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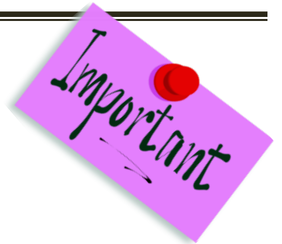
Dear Juvenile Law Section Members:

Welcome to the e-newsletter published by the Juvenile Law Section of the State Bar of Texas. Your input is valued so please take a moment to email us and tell us what you think of the new format.

The "Review of Recent Cases" includes cases that are hyperlinked to Casemaker, a free service provided by TexasBarCLE. To access these opinions, you must be a registered user of the TexasBarCLE website, which requires creating a password and log-in. If you do not wish to receive emails from TexasBarCLE, you can opt-out of their email list.



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EDITOR'S FOREWORD By Associate Judge Pat Garza

Somebody said life begins at 40. So, what does that mean to someone who's in his late 50s? I can tell you it doesn't mean much. While my days in the 50s are numbered and those numbers are small, I do realize that age is a relative thing. And I know that a person's attitude toward his age can reflect his true age. Well, the truth is, I don't feel old at all. In fact, especially when I'm not working, I feel like a kid in a grown up body. While that feeling doesn't always help my decision making, it does wonders for my attitude. And after all, it is our choices and our attitude which truly shape who we are.

I know I'm not the man I once was. But then, I've also learned to not be the man I once was. While we may lose certain things with time, we gain others. Yes, there's the memory problem, the vision problem, the hair problem, the joint problem, along with a few other problems that I just won't put down on paper. Did I mention the memory problem? It's funny, I can tell my daughter all about November 22, 1963, but I can't tell my wife what she asked me to do yesterday (maybe that's not old age, but I'm using it anyway). Sorry, I digress.

With age we gain that which no young person can find without living. They can't get it at the gym and they can't look it up on line. With age we gain experience. And experience is something a person just has to live through. There's no short-cut to it.

As we live our lives, we experience different things. Family, jobs, relationships, people, cultures, emotions, everything that we see, hear, feel, touch, and sense, becomes a part of our life experience and inevitably part of who we grow up to be. Even the tragedies in our life shape us. Maybe even more so than all the others.

I would like to believe that as I've aged I've grown for the better. That I have become a better husband, father, son, friend, co-worker and human being. I would like to believe that my experiences weren't wasted. That my choices in the past, both good and bad, have made me a better person today. That it is not my age that makes me who I am, it is my experience. And experience is good thing. So, while my days in the 50s are numbered, my days of being a better person are not.

A Prayer for Growing Old Gracefully

Lord, Thou knowest better than I myself that I am growing older and will someday be old.
Keep me from the fatal habit of thinking I must say something on every subject and on every occasion.
Release me from craving to straighten out everybody's affairs.
Make me thoughtful but not moody; helpful but not bossy.
With my vast store of wisdom, it seems a pity not to use it all; but Thou knowest, Lord, that I want a few friends at the end.
Keep my mind free from the recital of endless details; give me wings to get to the point.
Seal my lips on my aches and pains; they are increasing, and love of rehearsing them is becoming sweeter as the years go by.
I dare not ask for improved memory, but for a growing humility and a lessening self-sureness when my memory seems to clash with the memories of others.
Teach me the glorious lesson that occasionally I may be mistaken.
Keep me reasonably sweet, for a sour old person is one of the crowning works of the devil.
Give me the ability to see good things in unexpected places and talents in unexpected people; and give, O Lord, the grace to tell them so...........................Amen.

~ Author Unknown ~

Congratulations. The 2013 Texas Juvenile Justice Department's Post-Legislative Conference was held July 30-31, 2013 with over 400 participants. It was a great success. On behalf of the Juvenile Law Section, we'd like to thank the Texas Juvenile Justice Department for their efforts in sponsoring and coordinating this conference and in making it the success that it was. Congratulations.

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Special Legislative Issue. The Texas Juvenile Justice Department and the Juvenile Law Section should have released the 2013 Special Legislative Issue for juvenile law in August. All members of the Juvenile Law Section and all Chief Juvenile Probation Officers will receive a complimentary copy mailed by the State Bar of Texas. Section members will receive their copy via the mailing address that is on file with the State Bar of Texas. If you would like to update your address, please visit MyBarPage on the State Bar's website. An electronic version will be available on our website at www.juvenilelaw.org.

Elections. The council plans to have elections for council and officer positions in connection with our February conference. That means under State Bar rules the slate of nominees must be published in the December issue of this newsletter. If you have ideas for council members or officers, please contact Jill Mata, Nominations Committee Chair at (210) 531-1965 or Richard Ainsa at (915) 849-2552 on or before October 15.

27th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's Juvenile Law Institute will be held on February 24-26, 2014 in Corpus Christi, Texas. Chair-Elect Laura Peterson and her planning committee are already working on putting together an excellent and practical conference. Registration information will be sent out and will also be available on our website at www.juvenilelaw.org in October.

And now the end is near
So I face the final curtain,
I'll state my case of which I'm certain.
I've lived a life that's full, I travelled each and ev'ry highway,
And more, much more than this. I did it my way.

Frank Sinatra, "My Way" (lyrics by Paul Anka)

CHAIR'S MESSAGE By Richard Ainsa

Hope all of you have had a wonderful and fun summer. The 83rd Legislative Session just concluded and there were several changes to our juvenile statutes. To enlighten us as to these changes, the Texas Juvenile Justice Department sponsored its bi-annual Post-Legislative Conference in Austin at the end of July. The Conference was very well attended and thoroughly covered all the substantive changes to the Texas juvenile justice system. You may review this information at www.juvenilelaw.org as soon as it is posted.

As we look to the coming months, Juvenile Law Section members should be aware of the following matters and events: Special Legislative Issue. In the near future, you should receive a hard copy of the Special Legislative issue published after each session by the Juvenile Law Section and the Texas Juvenile Justice Department. The Special Legislative issue contains the text of key legislation affecting the juvenile justice system along with excellent commentary and history. An electronic version of the issue will eventually be available at www.juvenilelaw.org. Many thanks to the team of writers and editors who contributed their time and effort to produce this most informative issue.

27th Annual Robert O. Dawson Juvenile Institute. The Juvenile Law Section's annual conference with be held next year on February 24 – 26, 2014, in Corpus Christi at the Omni Bayfront Hotel. Chair-elect, Laura Peterson and the planning committee have assembled a dynamic group of speakers to address important and current issues in juvenile law today. Conference brochures should go out in October and you can always find information about the conference at the Juvenile Law Section website at www.juvenilelaw.org. We look forward to seeing you there.

Council and Officer Elections. The Juvenile Law Section is seeking nominations for council members and officers. State Bar rules require us to publish a final slate of nominees in the December issue of the newsletter. Actual elections will take place on February 24, 2014, at our Annual Conference during the Robert O. Dawson Juvenile Law Institute. If you are interested in serving or nominating someone, please advise our nominations chair, Jill Mata, at jmata@bexar.org. As always, we encourage members of the Juvenile Law Section to help us explore and develop new ways to be of service the children and families of our great State. If you have any ideas or suggestions, please contact myself or any council member.

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REVIEW OF RECENT CASES

CRIMINAL PROCEEDINGS

TRIAL COURT WAS NOT PRECLUDED FROM IMPOSING A DISCRETIONARY SENTENCE OF LIFE WITHOUT PAROLE FOR JUVENILE DEFENDANT CONVICTED OF A HOMICIDE OFFENSE.

¶ 13-3-7. **Arredondo v. State**, No 04-12-00278-CR, --- S.W.3d ----, 2013 WL 3198439 (Tex.App.-San Antonio, 6/26/13).

Facts: The jury convicted appellant, a juvenile offender, of one count of capital murder, one count of aggravated kidnapping, and two counts of aggravated sexual assault. The trial court imposed a life sentence on each of the four counts, with the life sentences on the two counts of aggravated sexual assault to run consecutively and the remaining sentences to run concurrently. In his second issue, appellant contends the two consecutive life sentences on the counts of aggravated sexual assault amount to a de facto sentence of life without parole for non-homicide offenses and, because of his juvenile offender status, the sentence violates the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution as the Supreme Court has dictated in Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). We express no opinion on whether appellant's sentence amounts to a de facto sentence of life without parole; however, for the purpose of addressing the merits of his argument, we predicate our analysis on the assumption that it does.

Held: Affirmed

Opinion: In Graham, the juvenile defendant pled guilty to armed burglary and attempted armed robbery, for which he was placed on deferred adjudication probation pursuant to a plea bargain. Id. at 2018.When he violated his probation, the trial court found him guilty of the offenses and sentenced him to life without parole FN1 for the armed burglary and fifteen years' imprisonment for the attempted armed robbery, both nonhomicide offenses. Id. at 2020.The Court held the Eighth Amendment forbids a State from imposing a sentence of life without parole on a juvenile offender who does not commit homicide. Id. at 2030.However, in clarifying its ruling, the Court noted:

> Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a non-homicide offense. Id. at 2023.

The Supreme Court made clear that its holding only concerned cases where juvenile offenders are sentenced to life without parole solely for nonhomicide offenses. Here, appellant was found guilty of both homicide and nonhomicide offenses.

In the more recent opinion of Miller v. Alabama, ––– U.S. ––––, ––––, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012), the Supreme Court held mandatory sentences of life without parole for juveniles violate the Eighth Amendment. In Miller, two separate juvenile defendants were found guilty of murder—one of murder in the course of arson and the other of capital murder. Id. at 2461.Both sentencing schemes provided a mandatory sentence of either death or life without parole when convicted of either of those offenses. Because the Supreme Court had previously invalidated the death penalty for juvenile offenders, the trial court had only one possible option in sentencing upon conviction—life without parole. Id.; see Roper v. Simmons, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding the death penalty cannot be imposed upon juvenile offenders). A sentence of life without parole was the required, mandatory sentence for a juvenile offender convicted under the statute and was automatically imposed upon conviction, with no exercise of discretion as to whether such a sentence was appropriate. The Miller Court held such a sentencing scheme providing for a required, mandatory sentence of life without parole for juvenile offenders violated the Constitution, and precluded a sentencer from taking into account an offender's age, life circumstances, and the circumstances of the homicide offense. Miller, 132 S.Ct. at 2464, 2467–68. However, the Court did not hold that discretionary life without parole sentences violate the Eighth Amendment. See id. at 2469 ("[A] sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty."). Instead, in regards to life-without-parole sentences for juvenile offenders, the Miller Court stated, "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."Id.

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In sum, Graham prevented the imposition of life without parole for juvenile offenders convicted of nonhomicide offenses. Miller prevented the mandatory imposition of life without parole for juvenile offenders, but specifically allowed a discretionary sentence of life without parole when the circumstances justify it. Therefore, even assuming for purposes of argument that two consecutive life sentences amount to a sentence of "life without parole," we conclude nothing prevents such a discretionary sentence when, as here, appellant has been found guilty of both a homicide offense and nonhomicide offenses in a particularly heinous crime.

Appellant also asserts the imposition of two consecutive life sentences contravenes the intent of the Texas Legislature in amending Texas Penal Code section 12.31(a)(1) to provide for a sentence of life imprisonment for juvenile offenders, rather than life without parole.

Texas Penal Code section 12.31 provides the sentencing scheme for offenders convicted of a capital felony. SeeTEX. PENAL CODE ANN. § 12.31(a) (West 2011). Prior to September 1, 2009, section 12.31(a) provided for only two sentencing options when an individual was found guilty of a capital felony—death or life without parole. Act of Sept. 1, 2005, 79th Leg., R.S., ch. 787, § 1, sec. 12.31, 2005 Tex. Gen. Laws 2705, 2705. The section was amended by the Legislature and now provides for a sentence of death, life without parole, or, when the convicted offender is a juvenile transferred to district court from juvenile court under Family Code section 54.02, life.FN2TEX. PENAL CODE § 12.31(a) (West 2011). The current statute reads as follows:

An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for: (1) life, if the individual's case was transferred to the court under Section 54.02, Family Code, or (2) life without parole. Id. (emphasis added).

Appellant argues that because the Legislature amended Penal Code section 12.31(a) to prohibit a sentence of life without parole for juvenile offenders convicted of capital murder, then it would follow that the Legislature also intended to prohibit a sentence of life without parole for "less serious offenses," such as aggravated sexual assault. Again, assuming appellant's sentence amounts to life without parole, we disagree with appellant's argument.

Aggravated sexual assault is a first degree felony, and, as dictated by Penal Code section 12.32(a), carries a sentence of "life or for any term of not more than 99 years or less than 5 years."TEX. PENAL CODE § 12.32 (first degree felony punishment); seeTEX. PENAL CODE § 22.021(e) (aggravated sexual assault is a first degree felony). The sentencer has discretion to sentence between the range provided.

The Miller holding clearly tells us that a mandatory sentence of life without parole for juveniles is unconstitutional because it is a violation of the Eighth Amendment to automatically sentence a juvenile to life without parole without first considering "how children are different" and how those differences may weigh against the imposition of such a harsh sentence. See Miller, 132 S.Ct. at 2468–69. This same principle is reflected in the Legislature's amendment of section 12.31, which, three years prior to the Miller decision, was amended to prohibit a mandatory sentence of life without parole for a juvenile offender convicted of a capital felony. However, neither the holding in Miller nor the legislative amendment to section 12.31 concerned discretionary sentences.

"[C]ourts must apply penal statutes exactly as they read." Coit v. State, 808 S.W.2d 473, 475 (Tex.Crim.App.1991). We decline to extend the Legislature's amendment of section 12.31(a) so far as to imply the Legislature intended to never allow a trial court the discretion to impose a sentence of life without parole for a juvenile convicted of both homicide and non-homicide offenses. See id.(quoting Ex parte Davis, 412 S.W.2d 46, 52 (Tex.Crim.App.1967)) ("Where the statute is clear and unambiguous the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute."). Based on the foregoing, we conclude appellant's sentence does not violate his constitutional rights.

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LIFE WITHOUT PAROLE SENTENCE REFORMED TO LIFE IMPRISONMENT, PURSUANT TO THE SUPREME COURT'S MANDATE IN MILLER V. ALABAMA.

¶ 13-3-5. **Lewis v. State**, No. 07-11-00444-CR, --- S.W.3d ----, 2013 WL 2360146 (Tex.App.-Amarillo, 5/29/13).

Facts: By opinion and judgment dated April 17, 2013, this Court affirmed the capital murder conviction and sentence of life without parole of Appellant, Derrick Lynn Lewis [See Lewis v. State, No. 07-11-0444-CR, --- S.W.3d ----, Tex. Juv. Rep. Vol. 27, No. 2 ¶ 13-2-9, 2013 WL 1665835 (Tex.App.-Amarillo, 4/17/13)]. By motion for rehearing, he contends his sentence of life without parole is unconstitutional. Appellant asserts the issue raised by his supplemental brief was not disposed of by our earlier opinion, as required by Rule 47.1 of the Texas Rules of Appellate Procedure. That issue challenges the constitutionality of his sentence under Miller v. Alabama, 567 U .S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), a decision handed down by the United States Supreme Court subsequent to the filing of his original brief. His motion does not challenge this Court's disposition of his original three issues. Having

considered the merits of his supplemental issue, we grant the motion for rehearing, withdraw our original opinion and judgment, and issue this opinion in lieu thereof.

Held: Conviction affirmed, Punishment reformed to delete the phrase "without parole."

Opinion: In his Supplemental Brief, Appellant contends that because he was sixteen years old when his crime was committed, and because his case was transferred to the trial court under section 54.02 of the Texas Family Code, assessment of the sentence of life without parole violates the Eighth Amendment to the United States Constitution. In support of his claim, Appellant cites Miller v. Alabama, 567 U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012),FN8 decided June 25, 2012, in which the United States [19] Supreme Court held that, as to a criminal defendant who was under the age of eighteen at the time when he committed a capital crime, the mandatory imposition of life without the possibility of parole violates the Eighth Amendment's prohibition of "cruel and unusual punishments ."

FN8. The Miller opinion actually addresses two separate cases, No. 10–9646, Miller v. Alabama and No. 10–9647, Jackson v. Hobbs.

Miller, a fourteen year old at the time of his offense, was charged with murder in the course of arson, a capital offense under Alabama law. His case was removed to adult court and, following conviction, the trial court imposed the statutorily mandated punishment of life without parole in accordance with Alabama law. 132 S.Ct. at 2463. Jackson, also fourteen years old at the time of his offense, was charged with capital felony murder and aggravated robbery in connection with the robbery of a video store. An Arkansas jury convicted him of both crimes and the trial court imposed a mandatory sentence of life imprisonment without the possibility of parole in accordance with Arkansas law. Id. at 2461.In both cases, the Supreme Court held that a sentencing scheme requiring the mandatory imposition of a life sentence without parole, in a homicide case where the criminal defendant was under the age of eighteen at the time the crime was committed, violated the Eighth Amendment's prohibition of cruel and unusual punishment. Id. at 2460.

Here, there is evidence in the record that Appellant was sixteen years old when he com-mitted the instant offense, and the State does not contend otherwise. The offense was committed on or about August 28, 2008, and the Clerk's Record contains a Waiver of Juris-diction and Order of Transfer to Criminal District Court wherein it is stated that the Appellant's date of birth is August 29, 1991. In view of the State's [20] implied concessions and the documentation reflecting Appellant's birthdate, the record adequately reflects that Appellant was younger than eighteen years of age at the time of the offense and his case was transferred to the trial court pursuant to section 54.02 of the Texas Family Code. Accordingly, Appellant's supplemental issue is sustained.

Conclusion: Pursuant to the Supreme Court's mandate in Miller, Appellant's sentence of life without parole is hereby reformed to a sentence of life imprisonment. TEX.R.APP. P. 43.2. See Salinas v. State, 163 S.W.3d 734 (Tex.Crim.App.2005); Herrin v. State, 125 S.W.3d 436, 444 (Tex.Crim.App.2002); Collier v. State, 999 S.W.2d 779, 782 (Tex.Crim.App.1999). As re-formed, the trial court's judgment is affirmed.

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DEFENDANT WAS NOT ELIGIBLE FOR MANDATORY-SUPERVISION REVIEW ON SUBSEQUENT CASE WHERE HE HAD PREVIOUSLY BEEN TRANSFERRED FROM TYC TO TDCJ FOR MURDER ADJUDICATION.

¶ 13-3-6. **Ex Parte Valdez**, No. AP-76,867, --- S.W.3d ----, 2013 WL 3196870 (Tex.Crim.App., 6/26/13).

Facts: Applicant, Joe Anthony Valdez, was adjudicated as a juvenile for committing murder with a deadly weapon, a first-degree felony under Texas Penal Code Section 19.02. He received a determinate sentence of fifteen years. Applicant was committed to the Texas Youth Commission (TYC) until his eighteenth birthday and was then transferred by the juvenile court to Texas Department of Criminal Justice (TDCJ) to complete his sentence.FN1 He was released from TDCJ on parole. His parole was later revoked for burglary of a habitation with the intent to commit assault, a second degree felony under Texas Penal Code Section 30.02. He pled nolo contendre to the offense and was sentenced to sixteen years' imprisonment. Applicant filed an application for writ of habeas corpus, contending that TDCJ is improperly denying him review for mandatory-supervision release based on his prior juvenile adjudication of delinquent conduct.

The trial court entered findings of fact and conclusions of law culminating with the following:

If the Court finds that Applicant's juvenile adjudication became a first-degree felony conviction of murder upon transfer to TDCJ, this Court recommends that this application be DENIED. However, if the Court finds that Applicant's juvenile adjudication did not become a first-degree felony conviction for murder upon transfer to the custody of the Texas Department of Criminal Justice, then it is recommended that this application be GRANTED and Applicant should be evaluated for release on mandatory supervision.

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We filed and set this application to determine “whether a prior juvenile adjudication for conduct, that would have been an ineligible felony had it been committed by an adult, renders an inmate ineligible for mandatory-supervision review when serving subsequent offenses which are mandatory release eligible on their own.”

Held: Petition denied

Opinion: Eligibility for mandatory supervision is determined by the law in effect on the date that the inmate committed the offense. Ex parte Hernandez, 275 S.W.3d 895 (Tex.Crim.App.2009). When Applicant committed the burglary-of-a-habitation offense in 2007, Texas Government Code Section 508.149 stated in relevant part:

(a) An inmate may not be released to mandatory supervision if the inmate is serving a sentence for or has been previously convicted of:

(1) an offense for which the judgment contains an affirmative finding under Section 3(g)(a)(2), Article 42.12, Code of Criminal Procedure;

(2) a first degree felony or a second degree felony under Section 19.02, Penal Code.

Subsection (a)(1) refers to a deadly-weapon finding and subsection (a)(2) refers to the offense of murder. Thus, Applicant's juvenile offense of murder with a deadly weapon, a first-degree felony, clearly fits into the category of offenses ineligible for release on mandatory supervision. We must determine whether Applicant was actually “convicted of” the juvenile offense versus being “adjudicated as having engaged in delinquent conduct,” and whether Applicant's transfer from TYC to TDCJ had any effect on this determination. Whether Applicant's juvenile adjudication at some point became a conviction is the deciding factor here.FN4

Under Texas Government Code Section 508.156(f), “a person released from the Texas Youth Commission on parole under this section is considered to have been convicted of the offense for which the person has been adjudicated.” Applicant argues that because he was not released from TYC on parole and was instead released from TDCJ on parole under his juvenile adjudication, he should not be considered to have been convicted of his juvenile offense of murder with a deadly weapon.

We agree with the State that Applicant's interpretation of the law would lead to absurd results. Applicant's version would mean that an offender released directly from TYC on parole would be considered to be convicted of the offense while an offender transferred, due simply to age, from TYC to TDCJ and later released on parole would not. We cannot imagine a scenario where the legislature would intend for older juveniles, who have been transferred to TDCJ, to remain free from conviction while younger juveniles who serve all of their time in TYC would be considered to be convicted for the same offense.

We construe a statute in accordance with the plain meaning of its text unless the plain meaning leads to absurd results that the legislature could not have possibly intended. Boykin v. State, 818 S.W.2d 782, 785 (Tex.Crim.App.1991). Texas Government Code Section 311.023 states that:

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

(1) object sought to be attained;
(2) circumstances under which the statute was enacted;
(3) legislative history;
(4) common law or former statutory provisions, including laws on the same or similar subjects;
(5) consequences of a particular construction;
(6) administrative construction of the statute; and
(7) title (caption), preamble, and emergency provision.

The legislative history provides some guidance on the question before us.

The parole and mandatory-supervision statute, Texas Code of Criminal Procedure Article 42.18, was revised in 1987 so that certain violent offenders were not eligible for mandatory supervision. In 1995, the statute was further amended to prevent offenders who had previously been convicted of crimes ineligible for mandatory supervision from eligibility for any future conviction, regardless of their current offense. This revision applied to those who were serving a sentence for an offense committed on or after September 1, 1995. The Bill Analysis for this amendment states that one of the purposes of the legislation is that, “If a prisoner previously served time for a violent offense which is ineligible for mandatory supervision, he will never be eligible for mandatory supervision, regardless of the offense, for any subsequent prison sentence.” Tex. H.B. 1433, 74th Leg., R.S. (1995). We note that the stated purpose of mandatory-supervision ineligibility was to prevent those who had “served time” for a violent offense from eligibility for subsequent offenses; a “conviction” for a violent offense was not stated as a requirement. In 1997, Texas Code of Criminal Procedure Article 42.18 was repealed and the Parole and Mandatory Supervision law was codified under Texas Government Code Chapter 508. The evolution of the predecessor to this code makes it clear that the legislature intended to prevent those who have committed certain prior violent offenses from eligibility for mandatory-supervision review. In keeping with this intent, we will not narrow the definition of “conviction” to exclude adjudicated juvenile offenders who were transferred to TDCJ due to age and released from TDCJ on parole.

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Conclusion: Applicant's transfer from TYC to TDCJ did not alter the fact that, upon his release on parole, he was considered to have been convicted of the offense for which he had been adjudicated. Applicant's juvenile adjudication was a first-degree felony conviction for the purpose of mandatory-supervision eligibility, and TDCJ was correct that Applicant is not eligible for mandatory-supervision review. Relief is denied.

IMMIGRATION

FAILURE TO ADMONISH JUVENILE OF POSSIBLE IMMIGRATION CONSEQUENCES HARMLESS WHERE RECORD SHOWED JUVENILE TO BE A U.S. CITIZEN.

¶ 13-3-1. **In the Matter of J.C.**, MEMORANDUM, No. 04-12-00386-CV, 2013 WL 2145700 (Tex.App.-San Antonio, 5/15/13).

Facts: J.C. pled true to an allegation that he engaged in delinquent conduct by committing aggravated sexual assault of a child. Before accepting his plea, the trial court explained to J.C. the allegations against him and the nature and possible consequences of the proceedings, including the law relating to admissibility of the record of a juvenile court adjudication in a criminal proceeding, his privilege against self-incrimination, his right to trial and to confrontation of witnesses, his right to an attorney, and his right to a jury trial. See TEX. FAM.CODE ANN. § 54.03(b) (West Supp.2012). At the conclusion of the hearing, the trial court adjudged that J.C. engaged in delinquent conduct by committing aggravated sexual assault of a child. After a disposition hearing, the trial court ordered J.C. committed to the Texas Juvenile Justice Department for an indeterminate sentence.

On appeal, J.C. complains that the trial court committed fundamental error during the adjudication hearing when it failed to admonish him regarding the potential immigration con-sequences of his plea of true to the alleged delinquent conduct. J.C. acknowledges that the trial court admonished him of his rights as mandated by section 54.03 of the Juvenile Justice Code. SeeTEX. FAM.CODE ANN. § 54.03(b). He also concedes that the Juvenile Justice Code does not contain a requirement that the trial court admonish a juvenile of the deportation consequences of his plea. Nevertheless, he argues that, in view of the Juvenile Justice Code's purpose of assuring a juvenile's constitutional rights are enforced, the trial court was also required to admonish him of the possible negative repercussions of his plea on his citizenship pursuant to Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010). J.C. does not complain of ineffective assistance of trial counsel.

Held: Affirmed

Memorandum Opinion: Assuming, without deciding, that the juvenile court was required to admonish J.C. of possible deportation consequences, we conclude that the record does not demonstrate that J.C. was harmed by the trial court's failure to warn him of potential deportation consequences of his plea. See, e.g., In re E.J.G.P., 5 S.W.3d 868, 872–73 (Tex. App–El Paso 1999, no pet.) (reviewing record for harm where juvenile complained that trial court erred in failing to admonish her of possible deportation consequences in accordance with article 26.13 of the Texas Code of Criminal Procedure). J.C. contends the record in this case is wholly silent regarding his citizenship status. We disagree. The record before us contains the probation department's pre-disposition report, admitted into evidence without objection, in which the probation officer documents that "according to a legible copy of [J.C.'s] birth certificate, [he] was born to [J.B.-J.] on December 5, 1998 in Bexar County, Texas." Thus, the record reveals that J.C. was born in Bexar County, Texas, making him a non-deportable citizen of the United States. See De la Cruz v. State, No. 04–10–00786–CR, 2011 WL 4088702, at *2 (Tex. App–San Antonio Sept. 14, 2011) (mem. op., not designated for publication), cert. denied, 133 S.Ct. 147 (2012) (holding failure to admonish defendant of deportation consequences of no contest plea was harmless where record reflected that defendant was United States citizen); Lawrence v. State, 306 S.W .3d 378, 379 (Tex.App.-Amarillo 2010, no pet.) (trial court's error in failing to admonish appellant about deportation was harmless where pen packet admitted into evidence reflected that appellant was born in Texas). Because the record shows J.C. is a United States citizen, and there is no controverting evidence, we conclude the juvenile court's error, if any, in failing to advise J.C. of the possible immigration consequences of his plea was harmless. See Van Nortrick v. State, 227 S.W.3d 706, 709 (Tex.Crim.App.2007) (trial court's failure to ad-monish defendant on immigration consequences of his plea is harmless error when record shows defendant to be United States citizen); see also Gist v. State, No. 07080030CR, 2009 WL 3320203, at *2 (Tex.App.-Amarillo Oct. 14, 2009, no pet.) (mem. op., not designated for publication) (holding that appellant's bond paperwork contained in supplemental record which showed that appellant was born in Arkansas permitted inference that appellant was United States citizen, and thus error in failing to admonish appellant pursuant to article 26.13 was harmless). Accordingly, we overrule J.C.'s sole issue on appeal.

Conclusion: Based on the foregoing, the judgment of the trial court is affirmed.

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THE POSSIBILITY OF DEPORTATION UPON A PLEA OF TRUE IS NOT INCLUDED IN THE FAMILY CODE'S REQUIRED ADMONISHMENTS FOR JUVENILES.

¶ 13-3-9. **In the Matter of J.D.**, MEMORANDUM, No. 04-12-00792-CV, 2013 WL 3486826 (Tex.App.-San Antonio, 7/10/13).

Facts: In accordance with a plea bargain agreement, J.D. pled true to one count of aggravated sexual assault, and the trial judge assessed a determinate sentence of twenty years. On appeal, J.D. contends the trial court: (1) committed fundamental error in failing to admonish him regarding the immigration consequences of his plea; and (2) erred in denying his motion to quash.

Held: Affirmed

Memorandum Opinion: In his first issue, J.D. asserts the trial court committed fundamental error in failing to admonish him regarding the immigration consequences of his plea. J.D. cites article 26.13(a)(4) of the Texas Code of Criminal Procedure, which requires a trial court to admonish an adult defendant pleading guilty to an offense of the immigration consequences of his plea. TEX.CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West Supp.2012). Although J.D. "readily acknowledged" in his brief, that no equivalent statutory admonishment is contained in the Juvenile Justice Code, J.D. argues that the admonishment should nevertheless be given.

The Texas Legislature has expressly determined which provisions of the Texas Code of Criminal Procedure are applicable to a juvenile proceeding, and article 26.13 is not among them. See TEX. FAM.CODE ANN. § 51.17 (West Supp.2012). In fact, the Texas Legislature has provided a separate set of admonishments a trial court is required to provide at the beginning of a juvenile adjudication hearing. TEX. FAM.CODE ANN. § 54.03 (West Supp.2012). As J.D. acknowledged in his brief, the possibility of deportation upon a plea of true is not included in these admonishments. See id.; see also In re R.F., No. 07–02–0298–CV, 2003 WL 21404126, at *1 (Tex.App.-Amarillo June 17, 2003, no pet.)(mem.op.) (concluding "trial court's failure to admonish appellant regarding deportation consequences in a juvenile proceeding did not violate his due process rights").

Conclusion: Accordingly, the trial court's failure to provide an admonishment it was not statutorily required to give cannot be considered fundamental error. See Carranza v. State, 980 S.W.2d 653, 656–57 (Tex.Crim.App.1998) (holding admonishments are statutorily, but not constitutionally, required). Moreover, as the State notes in its brief, the record contains a determinate sentence report stating that J.D. was born in San Antonio, Texas. Even in the context of a guilty plea by an adult defendant, a trial court's failure to admonish the defendant on the immigration consequences of his plea is harmless error when the record establishes that the defendant is a United States citizen. Van Nortrick v. State, 227 S.W.3d 706, 709 (Tex.Crim.App.2007). J.D.'s first issue is overruled.

QUALIFIED IMMUNITY

THERE IS NO CLEARLY ESTABLISHED LAW HOLDING THAT A STUDENT IN A PUBLIC SECONDARY SCHOOL HAS A PRIVACY RIGHT UNDER THE FOURTEENTH AMENDMENT THAT PRECLUDES SCHOOL OFFICIALS FROM DISCUSSING WITH A PARENT THE STUDENT'S PRIVATE MATTERS, INCLUDING MATTERS RELATING TO SEXUAL ACTIVITY OF THE STUDENT.

¶ 13-3-4. **Wyatt v. Fletcher/Newell**, No. 11-41359, --- F.3d ----, 2013 WL 2371280 (U.S.C.A.5 (Tex.), 5/31/13).

Facts: Wyatt alleged in her complaint that the coaches' conduct violated her daughter's constitutional right to privacy under the Fourteenth Amendment and her right to be free from unreasonable seizure under the Fourth Amendment. The United States District Court for the Eastern District of Texas, John D. Love, United States Magistrate Judge, denied qualified immunity to coaches. Coaches took interlocutory appeal

As we will see, to decide the overarching question of whether the district court erred in denying the coaches qualified immunity, we ask whether the Fourth and Fourteenth Amendment rights, which Wyatt claims were violated, are "clearly established." See Jones v. City of Jackson, 203 F.3d 875, 879 (5th Cir. 2000) (quoting Siegert v. Gilley, 500 U.S. 226, 231 (1991)). If they are not, the appellants are entitled to qualified immunity, and the district court's denial of summary judgment on the federal claims was error.

The dispute arose in the East Texas town of Kilgore. On March 3, 2009, S.W., a student at Kilgore High School ("KHS"), attended a meeting of the varsity softball team on which she played. The meeting was held at an off campus playing field where practices regularly took place. In her complaint, Wyatt alleges that, upon S.W.'s arrival at the meeting, S.W.'s softball coaches Fletcher and Newell dismissed the rest of the team and led S.W. into a nearby locker room, locked the door, and questioned her about an alleged relationship with an older young woman named Hillary Nutt ("Nutt"). Wyatt said that the coaches then yelled at S.W., falsely accused her of spreading rumors regarding one of the coaches' sexual orientation, and threatened to tell S.W.'s mother that her daughter was in a sexual relationship with another woman. In her complaint, Wyatt made a further allegation: that, at the locker room meeting, "Fletcher asked S.W. if she was gay." In her deposition, however, S.W.'s story changed: she said definitively that the coaches did not ask, point blank, whether she was a lesbian. Besides this inconsistency, there is one more worthy of note: in her complaint, Wyatt states, "At the time of Fletcher and Newell's

confrontation, S.W. was dating [Nutt]." But in her appellate brief, she says "in fact, [S.W.] and Hillary [Nutt] hadn't dated" and "weren't in a relationship."

Following the meeting with S.W., the coaches called Wyatt, S.W.'s mother, and requested they meet. The parties' characterizations of events differ. In her complaint, Wyatt alleges that Fletcher revealed S.W.'s sexual orientation to her mother at this second meeting and that Newell then offered Wyatt the contact information for Nutt. As with the locker room meeting, however, there are inconsistencies in Wyatt's story. Wyatt's allegation in her complaint was that, at the second meeting, the coaches "outed" her daughter: "Fletcher said [to Wyatt that] S.W. was a lesbian." Wyatt apparently withdrew this allegation when, at her deposition, she testified under oath that Coach Fletcher in fact never used the word "gay" or "lesbian." The claim involving the revelation of S.W.'s sexual orientation has become ever more nuanced over the course of the briefing on this appeal: Instead of alleging that the coaches divulged, pointblank, her daughter's homosexuality, Wyatt's claim is now that she inferred S.W.'s sexual orientation from the coaches' comments. In response, the coaches argue that they were obliged to contact S.W.'s mother because rumors regarding S.W.'s relationship with Nutt were causing dissension on the team, Nutt was a potentially dangerous and underage user of illegal drugs and alcohol, and any possible sexual relationship between Nutt and S.W. was a valid concern.

Wyatt filed three separate grievances with Kilgore Independent School District ("KISD") alleging the coaches acted inappropriately by disclosing S.W.'s sexual orientation to her mother; all were subsequently dismissed. Then, on December 10, 2010, Wyatt, as next-friend of her minor daughter S.W., filed a complaint in federal court against KISD, and, in their personal capacities, against KHS assistant athletic director Douglas Duke, Fletcher, and Newell, for violating S.W.'s federal rights under the Fourth and Fourteenth Amendments and state privacy rights under the Texas Constitution. In their answer, Defendants pleaded the affirmative defense of Texas official immunity for KISD on the state claims and qualified immunity for Fletcher and Newell on the federal claims. The parties consented to proceed before a magistrate judge, and the coaches moved for summary judgment on the basis of qualified immunity. The magistrate judge rejected the defense of qualified immunity and consequently denied the coaches' motion for summary judgment. The magistrate judge cited "multiple unresolved questions of fact." With regard to Wyatt's Fourth Amendment claim of unlawful seizure, the court said "there remains a genuine material issue of fact as to whether there was an objectively reasonable basis for the coaches' actions including factual disputes over what transpired behind the closed doors of the locker room." With regard to the Fourteenth Amendment right to privacy claim, the magistrate judge held that S.W.'s right to privacy in her sexual orientation was clearly established, and summary judgment was premature due to unresolved questions of fact – such as "whether the Coaches[] disclosed S.W.'s sexual orientation as retaliation for S.W.'s conduct, whether they disclosed the identity of Ms. Nutt [to Ms. Wyatt] without provocation by Ms. Wyatt, and the words they used to describe the relationship . . ."– all of which related to the reasonableness of their conduct.

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As we have said, we lack appellate jurisdiction in this interlocutory appeal to determine whether a genuine factual issue exists; however, we do have jurisdiction to review the materiality of disputed facts as well as the district court's legal analysis as it pertains to qualified immunity. See Wagner, 227 F.3d at 320; see also Kinney, 367 F.3d at 358. As we will see, the magistrate judge erred in analyzing the materiality of disputed facts because, even taking the facts in the light most favorable to Wyatt, Wyatt has not alleged violations of clearly established Fourth and Fourteenth Amendment rights. Consequently, we have appellate jurisdiction over this interlocutory appeal.

Held: REVERSE and VACATE in part and REMAND for entry of judgment dismissing the federal claims against these individual defendants.

Opinion: Our review of the magistrate judge's legal analysis begins with setting out the standard for qualified immunity. As we have indicated in many prior cases, evaluating qualified immunity is a two-step process, and the burden is on the plaintiff to prove that a government official is not entitled to qualified immunity. Michalik v. Hermann, 422 F.3d 252, 258 (5th Cir. 2005). First, we determine whether the plaintiff has alleged a violation of a clearly established constitutional or statutory right. See Jones, 203 F.3d at 879. A right is clearly established only if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Wooley v. City of Baton Rouge, 211 F.3d 913, 919 (5th Cir. 2000) (inset quotation marks omitted). The applicable law that binds the conduct of officeholders must be clearly established at the time the allegedly actionable conduct occurs. Id. (inset quotation marks omitted).

If the first step is met (i.e. the official's conduct violates an established right), the second step is to determine whether the defendant's conduct was objectively reasonable. Jones, 203 F.3d at 879 (inset quotation marks omitted). Both steps in the qualified immunity analysis are questions of law. Wooley, 211 F.3d at 919. Under the Fifth Circuit standard, the doctrine of qualified immunity protects government officials from civil damages liability when they reasonably could have

believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question beyond debate. Morgan v. Swanson, 659 F.3d 359, 370-71 (5th Cir. 2011) (en banc). "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009). The law generally disfavors expansive civil liability for actions taken while state officials are on duty because such liability "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Anderson v. Creighton, 483 U.S. 635, 638 (1987). In short, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011).

When deciding whether the right allegedly violated was "clearly established," the court asks whether the law so clearly and unambiguously prohibited the conduct that every reasonable official would understand that what he is doing violates the law. Morgan, 659 F.3d at 371 (inset quotations omitted).

Our analysis does not reach the "second step" of the qualified immunity analysis because, as the discussion that follows will indicate, the first, "clearly established" step has not been met by Wyatt in this case. Thus, consideration of the "objectively reasonable" prong of qualified immunity is unnecessary.

Answering in the affirmative requires the court to be able to point to "controlling authority–or a robust consensus of persuasive authority–that defines the contours of the right in question with a high degree of particularity." Id. at 37172 (citations and inset quotations omitted). This requirement establishes a high bar. When there is no controlling authority specifically prohibiting a defendant's conduct, the law is not clearly established for the purposes of defeating qualified immunity. See id. at 372. Acknowledging these clearly drawn bright lines as rigorous background principles of qualified immunity, we proceed to the merits of Wyatt's privacy claim.

Wyatt's assertions of federal liability have essentially morphed over the course of the litigation into one primary constitutional claim involving an alleged right to privacy under the Fourteenth Amendment. It is true that, originally, Wyatt alleged two basic claims. In her complaint, Wyatt alleged a Fourth Amendment violation, saying that the coaches' decision to "lock the locker room door and order S.W. to remain inside while Defendants confronted and threatened her was a de facto seizure of S.W.'s person . . . ." However, in her appellate brief and at oral argument, Wyatt barely mentioned this seizure allegation. She cites no authorities establishing such a Fourth Amendment violation in school contexts, making practically no effort to show the right in question is "clearly established." When before the district court on summary judgment, however, the district court held there was a genuine issue of material fact relating to her claim of "seizure" – whether there was an objectively reasonable basis for the coaches' actions in the locker room, which, according to S.W., included shouting, intimidating gestures, and locked doors.

As mentioned earlier, however, S.W. has conceded that she was not asked in the locker room whether she was gay, so, even taking the facts in the light most favorable to S.W., that specific allegation of her Fourth Amendment claim is not before us. However, the court erred; there is no material disputed fact that prevented it from deciding the legal question. First, the district court overlooked case law that establishes that the Fourth Amendment applies differently in the school context and particularly with regard to student athletes in locker rooms. See Milligan v. City of Slidell, 226 F.3d 652, 654-55 (5th Cir. 2000); see also Vernonia School District 47J v. Acton, 515 U.S. 646, 657 (1995) (noting that "[p]ublic school locker rooms . . . are not notable for the [Fourth Amendment] privacy they afford" and "[b]y choosing to go out for the team, [student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.") (inset quotations omitted).

Second, verbal abuse does not give rise to a constitutional violation under 42 U.S.C. § 1983, so any yelling that may have occurred is not actionable. See Calhoun v. Hargrove, 312 F.3d 730, 734 (5th Cir. 2002); see also Doe v. Gooden, 214 F.3d 952, 955 (8th Cir. 2000) (holding that a teacher's statements, while "demeaning" and "belittling" to his students, did not violate their constitutional rights); Walker-Serrano by Walker v. Leonard, 168 F. Supp. 2d 332, 347 (M.D. Pa. 2001) (stating "verbal abuse, whether coming from a student or a teacher, is not a constitutional violation."). Thus, there is simply no clearly established constitutional right – and Wyatt cites none – that protects students from being privately questioned, even the dissent scolds us for citing Vernonia, saying the Supreme Court's urinalysis decision has "absolutely nothing to do with the instant case." To be sure, however, Vernonia states background principles, cited above, that not only are relevant to the application of the Fourth Amendment in any school athletics context but also support what should be plain: there is nothing per se unreasonable about a one-on-one, closed door meeting between coaches and student athletes. As seen in Milligan, courts have routinely applied Vernonia to contexts other than urinalysis testing. See 226 F.3d at 654-55. Forcefully, even in a locked locker room. Thus Newell and Fletcher are entitled to qualified immunity on the Fourth Amendment claim.

We are left only with Wyatt's Fourteenth Amendment claim relating to the coaches' conversation with S.W's mother. Under Wyatt's theory, S.W. has a constitutional right to the confidentiality – even with respect to her mother – of her own sexual orientation, which was breached by the coaches when they spoke to her about S.W.'s violations of team policy. In order to further understand the nature of Wyatt's claim – and whether, for purposes of qualified immunity, the right purportedly violated is clearly established, we first briefly consider the modern-day origin and subsequent development of the constitutional right to privacy under the Fourteenth Amendment upon which Wyatt relies.

We begin with Griswold v. Connecticut, 381 U.S. 479 (1965). There, the Supreme Court declared that a state law prohibiting the use of contraceptives by married couples was unconstitutional because it violated the right to privacy, a right long last apparent from the penumbra of rights established by the Bill of Rights and applied to the States by the Due Process Clause of the Fourteenth Amendment. See id. at 485-86. The decision can be said to have validated an earlier dissent by Justice Brandeis in Olmstead v. United States, which described the "right to be let alone" as the "most comprehensive of rights and the right most valued by civilized man." 277 U.S. 438, 478 (1928). In order to protect the right, Justice Brandeis wrote, in dissent, "every unjustifiable intrusion of the government upon the privacy of an individual . . . must be deemed a [constitutional] violation . . . ." Id.

Wyatt does not make any allegation of physical restraint, instead stressing what does not sound like a Fourth Amendment claim at all: that her daughter was "bullied into revealing private information." S.W. admits she was never asked by coaches whether she was homosexual, so the "information" Wyatt claims she was forced to reveal is never expressly stated but seems to involve her interactions with Nutt, with whom she expressly denies being in a relationship at the relevant time. See supra Part II. The Fourth Amendment claim thus stumbles, then falls.

Later, in Whalen v. Roe, the Supreme Court identified two separate interests that fall under the constitutional right to privacy. 429 U.S. 589, 599600 (1977). The one of relevance to us is the "individual interest in avoiding disclosure of personal matters" by the government. Id. at 599; see also Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457 (1977) ("One element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters . . . .'"). This confidentiality interest has been defined as "the right to be free from the government disclosing private facts about its citizens." Ramie v. City of Hedwig Village, Tex., 765 F.2d 490, 492 (5th Cir. 1985).

Since Whalen and Nixon, however, the Supreme Court "has said little else on the subject of an individual interest in avoiding disclosure of personal matters." NASA v. Nelson, 131 S. Ct. 746, 756 (2011) (noting that "no other decision has squarely addressed a constitutional right to informational privacy."). Wyatt argues, however, that the Fifth Circuit has "addressed the contours" of her right to privacy and that the constitutional protection accorded to such a right "in this and other circuits is clear." But, in so doing, she overstates the degree to which precedent supports her particular claim. The Fifth Circuit has never held that a person has a constitutionally-protected privacy interest in her sexual orientation, and it certainly has never suggested that such a privacy interest precludes school authorities from discussing with parents matters that relate to the interests of their children. Indeed, we have said, "There is no Fifth Circuit authority on what types of disclosures are personal enough to trigger the protection of the confidentiality branch." Zaffuto v. City of Hammond, 308 F.3d 485, 490 (5th Cir. 2002) (emphasis added). Therefore, when the magistrate judge in this case held that there is a constitutional right that bars the unauthorized disclosure by school coaches of a student's sexual orientation to the student's mother, he proclaimed a new rule of law.

And although Wyatt argues that the distinct contours of her asserted right were well-established, she can only cite two irrelevantly remote Fifth Circuit cases in an attempt to buttress her claim, Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981), and ACLU of Miss., Inc. v. Miss., 911 F.2d 1066 (5th Cir. 1990), neither of which even touch on privacy rights between a student and a parent. The first, Fadjo v. Coon, concerned disclosure of an insurance beneficiary's personal information in the context of a criminal investigation. 633 F.2d at 1174. Plaintiff Fadjo was the named beneficiary of life insurance policies insuring a man who mysteriously disappeared. Id. at 1174. After explicit assurances by the state attorney that his testimony would be absolutely privileged, Fadjo, as part of the criminal investigation, provided the state with information concerning "the most private details of his life." Id. The state attorney then shared this information with insurance companies, resulting in personal misfortune to Fadjo, who was forced to move his residence and struggled to find meaningful employment. Id. Finding that Fadjo's right to privacy had been violated by the disclosure, the court held that there was an actionable § 1983 claim under the confidentiality branch of the Fourteenth Amendment15 and that "no legitimate state purpose existed sufficient to outweigh the invasion into Fadjo's privacy." Id. at 1175. Notably, the court never discussed the specific nature of the "private details of Fadjo's life" that were disclosed (i.e. details private enough to warrant constitutional protection), and the court never suggested that sexual

orientation might be one of them. Furthermore, the court stressed that Fadjo had been promised that the information he provided investigators would be confidential and that the plaintiff's allegation was that the state had not honored this pledge. Id. at 1176 (stating "Fadjo's case is distinguishable . . . since it involves the revelation of intimate information obtained under a pledge of confidentiality . . . .") (emphasis added). In Wyatt's case, the coaches made no such promise to S.W. even to speculate that an established right to the non-disclosure of one's sexual orientation exists does not help Wyatt's case and still does not result in liability for the coaches. This is so because such speculation does not establish specifically that school officials are barred from communicating with parents regarding minor students' behavior and welfare, when doing so might cause the parents to infer their child's sexual orientation.

The second Fifth Circuit case Wyatt relies upon is American Civil Liberties Union of Miss., Inc. v. Mississippi, 911 F.2d at 1066. That case concerned the dismantling of a state agency whose purpose was to perpetuate racial segregation. Id. at 1068. After the agency had been shut down, the district court ordered that all agency files, including some containing sensitive, personal information of civil rights activists, be released to the general public. Id. This court reversed. We held that the public interest in full disclosure of the files was outweighed by the privacy concerns of the individuals whose information was obtained without permission. Id. at 1069. In the passage most relevant to the case at bar, the court said that plaintiffs "undeniably have an interest in restricting the disclosure of information" regarding "numerous instances of (often unsubstantiated) allegations of homosexuality, child molestation, illegitimate births, and sexual promiscuity . . . ." Id. (emphasis added).

Importantly, ACLU of Miss. was an appeal of a district court's granting of complete public disclosure of agency files and thus did not involve the qualified immunity framework fundamental to deciding this interlocutory appeal. The analysis in ACLU of Miss. also focused in part on First Amendment concerns not relevant in S.W.'s case, saying that "to the extent that [the] information [in the agency files] is a matter of public concern, any public need to know could be satisfied by release of the information in a more limited format." Id. at 1071. Although the public undoubtedly had an interest in obtaining information about the defunct, anti-civil rights agency, the public's interest could not prevail over the plaintiffs' right to privacy because the public interest could be addressed by this option of selective disclosure. The ACLU of Miss. court also emphasized that the personal information at issue was originally gathered by unconstitutional means (illegitimate searches and seizures by segregationist agency officials) pursuant to an unconstitutional purpose (suppressing speech of civil rights activists contrary in viewpoint to the agency), suggesting the court was further motivated by fairness concerns inherent in the public release of private information the government never had a right to possess in the first place. Id. at 1070.

Although the selective disclosure and fairness considerations in ACLU of Miss. are not analogous to the student-teacher-parent concerns in S.W.'s case, it is appropriate to point out that the "disclosure" here was only to the student's mother; it was not discussed with other coaches, teachers, or students. Further, instead of bluntly declaring her daughter to be a homosexual, it is undisputed that the coaches mentioned to Wyatt only that S.W. was in a possibly inappropriate relationship with Nutt – thus narrowly tailoring the disclosure to the mother's "need to know." Second, unlike the facts in ACLU of Miss., the government here was not illegally and secretly collecting information in order to do harm to private citizens; disclosure of S.W.'s relationship was in the interest of the student and became necessary only after S.W., allegedly influenced by Nutt, violated team rules and policy, which were in place for the benefit and safety of students.

In summary, then, when we consider ACLU of Miss. and Fadjo, neither is established – much less clearly established – authority for the claims presented here. It is of major significance that neither occurred in the context of public schools' relations with their students and the students' parents. We therefore hold there is no controlling Fifth Circuit authority – certainly not with "sufficient particularity" – showing a clearly established Fourteenth Amendment privacy right that prohibits school officials from communicating to parents information regarding minor students' interests, even when private matters of sex are involved. See Morgan, 659 F.3d at 372.

Nor from outside the circuit do we find a "robust consensus of persuasive authority" that such a right was clearly established. Id. (emphasis added). In her attempt to draw help from outside friends, Wyatt calls on the Third Circuit. Sterling v. Borough of Minersville, she argues, stands for the proposition that there is a clearly established privacy right in one's sexual orientation. 232 F.3d 190 (3d Cir. 2000). There, a police officer discovered two male teenagers in a parked car at night and threatened to disclose to one of the teenager's relatives the secret that the teenager was a homosexual. Id. at 192. The threat allegedly resulted in the teenager's committing suicide. Id. In affirming an order denying summary judgment on qualified immunity grounds, the Third Circuit held that public disclosure by the government of a plaintiff's sexual orientation can give rise to a constitutional claim for the violation of privacy. Id. at 196. Because there was a clearly established right to privacy in the Third Circuit, the defendants were not entitled to qualified immunity. Id. at 196-98.

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The Sterling decision is notable in several respects. First, it is not controlling authority in this case and, thus, its reasoning, standing alone, is not dispositive for us today. Second, the deceased victim was not a minor, and the court noted this fact when it acknowledged that "because [plaintiff] was 18, there was no reason for [the officer] to interfere with [plaintiff's] family's awareness of his sexual orientation." Id. at 197-98 (emphasis added). This observation suggests that the Sterling court may have considered a situation involving a minor, differently. Third, although Sterling held that the law regarding the disclosure of one's sexual orientation was "clearly established," at least in the Third Circuit, in 1997, the court's justifications for its doing so are dubious: cases from within the circuit that dealt with private medical and financial information and precedent from outside the circuit that was, at best, unclear on the issue. Id. at 195-96; cf., id. at 198, 199 n.3 (Stapleton, J., dissenting) ("[A] person's right to privacy in his or her sexual orientation simply was not clearly established in April of 1997" because, for example, "[t]he Fourth Circuit's decision in [Walls v. City of Petersburg, 895 F.2d 188, 193 (1990)] addressed the issue squarely . . . and reached the opposite conclusion . . . ."). Since Sterling, the Supreme Court has repeatedly admonished courts to avoid finding "clearly established" law through such a loose method; looking to precedent that is, at best, inconclusive, and, at worst, irrelevant, as Sterling did, simply no longer suffices. See, e.g. Brousseau v. Haugen, 543 U.S. 194, 198-201 (2004) (holding that, when none of a "handful" of cases "squarely govern" the specific factual circumstances in a § 1983 suit, the cases do not clearly establish – in the mandatory "particularized sense" – a right that was violated).

In our case today, the trial court cited other cases from outside the circuit on its way to denying summary judgment to the coaches. Perhaps the most salient distinguishing factor in all these cases is that none occurred in a school context; together, they establish only the simple and unsurprising proposition that individuals generally can have a privacy interest in some personal "sexual matters," a broad, general proposition with which we do not take issue. None of these cases approximate the factual context we have before us, and none of them provide any guidance regarding the crucial question: whether a student has a privacy right under the Fourteenth Amendment that forbids school officials from discussing student sexual information during meetings with parents. In sum, then, we hold that Wyatt has not alleged a clearly established constitutional right – drawn either from the Supreme Court's jurisprudence, from our own precedent or from that of other circuits – that the coaches violated. The magistrate judge, therefore, erred in denying qualified immunity to each of the defendants on each of the federal claims.

Conclusion: To summarize our opinion today: we hold that the magistrate judge erred in denying Newell and Fletcher summary judgment on the claims of qualified immunity. It was error because there is no Supreme Court or Fifth Circuit case that clearly establishes or even suggests that a high school student has a Fourth Amendment right that bars the student from being questioned by coaches in a locker room or a Fourteenth Amendment right to privacy that bars a teacher or coach from discussing the student's private matters with the student's parents. Fletcher and Newell were entitled to qualified immunity for this suit with respect to the federal claims, because, based on undisputed facts, there was no violation of a clearly established federal right. Jones, 203 F.3d at 879. For the above reasons, the judgment is reversed and vacated with respect to all federal claims against the individual defendants, and the case is remanded for entry of the appropriate judgment not inconsistent with this opinion.

REVERSED and VACATED in part, and REMANDED for entry of judgment.

Dissent: GRAVES, Circuit Judge.
I disagree with the majority's finding that high school students have no clearly established rights under the Fourteenth and Fourth Amendments. Because I would affirm the district court's denial of qualified immunity to coaches Cassandra Newell and Rhonda Fletcher, I respectfully dissent.

Dissent Factual History: S.W. was a 16-year-old softball player at Kilgore High School (KHS) in Texas. S.W., who had told only a few friends that she was gay, became involved in a relationship with 18-year-old Hillary Nutt. The softball coaches, Newell and Fletcher, claimed that they had heard a rumor that S.W. had told someone she was involved in a relationship with Nutt and that Nutt was Newell's ex-girlfriend. Newell is gay and admitted in her deposition that Nutt started attending softball games after being invited by Newell's former girlfriend.

Upon hearing this rumor, the coaches decided to confront S.W. They arranged an off-campus meeting after school on March 3, 2009. During this meeting, the coaches locked S.W. in the softball locker room and aggressively questioned her at length about her relationship with Nutt, her sexual orientation, and whether she had told anyone about Newell's alleged relationship with Nutt. S.W. indicated that she was afraid and sat on a beanbag chair with her arms wrapped around her knees, while the coaches sat on their knees. At one point, Fletcher raised up, towering over S.W., and yelled at her. Fletcher asked S.W. if she was having a relationship with Nutt. While S.W. did say in her deposition that the coaches did not use the word "lesbian," she said in her declaration that they asked if

she was gay. S.W. also said that the coaches got very angry, repeatedly called her a "liar," threatened her, and made intimidating gestures to the point that she thought Fletcher might hit her.

The coaches then called S.W.'s mother, Barbara Wyatt, arranged a meeting with her a short time later, and disclosed to her that S.W. was having an inappropriate relationship with another female. The coaches also revealed the identity of S.W.'s "girlfriend" to Wyatt, who was unaware that S.W. was gay. Wyatt testified in her deposition that, although she had suspected that S.W. may be gay, S.W. had always denied it to her.

The coaches then refused to discuss the matter further. S.W. was later removed from the softball team. Wyatt attempted to resolve the situation through school officials and then by filing official complaints, which were denied. Subsequently, Wyatt filed an action in district court, asserting that the coaches violated S.W.'s privacy rights under the Fourth and Fourteenth Amendments and under the Texas Constitution. The coaches filed a motion for summary judgment on the basis of qualified immunity. The district court denied the motion, and the coaches filed an interlocutory appeal. The majority states that Wyatt's claim has "become ever more nuanced" and that her "claim is now that she inferred S.W.'s sexual orientation from the coaches' comments." In fact, Wyatt has consistently maintained that the coaches told her S.W. was dating a girl and characterized Nutt as S.W.'s "girlfriend."

Dissent Standard of Review

As correctly stated by the majority, this court reviews de novo a district court's denial of a motion for summary judgment on the basis of qualified immunity. Kovacic v. Villarreal, 628 F.3d 209, 211 (5th Cir. 2010). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The denial of a motion for summary judgment on the basis of qualified immunity is immediately appealable, to the extent that it turns on an issue of law. Kovacic, 628 F.3d at 211. The limitation of the interlocutory appellate jurisdiction to questions of law prohibits this court's consideration of the correctness of plaintiff's version of the facts. Good v. Curtis, 601 F.3d 393, 397 (5th Cir. 2010).

This means that the district court's finding that a genuine factual dispute exists is a factual determination that this court is prohibited from reviewing in this interlocutory appeal. But the district court's determination that a particular dispute is material is a reviewable legal determination. Thus, a defendant challenging the denial of a motion for summary judgment on the basis of qualified immunity must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal.

Id. at 397-98. (Internal marks, citations and emphasis omitted).

The majority erroneously fails to concede the best view of the facts to the plaintiff, apparently under this Court's authority to decide whether the factual disputes are material to deciding the summary judgment. Wagner v. Bay City, 227 F.3d 316, 320 (5th Cir. 2000). While it is correct that we can review the materiality of factual disputes, we must keep in mind what this Court said in the excessive force case of Wagner. There, this Court said:

In deciding an interlocutory appeal of a denial of qualified immunity, we can review the materiality of any factual disputes, but not their genuineness. See Colston v. Barnhart, 146 F.3d 282, 284 (5th Cir.) (on petition for rehearing en banc), cert. denied, 525 U.S. 1054, 119 S.Ct. 618, 142 L.Ed.2d 557 (1998). So, we review the complaint and record to determine whether, assuming that all of Wagner's factual assertions are true, those facts are materially sufficient to establish that defendants acted in an objectively unreasonable manner. Even where, as here, the district court has determined that there are genuine disputes raised by the evidence, we assume plaintiff's version of the facts is true, then determine whether those facts suffice for a claim of excessive force under these circumstances. Wagner, 227 F.3d 320.

Rather than weigh Wyatt's version of the facts and compare it to the coaches' version, this Court must decide whether the facts as presented by Wyatt are materially sufficient to establish that the coaches acted in an objectively unreasonable manner.

Dissent Qualified Immunity

When a defendant moves for summary judgment on the basis of qualified immunity, the court must decide: 1) Whether the facts made out a violation of a constitutional right; and 2) whether that right was "clearly established" at the time of the defendant's alleged misconduct so that a reasonable official in the defendant's situation would have understood that his conduct violated that right. See Ontiveros v. City of Rosenberg, Tex., 564 F.3d 379 (5th Cir. 2009). See also Brewer v. Wilkinson, 3 F.3d 816 (5th Cir. 1993).

Dissent Right of Privacy

With regard to the Fourteenth Amendment right to privacy violation, the district court found that there is a constitutional right to prevent the unauthorized disclosure of one's sexual orientation, and cites various cases from this Circuit and beyond in support of such a proposition. I agree with the district court's analysis.

The majority acknowledges that the United States Supreme Court has recognized an individual interest in avoiding the disclosure of personal matters, but then finds that Wyatt has failed to allege a clearly established constitutional right. There is no dispute

that one's sexual orientation is a personal matter. The majority attempts to distinguish the cases cited by the district court and Wyatt on the basis that none occurred in the school context. However, the majority ultimately concedes that individuals have a privacy interest in personal sexual matters. See Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). See also Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981), and ACLU v. State of Miss., 911 F.2d 1066, 1070 (5th Cir. 1990). But, as discussed more fully herein, the majority then finds that any such right does not extend to high school students.

At least five other circuits have recognized a right of privacy regarding personal sexual matters. See Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000) ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity.") ("We can, therefore, readily conclude that Wayman's sexual orientation was an intimate aspect of his personality entitled to privacy protection under Whalen."); Powell v. Schriver, 175 F.3d 107, 111 (2nd Cir. 1999)("We conclude that the reasoning that supports the holding in Doe compels the conclusion that the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism."); Bloch v. Ribar, 156 F.3d 673, 685-86 (6th Cir. 1998) ("Our sexuality and choices about sex, in turn, are interests of an intimate nature which define significant portions of our personhood. Publically revealing information regarding these interests exposes an aspect of our lives that we regard as highly personal and private. Indeed, for many of these reasons, a number of our sister circuits have concluded that information regarding private sexual matters warrants constitutional protection against public dissemination."); and Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983) ("The interests Thorne raises in the privacy of her sexual activities are within the zone protected by the constitution. This conclusion follows from the cases holding that such basic matters as contraception, abortion, marriage, and family life are protected by the constitution from unwarranted government intrusion."); and Eastwood v. Dept. of Corrections, 846 F.2d 627, 631 (10th Cir. 1988) ("As in Thorne, plaintiff in the instant case was forced to answer a number of irrelevant and embarrassing questions. . . . Indications of a victim's promiscuity are not probative of either credibility or consent to sexual advances. . . . Nor should such an inquiry be sanctioned in this case."). While this authority may not be controlling, it is certainly persuasive. Significantly, the majority fails to provide any authority for its finding that the right to privacy in personal sexual matters does not extend to high school students. To the contrary, the Supreme Court has found that the constitutional right to privacy extends to minors. See Application of Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The question is then whether minors lose that right upon entering the schoolhouse gate. The only cases cited by the majority, albeit in the Fourth Amendment analysis, regarding high school students do not support the majority's finding that the right to privacy does not extend to high school students. See Vernonia School District 47J v. Acton, 515 U.S. 646, 655-56 (1995) and Milligan v. City of Slidell, 226 F.3d 652, 654-55 (5th Cir. 2000), discussed more fully herein.

Based on the applicable case law set out above, there clearly exists a right to privacy regarding one's sexual orientation. The findings of the United States Supreme Court and six Circuit Courts of Appeal (including the 5th) that information of a sexual nature is intrinsically private is more than a "simple and unsurprising proposition." Additionally, the school context does not defeat the very existence of a right, but rather comes into play with regard to a balancing test and whether the government's interest outweighs a student's privacy right. "Thus, while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school." Vernonia, 515 U.S. at 655-56 (internal citations omitted). Based on the applicable authority and the coaches' own admissions that they recognized the private nature of the information, the district court is absolutely correct that sexual orientation would fall within the categories of highly personal information protected by the right to privacy. The district court correctly held that, while the 5th Circuit has never explicitly held that a student has a right to privacy in keeping his or her sexual orientation confidential, an analysis of precedent compels the finding of such a right.

The question then becomes whether the coaches had a legitimate interest which outweighed S.W.'s right to privacy. See Fadjo, 633 F.2d at 1176. See also Vernonia, 515 U.S. at 656-57. The majority does not reach this balancing test, finding that consideration of the objectively reasonable prong of qualified immunity is unnecessary. However, this prong is necessary to determine whether the coaches' interests outweigh a student's right to privacy.

In support of a legitimate State interest, the coaches assert various reasons, including the possible sexual assault of a minor under Texas statute, Nutt being a bad influence, a violation of rules for S.W. riding with Nutt, and team discipline. Both the law and the facts undermine the legitimacy of the reasons given by the coaches. The Texas statute referred to by the majority specifically provides an affirmative defense because S.W. was over 14 and there was only two-years age difference between S.W. and Nutt. Thus, there was likely no valid legal concern regarding sexual assault.

With regard to Nutt being a bad influence, after indicating during her deposition that she did not know of Nutt ever doing drugs, S.W. was asked, "[y]ou don't know whether or not Hillary Nutt has ever taken a sip of alcohol?" S.W. responded that she knew Nutt had taken a drink but never in her presence. Also, S.W. was not asked if she knew where Nutt had taken that "sip of alcohol" or the applicable drinking age of the location. Further, Coach Newell testified a resounding "No" when asked during her deposition, "So, just to clarify, did you consider Hillary Nutt, the woman that your girlfriend invited to see your team members play, to be a threat to any of your – any of the players on your team ever?" Thus, there is no indication that Nutt was "potentially dangerous" or an "underage user of illegal drugs and alcohol." The claim of S.W. violating a team rule for riding with Nutt is also unsupported by the facts. The team rule involves a permission slip that pertains to, inter alia, in-school transportation by other softball players between 6th and 7th periods for practice. Nutt was not listed on the permission slip. However, the permission slip does not regulate riding with anyone outside of softball. To construe this permission slip to apply to drivers not on the softball team is erroneous and would mean that neither Wyatt nor S.W.'s grandmother would have ever been able to transport S.W. because neither are listed on the permission slip. Yet, the coaches repeatedly said both Wyatt and the grandmother could also transport S.W. As to team dissension caused by rumors of S.W.'s involvement with Nutt, we are, again, bound by S.W.'s facts - that she did not spread any rumors. Further, the coaches could not have known of any alleged dissension as this alleged "rumor" did not come to light until March 3, the day the coaches interrogated S.W. and revealed her sexual orientation to her mother. But the coaches dismissed the rest of the softball team prior to the "meeting" with S.W. Also, the allegation regarding dissension emanates from the coaches' version of the facts.

More importantly, the only thing the coaches knew prior to interrogating S.W. was a rumor that she had allegedly told someone that she was in a relationship with Nutt and that Nutt was Newell's ex-girlfriend. There was no evidence that S.W. was actually in a relationship with Nutt, that it was a sexual relationship, that S.W. lied about anything or had ever ridden with Nutt. The coaches did not find out that S.W. was actually involved in a relationship, albeit apparently never sexual, with Nutt until they interrogated S.W. The record indicates that the coaches also did not find out that S.W. was riding with Nutt until after they met with S.W. Moreover, Fletcher admitted as much in her deposition when she testified that the coaches called Wyatt to the field because they wanted her to help stop the spreading of rumors about Newell and because S.W. was "dating" an "adult."

The district court fully considered all of the above and found that there was sufficient evidence from which a reasonable person could conclude that the coaches were not motivated by the need to protect S.W. but rather were retaliating against S.W. for allegedly spreading a rumor about Newell. The State has no interest in retaliating against students. As the district court found, even if the coaches were motivated by a desire to protect S.W., Wyatt provided expert testimony that the coaches' actions "were not a reasonable response to any potential concerns they may have had regarding S.W. or her welfare." The district court further found that, based on the record, it could not find that the States' interest outweighed S.W.'s right to keep her sexual orientation confidential, and that S.W.'s rights were clearly established at the time. The district court also found that there were substantial unresolved questions of fact surrounding the circumstances leading up to the confrontation and the content of the coaches conversation with Wyatt that prevent it from making a qualified immunity determination. "Without a factual determination by the appropriate trier of fact, this Court cannot resolve the legal question as to whether the Defendants' actions are amenable to a qualified immunity defense on this claim," concluded the district court. I agree.

Dissent Unreasonable Seizure

With regard to the Fourth Amendment claim based on the confrontation in the locker room, the majority says that the district court overlooked case law that establishes that the Fourth Amendment applies differently in the school context and particularly with regard to student athletes in locker rooms. Again, the majority cites Vernonia, 515 U.S. 646, and Milligan, 226 F.3d 652, for the diminished expectation of privacy of school children, particularly student athletes. However, neither case supports any such finding.

Vernonia was a case involving random urinalysis drug testing of student athletes. The majority cites this case for the proposition that athletes have less privacy expectations and that locker rooms are "not notable for the [Fourth Amendment] privacy they afford." Vernonia, 515 U.S. at 657. But those propositions have absolutely nothing to do with the instant case. The Supreme Court specifically said:

While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," we have acknowledged that for many purposes "school authorities ac[t] in loco parentis," with the power and indeed the duty to "inculcate the habits and manners of civility." Thus, while children assuredly do not "shed their constitutional rights ... at the schoolhouse gate," the nature of those rights is what is appropriate for children in school. Vernonia, 515 U.S. at 655. (Internal citations, marks omitted).

The Court further said:

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation." Vernonia, 515 U.S. at 657. (Internal citations omitted).

This case has nothing to do with physical privacy in a locker room or even compliance with established rules such as random drug testing. That said, even conceding a diminished expectation of privacy, the Court's further analysis regarding random drug testing is telling: Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We recognized in Skinner that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." We noted, however, that the degree of intrusion depends upon the manner in which production of the urine sample is monitored. . . . These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.

Here, there was no policy regarding lesbian relationships. In fact, at least one of the coaches and other members of the softball team were gay. Newell testified in her deposition that she had not made efforts to find out about other players' relationships and had never informed any other parents of who their children were dating. The results of the interrogation were not disclosed only to a limited class of school personnel who had a need to know, but were instead turned over to S.W.'s mother.

The Fourth Amendment claim involves the coaches' locking S.W. in the locker room and confronting her - not the invasion of privacy under the Fourteenth Amendment which involved the disclosure of her sexual orientation to her mother. Therefore, the majority incorrectly finds that the district court overlooked case law. Further, the majority finds that verbal abuse does not give rise to a constitutional violation under 42 U.S.C. § 1983, and, "thus, there is simply no clearly established constitutional right." Again, the majority errs. The case cited by the majority, Calhoun v. Hargrove, 312 F.3d 730, 734 (5th Cir. 2002), for the proposition that verbal abuse does not give rise to a constitutional violation under 42 U.S.C. § 1983 actually says:

A claim for relief under § 1983 must allege the deprivation of a right secured by the Constitution or the laws of the United States by a defendant acting under color of state law. Wong v. Stripling, 881 F.2d 200, 202 (5th Cir.1989). Furthermore, under 42 U.S.C. § 1997e(e), "[n]o federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

This is not a suit by a prisoner and there is no applicable federal statute requiring physical injury. Notwithstanding the inapplicability of Calhoun, verbal abuse is only one of the actions cited by Wyatt. The others included locking S.W. in the locker room, interrogating her, intimidating gestures, etc. Under the same authority as the Fourteenth Amendment analysis above, there clearly exists a Fourth Amendment right against unreasonable seizure/false imprisonment. The majority ignores the balancing test which is required to determine whether the State's interest outweighs S.W.'s right against unreasonable seizure. Instead, the majority presumably finds that such a right does not clearly exist for high school students and, thus, there is no need to determine objective reasonableness. I disagree. As stated previously, school children do not shed their constitutional rights at the schoolhouse gate. The majority fails to cite any authority to indicate that the Fourth Amendment right to be free from unreasonable seizure does not extend to high school students. A consideration of the objectively reasonable prong is necessary.

For the same reasons stated in the Fourteenth Amendment right to privacy discussion, I would conclude that there are genuine issues of material fact and that summary judgment was correctly denied.

Dissent Conclusion: Accordingly, I would find that Wyatt has alleged clearly established constitutional rights and that there are genuine issues of material fact sufficient to warrant denial of summary judgment on

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the basis of qualified immunity. Because I would affirm the district court, I respectfully dissent.

SEX OFFENDER REGISTRATION

ONE WITNESS'S TESTIMONY IS SUFFICIENT TO SUPPORT A CONCLUSION THAT THE PUBLIC INTEREST REQUIRES SEX OFFENDER REGISTRATION.

¶ 13-3-8. **In the Matter of J.T.W.**, MEMORNADUM, No. 02-12-00430-CV, 2013 WL 3488153 (Tex.App.-Fort Worth, 7/11/13).

Facts: On November 9, 2010, the State filed a petition alleging that Appellant, who was sixteen, committed two counts of aggravated sexual assault and two counts of sexual assault against his brother and step-brother, who were both younger than fourteen at the time. Appellant stipulated to the facts supporting the four counts, and on December 14, 2010, the juvenile court concluded that Appellant had engaged in delinquent conduct. SeeTex. Family Code Ann. §§ 51.03(a), 54.03(f) (West Supp.2012). That same day, the juvenile court held a disposition hearing and concluded that "the child is in need of rehabilitation and/or that the ... child is in need of supervision."See id. § 54.04(c). The juvenile court placed Appellant on probation for two years (until December 13, 2012) and ordered him to comply with several terms and conditions, including the requirement that he complete a program for the treatment of sex offenders. See id. §§ 54.04(l) & (p), 54.0405. The juvenile court deferred its decision on requiring Appellant to register as a sex offender until after he successfully completed the sex-offender program. SeeTex.Code Crim. Proc. Ann. art. 62.352(b)(1) (West 2006). Appellant signed a waiver of his right to appeal these orders. SeeTex. Family Code Ann. § 56.01(n) (West Supp.2012).

Appellant successfully completed the sex-offender program on December 15, 2011, and began out-patient treatment as previously ordered while continuing on probation. On October 9, 2012, the State filed a petition to modify the prior disposition to require Appellant to register as a sex offender because Appellant had violated the terms of his probation. See id. § 54.05 (West Supp.2012). Specifically, the State alleged that Appellant had contact with children more than two years younger than himself ("the contact violation"), viewed pornographic material on the internet, and possessed sexually arousing material ("the pornography violations").

The juvenile court held a hearing on the State's petition on October 12, 2012. SeeTex.Code Crim. Proc. Ann. art. 62.352(c) (West 2006); see alsoTex. Family Code Ann. § 54.05(d) (West Supp.2012) (mandating hearing upon State's motion to modify disposition). Appellant pleaded not true to the contact violation and true to the pornography violations. Appellant's juvenile probation officer, Jennifer Schindler, testified at the hearing. She stated that Appellant was given two polygraph examinations: one in June 2012 and one in September 2012. During the pre-examination interview for the June polygraph, Appellant admitted to the contact violation. Appellant admitted to the pornography violations during the pre-examination interview for the September polygraph. The State introduced the letters from the polygraph examiner into evidence at the hearing, detailing Appellant's pre-examination admissions. FN2

FN2. We recognize that the court of criminal appeals has held that polygraph-test results are inadmissible as unreliable. See Leonard v. State, 385 S.W.3d 570, 577–81 (Tex.Crim.App.2012). But here, Appellant's polygraph results were not considered as a ground to require him to register as a sex offender. What was considered were Appellant's admissions that he committed the contact violation and the pornography violations during the pre-examination interviews. See, e.g., United States v. Allard, 464 F.3d 529, 533–34 (5th Cir.2006); Autry v. State, Nos. 05–11–00217–CR, 05–11–00218–CR, 2012 WL 1920900, at *2–3 (Tex.App.-Dallas May 29, 2012, no pet.)(mem. op., not designated for publication); Brisco v. State, No. 01–00–00762–CR, 2002 WL 595075, at *1–2 (Tex.App.-Houston [1st Dist.] Apr. 18, 2002, pet. ref'd) (op. on reh'g, not designated for publication).

The juvenile court found that Appellant had violated the terms of his probation, as proved through the contact violation and the pornography violations; thus, the juvenile court concluded "that the adequate protection of the public and the rehabilitative needs of [Appellant] require[ ] that the terms of supervision for [Appellant] be modified to require that [Appellant] register as a sex offender [for ten years] in accordance with Article [62.051], Texas [Code] of Criminal Procedure. SeeTex.Code Crim. Proc. Ann. art. 62.352(c).

Held: Affirmed

Memorandum Opinion: Appellant appeals from the modification requiring registration and argues that there was no evidence supporting the conclusion that the public interest would be served by requiring him to register as a sex offender. SeeTex.Code Crim. Proc. Ann. arts. 62.352(c), 62.357(b) (West 2006). It is undisputed that Appellant successfully completed the treatment program ordered by the juvenile court. Therefore, the juvenile court was required to exempt Appellant from the registration requirement unless the interests of the public required registration. Tex.Code Crim. Proc. Ann. art. 62.352(c).

The evidence admitted at the hearing revealed that Appellant admitted to viewing pornography on the computer; contacting minors on social-media sites, chat rooms, and interactive video games; sending pictures of his genitals in a text message to an adult woman;

sending a picture of his genitals to a minor through a social-media site; consuming alcohol; and paying two minor girls to kiss each other in his presence. These actions were violations of the terms of Appellant's probation and most were the bases for the State's petition to modify disposition to require registration. These multiple violations were sufficient evidence to uphold the juvenile court's implied findings supporting its conclusion that the interests of the public required registration. See, e.g.,Tex.Code Crim. Proc. Ann. art. 62.351(b) (delineating evidence court may consider in hearing to determine public interest in requiring registration); In re J.D.G., 141 S.W.3d 319, 322 (Tex.App.-Corpus Christi 2004, no pet.)(holding evidence of multiple violations of probation terms supported order requiring registration). Further, we do not agree with Appellant's ostensible argument that one witness's testimony—here, Appellant's juvenile probation officer—is insufficient, ipso facto, to support a conclusion that the public interest requires registration. Article 62.351(b) does not require a specific amount of evidence, but only dictates the appropriate types of evidence that may be admitted, including witness testimony and exhibits, both of which were before the juvenile court at Appellant's hearing. SeeTex.Code Crim. Proc. Ann. art. 62.351(b).

Conclusion: Therefore, we conclude that the evidence was sufficient to justify the registration requirement; thus, the juvenile court did not abuse its discretion. We overrule Appellant's issue and affirm the juvenile court's order.

SUFFICIENCY OF THE EVIDENCE

SCHOOL DISTRICT POLICE OFFICER CONSIDERED VALID OWNER OF SCHOOL PROPERTY IN CRIMINAL TRESPASS PETITION.

¶ 13-3-2. **In the Matter of J.V.**, MEMORANDUM, No. 04-12-00707-CV, 2013 WL 2145779 (Tex.App.-San Antonio, 5/15/13).

Facts: During the bench trial in this case, the State called Kevin Thompson, an Austin Independent School District Police Officer, to testify. Thompson testified that on the date of the alleged offense, he was assigned to the Alternative Learning Center and was told by a teacher that J.V., a student at the school, was standing outside the school. Thompson went outside and asked J.V. to come inside the school. According to Thompson, J.V. refused. So, Thompson told J.V. that if he was not going to come inside, he had to leave. Thompson testified that he also told J.V. if he did not leave in a timely manner, J.V. would be arrested for criminal trespass. J.V. left but then returned. Thompson then told the security monitor to tell J.V. that he had to leave or be arrested. J.V. left, but again returned. Thompson testified that he then told J.V. for a third time that unless he left he would be arrested. J.V. again left. However, later, Thompson's partner radioed Thompson, telling him that J.V. had returned to campus. Thompson told his partner to place J.V. in custody and send him to Thompson's office. J.V. was then arrested for trespassing.

Thompson further testified that it was within his professional capacity to tell people they are no longer permitted to be on the campus by virtue of the fact that he is a police officer. According to Thompson, although the school administrators usually get involved, because no administrators were there at the time of the incident, he took it upon himself to make sure J.V. was aware that failing to leave campus would result in his arrest.

J.V. testified that on the day of the alleged offense, he arrived at the school, but did not go into the building because he did not want to go to school. He used a security guard's phone to call his mother to come and get him, but his mother did not answer the phone. According to J.V., Thompson only warned him one time that if he did not leave the campus he would be arrested. J.V. testified that he did understand that he was not allowed back on campus and that he had broken a school rule—trespass. J.V.'s mother testified that she did not answer the phone when J.V. called from the school because she wanted him to stay at school.

J.V. argues that the evidence is legally insufficient to establish he committed the offense of criminal trespass because the State, although not required to do so, named Kevin Thompson as the owner of the property in its Original Petition .FN1According to J.V., if the State names an owner in its Original Petition, rather than merely alleging the accused trespassed on the property of "another," then the State assumes the additional burden of proving ownership of the property. And, according to J.V., because the State did not meet its burden of proving Kevin Thompson was the owner of the property, the evidence was legally insufficient to prove J.V. committed a trespass.

Held: Affirmed

Memorandum Opinion: In support of his argument, J.V. cites Langston v. State, 855 S.W.2d 718 (Tex.Crim.App.1993). In Langston, the court of criminal appeals did, in fact, state that although ownership is not a necessary allegation to prove the offense of criminal trespass, when the State does allege an owner of the property, it is required to prove that ownership allegation. Id. at 721.However, as the State points out, since Langston was decided, the Texas Court of Criminal Appeals has required sufficiency of the evidence to be analyzed under the hypothetically correct jury charge.

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See Gharbi v. State, 131 S.W.3d 481, 483 (Tex.Crim.App.2003); see also Adames, 861–63 (explaining that an appellate court applies the Jackson v. Virginia standard of review to the hypothetically correct jury charge). In Gharbi, 131 S.W.3d at 481, the court of criminal appeals addressed the issue of whether the evidence is sufficient to support a conviction for an offense when the charging instrument contains an unnecessary allegation. The court held that an allegation in a charging instrument that is "not a statutory element or an 'integral part of an essential element of the offense'" may be disregarded. Id. at 483 (quoting Gollihar v. State, 46 S.W.3d 243, 253–55 (Tex.Crim.App.2001)). Thus, in this case, because ownership is not an element of the offense of trespass, the State was not required to prove ownership. See Langston, 855 S.W.2d at 721. And, J.V. makes no other argument with regard to sufficiency of the evidence.

Moreover, even if the State had assumed the burden of proving Kevin Thompson was the owner of the property, it met that burden by proving that Thompson had a greater right to possession of the property than J.V. See Vanderburg v. State, 874 S.W.2d 683, 684 (Tex.Crim.App.1994) (holding State may establish ownership in trespass case by proving the complainant had a greater right to possession of the property than the defendant). J.V. acknowledges that this is the law, but nevertheless argues that the evidence in this case failed to show that Thompson had a greater right to possession of the property than J.V.

J.V. relies on Dingier v. State, 705 S.W.2d 144 (Tex.Crim.App .1984), to advance his argument that the State did not meet its burden of establishing that Thompson had care, custody, or control over the property. Dingier involved the burglary of a vehicle owned by a furniture store. Id. at 144–45.The State alleged the store manager was the owner, but offered no proof that the manager exercised care, custody or control over the vehicle. Id. at 146.According to the court in Dingier, his position as store manager was not sufficient to establish that he had care, custody, or control over the vehicle. Id. The court emphasized that the State had not shown any connection between the vehicle and the store manager. Id. Thus, the court held that the evidence was insufficient to support the conviction. Id. at 146–47.

J.V. argues that in this case, like in Dingier, the State proved nothing more than Thompson's status as an employee of the owner. J.V. points to Thompson's testimony that he was authorized to act by virtue of his position as a police officer, and argues that Thompson's testimony amounts to no evidence. Further, J.V. argues that because Thompson testified that he acted in place of school administrators who usually handle such matters, the administrators, rather than Thompson, were the actual "owners" of the property. Dingier, however, is distinguishable from the facts presented here. In Dingier, the State proved only that the store manager was an employee of the store, and failed to prove that the manager had care, custody, or control over the vehicle or any connection whatsoever with the vehicle. Id. at 146.In this case, there is sufficient evidence from which the trial judge, as the trier of fact, could conclude Thompson exercised care, custody or control of the property and had a greater right to possession of the property than J.V.

Thompson testified that he was employed as a police officer by the Austin Independent School District and assigned to the Alternative Learning Center where the offense was alleged to have been committed. It is apparent from his testimony that his responsibilities included handling security at the campus and monitoring activities of the students. During his testimony, it was apparent that Thompson held a position of authority because Thompson related that teachers, security monitors and another police officer reported to him that J.V. had returned to the school after having been told to leave. According to Thompson, by virtue of his position as police officer with the school district, he had authority to act as he did. Although Thompson did testify that the administrators usually are involved, such testimony does not necessarily indicate that Thompson did not have the authority to have a student arrested for trespassing when that student refused to leave after having been told to leave. Thus, we find the evidence sufficient to establish J .V. committed the offense of trespass.

Conclusion: We therefore affirm the judgment of the trial court.

TRIAL PROCEEDINGS

JUVENILE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY SUBMITTING ELEMENTS OF DEADLY CONDUCT OFFENSE TO THE JURY DISJUNCTIVELY, ALLOWING FOR A POSSIBLE NON-UNANIMOUS VERDICT.

¶ 13-3-3. **In the Matter of L.D.C.**, No. 12-0032, --- S.W.3d ----, 2013 WL 2278968 (Tex.), 5/24/13.

Facts: L.D.C., age 16, admitted that during a street party near a middle school, he fired five or six shots from an AK–47 rifle "in the air". A bullet fragment was later found in the sun visor of a vehicle parked nearby. Officer Martin heard the shots and drove up as L.D.C. and a friend, T.J., were running through a field behind the school. When Martin yelled "police" and ordered them to stop, one of the two turned and fired toward him and the row of houses behind him. Martin and T.J. testified it was L.D.C; L.D.C. testified it was T.J. Martin returned fire, the rifle fell to the ground, and L.D.C. and T.J. continued running away. The two were found hiding outside the school.

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L.D.C. was charged with three criminal offenses: attempted capital murder (Count I), aggravated assault on a public servant (Count II), and deadly conduct (Count III). The jury answered "not true" to Count I and "true" to Counts II and III, assessing determinate sentences of forty years for Count II and ten years for Count III. Based on the verdict, the trial court committed L.D.C. to the Texas Youth Commission. The court of appeals affirmed the aggravated assault adjudication but reversed on deadly conduct. Only the State has petitioned for review. Thus, we are concerned only with L.D.C.'s adjudication for deadly conduct.

"A person commits [deadly conduct] if he knowingly discharges a firearm at or in the direction of ... a habitation ... or vehicle and is reckless as to whether the habitation ... or vehicle is occupied." "Jury verdicts [in cases under the Juvenile Justice Code] must be unanimous." In criminal cases, in which the jury verdict must also be unanimous, "when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." Had the State alleged only that L.D.C. shot the rifle during the party, surrounded by both vehicles and habitations, the jury would not have been required to agree that he shot at one or the other. But the State alleged that L.D.C. shot the rifle on two occasions, first during the party, as L.D.C. admitted, "at and in the direction of a vehicle" while being "reckless as to whether [it] was ... occupied", and later in the field, toward Martin and a row of homes, which L.D.C. denied. The trial court instructed the jury they could find that L.D.C. engaged in deadly conduct if, with the requisite intent and recklessness, he shot either toward a vehicle, apparently referring to the first shooting, or toward a habitation, referring to the second. While the jury did not have to agree on how an offense was committed, it had to agree "on the same act for a conviction", not "mere[ly] ... on a violation of a statute".FN7 The court did not instruct the jury that they had to be unanimous in finding that L.D.C. committed an offense either in shooting at a vehicle (during the party), or in shooting at a habitation (in the field), or both. Theoretically, at least, the jury could agree that L.D.C. committed deadly conduct even though only some believed it occurred during the party and the rest believed it occurred in the field. The court of appeals concluded that the disjunctive jury instruction was error:

[T]he jury convicted [L.D.C] of the offense of deadly conduct by choosing between dis-junctive paragraphs in the jury charge that were likely intended as alternative means of committing the offense. Nevertheless, the alternate means were actually separate offenses because the jury was presented with the two separate shooting incidents from which to choose. Thus, it is possible some jurors chose to convict appellant based on the shooting at the party, while other jurors chose to convict him based on the shooting directed towards Officer Martin and the houses behind the officer. Additionally, the trial court failed to specifically instruct the jury it must be unanimous as to the offense supporting Count III. Therefore, it cannot be said the jury in this case rendered a unanimous verdict with regard to Count III, as required by the Texas Family Code.

L.D.C. did not object to the disjunctive jury instruction for Count III, so the question then became whether the error was reversible when it was not preserved. The Family Code provides that in juvenile justice cases, "[t]he requirements governing an appeal are as in civil cases generally." In civil cases, unobjected-to charge error is not reversible unless it is fundamental, which occurs only "in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas." Fundamental error is reversible if it "probably caused the rendition of an improper judgment [or] probably prevented the appellant from properly presenting the case to the court of appeals." But we have stated that "a juvenile proceeding is not purely a civil matter. It is quasi-criminal, and ... general rules requiring preservation in the trial court ... cannot be applied across the board in juvenile proceedings." In criminal cases, unobjected-to charge error is reversible if it was "egregious and created such harm that his trial was not fair or impartial", considering essentially every aspect of the case. If, for example, "[i]t is ... highly likely that the jury's verdicts ... were, in fact, unanimous", unobjected-to charge error is not reversible. Without analyzing differences between these standards for civil and criminal cases, the court of appeals followed other courts in applying the criminal standard and concluded that the error was reversible. The court remanded the case for a new trial on Count III.

We granted the State's petition for review to decide the proper standard for reviewing unpreserved charge error in a juvenile delinquency case.

Held: Judgment of the court of appeals reversed and render judgment for the State.

Opinion: From the evidence and the jury's finding of aggravated assault, it is highly likely that the jury unanimously agreed that L.D.C. committed deadly conduct both during the party and in the field. L.D.C. admitted that he fired the AK–47 five or six times during the party and that there were vehicles nearby. There can be no question that he acted knowingly—"aware of the nature of his conduct" —or that he shot at a vehicle: a bullet fragment was retrieved from inside a vehicle. L.D.C. also admitted that the rifle was fired in the field—by T.J.; the jury, in finding aggravated assault, unanimously agreed that L.D.C, not T.J., was

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the shooter, acting "intentionally or knowingly". The evidence established that there were homes behind Martin, in the direction L.D.C. was shooting, and well within range of an AK–47. L.D.C.'s unconcern for whether the vehicles and habitations in the directions in which he fired were occupied was reckless—"consciously disregard[ing] a substantial and unjustifiable risk" and "a gross deviation from the standard of care that an ordinary person would exercise" —during the party and later in the field.

For the jury to have agreed that L.D.C. engaged in deadly conduct either during the party or in the field, but not to have agreed that it occurred at one place or both, at least one juror would have had to: disbelieve both L.D.C.'s denial that he shot in the field and his admission that he shot during the party; or believe that he shot at either vehicles or habitations, but not both; or believe that L.D.C. consciously disregarded the possible presence of occupants in either the surrounding vehicles or the surrounding habitations, but not both; or have been irrational. We think the first three are highly unlikely, and we will not base reversible error on the possibility that a juror might act irrationally, which a correct instruction cannot prevent. Under the civil standard of review, error in the trial court's disjunctive submission of deadly conduct did not probably cause an improper judgment or probably prevent a proper presentation of L.D.C.'s appeal. Under the criminal standard of review, the error was not egregious, and "[i]t is ... highly likely that the jury's verdicts ... were, in fact, unanimous." Thus, under either the civil or criminal standard of review, the error does not war-rant reversal.

L.D.C. concedes that the State's argument, to the same effect as the argument we have just set out, might have been sound if the State's counsel had not argued to the jury [in summation] that it could adjudicate L.D.C. of this single offense [of deadly conduct] on either of the two situations raised by the evidence, but the State invited the jury to adjudicate on either set of fact[s], and the jury of course did not say whether it adjudicated unanimously on one of the two, or split its vote. As the court of appeals said in its opinion, this argument "tipped the scale leaving the jury to decide Count III based on a less than unanimous verdict.[")]

The State's closing argument to which L.D.C. and the court of appeals refer was this:

Now, for Count 3, something to remember is that it's not just the houses and vehicles over by the party, because remember when he shot at Officer Martin, what was all behind Officer Martin? Houses. That was a residential fence that Officer Martin was standing in front of. So when he's shooting at Officer Martin—and that rifle can go over 400 yards, the firearms expert testified—when he's shooting at Officer Martin, if he misses, he can hit one of those houses back there. You heard the 911 tapes. People are stuttering, they're crying, they're terrified because they're hearing these gunshots by their houses.

This does not seem to us so much a suggestion that the jury might find that deadly conduct occurred only during the party or only later in the field as it is an encouragement to find that deadly conduct occurred both times. Even if the State's argument did suggest that the jury could find only one or the other, if not both, we think, again based on the jury's finding of aggravated assault and the uncontradicted evidence, the jury did not take the suggestion.

Conclusion: Regardless of whether a civil or criminal standard applies, we conclude that the trial court's disjunctive jury instruction, given without objection, was not reversible error. The harm to L.D.C, given the jury's other findings and the evidence, was only theoretical, not actual. Accordingly, we reverse the judgment of the court of appeals and render judgment for the State.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

IN A DISCRETIONARY TRANSFER TO ADULT COURT, A FINDING BASED ON THE SERIOUSNESS OF THE OFFENSE ALONE IS NOT ENOUGH FOR TRANSFER.

¶ 13-3-10. Moon v. State, No. 01-10-00341-CR, 2013 WL 3894867, Tex.App.-Houston [1 Dist.] 7/30/13.

Facts: In July 2008, Deer Park Police Detective Jason Meredith arrived at a grocery store parking lot to investigate a homicide and found Christopher Seabrook dead. Seabrook's cousin, Able Garcia, told the Detective that he and Seabrook had made arrangements to buy a pound of marijuana from a seller whom Garcia knew as "JT." Garcia arrived first, and Seabrook pulled up and parked his truck alongside Garcia's car. The two cousins sat in Garcia's car until a third vehicle, driven by Gabriel Gonzalez, arrived and parked next to Seabrook's truck.

Seabrook approached Gonzalez's car, leaned in the window, and spoke to the front seat passenger. Garcia heard the conversation grow heated, saw Seabrook lunge into the passenger side window, and then heard gunshots. Seabrook then ran from the vehicle but was fired upon by someone who jumped from the passenger side of the car. The shooter, identified by Garcia only as a white male, returned to Gonzalez's car, which sped away.

Gonzalez later returned to the parking lot and admitted to the Detective that he was the driver of the third vehicle, the shooter whom Gonzalez identified as "Crazy" had been seated next to him, and Emmanuel Hernandez was the backseat passenger. Gonzalez recounted that Seabrook pulled Crazy from the car and gunshots were fired. Gonzalez thereafter directed the

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police to where the shooter lived in La Porte. When recovered by the police, Seabrook's cell phone indicated that the last incoming call was from a phone owned by Moon.

The continued investigation at the parking lot led to the arrest of Hernandez for possession of marijuana and to the discovery of the pistol from which, a ballistic test confirmed, were fired three of the four bullets recovered from Seabrook's corpse. Hernandez identified Moon, who he knew as "J.T.," as the shooter and told the Detective that he and Moon had intended to "jack" Seabrook. Text messages from Moon on Hernandez's cell phone before the shooting asked if he was "ready to hit that lick" and to bring a gun; after the shooting the texts pleaded "don't say a word" and "tell them my name is Crazy, and you don't know where I live."

Moon later confessed to the shooting, was arrested, taken into custody and two days following the shooting, on July 20, 2008, taken to the Juvenile Detention Center.

At the juvenile court hearing on the State's motion to waive jurisdiction held December 17, 2008, Moon's maternal aunt, Jennifer Laban, testified about Moon's family life: his parents divorced when he was very young; when Moon was two- and-a-half years old, his mother gave birth to, suffocated, and threw her newborn daughter into a trash can. After she was convicted of capital murder and sentenced to life without the possibility of parole, Moon never saw his mother again. Moon learned of his mother's history for the first time in 2007, one year before the incident that gives rise to this case.

Moon had been charged with criminal mischief five months earlier for allegedly "keying" another student's vehicle and subsequently went to live with his maternal grandmother, Sharon Van Winkle, in La Porte. As a result of the mischief charge, Moon was compelled to enroll in an alternative school and, Laban testified, began exhibiting anxiety and panic attacks such that she and Van Winkle took Moon to see Tom Winterfeld, a counselor.

Mary Guerra, the juvenile probation officer assigned to Moon for the "keying" case, testified that Moon passed all of his classes with no reports of negative behavior at either the alternative school or the detention center's charter school. He successfully completed a program designed to address teen and family relationships, anger management and substance abuse, and was compliant, never angry, always called to check in with her, and was "very cooperative."

Forensic psychiatrist Dr. Seth Silverman testified and submitted his psychiatric evaluation that noted:

- Moon is mild mannered, polite, and dependent, almost to the point of being fearful, easily influenced, and confused;
- It is this examiner's strong opinion that adult criminal justice programs have few constructive and, possibly, many destructive influences to offer to Moon. There is little to no programming. Therapy, and attempts at rehabilitation, if any, are clearly minimal. Numerous severe, untoward, and aggravating influences are present.
- Moon has little inclination toward violence, does not fit the mold of individuals treated and assessed who have been charged with similar offenses, and he does not appear to be a flight risk or prone to aggressive behavior; and
- Moon's thought process lacks sophistication that is indicative of immaturity.

Ulysses Galloway, a Harris County probation officer who supervised Moon in the juvenile justice center, described him as "a good kid, young man." He testified that, in his eleven years as a probation officer, he has seen a lot of kids come and go and "Moon is one of the best kids I have seen come through . . . ." Galloway also testified that Moon followed his orders, attended classes, was neither aggressive nor mean-spirited, and he considered Moon amenable to treatment. Two other Harris County probation officers who supervised Moon—

Warren Broadnaz and Michael Merrit—testified that their observations of Moon were exactly the same as Galloway's. Julie Daugherty, the mother of Moon's former girlfriend, described Moon as extremely polite and respectful. Leslie Wood, Moon's childhood friend, testified that she had never seen Moon become aggressive.

On December 18, 2008, the juvenile court granted the State's motion to waive jurisdiction and transferred Moon's case to the 178th District Court. On April 19, 2010, a jury convicted Moon of murder and assessed punishment at thirty years' imprisonment. Moon timely filed this appeal.

Held: Judgment Vacated, Case Dismissed

Opinion: In Kent v. United States, 383 U.S. 541 (1966), the United States Supreme Court stated that "[i]t is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile." Id. at 556. The Court characterized the "decision as to waiver of jurisdiction and transfer of the matter to the District Court [as] potentially as important to petitioner as the difference between five years imprisonment and a death sentence." Id. at 557. In Hidalgo v. State, 983 S.W.2d 746 (Tex. Crim. App. 1999), the Court of Criminal Appeals likewise recognized that "transfer to

criminal district court for adult prosecution is 'the single most serious act the juvenile court can perform . . . because once waiver of jurisdiction occurs, the child loses all protective and rehabilitative possibilities available.'" Id. at 755. The Hidalgo Court noted that "transfer was intended to be used only in exceptional cases" and that "[t]he philosophy was that, whenever possible, children 'should be protected and rehabilitated rather than subjected to the harshness of the criminal system' because 'children, all children are worth redeeming.'" Id. at 754 (citation omitted).

Section 54.02 of the Family Code authorizes a juvenile court to waive its exclusive, original jurisdiction and to transfer a child to a criminal district court if:
(1) the child is alleged to have committed a felony;
(2) the child was fourteen years or older if the alleged offense is a first degree felony or fifteen years or older if the alleged offense is a second degree felony; and
(3) after a full investigation and hearing, the juvenile court determines that there is probable cause to believe that the juvenile committed the offense alleged and that because of the seriousness of the offense alleged or the background of the juvenile, the welfare of the community requires criminal proceedings. TEX. FAM. CODE ANN. § 54.02(a) (West Supp. 2012).

To limit the juvenile court's discretion in making the waiver determination, the Supreme Court in Kent set out a series of factors for juvenile courts to consider. Hidalgo, 983 S.W.2d at 754 (citing Kent, 383 U.S. at 566–67). These factors are incorporated into section 54.02(f), which provides as follows:

(f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:
(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
(2) the sophistication and maturity of the child;
(3) the record and previous history of the child; and
(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court. TEX. FAM. CODE ANN. § 54.02(f).

The juvenile court "may order a transfer on the strength of any combination of the criteria" listed in subsection (f). Hidalgo, 983S.W.2d at 754 n.16 (citing United States v. Doe, 871 F.2d 1248, 1254–55 (5th Cir.), cert. denied, 493 U.S. 917 (1989)). Section 54.02(d) requires that, prior to the hearing on the motion to transfer, the juvenile court "shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." TEX. FAM. CODE ANN. § 54.02(d). If the juvenile court waives jurisdiction, it must "state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court . . . ." Id. § 54.02(h). Rigid adherence to these requirements is mandatory before a court may waive its jurisdiction over a juvenile. In re J.R.C., 522 S.W.2d 579, 582–83 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.); see also In re J.T.H., 779 S.W.2d 954, 960 (Tex. App.—Austin 1989, no pet.).

JUVENILE COURT'S ORDER

In its Order to Waive Jurisdiction, the juvenile court found that "because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding." TEX. FAM. CODE ANN. § 54.02(a)(3). The juvenile court noted that, in making that determination, it had considered the four factors enumerated in section 54.02(f), among other matters. The court concluded as follows:

The Court specifically finds that the said CAMERON MOON is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived by the said CAMERON MOON, to have aided in the preparation of HIS defense and to be responsible for HIS conduct; that the OFFENSE allege[d] to have been committed WAS against the person of another; and the evidence and reports heretofore presented to the court demonstrate to the court that there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of the said CAMERON MOON by use of procedures, services, and facilities currently available to the Juvenile Court.

Thus, the juvenile court found that waiver of its jurisdiction was supported by the first, second, and fourth factors under section 54.02(f).

"SOPHISTICATION AND MATURITY"

Moon's argument regarding the court's "sophistication and maturity" finding is two-fold. First, he argues that the juvenile court misunderstood and misapplied this factor. Second, he contends that the evidence does not support the court's finding. The State contends that the juvenile court applied the proper approach in making its determination regarding Moon's sophistication and maturity, and that the evidence was sufficient to support the juvenile court's finding on this factor.

PROPER STANDARD

Moon argues that the proper standard for considering the sophistication and maturity prong is not whether he was sophisticated and mature enough to waive his constitutional rights or to assist in the preparation of his defense, as the juvenile court found. Rather, he argues, this factor relates only to the question of culpability and criminal sophistication. In support of his argument, Moon relies on R.E.M. v. State, 541 S.W.2d 841 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.) and Hidalgo v. State, 983 S.W.2d 746 (Tex. Crim. App. 1999).

In R.E.M., the defendant sought reversal of the juvenile court's order transferring the murder charge against him to district court. See R.E.M., 541 S.W.2d at 843. With regard to the juvenile court's finding that the defendant was of "sufficient sophistication and maturity to have intelligently, knowingly, and voluntarily waived all constitutional and statutory rights heretofore waived," the appeals court stated:
This finding is somewhat difficult to understand. We believe that the requirement that the juvenile court consider the maturity and sophistication of the child refers to the question of culpability and responsibility for his conduct, and is not restricted to a consideration of whether he can intelligently waive rights and assist in the preparation of his defense. Id. at 846.

In Hidalgo, the appellant challenged his transfer from juvenile court on the ground that he had been denied his right to assistance of counsel because his appointed attorney had not been notified of a psychological examination until after the exam had taken place. See Hidalgo, 986 S.W.2d at 747–48. In examining the purpose of the transfer mechanism, the Court noted State legislatures originally devised the process as a means of removing serious or persistent juvenile offenders generally not amenable to rehabilitation to the adult criminal system. The presence of such juveniles was seen as a threat to the fundamental structure of the juvenile system and the less criminally sophisticated. [Footnote omitted]. Transfer was intended to be used only in exceptional cases.Id. at 754 (emphasis added).

Based on the above-quoted language, Moon urges us to conclude that the sophistication and maturity element relates only to his culpability and criminal sophistication, and not to an ability to waive his rights or aid in the preparation of his defense. We decline the invitation.

Although the R.E.M. court believed that the sophistication and maturity factor referred to the question of culpability, it also stated that it was "not restricted to a consideration of whether he can intelligently waive rights and assist in the preparation of his defense." R.E.M., 541 S.W.2d at 846 (emphasis added). With regard to Hidalgo, we do not read the Court's explanation of the purpose behind transfer—to remove serious or persistent offenders who were considered a threat to the less criminally sophisticated in the juvenile system—as a restriction on what the court may consider in determining a juvenile's sophistication and maturity under subsection (f). We conclude that the juvenile court did not err in considering Moon's ability to waive his rights and assist in the preparation of his defense.

EVIDENCE OF SOPHISTICATION AND MATURITY

Moon contends that the juvenile court's finding as to his sophistication and maturity is unsupported by the evidence. Pointing to Moon's text messages instructing Hernandez to not "say a word," "[t]ell them my name is Crazy, and you don't know where I live," and to the exculpatory stories Moon told Detective Meredith before confessing to the shooting, the State's brief argues that Moon's efforts to conceal the crime and avoid apprehension demonstrate that he knew the difference between right and wrong and that his conduct was wrong. The finding of the juvenile court on the sophistication and maturity issue, however, was based on Moon's ability to waive his rights and assist counsel in preparing his defense, not an appreciation of the nature of his actions or that his conduct was wrong. Moon's text messages and exculpatory stories constitute no evidence supporting the juvenile court's finding that Moon was sufficiently sophisticated and mature to waive his rights and assist in preparing his defense.

In Hidalgo, the Court of Criminal Appeals noted that a psychological examination is ordinarily required to assist the court in assessing a juvenile's sophistication, maturity, and the likelihood of rehabilitation as required by subsection(f). In his psychiatric evaluation report, Dr. Silverman concluded that Moon "has a lack of sophistication and maturity" and that his "thought process lacks sophistication which is indicative of immaturity." Dr. Silverman also found Moon to be "mild mannered, polite, and dependent almost to the point of being fearful, easily influenced and confused." The State presented no controverting expert testimony to undermine Dr. Silverman's conclusion regarding Moon's lack of sophistication and his immaturity.

The State correctly asserts that as the sole judge of credibility, the juvenile court was entitled to disbelieve Dr. Silverman's testimony that Moon lacked sophistication and maturity. See In re D.W.L., 828 S.W.2d 520, 525 (Tex. App.— Houston [14th Dist.] 1992, no pet.) (noting juvenile court is sole fact-finder in pretrial hearing and may choose to believe or disbelieve any or all of witnesses' testimony). Nonetheless, there must be some evidence to support the juvenile court's finding that Moon was sufficiently sophisticated and mature for the reasons specified by the court in order to uphold its waiver determination. Our review finds no evidence supportive of the court's finding that Moon was "of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived . . . [and] to have aided in the preparation of [his] defense." As such, the evidence to uphold the juvenile court's finding regarding Moon's sophistication and maturity is legally insufficient.

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PROTECTION OF THE PUBLIC AND REHABILITATION OF THE JUVENILE

Moon next contends that the evidence adduced is insufficient to support the court's finding that "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [Moon] by use of procedures, services, and facilities currently available to the Juvenile Court."

The State contends that the evidence regarding this factor is sufficient to support the court's finding and asserts that the juvenile court does not abuse its discretion by finding that the community's welfare requires transfer due to the seriousness of the crime alone, despite the juvenile's background. Pointing to the offense itself and the evidence showing that it was committed during a drug transaction and that Moon repeatedly shot Seabrook while he fled, the State concludes, "based on the seriousness of the offense alone, the evidence sufficiently demonstrated that appellant's transfer was consistent with the public's need for protection."

The State conflates subsections (a)(3) and (f). Subsection (a)(3) authorizes the juvenile court to waive jurisdiction if it determines that "because of the seriousness of the offense alleged or the background of the juvenile, the welfare of the community requires criminal proceedings." TEX. FAM. CODE ANN. § 54.02(a) (emphasis added). Thus, a juvenile court can properly find that the welfare of the community requires criminal proceedings because of the seriousness of the offense, the background of the individual, or both. See id. However, a finding based on the seriousness of the offense under subsection (a) does not absolve the juvenile court of its duty to consider the subsection (f) factors.

If, as the State argues, the nature of the offense alone justified waiver, transfer would automatically be authorized in certain classes of "serious" crimes such as murder, and the subsection (f) factors would be rendered superfluous. See R.E.M., 541 S.W.2d at 846 ("We find nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a 'serious' crime."). Further, the cases relied on by the State do not suggest that the nature of the crime alone can support waiver; rather, they merely make the observation that subsection (a)(3) is written in the disjunctive. See McKaine v. State, 170 S.W.3d 285, 291 (Tex. App.—Corpus Christi 2005, no pet.) (noting that because § 54.02(a)(3) is disjunctive, "[e]ven if we were to sustain McKaine's challenge regarding his background, his failure to challenge the court's finding regarding the seriousness of the offense would preclude relief."); In re D.D., 938 S.W.2d 172, 177 (Tex. App.—Fort Worth 1996, no writ) ("The second element, however, is not written in the conjunctive. It requires only that the trial court find that the seriousness of the offense or the background of the child requires criminal prosecution to protect the welfare of the community.").

EVIDENCE RELATED TO PROTECTION OF THE PUBLIC

The record reflects that Moon had a sole misdemeanor conviction for "keying" a car, and while locked up in the juvenile facility was accused of four infractions. The probation report provides no details. In his psychiatric evaluation report, Dr. Silverman stated that Moon "has little inclination towards violence," "does not fit the mold of individuals treated and assessed who have been charged with similar offenses," and "does not appear to be a flight risk or prone to aggressive behavior." Dr. Silverman found Moon "especially when compared to other individuals with similar [alleged] aggressive behavior who have been treated by this psychiatrist—to be mild mannered, polite, and dependent, almost to the point of being fearful, easily influenced and confused." In his report, Dr. Silverman also referenced the notes of Moon's therapist, Tom Winterfeld, stating that Moon showed no signs of aggression. Dr. Silverman concluded that Moon "is at little risk to . . . harm himself or others." Moon's juvenile probation officers described Moon as "very cooperative" and compliant, never angry, "a good kid, young man," "one of the best kids I have seen come through," and neither "aggressive nor mean-spirited." Daugherty, the mother of Moon's former girlfriend, described him as "an extremely polite young man" and "very respectful." Wood, Moon's childhood friend, testified that she had never seen him become aggressive.

EVIDENCE OF LIKELIHOOD OF REHABILITATION

Dr. Silverman noted that "[p]rior to the alleged offense, Moon had been subject to multiple significant psychosocial stressors, including but not limited to, a change of caretakers, custody battle between caretakers, and placement in an alternative school. He had also learned the reason that he had never had contact with his biological mother—she was incarcerated for life because she had killed her newborn after delivering at home and then place[d] it in a garbage dumpster." Dr. Silverman stated "[i]t is this examiner's strong opinion that adult criminal justice programs have few constructive, and possibly many destructive, influences to offer [] Moon. There is little to no programming. Therapy and attempts at rehabilitation, if any, are clearly minimal. . . . Moon, in the opinion of this forensic psychiatrist, might be harmed by placement in an adult criminal justice jail due to its untoward influences and lack of rehabilitative intent." Dr. Silverman concluded that Moon "would probably benefit from placement in a therapeutic environment specifically designed for adolescent offenders, especially one licensed by, and contracted with, the Texas Youth Commission." His conclusion comported with Winterfeld's therapy notes indicating that Moon had responded to psychological therapy. Officer Galloway, Moon's juvenile probation officer,

also testified that he considered Moon amenable to treatment.

Construing the prior "keying," juvenile facility infractions, and the nature of the charged offense as more than a scintilla of evidence and considering only this favorable evidence to support the court's finding, we must conclude the evidence to be legally sufficient to support the court's determination that "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [Moon] by use of procedures, services, and facilities currently available to the Juvenile Court." However, careful consideration of all of the evidence presented further compels the conclusion that the evidence is factually insufficient to support the juvenile court's finding. As to the protection of the public, Moon's keying a car is not only a non-violent act, it is an undeniably low- level misdemeanor mischief offense against property—hardly the sort of offense for which "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation . . . by use of procedures, services, and facilities currently available to the Juvenile Court." Further, the probation report offers no details regarding Moon's "write-ups" at the resident juvenile facility. Indeed, Moon's juvenile detention officers, presumably in a position to observe such incidents, uniformly testified that Moon "was one of the best kids I have seen come through," that he followed orders, attended classes, and was not aggressive or mean-spirited.

The State relies only on the juvenile court's conclusion that, "due to appellant's age, the juvenile system would not have authority over appellant long enough to rehabilitate him." Such a conclusion, of course, is not evidence, and there is nothing in the record supporting this conclusion. Further, the State's reliance on Faisst is misplaced. See 105 S.W.3d at 12–13, 15. There, the appeals court found the evidence sufficient to support the juvenile court's finding that the juvenile system could not adequately provide for the defendant's rehabilitation because the offense of intoxication manslaughter required a longer period of supervision and probation than was available under the juvenile system. See Faisst, 105 S.W.3d at 15. However, there was specific testimony that (1) in the juvenile system the maximum punishment is twelve months of intensive supervision followed by twelve months of probation, (2) the defendant had a "significant problem with alcohol abuse," and (3) such a "person needs a minimum of fifteen to twenty months of supervision to ensure that rehabilitation takes place." See id. at 12. The record here has no such evidence. Indeed, the only evidence regarding the likelihood of Moon's rehabilitation was the uncontroverted testimony that Moon was amenable to treatment.

Consequently, we conclude that the juvenile court's finding that "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of [Moon] by use of procedures, services, and facilities currently available to the Juvenile Court" was so against the great weight and preponderance of the evidence as to be manifestly unjust.
In sum, we find the evidence legally insufficient to support the juvenile court's finding related to Moon's sophistication and maturity. We also find the evidence factually insufficient to support the court's finding regarding the prospect of adequate protection of the public and the likelihood of Moon's rehabilitation. Thus, the first factor—whether the offense was against person or property—is the only factor weighing in favor of Moon's transfer. Under these circumstances, we hold that the juvenile court abused its discretion when it certified Moon as an adult and transferred his case to the district court.

Conclusion: Because the juvenile court abused its discretion in waiving its jurisdiction over Moon and certifying him for trial as an adult, the district court lacked jurisdiction over this case. We therefore vacate the district court's judgment and dismiss the case. The case remains pending in the juvenile court.