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Supreme Court

Police officer D was properly convicted of conspiring to commit extortion for routing ve-hicles from accident scenes to a repair shop in exchange for payments from the shop owners because the conspirators in an extortion scheme need only to agree that the public official will obtain property from another person; this other person may be one of the co-conspirators.*Ocasio v. United States,* 136 S. Ct. 1423 (2016).

D, a former police officer, participated in a kickback scheme in which he and other officers routed damaged vehicles to an auto repair shop in exchange for payments from the shop owners. D was charged with obtaining money from the shop owners under color of official right, in violation of the Hobbs Act, 18 U.S.C. §?1951, and of conspiring to violate the Hobbs Act, in violation of 18 U.S.C. §?371. The trial court rejected D?s argument that?because the Hobbs Act defines extortion as ?the obtaining of property from another, with his consent . . . under color of official right??a Hobbs Act conspiracy requires that the alleged conspirators agreed to obtain property from someone outside the conspiracy. D was convicted on all counts, and the Fourth Circuit affirmed. D challenged his conspiracy conviction, contending he could not be convicted of conspiring with the shop owners to obtain money from them under color of official right. The Supreme Court affirmed.

The general federal conspiracy statute, §?371, makes it a crime for ?two or more persons [to] conspire . . . to commit any offense against the United States.? This use of ?conspire? incorporates the longstanding principles of conspiracy law; a defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another conspirator with his consent and under color of official right. And under established case law, the fundamental characteristic of a conspiracy is a joint commitment to an endeavor that, if completed, would satisfy all the elements of the underlying substantive criminal offense. A conspirator need not agree to commit the substantive offense?or even be capable of committing it?to be convicted. It is sufficient that the conspirator agreed that the underlying crime be committed by a member of the conspiracy capable of committing it. D and the shop owners reached just such an agreement: They shared a common purpose that

D and other police officers would obtain property ?from another??that is, from the shop owners?under color of official right. Although the shop owners could not act under color of official right, they were nonetheless conspirators in the extortion scheme since they shared a common purpose with the officer to commit every element of the extortion offense with the shop owners? consent.

State court?s summary denial of habeas relief was a de-cision on the merits subject to deferential review; the presumption that the state court adopted the procedural rejection of the lower court was amply refuted.*Kernan v. Hinojosa,* 136 S. Ct. 1603 (2016).

Inmate D filed a state habeas petition asserting an ex post facto claim. The state superior court dismissed for improper venue, because D did not file the petition in the county in which he was confined, and the Supreme Court of California summarily denied relief without explanation.

D filed a federal habeas petition. The district court denied D?s ex post facto claim under the Antiterrorism and Effective Death Penalty Act?s deferential review. The Ninth Circuit, citing *Ylst v. Nunnemaker,* 501 U.S. 797 (1991), ?looked through? the Supreme Court of California?s denial to the last reasoned decision adjudicating D?s claim: the superior court?s dismissal for improper venue. The Ninth Circuit reasoned that the superior court?s decision was ?not a determination ?on the merits?? and, as a result, ?not bound by AEDPA.? Having freed itself from AEDPA?s strictures, the Ninth Circuit granted habeas relief.

The Supreme Court reversed and remanded. The Ninth Circuit should have reviewed D?s claim through the AEDPA?s deferential lens because the Supreme Court of California?s denial of D?s petition was on the merits. *Ylst* held that where ?the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.? But the Court refused to make that presumption irrebuttable; ?strong evidence can refute it.? It was amply refuted here. Improper venue could not possibly have been a ground for the high court?s summary denial of D?s claim. There is only one Supreme Court of California and, thus, only one venue in which D could have sought an original habeas writ in that court. Under these circumstances, it cannot be that the state supreme court?s denial, as stated in *Ylst*, ?rest[ed] upon the same ground? as the superior court?s. It quite obviously rested on some different ground. The *Ylst* look-through approach was therefore inapplicable.

Fifth Circuit

The maxima in 18 U.S.C. §?3581, which depend on the classification of the offense under §?3559, do not apply where the statute of conviction itself specifies the maximum term of imprisonment allowed. *United States v. Simpson,* 796 F.3d 548 (5th Cir. 2015).

District court abused its discretion in reopening, pursuant to Fed. R. Civ. P. 60(b)(6), its 1998 judgment denying D (sentenced to life imprisonment on drug charges) collateral relief under 28 U.S.C. §?2255.*United States v. Fernandez,* 797 F.3d 315 (5th Cir. 2015).

The purported basis for D?s Rule 60(b)(6) motion?that the district court inadvertently failed to rule on a meritorious claim that defense counsel was ineffective in not severing D?s trial from his co-defendant?was more properly characterized as one under Rule 60(b)(1) (mistake or inadvertence), to which a one-year limitation applied. Because D?s motion was not filed until long after one year, the motion was untimely. The Fifth Circuit reversed the district court?s order granting Rule 60(b) relief and granting a new trial.

District court properly granted a new trial for police officers charged with shooting civilians at the Danziger Bridge after Hurricane Katrina based on federal prosecutors? anonymous comments about the case while it was going on and other wrongdoing by the prose-cu-tors.*United States v. Bowen,* 799 F.3d 336 (5th Cir. 2015),*reh?g en banc denied,* 813 F.3d 600 (5th Cir. 2016).

The panel majority agreed with the district court that a new trial was warranted, irrespective of harm/prejudice, under *Brecht v. Abrahamson,* 507 U.S. 619 (1993). The panel majority also agreed with the district court?s alternative finding that Ds were prejudiced. Finally, the panel rejected the Government?s request to remove the district judge.

D failed to show any reversible plain error occurred in his sentencing under the ACCA; thus, he also failed to show, under a more demanding standard and on the existing record, that extraordinary circumstances warranted a rehearing.*United States v. Guzman,* 797 F.3d 346 (5th Cir. 2015).

D claimed for the first time, in this petition for rehearing, that his sentence enhanced under the Armed Career Criminal Act, 18 U.S.C.S. §?924(e), was invalid under *Johnson v. United States,* 135 S. Ct. 2551 (2015)(which invalidated the residual clause of the ACCA?s ?violent felony? definition). The Fifth Circuit declined relief, saying it was unclear whether the prior conviction in question qualified as a ?violent felony? under the elements clause of the ?violent felony? definition; that lack of clarity precluded relief under the plain-error standard.

Where the indictment charging D with defrauding two banks was redacted to delete all references to one of the banks, there was no constructive amendment of the indictment because the charge against D was narrowed not broadened.*United States v. Griffin,* 800 F.3d 198 (5th Cir. 2015).

Nor was there a prejudicial variance because D knew before trial that the Government was proceeding on a theory that only one bank was defrauded.

(2) The Fifth Circuit rejected D?s claim that the Government failed to prove D defrauded the bank?i.e., failed to prove D placed the bank at risk of civil liability or financial loss. The Fifth Circuit noted, but did not address the effect of, *Loughrin v. United States,* 134 S. Ct. 2384 (2014); the Government argued that the risk-of-loss requirement was questionable in light of *Loughrin.*

District court plainly erred in imposing a pornography restriction as a special condition of supervised release because the court did not justify the condition, and the record did not make it clear how the condition was related to the statutory factors.*United States v. Prieto,* 801 F.3d 547 (5th Cir. 2015).

The error affected D?s substantial rights because the condition could not properly have been imposed on this record; however, the Fifth Circuit declined to exercise its plain-error discretion to correct the error: ?[W]e do not think that the public would perceive any grave injustice when a district court imposes a modifiable condition prohibiting a defendant with a prior child-molestation conviction from purchasing, possessing, or using sexually stimulating or sexually oriented ma-te-rials, the defendant?s [presentence investigation report] recommended the condition, and the defendant forwent not one but two opportunities to object to the condition[.]? Furthermore, the Fifth Circuit upheld its precedent in holding that the district court did not plainly err in imposing a special supervised-release condition prohibiting D from residing in or going to places minors were known to frequent.

In treaty-transfer determination for prisoner transferred from Costa Rica to the United States, the Parole Commission did not run afoul of the statutory directive that the total transfer sentence could not exceed the sentence imposed by the foreign tribunal; the Parole Commission permissibly accomplished this by stating D was to be released from supervision when his imprisonment and supervision totaled 30 years (which was the Costa Rican sentence).*Bender v. United States Parole Commission,* 802 F.3d 690 (5th Cir. 2015).

Even though the exact amounts of imprisonment and supervision were not precisely known at the time, this did not constitute an impermissibly determinate sentence. Nor was the Parole Commission?s determination procedurally or substantively unreasonable. The Fifth Circuit affirmed.

Court of Criminal Appeals

COA improperly concluded that counsel?s advice, what-ever it was, constituted deficient performance; to over-come the presumption of reasonable professional as-sis-tance, any allegation of ineffectiveness must be firmly founded in the record.*Anthony v. State,* 494 S.W.3d 106 (Tex.Crim.App. 2016).

D pleaded guilty to aggravated sexual assault of a child younger than 14 in exchange for deferred-adjudication community supervision. The trial judge placed D on 8 years of community supervision; the judge?s deferred-adjudication order listed the victim?s age as 3 years old. Several years later, the State moved to adjudicate, alleging D violated his community supervision. The judge found the violations true, found D guilty, and sentenced him to life imprisonment. The judgment again noted that the victim was 3 at the time of the assault.

COA reversed, finding the judge had no authority to grant D deferred adjudication because the judge?s deferred-adjudication order contained a finding that the victim was 3 years old; COA then concluded D was prejudiced by counsel?s deficient performance in advising him on the offense?s punishment range, though the record does not contain what exactly D?s coun-sel told him. In its view, the finding that the victim was 3 raised the issue of whether Tex. Code Crim. Proc. art. 42.12 precluded the judge from imposing deferred adjudication. (Article 42.12 stated that a judge may not impose deferred adjudication on a defendant punishable under Tex. Penal Code §?22.021(f); §?22.021(f)(1) provided a minimum pun-ishment of 25 years? confinement for aggravated sexual assault of a child under 6.)

CCA reversed, reinstating and reforming the trial court?s judgment. CCA struck from the judgment the finding that the victim was 3 and reformed it to reflect a finding that the victim ?was younger than 14 years of age at the time of the offense.? CCA disagreed with COA?s analytical premise and, as a result, its conclusion that D received ineffective assistance. The indictment specifically alleged D assaulted a child who was younger than 14. D?s guilty plea, admonishments, waivers, stipulations, and judicial confession regarded a child under 14 as in the indictment. He pleaded guilty to a first-degree felony with a punishment range of 5 to 99 years or life, and was admonished on that range both orally and in writing when he received deferred adjudication. Other than the notation that the victim was 3?a finding that could be accurate under the indictment alleging a victim under 14?the record contained no indication that the parties or judge intended to punish the assault under §?22.021(f). Furthermore, the presumption of regularity requires that appellate courts indulge every presumption in favor of the regularity of the plea proceedings and trial court documents. Even if the finding was accurate, it had no support in the record.

COA should have vacated D?s aggravated assault conviction that the State unequivocally abandoned to avoid running afoul of the constitutional prohibition against multiple punishments.*Duran v. State,* 492 S.W.3d 741 (Tex.Crim.App. 2016).

A jury convicted D of burglary of a habitation and aggravated assault in two separate counts. The jury found D guilty of both counts, but the State abandoned the aggravated assault conviction prior to the trial?s punishment phase. COA upheld the aggravated assault conviction even though the State abandoned that charge; COA also upheld the trial court?s modification of the judgment to include a deadly-weapon finding. CCA reversed.

COA should have vacated the conviction for aggravated assault because the State unequivocally abandoned the charge in the middle of trial and after jeopardy had attached. Moreover, COA improperly held that the deadly-weapon finding was proper based on the jury?s finding of guilt on the burglary charge. For a trial court to enter a deadly-weapon finding in the judgment, the trier of fact had to first make an affirmative finding to that effect. CCA disagreed with the State that the trial court could rely on the abandoned jury verdict in the aggravated assault case to support the entry of a deadly-weapon finding. The

jury did not necessarily decide the deadly-weapon issue when it found D guilty of burglary of a habitation; the jury was not required to decide whether D committed aggravated assault with a deadly weapon. CCA reformed the judgment to delete any reference to a deadly-weapon finding in D?s burglary of a habitation conviction.

CCA rejected capital-murder D?s points of error, mainly that the evidence was sufficient to reasonably infer D intentionally committed murder in the course of committing aggravated rape; D?s ?proffered scenario, in which [D] had sexual intercourse with [victim] and then someone else entered the apartment and murdered her, strains credulity.?*Jenkins v. State,* 493 S.W.3d 583 (Tex.Crim.App. 2016).

?In June 2013, a jury convicted appellant of capital murder for committing the offense of murder in the course of aggravated rape in November 1975. Based upon the jury?s answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.0711, sections 3(b) and 3(e), the trial judge sentenced appellant to death. Direct appeal to this Court is automatic. Appellant raises 19 points of error. After reviewing appellant?s points of error . . . we affirm the trial court[.]?

CCA focused on rejecting four of D?s claims: One, viewing the totality of the evidence, the jury could have reasonably inferred that D murdered the victim in the course of committing aggravated rape because his DNA profile was identified in semen inside her body and in a hand print on the blouse she was wearing. Two, the trial court did not err by determining that the DNA evidence was sufficiently reliable and relevant under Tex. R. Evid. 702; a DNA analyst stated he followed the protocol in effect in 1997 by running a reagent blank when he first analyzed the liquid extract. Three, the court did not err under Tex. R. Evid. 410 in excluding plea evidence because any probative value of D?s plea offer was diluted by the various motivations that might have driven his decision to make the offer; any probative value was substantially outweighed by the danger of misleading the jury.

Four, the trial court did not abuse its discretion in denying D?s motion for mistrial after juror misconduct was brought to the court?s attention; D said he did not receive a fair and impartial trial as a result of a juror?s improper conversation with an outside party. CCA deferred to the trial court?s findings that the juror?s testimony denying prior knowledge of the case was credible and that the juror did not communicate outside knowledge to other jurors. The trial court properly employed less drastic measures that effectively insulated the jury from outside influence and sufficiently cured the problem created by the juror?s misconduct.

Trial court properly excluded evidence in support of D?s claim that he was justified in assaulting his ex-wife; the evidence was irrelevant, as it did not give rise to any justification defense because it failed to show D had to make a split-second decision to assault his ex-wife to keep his sons from immediate harm.*Henley v. State,* 493 S.W.3d 77 (Tex.Crim.App. 2016).

A jury found D guilty of misdemeanor assault causing bodily injury to a family member. He appealed that the trial court excluded evidence in support of his claim of defense of a third person under Tex. Penal Code §?9.33. D had asked the court to permit him to cross-examine his ex-wife about alleged misconduct of her new husband and alleged sexual abuse of their sons by the new husband?s former stepson. D also sought to introduce his own testimony that if his ex-wife left his house with their sons, he believed she would allow the boys to come in contact with her new husband and the former stepson, and this would put them in danger. D asserted this evidence supported his claim of defense of a third person and should have been allowed to justify the evidence that D pulled his ex-wife out of her car by her hair, punched her in the face several times, and hit her head against the driveway. COA concluded the trial court erred by denying D the right to show his state of mind and develop his justification defense. CCA reversed COA and reinstated D?s conviction.

CCA concluded that ?none of the proffered testimony had any tendency to show that the children were in need of immediate protection.? In determining whether evidence must be admitted under the U.S. Const. amend. VI Confrontation Clause, the trial court must balance the defendant?s right to cross-examine and the probative value of the evidence against the risk factors associated with admitting the evidence. The trial court maintains broad discretion to impose reasonable limits on cross-examination. This evidence ?was not probative. It did not show in any way that appellant was justified in assaulting [his ex-wife]. It wasn?t even marginally relevant.? And D failed to assert how the evidence would have shown any motive or witness bias. Finally, admission of the evidence would have presented a significant risk that the jurors might be distracted from the charged case and might disregard D?s actions due to their dislike of his ex-wife. Moreover, D?s state of mind about what he thought might happen in the future was irrelevant to whether his conduct was immediately necessary to protect his sons from the new husband or his stepson, as neither of them were there, and there was no evidence that the ex-wife or her mother was about to use unlawful force on the boys.

The State may appeal a grant of shock probation, but that appeal stays the proceedings in trial court; given the stay in proceedings, the trial judge?s timeline to sentence D extended, and his order placing D on shock probation was valid.*State v. Robinson,* No. PD-0974-15 (Tex.Crim.App. June 29, 2016).

Tex. Code Crim. Proc. art. 42.12, §?6(c) allows a judge to temporarily send a defendant to prison before returning him to court and sentencing him to community supervision. This is ?shock probation.? Section 6 states that the judge retains jurisdiction over the case for 180 days after sentencing the defendant to prison. Tex. Code Crim. Proc. art. 44.01(a)(2) allows the State to appeal a court order that arrests or modifies a judgment.

A court of appeals has subject-matter jurisdiction to entertain a State?s art. 44.01(a)(2) appeal of a trial court?s grant of art. 42.12, §?6(c), shock probation, but the pendency of that appeal does not deprive the trial court of subject-matter ju-ris-diction to consider a motion for shock probation after the man-date has issued on that appeal. ?When the State appealed the trial court?s grant of shock probation, that stayed the proceedings until the appeal was resolved. The timeline for the trial court to grant shock probation started on December 28, 2011, when Appellee began serving his sentence, and ran through February 14, 2012, when the State filed its notice of appeal. It was then stayed until the appellate court?s first mandate is-sued on August 19, 2013, at which point it began running again. Therefore, only 111 days had passed when the trial court granted Appellee shock probation. . . . Applying Article 42.12 §?6, without harmonizing that statute with Article 44.01(e), could prevent a defendant from ever receiving shock probation because the State could simply appeal whenever a trial court grants it. And then, regardless of the State?s points of error, by the time the appeal was resolved it would be too late for the trial court to grant shock probation. That, as the trial court put it, would be an absurd result. We reverse the judgment of the court of appeals and enter judgment affirming the shock probation order of the trial court.?

Trial court?s cumulation order was invalid because D?s parole had not been revoked at the time he was sentenced on the second offenses; there was no existing sentence to cumulate.*Byrd v. State,* No. PD-0213-15 (Tex.Crim.App. Sept 14, 2016).

While D was on parole, he was convicted of possession of drugs and evading arrest. He was sentenced on these offenses before his parole on the original offense was revoked. On D?s appeal, COA and CCA asked, if a defendant commits an offense while on parole, is the trial court able to stack the second sentence on top of the first sentence if the defendant?s parole on the first offense has not been revoked before he is sentenced on the second offense? COA held that a trial court may stack a new sentence on a prior sentence for which the defendant is on parole, ?irrespective of parole revocation.? CCA affirmed, but modified COA?s judgment.

?[F]or purposes of [Tex. Code Crim. Proc. art.] 42.08, the timing of a defendant?s parole revocation for the original offense matters. If parole is revoked on a defendant?s first offense before that defendant is

sentenced on the second offense . . . the second sentence may be stacked on top of the first sentence. However, if parole is not revoked on a defendant?s first offense before that defendant is sentenced for the second offense, then the second sentence may not be stacked on top of that first sentence. For the purposes of Article 42.08 and in relation to the second offense, that defendant had ?made parole? on the first offense, and thus his first sentence had already ceased to operate. We disapprove of all intermediate appellate court holdings to the contrary. . . . Because there was no evidence that appellant?s parole had been revoked at the time he was sen-tenced on his second offense, the trial court?s cumulation order was invalid. Each of the trial court?s judgments is reformed to delete the cumulation order.?

Trial court and COA properly held that D could be convicted of enhanced felony assault against his common-law spouse based solely on their past dating relationship.*Sanchez v. State,* No. PD-0372-15 (Tex.Crim.App. Sept 14, 2016).

D was charged with the third-degree felony of assaulting an individual with whom he ?has or has had? a dating relationship. The indictment alleged D knowingly or recklessly impeded the normal breathing or circulation of this individual by applying pressure to her throat or neck. The trial court found D guilty in a bench trial. COA affirmed. CCA granted D?s pe-tition to consider whether a defendant can be convicted of as-sault-ing his spouse based solely on their past dating relationship.

?[A]ssault is generally a Class A misdemeanor, but is en-hanced to a third-degree felony when the assault is committed against one of the three classes of individuals defined in the Texas Family Code and is committed by strangulation or suffocation. Tex. Pen. Code §?22.01(b). The three classes de-lin-eated in the Texas Family Code are those in a ?dating re-la-tionship,? ?family,? and ?household.? A dating relationship is a ?relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature.? Tex. Fam. Code §?71.0021(b). . . . Appellant?s assault offense was en-hanced by the charge that he assaulted someone with whom he ?has or has had a dating relationship.?. . . The State alleged no other alternatives in the indictment. . . . Under a plain language reading, the ?has had? phrase allows the dating relationship to have ended prior to the assault. In this case, Appellant and Price dated from June of 2006 until some point in August of 2006. As someone who had a dating relationship with Price before the 2009 assault, Appellant satisfies the basic requirements of Section 71.0021 in enhancing the Class A misdemeanor. . . . Whether the dating relationship ended due to the dissolution of the relationship or the inception of a marriage is irrelevant. Nowhere does the statute indicate that a marriage somehow cancels out a prior dating relationship between the same individuals. . . . Appellant claims that convicting him based upon his prior dating relationship with his spouse would meld dating relationships and spousal relationships into one in-distinguishable category. Appellant?s argument implies that the State could choose to prove either a dating relationship or a spousal relationship while alleging only a single charge. . . . There may be significant overlap between the categories of dating relationships and marriage, especially in the case of a common-law marriage, but the overlap between the categories does not make them identical or interchangeable. . . . There are individuals who have a spousal relationship but no prior dating relationship with each other, for instance in an arranged marriage. A defendant who assaults his spouse under these circumstances could be charged only with assault-family violence against a member of his family. . . . Finally, we are not convinced by the proposition that the legislature intended for the ?has had? element of the statute to apply exclusively to dating relationships that ended recently. . . . We will not add a statutory time limit when none exists[.]?

Court of Appeals

The evidence was insufficient to support D?s conviction for bail jumping and failure to appear because there was no evidence that D had actual notice of the trial setting.*Ferguson v. State,* No. 06-16-00046-CR (Tex.App.?Texarkana Oct 27, 2016).

D was arrested for possession of a controlled substance less than one gram. She was released after

posting a $100,000 surety bond. After hearing evidence that D missed a December 14, 2015, trial date, a jury convicted her of bail jumping and failure to appear. D appealed, arguing that the State failed to prove she intentionally or knowingly committed the offense be-cause she had no notice of the special trial setting.

COA rendered an acquittal. The evidence was insufficient to support D?s conviction of bail jumping and failure to appear under Tex. Penal Code §?38.10(a) because her instanter bond was not prima facie evidence of actual notice of the December 14 trial setting, as it did not advise her of the court in which she was to appear, the date or time, or whether the offense was a felony or misdemeanor, and because there was no evidence to prove D had actual notice of the trial setting. The evidence at trial established that no one sent D a written notice of her trial date, no one was able to reach her by phone, and there was no evidence that the trial setting was included on the trial court?s website.

Juvenile court did not make requisite statutory findings to waive its jurisdiction and transfer the case to district court.*Morrison v. State,* No. 14-15-00773-CR (Tex.App.?Houston [14 Dist] Nov 10, 2016).

D challenged his murder conviction on the basis that the district court did not have jurisdiction to hear his case because he was 16 years old at the time of the offense and the juvenile court?s jurisdiction was not properly waived. The State charged D and filed a petition for a discretionary transfer from juvenile court to criminal district court before D turned 18; however, the juvenile court heard the petition and transferred the case after D had reached his eighteenth birthday. The district court jury returned a guilty verdict and assessed punishment at 45 years? confinement.

COA concluded that the juvenile court abused its discretion in transferring the case to the district court after the child turned 18 without making findings under Tex. Fam. Code §?54.02(j)(4) as to why it was not practicable to proceed earlier; consequently, its jurisdiction was not waived, jurisdiction did not vest in the district court, and a conviction had to be vacated. Objecting at the transfer hearing was not necessary under §?51.042, read in context with the exclusive original jurisdiction of juvenile courts regarding illegal conduct by children under §§?51.02, 51.04(a), to preserve error on a complaint that the juvenile court?s transfer of the case did not properly waive jurisdiction and thus did not vest jurisdiction in the district court under Tex. Penal Code §?8.07(b) to conduct criminal proceedings. COA vacated the district court?s judgment and remanded to the juvenile court.
