: Well you don't agree that that's
20 the case? Do you not agree that that's the case?

21 MS. DUNCAN: The Court has limited
22 jurisdiction --

23 THE COURT: Okay.

24 MS. DUNCAN: -- on a remand to deal with an
25 adult who was previously certified as a juvenile. And --

1 THE COURT: Is that not what we're doing
2 here?

3 MS. DUNCAN: Yes, Your Honor.

4 THE COURT: Okay.

5 MS. DUNCAN: And under 54.02(J), the State
6 has not satisfied its burden to prove that there was no
7 prior adjudication.

8 THE COURT: And exactly what would they do to
9 satisfy that? I mean, we know for sure that we wouldn't be
10 here. That case could not have been reversed and remanded
11 had there not been an adjudication because that's why it
12 went to the adult court. That case was reversed, set aside
13 or remanded for a new trial. So I'm not sure that I follow
14 your argument. I know it's a novel argument and it sounds
15 pretty good to some people, it doesn't sound that good to
16 me. But you know, tell me, tell me how this case is
17 different.

18 You're saying that he had to do something else?
19 He has to do something else to show that there's -- that
20 there's been no prior adjudication?

21 MS. DUNCAN: Correct.

22 THE COURT: That I couldn't take judicial
23 notice of the reversal and the remand to this Court from the
24 Court of Appeals for a new trial? That I can't take -- I
25 can't take judicial notice of that in your mind. So that if

1 I can't do that, that there hasn't been proof that there was
2 no prior adjudication. Is that what you're saying?

3 MS. DUNCAN: No, of course, Your Honor, you
4 can take judicial notice of the prior reversal but there
5 wasn't a reversal.

6 THE COURT: Well no, no, no. Don't play word
7 games with me, okay? We're talking about a prior -- the
8 issue of what you say is a responsibility by the State to
9 prove no prior adjudication in this Court. But -- is that
10 what you just said?

11 MS. DUNCAN: No, Your Honor.

12 THE COURT: Okay.

13 MS. DUNCAN: And that's actually the novel
14 point that we're making here. It doesn't -- under the
15 statute, it doesn't have to be an adjudication in the Court.
16 The statute isn't either or. Either there has been a prior
17 adjudication hearing, which would be an adjudication of a
18 juvenile, you know --

19 THE COURT: Yes.

20 MS. DUNCAN: -- under that or there has to be
21 an adjudication.

22 THE COURT: And there was an adjudication in
23 the adult court.

24 MS. DUNCAN: Exactly, Your Honor.

25 THE COURT: Okay. And you're saying that the

1 State has to prove that there was no adjudication in the
2 adult court and they can't rely on this Court, me, taking
3 judicial notice that in fact there was an adjudication in
4 the adult court, and in fact, there was a reversal of that
5 adjudication. You're saying that they can't rely on me, the
6 314th, taking judicial notice. Is that what your argument
7 is?

8 MS. DUNCAN: Not at all, Your Honor. You are
9 absolutely --

10 THE COURT: Okay. I think you need to go on
11 to your next point then.

12 MS. DUNCAN: All right.

13 THE COURT: I think we've established that
14 one.

15 MS. DUNCAN: All right.

16 THE COURT: Go on to your next one.

17 MS. DUNCAN: The second one is the
18 requirement that the State prove to the Court that it
19 exercised due diligence to obtain adjudication in this Court
20 before Mr. Guerrero turned 18.

21 THE COURT: Okay. Wait a second, wait a
22 second. So the facts are this. There was a hearing, a
23 motion to waive jurisdiction hearing before your client was
24 18. The Court granted the State's motion to waive
25 jurisdiction. His case went to the adult court and he pled

1 guilty. And he pled guilty to taking some time in the adult
2 prison. Okay. And so now -- and he stayed in the adult
3 prison until his case was on appeal and ultimately reversed
4 and remanded back here.

5 And now you say that the State didn't exercise due
6 diligence in having a hearing, such as we're having here,
7 before his 18th birthday? Is that what your argument is?

8 MS. DUNCAN: Yes, Your Honor.

9 THE COURT: Okay. And tell me exactly what
10 else the State could have done. In fact, you know, we did
11 have a hearing.

12 MS. DUNCAN: Yes, Your Honor.

13 THE COURT: Okay. So there's no question
14 that a hearing was held. So what I want to know from you
15 is, in relation to your argument, what else could the State
16 have done to have another hearing, that would satisfy your
17 argument, to have another hearing before his 18th birthday?

18 MS. DUNCAN: Well Judge, the State had the
19 discretion to choose whether to try to certify Mr. Guerrero
20 as an adult or to proceed to an adjudication in this court.

21 THE COURT: At what point in time are you
22 talking about? Let's get a time line.

23 MS. DUNCAN: Initially. Back in 2012.

24 THE COURT: Okay. Look. Don't waste time
25 there. Don't waste time. There's no question that a

1 hearing was already held before he was 18.

2 MS. DUNCAN: The statute, however, said --

3 THE COURT: Don't interrupt me either. A
4 hearing was held before he was 18. The State's motion was
5 granted. He went to the adult court. I don't know how long
6 he stayed in jail before he and his attorney got together
7 and decided to enter a plea of guilty but he did, case was
8 reversed and brought here. My question to you, again, and I
9 appreciate you answering the question, is what else are you
10 saying that the State should have done to have had another
11 hearing before his 18th birthday? He already had one, then
12 what else should they have done?

13 MS. DUNCAN: Your Honor, the point that I'm
14 trying to make is not that they needed to have another
15 hearing. The point is that they chose to go forward with a
16 certification rather than an adjudication and didn't
17 exercise due diligence in making sure that the Court had an
18 adequate record to base the certification on. That's the
19 State's problem.

20 THE COURT: What could they have done -- I
21 don't follow that argument. Now you're saying that there
22 was no adequate record for the hearing that, in fact, was
23 done. Okay. And how was the record inadequate?

24 MS. DUNCAN: Well the Court of Appeals said
25 that it was inadequate because the State just provided the

1 same boiler plate form that the courts have been using here
2 forever.

3 THE COURT: No, no. I don't agree with you.
4 The Court of Appeals did not say that the record was
5 inadequate. They objected to the document, the judgment and
6 then they issued some requirements concerning the mental
7 processes of the Court and reasonings why. I disagree with
8 you about the record itself. That's just simply not true.
9 You just haven't -- you just have the wrong reading of that.
10 Is there something else about this point that you want to
11 make?

12 MS. DUNCAN: Just that you're correct as far
13 as the Guerrero language and the opinion itself, but the
14 Guerrero Court relied on the decision in Moon and that was
15 the basis for it, for its reversal. And Moon is very
16 explicit that the evidence is insufficient when all the
17 reviewing Court has to review is the boiler plate form that
18 everybody was using back in 2012.

19 THE COURT: I don't think that's, that's
20 something I can agree with you about. Okay. Do you have
21 another point?

22 MS. DUNCAN: Yes, Your Honor. Finally, the
23 State wasn't able to prove that there's probable cause that
24 Mr. Guerrero committed the offense. They were able to
25 prove, I believe, that he was a party to the offense and

1 that's something that matters in adult court --

2 THE COURT: I'm sorry?

3 MS. DUNCAN: -- but not in the juvenile
4 court.

5 THE COURT: You're saying that a person in
6 juvenile court cannot be charged or adjudicated as a party
7 to an offense? Is that what you're saying?

8 MS. DUNCAN: No, Your Honor. What I'm saying
9 is that they can't be certified based solely on their
10 participation as a party because there's a difference
11 between criminal culpability for a party and commission of
12 an offense. And the Penal Code's very clear on that
13 distinction.

14 THE COURT: Oh yeah? Tell me about where
15 that is in the Penal Code.

16 MS. DUNCAN: You know, I don't know that I
17 got it, but I'm happy to supplement --

18 THE COURT: No, no. You need to tell me
19 about it right now. You're not doing supplements. You came
20 here prepared today, didn't you?

21 MS. DUNCAN: Yes, Your Honor.

22 THE COURT: Okay. So what you're saying is
23 that, is that as far as the -- a hearing on a waiver of
24 jurisdiction, that with respect to a Court finding probable
25 cause or not, that probable cause cannot be found on a

1 person who is charged as a party to an offense; for
2 instance, a get away driver or a lookout or somebody like
3 that. Their case cannot be -- the Court can't find probable
4 cause and therefore grant the State's motion to waive
5 jurisdiction.

6 MS. DUNCAN: That's correct.

7 THE COURT: Is that what you're saying?

8 MS. DUNCAN: Yes, Your Honor.

9 THE COURT: Okay. And specifically where do
10 you find that in the code?

11 MS. DUNCAN: In the Family Code, the
12 requirement is that he has committed the offense.

13 THE COURT: So you think a party, a person
14 who is charged as a party can't be found to have committed
15 an offense as a party, only a person who, for instance, just
16 has the weapon, let's say, in an aggravated robbery and
17 points the gun at the person. So you're saying if a person
18 stands by as a lookout or a driver, getaway driver, that
19 they can't -- they cannot have committed an offense. Is
20 that your argument?

21 MS. DUNCAN: Yes, Your Honor.

22 THE COURT: Where did you learn that? Where
23 did you learn that?

24 MS. DUNCAN: That was research when I was
25 putting the brief together.

1 THE COURT: No. Tell me where you learned
2 that. Did you make that up by yourself?

3 MS. DUNCAN: No, Your Honor. I had some
4 help.

5 THE COURT: Okay. Why don't you tell me
6 where you learned that.

7 MS. DUNCAN: I learned it from the Penal Code
8 after researching --

9 THE COURT: The Penal Code. Did you consult
10 any experts in criminal law?

11 MS. DUNCAN: No, Your Honor.

12 THE COURT: Did you talk to any legislators
13 that were involved in writing this section of the Penal Code
14 that you're referring to?

15 MS. DUNCAN: I did research the legislative
16 history, Your Honor.

17 THE COURT: Okay. And what about a specific
18 legislative history? Do you have like a date or something
19 that we can go back to so we can see exactly where you came
20 to your conclusion?

21 MS. DUNCAN: I don't know about a date, Your
22 Honor.

23 THE COURT: Well I mean does legislative
24 histories have dates to them?

25 MS. DUNCAN: Yes, they do and this one goes

1 back to 1995.

2 THE COURT: 1995?

3 MS. DUNCAN: Yes, Your Honor.

4 THE COURT: So any person who has been
5 certified as an adult on the basis of a finding of probable
6 cause that they may have committed a crime, but in fact
7 their part in the crime was as a party, then all of those
8 for the past 20 years, those would be wrongful waivers of
9 jurisdiction on all juvenile courts in the State of Texas,
10 according to you.

11 MS. DUNCAN: I believe so, Your Honor.

12 THE COURT: Well you've bitten off a pretty
13 big bite of the apple there, haven't you?

14 MS. DUNCAN: Yes, Your Honor, I did. And the
15 Court of Appeals didn't reach the issue because they were
16 able to reverse based on Moon. So it's still an open
17 question. I'm not saying it's subtle precedent at all, but
18 it's still our argument.

19 THE COURT: And once again, before we leave
20 this topic, I would like you, just for my own personal
21 reading and education, for you to point exactly what area of
22 the Penal Code you're referring to.

23 MS. DUNCAN: I'm looking for it in my brief,
24 Your Honor, and --

25 THE COURT: Well now it seems like it would

1 be right on the top of your head because, you know, there's
2 very few things that would render 20 years of judgments
3 invalid that wouldn't be right on the top of your head with
4 respect to an area of the Penal Code that you say is the
5 most relevant part that backs up your opinion. I mean
6 that's something you really would know, wouldn't you?

7 MS. DUNCAN: I should, Your Honor, and I
8 don't have it at the top of my head.

9 THE COURT: Well how long would it take you
10 to look at your Penal Code?

11 MS. DUNCAN: Not long.

12 THE COURT: Okay. Well I'll give you some
13 time. I want you to look at your Penal Code and tell me.
14 You want to borrow one or do you have one?

15 MS. DUNCAN: Yes. I appreciate borrowing
16 one.

17 THE COURT: Okay. Here you go.

18 MS. DUNCAN: Thank you, sir.

19 THE COURT: You take your time. I mean,
20 don't take too long. I'm 63, I could die here.

21 MS. DUNCAN: I'm almost your age, Judge, so I
22 know what you're talking about. I believe it's in my
23 motion. And I could find it in my brief if I could get my
24 cell phone and look it up.

25 THE COURT: Take your time. Take as much

1 time as you want.

2 MS. DUNCAN: Thank you, Your Honor. I
3 appreciate it.

4 MS. FISHER: Judge, would you like me to
5 proceed with my part?

6 THE COURT: No. We're stuck right now.
7 Y'all can relax if you want to.

8 MS. FISHER: Okay. Thanks.

9 THE COURT: Go ahead, please.

10 MS. DUNCAN: Your Honor, the Family Code
11 requires that a defendant commit an offense, not just have
12 criminal responsibility for the offense. Those are two
13 different things under the Penal Code.

14 THE COURT: I'm sorry? You said Family Code
15 first and then you said Penal Code.

16 MS. DUNCAN: Yes, Your Honor.

17 THE COURT: What are you referring to now?

18 MS. DUNCAN: Family Code 54.02(A) expressly
19 uses the term committed the offense rather than criminally
20 responsible for the offense. The Penal Code explains the
21 difference between those two words.

22 THE COURT: What section of the Penal Code?

23 MS. DUNCAN: Two sections, Your Honor.
24 29.03(A), a person may be criminally responsible under the
25 Penal Code -- I'm sorry. The Penal Code, a person can only

1 commit an offense as a principal. That's 29.03(A). But a
2 person may be criminally responsible --

3 THE COURT: Whoa, whoa, whoa. I'm at
4 29.03(A).

5 MS. DUNCAN: Uh-huh.

6 THE COURT: And what did you say it says?

7 MS. DUNCAN: A person commits an offense --

8 THE COURT: Uh-huh.

9 MS. DUNCAN: -- as a principal. It may not
10 use the word principal.

11 THE COURT: It doesn't say that at all. It
12 says a person commits an offense if he commits robbery as
13 defined in section 29.02 and he does some other things.

14 MS. DUNCAN: Right. But not --

15 THE COURT: You added the word principally as
16 if that was part of the code.

17 MS. DUNCAN: No, Your Honor.

18 THE COURT: I think that would change the
19 entire meaning of this section.

20 MS. DUNCAN: Did not intend to change the
21 meaning, Your Honor. But --

22 THE COURT: But you used that word.

23 MS. DUNCAN: I did.

24 THE COURT: Principally.

25 MS. DUNCAN: I did.

1 THE COURT: Okay. But it doesn't exist here.

2 MS. DUNCAN: That's correct.

3 THE COURT: And you agree that if the word
4 principally was included in 29.03(A) that that would change
5 the meaning of 29.03(A).

6 MS. DUNCAN: I don't know that it would one
7 way or the other, Your Honor, it might. But not for the
8 purposes of --

9 THE COURT: Why did you say that -- why did
10 you use the word principally?

11 MS. DUNCAN: Because I'm trying to make the
12 argument as clear as I can.

13 THE COURT: Well no, no, no. Adding a word
14 to 29.03 doesn't make your argument more clear. It confuses
15 it.

16 MS. DUNCAN: I wasn't adding a word to it.

17 THE COURT: Well now wait a second. Until I
18 looked at it -- are you denying that you said that 29.03
19 means -- says that if a person commits an offense
20 principally? You used that word in there. Do you want me
21 to have it read back to you?

22 MS. DUNCAN: No. I agree that I used that
23 word.

24 THE COURT: Okay.

25 MS. DUNCAN: A different --

1 THE COURT: You want to take that word out
2 now, right?

3 MS. DUNCAN: I want to make that part of my
4 argument as opposed to the quotation.

5 THE COURT: Okay. We want to make clear that
6 you're not trying to tell the Court that 29.03(A) uses the
7 word principally in any way, shape, or form.

8 MS. DUNCAN: Never said that, Your Honor.
9 No, I don't believe that.

10 THE COURT: All right. Go ahead.

11 MS. DUNCAN: So the next provision is that a
12 person may be criminally responsible.

13 THE COURT: Where is the next provision?

14 MS. DUNCAN: Penal Code.

15 THE COURT: Now what are you referring to?

16 MS. DUNCAN: Penal Code section 7.02.

17 THE COURT: 7.02 what?

18 MS. DUNCAN: (A)2.

19 THE COURT: Okay. Go ahead.

20 MS. DUNCAN: And again, I'm just
21 paraphrasing, not direct quoting, but a person may be
22 criminally responsible as a party. The Penal Code uses two
23 different terms. Commit means one thing; criminally
24 responsible means another. The Family Code --

25 THE COURT: Well whoa, whoa, whoa. You're

1 straying from your argument now. We're at 7.02. And
2 7.02(A) says a person is criminally responsible for an
3 offense committed by the conduct of another if; and then it
4 shows how.

5 MS. DUNCAN: Yes.

6 THE COURT: Okay. Now where are you going
7 now? Where are you?

8 MS. DUNCAN: I'm back to my original
9 argument.

10 THE COURT: No, no. Where are you in the
11 code? Remember my question for you is where in the code is
12 your argument listed? You know, where's your reference in
13 the code?

14 MS. DUNCAN: Your Honor, these are the two
15 references from which I develop an argument. You know, Your
16 Honor --

17 THE COURT: No. What you said --

18 MS. DUNCAN: The argument doesn't come from
19 the code.

20 THE COURT: What you said is that the word,
21 committed an offense, is different than criminally
22 responsible for an offense. All right. So -- and you said
23 that's in the code. So I want you to tell me where in the
24 code it says that.

25 MS. DUNCAN: These two provisions make that

1 clear, Your Honor.

2 THE COURT: Okay. Well I don't think it
3 makes it clear at all. Show me exactly where it makes it
4 clear.

5 MS. DUNCAN: It --

6 THE COURT: Just point to it. This will be a
7 lot easier if you could just back up what you're saying.
8 You use the two references, the sections in the code, so
9 show me where it says that. Show me where it says a person
10 who's committed an offense is different than being
11 criminally responsible and what would that difference be.
12 Show me where it says that and show me where it gives us
13 some guidance as to what that difference would be.

14 MS. DUNCAN: Not sure how to respond to that,
15 Your Honor, because a legal argument is based on statutory
16 provisions but isn't always a direct quote. If there were,
17 there wouldn't be issues to raise on appeal. I'm saying
18 that these two provisions lead to the conclusion that
19 there's a difference between someone who commits an offense
20 and someone who is criminally responsible.

21 THE COURT: Well you started out saying that
22 that would only be true in an instance where you were
23 talking about waivers of jurisdiction in juvenile cases, but
24 these two sections don't have anything to do with probable
25 cause issues in waivers of jurisdiction in juvenile cases.

1 This is the Penal Code for all purposes. So were you
2 incorrect when you said that the difference only applies
3 with respect to waivers of jurisdiction in juvenile cases?
4 Where did you get that from?

5 MS. DUNCAN: That's from the family --

6 THE COURT: Because now you're arguing -- no.
7 Your argument now is, no, these two sections are in the
8 Penal Code and they must apply to criminal offenses, period.
9 But you said earlier that it was just juvenile cases.

10 MS. DUNCAN: It's only in juvenile --

11 THE COURT: I have a record of all of this
12 and actually I do listen to you pretty well. I'm interested
13 in arguments, particularly novel ones. So what I'd like to
14 know is, is your argument, because remember I told you, well
15 that would be, that would be interesting because that means
16 since 1995, the date that you gave, 20 years worth of
17 judgments, or I guess you could say waivers of State's
18 jurisdictions, judgments by the Court waiving jurisdiction
19 would be bad. But now you're saying, no, that's not really
20 the case. Actually because this is -- both these cases are
21 in the Penal Code, that perhaps there's a difference between
22 criminal responsibility and commission of an offense and
23 that that would be relevant in adult cases, too.

24 MS. DUNCAN: Not correct, Your Honor.

25 THE COURT: I know that's not correct but

1 that's your argument.

2 MS. DUNCAN: That's not my argument.

3 THE COURT: What is your argument exactly?

4 MS. DUNCAN: Back to the original argument
5 which is Family Code section 54.02(J).

6 THE COURT: Uh-huh.

7 MS. DUNCAN: I'm sorry. (A). Requires that
8 the defendant have or the respondent have committed an
9 offense. The State has to prove that they committed an
10 offense.

11 THE COURT: Well now you're talking about
12 probable cause?

13 MS. DUNCAN: Correct. The probable cause.

14 THE COURT: That the Court find probable
15 cause that the person may have committed the offense.

16 MS. DUNCAN: Correct.

17 THE COURT: Okay.

18 MS. DUNCAN: Correct.

19 THE COURT: Not committed the offense.
20 You're actually wrong about that too.

21 MS. DUNCAN: I am -- I would not say too.

22 THE COURT: You're not too wrong about that,
23 but that's pretty wrong.

24 MS. DUNCAN: No, I'm not wrong.

25 THE COURT: Because the Court is only

1 required, if there's evidence to find probable cause, not
2 the commission of an offense.

3 MS. DUNCAN: Absolutely, Your Honor.
4 Absolutely.

5 THE COURT: Okay. So you want to back track
6 on that one and fix that one up, right?

7 MS. DUNCAN: Yes.

8 THE COURT: Okay. Good.

9 MS. DUNCAN: We can correct that one, Your
10 Honor.

11 THE COURT: Good. All right. Go ahead.

12 MS. DUNCAN: 54.02(A) says -- uses the term
13 commit. That's not a defined term in the Family Code but
14 the legislature certainly knew how the term was treated in
15 the Penal Code.

16 THE COURT: The legislature did what?

17 MS. DUNCAN: Would have known, you know,
18 because the cases say that they are on notice of other
19 statutes that interact and so they're on notice of the Penal
20 Code provisions that we have been arguing about.

21 THE COURT: And what is the other -- the
22 Penal Code provision -- you said they're on notice, they
23 should have known or would have known. Would have known
24 what?

25 MS. DUNCAN: That --

1 THE COURT: What does this other Penal Code
2 provision say that intersects or conflicts with the word
3 commission of an offense or commit an offense? What's the
4 issue?

5 MS. DUNCAN: I don't believe there's a
6 conflict, Your Honor, that's not what I'm --

7 THE COURT: Well if there's no conflict, then
8 your argument is flying away because your whole premise here
9 is that there's a difference between being criminally
10 responsible for an offense and committing an offense.

11 MS. DUNCAN: That's true. That is my
12 position.

13 THE COURT: Okay. And I asked you to show me
14 in the Penal Code what section says that. I've not seen it
15 yet but you pointed me to two, but I still haven't seen
16 that. I mean can -- can we go further into the code where
17 that is laid out for us?

18 MS. DUNCAN: Your Honor, this is a legal
19 argument based on an analysis of those two provisions of the
20 Penal Code. I'm not arguing to you that there is Penal Code
21 section 54.063 that says that.

22 THE COURT: Well I would like to see some
23 area -- I would like to see something in either of these
24 Penal Code that actually demonstrates your argument. I mean
25 that actually lays out something that backs up your

1 argument. I just don't see it.

2 MS. DUNCAN: I understand you don't, Your
3 Honor.

4 THE COURT: Can you show me a section
5 7.02(A), is there anything under (A)1, (A)2, (A)3 or (B) at
6 7.02 that illustrates your argument?

7 MS. DUNCAN: The section I cite is 02(A).

8 THE COURT: Uh-huh. Yeah. I read that.

9 MS. DUNCAN: Two. But I can't read further
10 than that. That's, that's the argument. We've made it and
11 I think the Court disagrees with me.

12 THE COURT: Well let's get into this.
13 7.02(A)2 says that a person is criminally responsible for an
14 offense committed by the conduct of another if acting with
15 intent to promote or assist the commission of the offense he
16 solicits, encourages, directs, aids or attempts to aid the
17 other person to commit the offense. And then you could go
18 on to 3 and you could go on to (B). But your argument is
19 that there is no attempt to aid a person in the commission
20 of the offense by simply being a getaway driver or a
21 lookout; is that your argument?

22 MS. DUNCAN: No. My argument is that the aid
23 is to the commission of the offense, using the language of
24 the statute, those are two different things. And the Family
25 Code is talking about the commission of an offense, not the

1 aiding of an offense.

2 THE COURT: No. 7.02 is, is a part of the
3 code that explains why a person can be guilty for the
4 commission of an offense and it explains very well, I think,
5 that that, in fact, can take place if a person does certain
6 things. And of course it says they have to act with intent
7 to do those things. So I'm really -- I'm having a hard time
8 with your argument.

9 MS. DUNCAN: I understand.

10 THE COURT: I really am.

11 MS. DUNCAN: Yes, Your Honor, I can tell.
12 And I respect that, that there is a difference. I don't
13 believe I can make it any clearer for the Court than I have.

14 THE COURT: Is that right?

15 MS. DUNCAN: That's the best I can do.

16 THE COURT: You can't make it anymore clear?

17 MS. DUNCAN: That's all I got, Your Honor.

18 THE COURT: I only have reasonable
19 intelligence so.

20 MS. DUNCAN: Far superior to me.

21 THE COURT: I may transfer this case to
22 someone that has above reasonable intelligence. Maybe they
23 could understand your argument.

24 MS. DUNCAN: Then we'd need a lawyer to take
25 my place as well.

1 THE COURT: Okay. What else do you have?

2 MS. DUNCAN: That -- as far as the State's
3 burden of proof, that's as far as we got on our -- Your
4 Honor, I do have one more argument.

5 THE COURT: Okay. Go ahead.

6 MS. DUNCAN: The timing of it is interesting
7 because of this argument we've been doing. But honestly,
8 Your Honor, what this comes down to is that the Court has
9 discretion to dismiss this.

10 THE COURT: The discretion to do what?

11 MS. DUNCAN: To dismiss this case in the
12 interest of justice.

13 THE COURT: No, no, I know. But you don't
14 spend time telling me stuff that people like me with
15 reasonable intelligence already know. I already knew that.

16 MS. DUNCAN: Well Your Honor, what we want to
17 tell you about Jorge Guerrero is that he is sort of your
18 text book case of the Court having made the right call the
19 first time. Deciding that this is a young man who needed --
20 or a teenager at that time, who needed to spend some time in
21 the adult system to grow up and have a chance to
22 rehabilitate himself and that's exactly what you've got
23 here. This could be a poster child for how juvenile courts
24 work and work well. Because he has gone on to adult court,
25 he's served --

1 THE COURT: What part -- okay. I respect
2 your argument. But what part of -- what part of the Family
3 Code are you basing this argument? I mean this sounds like
4 an emotional appeal. That's okay. Lawyers are good at that
5 but tell me strictly what section are you dealing with now
6 in making the argument that because he was in timeout for a
7 while and he's kind of, you know, seen the light in some
8 respects, that that should bear on my decision as to whether
9 or not to find probable cause and other things, I suppose.

10 MS. DUNCAN: And it may not, Your Honor.
11 Because this is --

12 THE COURT: Okay.

13 MS. DUNCAN: This is purely discretion for
14 the Court. But I'm saying that if there ever were a case
15 where --

16 THE COURT: Discretion of the Court. But
17 you're not saying that, in using my discretion, that I would
18 use it somewhat akin to judicial notification. In other
19 words, you're not saying that I should, even in the presence
20 of probable cause, that I should make an emotional decision
21 based on what you believe is adequate rehabilitation, I
22 suppose.

23 MS. DUNCAN: Certainly.

24 THE COURT: I mean that's what you're asking
25 me to do. You're asking me to not follow the law, but yet

1 use your discretion in an emotional way to not make a
2 finding that I otherwise should make. Is that what your
3 argument is?

4 MS. DUNCAN: Your Honor, you have the
5 discretion once --

6 THE COURT: I don't want to use my discretion
7 to not follow the law though. I mean, you don't blame me
8 there, do you?

9 MS. DUNCAN: The law does allow you to
10 dismiss or to recertify, that's the jurisdiction that the
11 Court has on a remand under oath 41 and so that's why I was
12 offering the argument.

13 THE COURT: Okay.

14 MS. DUNCAN: And you know, we have more, but
15 if you don't want to --

16 THE COURT: I want to hear everything you
17 have to say. I'm actually fascinated by most of it.

18 MS. DUNCAN: Well I guess that's something,
19 Your Honor, and I'm grateful for that.

20 THE COURT: Okay.

21 MS. FISHER: Judge, at this time, we'd like
22 to offer Respondent's No. 1.

23 (Whereupon Respondent's Exhibit No. 1 is offered
24 into evidence.)

25 THE COURT: Okay.

1 MS. FISHER: This is a business records
2 affidavit with the pen packet from TDC showing that my
3 client had no disciplinary records or write-ups while he was
4 in prison.

5 THE COURT: All right. It's admitted.
6 Anything else?

7 (Whereupon Respondent's Exhibit No. 1 is admitted
8 into evidence.)

9 MS. FISHER: Judge, I'd also like to make the
10 argument that Jorge had a misdemeanor possession of
11 marijuana at 13, a trespass at 13 and a trespass at 15.
12 Prior to committing this offense, he had three misdemeanor
13 offenses that were nonviolent. In this particular offense,
14 you heard testimony that he did not yield the weapon, that
15 he did not exit the vehicle and that he drove the vehicle
16 and that he was fleeing in most scenarios.

17 THE COURT: Well you're back on the argument
18 of --

19 MS. FISHER: That he's been rehabilitated.

20 THE COURT: -- issues relating to whether a
21 person can be rehabilitated, I suppose.

22 MS. FISHER: That's correct.

23 THE COURT: Because you're talking about --
24 but you failed to point out that every one of those cases
25 that he was adjudicated on, he was actually placed on

1 probation, violated probation and ended up going to --

2 MS. FISHER: Placement.

3 THE COURT: -- placements within the
4 probation department.

5 MS. FISHER: That's correct.

6 THE COURT: In fact, he's been to all of our
7 placements, I think, except the Leadership Academy, but he
8 went to one twice. So your argument is not that he hasn't
9 had the benefit of all that -- or pretty much all that the
10 juvenile probation department has to offer.

11 MS. FISHER: Not at all.

12 THE COURT: You're not arguing that, are you?

13 MS. FISHER: Not at all. He's had all the
14 services as a 16 year old and a 15 year old and a 14 year
15 old and he went --

16 THE COURT: And isn't it -- is it not
17 significant to you that -- you said that he committed these
18 other offenses before he graduated to the aggravated
19 robbery, which co-counsel says he's not criminally
20 responsible for. But if, in using your argument, that he
21 did commit a aggravated robbery after all these other
22 things -- other cases where, in fact, he violated each one
23 of the probations, that wouldn't -- isn't that telling that
24 after having all the benefits of rehabilitation efforts and
25 programs that he still went to aggravated robbery after all

1 that?

2 MS. FISHER: That's correct.

3 THE COURT: That's a significant thing, isn't
4 it?

5 MS. FISHER: Absolutely.

6 THE COURT: Okay. All right. So what else
7 is your argument?

8 MS. FISHER: That's my argument, Judge. That
9 he's been -- spent three years locked up and that he has --

10 THE COURT: Would it have been different to
11 you if he had committed an aggravated robbery first and then
12 never did another aggravated robbery, but in fact, committed
13 misdemeanors for the next -- over the next three or four
14 years? Would that have been better?

15 MS. FISHER: I have no idea. That's not my
16 argument.

17 THE COURT: Okay.

18 MS. FISHER: It's just an equity argument.

19 THE COURT: I just try to reach logical
20 conclusions from arguments sometimes.

21 MS. FISHER: And with that, we conclude.

22 THE COURT: Anything else?

23 MR. NIELSEN: Judge, I rest also.

24 THE COURT: You sure you didn't leave
25 anything out?

1 MS. FISHER: No.

2 THE COURT: Okay.

3 MR. NIELSEN: Judge, I simply argue a
4 couple -- as long as you've rested; is that correct?

5 MS. FISHER: I have.

6 MR. NIELSEN: So we both close, Judge. In
7 any event, I would argue that, obviously due to his age,
8 there's nothing that the juvenile system can do for him.
9 The juvenile system did try and help him, as the Court
10 pointed out, with numerous placements in juvenile probation.

11 THE COURT: Well I think your -- I think I
12 would like to hear you respond to -- you know, I asked
13 questions about the argument that was made, but I'm not -- I
14 can't -- I'm not responding. That's your job. I don't know
15 what the response is to what she said.

16 For instance, one of the arguments was, well you
17 guys didn't exercise due diligence. I asked the question,
18 well what else would you have them do? And I don't know the
19 answer to that. But you still -- I would like to hear you
20 respond --

21 MR. NIELSEN: Sure.

22 THE COURT: -- to that argument.

23 MR. NIELSEN: Yeah. I think the State did
24 exercise due diligence.

25 THE COURT: Okay. But tell me how.

1 MR. NIELSEN: Okay. We proceeded on the
2 initial certification hearing before he turned age 18,
3 that's shown. The case was then adjudicated in the adult
4 court in which he received a TDC sentence. He then appealed
5 it and that case then was reversed based on the Moon
6 opinion. There is nothing that the State could have done
7 differently to exercise due diligence in this case. Even
8 moving faster than the Court -- than all these courts did to
9 adjudicate him wouldn't have made any difference in this
10 case, Judge.

11 I think that when you have a case in which a -- in
12 which a juvenile's adult sentence is reversed on appeal, as
13 long as the State has proceeded in an orderly fashion and
14 not prolonged the case through me, through its own -- in
15 other words, I think the due diligence issue, Judge, is
16 really the classic, we sit on a case for years, we know we
17 have enough evidence to file it but we want to go ahead and
18 get it over because we would like to gain some sort of
19 unfair advantage against the defense.

20 THE COURT: Do you think that --

21 MR. NIELSEN: That's not what we're doing
22 here.

23 THE COURT: Do you think that the Court of
24 Appeals, in reversing this case, intended in any way, I
25 don't see it in the opinion, but do you think that the Court

1 of Appeals in reversing this case intended that, not only
2 would the respondent in the case receive a remand for a new
3 hearing but that it also goes along with a dismissal for
4 failure of jurisdiction for the failure of the state to have
5 had a hearing that ultimately did not result in a reversal.

6 MR. NIELSEN: No, no, Judge. I don't think
7 they did. And I think even in the Moon case, it's very
8 clear at the end of the Moon case and part of a footnote, I
9 believe, that they were very explicit in saying the case
10 goes back to the juvenile court for proceedings that I think
11 clearly fit within the legislature's intent, which was under
12 section 51.0412, jurisdiction over incomplete proceedings.
13 I mean I think that's the classic example of that. That is
14 exactly what the legislature had in mind when we're dealing
15 with a situation and I believe that's exactly what the Moon
16 case, the Court of Criminal Appeals referred to was section
17 51.0412, and that the Court can continue to proceed. And I
18 think you can even look at the legislature and the last
19 legislative session decided, well we want to go ahead and
20 give the respondent another, another way of remedying this
21 so that he could possibly still proceed in the juvenile
22 court by allowing an expedited appeal in the Texas Supreme
23 Court of any waiver of jurisdiction hearing.

24 So I think, I think it's all -- it makes sense.
25 It's common sense. It's pretty clear from all the opinions

1 that we can, you know, we can continue to proceed, that this
2 is not a -- if that were the case, why wouldn't the Court of
3 Appeals just said -- remanded it and order this Court to
4 dismiss this case?

5 THE COURT: I don't know why the Court of
6 Appeals does what they do. But I would say that in the Moon
7 case though, as you will recall, the Moon case was a
8 circumstance where the respondent's attorney brought a
9 psychiatrist to testify at how nice the juvenile was and
10 there was no cross examination or there was no contest by
11 the State as to all the flowery-type things that the
12 psychiatrist, hired by the respondent, came and testified
13 to. And because of that, in the Moon case, they said well
14 you know, you really haven't -- you don't have enough
15 specifics as to, as to why you ordered transfer because the
16 psychiatrist of the respondent said such nice things and you
17 don't have things that say other things.

18 Now in a case like this though, as far as
19 addressing specifics, you know they complained about lacking
20 specifics, but seems like your main specific in this case is
21 the fact that he's too -- he's not even eligible for
22 rehabilitation in the juvenile system. But that wasn't --
23 that was caused because the case was reversed at the time it
24 was reversed and that he's just too old now.

25 And so the issue of choosing by the Court,

1 choosing the protection of the public versus the question of
2 can he be rehabilitated in the juvenile section, really
3 almost doesn't apply anymore. It makes the protection of
4 the public the only thing that's still out there.

5 MR. NIELSEN: I agree. And I think that the
6 Court reversed this case because the order was insufficient
7 for any kind of effective review by the Court of Appeals.
8 And -- but I think that in this particular situation,
9 obviously after having a hearing now and if the Court grants
10 it and grants it with a order that is specific, using the
11 testimony that the Court heard and also all the exhibits and
12 documents that the Court has reviewed, that there wouldn't
13 be any issue.

14 THE COURT: What about review of, for
15 instance, you offered in evidence a probation report today
16 that seems to be updated from one that was done before,
17 right?

18 MR. NIELSEN: That is correct.

19 THE COURT: Same one except it was updated?

20 MR. NIELSEN: That is correct, Judge.

21 THE COURT: All right. So I'm not missing
22 something that I could use to review, am I? What about
23 anything else in the case when it was first brought?

24 MR. NIELSEN: Judge --

25 THE COURT: Is there anything else that I'm

1 missing or that I can't use or should use?

2 MR. NIELSEN: I don't think so.

3 THE COURT: What about the transcript of the
4 first -- of the first hearing? Is that fair game?

5 MR. NIELSEN: I think it would be, Judge.
6 First of all, he had the same lawyer in that hearing. He
7 had the same issues that are at stake here. In other
8 words --

9 THE COURT: Would it be appropriate -- would
10 it be appropriate for me to use -- to read the transcript
11 from the first hearing and see if there's something in there
12 that could assist the Court on some of these issues? Or the
13 fact that he's now 20, does that make that all kind of a
14 moot question in your mind? I mean, obviously the issues
15 are different today than they were when he was 16 or 17.

16 MR. NIELSEN: Well I'm assuming that the
17 testimony in that case, I don't know if there was any
18 testimony from a parent, but I'm assuming the testimony in
19 that case was from an officer would establish probable
20 cause, so I don't know how much --

21 THE COURT: Well let's assume for a second
22 that probable cause is not the issue.

23 MR. NIELSEN: Okay.

24 THE COURT: It's the other things.

25 MR. NIELSEN: The other factors, yes.

1 THE COURT: Okay.

2 MR. NIELSEN: Certainly I think the Court
3 should be allowed to review that. I don't know -- I don't
4 know the answer for sure on that. I haven't thought -- I
5 hadn't -- I hadn't researched it and I don't know -- I doubt
6 there's anything out there that would give us any insight as
7 to whether the Court can do that.

8 THE COURT: What if I remembered some things
9 but not all things? Would that make it more or less
10 appropriate to review the prior transcript?

11 MR. NIELSEN: I don't know the answer to
12 that. I honestly don't.

13 THE COURT: Well do you have a response to
14 that? Do you have a response to that?

15 MS. DUNCAN: To the question of whether a
16 prior record --

17 THE COURT: Would it be appropriate for me to
18 look at the transcript of the prior hearing?

19 MS. DUNCAN: Certainly, you know, the Court
20 has discretion to review whatever materials it chooses. But
21 under subsection (J), that's just not a factor. I mean, you
22 know, the prior reports, the prior experience, the prior
23 placements are not elements under subsection (J).

24 THE COURT: Well why wouldn't it be a factor?
25 If it was part of a big picture, why would it not be factor?

1 MS. DUNCAN: The big picture is for initial
2 certification under (A) and (H), Your Honor.

3 THE COURT: I'm sorry?

4 MS. DUNCAN: The initial -- the big picture
5 is what is at issue in the initial certification and in (A)
6 or (H) proceeding when a child was under 18. But once he's
7 over 21 -- I mean once he's over 18, then subsection (J)
8 kicks in and the Court can consider, of course, whatever it
9 chooses. But it's not required and it certainly --

10 THE COURT: I don't want to be considering
11 something that, that you or the State believes would be
12 inappropriate. You know, I want to -- I want this to be
13 done correctly. If we're gonna do it, we should do it right
14 and so that's -- you know, that's why I'm asking the
15 question and giving you input as to whether or not that
16 would be appropriate.

17 MS. DUNCAN: Appropriate is, you know,
18 whatever's within the Court's discretion. Certainly that's
19 within the Court's discretion if the Court chooses to review
20 the old record. However, when the Court making its finding
21 under subsection (J), the prior proceeding is not going to
22 be a factor one way or the other.

23 MR. NIELSEN: Well it could be as to probable
24 cause, Judge.

25 THE COURT: Well we're not talking about

1 probable cause right now. We're talking about those
2 factors.

3 MR. NIELSEN: It is those factors --

4 THE COURT: We're past the issue of is the
5 offense charged --

6 MR. NIELSEN: Yes.

7 THE COURT: -- violent against people and
8 that. Okay. Is there anything else y'all want -- okay. I
9 will -- I'm gonna look at some other things. I'll have a
10 decision for you probably in a week or so. Yeah. Probably
11 in a week. So that would be next Monday.

12 MR. NIELSEN: All right, Judge.

13 THE COURT: Thank you.

14 MS. DUNCAN: Thank you, Your Honor.

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1 THE STATE OF TEXAS)

2 COUNTY OF HARRIS)

3 I, Julia M. Rangel, Official Court Reporter in and
4 for the 314th District Court of Harris County, State of
5 Texas, do hereby certify that the foregoing contains a true
6 and correct transcription of all portions of evidence and
7 other proceedings requested in writing by counsel for the
8 parties to be included in this volume of the Reporter's
9 Record, in the above-styled and numbered cause, all of which
10 occurred in open court or in chambers and were reported by
11 me.

12 I further certify that this Reporter's Record of
13 the proceedings truly and correctly reflects the exhibits,
14 if any, admitted, tendered in an offer of proof or offered
15 into evidence.

16 WITNESS MY OFFICIAL HAND this the 8th day of
17 December, 2015.

18 /s/ Julia M. Rangel_____
19 JULIA M. RANGEL, Texas CSR 6412
20 Expiration Date: 12/31/16
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