Review of Recent Juvenile Cases (2007)

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

To determine the admissibility of a probation officer's report at disposition, in light of *Crawford,* the trial court must balance the defendant's interest in confronting and cross-examining an adverse witness against the State's interest in not having to produce that witness. [In the Matter of M.P.](07-1-14)

On February 7, 2007, the Waco Court of Appeals concluded that a juvenile has no Sixth Amendment or *Article I, Section 10 of the Texas Constitution* right of confrontation during the disposition phase of a juvenile delinquency proceeding, however, he does have a limited right of confrontation under the *Due Process Clause of the Fourteenth Amendment,* which requires a balancing test.

¶ 07-1-14. **In the Matter of M.P.**, No. 10-06-00008-CV, 2007 Tex.App.Lexis 921 (Tex.App.— Waco, 2/7/07).

Facts: During the disposition phase, the State offered a Juvenile Court Investigation Report prepared by M.P.'s juvenile probation officer, Sha'Vonne Brown-Lewis. The report contains general background information, M.P.'s referral history, the history of services provided by the juvenile department, a narrative of "impressions" reviewing M.P.'s history and briefly stating the probation officer's recommendation that M.P. be committed to TYC, and a concluding section reviewing the dispositional alternatives and providing a list of reasons TYC is the appropriate disposition.

The report is supported by a collection of "over thirty" disciplinary referrals M.P. has received at different schools. n1 These referrals largely consist of brief narratives prepared by the teachers who made the referrals describing the conduct and the actions taken. Some referrals include witness statements. Others include documentary evidence.

> n1 The report itself is nine pages, excluding the cover page. There are about ninety pages of supporting documentation appended to the report. "Over thirty" referrals appears to be a significant understatement. "Over sixty" would be more accurate.

M.P. objected when the State offered the report in evidence on the basis that "information both contained in the report and, frankly, the totality of Ms. Brown's testimony" violate *Crawford v. Washington* and the *confrontation clauses of the federal* and *state constitutions*. Counsel specifically identified Brown-Lewis's references to M.P.'s various referrals as a matter of concern.

After taking the matter under advisement, the court advised the parties that it would overrule the objection based on the reasoning of Indiana's Fourth District Court of Appeals in *C.C. v. State. 826 N.E.2d 106 (Ind. Ct. App. 2005)*. The court followed the recommendation of Brown-Lewis and committed M.P. to TYC.

Held: Affirmed

Lead Opinion: Juvenile delinquency proceedings must provide constitutionally mandated due process of law. *In re Gault, 387 U.S. 1, 13, 87 S. Ct. 1428, 1436, 18 L. Ed. 2d 527 (1967)*; *L.G.R. v. State, 724 S.W.2d 775, 776, 30 Tex. Sup. Ct. J. 213 (Tex. 1987)*; *Hidalgo v. State, 983 S.W.2d 746, 751 (Tex. Crim. App. 1999)*; *In re J.S.S., 20 S.W.3d 837, 841-42 (Tex. App.--El Paso 2000, pet. denied)*. However, the process due a juvenile offender does not equate to that due an adult offender in every instance. *See Gault, 387 U.S. at 14, 87 S. Ct. at 1436*; *In re J.R.R., 696 S.W.2d 382, 383-84, 28 Tex. Sup. Ct. J. 606 (Tex. 1985)* (per curiam); *Hidalgo, 983 S.W.2d at 751-52*; *J.S.S., 20 S.W.3d at 842*.

The Court of Criminal Appeals has adopted a balancing test it distilled from eight foundational decisions of the Supreme Court of the United States "to determine whether and to what degree" a particular constitutional protection must be afforded a juvenile. n4 *Lanes v. State, 767 S.W.2d 789, 794 (Tex. Crim. App. 1989)*; *accord Hidalgo, 983 S.W.2d at 751*. This test requires an appellate court to "balance[] the function that [the asserted] constitutional or procedural right serve[s] against its impact or degree of impairment on the unique processes of the juvenile court." *Lanes, 767 S.W.2d at 794*; *accord Hidalgo, 983 S.W.2d at 751-52*; *J.S.S., 20 S.W.3d at 842-44*; *S.D.G. v. State, 936 S.W.2d 371, 378-79 (Tex. App.--Houston [14th Dist.] 1996, writ denied)*.

> n4 The eight foundational decisions in chronological order: (1) *Haley v. Ohio, 332 U.S. 596, 601, 68 S. Ct. 302, 304, 92 L. Ed. 224 (1948)* (coerced confession cannot be used against juvenile); (2) *Kent v. United States, 383 U.S. 541, 557, 86 S. Ct. 1045, 1055, 16 L. Ed. 2d 84 (1966)* (juvenile entitled to procedural protections in transfer hearing); (3) *In re Gault, 387 U.S. 1, 31-55, 87 S. Ct. 1428, 1445-58, 18 L. Ed. 2d 527 (1967)* (juvenile has due process rights of notice, counsel, confrontation, cross-examination, and privilege against self-incrimination); (4) *In re Winship, 397 U.S. 358, 368, 90 S. Ct. 1068, 1075, 25 L. Ed. 2d 368 (1970)* (State must prove allegation of delinquent conduct beyond a reasonable doubt); (5) *McKeiver v. Pennsylvania, 403 U.S. 528, 545, 91 S. Ct. 1976, 1986, 29 L. Ed. 2d 647 (1971)* (juvenile has no constitutional right to jury trial); (6) *Breed v. Jones, 421 U.S. 519, 528-29, 95 S. Ct. 1779, 1785, 44 L. Ed. 2d 346 (1975)* (double jeopardy protections apply to juveniles); (7) *Schall v. Martin, 467 U.S. 253, 281, 104 S. Ct. 2403, 2419, 81 L. Ed. 2d 207 (1984)* (pretrial detention of juvenile does not violate due process); (8) *New Jersey v. T.L.O., 469 U.S. 325, 341-42, 105 S. Ct. 733, 742-43, 83 L. Ed. 2d 720 (1985)* (*Fourth Amendment* does not require probable cause to justify school search).

The Court recognized in *Hidalgo* that the justifications for affording fewer constitutional protections to juveniles than adults have lessened in recent years as the juvenile justice system has become more punitive than rehabilitative.

In adopting this balancing test this Court also announced a desire to "dispel the antiquated and unrealistic resistance to procedural safeguards" in the juvenile court system. We observed that due to the scarcity of treatment programs, professional training, and financial resources the juvenile system had become more punitive than rehabilitative. Rather than ignore these realities we chose to balance the "aspirations of the juvenile court and the grim realities of the system."

Recent amendments to the Juvenile Justice Code change[d] juvenile adjudication and punishment, causing the "grim realities" to be even more salient. As this Court recently recognized in *Blake v. State, 971 S.W.2d 451, 460 (Tex. Crim. App. 1998)*, juveniles now face consequences similar to those faced by adults. Most apparent is the fact juveniles may now be subject to a forty-year term of imprisonment. *Blake* recognized some of the legislative changes making the juvenile system more punitive than rehabilitative:

[T]he legislature expanded the definitions of delinquent conduct, expanded the list of felony offenses that authorize criminal proceedings for juveniles over the age of fourteen, authorized confinement in the Texas Department of Criminal Justice for various grades of felony and habitual felony conduct, categorized certain adjudications as "final felony convictions" that can be used as enhancements for repeat offenders, removed provisions forbidding the maintenance of centralized photograph and fingerprint records, repealed laws about sealing and destruction of juvenile records, and mandated the use of the Texas Rules of Criminal Evidence and the evidentiary provisions of Chapter 38 of the Code of Criminal Procedure instead of their civil counterparts for judicial proceedings involving juveniles. *Blake, 971 S.W.2d at 460 n.28*.

These recent legislative changes continue to erode the original justifications for denying juveniles the same procedural protections as adults. *Hidalgo, 983 S.W.2d at 751-52* (other citations and footnote omitted).

Accordingly, we must determine whether the disposition phase of a juvenile delinquency proceeding is the type of proceeding to which the Sixth Amendment right of confrontation n5 applies. If so, then we must examine the impact the application of that right would have on the juvenile justice system. *See id. at 752*; *J.S.S., 20 S.W.3d at 842*.

> n5 In *Hidalgo*, the Court of Criminal Appeals addressed a juvenile's Sixth Amendment right to counsel in connection with a court-ordered psychological examination under *section 54.02(d)* of the Juvenile Justice Code. *See Hidalgo v. State, 983 S.W.2d 746, 748 (Tex. Crim. App. 1999)* (citing *TEX. FAM. CODE ANN. § 54.02(d)*).

Text Omitted...

Sixth Amendment Summary

There is an indisputable Sixth Amendment right to counsel during the punishment phase and an indisputable right to be present during the punishment phase, the latter of which is a part of the Sixth Amendment right of confrontation. However, there is only a limited Sixth Amendment right to a jury during the punishment phase under *Apprendi* at its progeny. And most state and federal courts which have directly addressed the issue have concluded that there is no Sixth Amendment right of confrontation at sentencing.

Nevertheless, the Court of Criminal Appeals and a significant number of the intermediate appellate courts in Texas have at least implicitly concluded that a defendant has a Sixth Amendment right of confrontation at sentencing by addressing the merits of such claims or concluding that such claims were waived.

Here, because this is a juvenile proceeding, we need not determine the precise parameters of the Sixth Amendment right of confrontation during the punishment phase of an adult criminal trial. We do conclude, however, that at a minimum an adult criminal defendant has a constitutional right of confrontation at sentencing: (1) in cases in which the State seeks imposition of a sentence on the basis of findings beyond those "reflected in the jury verdict or admitted by the defendant"; *see Booker, 543 U.S. at 232, 125 S. Ct. at 749*; *McGill, 140 P.3d at 942*; and (2) whenever the State calls a witness to testify at punishment. *See Allen, 397 U.S. at 338, 90 S. Ct. at 1058*; *Garcia, 149 S.W.3d at 140*; *Baltierra, 586 S.W.2d at 556*; *Kessel, 161 S.W.3d at 45*; *C.T.C., 2 S.W.3d at 410*.

Impact on Juvenile Proceedings

Having determined that there is at least a limited Sixth Amendment right of confrontation during the punishment phase of an adult criminal trial, we now examine the impact the application of that right would have on the juvenile justice system. *See Hidalgo, 983 S.W.2d at 752*; *J.S.S., 20 S.W.3d at 842*.

The Texas juvenile justice system requires courts to balance the need for public safety and punishment for criminal conduct with the medical, educational and rehabilitative needs and the best interests of the juvenile delinquent, while simultaneously ensuring that his "constitutional and other legal rights" are protected. *See TEX. FAM. CODE ANN. § 51.01* (Vernon 2002). Among other purposes, the juvenile justice system is supposed to:

> . provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
>
> . provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions; and
>
> . achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents.
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> *Id. § 51.01(2)(C), (3), (5)*.

There appears to be only one potential fact issue to be determined during the disposition phase of a juvenile proceeding which may permit a disposition more severe than authorized by findings "reflected in the jury verdict [from the adjudication phase]." n11 *See Booker, 543 U.S. at 232, 125 S. Ct. at 749.* That issue is whether the juvenile engaged in "habitual felony conduct." *See TEX. FAM. CODE ANN. § 54.04(m)* (Vernon Supp. 2006). n12

> n11 There are numerous findings which may affect a juvenile's disposition in some manner, but such findings will not alter the applicable "punishment range." *See, e.g., TEX. FAM. CODE ANN. § 54.04(g)* (Vernon Supp. 2006) (deadly weapon finding), *§ 54.0406* (Vernon 2002) (finding that juvenile possessed, used, or exhibited handgun); *§ 54.041(b)* (Vernon Supp. 2006) (restitution), *§ 54.042* (Vernon Supp. 2006) (license suspension); *see also Harris v. United States, 536 U.S. 545, 568-69, 122 S. Ct. 2406, 2420, 153 L. Ed. 2d 524 (2002)* (finding which increases minimum punishment need not be submitted to jury under *Apprendi*); *Surredin, 165 S.W.3d 751, 753 n.2 (Tex. App.--San Antonio 2005, no pet.)* (same).
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> n12 Habitual felony conduct is conduct violating a penal law of the grade of felony, other than a state jail felony, if:
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> (1) the child who engaged in the conduct has at least two previous final adjudications as having engaged in delinquent conduct violating a penal law of the grade of felony;
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> (2) the second previous final adjudication is for conduct that occurred after the date the first previous adjudication became final; and
>
> (3) all appeals relating to the previous adjudications considered under Subdivisions (1) and (2) have been exhausted.

TEX. FAM. CODE ANN. § 51.031(a) (Vernon 2002).

Nevertheless, under *Apprendi* and its progeny, a finding that a juvenile engaged in "habitual felony conduct" is nothing more than a finding that the juvenile has been previously and sequentially adjudicated of at least two prior felonies. Such a finding does not invoke the Sixth Amendment right to jury trial recognized in *Apprendi. See 530 U.S. at 490, 120 S. Ct. at 2362-63* ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added).

Because there are no findings to be made in the disposition phase which would invoke the Sixth Amendment right to jury trial recognized by *Apprendi* and its progeny and because of the importance of effectively addressing the medical, educational and rehabilitative needs and the best interests of the juvenile delinquent as recognized by the Juvenile Justice Code, we conclude that a juvenile has no Sixth Amendment right of confrontation during the disposition phase. *See C.C., 826 N.E.2d at 111*; *Romeo C., 40 Cal.Rptr.2d at 89-91*. Such a conclusion preserves the flexibility inherent in the design of the juvenile justice system for ensuring that the needs of each child are adequately addressed in the disposition phase.

Nevertheless, the Juvenile Justice Code expressly recognizes that a juvenile must be provided a "fair hearing" and his or her "constitutional and other legal rights" must be "recognized and enforced." *TEX. FAM. CODE ANN. § 51.01(6)*. Therefore, we hold that a juvenile has a limited right of confrontation under the *Due Process Clause of the Fourteenth Amendment* rather than under the *Sixth Amendment*. *Cf. Gagnon, 411 U.S. at 782-86, 93 S. Ct. at 1760-62*; *Morrissey, 408 U.S. at 487-89, 92 S. Ct. at 2603-04*; *Diaz, 172 S.W.3d at 670-71*; *Smart, 153 S.W.3d at 121*.

Due Process Right of Confrontation

The Supreme Court in *Morrissey* explained that this "process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *408 U.S. at 489, 92 S. Ct. at 2604*; *accord Diaz, 172 S.W.3d at 670-71*; *Smart, 153 S.W.3d at 121*. The Court discussed this due process right of confrontation in more detail in *Gagnon*.

An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements. *411 U.S. at 782 n.5, 93 S. Ct. at 1760 n.5*; *accord Diaz, 172 S.W.3d at 671*.

Therefore, the Supreme Court's jurisprudence regarding the Sixth Amendment right of confrontation, and particularly *Crawford*, has no application to the disposition phase of a juvenile delinquency proceeding. *See Diaz, 172 S.W.3d at 672*; *Smart, 153 S.W.3d at 120-21*. Instead, the due process right of confrontation described in *Gagnon* applies. *Id.*; *see also People v. Johnson, 121 Cal. App. 4th 1409, 18 Cal. Rptr. 3d 230, 232 (Cal. Ct. App. 2004)*; *People v. Turley, 109 P.3d 1025, 1026 (Colo. Ct. App. 2004)*; *Jenkins v. State, 2004 Del. LEXIS 549, at *8-9 (Del. 2004)* (not designated for publication); *Young v. United States, 863 A.2d 804, 807-08 (D.C. 2004)*; *Peters v. State, 919 So. 2d 624, 626-28 (Fla. Ct. App. 2006, review granted)*; *State v. Rose, 2006 Ida. App. LEXIS 54, 2006 WL 1459803, at *4 (Idaho Ct. App. 2006, review granted)*; *Reyes v. State, 853 N.E.2d 1278, 1281-83 (Ind. Ct. App. 2006)*; *State v. Abd-Rahmaan, 154 Wn.2d 280, 111 P.3d 1157, 1160-61 (Wash. 2005)*.

Under the due process right of confrontation described in *Morrissey* and *Gagnon*, a defendant has "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Gagnon, 411 U.S. at 786, 93 S. Ct. at 1762* (quoting *Morrissey, 408 U.S. at 489, 92 S. Ct. at 2604*); *accord Ex parte Taylor, 957 S.W.2d 43, 44 (Tex. Crim. App. 1997)* (per curiam); *Diaz, 172 S.W.3d at 670*; *Smart, 153 S.W.3d at 121*. Thus, the trial court must weigh the defendant's interest in confronting and cross-examining an adverse witness against the State's interest in not having to produce that witness, "particularly focusing on the indicia of reliability of the hearsay offered." *Taylor, 957 S.W.2d at 46* (citing *United States v. McCormick, 54 F.3d 214 (5th Cir. 1995))* (other citations omitted). This determination must be made on a case-by-case basis. *Taylor, 957 S.W.2d at 46*; *see also Gagnon, 411 U.S. at 788-91, 93 S. Ct. at 1763-64*; *United States v. Bell, 785 F.2d 640, 642-43 (8th Cir. 1986)*; *Downie v. Klincar, 759 F. Supp. 425, 429 (N.D. Ill. 1991)*.

Texas Constitution

M.P. also contends that the admission of the juvenile probation officer's report violated his right of confrontation under *article I, section 10 of the Texas Constitution.*

Article I, section 10 provides in pertinent part, "In all criminal prosecutions the accused . . . shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor." *TEX. CONST. art. I, § 10*.

Although M.P. observes some textual differences between this provision and the *Sixth Amendment*, he does not cite any authority which directly supports a proposition that the right of confrontation under the Texas Constitution varies in any appreciable manner from that provided in the *Sixth Amendment*. Rather, Texas courts have consistently interpreted these provisions as providing the same protection. *See, e.g., Ex parte Johnson, 654 S.W.2d 415, 421, 26 Tex. Sup. Ct. J. 484 (Tex. 1983)* (orig. proceeding); *Lagrone v. State, 942 S.W.2d 602, 614 (Tex. Crim. App. 1997)*; *Gomez v. State, 183 S.W.3d 86, 91 (Tex. App.--Tyler 2005, no pet.)*.

Therefore, assuming without deciding that the protections of *article I, section 10* apply to a juvenile offender in any instance, we hold that the right of confrontation under *article I, section 10* does not apply to the disposition phase of a juvenile delinquency proceeding just as we have previously determined that the Sixth Amendment right of confrontation does not apply.

Application

Under *Morrissey* and *Gagnon*, the trial court must balance the defendant's interest in confronting and cross-examining an adverse witness with the State's interest in not having to produce that witness. *Taylor, 957 S.W.2d at 46*; *see also United States v. Rondeau, 430 F.3d 44, 48 (1st Cir. 2005)*; *United States v. Martin, 382 F.3d 840, 844-45 (8th Cir. 2004)*; *Barnes v. Johnson, 184 F.3d 451, 454 (5th Cir. 1999)*; *Rose, 2006 Ida. App. LEXIS 54, 2006 WL 1459803, at *5*; *Reyes, 853 N.E.2d at 1283*; *Abd-Rahmaan, 111 P.3d at 1161-62*. Here, the trial court erred because it failed to conduct this balancing inquiry. We must determine whether this error requires reversal. *See In re D.I.B., 988 S.W.2d 753, 758-59, 42 Tex. Sup. Ct. J. 467 (Tex. 1999)*.

According to the Juvenile Justice Code, "[t]he requirements governing an appeal are as in civil cases generally." *TEX. FAM. CODE ANN. § 56.01(b)* (Vernon Supp. 2006). Most courts which have discussed the appropriate harm analysis have concluded that the harm analysis applicable in civil appeals (*Rule of Appellate Procedure 44.1*) applies to a juvenile delinquency appeal unless the appellant received a determinate sentence. *See In re J.H., 150 S.W.3d 477, 485 (Tex. App.--Austin 2004, pet. denied)*; *In re D.V., 955 S.W.2d 379, 380 (Tex. App.--San Antonio 1997, no pet.)*; *In re D.Z., 869 S.W.2d 561, 565-66 (Tex. App.--Corpus Christi 1993, writ denied)*; *but cf. In re L.R., 84 S.W.3d 701, 707 (Tex. App.--Houston [1st Dist.] 2002, no pet.)* (expressly declining to decide what

harm analysis applies for a case involving "non-determinate sentencing"). Because the court did not impose a determinate sentence, we will apply the harm analysis of *Rule 44.1*.

Rule 44.1(a) permits reversal for error only if the error: "(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals." *TEX. R. APP. P. 44.1(a)*.

Though the issue has apparently not been decided in Texas, numerous courts in other jurisdictions have found such error harmless in cases in which the hearsay evidence was sufficiently reliable. *See, e.g., United States v. Kelley, 446 F.3d 688, 692 (7th Cir. 2006)* (arresting officer's testimony and offense report); *United States v. Hall, 419 F.3d 980, 987 (9th Cir. 2005)* ("Hall's interest in excluding [medical records and statements made for purposes of diagnosis or treatment] was thus weak"); *United States v. Morris, 140 F. App'x 138, 142-43 (11th Cir. 2005)* (per curiam) (not designated for publication) (written report submitted to probation officer by defendant's case manager at halfway house which was admissible as business record); *State ex rel. Simpson v. Schwarz, 2002 WI App 7, P 22, 250 Wis. 2d 214, 640 N.W.2d 527, P 22 (Wis. Ct. App. 2002)* (good cause requirement "is always met when the evidence offered in lieu of an adverse witness's live testimony would be admissible under the Wisconsin Rules of Evidence"); *see also United States v. Aspinall, 389 F.3d 332, 344 (2d Cir. 2004)* (no balancing required where evidence admissible under recognized hearsay exception); *United States v. Redd, 318 F.3d 778, 784-85 (8th Cir. 2003)* (upholding district court's implicit findings with regard to balancing test for "documentary hearsay evidence"); *Williams v. Johnson, 171 F.3d 300, 306-07 (5th Cir. 1999)* (failure to conduct balancing test harmless because defendant did not dispute parole violation, proved by parole officer's affidavit, but rather sought to prove reasons for violation).

Here, the juvenile probation officer's report was admissible in the disposition phase under a statutory exception to the hearsay rule. *See TEX. FAM. CODE ANN. § 54.04(b)* (Vernon Supp. 2006). Thus, the Legislature has determined that such reports have some degree of reliability for purposes of determining the appropriate disposition in a particular case. In fact, such reports have been required for the disposition phase of juvenile delinquency proceedings since at least 1973. n13 *See* Act of May 25, 1973, 63d Leg., R.S., ch. 544, § 54.04(b), 1973 Tex. Gen. Laws 1460, 1478. Our research has disclosed at least one appellate decision which has addressed the reliability of such reports. *See In re JV-512016, 186 Ariz. 414, 923 P.2d 880 (Ariz. Ct. App. 1996)*. There, the court concluded that the juvenile court did not abuse its discretion by accepting (1) hearsay statements regarding extraneous offenses contained in the juvenile probation report and (2) the juvenile's admissions to a clinician that he had committed these extraneous offenses contained in the clinician's report "as reliable sources of dispositional fact." *Id. at 884*.

> n13 Juvenile social histories were first expressly required by statute in 1967 for hearings to transfer a juvenile delinquency proceeding to another county or to waive juvenile court jurisdiction and transfer the child to an adult criminal court in felony cases where the child was 15 or older. *See* Act of May 24, 1967, 60th Leg., R.S., ch. 475, § 6(d), 1967 Tex. Gen. Laws 1082, 1083 (repealed 1973).

The report required by *section 54.04(b)* is very similar to the presentence investigation report required in most felony cases. *See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9* (Vernon 2006). Courts have long held that such reports have sufficient indicia of reliability to aid a court in determining the appropriate sentence. *See, e.g., United States v. Marin-Cuevas, 147 F.3d 889, 895 (9th Cir. 1998)*; *United States v. Montoya-Ortiz, 7 F.3d 1171, 1180 (5th Cir. 1993)*; *People v. Otto, 26 Cal. 4th 200, 109 Cal. Rptr. 2d 327, 26 P.3d 1061, 1067-69 (Cal. 2001)*; *State v. Crossman, 1994 Tenn. Crim. App. LEXIS 652, at *14-15 (Tenn. Crim. App. 1994)*; *State v. Caldwell, 154 Wis. 2d 683, 454 N.W.2d 13, 18 (Wis. Ct. App. 1990)*; *see also Fryer v. State, 68 S.W.3d 628, 630-33 (Tex. Crim. App. 2002)* (approving trial court's consideration of punishment recommendation by victim contained in PSI); *Brown v. State, 478 S.W.2d 550, 551 (Tex. Crim. App. 1972)* ("To suggest that the judge should not use the

information in the probation report because it contains 'hearsay statements' is to deny the obvious purpose of the statute.").

Finally, we note that numerous courts have found no due process violation arising from a trial court's consideration of a PSI report so long as the defendant is given a reasonable opportunity to review the report before the hearing and the opportunity to dispute the accuracy of information in the report and present controverting evidence. *See United States v. Inglesi, 988 F.2d 500, 502 (4th Cir. 1993)*; *United States v. Musa, 946 F.2d 1297, 1306-08 (7th Cir. 1991)*; *see also TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(d)*, *(e)*; *DuBose v. State, 977 S.W.2d 877, 880-81 (Tex. App.--Beaumont 1998, no pet.)* (discussing defendant's burden to dispute accuracy of information in PSI); *Garcia v. State, 930 S.W.2d 621, 623-24 (Tex. App.--Tyler 1996, no pet.)* (same); *Hernandez v. State, 900 S.W.2d 835, 839 (Tex. App.--Corpus Christi 1995, no pet.)* (same); *Stancliff v. State, 852 S.W.2d 639, 641 (Tex. App.--Houston [14th Dist.] 1993, pet. ref'd)* (same), *overruled on other grounds by Whitelaw v. State, 29 S.W.3d 129 (Tex. Crim. App. 2000)*.

Section 54.04(b) requires a juvenile court to provide counsel for the child with access to any reports the court will consider before the disposition hearing. *TEX. FAM. CODE ANN. § 54.04(b)*. To exercise the limited right of confrontation we have recognized herein, a juvenile may subpoena any necessary witnesses to challenge the accuracy of any information contained in any reports to be offered under *section 54.04(b)*. *See In re M.R., 5 S.W.3d 879, 881-82 & n.3 (Tex. App.--San Antonio 1999, pet. denied)* (describing limited right of confrontation available for transfer/release hearing under *section 54.11* of the Juvenile Justice Code).

Conclusion: The juvenile probation officer's report admitted during the disposition phase of M.P.'s trial contains sufficient indicia of reliability to allow us to conclude that the court's failure to conduct the balancing test required for the admission of hearsay evidence without violating the limited due process right of confrontation described in *Morrissey* and *Gagnon* did not "probably cause the rendition of an improper judgment." *See Kelley, 446 F.3d at 692*; *Hall, 419 F.3d at 987*; *Morris, 140 F. App'x at 142-43*; *Schwarz, 2002 WI App 7, P 22, 250 Wis. 2d 214, 640 N.W.2d 527, P 22*; *see also Aspinall, 389 F.3d at 344*.

Therefore, we overrule M.P.'s sole issue and affirm the judgment.

FELIPE REYNA

Justice

Before Chief Justice Gray,

Justice Vance, and

Justice Reyna

(Chief Justice Gray issuing a separate opinion)

(Justice Vance dissenting)

DISSENT BY: BILL VANCE

DISSENT: I agree with Justice Reyna's preservation determination and his application of the due process right of confrontation, n1 but I respectfully disagree with the blanket conclusion that a juvenile has no Sixth Amendment right of confrontation during the disposition phase.

n1 Justice Reyna is the designated author under our Internal Administrative Rules. Chief Justice Gray's opinion is a concurring opinion.

In *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*, the Supreme Court resuscitated the *Sixth Amendment's Confrontation Clause*. As Justice Reyna recognizes, Texas courts have applied it in the punishment phase. *Ante at 11-12*; *e.g., Russeau v. State, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005), cert. denied, 126 S. Ct. 2982, 165 L. Ed. 2d 990 (2006)* (applying *Crawford* to introduction of prison incident and disciplinary reports and concluding that their introduction violated *Confrontation Clause*). And at least one other state's highest court has expressly applied *Crawford* to the punishment phase. *See Rodgers v. State,* So. 2d , , 2006 Fla. LEXIS 2542, 2006 WL 3025668 (Fla. Oct. 26, 2006).

I would extend those holdings to a juvenile adjudication's disposition phase. n2 The juvenile system has "become more punitive than rehabilitative." *Hidalgo v. State, 983 S.W.2d 746, 751 (Tex. Crim. App. 1999)*. Juveniles now face consequences similar to adults; for example, they can be subject to a forty-year term of imprisonment. *Id.* (citing *TEX. FAM. CODE ANN. § 54.04(d)(3)(A)*). As a result, I believe that the balancing test employed to determine the constitutional protection afforded to a juvenile in a disposition hearing should tilt toward providing constitutional protections such as the Sixth Amendment confrontation right articulated in *Crawford*:

The juvenile is guaranteed the same constitutional rights as an adult in a criminal proceeding because a juvenile-delinquency proceeding seeks to deprive the juvenile of his liberty. *In re Winship, 397 U.S. 358, 359, 90 S. Ct. 1068, 1070, 25 L. Ed. 2d 368 (1970)*. Neither the *Fourteenth Amendment* nor the *Bill of Rights* is for adults alone. *In re Gault, 387 U.S. at 13, 87 S. Ct. at 1436. State v. C.J.F., 183 S.W.3d 841, 847 (Tex. App.--Houston [1st Dist.] 2005, pet. denied)* (citations omitted); *see In re J.S.S., 20 S.W.3d 837, 841-44 (Tex. App.--El Paso 2000, pet. denied)* (applying Fifth Amendment privilege against self-incrimination to juvenile disposition phase); *see also In re S.M., 207 S.W.3d 421, 425-26 (Tex. App.--Fort Worth 2006, no pet. h.)* (Livingston, J., concurring) (noting conflict between *Family Code section 54.11(d)* and *Crawford's Confrontation Clause* protections and "the potential magnitude of the result of a transfer hearing with the lack of protection for a juvenile's right to cross-examine the witnesses who testify against him via untested written reports").

n2 "'[D]isposition is a euphemism for sentencing [] and is used to honor the non-criminal character of the proceedings.'" *In re K.T., 107 S.W.3d 65, 67 (Tex. App.--San Antonio 2003, no pet.)* (quoting *In re C.S., 804 A.2d 307, 309 n.2 (D.C. App. 2002))*.

Because I believe that a juvenile should be afforded the Sixth Amendment confrontation right in the disposition phase and that the disciplinary referrals containing teachers' narratives are testimonial statements (and thus indistinguishable from the incident and disciplinary reports in *Russeau*), I would find a Confrontation Clause violation by the trial court's admission of the disciplinary referrals and then proceed to a Confrontation-Clause error harm analysis. n3 *See McClenton v. State, 167 S.W.3d 86, 94-95 (Tex. App.--Waco 2005, no pet.)*; *see also Davis v. State, 203 S.W.3d 845, 849-53 (Tex. Crim. App. 2006)*.

n3 Because I believe that a juvenile should be afforded the Sixth Amendment confrontation right in the disposition phase, and because of the quasi-criminal nature of juvenile proceedings, I would not apply the harm analysis for civil appeals. I note that one court has applied a criminal harm analysis in a non-determinate juvenile appeal. *See In re K.W.G., 953 S.W.2d 483, 488 (Tex. App.--Texarkana 1997, pet. denied)*. Meanwhile, the supreme court and others have reserved the question. *See In re D.I.B., 988 S.W.2d 753, 756, 42 Tex. Sup. Ct. J. 467 (Tex. 1999)*; *In re L.R., 84 S.W.3d 701, 707 (Tex. App.--Houston [1st Dist.] 2002, no pet.)*.

I respectfully dissent.