CASELAW UPDATE

Pat Garza
Associate Judge
386th District Court

Fact Situation
Who does a PO work for?

D.R. participated in a Challenge Boot Camp Program while under the custody of the El Paso County Juvenile Probation Department. D.R. reported that a Challenge Officer struck him in the back with a cell door. When the incident occurred, the Officer was under the Probation Department's employ.

D.R.'s mother filed suit against El Paso County alleging that the perpetrator was an agent, servant, representative, or employee of the County, and was acting within the scope of his employment when he committed the alleged act.

Is an employee of the El Paso Juvenile Probation Department an "employee" of El Paso County under the TTCA?

No

Although El Paso Juvenile Probation Department personnel are paid by and receive certain employment benefits from El Paso County, the County does not have the legal right to control and supervise the details of juvenile probation personnel. As a result, the proper defendant should be the El Paso County Juvenile Board, which is a separate entity apart from the County.

El Paso County v. Solorzano

McCulley v. State
Tex.App.-Ft. Worth, 8/18/11

THE MERE FACT THAT AN INTERROGATION BEGINS AS NONCUSTODIAL DOES NOT PREVENT CUSTODY FROM ARISING LATER IN THE INTERROGATION.

In the Matter of M.A.C.
Tex.App.-Eastland, 4/14/11

THE REQUIREMENT THAT A STATEMENT MUST BE SIGNED BY THE CHILD WITH NO LAW ENFORCEMENT OFFICER OR PROSECUTING ATTORNEY PRESENT, DOES NOT APPLY TO VIDEO STATEMENTS.

TFC 51.095(a)
Part 1

(a) Notwithstanding Section 51.09, the statement of a child is admissible in evidence in any future proceeding concerning the matter about which the statement was given if:

(1) the statement is made in writing under a circumstance described by Subsection (d) and:

(A) the statement shows that the child has at some time before the making of the statement received from a magistrate a warning that:

(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(iv) the child has the right to terminate the interview at any time;

(B) and:

(i) the statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child; and

TFC 51.095(a)
Parts 2-5

(2) the statement is made orally and the child makes a statement of facts or circumstances that are found to be true, which conduct tends to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed;

(3) the statement was res gestae of the delinquent conduct or the conduct indicating a need for supervision or of the arrest;

(4) the statement is made:

- **(A) in open court at the child's adjudication hearing;**
- **(B) before a grand jury considering a petition, under Section 53.045, that the child engaged in delinquent conduct; or**
- **(C) at a preliminary hearing concerning the child held in compliance with this code, other than at a detention hearing under Section 54.01; or**

(5) the statement is made orally under a circumstance described by Subsection (d) and the statement is recorded by an electronic recording device, including a device that records images, and:

- **(A) before making the statement, the child is given the warning described by Subdivision (1)(A) by a magistrate, the warning is a part of the recording, and the child knowingly, intelligently, and voluntarily waives each right stated in the warning;**

Chappel v. State
Tex.App.-Dallas, 6/20/11

JUVENILE MISDEMEANOR OFFENSE ADMISSIBLE IN ADULT PUNISHMENT HEARING.

Vaughns v. State
Tex.App.-San Antonio, 3/17/11

THE TEXAS LEGISLATURE DID NOT INTEND FOR JUVENILE ADJUDICATIONS TO BE FINAL FELONY CONVICTIONS IN ORDER TO ENHANCE A SENTENCE FOR A HABITUAL OFFENDER.

In the Matter of W.E.H
Tex.App.-Fort Worth, 5/16/11

AN ORDER TRANSFERRING A JUVENILE'S DETERMINATE SENTENCE PROBATION TO AN ADULT DISTRICT COURT IS NOT AN APPEALABLE ORDER.

In the Matter of V.M.S
Tex.App.-Eastland, 7/14/11

A VIOLATION OF THE STATUTORY REQUIREMENT ALLOWING PARENTS TO HAVE ACCESS TO THEIR CHILD DURING A CONFESSION (IN A J.P.O.) MAY NOT BE RAISED BY THE CHILD ON APPEAL.

In the Matter of B.T.
Tex.App.-Dallas, 7/20/11

IN A DETERMINATES SENTENCE TRANSFER HEARING, THE TRIAL COURT DOES NOT LOSE JURISDICTION BECAUSE THE RELEASE AND TRANSFER HEARING IS HELD MORE THAN SIXTY DAYS AFTER THE REFERRAL WAS RECEIVED BY THE COURT AS REQUIRED BY TFC§54.11(H).

§ 54.11. Release or Transfer Hearing

(h) The hearing on a person who is referred for transfer under Section 244.014(a) 61.079(a), Human Resources Code, shall be held not later than the 60th day after the date the court receives the referral.

In the Matter of R.L
Tex.App.-San Antonio, 9/14/11

THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES ("TDFPS"), AS A DELINQUENT JUVENILE'S CUSTODIAN, HAS SOVEREIGN IMMUNITY AGAINST A TRIAL COURT'S ASSESSING COURT COSTS, FEES, AND RESTITUTION.

Morales v. State
Tex.App.-Dallas, 12/20/10

A TRIAL COURT CAN TAKE JUDICIAL NOTICE OF ITS OWN ORDERS, RECORDS, AND JUDGMENTS RENDERED IN CASES INVOLVING THE SAME PARTIES.

Tienda v. State
Tex.App.-Dallas, 12/17/10

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING *DETAILS* OF THE MYSPACE PAGES IN EVIDENCE.

Benton v. State
Tex.App.-Texarkana, 2/4/11

THE STATE MAY USE CIRCUMSTANTIAL EVIDENCE TO PROVE THAT THE DEFENDANT IS THE SAME PERSON NAMED IN AN ALLEGED PRIOR CONVICTION.

Ex Parte Yekaterina Tanklevskaya
Tex.App.-Hous. (1 Dist.) 5/26/11

IN A PLEA TO THE COURT, COUNSEL HAS A DUTY TO INFORM APPLICANT (DEFENDANT) OF NOT JUST THE POSSIBLE IMMIGRATION CONSEQUENCES IN GENERAL TERMS (AS IS CONTAINED IN PLEA PAPERWORK), BUT MUST SPECIFICALLY INFORM APPLICANT IF IT WOULD AFFECT HIS INADMISSIBILITY OR SUBSEQUENT REMOVAL AND FAILURE TO DO SO IS INEFFECTIVE ASSISTANCE OF COUNSEL.

Limon v. State
Tex.Crim.App., 6/15/11

FOURTH AMENDMENT DOES NOT PROHIBIT A MINOR CHILD FROM CONSENTING TO ENTRY INTO A HOME WHEN THE RECORD SHOWS THE OFFICER'S BELIEF IN THE CHILD'S AUTHORITY TO CONSENT IS REASONABLE UNDER THE FACTS KNOWN TO THE OFFICER.

In re A.S
Tex.App.-San Antonio, 4/6/11

AN OFFICER IS NOT REQUIRED TO PROVE AND ACTUAL VIOLATION OF A LAW OR ORDINANCE TO JUSTIFY AN INVESTIGATORY STOP, HIS EXPRESSED BELIEF (REASONABLE GROUNDS) THAT A PERSON IS VIOLATING A STATUTE OR ORDINANCE IS SUFFICIENT.

Beechum v. State
Tex.App.-San Antonio, 2/2/11

JUVENILE PROBATION OFFICERS ARE CONSIDERED GOVERNMENT AGENTS FOR THE PURPOSES OF IMPLEMENTING THE PLAIN VIEW DOCTRINE IN A SEARCH.

Adams v. State
Tex.App.-Dallas, 11/07/11

HEARING NOT REQUIRED FOR TRIAL COURT TO ORDER SEX OFFENDER REGISTRATION WHERE RESPONDENT FAILED TO SUCCESSFULLY COMPLETE TREATMENT.

Tex. Code Crim. Proc. Ann. Art. 62.352(c)

… Following successful completion of treatment, the respondent is exempted from registration under this chapter unless a hearing under this subchapter is held on motion of the state, regardless of whether the respondent is 18 years of age or older, and the court determines the interests of the public require registration…

State v. Rhinehart
Tex.Crim.App., 3/9/2011

A CRIMINAL DISTRICT COURT'S REVIEW OF A JUVENILE COURT'S TRANSFER ORDER TO IT, BY WAY OF MOTION TO QUASH, WAS UPHELD BY THE COURT OF CRIMINAL APPEALS, BUT ONLY WITH RESPECT TO QUASHING THE INDICTMENT.

J.D.B. v. North Carolina
U.S. Supreme Court

Police show up at a school to question a 13-year-old special education student about a string of neighborhood burglaries. The boy was escorted to a school conference room, where he was interrogated in the presence of school officials. The student's parents were not contacted, and he was not given any Miranda warnings before he confessed to the crimes. In a motion to have his confession suppressed he argued that because he was effectively in police custody when he incriminated himself, he was entitled to Miranda protections.

NORTH CAROLINA SUPREME COURT
Holding

The North Carolina Supreme Court held that it could not consider the boy's age or special education status in determining whether he was in custody, and as a result, under a *Reasonable Person* Standard, he was not in custody and not entitled to Miranda warnings.

Should courts consider the age of a juvenile suspect in deciding whether he or she is in custody for Miranda purposes?

J.D.B. v. North Carolina
U.S. Supreme Court Argument

SPEAKERS:

Roy A. Cooper III

Attorney General of North Carolina, for the respondent

Justice Antonin Scalia
Justice Ruth Bader Ginsburg
Justice Anthony Kennedy
Justice Sonia Sotomayor
Justice Elena Kagan
Justice Stephen G. Breyer

Yes
Age is a factor for Miranda purposes

"It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis,"

Reasonable Person +Age
To Determinae Custody for Miranda

So long as the child's age was known to the officer, or would have been objectively apparent to a reasonable officer, including age in the custody analysis is consistent with the *Miranda* test's objective nature. This does not mean that a child's age will be a determinative, or even a significant, factor in every case, but it is a reality that courts cannot ignore.

J.D.B. v. North Carolina
U.S. Supreme Court

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.

THANK YOU
AND
HAVE A SAFE TRIP HOME

CASELAW UPDATE

25th Annual Juvenile Law Conference
ROBERT O. DAWSONJUVENILE LAW INSTITUTE

February 27-29, 2012 • Grand Hyatt • San Antonio, Texas

Pat Garza
Associate Judge/Referee
386TH District Court
Bexar County, Texas
(210)335-1154

PAT GARZA
Associate Judge
386th District Court
235 E. Mitchell St.
San Antonio, Texas 78210

EDUCATION

Board Certified – Juvenile Law – by the Texas Board of Legal Specialization
1980: Admitted to the Texas Bar.
1977 - 1980: Jurist Doctor, South Texas College of Law, Houston, Texas.
1977: B.A., University of Texas at Austin, Texas.

PROFESSIONAL

2009 – Present: Texas Board of Legal Specialization Juvenile Law Exam Commissioner
Fellow of the Texas Bar Foundation
Editor – State Bar Juvenile Law Section Report.
2007 Franklin Jones Best Continuing Legal Education Article Award by the State Bar College Board of Directors. Police Interactions with Juveniles.
2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation. Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent.
1999 - Present, Juvenile Court Associate Judge/Referee, 386th Judicial District Court.
1997 - 1999, Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.
1989 - 1997, Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.
Fall 1997, Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

SPEECHES AND PRESENTATIONS

- Police Interactions with Juveniles – Arrest, Confessions, Search and Seizure; Advanced Juvenile Law Certification Seminar, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2011.
- Juvenile Overview; 2011 Summer School Course, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2011.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 24th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2011.
- Caselaw Updates; 24th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2011.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Advanced Juvenile Law Certification Seminar, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2010.
- Juvenile Search & Seizure; Nuts and Bolts of Juvenile Law, Sponsored by The Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, Texas, July, 2010.
- Juvenile Search & Seizure; 36TH Annual Advanced Criminal Law Course, Sponsored by The State Bar of Texas, San Antonio, Texas, July, 2010.
- Juvenile Search and Seizure; 23rd Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2010.

- Proper Detainment and Questioning of Juveniles; 2009 Annual Criminal and Civil Law Update, Sponsored by Texas District and County Attorney's Association, Corpus Christi, Texas, September, 2009.
- Caselaw Updates; Annual Juvenile Justice Symposium, Presented by the Dispute Resolution System, Lubbock, Texas, March, 2009.
- Caselaw Updates; 22nd Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2009.
- Juvenile Confessions; 22nd Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2009.
- School Searches and Confessions; 4th Annual Collin County Juvenile Law Seminar, Sponsored by Juvenile Law Section of the CCBA, and 417th Judicial District Court, Plano, Texas, October, 2008.
- School Search & Seizure; 34th Annual Advanced Criminal Law Course, Sponsored by The State Bar of Texas, San Antonio, Texas, July, 2008.
- Juvenile Search & Seizure; Texas College for Judicial Studies, Sponsored by the Texas Center for the Judiciary, Richardson, Texas, April, 2008.
- Caselaw Updates; 21ST Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2008.
- Advanced Search and Seizure; 21st Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2008.
- Juvenile Search & Seizure, Live Nationwide Broadcast via Webinar, Sponsored by LegalSpan, January 10, 2008.
- Legislative Updates; Nuts and Bolts of Juvenile Law 2007, Sponsored by the Texas Juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, July 2007.
- Arrests, Searches, Confessions, Juvenile Processing Offices, and Waiver of Rights. Nuts and Bolts of Juvenile Law 2007, Sponsored by the Texas juvenile Probation Commission and the Juvenile Law Section of the State Bar of Texas, Austin, July 2007.
- Caselaw Updates; 20th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2007.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 20th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2007.

PUBLICATIONS

- "Any Detectable Amount of Alcohol": Taking a Breath or Blood Specimen of a Juvenile. Texas Bar Journal, Volume 75, Number 2, February, 2012. A legal article analyzing the taking of a Breath or Blood Specimen of a Juvenile.
- Police Interactions with Juveniles. 20th Annual Juvenile Law Conference Article, February, 2007. This article won the Franklin Jones Best Continuing Legal Education Article for 2007, as voted on by the State Bar College Board of Directors, February 2, 2008.
- Juvenile Legislation. The San Antonio Lawyer, Sept–October 2007. An article hi-lighting the 2007 legislative changes in juvenile law.
- TYC and Proposed Legislation . State Bar Section Report Juvenile Law, Volume 21, Number 2, June 2007. An article discussing the proposed juvenile legislative changes from the 2007 legislative session.
- Mandatory Drug Testing of All Students, It's Closer Than You Think . State Bar Section Report Juvenile Law, Volume 20, Number 3, September 2006. An article discussing the Supreme Court's decisions on mandatory drug testing in schools.
- Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent. The San Antonio Lawyer, July–August 2003. An article discussing the requirements of parental presence during juvenile confessions. This article received a 2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation.
- Juvenile Law: 2003 Legislative Proposals. The San Antonio Defender, Volume IV, Issue 9, April 2003. An early look at proposed Juvenile Legislation for this 2003 session.

- A Synopsis of Earls. The San Antonio Defender, Volume IV, Issue 9, April 2003. A synopsis of the Supreme Court's decision in *Board of Education v. Earls* and the random drug testing of students involved in extracurricular activities.
- Police Interactions with Juveniles and Their Effect on Juvenile Confessions. State Bar Section Report Juvenile Law, Volume 16, Number 2, June 2002. An article regarding the requirements for law enforcement during the taking of a confession.
- Juvenile Confessions: AI Want My Mommy!@ The San Antonio Defender, Volume III, Issue 9, April 2002. An article regarding the pitfalls of taking a juvenile confession.
- Doing the Right Thing. The San Antonio Defender, Volume II, Issue 6, December 2000. An article regarding the rights of a juvenile during a confession.
- Doing the Right Thing. State Bar Section Report Juvenile Law, Volume 14, Number 4, December 2000. An article regarding the rights of a juvenile during a confession.
- School Search and Seizure. State Bar Juvenile Law Section Report, Volume 13, Number 2, June 1999. A legal article updating legal issues regarding the search of students in school, including consent, drug testing and dog sniffing.
- The New Juvenile Progressive Sanctions Guidelines. Texas Bar Journal, Volume 59, Number 5, May, 1996. A legal article analyzing the New Juvenile Progressive Sanction Guidelines.
- Juvenile Punishments and the New Progressive Sanction Guidelines. Voice For The Defense, Volume 24, Number 10, December, 1995. A legal article introducing the New Progressive Sanction Guidelines in the Juvenile Code.
- Juvenile Punishments and the New Progressive Sanction Guidelines. State Bar Juvenile Law Section Report, Volume 9, Number 5, December 1995. A legal article introducing the New Progressive Sanction Guidelines in the Juvenile Code.

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REVIEW OF RECENT CASES

APPEALS—

Marsh v. State, 343 S.W.3d 158, 2011 WL 2279056, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-5 (Tex.App.-Texarkana, 6/10/11).

FAILURE TO ARGUE THAT THE DEFENDANT'S CONSTITUTIONAL RIGHT OF CONFRONTATION WAS VIOLATED AT TRIAL WAIVES THE ISSUE ON APPEAL.

Facts: Marsh was charged with intentionally and knowingly threatening Marcus with imminent bodily injury "by pointing a firearm in the direction of Marcus Smith, and ... us[ing] or exhibit[ing] a deadly weapon, to-wit: a firearm, during the commission of said assault." Rule 404(a)(2) of the Texas Rules of Evidence allows admission of "evidence of a pertinent character trait of the victim of the crime offered by an accused." Tex.R. Evid. 404(a)(2). Rule 405 provides that "[i]n cases in which a person's character or character trait is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct." Tex.R. Evid. 405(b). Because Marsh asserted a self-defense claim, testifying that Marcus assaulted him after he was asked to leave, Marsh wanted to introduce a juvenile adjudication on Marcus' record for attempted capital murder during his direct testimony. The purpose for introduction of the records was to establish that his fear of Marcus was reasonable.

However, there was no testimony or argument presented that Marsh was, in fact, fearful of Marcus on the basis of attempted capital murder which occurred over sixteen years ago. Nevertheless, Marsh complains that the trial court's ruling "denying the defendant the right to cross examine Marcus Smith about his juvenile adjudication for attempted capital murder in light of defendant's claim of self-defense" was in error. To support his analysis, Marsh cites to Rule 404. Yet, in accordance with Rule 404, the trial court allowed Marsh to testify to Marcus' character through opinion and reputation testimony, but instructed Marsh not to address the juvenile adjudication and underlying facts of the attempted capital murder. Our review of Marsh's briefing reveals no complaint addressing Rule 405.

Held: Affirmed

Opinion: Juvenile adjudications are generally not admissible in criminal cases unless the evidence is required to be admitted by the Constitutions of the United States or Texas. Tex.R. Evid. 609(d). Marsh now argues that excluding evidence of Marcus' juvenile adjudication restricted his ability to attack Marcus' credibility thereby denying him his constitutional right of confrontation and cross-examination. Davis v. Alaska, 415 U.S. 308 (1974). But at the trial court, the only basis presented for admitting Marcus' juvenile record was to establish the reasonableness of Marsh's fear of Marcus in support of his claim of self-defense or his claim that Marcus was the aggressor. The trial court was never presented with an argument that Marsh's constitutional right of confrontation was violated and, therefore, it never had an opportunity to rule on that issue. Failure to present the very complaint that is made on appeal waives or forfeits the issue. Martinez v. State, 91 S.W.3d 331, 336 (Tex.Crim.App.2002). In any event, under an

abuse of discretion review, we will uphold the trial court's ruling on the admission or exclusion of evidence if the ruling was proper under any legal theory or basis applicable to the case. See id.

It appears that the objection and the trial court's ruling was based on the application of Rule 403. The court felt that even if the specific instance of conduct, an attempted capital murder which occurred over sixteen years ago, had some probative value on the issue of self-defense, the probative value was substantially outweighed by the danger of unfair prejudice. Our review of Marsh's brief reveals that there is no challenge to the trial court's Rule 403 ruling. Failure to challenge this independent ground for exclusion of the evidence would allow us to uphold the trial court's ruling.

Rather than attacking the trial court's ruling that the evidence was barred by Rule 403, Marsh argues the trial court erred in excluding the evidence because Marsh "sought to demonstrate his right of self-defense" which would demonstrate a "reasonable fear of Marcus...." The evidence would have had "an effect on a jury" and the violation of Marsh's right of cross-examination is a constitutional error that requires reversal.

Conclusion: None of these arguments contend that the trial court erred in explicitly finding that even if the evidence was relevant, it should be excluded because the danger of unfair prejudice substantially outweighed its probative value. Therefore, we overrule Marsh's sole point of error.

We affirm the trial court's ruling.

In the Matter of T.D.S., MEMORANDUM, No. 14-11-00005-CV, 2011 WL 2474056, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-11 (Tex.App.-Hous. (14 Dist.), 6/23/11).

A DETERMINATE SENTENCE PROBATION TRANSFER ORDER IS NOT ONE OF THE APPEALABLE ORDERS ENUMERATED IN THE FAMILY CODE, AS A RESULT, IT IS NOT AN APPEALABLE ORDER AND THE APPELLATE COURT IS WITHOUT JURISDICTION TO HEAR IT.

Facts: Appellant T.D.S. attempts to appeal the trial court's order transferring his determinate sentence probation from juvenile court to adult district court. Appellant was adjudicated delinquent on December 1, 2010, for the offense of aggravated sexual assault of a child and was assessed a determinate sentence of three years' probation. Prior to his eighteenth birthday, which was December 12, 2010, the State sought to have appellant's probation transferred to adult district court pursuant to section 54.051(d) of the Texas Family Code. The court transferred appellant's probation to adult district court on December 9, 2010.

Held: Dismissed for want of jurisdiction

Memorandum Opinion: Section 56.01(c) of the Texas Family Code specifically lists the orders from which a juvenile may appeal, but an order transferring a juvenile's determinate sentence probation to an adult district court is not one of the orders enumerated in the statute.

Tex. Fam.Code Ann. § 56.01; In re J.H., 176 S.W.3d at 679. Thus, the order transferring appellant's determinate sentence probation to the adult district court is not an appealable order.

Conclusion: We therefore dismiss this appeal for want of jurisdiction.

In the Matter of K.G., MEMORANDUM, No. 02-10-00057-CV, 2010 WL 5019198, Juvenile Law Newsletter, Vol. 25 No. 1 ¶ 11-1-2 (Tex.App.-Waco, 12/09/10).

UNDER RULE OF APPELLATE PROCEDURE 34.6(F), WHEN A SIGNIFICANT PORTION OF THE ELECTRONICALLY RECORDED PROCEEDINGS ARE INAUDIBLE THROUGH NO FAULT OF THE RESPONDENT, HE IS ENTITLED TO A NEW TRIAL.

Facts: This is a juvenile case in which the State alleged that Appellant K.G., a ten-year-old minor, engaged in one count of delinquent conduct. An adjudication hearing was held before the trial court, and the trial court adjudged K.G. delinquent. After a disposition hearing before the trial court, the trial court signed an order of no disposition on February 17, 2010.

In an affidavit, the court reporter advised this court that the proceedings in this case were recorded electronically, that the audiotape was changed during the first witness's testimony, and that the replacement tape--spanning the rest of the first witness's testimony and the remainder of the proceedings--was "of such low volume that, although some sound could be heard, words and even speakers were not distinguishable."

Held: Reversed and remanded

Memorandum Opinion: Rule 34.6(f) of the rules of appellate procedure states: Reporter's Record Lost or Destroyed. An appellant is entitled to a new trial under the following circumstances:

(1) if the appellant has timely requested a reporter's record;
(2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or--if the proceedings were electronically recorded—a significant portion of the recording has been lost or destroyed or is inaudible;

In his brief, K.G. has established each of rule 34.6's requirements. Indeed, the State concedes error concerning K.G.'s first issue and agrees that K.G. is entitled to a new trial.

Conclusion: We therefore sustain K.G.'s first issue, and we reverse the trial court's judgment and remand this case for a new trial.

CIVIL LIABILITY—

El Paso County v. Solorzano, 351 S.W.3d 577, 2011 WL 4396843, Juvenile Law Newsletter, Vol. 25 No. 4 ¶ 11-4-3 (Tex.App.-El Paso, 9/21/11).

AN EMPLOYEE OF THE EL PASO JUVENILE PROBATION DEPARTMENT IS NOT AN "EMPLOYEE" OF EL PASO COUNTY UNDER THE TTCA.

Facts: This is an interlocutory appeal by the County of El Paso from the denial of its plea to the jurisdiction of Laura Solorzano's claims under the Texas Tort Claims Act, the Fourth and Fourteenth Amendments of the U.S. Constitution, and 42 U.S.C. § 1983 for personal injury.

In February 2006, Daniel Reyes was a participant in the Samuel F. Santana Challenge Boot Camp Program while under the custody of the El Paso County Juvenile Probation Department ("the Department"). On March 6, 2006, Mr. Reyes reported to Challenge Officer Kanaan Pitts that Challenge Officer Jesus LeGrande struck him in the back with a cell door seven to nine days earlier. When the incident occurred, Officer LeGrande was under the Department's employ, but he resigned shortly afterwards. On March 6, 2006, the Department's facility nurse provided Mr. Reyes with a medical assessment, and he was then taken to Thomason Hospital. The Hospital notified Laura Solorzano, Mr. Reyes' mother, of his injury that day.

On February 25, 2008, Ms. Solorzano filed suit individually and on behalf of her minor son, Mr. Reyes, against El Paso County ("the County"), arguing that the February 2006 incident resulted in "serious injuries" to various parts of Mr. Reyes' body. Ms. Solorzano alleged that the perpetrator was an agent, servant, representative, or employee of the County, and was acting within the scope of his employment when he committed the alleged act. In her petition, Ms. Solorzano alleged that Officer LeGrande was negligent in various respects when he closed the door to Mr. Reyes' cell, and that the County was negligent in the officer's hiring, supervision, and training, among other things. Ms. Solorzano also claimed that she had incurred medical care expenses on behalf of Mr. Reyes. She brought her claims under the Texas Tort Claims Act, arguing that the County's negligence in "the use, misuse, or failure to use tangible pieces of property while closing the jail cell door" resulted in its waiver of sovereign immunity, and that the County received actual notice of the incidents in question. She asserted that the County's refusal to provide Mr. Reyes with reasonable medical care after his injuries, as well as its failure to take preventative or remedial measures to guard against the alleged misconduct, violated his civil rights and Constitutional rights under the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983.

After filing its answer, the County filed a plea to the jurisdiction to challenge the trial court's subject-matter jurisdiction, arguing primarily that Ms. Solorzano failed to plead a cause against the County because an employee of the El Paso Juvenile Probation Department is not an employee of the County. Ms. Solorzano then filed a response to the County's plea, and attached to it affidavits by her and Mr. Reyes, photographs of the facility and cell where Mr. Reyes was an inmate, an incident report regarding the alleged incident, an investigation report of the alleged abuse, Mr. Reyes' complaint, an El Paso County Juvenile Probation Department memorandum to all Challenge Program staff, as well as a Texas Juvenile Probation Commission's notice of investigation findings. The court denied the County's plea. The County now makes the instant interlocutory appeal to challenge that denial.

In its sole issue, the County contends the trial court erred in denying its plea to the jurisdiction. A plea to the jurisdiction based on governmental immunity is a challenge to the trial court's subject-matter jurisdiction. State v. Holland, 221 S.W.3d 639, 642 (Tex.2007). Because such a challenge presents a question of law, we review a court's ruling on a plea to the jurisdiction de novo. Holland, 221 S.W.3d at 642. The pleadings are the central focus of such a review, and they will be construed in the plaintiff's favor, with an eye toward the pleader's intent. See Tex. Dept. of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex.2004). We will consider the pleadings, and any evidence relevant to the jurisdictional issue presented, without regard to the merits of the case itself. Miranda, 133 S.W.3d at 226. Our primary inquiry is whether the plaintiff's pleadings allege facts sufficient to demonstrate that jurisdiction exists. Holland, 221 S.W.3d at 642-43.

Held: Reverse trial court's order denying the plea to jurisdiction and dismiss for want of jurisdiction.

Opinion: Absent the unit's consent, governmental immunity deprives a trial court of subject-matter jurisdiction over suits against the State, and certain governmental entities. Miranda, 133 S.W.3d at 224. The Texas Tort Claims Act ("TTCA") provides a limited waiver of governmental immunity, under which a governmental unit's immunity from suit exists side-by-side with its immunity from liability. See TEX.CIV.PRAC. & REM.CODE ANN. §§ 101.001-101.109 (West 2011); Miranda, 133 S.W.3d at 224-25. As the standard of review reflects, it is the plaintiff's burden to demonstrate a waiver of governmental liability provided by the TTCA. Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540, 542 (Tex.2003). To determine whether the plaintiff has met its burden, we consider the facts alleged in the petition, and to the extent it is relevant to the jurisdictional question presented, evidence submitted by the parties. Id.

The first argument the County raises is that the court erred in not granting the County's plea to the jurisdiction because the proper defendant should be the El Paso County Juvenile Board, which it claims to be a separate entity apart from the County, and so the trial court lacked subject-matter jurisdiction over this case. Although the County concedes that El Paso Juvenile Probation Department personnel are paid by and receive certain employment benefits from El Paso County, it contends that because the County does not have the legal right to control and supervise the details of juvenile probation personnel such as Officer LeGrande, these personnel are not County employees.

In arguing that the Department is a separate entity apart from the County, the County directs us to an Attorney General's Opinion, No. DM-460. TEX.ATT'Y GEN.OP. No. DM-460 (Dec. 17, 1997). Because no statutory provision clearly addresses whether the El Paso Juvenile Probation Department is a separate entity or a part of El Paso County, the Attorney General in that opinion reviewed the Department's characteristics, including its source of funding, accountability, and supervision to answer this question. TEX.ATT'Y GEN.OP. No. DM-460, quoting Lohec v. Galveston County Comm'rs Court, 841 S.W.2d 361, 363 (Tex.1992). Based on the relevant statutory provisions, the Attorney General determined that "[t]he purpose of the department, the provision of juvenile probation services, is not merely a county concern, but a state-wide one, provided in response to and under the direction of juvenile court orders and

governed by state regulations." TEX.ATT'Y GEN.OP. No. DM-460, citing TEX.HUM.RES.CODE ANN. §§ 141.042, 142.001, 152.0007. Moreover, the commissioners court lacks authority in the "creation and composition of the [B]oard" because the Board is a statutorily created entity consisting of statutorily-designated members. Id., citing TEX.HUM.RES.CODE ANN. § 152.0771. The Board hires the Department's personnel, sets their salaries, without any supervision by the commissioners court. Id., citing TEX.HUM.RES.CODE ANN. §§ 142.002(b), 152.0007(a). Additionally, Department personnel are considered state employees for purposes of state liability and indemnification for acts of negligence and criminal prosecution. Id., citing TEX.HUM.RES.CODE ANN. § 142.004(b). Even though the Department's budget includes both county and state funds, the commissioners court has limited control even over portion of the budget funded by the county. Id., citing TEX.HUM.RES.CODE ANN. §§ 142.002(b), 152.0004, 152.0012.

Finally, the Attorney General determined that the Board or the Department, is specifically empowered, without an express provision for County oversight, to enter into certain contracts. Id., citing TEX.HUM.RES.CODE ANN. §§ 141.0432(d), (e), 142.003(b), 152.0011. Although the Department was subject to some County supervision in the deposit and disbursement of Department funds, the Attorney General stated that it did not believe this requirement indicated that the Department is part of the County. Id., citing LOCAL GOV'T CODE ANN. § 140.003. The Attorney General stated that this instead "indicates that the [D]epartment is distinct from the [C]ounty," reasoning that if the Department was part of the County, "there would be no need to require the deposit of [D]epartment funds in the [C]ounty treasury and disbursement by the [C]ounty." TEX.ATT'Y GEN.OP. No. DM-460. Based on the foregoing factors, the Attorney General concluded that the Department is an entity independent of the County. Id.

After reviewing the relevant laws and persuasive authorities, we conclude an employee of the El Paso Juvenile Probation Department is not an "employee" of the El Paso County under the TTCA because he is not subject to the County's control. See Murk, 120 S.W.3d at 866, quoting TEX.CIV.PRAC. & REM.CODE ANN. § 101.001(2); Adkins, 2 S.W.3d at 348. Because the County's immunity from suit was not waived under the TTCA, the trial court lacked subject-matter jurisdiction over Ms. Solorzano's cause of action. See Adkins, 2 S.W.3d at 348. We sustain Issue One to the extent of the County's first argument. Having determined that the trial court erred in denying the County's plea to the jurisdiction with respect to Ms. Solorzano's claims under the TTCA on this basis, we need not address the County's second argument that the court erred in denying the plea because Ms. Solorzano failed to provide the County with notice as required by the Act.

Conclusion: Having sustained the County's issue, we reverse the trial court's order denying the plea to jurisdiction and dismiss this suit for want of jurisdiction.

COLLATERAL ATTACK—

Ex parte A.M., MEMORANDUM, No. 04-10-00805-CV, 2011 WL 3610128, Juvenile Law Newsletter, Vol. 25 No. 4 ¶ 11-4-1 (Tex.App.-San Antonio, 8/17/11).

THE WRIT OF HABEAS CORPUS MAY NOT BE USED TO RAISE MATTERS THAT COULD HAVE BEEN RAISED ON DIRECT APPEAL.

Facts: On March 31, 2006, A.M. was adjudicated as having engaged in delinquent conduct by committing an aggravated sexual assault of his four-year-old niece. Following a disposition hearing, the court sentenced A.M. to a determinate sentence of forty years, committing him to the Texas Youth Commission until the age of 18 with a possible transfer to the Texas Department of Criminal Justice. See TEX. FAM.CODE ANN. §§ 54.04(d)(3), 54.11 (West Supp.2010). A.M. appealed, asserting that the trial court erred in refusing to conduct an evidentiary hearing on his motion for new trial, and that his trial counsel rendered ineffective assistance by (i) failing to object to admission of the outcry testimony based on lack of notice, (ii) failing to cross-examine the outcry witness at the outcry hearing, (iii) failing to call Catherine Cordova as a witness, and (iv) opening the door to extraneous offense evidence. On August 22, 2007, we issued a memorandum opinion affirming the trial court's judgment. See In re A.M., No. 04-06-00483-CV, 2007 WL 2376077 (Tex.App.-San Antonio Aug. 22, 2007, no pet.) (mem.op.). Thereafter, on June 17, 2010, A.M. filed a post-adjudication petition for writ of habeas corpus raising multiple grounds. A.M. attached copies of affidavits, excerpts of the trial transcript, and other exhibits to his pro se habeas petition. Without a hearing, on August 19, 2010 the trial court denied the petition in a written order containing its findings of fact and conclusions of law. A.M. now appeals the denial of habeas corpus relief.

Turning to the merits of A.M.'s habeas claims, he asserts that his restraint is illegal because: (1) his forty-year determinate sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, § 10 of the Texas Constitution; (2) he received ineffective assistance of counsel at trial and on appeal; (3) the State engaged in several instances of prosecutorial misconduct at trial; and (4) the trial court abused its discretion on nine occasions. A.M. asserts the cumulative effect of these errors deprived him of a fair trial, due process, and equal protection as guaranteed by the federal and state constitutions. We must affirm a trial court's decision on an application for writ of habeas corpus absent a clear abuse of discretion. In re M.P.A., No. 03-08-00337-CV, 2010 WL 2789649, at *5 (Tex.App.-Austin July 14, 2010, pet. filed) (mem.op.) (appellate court views evidence in light most favorable to trial court's ruling, deferring to court's determination of historical facts supported by record and application of law to facts to extent it turns on credibility, but reviewing purely legal issues de novo).

Held: Affirmed

Memorandum Opinion: The State contends that most of A.M.'s present claims are barred because they either were, or should have been, raised on direct appeal. We agree. As an extraordinary remedy, the writ of habeas corpus may not be used to raise matters that should have been raised on direct appeal. Ex parte Townsend, 137 S.W.3d 79, 81 (Tex.Crim.App.2004); Ex parte Banks, 769 S.W.2d 539, 540 (Tex.Crim.App.1989). Even a constitutional claim may be forfeited if the claim could have been raised on direct appeal. Ex parte Townsend, 137 S.W.3d at 81; Ex parte Drake, 883 S.W.2d 213, 215 (Tex.Crim.App.1994) (habeas remedy is available only when there is no other adequate remedy at law). With respect to A.M.'s claims of prosecutorial

misconduct and erroneous rulings by the trial court, these claims are based on the trial record and were thus available to be raised by A.M. in his appeal. Because they could have been, but were not, raised and resolved in A.M.'s direct appeal, they may not be raised through a subsequent petition for habeas corpus relief. Similarly, A.M.'s constitutional claim that his forty-year determinate sentence amounts to cruel and unusual punishment could have been, but was not, raised in the trial court and on appeal, and has thus been forfeited. Ex parte Townsend, 137 S.W.3d at 81. Moreover, the forty-year determinate sentence is not cruel and unusual because it falls within the statutory range of punishment and there is nothing to show that the prosecuting attorney did not follow the procedures set by the Family Code. See TEX. FAM.CODE ANN. § 54.04(d)(3); Id. § 53.045 (West 2008); see also Jackson v. State, 680 S.W.2d 809, 814 (Tex.Crim.App.1984).

Conclusion: Accordingly, based on the foregoing reasons, we hold the trial court's denial of A.M.'s request for habeas relief was not a clear abuse of discretion and we affirm the trial court's order.

CONFESSIONS—

McCulley v. State, 352 S.W.3d 107, 2011 WL 3672062, Juvenile Law Newsletter, Vol. 25 No. 4 ¶ 11-4-4 (Tex.App.-Fort Worth, 8/18/11).

THE MERE FACT THAT AN INTERROGATION BEGINS AS NONCUSTODIAL DOES NOT PREVENT CUSTODY FROM ARISING LATER IN THE INTERROGATION.

Facts: McCulley called the police on the night of May 20, 2007. When police arrived at his house, McCulley was covered in blood and his wife had been stabbed. The police took McCulley to the hospital, where an ambulance transported his wife, who later died. The police extensively photographed McCulley. From there, McCulley accompanied the police to the police station, where the police questioned him for almost four and one-half hours. McCulley eventually implicated himself in his wife's death. Before trial, McCulley filed a motion to suppress the statement he made to police. The trial court held a suppression hearing.

At the suppression hearing, the State called Detective Kelly Brunson of the City of Wichita Falls Police Department to testify. Brunson testified that he was trained in conducting interviews for the police department. He averred that he also had been trained regarding *Miranda* warnings and the warnings contained in Texas Code of Criminal Procedure article 38.22. According to Brunson, his sergeant called him on the night of May 20, 2007. The sergeant sent Brunson to the hospital to "view the body and to speak to [ ] McCulley." After McCulley consented to the search of his house, Brunson said that he asked McCulley to go to the police station so that he could interview him. Brunson testified that McCulley obliged and that another officer brought McCulley to the police station. He also said that McCulley was not a suspect at this time and that the interview was intended to "gather leads and any intelligence he might have to try to find out what happened." Brunson said that the videotaped interview began shortly before 1:00 a.m. on

May 21.

Brunson said that as he interviewed McCulley, he had McCulley verify to him that he was there of his own free will, and Brunson said that McCulley freely answered his questions. Brunson testified, as the video of the interview played for the trial court, that after asking McCulley, "is there anything that you haven't talked about that might help me out on this case, anything at all that might help me," McCulley responded, "I just want to see her," and "I just want to go to the hospital." After telling McCulley that his wife "was still at the hospital," Brunson told McCulley that he could see her "as soon as we finish here."

The video of the interview reflects many of the statements Brunson testified to. In the video, as the interview begins, Brunson tells McCulley that he is not under arrest and is not being charged with anything. Brunson also has McCulley verify that he knows he is there of his own free will. It is clear that McCulley is not wearing shoes. Less than thirty minutes into the interview, the questions by the detectives primarily concern McCulley's timeline of events. McCulley's initial story is that his wife had left earlier that day, that he was watching a movie, and that his stomach got upset during the movie, so he went for a walk. When he arrived home from his walk, he discovered his wife lying on the living room floor, bleeding. According to McCulley's initial story, she asked for his help and declared that she was dying.

Brunson asks McCulley about previous physical altercations with his wife and a prior record of violence with her. Brunson asks several questions about why McCulley was not wearing shoes, what shoes he wore when he allegedly went for a walk during the movie, and when and where he took them off. Brunson physically examines McCulley by looking at the bottoms of his feet, looking at his hands, and lifting up his shirt and examining his torso. Brunson questions McCulley about cuts on his hands. Each time McCulley asks to go home or to the hospital, Brunson's responses, although couched in terms of that not being a "good idea" or not "right now," were statements suggesting that McCulley could eventually go to those places, but not during the time the interview was being conducted. At one moment, McCulley asks "when" he can go to the hospital. Brunson responds, "[A]s soon as we finish here." Later, when McCulley asks to go home, Brunson responds similarly with, "[W]e can take you there when we get finished."

In the interview, two detectives other than Brunson also question McCulley. The first of the two question him before he was ever given any warnings. She asks him about violence in his relationship. The detective also tells McCulley that, according to his timeline, he would have been leaving the movie during its climactic moment. She tells him directly that his timeline does not make sense. After almost four hours, Brunson and McCulley read McCulley's *Miranda* and article 38.22 warnings together. McCulley eventually states that he had "killed her" and had thrown the knife in a neighboring yard.

The State introduced McCulley's videotaped statement at trial, and a jury found him guilty of murder. The jury also found that McCulley acted in the heat of passion. *See* Tex. Penal Code Ann. § 19.02 (West 2011). McCulley was sentenced to twenty years' incarceration. This appeal followed.

Held: Affirmed

Opinion: Four factors are relevant to determining whether a person is in custody: (1) probable cause to arrest, (2) subjective intent of the police, (3) focus of the investigation, and (4) subjective belief of the defendant. *Dowthitt v. State,* 931 S.W.2d 244, 254 (Tex.Crim.App.1996). Factors two and four have become irrelevant except to the extent that they may be manifested in the words or actions of police officers; the custody determination is based entirely upon objective circumstances. *Id.; see also Stansbury v. California,* 511 U.S. 318, 322–23, 114 S.Ct. 1526, 1528–29, 128 L.Ed.2d 293 (1994). Simply becoming the focus of the investigation does not necessarily equate to custody for purposes of determining whether a statement is voluntarily given. *Meek v. State,* 790 S.W.2d 618, 621 (Tex.Crim.App.1990).

There are at least four general situations when a suspect's detention may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest [FN1] and law enforcement officers do not tell the suspect that he is free to leave. *Dowthitt,* 931 S.W.2d at 255. In the first through third situations, the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. *Id.* (*citing Stansbury,* 511 U.S. at 322–23, 114 S.Ct. at 1528–29). Concerning the fourth situation, the officers' knowledge of probable cause must be manifested to the subject, and such manifestation could occur if information sustaining the probable cause is related by the officers to the suspect or by the suspect to the officers. *Id.; see Ruth v. State,* 645 S.W.2d 432, 436 (Tex.Crim.App. [Panel Op.] 1979) (holding that a suspect's "statement that he had shot the victim immediately focused the investigation on him and furnished probable cause to believe that he had committed an offense[;] [a]fter that time, the continued interrogation must be considered a custodial one"). Situation four, however, will not automatically establish custody; rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. *Dowthitt,* 931 S.W.2d at 255. Additionally, the length of time involved is an important factor to consider in determining whether a custodial interrogation occurred. *Id.* at 256.

Here, according to Brunson, McCulley voluntarily rode with an officer to the police station from the hospital. Brunson's testimony is the only evidence at the suppression hearing regarding McCulley's ride to the police station. This testimony indicates that McCulley was not in custody when the interview at the police station began. *Miller v. State,* 196 S.W.3d 256, 266 (Tex.App.-Fort Worth 2006, pet. ref'd) (reasoning that appellant's choice to voluntarily meet police at a location demonstrated that police encounter was initially noncustodial). McCulley, however, was not wearing shoes and had blood on his clothing. At the suppression hearing, Brunson testified that in order for McCulley to return home or to the hospital, the police would have needed to transport him. When asked whether McCulley was dependent upon the police for transportation, Brunson answered, "It would have been up to me." Brunson also averred that leaving the interrogation room would have been difficult, requiring knowledge of a "sneaky way out," so much so that Brunson said more than once that he would have been required to escort McCulley out of the building. When taken as a whole, we conclude that McCulley was physically deprived

of his freedom in a significant way.

And even though the police never directly told McCulley that he could not leave, a reasonable person in McCulley's situation would have believed that his freedom of movement had been significantly restricted. Each time McCulley indicated a desire to go to the hospital or his home, the police indicated that he could not go to those places until the police were "finished." Furthermore, the police possessed probable cause that McCulley had committed the murder, and Brunson expressed this directly to McCulley several times during questioning. The questioning in the video reflects an interview primarily focused on McCulley. His version of his timeline was the subject of most of the questions asked by multiple police officers. Regarding McCulley's statement that he had been on a walk only to come home and find that his wife had been stabbed, Brunson asked McCulley several questions about his lack of shoes and when he had taken them off. Brunson asked McCulley multiple times, "Did you do this?," and if things had gotten "out of hand." Brunson also examined McCulley's hands, asked about cuts on his fingers, examined the bottoms of his feet, and even had him raise up his shirt to physically examine his torso. McCulley had already been photographed in this same manner at the hospital before he went to the interrogation room. Multiple police officers directed questions to McCulley that focused on the murder weapon.

At one point, Brunson explained to McCulley that the person closest to the victim was a natural suspect. McCulley responded "I'm probably in trouble." This statement later served as one of Brunson's transitions back to questioning McCulley about his timeline and about whether McCulley had been the one who stabbed his wife. McCulley was also told directly that his timeline did not make sense, and detectives asked him why he would leave the movie he was watching at such a climactic moment. Again, all of these questions were framed by McCulley's questions about when he could go home or to the hospital, and each time those requests were rebuffed with statements indicating that McCulley could not go to either of those places and, moreover, could not leave until the officers were finished questioning him. Police finally read McCulley his rights almost four hours after they brought him to the interrogation room. *See Dowthitt,* 931 S.W.2d at 255–56 (reasoning that the length of time involved is an important factor to consider in determining whether a custodial interrogation occurred). We conclude that McCulley was in custody and the focus of the police's investigation well before 4:55 a.m., when police finally read McCulley his *Miranda* and article 38.22 warnings. *See id.,* 931 S.W.2d at 254 (holding that a suspect being the focus of police investigation is a relevant factor in determining whether suspect is in custody). But our analysis does not end with this conclusion.

The real question in McCulley's first point is whether the trial court erred by overruling his motion to suppress his statement that was the result of custodial interrogation without the benefit of police timely providing him with *Miranda* and article 38.22 warnings.

In this case, the trial judge made specific findings that McCulley's post-*Miranda* statement to police was voluntarily made. We find that the record and reasonable inferences from that record support this finding. Brunson administered appropriate *Miranda* and article 38.22 warnings prior to McCulley's statement that he had killed his wife. In the video of the interview, McCulley repeatedly said that he understood his rights and was willing to talk to the police. Thus, predicated on the legal conclusion that it was voluntarily made, we agree with the trial

judge that McCulley's statement was admissible. *See Carter,* 309 S.W.3d at 37 (holding that trial court's finding that defendant's statement was voluntarily made supported trial court's admission of statement despite mid-*Miranda* warning). We overrule McCulley's first point.

Conclusion: Having overruled McCulley's points, we affirm the trial court's judgment.

Paolilla v. State, 342 S.W.3d 783, 2011 WL 2042761, Juv.L.New., Vol. 25 No. 3 ¶ 11-3-3 (Tex.App.-Hous. (14 Dist.) 5/26/11). Substituted opinion for ¶ 11-2-1.

APPELLANT'S STATEMENTS WERE NOT INDUCED FROM EITHER THE MEDICATIONS SHE HAD RECEIVED OR FROM THE EFFECTS OF HER WITHDRAWAL SYMPTOMS, AND AS A RESULT THE COURT FOUND THAT SHE VOLUNTARILY WAIVED HER RIGHTS.

Facts: Four people were murdered in a Clear Lake home during the afternoon of July 18, 2003. The home belonged to Tiffany Rowell, who was counted among the four complainants. The other three were her friends Rachel Koloroutis, Marcus Precella, and Adelbert Sanchez.

Nearly three years after the offense, police received a tip through Crime Stoppers linking the homicides to appellant and her then-boyfriend, Christopher Lee Snider. A warrant was secured for appellant's arrest in San Antonio, where she had been staying in a hotel with her husband, Stanley Justin Rott.

The warrant was executed at 11:55 a.m. on July 19, 2006. When police entered the hotel room, they were met with evidence that the occupants had been using substantial amounts of heroin. Hundreds of used syringes littered the room. Appellant was wearing a t-shirt stained with blood, and several needle marks could be found over her body.

Appellant was escorted to the San Antonio Police Department, where she agreed to a video-taped interview at 2:45 p.m. During the interrogation, appellant admitted to driving Snider to Rowell's house on the day of the offense. She said they originally went there to purchase drugs, but they made a return trip when Snider complained of forgetting something. Appellant insisted that Snider went into the house by himself on both occasions while she remained in the car. When Snider returned the second time, she saw him running with a gun in his hands. She denied ever hearing any gunshots.

The interrogation ended at approximately 3:50 p.m. Appellant, however, remained alone in the interview room as the recorder continued to tape. In the ensuing minutes, her condition clearly began to deteriorate. She grew visibly tired, appearing weak and sick. The recording ended just after 3:58 p.m., when appellant requested to see a nurse, claiming she was bleeding.

Appellant was transported to Santa Rosa Hospital in San Antonio at approximately 4:12 p.m. Medical records indicate she was currently menstruating, but no other signs of bleeding were reported. Appellant did present, though, with a chief complaint of heroin withdrawal. She informed doctors that she was accustomed to taking heroin every ten to fifteen minutes, and that

her last injection was roughly 10:00 a.m. that morning. At 5:30 p.m., appellant was administered six milligrams of morphine and twenty milligrams of Methadone.

Using only an audio recorder, interrogators continued their interview inside the hospital at 6:15 p.m. During this session, appellant again denied ever entering the home. She stated, however, that a fight erupted inside, with Snider admitting to shooting all four complainants. The interview concluded at 7:15 p.m. At approximately 9:00 p.m., just before her discharge, appellant received additional dosages of morphine and Methadone.

Appellant was flown to Houston later that evening. She slept on the flight and through part of the next day after being placed in a jail cell. Following an unrecorded interview during the afternoon of July 20, appellant complained of illness and requested to see a doctor. She was taken to Ben Taub Hospital at 6:50 p.m. and again treated for heroin withdrawal, this time receiving twenty-five milligrams of Librium at 10:07 p.m. Appellant was discharged at 11:00 p.m. and escorted back to police headquarters in downtown Houston.

A final video-taped interrogation commenced at 11:38 p.m. During this interview, appellant stated that Snider forced her into the house on the return trip, making her hold one of his two guns. Although she denied aiming at any of the complainants, she stated that Snider pulled the trigger a number of times while she held the gun in her hand. The interrogation ended at 1:39 a.m. on July 21. Appellant was then returned to her jail cell. The record does not show that she complained of illness following the interview.

In a pretrial hearing, appellant moved to suppress all three recorded statements. Although advised of her Fifth Amendment rights before each interview, appellant complained that her statements were rendered involuntary because of medications she ingested and because she was suffering from acute opioid withdrawal.

Appellant called a single expert witness, Dr. George S. Glass, a physician board certified in psychiatry and addiction medicine. Dr. Glass testified that appellant was a heroin addict with a very high tolerance for narcotics. He stated that heroin has a short half-life, meaning that it breaks down in the body relatively quickly. If the addiction is not sustained, an abuser can suffer from withdrawal between four and eight hours after her last injection. The physical symptoms of withdrawal, he said, include chills, fever, shaking, nausea, vomiting, and seizing.

Dr. Glass assumed that appellant's last use of the drug prior to her arrest occurred between 10:00 a.m. and 12:00 p.m. on July 19. Based on that time frame, he supposed that appellant would have entered serious opioid withdrawal between 4:00 p.m. and 8:00 p.m. that evening. Dr. Glass observed the first video-taped interrogation, which ended just before 4:00 p.m., and opined that appellant was in acute withdrawal because she was wrapped in a thin blanket and shaking.

The State produced testimony from three police officers. Sergeant Brian Harris executed the arrest warrant and conducted the two recorded interviews in San Antonio. He testified that he has been a certified peace officer for twenty-one years. During his tenure on the police force, he personally observed the effects of heroin on users, which he claimed are typically marked by

irrational behavior and slurred and incoherent speech. He has also observed the physical breakdown of a person entering withdrawal.

According to Sergeant Harris, appellant did not appear to be under the influence of narcotics at the time of her arrest. During the first recorded interview, he stated that appellant was clear and calm, and her tone suggested an inquisitive demeanor. He testified that appellant did shake occasionally, but only when she was crying, which occurred during the interview's more sensitive discussion of the complainants, who appellant revealed were her friends and classmates. Sergeant Harris denied seeing any signs of intoxication. When questioned whether appellant deliberated before giving her answers, he described her responses as "calculated."

Officer Connie Park managed the intake desk at the Houston Police Department on the night of July 20, 2006. Sometime between 5:30 p.m. and 6:30 p.m. on July 20, Officer Park was asked to escort appellant to the bathroom, where they had a casual conversation. Officer Park testified that during their brief discussion, she observed none of the signs of impairment that typically accompany drug abuse. Officer Park described appellant's speech as "clearly coherent" and "matter of fact." In her view, appellant appeared to be oriented to time and place, and neither upset nor distraught. She also testified that appellant made no complaints about withdrawing from heroin.

Sergeant Breck C. McDaniel conducted the video-taped interview in Houston. He testified that appellant displayed none of these symptoms during her interview. Occasionally, appellant did seem upset. When she recounted the shootings, for instance, her hands shook and she began to cry. Sergeant McDaniel allowed her frequent breaks to compose herself, even permitting her to smoke and drink a soda. According to him, she appeared physically fine and lucid throughout the interview.

The trial court denied appellant's motion to suppress. The court later issued findings of facts, which stated that the testimony from Sergeant Harris, Officer Park, and Sergeant McDaniel was credible and reliable. In the findings, the court also concluded that appellant was not intoxicated or suffering from withdrawal symptoms, and that during all three interviews, she was "lucid and capable of understanding the warnings given to her and the nature of her statements." Furthermore, the court specifically found that Dr. Glass's opinions were "not supported by the evidence and therefore not reliable." Because the court determined that appellant voluntarily waived her rights in supplying her statements, all three recordings were later published for the jury's consideration.

Held: Affirmed

Opinion: The recording of an interrogation may not be introduced into evidence unless the defendant knowingly, intelligently, and voluntarily waives her Fifth Amendment rights. Tex.Code Crim. Proc. Ann. art. 38.22, § 3(a) (West 2005); Miranda v. Arizona, 384 U.S. 436, 444, 474-75, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellant argues that waiver was involuntary in this case because her recorded statements were procured as she was either withdrawing from heroin or under the influence of morphine, Methadone, and Librium.

The voluntariness of a statement is assessed by considering the totality of the circumstances under which the statement was obtained. Creager v. State, 952 S.W.2d 852, 855 (Tex.Crim.App.1997). Of principal concern are the characteristics of the accused and the details of the interrogation. Davis v. State, 313 S.W.3d 317, 337 (Tex.Crim.App.2010). Although relevant, evidence of intoxication does not necessarily render a statement involuntary. Jones v. State, 944 S.W.2d 642, 651 (Tex.Crim.App.1996); King v. State, 585 S.W.2d 720, 722 (Tex.Crim.App. [Panel Op.] 1979). When the record reflects evidence of narcotics, medications, or other mind-altering agents, the question becomes whether those intoxicants prevented the defendant from making an informed and independent decision to waive her rights. See Jones, 944 S.W.2d at 651; see also Nichols v. State, 754 S.W.2d 185, 190 (Tex.Crim.App.1988) ("The central question is the extent to which appellant was deprived of his faculties due to the intoxication."), overruled on other grounds by Green v. State, 764 S.W.2d 242 (Tex.Crim.App.1989).

We recognize that appellant's drug abuse was significant, and her medical treatment considerable. Nevertheless, the record supports the trial court's ruling that appellant was capable of making an informed decision to waive her rights. Appellant did not appear intoxicated at any stage of her three recorded interrogations. Sergeant Harris testified that appellant spoke clearly and concisely during both interviews in San Antonio. During her first interview, appellant's responses were described as "calculated." At the hospital, Sergeant Harris said she was conscious and alert. Officer Park testified that appellant was oriented to her surroundings, and Sergeant McDaniel testified that she was physically fine and lucid during her Houston interview. All three officers testified to having experience dealing with heroin addicts, and each denied witnessing any signs that appellant was withdrawing from heroin or under the influence of any sort of intoxicant. The court, as trier of fact during the suppression hearing, was free to believe the officers over the testimony of the expert. See McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex.1986).

Although we defer to the trial court's finding that Dr. Glass's opinions were not credible, Guzman, 955 S.W.2d at 89, we do observe that Dr. Glass similarly testified that appellant was not intoxicated from any of the drugs she received. Even if appellant was further suffering from the effects of withdrawal, as Dr. Glass claimed, the evidence does not support appellant's argument that she was unable to make an informed decision to waive her rights. Cf. Davis, 313 S.W.3d at 337-38 (finding waiver voluntary despite confessor's testimony that he was "coming off" drugs where confessor was calm and exhibiting a rational understanding of the questioning); United States v. Kelley, 953 F.2d 562, 565 (9th Cir.1992) (finding waiver voluntary despite symptoms of withdrawal where confessor was coherent, responsive, and displaying an ability to think rationally), disapproved on other grounds by United States v. Kim, 105 F.3d 1579 (9th Cir.1997). We find support for the testimony of the officers in our own review of the recordings. We therefore conclude that the record supports the trial court's conclusion that appellant voluntarily waived her rights.

Before her third recorded interview in Houston, appellant received Librium to treat the anxiety associated with her heroin withdrawal. Dr. Glass testified that the amount of Librium administered was the equivalent of several shots of alcohol, and that it did nothing for the physical symptoms of withdrawal. Dr. Glass agreed with the officers, however, that appellant

was not intoxicated when she offered her statements. Moreover, Dr. Glass never testified that Librium would prevent appellant from waiving her rights freely and knowingly.

The record supports the trial court's finding that appellant's statements were not induced from either the medications she received or the effects of withdrawal. Because her recorded statements were not admitted in violation of Townsend, we overrule issues three through six.

J.D.B. v. North Carolina, 131 S.Ct. 2394, 180 L.Ed.2d 310, 79 USLW 4504, 11 Cal. Daily Op. Serv. 7346, 2011 Daily Journal D.A.R. 8827, 22 Fla. L. Weekly Fed. S 1135, U.S.N.C., Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-6 (6/16/11).

A CHILD'S AGE IS A FACTOR IN DETERMINING WHETHER OR NOT HE IS IN OFFICIAL CUSTODY WHEN BEING SUBJECTED TO INTERROGATION.

Facts: Petitioner J. D. B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour. This was the second time that police questioned J. D. B.in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J. D. B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J. D. B.'s grandmother—his legal guardian—as well as his aunt. Police later learned that a digital camera matching the description of one of the stolen items had been found at J. D. B.'s middle school and seen in J. D. B.'s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J. D. B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J. D. B. about the break-ins. Although DiCostanzo asked the school administrators to verify J. D. B.'s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J. D. B.'s grandmother. The uniformed officer interrupted J. D. B.'s afternoon social studies class, removed J. D. B. from the classroom, and escorted him to a school conference room. There, J. D. B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J. D. B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J. D. B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room. Questioning began with small talk—discussion of sports and J. D. B.'s family life. DiCostanzo asked, and J. D. B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J. D. B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J. D. B. for additional detail about his efforts to obtain work; asked J. D. B. to explain a prior incident, when one of the victims returned home to find J. D. B. behind her house; and confronted J. D. B. with the stolen camera. The assistant principal urged J. D. B. to "do the right thing," warning J. D. B. that "the truth always comes out in the end." Eventually, J. D. B. asked whether he would "still be in trouble" if he returned the "stuff." In response, DiCostanzo explained that return of the

stolen items would be helpful, but "this thing is going to court" regardless. ("[W]hat's done is done[;] now you need to help yourself by making it right"); DiCostanzo then warned that he may need to seek a secure custody order if he believed that J. D. B. would continue to break into other homes. When J. D. B. asked what a secure custody order was, DiCostanzo explained that "it's where you get sent to juvenile detention before court." After learning of the prospect of juvenile detention, J. D. B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J. D. B. that he could refuse to answer the investigator's questions and that he was free to leave. Asked whether he understood, J. D. B. nodded and provided further detail, including information about the location of the stolen items. Eventually J. D. B. wrote a statement, at DiCostanzo's request. When the bell rang indicating the end of the school day, J. D. B. was allowed to leave to catch the bus home. Two juvenile petitions were filed against J. D. B., each alleging one count of breaking and entering and one count of larceny. J. D. B.'s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J. D. B. had been "interrogated by police in a custodial setting without being afforded *Miranda* warning[s]," and because his statements were involuntary under the totality of the circumstances test; see *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973) (due process precludes admission of a confession where "a defendant's will was overborne" by the circumstances of the interrogation). After a suppression hearing at which DiCostanzo and J. D. B. testified, the trial court denied the motion, deciding that J. D. B. was not in custody at the time of the schoolhouse interrogation and that his statements were voluntary. As a result, J. D. B. entered a transcript of admission to all four counts, renewing his objection to the denial of his motion to suppress, and the court adjudicated J. D. B. delinquent.

A divided panel of the North Carolina Court of Appeals affirmed. *In re J.D.B.*, 196 N. C. App. 234, 674 S. E. 2d 795 (2009). The North Carolina Supreme Court held, over two dissents, that J. D. B. was not in custody when he confessed, "declin[ing] to extend the test for custody to include consideration of the age . . . of an individual subjected to questioning by police." *In re J.D.B.*, 363 N. C. 664, 672, 686 S. E. 2d 135, 140 (2009).

The Supreme Court granted certiorari to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age.

Held: Reversed and remanded.

Opinion: Custodial police interrogation entails "inherently compelling pressures," *Miranda* v. *Arizona*, 384 U. S. 436, 467, that "can induce a frighteningly high percentage of people to confess to crimes they never committed," *Corley* v. *United States*, 556 U. S. ___, ___. Recent studies suggest that risk is all the more acute when the subject of custodial interrogation is a juvenile. Whether a suspect is "in custody" for *Miranda* purposes is an objective determination involving two discrete inquires: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." *Thompson* v. *Keohane*, 516 U. S. 99, 112 (footnote omitted). The police and courts must "examine all of the circumstances surrounding the interrogation," *Stansbury* v. *California*, 511 U. S. 318, 322, including those that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," *id.*, at 325. However, the test involves no consideration of the particular

suspect's "actual mindset." *Yarborough* v. *Alvarado*, 541 U. S. 652, 667. By limiting analysis to objective circumstances, the test avoids burdening police with the task of anticipating each suspect's idiosyncrasies and divining how those particular traits affect that suspect's subjective state of mind. *Berkemer* v. *McCarty*, 468 U. S. 420, 430–431. Pp. 5–8.

In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." *Stansbury*, 511 U. S., at 325. Courts can account for that reality without doing any damage to the objective nature of the custody analysis. A child's age is far "more than a chronological fact." *Eddings* v. *Oklahoma*, 455 U. S. 104, 115. It is a fact that "generates commonsense conclusions about behavior and perception," *Alvarado*, 541 U. S., at 674, that apply broadly to children as a class. Children "generally are less mature and responsible than adults," *Eddings*, 455 U. S., at 115; they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti* v. *Baird*, 443 U. S. 622, 635; and they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper* v. *Simmons*, 543 U. S. 551, 569. In the specific context of police interrogation, events that "would leave a man cold and unimpressed can overawe and overwhelm a" teen. *Haley* v. *Ohio*, 332 U. S. 596, 599. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Legal disqualifications on children as a class—*e.g.*, limitations on their ability to marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

Given a history "replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults, *Eddings*, 455 U. S., at 115–116, there is no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to a reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances "unknowable" to them, *Berkemer*, 468 U. S., at 430, nor to" '"anticipat[e] the frailties or idiosyncrasies" of the particular suspect being questioned." ' " *Alvarado*, 541 U. S., at 662. Precisely because childhood yields objective conclusions, considering age in the custody analysis does not involve a determination of how youth affects a particular child's subjective state of mind. In fact, were the court precluded from taking J. D. B.'s youth into account, it would be forced to evaluate the circumstances here through the eyes of a reasonable adult, when some objective circumstances surrounding an interrogation at school are specific to children. These conclusions are not undermined by the Court's observation in *Alvarado* that accounting for a juvenile's age in the *Miranda* custody analysis "could be viewed as creating a subjective inquiry," 541 U. S., at 668. The Court said nothing about whether such a view would be correct under the law or whether it simply merited deference under the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214. So long as the child's age was known to the officer, or would have been objectively apparent to a reasonable officer, including age in the custody analysis is consistent with the *Miranda* test's objective nature. This does not mean that a child's age will be a determinative, or even a significant, factor in every case, but it is a reality that courts cannot ignore. Pp. 8–14.

Additional arguments that the State and its *amici* offer for excluding age from the custody inquiry are unpersuasive. Pp. 14–18.

Conclusion: On remand, the state courts are to address the question whether J. D. B. was in custody when he was interrogated, taking account of all of the relevant circumstances of the interrogation, including J. D. B.'s age at the time.

SOTOMAYOR, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.

In the Matter of M.A.C., 339 S.W.3d 781, 2011 WL 1519351, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-10 (Tex.App.-Eastland, 4/14/11).

THE REQUIREMENT THAT A STATEMENT MUST BE SIGNED BY THE CHILD WITH NO LAW ENFORCEMENT OFFICER OR PROSECUTING ATTORNEY PRESENT, DOES NOT APPLY TO VIDEO STATEMENTS.

Facts: M.A.C. and the victim, J.M., resided in the same foster home in Midland in March 2009. M.A.C. was thirteen years old at the time, and J.M. was nine years old. One of the juveniles' foster parents, Austin Harris, testified that he and the youth in the foster home watched a movie in the main living area of the home on the evening of March 14, 2009. After the movie ended, he told all of the children that they needed to go to their respective bedrooms and get ready for bed. After a momentary absence, Mr. Harris returned to the main living area to adjust the thermostat for the home. He found M.A.C. and J.M. in the main living area with the lights turned off. J.M. said that she and M.A.C. were "just talking"; M.A.C. told Mr. Harris that he was looking for a pencil.

Mr. Harris reported his discovery to his wife, Linea Harris. Based on their suspicions, Mrs. Harris decided to question J.M. about the incident. She and Mr. Harris also questioned M.A.C. about the incident. M.A.C. told them that he had done "something very bad" in that he had touched J.M.'s breasts over her clothes. Mr. and Mrs. Harris subsequently reported the incident to their supervisors. Alexandra Arredondo, a former foster care case manager for the Buckner Home, testified that M.A.C. told her that he and J.M. touched each other under their shirts and that they were "humping" with their clothes on.

Detective Charles Sims of the Midland Police Department met with M.A.C. and subsequently transported M.A.C. to meet with Honorable Joe L. Matlock, Justice of the Peace, for the administration of magistrate warnings for the purpose of obtaining a recorded statement from M.A.C. Judge Matlock testified that Detective Sims was present when he administered the magistrate warnings to M.A.C. and that Detective Sims remained present during the time that Judge Matlock subsequently asked M.A.C. questions pertaining to the voluntariness of his statement. Judge Matlock testified that he requested Detective Sims to remain present during the entire warning and interview process. Furthermore, Detective Sims testified that he was armed during this process and that his firearm was visible at all times.

M.A.C. asserts in his first issue that the trial court erred in admitting his recorded statement into evidence. He contends that it was illegally obtained in violation of TEX. FAM.CODE ANN. § 51.095 (Vernon 2008). We note at the outset of our analysis that M.A.C. is not asserting that his statement was involuntary. *See Martinez v. State,* 131 S.W.3d 22, 35 (Tex.App.-San Antonio 2003, no pet.) (Due process may be violated by the admission of a confession that was not voluntarily given.). Instead, he contends that officials violated the procedural requirements of Section 51.095(a)(1)(B)(i).

Held: Affirmed

Opinion: M.A.C. contends that the provisions of Section 51.095(a)(1)(B)(i) were violated because Detective Sims was present during the entire warning and interview process and was armed during this process with his firearm visible at all times. Given Judge Matlock's testimony that he requested the presence of Detective Sims, we focus our attention to the presence of Detective Sims's weapon during the interview process. The critical inquiry is whether or not the weapon prohibition applied to the taking of M.A.C.'s recorded statement.

Subsection (a) of Section 51.095 consists of five subparts, each of which applies to a particular type of statement that a juvenile may make: subpart (a)(1) applies to written statements; subpart (a)(2) applies to oral statements evidencing the child's guilt; subpart (a)(3) applies to res gestae statements; subpart (a)(4) applies to statements made in court proceedings; and subpart (a)(5) applies to statements recorded by an electronic recording device. We focus our attention on subparts (a)(1) (written statements) and (a)(5) (recorded statements). Subpart (a)(1) is of interest because the weapon prohibition is found under this subpart. Subpart (a)(5) is of interest because M.A.C. gave a recorded statement.

The provisions for written statements contained in subpart (a)(1) contemplate two periods during which the magistrate will interact with the juvenile. Subpart (a)(1)(A)(i)-(iv) sets out four warnings that the magistrate must give the juvenile prior to the juvenile giving the written statement. The provisions of subpart (a)(1)(B)(i) set out the procedures that the magistrate must follow to assess the voluntariness of the juvenile's written statement after its preparation. Specifically, subpart (a)(1)(B)(i) provides:

> **[T]he statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child.**

Thus, by its express terms, the weapon prohibition applies when the juvenile executes a written statement in the presence of a magistrate.

The procedures for obtaining a recorded statement from a juvenile are similar to those applicable to obtaining a written statement. They are similar in the respect that subpart (a)(5)(A)

requires a magistrate to give the juvenile the same warnings set out in subpart (a)(1)(A) for written statements. However, the statute provides a different follow-up procedure for recorded statements. The applicable follow-up procedure for a recorded statement is set out in subsection (f):

> **A magistrate who provides the warnings required by Subsection (a)(5) for a recorded statement may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.**

Conclusion: As reflected above, the follow-up procedure set out in subsection (f) for recorded statements is discretionary. Furthermore, it does not contain the weapon prohibition found in subpart (a)(1)(B)(i) for written statements. Accordingly, the trial court did not err in allowing M.A.C.'s recorded statement to be admitted despite the fact that Detective Sims's firearm was visible. Appellant's first issue is overruled.

In the Matter of A.M., 333 S.W.3d 411, 2011 WL 491018, Juvenile Law Newsletter, Vol. 25 No. 1 ¶ 11-1-7 (Tex.App.-Eastland, 2/11/11).

REQUIRING PARTICIPATION IN SEX OFFENDER TREATMENT AS A CONDITION OF PROBATION DOES NOT COMPEL PARTICIPATION IN A POLYGRAPH EXAMINATION.

Facts: In 2008, A.M. was charged with aggravated sexual assault of his twelve-year-old sister. At that time, A.M. was fourteen years old. Pursuant to a plea bargain agreement, the 2008 aggravated sexual assault charge was reduced to a charge of indecency with a child by exposure, and A.M. was placed on probation for two years. The conditions of probation required A.M. to participate in sex offender treatment. As part of that treatment, A.M.'s therapist required him to take a monitoring polygraph examination. On August 6, 2009, A.M. took the examination. During the interview part of the examination, A.M. told the polygraph examiner that he had engaged in sexual contact with his sister five times since the beginning of his probation period. On August 17, 2009, the State filed an original adjudication petition alleging that, on or about May 15, 2009, A.M. had committed the offense of aggravated sexual assault of his sister.

A.M. filed a motion to suppress the statements that he had made to the polygraph examiner. Following a hearing, the trial court denied the motion. A.M. then pleaded "true" to the allegations in the State's petition and, in a stipulation of evidence, judicially confessed that he had committed the alleged offense. The trial court entered an adjudication-hearing judgment in which it found that A.M. had committed the offense of aggravated sexual assault of a child and

adjudicated A.M. as having engaged in delinquent conduct. The trial court also entered an order committing A.M. to the Texas Youth Commission.

Appellant contends that the trial court erred by denying his motion to suppress for two reasons. In his first issue, he argues that the condition of his probation requiring him to take the polygraph examination placed him in a "classic penalty situation" as described in Minnesota v. Murphy, 465 U.S. 420, 434-35 (1984), and that, therefore, his statements to the polygraph examiner were compelled and inadmissible. In his second issue, he argues that the disclosure of his polygraph examination results to the district attorney's office for the purpose of obtaining a new conviction against him violated his due process rights because he was led to believe that the results would be disclosed only to the probation department and his father.

Held: Affirmed

Opinion: In his first issue, A.M. contends that his statements to Perot were compelled. The State may not compel a person to make an incriminating statement against himself. U.S. CONST. amend. V; Tex. Const. art. I, § 10. A criminal defendant does not lose this constitutional protection against self-incrimination merely because he has been convicted of a crime. *Murphy*, 465 U.S. at 426; *Chapman v. State*, 115 S.W.3d 1, 5 (Tex.Crim.App.2003). A person who is on probation has a right against self-incrimination concerning statements that would incriminate him for some other offense. *Murphy,* 465 U.S. at 426; *Chapman,* 115 S.W.3d at 5-6.

The privilege against self-incrimination is self-executing when a person is subjected to a custodial interrogation by law enforcement officers. *Murphy,* 465 U.S. at 429-30. Statements made by a suspect during a custodial interrogation are inadmissible unless the suspect was given a *Miranda* warning and knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. *Murphy*, 465 U.S. at 430;*Miranda,* 384 U.S. at 475. However, requiring a probationer to submit to a polygraph examination does not subject the person to custodial interrogation. *Ex parte Renfro,* 999 S.W.2d 557, 561 (Tex.App.-Houston [14th Dist.] 1999, pet. ref'd); *Marcum v. State,* 983 S.W.2d 762, 766 (Tex.App.-Houston [14thDist.] 1998, pet. ref'd). Therefore, the probationer need not be given *Miranda* warnings before administering the polygraph examination. *Marcum,* 983 S.W.2d at 766.

Another exception to the general rule is the "classic penalty situation." *Murphy,* 465 U.S. at 434-35; *Chapman,* 115 S.W.3d at 6. If a person is placed in a classic penalty situation, the privilege against self-incrimination is self-executing, the person's statements are deemed compelled, and the statements are inadmissible in a criminal prosecution. *Murphy,* 465 U.S. at 434-35; *Chapman,* 115 S.W.3d at 6-7. In the classic penalty situation, the State threatens a person with punishment for asserting his privilege against self-incrimination, thereby depriving him of his choice to refuse to answer. *Chapman*, 115 S .W.3d at 6. In the probation context, a classic penalty situation is created if the State, either expressly or by implication, asserts that invocation of the privilege against self-incrimination would lead to a revocation of probation. *Murphy,* 465 U.S. at 435. To determine the issue, courts must inquire "whether [the person's] probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went farther and required him to choose between making

incriminating statements and jeopardizing his conditional liberty by remaining silent." *Id.* at 436; *Chapman,* 115 S.W.3d at 7-8.

As the sole judge of the credibility of the witnesses, the trial court was free to believe Perot's and Hunt's testimony and to disbelieve A.M.'s statements in his affidavit. *Valtierra*,310 S .W.3d at 447; *Garza*, 213 S.W.3d at 346. According to Perot, he told A.M. that the polygraph examination was voluntary and that he could refuse to take it. A.M. signed a release indicating that he understood these facts, and Perot believed that A.M. understood them. Hunt believed that A.M. would have understood the explanation that the test was voluntary and that he did not have to take it. Hunt testified that she did not tell A.M. his probation would be revoked if he did not take the examination. Based on the evidence, the trial court could have reasonably concluded that the State did not expressly or impliedly threaten A.M. with revocation of his probation if he exercised his privilege against self-incrimination and that, therefore, the State did not place A.M. in a classic penalty situation. *Murphy,* 465 U.S. at 435-36; *Chapman*, 115 S.W.3d at 6- 7.

Conclusion: Therefore, A.M.'s privilege against self-incrimination was not self-executing. *Murphy,* 465 U.S. at 434; *Chapman,* 115 S.W.3d at 11. Because A.M. did not invoke his privilege against self-incrimination, his statements to Perot were not compelled within the meaning of the Fifth Amendment. *Chapman,* 115 S.W.3d at 3.

CRIMINAL PROCEEDINGS—

Chappel v. State, No. 05-10-00629-CR, Not Reported, 2011 WL 2438520, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-7 (Tex.App.-Dallas, 6/20/11).

JUVENILE MISDEMEANOR OFFENSE ADMISSIBLE IN ADULT PUNISHMENT HEARING.

Facts: Appellant was charged by indictment alleging he committed the first-degree felony offense of aggravated robbery. Appellant waived his right to arraignment and to a jury trial and entered an open plea of guilty. After receiving all of the evidence, the trial court sentenced appellant to fifteen years' imprisonment and a $5,000 fine. On appeal, appellant asserts the trial court lacked jurisdiction and erred by admitting appellant's juvenile record into evidence at the punishment phase of trial.

Held: Affirmed

Opinion: In his second issue, appellant argues the trial court erred in admitting appellant's juvenile record into evidence at the punishment phase of the trial. The code of criminal procedure provides that "... evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of felony or of a misdemeanor punishable by confinement in jail." Tex.Code Crim. Proc. Ann. art. 37.07 § 3(a) (West Supp.2010). Where the violation of penal law is a misdemeanor punishable

by confinement in jail, such evidence of adjudication is "admissible only if the conduct upon which the adjudication is based occurred on or after January 1, 1996." Id. § 3(i).

Conclusion: Because the offense was adjudicated after January 1996 and was punishable by confinement in jail, there is no basis for appellant's complaint that the prior adjudication was admitted in violation of article 37.07. Appellant's second issue is overruled. The judgment of the trial court is affirmed.

Vaughns v. State, MEMORANDUM, No. 04-10-00364-CR, 2011 WL 915700, Juvenile Law Newsletter, Vol. 25 No. 2 ¶ 11-2-5 (Tex.App.-San Antonio, 3-17-2011).

THE TEXAS LEGISLATURE DID NOT INTEND FOR JUVENILE ADJUDICATIONS TO BE FINAL FELONY CONVICTIONS IN ORDER TO ENHANCE A SENTENCE FOR A HABITUAL OFFENDER.

Facts: Vaughns is an inmate in the Connally Unit of the Texas Department of Criminal Justice ("TDCJ"). Correctional officers testified that on August 8, 2008, Vaughns was being disruptive while officers were trying to count the inmates before allowing them to go to recreation. Because Vaughns was being disruptive, he was ordered to return to his cell. When Vaughns refused to return to his cell, Officer Vernette Davis requested a video camera and two other officers for a "show of force," per TDCJ policy and procedure. Officers then ordered Vaughns to submit to restraints.

The four guards who tried to subdue Vaughns all testified Vaughns initially turned around in order to submit to restraints, but when Officer Daniel Clark was placing the hand restraints on Vaughns, Vaughns turned around and struck Officer Clark. Vaughns also struck Officer Paul Chavarria in the eye. The recording of the incident was entered into evidence, but the taping did not begin until after the preamble. The video shows three officers surrounding Vaughns while one of the officers pushes Vaughns. After the push, the video shows Vaughns hitting Officer Davis then Officer Chavarria. At the end of the video, Vaughns is sprayed with a chemical agent and submits to restraints.

Vaughn's only witness, inmate Timothy Hernandez, testified that when the officers ordered Vaughns to submit to hand restraints, Vaughns put his hands at "eye level," but showed no signs of aggression. Hernandez testified it was not until the officers "pushed and man handled him" that Vaughns defended himself by pushing back. Once Vaughns pushed back, he and the officers got into a wrestling match "and that's when [Vaughns] started swinging." Hernandez stated Vaughns retreated when the officers sprayed a chemical agent, and thereafter Vaughns laid down on the floor and submitted to hand restraints. Hernandez testified that at no time prior to Vaughns lying on the floor did it appear the officers had their hand restraints out to put them on Vaughns.

At trial, Vaughns requested the court instruct the jury on self-defense and on the lesser-included offense of misdemeanor assault; the court refused to instruct the jury on either. The jury convicted Vaughns of two counts of assault on a public servant. Vaughns perfected this appeal.

Held: Affirmed conviction, reversed and remanded for re-sentencing.

Memorandum Opinion: Vaughns contends the evidence was legally insufficient to establish his prior convictions for enhancement purposes at the punishment phase. The State concedes error and we agree.

The State has the burden to prove, beyond a reasonable doubt, that any prior conviction used to enhance a sentence was final under the law. Flowers v. State, 220 S.W.3d 919, 922 (Tex.Crim.App.2007). Section 12.42 of the Penal Code allows a punishment to be enhanced, as a habitual offender, to a term of not more than ninety-nine years or less than twenty-five years if the defendant has previously been finally convicted of two felony offenses. TEX. PENAL CODE ANN. § 12.42(d) (West Supp.2010). The Code also states that an adjudication by a juvenile court "that a child engaged in delinquent conduct on or after January 1, 1996, constituting a felony offense for which the child is committed to the Texas Youth Commission ... is a final felony conviction." Id. § 12.42(f). But, as the State points out in their brief, section (f) does not apply to section (d). Section (f) begins, "For the purposes of Subsections (a), (b), (c)(1), and (e)," but section (d) was intentionally omitted. Id. It is clear the Texas Legislature did not intend for juvenile adjudications to be final felony convictions in order to enhance a sentence under subsection (d) as a habitual offender.

Vaughn's sentence was enhanced under section (d) because he has two prior juvenile adjudications. But, as stated above, juvenile adjudications cannot be final for purposes of enhancement under section 12.42(d) of the Texas Penal Code. Therefore, we sustain Vaughn's third issue.

Conclusion: Based on the foregoing, we affirm the judgment of conviction, but reverse and remand for re-sentencing.

DETERMINATE SENTENCE TRANSFER—

In the Matter of W.E.H., MEMORANDUM, No. 02-10-00234-CV, 2011 WL 1901986, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-1 (Tex.App.-Fort Worth, 5/16/11).

AN ORDER TRANSFERRING A JUVENILE'S DETERMINATE SENTENCE PROBATION TO AN ADULT DISTRICT COURT IS NOT AN APPEALABLE ORDER.

Facts: Appellant W.E.H. attempts to appeal the trial court's order transferring his determinate sentence probation from juvenile court to an appropriate adult district court. W.E.H. was adjudicated delinquent on July 7, 2008, for the offense of aggravated sexual assault of a child and was given a determinate sentence of five years' probation. Before W.E.H.'s eighteenth birthday, the State filed a motion to have W.E.H.'s probation transferred to an adult district court pursuant to family code section 54.051(d), and the trial court granted the State's motion. W.E.H. then filed notice of this appeal.

Held: Dismissed for lack of jurisdiction

Memorandum Opinion: W.E.H. contends in his sole issue that section 54.051(d) is unconstitutionally vague because it does not include affirmative standards for the trial court to follow in deciding whether to transfer a juvenile's probation to an adult court. However, this and other Texas appellate courts have held that an order transferring a juvenile's community supervision to an adult district court is not an appealable order. See In re J.H., 176 S.W.3d 677, 679 (Tex.App.-Dallas 2005, no pet.) (dismissing appeal for lack of jurisdiction, holding limitation of right to appeal did not violate due process or equal protection, and stating that "the trial court's order transferring determinate sentence probation to an appropriate criminal district court is not an appealable order"); see also In re B.L.C., No. 08-10-00186-CV, 2010 WL 3784972, at (Tex.App.-El Paso Sept. 29, 2010, no pet.) (dismissing appeal for lack of jurisdiction); In re C.M.W., No. 02-04-00087-CV, 2005 WL 375183, at (Tex.App.-Fort Worth 2005, no pet.) (same).

Section 56.01 of the Texas Family Code sets out a child's right to appeal a juvenile court's order and describes which of those orders are appealable. See Tex. Fam.Code Ann. § 56.01 (Vernon Supp.2010). Section 56.01(c) specifically lists the orders from which the child may appeal, but an order transferring a child's determinate sentence probation to an appropriate district court is not one of the orders enumerated in the statute. See id. § 56.01(c); In re J.H., 176 S.W.3d at 679. Thus, the order transferring W.E.H.'s determinate sentence probation to the appropriate adult district court is not an appealable order. See In re J.H., 176 S.W.3d at 679; In re B.L.C., 2010 WL 3784972, at; In re C.M.W., 2005 WL 375183, at 1. We therefore dismiss this appeal for lack of jurisdiction. See Tex.R.App. P. 42.3(a), 43.2(f).

Conclusion: Based on the foregoing, we dismiss this appeal for lack of jurisdiction.

In the Matter of V.M.S., MEMORANDUM, No. 11-10-00357-CV, 2011 WL 2732581, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-12 (Tex.App.-Eastland, 7/14/11).

IN A DETERMINATE SENTENCE TRANSFER HEARING NEITHER THE LACK OF A FORMAL CHARGING INSTRUMENT NOR THE INTRODUCTION OF DOCUMENTARY EVIDENCE CONSTITUTES FUNDAMENTAL ERROR.

Facts: In 2006, the trial court found that V.M.S. had engaged in two counts of delinquent conduct: aggravated sexual assault of a person who was at least sixty-five years old. A jury then determined the appropriate disposition, and the trial court entered an order of disposition in accordance with the jury's determination: sentencing V.M.S. to the Texas Youth Commission for a determinate period of forty years. In 2010, TYC requested that the trial court conduct a hearing pursuant to TEX. FAM.CODE ANN. § 54.11 (Vernon Supp.2010) to determine whether V.M.S. should be transferred to the Texas Department of Criminal Justice. The trial court conducted a release or transfer hearing complying with Section 54.11 and ordered that V.M.S. be transferred to TDCJ to serve the remainder of his sentence. V.M.S. appeals the transfer order.

Held: Affirmed

Memorandum Opinion: At a release or transfer hearing like the one conducted in this case, the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of TYC. Section 54.11(d). This type of hearing is not a trial and is not part of a criminal prosecution. In re S.M., 207 S.W.3d 421, 425 (Tex.App.-Fort Worth 2006, pet. denied); In re D.L., 198 S.W.3d 228, 230 (Tex.App.-San Antonio 2006, pet. denied); In re D.S., 921 S.W.2d 383, 387 (Tex.App.-Corpus Christi 1996, writ dism'd w.o.j.). It is a "second chance hearing" conducted after a juvenile has already been sentenced to a determinate number of years, and it gives the juvenile a second chance to persuade the court that he should not be imprisoned. In re D.L., 198 S.W.3d at 230; In re D.S., 921 S.W.2d at 387.

The Sixth Amendment guarantees that the accused in "all criminal prosecutions" shall have the right to be confronted with the witnesses against him and to be informed of the nature and cause of the accusation. U.S. Const. amend. VI. A hearing conducted pursuant to Section 54.11 is not a criminal prosecution; therefore, the Sixth Amendment guarantees do not apply. In re F.D., 245 S.W.3d 110, 113 (Tex.App.-Dallas 2008, no pet.); In re S.M., 207 S.W.3d at 425; In re D.L., 198 S.W.3d at 230. Furthermore, V .M.S.'s rights were not violated by the lack of a formal pleading or charging instrument. In re D.L., 198 S.W.3d at 230-31. Contrary to the assertions made by V.M.S., a hearing conducted pursuant to Section 54.11 is not a second prosecution for the same offense and does not implicate double jeopardy.

Conclusion: Neither the lack of a formal charging instrument nor the introduction of the documentary evidence constituted fundamental error. Both of V.M.S.'s issues are overruled. The order of the trial court is affirmed.

In the Matter of B.T., MEMORANDUM, No. 05-10-00977-CV, 2011 WL 2860107, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-14 (Tex.App.-Dallas, 7/20/11).

IN A DETERMINATES SENTENCE TRANSFER HEARING, THE TRIAL COURT DOES NOT LOSE JURISDICTION BECAUSE THE RELEASE AND TRANSFER HEARING IS HELD MORE THAN SIXTY DAYS AFTER THE REFERRAL WAS RECEIVED BY THE COURT AS REQUIRED BY TFC§54.11(H).

Facts: Appellant B.T., a juvenile, complains of the trial court's order to transfer her from the Texas Youth Commission to the Texas Department of Criminal Justice (TDCJ) for the completion of her sentence. Appellant asserts the trial court lacked jurisdiction because her release or transfer hearing was held more than sixty days after the referral was received by the court, which was on May 3, 2010, in violation of section 54.11(h) of the family code. See Tex. Fam.Code Ann. § 54.11(h) (West Supp.2010).

Held: Affirmed

Memorandum Opinion: Appellant's argument fails for any of three reasons. First, the trial court actually began its hearing on June 22, 2010, within the time period mandated by the statute,

although appellant's counsel requested a "reset" to a later date (in order to subpoena several witnesses), and the hearing was held on July 8, 2010. Thus, the trial court complied with the statute. See In re K.H., No. 12-01-00342-CV, 2003 WL 744067, at *2 (Tex.App.--Tyler Mar. 5, 2003, no pet.) (mem.op.) (failure to hold hearing within time specified, even if error, does not deprive the trial court of jurisdiction, citing Tex. Fam.Code Ann. § 51.0411 (West 2008)).

On this point appellant attempts to distinguish In re K.H. by arguing that, unlike the situation there, no evidence was adduced here before the statutory deadline. This brings up the second reason appellant's argument fails, namely, no evidence was adduced when the hearing was first called because appellant requested a delay. Appellant cannot complain of actions she requested the trial court make. See Tittizer v. Union Gas Corp., 171 S.W.3d 857, 862 (Tex.2005) (per curiam) (explaining "invited error" doctrine).

Third, appellant presents no authority--and we have found none--supporting the argument that failure to comply with section 54.11(h) deprives the trial court of jurisdiction. Rather, we agree with the Tyler Court of Appeals to the contrary. See In re K.H., 2003 WL 744067, at *2.

We resolve appellant's first issue against her.

Conclusion: We affirm the trial court's order to transfer to the TDCJ.

DISPOSITION PROCEEDINGS—

In the Matter of R.L., 353 S.W.3d 524, 2011 WL 4089260, Juvenile Law Newsletter, Vol. 25 No. 4 ¶ 11-4-2 (Tex.App.-San Antonio, 9/14/11).

THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES ("DFPS"), AS A DELINQUENT JUVENILE'S CUSTODIAN, HAS SOVEREIGN IMMUNITY AGAINST A TRIAL COURT'S ASSESSING COURT COSTS, FEES, AND RESTITUTION.

Facts: R.L is a child under the permanent managing conservatorship of DFPS. See TEX. FAM.CODE ANN. § 161.207 (West 2008). Claudia Aranda is employed by DFPS and serves as R.L.'s substitute care caseworker. Aranda is not related to R.L, and her responsibilities include monitoring R.L.'s progress in his residential placement.

On December 1, 2010, the State of Texas, appearing through the Bandera County Attorney, filed a petition against R.L. for having engaged in delinquent conduct by committing the offense of burglary of a habitation. The delinquency petition alleged R.L. burglarized a home and stole various household items from the residence and that R.L.'s DFPS caseworker had by willful act or omission, contributed to, caused, or encouraged R.L.'s delinquent conduct. The petition requested that the trial court hold DFPS and Aranda liable for paying any costs, fees, and restitution imposed against R.L.

R.L., R.L.'s court appointed attorney, the Bandera County Attorney, and Aranda appeared at the hearing on the State's delinquency petition. R.L. pleaded "true" to the State's allegation of engaging in delinquent conduct and the trial court entered an order of adjudication. After the trial court adjudicated R.L. delinquent, the court conducted a disposition hearing. The trial court ultimately ordered DFPS or Aranda, as R.L.'s "guardian/custodian," to perform certain monitoring requirements with respect to the juvenile, including: (1) ensuring his attendance at school; (2) reporting any probation violations by R.L.; and (3) ensuring R.L. complied with his curfew. In addition, the court ordered DFPS or Aranda to pay $2,187.50 in restitution, $20.00 in court costs, $75.00 in attorney's fees, and $15.00 per month for the term of R.L.'s probation.

DFPS filed a motion to modify or reform the judgment to vacate "all parts of the orders directed towards either Aranda or DFPS" because the orders "impose obligations upon Aranda and DFPS that are not authorized by law or supported by the record." DFPS asserted that "because DFPS is a Texas sta[t]e agency and Aranda is named here in her capacity as a state employee, both enjoy sovereign immunity from any orders entered in this matter." DFPS's motion was overruled by operation of law and this appeal followed.

Held: Reversed and remanded

Opinion: In this case the trial court imposed obligations on DFPS and Aranda in connection with a juvenile delinquency proceeding, where the state agency was merely acting as a custodian of the juvenile. Although no suit in the traditional sense has been brought against the State, the proceeding nonetheless has coercive effects on the State in that it must now bear various obligations mandated by a court order.

A suit whose affect or purpose, whether directly or indirectly, is to coerce the State to perform some act, is effectively one against the State. See generally McKamey v. Aiken, 118 S.W.2d 482, 483 (Tex.Civ.App.-San Antonio 1938, writ dism'd) ("In the determination of whether an action is one against the State within the inhibited rule stated it is not necessary that the State appear upon the record as a party. If the State is the real party against which the relief is sought, the suit is one against the State, although nominally it appears upon the record against one of its officers."). The State, however, "is not subject to those coercive measures which may be employed against an individual" litigant. Borden v. Houston, 2 Tex. 594, 611-12 (1847).
It can be sued only with its own consent, and in the manner and for the causes which it may by law prescribe. But it would be of no avail to the government that it cannot be coerced by a direct suit, if the same thing may be done indirectly in another manner. Coercion in either mode is incompatible with sovereignty.

The policies and principles that preclude a direct suit against the State without prior consent would be defeated if the trial court's orders are permitted to stand in this case. See State v. Snyder, 66 Tex. 687, 701, 18 S.W. 106, 110 (1886) (citations omitted) (" 'it is a well-established principle that courts have no authority to enforce claims against the government, in whatever form of action they may be urged, unless the institution of such action or the recognition of such claim has been expressly sanctioned by law. In fact, the proposition that the government is above the reach of judicial authority by direct action, but within its control and coercive power by indirect suit, is a solecism and absurdity in its very terms.' "). Because the trial court was without

jurisdiction to impose obligations on DFPS or Aranda, the orders underlying this appeal cannot stand.

Conclusion: We hold that DFPS and Aranda are immune from the trial court's imposition of obligations on them, including the assessment of costs, fees, and restitution in connection with R.L.'s delinquency proceeding. We therefore reverse the trial court's orders and remand the cause to the trial court with instructions to eliminate any provisions in its order imposing obligations on DFPS or Aranda.

In the Matter of S.D.M.S., MEMORANDUM, No. 11-08-00315-CV, WL 4879395, Juvenile Law Newsletter, Vol. 25 No. 1 ¶ 11-1-1 (Tex.App.-Eastland, 11/30/10).

APPELLANT'S PROBATION MAY BE MODIFIED FOR VIOLATING THE GENERAL CONDITION OF BEING UNSUCCESSFULLY DISCHARGED FROM A PLACEMENT FACILITY.

Facts: The trial court, sitting as a juvenile court, found that S.D.M.S. had engaged in serious delinquent conduct (the aggravated sexual assault of a child), adjudicated his delinquency, and placed him on probation. The State subsequently filed a motion to modify the disposition.

The original terms and conditions of S.D.M.S.'s probation included the following provisions:
(a) [S.D.M.S.] is hereby committed to the care, custody and control of Adolfo Salcido, Chief of the Juvenile Probation Department, a public official of Midland County, at the Rockdale Regional Juvenile Justice Center, Milam County, Rockdale, Texas, for a period of at least six (6) months and until completion of program ...;
(b) [S.D.M.S.] does hereby agree to participate in the total program at the facility, including all rules and regulations and to remain in placement until discharged by the staff at the facility in conjunction with the Midland County Juvenile Probation Department; (emphasis added).

After a hearing on the motion, the trial court modified its previous disposition and ordered that S.D.M.S. be committed to the Texas Youth Commission.

Held: Affirmed

Memorandum Opinion: The record from the hearing on the motion to modify reveals that S.D.M.S. was unsuccessfully discharged after seven months in the detention center. S.D.M.S.'s case manager at the detention center testified that he was discharged unsuccessfully after seven months at Garza. She testified that, during his last two months at Garza, S.D.M.S. became defiant and disruptive and that he broke the rules by having sexual writings. The director of the sex offender treatment program at Garza, Dr. Beth Shapiro, testified that, though S.D.M.S. attended the sex offender classes, he had minimal progress in the program because he would not admit committing the offense that he had originally pleaded to. Dr. Shapiro also testified that S.D.M.S. exhibited inappropriate sexual behavior while at Garza. The evidence showed that

S.D.M.S. was discharged prior to the completion of the program; therefore, S.D.M.S. violated term and condition (a) of his probation, which required S.D.M.S. to complete the program.

Conclusion: Because the evidence supports the trial court's finding that S.D.M.S. violated a reasonable and lawful order of the court, we hold that the trial court did not abuse its discretion in modifying S.D.M.S.'s disposition. The sole issue on appeal is overruled.

EVIDENCE—

Morales v. State, No. 05-09-00412-CR, Not Reported, 2010 WL 5141838, Juvenile Law Newsletter, Vol. 25 No. 1 ¶ 11-1-3 (Tex.App.-Dallas, 12/20/10).

A TRIAL COURT CAN TAKE JUDICIAL NOTICE OF ITS OWN ORDERS, RECORDS, AND JUDGMENTS RENDERED IN CASES INVOLVING THE SAME PARTIES.

Facts: Edgar Jesus Morales appeals following the revocation of his probation for the offense of aggravated assault with a deadly weapon.

During the punishment stage of the hearing, the State called Andy Nation, a probation officer with the Collin County Community Supervision Corrections Department, as its first witness. The State asked the trial court to take judicial notice of appellant's two prior juvenile adjudications and commitments to Texas Youth Commission (TYC) for the offenses of aggravated assault with a deadly weapon and burglary of a habitation. The adjudications were from the 417th district court, and the trial court's file containing those adjudications was in court and referenced by the prosecutor during the revocation hearing. Appellant's trial counsel objected that the State had not established the proper predicate. The trial court sustained the objection.

The prosecutor continued to question Nation, who testified regarding appellant's criminal history and immigration status. Nation explained that the present case arose from appellant's shooting of another man in November 2006. In two unrelated cases, appellant was adjudicated and committed to the TYC for the felony offenses of aggravated assault with a deadly weapon and burglary of a habitation. Both of these offenses involved firearms. After being released from TYC in July 2008, appellant was voluntarily returned to Mexico by Immigration and Customs Enforcement. By September 2008 appellant had returned to Texas. In that same month, appellant was arrested while in possession of a weapon in a motor vehicle that also contained stolen property. The State initially filed a petition to enter final adjudication of appellant's guilt in September 2008 before filing the motion to revoke in December 2008. On December 18, 2008, appellant pleaded guilty to the offense of unlawful carrying of a weapon. Nation also testified that their records showed that appellant had "disclosed numerous prior criminal activities."

The State's second and final witness, Gerald Rutledge, a detective with the McKinney Police Department who encountered appellant both as a juvenile and an adult, testified that appellant

had a reputation for being violent and was associated with firearms. In Rutledge's opinion, appellant was able to move back and forth between Mexico and Texas "[v]ery easily." Based on his experience with appellant and knowledge of appellant's reputation, he believed appellant posed a continuing threat to the community.

At the close of the State's evidence, the prosecutor again asked the trial court to take judicial notice of the two juvenile cases. The prosecutor offered to call herself "as a witness to identify [appellant] as the same person who was adjudicated for these two offenses." Defense counsel stipulated that this would have been the prosecutor's testimony. Appellant did not call any witnesses at the revocation hearing. The trial court revoked appellant's probation and sentenced him to ten years in prison.

Held: Affirmed

Opinion: A trial judge may take judicial notice of the orders, records, and judgments rendered in his court in cases involving the same parties. See Tex.R. Evid. 201(b); Wilson v. State, 677 S.W.2d 518, 523 (Tex.Crim.App.1984); Brown v. State, No. 05-92-02146-CR, 1997 WL 211478, at *7 (Tex.App.--Dallas Apr. 30, 1997, no pet.) (not designated for publication); Bagley v. State, No. 05- 93-01539-CR, 1994 WL 718520, at *2 (Tex.App.--Dallas Dec. 22, 1994, pet. ref'd) (not designated for publication). A trial judge may also take judicial notice of evidence from a previous trial on the merits or a previous revocation hearing. See Bradley v. State, 608 S.W.2d 652, 656 (Tex.Crim.App.1980); Barrientez v. State, 500 S.W.2d 474, 475 (Tex.Crim.App.1973); Akbar v. State, 190 S.W.3d 119, 123 (Tex.App.--Houston [1st Dist.] 2005, no pet.); Brown, 1997 WL 211478, at *7.

In this case, the record does not show why counsel did not continue to object to the trial court taking judicial notice of appellant's two prior adjudications. Since the prior adjudications were from the same court and involved the same defendant, appellant's continued objection to the judicial notice would most likely have been futile.

Conclusion: In upholding the trial court's decision, the court of criminal appeals concluded: Certainly, [the trial court] could take judicial notice of the evidence introduced in that prior proceeding. We reach this conclusion despite appellant's contention that the two prior adjudications were inadmissible under rules of evidence 403, 802, and 803. Appellant failed to preserve these issues for appellate review because he did not make the necessary objections at the revocation hearing.

Tienda v. State, No. 05-09-00553-CR, Not Reported, 2010 WL 5129722, Juvenile Law Newsletter, Vol. 25 No. 1 ¶ 11-1-4 (Tex.App.-Dallas, 12/17/10).

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DETAILS OF THE MYSPACE PAGES IN EVIDENCE.

Facts: A jury convicted Ronnie Tienda, Jr. of murder. In his second issue on appeal, appellant complained that the trial court erred in admitting facebook evidence.

The complainant's sister, Priscilla Palomo, testified that she found appellant's MySpace accounts based on "a lead." She found MySpace pages containing photos of appellant and comments allegedly made by him when she searched for him under "Smiley," his nickname. The State produced no other witnesses to identify the MySpace pages. The district attorney's office subpoenaed records associated with ID user numbers from his MySpace accounts. The trial court admitted these records into evidence over appellant's objection. Several profiles were found for appellant on MySpace. His name was listed as "ron mr. t", "ron Mr.T" and "SMILEY FACE." His city was listed as "D TOWN," "D*Town," and "dallas." And his various email addresses incorporated the name Smiley or Ronnie Tienda, Jr.

On one MySpace page, there was a photograph of appellant with the caption, "If you ain't blasting, you ain't lasting," and the notation, "Rest in peace, David Valadez [the complainant]." There was a bar near the notation that allowed MySpace users to play a song, which Palomo testified was the song that the complainant's family had used at his memorial service. Another MySpace page contained the statement, "Yeah, ... I keep it gangster, even after Hector shot at Nu-Nu at [the second club], we still didn't tell. And I know Jesse told him we was there, 'cause we saw them at the club, but it's cool if I get off, man." Another comment read, "Yeah, ... everyone was busting and they only told on me." Still other comments mentioned appellant's electronic monitor and "Hector snitching on me." The photographs of appellant on the MySpace pages also included one where he was displaying his electronic monitor and another captioned "str8 outta jail and n da club." Palomo admitted there was no way to verify who is the author of anything written on a MySpace page.

Daniel Torres, a gang unit officer with the Dallas Police Department, testified that the photographs of appellant posted on MySpace demonstrated his membership in the Dallas branch of the Tango Blast gang. He stated that members of the gang often stay in contact through MySpace. He noted that the number 18 tattooed on the back of appellant's head was a reference to the North Side 18th Street Gang. Torres explained that the phrase, "If you ain't blasting, you ain't lasting" is a phrase they use against other gangs to let them know that if they are not part of their group, "you're not going to last."

In his second point of error, appellant complains the trial court erred in overruling his objection to the evidence taken from the MySpace pages. He argues that there was no proof the MySpace pages in question were created and maintained by him. In effect, he argues the MySpace pages were not authenticated. The requirement of authentication is a condition precedent to the admissibility of evidence and is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Tex.R. Evid. 901(a).

Held: Affirmed

Opinion: A trial court should admit evidence that is relevant based upon a conditional fact of authentication only if there is sufficient evidence to support a jury finding that the conditional fact is true. *See* *Druery v. State*, 225 S.W.3d 491, 502 (Tex.Crim.App.2007). The appearance, contents, substance, or other distinctive characteristics of the evidence, taken in consideration of the circumstances of the case, may be used to authenticate the evidence. *See* Tex.R. Evid.

901(b)(4). The trial court does not abuse its discretion in admitting evidence where it "reasonably believes that a reasonable juror could find that the evidence has been authenticated." *See Druery,* 255 S.W.3d at 502. We may not reverse the trial court's decision when that decision is within the zone of reasonable disagreement. *See Powell v. State*, 63 S.W.3d 435, 438 (Tex.Crim.App.2001).

The MySpace evidence complained of by appellant showed that the holder of the MySpace accounts identified himself as Smiley or Ron Tienda, Jr. in Dallas or D-town. There were photographs of appellant on the MySpace pages and references to the murder of the complainant, as well as appellant's being arrested and placed on electronic monitoring. The record shows that appellant was placed on the Electronic Monitoring Program as a condition of his bond on October 24, 2007. Comments on the pages referenced a Hector snitching on him and the fact that more than one person was involved in the shooting for which appellant was arrested.

Conclusion: The inherent nature of social networking websites encourages members who choose to use pseudonyms to identify themselves by posting profile pictures or descriptions of their physical appearances, personal backgrounds, and lifestyles. This type of individualization is significant in authenticating a particular profile page as having been created by the person depicted in it. The more particular and individualized the information, the greater the support for a reasonable juror's finding that the person depicted supplied the information. *See Griffin v. Maryland*, 995 A.2d 791, 806, *cert. granted,* 415 Md. 607 (September 17, 2010). Having reviewed the details of the MySpace pages admitted into evidence in this case, we conclude that the trial court did not abuse its discretion in admitting the evidence. We overrule appellant's second point of error.

Benton v. State, 336 S.W.3d 355, 2011 WL 339179, Juvenile Law Newsletter, Vol. 25 No. 1 ¶ 11-1-5 (Tex.App.-Texarkana, 2/4/11).

THE STATE MAY USE CIRCUMSTANTIAL EVIDENCE TO PROVE THAT THE DEFENDANT IS THE SAME PERSON NAMED IN AN ALLEGED PRIOR CONVICTION.

Facts: In the process of pleading guilty to murder, Courtney Benton confessed that, in the early morning hours of September 17, 2008, he shot and killed Steven McCullough in Houston County. Benton elected to have the jury assess his punishment. Benton appeals on the sole basis that the admission of certain juvenile court judgments was improper because the State did not provide evidence that he was the person reflected in those judgments.

Held: Affirmed

Opinion: Benton contends there is insufficient evidence to link him to the prior convictions contained in State's Exhibits 82 and 83. We disagree. The prior convictions are linked to Benton via (1) his name, "Courtney Antoine Benton," (2) his birth date of April 11, 1987, (3) his mother's name--Joycelyn Alexander (Benton), and (4) Benton's signature, which appears on Exhibits 49 and 51, the authenticity of which has not been contested.

All pleadings filed in connection with Benton's prosecution for McCullough's murder were styled using the name, "Courtney Benton." However, Benton stated that his full name is Courtney Antoine Benton. The judgments and stipulations of evidence admitted at trial as State's Exhibits 82 and 83 are signed variously as "Courtney Benton" and as "Courtney Antoine Benton." Generally, a name alone is insufficient to connect a defendant to a prior judgment. See Beck, 719 S.W.2d at 210. Here, we are not confronted with a name commonly encountered, a partial name, or initials. We are provided with the appellant's full name, an individual who was indicted in Houston County, Texas, for a crime committed in Crockett, Texas. We take judicial notice that it is 115.95 miles from Crockett, Texas to Houston, Harris County, Texas, where the prior convictions were rendered. While the name alone is not the sole evidence connecting Benton to the prior convictions, it is quite unlikely that another by the name of Courtney Antoine Benton was convicted in Harris County, Texas, within the time frames listed in those prior convictions.

The second factor connecting Benton to the prior convictions is his date of birth. The prior convictions each list Benton's date of birth as April 11, 1987. Benton himself acknowledges his date of birth as April 11, 1987; this is substantiated by Jones' testimony as well. We take judicial notice of the fact that, given Benton's date of birth, he would have been a juvenile at the time of the Harris County convictions in March and November 2003. Both prior convictions indicate that the Courtney Antoine Benton therein convicted was a juvenile.

In addition to his name and date of birth, the identity of Benton's mother connects Benton to the prior convictions admitted as State's Exhibit 82. The person identified as Benton's mother on the prior felony conviction is Joycelyn Alexander (Benton). The person Benton identified as his mother--in the video recording of his confession played to the jury--is Joycelyn Alexander.

Finally, the prior convictions and stipulations of evidence comprising State's Exhibits 82 and 83 are signed by the defendant variously as "Courtney Benton" or "Courtney Antoine Benton." Benton's signature appeared on State's Exhibits 49 and 51, the written statements Benton provided to Wagner. While the jury was not specifically requested to compare these signatures with those appearing on the prior convictions, it is nevertheless "competent to give evidence of handwriting by comparison, made by experts or by the jury." TEX.CODE CRIM. PROC. ANN. art. 38.27 (Vernon 2005); see Zimmerman v. State, 860 S.W.2d 89, 97 (Tex.Crim.App.1993) (authentication of handwriting may be established by comparison performed either by experts or by jury), vacated & remanded on other grounds, 510 U.S. 938 (1993). Exhibits 49 and 51 were admitted without objection and were available to the jury for signature comparison. The jury was therefore free to compare the signatures appearing on Exhibits 49 and 51 (which were never denied by Benton) with those appearing on the prior convictions to assist in the determination of whether or not Benton was indeed the same individual listed in the prior convictions.

As a practical matter--while Benton objected to the admission of the prior convictions due to claimed inadequate identification of the person so convicted--neither the State nor the defense argued the identity issue to the jury. In fact, when counsel for Benton did mention the prior felony conviction in closing argument, he stated, Now, the title to one of them is unanimous because it's engaging in organized criminal activity. But if you will look, Courtney and several

other youths, again, several years ago stole a car. That was it. And he pled guilty and took his punishment. Moreover, in speaking of the prior misdemeanor conviction, counsel for Benton stated, "The other offense is a drug possession case, codeine. And he pled guilty to that." A judicial admission must be a clear, deliberate, and unequivocal statement. Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 905 (Tex.2000); Spradlin v. State, 100 S.W.3d 372, 380 (Tex.App.-Houston [1st Dist.] 2002, no pet.). A judicial admission bars a party from disputing a fact and relieves his adversary from having to present proof of the fact. Auld, 34 S.W.3d at 905. While the State does not mention this argument in its brief, we find the foregoing statements on behalf of Benton to be judicial admissions.

Conclusion: Considering the totality of the evidence linking Benton to the prior convictions, even in the absence of the foregoing judicial admissions, a rational jury could have found beyond a reasonable doubt that Benton was indeed the same person identified in the prior convictions admitted via State's Exhibits 82 and 83.

IMMIGRATION—

Ex Parte Yekaterina Tanklevskaya, No. 01-10-00627-CR, --- S.W.3d ----, 2011 WL 2132722, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-2 (Tex.App.-Hous. (1 Dist.) 5/26/11).

IN A PLEA TO THE COURT, COUNSEL HAS A DUTY TO INFORM APPLICANT (DEFENDANT) OF NOT JUST THE POSSIBLE IMMIGRATION CONSEQUENCES IN GENERAL TERMS (AS IS CONTAINED IN PLEA PAPERWORK), BUT MUST SPECIFICALLY INFORM APPLICANT IF IT WOULD AFFECT HIS INADMISSIBILITY OR SUBSEQUENT REMOVAL AND FAILURE TO DO SO IS INEFFECTIVE ASSISTANCE OF COUNSEL.

Facts: In April 2009, the State charged applicant with the Class B misdemeanor offense of possession of less than two ounces of marijuana. Applicant pleaded guilty, and the trial court assessed punishment at four days‘ confinement in the Harris County Jail and a six-month suspension of her driver‘s license. Applicant did not directly appeal her conviction, and she successfully completed the terms of her punishment.

Shortly after pleading guilty, applicant, a Ukrainian citizen and legal permanent resident of the United States, left the country to visit her father in Germany. Upon her return to the United States, immigration officials detained applicant in Memphis, confiscated her permanent resident card, and allowed her to return to Houston pending removal proceedings. The Immigration and Naturalization Service subsequently initiated removal proceedings against applicant on the ground that her conviction rendered her —inadmissible to the United States.

In March 2010, the United States Supreme Court decided Padilla v. Kentucky, which addressed whether defense counsel‘s failure to provide information regarding the immigration consequences of a guilty plea constitutes ineffective assistance of counsel under Strickland v. Washington and therefore renders a guilty plea involuntary. See Padilla v. Kentucky, 130 S. Ct.

1473, 1482–84 (2010); Strickland, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984). The Padilla Court held that defense counsel ―must inform her client whether his plea carries a risk of deportation‖ to satisfy the requirements of the Sixth Amendment. Padilla, 130 S. Ct. at 1486. The Court clarified that when the relevant immigration law is ―not succinct and straightforward,‖ defense counsel need only ―advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences‖; however, when the deportation consequences are ―truly clear,‖ counsel has an ―equally clear‖ duty to give correct advice. Id. at 1483.

On May 27, 2010, applicant filed an application for a writ of habeas corpus alleging that her plea counsel did not sufficiently advise her of the immigration consequences of her guilty plea and therefore provided ineffective assistance under Padilla, rendering her guilty plea involuntary. At the habeas hearing, neither the State nor applicant called applicant's plea counsel as a witness, but both parties stipulated that he would testify that he informed applicant of the general immigration consequences to a guilty plea, but he did not specifically tell her that, upon leaving and attempting to return to the United States, she would be presumptively inadmissible. Nor did he tell her that she could not request a waiver of the inadmissibility provision because the information in the original case did not specify that the quantity of marijuana allegedly possessed was less than thirty grams. Both parties agreed that applicant signed the usual ―plea paperwork,‖ which includes the acknowledgement that ―I understand that upon a plea of guilty/nolo contendere . . . that if I am not a citizen of the United States my plea of guilty/nolo contendere may result in my deportation, exclusion from admission to this country, or denial of naturalization under federal law,‖ and that the trial court admonished applicant regarding the general immigration consequences before accepting her guilty plea pursuant to Code of Criminal Procedure article 26.13(a).

At the hearing, applicant testified that, when she met with her plea counsel, she informed him that she planned to visit her father in Germany and he confirmed her belief that she could not travel outside of the United States while on probation. Plea counsel informed applicant that an additional option to probation would be to plead guilty and receive a suspension of her driver's license. According to applicant, plea counsel did not tell her that if she left the country, she would be inadmissible and subject to removal proceedings upon her return to the United States. Applicant also testified that counsel never discussed how the State's failure to specify in the information the precise quantity of marijuana that she allegedly possessed affected her ability to obtain a waiver of the inadmissibility provision. Applicant stated that had she known that she would be inadmissible upon her return to the country, she ―would [not] have accepted the plea as [she] did.‖ When asked whether she ―would have decided maybe to go to trial,‖ applicant responded that she ―would have thought about it‖ and ―would have probably done so.‖ The trial court then had a brief discussion with defense counsel regarding how applicant's situation would be different if she had accepted deferred adjudication. Defense counsel indicated that applicant would not be facing removal proceedings if she had accepted, and the trial court had approved, deferred adjudication.

On cross-examination, applicant conceded that her plea counsel informed her of the ―general possibilities‖ regarding the immigration consequences of a guilty plea by a noncitizen. Applicant also admitted that she signed the ―green sheet,‖ which states the

consequences of a plea of guilty or nolo contendere and includes a warning that a conviction may result in deportation or inadmissibility to the country. Applicant also had the following exchange with the prosecutor:

State: You testified earlier that would have possibly thought about a jury trial had you known about other consequences; is that correct?

Applicant: That is absolutely correct. I would have certainly weighed my options differently had I known what would result by taking the trip outside of the country.

Applicant further acknowledged that she knew that she was voluntarily waiving her right to a jury trial when she signed the plea documents and entered her guilty plea.

The trial court subsequently denied habeas corpus relief. Applicant did not request findings of fact and conclusions of law.

In one issue, applicant contends that the trial court erred in denying habeas relief because, pursuant to Padilla, her plea counsel provided ineffective assistance when he failed to specifically inform her that a guilty plea would render her presumptively inadmissible upon leaving and attempting to re-enter the United States.

Held: Trial Court Judgment Reversed, Habeas Corpus Granted.

Opinion: Here, it is undisputed that applicant‘s plea counsel informed her of the general immigration consequences to pleading guilty, that applicant signed a document acknowledging that a guilty plea ―may result in [her] deportation, exclusion from admission to this country, or denial of naturalization under federal law,‖ and that the trial court provided this same admonishment pursuant to Code of Criminal Procedure article 26.13(a) before accepting applicant‘s guilty plea. It is also undisputed that applicant‘s plea counsel did not specifically inform her that a guilty plea rendered her presumptively inadmissible to the United States upon her return from traveling abroad or that she could not obtain a waiver from this inadmissibility requirement because the information did not specify that the quantity of marijuana allegedly possessed was less than thirty grams. Applicant contends that these failures constitute ineffective assistance and render her plea involuntary under Strickland and Padilla. An applicant seeking habeas corpus relief based upon ineffective assistance of counsel must demonstrate, by a preponderance of the evidence, (1) that her counsel‘s representation ―fell below an objective standard of reasonableness‖ and (2) that there is a ―reasonable probability that, but for counsel‘s unprofessional errors, the result of the proceeding would have been different.‖ Padilla, 130 S. Ct. at 1482 (quoting Strickland, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068); Ex parte Chandler, 182 S.W.3d 350, 353 (Tex. Crim. App. 2005). We presume that counsel‘s conduct falls within the wide range of reasonable professional assistance, and we will find counsel‘s performance deficient only if the conduct is so outrageous that no competent attorney would have engaged in it. Andrews v. State, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005) (citing Bone v. State, 77 S.W.3d 828, 833 n.13 (Tex. Crim. App. 2002)). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Section 1182(a)(2)(A)(i)(II) of Title 8 of the United States Code provides that ―any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of . . . any law or regulation of a state . . . relating to a controlled substance is inadmissible.‖ 8 U.S.C.S. § 1182(a)(2)(A)(i)(II) (2008). In certain circumstances, the Attorney General may, in his discretion, waive the application of this inadmissibility requirement ―insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana.‖ 8 U.S.C.S. § 1182(h) (2008). Upon pleading guilty to possession of marijuana, therefore, applicant was presumptively inadmissible if she left and attempted to return to the United States. Section 1229b(a) provides that the Attorney General may cancel the removal of an inadmissible alien if the alien (1) has been an alien lawfully admitted for permanent residence for not less than five years; (2) has resided in the United States continuously for seven years after having been admitted in any status; and (3) has not been convicted of any aggravated felony. 8 U.S.C.S. § 1229b(a) (2008). ―Aggravated felony‖ includes ―illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18).‖ 8 U.S.C.S. § 1101(a)(43)(B) (2008). Simple possession of marijuana is not considered an aggravated felony. See Lopez v. Gonzales, 549 U.S. 47, 53, 127 S. Ct. 625, 629 (2006) (―Mere possession is not, however, a felony under the federal [Controlled Substances Act] . . . .‖); Arce-Vences v. Mukasey, 512 F.3d 167, 171 (5th Cir. 2007) (―Because Arce's conviction for simple possession of marijuana is not a drug trafficking crime and does not involve commercial dealing, it is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B).‖). The habeas record indicates that applicant entered the United States as a lawful permanent resident in 1995, fourteen years before the offense at issue. She has not been convicted of an aggravated felony. Applicant therefore appears to qualify for discretionary cancellation of removal under section 1229b(a).

At the habeas hearing, applicant testified that she informed her plea counsel that she had an out-of-country trip planned and that she asked him about how that trip affected her ability to seek probation. Counsel informed her that she could not travel outside of the country while on probation and told her that her other option was to plead guilty and receive a suspension of her driver's license. The parties stipulated that plea counsel would testify that he informed applicant of the ―general immigration consequences‖ of a guilty plea—such as that applicant may be subject to deportation, inadmissibility, or denial of naturalization upon pleading guilty—but did not inform her that under the immigration statutes, upon her return to the United States from Germany, her inadmissibility and subsequent removal was presumptively mandatory, especially because she did not qualify for the ―simple possession‖ waiver due to the information's failure to specify that the quantity of marijuana allegedly possessed was less than thirty grams. Padilla recognizes that immigration law is complex and is a legal specialty with numerous nuances and intricacies. The Supreme Court therefore held that ―[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.‖ Padilla, 130 S. Ct. at 1483. The Court also held, however, that ―when the deportation consequence is truly clear,‖ counsel's ―duty to give correct advice is equally clear.‖ Id. In Padilla, ―[t]he consequences of Padilla's plea could easily be determined from reading the removal statute [and] his deportation was presumptively mandatory. . . .‖ Id. ―A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible

that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty. United States v. Bonilla, 637 F.3d 980, 984 (9th Cir. 2011) (citing Padilla, 130 S. Ct. at 1483) (emphasis in original).

Applicant's inadmissibility upon her return to the United States was presumptively mandatory, and the immigration consequences of a guilty plea in this scenario were clear from reading the inadmissibility and removal statutes. Applicant's plea counsel knew that she had an out-of-country trip planned, and she was entitled to know that, if she still chose to leave the country after pleading guilty, her inadmissibility and subsequent removal was not merely a —possibility but was a —virtual certainty and —presumptively mandatory under the immigration statutes.

We therefore conclude that because the inadmissibility consequence is truly clear in this case plea counsel had a duty to inform applicant of the specific consequences of her guilty plea. Because counsel, who knew that applicant had an out-of-country trip planned, only informed her of the general —possible immigration consequences, and did not inform her that her inadmissibility and subsequent removal was —virtually certain and —presumptively mandatory, we hold that counsel's performance was deficient under the first prong of Strickland.

To establish prejudice in the context of an involuntary guilty plea resulting from the ineffective assistance of counsel, the applicant must demonstrate that there is a reasonable probability that, but for her plea counsel's deficient representation, she would not have pleaded guilty, but would have instead insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); Morrow, 952 S.W.2d at 536. The Court of Criminal Appeals has stated that, to demonstrate prejudice in this situation, the defendant must show a reasonable probability that, absent counsel's errors, —a particular proceeding would have occurred, but she need not show that she would have received a —more favorable disposition had she gone to trial. Johnson v. State, 169 S.W.3d 223, 231 (Tex. Crim. App. 2005); see also Ex parte Crow, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005). Deprivation of a trial is a structural defect, and the —narrowed prejudice inquiry in the involuntary guilty plea context —is designed to ensure that the defendant would actually have availed himself of the proceeding in question, so that he really is in the same position as someone whose rights were denied by the trial court. Johnson, 169 S.W.3d at 231–32. Thus, counsel's allegedly deficient performance —must actually cause the forfeiture [of the proceeding in question]. Id. at 232. If the defendant cannot demonstrate that, but for the deficient performance, she would have availed herself of the proceeding, —counsel's deficient performance has not deprived [her] of anything, and [she] is not entitled to relief. Id. (quoting Roe v. Flores-Ortega, 528 U.S. 470, 484, 120 S. Ct. 1029, 1038 (2000)); Crow, 180 S.W.3d at 138. In determining whether the defendant met her burden to establish prejudice, —we are to consider the circumstances surrounding her guilty plea and the gravity of the advice that [the defendant] did not receive as it pertained to [the defendant's] plea determination. Jackson v. State, 139 S.W.3d 7, 20 (Tex. App.—Fort Worth 2004, pet. ref'd).

Here, at the habeas hearing, applicant testified regarding what actions she would have taken had her plea counsel informed her of the specific consequences of her guilty plea. Applicant had the following exchange with her habeas counsel:

Counsel: Had you known what you know now, at the time, that you were going to be subject to being [in]admissible and to going to this immigration proceeding, would you have accepted the plea as you did?

Applicant: No, I would have not.

Counsel: If you had known that not having a determination of the amount of possession [in the information,] you would have not been able to receive a waiver from the immigration courts, would you have decided maybe to go to trial?

Applicant: I would have thought about it. I would have probably done so.
Shortly thereafter, on cross-examination, applicant had a similar exchange about her options with the prosecutor:

State: You testified earlier that you would have possibly thought about a jury trial had you known about other consequences; is that correct?

Applicant: That is absolutely correct. I would have certainly weighed my options differently had I known what would result by taking the trip outside of the country.

On appeal, applicant argues that if she had known of the specific immigration consequences of her guilty plea, she would have gone to trial or, at the least, attempted to negotiate a different plea that would allow her to avoid the negative immigration consequences.

To establish prejudice in the involuntary guilty plea context, the defendant must show, by a preponderance of the evidence that, but for her counsel‘s errors, she would have ―insisted on going to trial.‖ Hill, 474 U.S. at 59, 106 S. Ct. at 370; Morrow, 952 S.W.2d at 536. Here, applicant testified at the habeas hearing that, had she known that she would be subject to inadmissibility and removal proceedings if she pleaded guilty, she would not have accepted the plea ―as [she] did‖ and she ―would have probably‖ gone to trial. She further stated that, had her plea counsel informed her of what would happen if she traveled outside of the country after pleading guilty, she ―would have certainly weighed [her] options differently.‖ We conclude that based on her testimony at the habeas hearing, applicant met her burden of demonstrating that, but for her plea counsel‘s deficient and incomplete advice regarding the immigration consequences of a guilty plea, an issue of vital importance to applicant, she would not have pleaded guilty. See Ex parte Moody, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999) (―Applicant alleges that he would not have accepted the plea bargain had he known he would not serve his sentences concurrently. . . . Applicant has met his burden of showing a reasonable probability that, but for counsel‘s erroneous advice, he would not have pled guilty. The nature of the erroneous information in this case is of such importance, and so critical to his decision, as to cast doubt on the validity of the plea.‖); see also Padilla, 130 S. Ct. at 1480 (―These changes [to immigration laws] confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.‖).

Here, the trial court properly admonished applicant pursuant to article 26.13(a). This admonishment, however, only requires the court to inform a defendant that the guilty plea —may result in deportation, inadmissibility, or the denial of naturalization. This admonishment is the same as the warning that appears on the plea paperwork that defendants in Harris County are required to sign before pleading guilty. This admonishment is also the same as the advice plea counsel gave to applicant: information regarding the general immigration consequences of a guilty plea. But here, plea counsel rendered ineffective assistance by not specifically informing applicant that, under the immigration statutes, inadmissibility and subsequent removal was —presumptively mandatory and —virtually certain upon her return to the United States.

We do not hold that trial courts are under an obligation to inform defendants of the specific immigration consequences to their guilty pleas. Rather, we hold that, under these facts, the trial court's statutory admonishment prior to accepting applicant's guilty plea does not cure the prejudice arising from plea counsel's failure to inform applicant that, upon pleading guilty, she would be presumptively inadmissible. We hold that applicant established that her plea counsel's representation constituted deficient performance under Strickland and Padilla and that, but for counsel's deficient advice, she would not have pleaded guilty. We further hold that due to plea counsel's ineffective assistance, applicant involuntarily pleaded guilty. We sustain applicant's sole issue.

Conclusion: Habeas corpus relief is granted. We set aside the judgment in cause number 1594654 in the County Criminal Court at Law No. 11 of Harris County and remand applicant to the Harris County Sheriff to answer the charges against her.

SEARCH & SEIZURE—

Castleberry v. State, (NO. 01-10-00158-CR, 01-10-00249-CR, 01-10-00159-CR, 01-10-00248-CR), ---S.W.3d---, 2011 WL 1598841, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-9 (Tex.App.-Hous. (1 Dist.), 4/28/11).

BY GIVING MINOR FULL ACCESS TO AND CONTROL OVER A LOCKBOX AND ITS CONTENTS BEFORE LEAVING THE COUNTRY, DEFENDANT GAVE UP ANY STANDING TO CHALLENGE ITS SEARCH AND SEIZURE.

Facts: Castleberry started sexually assaulting his stepdaughter, P., when she was eight years old. When P. and a fourth-grade classmate, A., became close friends, A. began to spend the night at P.'s house on weekends and holidays. Within a couple of years, Castleberry sexually assaulted A. as well as P. During some incidents, Castleberry would photograph the girls while they engaged in sexual conduct, plying them with alcohol and instructing them on what to wear and how to pose.

The abuse of both girls continued until 2003, when Castleberry took a job overseas. By then, P. and her mother had moved to live with P.'s grandfather, and Castleberry no longer lived with them. Before leaving, Castleberry gave P. a lockbox and key to keep for him while he was gone.

He did not tell her what was inside the lockbox, but instructed her to destroy it and its contents if anything happened to him. P., who was seventeen years old at the time, agreed, and stored the lockbox in the closet of the room she had in her grandfather's house.

Castleberry remained overseas for several years. In late December 2005, when P. was nineteen years old, she finally told her mother about the sexual abuse. Her mother called the police, who told P. to stop all contact with Castleberry. P., fearing that Castleberry would return to kill her, quit her job in Houston and moved to her uncle's home in Dallas a few days later. While traveling there, P. called her mother, told her about the lockbox, and asked her to give it to the police.

P.'s mother retrieved the lockbox. Before bringing it to the police, she opened it to find computer disks, floppy disks, printed photographs, and other materials. On one of the disks, Castleberry had written "For My Eyes Only." P.' s mother opened it on a computer and saw that it contained over 300 pornographic images of P. and A.

In the meantime, P. contacted Castleberry's girlfriend overseas and sent her an Internet link to the local news story on the police investigation. When Castleberry learned that criminal charges were pending against him in Texas, he quit his job in Kuwait and became a fugitive. Approximately three years later, in January 2009, the authorities located Castleberry in Thailand, arrested him, and returned him to the United States to face the charges.

Held: Affirmed

Opinion: Castleberry contends that the warrantless seizure of the lockbox violated his privacy rights under the state and federal constitutions. *See U.S. Const.* amend. IV; TEX. CONST. Art. 1, § 9. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). An accused has standing to contest the seizure of personal property under the Fourth Amendment only if he has a possessory interest and a legitimate expectation of privacy in the property. *See id.* at 121–22, 104 S.Ct. at 1661–62; *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978) (holding that "capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Villarreal v. State,* 935 S.W.2d 134, 138 (Tex.Crim.App.1996) ("An accused has standing, under both constitutional provisions, to challenge the admission of evidence obtained by a governmental intrusion only if he had a legitimate expectation of privacy in the place invaded." (citing *Rakas,* 439 U.S. at 143, 99 S.Ct. at 430)). In claiming that he had a reasonable expectation of privacy in the lockbox at the time it was seized, Castleberry relies on evidence that: (1) he never intended to abandon the lockbox; (2) he wanted P. to keep the lockbox safe for him while he was overseas; and (3) he never gave anyone authority, permission, or consent to open or view the contents of the lockbox, except for his instruction to P. that she destroy the lockbox and its contents if anything should happen to him. Castleberry likens his agreement with P. to a bailment agreement. Under well-settled Texas law, however, a minor is bound by an agreement only if she chooses to be. *Dairyland Cnty. Mut. Ins. Co. v. Roman,* 498 S.W.2d 154, 158 (Tex.1973); *Swain v. Wiley College,* 74 S.W.3d 143, 146–47 (Tex.App.-Texarkana 2002, no pet.); *see* TEX. CIV.

PRAC. & REM CODE ANN. § 129.001 (West 2005) ("The age of majority in this state is 18 years."); *see also Youngblood v. State,* 658 S.W.2d 598, 599 (Tex.Crim.App.1983) ("[I]t is risky business for an adult to knowingly enter into a contract with a person under the age of 18 ... because the adult is on notice that as a matter of law the minor can during his minority avoid and disaffirm the contract."). As a result, Castleberry could not reasonably rely on his agreement with seventeen-year-old P. to protect his privacy in the lockbox and its contents.

Further, the relevant question is not whether an effective bailment existed, but whether P. had mutual access to and control over the lockbox. *See Welch v. State,* 93 S.W.3d 50, 55 (Tex.Crim.App.2002). The record shows that Castleberry gave P. both the lockbox and its key before he went overseas. Castleberry thus made no effort to secure the privacy of the lockbox's contents as against P., giving P. mutual, if not superior, access to and control over them. *See id.; see also United States v. Osunegbu,* 822 F.2d 472, 480 (5th Cir.1987) (manager of private mailbox facility had authority to consent to search of defendant's mailbox where front of box was locked but back was open to access by employees sorting and arranging mail).

The record also shows that Castleberry never forbade P. from accessing the contents of the lockbox. The circumstances indicate that Castleberry assumed the risk that P. would consent to its seizure. *See Welch,* 93 S.W.3d at 57. After giving P. full access to and control over the lockbox and its contents, Castleberry could not have a reasonable expectation of privacy in them. We therefore hold that Castleberry lacked standing to challenge the seizure, and the trial court correctly denied his motion to suppress.

Conclusion: We hold that the trial court did not abuse its discretion in denying Castleberry's motion to suppress. We therefore affirm the judgment of the trial court.

In the Matter of S.M.C., 338 S.W.3d 161, 267 Ed. Law Rep. 925 (TexApp.—El Paso, 3/23/11).

IN SEARCH OF SCHOOL LOCKER, TWO-PRONGED REASONABLENESS TEST OF *T.L.O.* UTILIZED, EVEN WHERE COURT HELD THAT STUDENT HAD NO LEGITIMATE EXPECTATION OF PRIVACY IN THE SCHOOL LOCKER.

Facts: By amended petition, Appellant was alleged to have engaged in delinquent conduct, which included criminal mischief (Count I) and possessing a prohibited weapon, knuckles, on the physical premises of a school or educational institution (Count II). TEX. PENAL CODE ANN. §§ 28.03(a), (b)(2), 46.03(a)(1), 46.05(a)(6). Thereafter, Appellant filed a motion to suppress evidence.

Evidence presented at the suppression hearing showed that on or about March 11, 2009, a student at East Montana Middle School informed Ms. Josephine Angerstein–Guzman, an Assistant Principal, that "[Appellant] is high, you might want to check him out." The same student had on a previous occasion discussed with Angerstein–Guzman Appellant's use of drugs before school. Angerstein–Guzman thereafter encountered the school district's canine officer, Officer Harrison, in the hallway of the school, advised him of the information she had received

regarding Appellant, and upon seeing Appellant in the hallway, Angerstein–Guzman and Harrison escorted Appellant to the nurse's office, where nurse's aide Gonzalez was present.[FN1] Angerstein–Guzman requested that campus security Officer Ponce attend Gonzalez' examination of Appellant. [FN2] Upon examination, Gonzalez found Appellant's eyes to be red, but did not consider him to be under the influence of drugs. Angerstein–Guzman, who had previous experience in observing individuals with red, glossy, and dilated eyes who were under the influence of drugs, observed Appellant's eyes to be red as well as slightly glossy and dilated. Although Appellant asserted that pink eye and eye drops were the cause of his red eyes, Gonzalez had no parental note indicating that Appellant had pink eye or was otherwise being treated for that ailment. Gonzalez acknowledged that Appellant's red eyes could have resulted from smoking marijuana.

FN1. Officer Harrison's canine was neither present nor was utilized at any time in relation to Appellant, his locker, or any searches related thereto.

FN2. Officers Ponce and Harrison are not certified peace officers.

Angerstein–Guzman testified that upon receiving the tip and seeing Appellant's eyes, she suspected that he had used something, even if it was not enough to charge him with being under the influence. She also testified that the school's administration follows through on every tip that comes in. In accordance with school procedure, Angerstein–Guzman continued to investigate the possibility that Appellant was under the influence of or had drugs at school. Angerstein–Guzman explained that when conducting a search, school officials search the person's belongings, backpack, person, pockets and "[i]f there is reasonable suspicion, we go ahead and continue to search lockers [and] vehicles, if we need to [.]" Angerstein–Guzman stated that her training and experience have demonstrated that students hide drugs in shoes, notebooks, backpacks, lockers, and vehicles.

Appellant's notebook was searched for packets or residue of drugs, but none were found. Officer Ponce did a "pat down" search of Appellant for weapons. Appellant was asked to untuck his shirt and run his own fingers along the waistband of his pants, empty and turn out his pockets, and remove his socks and shoes but no drugs were found. Angerstein–Guzman then directed Officers Ponce and Harrison to check Appellant's locker because he may have been hiding drugs there. Appellant was asked to accompany the officers to the locker. Officer Harrison asked Appellant if he had anything illegal in his locker, and Appellant initially said that he did not, but upon arriving at the locker, Appellant informed the officers that he had a belt buckle. As Officer Ponce proceeded to open the locker, Appellant told the officers that he had brass knuckles. As Officer Ponce pulled a backpack from Appellant's locker, Officer Harrison noted that there was something shiny in the backpack. Officer Harrison reached into the backpack and retrieved brass knuckles, a weapon whose possession is prohibited on school premises. TEX. PENAL CODE ANN. §§ 46.03(a)(1), 46.05(a)(6). No other contraband was discovered in the locker.

The Clint Independent School District's Student Code of Conduct was admitted into evidence along with a receipt signed by Appellant and his mother, acknowledging that they had received, read, and agreed to abide by the Code of Conduct. The Code of Conduct provides:

Students shall have a diminished expectation of privacy while under the jurisdiction of the District. School administrators may search a student's outer clothing, pockets, or property by establishing reasonable suspicion or securing the student's voluntary consent.... Areas such as lockers, which are owned by the District and jointly controlled by the District and student, may be searched, and school Administrators may routinely conduct blanket locker searches. Students shall not place, keep, or maintain any article or material in school-owned lockers that is forbidden by District Policy or that would lead school officials to reasonably believe that it would cause a substantial disruption on school property or at a school-sponsored function. Students are responsible for any prohibited item found in their possession, in their lockers, or in vehicles parked on school property, and shall be subject to appropriate school disciplinary action in accordance with this CISD Student Code of Conduct and/or [prosecution].

The Code of Conduct states that a student's possession of a prohibited weapon, including knuckles, as defined in the Texas Penal Code is an offense for which a student may be expelled.

East Montana Middle School Principal Alfredo Solis testified that school lockers are searched "continuously," and that students are aware of the searches. When random searches are performed at the school, they are typically performed sporadically with the assistance of a dog.

Based on the evidence and testimony presented, the trial court denied Appellant's motion to suppress, and upon consideration of the stipulated evidence, dismissed Count I, and adjudicated Appellant delinquent under Count II, possession of a prohibited weapon on school premises.

In his sole issue on appeal, Appellant complains that the trial court committed error when it denied his motion to suppress evidence because the search of his locker was conducted without any reasonable suspicion and in violation of his rights under the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution. U.S. CONST. amends. IV, XIV; TEX. CONST. art. I, § 9. We disagree.

Held: Affirmed

Opinion: The Fourth Amendment prohibits unreasonable searches and seizures of students by public school officials. *New Jersey v. T.L.O.,* 469 U.S. 325, 341, 105 S.Ct. 733, 738, 83 L.Ed.2d 720 (1985). However, in balancing the privacy interests of school children and the substantial need of school teachers and administrators to maintain order in the school, the United States Supreme Court has determined that the legality of a search of a student depends not upon probable cause to believe the student has violated or is violating the law but rather, upon the reasonableness, under all of the circumstances, of the search. *T.L.O.,* 105 S.Ct. at 742; *Coronado v. State,* 835 S.W.2d 636, 640 (Tex.Crim.App.1992).

In determining reasonableness, we apply a two-pronged test. *T.L.O.,* 105 S.Ct. at 742–43; *Coronado,* 835 S.W.2d at 640. The first prong requires that we determine whether the search was justified at its inception. *T.L.O.,* 105 S.Ct. at 742–43; *Coronado,* 835 S.W.2d at 640. Typically, a teacher or school official's search of a student is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has

violated or is violating either the law or the rule of the school. *T.L.O.,* 105 S.Ct. at 743; *Coronado,* 835 S.W.2d at 640. The second prong requires that we determine whether the search, as actually conducted, was reasonably related in scope to the circumstances which justified the interference in the first place. *T.L.O.,* 105 S.Ct. at 743, *citing Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct., 1868, 1879, 20 L.Ed.2d 889 (1968); *Coronado,* 835 S.W.2d at 640. A search is deemed permissible in scope when the measures adopted and used are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction. *T.L.O.,* 105 S.Ct. at 743; *Coronado,* 835 S.W.2d at 640. Moreover, the requirement of reasonable suspicion is not a requirement of absolute certainty. *T.L.O.,* 105 S.Ct. at 745, *citing Hill v. California,* 401 U.S. 797, 804, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484 (1971). Instead, sufficient probability, not certainty, is the touchstone of reasonableness. *Id.*

Although he concedes that the first prong of *T.L.O.* was met in this case, Appellant contends that upon Gonzales' determination that he was not under the influence of a drug, there was no longer a reasonable basis for searching the locker. For this reason, and because the student's tip that Appellant was "high" did not suggest that appellant had drugs or weapons on his person or anywhere else, Appellant contends that there was no reasonable suspicion to conduct the search of his person or the school's locker.

In its written findings of fact and conclusions of law, the trial court found that despite Gonzalez' determination that Appellant was not under the influence, both Angerstein–Guzman and Gonzalez had observed Appellant's eyes to be red and his pupils dilated, and both testified that they had observed individuals who had red eyes after smoking marijuana. The trial court also found that Appellant voluntarily informed Officers Ponce and Harrison that he had brass knuckles in his locker before they opened and searched the school locker.

The trial court concluded that the search of Appellant was reasonable because it was justified at its inception as a result of the student's tip that Appellant was "high." Although the initial detention and search of Appellant's person revealed that he had red eyes and dilated pupils, but no drugs, the trial court determined that it was reasonable for Angerstein–Guzman to suspect that Appellant may have placed marijuana within the locker and that the subsequent search of the locker was reasonably related in scope to the circumstances justifying the search in the first place. The trial court likewise concluded that a student does not have a legitimate expectation of privacy in a school locker as it is school property that remains under the control of school authorities.

Although it is the fruit of the second search, the "knuckles," that is at issue in Appellant's motion to suppress evidence, the validity of that search depends upon the reasonableness of the initial search for marijuana. *See T.L.O.,* 105 S.Ct. at 744. Despite Gonzalez' determination that Appellant was not under the influence of drugs, when viewed in the light most favorable to the trial court's ruling, we find the evidence supports the trial court's factual determination that both Angerstein–Guzman and Gonzalez had observed Appellant to have red eyes with dilated pupils, which they had previously observed in persons who had smoked marijuana. *See T.L.O.,* 105 S.Ct. at 745 (teacher's report that student was smoking in lavatory gave principal reason to suspect that student was in possession of cigarettes and that student's purse was obvious place in

which to find them, nor was principal's suspicion an "inchoate and unparticularized suspicion or 'hunch' "); *Iduarte,* 268 S.W.3d at 548; *In re D.J.C.,* 312 S.W.3d at 711; *In re J.A.B.,* 281 S.W.3d at 65.

Reviewing *de novo* the trial court's legal conclusions, we find them to be supported by the record and correct under the reasonableness test established by the United States Supreme Court in *T.L.O. T.L.O.,* 105 S.Ct. at 742–43; *Iduarte,* 268 S.W.3d at 548; *In re D.J.C.,* 312 S.W.3d at 711; *In re J.A.B.,* 281 S.W.3d at 65. Because Angerstein–Guzman was informed that Appellant was "high," the initial search of Appellant was justified at its inception. While it is true that no drugs were found during the initial search of Appellant's notebook and clothing, both Gonzalez and Angerstein–Guzman had observed that persons who smoke marijuana thereafter exhibit red eyes with dilated pupils, and Angerstein–Guzman testified that some students hide contraband in the school lockers. Angerstein–Guzman had reasonable grounds for suspecting that a search of Appellant's locker would produce evidence that he was violating school rules, namely that Appellant had contraband in the locker. *T.L.O.,* 105 S.Ct. at 742–43; *compare Coronado,* 835 S.W.2d at 641 (principal had reasonable grounds to suspect student was "skipping" school in violation of school rules and, consequently, "pat down" of student for safety reasons was justified; however, subsequent searches of student's clothing, person, locker, and vehicle were not reasonably related to any discovery from the initial "pat down" for safety). We therefore conclude that the subsequent search of the locker was reasonably related in scope to the circumstances justifying the search in the first place and was not excessively intrusive. *T.L.O.,* 105 S.Ct. at 742–43; *Iduarte,* 268 S.W.3d at 548; *In re D.J.C.,* 312 S.W.3d at 711; *In re J.A.B.,* 281 S.W.3d at 65. Moreover, the Code of Conduct informs students and parents that school lockers, which are owned by the school district, may be searched and that students are responsible for any prohibited items, such as knuckles, that are found in his or her school locker. Therefore, the trial court's conclusion that a student, here Appellant, does not have a legitimate expectation of privacy in a school locker was correct. *See Shoemaker v. State,* 971 S.W.2d 178, 182 (Tex.App.-Beaumont 1998, no pet.) (court of appeals held that a student does not have a reasonable expectation of privacy in his school locker, which is school property that remains under the control of the school authorities).

Having determined that the evidence supports the trial court's findings of fact, and having determined *de novo* that the two-pronged reasonableness test of *T.L.O.* has been met, Appellant's issue is overruled.

Conclusion: The trial court's judgment is affirmed.

Limon v. State, 340 S.W.3d 753, No. PD–1320–10, Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-15 (Tex.Crim.App., 6/15/11). **Reverses:** *Limon v. State*, 314 S.W.3d 694, 2010 WL 2430428, Vol. 24, No. 3 ¶ 10-3-8A&B. (Tex.App.-Corpus Christi, 6/17/10).

FOURTH AMENDMENT DOES NOT PROHIBIT A MINOR CHILD FROM CONSENTING TO ENTRY INTO A HOME WHEN THE RECORD SHOWS THE OFFICER'S BELIEF IN THE CHILD'S AUTHORITY TO CONSENT IS REASONABLE UNDER THE FACTS KNOWN TO THE OFFICER.

Facts: At the pretrial hearing on the appellant's motion to suppress evidence, Detective Gus Perez of the Aransas Pass Police Department testified to the circumstances surrounding the entry of the appellant's residence. Around 10:00 pm on June 28, 2007, Perez was called to investigate two incidents of "shots fired" in Aransas Pass. During his investigation, Perez received information that a green, four-door car was seen leaving the area of the first incident and that a resident living in the area of the second incident "believed that the Limon kids were involved." Perez, who knew of only one Limon family in Aransas Pass, proceeded to the Limon residence. When he arrived, Perez saw a "green Buick four door" parked on the street adjacent to the house. The hood of the car was still warm, and the passenger door appeared to have a bullet hole in it. Perez called for back-up and waited for three other officers to arrive before knocking on a front door [FN4] of the house at approximately 2:00 a.m.

The door was opened by a boy whom we shall call "A.S." Detective Perez testified that he did not know who A.S. was or how old he was. He later learned A.S.'s age to be 13 or 14.

Perez did not ask A.S. if he owned or possessed the residence, but "assumed that because he opened the door that he was one of the residents." Perez told A.S. that he was investigating a shooting case, and he asked for permission to enter the residence. A.S. admitted Perez and another officer.

When the officers entered the house, "there was an odor of marijuana coming from the residence itself." Perez and the other officer then proceeded to search the house, seizing certain evidence and arresting the appellant.

The appellant, Dennis Wayne Limon, Jr., was convicted of the offense of deadly conduct and sentenced to three years' imprisonment. On appeal he challenged the trial court's denial of his pretrial motion to suppress evidence, and the Thirteenth Court of Appeals reversed. The Court of Criminal Appeals granted the State's petition to review to the following issues: (1) Is it reasonable for police to believe that a person who answers the door of a residence in the middle of the night has authority to invite police to enter, or must police inquire as to that person's authority? (2) Does a teenager lack authority to invite officers inside a residence simply because he is a minor? (3) Does *Illinois v. Rodriguez* require officers to make further inquiry when they are faced with ambiguity regarding the authority of a third party to consent to an entry or search?

Held: Reversed and remanded

Opinion: Even if actual authority does not exist, consent may be validly obtained from an individual with apparent authority over the premises. Apparent authority is judged under an objective standard: "would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" As the Supreme Court discussed in *Georgia v. Randolph,* reasonableness hinges on "widely shared social expectations" and "commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interest."

The State must prove actual or apparent authority by a preponderance of the evidence. On appeal, determinations of actual and apparent authority are reviewed *de novo* as mixed questions of law and fact. When the trial court does not enter findings of fact, as in this case, reviewing courts view the evidence in the light most favorable to the trial court's rulings and assume that the trial court resolved any issues of historical fact or credibility consistently with its ultimate ruling.

Under the circumstances of the present case, we find five key facts supporting the reasonableness of Perez's belief. First, A.S. opened the door by himself in response to Perez's knock. The trial court could have believed that his act suggests a greater level of authority to permit entry than, for example, if he had answered "What do you want?" from behind the door, or if he had answered the door with an adult in view behind him. Second, viewing the evidence in the light most favorable to its ruling, the trial court reasonably could have inferred from Perez's testimony that A.S. appeared to be at least a teenager of significant maturity, if not a young adult. Third, A.S. consented to mere entry through the front door, as opposed to entry or search of less public areas of the house. The trial court could have believed that it was reasonable to rely on a teenager's authority to consent to such a limited scope of entry, while it would not have been reasonable to rely on his authority to consent to a more intrusive search. Fourth, the officer's announced purpose was to conduct an emergency public-safety function. We think it an even more widely shared social expectation that a teenager would have authority to permit entry for an emergency public-safety function than, for example, entry for a salesperson to make a sales pitch.

Finally we consider the time of the entry: 2:00 a.m. The Court of Appeals found that the hour weighed against believing that A.S. had authority because he may have been awakened from sleep and not thinking clearly. On the other hand, the trial court could have found it reasonable for Perez to believe that an individual opening the door at 2:00 a.m. was a resident rather than a guest. Furthermore, there is no evidence in the record that A.S. was in fact awakened from sleep or not thinking clearly. More importantly, lack of sleep and clarity of thought would be evidence relevant to the voluntariness of the consent rather than apparent authority to consent.

Under the facts available to Officer Perez at the moment, a mature teenager, possibly an adult, opened the front door to him at 2:00 a.m. and, after hearing that he was investigating a shooting, gave him consent to enter through the front door. We find that a person of reasonable caution could reasonably believe that A.S. had the authority to consent to mere entry under those circumstances.

Conclusion: We hold that the court of appeals erred in finding that A.S. did not have apparent authority to consent to entry. We therefore need not address the State's fourth point of error regarding harm. We reverse and remand to the court of appeals for proceedings not inconsistent with this opinion.

Dissent: MEYERS, J., filed a dissenting opinion.

Nobody gives a teenager permission to allow strangers into their home. Yet, the majority focuses on what apparent authority the child in this case may have had to let the cops into the

house at 2 o'clock in the morning. Since no actual authority would *ever* be given to a minor child in these circumstances, we are just ignoring reality and wasting our time analyzing this question. In my experience, no one gives their minor children any authority to allow strangers to enter their home. The police should presume that minors have no authority to consent to entry and should ask to speak to an adult. If no adults are available then the officers need to get a warrant (and possibly call CPS). The majority's solution will always depend upon a fact-specific analysis resulting in a problematic uncertain determination.

The officers' actions in this case could only be legal if the parents gave the child actual authority to allow strangers into the home, which simply defies common sense. As the Supreme Court said in *Watts v. Indiana,* 338 U.S. 49, 52, 69 S.Ct. 1347, 338 U.S. 49 (1949), "there comes a point where this Court should not be ignorant as judges of what we know as men."

In re A.S., MEMORANDUM, No. 04-10-00621-CV, 2011 WL 1303700, Juvenile Law Newsletter, Vol. 25 No. 2 ¶ 11-2-7 (Tex.App.-San Antonio, April 06, 2011).

AN OFFICER IS NOT REQUIRED TO PROVE AND ACTUAL VIOLATION OF A LAW OR ORDINANCE TO JUSTIFY AN INVESTIGATORY STOP, HIS EXPRESSED BELIEF (REASONABLE GROUNDS) THAT A PERSON IS VIOLATING A STATUTE OR ORDINANCE IS SUFFICIENT.

Facts: On the evening A.S. was arrested, San Antonio police officers Don Becker and Evan Bagley were downtown on bike patrol. According to the officers, they heard a vehicle "basing." Officer Becker explained "basing" occurs when loud music is emitted from a motor vehicle that can be heard from a distance, causing vibrations. The officers testified they heard the music and felt the vibrations from their position approximately thirty feet away. The officers, believing the "basing" emitting from the vehicle was in violation of several city noise ordinances, decided to stop the vehicle. According to Officer Becker, the music was so loud he had to tap on the vehicle's window to get the driver's attention. As the officers were standing outside the vehicle, they noticed A.S. sitting in the passenger seat. Both officers testified A.S. was not wearing a seatbelt. The officers asked all the occupants of the vehicle to get out. The officers stated A.S. was arrested for not wearing a seatbelt. A.S. was searched incident to the arrest. During the search, Officer Bagley found five pills, later identified as Alprazolam, in A.S.'s front shirt pocket.

Subsequently, the State filed a petition alleging A.S. had engaged in delinquent conduct by possessing a controlled substance, Alprazolam, in an amount less than twenty-eight grams. A.S. filed a pretrial motion to suppress. After a hearing, the trial court denied the motion. Thereafter, A.S. pleaded not true to the petition, and the case was tried to a jury. The jury found "true" to the allegation that A.S. had engaged in delinquent conduct by possessing a controlled substance. The trial court placed A.S. on probation for nine months in the custody of his mother, and ordered him to perform twenty-four hours of community service restitution. A .S. timely filed a notice of appeal.

Held: Affirmed

Memorandum Opinion: Officers Becker and Bagley testified the vehicle in which A.S. was riding was stopped because of violations of several provisions of the City of San Antonio Code of Ordinances, specifically section 21-52, 21-53, and 21-54. See SAN ANTONIO, TEX., art. III §§ 21-52, 21-53, & 21-54. Section 21-52 precludes "noise nuisances," which include, in part, "[t]he playing or permitting or causing the playing of any radio, television, phonograph, drum, juke box, nickelodeon, musical instrument, sound amplifier or similar device which produces, reproduces, or amplifies sound" in such a manner or with such volume so as "to annoy, to distress, or to disturb the quiet, comfort, or repose of a person of reasonable nervous sensibilities." Id. § 21-52(a)(1). Section 21-53 states that it is unlawful to "create, maintain or cause any ground or airborne vibration which is perceptible without instruments at any point on any affected property adjoining the property in which the vibration source is located." Id. § 21-53. And most pertinent in this case, section 21- 54, which is entitled "Vehicular Mounted Sound Amplification Systems," states it is unlawful:

> **... for any person operating or controlling a motor vehicle in either a public or private place within the city to operate any sound amplifier which is part of, or connected to any radio, stereo receiver, compact disc player, cassette player, or other similar device in the motor vehicle, in such a manner that, when operated, is audible at a distance of thirty (30) or more feet from the source or, when operated causes a person to be aware of the vibration accompanying the sound in any location outside the confines of the vehicle emitting the sound, noise, or vibration.** Id. § 21-54.

Section 21-58 provides that a violation of any of these ordinances is a Class C misdemeanor, and punishable by a fine of $100 to $2,000, depending upon the violator's intent. Id. § 21-58(a), (b).

The officers, who stated they were "well over" thirty feet away, testified loud music was emanating from the vehicle in which A .S. was riding. Admittedly, the officers did not use any instrumentation to measure the decibel level of the music, but that is not required by section 21-54. Rather, a violation occurs when a stereo or other music device in a motor vehicle is operated in a manner that makes it audible from thirty or more feet away. We hold the officers' testimony, which the trial court was entitled to believe, provided "specific, articulable facts" that led them "to reasonably conclude" the vehicle in which A.S. was riding was in violation of section 21-54, a criminal violation. See Derichsweiler, 2011 WL 222210, at *1; Ford, 158 S.W.3d at 492. Therefore, the initial stop of the vehicle and its occupants was supported by reasonable suspicion, and therefore valid under the Fourth Amendment. See id. Because the initial stop was justified, and A.S. does not contest the officers' observation of the seatbelt violation and probable cause to arrest based thereon, we hold the search that produced the controlled substance was not in violation of the Fourth Amendment and the trial court did not err in denying the motion to suppress.

A.S. seems to contend the officers were required to prove an actual violation of the ordinance to establish reasonable suspicion, and that the officers' testimony based on their personal observations that ordinances were being violated was insufficient. We disagree. An officer's expressed belief that a person was violating a statute or ordinance is sufficient to justify an investigatory stop. See Howard v. State, 932 S.W.2d 216, 218-19 (Tex.App.- Texarkana 1996,

pet. ref'd). Even a subsequent finding that there was no violation will not vitiate reasonable suspicion for the investigatory detention. Id.

Conclusion: Based on the foregoing, we hold the officers had reasonable suspicion to detain the vehicle in which A.S. was a passenger. The valid detention allowed the officers to observe the seatbelt violation, which gave them probable cause to arrest, and the right to search incident to that arrest. Accordingly, the trial court did not err in denying A.S.'s motion to suppress the Alprazolam. We therefore overrule A.S.'s issue and affirm the trial court's judgment.

Beechum v. State, 346 S.W.3d 5, 2011 WL 313803, Juvenile Law Newsletter, Vol. 25 No. 1 ¶ 11-1-6 (Tex.App.-San Antonio, 2/2/11).

JUVENILE PROBATION OFFICERS ARE CONSIDERED GOVERNMENT AGENTS FOR THE PURPOSES OF IMPLEMENTING THE PLAIN VIEW DOCTRINE IN A SEARCH.

Facts: San Antonio Police Officer Eric Rubio testified that on November 25, 2009, he was on patrol when he was flagged down by two individuals who identified themselves as Bexar County Juvenile Probation Officers. Officer Rubio testified one of the officers handed him a bag of marihuana, which the probation officer stated he had obtained from Beechum. The probation officers told him they were going to a residence for a probation check and noticed a car with three people inside parked in front of the residence. They parked behind the car and when they got out to approach the residence, they saw smoke and smelled marihuana coming from inside the car. As they approached the car, one of the probation officers saw Beechum holding a bag of marihuana. Officer Rubio testified the probation officer saw the bag of marihuana in "plain view." The probation officer told Officer Rubio that he asked Beechum about the marihuana, and she responded by handing the bag to him. Officer Rubio testified that after taking custody of the marihuana, he went to the car where Beechum was still sitting in the front passenger seat and arrested her.

In a single point of error, Beechum asserts the trial court erred in denying the motion to suppress the marihuana because it "was seized without a warrant and in violation of the Fourth Amendment." Beechum argues the marihuana was seized pursuant to an illegal arrest because neither the probation officers nor Officer Rubio had legal authority to arrest her. She contends the plain-view doctrine does not apply because the probation officers were not peace officers, and further argues that the record does not support the trial court's fact finding that the marihuana was in plain view.

Held: Affirmed

Opinion: The plain-view doctrine is an exception to the warrant requirement of the Fourth Amendment. Horton v. California, 496 U.S. 128, 133 (1990). In general terms, the doctrine permits the warrantless seizure of evidence or contraband if the police officer is justified in being at the location where the evidence is observed, the contraband or evidence is in plain view, and its nature as contraband or evidence is immediately apparent. See id. at 136; State v. Dobbs, 323

S.W.3d 184, 187 (Tex.Crim.App.2010). As long as the officer has not violated the Fourth Amendment to be in the physical position to view the evidence, "neither its observation nor its seizure would involve any invasion of privacy." Horton, 496 U.S. at 133. Beechum asserts the probation officers could not seize the marihuana pursuant to the plain-view doctrine because they are not peace officers. However, she does not cite any authority or provide any argument as to why the probation officers' seizure of the marihuana, which was required to be reasonable under the Fourth Amendment, was not subject to the plain-view exception to the Fourth Amendment.

Conclusion: We hold that the plain-view doctrine is properly considered in an analysis of whether a government agent's search and seizure was reasonable under the Fourth Amendment.

SEX OFFENDER REGISTRATION—

Adams v. State, MEMORANDUM, No. 05-10-01056-CR, 2011 WL 5311099, Juvenile Law Newsletter, Vol. 25 No. 4 ¶ 11-4-5A (Tex.App.-Dallas, 11/07/11).

HEARING NOT REQUIRED FOR TRIAL COURT TO ORDER SEX OFFENDER REGISTRATION WHERE RESPONDENT FAILED TO SUCCESSFULLY COMPLETE TREATMENT.

Facts: In 2005, a juvenile court found that appellant engaged in delinquent conduct for committing the offense of aggravated sexual assault of a child. See Tex. Fam.Code Ann. § 51.03(a)(1) (West Supp.2010) (delinquent conduct); Tex. Penal Code Ann. § 22.021(a)(1)(B), (2)(B) (West 2011). The juvenile court sentenced appellant to ten years' confinement with the Texas Youth Commission, probated for ten years, and also deferred its decision on whether appellant would be required to register as a sex offender while he participated in a sex offender treatment program. See Tex.Code Crim. Proc. Ann. art. 62.352(b)(1) (West 2006); see also id. art. 62.001(5)(A) (requiring sex offender registration for conviction based on aggravated sexual assault).

When appellant turned eighteen in 2008, the district court accepted transfer of appellant's case from the juvenile court and placed him on adult community supervision for the remainder of his ten-year term. See Tex. Fam.Code Ann. § 54.051 (West 2006). As part of his probation, appellant was subject to numerous terms and conditions, including the requirement that he "participate fully in [sex offender] counseling, comply with the rules and regulations of the approved agency, ... and continue in treatment/counseling for sex offenders until released by the Court." According to the conditions of his community supervision, appellant was instructed to report to the "Sex Offender Supervision Unit" to schedule an appointment.

The State filed a motion to revoke appellant's probation in June 2009, alleging appellant violated four conditions of his probation. The State subsequently withdrew its motion, and appellant was continued on probation. The trial court ordered that appellant be released to the staff of the Wayback House for treatment and also modified the conditions of appellant's probation to include a requirement that appellant faithfully comply with all rules, regulations,

and treatment programs at the Wayback House. One year later, the State filed a second motion to revoke. Among the alleged violations included in the motion was appellant's "unsuccessful[ ] discharge from [the] Wayback House."

Appellant pleaded true to the State's allegations at a hearing on the State's second motion to revoke. During the hearing, the trial court heard testimony from Mark Brandon, appellant's case manager at the Wayback House, and from appellant. Brandon described the Wayback House as a facility that provided general supervision and assistance with the requirements of probation and explained the "majority of the residents that [had] been referred there" during his tenure were registered sex offenders. Brandon testified that appellant had made no progress in his treatment, did not take his probation seriously, and had not demonstrated an ability to follow the rules. He said appellant had committed at least fourteen infractions during his time at the Wayback House and described specific examples of appellant's disregard for authority; Brandon stated he could "see no justification for wanting to continue [appellant's probation] by the basis of his actions." Brandon also testified that appellant was untrustworthy, appellant's "arrogance [was] just totally irrational," and that appellant had a "total disregard for any authority figure whatsoever."

Appellant admitted he was a sex offender, that he pleaded guilty to raping his young nieces, and that he had thirteen child victims since he was fourteen years old. He also admitted he committed the various infractions described by Brandon and that he received an unsuccessful discharge from the Wayback House. Yet he hoped to continue his probation, explaining that he "let [his] pride get in the way" and had "[a] lot of learning" to do.

The trial court accepted appellant's plea of true, found he violated the terms and conditions of his probation as alleged by the State, and revoked appellant's probation. The trial court assessed punishment at ten years' imprisonment. The trial court also set aside the prior order excusing appellant from sex offender registration and ordered appellant to register to as a sex offender under Texas Code of Criminal Procedure article 62.352(c) because appellant's "treatment was terminated." See Tex.Code Crim. Proc. Ann. art. 62.352(c).

Held: Affirmed

Memorandum Opinion: In his first point of error, appellant contends the trial court erred by requiring him to register as a sex offender without first holding a hearing, which he contends is required by code of criminal procedure article 62.352(c). See id. He claims that when the trial court did not hold a hearing before requiring him to register, he was deprived of a "state-created liberty interest" in violation of his due process rights.

An adjudication of delinquent conduct for aggravated sexual assault of a child requires the juvenile to register as a sex offender. See id. art. 62.001(5)(A). Under article 62.352(b)(1), however, a court may defer making a decision on requiring a juvenile to register as a sex offender until the juvenile has completed treatment for the sexual offense as a condition of probation or while the juvenile is committed to the Texas Youth Commission. Id. art. 62.352(b)(1). If the court enters an order under article 62.352(b)(1), the court "retains discretion and jurisdiction" to require, or exempt the juvenile from, registration on the successful or unsuccessful completion of treatment. Id. art. 62.352(c). Before the court may require

registration of one who successfully completed treatment, subsection (c) provides the court must hold a hearing on the State's motion and determine that the interests of the public require registration. Id.

Appellant asserts subsection (c) affords him a "mandatory opportunity to be heard prior to the imposition of sex offender registration." Under subsection (c), however, the requirement of a hearing before being required to register as a sex offender is conditioned upon whether the person successfully completed treatment for his sexual offense. Id. Specifically, the subsection provides: "Following successful completion of treatment, the respondent is exempted from registration under this chapter unless a hearing under this subchapter is held on motion of the state, regardless of whether the respondent is 18 years of age or older, and the court determines the interests of the public require registration." Id. (emphasis added). Nothing in the statute mandates the trial court hold a hearing before requiring registration of a person who does not successfully complete treatment. Rather, the trial court retains the discretion to require the person to register on the unsuccessful completion of treatment. Id.

Conclusion: Thus, we conclude the trial court did not abuse its discretion when it ordered appellant to register as a sex offender without holding a separate hearing. See id. art. 62.357(b) (providing appellate court reviews court's order requiring registration for procedural error or an abuse of discretion). We overrule appellant's first point of error.

In the Matter of L.L., Jr., No. 08-10-00073-CV, --- S.W.3d ----, 2011 WL 2162748 Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-4 (Tex.App.-El Paso, 6/1/11).

IN SEX OFFENDER REGISTRATION, EVIDENCE WAS CONSIDERED FACTUALLY SUFFICIENT TO SUPPORT AN IMPLIED FINDING THAT THE INTERESTS OF THE PUBLIC REQUIRED REGISTRATION EVEN WHERE THERE WAS CONFLICTING EVIDENCE AND CONFLICTING RECOMMENDATIONS AS TO REGISTRATION.

Facts: In 2007, the State filed a petition based on delinquent conduct alleging that fourteen-year-old Appellant committed the offense of indecency with a child by contact. The juvenile court, based on Appellant's written stipulation, found that Appellant engaged in delinquent conduct as alleged in the petition, and the court placed Appellant on supervised probation. An adjudication of delinquent conduct for indecency with a child requires the juvenile to register as a sex offender. See Tex.Code Crim.Proc.Ann. art. 62.001(5)(A)(West Supp.2010). As permitted by Article 62.352(b)(1), the juvenile court deferred making a decision on registration while Appellant participated in a sex offender treatment program. See Tex.Code Crim.Proc.Ann. art. 62.352(b)(1). After Appellant completed the program, the juvenile court entered an order requiring Appellant to register as a sex offender. This appeal follows.

In his sole issue, Appellant contends that the juvenile court abused its discretion by requiring him to register as a sex offender because the court failed to include the required findings in its order. Appellant additionally argues the evidence does not support the court's decision to require registration.

Held: Affirmed

Opinion: Article 62.352(a) of the Code of Criminal Procedure requires the juvenile court to enter an order exempting a juvenile from registration if the court determines: (1) that the protection of the public would not be increased by registration; or (2) that any potential increase in protection of the public resulting from registration is clearly outweighed by the anticipated substantial harm to the juvenile and the juvenile's family that would result from registration. Tex.Code Crim.Proc.Ann. art. 62.352(a). The juvenile court may also defer decision on requiring registration until the juvenile has completed treatment for the sexual offense as a condition of probation or while the juvenile is committed to the Texas Youth Commission. Tex.Code Crim.Proc.Ann. art. 62.352(b)(1). If the court enters an order pursuant to Article 62.352(b)(1), the court retains discretion and jurisdiction to require, or exempt the juvenile from, registration on the successful or unsuccessful completion of treatment. Tex.Code Crim.Proc.Ann. art. 62.352(c). Following successful completion of treatment, the juvenile is exempted from registration unless a hearing is held on motion of the state and the court determines the interests of the public require registration. Tex.Code Crim.Proc.Ann. art. 62.352(c). The standard of review is whether the juvenile court committed procedural error or abused its discretion in requiring the juvenile to register as a sex offender. Tex.Code Crim.Proc.Ann. art. 62.357(b).

Appellant directs his sufficiency argument at the two findings required by Article 62.352(a): (1) that the protection of the public would not be increased by registration; or (2) that any potential increase in protection of the public resulting from registration is clearly outweighed by the anticipated substantial harm to the juvenile and the juvenile's family that would result from registration. The juvenile court had, however, previously made the decision to defer the registration decision until after Appellant completed sex offender treatment. See TEX.CODE CRIM.PROC.ANN. art. 62.352(b)(1). Consequently, Article 62.352(c) comes into play. Under that statute, Appellant is exempt from registration if he successfully completed the treatment program unless a hearing is held on motion of the State and the court determines that the interests of the public requires registration. TEX.CODE CRIM.PROC.ANN. art. 62.352(c). While Article 62.352(a) requires Appellant to establish certain facts in order to be exempt from registration, Article 62.352(c) requires exemption if Appellant successfully completed sex offender treatment unless the court finds that the interests of the public nevertheless requires registration. [FN1]

In the absence of written findings, we will examine the implied findings which could support the juvenile court's decision. The juvenile court could have found under Article 62.352(c) that Appellant successfully completed the treatment program but the interests of the public requires registration. Appellant does not expressly state in his brief whether he is challenging the legal or factual sufficiency of the evidence supporting the implied finding under Article 62.352(c), but we have construed his argument as a factual sufficiency challenge because he asserts that the juvenile court's decision is contrary to the overwhelming evidence. In reviewing this sufficiency challenge, we view all of the evidence but do not view it in the light most favorable to the challenged finding. See In re M.A.C., 999 S.W.2d at 446; In the Matter of A.S., 954 S.W.2d 855, 860 (Tex.App.-El Paso 1997, no writ). Only if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust will we conclude

that the evidence is factually insufficient. In re M.A.C., 999 S.W.2d at 446; In re A.S., 954 S.W.2d at 860.

Conclusion: The juvenile court had before it conflicting evidence and conflicting recommendations as to registration, but that does not automatically render the evidence factually sufficient. There is credible evidence supporting an implied finding that Appellant successfully completed treatment at Pegasus. Turning to the interests of the public element, the evidence showed that Appellant had engaged in inappropriate sexual behavior with thirty people, both male and female, ranging in age from one year of age to seventeen years of age. Appellant continued to have sexual fantasies about children and he engaged in unsupervised contact with several former victims even after treatment at Pegasus and in violation of the court's order. Appellant's behavior indicates an unwillingness to control his impulses which both Joslin and Desrosiers identified as a risk factor for relapse. The evidence is factually sufficient to support an implied finding that the interests of the public require registration. We conclude that the juvenile court did not abuse its discretion by entering the registration order. Appellant's sole issue is overruled and the judgment of the juvenile court is affirmed.

FN1. Article 62.352 does not specify what standard would be required for exemption if the juvenile is unsuccessful at the treatment program. Presumably, Article 62.352(a) would govern the juvenile court's decision on registration.

Cornell v. State, MEMORANDUM, No. 02-10-00056-CR, 2011 WL 856910, Juvenile Law Newsletter, Vol. 25 No. 2 ¶ 11-2-3 (Tex.App.-Fort Worth, 3/10/11).

APPELLANT COULD NOT CHALLENGE HIS ORIGINAL PLACEMENT ON PROBATION FOR VIOLATING SEX OFFENDER REGISTRATION REQUIREMENTS, AFTER THAT COMMUNITY SUPERVISION HAD BEEN REVOKED, WITH A LATER JUVENILE COURT ORDER ATTEMPTING TO EXCUSE APPELLANT FROM REGISTERING RETROACTIVELY.

Facts: When he was a juvenile, appellant was adjudicated delinquent for an offense that would require him to register as a sex offender. On June 1, 2006, he was indicted for violating the registration statute. Tex.Code Crim. Proc. Ann. art. 62.102(a) (Vernon 2006). He pled guilty to the offense on October 12, 2006; the trial court sentenced him to two years' confinement but suspended the sentence and placed appellant on community supervision.

A month later, on November 13, 2006, appellant filed a motion with the juvenile court asking to be excused from registering as a sex offender. The juvenile court signed an order excusing appellant from registering as a sex offender, which order was entitled, "Sex Offender Registration Order Registration Excused Retroactively [de-registration]." The order does not specifically say, however, that appellant was retroactively excused from registering. Because of that order, appellant stopped registering. However, neither appellant nor his attorney at that time [FN2] moved the trial court to terminate his community supervision.

FN2. Appellant's attorney in the juvenile court was not the same counsel who represents appellant on appeal and who also represented appellant at trial in this cause number.

On October 15, 2009, the State filed a motion to revoke appellant's community supervision alleging that appellant had violated his community supervision by driving while intoxicated, consuming alcohol, refusing to give a blood or breath specimen, having a positive urine test for THC, and by failing to complete four hours per week of community service restitution. Appellant pled true to the allegations in the motion on November 19, 2009, and the trial court sentenced him to nine months' confinement in state jail. Appellant's trial and appellate counsel received a fax on December 8, 2009 from a family member of appellant with the juvenile court's de-registration order attached. Appellant's counsel had not been aware of the order until then. Appellant's counsel timely filed a motion for new trial, which the trial court denied after a hearing.

In his first issue, appellant contends that the trial court did not have jurisdiction to revoke his community supervision.

Held: Affirmed

Memorandum Opinion: Generally, an appellant may not raise issues related to the trial court's placement of the appellant on community supervision in appeals filed after that community supervision is revoked. Manuel v. State, 994 S.W.2d 658, 661-62 (Tex.Crim.App.1999). There are two exceptions to this rule: the void judgment exception and the habeas corpus exception. Nix v. State, 65 S.W.3d 664, 667 (Tex.Crim.App.2001). Appellant argues that the void judgment exception applies here.

"The void judgment exception recognizes that there are some rare situations in which a trial court's judgment is accorded no respect due to a complete lack of power to render the judgment in question." Id. "A void judgment is a 'nullity' and can be attacked at any time." Id. at 667-68. In other words, to avoid the Manuel rule, the trial court must have had no power to render the initial community supervision order. Id. at 668. A judgment is void when (1) the document purporting to be a charging instrument does not satisfy the constitutional requisites of a charging instrument, (2) the trial court lacks subject matter jurisdiction over the offense charged, (3) there is no evidence to support the conviction, or (4) an indigent defendant who has not waived the right to counsel is forced to face criminal proceedings without counsel. Id.

Conclusion: The juvenile court's order excusing appellant from registering as a sex offender did not exist at the time the trial court placed appellant on community supervision. Even if we were to construe the juvenile court's order as attempting to excuse appellant from registering retroactively, appellant has not cited any authority giving the juvenile court the ability to make such an order retroactive. See Tex.Code Crim. Proc. Ann. arts. 62.351-.53 (Vernon 2006). None of the void judgment scenarios listed above apply. Moreover, appellant's counsel admitted at the motion for new trial that the trial court had jurisdiction to place appellant on community supervision in October 2006. Accordingly, we conclude and hold that the void judgment exception does not apply and, thus, that appellant cannot challenge his original placement on community supervision in this appeal. See Nix, 65 S.W.3d at 668.

Accordingly, we overrule appellant's first issue.

SUFFICIENCY OF THE EVIDENCE—

Menson v. State, MEMORANDUM, No. 07-09-0331-CR, 2011 WL 534487, Juvenile Law Newsletter, Vol. 25 No. 1 ¶ 11-1-8 (Tex.App.-Amarillo, 2/16/11).

AN APPELLANT'S PLEA OF TRUE PRECLUDES HIS COMPLAINT ABOUT THE INSUFFICIENCY OF THE EVIDENCE TO ESTABLISH HIS ENHANCEMENT PARAGRAPH.

Facts: Kalmine Shanell Menson (appellant) appeals the punishment portion of his conviction for aggravated assault. Through one issue, appellant contends that the evidence is legally insufficient to support the enhancement paragraph.

Appellant was charged with aggravated assault, enhanced. He pled guilty and was placed on six years deferred adjudication probation. Subsequently, the State filed a motion to adjudicate appellant's guilt. At the hearing, appellant entered pleas of not true to the allegations contained in the motion. Evidence was presented by both the State and appellant after which the trial court adjudicated appellant guilty. Appellant appeals this determination.

According to the record, the trial court admonished appellant as follows: "[Appellant], you are charged by an information ... what would normally be a second-degree felony of aggravated assault with a deadly weapon, but ... in the information there's an allegation of a previous conviction in Tarrant County, Texas, that enhances the punishment making it a first-degree felony. Do you understand the charge?" Appellant stated that he did. The court further admonished appellant about the range of punishment for both a second degree felony and a first degree. Next, the trial court asked appellant how he was pleading to the information and appellant pled guilty. Furthermore, the clerk's record contained a judicial confession wherein appellant confessed to the charge contained in the information and the enhancement. Moreover, the trial court reviewed the judicial confession with appellant and questioned him as to his understanding of the confession and that he was admitting to everything contained in the information. Specifically, the court asked appellant if he had "read the enhancement paragraph wherein it says that in 1998, you were convicted in Tarrant County, Texas, in the district court there of aggravated robbery," and appellant answered in the affirmative and then pled true to the enhancement.

Appellant, in his brief, admits that all potential areas raised by this court have been addressed except for the fact that appellant's prior conviction was as a juvenile and as such is barred from use as an enhancement. This is so according to appellant because juvenile convictions committed prior to 1996 are statutorily barred from such use. And, even though the enhancement paragraph stated the conviction occurred in 1998, nothing of record shows that the offense had not been committed in 1996. Therefore, the State failed to prove this element.

Held: Affirmed (Per Curiam)

Memorandum Opinion: However, appellant pled true to the enhancement paragraph. Appellant's plea of true to the enhancement paragraph is alone sufficient to show that he had a prior felony conviction. *See Dinn v. State,* 570 S.W.2d 910, 915 (Tex.Crim.App.1978); *Hall v. State,* 137 S.W.3d 847, 856 (Tex.App.-Houston [1 st Dist.] 2004, pet. ref'd). Therefore, we conclude that appellant's plea of true precludes his complaint about the insufficiency of the evidence to establish his enhancement paragraph. *See Dinn v. State,* 570 S.W.2d at 915; *Hall v. State,* 137 S.W.3d at 856.

Conclusion: Accordingly, we affirm the judgment of the trial court.

TRIAL PROCEDURE—

In the Matter of A.C., MEMORANDUM, No. 11-09-00164-CV, 2011 WL 1326275, Juvenile Law Newsletter, Vol. 25 No. 2 ¶ 11-2-8 (Tex.App.-Eastland, 4/7/2011).

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO HOLD A HEARING PRIOR TO DENYING JUVENILE'S MOTION FOR NEW TRIAL WHERE JUVENILE DID NOT ESTABLISH THAT HIS FAILURE TO DISCOVER NEW EVIDENCE WAS NOT OWING TO A WANT OF DUE DILIGENCE.

Facts: T.N. lived in the same neighborhood as A.C. One evening, T.N. was riding his bicycle home when he went down an alley behind A.C.'s house. T.N. testified that A.C. and A.C.'s brother knocked him off his bicycle and hit him repeatedly. Eventually, A.C. and his brother stopped and went away. T.N. testified that he was bleeding a lot from his nose and mouth and that he was missing a few teeth. T.N. got back on his bicycle and rode home.

At home, T.N. told his grandmother that his injuries were caused by a bicycle accident. T.N. explained that he lied to his grandmother because he was afraid of being beaten up again but that his grandmother did not believe him. She took him to the emergency room in Brownwood. Hospital staff told them that T.N. would have to go to another hospital. They then drove to Cook Children's Medical Center in Fort Worth. From there, he was sent to John Peter Smith Hospital for surgery. As a result of the assault, T.N. lost three teeth and had a broken nose and a cracked jaw. T.N. told medical personnel at all three hospitals that he had been in a bicycle accident.

A few days later, T.N. revealed to his family that A.C. and A.C.'s brother assaulted him. They contacted the police. Officer Robert Mullins of the Brownwood Police Department investigated. Although he could not rule an accident out, Mullins did not think T .N.'s injuries were consistent with a bicycle accident because they were too centralized. T.N. told Officer Mullins that he was afraid of retaliation from A.C.

The jury found that A.C. engaged in delinquent conduct by intentionally, knowingly, or recklessly causing serious bodily injury to T.N. by striking him in the face.

A.C. alleged he was entitled to a new trial because of newly discovered evidence and provided three supporting affidavits. A.C. alleged that this evidence was unknown to him at the time of trial, that his failure to discover the evidence was not owing to a lack of due diligence, that the evidence would probably bring about a different result at a new trial, and that it was not cumulative, corroborative, impeaching, or collateral.

Held: Affirmed

Memorandum Opinion: First, David Franklin Chamberlain, a neighbor of A.C., testified by affidavit that, on the evening of the alleged assault, he saw T.N. have a bicycle accident in the alley in which he flew over the bicycle's handlebars and hit the ground face first. Chamberlain stated that he did not come forward sooner because he learned only after the adjudication hearing that A.C. was on trial for causing T.N.'s injuries.

Second, Arely Guadalupe Sandoval, a student at Brownwood High School and a defense witness at the adjudication hearing, submitted an affidavit alleging that, while he was waiting to testify, he saw T.N. exiting the courthouse. T.N. met his brother at the door. Sandoval stated that T.N.'s brother asked, "Did you lie?" T.N. responded, "Yes, but it's not working." Sandoval believed that T.N. meant that he had lied in court. Sandoval immediately told A.C.'s father what he had heard but did not tell the county attorney or A.C.'s attorney because he did not know that he was allowed to do so.

Third, Anthony Sanchez Sr., the father of a defense witness, submitted an affidavit stating that his former girlfriend, Sherry Nichols, was T.N.'s aunt. Sanchez and Nichols have a daughter. Their daughter is married and has a daughter of her own. After Sanchez separated from Nichols, he claimed that she accused him of molesting their daughter. Sanchez met with Brownwood Police Department officers and established that he had no access to his daughter during the time period in which the molestation allegedly occurred. Sanchez claimed that he learned Nichols accused him of molestation because her mother, T.N.'s grandmother, told her to do so. Thus, while he had no knowledge of the case, he was wary of any allegations coming from T.N.'s family. Moreover, just before trial, his daughter threatened to prohibit any visitation with his granddaughter if he allowed his son to testify at A.C.'s adjudication hearing. This threat reinforced his belief that T.N. may have been influenced to make false allegations against A.C.

In 2009, the legislature amended TEX. FAM.CODE ANN. §§ 51.17(a) and 56.01 (Vernon Supp.2010) to provide that motions for new trials are governed by Tex.R.App. P. 21. Act of June 19, 2009, 81st Leg., R.S., §§ 1-2, 2009 Tex. Gen. Laws 642 (relating to the rules governing a motion for new trial in juvenile cases). This amendment applies to all juvenile proceedings whose disposition takes place after September 1, 2009. Id. §§ 3-4. A.C.'s disposition order was signed on March 6, 2009. His motion for new trial is, therefore, not subject to the amendment. Under prior law, a motion for new trial was governed by the Texas Rules of Civil Procedure. See In re M.R., 858 S.W.2d 365, 366 (Tex.1993) (juveniles are required to file a motion for new trial to assert evidentiary and procedural errors, including factual sufficiency and jury misconduct).

When a motion alleges facts that, if true, would entitle the movant to a new trial, a trial court is obligated to hear such evidence. Hensley v. Salinas, 583 S.W.2d 617, 618 (Tex.1979). To obtain a new trial based on newly discovered evidence, a defendant must show that (1) the evidence was unknown to the defendant at the time of trial, (2) the failure to discover the evidence was not due to defendant's want of diligence, (3) the evidence has materiality in that it would probably bring about a different result in another trial, and (4) the evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching. Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex.1983), overruled on other grounds by Moritz v. Preiss, 121 S.W.3d 715, 720-21 (Tex.2003). Each of these elements must be established by an affidavit of the party. In re Thoma, 873 S.W.2d 477, 512 (Tex. Rev. Trib.1994, no appeal); Rivera v. Countrywide Home Loans, Inc., 262 S.W.3d 834, 844 (Tex.App.-Dallas 2008, no pet.). Except when jury misconduct is alleged, the trial court's decision to hold an evidentiary hearing on a motion for new trial is reviewed for abuse of discretion. See Tex.R. Civ. P. 327(a); Hamilton v. Williams, 298 S.W.3d 334, 338 (Tex.App.-Fort Worth 2009, pet. denied). To determine whether the trial court abused its discretion, we must decide ultimately whether the trial court acted without reference to any guiding rules or principles. Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex.1997).

A.C.'s motion for new trial did not establish that his failure to discover the evidence was not owing to a want of due diligence. While Chamberlain stated that he did not come forward earlier because he did not know about the allegations against A.C., the motion for new trial did not explain why A.C. could not have discovered Chamberlain's testimony earlier with the exercise of due diligence. Likewise, there is no explanation why the evidence provided by Sanchez, whose son was a witness for A.C. at the adjudication hearing, could not have been discovered before trial. In the absence of a showing of due diligence, the trial court was not required to hold a hearing. See Neyland v. Raymond, 324 S.W .3d 646, 652-53 (Tex.App.-Fort Worth 2010, no pet.). Moreover, the facts alleged in Sandoval's and Sanchez's affidavits primarily impeached the credibility of T.N. and, thus, would not be grounds for a new trial. See Ski River Dev., Inc. v. McCalla, 167 S.W.3d 121, 132 (Tex.App.- Waco 2005, pet. denied) (newly discovered evidence alleging that a witness committed perjury was cumulative, impeaching, and not grounds for a new trial).

We cannot say that the trial court abused its discretion by failing to hold a hearing on A.C.'s motion for new trial based upon newly discovered evidence. A.C.'s first issue is overruled.

Conclusion: The judgment of the trial court is affirmed.

Taylor v. State, 332 S.W.3d 483, 2011 WL 798667, Juvenile Law Newsletter, Vol. 25 No. 2 ¶ 11-2-4 (Tex.Crim.App., 3/9/2011). Affm'd, ***Taylor v. State,*** MEMORANDUM, 2012 WL 246036 (Tex.App.-Hous. (1 Dist.) 1/26/12)

THE ABSENCE OF AN 8.07(B) INSTRUCTION (INSTRUCTIONS WHICH LIMIT THE JURY'S CONSIDERATION TO EVENTS AFTER APPELLANT'S SEVENTEENTH BIRTHDAY ONLY), COMBINED WITH THE EVIDENCE OF APPELLANT'S CONDUCT AS A JUVENILE AND THE INSTRUCTIONS THAT THE JURORS DID

RECEIVE, ULTIMATELY RESULTED IN INACCURATE CHARGE, ALTHOUGH THE ERROR DID NOT RESULT IN EGREGIOUS HARM.

Facts: The jury found Appellant guilty of three offenses of aggravated sexual assault, as charged in three separate indictments. The earliest date cited among the indictments was "on or about September 01, 2002." On that date, Appellant was seventeen years old. Therefore, the indictments did not violate Section 8.07(b), nor did the verdict forms, which referred back to the indictments. The issue before this Court relates to the jury charges.

At trial, testimony referred to various years as the start of Appellant's abusive conduct, all pre-dating Appellant's seventeenth birthday. A child-abuse pediatrician testified regarding her examination of the victim, which took place at the Children's Assessment Center in 2006. Her report, admitted into evidence, stated that Appellant touched the victim inappropriately for the first time when the victim was seven. Appellant would have been twelve at that time. The victim's father dated the start of his daughter's contact with Appellant as the fall of 1998, when the victim would have been eight and Appellant would have been thirteen. The victim's own testimony described the "worst" years of abuse as her sixth through eighth grade years. She agreed with the State's assertion that in sixth grade she was ten and eleven. Appellant would have then been fifteen and sixteen.

The jury charges did not contain an 8.07(b) instruction to limit the jury's consideration to events after Appellant's seventeenth birthday. After reviewing the court's proposed charge, defense counsel stated that she had no objections.

At the court of appeals, Appellant argued that, without an 8.07(b) instruction, the charges were erroneous because the evidence presented at trial included acts committed before he turned seventeen. The court of appeals agreed, concluding that without an 8.07(b) instruction, "the charge authorized the jury to convict [A]ppellant based on acts he committed before his seventeenth birthday." Taylor v. State, 288 S.W.3d 24, 30 (Tex.App.-Houston [1st Dist.] 2009, pet. granted).

The State now argues to this Court that, in the absence of any request for an 8.07(b) instruction from defense counsel, the judge was not required to sua sponte instruct the jury on this point. The State also argues that the court of appeals should have found any error to be harmless.

Held: The Court of Criminal Appeals reverse the court of appeals and remand to the court of appeals.

Opinion: The State's first issue asks if the trial judge was required to sua sponte submit an 8.07(b) instruction in this case. Code of Criminal Procedure Article 36.14 details the requirements and procedures for the delivery of the court's charge to the jury. TEX.CODE CRIM. PROC. ANN. art. 36.14. It states, "the judge shall ... deliver to the jury ... a written charge distinctly setting forth the law applicable to the case." Id. Article 36.14 also provides that, before the charge is read to the jury, "the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections." Id. However, the judge's duty to instruct

the jury on the law applicable to the case exists even when defense counsel fails to object to inclusions or exclusions in the charge; this may require the judge to sua sponte provide the jury with the law applicable to the case, under Article 36.14. So, even in the absence of action on the part of Appellant's defense counsel, if an 8.07(b) instruction were the law applicable to this case, the trial judge was required, under Article 36.14, to include it in the jury charges. We must assess whether the jury charges set forth the law applicable to the case, and specifically, whether an 8.07(b) instruction belonged in the jury charges.

We have previously held that Article 36.14 imposes no duty on trial courts to sua sponte instruct the jury on unrequested defensive issues. Posey v. State, 966 S.W.2d 57, 62 (Tex.Crim.App.1998). An unrequested defensive issue is not the law applicable to the case. Id. So, we must classify an 8.07(b) instruction as the law applicable to the case or as an unrequested defensive issue.

Due to the repeated testimony regarding Appellant's pre-seventeen conduct, the absence of an 8.07(b) instruction in the jury charges is problematic. Further complicating matters is an instruction that was included:
You are further instructed that the State is not bound by the specific date which the offense, if any, is alleged in the indictment to have been committed, but that a conviction may be had upon proof beyond a reasonable doubt that the offense, if any, was committed at any time within the period of limitations. The limitation period applicable to the offense of aggravated sexual assault of a child is ten years from the date of the 18th birthday of the victim of the offense.

With this paragraph, the jury was instructed that it could ignore the dates cited in the indictments and could convict Appellant for any offense committed prior to the victim's twenty-eighth birthday, which will fall in 2018.

We conclude that a jury charge is erroneous if it presents the jury with a much broader chronological perimeter than is permitted by law. The trial judge is "ultimately responsible for the accuracy of the jury charge and accompanying instructions." Delgado v. State, 235 S.W.3d 244, 249 (Tex.Crim.App.2007). This is an "absolute sua sponte duty," and, in this case, the trial judge had a sua sponte duty to provide an 8.07(b) instruction. Id. Although the jury instruction here did not specifically refer to "any offense anterior to the presentment of the indictment" as did the charge in Alberty, it did not limit the jury's consideration of such. The absence of an 8.07(b) instruction, combined with the evidence of Appellant's conduct as a juvenile and the instruction that the jurors did receive--that "a conviction may be had" for any offense committed before the victim's twenty-eighth birthday-- ultimately resulted in inaccurate charges that omitted an important portion of the law applicable to the case. Therefore, we find a violation of Article 36.14 and must proceed to a second step of analysis.

Taking the record as a whole, we believe that egregious harm did not result from the jury-charge error. The defensive theory was that no sexual abuse occurred at any time. It is unlikely that the jury believed that Appellant sexually assaulted the victim before he turned 17 years old but not after. In this case, the jury either believed Appellant or believed the victim.

Here, the error was the omission of an instruction, rather than the presentation to the jury of an erroneous instruction. In contrast to Hutch, the jury in this case could have convicted Appellant based upon evidence presented, even if the proper instruction had been given and Appellant's pre-seventeen acts were disregarded by the jury. The evidence showed an eight-year pattern of escalating sexual abuse of J.G. by Appellant. Appellant turned 17 years old midway through the abusive period, meaning that he is subject to prosecution for his conduct beginning on that birthday or March 25, 2002, and evidence of molestation that occurred after that date was introduced at trial. For example, although J.G. described with more detail the instances that occurred during Appellant's juvenile years, she also described abuse that occurred when Appellant was 17, 18, 19, and 20 years old. The State emphasized this in its closing argument.

Accordingly, we conclude that Appellant was not denied a fair and impartial trial and was, therefore, not egregiously harmed. TEX.CODE CRIM. PROC. ANN. art. 36.19.

Conclusion: Section 8.07(b) is the law applicable to this case and therefore subject to sua sponte submission. Appellant was not required to make an objection or request to have this instruction included in the jury charges. See Huizar v. State, 12 S.W.3d 479, 484 (Tex.Crim.App.2000). The court of appeals was correct to conclude that the trial court erroneously failed to instruct the jury on Section 8.07(b). However, the court of appeals erred in concluding that the error resulted in egregious harm. We reverse the court of appeals and remand to the court of appeals to address the remaining issues.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—

DeLaCerda v. State, No. 01-09-00972-CR, --- S.W.3d ----, 2011 WL 2931189, Tex. Juvenile Law Newsletter, Vol. 25 No. 3 ¶ 11-3-13 (App.-Hous. (1 Dist.) 7/21/11).

AS LONG AS A DISCRETIONARY TRANSFER ORDER UNEQUIVOCALLY PROVIDES FOR THE ASSUMPTION OF JURISDICTION BY THE CRIMINAL DISTRICT COURT, THE LACK OF A DATE AND PRINTED NAME OF THE JUDGE WILL NOT AFFECT IT.

Facts: On January 21, 1997, the complainant, seventeen year old Jesus "Robert" Contreras, was walking home from Stephen F. Austin High School in southeast Houston with his twin brother, Albert, and their friends, Gene Cantu, Raul Rodriguez, Chris Aviles, and Julio Lara. As the group walked home on Dumble Street, a newer-model navy blue truck drove past. Albert Contreras testified that he saw three people inside the truck--a male driver, a male passenger, and a female sitting in between--and one person lying in the truck bed, who kept "popping his head up." Albert stated that he recognized the person in the back of the truck as someone whom he had seen around school two or three times, but he did not know his name. Albert testified that no one in his group said anything to the truck's occupants as they drove past, but the truck stopped and the passenger looked at the boys after the truck had driven by. Albert did not recognize the passenger as a fellow student.

The truck continued down Dumble and turned right onto Polk Street. As the boys crossed the intersection of Dumble and Polk, Albert saw that the truck had stopped and the person in the back of the truck was speaking to the people in the truck's cab. Albert testified that the truck made a U-turn and turned back onto Dumble, driving in the same direction that the boys were walking, and passed the boys as they reached a tire shop. At the tire shop, the passenger pulled out a gun and shot approximately five or six times at the group. After the passenger stopped shooting and the truck drove away, Albert looked for his brother and found him underneath a piece of plywood, leaning against the wall of the tire shop. Robert had a gunshot wound to his left lower back and died later that night at the hospital.

The jury convicted appellant of murder and assessed punishment at thirty-five years' confinement and a $10,000 fine.

In his first issue, appellant, who was sixteen at the time of the shooting, contends that the trial court lacked jurisdiction to hear this case because the order purportedly assuming jurisdiction from the juvenile court was defective and invalid, and, therefore, jurisdiction remained in the juvenile court. Specifically, appellant contends that the order does not meet Code of Criminal Procedure article 42.01's requirements for judgments because (1) the order is not dated, (2) the order reflects only the date on which the juvenile court waived jurisdiction, (3) the order is not file-stamped by the district clerk's office, and (4) the district court judge's signature is illegible and there is no printed name of the judge on the order.

Held: Affirmed

Opinion: Here, it is undisputed that the juvenile court signed an order waiving its exclusive jurisdiction and transferring jurisdiction "to the Criminal District Court of Harris County." Appellant does not contend that this order waiving jurisdiction is invalid or that the juvenile court improperly waived and transferred its jurisdiction. The order assuming jurisdiction in the district court is included within the clerk's record, indicating that it was duly filed in the district clerk's office with the other papers in the case. The caption of the order states "In the 174 District Court of Harris County, Texas," the order is signed, and the order includes a statement that: IT IS ACCORDINGLY CONSIDERED, ORDERED AND ADJUDGED THAT jurisdiction of this court of said ROGELIO DELACERDA for criminal proceedings be and the same are hereby assumed by this court; that this cause be filed and docketed and this order entered in the minutes of this court, and that a certified copy of same be certified to said Judicial District Court, sitting as a Juvenile Court, for observance. However, the order is not dated, nor does the printed name of the presiding judge appear on the order.

Conclusion: We conclude that, despite the lack of a date and printed name of the judge, this order unequivocally provides for the assumption of jurisdiction by the 174th District Court. See Speer v. State, 890 S.W.2d 87, 93 (Tex.App.- Houston [1st Dist.] 1994, pet. ref'd) (holding that, when discrepancy existed between district court number within order assuming jurisdiction, discrepancy was "no more than a typographical error or editing oversight," and district court named in caption properly assumed jurisdiction). We hold that the district court properly assumed and exercised jurisdiction over appellant in this case.

State v. Rhinehart, 333 S.W.3d 154, 2011 WL 798650, Juvenile Law Newsletter, Vol. 25 No. 2 ¶ 11-2-2 (Tex.Crim.App., 3/9/2011).

A CRIMINAL DISTRICT COURT'S REVIEW OF A JUVENILE COURT'S TRANSFER ORDER TO IT, BY WAY OF MOTION TO QUASH, WAS UPHELD BY THE COURT OF CRIMINAL APPEALS, BUT ONLY WITH RESPECT TO QUASHING THE INDICTMENT.

Facts: Appellee was born on April 13, 1989. He was charged in juvenile court with an aggravated robbery that was committed on February 28, 2006, forty-four days before appellee's seventeenth birthday. On April 16, 2007, three days after appellee's eighteenth birthday, the State filed a petition in the juvenile court to transfer appellee's case to a criminal district court where appellee would be tried as an adult. Appellee claimed at an April 30, 2007 transfer hearing that the juvenile court should deny this petition because the State did not use due diligence in proceeding with his case in juvenile court before appellee's eighteenth birthday. The State claimed at this hearing that it had used due diligence. On May 2, 2007, the juvenile court signed an order waiving its jurisdiction and transferring appellee to criminal district court, after which appellee was indicted for aggravated robbery.

Appellee raised the due-diligence issue again in the criminal district court in a motion that he labeled a "MOTION TO QUASH INDICTMENT." Attached to this motion was a proposed order indicating that the motion was either "Granted" or "Denied." The criminal district court held a hearing on this motion, during which the parties relitigated the due-diligence issue that had been litigated in the juvenile court. The State's only argument at the hearing in the criminal district court was that it had used due diligence. Appellee relied on six exhibits that covered matters that were covered at the transfer hearing in the juvenile court. One of these exhibits (Defendant's Exhibit 5) is the reporter's record of the transfer hearing in the juvenile court. The criminal district court "Granted" appellee's "MOTION TO QUASH INDICTMENT."

The State appealed to the court of appeals, claiming for the first time on appeal that: (1) the criminal court was without jurisdiction to review "the evidence underlying the juvenile court's decision to transfer this case" because appellee "had no statutory right to appeal the sufficiency of the evidence in the juvenile court's transfer proceedings prior to being finally convicted in the criminal district court" (emphasis supplied), and (2) the criminal district court erred to grant appellee's motion to quash the indictment on a ground not authorized by law because the sufficiency of the evidence supporting a juvenile court's order to transfer a case to criminal district court is not a valid ground for granting a motion to quash an indictment as a matter of statutory law. Appellee responded by arguing, among other things, that the State had waived these issues by failing to raise them in the criminal district court and that he did not "appeal" but only "challenged" the juvenile court's transfer order (as opposed to the indictment) in the criminal district court.

The court of appeals sustained the State's second issue, found it unnecessary to address its first issue, reversed the criminal district court's order quashing the indictment, and remanded the case to the criminal district court for further proceedings consistent with its opinion. The court of

appeals further stated that "issues relating to the [juvenile-court] transfer proceedings are properly raised in an appeal from a conviction after transfer." See Rhinehart, slip op. at 4. It also stated:

Appellee acknowledges that a party may only appeal a transfer order in conjunction with a conviction or an order of deferred adjudication. See TEX.CODE CRIM. PROC. ANN. Art. 44.47(b) (Vernon 2006). Nonetheless, appellee contends that an "appeal" differs from a "challenge," and insists the statute does not restrict a defendant's rights to challenge a transfer order. Although we note that the construction appellee seeks to advance would effectively allow a defendant two bites at the proverbial apple, we need not decide the issue here. Appellee's motion did not seek to set aside the transfer order; it sought to quash the indictment. Moreover, even if the statute afforded different treatment for a "challenge" than an "appeal," the distinction is without a difference in the present case. Appellee's motion concerned the sufficiency of the evidence in the transfer proceeding. And in the absence of a conviction or other order of deferred adjudication, we have no jurisdiction to determine the propriety of a transfer. See TEX.CODE CRIM. PROC. ANN. Art. 44.47(b) (Vernon 2006).

See Rhinehart, slip op. at 5.

We granted appellee's discretionary-review petition to review the court of appeals' decision. The grounds upon which we granted review are:

1. The court of appeals erred in failing to address the "waiver" issue.
2. The court of appeals erred in re-framing the issue and failing to address the true issue at hand, namely: whether the Criminal District Court had the authority to set aside the transfer order.
3. The [court of appeals] erred in implicitly ruling that the trial court lacked the authority to set aside the transfer order.

(Emphasis in original).

Held: Court of Criminal Appeals reversed the judgment of the court of appeals and affirmed the criminal district court's ruling quashing the indictment.

Opinion: Appellee asserts that the criminal district court "set aside the transfer order because the State failed to proceed in the juvenile court with due diligence before Rhinehart's eighteenth birthday" and that the "issue in this case is whether the [criminal district] court had the judicial authority to set aside a transfer order." And, in support of his second ground for review, appellee argues, "Some of the confusion in this case apparently has resulted from the fact that Rhinehart mislabeled the motion as being a 'Motion to Quash Indictment.' The motion was, in fact, a motion challenging the validity of the transfer order. A review of the contents of the motion itself and the arguments made during the pre-trial hearing clearly established that fact."

Though the record does reflect that the basis of appellee's "MOTION TO QUASH INDICTMENT" was the validity of the juvenile court's transfer order, we must disagree with appellee that the effect of the criminal district court granting this motion to quash was to set aside the transfer order. Appellee's motion requested that the indictment be quashed, not that the transfer order be set aside. On the record presented to the court of appeals, the procedural posture of this case was that the juvenile court's transfer order was still in force and that, in granting appellee's "MOTION TO QUASH INDICTMENT," the criminal district court had merely set aside the indictment. See State v. Eaves, 800 S.W.2d 220, 221-22 n. 5 (Tex.Cr.App.1990)

("quash" and "set aside" are synonymous). We, therefore, disagree with the claim in appellee's second ground for review that the court of appeals re-framed the issue and failed to address the true issue, namely: whether the criminal district court "had the authority to set aside the transfer order." This issue is not presented in this case since the criminal district court did not set aside the juvenile court's transfer order, and the court of appeals would have erred even to address this issue.

We also understand appellee to argue that a juvenile court's erroneous transfer order does not divest the juvenile court of its exclusive jurisdiction over the case, thus permitting the criminal district court to review the validity of the transfer order to determine whether it has jurisdiction over the case. Appellee argues, "Accordingly, Rhinehart would urge that, without a valid transfer proceeding, the [criminal district] court would not have acquired jurisdiction. Consequently, the validity of the transfer order is and must be subject to judicial review in the [criminal district] court." We do not believe that the criminal district court's quashing of appellee's indictment, based on the State's lack of "due diligence," is necessarily a determination by the criminal district court that it lacks jurisdiction over the case. In addition, the legislative provision in Article 44.47(b) that a defendant may appeal a juvenile court's transfer order "only in conjunction with the appeal of a conviction ... for which the defendant was transferred to criminal court" is some indication that a juvenile court's erroneous transfer order does not divest the criminal district court of jurisdiction over the case. We do not believe that the issue of whether the criminal district court could set aside the juvenile court's transfer order would be presented in this case unless the criminal district court set aside the transfer order and attempted to remand the case to the juvenile court.

At least in this case, we believe that appellee should have labeled his motion something other than a motion to quash (e.g., a motion to set aside the juvenile court's transfer order) if his intention was, as he claimed on appeal, to challenge the validity of the transfer order. Appellee has even acknowledged in this proceeding that "[s]ome of the confusion in this case apparently has resulted from the fact that Rhinehart mislabeled the motion as being a 'Motion to Quash Indictment.' " In this particular case, we believe it appropriate to put appellee back in the position that he was in after the juvenile court waived its jurisdiction and transferred his case to the criminal district court and before appellee filed his mislabeled motion to quash that may have confused the other party on exactly what it was that appellee was attempting to accomplish. Appellee's second ground for review is overruled.

Conclusion: To summarize, in this case, we apply ordinary rules of procedural default to decide that the State, as the losing party in the criminal district court, could not raise for the first time on appeal a claim that there was no valid basis for the criminal district court to have quashed the indictment. We decline to apply, in this case, the Fourth Amendment standing rule of Rakas which, in any event, does not clearly support the proposition that the State should be permitted to raise this claim for the first time on appeal, particularly since the State chose to litigate only the due-diligence issue in the criminal district court thus, in effect, conceding that this might be a valid basis for quashing the indictment. See Steagald, 451 U.S. at 209-11. Appellee's first ground for review is sustained.

We reverse the judgment of the court of appeals and affirm the criminal district court's ruling quashing the indictment.

KELLER, P.J., filed a dissenting opinion.
PRICE, J., filed a dissenting opinion in which WOMACK, J., joined.
KELLER, P.J., filed a dissenting opinion.