CASELAW UPDATE

24th Annual Juvenile Law Conference
ROBERT O. DAWSON
JUVENILE LAW INSTITUTE
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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, 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

- 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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CASELAW UPDATE

ADJUDICATION PROCEEDINGS—

In the Matter of M.C.S., Jr., No. 02-09-00332-CV, --- S.W.3d ----, 2010 WL 4138554, Juvenile Law Newsletter ¶ 10-4-9B (Tex.App.-Fort Worth, 10/21/10).

IN JUVENILE PLEA, JUVENILE DOESN'T HAVE TO PERSONALLY VOCALIZE HIS PLEA DURING THE ADJUDICATION HEARING.

Facts: On August 10, 2009, the trial court held a hearing on the State's petition, which appellant and his mother attended. Toward the beginning of the hearing, the following conversation occurred:

> THE COURT: Now, according to the pleadings, you're charged with cruelty to animals, a charge that, if you were an adult, carries with it possible jail time. As a juvenile, it carries with a possibility of being placed on probation or going to the Texas Youth Commission. Either one of those things can last at least until your 18th birthday and even up to your 19th birthday, so you're entitled to a trial. You're not required to admit to this charge, and you're not going to make anybody angry, you're not going to change the punishment range or mak[e] things worse for yourself by asking for a trial.
>
> You've signed waivers saying a trial is not necessary. You have agreed that the attorneys can just tell me what the evidence is in this case without the need of the formalities of a trial and so I'm going to hear the evidence about what happened, it looks like, back in July, and if I find it to be true, proceed on with some additional evidence to decide whether or not you should be put on probation or not and what the conditions should be. [[FN2]]

FN2. Appellant and his trial attorney signed a stipulation of evidence stating they were informed of and understood appellant's rights to present and confront witnesses but that they were voluntarily consenting "to the stipulation of evidence in this case ." They specifically consented to the "introduction of testimony by oral stipulation." They acknowledged in the same document that they understood the consequences of appellant's waiving his right to a jury trial.

> All right. [Appellant's counsel], would you waive a full reading of the petition?
>
> [APPELLANT'S COUNSEL]: Yes, You're Honor.
>
> THE COURT: Let's proceed.
>
> [THE STATE]: ... May it be ... agreed and stipulated that the Respondent did violate section 42.092 of the Texas Penal Code, when on or about the 23rd day of July of 2009, in the County of Tarrant and State of Texas, he did then and there intentionally or knowingly

torture, kill, or--or torture or kill in a cruel manner or cause serious bodily injury to an animal, to wit, a bat, by setting it on fire and burning it.

The State is prepared to call Fort Worth police officers who would testify that they responded in reference to a disturbance where kids were knocking on doors and then running away. They noticed a group of youths at the apartment complex. They made contact and the group denied having any involvement; however, as the officers were leaving, they saw the Respondent light something on fire and when they turned around, the Respondent took off running. The Respondent was subsequently chased and caught, at which time the officers later discovered the object that had been burnt by the Respondent was in fact a bat that was in a--that a girl had in a glass jar.

The officers would also testify that this offense did occur within Tarrant County and the State of Texas, and the State would rest.

[APPELLANT'S COUNSEL]: No objections, judge.

The trial court then received a placement summary and evidence about appellant's social history. It also heard testimony from appellant and his mother. The trial court adjudicated appellant delinquent, placed him on probation (with several delineated conditions), and ordered that he complete treatment at the Texas Adolescent Treatment Center.

In September 2009, appellant, who was represented by new counsel, filed a motion for new trial, contending that the evidence is insufficient to support the trial court's judgment and that he did not knowingly or voluntarily sign the written stipulation of evidence. Appellant's motion was overruled by operation of law. Appellant also filed his notice of this appeal.

Held: Affirmed

Opinion: Appellant argues that the oral stipulation presented by the State during the adjudication hearing was "so defective that it failed to reveal whether [he] was knowingly, intelligently, voluntarily and willingly" making the stipulation. Specifically, appellant contends that the trial court should have sought an oral response from appellant after the State presented the stipulation and that his counsel's "[n]o objections" response was insufficient.

Appellant relies on our decision in *In re M.A.O.*, in which we recited the following events that occurred in that case:
When asked to make a plea as to the burglary of a habitation allegation, Appellant pleaded true. Appellant agreed that he understood his rights and that he was pleading true because that was what he intended to do and for no other reason. Appellant also agreed that he had not been threatened through fear of force, promised anything in exchange for his plea of true, or pressured to plead through any persuasion or hope of pardon. Appellant acknowledged that he was knowingly, intelligently, voluntarily, and willingly making his plea of true. No. 02-03-00262-CV, 2004 WL 1746890, at *1 (Tex.App.-Fort Worth Aug. 5, 2004, no pet.) (mem.op.).

Based on *M.A.O.* and other cases, appellant contends that an "oral in [-] court Stipulation *should contain* an audible utterance from the juvenile." [Emphasis added.] But appellant has not cited authority showing that such an "audible utterance" *must* occur to validate a stipulation, and we have found none. Also, appellant's argument contravenes section 51.09 of the family code, which states that a juvenile may waive rights "in writing *or* in court proceedings that are recorded." Tex. Fam.Code Ann. § 51.09(4) (emphasis added).

Conclusion: We cannot agree with appellant's contention that for his stipulation to be effective, he was required to personally, orally reaffirm it during the adjudication hearing.

In the Matter of B.W., 313 S.W.3d 818, 2010 WL 2431630, Juvenile Law Newsletter ¶ 10-3-7 (Tex. Sup. Ct., 6/18/10).

A CHILD UNDER FOURTEEN CANNOT BE PROSECUTED FOR PROSTITUTION.

Facts: B.W. waved over an undercover police officer who was driving by in an unmarked car and offered to engage in oral sex with him for twenty dollars. The officer agreed. When B.W. entered the officer's car, he arrested her for the offense of prostitution. B.W. was originally charged in criminal court, but when a background check revealed that she was only thirteen the case was dismissed. Charges were then refiled under the Family Code, which governs juvenile proceedings. TEX. FAM.CODE §§ 51.02(2), .04(a).

At trial, pursuant to an agreed recommendation, B.W. pleaded true to the allegation that she had "knowingly agree[d] to engage in sexual conduct ... for a fee." Following her plea, the trial court found that B.W. had engaged in delinquent conduct constituting a Class B misdemeanor offense of prostitution as defined by section 43.02 of the Penal Code, and placed her on probation for eighteen months. The trial court denied B.W.'s motion for new trial and granted her permission to appeal. The court of appeals affirmed. 274 S.W.3d 179. We granted B.W.'s petition for review to consider the challenges she raises to her adjudication of delinquency for the offense of prostitution.

Held: Reversed

Opinion: Under the Texas Penal Code, a person commits prostitution if the person "knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee." TEX. PENAL CODE § 43.02(a)(1). "A person acts knowingly, or with knowledge, with respect to the nature of his conduct ... when he is aware of the nature of his conduct ." TEX. PENAL CODE § 6.03(b). Thus, "knowing agree[ment]" suggests agreement with an understanding of the nature of what one is agreeing to do. B.W. contends the Legislature cannot have intended to apply the offense of prostitution to children under fourteen because children below that age cannot legally consent to sex. See TEX. PENAL CODE § 22.021 (criminalizing sex with a child irrespective of consent). The State, on the other hand, claims that consent by a child under the age of fourteen is a shifting concept designed to protect victims of sex crimes rather than juvenile offenders like B.W. We agree with B.W.

In enacting the sexual assault statute, section 22.011 of the Texas Penal Code, the Legislature made it a crime to intentionally or knowingly have non-consensual sex with an adult, or sex under any circumstances with a child (a person under seventeen). There are defenses available if the child is at least fourteen, such as when the accused is no more than three years older than the child, or when the accused is the child's spouse. In those instances, the child's subjective agreement or assent becomes the main issue in determining whether or not a crime has been committed. There are no such defenses, however, when the child is under fourteen, irrespective of the child's purported willingness. Thus, in Texas, "a child under fourteen cannot legally consent to sex." May v. State, 919 S.W.2d 422, 424 (Tex.Crim.App.1996).

It is difficult to reconcile the Legislature's recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involves their own sexual exploitation. In the context of these laws, and given the blanket adoption of the Penal Code into the Family Code, it is far more likely that the Legislature intended to punish those who sexually exploit children rather than subject child victims under the age of fourteen to prosecution. Given the longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex, it is difficult to see how a child's agreement could reach the "knowingly" standard the statute requires. Because a thirteen-year-old child cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute under section 43.02 of the Penal Code.

The dissent contends Texas' statutory rape statutes do not render all minors under the age of fourteen incapable of consenting to sex with an adult as a matter of law. In the dissent's view, the statutes merely eliminate consent as an affirmative defense to the offense of child rape. But the very purpose of the Legislature's abrogation of the consent defense was its determination that underage children cannot meaningfully consent to sex. While no statute explicitly states that children under fourteen are unable to provide consent for all purposes, the inability of children to consent to sex as a matter of law is both part of the common law and a necessary inference from section 22.021 and the other statutes dealing with sexual exploitation of a child.

The dissent concedes that children below a certain age lack the mental capacity to consent to certain actions, and that the law reflects that inability to consent. Nonetheless, the dissenting justices would themselves allow children as young as ten to be prosecuted for prostitution. By contrast, our conclusion that children under a certain age lack the legal capacity to consent to sex rests on the legislative policy determination expressed in the statutory rape statute that children under the age of fourteen are legally incapable of consenting to sex.

We do not agree that our decision today infringes on prosecutorial discretion. The Legislature has determined that children thirteen and younger cannot consent to sex. This necessitates the holding that these children cannot be tried for prostitution. If this holding infringes on the prosecutor's discretion, then so too does every decision upholding a legislative or constitutional limitation on the ability of a prosecutor to bring a case.

The State has broad power to protect children from sexual exploitation without needing to resort to charging those children with prostitution and branding them offenders. Section 261.101 of the Family Code requires a person to report to a law enforcement agency or the Department of Family and Protective Services if there is cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect. The department or agency must then conduct an investigation during which the investigating agency may take appropriate steps to provide for the child's temporary care and protection.

Children are the victims, not the perpetrators, of child prostitution. Children do not freely choose a life of prostitution, and experts have described in detail the extent to which they are manipulated and controlled by their exploiters. Courts, legislatures, and psychologists around the country have recognized that children of a certain age lack the mental capacity to understand the nature and consequences of sex, or to express meaningful consent in these matters. Drawing a distinction between consensual sex with a child and exploitation simply blinks reality.

Conclusion: Our Legislature has passed laws recognizing the vulnerability of children to sexual exploitation, including an absolute prohibition of legal consent for children under fourteen. In the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution when they lack the capacity to consent to sex as a matter of law, we hold that a child under the age of fourteen may not be charged with that offense. Accordingly, we reverse the court of appeals' judgment, and remand the case to the trial court for an appropriate disposition.

Dissent: The Court holds that a thirteen-year-old minor cannot be adjudicated under the Juvenile Justice Code for prostitution, despite a clear statutory charge to address such distressing conduct by treatment and rehabilitation of the minor and protection of the public through the juvenile justice system. The text of the Juvenile Justice and Penal Codes does not support the Court's result. The language of the prostitution statute includes thirteen-year-olds, and the Juvenile Justice Code makes them subject to juvenile delinquency proceedings for committing that offense; and neither the Court nor B.W. point to any language in the Juvenile Justice or Penal Codes that changes the prostitution statute to mean something other than what it says. The Court attempts to justify this infirmity through a narrow exception found in a criminal statute unrelated to the provision proscribing prostitution, even though the circumstances of this case support the juvenile court order of rehabilitation and treatment. The Legislature established the juvenile justice system for these types of circumstances and has not indicated an intent to depart from that system when a minor is thirteen. And the Court blanketly decides that the juvenile justice system is never available to rehabilitate thirteen-year-olds who commit sex crimes because it proclaims that all thirteen-year-old teens are legally incapable of consenting to sex.

While I would prefer a world in which such questions concerning the delinquent sexual conduct of minors would never arise, the reality is that these questions do arise, and we must answer them. I could not agree more that thirteen-year-old teenagers engaging in prostitution are victims of severe physical, sexual, and emotional scarring. But, exempting all of these minors from civil adjudication in the juvenile justice system--where treatment and rehabilitation are favored--when they commit the crime of prostitution imposes a broad policy on the State that is not supported by statute or legislative intent. The Legislature addressed the plight of minors such

as B.W. by creating the juvenile justice system to offer a means, albeit not perfect, of hopeful rehabilitation. The Court globally declares that all thirteen-year-olds lack capacity to commit sex crimes and thereby precludes them all from any assistance through the juvenile justice system. I therefore respectfully dissent.

In the Matter of the Expunction of D.R.R., 322 S.W.3d 771, 2010 WL 3169352 Juvenile Law Newsletter ¶ 10-4-1 (Tex.App.-El Paso, 8/11/10).

PLEA-BARGAIN THAT REQUIRED SEVENTEEN YEAR OLD (MINOR) TO VOLUNTARILY WAIVE RIGHT TO AN EXPUNCTION IN ORDER TO ENROLL IN A PRE-TRIAL DIVERSION PROGRAM WAS BINDING ON THE MINOR.

Facts: This appeal centers on the filing of a petition to expunge the records of Appellee's arrest on November 29, 2002, for possession of marijuana. On November 28, 2007, a hearing was held regarding the expungement petition. The evidence adduced at the hearing revealed that Appellee, represented by counsel, and the State of Texas entered into an agreement whereby Appellee would enroll in a pre-trial diversion program, and upon completion of that program, the charge for possession of marijuana under two ounces would be dismissed. Appellant was seventeen years old at the time, and he was charged as an adult.

In order to enroll in the program, Appellee went to the offices of the Adult Probation Department to sign the requisite forms. He was not accompanied by counsel. There, he signed a document agreeing to participate in the pre-trial diversion program and to abide by certain conditions. The document also contained a provision indicating that if he successfully completed the pre-trial diversion program, he voluntarily waived any right to an expunction. Appellee signed his name, voluntarily agreeing to waive his right to expunction, beneath the provision. The last line of the document also recited that Appellee read and understood the document fully, and Appellee, indicating his understanding of the document, signed below that provision, as well.

Upon his successful completion of his participation in the pre-trial diversion program, the charge of possession of marijuana under two ounces was dismissed by the court. Appellee testified at the expunction hearing that he was unfamiliar with the word "expunction" when he signed the forms, and the rights that he waived were not explained to him. He stated that the purpose in seeking the expunction was to enlist in the United States Navy.

Noting that Appellee was only seventeen years old at the time he waived his right to expunction, the court believed that he did not have the capacity to contract for himself regarding that right. Thus, the court granted the petition for expunction.

Held: Reversed and expunction denied

Opinion: In its sole issue on appeal, the County asserts the court abused its discretion in granting Appellee's petition for expunction by ruling that Appellee lacked the capacity to

contract; thereby invalidating his waiver of his right to expunge his criminal records. We review a trial court's ruling on a petition for expunction under an abuse of discretion standard.

Appellee contends that as a minor, one younger than eighteen, he could not make a contract or waive a legal right; accordingly, as his minority disability has not been removed, the waiver is voidable, and he has the option to disallow it. Appellee maintains that in invoking his right to set aside the contract, he has not cancelled out the entire agreement. He cites Ex parte White, 50 Tex.Crim. 473, 474, 98 S.W. 850, 851 (1906), for the proposition that his minority status allows him to plead guilty, but that same disability prevents him from entering into a contract, waiving his rights or forming a contract that may be in contravention of the law or public policy. However, the cited case stands for no more than the proposition that a minor may plead guilty to an offense. Id. Logically, if Appellee can disallow one portion of the contractual agreement, he can disavow any portion of the agreement. This cannot be the intent of the legislature in providing that one has adult status with regard to criminal liability at the age of seventeen. When one who becomes involved with the criminal justice system is considered in his or her majority at age seventeen, that majority status carries over into the attendant contractual agreements. We find that when Appellee entered into a bargain-for pre-trial diversion agreement, that is, a contract, legally at the age of seventeen, he was bound by that contract and its attendant provisions. He cannot absolve himself from those portions of the contract that he, at some later time, finds unsuitable.

We predicate this finding on the concept of estoppel by contract. A party who accepts benefits under a contract is estopped from questioning the contract's existence, validity, or effect. See Rhodes v. State, 240 S.W.3d 882, 891 (Tex.Crim.App.2007) (discussing such principle in a plea-bargain agreement). As is true with most contracts, it is typical that both parties to an agreement will benefit from the result. A defendant cannot enter an agreement, benefit therefrom, and then attack the agreement later when it is suddenly in his interests to do so. Issue One is sustained.

Conclusion: We reverse and render judgment denying Appellee's petition for expunction.

APPEALS—

In the Matter of D.H., MEMORANDUM, No. 07-03-8148-J, 2010 WL 3787807, Juvenile Law Newsletter ¶ 10-4-7 (Tex.App.-Dallas, 9/30/10).

BY FAILING TO OBJECT AT TRIAL, APPELLANT FAILED TO PRESERVE ANY ISSUE ON WHETHER OR NOT HE HAD REASONABLE NOTICE OR AN ADEQUATE OPPORTUNITY TO PREPARE ON THE STATE'S MOTION TO MODIFY DISPOSITION.

Facts: In January 2005, when D.H. was thirteen, he committed two acts of aggravated sexual assault of a child as well as indecency with a child. The trial court found D.H. to have engaged

in delinquent conduct and placed him on probation. During the next few years, the State filed several motions to modify disposition. In its final motion to modify dated April 14, 2009, the State alleged D.H. violated two terms of his probation: (1) failing to successfully complete the juvenile sexual offender treatment program and (2) failing to successfully complete the boot camp program at the Department of Juvenile Services Juvenile Boot Camp because he did not follow the program rules and successfully complete the inpatient sex offender treatment portion of the boot camp. After a hearing, the trial court ordered D.H. committed to the Texas Youth Commission until he reached nineteen years of age and ordered D.H. be required to register as a sex offender.

In his first point of error, D.H. claims he did not receive reasonable notice of the hearing on the State's motion to modify disposition as required by section 54.05(d) of the family code and, thus, did not have an adequate opportunity to prepare for the hearing as required by law.

Held: Affirmed

Memorandum Opinion: Section 54.05(d) provides that "[r]easonable notice of a hearing to modify disposition shall be given to all parties." Tex. Fam.Code Ann. § 54.05(d) (West 2008). However, as a prerequisite to presenting a complaint on appeal, Texas Rule of Appellate Procedure 33.1 requires the record show the complaint was timely made to the trial court, the grounds were specifically stated or were readily apparent from the context, the complaint complied with the rules of evidence or appellate procedure, and the trial judge ruled on the objection. Tex.R.App. P. 33.1(a); *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex.Crim.App.1999). "Except for complaints involving fundamental constitutional systemic requirements which are not applicable here, all other complaints based on a violation of both constitutional and statutory rights are waived by failure to comply with Rule 33.1." *Ibarra*, 11 S.W.3d at 197.

The State filed its petition for hearing to modify disposition on April 14, 2009. At the April 22, 2009 hearing, D.H. did not object to the lack of reasonable notice on the modification nor did he seek a continuance or argue he required additional time to prepare for the hearing.

Conclusion: Under these circumstances, we conclude appellant has not preserved this issue for appellate review. We overrule his first point of error.

In the Matter of B.L.C., MEMORANDUM, No. 08-10-00186-CV, 2010 WL 3784972, Juvenile Law Newsletter ¶ 10-4-3 (Tex.App.-El Paso, 9/29/10).

A JUVENILE COURT'S ORDER TRANSFERRING A DETERMINATE SENTENCE PROBATION TO AN ADULT DISTRICT COURT OR THE COURT'S REFUSAL TO AMEND THOSE CONDITIONS ARE NOT APPEALABLE ORDERS.

Facts: On September 19, 2007, the State file a petition alleging Appellant engaged in delinquent conduct by committing indecency with a child by sexual contact. By its petition, the State sought a determinate sentence. A jury found that Appellant engaged in delinquent conduct as alleged in the petition. The jury found that Appellant was in need of rehabilitation, sentenced

him to five years in the Texas Youth Commission with possible transfer to the Texas Department of Criminal Justice Institutional Division, and recommended that he be placed on probation outside of his home.

Shortly before Appellant's eighteenth birthday, the State filed a motion to transfer the determinate sentence probation to an adult district court. The trial court signed an order on March 5, 2010 transferring Appellant's juvenile determinate sentence probation to a criminal district court pursuant to Section 54.051 of the Texas Family Code. TEX.FAM.CODE ANN. § 54.051 (Vernon 2008). The transfer became effective on Appellant's eighteenth birthday, April 2, 2010. See TEX.FAM.CODE ANN. § 54.051(d). On May 14, 2010, the trial court held a hearing on Appellant's written objections to changes in the conditions of probation, but the court declined to amend the conditions. Appellant thereafter filed notice of appeal stating an intention to challenge matters raised by written motion and ruled on by the trial court on May 14, 2010.

Held: Dismissed for want of jurisdiction

Conclusion: On July 19, 2010, we sent Appellant notice of our intent to dismiss the appeal for want of jurisdiction. Appellant's counsel has filed a written response conceding that Appellant did not file notice of appeal from the transfer order, and even if he had, the transfer order is not appealable. We agree. See In the Matter of J.H., 176 S.W.3d 677, 679 (Tex.App.-Dallas 2005, no pet.). Additionally, counsel correctly states that the trial court's refusal to amend the conditions of probation is not appealable. See Basaldua v. State, 558 S.W.2d 2, 5 (Tex.Crim.App.1977).

In the Matter of J.S.H., MEMORANDUM, No. 01-08-00563-CV, 2010 WL 987247, Juvenile Law Newsletter ¶ 10-2-8 (Tex.App.-Hous. (1 Dist.), 3/18/10).

FAILURE TO OBJECT AT TRIAL TO THE AMOUNT OF CHILD SUPPORT ORDERED BY THE TRIAL COURT FAILS TO PRESERVE ISSUE FOR APPEAL.

Facts: Appellant, L.H., appeals the child-support portion of the trial court's May 28, 2008 judgment and order of commitment to the Texas Youth Commission of her son J.S.H..

Held: Affirmed.

Memorandum Opinion: L.H.'s sole issue on appeal is that she cannot afford the $419 monthly child-support payments ordered by the trial court. She did not object at trial to the amount of child support ordered by the trial court. This issue, therefore, is not preserved for appeal. SeeTex.R.App. P. 33.1(a) (as prerequisite to presenting complaint for appellate review, appellate record must show that complaint was made to trial court by timely request, objection, or motion stating specific grounds of complaint and that trial court ruled on request or objection). We have not been presented with any issue as to whether L.H. may file a motion to modify the amount of her child-support payments, nor have we been presented with arguments on her behalf to justify a modification.

Conclusion: We overrule L.H.'s sole issue and affirm the trial court's judgment.

In the Matter of R.D., 304 S.W. 3d 368, 53 Tex.Sup.Ct.J. 303, Juvenile Law Newsletter ¶ 10-2-9 (2/12/10).

JUVENILE'S MOTION FOR NEW TRIAL, WAS SUFFICIENT TO ENCOMPASS, AND PRESERVE, HIS COMPLAINT ON APPEAL.

Facts: Accused of committing aggravated robbery, R.D. claimed that he acted under duress and raised the issue as an affirmative defense at trial. The jury was asked to decide whether R.D. had engaged in delinquent conduct by committing aggravated robbery, and if not, if R.D. had engaged in delinquent conduct by committing the lesser offense of robbery, the distinction being whether a deadly weapon was used. The jury was instructed that the burden of proof for the affirmative defense rested upon R.D., and that if it believed R.D. committed the crime under duress the jury should find that he did not engage in delinquent conduct. The jury found that R.D. had engaged in delinquent conduct by committing aggravated robbery.
R.D. filed a motion for new trial contending the evidence presented by the State was legally and factually insufficient to support the jury's delinquency verdict. R.D. followed this general challenge with a specific challenge to the legal and factual sufficiency of the State's proof of the use of a deadly weapon. The trial court denied R.D.'s motion for new trial.
On appeal, R.D. challenged the legal and factual sufficiency of the evidence supporting*370 the jury's deadly-weapon finding, but also the factual sufficiency of the evidence to support the jury's rejection of his affirmative defense. The appeal was transferred from the Fourth Judicial District Court of Appeals to the Eighth, which upheld the deadly-weapon finding. Applying the transferor court's precedent, the court of appeals held that R.D.'s evidentiary challenge to the jury's failure to find duress was not preserved because he did not specify this ground in his motion for new trial. Accordingly, the court of appeals affirmed.FN1

FN1. The court noted that had it applied its own precedent, which acknowledged "the drift of juvenile law from its civil roots," In re J.L.H., 58 S.W.3d 242, 246 (Tex.App.-El Paso 2001, no pet.), there would be no requirement of a new trial motion to preserve a factual sufficiency challenge on appeal. 304 S.W.3d at 429.

Held: Reversed and remanded

Opinion: PER CURIAM. In a civil case, in order to challenge on appeal the factual sufficiency of the evidence to support a jury finding, the point must be raised in a motion for new trial. TEX.R. CIV. P. 324(b)(2). In *In re M.R.*, 858 S.W.2d 365, 366 (Tex.1993) (per curiam opinion denying application for writ of error), we stated that, unlike the rule in criminal cases, in juvenile proceedings a motion for new trial is necessary to preserve a factual sufficiency challenge. [FN2] Unlike in *In re M.R.*, however, R.D. did file a motion for new trial. The question is whether that motion was sufficient to encompass R.D.'s complaint on appeal that the jury's rejection of his affirmative defense had no evidentiary support. We conclude that it was.

FN2. Since our decision and R.D.'s trial in this case, the Legislature has eliminated the requirement of a new trial motion to preserve a factual sufficiency challenge on appeal in

juvenile delinquency cases. TEX. FAM.CODE § 56.01(b1). We make no comment about the continuing viability of *In re M.R.* in light of subsequent developments in the law.

The jury's single finding that "the respondent ... did engage in delinquent conduct by committing aggravated robbery" subsumed its rejection of R.D.'s affirmative defense, which was not submitted as a separate question but as an instruction to the delinquency question. In his motion for new trial, R.D. made a general challenge to the legal and factual sufficiency of the evidence to support the jury's delinquency finding. That R.D. followed this general complaint with a more specific one aimed at the deadly-weapon instruction does not constitute a waiver in these circumstances.

Where practical, the rules of civil procedure are to be given a liberal construction in order to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law. TEX.R. CIV. P. 1. *See also Verburgt v. Dorner,* 959 S.W.2d 615, 616-17 (Tex.1997) ("[W]e have instructed the courts of appeals to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule."). We conclude that R.D.'s general challenge to the sufficiency of the evidence to support the jury's delinquency finding met Rule 324's requirement for preserving his challenge to the jury's rejection of his affirmative defense.

Conclusion: Accordingly, pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure, without hearing oral argument, we grant R.D.'s petition for review, reverse the court of appeals' judgment, and remand the case to that court for further proceedings.

Longoria v. State, MEMORANDUM, No. 07-09-0196-CR, 2010 WL 668535, Juvenile Law Newsletter ¶ 10-2-4 (Tex.App.-Amarillo, 2/25/10).

OBJECTION TO JUVENILE ENHANCEMENT WAS NOT PRESERVED FOR APPEAL WHERE OBJECTIONS AT TRIAL DID NOT COMPORT TO THAT WHICH WAS ASSERTED ON APPEAL.

Facts: Appellant Rene Longoria appeals his conviction for aggravated robbery, a felony of the first degree. He contends that the trial court erred in permitting the enhancement of his sentence via the use of a purported state jail felony. In 2004, appellant, a juvenile at the time, was adjudicated as having engaged in delinquent conduct and was committed to the Texas Youth Commission. The conduct consisted of participating in organized criminal activity involving the burglary of a vehicle. Furthermore, a conviction for engaging in it allegedly constituted a state jail felony. Such a felony may not be used to enhance the punishment applicable to a subsequent felony. Tex. Penal Code Ann. § 12.42(e) (Vernon Supp.2009); Fortier v. State, 105 S.W.3d 697, 701 (Tex.App.-Amarillo 2003, pet. refd). Yet, appellant believes such happened here. Whether that is true is not something we address for the complaint was not preserved.

Held: Affirmed

Memorandum Opinion: Appellant's objection at trial was two-fold. First, he stated that he was not afforded proper notice of the State's intent to use the prior adjudication for enhancement purposes. Then he averred that it's not at all certain that the conviction which the State desires to introduce to use for the purpose of enhancement met the proper requisites of Chapter 51 of the Family Code, and that it--I don't believe that it had the proper findings as required by the Family Code since it was a juvenile conviction to be used in a subsequent 1st degree felony prosecution. He then ended his objection by saying, "[s]o on those grounds, Judge, we would object to the inclusion of any enhancement in the punishment stage...." [FN2] As can be seen, none of those utterances mention the purported inability to use a state jail felony for purposes of enhancing a subsequent felony. Instead, they focused on the supposed lack of prior notice or the status of the prior conviction, if any, as being one involving a juvenile. Consequently, the substance of his objection at trial fails to comport with that asserted on appeal; this, in turn, means that the matter was not preserved. Pena v. State, 285 S.W.3d 459, 464 (Tex.Crim.App.2009) (requiring the substance of the objection at trial to comport with that on appeal; otherwise the matter is waived); see Harris v. State, 204 S.W.3d 19, 27 (Tex.App.-Houston [14th Dist.] 2006, pet. refd) (stating that one may fail to preserve a complaint involving the enhancement of his punishment by failing to object); Brown v. State, No. 02-08-037-CR, 2009 TEX.APP. LEXIS 2664 at *2-3 (Tex.App.-Fort Worth April 9, 2009, no pet.) (not designated for publication) (stating the same); Cody v. State, No. 05-06- 01222-CR, 2007 TEX.APP. LEXIS 2764 at 8-9 (Tex.App.-Dallas April 11, 2007, pet. refd) (not designated for publication) (stating the same). [FN3]

FN2. In later referring to the objections during trial, he characterized them as "objections to the improper or untimely notice thereof."

FN3. Aggravated robbery is a felony of the first degree and carries a punishment of life or any term of not more than 99 years or less than five years. Tex. Penal Code Ann. 12.32(a) (Vernon Supp.2009). Here, appellant was sentenced to fifty years imprisonment. Because the sentence fell within the lawful range, it cannot be said to be an illegal one. See Mizell v. State, 119 S.W.3d 804, 806 (Tex.Crim.App.2003) (stating that a sentence that is outside the maximum or minimum range of punishment is illegal, which relieves one from uttering a contemporaneous objection to the sentence). Thus, appellant was obligated to preserve his complaint by contemporaneously objecting and informing the trial court of all grounds upon which he intends to rely.

Conclusion: Accordingly, we overrule appellants issue and affirm the judgment.

In the Matter of E.E., 320 S.W.3d. 399, No. 08-08-00338-CV, 2010 WL 1986393, Juvenile Law Newsletter ¶ 10-3-4 (Tex.App.-El Paso, 5/19/10).

BY FAILING TO OBJECT TO ANY PROCEDURAL DEFECT OR ANY LACK OF NOTICE, WITH REGARD TO THE TRIAL COURTS REDUCTION OF JUVENILE'S DETERMINATE SENTENCE PROBATION, THE STATE FAILED TO PRESERVE THE ISSUE FOR REVIEW.

Facts: On July 11, 2008, the 65th District Court held a stipulation and sentencing hearing. E.E., accompanied by counsel, stipulated to having committed an aggravated assault with a deadly

weapon. The juvenile indicated that he was entering the plea voluntarily and giving up his right to a jury trial. The State agreed to a six year probationary period rather than confinement at the Texas Youth Commission with a subsequent transfer to the adult system. The court followed the recommendation of the State, imposed a suspended sentence of six years, and placed E.E. on community supervision.

The court then set a review hearing for December 2, 2008, a week prior to the juvenile's 18th birthday. Juvenile Probation Officer Marcela Carrillo testified that during the six month period of supervision, E.E. had performed extremely well, despite his arrest in October for shoplifting. When asked whether she would object if the court on its own motion discharged E.E. from probation, she replied, "Not with myself." Nor did she believe that the court should place the juvenile on adult probation. In her expert opinion, the juvenile had matured and learned his lesson.

Although defense counsel asked to make a brief argument on the issue of termination, the court wished to hear from the juvenile instead. When asked why his probation should be terminated, E.E. responded that he's "been good," has learned his lesson, is trying to fix up his life, is doing well in school, is trying to finish school, and wants to get his degree as a radiologist. The assistant county attorney objected to termination, emphasizing that E.E. had picked up an additional charge within the six month period. He recommended that the court hold off on the termination.

The trial judge then ruled from the bench. Addressing the juvenile directly, he remarked that the adult probation division did not provide as many services as the juvenile probation department. If it did, he would place E.E. on probation in the adult system. While expressing his opinion that he did not believe E.E. would remain out of the system in the future, the judge nevertheless terminated probation.

The State argues that the trial court failed to follow the proper procedure in the Texas Family Code in determining whether to transfer E.E. to the Adult Probation System. It also contends that the trial court's decision is at odds with the evidence presented.

Held: Affirmed

Opinion: On appeal, the State argues that the Legislature has laid out clear procedures governing the transfer of a juvenile placed on an extended period of probation in a determinate sentencing case and contends it was not given adequate notice that the review hearing would encompass the transfer issue. But this argument has been waived because there was no objection lodged below. As a prerequisite to presenting a complaint for appellate review, a complaint must be made in the trial court by a timely request or objection. Tex.R.App.P. 33.1(a). This rule ensures that trial courts are provided the opportunity to correct their own mistakes before a case need be appealed. Vidaurri v. State, 49 S.W.3d 880, 886 (Tex.Crim.App.2001).

At the hearing the court asked the assistant county attorney to address the issue:

THE COURT: What do you think, Mr. Herrera?

MR. HERRERA: There's one phrase that rings in my ear: What is past is prolog. There were four referrals prior to this referral, Judge. This particular adjudication was a violent crime which is why my office decided to seek a determinant sentence for six years and that was the agreement. Had there been no arrest in October of 2008, had there been no more arrest, I don't think the State would have much to say. But again, this pattern of behavior seems to pop up, perhaps even perception of most as a minor matter, a shoplifting. But having gone through the system four times before this one, still not realizing that in order to receive benefits from the Court or a favorable treatment by the Court, that should have been foremost in this young man's mind. With other responsibilities, with all the hopeful outcome that is ejected, with the good behavior that is shown, we had another relapse. It may be too early, at least from the State's prospective to release him, especially when he is so close to his date of maturity. My suggestion and my request to the court is to hold off a little bit longer and see if his good behavior continues.

Because the State did not object to any procedural defect or any lack of notice, this issue has not been preserved for review. Tex.R .App.P. 33.1.

The State next complains that the trial court disregarded the juvenile's continuing need for rehabilitation, emphasizing that E.E. committed an additional offense while he was on probation. It also challenges the trial court's perception that adult probation services offer less than the juvenile probation department. If the court truly believed that E.E. would not remain out of the adult system in the future, argues the State, then early termination is not supported by the evidence.

We have reviewed the evidence and perceive no abuse of discretion. The trial court relied on the positive testimony of the probation officer and the testimony of the juvenile himself in reaching its decision to terminate probation. Indeed, he concluded by saying:
I value the opinion of your probation officer and I don't think we need to place you on probation in the adult system.... I've got this feeling about you that you're going to do okay.

Conclusion: Because the trial court did not act without reference to any guiding rules and principles, we overrule the sole issue for review and affirm the decision of the trial court.

CONFESSIONS—

Nunez v. State, MEMORANDUM, No. 07-08-0475-CR, 2010 WL 2891760, Juvenile Law Newsletter ¶ 10-3-14 (Tex.App.-Amarillo, 7/26/10).

QUESTIONING OF JUVENILE TWO DAYS AFTER HE REQUESTED AN ATTORNEY ON A DIFFERENT CASE VIOLATED HIS FIFTH AMENDMENT RIGHTS.

Facts: On October 22, 2006, Richard Ramirez and appellant, his sixteen-year-old nephew, [FN1] and appellant's friend Christopher Crittendon went to the Boom Boom Cabaret in Lubbock. They spent some time there and decided to rob it. As Gilbert Victor, general manager of the club, and Anthony Lopez, a bouncer, locked up and left the club, appellant and Crittendon approached them with guns and forced them to lie on their stomachs on the ground. Kim Suddeth, a dancer at the club who was being given a ride home by Lopez, was already seated in his vehicle. She observed the actions of the youths and called 911 on her cell phone. While doing so, Ramirez appeared at the window of the vehicle and threatened to shoot her if she did not hang up the phone and get out of the vehicle. She did so and Ramirez threw her to the ground. Ramirez then walked over and shot both Gilbert and Lopez. He walked back to Suddeth and shot her three times. After doing so, Ramirez returned to Gilbert and Lopez and shot each of them again and then shot Suddeth one more time. The robbers left with two briefcases which contained money and other items. Both Gilbert and Lopez died at the scene, but Suddeth survived.

FN1. Appellant was certified to stand trial as an adult.

Appellant argues that his confession should have been suppressed because it was involuntary and he had previously invoked his Fifth Amendment right to counsel when questioned about another robbery. [FN2] Though the State disputes that the statement was involuntary, it concedes that appellant's Fifth Amendment right to counsel was violated. To avoid reversal, however, it attempts to argue that the complaint was not preserved for review and that the law should be changed. Regarding the latter argument, we are bound to follow the interpretation given the Fifth Amendment by the United States Supreme Court and Court of Criminal Appeals. Should one care to have the Amendment reinterpreted, he must seek that from those courts.

FN2. The alleged Fifth Amendment violation is based on his prior utterance to law enforcement personnel investigating another robbery that he wished to "talk with an attorney before giving a statement." This utterance occurred two days prior to the date he gave the statement here at issue. Allegedly, Deputy Stephens did not know that appellant had made the utterance when he initially met with appellant.

Held: Reversed and remanded

Memorandum Opinion: The State having conceded error, we next determine whether the mistake was harmless. Since the error was of constitutional magnitude, it can be disregarded only if we conclude, beyond reasonable doubt, that it did not contribute to the conviction or punishment. Tex.R.App. P. 44.2(a). While it is true that evidence other than appellant's statement illustrates his complicity in the crime, one cannot discount the impact of a detailed confession like that at bar. Hearing the accused clearly inculpate himself, purportedly in a voluntarily manner, can hardly be ignored by a rational jury. Given this, we cannot say beyond reasonable doubt that appellant's statement did not contribute to his conviction or sentence.

Conclusion: The trial court erred in refusing to suppress the confession, and the error was harmful. Thus, the judgment is reversed and the cause remanded for further proceedings.

Limon v. State, 314 S.W.3d 694, 2010 WL 2430428, Juvenile Law Newsletter ¶ 10-3-8B (Tex.App.-Corpus Christi, 6/17/10).

ILLEGAL ENTRY AND SEARCH OF RESIDENCE BARRED ADMISSION OF LATER CONFESSION, WHERE NO ATTENUATION FROM THE TAINT OF THE ILLEGAL ENTRY AND SEARCH WAS SHOWN.

Facts: Limon was indicted for the offense of deadly conduct with a firearm on August 14, 2007. On October 10, 2007, Limon filed a "Motion to Determine the Admissibility of Illegally Obtained Evidence and Statements." The trial court held a hearing on the motion on October 23, 2008.

Officer Gus Perez testified at the hearing on the motion to suppress that on June 28, 2007, he received a call at about 10:00 p.m. informing him that there was a shooting in Aransas Pass at the 1400 block of W. Matlock. On his way to that location, Officer Perez was advised that another shooting had occurred. He proceeded to the location of the second shooting, at 244 N. 11th Street.

At the scene of the second shooting, Officer Perez recovered three "shotgun waddings," which he described as projectiles from a shotgun. He spoke to a witness named "Lupe Ortiz" or "Guadalupe Ortiz," who advised that he had seen a green four-door car leaving the area. Ortiz could not provide a make, model, or license plate for the car. The rest of the witnesses at the residence were reluctant to cooperate.

Officer Perez then proceeded to the location of the first shooting. When he arrived, he was approached by a "person that live[d] in the vicinity who advised [him] that that person believed that the Limon kids were involved." Officer Perez admitted that he did not know the name of his informant, but he believed the person was a neighbor or resident that lived in the area.

Officer Perez testified that he knew of only one Limon family in Aransas Pass, and he knew where they lived. He went to the Limon residence, arriving at approximately 2:00 a.m., where he observed a green Buick four-door car. He felt the hood, which he stated was warm, and observed what appeared to be a bullet hole in the front passenger door. Officer Perez testified on cross-examination that the bullet hole indicated to him that the car had been shot at. Officer Perez then called for backup, and three other officers arrived within minutes.

Officer Perez testified that he did not have a search warrant or an arrest warrant, and it would have taken him about an hour and a half to two hours to get a warrant. Officer Perez went to the front door and knocked. The door was answered by A.S. Officer Perez testified that he knew that Limon's father (hereinafter "Limon, Sr."), an adult, lived in the residence. On direct examination during the pretrial hearing, Officer Perez testified about A.S.'s identity and their encounter:

[State]: Do you know who [A.S.] is?

[Perez]: At the time I did not, but I later learned that [he] was a nephew of Mr. Limon and a cousin of the Defendant.

[State]: Okay. How old is [A.S.]? Do you know?

[Perez]: I'm not aware, sir.

[State]: Is he an adult?

[Perez]: I do not believe so.

[State]: What did you tell [A.S.], if anything?

[Perez]: I advised [A.S.] that I was investigating a shooting case and asked for permission to enter the residence.

[State]: And did he let you come in?

[Perez]: Yes, sir, he did.

[State]: Did any other officers come in with you?

[Perez]: Yes, sir, Officer Hernandez.

On cross-examination, Officer Perez further testified about the entry into the home:

[Defense]: And as you stood on the front porch how long a conversation did you have with this young man who is a juvenile [A.S .]?

[Perez]: It was a fairly short conversation. I advised him who I was, what department I was with[,] and why I was there.

[Defense]: And did you ask him if he owned or had possession of that residence?

[Perez]: I assumed that because he opened the door that he was one of the residents.

[Defense]: Okay. And did you ask him if there was someone there who was the owner or had greater right of possession to that residence?

[Perez]: No, sir, I did not.

[Defense]: And at the time that he approached[,] you indicated that you felt or you knew that he was not an adult; is that correct?

[Perez]: No. I indicated that I found out he wasn't an adult, but he's not a young kid. I believe he is maybe 14, 13, somewhere in that area.

[Defense]: So at the time you weren't sure?

[Perez]: That's correct.

[Defense]: Did you ask him for any identification?

[Perez]: No, sir, I did not.

[Defense]: Did you ask him how old he was?

[Perez]: No, sir, I did not.

[Defense]: Did you ask him what grade he had gone to school?

[Perez]: No, sir, I did not.

Officer Perez testified that while he was outside the home, he did not see any crimes visibly being committed inside or outside the home. He stated that when he arrived at the front door, he had a "reasonable suspicion that there was a suspect inside.... It was likely--I didn't know. It was approaching probable cause but more than a reasonable suspicion."

Once inside the home, Officer Perez smelled marijuana. He stated that he and Officer Hernandez went to the bedroom in the southwest corner of the residence, where they observed Limon and two other males lying in bed, apparently sleeping with the lights on. The officers had

their guns drawn, and they told Limon and the two males to get up. Limon was handcuffed and moved into the common area of the home.

Officer Perez stated that another officer, Officer Rhodes, was outside the residence looking through a window into the southwest bedroom, and he informed Officer Perez that he saw weapons in the room. Officer Perez stated that "[t]here was [sic] two handguns towards the front where their heads were to the west side of the bed at which point we went ahead and detained everybody in the residence, secured them all so we could secure those weapons and see if there was [sic] any other weapons." Officer Perez stated that one of the handguns was a .22 caliber handgun and the other was a .380 caliber handgun.

Officer Perez testified that one of the officers went into the southeast bedroom, which belonged to Limon's parents, who were sleeping. Limon, Sr. was not dressed, and Mrs. Limon had a nightgown on. Both were handcuffed. Mrs. Limon was taken to a common area in the home, and Limon, Sr. was told to lie face down on the floor, despite being completely naked. Officer Perez testified that the officers "went ahead and got him some clothes, removed the hand restraints, and that's when we asked for consent."

Officer Perez stated that he asked for a written consent to search from Limon, Sr., who stated that he wanted to speak to his wife because he could not see. Mrs. Limon then gave written consent to search the home.

After obtaining consent, Officer Perez photographed the residence, and he testified that ammunition for a .22 caliber gun and a 12-gauge shotgun were found in the southwest bedroom, along with drug paraphernalia. He stated that, outside the residence in the vicinity of the southwest bedroom, the officers located a "Remington semiautomatic shotgun 12 gauge." Officer Perez agreed that the shotgun was "near the window of the southwest bedroom" in an area enclosed by a privacy fence belonging to the Limon residence.

After searching the residence and finding the guns, Officer Perez obtained consent to search the vehicle from Limon, who stated that his parents bought the vehicle for him to drive. In the vehicle, Officer Perez found a metal jacket from an unknown caliber weapon.

Officer Perez testified that at that time, he "felt that there was probable cause for the arrest," and he arrested Limon. Limon was transported to the police station and booked, which took approximately one hour. Limon was in the jail for about thirty minutes before he was given his Miranda warnings; following the warnings, at 5:01 a.m., he provided a statement.

The trial court denied Limon's motion to suppress without stating the grounds or issuing findings of fact and conclusions of law. At trial, when the State attempted to admit Limon's videotaped statement, the following exchange occurred:

[Defense]: Excuse me, Ms. Cable. Judge, at this time I would reassert the motions filed prior to trial, and I object to any testimony regarding those matters.

The Court: Would y'all come up for a second?

(Bench conference)

[State]: There was a motion to suppress the statement, and it was denied by Judge Whatley.

The Court: I'm showing an [sic] October of 2007 Judge Whatley heard that motion.

[Defense]: Right. And so I'm reasserting it for the purposes of getting a Court's ruling into the record on this matter.

The Court: Fine. I just want to be sure that we're all on the same page.

[Defense]: That is when we had it, October.

[State]: I don't remember the date.

[Defense]: Yeah.

[State]: I rely on the docket sheet.

[Defense]: And then--well, go ahead.

The Court: The Court will adopt the prior rulings of Judge Whatley in this matter. Your objection is overruled.

The evidence obtained from the search of the residence, the search of the car, and Limon's statement were admitted at trial, and Limon was convicted of deadly conduct by use of a firearm. See id. at § 22.05(b)(2), (e).

Held: Reversed and remanded

Opinion: At the suppression hearing, the State argued that the evidence obtained at the residence could be admitted at trial because after the entry into the home, Limon's parents consented to a search of the residence. Limon argues that his parents' consent to search the home was tainted by the illegal entry into the home; therefore, all the evidence discovered pursuant to the consent should be excluded. Limon further argues that his statement given to police after his arrest, which was based on the illegally-obtained evidence, was tainted by the police conduct and should have been excluded. We agree.

A. The Limons' Consent to Search

As the Supreme Court has explained,

[t]he exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search. Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint." Murray v. United States, 487 U.S. 533, 537 (1988).

To determine whether consent to a search, following the police's illegal entry onto premises, is tainted by the illegal entry, we must look to the following factors:

(1) the temporal proximity between the unlawful entry and the given consent; (2) whether the warrantless entry brought about police observation of the particular object for which consent was sought; (3) whether the entry resulted from flagrant police misconduct; (4) whether the consent was volunteered or requested; (5) whether appellant was made fully aware of the right to refuse consent, and (6) whether the police purpose underlying the illegality was to obtain the consent.

Stone v. State, 279 S.W.3d 688, 693 (Tex.App.-Amarillo 2006, pet. ref'd) (adapting the factors set forth in Brick v. State, 738 S.W.2d 676 (Tex.Crim.App.1987), to an unlawful entry followed by consent to search).

First, the consent occurred shortly after the police entered the Limon home and swept the home for weapons. This factor weighs in favor of exclusion of the evidence. Id.

Next, Officer Perez testified that he was investigating the shooting and did not have probable cause to arrest Limon at the time he arrived at the home. Officer Perez was looking for evidence relating to the shootings, and the illegal entry into the home allowed him to view guns in the southwest bedroom, providing him with further suspicion that Limon was involved. The subsequent consent to search the rest of the home further revealed ammunition in that bedroom. Accordingly, this factor supports exclusion of the evidence. Id.

Third, there was flagrant misconduct in this case. Officer Perez obtained information from an unidentified person that the "Limon kids" were involved in the shootings. In fact, he admitted that at the time he arrived at the Limon house, he had a reasonable suspicion that a suspect was in the house, but he did not have probable cause. He testified that he went to the Limon residence to "investigate" at 2:00 a.m. Upon encountering A.S. at the door, Officer Perez made absolutely no inquiry as to A.S.'s authority to consent to his entry, and he and the other officers immediately proceeded to the back bedroom of the house, where Limon was sleeping. Limon and the two other males in the bedroom were handcuffed and moved to the common area of the house. Limon's parents, who Officer Perez had no reason to suspect as being involved in the shootings, were awakened from their sleep in the middle of the night. Limon, Sr. was handcuffed and made to lie face-down on the floor--naked. Although Limon, Sr., was allowed to get dressed and his handcuffs were removed before the officers asked for consent, there was no significant time lapse between these events. Under these circumstances, this factor weighs in favor of excluding the evidence.

Fourth, the consent was not volunteered, but was requested, which favors exclusion of the evidence. Fifth, the Limons were made aware of the right to refuse consent, which favors admitting the evidence. Finally, the State did not present any evidence on whether the police purpose underlying the illegality was to obtain the consent, but as stated above, the police misconduct justified such a conclusion. See Brown, 422 U.S. at 605. When taking these factors together, it is clear that the State failed to meet its burden to prove that the taint from the illegal entry had sufficiently dissipated before the consent was given. See Brick, 738 S.W.3d at 681 (holding that the burden is on the State). Accordingly, all of the evidence discovered at the residence should have been excluded.

B. Limon's Statement

Next, Limon argues that because all of the evidence discovered at the house was illegally obtained, and Officer Perez did not have a warrant for his arrest, his arrest was illegal, and therefore, the statement he gave to the police while in custody should be excluded. Officer Perez admitted that at the time he sought permission to enter the Limon residence, he did not have probable cause to arrest Limon and he did not have a warrant. Officer Perez testified that after

the search of the residence, which we have held was illegal, he believed he had probable cause to arrest Limon and took him to the police station. Shortly after his arrival, Limon gave a statement to police that was relied upon to obtain his conviction.

Here, Limon's arrest was illegal because it was without a warrant, and the information necessary to establish probable cause was the result of the illegal entry and search of the home. Sturchio v. State, 136 S.W.3d 21, 25 (Tex.App.-San Antonio 2002, no pet.) ("Because the warrantless arrest and search incident to arrest that led to the discovery of the cocaine were based on the illegal seizure of the crack pipe, they were illegal as well. Consequently, the evidence obtained as a result of the pat down, warrantless arrest, and search incident to arrest should have been suppressed."). To determine whether a defendant's statement, given after an illegal arrest, was attenuated from the illegality, we must look at (1) the giving of Miranda warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official conduct. Brown, 422 U.S. at 603-04; Bell, 724 S.W.2d at 788.

First, it is undisputed that Limon received Miranda warnings before giving his statement. This fact, however, does not carry much weight in the analysis. Bell, 724 S.W.2d at 788. "[E]ven repeated warnings alone are not enough to purge the taint of an otherwise illegal arrest." Id. Second, the statement was given shortly after Limon's arrest. Officer Perez testified that it took an hour from the time of Limon's arrest to transfer him to the police station and book him, and Limon was in jail for thirty minutes before Officer Perez read him his Miranda rights and obtained the statement. See id. at 788-89 & n. 4 (holding that a time span of one to three hours is considered "close temporal proximity"). Third, according to Officer Perez, there were no intervening circumstances. Officer Perez denied having any conversations with Limon, nor did Limon have any significant time to reflect or consult with anyone prior to his statement. Id. at 788-89. Finally, our analysis of the purpose and flagrancy of the police conduct is the same as our analysis of the taint resulting from the improper entry of the home. Id. at 789-90. Accordingly, Limon's statement was not attenuated from the taint of the illegal entry and search of the residence, and should have been excluded.

V. HARMFUL ERROR

Limon argued below and argues to this Court that the evidence in this case was obtained and admitted at trial in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. See U.S. Const. amend. IV, XIV. Because the error below was constitutional, we apply the harmless error analysis under Texas Rule of Appellate Procedure 44.2(a). See Hernandez v. State, 60 S.W.3d 106, 108 (Tex.Crim.App.2001). Rule 44.2(a) provides that "[i]f the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Tex.R.App. P. 44.2(a). While this rule does not explicitly place the burden on the State to show harmless error, "the 'default' is to reverse unless harmlessness is shown. Thus, if neither party does anything, the case will be reversed. This requires the State to come forward with reasons why the appellate court should find the error harmless." Merritt v. State, 982 S.W.2d 634, 637 (Tex.App.-Houston [1st Dist.] 1998, no pet.)

(citing Arnold v. State, 786 S.W.2d 295, 298 (Tex.Crim.App.1990) (placing the burden on the State to show harmless error under former rule 81(b)(2), the predecessor to rule 44.2(a)); see also Davis v. State, 195 S.W.3d 311, 317 (Tex.App.-Houston [14th Dist.] 2006, no pet.). The State has not filed a brief in this case and has provided us with no argument or any reason why the constitutional error in this case was harmless beyond a reasonable doubt. Accordingly, we reverse and remand for a new trial.

Conclusion: For all the foregoing reasons, we reverse the trial court's judgment and remand for further proceedings.

Grant v. State, 313 S.W.3d 443, 2010 WL 311430, Juvenile Law Newsletter ¶ 10-1-5B (Tex.App.-Waco, 1/27/10).

IN MOTION TO SUPPRESS CONFESSION, JUVENILE HAS THE BURDEN OF PROVING THE CAUSAL CONNECTION BETWEEN THE ALLEGED STATUTORY VIOLATION AND HIS STATEMENT.

Facts: In the early morning of September 15, 2007, the body of James Michael Grant (Michael), the father of appellant Grant, was found lying in a bar ditch a few feet from his pickup. Michael was wrapped in bed linens and tied with coax cables and yellow nylon ropes. His body had been stabbed multiple times in the chest and stomach area. Michael was wearing only boxer shorts and was covered in blood. The tailgate of his pickup was down. Because it appeared to investigators that Michael had been killed somewhere else and dumped in the bar ditch, the investigation was moved to Michael's house.

Michael's master bedroom looked like it had been ransacked. All of the drawers had been pulled out of the dresser. The bed sheets had been taken off of the bed. Blood was splattered on the wall, the bed, and the carpet. The garage door was open and there were no signs of a forced entry. A large comforter soaked in blood was on top of either the washer or the dryer. Blood was on the doorway leading out into the garage, on the garage floor, and on the driveway.

Jesus Ramos, a Texas Ranger investigating the murder, was told by Michael's father, Garnett, that the relationship between Grant and Michael was bad.

Ramos and Ricky Helms, an investigator with the Coryell County Sheriff's Department, initially spoke with Grant during the evening of September 15th. Grant told Ramos he was at home asleep at the time of the murder. He stated he went to bed at about 11:30 p.m. and slept through the night. Although Grant's room was across the house from Michael's room, it was a very small house. Grant stated to Ramos that Michael sold drugs and that Grant believed someone had killed Michael. Grant denied hearing any commotion in the house.

Ramos noticed during the interview that there was "a lot of hate" in Grant and that Grant was not emotional or distraught that his father had been killed. Ramos also thought Grant had a cocky attitude. While Ramos was questioning Grant, Grant would not answer a question until the next question was asked, as if Grant was stalling. When Ramos continued with his questions,

Grant became upset. He pointed his finger at Ramos and told Ramos not to interrupt him. Grant affirmed that he and Michael had a physical altercation in the past. When asked if he could "take" his father, Grant was very confident and cocky, stating he could hold his own. During the interview, Ramos got the impression that Grant was intentionally attempting to be manipulative or deceitful. When Grant left the room to go to the bathroom during the interview, he grabbed the door handle using his t-shirt. Ramos thought Grant was trying to prevent him from acquiring Grant's fingerprints.

John Hopkins, Megan's boyfriend, was the first person arrested for Michael's murder. [FN2] One day, after the murder and after drinking, Hopkins put a gun to his head. At one point, Hopkins pointed the gun at Grant to get him to "back off." Megan and Grant called 911. On the recording, Megan and Grant were both trying to talk Hopkins out of committing suicide. Grant was pleading with Hopkins not to kill himself. Grant was crying, and toward the end of the recording, Grant told Hopkins that he loved him. Ramos found Grant's reaction to Hopkins's suicide attempt strange because Grant had not given that same emotion about Michael's death.

FN2. Hopkins had at some point prior to the murder been in prison in either New Jersey or Pennsylvania for a sex offense with a minor female.

By the time police arrived, Hopkins had left the house. Megan directed the police to a suicide note left by Hopkins. The note implicated only Hopkins in Michael's murder. But when interviewed after his arrest, Hopkins confessed to his involvement in the murder and implicated both Grant and Megan.

Hopkins stated in his confession that Megan wanted Hopkins to kill Michael so that she could gain custody of her children.

After Hopkins' confession, warrants were obtained for Grant's and Megan's arrest. When Ramos arrived to arrest Grant, Grant was wearing a loose t-shirt. Ramos asked him to raise his arms so Ramos could see if anything was hidden under the shirt. Grant refused. When Ramos grabbed the bottom of the t-shirt, Grant slapped Ramos's arm away and told Ramos to get his "fucking" hands off of him. Grant was then arrested and re-interviewed.

At the second interview, Grant confirmed that he spoke to Hopkins at about one or two o'clock in the morning. Hopkins told him he was coming over to the house and he needed the door opened. Grant said he waited and when Hopkins arrived, Grant opened the back door to the patio. When Grant asked Hopkins what he wanted, Hopkins stated, "You know what I'm here for," and displayed a knife strapped to his waist. Grant said he thought Hopkins was there to kill him. Hopkins told Grant to leave the room and Grant walked into the living room. Grant stated that Hopkins then proceeded to stab Michael. Grant stated that at various times he was held at knifepoint or gunpoint and was forced to help Hopkins. Neither Ramos nor Helms thought Grant was afraid of Hopkins.

Held: Affirmed

Opinion: His second issue is twofold: the trial court erred in denying his motion to suppress his written statement [FN3] because Grant's mother was not notified that he was taken into custody in violation of Texas Family Code Section 52.02(b) and because his mother was denied access to him before he gave his statement. *See*Tex. Fam.Code Ann. § 52.02(b) (Vernon 2008). Grant specifically argued at the motion to suppress hearing that pursuant to section 52.02(b), the law enforcement officers who arrested Grant did not give the required notice to anyone. He argued that the reason for the notice is so statements are not taken in such a way that juveniles do not have the benefit of advice from someone looking out for them.

FN3. At trial, Grant argued for the suppression of a statement given on September 15, 2007 and a statement given on October 29, 2007. On appeal, he contests the denial of the motion as to the second statement only.

Even if a violation of section 52.02(b) has occurred, a holding which we are expressly not making, Grant's statement is not automatically excluded. To suppress a juvenile's statement because of a violation of section 52.02(b), there must be some exclusionary mechanism. *Gonzales v. State*, 67 S.W.3d 910, 912 (Tex.Crim.App.2002). Section 52.02(b) is not an independent exclusionary statute. *Id.* If evidence is to be excluded because of a section 52.02(b) violation, it must be excluded through the operation of Article 38.23(a). *Id.* In light of Article 38.23(a), before a juvenile's written statement can be excluded due to a violation of section 52.02(b), there must be a causal connection between the Family Code violation and the making of the statement. Id. The burden of proving this causal connection rests with the party attempting to exclude the statement, in this case, Grant. *Pham v. State*, 175S.W.3d 767, 774 (Tex.Crim.App.2005). Once a causal connection is established, the burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal chain asserted by the defendant was in fact broken. *Id.*

Conclusion: Grant had the burden of proving a causal connection between the alleged violation of section 52.02(b) and his statement. No evidence of a causal connection was presented at the motion for new trial hearing. Accordingly, the trial court was not required to exclude Grant's statement.

Accordingly, the trial court did not err in denying Grant's motion to suppress.

Grant v. State, 313 S.W.3d 443, 2010 WL 311430, Juvenile Law Newsletter ¶ 10-1-5C (Tex.App.-Waco, 1/27/10).

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.

Facts: In the early morning of September 15, 2007, the body of James Michael Grant (Michael), the father of appellant Grant, was found lying in a bar ditch a few feet from his pickup. Michael was wrapped in bed linens and tied with coax cables and yellow nylon ropes. His body had been stabbed multiple times in the chest and stomach area. Michael was wearing

only boxer shorts and was covered in blood. The tailgate of his pickup was down. Because it appeared to investigators that Michael had been killed somewhere else and dumped in the bar ditch, the investigation was moved to Michael's house.

Jesus Ramos, a Texas Ranger investigating the murder, was told by Michael's father, Garnett, that the relationship between Grant and Michael was bad.

Ramos and Ricky Helms, an investigator with the Coryell County Sheriff's Department, initially spoke with Grant during the evening of September 15th. Grant told Ramos he was at home asleep at the time of the murder. He stated he went to bed at about 11:30 p.m. and slept through the night. Although Grant's room was across the house from Michael's room, it was a very small house. Grant stated to Ramos that Michael sold drugs and that Grant believed someone had killed Michael. Grant denied hearing any commotion in the house.

Ramos noticed during the interview that there was "a lot of hate" in Grant and that Grant was not emotional or distraught that his father had been killed. Ramos also thought Grant had a cocky attitude. While Ramos was questioning Grant, Grant would not answer a question until the next question was asked, as if Grant was stalling. When Ramos continued with his questions, Grant became upset. He pointed his finger at Ramos and told Ramos not to interrupt him. Grant affirmed that he and Michael had a physical altercation in the past. When asked if he could "take" his father, Grant was very confident and cocky, stating he could hold his own. During the interview, Ramos got the impression that Grant was intentionally attempting to be manipulative or deceitful. When Grant left the room to go to the bathroom during the interview, he grabbed the door handle using his t-shirt. Ramos thought Grant was trying to prevent him from acquiring Grant's fingerprints.

After the interview with Grant, Ramos searched Megan Lewis's house with her consent. Megan was Grant's mother and Michael's ex-wife. Grant was present at the time of the search. Both Megan and Grant acted strange. They were not distraught about Michael's death. They were laughing and having a good time, making strange comments. Grant commented that if all he lost that day was his boots, because they had been taken to be compared to bloody footprints, then it was a good day.

John Hopkins, Megan's boyfriend, was the first person arrested for Michael's murder. [FN2] One day, after the murder and after drinking, Hopkins put a gun to his head. At one point, Hopkins pointed the gun at Grant to get him to "back off." Megan and Grant called 911. On the recording, Megan and Grant were both trying to talk Hopkins out of committing suicide. Grant was pleading with Hopkins not to kill himself. Grant was crying, and toward the end of the recording, Grant told Hopkins that he loved him. Ramos found Grant's reaction to Hopkins's suicide attempt strange because Grant had not given that same emotion about Michael's death.

FN2. Hopkins had at some point prior to the murder been in prison in either New Jersey or Pennsylvania for a sex offense with a minor female.

By the time police arrived, Hopkins had left the house. Megan directed the police to a suicide note left by Hopkins. The note implicated only Hopkins in Michael's murder. But when

interviewed after his arrest, Hopkins confessed to his involvement in the murder and implicated both Grant and Megan.

After Hopkins' confession, warrants were obtained for Grant's and Megan's arrest. When Ramos arrived to arrest Grant, Grant was wearing a loose t-shirt. Ramos asked him to raise his arms so Ramos could see if anything was hidden under the shirt. Grant refused. When Ramos grabbed the bottom of the t-shirt, Grant slapped Ramos's arm away and told Ramos to get his "fucking" hands off of him. Grant was then arrested and re-interviewed.

At the second interview, Grant confirmed that he spoke to Hopkins at about one or two o'clock in the morning. Hopkins told him he was coming over to the house and he needed the door opened. Grant said he waited and when Hopkins arrived, Grant opened the back door to the patio. When Grant asked Hopkins what he wanted, Hopkins stated, "You know what I'm here for," and displayed a knife strapped to his waist. Grant said he thought Hopkins was there to kill him. Hopkins told Grant to leave the room and Grant walked into the living room. Grant stated that Hopkins then proceeded to stab Michael. Grant stated that at various times he was held at knifepoint or gunpoint and was forced to help Hopkins. Neither Ramos nor Helms thought Grant was afraid of Hopkins.

During the investigation, Ramos spoke to E.M., a classmate of Grant. When, in E.M.'s view, Grant was acting strange one day, E.M. asked Grant if Grant had killed Michael. Grant nodded his head and made stabbing motions. E.M. was afraid of revealing this information because when he, Grant, and Hopkins, were on their way to buy marijuana on day after the murder, Hopkins told E.M. that if anyone was informing the police about the murder, that person would be in trouble.

Also during the investigation, Investigator Helms took a statement from Megan's father. He stated that during Megan and Michael's divorce, Megan made the statement that she wished Michael was dead or that someone would kill him. Megan's father said that Grant volunteered to do it for his mother.

Held: Affirmed

Opinion: His second issue is twofold: the trial court erred in denying his motion to suppress his written statement [FN3] because Grant's mother was not notified that he was taken into custody in violation of Texas Family Code Section 52.02(b) and because his mother was denied access to him before he gave his statement. *See*Tex. Fam.Code Ann. § 52.02(b) (Vernon 2008). Grant specifically argued at the motion to suppress hearing that pursuant to section 52.02(b), the law enforcement officers who arrested Grant did not give the required notice to anyone. He argued that the reason for the notice is so statements are not taken in such a way that juveniles do not have the benefit of advice from someone looking out for them.

FN3. At trial, Grant argued for the suppression of a statement given on September 15, 2007 and a statement given on October 29, 2007. On appeal, he contests the denial of the motion as to the second statement only.

To the extent that Grant actually made the argument to the trial court that Grant's mother was denied access to him, that part of the issue is overruled. Generally, section 61.103 of the Texas Family Code provides that parents have a right of access to their child. Tex. Fam.Code Ann. § 61.103(a) (Vernon 2008). However, if the parent is denied the right of access, the child may not raise that complaint on appeal. *Id.* § 61.106.

Accordingly, the trial court did not err in denying Grant's motion to suppress.

COURT APPOINTED ATTORNEY—

Menson v. State, UNPUBLISHED, No. 07-09-0221-CR, 2010 WL 571716, Juvenile Law Newsletter ¶ 10-2-1 (Tex.App.-Amarillo, 2/18/10).

APPELLATE COURT MUST REMAND FOR APPOINTMENT OF NEW COUNSEL WHERE APPELLATE ISSUES EXIST IRRESPECTIVE OF FILING OF ANDERS BRIEF.

Facts: On June 18, 2007, Appellant was charged by information with the second degree felony offense of aggravated assault. The information also contained an enhancement paragraph alleging that Appellant had previously been convicted of the felony offense of aggravated robbery. Pursuant to a plea bargain, Appellant was placed on deferred adjudication community supervision.

In 2009, the State filed a motion to proceed, alleging ten violations of the terms and conditions of community supervision. Appellant entered a plea of "not true" to those allegations. After a hearing on the State's motion, the trial court found seven of the ten allegations to be true, and adjudicated Appellant guilty of the charged offense.

At the commencement of the punishment phase of the proceeding, no plea was taken as to the enhancement allegation. Brief testimony was presented that Appellant had previously been adjudicated as a juvenile for the offense of aggravated robbery, but no order of adjudication was offered and no evidence was presented as to when that offense was committed. For purposes of enhancement, 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 under section 54.04(d)(2), (d)(3), or (m), or section 54.05(f), Family Code, is a final felony conviction. At the conclusion of the hearing, no § 12.42 finding was made as to whether Appellant had previously either been convicted of a felony or adjudicated guilty of delinquent conduct occurring after January 1, 1996. The trial court then sentenced Appellant to twenty-five years confinement and a $2,000 fine.

Held: Appeal abated and remand for appointment of new counsel.

Opinion: In presenting this appeal, counsel has filed an Anders brief in support of a motion to withdraw.

Because the trial court assessed Appellant's sentence outside the range of punishment for a second degree felony, a finding of true as to the enhancement paragraph was essential to support the trial court's sentence of twenty-five years confinement. Given the facts of this case, at least four potential issues arise:

(1) Did the trial court err by not taking a plea to the enhancement allegation?
(2) Did the trial court err by not making a finding of true to the enhancement allegation?
(3) Was any implied finding of true to the enhancement allegation supported by legally and factually sufficient evidence?
(4) Was the error, if any, harmless?

Conclusion: Having concluded that an arguable ground for appeal exists affecting the punishment phase of Appellant's trial, we grant Appellants counsels motion to withdraw, abate this proceeding, and remand this cause to the trial court for the appointment of new counsel.

CRIMINAL PROCEEDINGS—

Graham v. Florida, No. 08-7412, 560 U.S. ___ , Juvenile Law Newsletter ¶ 10-2-18 (Sup. Ct., 5/15/10).

THE SUPREME COURT OF THE UNITED STATES HELD THAT THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENTS CLAUSE DOES NOT PERMIT A JUVENILE OFFENDER TO BE SENTENCED TO LIFE IN PRISON WITHOUT PAROLE FOR A NONHOMICIDE CRIME.

Facts: Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, but the State First District Court of Appeal affirmed.

Held: Reversed and remanded

Opinion: The Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime.

(a) Embodied in the cruel and unusual punishments ban is the "precept . . . that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U. S. 349, 367. The Court's cases implementing the proportionality standard fall within two general

classifications. In cases of the first type, the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant's crime. The second classification comprises cases in which the Court has applied certain categorical rules against the death penalty. In a subset of such cases considering the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. E.g., Kennedy v. Louisiana, 554 U. S. ___, ___. In a second subset, cases turning on the offender's characteristics, the Court has prohibited death for defendants who committed their crimes before age 18, Roper v. Simmons, 543 U. S. 551, or whose intellectual functioning is in a low range, Atkins v. Virginia, 536 U. S. 304. In cases involving categorical rules, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Roper, supra, at 563. Next, looking to "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," Kennedy, supra, at ___, the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution, Roper, supra, at 564. Because this case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes, the appropriate analysis is the categorical approach used in Atkins, Roper, and Kennedy.

(b) Application of the foregoing approach convinces the Court that the sentencing practice at issue is unconstitutional.

(1) Six jurisdictions do not allow life without parole sentences for any juvenile offenders. Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven States, the District of Columbia, and the Federal Government permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. The State relies on these data to argue that no national consensus against the sentencing practice in question exists. An examination of actual sentencing practices in those jurisdictions that permit life without parole for juvenile nonhomicide offenders, however, discloses a consensus against the sentence. Nationwide, there are only 129 juvenile offenders serving life without parole sentences for nonhomicide crimes. Because 77 of those offenders are serving sentences imposed in Florida and the other 52 are imprisoned in just 10 States and in the federal system, it appears that only 12 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders, while 26 States and the District of Columbia do not impose them despite apparent statutory authorization. Given that the statistics reflect nearly all juvenile nonhomicide offenders who have received a life without parole sentence stretching back many years, moreover, it is clear how rare these sentences are, even within the States that do sometimes impose them. While more common in terms of absolute numbers than the sentencing practices in, e.g., Atkins and Enmund v. Florida, 458 U. S. 782, the type of sentence at issue is actually as rare as those other sentencing practices when viewed in proportion to the opportunities for its imposition. The fact that many jurisdictions do not expressly prohibit the sentencing practice at issue is not dispositive because it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that such sentences would be appropriate. See Thompson v. Oklahoma, 487 U. S. 815, 826, n. 24, 850.

(2) The inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide offenders, the limited culpability of such offenders, and the severity of these sentences all lead the Court to conclude that the sentencing practice at issue is cruel and unusual. No recent data provide reason to reconsider Roper's holding that because juveniles have lessened culpability they are less deserving of the most serious forms of punishment. 543 U. S., at 551. Moreover, defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of such punishments than are murderers. E.g., Kennedy, supra. Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.' " Id., at ___. Thus, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. Age and the nature of the crime each bear on the analysis. As for the punishment, life without parole is "the second most severe penalty permitted by law," Harmelin v. Michigan, 501 U. S. 957, 1001, and is especially harsh for a juvenile offender, who will on average serve more years and a greater percentage of his life in prison than an adult offender, see, e.g., Roper, supra, at 572. And none of the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation, see Ewing v. California, 538 U. S. 11, 25—is adequate to justify life without parole for juvenile nonhomicide offenders, see, e.g., Roper, 543 U. S., at 571, 573. Because age "18 is the point where society draws the line for many purposes between childhood and adulthood," it is the age below which a defendant may not be sentenced to life without parole for a nonhomicide crime. Id., at 574. A State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.

(3) A categorical rule is necessary, given the inadequacy of two alternative approaches to address the relevant constitutional concerns. First, although Florida and other States have made substantial efforts to enact comprehensive rules governing the treatment of youthful offenders, such laws allow the imposition of the type of sentence at issue based only on a discretionary, subjective judgment by a judge or jury that the juvenile offender is irredeemably depraved, and are therefore insufficient to prevent the possibility that the offender will receive such a sentence despite a lack of moral culpability. Second, a case-by-case approach requiring that the particular offender's age be weighed against the seriousness of the crime as part of a gross disproportionality inquiry would not allow courts to distinguish with sufficient accuracy the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence from the many that have the capacity for change. Cf. Roper, supra, at 572–573. Nor does such an approach take account of special difficulties encountered by counsel in juvenile representation, given juveniles' impulsiveness, difficulty thinking in terms of long term benefits, and reluctance to trust adults. A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide. It also gives the juvenile offender a chance to demonstrate maturity and reform.

(4) Additional support for the Court's conclusion lies in the fact that the sentencing practice at issue has been rejected the world over:

Conclusion: The United States is the only Nation that imposes this type of sentence. While the judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment, the Court has looked abroad to support its independent conclusion that a particular punishment is cruel and unusual. See, e.g., Roper, supra, at 575–578. 982 So. 2d 43, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to Parts I and III. ALITO, J., filed a dissenting opinion.

DEFERRED PROSECUTION—

In the Matter of R.C., MEMORANDUM, No. 13-08-00334-CV, 2010 WL 411873, Juvenile Law Newsletter ¶ 10-1-6 (Tex.App.-Corpus Christi, 2/4/10).

FOR A DEFERRED PROSECUTION BY THE PROSECUTOR TO BE ENFORCEABLE IT MUST BE IN WRITING, SIGNED AND FILED.

Facts: Appellant and his fraternal twin brother were born on March 19, 1991. On August 24, 2007, the juveniles were arrested and placed into custody. Identical petitions were filed on August 31, 2007, alleging that each brother intentionally or knowingly caused the penetration of the sexual organ of S.G. (also 16), who was younger than 17 years of age, and not the spouse of the respondent, by respondent's sexual organ. On August 29, 2007, an Order of Detention was entered and hearing set for September 10, 2007. That hearing was conducted and another Order of Detention was signed and entered. After another hearing September 24, 2007, the two juveniles were ordered released on house arrest. A pre-trial hearing was set October 1, 2007, where the juveniles and their attorney appeared, announced ready for trial, and demanded a trial by jury. Per local practice, the case was transferred from the County Court at Law to the District Court of San Patricio County. The case was set for jury trial on October 22, 2007. However on October 2, 2007, the county attorney's office requested the appointment of a special prosecutor who was board certified, which request was granted. The special prosecutor requested a continuance because of a conflicting setting, and to obtain additional time to prepare. The unopposed motion was granted.

The case was reset to January 11, 2008. At the January trial setting, a tentative settlement was reached between the special prosecutor and defense attorney deferring prosecution for a period of six months upon the juveniles agreeing to voluntary supervision by the San Patricio County probation officer and to abide by a list of specified conditions. No record was made of the agreement, and no written form of agreement was signed at that time. Later that day, an agreement was signed by appellant, his brother, their parent/guardian, and a probation officer. The agreement was not signed by the special prosecutor, defense counsel, or the judge. The form

agreement, apparently prepared by a probation officer, provided for approval and signature of the judge, but not for the prosecutor. Two judges later refused to approve the agreement. The special prosecutor and defense counsel later professed ignorance of any requirement for the judge's signature or approval. A notice of setting for trial/dismissal/status was set for April 21, 2008. Defense counsel denied any knowledge that the agreement was not in force until April 2008. Defense counsel also asserted that the probation officer indicated that neither the prosecutor's nor the judge's signature was required.

On April 28, 2008, appellant filed a motion to enforce the agreement to defer prosecution and alternatively to dismiss for want of a speedy trial. Before that date, the case had already been set for a jury trial on May 19, 2008. At the trial setting, a jury was waived, and the case tried to the court.

Held: Affirmed

Memorandum Opinion: Appellant argues that under the family code, the prosecutor, without court approval, may agree to defer prosecution. *See*Tex. Fam.Code Ann. § 53.03(e), (g) (Vernon 2006). The family code does provide in pertinent part: "A prosecuting attorney may defer prosecution for any child." *Id.* at § 53.03(e). As appellant points out, this power is denied if the offense is under certain provisions of the penal code, or is a third or subsequent offense under certain provisions of the Texas Alcoholic Beverage Code. *Id.* at § 53.03(g).

Appellant acknowledges that the trial court may defer prosecution at any time for an adjudication that is: (1) to be decided by a jury trial before the jury is sworn; (2) for an adjudication before the court, before the first witness is sworn; and (3) for an uncontested adjudication before the child pleads to the petition or agrees to a stipulation of evidence. *Id.* at § 53.03(i). Appellant appears to concede in his brief that in the procedural context of a "demand or insist that a jury trial is to be conducted in the case that *the Court* may reject an agreement of the application for deferred prosecution." (Emphasis in original.) The appellant had demanded a jury trial twice in this proceeding.

Appellant contends that the record supports his position that the deferred prosecution agreement, which was not executed by the prosecutor or approved by the judge, established his entitlement to enforcement of the agreement. We disagree. Family code section 51.17, entitled "Procedure and Evidence," provides: "(a) Except for the burden of proof to be borne by the state in adjudicating a child to be delinquent or in need of supervision under Section 54.03(f) or otherwise when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title." Tex. Fam.Code Ann. § 51.17 (Vernon 2006). For a settlement agreement to satisfy the requirements of rule 11 it must be: (1) in writing; (2) signed; and (3) filed with the court or entered in open court prior to a party seeking enforcement. Tex.R. Civ. P. 11; *Staley v. Herblin*, 188 S.W.3d 334, 336 (Tex.App .-Dallas, 2006, pet.denied) (citing *Padilla v. LaFrance*, 907 S.W.2d 454, 461, (Tex.1995)). This rule has existed since 1840 and has contained the filing requirement since 1877. *Padilla*, 907 S.W.2d at 461 (citing *Kennedy v. Hyde*, 682 S.W.2d 525, 526 (Tex.1984) (tracing the history of Rule 11)).

The rationale for the rule is straightforward: Agreements of counsel, respecting the disposition of causes, which are merely verbal, are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel respecting their causes shall be in writing, and if not, the court will not enforce them. They will then speak for themselves, and the court can judge of their import, and proceed to act upon them with safety. The rule is a salutary one, and ought to be adhered to whenever counsel disagree as to what has transpired between them. *Id.* at 460-61 (citing *Birdwell v. Cox*, 18 Tex. 535, 537 (1857)).

More recently, the supreme court has again emphasized the civil component of juvenile cases. *See In re Hall*, 286 S.W.3d 925, 927 (Tex.2009) (because juvenile proceedings are civil matters, the Court of Criminal Appeals has concluded that it lacks jurisdiction to issue extraordinary writs in such cases even in those initiated by a juvenile offender who has been transferred to the Texas Department of Criminal Justice because he is now an adult) (citing *Ex parte Valle*, 104 S.W.3d at 889); *see also Vasquez*, 739 S.W.2d at 42 (recognizing that delinquency proceedings are civil in nature).

Appellant does not contend that the trial court was without jurisdiction to reject the purported agreement to defer prosecution or enforce the same agreement. Indeed, section 53.03 of the family code authorizes trial court approval under the circumstances of this case. Tex. Fam.Code Ann. § 53.03(i).

Conclusion: While we agree with appellant that section 53.03(e) of the family code appears to grant the prosecutor discretion to defer prosecution of a juvenile without court approval in certain circumstances, we need not address this dichotomy because the agreement or settlement was not enforceable in that it did not comport with rule 11. *See*Tex. Fam.Code Ann. § 53.03(e); Tex.R. Civ. P. 11; *In re M.S.*, 115 S.W.3d at 543) ("Rule 11 of our rules of civil procedure requires agreements between attorneys or parties concerning a pending suit to be in writing, signed and filed in the record of the cause to be enforceable."). We overrule appellant's first issue.

DETERMINATE SENTENCE ACT—

Bleys v. State, 319 S.W.3d 857, 2010 WL 1904130, Juvenile Law Newsletter ¶ 10-2-17 (Tex.App.-San Antonio, 5/12/10).

JUVENILE COURT HAS NO AUTHORITY TO FORCE THE STATE TO PROSECUTE JUVENILE UNDER THE DETERMINATE SENTENCE STATUTE.

Facts: Bexar County Deputy Sheriff Santos Chavarria Jr. was dispatched to the scene of a stabbing. When he arrived, he found a chaotic scene that included neighbors, family members, the victim, and Bleys. The victim, twelve-year-old Mohammad Martinez, was lying face down near a wooded area. Martinez suffered multiple stab wounds and was covered in blood. Deputy

Chavarria believed Martinez would likely die. Deputy Chavarria asked Martinez, who was conscious, who had done this to him. Martinez said it was a long story. Martinez was airlifted to the hospital where he underwent emergency surgery. Martinez's lungs had collapsed, his liver, small intestine, and duodenum were punctured, and his gall bladder had to be removed. He also suffered stab wounds to his right arm that caused nerve damage, two stab wounds to his chest, and one stab wound on his left arm. In all, it appeared Martinez suffered as many as seventeen stab wounds. He remained in the hospital for a month. An expert stated Martinez would have likely died but for the emergency surgery.

Bleys, who was sixteen-years-old at the time of the stabbing, was originally under the jurisdiction of the juvenile court system. However, the State subsequently filed an "Original Petition for Waiver of Jurisdiction and Discretionary Transfer to Criminal Court," asking the juvenile court to waive jurisdiction and transfer the case to the district court. A certification hearing was held, after which the trial court granted the State's petition, waiving jurisdiction and transferring the case to criminal district court. Bleys was thereafter indicted for aggravated assault with a deadly weapon.

Bleys pled guilty to the jury, which assessed punishment at confinement for sixteen years, implicitly denying his application for community supervision. The trial court entered judgment in accord with Bleys's plea and the jury's verdict. Bleys then perfected this appeal.

Held: Affirmed

Opinion: In his sole point of error, Bleys contends the trial court abused its discretion in waiving jurisdiction and transferring his case to adult criminal court. He argues the evidence was factually insufficient to support the trial court's findings that (1) the procedures, services, and facilities available to the juvenile court were inadequate for Bleys's rehabilitation, and (2) the welfare of the community required proceedings in criminal district court. Bleys's entire argument is based on his belief that determinate sentencing was an available option that would have afforded adequate services, procedures, and facilities for his rehabilitation, and protected the community welfare.

"A defendant may appeal an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02, Family Code." Tex.Code Crim. Proc. Ann. art. 44.47(a) (Vernon 2006). Such an appeal is permitted only in conjunction with an appeal of a conviction for the offense for which the defendant was transferred to criminal court. Id. art. 44.47(b). An appeal from a certification and transfer order is a criminal matter governed by the Texas Code of Criminal Procedure and the rules of appellate procedure applicable to criminal cases. Id. art. 44.47(c); see also In re M.A.V., 88 S.W.3d327, 331 n. 2 (Tex.App.-San Antonio 2002, no pet.).

A juvenile court may waive its exclusive jurisdiction and transfer a child to a criminal court if: (1) the child is alleged to have committed a felony; (2) the child was fifteen years of age or older at the time the offense occurred, and the offense allegedly committed is a second or third degree felony, or a state jail felony; (3) no adjudication hearing has been conducted concerning the alleged offense; and (4) after a full investigation and a hearing the juvenile court determines

there is probable cause to believe the child committed the offense alleged, and that because of the seriousness of the offense or the child's background, the welfare of the community requires criminal prosecution. TEX. FAM.CODE ANN. § 54.02(a)(1), (2)(B), (3) (Vernon Supp.2009).

To facilitate this decision, the Texas Family Code provides criteria for the court to consider:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer if the offense was against a person;
(2) the sophistication and maturity of the child;
(3) the record and previous history of the child; and
(4) the prospects of adequate protection of the public and the likelihood of re-habilitation of the child by use of procedures, services, and facilities currently available to the juvenile court. Id. § 54.02(f).

In this case, Bleys challenges only the trial court's findings that (1) the seriousness of the offense and the child's background were such that transfer to a criminal district court was necessary for the welfare of the community, and (2) the procedures, services, and facilities currently available to the juvenile court were inadequate for Bleys's rehabilitation. See TEX. FAM.CODE ANN. § 54.02(a)(3), (f)4). In arguing these findings are supported by factually insufficient evidence, Bleys relies solely on the idea that an option was available that would have allowed for his rehabilitation and adequately protected the community--determinate sentencing.

A determinate sentence is one in which a juvenile is initially committed to a term in the custody of the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice-Institutional Division. See id. § 54.04(d)(3) (Vernon Supp.2009). Section 53.045(a) of the Family Code provides that when a child is alleged to have committed certain offenses, including aggravated assault, the prosecutor may refer the petition requesting adjudication as a delinquent to the grand jury. Id. § 53.045(a)(6) (emphasis added). If the grand jury approves the submitted petition by a vote of nine, just as with an indictment, the approval is certified to the juvenile court and entered into the record. Id. § 53.045(b), (d). If the prosecutor refers the petition to the grand jury, the grand jury approves the petition, and the grand jury's approval is certified to the juvenile court and filed in the juvenile court's record, the juvenile court may impose a determinate sentence. See Matter of S .J., 977 S.W.2d 147, 149 (Tex.App.-San Antonio 1998, no pet.) (citing sections 53.045(a), (d) and 54.04(d)(3) of the Texas Family Code). However, if the prosecutor does not obtain and file the grand jury's certification, the juvenile court is without jurisdiction to impose a determinate sentence. Id. (citing section 54.04(d)(2), (3) of the Texas Family Code). Only if all the requirements are met may the court impose a determinate sentence; it is only then that the State's petition is deemed an indictment for purposes of later transferring the juvenile to Texas Department of Criminal Justice-Institutional Division or the parole board. Matter of S.J., 977 S.W.2d at 149 (citing section 53.045(d)); see also TEX. HUM. RES.CODE ANN. § 61.084(a), (c) (Vernon Supp.2009) (stating that if person is committed to Texas Youth Commission pursuant to determinate sentence under section 54.04(d)(3) of Family Code, Commission may not discharge person from custody, rather it must transfer person to Texas Department of Criminal Justice-Institutional Division for completion of sentence).

Clearly, the decision to refer the petition to the grand jury is at the State's option, and if the State never refers the petition, the trial court has no jurisdiction to order determinate sentencing. Matter of S.J., 977 S.W.2d at 149 (citing section 54.04(d)(2), (3) of the Texas Family Code). In this case, the State chose not to refer the petition; rather, the State chose to seek a waiver of jurisdiction and transfer to criminal district court, as was its right. Therefore, contrary to Bleys's assertion, the trial court did not have the option of imposing determinate sentencing so as to provide Bleys with the rehabilitation needed and to protect the community welfare. See id. Moreover, Bleys has not cited any authority to support his suggestion that the juvenile court could somehow force the State to refer its petition for adjudication to the grand jury. The statute clearly gives the State the option of referral without interference from the trial court. See TEX. FAM.CODE ANN. § 53.045(a).

Conclusion: Because Bleys's only argument is that the trial court ignored the option of determinate sentencing, rendering its findings on rehabilitation and community welfare factually insufficient, we must overrule his contention because as demonstrated above, determinate sentencing was not an option available to the trial court. The trial court was, in fact, without jurisdiction to impose a determinate sentence. Accordingly, we overrule Bleys's point of error and affirm the trial court's judgment.

DETERMINATE SENTENCE TRANSFER—

In the Matter of R.A., MEMORANDUM, No. 07-09-0386-CV, 2010 WL 4366499, Juvenile Law Newsletter ¶ 10-4-12 (Tex.App.-Amarillo, 11/3/10).

NO ABUSE OF DISCRETION WHERE TRIAL COURT TRANSFERRED JUVENILE TO THE PENITENTIARY NOTWITHSTANDING TYC'S RECOMMENDATION THAT HE BE PAROLED.

Facts: R.A., born on November 1, 1988, committed sexual assault and indecency with a child against an eight year old female and an eight year old male on separate occasions when he was fourteen years old. When R.A. was sixteen, the State brought charges alleging delinquent conduct. In May 2007, R.A. pled not true, and a jury found that he engaged in delinquent conduct as defined in section 51.03(a)(1) of the Texas Family Code. Following his disposition hearing, the jury found that R.A. should be committed to the Texas Youth Commission (TYC) with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ) for a determinate sentence of seventeen years. The trial court adopted the jury's finding.

On August 25, 2009, when it was determined that R.A. would not complete the statutory minimum sentence of three years by his twenty-first birthday, TYC referred R.A. to the trial court for a release or transfer hearing. See Tex. Hum. Res.Code Ann. §§ 61.079(a) and 61.081 (Vernon Supp.2010). Pursuant to section 54.11 of the Texas Family Code, the court gave notice of the hearing to the parties. Following the presentation of testimony and evidence, the trial

court ordered that R.A. be transferred to the custody of TDCJ for completion of his seventeen year sentence. This appeal followed.

By a sole issue, Appellant questions whether the trial court abused its discretion in transferring him to the Institutional Division of TDCJ. The State of Texas did not favor us with a brief. Thus, this being a civil case, we will accept as true facts provided by Appellant in his brief. See Tex.R.App. P. 38.1(g).

Held: Affirmed

Memorandum Opinion: When a juvenile is given a determinate sentence, upon TYC's request to transfer the juvenile to TDCJ, the trial court is required to hold a hearing. See Tex. Fam.Code Ann. § 54.11 (Vernon Supp.2010). See also Tex. Hum. Res.Code Ann. § 61.079(a) (Vernon Supp.2010). At the hearing, a trial court may consider written reports from probation officers, professional court employees, professional consultants, or TYC employees, in addition to testimony of witnesses. Tex. Fam.Code Ann. § 54.11(d). Following the hearing, the trial court may either (1) order the return of the juvenile to TYC or (2) order the transfer of the juvenile to the custody of TDCJ for completion of his sentence. § 54.11(i).

Factors the trial court may consider in its decision include (1) the experiences and character of the person before and after commitment to TYC; (2) the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed; (3) the abilities of the juvenile to contribute to society; (4) the protection of the victim of the offense or any member of the victim's family; (5) the recommendations of TYC and the prosecuting attorney; (6) the best interests of the juvenile; and (7) any other factor relevant to the issue being decided. § 54.11(k). Not every factor need be considered and the trial court may assign different weights to the factors considered. In re R.G., 994 S.W.2d at 312.

III. Analysis

A. The State's Witnesses

The trial court heard testimony from seven witnesses, including R.A. [FN5] Leonard Cucolo, TYC liaison to the courts, opened the testimony for the State and testified that TYC's recommendation was for R.A. to be released to adult parole for the remainder of his determinate sentence with intense supervision, including wearing a leg monitor. He explained the serious procedure TYC follows in deciding whether to recommend a juvenile for transfer to prison or for release to adult parole. According to Cucolo, a juvenile who has severe behavioral problems, fails to progress in programs, and is a great risk to the community will likely be transferred to prison whereas a juvenile who completes treatment and programs, exhibits stable behavior, and presents a low risk to the community based on a psychological evaluation will be considered for release. According to Cucolo, after a juvenile is evaluated by a psychologist, TYC department heads meet to review and consider the information and determine whether the juvenile is on a particular track. The committee, who considers all factors listed in section 54.11 of the Family Code, then votes on whether to release the juvenile to parole and sends its recommendation to the facility's superintendent. If the superintendent agrees with the committee's recommendation,

he approves it and forwards it to Cucolo's office in Austin. Several other TYC personnel review the recommendation and either approve or disapprove it before it finally reaches TYC's Executive Director, who makes the final decision on whether to recommend a release or transfer to prison. Cucolo added that the decision to release a sex offender is not a decision that is "lightly made."

FN5. Both victims' mothers and R.A.'s mother testified with the aid of an interpreter.

Cucolo testified that R.A. eventually accepted responsibility for his conduct, participated in resocialization programs, and successfully completed a sex offender treatment program. Academically, R.A. lacked only one credit in algebra for a high school diploma as opposed to a General Equivalency Diploma. He also earned a vocational certificate in building cabinets. R.A.'s behavior was described as "excellent," and he only had one incident of misconduct for failing to report a fight in a dormitory, which R.A. successfully appealed.

Cucolo explained that the goal was to have R.A. released to parole in Palestine, Texas, where his parents own a home. Palestine is not in Garza County where the victims and their families reside. Essentially, R.A. would be under house arrest for the remainder of his determinate sentence. Cucolo's written report indicated that one of the conditions of release would be R.A.'s participation in a "Super Intensive Supervision Program" (SISP). He would also be required to continue sex offender programming and either maintain stable employment or school enrollment. No extracurricular activities would be allowed.

Brandt Taylor, Chief Juvenile Probation Officer for Garza County, recommended that R.A. serve the remainder of his sentence in prison. Although he testified that the success rate for adult sex offenders he has supervised was "not very good," he could not say whether juveniles would reoffend after age eighteen. Taylor testified contrary to Cucolo that Cucolo had informed him that R.A. had not admitted his crimes, which Taylor interpreted as a failure by R.A. to cooperate. Taylor also testified that the male child victim was adjusting well but his progress would be hindered if R.A. was released to adult parole.

The male child victim's mother testified that, prior to adjudication, R.A. had threatened the victim and her family if the abuse was reported. According to her, the victim is unable to trust others, is nervous and sad, and has trouble sleeping. The family does not talk about the abuse, and television programs are censored for sexual content. She believes R.A. poses a danger to her family and believes parole would be an "injustice." She testified that she wanted R.A. to admit his crimes. In her opinion, if R.A. was granted parole, she would want him to live as far away as possible, but knew that R.A.'s family still resided in Garza County notwithstanding that they owned a home in Palestine, Texas.

The female victim's mother testified that her family and R.A.'s family used to be neighbors, but they have since moved. After the abuse, the female victim developed nervous habits, experienced headaches, and did not do well in school. She requires medication to function. The victim's mother wants R.A. to admit the truth about the abuse.

B.R. A.'s Witnesses

Cucolo was recalled to clarify Taylor's testimony that R.A. was not accepting responsibility for his conduct. During his testimony, Taylor suggested that Cucolo had told him R.A. had not admitted his crimes, which Taylor interpreted as a lack of cooperation. Cucolo, however, testified that R.A. had confessed his guilt while at TYC.

R.A.'s case worker, Destany Carter, testified that a requirement of the sex offender treatment program is to provide a description of the offense. When R.A. was first confined to TYC, he denied the abuse. Eventually, R.A. confessed to his previous case worker and then did so again in a group setting after Carter was assigned to his case. Carter testified that she visited with R.A. on a daily basis and was satisfied with his progress. R.A. took a leadership role while at TYC, received recognition for his behavior, including two student-of-the-month awards, and performed well academically. R.A. also learned a trade while at TYC and received recognition for completing core curriculum from the National Center for Construction, Education, and Research to build cabinets. R.A. is also certified to work on auto air conditioners.

Carter testified that after seriously considering the victims and their families, she was comfortable recommending R.A. for release to parole away from where the victims reside. During cross-examination, she revealed that she has counseled over one hundred sex offenders and has recommended "very few" for release. Again during cross-examination, she testified that R.A. admitted to one incident of abuse against his victims, yet was found to have engaged in multiple incidents with each of them. According to Carter, R.A. abused his male victim because he was young and R.A. believed he would get away with it. With his female victim, he acted more on impulse when she visited his home. From the tenor of the questions during cross-examination, she testified it was possible for R.A. to be a potential future threat to those who are smaller and weaker than himself.

R.A. testified that as part of his treatment, he was required to keep a notebook in which he wrote letters to his victims apologizing for his conduct. The letters, however, were only part of the program and were not intended to be mailed to the victims. He explained that he first denied the allegations because he was scared after a judge at his first court appearance told him he could get a life sentence.

R.A. hoped to move to Palestine and work as an auto mechanic and build cabinets. He acknowledged that he would have to register as a sex offender once his parole was concluded. He explained that his treatment made him aware that pornography was one of his high risk factors for offending. Several other risk factors included R.A. being confronted with difficult situations and dealing with others. According to a psychological evaluation written by Dr. Greg W. Joiner, Ph.D., which was admitted into evidence, other risk factors included limited sexual contact, limited social network, and marginal social skills. Dr. Joiner also listed certain protective factors indicative of not re-offending including absence of abuse, functional and nurturing family, absence of sexual acting out, absence of delinquency, absence of substance abuse, and absence of behavioral problems in an educational setting. Dr. Joiner concluded, "[o]verall, [R.A.] does not present as a severe risk for re-offense. He has some significant protective factors."

Following all the testimony and brief closing arguments, the trial court expressed certain concerns. At the time of the hearing, R.A. was two weeks from his twenty-first birthday and had not yet completed the minimum three year sentence. While the trial court commended R.A. on his treatment and progress, it appeared that R.A.'s testimony was "regurgitation." The court seriously considered R.A. being amenable to rehabilitation, but was concerned about Cucolo's testimony and report that R.A. can conform his behavior within the confines of a high restriction facility. If paroled, the court doubted that R.A. would have the intensive supervision he requires. The court concluded, "just quite honestly," it "would not feel secure in approving and ordering a release of [R.A.] when he is several months away from even serving the minimum period of confinement." The court then ordered that R.A. be transferred to TDCJ.

Notwithstanding the testimony of Cucolo and Carter that R.A. be released to parole, the trial court was under no duty to follow their recommendations. J.R.W., 879 S.W.2d at 256. After reviewing the entire record and taking into consideration the factors enumerated in section 54.11(k) of the Family Code, we find there is some evidence to support the trial court's decision to transfer R.A. to the Institutional Division of TDCJ. See In re J.M.O., 980 S.W.2d at 813. Consequently, we find no abuse of discretion in the trial court's decision. R.A.'s sole issue is overruled.

Conclusion: Accordingly, the trial court's order transferring custody of R.A. to the Institutional Division of the Texas Department of Criminal Justice for completion of his seventeen year sentence is affirmed.

In the Matter of J.B.L., 318 S.W.3d 544, 2010 WL 3037801, Juvenile Law Newsletter ¶ 10-3-13A (Tex.App.-Beaumont, 8/5/10).

DETERMINATE SENTENCE TRANSFER PROCEDURE DOES NOT VIOLATE DUE PROCESS BECAUSE IT ALLOWS THE TRIAL COURT TO DETERMINE WHETHER JUVENILE SHOULD BE RETURNED TO THE TYC OR BE TRANSFERRED FOR THE COMPLETION OF THE SENTENCE ASSESSED BY THE JURY.

Facts: Issues one and two posit that the determinate sentencing statute violates the due process requirement that a jury determine any discrete issue of fact that has the effect of increasing the maximum punishment that can be assessed. See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). [FN1] "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. The "statutory maximum" for Apprendi purposes "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Blakely v. Washington, 542 U.S. 296, 303- 04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The relevant inquiry is whether the required finding exposes the defendant to a greater punishment than that authorized by the jury's verdict. Apprendi, 530 U.S. at 494.

FN1. J.B.L. claims violation of both the state and federal constitutions, but he presents a combined analysis of precedent based entirely on the federal constitution. "Consequently, we

need not address J.B.L.'s Texas Constitutional claims." See Muniz v. State, 851 S.W.2d 238, 251-52 (Tex.Crim.App.1993) (Absent argument and authority supporting the claim that the state constitution provides greater protection than the federal constitution, the court need not address the state constitutional claims).

J.B.L. contends that the Juvenile Justice Code violates the Apprendi standard at two points in a determinate sentencing proceeding: (1) when the grand jury approves the petition for determinate sentencing; and (2) when the trial court determines whether to transfer the juvenile to the adult prison system to complete his sentence. J.B.L. argues that both actions increased his punishment without a jury having determined the issue beyond a reasonable doubt.

Held: Affirmed

Opinion: A grand jury certified the petition for determinate sentencing filed by the State. See TEX. FAM.CODE ANN. § 53.045 (Vernon 2008). J.B.L. argues that Section 53.045 violates the due process requirements established by Apprendi because J.B.L. may lose his liberty and be stigmatized by a conviction as an adult without having a jury determine beyond a reasonable doubt that "this form of penalty should be imposed." The narrow issue resolved by Apprendi--whether the sentence imposed was permissible given that it was above the maximum for the offense charged by the indictment count in question-- concerned sentencing. See Apprendi, 530 U.S. at 474-75. The grand jury certification functions as an indictment and satisfies the constitutional requirement of an indictment. In re T.D.H., 971 S.W.2d 606, 608-09 (Tex.App.-Dallas 1998, no pet.). The procedure established by Section 53.045 does not violate the due process requirements established by Apprendi because the jury determines the maximum punishment allowed under the charging instrument. See TEX. FAM.CODE ANN. § 53.045.

The trial court instructed the jury that "the disposition for Aggravated Robbery, is commitment in the Texas Youth Commission with a possible transfer to the institutional division or the pardons and paroles division of the Texas Department of Criminal Justice for a term of not more than forty (40) years." The charge questions asked if the jury did "find beyond a reasonable doubt that [J.B.L.] is in need of rehabilitation or the protection of the public or the child requires that disposition be made?" The jury was given the option of answering "Yes" or "No," and answered "Yes." The jury then found that "[J.B.L.], engaged in delinquent conduct by committing the offense of Aggravated Robbery" and assessed punishment at thirty years. Thus, the jury did determine the maximum punishment for the offense. [FN2] See Apprendi, 530 U.S. at 494.

FN2. J.B.L. does not suggest that the jury could not constitutionally assess a thirty year sentence. See generally In re Gault, 387 U.S. 1, 16, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) ("At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders.").

J.B.L. argues that the transfer procedure in Section 54.11 of the Texas Family Code does not comport with due process because the jury was not given the opportunity to determine whether J.B.L. met the criteria for transfer. See TEX. FAM.CODE ANN. § 54.11(k). Apprendi prohibits a trial court from an action that has the effect of increasing the punishment imposed

over that which the jury authorized with its verdict. Apprendi, 530 U.S. at 494. Apprendi distinguished state capital sentencing schemes in which a jury verdict finds the defendant guilty of a capital crime and the trial court subsequently determines whether the maximum penalty, rather than a lesser one, should be imposed. Apprendi, 530 U.S. at 496-97. The transfer procedure found in Section 54.11 of the Texas Family Code allows the trial court to decide whether a lesser sentence than that assessed by the jury ought to be served. See TEX. FAM.CODE ANN. § 54.11(k). After being instructed on a possible transfer to the Texas Department of Criminal Justice, the jury authorized a thirty year sentence for J.B .L. At the transfer hearing, the trial court determined whether J.B.L. should be returned to the Texas Youth Commission or be transferred for the completion of the sentence assessed by the jury. Id. J.B.L. was never exposed to a greater punishment than that authorized by the jury's verdict. Apprendi, 530 U.S. at 494.

Conclusion: We overrule issues one and two.

DISPOSITION PROCEEDINGS—

State of Idaho v. Jane Doe, No. 36121, ___Idaho___, Juvenile Law Newsletter ¶ 10-4-2 (Idaho Sup.Ct., 6/1/10).

IT WOULD BE A VIOLATION OF THE FOURTH AMENDMENT FOR A MAGISTRATE TO REQUIRE PARENTS TO INVOLUNTARILY SUBMIT TO RANDOM URINALYSIS DRUG TESTS AS A CONDITION OF THEIR CHILD'S PROBATION.

Facts: On September 26, 2005, John and Jane Doe, Appellants, appeared without an attorney in magistrate court with their minor daughter, who, with the consent of her parents, signed a written admission to two counts of petit theft. At the disposition hearing the following month, the magistrate found the Does' daughter to be under the purview of the Juvenile Corrections Act (—JCA‖) and imposed informal probation on her for her offenses. Because a social investigation revealed that the Does had a history of drug abuse and that Jane was on probation for possession of marijuana drug paraphernalia, the magistrate questioned the Does about their use of controlled substances. Jane admitted to the magistrate that she used methamphetamine before having her children and had continued to smoke marijuana until she was caught with paraphernalia sometime prior to the events in this case. The magistrate consequently required both John and Jane to undergo random drug urinalyses as a term of their daughter's probation. John subsequently signed two written admissions to smoking marijuana on separate occasions shortly after the probation terms were imposed. Jane signed a similar written admission to using marijuana after the terms had been imposed. Both of the Does also submitted urine samples that tested positive for THC. Additionally, the Does' daughter was found to have violated the terms of her probation for various reasons. The Does obtained counsel for the Order to Show Cause Hearing to determine whether to revoke their daughter's informal probation and to hold them in contempt for their drug use. Although the Does both tested positive for THC at the Order to

Show Cause Hearing, the State moved to withdraw the contempt action because the Does were complying with the order to submit to urinalysis testing.

At the Disposition Hearing, the magistrate placed the Does' daughter on formal probation and imposed terms requiring the Does to submit to random urine testing and not to violate controlled-substance laws. The disposition order admonished the Does that they could be subject to contempt proceedings if they disobeyed the order.2 The Does refused to sign the order. Based in part on the juvenile probation officer's report that the Does were using marijuana in front of their daughter, the magistrate also expanded the JCA proceedings into a Child Protection Act proceeding. These proceedings were ultimately dismissed based on contradictory evidence. The Does appealed their probation terms to the district court, arguing that the magistrate lacked statutory authority under I.C. § 20-520(1)(i) to require them to submit to random urinalyses and that, even if statutory authority existed, such terms violated the U.S. Constitution. The district court affirmed the magistrate's order, but the Idaho Court of Appeals vacated, finding that although the magistrate court acted within its statutory capacity, it nonetheless violated the Fourth Amendment by imposing the urinalysis requirement. This Court granted the State's petition for review.

The order stated: NOTICE TO PARENT, GUARDIAN OR CUSTODIAN: The parent, guardian or custodian shall assist in the compliance with the terms herein and shall immediately notify the Probation Department of any violation(s) of this order. Any parent, guardian or custodian violating any order of the Court under the provisions of the Juvenile Corrections Act shall be subject to contempt proceedings.

Held: District court's decision affirming the magistrate is reversed, probation order is vacated.

Opinion: Because it intrudes on bodily privacy, requiring parents to provide urine samples is a search within the meaning of the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n* , 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989). To satisfy the Constitution, any search by a government actor must be reasonable. *United States v. Sharpe* , 470 U.S. 675, 682, 105 S. Ct. 1568, 1573 (1985). A reasonable search requires a warrant supported by probable cause unless a recognized exception applies. *State v. Smith* , 144 Idaho 482, 485, 163 P.3d 1194, 1197 (2007). There is a well-recognized exception for instances where there is a ―special need‖ for a search ―beyond the normal need for law enforcement‖ that makes the warrant process impracticable. *Skinner* , 489 U.S. at 619, 109 S. Ct. at 1414. Whether a special need exempts the search procedure from the warrant requirement is determined by balancing the intrusion on the individual's Fourth Amendment interests against the State's legitimate interests. *Delaware v. Prouse* , 440 U.S. 648, 654, 99 S. Ct. 1391, 1396 (1979). The first step is to gauge the weight and nature of the privacy interest at stake. *Bd. of Educ. v. Earls* , 536 U.S. 822, 830, 122 S. Ct. 2559, 2565 (2002). In some situations, the individual might have a diminished or nonexistent expectation of personal privacy because he or she is in the care of the State, such as a child in public school. *See New Jersey v. T.L.O.* , 469 U.S. 325, 339-40; 105 S. Ct. 733, 741-42 (1985) (noting that students have a lower expectation of privacy) . The U.S. Supreme Court has also upheld suspicionless drug testing when conditioned on a benefit like obtaining a job in a highly sensitive position, for example those dealing with public safety, law enforcement, or drug interdiction. *See Nat'l Treasury Employees Union v. Von Raab* , 489 U.S. 656, 672, 109 S. Ct.

1384, 1394 (1989) (stating that U.S. Customs employees working in contraband interdiction ―have a diminished expectation of privacy‖ with respect to urine tests). It goes without saying that since the Does are adults, the State has no stewardship over them that would justify asserting a greater scope of authority. They have not voluntarily submitted to the State's custody or oversight. Similarly, the Does are not seeking any benefit, such as employment, that would ordinarily subject them to enhanced government oversight. Although the State has a compelling interest in ensuring the well-being of Idaho's children, the Does themselves are not subject to lesser Fourth Amendment protections in their persons merely by virtue of the fact that their daughter has committed a crime. More relevant here is that those who have been convicted of a criminal offense, such as parolees and prison inmates, can also be subject to greater levels of State intrusion. *See Hudson v. Palmer* , 468 U.S. 517, 527, 104 S. Ct. 3194, 3201 (1984) (―A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells . . . .‖); *Morrissey v. Brewer* , 408 U.S. 471, 482, 92 S. Ct. 2593, 2601 (1972) (stating that parolees can be subject to restrictions that would be unconstitutional when applied to the general population). Specifically, it is well established that probationers have a lower expectation of privacy and liberty. *Griffin v. Wisconsin* , 483 U.S. 868, 874, 107 S. Ct. 3164, 3169 (1987) ; *State v. Gawron* , 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987) .

Although the Does' daughter is on probation, it does not necessarily follow that they themselves are subject to a diminished expectation of privacy in their bodily fluids. Parolees, probationers, and indeed all criminal offenders are on a ―continuum of state-imposed punishments. *Samson v. California* , 547 U.S. 843, 850, 126 S. Ct. 2193, 2198 (2006) (quotations omitted). The probationer can expect to be supervised by the State on the theory that the probationer, as a recent offender, ―is more likely than the ordinary citizen to violate the law. ‖ *United States v. Knights* , 534 U.S. 112, 119-20, 122 S. Ct. 587, 591-92 (2001). However, this theory only applies to offenders—probation, parole, and other criminal sanctions can only be imposed on individuals ―after verdict, finding, or plea of guilty.‖ *Griffin* , 483 at 874, 107 S. Ct. at 3168.

It is for this reason that the Ninth Circuit has found unconstitutional home urine testing for people released pending trial, reasoning that they have not yet suffered ―judicial abridgment of their constitutional rights.‖ *United States v. Scott* , 450 F.3d 863, 872 (9th Cir. 2006). The Does have not been adjudicated guilty of any drug crime, nor has any neutral magistrate formally issued a warrant based on probable cause for such a criminal investigation. *State v. Nunez* , 138 Idaho 636, 642, 67 P.3d 831, 837 (2003) (citing *United States v. Leon* , 468 U.S. 897, 914, 104 S. Ct. 3405, 3416 (1984)). The Does are presumed innocent and are therefore not located anywhere on the ―continuum of state-imposed punishments. ‖ Aside from pointing to the possibility in their daughter's presentence social investigation that the Does abused drugs, the State has not overcome any formal procedural safeguards to diminish the Does' Fourth Amendment rights in their bodies. The Does therefore retain the full measure of Fourth Amendment privacy.

The next step is to measure the intrusiveness of the search at issue. *Earls* , 536 U. S. at 832, 122 S. Ct. at 2566. Although a urine test does not physically invade a person's body, it necessarily requires the Does ―to perform an excretory function traditionally shielded by great

privacy.‖ *Skinner* , 489 U.S. at 626, 109 S. Ct. at 1418. However, ―the degree of intrusion depends upon the manner in which production of the urine sample is monitored,‖ as well as ―the information it discloses concerning the state of the subject's body, and the materials he has ingested.‖ *Vernonia Sch. Dist. 47J v. Acton* , 515 U.S. 646, 657, 115 S. Ct. 2386, 2393 (1995). Neither the parties, nor the record, offer any details about how the urine tests in this case are administered, such as whether the samples are provided in a private room, and whether the Does are visually or aurally monitored while urinating, or both. The record also is not clear about what drugs or compounds the urine test detects, although presumably the test only identifies controlled substances. Without more information, this Court cannot determine how intrusive the urine testing is.

Last, the Court must determine whether the State has a sufficient reason to require the urine tests. Where the test subject has a full expectation of Fourth Amendment privacy, as do the Does in this case, ―the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.‖ *Chandler v. Miller* , 4 Because the search at issue here is of the Does' persons, specifically their bodily fluids, this opinion does not address situations in which police search an area controlled in common by a probationer and others not under the State's supervision. *See State v. Barker* , 136 Idaho 728, 731-32, 40 P.3d 86, 89-90 (2002) (upholding a warrantless search of the common areas in an apartment occupied by a parolee and another person).
8 520 U.S. 305, 318, 117 S. Ct. 1295, 1303 (1997). A ―demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime,‖ can help support a warrantless testing program. *Id.* at 319, 117 S. Ct. at 1303.

Here, neither party disputes the fact that protecting the welfare of children and rehabilitating child offenders are among the most laudatory of State interests. Moreover, ―voluntary involvement of a parent in the rehabilitation of his or her child likely has a salutary effect.‖ *State v. Watkins* , 143 Idaho 217, 221, 141 P.3d 1086, 1090 (2006). The magistrate also acted upon individualized suspicion available in the child's social investigation indicating that the Does might be using drugs at home. However, even where a substantial State interest exists, this Court will not uphold a search ―whose primary purpose is ultimately indistinguishable from the general interest in crime control.‖ *City of Indianapolis v. Edmond* , 531 U.S. 32, 44, 121 S. Ct. 447, 455 (2000) . In *Ferguson v. City of Charleston* , a hospital devised a program in which it tested pregnant patients for cocaine if they showed one among a list of medical indicators and then sent positive results to the authorities. 532 U.S. 67, 72, 121 S. Ct. 1281, 1285 (2001). Even though the patients were only tested if the hospital suspected cocaine use and they could avoid arrest by consenting to substance abuse treatment, the Court found that the practice was impermissible because it was primarily geared toward law enforcement. *Id.* at 81, 121 S. Ct. at 1290. Just like the testing program in *Ferguson* , testing in this case is characterized by a general interest in law enforcement. The magistrate imposed the urinalysis requirement during juvenile delinquency proceedings under the JCA, which are quasi-criminal in nature. *See* I.C. § 20-508 (allowing courts to waive jurisdiction under the JCA so that the juvenile may be transferred to ―adult criminal proceedings‖). The magistrate's order requires the Does to report to their daughter's probation officer, who is an officer of the county required by law to ―enforce probation conditions.‖ *Id.* §§ 20-529, -533(3). Nothing prevented

the probation officer from conveying the Does' test results to law enforcement. Their failure to comply could result in contempt sanctions, which would be brought and pursued by the prosecuting attorney. Indeed, the juvenile probation officer in this case reported the parents' positive urinalysis results to the prosecutor. It also appears that such evidence could be used to obtain search warrants against the Does and would be admissible against the Does in further criminal proceedings for encouraging their daughter's delinquency. *See id.* § 20-526 (punishing anyone ―who by any act or neglect encourages, aids or causes a juvenile to come within the purview or jurisdiction of [the JCA]‖).

The State contends that the goal here is primarily to rehabilitate the minor, not to enforce criminal sanctions. The U.S. Supreme Court dealt with a similar argument in *Ferguson* : While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal. . . . Because law enforcement involvement always serves some broader social purpose or objective, under [the State's] view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. *Ferguson* , 532 U.S. at 82-84, 121 S. Ct. at 1291-92. This reasoning applies equally to the Does. Just as the urine-test requirement in *Ferguson* was intended to protect the health of unborn fetuses by detecting prenatal cocaine use, the drug testing here is intended to ensure the Does' daughter's rehabilitation by detecting drug use at home. The immediate method for attaining the goals in both cases is to report the drug use for criminal sanctions. In response, the State also argues that the urine testing does not further the interests of law enforcement because the Does would only be held in contempt of court for refusing to comply.

The State reasons, without authority, that contempt is not a criminal sanction, but rather is merely a civil power exercised by the judiciary. It is, of course, true that the judiciary's power to hold individuals in contempt flows from its inherent authority and is not conveyed by statute. *McDougall v. Sheridan* , 23 Idaho 191, 222-23, 128 P. 954, 964-65 (1913). But the State's assertion that the contempt proceedings in this case cannot be criminal in nature is simply wrong. The magistrate has the power to impose a fine of up to $5000 and to imprison the contemnor for up to five days. I.C. § 7-610; *see also id.* § 20-520(5) (stating that ordinary contempt proceedings apply when parents violate juvenile probation orders). Punishing the Does for failing their urinalyses or for refusing to undergo the test could in either case involve a determinate fine or determinate jail sentence, both of which are criminal-contempt penalties. *Camp v. East Fork Ditch Co.* , 137 Idaho 850, 865, 55 P.3d 304, 319 (2002). ―[C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same.‖ *Bloom v. Illinois* , 391 U.S. 194, 201, 88 S. Ct. 1477, 1482 (1968). Criminal contempt cannot be imposed on an individual absent virtually all the ordinary protections afforded by the U.S. Constitution. *Hicks v. Feiock* , 485 U.S. 624, 632, 108 S. Ct. 1423, 1429-30 (1988); *Camp* , 137 Idaho at 860-61, 55 P.3d at 314-15. This specifically includes the Exclusionary Rule's protection against Fourth Amendment violations. *Dyke v. Taylor Implement Mfg. Co.* , 391 U.S. 216, 222, 88 S. Ct. 1472, 1476 (1968). Criminal contempt is therefore just like any other criminal sanction.

In summary, the magistrate's order requiring the Does to undergo urinalysis testing constituted a search under the Fourth Amendment of the U.S. Constitution that is presumptively invalid absent a warrant. The intrusion is not extraordinarily invasive, but the Does do not have a diminished expectation of privacy in their bodies simply because their daughter is on juvenile probation. The search is therefore unconstitutional because it primarily furthers the State's interest in law enforcement.

Conclusion: Although the magistrate had the statutory power to require the Does to undergo urinalysis testing as a condition of their daughter's juvenile probation, such a term is unconstitutional under the Fourth Amendment of the U.S. Constitution. The district court's decision affirming the magistrate is reversed and the probation order is vacated.

Forcey v. State, MEMORANDUM, No. 10-09-00335-CR, 2010 WL 2010942, Juvenile Law Newsletter ¶ 10-3-3 (Tex.App.-Waco, 5/19/10).

A MANDATORY LIFE SENTENCE WITHOUT THE OPTION OF PAROLE, FOR A JUVENILE WHO COMMITS CAPITAL MURDER BEFORE SEPTEMBER 1, 2009, IS CONSTITUTIONAL.

Facts: After a hearing granting a transfer to adult court, Scottie Forcey was convicted of the offense of capital murder and sentenced to an automatic life sentence without the possibility of parole. See TEX. PEN.CODE ANN. § 12.31(a) (Vernon 2003). Forcey complains that the sentence imposed violates constitutional prohibitions against cruel and unusual punishment, that section 12.31(a) is unconstitutional as applied to Forcey, that the sentence of life without the possibility of parole is disproportionate punishment, that the transfer to adult court was void because the summons was defective, and that the trial court erred by denying an instruction on duress in the jury charge.

Held: Affirmed

Memorandum Opinion: Forcey challenges the constitutionality of the Texas sentencing scheme requiring that he be automatically sentenced to life without parole even though he was only sixteen at the time of the offense. Forcey contends that the capital murder sentencing scheme for a juvenile tried as an adult constitutes "cruel and unusual" punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 13 of the Texas Constitution. U.S. Const. amends. VIII and XIV; Tex. Const. art. I, § 13. He further argues that section 12.31(a) is unconstitutional as applied to him and is a disproportionate punishment to the offense of capital murder.

The Eighth Amendment guarantees individuals the right not to be subjected to excessive or cruel and unusual punishment. U.S. Const. amend. VIII. A punishment is "excessive," and therefore prohibited by the Eighth Amendment, if it is not graduated and proportioned to the offense. Atkins v. Virginia, 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (citing Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)); Roper, 543 U.S. at 560. This prohibition against grossly disproportionate punishment survives under the Eighth

Amendment to the United States Constitution apart from any consideration of whether the punishment assessed is within the range established by the Legislature. U.S. Const. amend. VIII; see Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Scalia, J., plurality op.); Mullins v. State, 208 S.W.3d 469, 470 (Tex.App.-Texarkana 2006, no pet.).

In 2005, the United States Supreme Court ruled that execution of a juvenile would be "cruel and unusual" punishment, and therefore, was unconstitutional. Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Just two days ago, the Supreme Court has also determined that a sentence of imprisonment for life without the possibility of parole for a non-homicide offense violates the same provision of the Eighth Amendment--cruel and unusual punishment. See Graham v. Florida, No. 08-7412, 560 U.S. ---- (May 17, 2010). Additionally, the Court of Criminal Appeals has recently granted a petition for review in order to determine whether the sentence of life without parole for a juvenile offender pursuant to section 12.31(a) is unconstitutional. See Meadoux v. State, No. 04-08-00702-CR, 2009 Tex.App. LEXIS 9353 at *35 (Tex.App.-San Antonio Dec. 9, 2009, pet. granted by, In re Meadoux, 2010 Tex.Crim.App. LEXIS 175 (Tex.Crim.App. Mar. 24, 2010)).

The Texas legislature recently amended section 12.31 of the Penal Code to restore parole eligibility for juvenile capital murder offenders who are certified as adults for trial; but the legislature chose not to make the law retroactive, specifically restricting the amendment to juvenile offenders who commit capital murder on or after September 1, 2009. See TEX. PEN.CODE ANN. § 12.31(a) (Vernon Supp.2009) (providing for a mandatory life sentence, with the option of parole, for a juvenile whose case is transferred under section 54.02 of the Family Code). Given that the legislature chose not to apply the parole eligibility amendment retroactively to juveniles who have already been sentenced for a capital murder, we do not believe that it would be appropriate for this court to "judicially amend" the statute. See TEX. PEN.CODE ANN. § 12.31(a)(1).

We conclude that, until the Supreme Court or the Court of Criminal Appeals determines otherwise, the Texas sentencing scheme mandating life without parole for a juvenile convicted of capital murder does not constitute "cruel and unusual" punishment in violation of the federal and state constitutions on its face. Harmelin, 501 U.S. at 995-996.

Conclusion: The sentence imposed of life without the possibility of parole is not unconstitutional as it relates to Forcey, nor is it disproportionate to the offense of capital murder.

In the Matter of K.E., 316 S.W.3d 776, 2010 WL 2764788, Juvenile Law Newsletter ¶ 10-3-12 (Tex.App.-Dallas, 7/14/10).

RECITING THE STATUTORY LANGUAGE AND SUPPLEMENTING IT WITH ADDITIONAL FINDINGS IS SUFFICIENT TO MEET THE REQUIREMENTS OF THE TEXAS FAMILY CODE FOR PLACEMENT OUTSIDE THE HOME.

Facts: Dallas police officer Walls was patrolling an area in South Oak Cliff when he saw appellant and another juvenile, B.J., outside past the City's juvenile curfew. The juveniles recognized Officer Walls, who was in uniform, and ran up to an apartment. B.J. had a key that allowed them to enter one of the apartments. Officer Walls pursued the juveniles into the apartment and saw B.J. jump over an exterior balcony. Another officer pursued B.J., while Officer Walls found appellant lying on the floor in the bedroom, pretending to be asleep, with his arm outstretched near a couch. Underneath the couch were two . 45 caliber handguns. Appellant never attempted to take possession of or shoot the guns. After appellant was handcuffed he showed the officers two SKS rifles, with fully loaded magazines, in a closet in the apartment. Appellant was the only person in the apartment at the time. The officers found crack cocaine in plain view on the kitchen counter. After searching the apartment they also found cocaine, marijuana, PCP (phencyclidine), alprazolam, and four or five scales frequently used in the drug trade to weigh and package drugs. Some of the drugs were already packaged to be sold.

A five-count petition was filed against appellant and a grand jury approved two counts for a determinate sentence: possession with intent to deliver cocaine (4 grams or more but less than 200 grams); and possession with intent to deliver phencyclidine (4 grams or more but less than 200 grams). TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D) (cocaine), 481.102(8) (phencyclidine), 481.112(a), (d) (Vernon Supp.2009); TEX. FAM.CODE ANN. § 53.045(a)(10) (Vernon 2002) (referral of petition to grand jury for child engaged in delinquent conduct that constitutes habitual felony). Appellant waived a jury trial and entered pleas of true to both counts.

The evidence established that appellant had been admitted to three other placements: Lyle Medlock Center, Dallas Youth Village, and Gulf Coast Trade School. Despite the availability of the other placements, the probation officer and the arresting officer continued to recommend placement in TYC, based upon the nature of the offenses, appellant's history of gang involvement and drug use, and the fact that he was almost seventeen.

Appellant has not had any other referrals to juvenile court. However, the predisposition report indicated that appellant had been referred to an alternative education program the preceding year for "almost getting into a gang fight."

Held: Affirmed

Opinion: In his fourth issue, appellant contends that the order in this case does not satisfy the requirements of section 54.04(f) of the family code, and therefore, this case should be remanded to the trial court for reformation. Section 54.04(f) provides that the "court shall state specifically in the order its reasons for the disposition." TEX. FAM.CODE ANN. § 54.04(f) (Vernon Supp.2009). The reason for this requirement is so the child will have notice of the trial court's reasons for the disposition, and the appellate court can determine whether the evidence supports those reasons. A.R.D., 100 S.W.3d at 650 (referring to similar language in section 54.05(i)).

Merely reciting the statutory grounds for disposition is not sufficient to justify the trial court's ruling. In re J.T.H., 779 S.W.2d 954, 959 (Tex.App.-Austin 1989, no writ) (applying section 54.04(c)). However, reciting the statutory language and supplementing it with additional

findings is sufficient to meet the requirements of the Texas Family Code. See In re P.L., 106 S.W.3d 334, 338 (Tex.App.-Dallas 2003, no pet.) (order tracking language of section 54.05 and explaining court's reasons was appropriate).

In this case the trial court made findings in two exhibits to the order. Exhibit B states that "reasonable efforts" had been made to prevent the need for removing the child from his home, including that appellant had been referred to an alternative education program last year; he had received psychological and chemical assessments through the juvenile department; and he had been arrested for multiple felony drug charges and evading arrest. In addition, in an attachment to Exhibit B, the court found that it was in appellant's best interest to be placed outside of the home because he (1) may be dangerous to himself or the public; (2) had a history of aggression toward others; and (3) had been arrested for multiple felony drug offenses, evading arrest, and four guns had been found nearby when he was arrested.

Conclusion: The elements of section 54.04(f) are supported by the findings in the exhibits. Therefore, we conclude that the facts set forth in the exhibit and attachment to the order were sufficient to satisfy the requirements of section 54.04(f) and we overrule appellant's fourth issue.

In the Matter of S.J.C., 304 S.W.3d 563, 2010 WL 23658 Juvenile Law Newsletter ¶ 10-1-3 (Tex.App.-El Paso, 1/6/10).

EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING THAT THE JUVENILE'S MOTHER BY WILLFUL ACT OR OMISSION, CONTRIBUTED TO, CAUSED, OR ENCOURAGED THE CHILD'S DELINQUENT CONDUCT.

Facts: S.J.C. was charged by petition with engaging in delinquent conduct in the form of marking with indelible marker on a bathroom sink, mirrors and tile walls in violation of Tex. Pen.Code Ann. § 28.08. An attorney was appointed to represent the child, and with his attorney's concurrence the child agreed to a hearing before the juvenile court referee without a jury. The child pleaded true to committing the offense of graffiti misdemeanor both in open court and by written waiver, stipulation and admission.

In her predisposition report, juvenile probation officer Dora Rodarte noted that the child's mother was a substitute teacher for El Paso I.S.D., and the father had not been in contact with the child for many years. The mother has no criminal history. She attended a PEACE meeting on August, 11, 2008. The child participated in school band and swim team and attended church with his mother on Wednesdays and Sundays. He had no curfew because he rarely went out, but when he did his mother would drive him to and from the event. It was the probation officer's opinion that the mother had not contributed to the child's delinquent behavior, as the mother made sure the juvenile was involved in positive activities and maintained contact with school officials. The officer noted that the delinquent behavior was attributable to negative associations and peer pressure.

A disposition hearing was held on August 27, 2008, before juvenile court referee Richard Ainsa. The predisposition report was entered in evidence at the hearing. Officer Rodarte testified that she believed that the child was in need of rehabilitation, and recommended that he be placed on supervised probation with a 5 p.m. curfew until he turned 18, with a review hearing in four months. Rodarte testified that the child had committed the graffiti offense because he wanted to be accepted into the "Crazy Azz Tagging Crew" (which she noted was not a gang). At home, the child's mother reported no problems with the child other than some "talking back" the year before, which was no longer a problem. The child complied with his mother's rules and did chores such as pulling weeds, cleaning his room and throwing out trash. Sometimes he would question these rules, but he did comply. Officer Rodarte further stated that the mother was able to provide proper control and supervision. She did not believe that the mother had contributed to the delinquency.

Officer Rodarte further testified that, in a conversation before the hearing, she had recommended to the mother that she be evaluated at El Paso MHMR, and the mother responded that if she was going to go then the child had to go too. Ms. Rodarte asked if there were any problems, to which the mother replied, "Well, I'm the mother and there are a lot of problems." Upon hearing that statement, the mother (in the courtroom but not on the witness stand) stated, "No, I didn't say that." The referee admonished her not to speak out of turn. Later in Rodarte's testimony, she explained her reason for recommending that the mother attend counseling:

The reason for this was that during the interview, the juvenile was fine, we talked, he was very open. However, when I spoke to the mother, when I interviewed her, she seemed to be-I was a little concerned that maybe she was a little depressed. She was crying a lot about what had happened, stated that why were we opening up the case again, that we were going to break up her family. I told her to calm down and that everything would be okay because [the juvenile] appeared fine.

I was a little concerned also when I went to the home because it is a three bedroom home, two bath, however, they only use one of the bedrooms because the home has a lot of things, you know, stacks of books, clothes. She did indicate that she was trying to have a garage sale.

The juvenile's mother also testified at the disposition hearing. She explained that the child had a hard time in 2007 when they had moved to Nevada for a year. She also discussed her depression-as a teacher she is required to issue referrals on kids, and it was hard for her to accept that her own son was in trouble at school. She did not understand that the process would require her to come to court, and she had never been involved in anything like this before. The referee reassured her, saying, "Well, you didn't do this. You didn't do it so you shouldn't be upset about it." Upon questioning, she stated that she was willing to see a counselor. *In the judgment of probation, the court placed the juvenile on probation and also found that the child's mother, by willful act or omission, had contributed to, caused, or encouraged the child's delinquent conduct, and ordered her to participate in the juvenile's rehabilitation* (Italics added).

Some time after the hearing, but still on the same day, the case went back on the record because the mother and juvenile had refused to sign a copy of the referee's recommendations after having been ordered to do so. The juvenile had been returned to school by this time, but the

mother was present and the referee told her: "[Y]ou're going to have to sign it [the recommendations] or you're going to go to the county jail." The following exchange then occurred:

The Mother: Sir, I'm not refusing to sign it. What you-hopefully it was recorded in the hearing this morning. You had mentioned that I was not-I had not contributed to his delinquency. What you said and what she has written in the papers are not in agreement. Her paper reads that I have. So, therefore, for that reason, I-

The Court: I didn't comment on the record.

The Mother: I have asked her to go ahead and have you fix that.

The Court: No, because I didn't-.

The Mother: What you said-

The Court: Ms. Valdez, I didn't make that finding on the record, and whatever is in my Order-

The Mother: You mentioned it. Was it-was it recorded earlier?

The Court: Do you remember anything about me mentioning that?

Officer Rodarte: I don't know if you said it, Your Honor. I did say that we had not found that.

The Court: It was your recommendation.

Officer Rodarte: Right.

The Court: That's not my finding.

Officer Rodarte: However, I explained to her that that was based on what she reported to me at the interview. However, right before we walked in and I told her about the evaluation that I was going to have her submit to, she said that there was issues and that she would not turn her son in, therefore, she was not truthful with me in the interview.

The Mother: Well-

The Court: No, ma'am. You listen to me. That's her recommendation. I don't have to follow it, and I didn't follow it. I found that you contributed to the delinquency of your son. So that's my finding. If you don't like it, your remedy is to appeal my judgment. I'm not going to change it. So you either sign that acknowledging that you received the judgment or you're going to go to the county jail. If you don't like what it says in there, you're free to

appeal it. You have a certain amount of time after today to appeal it to another court to have it reviewed.

...

The Court: Ma'am, I didn't say anything. I didn't say anything because I didn't agree with her recommendation, and I made a finding in there that you did contribute.

The Mother: Now you're changing your story.

The Court: No.

The Mother: Yes.

The Court: Ms. Valdez, you're going to make me lose my patience. You either sign it or you're going to the county jail.

The Mother: It doesn't matter. Do what you will with me. It doesn't matter to me.

The Court: Then the Court's finding you in contempt of court. You'll remain in the county jail until you sign it. You'll sit there as long as it takes until you sign that.

The Mother: Whatever.

The Court: All right. Take her into custody.

The Mother: Good job, Dora.

Still later, the referee brought the mother and juvenile back into the courtroom and presented them with a copy of the judgment of probation on the record. He then released the mother from custody. A review hearing was held on January 7, 2009, at which time the juvenile's probation was terminated.

Held: Judgment reversed as to the findings of the court that the child's mother, by willful act or omission, had contributed to, caused, or encouraged the child's delinquent conduct.

Opinion: With regard to legal sufficiency, we examine only the evidence supporting the finding that the mother contributed to her son's delinquency. We find the following: Officer Rodarte was concerned that the mother "was a little depressed," crying about what had happened, asked why the case was being opened again, and was concerned that the State was going to break up her family. Only one bedroom of the three bedroom home was in use (apparently by the juvenile) as the other bedrooms were filled with books and clothes. The mother was having a hard time dealing with the disposition hearing because the graffiti incident had occurred months before, and this was a new experience to her. She is a substitute teacher and it was hard for her to accept that her own son was in trouble. A new school year had begun before the case came to court. She agreed to see a counselor. No other evidence before the referee at the time of his finding even remotely supports the conclusion that this parent contributed to her child's graffiti offense, except the fact of the offense itself. We conclude this does not amount to a scintilla.

The State places some reliance on the events after the referee's finding, when the Appellant declined to sign the judgment and the referee threatened her with jail. We first note that the referee had already made his finding and events occurring afterward are therefore of doubtful relevance. The child was not present to witness the exchange between the parent and referee, and further there is nothing in the law which would require the mother's signature on recommendations or judgment. The Family Code simply requires that the court "furnish a copy of the order to the child." Tex. Fam.Code Ann. § 54.04(f) (Vernon 2008). Nor is there anything in Appellant's conduct that is discernable from this record which would constitute direct contempt, as argued by the State. Even her statement to the referee "[n]ow you're changing your story" was an apparent reference to his remarks "[w]ell, you didn't do this. You didn't do it so you shouldn't be upset about it ." It is understandable that the Appellant would find this statement inconsistent with a finding that she had contributed to her son's delinquency, and we find nothing contumacious in her questions. Thus, even viewing the post-disposition exchange in the light most favorable to the challenged finding, we cannot conclude that it lends support to a determination of contribution to an act of graffiti.

Finally, the State argues that the court would have no authority to send Appellant for an evaluation and counseling unless she was found to have contributed to her son's delinquency. This is true, but it does not constitute any evidence supportive of the finding. Although the referee's motives may have been good, nevertheless his findings must be supported by sufficient evidence, and that simply does not exist here. The mother's issue on appeal is sustained. Because we find the evidence legally insufficient to support the finding, we need not reach the issue of factual sufficiency.

Conclusion: For the reasons set out above, we find that the issue before us is reviewable under the collateral consequences exception to the mootness doctrine. We further find that the evidence was legally insufficient to support the trial court's finding that the juvenile's mother by willful act or omission, contributed to, caused, or encouraged the child's delinquent conduct. We therefore reverse that portion of the trial court's judgment of probation, and order that finding vacated. As modified, the remainder of the judgment is affirmed.

EVIDENCE—

Davis v. State, MEMORANDUM, No. 14-09-00741-CR, 2010 WL 4069343, Juvenile Law Newsletter ¶ 10-4-10 (Tex.App.-Hous. (14 Dist.), 10/19/10).

THE STATE CAN PROVE A PRIOR CONVICTION BY DIFFERENT EVIDENTIARY MEANS AS LONG AS A RATIONAL JURY CAN FIND BEYOND A REASONABLE DOUBT THAT APPELLANT WAS CONVICTED.

Facts: In the present case, the enhancement paragraph of the indictment and the enhancement portion of the jury charge alleged a June 9, 2005 juvenile conviction and commitment to the

Texas Youth Commission for the felony offense of burglary of a habitation. See Tex. Fam.Code Ann. § 51.13(d) (West 2008) (providing, adjudication that child engaged in conduct occurring on or after January 1, 1996 which constitutes felony offense resulting in commitment to Texas Youth Commission is final felony conviction for purpose of punishment enhancement for subsequent first-degree felony).

To prove this prior conviction, the State presented two documents: (1) a judgment showing "Clifton Jerome Davis" was "adjudicated" on October 27, 2004 in the 313th District Court of Harris County, Texas under cause number 2004- 07509J for burglary of an habitat with intent to commit theft, a second-degree felony, and placed on probation; and (2) a "Judgment and Order of Commitment" reflecting "Clifton Jerome Davis" was "adjudicated" on June 9, 2005 in the same court and under the same cause number for "VOP RULE 4 VIOLATION OF THE LAW" and committed to the Texas Youth Commission.

As appellant notes, at trial of the present case, a deputy testified she was unable to match appellant's fingerprint taken that morning to the fingerprints on the above-cited documents because of the poor quality of the latter. However, the State also presented Jose Salinas, a Harris County juvenile probation officer, who testified as follows: he supervised "Clifton Jerome Davis" for several months when he was on probation for burglary of a habitation with intent to commit theft under cause number 2004-07509J; Davis did not successfully complete probation; Salinas's supervision ended on June 9, 2005 when Davis was committed to the Texas Youth Commission; "adjudication" in the juvenile system means "convicted"; a person may be adjudicated if he does not complete probation; and more specifically, Davis was "convicted" on June 9, 2005. Further, at trial, Salinas positively identified appellant as the "Clifton Jerome Davis" whom he supervised.

Held: Affirmed

Memorandum Opinion: Appellant contends the evidence was legally insufficient to support the jury's finding because the "Judgment and Order of Commitment" dated June 9, 2005 merely reflects an "adjudication" for "VOP RULE 4 VIOLATION OF THE LAW," a "Technical Violation," as opposed to a felony, particularly burglary of a habitation. However, the fact finder considers the totality of evidence to determine whether the State proved a prior conviction beyond a reasonable doubt. Flowers, 220 S.W.3d at 923. Moreover, no specific document or mode of proof is required to establish a defendant was convicted of a prior offense. Id. at 921. "Just as there is more than one way to skin a cat, there is more than one way to prove a prior conviction." Id. at 922. Considering both above-cited documents together with Deputy Salinas's testimony, a rational jury could have found beyond a reasonable doubt that appellant was convicted on June 9, 2005 for burglary of a habitation when his probation, originally imposed for the offense, was revoked.

Appellant also relies on a variance between the cause number of the prior conviction alleged in the enhancement paragraph of the indictment-- "2004077509J"--and the cause number on the above-cited documents--"2004- 07509J." When reviewing a sufficiency challenge based on a variance between the indictment and the evidence, we consider the materiality of the variance. Fuller v. State, 73 S.W.3d 250, 253 (Tex.Crim.App.2002) (en banc); Rogers v. State,

200 S.W.3d 233, 236 (Tex.App.-Houston [14th Dist.] 2006, pet. ref'd). A variance is fatal and renders the evidence insufficient only when it is material. Fuller, 73 S.W.3d at 253; Gollihar v. State, 46 S.W.3d 243, 257 (Tex.Crim.App.2001); Rogers, 200 S.W.3d at 236. A variance is material if it (1) deprived the defendant of sufficient notice of the charges against him such that he could not prepare an adequate defense, or (2) would subject him to the risk of prosecution twice for the same offense. Rogers, 200 S.W.3d at 236 (citing Fuller, 73 S.W.3d at 253; Gollihar, 46 S.W.3d at 257). The defendant bears the burden to demonstrate materiality of a variance. Id. at 237 (citing Santana v. State, 59 S.W.3d 187, 194-95 (Tex.Crim.App.2001)).

The State need not allege enhancement convictions with the same particularity required for charging the primary offense. Freda v. State, 704 S.W.2d 41, 42 (Tex.Crim.App.1986); Cole v. State, 611 S.W.2d 79, 80 (Tex.Crim.App.1981). The purpose of an enhancement paragraph is to provide the accused with notice of the prior conviction on which the State relies. Cole, 611 S.W.2d at 82. Appellant does not assert that he was deprived of such notice due to the variance. Indeed, the enhancement paragraph was correct relative to the nature of the prior offense and the court and date of conviction. Therefore, the variance was not material because appellant was afforded the ability to find the record of prior conviction and present a defense. See id. (holding that transpositional error in cause number of prior conviction alleged in enhancement paragraph did not create fatal variance between indictment and proof at trial because paragraph described prior conviction as felony, exact nature of offense as theft, and date and court of conviction). Accordingly, the variance did not render the evidence legally insufficient to support the jury's finding of "true" to the enhancement paragraph.

Conclusion: We overrule appellant's sole issue and affirm the trial court's judgment.

Irby v. State, No. PD-1097-08, --- S.W.3d ----, 2010 WL 2382594, Juvenile Law Newsletter ¶ 10-3-9 (Tex.Crim.App., 6/16/10).

JUVENILE WITNESS'S STATUS AS A PROBATIONER IS NOT AUTOMATICALLY ADMISSIBLE WHEN HE TAKES THE STAND TO TESTIFY.

Facts: Appellant was charged with the sexual assault of W.P., a sixteen-year-old child, enhanced with a prior conviction for indecency with a child.

Before trial, appellant's counsel told the trial judge that he wanted to cross-examine W.P. about the fact that he was on deferred-adjudication probation for aggravated assault with a deadly weapon. He stated that W.P.'s "vulnerable status" was relevant to show bias and motive under Davis v. Alaska. The trial judge deferred his ruling because he had not yet heard any of the facts. During the trial, the judge gave the defense two more hearings outside the presence of the jury to show a plausible connection between W.P.'s "vulnerable status" and a possible bias or motive to fabricate his story, but the judge ultimately disallowed the proposed cross-examination. He concluded that W.P.'s "juvenile records" were irrelevant to show a possible motive to fabricate because the two matters were "completely separate."

The jury convicted appellant and, because he had a prior sex-offense conviction, the trial judge was required to sentence him to life in prison.

Proceedings in the Court of Appeals.

On appeal, appellant complained that the trial judge denied him his constitutional right to confrontation and cross-examination by not permitting defense counsel to cross-examine W.P. about his juvenile deferred-adjudication probation. The court of appeals upheld the trial judge's ruling. It first noted that "evidence of a juvenile adjudication, outside the realm of a juvenile proceeding, is not admissible for impeachment unless required by the Texas or United States Constitutions." It then acknowledged that the confrontation clause may require the admission of such evidence "if the cross-examination is reasonably calculated to expose a motive, bias, or interest for the witness to testify." But the mere fact that a juvenile had been placed on probation or had some other "vulnerable relationship" with the State is not enough to establish bias or prejudice; the cross-examiner must show some "causal connection" between the witness's "vulnerable relationship" and the witness's testimony. The court of appeals concluded that appellant had failed to show any such connection between W.P.'s juvenile record and his testimony at trial, thus the trial judge did not abuse his discretion in forbidding such cross-examination.

On discretionary review in this Court, appellant argues that the court of appeals incorrectly held that Davis v. Alaska mandates a "causal connection" between the witness's "vulnerable relationship" with the State and the potential bias or prejudice of that witness. He also asserts that our decision in Carpenter v. State, which had held that the proponent of the evidence of a pending charge must establish "some causal connection or logical relationship" between the pending charges and the witness's potential bias before it is admissible, was "wrongly decided."

Held: Affirmed

Opinion: The constitutional right of confrontation includes the right to cross-examine the witnesses and the opportunity to show that a witness is biased or that his testimony is exaggerated or unbelievable. Nonetheless, the trial judge retains wide latitude to impose reasonable limits on such cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." The constitutional right to cross-examine concerning the witness's potential bias or prejudice does not include "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

In Texas, as in most jurisdictions, juvenile criminal records and adjudications are not admissible to impeach the general credibility of a testifying witness, even though the juvenile may be on probation and is technically in a "vulnerable relationship" with the State throughout that probationary period. Rule 609(d) of the Texas Rules of Evidence explicitly prohibits their use for attacking the general credibility of the witness. But Rule 609(d) also contains an explicit exception that such evidence may be admissible when it is required by the United States Constitution, such as in the Davis scenario.

In Carpenter v. State, this Court held that, in the context of cross-examination of a witness with pending charges, "[f]or the evidence to be admissible, the proponent must establish some causal connection or logical relationship between the pending charges and the witness' 'vulnerable relationship' or potential bias or prejudice for the State, or testimony at trial." That is, a "vulnerable relationship" based on a witness's pending charges or probationary status does not hover cloud-like in the air, ready to rain down as impeachment evidence upon any and all such witnesses. There must be some logical connection between that "vulnerable relationship" and the witness's potential motive for testifying as he does. As Judge Meyers explained in Carpenter, this "causal connection" or logical relationship is a matter of simple relevance under Rule 401. Evidence that a witness is on probation, is facing pending charges, or has a prior juvenile record is not relevant for purposes of showing bias or a motive to testify absent some plausible connection between that fact and the witness's testimony. Carpenter is a prime example of when and why a logical connection is necessary. A long line of cases hold that a witness may be cross-examined for bias concerning a pending charge because his testimony may be "given under a promise or expectation of immunity, or under the coercive effect of his detention by officers ... conducting the present prosecution ." But, in Carpenter, we did not follow that general rule because the pending charges were in federal court and the witness was testifying in state court. Thus, absent additional facts of some potential "deal" between state and federal authorities, there was no logical connection between the federal pending charges and the witness's possible motive to "curry favor" with state authorities. The pending federal charge was therefore irrelevant as a possible source of bias. The reasoning and result in Carpenter is in accord with numerous Texas cases in which the cross-examiner failed to show a logical connection between the fact or condition that could give rise to a potential bias or motive and the existence of any bias or motive to testify.

Appellant relies on this Court's opinion in Maxwell v. State for the proposition that the mere fact of probation status is always and inevitably sufficient to establish a witness's potential bias and motive to "curry favor" with the authorities. Indeed, Maxwell could be read that broadly, but that would be inconsistent with Carpenter and our other Texas cases which require some logical relevance of the pending charge, probation or immigration status, or other alleged source of bias to the witness's testimony. In Maxwell, the Court relied upon two earlier Texas cases, in which the cross-examiner had, in fact, shown a logical relationship between the witness's pending charge, probation, or other alleged source of bias and his testimony. [FN46] We said that Texas and Supreme Court cases "have indicated that a witness's deferred adjudication probation status is sufficient to show a bias or interest in helping the State." [FN47] Some of our cases might, at first blush, have "indicated" such a possibly broad brush, but they all use qualifiers such as "may be" [FN48] or "under certain circumstances," [FN49] or "under these facts." [FN50] And the cross-examiner must still show the relevance of the "vulnerable status" or other alleged source of bias to the witness's testimony. It is not enough to say that all witnesses who may, coincidentally, be on probation, have pending charges, be in the country illegally, or have some other "vulnerable status" are automatically subject to cross-examination with that status regardless of its lack of relevance to the testimony of that witness. Thus, to the extent that Maxwell is inconsistent with Carpenter, we overrule it. [FN51]

Furthermore, Texas, like other states, has an important interest in "protecting the anonymity of juvenile offenders[.]" Our Family Code and Rules of Evidence explicitly protect

that anonymity. To hold that any juvenile who happens to be on probation at the time that he also is the victim of a crime or a witness in a criminal proceeding automatically loses that privacy protection is not required by the constitution or by common sense.

So how does the fact that W.P. was a juvenile on deferred-adjudication probation for aggravated assault provide a motive for him to make up this story? The trial judge gave appellant's attorney three different hearings outside the presence of the jury to show a plausible connection. Appellant cited Davis and explained that, on the day that W.P. told the police about the sexual encounters, W.P. believed that he could get into trouble because William had planned to rob appellant. He elaborated:

I would state that the relevance is that the complaining witness has testified that one of the reasons he told his mother about this allegation, the first adult family member about it, was because of his fear of potentially getting in trouble over the circumstances surrounding William Flowers and any potential crime committed by William Flowers against Christopher Irby. Based on that, I believe that it is particularly relevant and there is a causal relationship.... And that he was either on bond or probation at that time, which would give him greater motivation to lie, greater motivation towards bias and to lie about the allegation given the fact that he was looking at charges ... should there have been a crime committed against Christopher Irby. And I believe the testimony bears out that that was his state of mind.

But this argument is not logical. First, W.P. had already told two other people about the sexual encounters, so he did not make up the story at the time he told it to his mother. Second, W.P.'s act of telling his mother this story is totally unconnected to his later act of telling the police. Third, William had already been deterred from accosting appellant at the time W.P. told his mother this story, so any anticipated "robbery" by William had already been foiled. Fourth, even if William had succeeded in "robbing" appellant, appellant fails to suggest how William's conduct would be attributable to W.P. or how a false story of W.P.'s consensual sexual encounters would exonerate or ameliorate the conduct of either of them. Fifth, if W.P. felt that he had a "vulnerable relationship" with law enforcement or the State, the very last thing that he would logically do is invite their scrutiny by filing a criminal complaint against someone else for sexual assault. That act would make a "vulnerable relationship" much more vulnerable.

Conclusion: In this case, we agree with the trial judge and court of appeals that appellant failed to make a logical connection between W.P.'s testimony concerning his sexual encounters with appellant and his entirely separate probationary status. Thus, the trial judge did not abuse his discretion in excluding this impeachment evidence because it was irrelevant. We affirm the judgment of the court of appeals.

In the Matter of A.C.T., MEMORANDUM, No. 04-09-00068-CV, 2010 WL 374392, Juvenile Law Newsletter ¶ 10-1-7B (Tex.App.-San Antonio, 2/3/10).

HEARSAY TESTIMONY FROM AN OUTCRY WITNESS, WHICH THE STATE FAILED TO PROPERLY NOTIFY JUVENILE'S COUNSEL OF, WAS ADMISSIBLE AS A HEARSAY EXCEPTION WHERE THE TESTIMONY WAS OFFERED TO

REBUT AN EXPRESS OR IMPLIED CHARGE OF RECENT FABRICATION OR IMPROPER INFLUENCE OR MOTIVE.

Facts: On July 10, 2008, the State filed an original petition alleging that A.C.T., a fourteen year-old boy, had engaged in delinquent conduct by committing two counts of aggravated sexual assault on J.K ., a female child younger than fourteen years old, and seeking a determinate sentence. Count I of the petition alleged that, on or about July 17, 2007, A.C.T. intentionally and knowingly caused the sexual organ of J.K., a child younger than fourteen, to contact the sexual organ of A.C.T. Count II alleged that, on or about July 17, 2007, A.C.T. intentionally and knowingly caused the sexual organ of J.K., a child younger than fourteen, to contact the mouth of A.C.T. The State filed a pretrial "Notice of Intent to Present Outcry Statement" naming J.K.'s mother, Jeanette, as the outcry witness. After the jury was sworn and opening statements were made, a hearing was held outside the jury's presence to determine whether Jeanette or another witness subpoenaed by the defense, Sonya Vallejo, was the first adult to whom J.K. made an outcry. The trial court ruled that Sonya was the proper outcry witness. Defense counsel objected that the State had not given the fourteen-day notice required by the outcry statute as to Sonya, arguing that the "proper predicate had not been laid" for admission of Sonya's testimony as the outcry witness. A discussion was held on the record during which the defense conceded it was not claiming unfair surprise or asking for a continuance. The trial court ultimately ruled that Sonya would not be permitted to testify as the outcry witness. The court later admitted Sonya's testimony about what J.K. told her as a prior consistent statement to rebut a charge of fabrication or improper influence. At the conclusion of the trial, the jury found that A.C.T. had engaged in delinquent conduct as alleged in both counts, and found that disposition was required. The court adjudicated A.C.T. as having engaged in delinquent conduct as alleged in both counts, and entered a disposition order committing A.C.T. to TYC with a possible transfer to TDCJ for eleven (11) years. A.C.T. now appeals.

Held: Affirmed

Memorandum Opinion: Finally, A.C.T. argues the trial court erred in admitting Sonya Vallejo's hearsay testimony as a prior consistent statement "when no express or implied challenge was made to the complainant's testimony on the grounds of recent fabrication or improper influence or motive." As noted, *supra*, it was determined that Sonya Vallejo was the proper outcry witness; however, her testimony about what J.K. told her was not admitted under the outcry statute, but, rather, was admitted as a "prior consistent statement" under Rule 801(e)(1)(B). Tex.R. Evid. 801(e)(1)(B) (providing that a statement is not hearsay if the declarant testifies at trial subject to cross-examination, and the statement is consistent with the declarant's testimony and "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive"). It is clear from the record that the declarant, J.K., testified at trial and was cross-examined; further, it is not disputed that her prior statement to Sonya was consistent with her trial testimony. The only question before us is whether a charge of recent fabrication or improper influence or motive was raised which would warrant admission of J.K.'s prior consistent statement under Rule 801(e)(1)(B). We review the trial court's ruling that a prior consistent statement is admissible under Rule 801(e)(1)(B) for an abuse of discretion. *Hammons v. State*, 239 S.W.3d 798, 806 (Tex.Crim.App.2007).

A.C.T. argues on appeal that he made no express or implied charge of recent fabrication or improper influence, stressing that his attorney's cross-examination of J.K. contained no reference to recent fabrication or improper influence that would warrant admission of J.K.'s out-of-court statement. However, the Court of Criminal Appeals clarified in *Hammons* that a charge of fabrication or improper influence "may be subtly *implied* through tone, tenor, and demeanor," and need not be restricted to the specific wording used by counsel. *Id.* at 799. Because there is no "bright line" between a challenge to the witness's memory or credibility and a suggestion of conscious fabrication, the trial court has substantial discretion in determining whether the tenor of the questioning reasonably implies a conscious intent to fabricate. *Id.* at 804-05. In determining whether the record shows an implied charge of recent fabrication or improper influence was raised, an appellate court focuses on the "purpose of the impeaching party, the surrounding circumstances, and the interpretation put on them by the [trial] court." *Id.* at 808. In addition to the totality of the questioning, we may also consider clues from the voir dire, opening statements, and closing arguments of counsel. *Id.* The ultimate question is whether, giving deference to the trial judge's assessment of tone, tenor, and demeanor, a reasonable trial judge could have concluded that a charge of recent fabrication or improper influence was raised. *Id* . at 808-09.

In ruling that Sonya Vallejo would be permitted to testify to J.K .'s out-of-court statement about the sexual abuse by A.C.T., the court noted that J.K. had already testified and been subjected to cross-examination. The court stated the prior consistent statement was being admitted "to rebut the defense that this is somehow a fabrication or a coaching situation to rebut some family feud regarding the ownership of these houses." During cross-examination of Sonya, defense counsel inquired whether she knew of any arguments between Rose and Jeanette over the housing situation. Sonya testified that Rose had argued with Jeanette about the houses, there had been a break-in, the water was turned off, and eviction was mentioned. Defense counsel continued to raise the family discord theme during his questioning of Rose during the defense case. Rose testified that before J.K.'s allegations she informed Jeanette to start paying the bills and utilities for the small house, but Jeanette did not pay them. Rose also stated that Jeanette and her mother asked Rose whether Jeanette's family could move into the big house, but Rose refused; there was one argument about this. When counsel asked Rose whether J.K. "has reasons to lie," Rose replied she did not know why J.K. would have lied. Finally, during closing arguments, counsel for A.C.T. again brought up the family discord and suggested that someone had influenced parts of J.K.'s story. Further, we note that in his brief A.C.T. concedes that his "defensive theory was, from the beginning of the trial, that the child had been coached prior (emphasis omitted) to the outcry to Sonya Vallejo ... in retaliation for Rose[ ]'s attempts to collect bills owed her by Jeanette...."

The record shows that during questioning, as well as opening statements and closing arguments, A.C.T.'s counsel made an implied charge that J.K.'s allegations were the product of improper influence by Jeanette and her family in retaliation against A.C.T.'s mother, Rose, for the housing dispute. In admitting the evidence under Rule 801(e)(1)(B), the trial court specifically noted the basis was to rebut charges of coaching or fabrication due to a family feud over housing. We conclude the trial court did not abuse its discretion in admitting Sonya's testimony about J.K.'s out-of-court statement under Rule 801(e)(1)(B).

Conclusion: Based on the foregoing reasons, we overrule A.C.T.'s issues on appeal and affirm the trial court's judgment.

In the Matter of A.W.B., No. 07-08-0345-CV, ___ S.W.3d ___, 2010 WL 364250, Juvenile Law Newsletter ¶ 10-1-8A (Tex.App.-Amarillo, 2/2/10).

AN UNNOTICED OUTCRY STATEMENT MAY STILL BE ADMISSIBLE IF THE STATEMENT IS ADMISSIBLE UNDER A HEARSAY EXCEPTION.

Facts: On September 10, 2007, Jane Doe, a four year old, was taken by her grandmother, Gwen, to gymnastics class at Ready, Set, Go, in Plainview, Texas. Gwen left Jane Doe with A.W.B., a 16 year old, because Gwen thought that A.W.B. worked for Ready, Set, Go and Jane Doe appeared to know A.W.B. As Gwen returned to her car, she noticed A.W.B. and Jane Doe walking up a stairway that did not lead to Jane Doe's classroom. Gwen followed the two to an upstairs room and, upon entering the room, Gwen saw Jane Doe standing in front of A.W.B. with her face near A.W.B.'s crotch. A.W.B. noticed Gwen, jumped, and pulled up his pants. Gwen confronted A.W.B.'s mother, who worked for Ready, Set, Go, regarding what she had seen and then immediately took Jane Doe to her mother, Audra. When Gwen arrived, Audra heard Jane Doe "screaming and crying," so she ran over to the vehicle to see what was wrong. Audra attempted to console Jane Doe and, eventually, she asked Jane Doe what had happened. Jane Doe told her that A.W.B. "put his private in her mouth." Following this report, Audra called the police about the incident.

As part of the police investigation of the report, A.W.B. gave a statement. In this statement, A.W.B. admitted that he pulled his pants down and showed Jane Doe his "front." However, A.W.B. claimed that he "never put a hand on her at all." This statement was admitted into evidence during the subsequent adjudication hearing.

The State filed a Petition alleging that A.W.B. had engaged in delinquent conduct. By this petition, the State alleged that A.W.B. had (1) committed aggravated sexual assault of a child by intentionally or knowingly causing the penetration of Jane Doe's mouth by A.W.B.'s sexual organ, (2) committed attempted aggravated sexual assault on Jane Doe, (3) caused Jane Doe to touch A.W.B.'s genitals, and (4) intentionally and knowingly exposed his genitals to Jane Doe. All four of these allegations relate to the single incident occurring on September 10, 2007.

Prior to the adjudication hearing, A.W.B.'s counsel filed a motion for psychological evaluation of A.W.B. The motion requested a psychological examination pursuant to section 51.20 of the Texas Family Code because A.W.B.'s counsel believed that A.W.B. "has or may have significant limitations in his ability to form the requisite intent to commit the alleged delinquent conduct ..." alleged by the State. *See*TEX. FAM. CODE ANN. § 51.20 (Vernon 2008). [FN1] This motion was granted by the trial court and Dr. Richard Wall was appointed to conduct a psychological examination of A.W.B. Dr. Wall performed this evaluation on October 1, 2007.

During the adjudication hearing, Gwen testified regarding what she observed at Ready, Set, Go on September 10, 2007. Over A.W.B.'s hearsay objection, Audra testified that Jane Doe told her that A.W.B. "had put his private in her mouth." Dr. Wall also testified regarding his examination of A.W.B. However, the trial court sustained the State's relevancy objection to the report Dr. Wall prepared in conjunction with his psychological examination of A.W.B. At the close of the adjudication hearing, the trial court found each of the State's four allegations true and proceeded to disposition. At the close of the disposition hearing, the trial court ordered A.W.B. committed to the Texas Youth Commission for an indeterminate period not to exceed A.W.B.'s 19th birthday. A.W.B. timely filed notice of appeal of both the adjudication and disposition.

Held: Adjudication affirmed in part vacated in part, Disposition affirmed

Opinion: By his first issue, A.W.B. contends that the trial court abused its discretion by allowing Audra to testify as to Jane Doe's outcry statement without the State satisfying the requirements of section 54.031 of the Texas Family Code. *See*§ 54.031. A.W.B.'s argument focuses on the trial court's failure to hold a hearing on whether the outcry testimony of Audra met the statutory requisites.

In the present case, Audra's testimony regarding what Jane Doe told her was admissible as an excited utterance and, as such, any failure to meet the statutory requisites for an outcry statement is not error. It is clear that Audra's testimony of what Jane Doe told her is hearsay. *See*TEX. R. EVID. 801(d). However, Rule 803 provides a number of exceptions to the general rule that hearsay is not admissible. An excited utterance is not excluded by the hearsay rule, regardless of the declarant's availability, and is defined as "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." TEX. R. EVID. 803(2). To meet this exception, the statement must (1) be the product of a startling occurrence that produces a state of nervous excitement in the declarant that renders the statement spontaneous and unreflecting, (2) have been made at a time when the state of excitement still so dominates the mind of the declarant that there is no time or opportunity to contrive or misrepresent, and (3) relate to the circumstances of the occurrence preceding it. *See* *Sellers v. State*, 588 S.W.2d 915, 918 (Tex.Crim.App.1979). The reviewing court should not examine each requirement independently, but should rather focus on whether the combined effect shows the statement to be sufficiently reliable. *Id.*

In the present case, the evidence establishes that Jane Doe began to cry uncontrollably immediately after Gwen witnessed the encounter between Jane Doe and A.W.B. The time elapsed between when Gwen witnessed the encounter and Jane Doe made the declaration that A.W.B. "put his private in her mouth" was approximately 10 minutes and, throughout this period, Jane Doe cried. Further, while Audra asked Jane Doe what was wrong, the declaration was not the result of questioning and was a spontaneous declaration regarding the occurrence that caused the emotional state Jane Doe was in at a time that Jane Doe was still in that emotional state.

Conclusion: From these facts, we cannot say that the trial court abused its discretion in admitting Audra's testimony relating Jane Doe's declaration.

We overrule A.W.B.'s first issue.

MENTAL ILLNESS—

In the Matter of A.W.B., No. 07-08-0345-CV, ___ S.W.3d ___, 2010 WL 364250, Juvenile Law Newsletter ¶ 10-1-8B (Tex.App.-Amarillo, 2/2/10).

FAMILY CODE DOES NOT REQUIRE THAT A RESPONDENT GIVE PRIOR NOTICE OF INTENT TO ASSERT THE DEFENSE OF LACK OF RESPONSIBILITY DUE TO MENTAL ILLNESS OR MENTAL RETARDATION.

Facts: On September 10, 2007, Jane Doe, a four year old, was taken by her grandmother, Gwen, to gymnastics class at Ready, Set, Go, in Plainview, Texas. Gwen left Jane Doe with A.W.B., a 16 year old, because Gwen thought that A.W.B. worked for Ready, Set, Go and Jane Doe appeared to know A.W.B. As Gwen returned to her car, she noticed A.W.B. and Jane Doe walking up a stairway that did not lead to Jane Doe's classroom. Gwen followed the two to an upstairs room and, upon entering the room, Gwen saw Jane Doe standing in front of A.W.B. with her face near A.W.B.'s crotch. A.W.B. noticed Gwen, jumped, and pulled up his pants. Gwen confronted A.W.B.'s mother, who worked for Ready, Set, Go, regarding what she had seen and then immediately took Jane Doe to her mother, Audra. When Gwen arrived, Audra heard Jane Doe "screaming and crying," so she ran over to the vehicle to see what was wrong. Audra attempted to console Jane Doe and, eventually, she asked Jane Doe what had happened. Jane Doe told her that A.W.B. "put his private in her mouth." Following this report, Audra called the police about the incident.

The State filed a Petition alleging that A.W.B. had engaged in delinquent conduct. By this petition, the State alleged that A.W.B. had (1) committed aggravated sexual assault of a child by intentionally or knowingly causing the penetration of Jane Doe's mouth by A.W.B.'s sexual organ, (2) committed attempted aggravated sexual assault on Jane Doe, (3) caused Jane Doe to touch A.W.B.'s genitals, and (4) intentionally and knowingly exposed his genitals to Jane Doe. All four of these allegations relate to the single incident occurring on September 10, 2007.

Prior to the adjudication hearing, A.W.B.'s counsel filed a motion for psychological evaluation of A.W.B. The motion requested a psychological examination pursuant to section 51.20 of the Texas Family Code because A.W.B.'s counsel believed that A.W.B. "has or may have significant limitations in his ability to form the requisite intent to commit the alleged delinquent conduct ..." alleged by the State. *See*TEX. FAM. CODE ANN. § 51.20 (Vernon 2008). [FN1] This motion was granted by the trial court and Dr. Richard Wall was appointed to conduct a psychological examination of A.W.B. Dr. Wall performed this evaluation on October 1, 2007.

During the adjudication hearing, Gwen testified regarding what she observed at Ready, Set, Go on September 10, 2007. Over A.W.B.'s hearsay objection, Audra testified that Jane Doe told her that A.W.B. "had put his private in her mouth." Dr. Wall also testified regarding his

examination of A.W.B. However, the trial court sustained the State's relevancy objection to the report Dr. Wall prepared in conjunction with his psychological examination of A.W.B. At the close of the adjudication hearing, the trial court found each of the State's four allegations true and proceeded to disposition. At the close of the disposition hearing, the trial court ordered A.W.B. committed to the Texas Youth Commission for an indeterminate period not to exceed A.W.B.'s 19th birthday. A.W.B. timely filed notice of appeal of both the adjudication and disposition.

Held: Adjudication affirmed in part vacated in part, Disposition affirmed

Opinion: By A.W.B.'s second issue, we are left with a challenge to the trial court's decision to exclude the report of Dr. Wall's psychological examination of A.W.B. When A.W.B. offered Dr. Wall's report for admission into evidence, the State objected on the basis that the report was ordered under a statute that allows for only a general psychological evaluation and, as such, it was not relevant to any issue before the trial court in the adjudication hearing. A.W.B. responded that Dr. Wall's report addresses whether A.W.B. was capable of forming the intent that is an element of two of the offenses alleged by the State and, therefore, it is relevant defensive evidence. The trial court sustained the State's objection to the report. After the trial court excluded Dr. Wall's report, Dr. Wall began to testify regarding Asperger's Disorder, which is a condition that Dr. Wall diagnosed A.W.B. to have. During his testimony, the State again objected to the relevancy of the testimony. Following the State's objection, the trial court asked A.W.B.'s counsel if this testimony was being offered as an insanity defense. Counsel stated that, in effect, it was. The trial court asked counsel if notice had been given of an insanity defense. Counsel said no. The trial court then sustained the objection.

Initially, we note that section 55.51 does not require that a respondent give notice of intent to assert the defense of lack of responsibility due to mental illness or mental retardation. *See*§ 55.51. Furthermore, our review of Dr. Wall's report, which was admitted into evidence during the disposition hearing, leads us to conclude that the report was relevant to the issues before the trial court during adjudication and that there was no valid basis for exclusion of the evidence. Therefore, we conclude that the trial court abused its discretion in sustaining the State's objection to the report.

As to the State's objection to Dr. Wall's testimony, however, at the time that the trial court sustained the objection, Dr. Wall was testifying regarding studies done on chimpanzees as a means to explain Asperger's Disorder to the court. After reviewing this testimony, we conclude that the State's relevancy objection was well taken. Further, at no point during Dr. Wall's testimony was Dr. Wall asked if A.W.B. had a mental illness or mental retardation that would prevent him from being responsible for his actions. The most that can be taken from Dr. Wall's testimony is that A.W.B. suffers from Asperger's Disorder and that this condition limits A.W.B.'s ability to understand abstract subtleties. Further, no offer of proof was requested to allow Dr. Wall to articulate his opinion regarding whether A.W.B. was not responsible for his actions due to mental illness or mental retardation.

While we have concluded that the trial court abused its discretion in excluding Dr. Wall's report from evidence in the adjudication hearing, we must determine whether this error harmed A.W.B. For the trial court's error to be reversible, we must determine that the error probably

caused the rendition of an improper judgment or probably prevented A.W.B. from properly presenting the case to this Court. *See*TEX. R. APP. P. 44.1(a). Dr. Wall's report states that, "The problematic incident which currently brings [A.W.B.] to the court's attention does not reflect any integrated attempt to gain any sexual gratification. It was simply an un-integrated piece of behavior with no goal." Taking this statement as true, it fails to establish the requisites for the mental illness or mental retardation defense found in section 55.51. Nothing in the report identifies Asperger's Disorder as a mental illness that would meet the statutory definition. Additionally, while the report states that A.W.B. did not act with the intent to gain sexual gratification, the report falls short of concluding that A.W.B. was not responsible for his actions. Evidence was presented that A.W.B. was aware that what he was doing was wrong. Audra testified that A.W.B. told Jane Doe that if she told anyone about the incident that she would get in trouble. Further, when A.W.B. noticed Gwen, he "jumped" and pulled up his pants.

Conclusion: While A.W.B.'s inability to form the requisite intent to satisfy his sexual desires is relevant to the proof of a couple of the offenses alleged by the State, it is not, of itself, sufficient to vitiate A.W.B.'s responsibility for committing the offense of aggravated sexual assault of a child, which does not require a specific intent to arose or gratify sexual desire. Even accepting Dr. Wall's erroneously excluded report to be true, it is insufficient to establish the statutory defense found in section 55.51, it did not present a defense to aggravated sexual assault of a child, and sufficient evidence exists in the record to establish that A.W.B. was aware that his actions were wrong and, therefore, that he was responsible for those actions.

For the foregoing reasons, we overrule A.W.B.'s second issue.

PETITION AND SUMMONS—

In the Matter of T.L.K., 316 S.W.3d 701, 2010 WL 2331452, Juvenile Law Newsletter ¶ 10-3-6 (Tex.App.-Fort Worth, 6/10/10).

TRIAL COURT LACKED JURISDICTION TO PROCEED WHERE THE STATE'S PETITION FAILED TO SET FORTH WITH REASONABLE PARTICULARITY THE "PLACE" WHERE THE CHILD'S ALLEGED DELINQUENT CONDUCT OCCURRED.

Facts: In his second issue, T.L.K. attacks the jurisdiction of the juvenile court, claiming that the State's petition is fatally defective for failure to state the "place" where his alleged delinquent conduct occurred. According to section 53.04 of the family code, a petition to adjudicate delinquency "must state[,] ... with reasonable particularity[,] the time, place, and manner of the acts alleged and the penal law or standard of conduct allegedly violated by the acts." Tex. Fam.Code. Ann. § 53.04(d)(1) (Vernon 2008).

Here, the State concedes that both its original and amended petitions fail to set forth with reasonable particularity the "place" where T.L.K.'s alleged delinquent conduct occurred. The

State, however, asserts that even without this information, T.L.K. was afforded fair treatment and due process or, in the alternative, T.L.K. waived this issue because he failed to object, file a motion, or specially except to the alleged defect. We first determine whether T.L.K. preserved this issue for our review.

Held: Judgment vacated, case dismissed.

Opinion: Title 3 includes section 53.04, which, as previously noted, provides a child with the right to fair notice of the charges he will be required to meet. Id. § 53.04(d)(1). Because the right to fair notice is a right given to a child by title 3, it is a right that can be waived only in the manner provided for in section 51.09. See R.A.M. v. State, 599 S.W.2d 841, 848 (Tex.Civ.App.-San Antonio 1980, no writ) (concluding juvenile had not waived his rights to fair notice under section 53.04 because section 51.09's waiver requirements had not been satisfied); In re W.H.C., 580 S.W.2d 606, 608 (Tex.Civ.App.-Amarillo 1979, no writ) (concluding same); but see Tex.Code Crim. Proc. Ann. art. 1.14(b) (Vernon 2005) (stating that if an adult criminal defendant does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial commences, he waives the defect for purposes of review on appeal).

Here, the record does not reflect, and the State does not contend, that T.L.K. waived his right to fair notice in the manner provided for in section 51.09. Therefore, this issue is properly before us. Id. We next determine whether the State's petition afforded T.L.K. fair notice--in other words, whether T.L.K. was afforded fair treatment and due process.

Although juvenile delinquency proceedings are civil in nature, the child is entitled to the essentials of due process and fair treatment because the proceedings may result in the child being deprived of liberty. In re J.R.R., 696 S.W.2d 382, 383 (Tex.1985) (per curiam). Accordingly, the United States Supreme Court has held that "[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' " In re Gault, 387 U.S. 1, 33, 87 S.Ct. 1428, 1446 (1967). Likewise, Texas courts have recognized that due process requires that a juvenile be informed of the specific issues he is to meet. See Carrillo v. State, 480 S.W.2d 612, 615 (Tex.1972) (citing In re Gault, 387 U.S. at 33, 87 S.Ct. at 1446); In re B.P.H., 83 S.W.3d 400, 405 (Tex.App.-Fort Worth 2002, no pet.).

Conclusion: We conclude, therefore, that the State's petition, which fails to set forth with reasonable particularity the "place" where T.L.K.'s alleged delinquent conduct occurred, does not satisfy mandatory statutory requirements and is fatally defective. See H.S., Jr., 564 S.W.2d at 448 (concluding State's petition was fatally defective when petition failed to allege with reasonable particularity the place where the alleged delinquent conduct occurred and declaring that when the "State prescribes requirements which do not contravene the U.S. Constitution, then the State must adhere to its requirements."); see also W.H.C., 580 S.W.2d at 608 (holding State's petition was fatally defective because it failed to allege essential elements of the offense). Consequently, the juvenile court lacked jurisdiction. Cf. In re D.W.M., 562 S.W.2d at 851-52 (declaring that juvenile court's failure to comply with section 54.02(b)'s notice requirements in a discretionary transfer case deprived the juvenile court of jurisdiction to consider the transfer).

Accordingly, we sustain T.L.K.'s second issue. We vacate the judgment of the juvenile court and dismiss the case for lack of jurisdiction.

RESTITUTION—

In the Matter of D.S.W., MEMORANDUM, Nos. 04-09-00592-CV, 04-09-00593-CV, 2010 WL 3443214, Juvenile Law Newsletter ¶ 10-4-5 (Tex.App.-San Antonio, 9/1/10).

IN ARSON ADJUDICATION, RESTITUTION ORDER IN THE AMOUNT OF $248,429.37 WAS SET ASIDE BECAUSE IT WAS NOT ADEQUATELY SUPPORTED BY THE RECORD.

Facts: This is an appeal of two **juvenile** cases. In cause number 2009-JUV-01290, D.S.W. pled true to arson of a habitation causing bodily injury and to arson of a habitation. In 2009-JUV-01291, D.S.W. pled true to three counts of arson of a habitation causing bodily injury and to arson of a habitation. The trial court found a need for disposition and committed D.S.W. to the Texas Youth Commission. The court also ordered restitution in the total amount of $477,556.72, to be owed jointly and severally by D.S.W. and his mother.

D.S.W. brings three issues on appeal. In his first two issues on appeal, D.S.W. contends his double jeopardy rights were violated in each case when he was adjudicated for arson of a habitation causing bodily injury and for arson of a habitation. The State agrees that D.S.W.'s double jeopardy rights were violated and, therefore, we will sustain D.S.W.'s first two issues on appeal. In his third issue, D.S.W. argues "[t]he trial court abused its discretion when it ordered restitution in the aggregate amount of $477,556.75, because this extraordinary amount of restitution is not appropriate to the age and physical, emotional, and mental abilities of [D.S.W.], and is not supported in the record."

Held: Restitution order set aside and remanded for a new hearing on restitution.

Memorandum Opinion: Because juvenile proceedings are considered quasi-criminal, the rules of restitution for criminal cases apply to restitution ordered by a court in a juvenile proceeding. *In re D.S.*, 921 S.W.2d 860, 861 (Tex.App.-San Antonio 1996, no writ). The amount of restitution ordered must be "just," that is, supported by a factual basis within the record. *Thompson v. State*, 557 S.W.2d 521, 525-26 (Tex.Crim.App.1977); *In re J.R.*, 907 S.W.2d 107, 109 (Tex. App-Austin 1995, no writ). When the amount of restitution is not supported by the record, the proper procedure on appeal is to set aside the amount of restitution and remand the case for a hearing to determine a just amount of restitution. *Barton v. State*, 21 S.W.3d 287, 290 (Tex.Crim.App.2000).

In cause number 2009-JUV-01290, the trial court ordered restitution to be paid to the property owner, William Ponce, in the amount of $2,240.00 and to the property insurer, American Reliable Insurance Company in the amount of $226,887.38. The evidence relating to the amount of loss incurred in 2009-JUV-01290 consisted of the fire marshal's report, William

Ponce's unsworn affidavit, and American Reliable Insurance Company's loss run statement. The fire marshal's report stated that the building was owned by William Ponce, that the building was appraised for $218,180.00 in 2008, that it was insured by Voyager Indemnity Insurance Company for $224,000.00, that the policy was in effect from May 16, 2008, until May 16, 2009, and that the policy number was TSG019061. The unsworn affidavit of William Ponce declared that the amount of pecuniary loss to the building was $224,000.00. The American Reliable Insurance Company's loss run statement indicated that it was for policy number TSG019061 with an effective date of May 16, 2008, until May 16, 2009. The statement included William Ponce's name and the address of the property that was lost. It also contained a series of columns indicating "Payments" at the "Policy Total" of $224,000.00, "L.A.E." of $2,887.38, and "Total Inc." of $226,887 .38. One might speculate that William Ponce's deductible under the insurance policy was $2,240.00; however, there is no evidence in the record to support payment of restitution to William Ponce for any amount. Further, one might speculate that American Reliable Insurance Company insured the property for $224,000.00, but paid out $226,887.38, which included an amount for "L.A.E." There is nothing in the record explaining what the "L.A.E." amount is. Yet, the "Policy Total" plus the "L.A.E." is the amount the court ordered in restitution to American Reliable Insurance Company.

In cause number 2009-JUV-01291, restitution was ordered in the amount of $248,429.37 to Wachovia Bank Account # 5320511000161788. The evidence relating to the amount of loss incurred in 2009-JUV-01291 consisted of the fire marshal's report and a letter dated July 2, 2009. The fire marshal's report stated that the building was owned by Alexander and Alejandra Mathes and was appraised for $209,880.00 in 2008. It further indicated the building was insured by Farmers Insurance Group for $250,000.00, the policy was in effect from December 21, 2008, until December 21, 2009, and the policy number was 60470-29-76. The July 2, 2009, letter was addressed to "Leslie Lovelace" and signed by "Kath White, Bankruptcy Specialist." The letter identified the "Customer" as Alejandra Matthes and lists the address of the destroyed property as "Collateral." The letter indicated the payoff amount was $248,429.37 and stated payment should be sent to Wachovia Bank. The letter did not identify Leslie Lovelace nor did it identify Kath White with any certainty since the letter was not written on letterhead stationery. Again, one might speculate that Wachovia Bank was the mortgagor on the destroyed property and that the payoff amount was to be paid because of the fire; however, there is no evidence in the record to support that assumption.

Conclusion: Because the amount the trial court ordered in restitution is not adequately supported in the record and requires some amount of speculation, we set aside the restitution orders and remand the causes to the trial court for a new hearing on restitution. [FN1]

FN1. Because we are remanding the causes for a new restitution hearing, we need not address D.S.W.'s contention that the amount of restitution ordered is excessive because it is not appropriate to his age and physical, emotional, and mental abilities.

SEARCH & SEIZURE—

Limon v. State, 314 S.W.3d 694, 2010 WL 2430428, Juvenile Law Newsletter ¶ 10-3-8A (Tex.App.-Corpus Christi, 6/17/10).

STATE FAILED TO SHOW THAT THE JUVENILE WHO ANSWERED THE DOOR IN THE MIDDLE OF THE NIGHT HAD AUTHORITY TO CONSENT TO ENTRY INTO THE HOME.

Facts: Limon was indicted for the offense of deadly conduct with a firearm on August 14, 2007. On October 10, 2007, Limon filed a "Motion to Determine the Admissibility of Illegally Obtained Evidence and Statements." The trial court held a hearing on the motion on October 23, 2008.

Officer Gus Perez testified at the hearing on the motion to suppress that on June 28, 2007, he received a call at about 10:00 p.m. informing him that there was a shooting in Aransas Pass at the 1400 block of W. Matlock. On his way to that location, Officer Perez was advised that another shooting had occurred. He proceeded to the location of the second shooting, at 244 N. 11th Street. At the scene of the second shooting, Officer Perez recovered three "shotgun waddings," which he described as projectiles from a shotgun. He spoke to a witness named "Lupe Ortiz" or "Guadalupe Ortiz," who advised that he had seen a green four-door car leaving the area. Ortiz could not provide a make, model, or license plate for the car. The rest of the witnesses at the residence were reluctant to cooperate. Officer Perez then proceeded to the location of the first shooting. When he arrived, he was approached by a "person that live[d] in the vicinity who advised [him] that that person believed that the Limon kids were involved." Officer Perez admitted that he did not know the name of his informant, but he believed the person was a neighbor or resident that lived in the area. Officer Perez testified that he knew of only one Limon family in Aransas Pass, and he knew where they lived. He went to the Limon residence, arriving at approximately 2:00 a.m., where he observed a green Buick four-door car. He felt the hood, which he stated was warm, and observed what appeared to be a bullet hole in the front passenger door. Officer Perez testified on cross-examination that the bullet hole indicated to him that the car had been shot at. Officer Perez then called for backup, and three other officers arrived within minutes.

Officer Perez testified that he did not have a search warrant or an arrest warrant, and it would have taken him about an hour and a half to two hours to get a warrant. Officer Perez went to the front door and knocked. The door was answered by A.S. Officer Perez testified that he knew that Limon's father (hereinafter "Limon, Sr."), an adult, lived in the residence.

Officer Perez testified that while he was outside the home, he did not see any crimes visibly being committed inside or outside the home. He stated that when he arrived at the front door, he had a "reasonable suspicion that there was a suspect inside.... It was likely--I didn't know. It was approaching probable cause but more than a reasonable suspicion."

Once inside the home, Officer Perez smelled marijuana. He stated that he and Officer Hernandez went to the bedroom in the southwest corner of the residence, where they observed Limon and two other males lying in bed, apparently sleeping with the lights on. The officers had

their guns drawn, and they told Limon and the two males to get up. Limon was handcuffed and moved into the common area of the home. Officer Perez stated that another officer, Officer Rhodes, was outside the residence looking through a window into the southwest bedroom, and he informed Officer Perez that he saw weapons in the room. Officer Perez stated that "[t]here was [sic] two handguns towards the front where their heads were to the west side of the bed at which point we went ahead and detained everybody in the residence, secured them all so we could secure those weapons and see if there was [sic] any other weapons." Officer Perez stated that one of the handguns was a .22 caliber handgun and the other was a .380 caliber handgun. Officer Perez testified that one of the officers went into the southeast bedroom, which belonged to Limon's parents, who were sleeping. Limon, Sr. was not dressed, and Mrs. Limon had a nightgown on. Both were handcuffed. Mrs. Limon was taken to a common area in the home, and Limon, Sr. was told to lie face down on the floor, despite being completely naked. Officer Perez testified that the officers "went ahead and got him some clothes, removed the hand restraints, and that's when we asked for consent."

Officer Perez stated that he asked for a written consent to search from Limon, Sr., who stated that he wanted to speak to his wife because he could not see. Mrs. Limon then gave written consent to search the home. After obtaining consent, Officer Perez photographed the residence, and he testified that ammunition for a .22 caliber gun and a 12-gauge shotgun were found in the southwest bedroom, along with drug paraphernalia. He stated that, outside the residence in the vicinity of the southwest bedroom, the officers located a "Remington semiautomatic shotgun 12 gauge." Officer Perez agreed that the shotgun was "near the window of the southwest bedroom" in an area enclosed by a privacy fence belonging to the Limon residence. After searching the residence and finding the guns, Officer Perez obtained consent to search the vehicle from Limon, who stated that his parents bought the vehicle for him to drive. In the vehicle, Officer Perez found a metal jacket from an unknown caliber weapon. Officer Perez testified that at that time, he "felt that there was probable cause for the arrest," and he arrested Limon. Limon was transported to the police station and booked, which took approximately one hour. Limon was in the jail for about thirty minutes before he was given his Miranda warnings; following the warnings, at 5:01 a.m., he provided a statement.

The evidence obtained from the search of the residence, the search of the car, and Limon's statement were admitted at trial, and Limon was convicted of deadly conduct by use of a firearm. See id. at § 22.05(b)(2), (e).

Held: Reversed and remanded

Opinion: Consent to enter and search property can be given either by the individual whose property is searched or by a third party who possesses common authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990); Patrick v. State, 906 S.W .2d 481, 490 (Tex.Crim.App.1995). "Common authority" is "mutual use of the property by persons generally having joint access or control for most purposes." Patrick, 906 S.W.2d at 490. "Although property interests are relevant to this determination, the commonality of authority to consent is not determined solely by the law of property." Hubert, 2010 WL 2077166, at *3. Rather, we look to whether it is "reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number

might permit the common area to be searched." Id. at *3-4. The State bears the burden of proving actual authority by presenting facts that show mutual use of and control over the property by the third person. Id. at *4.

When the facts do not support a finding of actual authority, a search may be valid if the consent-giver is clothed with apparent authority. Rodriguez, 497 U.S. at 188. A law enforcement officer's warrantless search of a person's premises may be justified under the doctrine of "apparent authority" when consent to search is obtained from a third party whom the officers reasonably believe at the time of the search to possess common authority over the premises, but who does not, in fact, possess such authority. Id. at 186-89. A third party's consent is valid if "the facts available to the officer at the moment [would] warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." Id. at 188. The State has the burden to prove apparent authority, id. at 181, and this burden is not met if, when faced with an ambiguous situation, the officer nevertheless proceeds without making any further inquiry. Id. at 186-89. If the officers do not learn enough and if the circumstances fail to clarify whether the property is subject to common authority by the consent-giver, then the warrantless search is unlawful. Id.

It is undisputed that A.S. was Limon, Sr.'s nephew and Limon's cousin. The testimony presented by the State at the suppression hearing does not provide any information regarding whether A.S. lived at the Limon residence or was just visiting. Officer Perez testified that he did not inquire as to A.S.'s use of or control over the property. Based on this lack of evidence, it is clear that the State failed to demonstrate that A.S. had actual authority to consent to the officers' entry into the home. Cf. Hubert, 2010 WL 2077166, at *5-6 (holding that the evidence was sufficient to justify an implied finding that the defendant's grandfather was the exclusive owner of the home and validly consented to a search of the defendant's bedroom). Moreover, consent to enter a home is different than consent to search the premises, and there was no evidence presented that A.S. had actual authority to allow the officers to proceed to Limon's bedroom for a search of the room. See Alberti v. State, 495 S.W.2d 236, 237 (Tex.Crim.App.1973) ("[A]n invitation to officers to enter a residence ordinarily cannot be construed as an invitation or consent to search."). Thus, the warrantless entry can only be sustained if the facts available would warrant a person of reasonable caution in the belief that A.S. had authority over the premises under the doctrine of apparent authority.

Officer Perez testified at the suppression hearing that he knew that A.S. was not an adult, that he believed A.S. was thirteen or fourteen years old, and knew that the house belonged to Limon, Sr., an adult. Officer Perez admitted that he did not ask A.S. if he lived at the house, if he had possession or control of the house, how old he was, or what grade he attended at school. Rather, he told A.S. he was a police officer there to investigate a shooting and then asked for permission to enter.

Limon argued below and argues to this Court that the evidence in this case was obtained and admitted at trial in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. See U.S. Const. amend. IV, XIV. Because the error below was constitutional, we apply the harmless error analysis under Texas Rule of Appellate Procedure 44.2(a). See Hernandez v. State, 60 S.W.3d 106, 108 (Tex.Crim.App.2001). Rule 44.2(a)

provides that "[i]f the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Tex.R.App. P. 44.2(a). While this rule does not explicitly place the burden on the State to show harmless error, "the 'default' is to reverse unless harmlessness is shown. Thus, if neither party does anything, the case will be reversed. This requires the State to come forward with reasons why the appellate court should find the error harmless." Merritt v. State, 982 S.W.2d 634, 637 (Tex.App.-Houston [1st Dist.] 1998, no pet.) (citing Arnold v. State, 786 S.W.2d 295, 298 (Tex.Crim.App.1990) (placing the burden on the State to show harmless error under former rule 81(b)(2), the predecessor to rule 44.2(a)); see also Davis v. State, 195 S.W.3d 311, 317 (Tex.App.-Houston [14th Dist.] 2006, no pet.). The State has not filed a brief in this case and has provided us with no argument or any reason why the constitutional error in this case was harmless beyond a reasonable doubt. Accordingly, we reverse and remand for a new trial.

Conclusion: For all the foregoing reasons, we reverse the trial court's judgment and remand for further proceedings.

In the Matter of D.H., 306 S.W.3d 955, 2010 WL 744117, Juvenile Law Newsletter ¶ 10-2-2 (Tex.App.-Austin, 3/5/10).

DOG SNIFF OF STUDENT'S PROPERTY IN CLASS ROOM WHILE STUDENTS ASKED TO WAIT OUTSIDE WAS CONSIDERED CONSTITUTIONAL.

Facts: In October 2006, officers from the Austin Police Department arrived at Reagan High School to conduct a canine search of the school. D.H., who was sixteen at the time, was a student at the school. Assistant Principal Mike Perez led the officers through the school, allowing the dog to sniff several classrooms on each floor of each building. For every inspection, Perez entered the classroom and informed the teacher of the sweep. The students were then instructed to leave their property in the classroom and wait in the hall, and the police entered and allowed the dog to sniff the items left in the room. The students were not allowed to refuse the instructions or to take their items with them. When the officers searched D.H.'s classroom, the dog reacted to her backpack. The officers called D.H. into the classroom, read D.H. her rights, and searched her bag, where they found a small bag of marihuana.

On appeal, D.H. contends that (1) her backpack was seized for Fourth Amendment purposes when she was required to leave it behind in her classroom while she went into the hallway as instructed, and (2) because neither the school nor the officers had reason to believe she was engaged in criminal activity or in violation of school rules, they lacked reasonable suspicion to seize her bag. For those reasons, she argues that the seizure of her backpack was a violation of her constitutional rights and that the marihuana, as the fruit of an improper seizure, should have been suppressed. See Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (holding that evidence obtained by improper search or seizure is inadmissible).

Held: Affirmed

Opinion: D.H. does not contend that the dog's inspection of her bag was a search for Fourth Amendment purposes. Instead, she argues that requiring her to leave her backpack in the classroom while she left the room was an unconstitutional seizure of her property and that she otherwise would have carried it on her person, where the dog would not have been permitted to sniff it under Horton v. Goose Creek Independent School District, 690 F.2d 470, 479 (5th Cir.1982). We need not decide whether a seizure of D.H.'s property occurred, however, because assuming a seizure occurred, see United States v. Jacobsen, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (seizure occurs if there is "meaningful interference" with individual's possessory interests in property), the school's actions were reasonable and thus constitutionally permissible under the standards applied in a public-school setting.

Students have a lessened expectation of privacy under the Fourth Amendment. Id.; see Morse, 551 U.S. at 396-97, 127 S.Ct. 2618 (stating that students' constitutional rights must be considered in light of public-school setting and are not automatically coextensive with those of adults in other settings). "Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." Earls, 536 U.S. at 831, 122 S.Ct. 2559. We " 'cannot disregard the schools' custodial and tutelary responsibility for children,' " and must view the school environment as a "backdrop for the analysis of the privacy interest at stake and the reasonableness of" the school's decisions. Id. at 830, 122 S.Ct. 2559 (quoting Acton, 515 U.S. at 656, 115 S.Ct. 2386). D.H. certainly had a legitimate privacy interest in the contents of her backpack. See T.L.O., 469 U.S. at 337-38, 105 S.Ct. 733. However, considering that D.H.'s backpack was not opened, nor were its contents examined, until after the dog alerted on it, and bearing in mind the control and supervision that school authorities must properly exercise in their roles as guardians and tutors of their students, see Earls, 536 U.S. at 830, 122 S.Ct. 2559, we hold that restricting D.H.'s ability to take her backpack with her implicated a relatively minor privacy interest.

We next consider the nature of the alleged infringement on her privacy interests. On the day in question, before the police officers and drug dog entered the classroom, Perez went in, spoke to the teacher, and asked the students to step into the hallway. The students waited outside the classroom while the canine inspection took place, and there was no risk that another student might steal anything from or rummage through D.H.'s bag. The students themselves were not sniffed and they were not in the room while the dog sniffed their belongings. Only Perez, the dog, and the two officers were present when the dog alerted on D.H.'s backpack. Thus, D.H. was not exposed to embarrassment or scrutiny by her classmates while the inspection was taking place. She was not required to open her bag in front of anyone until after the dog alerted, and then the contents of the bag were only seen by Perez and the police officers. Given the method employed in conducting the canine inspection and the minimally intrusive nature of the inspection, we hold that the invasion of D.H.'s privacy was not significant. See id. at 834, 122 S.Ct. 2559.

Finally, we must weigh the invasion of D.H.'s rights against "the nature and immediacy of the government's concerns and the efficacy" of the seizure in meeting those concerns, keeping in mind the context in which the seizure took place. See id. There is an important "governmental concern in preventing drug use by schoolchildren," and the drug problem seems to be worsening. Id. The Supreme Court has held that "deterring drug use by schoolchildren is an 'important-

indeed, perhaps compelling' interest," Morse, 551 U.S. at 407, 127 S.Ct. 2618 (quoting Acton, 515 U.S. at 661, 115 S.Ct. 2386), and characterized it as a "nationwide drug epidemic [that] makes the war against drugs a pressing concern in every school," Earls, 536 U.S. at 834, 122 S.Ct. 2559. Considering the low level of intrusion on D.H.'s limited privacy rights and the evidence about the drug problem at Reagan High, we hold that the seizure effectively addressed the problem of student drug use and served the important governmental interest in protecting the students' safety and health. See id. at 834-88, 122 S.Ct. 2559.

Conclusion: D.H. brought her backpack into a public school, where she was required to temporarily surrender its possession and leave it in the classroom to be sniffed by a dog. Given D.H.'s reduced expectation of privacy, the low level of intrusion involved in the dog's inspection of the airspace surrounding her backpack, the limited information gathered, Reagan High's interest in combating drug abuse, and its tutelary and custodial responsibilities for its students, we hold that the detention of her backpack was reasonable and thus constitutionally permissible. See Jacobsen, 466 U.S. at 125-26, 104 S.Ct. 1652.FN3 We overrule D.H.'s issues and affirm the trial court's judgment.

Ford v. State, 305 S.W.3d 530, PD-1753-08, 2009 WL 3365661, Juvenile Law Newsletter ¶ 10-1-1 (Tex.Crim.App., 10/21/09).

IN A MOTION TO SUPPRESS, A TRIAL JUDGE CAN BASE HIS PRE-TRIAL RULING ON THE CONTENTS OF AN UNSWORN POLICE REPORT.

Facts: Appellant filed a pre-trial motion to suppress evidence concerning his arrest, alleging that Deputy Halcomb searched his truck without a warrant or probable cause. Appellant testified at the hearing for the limited purpose of showing that his arrest was made without a warrant. The prosecutor did not cross-examine appellant, and he offered no live testimony. Instead, the prosecutor offered only Deputy Halcomb's unsigned, undated, and unsworn police report and gave a verbal summary of its contents to support his position that the officer had probable cause to search appellant's truck. Appellant objected to the admission of the report (1) as a violation of the hearsay rule; (2) because there was no sponsoring witness; and (3) as a violation of his right to confrontation under the Sixth Amendment. The prosecutor responded that hearsay is admissible in a suppression hearing; a suppression hearing deals only with preliminary issues; and the confrontation right attaches only at trial. The trial judge overruled appellant's objections and admitted the report into evidence. Based upon the information in that report, he denied appellant's motion to suppress. The trial judge made findings of fact and conclusions of law, the most important of which reads,

> That the report submitted by Deputy Halcomb and entered into evidence is credible, and the Court accepts as true the submission of his offense report regarding his observations of the defendant and his conversations with the defendant.

Following the denial of his motion to suppress, appellant pled guilty to possession of less than two ounces of marihuana. The trial judge deferred the adjudication of his guilt and placed him on community supervision for twelve months.

On appeal, appellant argued that the trial judge erred in denying his motion to suppress because the arrest report was inadmissible. The court of appeals agreed, holding that in a suppression hearing, Texas Code of Criminal Procedure article 28.01, § 1(6), permits the trial court to determine the merits of a motion based on the motion itself, upon competing affidavits, or upon live testimony. The court of appeals concluded that only those three specific methods are permissible.

In this case, the State failed to accompany its proffered documentary evidence with either some form of affidavit or live, sponsoring witness testimony. It is not enough for the State to ignore the requirements of Article 28.01(6), and merely read a police report to the trial court and then tender it-unsigned, undated, and unverified-as was done here. Because the arrest report was the only evidence the State offered to establish probable cause to search appellant's truck, the court of appeals concluded that there was no basis for the trial court to deny Appellant's motion to suppress.

Held: Reversed Court of Appeals, and affirmed County Court's judgment (Evidence was sufficient, denying motion to suppress affirmed).

Opinion: A hearing on a pre-trial motion to suppress is a specific application of Rule 104(a) of the Texas Rules of Evidence. This rule, based on longstanding common-law principles, explicitly states that a trial judge is not bound by the rules of evidence in resolving questions of admissibil-ity of evidence, regardless of whether those questions are determined in a pre-trial hearing or at some time during trial. Both common law principles and Rule 104 provide the trial judge with an important "gatekeeping" role. They ensure that all evidence admitted at trial is relevant, reliable, and admissible under the pertinent legal principles. Although the present case does not deal with expert or scientific evidence, the underlying goal of Rule 104(a) is the same in a motion to suppress evidence: The trial judge makes a legal ruling to admit or exclude evidence based upon the relevance and reliability of the factual information submitted by the parties. The question in this case, then, is whether the trial judge used sufficiently reliable information, in the form of the unsworn offense report, when he ruled upon the merits of appellant's motion to suppress.

The court of appeals' holding turned on its reading of art. 28.01, § 1(6), of the Texas Rules of Criminal Procedure. That rule reads as follows:

(6) Motions to suppress evidence-When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court.

In Hicks v. State, we reiterated our "plain language" approach to statutory analysis:
In Boykin v. State, we held that " '[w]here the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.' " Therefore, when interpreting a statute, "we ordinarily give effect to that plain meaning." But we have acknowledged an exception to this rule: "where application of a statute's plain language would lead to absurd consequences that the Legislature could not possibly have intended, we should not apply the language literally." "If the plain language of a statute

would lead to absurd results, or if the language is not plain but rather ambiguous," then it is appropriate to seek the aid of extra textual factors to develop a reasonable interpretation of a statute.

Thus, we must look first to the specific words in art. 28.01 to determine its meaning. The statutory rule states that a motion to suppress "may" be resolved by considering different possible means of acquiring information. The rule does not state that the motion "shall be" or "must be" resolved by these specific means. There is no suggestion in the plain language of the rule that this is an exclusive list. Instead, the statutory language supports the notion that a motion to sup-press is an informal hearing in which the trial judge, in his discretion, may use different types of information, conveyed in different ways, to resolve the contested factual or legal issues. The State argues that the structure and language of the statute points to the conclusion that the legislature intended to give the trial court latitude to hold a "non-traditional, informal hearing that need not necessarily include witnesses, testimony, or even formal evidence."

Because the legislature carefully used the term "may" throughout art. 28.01 when it intended discretionary acts and procedures and used the terms "must" or "shall" when it intended mandatory acts or procedure, we conclude that the legislature intended to establish a discretionary and informal procedure for the trial court to conduct suppression hearings under art. 28.01, § 1(6). The legislature suggested, but did not require, several different methods to determine the merits of a motion to suppress, including information and facts set out in the motion itself, affidavits, or oral testimony. In sum, under the Boykin "plain language" analysis, we conclude that art. 28.01 means what it says when it uses the permissive term "may": A trial judge may use his discretion in deciding what type of information he considers appropriate and reliable in making his pre-trial ruling. We conclude that the trial judge did not abuse his discretion in relying upon an unsworn hearsay document. Deputy Halcomb's offense report could have been, but was not required to be, accompanied by an affidavit stating that "this is a true and accurate copy of my offense report."

Finally, we must determine whether the trial court abused his discretion by relying upon this particular unsworn hearsay document. If the source and content of the hearsay document were unreliable, then the trial court did not adequately perform his "gatekeeper" function. In this case, we conclude that Officer Halcomb's offense report contains sufficient indicia of reliability to serve as the factual basis for the trial court's ruling. The offense report includes appellant's name, correct offense date, and specific information that coincides with the same basic information to which appellant testified at the hearing. Furthermore, it is a criminal offense to file a false police report. Although the trial judge was clearly not required to believe the information contained within Deputy Halcomb's report, the document itself is a government record and of a type that a trial judge may consider reliable in a motion to suppress hearing, even though it is hearsay and is not admissible at a criminal trial on the merits.

In United States v. Matlock, the Supreme Court held that in a suppression hearing "the judge should receive the evidence and give it such weight as his judgment and experience counsel." And if there is nothing in the record to "raise serious doubts about the truthfulness of the statements themselves," then there is "no apparent reason for the judge to distrust the evidence."

Several federal cases have also held that a trial court may rely upon unsworn documentary evidence in a motion to suppress hearing.

Art. 28.01, § 1(6), comports with Matlock. The trial court may conduct the hearing based on motions, affidavits or testimony, but there is nothing in the statute to indicate that it must. It is merely an indication that such hearings are informal and need not be full-blown adversary hearings conducted in accord with the rules of evidence.

Significantly, appellant did not argue that Deputy Halcomb's offense report was, in any way, unauthentic, inaccurate, unreliable, or lacking in credibility. Appellant did not contest the accuracy of the facts within that offense report; he argued only that the report could not be considered without the shepherding wings of a sponsoring witness or affidavit. Had appellant complained about the reliability, accuracy, or sufficiency of the information supporting the trial judge's ultimate ruling on the motion to suppress, this would be a very different case. The prosecutor was perfectly willing to sponsor Deputy Halcomb's testimony if he arrived in time for the hearing, but the trial judge, hearing no complaint about the accuracy of the report, did not wait. He was prepared to rule on the motion based on the deputy's offense report. Although it is better practice to produce the witness or attach the documentary evidence to an affidavit, art. 28.01, § 1(6), did not create a "best evidence" rule that mandates such a procedure in a motion to suppress hearing. Thus, we cannot say that the trial judge abused his discretion in considering and relying upon Deputy Halcomb's offense report, which he found, in the absence of any objection to its specific contents, to be credible and reliable.

Conclusion: The Court of Appeals was mistaken in concluding that art. 28.01, § 1(6), mandates that all information considered by a trial judge must be accompanied by affidavit or testimony. Accordingly, we reverse the judgment of the court of appeals and affirm the trial court's judgment.

SEX OFFENDER REGISTRATION—

In the Matter of T.E., MEMORANDUM, No. 03-09-00148-CV, WL 4053705, Juvenile Law Newsletter ¶ 10-4-8 (Tex.App.-Austin, 10/14/10).

IN SEX OFFENDER REGISTRATION HEARING, IT IS THE JUVENILE'S BURDEN TO SHOW THAT THE PROTECTION OF THE PUBLIC WOULD NOT BE INCREASED BY HIS REGISTRATION.

Facts: In 2003, at age 13, T.E. was found guilty of engaging in delinquent conduct, *see id.* § 51.03 (West Supp.2009)--specifically, committing two acts of aggravated sexual assault of a child. *See* Tex. Penal Code Ann. § 22.021 (West Supp.2009). The court placed T.E. on probation in his mother's custody for one year. T.E.'s offenses required him to register as a sex offender, *see* Tex.Crim. Proc.Code Ann. art. 62.001(5) (West Supp.2009), but as a **juvenile** he was able to file a motion to excuse or defer registration. *See id.* art. 62.351 (West Supp.2009).

The trial court granted the motion and allowed T.E. to defer registration pending his completion of a treatment program. *See id.* art. 62.352(b)(1) (West 2006).

Approximately ten months later, the State filed a Motion to Modify Disposition alleging that T.E. had violated various conditions of his probation. The court found the State's allegations to be true. Accordingly, the court revoked T.E.'s probation and placed T.E. in the custody of the Texas Youth Commission (TYC) for an indeterminate period of time. [FN1]

FN1. T.E. appealed his committal to TYC, and we affirmed it. *See In re T.E.*, No. 03-04-00590-CV, 2005 Tex.App. LEXIS 5266 (Tex.App.--Austin July 7, 2005, no pet.) (mem.op.).

In February 2009, shortly before T.E. was to be released from TYC custody, the State filed a motion to require sex-offender registration. *See id.* art. 62.352(c) (court retains power to order sex-offender registration it previously deferred). The court held a hearing on the motion at which the State called two witnesses: Amy Smith-Rocha, who had been T.E.'s probation officer, and Leslie Moreau, who was T.E.'s psychotherapist between August 2008 and February 2009. T.E. called no witnesses. At the conclusion of the hearing, the court ordered T.E. to register publicly as a sex offender. *See id.* art. 62.051 (West Supp.2009). T.E. appeals that order.

Held: Affirmed

Memorandum Opinion: T.E. argues that the trial court abused its discretion by requiring him to register as a sex offender because (1) there was no evidence that his registration would protect the public and (2) there was clear evidence that his registration would harm him personally. T.E. is correct that a court must balance the public's interest against the juvenile's when deciding whether to exempt the juvenile from registering as a sex offender. Article 62.352(a) of the code of criminal procedure provides:

The court shall enter an order exempting a respondent from registration under this chapter if the court determines:
(1) that the protection of the public would not be increased by registration of the respondent under this chapter; or
(2) that any potential increase in protection of the public resulting from registration of the respondent is clearly outweighed by the anticipated substantial harm to the respondent and the respondent's family that would result from registration under this chapter. *Id.* art. 62.352(a) (West 2006).

The trial court recognized that T.E. would be harmed by registering as a sex offender, but it determined that his harm would not clearly outweigh the public interest in his registering.

We hold that this determination was supported by the evidence presented at the hearing. Leslie Moreau, T.E.'s therapist, testified that T.E. posed a high risk to the community. She testified that T.E. had actually regressed in the months leading up to his release. She based her opinion on T.E.'s behavior both in and out of the therapeutic setting. Amy Smith-Rocha, T.E.'s former probation officer, testified that T.E. missed approximately half of his scheduled therapy sessions while on probation. She also testified that T.E. had confessed to his brothers that he committed a sexual assault other than the one for which he was convicted. Finally, the State

submitted thousands of pages of TYC records and psychological evaluations that documented T.E.'s history of behavioral and psychological problems.

T.E. argues that even if the evidence showed he was a danger to the public, the State presented no evidence that his registration would actually decrease the danger he represented. It was not the State's burden, however, to show that registration would protect the public; rather, it was T.E.'s burden to show that it would not. *See id.* art. 62.351(b). T.E. presented no evidence on the matter and thus failed to carry his burden.

Conclusion: In sum, viewing all of the evidence in the light most favorable to the trial court's order, we hold that the court did not abuse its discretion by requiring T.E. to register as a sex offender. For the reasons stated above, we affirm the order requiring T.E. to register as a sex offender.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—

Maldonado v. State, MEMORANDUM, No. 07-09-00168-CR, 2010 WL 840814, Juvenile Law Newsletter ¶ 10-2-6 (Tex.App.-Amarillo, 3/12/10).

IN A CERTIFICATION AND TRANSFER HEARING, THE FAILURE TO SERVE SUMMONS ON JUVENILE IN A TIMELY MANNER(TWO DAYS PRIOR TO HEARING), DEPRIVED THE JUVENILE COURT OF ITS JURISDICTION TO TRANSFER JUVENILE CASE TO ADULT DISTRICT COURT.

Facts: On November 7, 2007, the State filed a petition alleging that appellant had engaged in delinquent conduct. Prior to any adjudication of the allegations against appellant, the State filed a motion requesting that the juvenile court waive jurisdiction of appellant's case and transfer the matter to the 69th District Court of Dallam County, Texas. The State then issued a summons for appellant's parents, Dina Maldonado and Simon Maldonado, to appear on January 24, 2008 at 2:30 p.m. when the court would consider the matter of the discretionary transfer of appellant's juvenile case to the district court. The clerk's record reflects that Dina Maldonado was not served with the summons until January 29, 2008 at 4:26 p.m., some five days after the hearing. Appellant and his father, Simon Maldonado, were served at 2:21 p.m. on January 24, 2008, some nine minutes before the hearing. On January 24, 2008, the juvenile court entered an order transferring the matter to the district court for trial as an adult. Subsequently, appellant entered a plea of guilty and was granted deferred adjudication community supervision for a period of 10 years. Appellant timely filed this appeal.

Held: Reversed and remanded.

Memorandum Opinion: A juvenile proceeding is governed by Title 3 of the Texas Family Code. See Tex. Fam.Code Ann. tit. 3 (Vernon 2007). A voluntary transfer of a case from a juvenile court to a district court is governed by section 54.02. Section 54.02(b) requires that the

notice provisions found in other sections of the Code must be satisfied. Specifically, the requirements of section 53.07 must be met. See § 54.02(b). This provision requires that a summons be served on a person at least two days prior to the hearing in question. See § 53.07(a). The record reflects that none of the parties required to be served in the underlying juvenile action, prior to the transfer to district court, were served in a timely manner. The State has confessed this error in its letter brief filed with this Court. As a result of the failure to serve the summons in question in a timely manner, the juvenile court was deprived of its jurisdiction to transfer this matter to the district court and, therefore, the district court never acquired jurisdiction over appellant. See Carlson v. State, 151 S.W.3d 643, 646 (Tex.App.-Eastland 2004, no pet.); Alaniz v. State, 2 S.W.3d 451, 452 (Tex.App.-San Antonio 1999, no pet.). We sustain appellant's second issue.

Conclusion: Because the juvenile court did not have jurisdiction to transfer the case to the district court, we reverse the conviction of appellant and remand this matter to the juvenile court for further proceedings. Because of our resolution of appellant's second issue, we need not address appellant's first issue concerning the failure to record the transfer hearing.

In re B.T., 323 S.W.3d 158, 54 Tex. Sup. Ct. J. 38, 2010 WL 3813367, Juvenile Law Newsletter ¶ 10-4-6 (Tex., 10/1/10).

IN DISCRETIONARY TRANSFER HEARING, JUVENILE COURT ABUSED ITS DISCRETION IN PROCEEDING WITHOUT A COMPLETE DIAGNOSTIC STUDY.

Facts: B.T. is a 17-year-old charged with murdering his teacher. In 2009, the State filed a petition for discretionary transfer urging the juvenile court to order B.T. tried as an adult. Under Family Code Section 54.02(a), the "juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if" certain conditions are met. Section 54.02(a)(3) authorizes transfer to criminal court if, among other requirements, the juvenile court determines "after a full investigation and a hearing" that there is probable cause to believe the child committed the alleged offense and "because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." Section 54.02(d) provides that "[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." Section 54.02(f) provides that the juvenile court, in making the transfer decision, shall consider several factors, including "the sophistication and maturity of the child," "the record and previous history of the child," and "the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court."

In accordance with the Family Code, the juvenile court commissioned Dr. Emily Fallis to perform a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense, and to assess his background, his sophistication and maturity, his record and previous history, the prospects of adequate protection of the public, and the likelihood of his rehabilitation by use of procedures, services, and facilities

currently available to the juvenile court. Dr. Fallis's preliminary evaluation concluded B.T. suffered from a mental disease or defect that substantially impaired his capacity to understand the charges against him and the proceedings in juvenile court, and to assist in his own defense. Dr. Fallis stated she would "not proffer an opinion regarding [B.T.'s] capacity to be adjudicated as an adult until he is fit to proceed." The report recommended that B.T. receive inpatient psychiatric treatment "in order to help him attain a minimal level of fitness to proceed" and be reevaluated with regard to the State's transfer motion. Dr. Fallis therefore submitted a report she specifically stated was incomplete. Based on Dr. Fallis's recommendations, the juvenile court committed B.T. to Vernon State Hospital for 90 days, where he underwent treatment and counseling until he was deemed fit to proceed by Dr. Stacey Shipley. The juvenile court then set B.T.'s transfer hearing for May 13, 2010, even though Dr. Fallis's report remained incomplete.

B.T. and the State *jointly* urged the court to delay the hearing to await completion of the diagnostic study. The court refused, believing it had sufficient information to proceed under Section 54.02(d). At the time, the juvenile court possessed Dr. Fallis's partial report, medical records from Vernon State Hospital by Dr. Shipley, and an evaluation of B.T. by Dr. Paul Andrews from an unrelated juvenile proceeding in 2007. B.T.'s counsel objected that the materials merely addressed B.T.'s fitness to proceed and did not comprise the "complete diagnostic study" required by statute. The court ignored this objection, explaining: "I think I've got before me so much information of an evaluative nature, psychological evaluations and that sort of thing, that I think I've got before me what I would consider a complete diagnostic study." B.T. filed a motion requesting the court reconsider its ruling and await the complete diagnostic study. The court denied this motion on May 10, 2010.

B.T. sought mandamus relief and requested an emergency stay from the court of appeals. The court of appeals stayed the juvenile-court proceedings but ultimately denied mandamus relief. B .T. now seeks relief from this Court.

Our mandamus-review standards are well settled. Mandamus relief is proper to correct a clear abuse of discretion when there is "no adequate remedy by appeal." *In Re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex.2004) (citations omitted). "A trial court has no 'discretion' in determining what the law is or applying the law to the facts." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992). "Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Id.* (citations omitted).

B.T. wants us to direct the juvenile court to (1) vacate its May 3 order that the complete diagnostic report is unnecessary; (2) vacate its May 10 order denying B.T.'s Motion for Reconsideration; (3) enjoin any attempt to conduct a transfer hearing without the finished report. This Court has already stayed the transfer hearing pending our decision on mandamus relief.

B.T. argues the juvenile court abused its discretion when it proceeded without the requisite study. Interestingly, the State does not oppose mandamus relief, sharing B.T.'s concern that a complete assessment has not been completed. The State notes "[t]he trial court appears to have abused its discretion in not allowing completion of a mandatory diagnostic study required before [B.T.] can stand trial as an adult for stabbing his teacher to death." The State is understandably

risk-averse: "Given the severity of the charge, the State has an interest in assuring that the law is complied with before a decision is made that Relator should stand trial as an adult."

The primary issue presented is whether the juvenile court erred in concluding the information it already possessed was sufficient, despite Dr. Fallis's caution that further evaluation was required to finish the report.

Held: Writ of Mandamus Conditionally Granted

Opinion: Based on a plain reading of Section 54.02(d), the juvenile court is required to "order and obtain" a "complete diagnostic study" before the hearing. Neither the Legislature, this Court, nor the Court of Criminal Appeals has defined "complete diagnostic study" for purposes of Section 54.02. One court of appeals has described a complete diagnostic study as one that "bears upon the maturity and sophistication of the child and relates to the questions of culpability, responsibility for conduct, and ability to waive rights intelligently and assist in the preparation of a defense." *L.M. v. State*, 618 S.W.2d 808, 811 (Tex.App.-Houston [1st Dist.] 1981, writ ref'd n.r.e.) (citations omitted). It is the "qualitative content of a diagnostic study, rather than a mere quantitative 'checklist' of included items, [that] is the paramount concern." *Id.* at 811-12.

Some courts of appeals have held a trial court did not abuse its discretion where it relied upon materials that did not clearly constitute a complete diagnostic report, but instead contained a variety of psychological evaluations and records. *See I.L. v. State*, 577 S.W.2d 375, 376 (Tex.Civ.App.-Austin 1979, writ ref'd n.r.e.) (study included an intelligence test completed one year prior to hearing, a social evaluation and investigation, monthly progress reports during a one-year stay at the juvenile detention center, a psychiatric examination conducted less than one month prior to the hearing, and testimony from an examining psychiatrist at the hearing that "no further testing was needed and that a complete diagnostic study had been made"); *R.K.A. v. State*, 553 S.W.2d 781, 783 (Tex.Civ.App.-Fort Worth 1977, no writ) (study that was "very comprehensive" included reports from three doctors, the supervisor of intake at the juvenile detention center, and a probation officer, and an evaluation prepared from daily observations by a juvenile department program director and a staff member); *Vasquez v. State*, No. 03-99-00664-CR, 2000 WL 795328, at *1 (Tex.App.-Austin June 22, 2000, no pet.) (study included "a juvenile probation officer's summary, a psychological evaluation, a psychiatric evaluation, a physical examination, and ... an elementary school record"); *L.M.*, 618 S.W.2d at 811-12 (psychological testing for a study was ordered and obtained by the trial judge but not entered into evidence due to the juvenile's objections).

B.T.'s case is distinguishable from these cases. While a trial court has discretion to determine whether a diagnostic study is in fact complete, no appellate court has upheld a case where the commissioned report itself declares it is insufficient. The State candidly concedes the awkwardness: "it is troubling to the State that the record as it currently stands contains evidence that the only § 54.02(d) diagnostic study ordered by Judge Getz states on its face that it was not completed due to Relator's unfitness to proceed ."

The three fitness reports the juvenile court deemed sufficient under Section 54.02(d) contain detailed information regarding B.T.'s background, his treatment, his history of behavioral

issues, the various evaluation and testing he has undergone, his diagnoses, and his understanding of the alleged murder and the surrounding circumstances. Each report, however, deals solely with the matter of B.T.'s fitness to proceed. A juvenile is unfit to proceed if "as a result of mental illness or mental retardation[, he] lacks capacity to understand the proceedings in juvenile court or to assist in [his] own defense." TEX. FAM.CODE § 55.31(a). After a motion to determine fitness to proceed is filed, the court may, in making its determination, consider the motion, supporting documents, professional statements of counsel, and witness testimony, and also make its own observation of the child. *Id.* at (b). In contrast, the "complete diagnostic study" for a transfer hearing calls for a far more comprehensive analysis, as described above. The juvenile court here violated Section 54.02(d) by substituting the Vernon State Hospital report and Dr. Andrews's two-year-old report for a reevaluation and complete report by Dr. Fallis.

B.T. has no plausible appellate remedy. While a "defendant may appeal an order of a juvenile court certifying the defendant to stand trial as an adult and transferring the defendant to a criminal court under Section 54.02," TEX. CODE CRIM. PROC. art. 44.47(a), any such appeal-a criminal matter governed by the Code of Criminal Procedure and the Texas Rules of Appellate Procedure, *id.* at (c)--must be joined with the defendant's appeal of any criminal--court conviction or order of deferred adjudication, *id.* at (b). That is, B.T. can appeal his transfer--but only after he has been convicted (or placed on deferred adjudication) in adult court. By this time, 17-year-old B.T. likely will have turned 18, and juvenile adjudication may be unavailable. *See In re N.J.A .*, 997 S.W.2d 554, 557 (Tex.1999). The State notes candidly the potential for wasted judicial resources:

Absent a finished report from Dr. Fallis ... the State believes that Relator might have a meritorious claim on appeal from any conviction as an adult in this case. A claim ... could result in having [to] start the entire certification process all over again.... Allowing this case to remain infected with potential reversible error when an order from the Court could inoculate the proceedings from that error seems to run contrary to the intent of the Family Code and the interest of justice. The State would certainly have no objection should the Court conclude that the purpose and intent of the law would be better served by having Judge Getz order a more complete diagnostic study.

The Family Code by its terms requires that a complete diagnostic study be requested *and* received. The juvenile court clearly abused its discretion in denying B.T.'s motion to delay the transfer hearing until Dr. Fallis completed her facially incomplete report.

Conclusion: Accordingly, without hearing oral argument, we conditionally grant the writ of mandamus and direct the juvenile court to vacate (1) its May 3 order denying the parties' joint request to delay the transfer hearing until Dr. Fallis finalizes her report, and (2) its May 10 order denying B.T.'s motion for reconsideration. Tex.R.App. P. 52.8(c). We are confident the trial court will comply, and the writ will issue only if it does not.

Pipkin v. State, No. 14-09-00018-CR, --- S.W.3d ----, 2010 WL 4361388, Juvenile Law Newsletter ¶ 10-4-11A (Tex.App.-Hous. (14 Dist.), 11/4/10).

FAILURE TO OBJECT TO COMPLETENESS OF DIAGNOSTIC STUDY IN DISCRETIONARY TRANSFER HEARING WAIVES ANY ERROR IN ITS COMPLETENESS.

Facts: The State filed a petition in juvenile court, alleging that appellant, who was fifteen years old at the time, had engaged in delinquent conduct. According to the petition, appellant committed aggravated robbery with a deadly weapon. The State later sought to amend its petition and moved the juvenile court to waive its jurisdiction and certify appellant to stand trial as an adult in criminal district court pursuant to section 54.02 of the Texas Family Code.

The juvenile court granted the State's motion for a certification hearing. By written order dated April 16, 2008, the juvenile court ordered that a "complete diagnostic study, social evaluation, and full investigation" be conducted on appellant, his circumstances, and the circumstances surrounding the offense. The juvenile court ordered the chief juvenile probation officer to present the study at the certification hearing. The State filed a motion requesting the juvenile court to order a complete psychiatric and psychological examination of appellant. The record contains an order dated April 23, 2008, in which the juvenile court granted the State's motion requesting a psychiatric and psychological evaluation.

At the certification hearing, the juvenile court took judicial notice of the contents of appellant's case file. The State sought to tender five State's exhibits into evidence. Appellant's counsel responded, "Your Honor, I think I have had an opportunity to examine these documents, and I have no objection." The juvenile court admitted the exhibits. One of the exhibits was a three-page report, entitled "Juvenile Probation Certification Report," that was compiled by a juvenile probation officer. Attached to the report were copies of appellant's birth certificate, social security card, and results of a physical examination. As relevant to our review, a section of the report, entitled "Testing/Physical Examination," contains the following two sentences pertaining to psychological and psychiatric evaluations:

Certification Psychological Evaluation was waived on April 23, 2008[,] by the juvenile's attorney, Daniel Kundiger.
Certification Psychiatric Evaluation was waived on April 23, 2008[,] by the juvenile's attorney, Daniel Kundiger.

The State presented testimony from a single witness, a police officer, who testified without objection about his investigation of the charged offense. According to the officer's testimony, appellant entered a retail store, displayed a handgun, demanded money from an employee, and fled with $2,517.57. Officers located appellant after the incident with assistance from witnesses. Officers recovered a bag containing $2,517.57 and the handgun from a location where appellant had discarded the items. The officer testified that appellant gave a written statement to the magistrate in which appellant admitted committing the offense and admitted purchasing the handgun one month before the offense. Officers learned that appellant had been documented in police records as being affiliated with a criminal street gang. Appellant's mother and grandfather testified, requesting that the juvenile court refuse to certify appellant as an adult.

By written order, the juvenile court waived its jurisdiction and certified appellant to stand trial as an adult. The juvenile court's order is set forth in relevant part:

On the 7th of May 2008, a hearing was held in the above styled and numbered cause number under section 54.02 of the Family Code, on the issue of waiver of jurisdiction. Prior thereto the Court had ordered and obtained a diagnostic study, social evaluation, a full investigation of the child, HIS circumstances, and the circumstances of the alleged AGGRAVATED ROBBERY/DEADLY WEAPON....

The juvenile court found, "[a]fter full investigation," that appellant is charged with the felony offense of aggravated robbery with a deadly weapon. The juvenile court found that appellant was fourteen years or older at the time of the offense and found probable cause to believe that appellant committed the alleged offense. The juvenile court transferred appellant's case to the criminal district court, noting the serious nature of the offense and the welfare of the community. In making its determination, the juvenile court considered the following factors: the alleged offense was committed against a person, appellant's sophistication and maturity, the record and appellant's previous history, the adequate protection of the public, and the likelihood of rehabilitation by resources available to the juvenile court.

Appellant was charged by indictment with the felony offense of aggravated robbery. In the district court, appellant waived his constitutional rights and judicially confessed to committing the charged offense without an agreed recommendation as to punishment. The district court found appellant guilty of the charged offense. After a pre-sentence investigation, the district court assessed punishment at twenty years' confinement.

In appellant's first issue, he claims the juvenile court failed to consider a complete diagnostic study as required by section 54.02(d) of the Texas Family Code [FN4] because the diagnostic study presented to the juvenile court did not contain the psychological and psychiatric evaluations previously ordered by the juvenile court.

FN4. Unless otherwise specified, all references to a "section" will be to the Texas Family Code.

Held: Affirmed

Opinion: A juvenile court may waive its exclusive original jurisdiction and transfer a juvenile to a criminal district court for criminal proceedings if (1) the child is alleged to have committed a felony, (2) the child meets one of two age requirements, and (3) after a full investigation and hearing, the juvenile court determines that probable cause exists to believe the juvenile committed the alleged offense and that the community's welfare requires criminal proceedings because of the serious nature of the offense or the child's background. *See* TEX. FAM.CODE ANN. § 54.02(a) (West 2009). Section 54.02(d) of the Texas Family Code requires that prior to a transfer hearing, a "juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense." *Id.* § 54.02(d). A juvenile may test the fullness of an investigation. *See Turner v. State*, 796 S.W.2d 492, 497 (Tex.App.-Dallas 1990, no writ). However, whether a diagnostic study is complete is a determination for the juvenile court. *In re J.S.C.*, 875 S.W.2d 325, 329

(Tex.App.-Corpus Christi 1994, writ dism'd by agr.). A juvenile court's ruling on the completeness of a diagnostic report will not be overturned absent a showing of abuse of discretion. *Id.*

Appellant did not raise this objection at the certification hearing, and, therefore, appellant has not preserved error on this issue. *See* Tex.R.App. P. 33.1(a); *see also* *McBride v. State*, 655 S.W.2d 280, 284 (Tex.App.-Houston [14th Dist.] 1983, no writ) (overruling appellant's complaint of alleged deprivation of due process at a transfer hearing because it was raised for the first time on appeal); *In re I.B.*, 619 S.W.2d 584, 586 (Tex.Civ.App.-Amarillo 1981, no writ) (providing that juvenile court at transfer hearing did not err in overruling juvenile's objections pertaining to the fullness of an investigation). An appeal of transfer from a juvenile court to a criminal court is a criminal matter governed by the Texas Code of Criminal Procedure and the Texas Rules of Appellate Procedure. Tex.Code Crim. Proc. Ann. art. 44.47(c) (West 2006). To preserve a complaint for appellate review, a party must make a timely request, objection, or motion with sufficient specificity to apprise the trial court of the complaint and to afford the trial court an opportunity to rule on the objection. Tex.R.App. P. 33.1(a); *Saldano v. State*, 70 S.W.3d 873, 886-87 (Tex.Crim.App.2002). Requiring a party to make a complaint to the trial court by specific, timely objection, request, or motion as a prerequisite to presenting a complaint for appellate review ensures the trial court will have an opportunity to prevent or correct errors. *Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex.Crim.App.2006). In this case, had an objection been raised regarding the completeness of the diagnostic study, possible corrective action could have included ordering a subsequent psychological evaluation. *See* *In re R.L.H.*, 646 S.W.2d 499, 502 (Tex.App.-Houston [1st Dist.] 1982, no writ) (concluding trial court had authority to reopen hearing and order a second psychological evaluation when the trial court lacked confidence in the psychologist who conducted an evaluation). But appellant did not voice any objection to the completeness of the diagnostic study as tendered and admitted in the transfer hearing. *See* *In re I.B.*, 619 S.W.2d at 586 ("The juvenile can, of course, test the fullness of the investigation made. If tested, the matter of the completeness of the investigation is one for initial determination by the trial court which ordered it."). Appellant has not cited and we have not found any place in the appellate record showing that appellant raised this issue in the juvenile court or in the district court. With few exceptions not applicable to the case under review, even constitutional complaints may be waived by the failure to raise a timely objection in the lower court. *See* *Saldano*, 70 S.W.3d at 886-89.

Conclusion: Based on the record before this court, appellant has not preserved error on this issue. *See* Tex.R.App. P. 33.1(a). Accordingly, we overrule appellant's first issue.

Pipkin v. State, No. 14-09-00018-CR, --- S.W.3d ----, 2010 WL 4361388, Juvenile Law Newsletter ¶ 10-4-11B (Tex.App.-Hous. (14 Dist.), 11/4/10).

IN A DISCRETIONARY TRANSFER HEARING, THE PSYCHOLOGICAL AND PSYCHIATRIC EVALUATIONS MAY BE WAIVED WITHOUT COMPLIANCE WITH SECTION 51.09 OF THE FAMILY CODE SINCE THESE EVALUATIONS ARE NOT CONSIDERED TO BE GRANTED TO THE CHILD BY THE FAMILY CODE OR BY THE CONSTITUTION OR LAWS OF THIS STATE OR THE UNITED STATES.

Facts: The State filed a petition in juvenile court, alleging that appellant, who was fifteen years old at the time, had engaged in delinquent conduct. According to the petition, appellant committed aggravated robbery with a deadly weapon. The State later sought to amend its petition and moved the juvenile court to waive its jurisdiction and certify appellant to stand trial as an adult in criminal district court pursuant to section 54.02 of the Texas Family Code.

The juvenile court granted the State's motion for a certification hearing. By written order dated April 16, 2008, the juvenile court ordered that a "complete diagnostic study, social evaluation, and full investigation" be conducted on appellant, his circumstances, and the circumstances surrounding the offense. The juvenile court ordered the chief juvenile probation officer to present the study at the certification hearing. The State filed a motion requesting the juvenile court to order a complete psychiatric and psychological examination of appellant. The record contains an order dated April 23, 2008, in which the juvenile court granted the State's motion requesting a psychiatric and psychological evaluation.

At the certification hearing, the juvenile court took judicial notice of the contents of appellant's case file. The State sought to tender five State's exhibits into evidence. Appellant's counsel responded, "Your Honor, I think I have had an opportunity to examine these documents, and I have no objection." The juvenile court admitted the exhibits. One of the exhibits was a three-page report, entitled "Juvenile Probation Certification Report," that was compiled by a juvenile probation officer. Attached to the report were copies of appellant's birth certificate, social security card, and results of a physical examination. As relevant to our review, a section of the report, entitled "Testing/Physical Examination," contains the following two sentences pertaining to psychological and psychiatric evaluations:

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The State presented testimony from a single witness, a police officer, who testified without objection about his investigation of the charged offense. According to the officer's testimony, appellant entered a retail store, displayed a handgun, demanded money from an employee, and fled with $2,517.57. Officers located appellant after the incident with assistance from witnesses. Officers recovered a bag containing $2,517.57 and the handgun from a location where appellant had discarded the items. The officer testified that appellant gave a written statement to the magistrate in which appellant admitted committing the offense and admitted purchasing the handgun one month before the offense. Officers learned that appellant had been documented in police records as being affiliated with a criminal street gang. Appellant's mother and grandfather testified, requesting that the juvenile court refuse to certify appellant as an adult.

By written order, the juvenile court waived its jurisdiction and certified appellant to stand trial as an adult. The juvenile court's order is set forth in relevant part:

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The juvenile court found, "[a]fter full investigation," that appellant is charged with the felony offense of aggravated robbery with a deadly weapon. The juvenile court found that appellant was fourteen years or older at the time of the offense and found probable cause to believe that appellant committed the alleged offense. The juvenile court transferred appellant's case to the criminal district court, noting the serious nature of the offense and the welfare of the community. In making its determination, the juvenile court considered the following factors: the alleged offense was committed against a person, appellant's sophistication and maturity, the record and appellant's previous history, the adequate protection of the public, and the likelihood of rehabilitation by resources available to the juvenile court.

Appellant was charged by indictment with the felony offense of aggravated robbery. In the district court, appellant waived his constitutional rights and judicially confessed to committing the charged offense without an agreed recommendation as to punishment. The district court found appellant guilty of the charged offense. After a pre-sentence investigation, the district court assessed punishment at twenty years' confinement.

Appellant asserts that because the diagnostic report did not include the psychological and psychiatric evaluations ordered by the juvenile court, a full investigation of his circumstances was not made.

FN4. Unless otherwise specified, all references to a "section" will be to the Texas Family Code.

Held: Affirmed

Opinion: In his second issue, appellant points to the two sentences in the probation officer's report indicating that appellant's attorney waived psychological and psychiatric evaluation prior to the certification hearing. According to appellant, his trial counsel's waiver to the evaluations was not effective under section 51.09, and, accordingly, without the psychological and psychiatric evaluations, the diagnostic study was not complete under section 54.02(d).

Section 51.09, entitled "Waiver of Rights," provides:
Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:
(1) the waiver is made by the child and the attorney for the child;
(2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
(3) the waiver is voluntary; and
(4) the waiver is made in writing or in court proceedings that are recorded. TEX. FAM.CODE ANN. § 51.09 (West 2009).

Absent an effective waiver, a juvenile may be subjected to treatment as an adult only if the mandatory requirements in section 54.02 have been met. *R.E.M. v. State*, 532 S.W.2d 645, 648 (Tex.Civ.App.-San Antonio 1975, writ ref 'd n.r.e.). But, neither section 54.02 nor any other statute expressly provide that a psychological or psychiatric evaluation is a "right granted to a child" as contemplated by section 51.09 for effective waiver. *See* TEX. FAM.CODE ANN. § 51.09.

A "complete diagnostic study," as required under section 54.02(d) has not been defined. *See In re B.T.*, No. 10-0383, --- S.W.3d ----, ----, 2010 WL 3813367, at *3 (Tex. Oct. 1, 2010). "Typically, the certification report includes a psychiatric report, a psychological report, and a report by a probation department caseworker." *In re J.S.C.*, 875 S.W.2d 325, 326-27 (Tex.App.-Corpus Christi 1994, writ dism'd). However, section 54.02(d) does not necessarily require a psychological or psychiatric evaluation to render a diagnostic study complete. [FN5] *See L.M. v.. State*, 618 S.W.2d 808, 811 (Tex.App.-Houston [1st Dist.] 1981 writ ref'd n.r.e.) (involving a diagnostic report in which psychological tests of a juvenile were not attached to diagnostic report and no psychiatric examination was conducted); *I--L--v. State*, 577 S.W.2d 375, 376 (Tex.Civ.App.-Austin 1979, writ ref'd n.r.e.) (upholding judgment ordering transfer of juvenile to stand trial as adult even though no psychological examination was made). Instead, a court considers the qualitative content of a diagnostic study rather than a "mere quantitative 'check-list' " of included items. *B.T.*, 2010 WL 3813367, at *3 (quoting *L.M.*, 618 S.W.2d at 811-12).

FN5. Likewise, a trial court does not abuse its discretion in failing to consider psychological or psychiatric evaluations in connection with a diagnostic study if a juvenile's attorney opposes the evaluations. *See R.E.M.*, 541 S.W.2d at 845 (indicating a juvenile still may be certified to stand trial as an adult despite attorney's efforts to actively thwart compliance with section 54.02(d) or juvenile's refusal to cooperate).

Conclusion: Because a psychological or psychiatric evaluation is not a "right granted to a child by this title or by the constitution or laws of this state or the United States," any waiver of such evaluations does not fall within the purview of section 51.09. *See* TEX. FAM.CODE ANN. § 51.09. On this basis, waiver by appellant's attorney at the transfer hearing was not governed by section 51.09 and need not have complied with the requirements of section 51.09. *See id.* Therefore, we overrule appellant's second issue. The judgment of the trial court is affirmed.

CASE LAW UPDATE

Pat Garza
Associate Judge
386th District Court

***In the Matter of M.C.S., Jr*.**
Tex.App.-Fort Worth, 10/21/10

IN A JUVENILE PLEA, JUVENILE DOESN'T HAVE TO PERSONALLY VOCALIZE HIS PLEA DURING THE ADJUDICATION HEARING.

MINORS AND THE PROSTITUTION STATUTE
Fact Situation

Thirteen year old B.W. waved over an undercover police officer who was driving by in an unmarked car and offered to engage in oral sex with him for twenty dollars. The officer agreed. When B.W. entered the officer's car, he arrested her for the offense of prostitution.

Can a child under fourteen years of age be charged with prostitution?

No

Our Legislature has passed laws recognizing the vulnerability of children to sexual exploitation, including an absolute prohibition of legal consent for children under fourteen. In the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution when they lack the capacity to consent to sex as a matter of law, we hold that a child under the age of fourteen may not be charged with that offense.

In the Matter of B.W.
Tex. Sup. Ct., 6/18/10

PETITION TO EXPUNGE
Fact Situation

Evidence adduced at expungement hearing revealed that Appellee, represented by counsel, and the State of Texas entered into an agreement whereby Appellee would enroll in a pre-trial diversion program, and upon completion of that program, the charge for possession of marijuana under two ounces would be dismissed. A document signed by Appellee contained a provision indicating that if he successfully completed the pre-trial diversion program, he voluntarily waived any right to an expunction. Appellant was seventeen years old at the time, and he was charged as an adult. The trial court granted the expungement, ruling that Appellee lacked the capacity to contract.

Did the trial court abuse its discretion in granting the expungement?

Yes
Expungement should not have been granted

A party who accepts benefits under a contract is estopped from questioning the contract's existence, validity, or effect. As is true with most contracts, it is typical that both parties to an agreement will benefit from the result. A defendant cannot enter an agreement, benefit therefrom, and then attack the agreement later when it is suddenly in his interests to do so.

In the Matter of the Expunction of D.R.R.
Tex.App.-El Paso, 8/11/10

In the Matter of D.H.
Tex.App.-Dallas, 9/30/10

BY FAILING TO OBJECT AT TRIAL, APPELLANT FAILED TO PRESERVE ANY ISSUE ON WHETHER OR NOT HE HAD REASONABLE NOTICE OR AN ADEQUATE OPPORTUNITY TO PREPARE ON THE STATE'S MOTION TO MODIFY DISPOSITION.

DET. SENT. PROBATION TRANSFER
Fact Situation

The State filed a motion to transfer a determinate sentence probation to an adult district court. The trial court signed an order transferring the probation. The trial court held a hearing on Appellant's written objections to changes in the conditions of probation, but the court declined to amend the conditions. Appellant thereafter filed notice of appeal.

Can a juvenile appeal changes made to his probation conditions at a probation transfer hearing?

No

Determinate sentence probation transfer orders and a trial court's refusal to amend conditions of probation are not appealable.

In the Matter of B.L.C.
Tex.App.-El Paso, 9/29/10

In the Matter of J.S.H.
Tex.App.-Hous. (1 Dist.), 3/18/10

FAILURE TO OBJECT AT TRIAL TO THE AMOUNT OF CHILD SUPPORT ORDERED BY THE TRIAL COURT FAILS TO PRESERVE ISSUE FOR APPEAL.

In the Matter of R.D.
Tex.Sup.Ct., 2/12/10

JUVENILE'S MOTION FOR NEW TRIAL, WAS SUFFICIENT TO ENCOMPASS, AND PRESERVE, HIS COMPLAINT ON APPEAL.

Longoria v. State
Tex.App.-Amarillo, 2/25/10

OBJECTION TO JUVENILE ENHANCEMENT WAS NOT PRESERVED FOR APPEAL WHERE OBJECTIONS AT TRIAL DID NOT COMPORT TO THAT WHICH WAS ASSERTED ON APPEAL.

DET. SENT. PROBATION TRANSFER
Fact Situation 2

E.E., stipulated to having committed an aggravated assault with a deadly weapon. He then through a plea bargain, agrees to a six year probationary period. Five months later, at a contested review hearing and one week before the child's 18th B-day, the judge decided to terminate the probation rather than transfer it.

Could the trial judge do what he did?

Yes

While the State argued the merits of the transfer and termination it failed to make a timely request or objection to the procedure to the trial court. Because the State did not object to any procedural defect or any lack of notice, this issue was not preserved for review.

In the Matter of E.E.
Tex.App.-El Paso, 5/19/10

Nunez v. State
Tex.App.-Amarillo, 7/26/10

QUESTIONING OF JUVENILE TWO DAYS AFTER HE REQUESTED AN ATTORNEY ON A DIFFERENT CASE VIOLATED HIS FIFTH AMENDMENT RIGHTS.

Grant v. State
Tex.App.-Waco, 1/27/10

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.

Menson v. State
Tex.App.-Amarillo, 2/18/10

APPELLATE COURT MUST REMAND FOR APPOINTMENT OF NEW COUNSEL WHERE APPELLATE ISSUES EXIST IRRESPECTIVE OF FILING OF ANDERS BRIEF.

Forcey v. State
Tex.App.-Waco, 5/19/10

A MANDATORY LIFE SENTENCE WITHOUT THE OPTION OF PAROLE, FOR A JUVENILE WHO COMMITS CAPITAL MURDER BEFORE SEPTEMBER 1, 2009, IS CONSTITUTIONAL.

Graham v. Florida
U.S. Sup. Ct., 5/15/10

THE SUPREME COURT OF THE UNITED STATES HELD THAT THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENTS CLAUSE DOES NOT PERMIT A JUVENILE OFFENDER TO BE SENTENCED TO LIFE IN PRISON WITHOUT PAROLE FOR A NONHOMICIDE CRIME.

DEFERRED PROSECUTION
Fact Situation

Juvenile was charged with aggravated sexual assault of a child. A tentative settlement was reached between a special prosecutor and the defense attorney deferring prosecution for a period of six months. No record was made of the agreement, and no written form of the agreement was signed at that time. The juvenile was sent to the probation department and an agreement was signed by the juvenile, his parent, and a probation officer. The agreement was not signed by the prosecutor, defense counsel, or the judge.

DEFERRED PROSECUTION
Fact Situation Continued

Three months later two judges refused to approve the agreement. Defense counsel denied any knowledge that the agreement was not in force and also asserted that the probation officer had indicated to him that neither the prosecutor's nor the judge's signature was required. Appellant then filed a motion to enforce the agreement to defer prosecution and alternatively to dismiss for want of a speedy trial.

Should Appellant's Motion to enforce be granted?

Appellate Court says "No"

While we agree with appellant that section 53.03(e) of the family code appears to grant the prosecutor discretion to defer prosecution of a juvenile without court approval in certain circumstances, we need not address this dichotomy because the agreement or settlement was not enforceable in that it did not comport with rule 11. *See* Tex. Fam.Code Ann. § 53.03(e); Tex.R. Civ. P. 11; ("Rule 11 of our rules of civil procedure requires agreements between attorneys or parties concerning a pending suit to be in writing, signed and filed in the record of the cause to be enforceable.").

In the Matter of R.C.
Tex.App.-Corpus Christi, 2/4/10

Bleys v. State
Tex.App.-San Antonio, 5/12/10

JUVENILE COURT HAS NO AUTHORITY TO FORCE THE STATE TO PROSECUTE JUVENILE UNDER THE DETERMINATE SENTENCE STATUTE.

In the Matter of R.A.
Tex.App.-Amarillo, 11/3/10

NO ABUSE OF DISCRETION WHERE TRIAL COURT TRANSFERRED JUVENILE TO THE PENITENTIARY NOTWITHSTANDING TYC'S RECOMMENDATION THAT HE BE PAROLED.

DISPOSITION PROCEEDING
Fact Situation

John and Jane Doe, appeared without an attorney in magistrate court with their minor daughter who was placed on probation. Because a social investigation revealed that the Does had a history of drug abuse and their admission to smoking marijuana, the magistrate ordered both John and Jane to undergo random drug urinalyses as a term of their daughter's probation and that they could be held in contempt if they disobeyed the order.

Does this term violate the Doe's Constitutional rights?

Yes

The magistrate's order requiring the Does to undergo urinalysis testing constituted a search under the Fourth Amendment that is presumptively invalid absent a warrant. The intrusion is not extraordinarily invasive, but aside from pointing to the possibility in their daughter's presentence social investigation that the Does abused drugs, the State has not overcome any formal procedural safeguards to diminish the Does' Fourth Amendment rights in their bodies. The search is therefore unconstitutional because it primarily furthers the State's interest in law enforcement.

State of Idaho v. Jane Doe, Idaho Sup.Ct., 6/1/10

In the Matter of S.J.C.
Tex.App.-El Paso, 1/6/10

EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING THAT THE JUVENILE'S MOTHER BY WILLFUL ACT OR OMISSION, CONTRIBUTED TO, CAUSED, OR ENCOURAGED THE CHILD'S DELINQUENT CONDUCT.

TFC Sect. 54.041
Orders Affecting Parents and Others

(g) On a finding by the court that a child's parents or guardians have made a reasonable good faith effort to prevent the child from engaging in delinquent conduct or engaging in conduct indicating a need for supervision and that, despite the parents' or guardians' efforts, the child continues to engage in such conduct, the court shall waive any requirement for restitution that may be imposed on a parent under this section.

Davis v. State
Tex.App.-Hous. (14 Dist.), 10/19/10

THE STATE CAN PROVE A PRIOR CONVICTION BY DIFFERENT EVIDENTIARY MEANS AS LONG AS A RATIONAL JURY CAN FIND BEYOND A REASONABLE DOUBT THAT APPELLANT WAS CONVICTED.

Irby v. State
Tex.Crim.App., 6/16/10

JUVENILE WITNESS'S STATUS AS A PROBATIONER IS NOT AUTOMATICALLY ADMISSIBLE WHEN HE TAKES THE STAND TO TESTIFY.

In the Matter of A.W.B.
Tex.App.-Amarillo, 2/2/10

AN UNNOTICED OUTCRY STATEMENT MAY STILL BE ADMISSIBLE IF THE STATEMENT IS ADMISSIBLE UNDER A HEARSAY EXCEPTION.

In the Matter of A.W.B.
Tex.App.-Amarillo, 2/2/10

FAMILY CODE DOES NOT REQUIRE THAT A RESPONDENT GIVE PRIOR NOTICE OF INTENT TO ASSERT THE DEFENSE OF LACK OF RESPONSIBILITY DUE TO MENTAL ILLNESS OR MENTAL RETARDATION.

In the Matter of T.L.K.
Tex.App.-Fort Worth, 6/10/10

TRIAL COURT LACKED JURISDICTION TO PROCEED WHERE THE STATE'S PETITION FAILED TO SET FORTH WITH REASONABLE PARTICULARITY THE "PLACE" WHERE THE CHILD'S ALLEGED DELINQUENT CONDUCT OCCURRED.

In the Matter of D.S.W.
Tex.App.-San Antonio, 9/1/10

IN ARSON ADJUDICATION, RESTITUTION ORDER IN THE AMOUNT OF $248,429.37 WAS SET ASIDE BECAUSE IT WAS NOT ADEQUATELY SUPPORTED BY THE RECORD.

Texas Family Code
§ 41.001. Liability

A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately caused by:

(1) the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent or other person to exercise that duty; or

(2) the wilful and malicious conduct of a child who is at least 10 years of age but under 18 years of age.

Texas Family Code
§ 41.002. Limit of Damages

Recovery for damage caused by wilful and malicious conduct is limited to actual damages, not to exceed $25,000 per occurrence, plus court costs and reasonable attorney's fees.

JUVENILE CONSENT/AUTHORIZATION
Fact Situation

At 2:00 am in the morning, while investigating a shooting at a different location, an officer went to a suspect's home and knocked on the door. The door was answered by a juvenile who appeared to be 15 or 16 years old. The officer told the juvenile he was a police officer there to investigate a shooting and then asked for permission to enter. The officer was admitted by the juvenile.

Did the officer have legal authorization to enter the home?

NO

The officer did not ask if the juvenile lived at the house or if he had possession or control of the house, how old he was, or what grade he attended at school. In this case the entry into the home was considered illegal since the state did not meet its burden of presenting evidence demonstrating a reasonable belief that the juvenile had the authority to allow the officers to enter.

Limon v. State
Tex.App.-Corpus Christi, 6/17/10

In the Matter of D.H.
Tex.App.-Austin, 3/5/10

DOG SNIFF OF STUDENT'S PROPERTY IN CLASS ROOM WHILE STUDENTS ASKED TO WAIT OUTSIDE WAS CONSIDERED CONSTITUTIONAL.

MOTION TO SUPPRESS

Fact Situation

Appellant testified that his arrest was made without a warrant. The prosecutor did not cross-examine appellant, and offered only the Deputies unsigned, undated, and unsworn police report. Appellant objected to the admission of the report (1) as a violation of the hearsay rule; (2) because there was no sponsoring witness; and (3) as a violation of his right to confrontation under the Sixth Amendment.

Can PC be determined through the report alone?

Yes

The trial court may conduct the hearing based on motions, affidavits or testimony, but there is nothing in the statute to indicate that it must. The report is a government record and of a type that a trial judge may consider reliable in a motion to suppress hearing, even though it is hearsay and is not admissible at a criminal trial on the merits.

Appellant did not argue that the report was, in any way, unauthentic, inaccurate, unreliable, or lacking in credibility. He argued only that the report could not be considered without the shepherding wings of a sponsoring witness or affidavit. Had appellant complained about the reliability, accuracy, or sufficiency of the information supporting the trial judge's ultimate ruling on the motion to suppress, this would be a very different case.

Ford v. State,
Tex.Crim.App., 10/21/09

In the Matter of T.E.
Tex.App.-Austin, 10/14/10

IN SEX OFFENDER REGISTRATION HEARING, IT IS THE JUVENILE'S BURDEN TO SHOW THAT THE PROTECTION OF THE PUBLIC WOULD NOT BE INCREASED BY HIS REGISTRATION.

Maldonado v. State
Tex.App.-Amarillo, 3/12/10

IN A CERTIFICATION AND TRANSFER HEARING, THE FAILURE TO SERVE SUMMONS ON JUVENILE IN A TIMELY MANNER (TWO DAYS PRIOR TO HEARING), DEPRIVED THE JUVENILE COURT OF ITS JURISDICTION TO TRANSFER JUVENILE CASE TO ADULT DISTRICT COURT.

In re B.T.
Tex., 10/1/10)

IN DISCRETIONARY TRANSFER HEARING, JUVENILE COURT ABUSED ITS DISCRETION IN PROCEEDING WITHOUT A COMPLETE DIAGNOSTIC STUDY.

Pipkin v. State
Tex.App.-Hous. (14 Dist.), 11/4/10

FAILURE TO OBJECT TO COMPLETENESS OF DIAGNOSTIC STUDY IN DISCRETIONARY TRANSFER HEARING WAIVES ANY ERROR IN ITS COMPLETENESS.

THANK YOU
AND
HAVE A SAFE TRIP HOME