Juvenile Law Section
STATE BAR OF TEXAS

Volume 26, Number 4 December 2012

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NEWSLETTER EDITOR

Associate Judge Pat Garza
386th District Court
San Antonio, Texas

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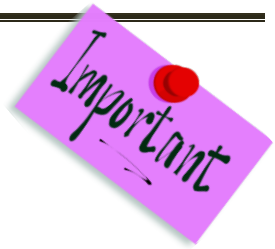
Dear Juvenile Law Section Members:

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

What a year it has been. 2012 has certainly had its share of monumental events. Two of those events came directly from the Supreme Court. First, the United States Supreme Court reached a landmark decision regarding Arizona's immigration law. The court ruled against all but one provision of Arizona's 2010 immigration law finding that several provisions conflicted with federal laws, including the provisions allowing for arrests without warrants. Secondly, the Supreme Court upheld President Obama's individual health care mandate. I have no doubt that both of these holdings will impact our country for years to come.

In July of this year, twelve people were killed while viewing a movie premier at a theater in Aurora, Colorado. In October, a Penn State assistant coach received a sentence of 30 to 60 years in prison for molesting young boys. Also in October, Hurricane Sandy devastated portions of the Caribbean and the Mid-Atlantic and Northeastern United States. In all, Hurricane Sandy affected 24 states, including the entire eastern seaboard from Florida to Maine and west across the Appalachian Mountains to Michigan and Wisconsin, with particularly severe damage in New Jersey and New York.

Oh, did I forget to mention… 2012 was an election year. The thing about election years is that for many of us and our friends it becomes a life changing event. Good people win and good people lose. Sometimes with no rhyme or reason. It is simply something we must endure every couple of years.

I know that every year has its ups and downs, but for many this was a tough one. And while 2012 is not over yet, and provided we're still here after December 21, 2012 (end of the Mayan calendar), Happy Holidays to all and let's make 2013 our best year yet.

Congratulations: Congratulations to Kristy Almager for being hired as the new director of the Juvenile Justice Training Academy with the Texas Juvenile Justice Department. This means that Kristy will once again be able to assist our section with training, seminars, and joint projects with TJJD. Kristy Almager has been in the field of juvenile justice for 17 years with the former TJPC and now TJJD.

Congratulations: Congratulations to Senior District Judge John J. Special of San Antonio for being named the next commissioner of the Texas Department of Family and Protective Services by Governor Rick Perry. Judge Specia has long been an advocate of juvenile issues and is a founding member and jurist in residence for the Supreme Court Children's Commission.

Article: An excellent article entitled Ticketing, Confidentiality, and Special Education Issues by Ryan Turner has been included in this issue. This interesting article examines the transference of discipline from schools to juvenile justice systems or the phenomenon known as "passing the paddle." The paper was presented on June 29, 2012 at the State Bar of Texas 8th Annual Special Education and the Juvenile Justice System Course by Ryan Turner.

26th Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 26th Annual Juvenile Law Conference will be held February 11-13, 2013, at the Grand Hyatt Hotel in San Antonio, Texas. Chair-Elect Richard Ainsa and his planning committee are already working on putting together an excellent and practical conference. The logistics of this year's conference will be put on by the State Bar of Texas.

Officer and Council Nominees. The Annual Juvenile Law Section meeting will be held in San Antonio, Texas on February 11, 2013, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Richard Ainsa, Chair
Laura Peterson, Chair-Elect
Kevin Collins, Treasurer
Riley Shaw, Secretary (Nominated to Officer)
Jill Mata, Immediate Past Chair

Council Members: Terms Expire in 2016
Kim Brown, Ft. Worth, TX
Anne Hazlewood, Lubbock, TX
Lisa Capers, Austin, TX

Nominations from the floor during the meeting will be accepted. If you have someone that you would like to nominate from the floor, contact the Chair of the Nominations Committee, Nydia Thomas, at nydia.thomas@tjjd.texas.gov.

Grant me the serenity to accept the things I cannot change,
the courage to change the things I can,
and the wisdom to know the difference.

Serenity Prayer

CHAIR'S MESSAGE Jill Mata

Welcome to the December 2012 edition of the Juvenile Law Section Report. Welcome back to returning Juvenile Law Section members and if you are a new member, I welcome you and hope you find the section and this newsletter helpful. As usual, in this edition you will find Judge Pat Garza's case update as he covers significant decisions affecting juvenile law since the September 2012 newsletter. As always, we thank Judge Garza for his dedication and hard work on behalf of the Section. On a personal note I thank him for always taking time to answer my crazy questions and suspect he has done the same for many of you!

As most of you already know, Mike Griffiths was selected as the new Executive Director of the Texas Juvenile Justice Department and he brings extensive experience in juvenile justice to the position. We offer our sincere congratulations and are excited to work with him. The Juvenile Law Section has historically enjoyed a close relationship with the former Texas Juvenile Probation Commission to our mutual benefits, and Mike has indicated that he will support our continued collaboration with TJJD. On that note, we also congratulate Kristy Almager for her recent promotion as Director of the Juvenile Justice Training Academy. Kristy has been in the field of juvenile justice for 17 years with the former TJPC and now TJJD and she brings a wealth of experience, knowledge and skill to her new position. Many of our long time members know that Kristy is a valued friend and supporter of the Juvenile Law Section so we are fortunate to be able to work with her again on juvenile justice and training issues.

More good news from TJJD is that the Texas Juvenile Law 8th Edition is complete and has been submitted to the Publisher. TJJD expects to start shipping all pre-ordered books in late December. I can't wait to get my copy and go through my ritual of tabbing and highlighting my favorite portions of the book! You can tell I need to get out more! Thanks to TJJD for making sure Texas juvenile justice practitioners have our coveted treatise first written by the late, great and most missed, Professor Bob Dawson.

Be on the lookout as the brochures just went out for the 26th Annual Juvenile Law Institute in February. The topics and speakers look great and you can expect an informative and fun conference in San Antonio at the Grand Hyatt, February 11-13, 2013. Register early to get all the discounts! We will have another silent auction to provide scholarships for TJJD youth. The auction has been a great success and a lot of fun, so if you have any new or gently used items to donate, please let me know. Please mark your calendars and make plans to attend!

Remember, if you encounter any problems or have suggestions for how we can improve our newsletter, please send us an email. As always, thank you for your continued membership in the Juvenile Law Section. Looking forward to seeing everyone in February at the conference and we hope you enjoy the newsletter!

Sincerely,
Jill Mata
Chair, Juvenile Law Section

TICKETING, CONFIDENTIALITY, AND SPECIAL EDUCATION ISSUES

By Ryan Kellus Turneri, General Counsel and Director of Education
Texas Municipal Courts Education Center, Austin, TX

ABSTRACT: This article examines three distinct aspects of the "passing the paddle" phenomenon in Texas: (1) citations for Class C misdemeanors, (2) confidentiality, and (3) disparities between the civil and criminal juvenile justice systems. It is written for attorneys (applicable statutes and case law are cited), special education advocates (legal constructs are explained), and Texas policy makers (ideas for reform are proposed).

The legislative response to juvenile crime in the 1990s was based on predictions that never came to pass (e.g., the emergence of juvenile super predators) and the popularity of crime control polices like "zero tolerance."[i] As a result of such polices, in less than two decades, law enforcement has slowly become an accepted presence in Texas schools. The issuance of citations by law enforcement to children (ages 10-16) for Class C misdemeanors has resulted in municipal and justice courts appearing more like extensions of the local school principal's office than local criminal trial courts of limited jurisdiction.

Notably absent from this dynamic—this "passing of the paddle"—are juvenile probation services and juvenile courts. Such entities were created specifically to address the wayward and illegal behavior of children. Today, however, more children in Texas are adjudicated as criminals in municipal and justice courts than come in contact with juvenile probation and juvenile courts combined.[ii] Despite the criminal nature of the conduct that results in "quasi-criminal" proceedings in juvenile court, juvenile court proceedings are civil law matters governed by Title 3 of the Family Code, known as the Juvenile Justice Code. The purpose of the Juvenile Justice Code is distinct from the objectives of the Code of Criminal Procedure and from the specific objectives of Chapter 45 governing municipal and justice court proceedings.[iii]

The subject matter adjudicated in juvenile court falls into two categories: (1) delinquent conduct and (2) CINS (conduct indicating a need for supervision).[iv] The distinction between delinquent conduct and CINS is that delinquent conduct is conduct that if committed by an adult could potentially result in the imposition by a court of a term of incarceration (i.e., misdemeanors other than Class C misdemeanors and contempt), whereas CINS is conduct including Class C misdemeanors (excluding traffic and tobacco offenses) and other manners of behavior that are not conducive to the well-being of children (e.g., running away from home). This awkward, dual classification quite often allows peace officers (not prosecutors or judges) to decide whether a child is adjudicated by the civil juvenile justice system or the criminal juvenile justice system.

Has Texas intentionally or otherwise given up on children whose conduct indicates a need for supervision? To conserve juvenile court resources, and because it is generally believed to cost less to adjudicate such cases in municipal and justice court rather than juvenile court, cases that can be filed as CINS are today more often filed as Class C misdemeanors. Consequently, more children are adjudicated in the Texas criminal justice system than the civil juvenile justice system. The wholesale adjudication of children by criminal courts for status offenses and misdemeanors defies commonly accepted notions about juvenile justice. The common narrative featured in most college textbooks explains that the emergence of juvenile courts in the American judicial system is one of the milestone events of the 19th Century, predicated on the belief that children are distinct from adults and should be treated by the legal system accordingly. Juvenile courts differ from criminal courts in three ways: (1) the focus is on rehabilitation, rather than punishment; (2) informal diversions are preferred to formal adjudications; and (3) confidentiality, rather than public access to proceedings and records, is the norm.

In recent years, the adjudication of children for fine-only misdemeanors has piqued the attention of critics and, in turn, the media.[v] Laws passed more recently suggest the Texas Legislature and Governor Perry realize that the wholesale criminalization of misbehavior by children should be subject to restraints and that the unbridled outsourcing of school discipline from the school house to the court house is bad public policy.[vi] Yet, at the same time, efforts to decriminalize truancy in 2011 and substantially curtail ticketing at schools in 2009 and 2011 have not gained traction at the Capitol. While it makes perfect sense to send such cases back to the civil juvenile justice system, neither juvenile courts nor juvenile probation services appear prepared to shoulder the caseload of CINS petitions which have been shifted to municipal and justice courts in the form of Class C misdemeanors.

This article examines three distinct aspects of the "passing the paddle" phenomenon in Texas. It is written for attorneys (applicable statutes and case law are cited), special education advocates (legal constructs are explained), and Texas policy makers (ideas for reform are proposed).

I. Citations

In the context of the criminal justice system, a citation is defined as "[a]n order, issued by the police, to appear before a magistrate or a judge at a later date. A citation is commonly used for minor violations (e.g., traffic violations); thus avoiding having to take the suspect into immediate physical custody."[vii]

Citations are such a common staple in the Texas criminal justice system that their purpose and utility are seldom contemplated, let alone fully appreciated. Despite their ubiquitous nature, when properly utilized, citations are remarkable devices of efficiency that are mutually beneficial to both the government and the public. From a public policy perspective, the importance of citations goes beyond avoiding the embarrassment, trauma, or inconvenience of being arrested. Logistically and financially, it is hard to imagine how society could manage the enormous burden of enforcing its laws relating to public safety and quality of life if every accused violator first had to be arrested, booked, incarcerated, and released on bail. While acknowledging their importance and utility, issuing citations to children poses a host of troubling public policy concerns and legal questions.

A. Ticketing Kids

While no Texas appellate court has considered the legal merits of issuing citations to children, it is hard to reconcile how Texas law allows a child to sign a written promise to appear in court (and be held criminally responsible for failing to appear) when the same child cannot legally enter in a binding contract. While issuing citations to children may be convenient for the government (debatably, too convenient), it is hardly convenient for children. Unlike an adult who receives a citation and may enter a plea by mail, a child is required to appear in open court with a parent to enter a plea. While deficiencies in data collection practices currently makes it impossible to tell what percentage of citations issued to children are written on school grounds or by school resources officers, what data is available is nonetheless startling. Children accused of identical behavior in the civil juvenile justice system seldom make an appearance in juvenile court. In 2011, only 511 CINS petitions were filed.[viii] During the same period of time, excluding justice court filings, 265,638 juvenile cases were filed in municipal court.[ix]

Unlike cases in juvenile court, there is no requirement that a case involving a child be reviewed by a prosecutor prior to the entering of a plea. The issuance of citations by law enforcement provides a means of directly filing criminal charges that bypass a seldom-emphasized safeguard of civil liberty: prosecutor discretion. Even if a prosecutor is involved, a citation alone rarely communicates enough information for a prosecutor to meaningfully exercise discretion. Furthermore, when criminal charges are instigated by citations, Texas law does not provide prosecutors with any statutory means of requesting additional information.

In certain instances, the Legislature has specified that charges against children must be instigated by complaints – not citations. For example in school attendance violations, the Legislature requires that complaints contain specific information (that allows a court to know if charges are being timely filed, if the school has adopted and attempted to successfully use truancy prevention measures, and whether a child is eligible to receive special education services).[x] When a complaint does not contain such required information, ostensibly the complaint fails to invoke the jurisdiction of the court.[xi]

B. Probable Cause

In recent years, with the increased presence of peace officers in schools, the Texas Municipal Courts Education Center (TMCEC) has received comments from prosecutors and judges suggesting that some peace officers inappropriately issue citations. This begs the questions: when is a peace officer legally authorized to issue a citation? Should a peace officer write a citation for conduct they did not personally observe?

Since both the Code of Criminal Procedure[xii] and the Transportation Code[xiii] describe the issuance of a citation as being incident to "arrest," a citation issued to a child should be viewed as a substitute for a full custodial arrest and scrutinized accordingly. As in all criminal cases, for a person to be lawfully arrested, there must be probable cause. Probable cause exists where the facts and circumstances known by the officer, stemming from reasonable trustworthy information, are sufficient in themselves to warrant a person of reasonable caution to believe that a particular person has committed or is committing an offense.[xiv]

Nothing in Texas law authorizes the issuance of a citation on the basis of something less than probable cause. Yet, because Texas criminal procedure contains no mechanism to weed out citations that are not predicated on probable cause, defendants, including children, wishing to raise such arguments must first contest their guilt.
Ostensibly, a citation can only be issued under the same circumstances that a peace officer can make a warrantless arrest. As all arrests (including warrantless arrests) require probable cause, the peace officer issuing a citation must have probable cause that the suspect has committed a Class C misdemeanor or offense otherwise punishable upon conviction by the imposition of a fine only. The probable cause presumably must be coupled with one of the following statutory exceptions to the warrant requirement contained in the Texas Code of Criminal Procedure: (1) offense within presence

or view if "classed as an offense against the public peace;"[xv] (2) offenses within the view of a magistrate; [xvi] (3) Class C offense involving family violence; (4) preventing the consequences of theft;[xvii] or (5) the cacophony of confusion known as "suspicious places."[xviii]

While most of the statutory authorization for warrantless arrests are relatively straight forward, suspicious places is not.[xix] Article 14.03(a)(1) states that "[a]ny peace officer may arrest without warrant persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section 49.02, Penal Code, or threaten, or are about to commit some offense against the laws." Assuming that citations can be issued only under the same circumstances as a peace officer can make warrantless arrest, one instance where Article 14.03(a)(1) appears applicable is where a suspect is alleged to have engaged in disorderly conduct but not within the view of a peace officer. A peace officer presumably can issue a citation for disorderly conduct after conducting an investigation and determining probable cause. In absence of case law, it unknown whether under certain circumstances school grounds or school-owned property can be deemed a "suspicious place" or whether Disruption of Class (Section 37.124, Education Code) or Disruption of Transportation (Section 37.126, Education Code) would be deemed breach of the peace offenses.

C. Citations are No Substitutes for Formal Charging Instruments

As the Court of Criminal Appeals explains in Huynh v. State, "There are three types of charging instruments -- indictments, informations, and complaints. Indictments and informations are provided for and defined in the Texas Constitution. They are also defined in the Code of Criminal Procedure. Complaints are not addressed in the Constitution, but are provided for in the Code of Criminal Procedure in a variety of contexts."[xx]

Unless a defendant chooses not to contest charges instigated by citation, a complaint must be filed.[xxi] As the Court of Criminal Appeals explained in Bass v. State, the ordinary purpose and lawful use of a complaint is to commence the proceedings and thereby confer jurisdiction upon the court.[xxii]

In 2009, Article 27.14 of the Code of Criminal Procedure was amended to provide that when a case is first instigated by citation, a formal complaint must be filed in the court if either (1) the defendant enters a plea of not guilty or (2) the defendant fails to appear or enter a plea pursuant in accordance with the terms of the written promise to appear. The Code of Criminal Procedure was also amended to clarify that in Class C misdemeanor cases a complaint must be filed within two years of the date of the offense.[xxiii]

Consequently, even in instances where the defendant has failed to appear, if a complaint has not been filed within two years, the municipal or justice court has no jurisdiction. The amendment to Article 27.14 is in accord with case law holding that failure to file a complaint within two years of the date of the alleged offense is barred by the statute of limitations.[xxiv]

D. Defects in Citations Rarely Invalidate Criminal Charges

Data entry errors (i.e., typos and other erroneous information) in the citation by peace officers can generally be corrected by a sworn complaint. The question is who is going to be the complainant? TMCEC commonly receives phone calls from clerks who are given citations that are defective or ambiguous in stating an offense. Ethically, court clerks should not be expected by peace officers to "fill in the blanks." Peace officers or prosecutors should remedy such defects. Ambiguous citations that fail to state a specific offense would likely be deemed an insufficient source of information for an affiant to attest to in obtaining a warrant.[xxv] It is also hard to see how a citation that fails to state an offense can satisfy Article 45.019(a)(4) of the Code of Criminal Procedure which requires that complaints "must show that the accused committed an offense against the laws of this state, or state that an affiant has good reason to believe and does believe that the accused has committed an offense against the laws of this state."

A trial court, in very limited circumstances, can dismiss a charging instrument.[xxvi] However, as previously explained, the charging instrument in municipal and justice court is a sworn complaint, not the citation. Accordingly, it is presumed that it would be inappropriate for a court to dismiss a defective citation without giving the State an opportunity to be heard or remedy the defect, because under Article 27.14(d) a citation is intended only as an interim complaint and time-saving device.

It is hard to imagine the circumstance where it is ever to a prosecutor's advantage to ask the defendant to waive charging by sworn complaint. Where a valid waiver has occurred and the citation is the charging instrument, case law suggests that a court has the power to dismiss a case without the State's consent if it contains a defect.[xxvii] Pursuant to Article 27.14(d) of the Code of Criminal Procedure, any defect in the citation could prove fatal to a prosecution (e.g., instances where the citation states the wrong day, month, year, location, etc.).

E. Proposed Reform #1: Utilize Complaints (Not Citations); Authorize Prosecutors to Request Information; and Formulate Filing Guidelines for School-Based Offenses to Ensure Justice

In light of the fact that Texas law does not allow citations to be issued to corporations, associations, or people who are publicly intoxicated, why should Texas law continue authorizing the issuance of citations to children? Ensuring that justice is done in cases involving children should take precedence over the utility and convenience that accompanies issuing citations to children. Barring the use of citations at public schools would not bar law enforcement from making arrests or preclude either school officials or employees from filing charges in court. On the other hand, barring the issuance of citations at public schools would help end the haphazard and liberal resort to judicial-imposed discipline and conserve limited judicial resources. Even if citations continue to be used, Chapter 37 of the Education Code should be amended to give local prosecutors the discretion to implement filing guidelines and obtain information from schools in order to curtail the misuse of criminal procedure and to ensure that only morally blameworthy children are required to appear in court and enter a plea to criminal charges, not children who are eligible for or are receiving special education services and whose behavior is a manifestation of a disability. Prosecutors should be told by schools if a child is eligible or is receiving special education services, has a behavioral intervention plan (BIP), or has a disorder or disability relating to culpability prior to the filing of charges. Prosecutors should be able to easily ascertain from schools what disciplinary measures, if any, have already been taken against a child to ensure proportional and fair punishment.

II. Confidentiality

A. The Shift from Non-Disclosure to Confidentiality

In 2009, in an effort to provide some semblance of parity between the civil and criminal juvenile justice systems, the Legislature passed S.B. 1056. The bill added Subsection (f-1) to Section 411.081 of the Government Code, requiring criminal courts to automatically issue a non-disclosure order upon the conviction of a child for a fine-only misdemeanor offense. While the intentions of the new law were applauded, non-disclosure was plagued with deficiencies that rendered it ineffective.[xxviii] By 2011, it was clear that the system for processing non-disclosure orders (via the Texas Department of Public Safety) was ill-equipped to handle the large volume of convictions involving children that occur in municipal and justice courts.[xxix]

In 2011, non-disclosure laws pertaining to children convicted of Class C misdemeanors were repealed and replaced with laws providing children with conditional confidentiality.[xxx]

Note the following about conditional confidentiality:

- Article 45.0217 of the Code of Criminal Procedure provides that all records and files, including those held by law enforcement and all electronically stored information, relating to a child who (1) is convicted of and (2) has satisfied the judgment for a fine-only misdemeanor offense (other than a traffic offense) are confidential and may not be disclosed to the public. The language in Article 45.0217 parallels the language in Title 3 of the Family Code, which protects records relating to juvenile conduct when adjudicated through the juvenile courts.

- Like nondisclosure orders, confidentiality only applies to cases in which a conviction is obtained. This means there is no confidentiality for records related to a case where a child defendant receives deferred disposition and the case is subsequently dismissed or where a child gets a dismissal from successful completion of teen court. Unlike nondisclosure, this new confidentiality does not attach to records until the judgment is satisfied. Nondisclosure orders were generated automatically upon conviction, and were problematic in the event the child did not pay the fine, attend an awareness class, or complete community service. Questions arose as to whether the court could turn the child over to collections, accept payment from a parent on a child's fine, or issue a capias pro fine and publicize that fact when the child turned 17. It bears repeating, confidentiality is conditional. It is not automatic. In order for confidentiality to occur, the child must first discharge the judgment of the court. While this may seem unfair, keep in mind these are criminal cases. Criminal cases are a public matter and for constitutional reasons the documents that accompany such cases are available to members of the media and the public. Secret criminal proceedings are not allowed, not even in Texas.

- Confidentiality does not apply to traffic offenses. This exclusion reflects the original intent behind S.B. 1056 but was not part of the plain language of the nondisclosure statute. Why are traffic offenses excluded? Because, unlike most other Class C misdemeanors, fine-only traffic offenses cannot be adjudicated in a juvenile court. The scope of confidentiality is limited to offenses that can be, but are not, filed in juvenile court.

- Article 45.0217 provides that the records are confidential and may not be released to the public, but provides a few exceptions. The information can be inspected by judges, court staff, a criminal justice agency for a criminal

justice purpose, the Department of Public Safety, the defendant, the defendant's attorney, a prosecuting attorney, or the defendant's parent, guardian, or managing conservator. This is a rather significant change from the nondisclosure process where parents were not a permissible party to receive information about a child's case. This reflects the Legislature's intent to keep parents involved in their child's criminal cases. Law enforcement agencies required to notify schools upon the arrest of the child, under Article 15.27 of the Code of Criminal Procedure, also have an exception from the confidentiality provision.

- Article 44.2811 of the Code of Criminal Procedure addresses confidentiality of records on appeal from a municipal or justice court. On appeal from a municipal court of non-record or justice court, confidentiality will apply under Chapter 44 only if the child is again convicted and satisfies the judgment. If the case is dismissed upon appeal or the child is acquitted, there will be no confidentiality. Likewise, confidentiality will only apply to records relating to a case appealed from a municipal court of record if the judgment is affirmed and then satisfied; if the judgment is reversed, there will be no confidentiality. In either case–appeal from a record or non-record court–confidentiality is only triggered upon satisfaction of the judgment. Article 44.2811 references Article 45.0217 for purposes of providing the same exceptions to confidentiality.

- Changes in the law apply to convictions occurring before, on, or after the effective date of the act: June 17, 2011. This saves courts the headache of having to determine date of conviction to know whether the records can be released under the common-law right of inspection. All cases where the child has satisfied the judgment, other than traffic convictions, are now confidential as provided in Article 45.0217 of the Code of Criminal Procedure. All records related to cases in which no conviction was obtained are subject to the common-law right of inspection. All cases subject to an existing nondisclosure order will still be subject to the nondisclosure order, including those traffic cases that under the new law are not afforded confidentiality.

B. Proposed Reform #2: Extend Confidentiality to All Successfully Completed Non-Traffic Deferred Disposition Orders

The 2011 shift from non-disclosure to confidentiality struck the correct balance between "the public's right to know" in criminal cases and privacy for children convicted of certain Class C misdemeanors. The policy, however, with slight modification can provide confidentiality to a greater number of children adjudicated in municipal and justice courts. Currently, the law only allows confidentiality in instances where children are "convicted" of certain Class C misdemeanor offenses and satisfy the judgment. There are no similar provisions for children placed on deferred disposition, other forms of deferred in Chapter 45, or deferred adjudication and whose complaints are dismissed following successful completion of the terms of their probation. If the Legislature is willing to extend confidentiality to children who are found guilty of certain fine-only offenses, it should be willing in a similar manner to extend confidentiality to the greater number of children who have avoided being found guilty by successfully completing some form of probation.

III. Disparities between the Civil and Criminal Juvenile Justice Systems

Compare the following:

Example 1: A child throws a brick through a window at school. The broken window is determined by a peace officer to be valued at $51. Pursuant to Section 8.07 of the Penal Code (Age Affecting Criminal Responsibility), a child younger than 15 years of age is not criminally responsible and may not be prosecuted or convicted. Under Texas law such a child is less morally blameworthy than an adult because of the child's age. Criminal mischief of a $51 window is a Class B misdemeanor if committed by an adult. Class B misdemeanors committed by children are considered delinquent conduct and are typically dealt with informally by law enforcement or juvenile probation services. It is unlikely that the child will ever see a juvenile judge. If the case goes to court and the child is indigent, the child shall be appointed counsel. Even if the child does see a juvenile judge, the judge does not have the authority to levy fines or convict the child of a crime.

Example 2: A child throws a brick through a window at school. The broken window is determined by a peace officer to be valued at $48. Criminal mischief of a $48 window is a Class C misdemeanor. Pursuant to Section 8.07(a)(4) of the Penal Code (Age Affecting Criminal Responsibility), because the specific criminal mischief is a misdemeanor punishable by fine only, regardless of the child's age, the child is criminally responsible and may be prosecuted and convicted. Under Texas law such a child is just as morally blameworthy as any adult who commits the same act. Although the conduct could be the basis of a CINS petition, it is more likely to be handled as a Class C misdemeanor (because it is more "expedient"). If the child is accused of a Class C misdemeanor, the child will have to appear in open court with a parent. Even if the child is indigent; the child is

unlikely to be appointed counsel (even if the case goes to trial, the indigent defendant will be pro se). If convicted, the judge or justice of the peace may impose a fine on the child not to exceed $500 plus court costs.

The blatant disparities between the two examples pose obvious grounds for legal challenges. The likelihood for such challenges are only enhanced when the defendant is a child whose illegal behaviors are a manifestation of a disability and the school district utilizes criminal law to discipline the child for misconduct.

A. Proposed Reform #3: Acknowledge that Age Affects Criminal Responsibility

Whether an offense is classified by the Legislature as a Class C misdemeanor should not singularly determine whether a child is to be held criminally responsible for the his or her conduct. The penalty classification for an offense may be altogether irrelevant to whether a defendant is morally blameworthy. Currently, Section 8.07 of the Penal Code, a statutory formulation of the common law defense of infancy, expressly prohibits the prosecution of the relatively small number of children in Texas who commit "more serious" jailable offenses, while providing no similar prohibition against prosecuting the large number of children who commit "less serious" fine-only criminal offenses.

Section 8.07 was enacted in 1973. Its underlying rationale—a person shall not be prosecuted for or convicted of any offenses that person committed when younger than age 15 (subject to limited exceptions)—makes more sense today in light of what science knows about adolescence and brain development.[xxxi] This accepted body of scientific knowledge has been relied upon twice by a majority of members of the United States Supreme Court in cases pertaining to the moral blameworthiness of children.[xxxii]

Short of express total prohibition, the repeal of Section 8.07(a)(2)-(5) would allow children accused of fine-only offenses to assert Section 8.07 as a criminal defense. Making the defense available to such children would substantially curtail the criminal adjudication of children for Class C misdemeanors while having no implications on the ability to adjudicate misconduct by the child in the civil juvenile justice system.

Alternatively, Section 8.07 could be amended to create a rebuttable presumption that a child younger than age 15 is presumed to not have criminal intent to commit a Class C misdemeanor. Such a presumption would be inapplicable offenses where culpability is not an issue (i.e., strict liability offenses). Chapter 45 of the Code of Criminal Procedure, in turn, could be amended to include a statutory procedure for certifying a child morally blameworthy before allowing a complaint to be accepted by the municipal or justice court and allowing the child to admit guilt. At such a hearing the State would be required to establish by a preponderance of the evidence that at the time of the alleged offense that child did not suffer from mental illness, mental retardation, or any other condition affecting the child's capacity to appreciate the wrongfulness of the conduct or to conform the conduct to the requirements of the law.

At a minimum, Section 8.07 could be amended to create a rebuttable presumption that a child younger than age 15 is presumed to not have criminal intent to commit a Class C misdemeanor on school grounds or school owned property (except, once again, for strict liability offenses). In 2011, the Legislature appeared receptive to similar safeguards when it made it an exception to the offenses of Disruption of Class (Section 37.124, Education Code), Disruption of Transportation (Section 37.126, Education Code), and Disorderly Conduct (Section 42.01, Penal Code) that the defendant was a student in the sixth or lower grade level. Such safeguards would be easier to apply if age (rather than grade level) was a prima facie element of the offense.

B. Proposed Reform #4: Acknowledge that Children are Indigent

In all seriousness, how many children in Texas are independently able to pay a $500 fine plus nearly another $100 in court costs? Need anyone be reminded that the imposition of fines and costs in a criminal case is solely the burden of the defendant (not their parents or legal guardians)? Municipal judges and justices of the peace worth their salt know that nearly all of these children are indigent. In 2011, the Legislature made substantial steps in the right direction by passing legislation authorizing judges to allow children to discharge fines and costs by community service and tutoring.[xxxiii] During the latter part of the 2011 Legislative Session, the Texas Municipal Courts Association (TMCA) suggested that S.B. 1489 be amended to give youthful defendants the choice between paying the fines and costs or discharging them by means of community service. Furthermore, TMCA proposed amendments to Articles 43.091 and 45.0491of the Code of Criminal Procedure (Waiver of Payment of Fines and Costs for Indigent Defendants) that would have given courts that hear Class C misdemeanors the authority to waive the payment of fines and costs in cases where the defendant is a child and discharging the judgment through community service would impose an undue hardship. There were concerns at the time that such broad reaching changes exceeded the limited scope of S.B. 1489. In 2013, the Legislature should pass TMCA's proposals into law.

C. Proposed Reform #5: Ensure Access to Counsel

Section 51.102 of the Family Code ensures that indigent children adjudicated in juvenile court for CINS have the right to counsel. No similar provision exists for indigent children adjudicated for the same conduct in municipal or justice courts. Rather, Article 1.051(c) of the Code of Criminal Procedure provides all criminal courts with a general authority to make "interest of justice" appointments. Despite collecting the lion's share of the monies remitted to the State of Texas, which are then used to help pay for indigent defense appointments in county, district, and juvenile courts, municipal and justice courts cannot use such monies to pay for indigent defense appointment even when the defendant is a child with mental retardation accused of a crime of moral turpitude.[xxxiv]

If the State of Texas is going to continue operating a dual system of juvenile justice, it is critical that children adjudicated in either system have their rights equally protected. In order for this to occur, the Legislature must provide some mechanism for local governments and municipal and justice courts to pay for "interest of justice appointments" (per Article 1.051(c), Code of Criminal Procedure) involving indigent children accused of Class C misdemeanors (guidelines for appointment should be devised with special concern for children accused of crimes of moral turpitude). Municipal and county governments should be authorized to collect a court cost designated specifically to pay for such appointments.

D. Proposed Reform #6: Begin Collecting Data on the Issuance of School-Related Citations

The ticketing of children poses serious questions about school disciplinary policies in Texas. Such questions come on the heels of groundbreaking statistical research using large sample of data collected by the Texas Education Agency (TEA) that suggests disproportionate disciplinary treatment of minority students in Texas public schools.[xxxv] Texas, however, does not require schools to collect data on citations issued on school grounds or school owned property. The Legislature should require the TEA to collect such data so that policy-makers may glean better insight into the use of citations and the relationship to other disciplinary practices and trends involving children in Texas public schools. Furthermore, such data would allow us to know exactly what percentage of children who receive citations at school are eligible or are receiving special education services.

E. Proposed Reform #7: Increase Diversions from Criminal Courts; Expand the Use of Juvenile Case Managers and Prevention Measures

As previously mentioned one of the ways that the juvenile courts differ from criminal courts is that informal diversion is preferred to formal adjudication. One of the reasons that the number of CINS petitions being adjudicated in juvenile courts has declined to fewer than 1,000 per year is that Title 3, Chapter 52 of the Family Code contains ways to dispose of such cases without referral to court. Currently, however, comparable provisions governing Class C misdemeanors do not exist. Accordingly, the Legislature should either adapt or use Section 52.03 (Disposition without Referral to Court), Section 52.031 (First Offender Program), and Section 52.032 (Informal Disposition Guidelines) as templates for specific legislation authorizing local governments to implement "deferred prosecution" measures in Class C misdemeanor cases to decrease the number of local filings and to conserve prosecutor and judicial resources. Efforts to decrease the number of cases adjudicated by municipal and justice courts may be increased by the use of juvenile case manager programs.[xxxvi] Accordingly, Article 45.056 of the Code of Criminal Procedure should be revised to expressly allow juvenile case managers to be involved in diversion measures without the entry of any formal court order. Likewise, the number of school-related Class C misdemeanors adjudicated in municipal and justice courts can decrease by expanding the use of "prevention measures" to all offenses occurring on school grounds and school-owned property and expressly providing that a court shall dismiss a complaint made by a school district that is not accompanied by satisfactory proof that prevention measures were utilized.

Conclusion

While it may be hard to understand why Texas decided to criminalize the behavior of children, it is easy to understand why municipal and justice courts inherited such cases. From the government's perspective, such courts provide a rapid, cost-effective means of adjudicating cases without having a duty to appoint counsel. Municipal and justice courts are the unsung workhorses of the Texas judicial system. When it comes to the ability to manage caseloads— sheer volume—such courts have no equal. Such attributes alone, however, hardly make such courts ideal venues for cases involving children. With this said, numerous legislative changes in the last decade have made municipal and justice courts better venues for cases involving children (e.g., mandatory IDEA training for municipal judges and justices of the peace, the advent of juvenile case manager programs). There is scant evidence that the Legislature is ready, willing, or even contemplating an overhaul of which courts should have jurisdiction of children who violate the law but are not necessarily engaging in delinquent conduct. Furthermore, general disapproval of peace officers liberally issuing citations to children while at school should not be confused with support for liberal crime control policies. Proposals that are viewed as "soft on crime" or that can be perceived as making our public schools "safe harbors" for criminality are

unlikely to be passed into law. Accordingly, the greatest likelihood for effecting meaningful change lies in implementing common sense solutions that substantially curtail the "classroom-to-courtroom pipeline" and ensure equitable treatment for children who are adjudicated in municipal and justice courts: Texas' new juvenile c

[i] Ryan Kellus Turner and Mark Goodner, "Passing the Paddle: Nondisclosure of Children's Criminal Cases" *State Bar of Texas Juvenile Law Section Newsletter* (December 2010) at 13.

[ii] Data from the Office of Court Administration's *Annual Report of the Texas Judiciary Fiscal Year 2010* (December 2010) showed that slightly more than 420,000 children appeared in Texas municipal and justice courts. During the same time slightly more than 44,000 children were adjudicated in juvenile courts. A review of data from the Texas Juvenile Probation Commission shows that nearly 90,000 referrals are made to the 168 juvenile probation departments serving the 254 counties in Texas. See, *The State of Juvenile Probation Activity in Texas: Calendar Years 2009 & 2010* (November 2011).

[iii] Compare Section 51.01, Family Code with Articles 1.03 and 45.001, Code of Criminal Procedure.

[iv] Section 51.03, Family Code. In other states, CINS refers to Child In Need of Supervision. The distinction between acronyms is at first glance subtle and insignificant.

[v] Efforts by Texas Appleseed have helped increase public awareness of children being ticketed and criminally adjudicated. See, Texas Appleseed, *Texas Classroom to Prison Pipeline: Ticketing, Arrests and Use of Force in Schools* (December 2010).

[vi] In 2007, the Legislature passed H.B. 278, which eliminated the authority of school districts to criminalize all violations of school rules as Class C misdemeanors. In 2011, the Legislature passed S.B.1489, which placed procedural safeguards and limitations on how schools and courts handle students who fail to attend school.

[vii] Black's Law Dictionary, Sixth Edition (West 1990).

[viii] Data compiled from the Office of Court Administration reveals that from 2006-2011 the total number of CINS petitions adjudicated by juvenile courts in Texas totaled 6,934.

[ix] Office of Court Administration, *Annual Report of the Texas Judiciary 2010* and Texas Juvenile Probation Commission, *The State of Juvenile Probation Activity in Texas for Calendar Years 2009 and 2010*.

[x] Stating if a child is eligible or is receiving special education services is integral in criminal school attendance cases because a child is exempt from compulsory school attendance if the child is eligible for to participate in a school district's special education program but cannot be appropriately served by the resident district. Section 25.086(a)(2), Education Code.

[xi] Section 25.0915, Education Code. To remove any possible doubt as to a court's obligation in such instances, Section 25.0915 should be amended to include language identical to Section 25.0951(d), Education Code.

[xii] Article 14.06, Code of Criminal Procedure.

[xiii] Section 543.003, Transportation Code.

[xiv] *Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991).

[xv] Article 14.01(a), Code of Criminal Procedure

[xvi] Article 14.02, Code of Criminal Procedure.

[xvii] Article 18.01, Code of Criminal Procedure.

[xviii] Because the Code of Criminal Procedure does not define a suspicious place, the meaning of the term has largely been left to the courts. Since appellate courts have not held that any place is inherently suspicious, courts should use the totality of the circumstances test in deciding if Article 14.03(a)(1) is appropriate. See, e.g., *Johnson v. State*, 722 S.W.2d 417 (Tex. Crim. App. 1986).

[xix] Gerald S. Reamey, "Arrests in Texas's 'Suspicious Places': A Rule in Search of Reason," *Texas Tech Law Review* Vol. 31, No. 3 (2000) at 931.

[xx] 901 S.W.2d 480, 482 n.3 (Tex. Crim. App. 1995).

[xxi] A citation can serve as a complaint in two limited circumstances (1) when the defendant is not contesting guilt or (2) when the defendant waives the right to be charged by sworn complaint. Article 27.14(d) of the Code of Criminal Procedure states that "the written notice serves as a complaint to which the defendant may plead 'guilty,' 'not guilty,' or 'nolo contendere.' If the defendant pleads 'not guilty' to the offense, a complaint shall be filed that conforms to the requirements of Chapter 45 of this Code, and that complaint serves as an *original* complaint."

Article 27.14(d) also states that "a defendant may waive the filing of a sworn complaint and elect that the prosecution proceed on the written notice of the charged offense if the defendant agrees in writing with the prosecution, signs the agreement, and files it with the court."

[xxii] 427 S.W.2d 624 (Tex. Crim. App. 1968).

[xxiii] Article 12.02,Code of Criminal Procedure. In the minds of most judges and attorneys, the amendment merely codified the popular belief stemming from old case law that complaints in Class C misdemeanors had to be filed within two years of the offense date and not later.

[xxiv] *Ex parte Hoard*, 140 S.W. 449 (Tex. Crim. App. 1911).

[xxv] See, generally, *Gordon v. State*, 801 S.W.2d 899 (Tex. Crim. App. 1990).

[xxvi] With no inherent authority for a trial court to dismiss a charging instrument without consent of the State, a court must gain its authority to do so from a constitution, statute, or common law. *State v. Mungia*, 119 S.W.3d 814 (Tex. Crim. App. 2003).

[xxvii] *State v. Johnson*, 821 S.W.2d 609, 612 n. 2 (Tex. Crim. App. 1991).

[xxviii] Mark Goodner, "Controlling the Taint of Criminality: Children and Orders of Nondisclosure" *The Recorder*, Vol. 19, No. 3 (July 2010) at 5.

[xxix] From 2009 to 2011, no municipal court in Texas reported to TMCEC having received confirmation that its non-disclosure order was disseminated by DPS.

[xxx] See, Bill Summary H.B. 961, *The Recorder*, Vol. 20, No. 5 (August 2011) at 46. H.B. 961 replaces procedures for *nondisclosure* with procedures that conditionally make particular criminal case records *confidential*. Additionally, DPS is no longer involved in the process.

[xxxi] "Adolescence, Brain Development, and Legal Culpability" American Bar Association Juvenile Justice Center (January 2004).

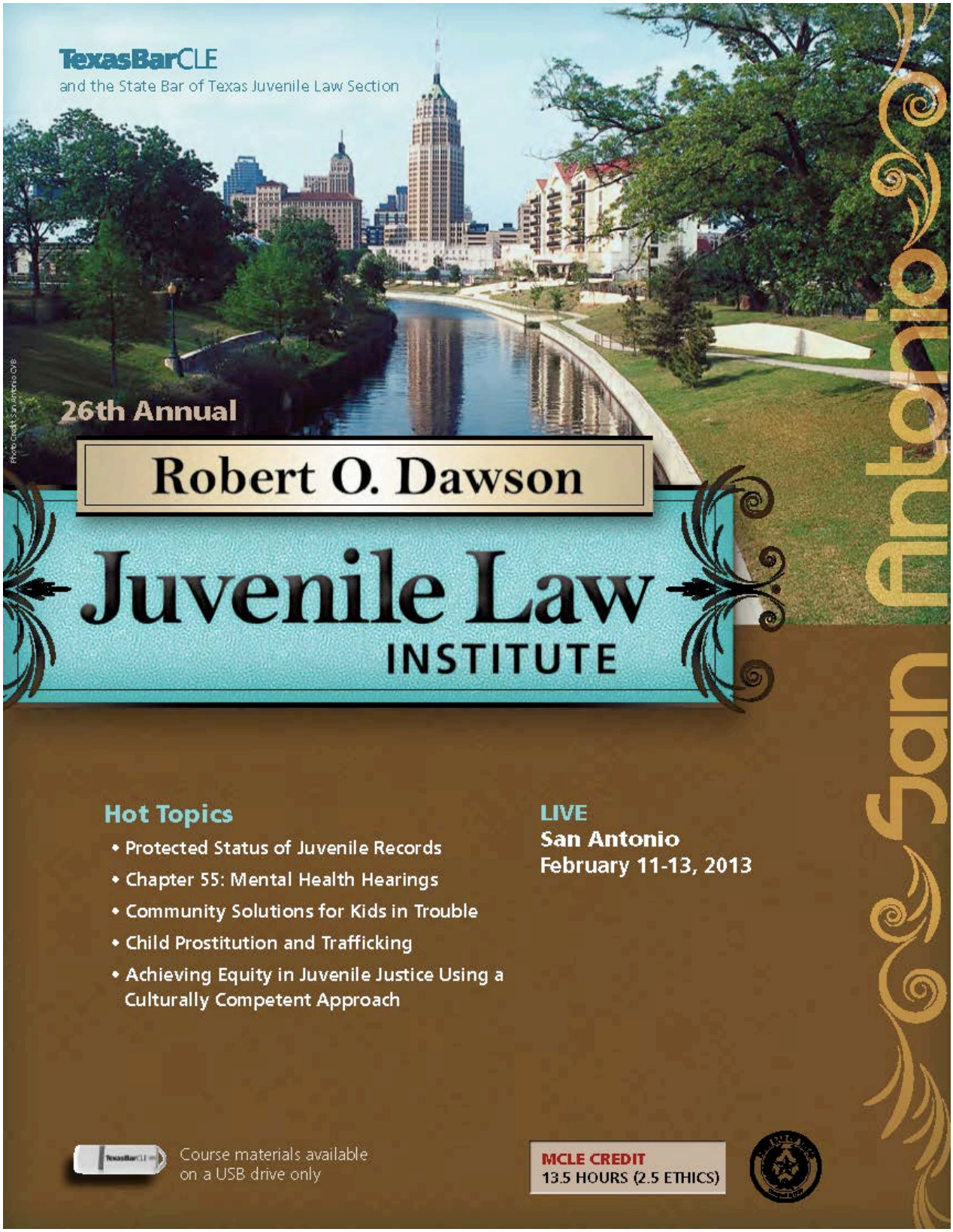
[xxxii] *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

[xxxiii] Article 45.0492, Code of Criminal Procedure.

[xxxiv] See, generally, Ryan Kellus Turner, "The Oversimplification of the Assistance of Counsel in the Adjudication of Class C Misdemeanors" *The Recorder*, Vol. 18, No. 3 (January 2009).

[xxxv] Council of State Governments Justice Center, "Breaking School Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement" (July 2011).

[xxxvi] Ryan Kellus Turner, "Juvenile Case Managers: The First Decade" *The Recorder*, Vol.21, No. 2 (March 2012).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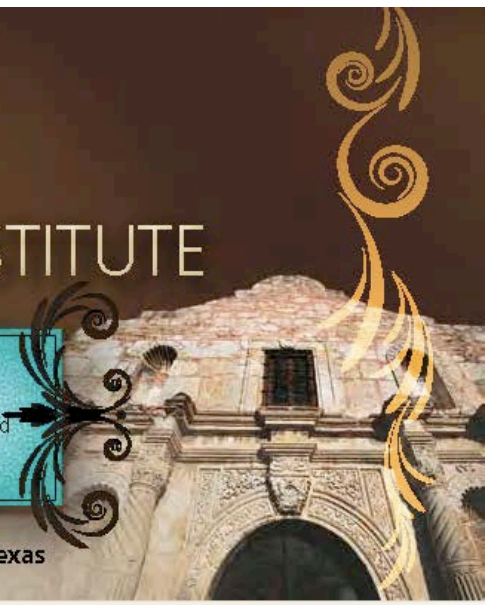

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3.25 hrs including 1.5 hrs ethics

11:00 **Registration**

12:55 **Welcoming Remarks**

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Hon. Richard L. Ainsa, *El Paso*
Juvenile Court Referee
65th District Court

1:00 **Keynote Address: TJJD Update** *.5 hr*
Mike Griffiths, *Austin*
Executive Director
Texas Juvenile Justice Department

1:30 **Case Law Update** *.75 hr (.5 ethics)*
Patrick J. Garza, *San Antonio*
Associate Judge
386th District Court

2:15 **Break**

2:30 **Legislative Outlook 2013** *1 hr*
Riley N. Shaw, *Fort Worth*
Tarrant County Justice Center

3:30 **Achieving Equity in Juvenile Justice Using a Culturally Competent Approach** *1 hr ethics*
Sheila S. Craig, *Austin*
Director, Center for Elimination of Disproportionality and Disparities
Health & Human Services Commission

4:30 **Adjourn**

4:45 **Juvenile Law Section Annual Meeting and Election of Officers**

5:00 **Judicial Caucus**
(all Judges invited)

Tuesday
2.75 hrs (morning session)

8:00 **Coffee and Pastries Provided**

8:25 **Morning Announcements**

8:30 **Protected Status of Juvenile Records** *.75 hr*
Nydia D. Thomas J.D., *Austin*
Special Counsel, Legal Education & Technical Assistance
Texas Juvenile Justice Department

9:15 **Brain Development** *1 hr*
Dr. Stephen A. Thorne, *Austin*
Stephen A. Thorne, Ph.D, Inc.

10:15 **Break**

10:30 **Chapter 55: Mental Health Hearings** *1 hr*
William R. Cox, *El Paso*
El Paso County Public Defender's Office

11:30 **TJJD Scholarship Committee Presentation**

11:45 **Lunch (on your own)**

1:15 **Return to Afternoon Breakout Sessions (see page 3)**

Wednesday
3.75 hrs including .5 hrs ethics

7:30 **Coffee and Pastries Provided**

7:55 **Morning Announcements**

8:00 **Practical and Ethical Community Solutions for Kids in Trouble**
1 hr (.5 ethics)
Benet Magnuson, *Austin*
Texas Criminal Justice Coalition

9:00 **Electronic Evidence and Social Media** *.75 hr*
John G. Browning, *Dallas*
Lewis Brisbois Bisgard & Smith

9:45 **Break**

10:00 **Child Prostitution/Trafficking** *FV
1 hr
Geoffrey I. Barr, *Austin*
Assistant Attorney General
Criminal Prosecutions Division
Office of the Texas Attorney General

11:00 **Confessions, Search and Seizure**
1 hr
Hon. Patrick J. Garza, *San Antonio*
Associate Judge
386th District Court

12:00 **Adjourn**

Judges Credits:
*FV This course has been approved by the Center for the Judiciary for 2.75 hours in Family Violence credit, and by The Association of Counties for 13.5 hours of Judicial credit.

Tuesday, Afternoon Breakout Sessions

	A Juvenile Law and Complex Issues 3.75 hours including .5 ethics	B Probation Track 3.5 hours including .5 ethics	C CPS Track 3.75 hours including .5 ethics
1:15	**School Disciplinary Hearings** *.5 hr* Kevin L. Collins, *San Antonio* The Law Office of Kevin L. Collins	**PREA Standards** *.5 hr* Brenda Smith, *Washington, DC* Professor and Project Director Washington College of Law / American University	**Cross Over Court** *.5 hr* Lynne Wilkerson, *San Antonio* General Counsel Bexar County Juvenile Probation Department
1:45	**Issues with Admissibility of Electronic Evidence** *.5 hr* Sharon N. Pruitt, *Austin* Assistant Attorney General Juvenile Crime Intervention Section Office of the Attorney General	**SB 1209: Making It Work** *.5 hr* Kaci Sohrt, *Austin* Travis County District Clerk's Office Criminal Courts Division	**CPS Case Law Update** *.5 hr* Brian J. Fischer, *Houston* Attorney at Law
2:15	**Ethics of Representing Juveniles** *.75 hr (.5 hr ethics)* David J. Hazlewood, *Lubbock* Hazlewood & Hazlewood	**Using Social Media in Supervision (GOTCHA)** *.75 hr (.5 hr ethics)* David J. Ferrell, *El Paso* David J. Ferrell, PLLC	**Ethics and the CPS Client Relationship** *.75 hr (.5 hr ethics)* Felipe Calzada, *Fort Worth* Attorney at Law
3:00	**Break**	**Break**	**Break**
3:15	**Sex Offender Issues** *FV *.5 hr* Laura A. Peterson, *Garland* Humphreys & Peterson Law Firm	***El Paso v. Solórzano*** *.5 hr* Lisa A. Capers J.D., *Austin* Senior Director of Administration & Training Texas Juvenile Justice Department	**Connection Before Correction: Trauma Informed Care as a Path to Healing** *FV *.5 hr* Aaryn Lamb, *Colleyville* Attorney at Law
3:45	**Juvenile Certification** *.75 hr* Jill L. Mata, *San Antonio* Chief, Juvenile Section Bexar County District Attorney's Office	**Drugs, Bath Salts & Potpourri** *1.25 hr* Jane C. Maxwell, *Austin* Senior Research Scientist The University of Texas	**Achieving Well-Being Outcomes for Rural Children in Foster Care** *FV *.75 hr* Hon. Rob Hofmann, *Mason* Judge, Child Protection Court of the Hill Country Hon. Cathy Morris, *Boerne* Judge, Child Protection Court of South Texas
4:30	**Determinate Sentence and Transfer** *.75 hr* Kameron D. Johnson, *Austin* Juvenile Public Defender Travis County Public Defender's Office	**Drugs, Bath Salts & Potpourri** *continued...*	**Current Trends in Court Appointed Representation in CPS Cases** *.75 hr* Hon. Debra H. Lehrmann, *Austin* Justice, Supreme Court of Texas
	5:15 Adjourn	**5:00 Adjourn**	**5:15 Adjourn**

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ADJUDICATION PROCEEDINGS

CONVICTION WAS NOT VOID WHERE APPELLANT WAS 17 AT THE TIME OF ARREST AND INDICTMENT.

¶ 12-4-6. **Tolder v. State**, MEMORANDUM, No 14-11-00179-CR, 2012 WL 3582645 (Tex.App.-Hous. (14 Dist.), 8/21/12).

Facts: On April 12, 2006, appellant's mother reported to police that appellant had been sexually assaulting his sister "dating back to 2005." On December 8, 2006, appellant entered a plea of guilty in exchange for a punishment of six years' deferred adjudication probation. The State subsequently filed a motion to adjudicate appellant's guilt on the grounds that appellant violated the terms and conditions of his probation. On December 15, 2010, the trial court adjudicated appellant's guilt and assessed punishment at 15 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

In a single issue, appellant contends he received ineffective assistance of counsel at the time of his original plea because counsel failed to investigate whether appellant was under the age of 17 when the offense occurred.

Held: Affirmed

Memorandum Opinion: Appellant contends that if he were improperly tried as a juvenile, the original conviction is void. Appellant was charged with aggravated sexual assault of a child alleged to have been committed in July, 2005. Appellant turned 17 years old on June 28, 2005. Appellant alleges it is possible he committed the offense prior to July, 2005. There is no question, however, that appellant was indicted and tried after he turned 17. Being 17 years old, appellant was not a juvenile within the terms of the statute at the time he was arrested, indicted, or tried. See Ex parte Morgan, 595 S.W.2d 128, 129 (Tex.Crim.App.1980) (petitioner charged with an offense after he turned 17 was not a juvenile). Therefore, even accepting appellant's contention as true, the conviction was not void because he was 17 at the time of the arrest and indictment.

Thus, appellant was required to challenge the effectiveness of his counsel at the time the trial court placed him on deferred adjudication. See Manuel, 994 S.W.2d at 661–62. Because he did not do so, his appeal after adjudication and revocation is untimely, and we cannot address his issue. The judgment of the trial court is affirmed.

APPEALS

NON-JURISDICTIONAL COMPLAINTS WHICH ARISE DURING THE TRIAL OF A MINOR CERTIFIED TO STAND TRIAL AS AN ADULT, SHOULD BE APPEALED EMEDIATELY AFTER CONVICTION OR DEFERRED ADJUDICATION.

¶ 12-4-8. **Eyhorn v. State**, No. 07-12-0019-CR, --- S.W.3d ----, 2012 WL 3264032 (Tex.App.-Amarillo, 8/10/12).

Facts: Alexander Clay Eyhorn appeals from a final judgment adjudicating him guilty of aggravated sexual assault of a child. He was fifteen years old when he committed the crime but was not prosecuted until he was eighteen. Upon his arrest, he was remanded to the jurisdiction of the juvenile court. Per a motion filed by the State, the juvenile court transferred its jurisdiction over the proceeding and appellant to the district court. Thereafter, appellant entered a plea bargain wherein he pled guilty to the offense in exchange for being placed on deferred adjudication for ten years. No appeal was taken from the order deferring his adjudication of guilt. However, the State later moved for such adjudication, which motion the court granted. After being found guilty and sentenced to forty years in prison, appellant contests the juvenile court's decision to transfer jurisdiction over him and the cause to the district court.

Held: Affirmed

Opinion: The contentions before us involve the decision to transfer jurisdiction over appellant from the juvenile court to the district court. First, the State allegedly failed to prove that it was not practicable to prosecute appellant as a juvenile despite its use of due diligence to do so, and because it failed in that regard, the district court allegedly acquired no jurisdiction over him. Second, appellant suggests that the juvenile court abused its discretion in "certifying appellant as an adult" because of the tenuousness of the evidence underlying the decision; the expert's conclusions were unfounded and did not support the decision, according to appellant.

No complaint was made of either matter until now. This is of import since 1) claims regarding the want of jurisdiction in juvenile proceedings "must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed," TEX.CODE CRIM. PROC. ANN. art. 4.18(a) (West 2005), while 2) other claims (non-jurisdictional in nature) of "defect or error in a discretionary transfer proceeding in juvenile court ..." may be appealed "only as provided by Article 44.47." Id. art. 4.18(g). Here, there was no written motion questioning jurisdiction or its transfer filed with either the juvenile or district court. Thus, appellant did not comply with the

statutorily devised manner by which such issues may be raised.

As for appealing via art. 44.47, the latter specifies that an appeal of a transfer order can be taken "only in conjunction with the appeal of a conviction or of an order of deferred adjudication for the offense for which the defendant was transferred...." Id. art. 44.47(b) (West 2006). At first blush, one could read this to mean that an appellant need not appeal non-jurisdictional error concerning such transfers after being granted deferred adjudication; instead, he may wait until he is finally convicted. Such an interpretation of the statute, however, tends to run afoul of analogous precedent from our Court of Criminal Appeals.

For over a decade, non-jurisdictional mistakes arising before issuance of an order deferring the adjudication of guilt had to be appealed immediately after the accused was placed on community supervision; appellant could not wait until the trial court ultimately convicted him to complain of such matters. Webb v. State, 20 S.W.3d 834, 836 (Tex.App.-Amarillo 2000, no pet.); see also Daniels v. State, 30 S.W.3d 407, 408 (Tex.Crim.App.2000) (stating a defendant may raise issues related to his original plea proceeding only in appeals taken when deferred adjudication is first imposed); Manuel v. State, 994 S.W.2d 658, 661–62 (Tex.Crim.App.1999) (stating the same). Furthermore, non-jurisdictional complaints arising in a proceeding that resulted in deferred adjudication and implicated the standard of abused discretion, see e.g. Strowenjans v. State, 919 S.W.2d 142, 145–146 (Tex.App.-Dallas 1996), set aside on other grounds, 927 S.W.2d 28 (Tex.Crim.App.1996) (objections to evidence), generally were and are of that ilk. So they must be appealed immediately. We see no logical reason why art. 44.47(b) should be read as jettisoning that rule simply because the accused was initially subject to being tried as a juvenile. Once certified as an adult, the defendant is subjected to other procedures applicable in the prosecution of adults.

Furthermore, the policy underlying Manuel, Daniels, and Webb fosters the notion that errors should be corrected at their earliest opportunity. If juveniles who commit criminal acts are to be matriculated via different procedures, it would seem appropriate, then, to address complaints regarding the subjection of minors to adult procedures as early as possible.

Finally, reading the statute to comport with Manuel and company would be tantamount to reading it as recognizing the realities of current practice. See Miller v. State, 33 S.W.3d 257, 260 (Tex.Crim.App.2000) (holding that courts are to presume that the legislature was aware of current judicial opinions when enacting a statute). That is, certifying a minor to be tried as an adult can lead to either immediate prosecution and conviction or deferred adjudication. If non-jurisdictional complaints arise during a trial resulting in a conviction, they should be appealed immediately after conviction. If they arise in a proceeding that results in a deferred adjudication, they should be immediately appealed at that point. And, that is how art. 44.47(b) is to be interpreted.

Conclusion: The objections asserted here arose before the district court decided to defer the adjudication of appellant's guilt. Thus, objections regarding the expert's conclusion upon which the juvenile court relied in certifying appellant as an adult were susceptible to review once he was placed on deferred adjudication. Furthermore, whether the juvenile court abused its discretion in ruling as it did after considering those conclusions is not jurisdictional in nature. So, the complaint should have been raised and appealed at the earliest opportunity. That was immediately after the district court deferred the adjudication of his guilt and placed appellant on community supervision. Because it was not, we cannot review the matter now. The issues raised by appellant are overruled, and the judgment of the trial court is affirmed.

JUDGMENT NUNC PRO TUNC RENDERED APPELLANT'S FIRST APPEAL MOOT (ISSUE CORRECTED), BUT DID RAISE ISSUES FOR SECOND APPEAL OF THE JUDGMENT NUNC PRO TUNC ITSELF.

¶ 12-4-7. **In the Matter of J.R.**, MEMORANDUM, Nos. 10-12-00003-CV, 10-12-00201-CV, 2012 WL 3537995 (Tex.App.-Waco, 8/16/12).

Facts: The State alleged in its amended petition that J.R. engaged in delinquent conduct by committing four offenses: (1) indecent exposure; (2) burglary of a habitation; (3) attempted sexual assault; and (4) sexual assault. Before the adjudication portion of the proceeding, appellant, his mother, and his attorney signed a "Court's Admonition of Statutory and Constitutional Rights and Juvenile's Acknowledgement," which included information about potential dispositions and several waivers. Among the waivers contained in this document was the right to appeal.

At the beginning of the December 5, 2011 adjudication hearing, the trial court confirmed that appellant understood the rights that he was waiving and that he waived those rights voluntarily. The trial court also provided several admonishments, including potential dispositions that could apply in this case—namely, probation at home, probation with placement outside the home, and confinement at the Texas Youth Commission ("TYC") for an indeterminate sentence. The trial court also informed appellant that he could be required to register as a sex offender. Appellant acknowledged that he discussed all of these matters with his trial counsel and that he did not have any questions regarding his rights.

Appellant, his mother, and appellant's attorney also signed a written stipulation in which appellant stipulated to the first three allegations contained in the State's amended petition. The trial court discussed the stipulation with appellant and subsequently admitted the stipulation into evidence. Thereafter, the trial court concluded that appellant had engaged in delinquent conduct based on the signed stipulation.

During the disposition phase, the State offered several reports and a social history on appellant. The trial court learned that appellant had a previous juvenile adjudication for which he had received felony probation. Appellant and his parents testified at the hearing, and appellant requested that he be granted probation, placed in an inpatient-sex-offender-treatment program, and excused from the sex-offender-registration requirement.

At the conclusion of the hearing, the trial court committed appellant to TYC for an indeterminate period. In addition, the trial judge, in open court, ordered that appellant register as a sex offender. However, contrary to the trial judge's statements in open court, the December 5, 2011 disposition order deferred the registration requirement pending the successful completion of a sex-offender-treatment program at TYC.

Appellant subsequently filed a motion for new trial, which was denied. He then filed his notice of appeal in appellate cause number 10–12–00003–CV. After appellant filed his notice of appeal, the State, on May 8, 2012, filed a "Motion for Dispositional Order of Commitment to the Texas Youth Commission Nunc Pro Tunc" in the trial court. In this motion, the State requested that the trial court modify its December 5, 2011 dispositional order to reflect the statement it made in open court—that appellant is required to register as a sex offender. On the same day, the trial court granted the State's nunc pro tunc motion and reformed the December 5, 2011 dispositional order to reflect that appellant is required to register as a sex offender.

On May 23, 2012, the State filed a motion to dismiss appellant's appeal in appellate cause number 10–12–00003–CV, asserting that appellant's complaint about the discrepancy between the oral and written pronouncements regarding his registration as a sex offender was moot in light of the trial court's judgment nunc pro tunc. The State also argued that appellant's first issue is a procedural ground that is also moot.

In the meantime, appellant filed a second appeal—appellate cause number 10–12–00201–CV—in which he appeals from the trial court's judgment nunc pro tunc. Appellant also filed a response to the State's motion to dismiss, contending that Texas Rule of Civil Procedure 329b(h) requires his issue pertaining to the validity of his waiver of his right to appeal be determined "in an appeal from the original judgment"; thus, his appeal in appellate cause number 10–12–00003–CV should not be dismissed. *See* TEX.R. CIV. P. 329b(h). We must now analyze the State's motion to dismiss.

Held: State's motion to dismiss granted; Appellant's motion to transfer the record granted.

Memorandum Opinion: A review of appellant's brief in appellate cause number 10–12–00003–CV shows that he wishes to challenge the portion of the trial court's December 5, 2011 dispositional order pertaining to his deferred registration as a sex offender. However, since appellant filed his notice of appeal in appellate cause number 10–12–00003–CV, the trial court corrected the error about which appellant complained via a judgment nunc pro tunc. In appellate cause number 10–12–00201–CV, appellant indicated that he wishes to appeal from the trial court's judgment nunc pro tunc.FN1 Nevertheless, in responding to the State's motion to dismiss, appellant argues that Rule 329b(h) requires us to deny the State's motion because his appellate-waiver issue remains and cannot be raised in appellate cause number 10–12–00201–CV. See id. Despite the lack of case law addressing this precise issue, we disagree with appellant's application of Rule 329b(h).

FN1. Appellant has not filed his brief in appellate cause number 10–12–00201–CV.

Texas Rule of Civil Procedure 329b(h) provides that:

If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment. Id. (emphasis added).

And, Texas Rule of Civil Procedure 329b(d) states that the trial court, regardless of whether an appeal has been perfected, has plenary power to "vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed." Id. at R. 329b(d). In this case, the trial court signed the dispositional order on December 5, 2011, yet it entered its judgment nunc pro tunc on May 8, 2012, which is more than thirty days from the signing of the dispositional order.

A judgment nunc pro tunc corrects clerical errors after the trial court has lost plenary power. FN2 Ferguson v. Naylor, 860 S.W.2d 123, 126 (Tex.App.-Amarillo 1993, writ denied). Texas courts have held that changes or modifications to the judgment may be made via a judgment nunc pro tunc pursuant to both Texas Rules of Civil Procedure 316 and 329b(f). See id. at R. 316,

329b(f) (providing that, among other things, "the court may at any time correct a clerical error in the record of a judgment and render a judgment nunc pro tunc under Rule 316"); Gutierrez v. Gutierrez, 86 S.W.3d 721, 726 (Tex.App.-El Paso 2002, no pet.); Jenkins v. Jenkins, 16 S.W.3d 473, 482 (Tex.App.-El Paso 2000, no pet.); see also Pletcher v. Hansen, Nos. 01–09–00516–CV, 01–10–00845–CV, 2011 Tex.App. LEXIS 3187, at *20, 2011 WL 1631811 (Tex.App.-Houston [1st Dist.] Apr. 28, 2011, no pet.) (mem.op.). Specifically, Texas Rule of Civil Procedure 316, entitled "Correction of Clerical Mistakes in Judgment Record," provides that:

FN2. A judgment nunc pro tunc may be issued after a trial court's plenary power expires to "correct a clerical error" in a judgment or order. See TEX.R. CIV. P. 316, 329b(f). To be clerical in nature, the error must be one that is not the result of judicial reasoning, evidence, or determination. See Andrews v. Koch, 702 S.W.2d 584, 585 (Tex.1986); Barton v. Gillespie, 178 S.W.3d 121, 126 (Tex.App.-Houston [1st Dist.] 2005, no pet.). Conversely, a judicial error arises from a mistake of law or fact that requires judicial reasoning to correct. Barton, 178 S.W.3d at 126. Essentially, a clerical error occurs in entering a final judgment, while a judicial error is made in rendering a final judgment. Id.; see Escobar v. Escobar, 711 S.W.2d 230, 231 (Tex.1986). Here, the parties agree that the error is clerical in nature, not judicial.

Clerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case after notice of the motion therefor has been given to the parties interested in such judgment, as provided in Rule 21a, and thereafter the execution shall conform to the judgment as amended.TEX.R. CIV. P. 316.

It is clear to us that the trial court's judgment nunc pro tunc served to correct a clerical error pursuant to Rules 316 and 329b(f). See id. at R. 316, 329b(f). Moreover, because the trial court's judgment nunc pro tunc was entered pursuant to, among other things, Rule 316, we conclude that the judgment nunc pro tunc is within the purview of Rule 329b(h). See id. at R. 316, 329b(h).

As stated earlier, Rule 329b(h) states that, for modifications to a judgment made pursuant to Rule 316, "no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment." See id. at R. 316, 329b(h); see also Pruet v. Coastal States Trading, Inc., 715 S.W.2d 702, 704 (Tex.App.-Houston [1st Dist.] 1986, no writ) (noting the general proposition that the court of appeals has no authority to hear any complaint that could have been presented in an appeal from the original judgment).

Based on our reading of the rule, we conclude that Rule 329b(h) operates to prevent appellant from raising a new argument in appellate cause number 10–12–00201–CV—the appeal pertaining to the trial court's judgment nunc pro tunc—that could have and should have been raised in appellate cause number 10–12–00003–CV—the appeal pertaining to the trial court's original dispositional order. See TEX.R. CIV. P. 329b(h); see also id. at R. 1 (stating that the Texas Rules of Civil Procedure should be interpreted liberally to "obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law"); Approximately $14,980.00 v. State, 261 S.W.3d 182, 187 (Tex.App.-Houston [14th Dist.] 2008, no pet.) ("When the language in a rule is specific and its meaning is clear, the rule is entitled to a literal interpretation, unless it would lead to absurdities and defeat the intent of the enacting body.") (citing Owens–Illinois, Inc. v. Chatham, 899 S.W.2d 722, 733 (Tex.App.-Houston [14th Dist.] 1995, writ dism'd)). Nothing in Rule 329b(h) prevents appellant from raising an issue he originally raised in appellate cause number 10–12–00003–CV in his new appeal in appellate cause number 10–12–00201–CV. See TEX.R. CIV. P. 329b(h).

We recognize that appellant has raised his issue about the validity of his waiver of his appellate rights in appellate cause number 10–12–00003–CV. However, within the scope of appellate cause number 10–12–00003–CV, we agree with the State's argument that appellant's waiver argument is moot because the trial court addressed appellant's complaint regarding his registration as a sex offender in its judgment nunc pro tunc. In the docketing statement for appellate cause number 10–12–00201–CV, appellant indicates that he wishes to challenge the trial court's judgment nunc pro tunc. Essentially, the scope of appellant's complaints has changed from an appeal of the trial court's dispositional order—appellate cause number 10–12–00003–CV—to an appeal of the trial court's modifications of the dispositional order—appellate cause number 10–12–00201–CV. While the dispositional order and the judgment nunc pro tunc are related, we think it is a better practice for appellant to once again raise his appellate waiver issue in his appeal pertaining to the trial court's judgment nunc pro tunc, especially considering he has already raised this issue "in an appeal from the original judgment." See TEX.R. CIV. P. 329b(h). As such, we find appellant's appeal in appellate cause number 10–12–00003–CV to be moot. See Allstate Ins. Co. v. Hallman, 159 S.W.3d 640, 642 (Tex.2005) ("A case becomes moot if a controversy ceases to exists or the parties lack a legally cognizable interest in the outcome."). Accordingly, we grant the State's motion to dismiss appellate cause number 10–12–00003–CV, and it is hereby dismissed.

Yet, our analysis of this matter does not end here. On June 19, 2012, appellant filed an unopposed motion to transfer the record in appellate cause number 10–12–00003–CV to appellate cause number 10–12–00201–CV.

Conclusion: Because of our disposition regarding the State's motion to dismiss, we grant appellant's motion

to transfer the record in appellate cause number 10–12–00003–CV to appellate cause number 10–12–00201–CV. The Clerk is directed to transfer all documents, including the clerk's record, reporter's record, correspondence, motions, briefs, rulings, orders, and opinions in the file for appellate cause number 10–12–00003–CV to the file for appellate cause number 10–12–00201–CV.

COLLATERAL ATTACK

JUVENILE COURT ABUSED ITS DISCRETION AND EXCEEDED ITS PLENARY POWER WHEN IT VACATED ITS ORDER GRANTING HABEAS CORPUS RELIEF MORE THAN SIX MONTHS AFTER GRANTING SAID RELIEF.

¶ 12-4-3. **In the Matter of R.G.**, No. 01-11-00748-CV, --- S.W.3d ----, 2012 WL 3774430 (Tex.App.-Hous. (1 Dist.), 8/30/12)

Facts: On March 20, 1995, a jury found that relator, who was fourteen years old at the time, engaged in delinquent conduct,[FN1] namely, committing the offense of murder,[FN2] and assessed his punishment at confinement for forty years. The Fourteenth Court of Appeals affirmed the adjudication of delinquency. *In re R.G.,* No. 14–95–00584–CV, 1997 WL 379151 (Tex.App.-Houston [14th Dist.] July 10, 1997, pet. denied) (not designated for publication).

On August 4, 2009, relator filed, in the juvenile court, an application for a writ of habeas corpus, alleging that he was denied effective assistance of counsel during his adjudication. On January 28, 2011, after a hearing, the juvenile court found that relator's adjudication was "based on the admission of inadmissible testimony, improper questions, argument outside the record, and ineffective assistance of counsel." Accordingly, it granted relator habeas corpus relief and a new trial.

Six months later, on June 28, 2011, relator filed a motion to dismiss the case against him for lack of jurisdiction. He asserted that the juvenile court lacked jurisdiction to retry him after he had become 17 years of age. The State responded, arguing that the juvenile court retained continuing jurisdiction over relator to retry his adjudication of guilt. After a hearing on the motion to dismiss, the juvenile court concluded that it had "no jurisdiction to re-try [the] case," further stating that "it appears this Court lacked jurisdiction to consider [relator's] habeas corpus or grant a new trial." The juvenile court then vacated its order granting relator habeas relief and a new trial, and it reinstated relator's adjudication of delinquency.

At the outset, we note that the State argues that this Court does not have jurisdiction to hear this "appeal" because it not authorized by the Texas Family Code. *See* TEX. FAM.CODE ANN. § 56.01(c)(1) (Vernon Supp.2011).

Section 56.01(c)(1) provides that an appeal may be taken "by or on behalf of a child" from an order entered under:

(A) Section 54.03 with regard to delinquent conduct or conduct indicating a need for supervision;
(B) Section 54.04 disposing of the case;
(C) Section 54.05 respecting modification of a previous juvenile court disposition; or
(D) Chapter 55 by a juvenile court committing a child to a facility or the mentally ill or mentally retarded....

Moreover, an appeal may be taken "by a person from an order entered under Section 54.11(i)(2) transferring the person to the custody of the Texas Department of Criminal Justice." *Id.* § 56.01(c)(2). The State argues that because this "appeal" does not fall into any of the above categories, this Court must dismiss the appeal for lack of jurisdiction. However, section 56.01 also provides that it "does not limit a child's right to obtain a writ of habeas corpus." *Id.* § 56.01(o).

The State correctly notes that in criminal cases, "no appeal can be had from a refusal to issue or grant a writ of habeas corpus even after a hearing." *See Ex Parte Hargett,* 819 S.W.2d 866, 868 (Tex.Crim.App.1991). However, "[w]hen a hearing is held on the merits of an applicant's claim and the court subsequently rules on the merits of that claim, the losing party may appeal." *Id.* Regardless, in its order vacating its grant of habeas corpus relief, the juvenile court did not purport to deny relator's relief on the merits. Rather, relator is now in the position of arguing that the juvenile court erred in issuing the order vacating its order granting habeas corpus relief because it had jurisdiction to grant him the relief and the order vacating the granting of relief is void because the juvenile court issued it after its plenary power had expired. Mandamus relief is appropriate when a trial court issues an order after its plenary power has expired because that order is void. *In re Brookshire Grocery Co.,* 250 S.W.3d 66, 68–69 (Tex.2008) (orig.proceeding); *In re Office of the Attorney Gen. of Tex.,* 264 S.W.3d 800, 805 (Tex.App.-Houston [1st Dist.] 2008) (orig.proceeding).

Relator requests that, if this Court concludes that it does not have appellate jurisdiction, we construe his appeal as a petition for a writ of mandamus. The Texas Supreme Court recently held that an interlocutory appeal should not have been dismissed for lack of jurisdiction, but instead should have been considered as a petition for a writ of mandamus as requested by the petitioner. *CMH Homes v. Perez,* 340 S.W.3d 444, 453–54 (Tex.2011). The court explained that "Texas policy ... 'disfavors disposing of appeals based upon harmless procedural defects.' " *Id.* at 453 (quoting *Higgins v. Randall County Sheriff's Office,* 257 S.W.3d

687, 688 (Tex.2008)); *see also In re J.P.L.,* 359 S.W.3d 695, 703 (Tex.App.-San Antonio 2011, pet. filed) (construing appeal from nonfinal order granting petition to enforce child custody as request for writ of mandamus). Accordingly, we construe relator's briefing as a petition for writ of mandamus.

Held: Writ of mandamus conditionally granted

Opinion: In his sole issue, relator argues that the juvenile court erred in vacating its order granting him habeas corpus relief because it did have jurisdiction to grant him the relief and it vacated the order granting him relief after its plenary power had expired.

Whether a trial court has subject-matter jurisdiction is a question of law that we review de novo. Westbrook v. Penley, 231 S.W.3d 389, 394 (Tex.2007).

Here, the juvenile court, the 315th Judicial District Court of Harris County, is a "family district court." TEX. GOV'T CODE ANN. §§ 24.601, 24.623 (Vernon 2004). "A family district court has the jurisdiction and power provided for district courts by the constitution and laws of this state." Id. § 24.601(a). "Its jurisdiction is concurrent with that of other district courts in the county in which it is located." Id. The Texas Constitution confers to the district courts "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." TEX. CONST. art. 5, § 8. And district court judges "shall have the power to issue writs necessary to enforce their jurisdiction." Id.

The Family Code provides that "[i]n each county, the county's juvenile board shall designate one or more district, criminal district, domestic relations, juvenile, or county courts or county courts at law as the juvenile court." TEX. FAM.CODE ANN. § 51 .04(b) (Vernon 2008). The 315th Judicial District Court has been designated as a juvenile court. See Harris County District Judges Rules of Administration R. 9.1.3 (listing 315th Judicial District Court as one of three courts constituting Harris County's "juvenile division" as established "by statutory preferences and board policy"). The Juvenile Justice Code covers the proceedings "in all cases involving the delinquent conduct ... engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct." TEX. FAM.CODE ANN. § 51.04(a). "[T]he juvenile court has exclusive original jurisdiction over proceedings under" the Juvenile Justice Code. Id.

The State argues that relator failed to invoke the constitutional jurisdiction of the juvenile court as a "district court" because he filed his application for a writ of habeas corpus "under the same petition number as the murder petition and directed it to the same court," which, the State asserts, made the petition effectively an out-of-time motion for new trial. The State further asserts that relator invoked the juvenile court's "limited jurisdiction solely as a juvenile court," which lacked the subject-matter jurisdiction to consider the writ. In support of this proposition, the State, as did the juvenile court in vacating its order, relies on In re N.J.A., 997 S.W.2d 554 (Tex.1999). In In re N.J.A., a juvenile defendant turned eighteen years of age during the pendency of a petition to transfer the case to criminal district court, which was denied. Id. at 554–55. The Texas Supreme Court held that the juvenile court no longer had jurisdiction to adjudicate the defendant's guilt. Id. at 556–57. The court reasoned that "[l]ogically, once a juvenile becomes eighteen, the juvenile court's jurisdiction does not include the authority to adjudicate the juvenile." Id. at 555. It held that once a juvenile defendant turns eighteen, the juvenile court's jurisdiction is limited to waiving its exclusive jurisdiction and transferring the case to district court, providing certain criteria are met. Id. at 557 (citing TEX. FAM.CODE ANN. 54.02(j) (Vernon Supp.2011)).FN3

Although relator filed his application for a writ of habeas corpus under the same cause number as that used in the previous juvenile proceedings, he styled it as an "Application for Writ of Habeas Corpus," alleging that he was denied effective assistance of counsel at his trial. In his application, relator argued that the juvenile court had jurisdiction, pursuant to the Texas Constitution, to consider a writ of habeas corpus. The State, and the juvenile court, treated relator's pleading as an application for a writ of habeas corpus during every stage of the proceedings. The court referred to it as an application for a writ of habeas corpus in its order granting relief and in its order vacating relief, noting that relator filed his application "pursuant to Article 5, Section 8 of the Texas Constitution." Thus, despite filing his application under the same cause number as that used in the previous juvenile proceedings, relator actually filed an application for a writ of habeas corpus, and he invoked the constitutional jurisdiction of the juvenile court, as a district court, to consider such writs. See TEX. CONST. art. 5, § 8; In re Hall, 286 S.W.3d 925, 926–27 (Tex.2009) (recognizing civil district court, which was also juvenile court, had jurisdiction to hear writ of habeas corpus); Ex Parte Valle, 104 S.W.3d 888, 889–90 (Tex.Crim.App.2003) (holding that civil, not criminal, district courts should entertain writs of habeas corpus, and noting that "several courts of appeals have entertained appeals when writs of habeas corpus were issued by district courts on the application of juveniles accused of delinquent conduct"). Accordingly, we hold that the juvenile court had jurisdiction to entertain relator's application for a writ of habeas corpus pursuant to its constitutional jurisdiction as a district court.

Relator next argues that the juvenile court lacked the power to vacate its order granting him habeas corpus relief because a trial court has plenary power to grant a

new trial or to vacate, modify, correct, or reform a judgment "within thirty days after the judgment is signed." See TEX.R. CIV. P. 329b(d). Relator further argues that because the juvenile court's order vacating its grant of habeas corpus relief was entered more than thirty days after the original order, it acted outside of its plenary power to modify the original order.

The State argues that relator's application is in effect an out-of-time motion for new trial. See In re Baylor Med. Ctr. at Garland, 280 S.W.3d 227 (Tex.2008). In Baylor, a trial court vacated a previous order granting a motion for new trial two months after it had granted the new trial, reinstating the original jury verdict. Id. at 228–29. The Texas Supreme Court explained that once a new trial is timely granted, "the case stands on the trial court's docket 'the same as though no trial had been had.' " Id. at 230–31 (citing Wilkins v. Methodist Health Care Sys., 160 S.W.3d 550, 563 (Tex.2005)). The court noted that federal courts and commentators have observed that there is "no sound reason why the court may not reconsider its ruling [granting] a new trial" at any time. Id. at 232 (citing 6A James William Moore, Moore's Federal Practice ¶ 59.13[1], at 59–227 (2d ed.1996)). Ultimately, the court concluded that a trial court should "have the power to set aside a new trial order 'any time before a final judgment is entered.' " Id. at 231 (quoting Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex.1993)).

The State argues that we should apply the above rule to the instant case because the Texas Family Code provides that, except as otherwise provided, "the Texas Rules of Civil Procedure govern proceedings under" the Juvenile Justice Code and courts have stated that juvenile proceedings are "civil in nature." See TEX. FAM.CODE ANN. § 51.17(a) (Vernon Supp.2011); Ex Parte Valle, 104 S.W.3d at 890. However, relator's application, styled as a petition for a writ of habeas corpus, initiated an entirely new proceeding; it cannot be treated as a motion for new trial in the underlying juvenile adjudication proceeding, which was disposed of by a final judgment entered long ago.

As the State itself notes, an application for a writ of habeas corpus constitutes a "separate proceeding collaterally attacking" the original judgment. See, e.g., Ex Parte Rieck, 144 S.W.3d 510, 516 (Tex.Crim.App.2004) (recognizing that habeas proceedings are considered to be "separate from the criminal prosecution"); Rose v. State, 198 S.W.3d 271, 272 (Tex.App.-San Antonio 2006, pet. ref'd) ("A habeas corpus proceeding, unlike a criminal trial, is an independent proceeding that makes inquiry into the validity of the conviction...."). "An application for habeas corpus is not like a motion for new trial in the sense that a habeas proceeding is not part of the underlying criminal prosecution against the applicant." Ex Parte Cummins, 169 S.W.3d 752, 757 (Tex.App.-Fort Worth 2005, no pet.); see also Ex Parte Galvan–Herrera, No. 13–11–00380–CR, 2012 WL 1484097, at *4–5 (Tex.App.-Corpus Christi Apr. 26, 2012, pet. struck) (mem.op.) (holding that application for writ of habeas corpus was not governed by rules applicable to motion for new trial because those rules "govern[ ] only direct challenges to a defendant's conviction or punishment filed within thirty days").

Thus, the granting of an application for a writ of habeas corpus where one is collaterally attacking a judgment is fundamentally different from the granting of a motion for new trial, where one is directly and timely attacking a judgment. In In re Baylor, the Texas Supreme Court reasoned that the granting of a timely filed new-trial motion may be reconsidered by the trial court at any time because a trial court has "not only the authority but the responsibility to review any pre-trial order upon proper motion." 280 S.W.3d at 231 (citing Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex.1985)). The granting of habeas corpus relief, in a separate and distinct proceeding from the original proceeding, and from which the State is entitled to appeal in certain circumstances,FN4 cannot be characterized as a "pre-trial" order.

Here, the juvenile court entered its order granting relator habeas corpus relief on January 28, 2011, and the State did not appeal from or otherwise complain about that order. And, as stated above, the juvenile court had jurisdiction to grant relator's application for a writ of habeas corpus pursuant to its constitutional jurisdiction as a district court. Accordingly, we hold that the juvenile court abused its discretion and exceeded its plenary power when it vacated its order granting relator habeas corpus relief more than six months after granting the relief. Thus, its order vacating relief is void. See TEX.R. CIV. P. 329b(d) (providing that trial court has plenary power to vacate or modify its judgment within thirty days after it is signed); In re State ex rel. Sistrunk, 142 S.W.3d 497, 503 (Tex.App.-Houston [14th Dist.] 2004, no pet.) (noting that trial court generally retains plenary jurisdiction over case for thirty days after sentencing). We sustain relator's sole issue.

Conclusion: We conditionally grant the writ of mandamus and reverse the juvenile court's order vacating its order granting habeas corpus relief, and we reinstate the juvenile court's order granting relator a new trial. The writ will issue only if the trial court fails to comply.

FN1. See TEX. FAM.CODE ANN. § 51.03 (Vernon Supp.2011).

FN2. See TEX. PENAL CODE ANN. § 19.02 (Vernon 2011).

FN3. We note that during R.G.'s incarceration, the Texas Legislature provided an exception to the holding of In re N.J.A. See TEX. FAM.CODE ANN. § 51.0412

(Vernon Supp.2011); see also In re V.A ., 140 S.W.3d 858, 859 (Tex.App.-Fort Worth, no pet.). Section 51 .0412 provides that a juvenile court retains jurisdiction over a person, "without regard to the age of the person," if the original petition was filed before the person turned 18 years of age, the proceeding is not complete before the person turned 18 years of age, and the juvenile court enters a finding that the prosecuting attorney exercised due diligence in an attempt to complete the proceedings before the person turned 18 years of age. TEX. FAM.CODE ANN. § 51.0412. However, section 51.0412 does not apply "to conduct that occur[red] on or after the effective date," which was September 1, 2001. See Act of Sept. 1, 2001, 77th Leg., R.S., ch. 1297, § 72, 2001 Tex. Gen. Laws 3142, 3175.

FN4. See, e.g., State v. Nkwocha, 31 S.W.3d 817, 818 n. 1 (Tex.App.-Dallas 2000, no pet.) (noting that State could appeal grant of habeas corpus relief, ordering new trial, on grounds of newly-discovered evidence); State v. Kanapa, 778 S.W.2d 592, 593 (Tex.App.-Houston [1st Dist.] 1989, no pet.) (noting that State can appeal from habeas corpus proceeding when it would otherwise have right to appeal under Code of Criminal Procedure).

CONFESSIONS

STORE'S LOSS-PREVENTION OFFICER DID NOT NEED TO GIVE MIRANDA WARNING BEFORE OBTAINING WRITTEN STATEMENT WHERE HE WAS NOT ACTING AT THE BEHEST OF LAW ENFORCEMENT OR THE DISTRICT ATTORNEY; RATHER HE WAS COLLECTING EVIDENCE ON BEHALF OF STORE WHICH EMPLOYED HIM.

¶ 12-4-13. **Elizondo v. State**, No. PD-0882-11, --- S.W.3d ----, 2012 WL 5413318 (Tex.Crim.App., 11/7/12).

Facts: Appellant and her friend were shopping in an Old Navy store. The store's loss-prevention officer, David Mora, noticed that Appellant's friend was carrying a flat purse. Mora watched the two women part ways inside the store and meet together behind a clothing rack a few minutes later. Mora then watched between the racks as Appellant's friend, standing shoulder-to-shoulder with Appellant, put items of merchandise into her purse. The two women, followed by Mora, left the store without paying for the items. Mora intercepted the women when they were outside the store and asked them to return to the store. Mora escorted the women to a room, accompanied by a female Old Navy manager, and retrieved the items from the purse. After retrieving the items, Mora asked Appellant to read and sign a document entitled "GAP INC. CIVIL DEMAND NOTICE," FN1 a document that contained the statement, "I, Becky Abajo Elizondo, have admitted to the theft of merchandise/cash valued at $65.00 from GAP INC., Store No. 6220, located at 6249 Slide Rd. I also hereby acknowledge that my detention on this date was reasonable." Appellant signed the form, dated it, and completed the address information section. Mora also had Appellant sign a store receipt reflecting the value of the merchandise and took photographs of Appellant and the stolen items. After completing what Mora testified was typical protocol for theft at Old Navy, he called the Lubbock Police Department, and officers came to the store to arrest Appellant and her friend. Before the trial began, the District Attorney's office obtained a copy of Mora's Old Navy report, including the civil demand notice. Appellant filed a motion to suppress the civil demand notice.

The trial court held a hearing on the motion to suppress outside the presence of the jury to consider the admissibility of the civil demand notice taken by Mora. Appellant argued that Mora was required to give Miranda warnings when he obtained the civil demand notice because he was engaged in an agency relationship with law enforcement.

Mora testified that he had been a loss-prevention officer at Old Navy for three years and had never worked in law enforcement. He testified that, in those three years, he obtained written confessions in about 99% of the encounters with accused shoplifters. He stated that the written confessions were kept for the store's records, but the store would give a copy of the report to a police officer or attorney upon request. Mora said that the police officer who arrested Appellant did not take a copy of the civil demand notice with him, although he was aware that one existed. Mora testified that the document was not handed over to the District Attorney until a couple of months after Appellant was arrested. Mora explained that, in line with the written policy contained in his manual provided by Gap Inc., his common practice is to ask the apprehended individual to sign the confession, however they may refuse to sign it if they wish. Mora stated that the primary reason for the store's policy requiring all documents to be signed is for punitive or monetary damages associated with the shoplifting incident.

Appellant claimed that, because she was taken to a manager's office and did not believe she was allowed to leave, she was in custody. She also cited cases stating that, if a private individual and law enforcement work together, or a private individual acts to benefit law enforcement, the private individual is required to issue Miranda warnings as if he were part of law enforcement.

The State argued that Article 38.22 does not require Miranda warnings for written confessions taken by private security personnel and pointed the court to Oriji v. State, 150 S.W.3d 833 (Tex.App.-Houston [14th Dist.] 2004, pet. ref'd). The State asserted that there was no evidence that Mora was acting at the behest of

law enforcement or the District Attorney; rather he collected evidence on behalf of Gap Inc.

The trial court denied Appellant's motion to suppress the written confession and entered findings of fact including that Mora was not a peace officer, that the defendant was not in custody, and that the civil demand notice contained no Miranda requirements. The trial court's conclusion of law was that the civil demand notice was not obtained as a result of a custodial interrogation of the defendant by a law enforcement officer. The case proceeded to trial, and Appellant was found guilty of theft of fifty to five hundred dollars and sentenced to 30 days in jail.

On appeal, Appellant argued that the trial court erred in failing to suppress her written confession, claiming that it was obtained in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, Article 1, Section 10, of the Texas Constitution and Article 38.22 of the Texas Code of Criminal Procedure. The court analyzed the relationship between Mora and law enforcement using the three-factored test from Wilkerson v. State, 173 S.W.3d 521 (Tex.Crim.App.2005). The court considered whether authorities were using Mora for their own purposes and examined records related to Mora's actions and perceptions and Appellant's perceptions of the encounter with Mora. The court determined that Mora did not obtain Appellant's statement pursuant to police practices. Elizondo, 338 S.W.3d at 211. The court further concluded that Mora was serving his employer's interests and that a reasonable person in Appellant's shoes would believe that Mora was a loss-prevention officer and not a law-enforcement agent. Id. at 212–13. The court of appeals held that the record supported the trial court's admission of the evidence and affirmed the judgment of the trial court.

We granted Appellant's ground for review to consider whether the court of appeals erred in determining that an agency relationship did not exist between Mora and the police and District Attorney's office.

Appellant argues that Mora was in an agency relationship with law enforcement and had apparent authority to act on behalf of law enforcement officers. She contends that officers used Mora to gain un-Mirandized confessions because they themselves could not do so. Appellant argues that the purpose of the investigation distinguishes agents from non-agents, but that the perception of the defendant is also relevant. Appellant says that the court of appeals failed to address the agency relationship and did not thoroughly address Wilkerson. Appellant contends that Mora's history and continued practice of receiving un-Mirandized confessions and handing them over to law enforcement shows that Mora's activities were in tandem with law enforcement. Applying the second factor in Wilkerson, Appellant states that Mora's purposes in obtaining the confession were to aid in the prosecution of the case, to maintain a good relationship with law enforcement, and to prevent defense attorneys from discrediting his testimony. Finally, Appellant states that her belief in Mora's authority was reasonable because he presented evidence against her, detained and photographed her, and required her to sign a confession before he had her taken to jail.

Appellant argues that the court of appeals failed to recognize the difference between an incidental relationship, such as the one in Oriji v. State, and the continued complicity of law enforcement in receiving un-Mirandized confessions. Appellant argues that Mora's history and continued practice of receiving un-Mirandized confessions is a systematic circumvention of the procedural guarantees of Miranda and Texas Code of Criminal Procedure Article 38.22. Appellant contends that an agency relationship be-tween Mora and law enforcement is apparent. Finally, Appellant says that Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), requires Miranda warnings for any statement that is to be used in a criminal proceeding and applies to anyone who gathers information that could someday be used for criminal prosecution.

The State disagrees with Appellant's characterization of Estelle v. Smith, stating that Smith involved a defendant in a post-arrest setting who was compelled by a court to provide evidence against himself, so Miranda warnings were obviously required. However, the State says Miranda warnings are not required for all custodial questioning-only for questioning by law enforcement or their agents. The State posits that we should apply the Wilkerson factors to the facts of this case to determine whether there is an agency relationship with law enforcement that would require Miranda warnings before questioning.

The State says that nothing in the record shows that officers were using Mora as an agent to obtain a statement from Appellant. According to the State, Mora was acting on behalf of a private company and did not even contact the police until he had completed his civil investigation. Mora turned over Appellant's statement because the District Attorney's office requested it, not because he was acting as an agent of law enforcement. The State says that Mora's primary purpose for questioning Appellant was to conduct a civil investigation for a private company. Mora did not hold himself out as law enforcement, he did not wear a uniform or badge, and he conducted his investigation in the Old Navy manager's office.

The State contends that these factors weigh against a finding that Mora was acting as an agent of law enforcement. The State concludes that, because Mora was not acting as an agent of law enforcement,

he was not required to give Miranda warnings and Appellant's statement was admissible under Texas Code of Criminal Procedure Article 38.22, Section 5.

Held: Affirmed

Opinion: In Miranda v. Arizona, the United States Supreme Court held that, in order to ensure that criminal suspects in custody are aware of their rights under the United States Constitution, police must give formal warnings before suspects are interrogated. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Miranda defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody." Id. at 444. Texas Code of Criminal Procedure Article 38.22 provides that a written statement made by an accused as a result of custodial interrogation is inadmissible if the accused did not receive Miranda warnings. The issue here is whether Miranda applies when questioning is initiated by someone other than law enforcement.

We introduced a test in Wilkerson v. State to determine whether non-law enforcement state agents are required to give Miranda warnings. In Wilkerson, a Child Protective Services investigator interviewed a father who was in police custody for injury to a child. 173 S.W.3d 521. The CPS worker needed to discuss the placement of Wilkerson's children in foster care and did not give Miranda warnings prior to speaking with him. During the interview, Wilkerson told the CPS worker about spanking his son, and this information was included in the CPS report that was forwarded to the police. We held that non-law-enforcement state agents are required to give Miranda warnings only when acting in tandem with the police to gather evidence for a criminal prosecution. Id. at 523. To determine if an agency relationship exists, the courts must examine the entire record and consider three factors: (1) the relationship between the police and the potential police agent, (2) the interviewer's actions and perceptions, and (3) the defendant's perceptions of the encounter. Id. at 530–31. The test helps courts determine whether the interviewer was acting as an instrumentality or was "in cahoots" with the police or prosecution. Id. at 531.

We concluded that Wilkerson's statements to the CPS worker were admissible because the CPS worker was not acting as an agent of law enforcement; rather she visited Wilkerson in jail as part of a routine CPS procedure. Id. at 532. Because there was nothing in the record to indicate that the police knew about the interview, that they spoke to the CPS worker before the interview, or that they solicited her to gain information from Wilkerson, we determined that the CPS worker was not acting as an agent of law enforcement. Id. at 533.

The facts of Oriji v. State are very similar to the case before us. In Oriji, the court admitted into evidence a written confession of theft made without Miranda warnings to a Foley's loss-prevention officer. 150 S.W.3d at 833. The court of appeals concluded that, because the loss-prevention officer did not elicit the incriminating information from the defendant at the request of the police, he was not engaging in a custodial interrogation requiring Miranda warnings. Id. at 836–837. The court stated that "[p]rivate citizens, even security guards, are not ordinarily considered 'law enforcement officers.' " Id. at 836. Because law enforcement did not know of or initiate the loss-prevention officer's effort to obtain a confession, the statement was not for law enforcement purposes. Id. at 837.

The law does not presume an agency relationship, and the party alleging such a relationship has the burden of proving that it exists. Wilkerson, 173 S.W.3d at 529. Appellant argues that there was an agency relationship between Mora and law enforcement because of: (1) the complicity of law enforcement as evidenced by the continuing relationship between Mora and the police, (2) the prosecutorial purpose of Mora's investigations, and (3) Appellant's reasonable belief that Mora was acting under the veil of authority. Because of this relationship, Appellant argues, Miranda warnings were required in order for her written confession to be admissible. To determine if Mora was working as an agent of law enforcement, we will apply the three Wilkerson factors to the facts of this case.

First, we look for information about the relationship between the police and Mora. Mora stated that every time he apprehended shoplifters he asked them to fill out a civil demand notice for Old Navy's records, and that 99% of the time the accused shop-lifter signed the document. While officers may have been aware that Old Navy had a policy of obtaining a civil demand notice, there is no indication that this knowledge led to a calculated practice between the police and the store's loss-prevention staff. The police had not even been contacted when Mora obtained Appellant's confession, so they clearly did not instruct Mora to get specific information or give him questions to ask Appellant. The police were not using Mora to get information from Appellant that they could not lawfully obtain themselves, and neither the police nor the DA's office asked Mora to obtain an admission of guilt to use in a criminal proceeding.

The second part of the Wilkerson test evaluates the purpose of the interview. In Oriji, the record showed that a written confession was obtained in order to further the store's need to prevent theft and was not for law enforcement purposes. 150 S.W.3d at 837. Similarly, in Wilkerson, we concluded that the CPS worker was not an agent of law enforcement because her questioning of the defendant was part of her duty regarding the placement of his children in foster care. 173 S.W.3d at 532. Here, Mora's reason for obtaining the civil demand notice was to adhere to the policies in

the Gap Inc. loss-prevention manual. Although Gap Inc.'s policy manual says that theft incident reports serve to aid in criminal prosecutions and convictions, help maintain a good rapport with law enforcement, and prevent defense attorneys from discrediting the testimony of the loss-prevention staff, those are not the primary purposes of the report. The manual says reports, which should include a civil demand notice, are necessary to record and preserve observations, details, and information about the events surrounding the theft, and it says that the reports are for company use and records only. The civil demand notice states that the law permits merchants to recover civil monetary damages and that the civil penalties are not intended to compromise any criminal action the store may seek as a result of the shoplifting incident. While Mora did help build a case that led to Appellant's arrest, and his testimony indicates that the purpose of obtaining a written confession goes beyond merely civil reasons, his primary duty was to document the incident for company records. The record indicates that Mora believed that he was following Old Navy policy and acting on the store's behalf, not acting as a police agent.

Under the third Wilkerson factor, because there is nothing in the record from the suppression hearing regarding Appellant's perception of her encounter with Mora, we consider whether a reasonable person in Appellant's position would believe that Mora was a law-enforcement agent. See Id. at 531. Mora testified that he was not wearing a uniform when he approached Appellant and her friend outside the store. He informed them that he was a loss-prevention officer for Old Navy, escorted them to the store man-ager's office, and asked them to fill out paperwork about the theft. A female Old Navy manager was present during the encounter, and the door to the manager's office was left ajar. Mora printed out an Old Navy store receipt for the items found in Appellant's purse and photographed Appellant and the stolen items. Under these circumstances, we cannot say that a reasonable person in Appellant's position would believe that Mora was a law-enforcement agent. There was nothing in the record indicating that Mora appeared to Appellant to be cloaked with the actual or apparent authority of the police. See Id. at 530.

Conclusion: We conclude that Mora was not acting in tandem or "in cahoots" with the police. The fact that Mora eventually gave the District Attorney's office a copy of Appellant's written confession does not transform him into an agent of law enforcement. See Wilkerson, 173 S.W.3d at 533. Because Mora was working on a path parallel to, yet separate from, the police, Miranda warnings were not required in this situation. See Wilkerson, 173 S.W.3d at 529. The record supports the trial court's decision to deny Appellant's motion to suppress the written confession and the court of appeals did not err in affirming the trial court's denial of the motion to suppress. The judgment of the court of appeals is affirmed.

DETERMINATE SENTENCE TRANSFER

IN DETERMINATE SENTENCE TRANSFER HEARING, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING APPELLANT TRANSFERRED TO THE TDJC EVEN THOUGH SHE MADE SOME PROGRESS PRIOR TO THE RELEASE/TRANSFER HEARING.

¶ 12-4-11. **In the Matter of A.C.**, No. 05-11-01469-CV, WL 5439001 (Tex.App.-Dallas, 11-7-12).

Facts: On November 9, 2009, the trial court declared A.C. was a child engaged in delinquent conduct for committing aggravated robbery with two adult accomplices. The trial court ordered A.C., who was seventeen years old at the time, committed to the TYC for a determinate sentence of five years, with possible transfer to the TDCJ. However, the sentence was probated and A.C. was transferred to the Rockdale Regional Juvenile Justice Center. On August 6, 2010, the trial court found A.C. violated the conditions of her probation by failing to obey all the rules of placement and sentenced A.C. to the TYC. On September 23, 2011, the trial court conducted a release or transfer hearing pursuant to section 54.11 of the family code. SeeTEX. FAM.CODE ANN. § 54.11 (West 2012). Evidence presented at the hearing included the TYC's summary report of A.C.'s progress and the testimony of a representative for the TYC, the complainant in A.C.'s offense, A.C.'s grandmother, and A.C. On September 26, 2011, the trial court ordered the transfer of A.C. to the TDCJ to complete the remainder of her determinate sentence.

In her sole issue on appeal, A.C. contends that the trial court abused its discretion by rendering the transfer order. A.C. argues she made progress prior to the release/transfer hearing, which indicated a release onto parole was the proper result in this case. Specifically, she identified as "progress," the credits she obtained toward her high school diploma, her attempt to pass the GED test, and her completion of the Capital Offender Program and several other programs while at the TYC.

The State responds "[w]hen the factual record is reviewed in its entirety, it cannot fairly be said that the trial court's transfer decision was made without reference to any guiding rules or principles because the record—at the very least—contains some evidence which supports the trial court's decision."(emphasis in original). The State contends the trial court's order is supported by the record that includes testimony of the victim of A.C.'s offense as to "the violence that [she] had suffered as a result of the conduct of [A.C.] and her cohorts;" testimony of the TYC representative

regarding A.C.'s misconduct and likelihood to commit new offenses; and A.C.'s "own testimonial demeanor."

Held: Affirmed

Opinion: "When a juvenile is given a determinate sentence and TYC makes a request to transfer the juvenile to TDCJ, the trial court is required to hold a hearing." In re J.A.R., 343 S.W.3d 504, 505 (Tex.App.-El Paso 2011, no pet.)(citing TEX. FAM.CODE ANN. § 54.11). "At a [release] hearing ... the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the Texas Youth Commission, in addition to the testimony of witnesses."TEX. FAM.CODE ANN. § 54.11(d). "At the hearing on a request to transfer a juvenile to the TDCJ, the judge may consider: (i) the experiences and character of the person before and after commitment to the TYC; (ii) the nature of the penal offense that the person was found to have committed; (iii) the abilities of the juvenile to contribute to society; (iv) the protection of the victim of the offense or any member of the victim's family; (v) the recommendations of the TYC and the prosecuting attorney; and (vi) the best interests of the juvenile and any other relevant factors." In re J.L.C., 160 S.W .3d at 313 (citing TEX. FAM.CODE ANN. § 54.11(k) (West 2012); In re R.G., 994 S.W.2d 309, 312 (Tex.App.-Houston [1st Dist.] 1999, pet. denied)). "Evidence of each factor is not required, and the trial judge need not consider every factor in making his decision."Id. at 313–14 (citing In re R.G., 994 S.W.2d at 312). "Further, the trial court may assign different weights to the factors it considers, and it may consider unlisted but relevant factors." In re D.T., 217 S.W.3d 741, 743 (Tex.App.-Dallas 2007, no pet.)(citing In re R.G., 994 S.W.2d at 312).

At the release/transfer hearing, Leonard Cucolo, Court Liaison for the TYC, agreed with the following characterization by the prosecutor of A.C.'s behavior: "despite periods of improvement or periods of good behavior, she's never sustained good behavior throughout ... never shown consistent improvement throughout."In 13 months at the TYC, A.C. had 36 incidents of misconduct, three of which involved assaultive behavior, was admitted to the security section 19 times, and participated in a major disruption. After the TYC conducted a review hearing in July 2011, A.C. continued to act defiantly against the rules, was disruptive and argumentative with staff, and "demonstrated suicidal behaviors." Cucolo confirmed A.C. completed most of the programs she participated in at the TYC, including behavioral improvement, alcohol and drug, and capital and serious violent offenders treatments programs. The psychological evaluation in the TYC summary report noted A.C. "maintain[ed] primarily positive behavior and continu[ed] to make satisfactory progress in her individual and group programs."

Cucolo said that A.C. had not performed well academically. For some time she refused to take the GED examination, but finally did so a week before the release/transfer hearing before the trial court. Also, A.C. earned approximately ten credits towards her high school diploma. Cucolo stated if it were not for A.C.'s imminent nineteenth birthday, the TYC would be willing to continue to work with A.C. However, Cucolo said he believed A.C. did not take seriously her commitment, her treatment, or her behavior needs or expectations. Although the treatment team that evaluated A.C. at the TYC was divided on whether A.C. was "suitable for release" or transfer, the executive director at the TYC made the ultimate recommendation to transfer A.C. to the TDCJ. Cucolo said he believed A.C. presented a risk to reoffend and that her transfer to the TDCJ was "in the best interest and the safety of the community."

The complainant in A.C.'s aggravated robbery offense, Crystal Ortiz, testified regarding the "nature of the penal offense that [A .C.] was found to have committed."SeeTEX. FAM.CODE ANN. § 54.11(k). Ortiz explained she was walking to her car when A.C. and her two accomplices assaulted her. She described being punched and kicked, but held onto her car, lost consciousness, and was dragged along with the car. Her injuries included sores on her stomach, headache, and a swollen face, and for two to three months after the assault, Ortiz had difficulty walking and required assistance to take showers. Because she did not feel safe alone or in crowds for six months, she left the college she was attending in Dallas and moved back to her home in McAllen. Although Ortiz admitted she did not know what conditions of parole might be placed on A.C., she felt A.C. should not be paroled and should remain in prison.

A.C.'s grandmother Princella Pruitt testified A.C. could live with her if released on parole. A.C. lived with Pruitt in the past as a child, including the period when A.C. served juvenile probation for committing a class A assault against another girl. Pruitt stated she participated in conferences about A.C.' s progress at the TYC and was under the impression the TYC's recommendation would be to release A.C. It was Pruitt's suggestion that A.C. participate in behavioral counseling and take medication for her bipolar disorder. Pruitt indicated A.C. was suspended from school for having a "smart mouth," but also said that behavior could have been due to lack of medication. Pruitt believed A.C. was ready to be released to the community, to follow the rules, and to obey the law.

A.C. testified she wanted to be released on parole to live with her grandmother, to return to high school, and to become an adoption counselor. She said the programs she participated in at the TYC taught her to control her behavior. According to A.C., her behavior problems at the TYC were due to her "playing too much" or "not following instructions." She admitted to making "gun signals to staff members" at the TYC, but

not to threatening or being defiant or argumentative. During cross-examination, A.C. stated "she would prefer not to" ..."show what the gun signal is," a response the State contends demonstrates her "defiant nature" and her continued failure to take her responsibilities seriously or to benefit from the programs she completed at the TYC. The trial judge denied the prosecutor's request to instruct A.C. to "make the gun signals."

The record shows that A.C. committed a Class A assault and aggravated robbery prior to her commitment at the TYC. She admitted she continued to have behavioral problems at the TYC. Ortiz's testimony explained the nature of the offense. The TYC, the prosecutor, and Ortiz recommended against A.C.'s release.

The record also shows A.C. had remorse for her actions and she wrote a letter of apology to Ortiz. Further, A.C. did not commit any major rule violations in the eight months prior to the release/transfer hearing. Finally, A.C. and her grandmother testified regarding her plans to return to high school to obtain her diploma and to become an adoption counselor to help other children like herself.

Conclusion: On this record, we conclude the trial court did not abuse its discretion by ordering appellant transferred to the TDJC. See In re D.T., 217 S.W.3d at 744; J.R.W., 879 S.W.2d at 257. A.C.'s sole point is decided against her. The trial court's order is affirmed.

DISPOSITION PROCEEDINGS

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE COMMITTING CHILD TO TYC WERE PARENTS' HOMES WERE NOT CONSIDERED SUITABLE.

12-4-2. **In the Interest of H.V.**, No. 04-11-00911-CV, --- S.W.3d ----, 2012 WL 3985782 (Tex.App.-San Antonio, 9/12/12)

Facts: H.V., fourteen years-old, pled true to an allegation that he engaged in delinquent conduct by possessing a prohibited weapon, namely brass knuckles, on the premises of a school. The trial court adjudged that H.V. had engaged in delinquent behavior, and after a disposition hearing ordered him committed to TYC for an indeterminate term. On appeal, H.V. challenges his commitment, arguing the evidence does not support the court's finding that neither of his parents' homes could provide him with the quality of care and level of support and supervision necessary to meet the conditions of probation.

Held: Affirmed

Opinion: Here, the trial court made the required statutory findings under section 54.04(i), plus the following specific findings in support of its commitment order:

paroled from the State of Georgia and sent to the State of Texas for a felony offense involving violence, robbery by intimidation; was in possession of a knife; gang activity in the past; aggressive and assaultive behavior in the past; and problems in school; concerned that the respondent may commit a new offense.

The trial court's findings are supported by documentary evidence in the record as well as testimony. The record contains a Harlandale Independent School District police report stating that on September 29, 2011, H.V. was in possession of a prohibited weapon, brass knuckles, on school premises in violation of Texas Penal Code section 46.03. See TEX. PENAL CODE ANN. § 46.03 (West 2011) (felony of the third degree). The pre-disposition report prepared by the Bexar County Juvenile Probation Department shows that H.V.'s history of delinquent conduct began when he was 12 years old or less, and details his history in Georgia, where he lived with his father until December 2010. Specifically, H.V.'s juvenile history in Georgia includes three adjudications: assault-bodily injury on March 27, 2010, for which he received probation; criminal trespass on June 30, 2010, for which his probation term was extended; and robbery by intimidation (knife) on November 29, 2010, for which he was committed and placed on parole. At the time of the instant offense, H.V. was on parole with the Georgia juvenile authorities. The report also states that H.V. admitted being involved with gangs in Georgia. The report recommended that, based on his prior history in Georgia, his aggression issues, and his behavioral problems within his mother's home, H.V. should be placed on probation for eighteen months in the custody of the Department, with several conditions including temporary placement in a residential facility. Leticia Wilson, a juvenile probation officer, testified that H.V. initially had issues with fighting, writing gang style, and refusing to obey staff when he was first detained; however, H.V.'s behavior in detention has improved and he is attending classes.

At the disposition hearing, several witnesses testified, including both of H.V.'s parents. H.V.'s father, Ramiro, stated that he currently resides with his girlfriend and her daughters in Atlanta, Georgia. Ramiro confirmed that H.V. lived with him in Georgia immediately prior to moving to San Antonio in December 2010, and that H.V. committed the above offenses while living with him in Georgia. Ramiro testified that his work schedule and neighborhood safety have since improved, and that he would now be able to provide H.V. with more supervision through his girlfriend and one of her adult daughters. Ramiro is a driver and works between 50 and 60 hours per week. Ramiro stated his belief that

H.V. needs psychological counseling, but is not a bad kid and will mature.

H.V.'s mother, Socorro, stated that she had no contact at all with H.V. during the years he lived in Georgia with his father. She did not know about H.V.'s problems in Georgia before he came to San Antonio. Socorro testified that H.V. was not a problem while he resided with her and her family which consists of her husband, a 16 year-old daughter, and three sons ranging in age from 3 years old to 9 years old. However, she stated that H.V.'s relationship with his stepfather is not ideal because H.V. uses profanity and wears sagging pants, and the younger boys try to model their behavior after H.V.'s behavior; H.V. also gets aggressive when he gets mad. Socorro stated she and her extended family in San Antonio could provide H.V. with support if he was permitted to come home with her. The pre-disposition report showed that since living with his mother in San Antonio, H.V. has had four referrals to the Bexar County Juvenile Justice Department, including one for resisting arrest.

In addition, three of H.V.'s teachers testified. H.V.'s middle school football coach and teacher, Simon Aguirre, Jr., testified that H.V. was well behaved and tried hard in his classroom and on the football field; H.V. sometimes used profanity but could be corrected. H.V. did well on the football team in seventh grade, but was unable to continue playing football in eighth grade due to deficient grades. Aguirre was aware of the incident in which H.V. possessed brass knuckles on school premises, but did not believe H.V. would be a problem if he returned to his classroom as he had matured. Antonio Arevalo, the principal of the Harlandale Alternative School, testified that when H.V. moved to San Antonio he was initially enrolled in boot camp because there had been a "serious incident" in the state he came from; he was very respectful and completed the program, and then moved on to a traditional middle school. However, H.V. was later sent back to the disciplinary alternative education program where he continued to have conflicts with instructors; he was also classified as a special needs student and was on medication for anger issues. Arevalo stated he was able to assist H.V. through counseling, but also recalled that H.V. told him that he is a gangster and that is just what he is going to be, that there is nothing anyone can do to change it. Arevalo testified that in his opinion H.V. needs a lot of guidance and a very structured setting. Paul Pena, H.V.'s case manager at the middle school, testified that H.V. had difficulty focusing in class and used inappropriate language; he dealt with H.V. almost every day and felt he was improving and that playing football was a motivator. H.V. told Pena he came from a pretty tough area of Georgia where there were a lot of gangs. Pena stated his opinion that H.V. could mature and grow out of the inappropriate behavior he exhibited during middle school.

Conclusion: Based on our review of the record, which includes evidence that H.V. committed a third degree felony in San Antonio, has a previous history of adjudications in Georgia which includes a violent felony for which he is currently on parole, and lacks supervision and support in both his parents' homes as evidenced, in part, by his continued delinquent conduct, we conclude there is sufficient evidence to support the order of commitment, and hold the trial court did not abuse its discretion. Accordingly, we affirm the trial court's judgment.

IMMIGRATION

NEBRASKA SUPREME COURT FOUND THAT THE SINCE JUVENILE WAS NOT SEEKING SPECIAL IMMIGRANT JUVENILE (SIJ) STATUS TO ESCAPE FROM PARENTAL ABUSE, NEGLECT, OR ABANDONMENT, REQUEST FOR FINDING THAT HE WAS ELIGIBLE FOR SIJ STATUS FAILED.

¶ 12-4-12. **In re Interest of Erick M**., No. S-11-919, -- N.W.2d--, 284 Neb 340 (Neb. Sup. Ct., 9/14/12).

Facts: Erick M., a juvenile, requested that the juvenile court issue an order finding that under 8 U.S.C. § 1101(a)(27)(J) (Supp. IV 2010), he was eligible for "special immigrant juvenile" (SIJ) status. SIJ status allows a juvenile immigrant to remain in the United States and seek lawful permanent resident status if federal authorities conclude that the statutory conditions are met. Under § 1101(a) (27) (J) (i), the conditions include a state court order determining that the juvenile's reunification with "1 or both" parents is not feasible because of abuse, neglect, or abandonment. The juvenile court found that Erick did not satisfy that statutory requirement. Erick appeals.
Held: Affirmed

Opinion: Under § 1101(a) (27) (J), a juvenile's petition for SIJ status must include a juvenile court order showing that the juvenile satisfies the statutory criteria. The court's findings in an "eligibility order" are a prerequisite to SIJ status, but they are not binding on federal authorities' discretion whether to grant a petition for SIJ status.

There are two eligibility provisions under § 1101(a) (27) (J), which we will refer to as "the reunification and best interest components." Subparagraph (i) is the reunification component and has two requirements: (1) The juvenile must be one whom a state juvenile court has determined to be a dependent, or has committed to or placed under the custody of a state agency or department, or has committed to or placed with an individual or entity appointed by the state or court; and (2) "reunification with 1 or both of the immigrant's parents [must not be] viable due to abuse, neglect, abandonment, or a similar basis found under State law." Subparagraph (ii) is the

best interest component. It requires a judicial or administrative finding that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence." If a state court finds that both of the eligibility components are satisfied, then federal authorities may grant a petition for SIJ status.

Here, the juvenile court adjudicated Erick and committed him to the care and custody of a state agency. The court committed him to the Office of Juvenile Services (OJS) in December 2010 because of two charges of being a minor in possession of alcohol. The court initially placed him in a residential treatment center. In July 2011, the juvenile court heard OJS' motion to transfer Erick to the Youth Rehabilitation and Treatment Center in Kearney, Nebraska. While in the residential treatment center, Erick had continually disappeared from the residential center, used alcohol and drugs, committed law violations, and threatened staff. Erick did not resist the motion for more restrictive custody, but his attorney stated that Erick's goal was to "get back home" and work on a rehabilitation program from there. The court sustained the motion for the transfer.

In September 2011, the court heard Erick's motion for an eligibility order for SIJ status. Erick's family permanency specialist testified that she had no contact information for Erick's father. In fact, she did not know whether paternity had ever been established. She said Erick was unsure whether his father was in Mexico or New York. She anticipated that she would continue to work with Erick's mother after OJS released Erick from the Youth Rehabilitation and Treatment Center in Kearney. She did not know of any reports or investigations of abuse or neglect by Erick's mother. Erick's mother testified that she did not know where Erick's father was and had not spoken to him in many years. She had never been accused of abusing or neglecting Erick. The court overruled Erick's motion for an eligibility order. It found that the first requirement was met because Erick was committed to a state agency or department. But the court found that the facts failed to show that reunification with Erick's mother was not viable because of abuse, neglect, or abandonment. The court found that (1) it had removed Erick from his home because of his alcohol abuse and he had never been removed from his mother's home because of abuse, neglect, or abandonment; (2) Erick's mother had been present at almost every hearing; (3) Erick had lived with her before the court committed him to OJS; and (4) no evidence showed that he would not be returned to his mother when he was paroled or discharged from the Youth Rehabilitation and Treatment Center in Kearney.

The court concluded that there was no evidence that Erick's father had ever abused or neglected Erick. It made no findings whether he had abandoned Erick. Because the reunification component was not met, the court did not consider whether return to Erick's country of origin would be in his best interest.

As stated, this case hinges on the meaning of the federal statute's requirement that a juvenile court determine that reunification with "1 or both of the immigrant's parents" is not feasible because of abuse, neglect, or abandonment. Both parties argue that the plain language of the statute supports their interpretation.

Erick argues that § 1101(a) (27) (J) (i) requires that he show only that reunification with one parent is not feasible because of abuse, neglect, or abandonment. He contends that by using the word "or" in the phrase "1 or both," Congress intended the statute to be disjunctive. And he argues that the evidence shows his father abandoned him.

The State counters that if Congress had intended that a juvenile could satisfy the statute by showing only that reunification with one parent was not feasible, then it would not have included the words "or both." It contends that Erick's interpretation renders this language superfluous and that Congress did not intend courts to ignore the presence of a parent with whom reunification is feasible. It argues that under Erick's interpretation, a juvenile court would be required to find that the reunification component was satisfied every time the State could not identify or find a juvenile's parent, even when reunification with the other parent was appropriate. In addition, the State argues that the evidence fails to show that Erick's father ever established paternity or abandoned him.

Interpreting this statute to reach a legal conclusion presents a challenge. To construe it as something other than an indigestible lump, we turn to familiar statutory canons. Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning. We will not look beyond the statute to determine the legislative intent when the words are plain, direct, or unambiguous. But we can examine an act's legislative history when a statute is ambiguous. A statute is ambiguous if it is susceptible of more than one reasonable interpretation.

Although Erick's argument is reasonable, Congress' use of the word "or" does not necessarily decide the issue in his favor. Because "or" describes what a juvenile court must determine in the alternative, we could also reasonably interpret the phrase "1 or both" parents to mean that a juvenile court must find, depending on the circumstances, that either reunification with one parent is not feasible or reunification with both parents is not feasible. Unfortunately, there are no related provisions in the act from which we can discern Congress' intent.

It is true that courts will sometimes look to an agency's interpretation of a governing, ambiguous statute for guidance. But here, the proposed regulations for the 2008 amendment to § 1101(a) (27) (J) (i), which is the source of the confusion, have not yet been adopted. And as proposed, they fail to clarify the issue that we must decide. Absent any statutory or regulatory guidance, we conclude that the statute is ambiguous because the parties have both presented reasonable, but conflicting, interpretations of its language. And if an ambiguous statute is to make sense, we must read it in the light of some assumed purpose. So we consider the statute's legislative history.

In 2008, Congress amended the eligibility requirements for SIJ status under § 1101(a) (27) (J) (i). Before 2008, subparagraph (i) defined a special immigrant juvenile as one whom a state juvenile court had (1) determined to be a dependent under its jurisdiction, (2) placed in the custody of a state agency or department, and (3) deemed eligible for long-term foster care due to abuse, neglect, or abandonment. Under the 2008 amendment, the eligibility requirements under subparagraph (i) hinge primarily on a reunification determination. The amendment expanded eligibility to include juvenile immigrants whom a court has committed to or placed in the custody of an individual or a state-appointed entity—not just those whom a court has committed to or placed with a state agency or department. In addition, Congress removed the requirement that the juvenile be under the court's jurisdiction because of abuse, neglect, or abandonment. Finally, Congress removed the requirement that a state juvenile court find that a juvenile is eligible for long-term foster care because of abuse, neglect, or abandonment. Instead, a court must find that reunification is not possible because of abuse, neglect, or abandonment.
So under the amended subparagraph (i), a juvenile court no longer needs to find that the juvenile is in the juvenile system because of abuse, neglect, or abandonment. It is sufficient that the court has placed the juvenile with a court-approved individual or entity and that reunification with "1 or both" parents is not feasible because of abuse, neglect, or abandonment. For example, a juvenile alien could be eligible for SIJ status if a juvenile court has appointed a guardian for the juvenile for any reason and reunification is not feasible because of parental abuse, neglect, or abandonment. These 2008 changes expanded the pool of juvenile aliens who could apply for SIJ status. But an earlier 1997 amendment to the statute shows that despite this expansion, these juveniles must still be seeking relief from parental abuse, neglect, or abandonment.

We start with the original language. Congress enacted the SIJ statute as part of the Immigration Act of 1990. The original eligibility requirements were a judicial or administrative order determining only that the juvenile alien was dependent on a juvenile court and that it would not be in the juvenile's best interest to be returned to the juvenile's or parent's home country.

In 1997, however, Congress amended § 1101(a)(27)(J) to require that a court, in its order, determine that the juvenile (1) is eligible for long-term foster care " 'due to abuse, neglect, or abandonment' " and (2) has been declared a dependent of a juvenile court or committed or placed with a state agency. "Congress intended that the amendment would prevent youths from using this remedy for the purpose of obtaining legal permanent resident status, rather than for the purpose of obtaining relief from abuse or neglect."

Even before the 1997 amendment, immigration authorities interpreted the "eligible for long-term foster care" requirement to mean that "a determination has been made by the juvenile court that family reunification is no longer a viable option."

Since 1997, however, that determination must be specifically tied to parental abuse, neglect, or abandonment. And guidance memoranda from the operational directors of the U.S. Citizenship and Immigration Services (USCIS) to field directors show that protecting the juvenile from parental abuse, neglect, or abandonment must be the petitioner's primary purpose. USCIS will not consent to a petition for SIJ status if it was "'sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.'"
Moreover, administrative appeal decisions from the denial of petitions for SIJ status illustrate how USCIS applies the requirement that a juvenile court find that reunification with "1 or both" parents is not feasible. We recognize that only designated decisions rendered in administrative appeals are published and considered binding precedent on immigration officials. But USCIS' unpublished decisions nonetheless enlighten and confirm our analysis.

A petition for SIJ status is typically filed for two general categories of juveniles: (1) for juvenile aliens who came to the United States without their parents or who began living with someone else soon after coming with their parents; and (2) for juveniles who came to the United States with one or both parents but later became a juvenile court dependent. In either circumstance, if the petitioner shows that the juvenile never knew a parent or that a parent has failed to provide care and support for the juvenile for a significant period, USCIS and courts have agreed that reunification with the absent parent or parents is not feasible because of abandonment.

But even when reunification with an absent parent is not feasible because the juvenile has never known the parent or the parent has abandoned the child, USCIS and juvenile courts generally still consider whether reunification with the known parent is an option. Thus, if the juvenile lives in the United States with only one parent and never knew the other parent, the reunification component is satisfied if reunification with the known parent is not feasible.

We believe that this result shows that the "1 or both" parents rule is consistent with Congress' intent to expand the pool of potential applicants. That is, under the "1 or both" parents rule, a juvenile is not disqualified from SIJ status solely because one parent is unknown or cannot be found and, thus, cannot be excluded from the possibility of reunification.

So we reject the State's argument that Erick was required to show that his father had established paternity before Erick could prove abandonment. Because Erick has lived with only his mother, his family circumstances appear to fall within Congress' intent that a juvenile court may sometimes focus primarily on whether reunification with only one parent (the custodial parent) is feasible. In accordance with USCIS cases, we hold that for obtaining SIJ status under § 1101(a)(27)(J), a petitioner can show an absent parent's abandonment by proof that the juvenile has never known that parent or has received only sporadic contact and support from that parent for a significant period.

Whether an absent parent's parental rights should be terminated is not a factor for obtaining SIJ status. These cases also illustrate, however, that USCIS does not consider proof of one absent parent to be the end of its inquiry under the reunification component. A petitioner must normally show that reunification with the other parent is also not feasible.

But if a juvenile lives with only one parent when a juvenile court enters a guardianship or dependency order, the reunification component under § 1101(a)(27)(J) is not satisfied if a petitioner fails to show that it is not feasible to return the juvenile to the parent who had custody. This is true without any consideration of whether reunification with the absent parent is feasible because the juvenile has a safe parent to whose custody a court can return the juvenile. In contrast, if the juvenile was living with both parents before a guardianship or dependency order was issued, reunification with both parents is usually at issue. These varied results are all consistent with Congress' intent that SIJ status be available to only those juveniles who are seeking relief from parental abuse, neglect, or abandonment.

Erick relies on In re E.G., an unpublished New York decision. We find it unpersuasive. In that case, a 13-year-old boy left his mother and siblings in Guatemala and made his way to the United States, where his biological father lived. The father squandered his wages on alcohol and eventually left the child alone. Social services removed the child from his father's custody when he was almost age 16; an attorney for the child sought an eligibility order for SIJ status. The mother filed an affidavit stating that she wanted her son to stay in the United States because he would have better education and employment opportunities. She also stated that because gang members in Guatemala had threatened him, she feared for his safety if he returned. The family court determined that under the "1 or both" parents language, the child could petition for SIJ status even if he had a fit parent abroad "so long as the minor has been abused, neglected or abandoned by one parent."

In re E.G. is distinguishable because the only parent with whom the juvenile was living when the dependency order was issued was the parent who had neglected and abandoned him. Also, the court's order does not show whether his mother had attempted to support or contact him. She did not attempt to intervene in the neglect proceedings. So her absence may have been the equivalent of abandonment. Most important, we disagree with the court's reasoning. Although many parents in other countries might be willing to relinquish custody of their child so the child could remain in the United States, the question for SIJ status is parental abuse, neglect, or abandonment.

So we disagree that when a court determines that a juvenile should not be reunited with the parent with whom he or she has been living, it can disregard whether reunification with an absent parent is not feasible because of abuse, neglect, or abandonment. Although a literal reading of the statute would seem to permit a state court to ignore whether reunification with an absent parent is feasible, in practice, courts and USCIS officials normally consider whether the petitioner has shown that an absent parent abused, neglected, or abandoned the juvenile.

We believe that this is the better rule. If a juvenile alien's absent parent has abused, neglected, or abandoned the juvenile, a petitioner seeking SIJ status for the juvenile should offer evidence on this issue. Thus, when ruling on a petitioner's motion for an eligibility order under § 1101(a) (27) (J), a court should generally consider whether reunification with either parent is feasible. But this case presents the exception. Because Erick was living with only his mother when the juvenile court adjudicated him, he could not satisfy the reunification component without showing that reunification with his mother was not feasible. Because he failed to satisfy this requirement, the court had no need to consider whether reunification with Erick's father was feasible. We conclude that the juvenile court did not err in concluding that Erick did not satisfy

the reunification component. Erick was not seeking SIJ status to escape from parental abuse, neglect, or abandonment. There is no claim that reunification with his mother is not feasible for those reasons.

Conclusion: Congress wanted to give state courts and federal authorities flexibility to consider a juvenile's family circumstances in determining whether reunification with the juvenile's parent or parents is feasible. Erick lived with only his mother when the juvenile court adjudicated him as a dependent. So the juvenile court did not err in finding that because reunification with Erick's mother was feasible, he was not eligible for SIJ status.

ORDERS AND JUDGMENT

TRIAL COURT DID NOT ERR BY ENTERING THE NUNC PRO TUNC ORDER AND CHANGING THE TITLE OF THE JUDGMENT FROM ONE ADJUDICATING GUILT TO ONE REVOKING COMMUNITY SUPERVISION.

¶12-4-10. **Hall v. State**, 373 S.W.3d 168, No. 02–11–00303–CR, (Tex.App.–Fort Worth, 6-14-12). Reh. overruled 7/26/12.

Facts: In 2008, when appellant was fifteen years old, the State filed a petition alleging that he had engaged in delinquent conduct. Appellant waived his rights to confront witnesses and to have a jury trial, and he entered into a plea bargain agreement with the State. The terms of the plea bargain included appellant's stipulation that he had committed aggravated sexual assault of a seven-year-old child.FN1 Based on the plea bargain, the juvenile court adjudicated appellant to be delinquent, assessed a five-year determinate sentence, suspended that sentence for five years, and placed appellant on probation.FN2 Appellant's probation began on June 26, 2008.

FN1. See Tex. Penal Code Ann. § 22.021(a) (1) (B) (i), (2) (B) (West Supp.2011).

FN2. See Tex. Fam.Code Ann. § 54.04(d) (3), (q) (West Supp.2011).

In July 2010, pursuant to the State's motion and a hearing that appellant attended with counsel, appellant's probation was transferred to a district court (the trial court); the transfer order recognizes that appellant had already been "found to have engaged in delinquent conduct." FN3 In conjunction with the transfer of his probation to the trial court, appellant signed a document stating that he would comply with the conditions of his community supervision.

FN3. See id. §§ 54.04(q), .051(a), (d) (West Supp.2011).

Although no document filed in the juvenile court had alluded to a deferral of that court's adjudication of appellant's delinquency, and although the record from the juvenile court clearly shows that appellant had been adjudicated delinquent, documents filed in the trial court after the transfer, including one document titled "Certificate of Proceedings," state that appellant had been placed on deferred adjudication in 2008.FN4 The trial court imposed several conditions on appellant's probation.

FN4. When a district court exercises jurisdiction over a juvenile through a transfer of the juvenile's probation under section 54.051 of the family code, the district court "shall place the child on community supervision ... for the remainder of the child's probationary period and under conditions consistent with those ordered by the juvenile court." Id. § 54.051(e) (emphasis added).

In March 2011, the State filed a "Petition to Proceed to Adjudication," alleging *170 that appellant had violated several terms of the probation. That petition asked the trial court to require appellant to show cause why the court should not proceed to the adjudication of his guilt. Two months later, the State filed its "First Amended Petition to Revoke Probated Sentence," which, unlike the first petition, prayed for the trial court to require appellant to appear and show cause why his "sentence should not be imposed and put into execution[ ] as the law provides."

In July 2011, the trial court held a hearing on the amended petition to revoke appellant's probated sentence, not the original petition to proceed to adjudication.FN5 Toward the beginning of the hearing, appellant recognized that he had been placed on a "five-year straight probation" term while his sentence was suspended. Appellant pled true to several allegations contained in the State's amended petition and judicially confessed to them; on the record, he expressed his understanding that by entering pleas of true, the trial court could find that he violated the terms of his probation and could sentence him to up to five years' confinement. After appellant entered his pleas of true, the State rested. Appellant called a few witnesses to testify about his behavior and treatment while he was on probation. In closing arguments, appellant's counsel asked the trial court to allow appellant to remain on probation, but the trial court verbally found that appellant had violated the terms of his probation and sentenced him to four years' confinement.FN6

FN5. Appellant recognized in his original brief that the State's second petition amended its first petition and that the trial court held a hearing on the second petition.

FN6. If a transferred defendant who has been adjudicated delinquent violates the conditions of his probation, the district court may "reduce the prison sentence to any length." Id. § 54.051(e–2); Krupa v. State, 286 S.W.3d 74, 77 (Tex.App.-Waco 2009, pet.

ref'd). The trial court's reduction of appellant's sentence from five years to four years indicates the court's awareness of the modified punishment range associated with section 54.051(e–2).

Although the trial court did not verbally purport to adjudicate appellant's guilt for aggravated sexual assault, the court originally entered a written judgment titled "Judgment Adjudicating Guilt." Appellant appealed that judgment, contending that the judgment was improper. In an abatement order, we agreed that the judgment was improper; we noted, in part, that double jeopardy bars a conviction for the same act for which a juvenile has been adjudicated delinquent. We explained in the abatement order that while the trial court had statutory authority to revoke appellant's probation and impose a prison sentence, it could not convict appellant of aggravated sexual assault. Because the trial court's original written judgment adjudicating guilt differed from the court's verbally expressed intentions at the end of the revocation hearing, we noted in our abatement order that the record suggested that a clerical error might have occurred. Therefore, we abated the appeal, remanded the case to the trial court, and ordered the trial court to conduct a hearing to determine whether the written judgment contained a clerical error that was subject to correction. We notified the trial court that if it determined that the written judgment contained a clerical error, the court needed to correct the error through a nunc pro tunc judgment and make findings of facts and conclusions of law concerning its decision about whether the judgment contained a clerical error.

Upon our abatement, the trial court held a hearing in which it expressed,

The judgment [adjudicating guilt] does not reflect the intent of this Court, nor does it reflect what actually happened at juvenile.

Mr. Hall was on a determinate sentence probation which is what we would call in the adult system after transfer [of] a straight probation. It was entered in the clerk's record as a determinate sentence deferred adjudication which this Court believes to be impossible. That is incorrect. It's a clerical error by the clerk. That clerical order, unfortunately, was carried forward throughout the file, which the Court's intent in this case, which was reflected in the revocation hearing, is that this is the straight probation that was transferred from juvenile. This Court does not have any intent to change that, nor does this Court believe this Court has the power to change a finding of guilt that's already been entered into a deferred adjudication. And every document thereafter that reflects a deferred adjudication, including the judgment adjudicating guilt, needs to be changed to be in conformity with the determinate sentence straight probation that Mr. Hall was on. [Emphasis added.]

After the hearing concluded, the trial court signed a "Nunc Pro Tunc Order Correcting Minutes of the Court," which changed the title of the original judgment from "Judgment Adjudicating Guilt" to "Judgment Revoking Community Supervision." Appellant filed a supplemental brief in which he asserts two points and asks us to discharge him from custody and release him from further community supervision.

Held: Affirmed

Opinion: In the first point of his supplemental brief, appellant argues that the trial court's original judgment adjudicating guilt was not the product of a clerical error. Appellant first contends that the "trial court at the [abatement] hearing did not address whether the signing of the judgment adjudicating guilt was ... the result of a clerical error." We disagree with this factual contention; as shown above, during the abatement hearing, the trial court made clear on the record that the judgment adjudicating guilt did not reflect the intent of the court and that, instead, a clerical error had been "carried throughout the file." Also, the trial court's final conclusion of law, which the trial court entered after the abatement hearing, states, "In this case, because the intent of this Court was to continue Appellant's straight probation and have a normal revocation proceeding, this Court's judgment reflecting an adjudication of guilt was the product of a clerical error."

Appellant also argues that even assuming that the trial court stated that the signing of the judgment adjudicating guilt was a clerical error, the record does not support that statement, but it rather shows that the trial court made an error caused by judicial reasoning that could not be corrected through a nunc pro tunc order. The classification of an error as clerical or judicial is a question of law. See Ex parte Poe, 751 S.W.2d 873, 876 (Tex.Crim.App.1988); Alvarez v. State, 605 S.W.2d 615, 617 (Tex.Crim.App. [Panel Op.] 1980). Clerical errors in judgments are subject to correction through judgments nunc pro tunc. English v. State, 592 S.W.2d 949, 955–56 (Tex.Crim.App.), cert. denied, 449 U.S. 891, 101 S.Ct. 254, 66 L.Ed.2d 120 (1980); Johnson v. State, 233 S.W.3d 420, 425–26 (Tex.App.-Fort Worth 2007, pet. ref'd); In re Hancock, 212 S.W.3d 922, 927 (Tex.App.-Fort Worth 2007, orig. proceeding).

A judgment may reflect a clerical error when it incorrectly records the judgment*172 rendered, so long as a product of judicial reasoning is not involved. See Alvarez, 605 S.W.2d at 617. A court "renders" a judgment when "orally in open court or by written memorandum signed by [it] and delivered to the clerk, the [court] pronounces ... a decision of the law upon given state of facts." Westbrook v. State, 753 S.W.2d 158, 160 (Tex.Crim.App.1988) (Clinton, J., concurring) (citing Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56,

58 (Tex.1970)); see also S & A Rest. Corp. v. Leal, 892 S.W.2d 855, 857 (Tex.1995) ("Judgment is rendered when the trial court officially announces its decision in open court...."). The purpose of a nunc pro tunc judgment is to reflect the truth of what actually occurred in the trial court. Alvarez, 605 S.W.2d at 617. "The trial court cannot, through a judgment nunc pro tunc, change a court's records to reflect what it believes should have been done." Collins v. State, 240 S.W.3d 925, 928 (Tex.Crim.App.2007). Thus, "before a judgment nunc pro tunc may be entered, there must be proof that the proposed judgment was actually rendered or pronounced at an earlier time." Id. (quoting Wilson v. State, 677 S.W.2d 518, 521 (Tex.Crim.App.1984)). When a trial court corrects its records to reflect the truth of what happened in the court, the court is correcting a clerical error, not a judicial error. See Poe, 751 S.W.2d at 876; see also In re Cherry, 258 S.W.3d 328, 333 (Tex.App.-Austin 2008, orig. proceeding) (explaining that a "nunc pro tunc order can only be used to make corrections to ensure that the judgment conforms with what was already determined and not what should have been determined").

These cases illustrate that the question that we must resolve in determining the validity of the trial court's nunc pro tunc judgment is whether the nunc pro tunc judgment truthfully aligns with the judgment that the court originally rendered or, instead, whether the nunc pro tunc judgment changes, through judicial reasoning, the judgment that the court originally rendered. As we have explained above, the record from the revocation hearing indicates that the trial court and the parties understood that the State was proceeding on its amended petition, which sought only revocation of appellant's probation, and not on its original petition, which sought adjudication of his guilt. At the end of the revocation hearing, the trial court stated,

Mr. Hall, the Court having received your pleas of true to Paragraphs 1, 2, 4, and 5, the Court will find those allegations to be true and find that you violated the terms and conditions of your probation.

I'll set your sentence at four years['] confinement in the Institutional Division of the Texas Department of Criminal Justice.

It will be the order of this Court that you be delivered by the sheriff of Tarrant County to the director of the Institutional Division where you'll serve your sentence as required by law.

As this excerpt from the record shows, in orally rendering its judgment, the trial court did not purport to adjudicate appellant's guilt, which is what the original written judgment reflected. Instead, the court unambiguously revoked appellant's probation and sentenced him, and the nunc pro tunc order accurately reflects this judicial reasoning.

Thus, under the authority cited above, we hold that the trial court did not err by entering the nunc pro tunc order and changing the title of the judgment from one adjudicating guilt to one revoking community supervision. Cf. Collins, 240 S.W.3d at 928 ("It is clear from the record of the trial court that there was no clerical *173 error that this judgment nunc pro tunc was correcting. The written judgment perfectly matches the judgment pronounced in court.").

Finally, we note that appellant did not object to the fact that the revocation hearing proceeded on the amended petition. He also did not object in the trial court to any nonconformity between the trial court's oral rendition of judgment that sentenced him to confinement by revoking straight probation and documents that had previously been filed in the case that indicated that he was on deferred adjudication. And appellant concedes that he had notice of the "term and conditions of his probation and [of] his required behavior to avoid being placed in jail."

Conclusion: For all of these reasons, we overrule appellant's first point.FN7

FN7. In his original brief, appellant's sole point stated, "The document entitled Judgment Adjudicating Guilt was not authorized by law...." Because we have held that the trial court did not err by entering its nunc pro tunc order, which replaced the judgment adjudicating guilt with a judgment revoking community supervision, we overrule appellant's point from his original brief.

RESTITUTION

TEXAS COURT OF CRIMINAL APPEALS REMANDED CASE TO COURT OF APPEALS TO DETERMINE WHETHER APPELLANT PRESERVED ERROR FOR APPEAL WHERE APPELLANT PLED TRUE TO THE FAILURE-TO-PAY ALLEGATION WITHOUT RAISING ANY ARGUMENT OR EVIDENCE THAT HE WAS UNABLE TO PAY AND, ON APPEAL, MAKES THAT ARGUMENT FOR THE FIRST TIME.

¶ 12-4-14. **Gipson v. State**, No. PD-1470-11, --- S.W.3d ----, 2012 WL 5503677 (Tex.Crim.App., 11/14/12).

Facts: The trial court revoked appellant's community supervision on the basis of appellant's plea of true to the failure-to-pay allegation alone. The State's motion to revoke proceeded on the sole allegation that appellant had "failed to pay court assessed fees as directed by the Court," to which he pled true. Those "fees" included a court-ordered fine; court costs; and fees for supervision, pre-sentence investigation, and Crime Stoppers. He signed a stipulation of evidence acknowledging that he had violated the terms and conditions of his community supervision by failing to make these payments. Neither the motion to revoke

nor the stipulation of evidence mentioned appellant's financial ability to pay the amounts due. Similarly, during the hearing on the motion to revoke, the parties stood mute regarding appellant's financial ability to pay the amounts due. Finding the failure-to-pay allegation true, the trial court revoked appellant's com-munity supervision and sentenced him to eight years' imprisonment for his underlying conviction of felony assault.

On direct appeal, appellant raised two issues. In his first issue, he urged that the trial court erred in revoking his community supervision because, when a trial court revokes a defendant's community supervision solely for failure to make required payments, Texas Code of Criminal Procedure art. 42.12 § 21(c) requires that the State have proven that a defendant was able to pay and did not, and no evidence showed that appellant was able to pay the amounts due. FN1 See TEX.CODE CRIM. PROC. art. 42.12 § 21(c). We refer to this provision as the "ability-to-pay statute." See id. He asserted that this statute applies to all of the unpaid amounts, including those not specifically listed in it. See id. He also challenged the State's contention that his plea of true satisfied the State's burden of proof. He argued that, although he pled true to the allegation, the State's motion to revoke did not allege that he was able to pay, and, therefore, his plea of true does not constitute evidence that he was able to pay.

FN1. In relevant part, the statute states,
In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, or court costs, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. TEX.CODE CRIM. PROC. art. 42.12 § 21(c).

In his second issue, he argued that the trial court "committed constitutional error" in failing to inquire as to appellant's reasons for not having paid. In support, he cited Bearden v. Georgia, which held that, "in a revocation proceeding for failure to pay a fine," the Fourteenth Amendment requires that "a sentencing court must inquire into the reasons for the failure to pay." 461 U.S. 660, 672 (1983).

Addressing appellant's issues together, the State responded that a defendant's plea of true precludes him from challenging the sufficiency of the evidence to support the trial court's revocation order and that a plea of true, standing alone, supports revocation of community supervision. The State explained that, "in the absence of some challenge by Appellant at the time of the hearing," the State may rely on appellant's plea of true to support any requirements under the ability-to-pay statute and Bearden. See id. at 672.

Sustaining appellant's first issue and not reaching his second, the court of appeals reversed the trial court's judgment. Gipson, 347 S.W.3d at 897. Interpreting appellant's first issue "as a challenge to the sufficiency of the evidence," the court of appeals acknowledged that a plea of true is "generally sufficient to support" revocation. Id. at 896–97 (citing Cole v. State, 578 S.W.2d 127, 128 (Tex.Crim.App.1979). The court stated, however, that "Bearden requires that to revoke community supervision and impose imprisonment, 'it must be shown that the probationer willfully refused to pay or make sufficient bona fide efforts to do so.' " Id. at 896 (quoting Lively v. State, 338 S.W.3d 140, 146 (Tex.App.—Texarkana 2011, no pet.)). The court observed that, because the motion to revoke alleged only failure to make the required payments, appellant's plea of true to that allegation did not satisfy the State's evidentiary burden under the ability-to-pay statute to prove that appellant was able to pay. Id. at 897.

Although it acknowledged that the ability-to-pay statute explicitly includes only the failure to pay fees for appointed counsel, community supervision, and court costs, the court of appeals determined that the statute must be interpreted as also applying to failure to make other payments due under community supervision in order to comply with Bearden 's constitutional requirements. Id. at 896–97. The court determined that it was obligated to implement this due-process requirement because courts must presume that the Legislature intended for statutes to comply with the constitutions of this State and the United States. Id. Based on its interpretation of the ability-to-pay statute, the court determined that the State was required to prove a willful failure to pay, despite appellant's plea of true. Id. It concluded that the record contained no evidence that appellant had willfully refused to pay and that the trial court, therefore, had erred in revoking appellant's community supervision on that basis. Id. at 897.

The State filed a motion for rehearing, contending that the court of appeals had erred by deciding the merits of appellant's sufficiency challenge without first addressing the State's procedural argument. The State asserted that, because appellant had pled true to the allegation that formed the basis of revocation, any potential error was not preserved for appeal. Without opinion, the court of appeals denied the State's motion.

In its petition for discretionary review, the State reurges its direct-appeal arguments. FN2 The State contends that a defendant waives any evidence-insufficiency issue when he pleads true to revocation allegations because no evidentiary hearing is required under those circumstances or in the procedurally similar punishment-enhancement context. See Mitchell v. State, 482 S.W.2d 221, 222–23 (Tex.Crim.App.1972)

(hearing not "mandatory" when defendant pleads true to revocation allegations); Bryant v. State, 187 S.W.3d 397, 402 (Tex.Crim.App.2005) (stipulation to element of enhancement paragraph "barred" sufficiency challenge). The State alternatively contends that, even if appellant did not waive the sufficiency issue, his plea of true alone is sufficient evidence to support revocation. See Wilson v. State, 671 S.W.2d 524, 526 (Tex.Crim.App.1984) ("[A] plea of 'true' does constitute evidence and sufficient proof to support the enhancement allegation.").

FN2. The State's sole issue in its petition for discretionary review asks,

Does a defendant's plea of true to the State's allegations in a motion to revoke community supervision that the defendant failed to pay the court-assessed fine, costs, and fees relieve the State and the trial court of the requirement to establish that no payment was made despite the ability to do so, the failure to pay was willful, and no bona fide effort to pay was made before supervision can be revoked?

The State explains that "[a]ppellant's plea of true not only served to prove what the State alleged but also constituted a waiver."

Appellant responds by also reurging his direct-appeal arguments. He claims that the State had the burden to prove that his failure to pay fees was willful despite his plea of true and that, because the motion to revoke did not allege that he was able to pay the fees, his plea of true does not constitute evidence of his ability to pay.

Held: Remanded for further proceedings

Opinion: This Court has held that a defendant who states that he does not desire to contest a motion to revoke may not complain, on appeal, of a trial court's failure to hear evidence on the motion. See Mitchell, 482 S.W.2d at 222–23; Cole, 578 S.W.2d at128 ("[S]ufficiency of the evidence could not be challenged in the face of a plea of true"). However, these holdings pre-dated Marin v. State, in which we explained that certain requirements and prohibitions are absolute and that certain rights must be implemented unless expressly waived. 851 S.W.2d 275, 279 (Tex.Crim.App.1993). These holdings also pre-dated enactment of the ability-to-pay statute. See TEX.CODE CRIM. PROC. art. 42.12 § 21(c).

In Menefee v. State, we were confronted with the similar issue of whether "the appellant procedurally defaulted his [Texas Code of Criminal Procedure] Article 1.15 sufficiency claim because he made no complaint about" any evidentiary deficiency at trial. 287 S.W.3d 9, 18 (Tex.Crim.App.2009). "Because issues of error preservation are systemic in first-tier review courts," we remanded the question to the court of appeals to decide the question within the Marin framework. Id.; see also, e.g., Patterson v. State, 204 S.W.3d 852, 857 (Tex.App.Corpus Christi 2006, pet. ref'd) (deciding appellant's accomplice-witness-corroboration sufficiency challenge under Texas Code of Criminal Procedure art. 38.14 not subject to default under Marin framework).

As in Menefee, we must remand the State's procedural arguments to the court of appeals to determine whether, by pleading true to an allegation that he failed to pay and by failing to assert his inability to pay, a defendant waives or forfeits a claim that he is unable to pay. See Menefee, 287 S.W.3d at 18. Although the court of appeals failed to address the State's procedural arguments, it did analyze the ability-to-pay statute and federal constitutional requirements in its sufficiency analysis. We, therefore, must evaluate that analysis to the extent that it may impact this case on remand.

Over the last twenty years, three sources of legal authority the federal Constitution as interpreted by Supreme Court precedent; Texas statutes; and Texas common law have addressed the permissibility of revocation or incarceration when a defendant is unable to pay amounts due under community supervision. Analysis of the State's procedural argument may depend on which of these sources governs the substantive issue. Because we disagree with portions of the court of appeals's substantive analysis, and because that analysis may impact its procedural analysis on remand, we discuss the applicable substantive law.

1. Federal–Constitutional Law

Contrary to the court of appeals's conclusion, Bearden does not place an evidentiary burden on the State. Rather, it sets forth a mandatory judicial directive that requires a trial court to (1) inquire as to a defendant's ability to pay and (2) consider alternatives to imprisonment if it finds that a defendant is unable to pay. Bearden, 461 U.S. at 672. The Court stated,

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. Id. (emphasis added). The Court held that, when a defendant "has made all reasonable efforts to pay the

fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." Id. at 668–69.

The Supreme Court reasoned that it could be unconstitutional to deprive a defendant of his liberty when he was unable to pay. Id. at 672–73. Noting that "[d]ue process and equal protection principles converge in the Court's analysis," it concluded that, "[b]y sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence" in violation of the Fourteenth Amendment. Id. at 665, 674.

Appellant raised a Bearden violation by his second issue, contending that the trial court "committed constitutional error" by failing to inquire into the reasons for his failure to pay, but the court of appeals did not reach that issue. See Gipson, 347 S.W.3d at 897 n.2. The court of appeals, however, discussed Bearden in its analysis of appellant's first issue, in which he challenged the sufficiency of the evidence to support revocation, and applied it as the sufficiency standard of review: "Bearden requires that to revoke community supervision and impose imprisonment, 'it must be shown that the probationer willfully refused to pay or make sufficient bona fide efforts to do so[,]' and '[w]e will review the sufficiency of the evidence with this as the standard.' " Gipson, 347 S.W.3d at 896 (quoting Lively, 338 S.W.3d at 146).

We do not read Bearden so broadly for two reasons. First, as discussed, Bearden prescribes a mandatory judicial directive, not a prosecutorial evidentiary burden. Bearden, 461 U.S. at 668–69, 672. Second, Bearden does not categorically prohibit incarceration of indigent defendants as the court of appeals suggests; rather, it permits incarceration when "alternative measures are not adequate to meet the State's interests in punishment and deterrence." Id. By misreading Bearden as imposing an evidentiary burden on the State, the court of appeals erred in applying it as the standard for reviewing appellant's sufficiency claim. On remand, therefore, Bearden will be inapplicable to analysis of appellant's first issue. Only if the court of appeals reaches appellant's second issue must it analyze Bearden. In that event, it must address the State's procedural argument that, although Bearden requires consideration of a defendant's financial circumstances when he is sentenced to imprisonment, appellant's plea of true dispenses with that requirement.

2. Texas Statutory Law

At least a part of appellant's sufficiency claim is governed by the ability-to-pay statute, which requires the State to prove, at a revocation hearing, that a defendant was able to pay and failed to pay certain fees. TEX.CODE CRIM. PROC. art. 42.12 § 21(c). This statute expressly applies to fees for appointed counsel, community supervision, and court costs. Id. The trial court revoked appellant's community supervision, not only for failure to make those payments explicitly listed in the statute, but also for failure to pay a fine and fees for Crime Stoppers and pre-sentence investigation, which are not specifically listed in the statute. See id. The court of appeals determined that the statute applied to all of the amounts unpaid by appellant because the legislative history of the statute revealed that the Legislature intended that it conform to the due-process requirements set forth in Bearden. Id. As discussed, however, the court of appeals erred in construing the due-process requirement described in Bearden as an evidence-sufficiency requirement. See Gipson, 347 S.W.3d at 896. Because the court of appeals misapplied Bearden in its analysis of the ability-to-pay statute, we remand this case so that the court may consider, in light of this opinion, whether the ability-to-pay statute applies to appellant's unpaid amounts that are not explicitly listed in the statute.

If the ability-to-pay statute does not apply to all of the amounts for which appellant's community supervision was revoked, then the court of appeals must consider whether common law would apply to those amounts not statutorily enumerated and, in either event, whether a plea of true waives or forfeits appellant's sufficiency challenge.

3. Texas Common Law

In the event that the court of appeals determines that the ability-to-pay statute does not apply to all of the unpaid amounts, the court may need to determine whether Texas common law would apply to the remaining unpaid amounts to which the statute does not apply.

Applicable common law has varied over the past fifty years. Prior to the 1977 codification of the law pertaining to revocation proceedings involving failure to make required payments, this Court, in reviewing a sufficiency challenge to revocation based on failure to pay, routinely held that the evidence must show (1) that a defendant was able to pay and (2) that he had acted intentionally. See Whitehead v. State, 556 S.W.2d 802, 805 (Tex.Crim.App.1977) ("[A]bsent a showing of a probationer's ability to make the restitution payments, and that his failure was intentional, it is an abuse of discretion for a court to revoke probation on this failure to make payments."); see also McKnight v. State, 409 S.W.2d 858, 859–860 (Tex.Crim.App.1966) (enforcing these common-law requirements); Taylor v. State, 353 S.W.2d 422, 424 (Tex.Crim.App.1962) (same).

In 1977 and continuing until 2007, the Legislature made inability to pay an affirmative defense to revocation. See former TEX.CODE CRIM. PROC.. 42.12 § 8(c), Act of May 28, 1977, 65th Leg., R.S., ch. 342 (S.B.32), §§ 1, 2, effective August 29, 1977. Some of this Court's decisions during that period interpreted the codification as disposing of the common-law requirement that the State prove that a defendant's failure to pay was intentional or willful. See Jones v. State, 589 S.W.2d 419, 421 (Tex.Crim.App.1979) (explaining that 1977 amendment made inability to pay an affirmative defense and holding that, because "there was a complete failure to prove the affirmative defense of inability to pay by a preponderance of the evidence[, i]t was not an abuse of discretion to revoke appellant's probation."); Hill v. State, 719 S.W.2d 199, 201–02 (Tex.Crim.App.1986). At least one decision, however, held that the codification did not dispose of that common-law requirement. See Stanfield v. State, 718 S.W.2d 734, 737–38 (Tex.Crim.App.1986) (holding that, although Legislature had made inability to pay an affirmative defense, "the State still has the burden of proving an alleged failure to pay fees, costs and the like was intentional."). FN3

FN3. In Stanfield, this Court commented that the 1977 amendment that made inability to pay an affirmative defense "may be constitutionally questionable in light of [Bearden]." Stanfield v. State, 718 S.W.2d 734, 735 n.2 (Tex.Crim.App.1986) (referring to Bearden v. Georgia, 461 U.S. 660, 672 (1983)). Regardless of whether the Legislature intended that its 1977 amendment supersede the common-law requirement that the State prove intentional failure to pay, we conclude that the 2007 amendment dispensed with that requirement with respect to the payments listed in the statute because, by its plain language, the ability-to-pay statute requires only that the State demonstrate, by a preponderance of the evidence, that the defendant was able to pay and did not. See TEX.CODE CRIM. PROC. art. 42.12 § 21(c). The question remains whether the statute includes only those payments specifically enumerated or whether it applies to a fine and fees for Crime Stoppers and pre-sentence investigation.

If the ability-to-pay statute does not pertain to revocation for fines and fees for Crime Stoppers and pre-sentence investigation, then the court of appeals must (1) consider whether the common-law requirement has been statutorily superseded or whether it would still apply to those payments and (2) decide how that determination would impact the question of whether appellant's sufficiency claim is procedurally barred. Because the requirements under the ability-to-pay statute may differ from those under common law, resolution of the State's procedural arguments may depend upon which applies. For example, the ability-to-pay statute dictates what the State must show at a "hearing" at which only failure to pay is alleged. TEX.CODE CRIM. PROC. art. 42.12 § 21(c). The court of appeals did not discuss whether appellant's plea of true and stipulation to the allegation would constitute a "hearing" so as to trigger the evidentiary requirements of the ability-to-pay statute. By contrast, under common law, the analysis appears to have turned on whether evidence of a defendant's ability to pay was introduced rather than on whether a "hearing" was held. See, e. g., Jones, 589 S.W.2d at 421.

We agree with the State that the court of appeals's opinion fails to address the State's procedural challenge regarding preservation of appellant's sufficiency claim. A court of appeals must hand down a written opinion "that addresses every issue raised and necessary to final disposition of the appeal." TEX.R.APP. P. 47.1; Keehn v. State, 233 S.W.3d 348, 349 (Tex.Crim.App.2007) (per curiam). "[I]ssues of error preservation are systemic in first-tier review courts"; such issues "must be reviewed by the courts of appeals regardless of whether the issue is raised by the parties." Menefee, 287 S.W.3d at 18; Haley v. State, 173 S.W.3d 510, 515 (Tex.Crim.App.2005). An appellate court "may not reverse a judgment of conviction without first addressing any issue of error preservation." Meadoux v. State, 325 S.W.3d 189, 193 n.5 (Tex.Crim.App.2010). Because the court of appeals did not address the State's procedural questions before reversing the case on insufficiency grounds, we sustain the State's sole issue and reverse the judgment of the court of appeals.

Conclusion: The court of appeals erred in failing to address the State's procedural arguments before reversing the trial court's judgment revoking appellant's community supervision on sufficiency grounds. We reverse the judgment of the court of appeals and remand the case for proceedings consistent with this opinion.

SUFFICIENCY OF THE EVIDENCE

A PLEA OF TRUE TO A PRIOR JUVENILE ADJUDICATION IS SUFFICIENT EVIDENCE TO PROVE THAT CONVICTION FOR ENHANCEMENT PURPOSES.

12-4-1. **Casel v. State**, No. 07-12-0106-CR, MEMORANDUM, 2012 WL 4210419 (Tex.App.-Amarillo, 9/20/12).

Facts: In pleading guilty to the underlying offense (*i.e.* burglary of a habitation), appellant was informed by the trial court that the State was also attempting to enhance the offense via his prior conviction "of [the] felony offense of aggravated robbery in Cause Number 9236–J# 1, County Court at Law Number 1, in Potter County, Texas, on January 14th of 2009." The court then asked appellant: "As to the allegation that you were *finally convicted* of that offense, how do you plead, true or untrue?" (Emphasis added). Appellant

answered, "True." Thereafter, the trial court not only found "that the allegation as to the prior conviction [was] true" but also found the evidence sufficient to establish guilt for the underlying burglary beyond reasonable doubt and accepted the State's recommendation to defer appellant's adjudication of guilt The State later moved to have appellant's guilt adjudicated. The trial court granted that motion, adjudicated appellant guilty of burglarizing a habitation, and sentenced him to 25 years in prison.

Today we are being asked if the evidence was sufficient to prove the allegations contained in an enhancement paragraph. The latter was used to elevate the burglary charge (to which appellant pled guilty) from a felony of the second degree to one of the first degree. Because appellant, Michael Allen Casel, believed that the State failed to present sufficient evidence to prove the enhancement allegation, he could not be convicted of the higher felony. Furthermore, the State allegedly failed to carry its burden by omitting to tender evidence that the prior offense resulted in appellant (who was a juvenile) being committed to the Texas Youth Commission.

Held: Affirmed

Memorandum Opinion: Generally, prior felony convictions may be used to enhance the punishment applicable to a subsequent offense. *See Miles v. State,* 357 S.W.3d 629, 634 (Tex.Crim.App.2011). However, the prior conviction must be final. *Beal v. State,* 91 S.W.3d 794, 796 (Tex.Crim.App.2002). Moreover, an adjudication by a juvenile court that a child engaged in delinquent conduct constituting a felony for which he was committed to the Texas Youth Commission is considered a "final felony conviction" for purposes of enhancement. TEX. PENAL CODE ANN. § 12.42(f) (West Supp.2012). To the extent that appellant pled "true" to the trial court's question about his being "finally convicted" of aggravated assault in cause number 9236–J# 1, appellant implicitly admitted to both of the elements for a final conviction as defined in § 12.42(f). That is, if the prior juvenile adjudication was not a felony and if he had not been committed to the Texas Youth Commission then he could not have legitimately pled true to the matter being a final conviction. *See Menson v. State,* No. 07–09–0221–CR, 2011 Tex.App. LEXIS 1123, at *4 (Tex.App.-Amarillo February 16, 2011, pet. ref'd) (not designated for publication) (involving a prior offense committed when the offender was a juvenile and holding that the appellant's "plea of true to the enhancement paragraph is alone sufficient to show that he had a prior felony conviction").

Conclusion: Nothing of record affirmatively shows either that appellant was not committed to the Youth Commission or that the enhancement allegation was otherwise untrue. *See Ex parte Rich,* 194 S.W.3d 508, 513 (Tex.Crim.App.2006) (stating that a plea of true alone is not sufficient to prove the enhancement allegation when the record affirmatively reflects that the enhancement is improper). Accordingly, the judgment is affirmed.

IN AS ASSAULT WITH BODILY INJURY, ENGAGING IN RECKLESS BEHAVIOR IS NOT THE SAME AS ENGAGING IN RECKLESSLY INJURING SOMEONE.

¶ 12-4-9. **In the Matter of I.L.**, No. 08-10-00273-CV, --- S.W.3d ----, 2012 WL 3195097 (Tex.App.-El Paso, 8/8/12).

Facts: On April 23, 2009, the students in Jose Montoya's art class at Desert Wind Middle School were given their routine bathroom break. The class was made up of both 7th and 8th grade students. Appellant was in 8th grade at the time and I.M., the victim, was in 7th grade.

While the students took their break, Montoya went across the hall to the teachers' facility. When he returned to the classroom he noticed I.M. at the back of the class, "not his normal self." Montoya spoke with the boy, who told him, "The guys threw me in the trash can." I.M. was visibly upset, crying, in distress, and in pain.

Montoya took Appellant and two other boys—E.C. and D.G.—outside the classroom. The trio admitted to throwing I.M. in the trash can. Appellant claimed they did it because I.M. was "little." The boys also said it was a joke and they were just playing. Montoya gave the boys a chance to apologize, but Appellant simply said, "I'm sorry, because you're just such a little shit." In Montoya's opinion, Appellant showed no remorse for his actions and even laughed while he apologized. Montoya then headed to file a report when Marco Tristan, the Dean of Instruction, walked down the hallway. Tristan took the three boys down to his office.

Once inside his office, Tristan asked the boys what happened. The boys were "very apologetic." Appellant claimed he had been the main instigator and asked Tristan to dismiss the other two boys. Tristan also spoke with I.M. As a result of their conversation, Tristan decided that I.M. had not been playing. He called I.M.'s mother, the parents of the three boys, and the Socorro Independent School District's Police Department.

The following day, Officer Jorge Murillo of the Socorro Independent School District Police Department went to Desert Wind Middle School to investigate the incident. He spoke with I.M.'s parents and also with I.M. directly. Officer Murillo testified that he observed red marks on the back of I.M.'s neck as well as a scratch on the left side of his stomach.

I.M.'s mother testified that her son was physically injured as a result of the incident. The boy's neck and waist area were hurt, and there were marks and bruises on his neck and hand. There was also swelling and it took three days for her son to recover.

I.M. testified that when he left the classroom, the restroom was full and he waited outside. Appellant, E.C., and D.G., grabbed him by his neck and pushed him head first into a trash can. I.M. resisted by putting his hands on the edge, but the three boys overpowered him. He fell down, hit his head, and heard his neck pop. As he tried to pull himself out, the boys shoved him down a second time. He again hit his head and heard his neck pop. At one point, the trash can was knocked over. The scenario was repeated yet a third time. During the incident, the boys were laughing at him and he was crying.

The defense called E.C. and D.G. as witnesses. E.C. testified that he, Appellant, D.G., and I.M. were playing with a soccer ball in Montoya's class just before the restroom break. According to E.C., the boys were all playing around and having a good time. No one was angry at I.M. or trying to hurt him. E.C. testified that the boys grabbed I.M. and put him inside the trash can, but he reiterated that all of the boys, including I.M. were "playing," and that no one punched or kicked the trash can during the incident. E.C. also testified that he did not intend to hurt I.M. when he pushed him into the trash can. D.G.'s testimony essentially tracked that of E.C. All of the boys were engaged in horseplay in Montoya's classroom just before the bathroom break. D.G. had no ill will against I.M. and had no reason to want to hurt him.

Appellant testified in his own defense, claiming that all four boys were horsing around with a soccer ball prior to their break. He heard someone say, "Let's—let's throw [I.M.] to the trash can." Appellant admitted that he grabbed I.M. by the legs and threw him into the trash can but he did not intend to hurt him. He did not see I.M. crying, but he knew the boy was upset during the incident. Appellant apologized, but he denied cussing when doing so.

On August 21, 2009, the State filed a petition alleging that Appellant engaged in delinquent conduct. The live pleading at trial alleged Appellant:

[D]id then and there intentionally, knowingly or recklessly cause bodily injury to [I.M.] by throwing the said [I.M.] into a trash can, in violation of Section 22.01 of the Texas Penal Code.

The case proceeded to a jury trial.

After hearing all the evidence, the jury found Appellant engaged in delinquent conduct by committing assault causing bodily injury against I.M. and adjudicated Appellant as delinquent. The presiding judge signed and filed an order of adjudication consistent with the jury's verdict and set a disposition hearing. After considering the evidence and the pre-disposition report, the court found that Appellant's parents "provide strong family support" and were able to provide Appellant with "suitable supervision at home." It determined that Appellant was not in need of rehabilitation and issued a final judgment without disposition.

On appeal, Appellant raises two issues. In Issue One, he complains of charge error. In Issue Two, he challenges the legal sufficiency of the evidence to prove he acted with the requisite mental state.

In Issue One, Appellant contends that the abstract portion of the jury charge wrongfully included the full statutory definition of "recklessly," one of the three possible mental states for assault causing bodily injury. According to Appellant, the definition should have been limited to the language relating to the "result of conduct" and that, as submitted, the charge allowed the jury to adjudicate him delinquent for engaging in reckless behavior (a conduct-oriented charge) rather than recklessly injuring the complainant (a result-oriented charge). Appellant contends this amounts to fundamental and reversible error.

Held: Affirmed

Opinion: We begin our inquiry by examining whether there was error in the charge. The petition alleged that Appellant committed assault by "intentionally, knowingly, or recklessly" causing bodily injury to I.M. in violation of Section 22.01 of the Texas Penal Code. The full statutory definitions of "intentionally," "knowingly," and "recklessly" provide:

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's

standpoint.TEX.PENAL CODE ANN. § 6.03(a), (b), & (c)(West 2011).

Here, the abstract portion of the charge limited the definitions of "intentionally" and "knowingly" to the result-of-conduct language:

A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. [Emphasis in original].

However, the charge included the full statutory definition of "recklessly." In other words, the definition included the phrase "with respect to circumstances surrounding his conduct or the result of his conduct." [Emphasis added].

On appeal, Appellant's complaint is based on the italicized text. He maintains that the italicized language should have been excluded because, as written, the charge allowed the jury to adjudicate him delinquent for engaging in reckless behavior (a conduct-oriented charge) rather than recklessly injuring the complainant (a result-oriented charge). We agree.FN1

There are three conduct elements which may be involved in any offense: (1) the nature of the conduct; (2) the result of the conduct; and (3) the circumstances surrounding the conduct. See Hughes v. State, 897 S.W.2d 285, 295 n. 14 (Tex.Crim.App.1994), cert. denied, 514 U.S. 1112, 115 S.Ct. 1967, 131 L.Ed.2d 857 (1995); Cook v. State, 884 S.W.2d 485, 487 (Tex.Crim.App.1994). As the Court of Criminal Appeals laid out in Hughes and Cook, a proper jury charge limits the definitions of the applicable culpable mental states to include only the language regarding the relevant conduct elements. See Hughes, 897 S.W.2d at 295–96; Cook, 884 S.W.2d at 491–92.

In Cook, the defendant was charged with murder and convicted of the lesser included offense of voluntary manslaughter. Cook, 884 S.W.2d at 485, 487. The definitions of the applicable mental states—"intentionally" and "knowingly"—included the full statutory definitions. Id. The defendant objected to the charge, arguing that because murder is a result-of-conduct offense, the definitions of the culpable mental states should have been limited to the result language only. Id. at 486. The Court of Criminal Appeals agreed and held that because murder is a result-of-conduct offense, the trial court erred in refusing to limit the definitions of the culpable mental states. Id. at 491–92.

Similarly, in Hughes, a jury convicted the defendant of capital murder of a peace officer based on a jury charge which included the following definitions of the applicable mental states:

A person acts 'intentionally,' or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts 'knowingly,' or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. [Emphasis in original].Hughes, 897 S.W.2d at 294.

The appellant complained that the italicized portions allowed the jury "to find criminal liability from the knowledge of conduct or circumstances surrounding the conduct (i.e.; intent to pull trigger) rather than from the consequences or results of the conduct (intent to cause death of deceased)." Id. at 295. The Court of Criminal Appeals looked to the indictment and found that the offense could be viewed to include two of the three conduct elements: (1) the result-of-conduct element (appellant intentionally or knowingly caused the death of the deceased); and (2) the circumstances surrounding the conduct (appellant knew the deceased was a peace officer). Id. at 295. But because the offense did not contain a nature-of-conduct element, the court found the trial court erred by failing to limit the definitions of the culpable mental states to the result and circumstances of conduct elements. Id. at 296, citing Cook, 884 S.W.2d at 491–92.

Conclusion: Assault causing bodily injury is a result-oriented offense. Therefore, the proper definitions of the culpable mental states (intentionally, knowingly, recklessly) should be limited to include only the result of conduct element. See Hughes, 897 S.W.2d at 295; Cook, 884 S.W.2d at 489 n. 3. Accordingly, the trial court erred. See Hughes, 897 S.W.2d at 296; Cook, 884 S.W.2d at 491–92. We must now analyze the error for harm. See Ngo v. State, 175 S.W.3d 738, 743 (Tex.Crim.App.2005).

After analyzing the error in light of all four Almanza factors, we conclude that Appellant has not suffered egregious harm. We overrule Issue One.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

AMENDED PETITION (FILED AFTER CHILD'S EIGHTEEN BIRTHDAY) RELATED BACK TO THE FILING DATE OF THE ORIGINAL PETITION (FILED BEFORE CHILD'S EIGHTEEN BIRTHDAY), AND AS A RESULT, THE

STATUTE'S REQUIREMENT THAT SUIT BE FILED BEFORE AGE EIGHTEEN HAD BEEN MET.

¶ 12-4-5. **In re B.R.H.**, No. 01-12-00146-CV, --- S.W.3d ----, 2012 WL 3775759 (Tex.App.-Hous. (1 Dist.), 8/28/12).

Facts: B.R.H. was born on August 4, 1993. In September 2009, on the date of the alleged offense, B.R.H. was sixteen years old. In June 2011, approximately two months before B.R.H.'s eighteenth birthday, the State filed an original petition alleging that he had engaged in delinquent conduct. The State amended its original petition in September 2011. The amended petition was approved by the Grand Jury for Determinate Sentencing.

In September 2011, B.R.H. moved to dismiss the case against him, contending that the juvenile trial court lacked jurisdiction because he had turned eighteen the month before. After a hearing, the trial court denied the motion to dismiss. The trial court's order denying the motion to dismiss includes the following findings:

1. The Petition ... was filed on June 6, 2011, alleging that the offense occurred prior to the Respondent's eighteenth birthday, which was August 4, 2011, the Respondent having been born on August 4, 1993.

2. The Respondent was detained on the offense ... and released from detention on May 19, 2011.... The State of Texas filed its petition on June 6, 2011 and the first setting on this case was August 18, 2011, after the date that the respondent turned eighteen years old.

3. The State of Texas was in possession of the offense report in this case in December 2010 and did not charge the Respondent until May 18, 2011. The State of Texas failed to request that the case be docketed prior to Respondent turning eighteen years old.

4. On September 30, 2011 the State of Texas filed an Amended Petition which was approved by the Grand Jury for Determinate Sentencing....

5. The State of Texas has used due diligence in prosecuting Respondent.

We review a trial court's interpretation of the law de novo. State v. Shumake, 199 S.W.3d 279, 284 (Tex.2006). A trial court has no discretion in determining what the law is or properly applying the law. In re Tex. Dep't of Family & Protective Servs., 210 S.W.3d 609, 612 (Tex.2006). A trial court abuses its discretion if it fails to properly interpret the law or applies the law incorrectly. Id. Mandamus relief is available to correct a clear abuse of discretion when there is no adequate remedy by appeal. In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex.2004).

B.R.H. contends that the trial court abused its discretion in denying his motion to dismiss. Relying on the Texas Supreme Court's decision in In re N.J.A., 997 S.W.2d 554 (Tex.1999), he maintains that the trial court lacks jurisdiction over the underlying case because he turned eighteen in August 2011, and the State failed to act with diligence in prosecuting the case. B.R.H. also contends that the trial court's order is not supported by the record because the State's amended petition, filed after his eighteenth birthday, and "extinguished" the original petition.

Held: Mandamus Relief Denied

Opinion: A juvenile court has exclusive, original jurisdiction over all proceedings involving a person who has engaged in delinquent conduct as a result of acts committed before age seventeen. See TEX. FAM.CODE ANN. §§ 51.02, 51.04 (West 2011). A juvenile court does not lose jurisdiction when a juvenile turns eighteen, but its jurisdiction becomes limited. The juvenile court retains limited jurisdiction to either transfer the case to an appropriate court or dismiss the case. N.J.A., 997 S.W.2d at 556; In re T.A.W., 234 S.W.3d 704, 705 (Tex.App.-Houston [14th Dist.] 2007, pet. denied). However, the Texas Family Code provides an exception to this rule, which applies to incomplete proceedings. In re V.A., 140 S.W.3d 858, 859 (Tex.App.-Fort Worth 2004, no pet.). Section 51.0412, which the legislature enacted after the Court decided N.J.A., provides:

The court retains jurisdiction over a person, without regard to the age of the person, who is a respondent in an adjudication proceeding, a disposition proceeding, a proceeding to modify disposition, or a motion for transfer of determinate sentence probation to an appropriate district court if:

(1) the petition or motion to modify was filed while the respondent was younger than 18 years of age or the motion for transfer was filed while the respondent was younger than 19 years of age;

(2) the proceeding is not complete before the respondent becomes 18 or 19 years of age, as applicable; and

(3) the court enters a finding in the proceeding that the prosecuting attorney exercised due diligence in an attempt to complete the proceeding before the respondent became 18 or 19 years of age, as applicable.
TEX. FAM.CODE ANN. § 51.0412 (West Supp.2011).

The State filed its original petition before B.R.H. turned eighteen, and the proceedings were incomplete at the time of B.R.H.'s eighteenth birthday. After a hearing, the trial court entered a finding that the prosecutor used due diligence in attempting to complete the proceedings before B.R.H.'s eighteenth birthday, and

concluded that section 51.0412 authorized it to retain jurisdiction.

B.R.H. objected to the trial court's jurisdiction in September 2011, before any adjudication hearing. See id. (requiring respondent to object to jurisdiction due to age at adjudication hearing or discretionary transfer hearing, if any). B.R.H. contends that, despite section 51.0412's exception for incomplete proceedings, the Supreme Court's holding in N.J.A. requires dismissal of the suit against him for lack of jurisdiction. Under N.J.A., a juvenile court retains jurisdiction over the person after he turns eighteen, but that jurisdiction is limited to either dismissing the case or transferring the case to another court under Texas Family Code section 54.02(j). See 997 S.W.2d at 555–56. Enacted after the Supreme Court's decision in N.J.A., section 51.0412 abrogated N.J.A. by expanding juvenile court jurisdiction for cases that meet the statutory criteria.

B.R.H. contends that this proceeding fails to meet the statutory criteria for two reasons. First, citing Texas Rule of Civil Procedure 65, B.R.H. maintains that the State's amended petition, filed in September 2011, "extinguishes" the original petition—filed before his eighteenth birthday. Second, he challenges the trial court's finding that the State exercised due diligence in prosecuting the case against him.

Texas Rule of Civil Procedure 65 provides that a substituted instrument takes the place of prior pleadings and "the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of, and exception be taken to the action of the court, or unless it be necessary to look to the superseded pleading upon a question of limitation." TEX.R. CIV. P. 65. Amended pleadings relate back to the time of filing of the original petition. See id.; TEX. FAM.CODE ANN. 51.17 (rules of civil procedure apply to juvenile cases unless in conflict with juvenile justice code); cf. Carrillo v. State, 480 S.W.2d 612, 615 (Tex.1972) (observing that strict prohibition against amended pleadings applicable to criminal cases does not apply to juvenile proceedings); In re J.A.D., 31 S.W.3d 668, 671 (Tex.App.-Waco 2000, no pet.) (relation back doctrine inapplicable to motion to modify filed after end of probation period in juvenile case because rules of civil procedure conflicted with juvenile justice code provision permitting modifications only during term of probation). The amendment in this case, containing an approval by the Grand Jury for Determinate Sentencing, relates back to the date of the original petition—June 2011. It is undisputed that the State filed the original petition before B.R.H.'s eighteenth birthday. Because the amended petition relates back to the filing date of the original petition—before B.R.H. turned eighteen years old—the statute's requirement that suit be filed before age eighteen has been met. See TEX. FAM.CODE ANN. § 51.0412(1).

B.R.H.'s challenge to the trial court's finding that the prosecutor acted diligently in attempting to complete the proceeding before B.R.H.'s eighteenth birthday is similarly unavailing. The Texas Family Code does not define diligence as it is used in section 51.0412. "Due diligence" has been defined, however, in other contexts. See e.g., Bawcom v. State, 78 S.W.3d 360, 363 (Tex.Crim.App.2002) (holding due diligence may be shown by pre-capias diligence); In re N.M.P., 969 S.W.2d 95, 100 (Tex.App.-Amarillo 1998, no pet.) (explaining that due diligence generally requires that party not simply sit on their rights or duties). Due diligence requires the State to "move ahead" or "reasonably explain delays." In re N.M.P., 969 S.W.2d at 100; see also In re C.B., No. 2–05–341–CV, 2006 WL 1791731, at *2 (Tex.App.-Fort Worth June 29, 2006, no pet.) (mem. op., not designated for publication). Due diligence does not require the State to "do everything perceivable and conceivable to avoid delay." In re N.M.P., 969 S.W.2d at 100; In re C.B., 2006 WL 1791731, at *2.

Diligence is usually a question of fact that the trial court determines in light of the circumstances of each case. See In re J.C.C., 952 S.W.2d 47, 49–50 (Tex.App.-San Antonio 1997, no pet.) (reviewing trial court's findings on diligence for abuse of discretion). When reviewing factual issues, we defer to the trial court's findings unless the record contains no evidence to support them. Marcus v. Smith, 313 S.W.3d 408, 417 (Tex.App.-Houston [1st Dist.] 2009, no pet.). Even if we would have decided the matter differently, we may not disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. Id. This is particularly the case with requests for mandamus relief. "[A]n appellate court may not deal with disputed areas of fact in an original mandamus proceeding." Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 714 (Tex.1990). Mandamus relief will not lie if the record contains legally sufficient evidence both against and in support of the trial court's decision; weighing conflicting evidence is a trial court function. In re Pirelli Tire, L.L.C, 247 S.W.3d 670, 686 (Tex.2007, orig.proceeding); Marcus, 313 S.W.3d at 417.

B.R.H. maintains that a two-month delay in setting the first hearing—after an approximately five-month delay in bringing charges against him—does not demonstrate diligence in prosecution. But the record contains ample evidence that the State has moved forward with its prosecution by filing charges within the limitations period and about eighteen months after the alleged delinquent conduct took place, and by promptly amending the petition to request determinate sentencing upon grand jury approval. We hold that some evidence supports the trial court's finding that the State used due diligence in its prosecution of the

case. See e.g., Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 60 (Tex.1991) (court of appeals may not disturb trial court ruling on disputed fact question in mandamus proceeding); Brady, 795 S.W.2d at 714; West v. Solito, 563 S .W.2d 240,245 (Tex.1978).

Conclusion: We conclude that the juvenile court did not abuse its discretion in denying B.R.H.'s motion to dismiss and in retaining the case for adjudication as a pending action under Texas Family Code section 51.0412. We therefore deny the request for mandamus relief.

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IN DISCRETIONARY TRANSFER TO ADULT COURT, JUVENILE WAS NOT ENTITLED TO A HEARING ON HIS MOTION TO SUPPRESS BECAUSE JUVENILE COURT NEED NOT RESOLVE ADMISSIBILITY OF EVIDENCE PRIOR TO CHILD'S TRANSFER TO ADULT COURT.

¶12-4-4. **Navarro v. State**, MEMORANDUM, No. 01-11-00139-CR, 01-11-00140-CR, , 2012 WL 3776372 (Tex.App.-Hous. (1 Dist.), 8/30/12).

Facts: After appellant, then fifteen years of age, was charged with the murder of Matthew Haltom FN4 and the aggravated assaults of Joe Eodice FN5 and Joel Arnold, the State filed a Petition for Discretionary Transfer in the juvenile court, requesting that it waive its jurisdiction and certify appellant to stand trial as an adult in criminal district court.

FN4. Trial court cause number 10–DCR–05236A; appellate cause number 01–11–00139–CR.

FN5. Trial court cause number 08–DCR–050238; appellate cause number 01–11–00140–CR.

Before the transfer hearing, appellant moved to suppress certain statements that he had made to police officers. The State argued that the juvenile court was not required to consider the motion because a transfer hearing is "only a baseline finding as to whether or not [the juvenile court believes] that there is probable cause" that appellant committed the offense. The juvenile court agreed that appellant was not entitled to a hearing on his motion, and, at the conclusion of the transfer hearing, it granted the State's petition.

Held: Affirmed

Memorandum Opinion: At a transfer and certification hearing, a juvenile court need only determine if there is "probable cause" that the juvenile committed the charged offense. In re D.W.L., 828 S.W.2d 520, 524 (Tex.App.-Houston [14th Dist.] 1992, no writ). The transfer and certification hearing is a nonadversary preliminary hearing, in which the juvenile court may rely upon hearsay as well as written and oral testimony. L.M.C. v. State, 861 S.W.2d 541, 542 (Tex.App.-Houston [14th Dist.] 1993, no writ). A transfer hearing "does not require the fine resolution of conflicting evidence that an adjudication of guilt or innocence requires"; the hearing's only goal is to determine the proper forum in which to adjudicate the defendant's guilt or innocence. Id.

Numerous courts of appeals have held that juvenile courts are not required to consider the admissibility of statements at a transfer hearing. See, e.g., In re T.L.C., 948 S.W.2d 41, 44 (Tex.App.-Houston [14th Dist.] 1997, no writ); L.M.C., 861 S.W.2d at 542; In re M.E.C., 620 S.W.2d 684, 686–87 (Tex.Civ.App.-Dallas 1981, no writ); In re Y.S., 602 S.W.2d 402, 404–05 (Tex.Civ.App.-Amarillo 1980, no writ). For example, in L.M.C., a juvenile defendant argued that the juvenile court erred in admitting his confession at a transfer hearing. 861 S.W.2d at 541–42. The court noted that the juvenile court was required to consider whether there was "evidence on which a grand jury may be expected to return an indictment," and a grand jury is not bound by the rules of evidence in making a probable cause determination. Id. at 542 (citing TEX. FAM.CODE ANN. § 54.02(f)(3) (Vernon 1986)). The court further noted that a juvenile defendant's constitutional rights would not be violated by considering the confession during a transfer hearing because:

A transfer hearing does not require the fine resolution of conflicting evidence that an adjudication of guilt or innocence requires.... Moreover, appellant's rights will be fully protected when the case reaches trial, whether it ultimately takes place before the juvenile court or the criminal district court.

In support of his argument that the juvenile court erred in not holding a hearing on his motion to suppress evidence, appellant relies on two cases from the San Antonio Court of Appeals. See In re S.A.R., 931 S.W.2d 585 (Tex.App.-San Antonio 1996, writ denied); R.E.M. v. State, 541 S.W.2d 841 (Tex.App.-San Antonio 1976, writ ref d n.re.). In S.A.R., the juvenile defendant argued that his statements were inadmissible at the transfer hearing because they were obtained in violation of section 51.09(b) of the Texas Family Code, which provides that "the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if" the child is read his legal rights and told the consequences and sentencing possibilities of admitting to various crimes. 931 S.W.2d at 587 (citing TEX. FAM.CODE ANN. § 51.09(b) (Vernon Supp.1996)). The State argued that it was unnecessary to consider the admissibility of the statements because "a waiver and certification hearing" is "not adjudicatory in nature." Id. The court held that the plain language of section 51.09(b), which refers to "any future proceeding," requires the juvenile court to consider the admissibility of the juvenile defendant's statements at the transfer hearing. Id.

The court in S.A.R. relied in part on R.E.M., in which the juvenile defendant argued that the juvenile court

improperly relied on witness testimony from a previous transfer hearing in waiving its jurisdiction. R.E.M., 541 S.W.2d at 845. The juvenile defendant relied on the evidentiary rule that "the testimony of a witness given at a prior trial of the same case" may only be introduced into evidence if the witness is otherwise unable to testify. Id. (citing Houston Fire & Cas. Ins. Co. v. Brittian, 402 S.W.2d 509, 510 (Tex.1966)). The court held that there is "no reason why the rule should not be applied in a hearing for the purpose of determining whether a youthful offender is going to be deprived of the protection afforded by the juvenile court system." Id. The court concluded that the juvenile court erred in relying on the prior witness testimony, and it remanded the case to juvenile court. Id. at 847.

Appellant notes that the Juvenile Justice Code was amended to delete the provision that the juvenile court, during a transfer hearing, "shall consider, among other matters ... whether there is evidence on which a grand jury may be expected to return an indictment." Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 106(a), 1995 Tex. Gen. Laws 2517, 2591. However, as noted in L.M.C ., the consideration of grand-jury evidence was only one justification for not requiring juvenile courts to rule on the admissibility of evidence during a transfer hearing. 861 S.W.2d at 541–42. The Texas Family Code still only requires a juvenile court to determine whether there is probable cause that the juvenile committed the alleged offense. TEX. FAM.CODE ANN. § 54.02(a)(3). Thus, a transfer hearing remains a "nonadversarial preliminary hearing" and "appellant's rights will be fully protected when the case reaches trial." L.M.C., 861 S.W.2d at 542; see also State v. Lopez, 196 S.W.3d 872, 874 (Tex.App.-Dallas 2006, pet. ref'd) (holding juvenile defendant was not entitled to jury trial at transfer hearing because, during such hearing, juvenile court "is not required to conform to all of the requirements of a criminal trial or even of the usual administrative hearing" and transfer hearing "is comparable to a criminal probable cause hearing and the court need not resolve evidentiary conflicts beyond a reasonable doubt").

Conclusion: Accordingly, we opt to agree with our sister court in L.M.C. and hold that the juvenile court was not required to resolve the admissibility of appellant's statements before the transfer hearing. We overrule appellant's second issue.