CASELAW UPDATE

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PROFESSOR ROBERT O. DAWSON
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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

- Fellow of the Texas Bar Foundation
- Editor – State Bar Juvenile Law Section Report.
- 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

- Juvenile Law: Arrest & Confessions; Texas District and County Attorneys Association 2005 Annual Criminal & Civil Law Update; Corpus Christi, Texas, January, 2006.
- Juvenile Law, Including Arrest and Confession Issues; 31th Annual Advanced Criminal Law Course, Sponsored by The State Bar of Texas, Corpus Christi, Texas, July, 2005.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 18th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Austin, Texas, February, 2005.
- Juvenile Law: Police Interactions With Juveniles – Arrest, Confessions, Search and Seizure; South Texas Juvenile Law Conference; Edinburg, Texas, December 10, 2004.
- Juvenile Law: Police and Their Interactions With Juveniles – Arrest, Confessions, and Search and Seizure; Texas District and County Attorneys Association 2004 Annual Criminal & Civil Law Update; South Padre Island, Texas, September 22– 24, 2004.
- Arrest and Confessions; 30th Annual Advanced Criminal Law Course, Sponsored by the Texas Criminal Justice Section and The State Bar of Texas Professional Development., San Antonio, Texas, July, 2004.
- Juvenile Law: Police and Their Interactions With Juveniles – Arrest, Search and Seizure, and Confessions; 41st Annual Judge Anees Semaan Criminal Law Institute; San Antonio, Texas, April 16–17, 2004.
- Detention and Pleas; Judicial Moderator and Panelist for Robert O. Dawson Juvenile Law Institute; San Antonio, Texas, February 18 – 20, 2004.
- Arrest, Waiver of Rights, Search and Seizure, and Confessions; 2003 Board Specialization Review Course, Sponsored by the Juvenile Law Section of the State Bar and Texas Juvenile Probation Commission, Austin, Texas, September 4 – 5, 2003.
- Determinate Sentencing and Certification, Detention Hearings, and Juvenile Confessions; Judicial Moderator and Panelist for TILS Juvenile Law Seminar (three sessions); San Antonio, Texas, August 1, 2003.

PUBLICATIONS

- 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.

TABLE OF TOPICS

REVIEW OF RECENT CASES

by Pat Garza

ADJUDICATION PROCEEDINGS—

TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW RESPONDENT TO WITHDRAW STIPULATION WHERE PLEA BARGAIN RECITED THAT CHILD WOULD BE PLACED ON ONE YEAR PROBATION IN THE HOME OF HIS GRANDMOTHER, AND TRIAL COURT ORDERED CHILD DETAINED IN JUVENILE FACILITY FOR A MINIMUM OF SIX MONTHS.

¶ 05-4-18. **In the Matter of M.D.G.**, UNPUBLISHED, No. 11-04-00125-CV, 2005 Tex.App.Lexis 8854 (Tex.App.— Eastland, 10/27/05).

Background: Juvenile defendant agreed with the State to stipulate to interfering with a police officer and to committing criminal mischief. The Juvenile Court of Midland County, Texas, adjudicated defendant delinquent, refused to follow the agreed disposition, and ordered that defendant be detained in the county juvenile facility for a minimum of six months. Defendant's subsequent request to withdraw his stipulations was denied. Defendant appealed.

Held: Judgment reversed and remanded for further proceedings.

Facts: In the underlying delinquency proceeding, the State and M.D.G. reached an agreement regarding disposition and presented that recommendation to the juvenile court for consideration. M.D.G. agreed to stipulate to interfering with a police officer. M.D.G. also agreed to stipulate to committing criminal mischief, specifically, throwing rocks at a garage door. However, he did not stipulate to the dollar amount of damages caused to the garage door. *TEX. PEN. CODE ANN. § 28.03(a)(1)* (Vernon Supp. 2004 - 2005). In consideration for these stipulations, the State and M.D.G. agreed to the following disposition: M.D.G. would be found to have engaged in delinquent conduct, would be placed on one year's probation in the home of his grandmother, and would be required to pay restitution.

M.D.G.'s stipulations were presented to the juvenile court at the adjudication hearing. The juvenile court questioned the partial stipulation concerning the act of criminal mischief. The court reasoned that, because M.D.G. would not stipulate to the amount of damages, the court would have to enter a plea of "not true" to the criminal mischief allegation. n1 After discussing M.D.G.'s partial stipulation, the trial court asked, "And you wish for the Court, then, to try to determine from the testimony that might be presented into which bracket of the ranges under the Penal Code this particular event might occur?" The juvenile responded, "Yes." When the court continued with its admonishments, it stated that M.D.G. was "essentially" pleading not true to the second charge.

n1 Criminal mischief is a state jail felony if the amount of damages is at least $ 1,500 and less than $ 20,000, but a class A misdemeanor if the damages were at least $ 500 but less than $ 1,500. *TEX. PEN. CODE ANN. § 28.03(b)(3-4)* (Vernon 2004 - 2005).

The adjudication hearing proceeded with testimony concerning only the amount of damages caused by the criminal mischief. Two witnesses testified to the cost of repair, and the owner testified to the cause and amount of the damages. Except for the stipulations, no evidence was presented to prove that M.D.G.

committed the offense of criminal mischief. The owner testified that "all the children across the alley [were] there when I opened [my garage door]." He further testified that two witnesses saw it occur and called the police before he got there. He did not testify that he knew which juvenile engaged in the criminal mischief, and he did not identify M.D.G. as the person responsible. When the juvenile court concluded the adjudication hearing, the court pronounced that M.D.G. had engaged in criminal mischief and found that the amount of damages was between $ 500 and $ 1,500.

After adjudicating M.D.G. delinquent, the juvenile court immediately held the disposition hearing. Pursuant to the terms of the agreement between the State and M.D.G., the juvenile probation officer recommended that M.D.G. be found to have engaged in delinquent conduct, be placed on one year's probation in the home of his grandmother, and be ordered to pay restitution. After the conclusion of the presentation of evidence, the juvenile court ordered that M.D.G. be detained in the Kerr County juvenile facility for a minimum of six months.

The record shows that the juvenile court understood that its disposition differed from the agreed disposition reached between M.D.G. and the State. Nevertheless, the juvenile court proceeded with its disposition after explaining that it had treated the stipulations as one plea of "true" and one plea of "not true." Trial counsel stated that M.D.G. had proceeded on the assumption that the only issue to be determined was the amount of damages/restitution and that, upon adjudication, the agreed disposition would be followed. After conferring with M.D.G., trial counsel requested that the stipulations be withdrawn. The juvenile court denied M.D.G.'s request.

Opinion: Delinquency proceedings for juveniles in Texas are not handled in the criminal system. Although these proceedings are civil proceedings, they are quasi-criminal in nature. *In the Matter of J.K.R., 986 S.W.2d 278, 280-81 (Tex.App. - Eastland 1998, pet'n den'd)*; *In the Matter of R.S.C., 940 S.W.2d 750, 751 (Tex.App. - El Paso 1997, no writ)*; *see also TEX. FAM. CODE ANN. § 51.17* (Vernon Supp. 2004 - 2005). Juvenile delinquency proceedings are governed by the Texas Family Code. *In the Matter of R.J.H., 79 S.W.3d 1, 6, 45 Tex. Sup. Ct. J. 732 (Tex.2002)*.

We find *TEX. FAM. CODE ANN. § 54.03(j)* (Vernon Supp. 2004 - 2005) to be controlling in this case. *Section 54.03(j)* provides as follows:

When the state and the child *agree to the disposition of the case, in whole or in part*, the prosecuting attorney shall inform the court of the agreement between the state and the child. The court shall inform the child that the court is not required to accept the agreement. The court may delay a decision on whether to accept the agreement until after reviewing a report filed under [*TEX. FAM. CODE ANN. § 54.04(b)* (Vernon Supp. 2004 - 2005)]. *If the court decides not to accept the agreement, the court shall inform the child of the court's decision and give the child an opportunity to withdraw the plea or stipulation of evidence.* If the court rejects the agreement, no document, testimony, or other evidence placed before the court that relates to the rejected agreement may be considered by the court in a subsequent hearing in the case. A statement made by the child before the court's rejection of the agreement to a person writing a report to be filed under *Section 54.04(b)* may not be admitted into evidence in a subsequent hearing in the case. (Emphasis added)

These provisions provide for a form of plea bargaining whereby a juvenile and the State may agree on the disposition, or a part thereof, and present an agreed recommendation to the juvenile court. Under *Section 54.03(j)*, if the court declines to accept the agreement, the court is required to inform the juvenile of its decision and give the juvenile an opportunity to withdraw his plea or any stipulations that he made.

In the instant case, the State and M.D.G. had reached an agreement regarding disposition. They agreed that M.D.G. would be found to have engaged in delinquent conduct, would be placed on one year's probation in the home of his grandmother, and would be ordered to pay restitution. Since the juvenile court elected not to accept this agreed disposition, *Section 54.03(j)* required the court to permit M.D.G. to withdraw his stipulations. Therefore, we hold that the juvenile court abused its discretion by refusing to allow M.D.G. to withdraw his stipulations.

The first point of error is sustained. In light of our disposition of the first point, we need not address the second point alleging ineffective assistance of counsel. *TEX.R.APP.P. 47.1*.

Conclusion: The judgment of the juvenile court is reversed, and the cause is remanded for further proceedings.

Editor's Note: While conditions of probation are generally the purview of the court, and not part of a plea bargain, this case appears to allow the State and Respondent to, not only plea bargain probation, but also whether or not that probation includes placement outside of the home (residential placement) or placement back in the home.

ATTORNEY GENERAL—

TEXAS ATTORNEY GENERAL SAYS THAT PARENT NOT EXCEPTED FROM FAMILY CODE CONFIDENTIALITY RESTRICTIONS.

¶ 05-2-26. **Texas Attorney General Opinion No. OR 2005-02732**, 2005 Tex.AG Lexis 2959 (3/31/05).

Re: Whether records kept by the Georgetown Police Department, relating to the requestor's daughter is subject to required public disclosure under the Public Information Act.

Ms. Patricia E. Carls
City Attorney
City of Georgetown
106 East Sixth Street, Suite 550
Austin, TX 78701

OPINION:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID # 221335.

The Georgetown Police Department (the "department"), which you represent, received a request for "anything and everything" related to the requestor's daughter. You claim that the requested information is excepted from disclosure under *section 552.101 of the Government Code*. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that Incident No. 2007318 and the related information are subject to a previous ruling by

this office. *See* Open Records Letter No. 2005-01414 (2005). In that ruling, we determined that you failed to comply with the fifteen-day deadline required by *section 552.301 of the Government Code*, resulting in the legal presumption that the information at issue was public. We further determined that if the department has any records in which the daughter is portrayed as a suspect, defendant, or arrestee, it would normally have to withhold such information under common-law privacy as encompassed by *section 552.101 of the Government Code*. However, when the requestor is the parent of the minor, the requestor has a special right of access to information that would normally be withheld under the daughter's common-law right of privacy. Therefore, under the current circumstances, we determined that the information at issue could not be withheld under section 552.101 on the basis of the holding in *Reporters Committee. See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).* We finally concluded that the information at issue was confidential pursuant to *section 262.201 of the Family Code* and must therefore be withheld in its entirety pursuant to section 552.101.

The facts and circumstances surrounding that ruling do not appear to have changed. Therefore, to the extent that the submitted records consist of the same information that was at issue in Open Records Letter No. 2005-01414 (2005), the department must comply with our previous ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). To the extent the submitted information is not subject to our prior ruling, we address the submitted arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the common-law right of privacy, which excepts from disclosure information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976).* Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).*

In this instance, the requestor asks for all information concerning his minor daughter. We therefore believe the daughter's right to privacy has been implicated. Thus, if the department has any records in which the daughter is portrayed as a suspect, defendant, or arrestee, it would normally have to withhold such information under common-law privacy as encompassed by *section 552.101 of the Government Code*. *See id.* We note, however, that as the parent of a minor, the requestor would have a special right of access to information that would ordinarily be withheld to protect the daughter's common-law privacy, and such information could not be withheld from him solely on that basis. *See Gov't Code § 552.023(b)* (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Thus, under the present circumstances, none of the requested information may be withheld under section 552.101 on the basis of the holding in *Reporters Committee.*

Section 552.101 also encompasses information protected by chapter 58 of the Family Code. *Section 58.007 of the Family Code* makes confidential the law enforcement records of a juvenile who, on or after September 1, 1997, engaged in delinquent conduct or conduct indicating a need for supervision. *See Fam. Code § 51.03* (defining "delinquent conduct" and "conduct indicating a need for supervision"). Section 58.007(c) provides:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and

information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). We have reviewed the submitted information and conclude that Incident Nos. 1007783, 1007816, 1026918, and 03024250 involve allegations that a juvenile engaged in delinquent conduct or conduct indicating a need for supervision after September 1, 1997. Thus, Incident Nos. 1007783, 1007816, 1026918, and 03024250 are subject to section 58.007. Because none of the exceptions in section 58.007 appear to apply, Incident Nos. 1007783, 1007816, 1026918, and 03024250 are confidential in their entirety in accordance with *section 58.007(c) of the Family Code*. Thus, Incident Nos. 1007783, 1007816, 1026918, and 03024250 must be withheld from disclosure pursuant to *section 552.101 of the Government Code*. Section 58.007 is not applicable to the remaining reports, Incident Nos. 2009321 and 03015751.

We note that Incident No. 03015751 contains Texas motor vehicle record information. *Section 552.130 of the Government Code* provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. You must withhold the marked Texas motor vehicle record information in Incident No. 030 15751 under section 552.130.

In summary, the department must comply with Open Records Letter No. 2005-01414 (2005) with respect to responsive information that was previously ruled on. Incident Nos. 1007783, 1007816, 1026918, and 03024250 must be withheld from disclosure pursuant to *section 552.101 of the Government Code* and *section 58.007 of the Family Code*. The marked Texas motor vehicle record information in Incident No. 03015751 must be withheld under *section 552.130 of the Government Code*. The remaining information in Incident Nos. 2009321 and 03015751 must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. *Gov't Code § 552.301(f)*. If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right

to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this [*9] ruling, the governmental body will either release the public records promptly pursuant to *section 552.221(a) of the Government Code* or file a lawsuit challenging this ruling pursuant to *section 552.324 of the Government Code*. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath, 842 S.W.2d 408, 411* (Tex. App. -- Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. *Gov't Code § 552.325*. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

A SCHOOL DISTRICT MAY ADOPT A POLICY AUTHORIZING CORPORAL PUNISHMENT WITHOUT THE PERMISSION OF THE PARENTS.

¶ 05-4-27. **Texas Attorney General Opinion No. GA-0374**, 2005 Tex.AG Lexis 3790 (11/7/05).

Re: Whether in light of House Bill 383 a school district employee may administer corporal punishment under a disciplinary policy adopted by the board of trustees (RQ-0369-GA)

Shirley J. Neeley, Ed.D.
Commissioner of Education
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

Opinion: You write to inquire about the "effect, if any, of the provisions of House Bill No. 383, as enacted by the 79th Legislature, Regular Session, on the ability of public schools to use corporal punishment." n1 In essence you ask for our opinion whether in light of House Bill 383 a school district employee may administer corporal punishment under a disciplinary policy adopted by the board of trustees.

> n1 Letter from Shirley J. Neeley, Ed.D., Commissioner of Education, Texas Education Agency, to Honorable Greg Abbott, Texas Attorney General, at 1 (July 27, 2005)(on file with Opinion

Committee, *also available at* http://www.oag.state.tx.us) [hereinafter Request Letter].

It is long established in Texas that a teacher has a right to "inflict moderate corporal punishment for the purpose of restraining or correcting the refractory" student. *Dowlen v. State, 14 Tex. Ct. App. 61, 1883 WL 8865,* at *3 (1883); *see also Spacek v. Charles, 928 S.W.2d 88,95* (Tex. App. -- Houston [14th Dist.] 1996, writ dism'd w.o.j.). You inform us "that the use of corporal punishment is a decision made by policies of the local school districts" and that "no state agency has authority over local policies involving corporal punishment." Request Letter, *supra* note 1, at 1 (citing *TEX. EDUC. CODE ANN. § 7.003*)(Vernon 1996); *see* Tex. Att'y Gen. Op. No. JC-0491 (2002) at 2 ("Matters of student discipline under Texas law, are generally speaking, within the authority of local school boards."). You further inform us that the Texas Association of School Boards offers local school districts, each of which ultimately adopts its own policy, three model policies: "one with a prohibition against corporal punishment, one with corporal punishment allowed but conditioned upon parental permission, and one that allows school administrators to determine whether to use corporal punishment." *Id.* You inquire about House Bill 383 which added a new subsection to *Family Code section 151.001* to provide:

> (e) Only the following persons may use corporal punishment for the reasonable discipline of a child:
>
> (1) a parent or grandparent of the child;
> (2) a stepparent of the child who has the duty of control and reasonable discipline of a child; and
> (3) an individual who is a guardian of the child and who has the duty of control and reasonable discipline of the child.
> Act of May 25, 2005, 79th Leg., R.S., ch. 924, § 1, 2005 Tex. Sess. Law Serv. 3165, 3165 (to be codified as an amendment of *TEX. FAM. CODE ANN. § 151.001(e)*).

You inform us that there are two other provisions relevant to corporal punishment in schools found in the Texas Education Code and the Texas Penal Code. *Section 9.62, Texas Penal Code*, a justification for the use of force entitled "Educator-Student," provides:

> The use of force, but not deadly force, against a person is justified:
> (1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and
> (2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.

TEX. PEN. CODE ANN. § 9.62 (Vernon 2003). *Texas Education Code section 22.0512(a)* provides that:

> A professional employee of a school district may not be subject to disciplinary proceedings for the employee's use of physical force against a student to the extent justified under *Section 9.62, Penal Code*.
> *TEX. EDUC. CODE ANN. § 22.0512(a)*(Vernon Supp. 2004-05).

In addition, section 22.0512(c) recognizes school districts' authority to adopt and enforce corporal punishment policies and to discipline employees for violating them. *See id.* § 22.0512(c)("This section does not prohibit a school district from: (1) enforcing a policy relating to corporal punishment; or (2) notwithstanding Subsection (a), bringing a disciplinary proceeding against a professional employee of the district who violates the district policy relating to corporal punishment."); *see also id.* § § 37.001 (Vernon

Supp. 2004-05),. 102 (Vernon 1996). Though limiting its use, these provisions recognize a school district's independent authority to administer corporal punishment.

Considering the Penal Code and Education Code provisions, you pose the following three questions about new subsection 151.001(e) in the Texas Family Code:

> 1. May an employee of a school district who is not related to a student in the manner described in *Section 151.001 (e), Family Code*, utilize corporal punishment pursuant to a district student discipline policy adopted by the board of trustees?
>
> 2. If your answer to question # 1 is "yes," may a district adopt a policy authorizing corporal punishment when a parent or other individual named in Sub*section 151.001 (e), Family Code*, has not given permission for corporal punishment?
>
> 3. If your answer to question # 2 is "no," may any individual listed in Sub*section 151.001(e), Family Code*, authorize corporal punishment despite objection by another individual? Request Letter, *supra* note 1, at 3.

I. Rules of Statutory Construction

The cardinal rule of statutory construction is to ascertain legislative intent. *See In re Canales, 52 S.W.3d 698, 702 (Tex. 2001).* To do so, courts first look to the statute's words, attempting to ascertain their plain and common meaning. *See TEX. GOV'T CODE ANN. § 311.011 (a)*-(b)(Vernon 2005)(Code Construction Act); *City of San Antonio v. City of Boerne, 111 S.W.3d 22, 25 (Tex. 2003).* Courts construe provisions in context, considering the statute as a whole. *See TEX. GOV'T CODE ANN. § 311.011(a)*(Vernon 2005)(words and phrases to be read in context); *Helena Chem. Co. v. Wilkins, 47 S.W.3d 486,493 (Tex. 2001)*("We must always consider the statute as a whole rather than its isolated provisions. We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone."). Additionally, courts will consider the body of law existing at the time the statute was enacted. *See Brunson v. Woolsey, 63 S.W.3d 583, 588* (Tex. App. -- Fort Worth 2001, no pet.)("We also construe the statute in the light of the entire body of law existing at the time of its enactment."); *accord City of Houston v. Woolley, 51 S.W.3d 850, 853* (Tex. App.-Houston [1st Dist.] 2001, no pet.); *City of Ingleside v. Kneuper, 768 S.W.2d 451,454* (Tex. App.-Austin 1989, writ denied)("In order to ascertain legislative intent, a statute will be construed in light of the entire body of law existing at the time of its enactment, including the common law."). Courts will "'not decide the scope of statutory language by a bloodless literalism in which text is viewed as if it had no context.'" *Korndorffer v. Baker, 976 S.W.2d 696,700* (Tex. App.-Houston [1st Dist.] 1997, writ dism'd w.o.j.)(citation omitted).

Regardless of whether a statute is considered ambiguous on its face, the Code Construction Act allows a reviewing court to consider, among other things, the object sought to be obtained, any legislative history, and the consequences of a particular statutory construction. *See TEX. GOV'T CODE ANN. § 311.023* (Vernon 2005); *Fleming Foods of Tex., Inc. v. Rylander, 6 S.W.3d 278, 283 (Tex. 1999); R.R. Comm'n of Tex. v. Mote Res, 645 S.W.2d 639, 643* (Tex. App.-Austin 1983, no writ)("Nevertheless, in reading a statute, whether or not the statute is considered ambiguous on its face, a court may consider the circumstances under which the statute was enacted and the underlying legislative history of the enactment."). An ambiguous statute must be construed consistent with the legislative intent, which can be ascertained by looking beyond the terms of the statute. *See In re K.L.V., 109 S.W.3d 61, 65* (Tex. App.-Fort Worth 2003, pet. denied). "'Ambiguity exists when a statute is capable of being understood by reasonably

well informed persons in two or more different senses.'" *Teleprofits of Tex., Inc., v. Sharp, 875 S.W.2d 748, 750* (Tex. App.-Austin 1994, no writ)(citation omitted).

Statutes should also be construed in harmony with other statutes unless a contrary intention is clearly manifest. Where two statutes seem to be inconsistent, a construction will be sought to harmonize them and leave both in concurrent operation, if it is possible fairly to reconcile them. *See Fortenberry v. State, 283 S.W. 146, 148* (Tex. Comm'n App. 1926, judgm't adopted). Texas courts do not favor implied repeals. *See Standard v. Sadler, 383 S.W.2d 391, 395 (Tex. 1964).* Statutes are presumed to be enacted by the legislature with full knowledge of the existing state of the law and with reference to it. *See McBride v. Clayton, 166 S.W.2d 125, 128 (Tex. 1942).* When a new statute is passed dealing with a subject covered by an old law, if there is no express repeal, the presumption is that in enacting a new law the legislature intended the old statute to remain in operation. *See State v. Humble Oil and Refining Co., 187 S.W.2d 93, 100* (Tex. Civ. App.-Waco 1945, writ ref'd w.o.m.).

II. Analysis

Mindful of these rules of statutory construction, we consider House Bill 383. House Bill 383 amends *section 151.001 of the Texas Family Code*, which establishes parents' rights and duties. *See TEX. FAM. CODE ANN. § 151.001(a)*-(d)(Vernon Supp. 2004-05). As initially introduced, the language of House Bill 383 provided:

> (e) A parent of a child or other person who has the duty of control and reasonable discipline of the child may use corporal and for the reasonable discipline of the child
> Tex. H.B. 383, 79th Leg., R.S. (2005)(introduced version).

The language of House Bill 383 was subsequently amended to read:

> (e) Only the following persons may use corporal punishment for the reasonable discipline of a child:
>
> (1) a parent or grandparent of the child;
> (2) a stepparent of the child who has the duty of control and reasonable discipline of the child; and
> (3) an individual who is a guardian of the child and who has the duty of control and reasonable discipline of the child. n2
>
> n2 You do not ask and we do not opine on whether school district employees are included within the scope of section 151.001(e).
> Tex. H.B. 383, 79th Leg., R.S. (2005)(engrossed version). This is the version of the bill that was passed by the legislature and became effective.

A. Construction of House Bill 383

House Bill 383 uses the exclusive term "only." n3 If we consider House Bill 383 's plain text in isolation, the new subsection (e) could be read as making the right to use corporal punishment exclusive to the listed persons, particularly when viewed in light of the fact that the language was amended during the legislative session to use the exclusive word "only." *See supra* at 4-5. The rules of statutory construction do not allow us to confine our analysis solely to the text of House Bill 383, however. Instead, we are directed to also consider the entire statute of which it is a part and the body of law existing at the time House Bill 383 was enacted. *See Brunson, 63 S.W.3d at 588; Woolley, 51 S.W.3d at 853; Kneuper, 768 S.W.2d at 454.*

n3 The term "only" is defined as "and no one else or nothing more besides; solely and exclusively." THE NEW OXFORD AMERICAN DICTIONARY 1196 (2001). *See also TEX. GOV'T CODE ANN. § 311.011(a)*(Vernon 2005)(Code Construction Act).

House Bill 383 added a provision to *section 151.001 of the Texas Family Code*. Section 151.001 is entitled "Rights and Duties of Parents" and is part of the larger subtitle governing suits affecting the parent-child relationship. *See TEX. FAM. CODE ANN. § § 151.001*-.005 (Vernon 2002 & Supp. 2004-05)(Title 5, Subtitle B, Texas Family Code). As suggested by its title, the provisions of section 151.001 that existed prior to House Bill 383 set forth various parental rights and duties. For instance, a parent is given the right of physical possession of the child and the right to direct the moral and religious training of the child. *See id.* § 151.001(a)(1)(Vernon Supp. 2004-05). A parent is also given the "duty of care, control, protection and reasonable discipline of the child" as well as the duty to support the child. *Id.* § 151.001(a)(2)-(3). Section 151.001(a)(6) grants the parent the right to consent to a child's marriage, enlistment in the armed forces, and medical and dental care and other surgical and health treatment. *See id.* § 151.001 (a)(6). A parent is also given the right in section 151.001 to represent the child in legal actions and to make other legal decisions for the child, *see id.* § 151.001(a)(7), to inherit from and through the child, *see id.* $ 151.001(a)(9), and to make decisions about the child's education. *See id.* § 151.001(a)(10). Section 151.001 provides that a parent failing to discharge the duty of support is liable to a person who provides necessaries to the child. *See id.* § 151.001(c). Finally, section 151.001 states that the rights and duties of a parent are subject to, among other things, "a court order affecting the rights and duties." *Id.* § 151.001(d)(1). It is in this context, notably not in the context of the Education Code, that House Bill 383 adds express authorization for parents and other listed persons to use corporal punishment.

At the time House Bill 383 was enacted, existing law outside the Family Code recognized a right of persons beyond those listed in House Bill 383 to use corporal punishment. n4 Common law recognized the right of teachers to administer corporal punishment. *See Dowlen, 14 Tex. Ct. App. 61, 1883 WL 8865,* at *3 (1883); *see also Spacek, 928 S.W.2d at 95.* The Texas Penal Code granted a defense in the form of a justification to parents, stepparents and those acting *in loco parentis* for the use of nondeadly force against a child for the discipline of the child. *See TEX. PEN. CODE ANN. § 9.61* (Vernon 2003). n5 A similar justification was available to educators, *see id.* § 9.62, and guardians. *See id.* § 9.63. Outside the Penal Code's criminal context, educators were granted immunity from school disciplinary proceedings for their use of physical force against a student for punishment to the extent such force was used as justified by *section 9.62 of the Penal Code* and within school district policy. *See TEX. EDUC. CODE ANN. § 22.0512(a),* (c)(Vernon Supp. 2004-05). House Bill 383 does not on its face purport to change the existing law. In the context of *section 151.001 of the Family Code* and existing law, House Bill 383 could be construed as leaving the existing law intact and merely recognizing the affirmative right of parents and the other persons listed in section 151.001(e) to use corporal punishment.

n4 "Texas cases have long recognized the rule that public school teachers and others standing in loco parentis may use reasonable force to discipline their charges." *Hogenson v. Williams, 542 S.W.2d 456, 459* (Tex. Civ. App.-Texarkana 1976, no writ)(citing *Balding v. State, 4 S.W. 579 (Tex. Ct. App. 1887)* and *Prendergast v. Masterson, 196 S.W. 246* (Tex. Civ. App.-Texarkana 1917, no writ)).

n5 A "justification" is a "lawful or sufficient reason for one's acts or omissions." BLACK'S LAW DICTIONARY 870 (7th ed. 1999).

With competing constructions, House Bill 383 is "capable of being understood by reasonably well informed persons in two or more different senses" and is therefore ambiguous. *See Teleprofits of Tex., Inc., 875 S. W.2d at 750.* Accordingly, we must look beyond the language of the statute for the intent of the legislature in enacting House Bill 383. *See In re K.L.V., 109 S.W.3d at 65.* In attempting to ascertain the legislative intent behind a statute, we may consider, among other things, the object sought to be obtained, any legislative history, and the consequences of a particular construction. *See TEX. GOV'T CODE ANN. § 311.023* (Vernon 2005); *see also Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 280 (Tex. 1994);* Tex. Att'y Gen. Op. No. GA-0283 (2004) at 6.

The legislative history of House Bill 383 is informative. The bill analysis accompanying the original language of House Bill 383 states that:

> Currently, Texas law provides that a parent of a child has the right and a duty to care, control, protect, and reasonably discipline a child. However, when a parent disciplines a minor child with the use of corporal punishment, or "spanking," the parent may be confronted with confusion as to possible criminal charges that may arise from the use of such punishment.
>
> House Bill 383 provides that a parent or person having a duty to control and reasonably discipline a child may use corporal punishment for the reasonably discipline of a child.
> HOUSE COMM. ON JUVENILE JUSTICE AND FAMILY ISSUES, BILL ANALYSIS, TEX. H.B. 383,79th Leg., R.S. (2005).

The House Committee on Juvenile Justice and Family Issues, not the House Committee on Public Education, held a public hearing and took testimony on the bill. Representative Harold V. Dutton, the bill's sponsor, stated that the bill "moves the language from the Penal Code . . . as a defense to child abuse . . . to the Family Code and the language is essentially that a parent has the right to use corporal punishment to reasonably discipline a child." *Hearing on Tex. H.B. 383 Before the House Comm. on Juvenile Justice and Family Issues,* 79th Leg., R.S. (Feb. 23, 2005)(Representative Dutton speaking). By his reference to movement from the Penal Code to the Family Code, Representative Dutton appears to be saying that the bill was intended to affirmatively recognize in the Family Code the right to parental use of corporal punishment that is distinguished from a defense to criminal child abuse charges under the Penal Code. n6 A witness testifying in support of the bill related to the committee a story about a parent who was subjected to a full Child Protective Services ("CPS") inquiry and parenting classes because the parent admitted to spanking the child. *See id.* (Lee Spiller statement). The witness testified that the injury that prompted the parent to be questioned was in fact caused by an allergy and not the spanking. *See id.* The other witness before the Juvenile Justice and Family Issues Committee encouraged the bill's passage because parents were afraid to discipline their children, and the witness attributed the lack of discipline to societal problems. *See id.* (Roy Getting statement). We believe these statements indicate that the wrong sought to be addressed by House Bill 383 was the confusion of parents about their right to spank their children and the need to discourage CPS involvement in reasonable parental corporal punishment discipline matters. *See Liberty Mut. Ins. Co. v. Garrison Contractors, Inc., 966 S.W.2d 482, 484 (Tex. 1998)*("We bear in mind 'the old law, the evil and the remedy'"in ascertaining legislative intent (citing *TEX. GOV'T CODE ANN. § 312.005*)); *accord Calvert v. Kadane, 427 S.W.2d 605, 608 (Tex. 1964); Wilson v. Bloys, 169 S.W.3d 364, 368*] (Tex. App.-Austin 2005, pet. filed)("In ascertaining legislative intent, we may consider the evil sought to be remedied . . . . "). Thus, we believe House Bill 383's purpose as introduced was to clarify confusion by affirmatively recognizing parents' right to use corporal punishment to reasonably discipline their children.

n6 Harold V. Dutton, Jr., *Corporal Punishment, so-called experts'* [sic] *and my bill,* Houston Chronicle, Feb. 24, 2005, ("You'll find that the corporal punishment provision is in the Penal Code as a defense to child abuse. As a defense to child abuse, that's what's offensive to most parents. House Bill 383 would simply move that provision to the Family Code. No more, no less.").

It is also apparent that House Bill 383's purpose did not change significantly after it was amended. The amendment to House Bill 383 with the language ultimately adopted was passed in April 2005. *See* H.J. OF TEX., 79th Leg., R.S. 1819 (2005). A month later, in May, the Senate Jurisprudence Committee, not the Senate Committee on Education, held a hearing on the bill. Senator Juan "Chuy" Hinojosa, the bill's Senate sponsor, stated that:

> Right now there is a lot of confusion as to what the law provides in terms of trying to discipline a child. Sometimes when a parent or grandparent tries to discipline a child [unintelligible] will call protective services. This eliminates the confusion by making it clear that only a parent, stepparent or guardian may use corporal punishment for the reasonable discipline of a child.
> *Hearing on Tex. H.B. 383 Before the Senate Comm. on Jurisprudence*, 79th Leg., R.S. (May 20, 2005)(Senator Hinojosa speaking).

We believe Senator Hinojosa's statement acknowledges that House Bill 383, despite its amended language, was nonetheless still intended to address the problem of parental fear of CPS involvement in the parent's reasonable discipline of a child. We do not believe that his statement -- "only a parent . . . may use corporal punishment" -- negates the clear purpose behind House Bill 383. *Id.* Indeed, by using the exclusionary term "only" here, Senator Hinojosa could have been alluding to the fact that the express recognition of the corporal punishment right was being given exclusively to those listed persons. n7 In light of the clear purpose of the bill to address parental fears of CPS involvement in reasonable child discipline issues, we do not believe this one statement justifies a conclusion that House Bill 383 as amended was designed to prohibit all other uses of corporal punishment.

n7 Jeffrey Gilbert, *House Oks* [sic] *Corporal Punishment,* Houston Chronicle, Apr. 19, 2005 ("A few lawmakers raised questions over whether that list covered grandparents . . . . Because of the confusion, Dutton will add grandparent to the list . . . . ").

As initially introduced, House Bill 383 was not intended to apply to a school's use of corporal punishment. *See* HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, Tex. H.B. 383, 79th Leg., R.S. (2005)("The bill would not apply to the use of corporal punishment by teachers or other school personnel."). In the Statement of Legislative Intent on the House Floor accompanying his amendment to House Bill 383, Representative Dutton sought to make it clear that the amended bill did not change the law with respect to use of corporal punishment in schools:

> REPRESENTATIVE TALTON: Representative Dutton, let me make sure -- when you put the amendment on, will that amendment prohibit teachers from using corporal punishment on the kids in public and private schools?
>
> REPRESENTATIVE DUTTON: I believe that the current law actually prohibits that. What this amendment does is simply make it a little bit more clearer that those people do not have standing in order to do that.

TALTON: I thought, right now, that the law is whatever that school decides on their policy.

DUTTON: I'm sorry. I couldn't understand you.

TALTON: I think current law is that each school district decides their own policy regarding corporal punishment, isn't that what current law is?

DUTTON: Well, but they have to have permission from the parent.

TALTON: Right, and your bill would make it so that not even with permission from the parent, they will not be able to do that, is that correct?

DUTTON: No, still it doesn't take that away.

TALTON: Okay, let me make sure that I understand, so if the parents give permission to do corporal punishment in either a public or private school then they can still do that?

DUTTON: Yes, under the amendment, that is correct.

TALTON: Okay.
Debate on Tex. H.B. 383 on the Floor of the House, 79th Leg., R.S. (Apr. 18, 2005); H.J. of Tex., 79th Leg., R.S. 1819 (2005)(Statement of Legislative Intent).

Both men believed, contrary to existing law, that a school could administer corporal punishment only with parental consent. This exchange does not, however, indicate any intent to repeal existing law on corporal punishment. *See Gordon v. Lake, 356 S.W.2d 138,139 (Tex. 1962)*("Repeals by implication are not favored . . . . "). Additionally, in neither of the House or Senate committee hearings on House Bill 383 was corporal punishment's use in schools and by educators even addressed. n8

n8 Abolishing the use of corporal punishment in schools was considered by the same legislature that passed House Bill 383. House Bill 2413 would have amended the Education Code to provide that "[a] school district employee or volunteer or independent contractor of a district may not administer corporal punishment or cause corporal punishment to be administered to a student." Tex. H.B. 2413,79th Leg., R.S. (2005). Evidently, the legislature knew how to draft legislation that would have prohibited corporal punishment in schools. However, House Bill 2413 was left pending in committee and was not enacted.

Based on its legislative history, we believe House Bill 383 was designed to address the confusion and fears that parents may have had about their ability to discipline their child. *See Garrison Contractors, Inc., 966 S.W.2d at 484; accord Kadane, 427 S.W.2d at 608.* House Bill 383 clarified the law by expressly recognizing the right of parents and the other listed persons to use corporal punishment without fear of CPS involvement.

In addition to examining legislative history, to determine legislative intent we may also consider the consequences of alternative constructions. *See In re Bay Area Citizens Against Lawsuit Abuse, 982 S.W.2d 371, 380 (Tex.1998).* Where possible, we are to construe statutes in harmony and avoid implied repeals. *See Fortenberry, 283 S.W. at 148; Sadler, 383 S.W.2d at 395.* If House Bill 383 were construed as a prohibition against the use of corporal punishment in schools, it would conflict with aspects of *section 9.62, Penal*

Code, and *section 22.0512, Education Code*, and render them partially meaningless. *Section 9.62, Penal Code*, provides a justification defense to educators for the use of physical force against a person if entrusted with responsibility over the person for a special purpose and the physical force is necessary to further the special purpose. n9 *See TEX. PEN. CODE ANN. § 9.62* (Vernon 2003). Section 9.62 has been construed to authorize an educator to use reasonable force in two circumstances: "(1) to enforce compliance with a proper command issued for the purpose of controlling, training, or educating the child, or (2) to punish the child for prohibited conduct." Tex. Att'y Gen. Op. No. GA-0202 (2004) at 2 (quoting *Hogenson v. Williams, 542 S.W.2d 456, 460* (Tex. Civ. App. -- Texarkana 1976, no writ)). The second circumstance is the one that speaks to a school's use of corporal punishment. *See* Tex. Att'y Gen. Op. No. GA-0202 (2004) at 3 (defining corporal punishment). If House Bill 383 prohibits educators from administering corporal punishment, to the extent it justifies the use of force in the second circumstance -- to punish a child for prohibited conduct -- the justification defense would not be legally effective. n10

n9 In the case of an educator, the "special purpose is 'that of controlling, training, and educating'" students. Tex. Att'y Gen. Op. No. GA-0202 (2004) at 2 (quoting *Hogenson v. Williams, 542 S.W.2d 456, 459-60* (Tex. Civ. App. -- Texarkana 1976, no writ)).

n10 Corporal punishment has been defined to mean "the infliction of bodily pain as a penalty for disapproved behavior." Tex. Att'y Gen. Op. No. GA-0202 (2004) at 3.

Similarly, with respect to corporal punishment, *Education Code section 22.0512* provides educators immunity from school disciplinary proceedings for the "use of physical force against a child to the extent justified under *Section 9.62, Penal Code*" and as authorized by school district policy. *TEX. EDUC. CODE ANN. § 22.0512(a)*, (c)(Vernon Supp. 2004-05). Because it is construed to have the same scope as *section 9.62, Penal Code*, *see* Tex. Att'y Gen. Op. No. GA-0202 (2004) at 4, *section 22.0512, Education Code*, would also be rendered meaningless to the same extent as would *section 9.62 of the Penal Code*. Were House Bill 383 to be construed as prohibiting an educator's use of corporal punishment, the conflict between it and the corporal punishment aspect of *section 9.62, Penal Code*, and *section 22.0512, Education Code*, would be irreconcilable. If House Bill 383 prohibited corporal punishment in schools but an educator were allowed to successfully use the Penal Code provision or the Education Code provision against charges of corporal punishment, the defense would negate the prohibition. We do not believe the legislature be construed in harmony where possible. *See Needham, 82 S.W.3d at 318.* Construing House Bill 383 to recognize an exp5122n5ight of corporal punishment in certain listed individuals and not as a prohibition against the use of corporal punishment for schools harmonizes it with the Penal Code and Education Code provisions so that all three provisions can be given full effect. Moreover, harmonizing the three statutes avoids an implied repeal of aspects of the existing Penal Code and Education Code. *See Sadler, 383 S.W.2d at 395.*

For all of these reasons, we conclude that House Bill 383, or *section 151.001(e), Family Code*, does not change Texas law with 512pect to a schooldistrict's use of corporal punishment.

B. Specific Questions

1. *School District's Use of Corporal Punishment*

Your first question W2nwhether an employee of a school districtnwho W2 not a person listed in section 151.001(e) may "utilize corporal punishment pursuant to a districtnstudent discipline policy." Request Letter, *supra* note 1, at 3. Because we construe House Bill 383 to recognize an affirmative 5ight in certain

persons to use corporal punishment and not to prohibit a school's use of corporal punishment, we conclude that a school district employee may utilize corporal punishment to the extent permitted by section 9.62, Penal Code, section 22.0512, Education Code, and any school district policy.

2. *School District's Use of Corporal Punishment without Parental Consent*

Your second question, contingent on an affirmative answer to your first, is whether a district "may adopt a policy authorizing corporal punishment when a parent or other individual named in Sub*section 151.001(e), Family Code*, has not given permission for corporal punishment." Request Letter, *supra* note 1, at 3.

In Texas, a teacher has long had the right to "inflict moderate corporal punishment for the purpose of restraining or correcting the refractory" student. n11 *Dowlen, 14 Tex. Ct. App. 61, 1883 WL 8865,* at *3 (1883); *Spear v. State, 25 S.W. 125, 125 (Tex. Crim. App. 1894); see also Spacek, 928 S.W.2d at 95* ("*Section 9.62 [Penal Code*] is generally expressive of the common law majority rule that public school teachers standing *in loco parentis* may use reasonable force to discipline their charges."). Prior to the enactment of House Bill 383, Texas law permitted a school district to utilize corporal punishment for the reasonable discipline of its students without permission or consent of parents. *See Ware v. Estes, 328 F. Supp. 657, 658-60 (N.D. Tex. 1971)*(affirming district court's dismissal of plaintiffs' lawsuit challenging Dallas Independent School District's use of corporal punishment without parental consent). Because we have concluded that House Bill 383 was not intended to abrogate existing law on corporal punishment in schools, we conclude here that a school district may adopt a policy authorizing corporal punishment without the permission of those persons listed in section 151.001(e).

3. *School District's Use of Corporal Punishment over Objection of Certain Persons*

> n11 Moreover, federal constitutional concerns are not implicated by a school policy authorizing reasonable corporal punishment. Reasonable corporal punishment does not constitute cruel and unusual punishment under the Eighth Amendment. *See Ingraham v. Wright, 525 F.2d 909, 914 (5th Cir. 1976)*("We concur with the approach taken by the two district courts that have held the Eighth Amendment to be inapplicable to corporal punishment in public schools."); *Woodard v. Los Fresnos Indep. Sch. Dist, 732 F.2d 1243, 1245 (5th Cir. 1984).* Similarly, where a "state affords adequate post-punishment remedies to deter unjustified or excessive punishment and to redress that which may nevertheless occur," a student's Fourteenth Amendment procedural due process rights are protected. *See Los Fresnos Indep. Sch. Dist, 732 F.2d at 1245* (citing *Ingraham v. Wright, 430 U.S. 651, 675-80 (1977)*(considering procedural due process charges brought under the Fourteenth Amendment)). A student's Fourteenth Amendment substantive due process rights are also not implicated by reasonable corporal punishment so long as the corporal punishment has a "real and substantial relation to the object sought to be attained." *Ingraham, 525 F.2d at 916-17.* And the Fifth Circuit has said that "paddling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children." *Id. at 917.*

Because your third question is contingent upon an affirmative answer to your second question, we do not address it.

III. Conclusion

In sum, House Bill 383 recognizes an express right in certain persons to use corporal punishment in the reasonable discipline of a child. It does not prohibit the use of corporal punishment by school districts. Therefore, a professional school district employee may utilize corporal punishment to the extent permitted by other state law and school district policies. Additionally, a school district may adopt a policy authorizing corporal punishment without the permission of the persons listed in *section 151.001(e), Family Code*.

SUMMARY

Section 151.001 (e), Family Code, added by House Bill 383 in the Seventy-ninth Legislature, recognizes an affirmative right in the persons listed in the legislation to use reasonable corporal punishment to discipline a child. Section 151.001 (e) is not a prohibition against the reasonable use of corporal punishment in schools.

Accordingly, a professional employee of a school district may administer corporal punishment to the extent permitted by section 9.62, Penal Code, section 22.0512, Education Code, and any school district policy. Moreover, a school district may adopt a policy authorizing corporal punishment without the permission of those persons listed in section 151.001(e).

CONFESSIONS—

A JUVENILE'S REQUEST TO CALL HIS MOTHER WAS AN UNAMBIGUOUS REQUEST FOR AN ATTORNEY WHEN REQUEST WAS FOLLOWED BY THE STATEMENT THAT HE WANTED HIS MOTHER TO GET AN ATTORNEY, AND SUBSEQUENT CONFESSION AND EVIDENCE FOUND AS A RESULT OF SAID CONFESSION MUST BE SUPPRESSED.

¶ 05-5-3. **In the Matter of H.V.**, ___S.W.3d ___, No. 2-04-029-CV, 2005 Tex.App.Lexis 9712 (Tex.App.— Fort Worth) on rehearing, 11/17/05; see *In the Matter of H.V.*, No. 2-04-029-VC, 2005 Tex.App.Lexis 2088, Juvenile Law Newsletter ¶ 05-2-14 (Tex.App.– Fort Worth) 3/17/05.

CAUSAL CONNECTION AND ATTENUATION OF TAINT ARE NOT THE SAME THING, THE RESPONDENT HAS THE BURDEN TO ESTABLISH A CAUSAL CONNECTION, WHILE IT IS THE STATE'S BURDEN TO DISPROVE THE CAUSAL CONNECTION OR ESTABLISH AN ATTENUATION-OF-TAINT.

¶ 05-3-08; **Pham/Gonzales v. State**, 175 S.W.3d 767, Nos. 12-4 & 72-04, 2005 Tex. Crim. App. Lexis 832 (Tex.Crim.App., 6/8/05).

Background: Appellant John Tuy Pham was convicted by a jury of the offense of murder, and was assessed a punishment of life imprisonment in the TDCJ Institutional Division. Appellant Chance Derrick Gonzales pled guilty to the offense of murder in the 208th District Court of Harris County, Texas. He was sentenced to 45 years' confinement in the Texas Department of Criminal Justice ("TDCJ") institutional division pursuant to a plea bargain. In both cases the Court of Criminal Appeals held that law enforcement officers had obtained statements from Appellants' in violation of §52.02 of the Family Code and were remanded for a causal connection analysis.

The Court of Criminal Appeals consolidated Appellants' cases, as the same issues are raised in each of their appeals, and both cases are being appealed from the First Court of Appeals in Harris County.

Facts: Appellant Pham was sixteen years old at the time he became a suspect in the drive-by shooting that resulted in the death of the victim, Dung Van Ha. At 2:35 p.m. on September 9, 1998, Houston police officers arrested Appellant at Clear Brook High School. At 3:35 p.m., a magistrate gave Appellant legal warnings as required by *section 51.095 of the Texas Family Code*. Subsequently, Appellant was taken to the police station and questioned by an investigator. Appellant admitted to his involvement in the shooting at approximately 4:38 p.m. He was then taken to a juvenile facility for processing by the police officers. An officer from this processing facility first notified Appellant's family at about 8:15 p.m. when he spoke to Appellant's sister. No one from the police department spoke with Appellant's parents until 9:50 p.m. Appellant's parents did not come to see him until the following day.

Appellant Gonzales was arrested in connection with a shooting death during a robbery at a convenience store when he was 15 years old. Appellant was identified by two witnesses who confirmed that he shot the victim while attempting to steal beer from the store for a gang party. Police arrested Appellant at a party, sometime between midnight and 1:30 a.m. Before police officers took Gonzales to a juvenile processing office at approximately 2:30 a.m., the officers made a stop at a sheriff's station where they left him for 20-30 minutes so they could pick up a surveillance tape from a convenience store. This tape showed Appellant committing a similar type of robbery the same night. Appellant was given his *Miranda* warnings in the car on the way to the processing facility. The officer's then took Appellant to a municipal judge at 3:35 a.m., where he was given the warnings required by *Texas Family Code section 51.095*. It was in the judge's chambers with the police officers that Appellant Gonzales then gave his written statement. The arresting officer testified that he did not notify Appellant's parents that their son had been arrested. Appellant Gonzales' parents did not know that he had been arrested until he was processed into the juvenile arresting facility five to six hours after he was arrested, and after he gave his statement to police.

II. Procedural History: Pham

Appellant Pham originally appealed his conviction to the First Court of Appeals. The court of appeals in *Pham v. State* n1 (*Pham I*), reversed the conviction based on the conclusion that the trial court erred in admitting Appellant's statement. The court held the statement inadmissible due to the State's violation of *Texas Family Code § 52.02(b)* n2, and remanded the case to the trial court. The State subsequently filed a petition for discretionary review with this court, which was granted. This court vacated *Pham I* in *Pham v. State n3* (*Pham II*), and remanded the case to the court of appeals in light of the decision in *Gonzales v. State* (*Gonzales* II). n4 Upon reconsideration, the court of appeals decided *Pham v. State* (*Pham III*), on November 26, 2003. In this decision, the court held that the trial court had properly admitted Appellant's confession, and that Appellant was not entitled to a jury instruction on the admissibility of his confession. Appellant subsequently filed a petition for discretionary review to this Court.

n1 *John Tuy Pham v. State, 36 S.W. 3d 199 (Tex. App.-Houston [1st Dist.] 2000).*
n2 *Texas Family Code section 52.02(b)* states:

A person taking a child into custody shall *promptly* give notice of the person's action and a statement of the reason for taking the child into custody, to:

(1) the child's parent, guardian, or custodian; and (2) the office or official designated by the juvenile board. (emphasis added)

n3 *Pham v. State, 72 S.W. 3d 346 (Tex. Crim. App. 2002).*
n4 *Gonzales v. State, 67 S.W. 3d 910 (Tex. Crim. App. 2002)* (*Gonzales II).*

III. Procedural History: Gonzales

Appellant Gonzales appealed to the First Court of Appeals from a plea of guilty. The court of appeals handed down its original decision (*Gonzales I)* on November 4, 1999, holding that Appellant's confession was inadmissible because the State had not met its burden of proving that *Texas Family Code § 52.02(b)* had not been violated. n5 We granted the State's petition for discretionary review, and on February 13, 2002, vacated the decision of the court of appeals (*Gonzales II)*. This Court held in *Gonzales II* that Appellant's statement was not inadmissible merely because the State failed to follow the requirements of *Texas Family Code § 52.02(b)*. We held that an exclusionary analysis under *Texas Code of Criminal Procedure Article 38.23*, including a causal connection analysis, had to be undertaken by the court, and had not been. n6 Therefore the case was remanded. Upon reconsideration of the case, the court of appeals handed down an opinion on November 26, 2003 (*Gonzales III*), n7 holding that, in an *article 38.23* exclusionary analysis, the initial burden was on the appellant to demonstrate a violation of a statutory requirement as well as a causal connection between the violation and his ensuing confession. n8 Finding that Appellant Gonzales presented no evidence to demonstrate this causal connection, the court of appeals affirmed the judgment of the trial court and held Appellant's statement admissible. n9 Appellant then filed a petition for discretionary review with this Court.

n5 *Gonzales v. State, 9 S.W. 3d 267 (Tex. App.-Houston [1st Dist.] 1999)* (*Gonzales I*).
n6 *Gonzales v. State, 67 S.W. 3d 910 (Tex. Crim. App. 2002).*
n7 *Gonzales v. State, 125 S.W. 3d 616 (Tex. App.-Houston [1st Dist.] 2003)* (*Gonzales III).*
n8 *Id. at 618.*
n9 *Id. at 619.*

IV. First Court of Appeals' Decisions and Grounds for Review

The court of appeals held in *Pham III* that the State did obtain Appellant Pham's confession in violation of *Texas Family Code section 52.02(b),* however, in light of our opinion in *Gonzales II,* the court also held that the confession was not automatically inadmissible without first conducting an analysis under *Texas Code of Criminal Procedure article 38.23* to determine whether there was a causal connection between the illegal conduct and the acquisition of the evidence. n10 The court of appeals interpreted our remand in *Gonzales II* as implying that an attenuation-of-taint analysis was an insufficient analysis to satisfy the requirement that a causal connection be established. Therefore the court of appeals determined that the causal connection analysis required by this Court in *Gonzales II* must be separate from an attenuation-of-taint analysis. n11 The court of appeals further relied on our opinion in *Roquemore v. State, 60 S.W. 3d 862 (Tex. Crim. App. 2001)* for this conclusion, where this Court first conducted a causal connection analysis and found a causal connection between the recovery of stolen property and the illegality of police conduct, but failed to conduct an attenuation-of-taint analysis because the State did not raise the argument. n12

n10 *Pham III, 125 S.W.3d 622 at 625*.
n11 *Id.*
n12 *Id.*

The court of appeals next addressed the issue of which party has the burden of proving a causal connection, noting that no direct authority establishes who takes on this burden. n13 The court pointed out that the issue is not who has the ultimate burden of persuasion as to the admissibility of a confession, as this clearly rests with the State in an attenuation-of-taint analysis, but rather who has the initial burden of production of proof of a causal connection between the violation of the statute and the ensuing confession. The court ultimately held that the defendant should shoulder this initial burden of proof, analogizing the situation to that of a violation of the statute requiring that a defendant promptly be taken before a magistrate. The court also based its conclusion upon more practical considerations, such as the fact that it is more "reasonable to place the burden on the defendant to produce evidence to which only the defendant has access." n14 The court concluded that the State has the burden to demonstrate attenuation of the taint once the defendant has satisfied the initial burden of production of some evidence that shows a causal connection between the police illegality and the recovery of the evidence. n15 The court found that Appellant Pham produced no evidence of a causal connection, and therefore did not meet his burden, making it unnecessary to conduct an attenuation-of-taint analysis, and rendering his confession admissible.

n13 *Id. at 626*.

n14 *Id. at 627*.

n15 *Id.*

In Appellant Gonzales' case, the court of appeals, citing its decision in *Pham III* (discussed above), again held that when there is a violation of *section 52.02(b) of the Texas Family Code*, the initial burden is on the defendant to demonstrate a violation of the statutory requirement and a causal connection between that violation and the ensuing confession. Again, the court held that Appellant Gonzales produced no evidence that would demonstrate a causal connection between the police violation of the Family Code and his ensuing confession, therefore his statement was admissible.

Both Appellants argue that a causal-connection analysis is part and parcel of an attenuation-of-taint analysis, and that the burden of proof falls on the State to negate the causal connection between the violation and the confessions of the two Appellants. Appellants claim that the court of appeals ignored cases stating that when voluntariness is an issue, the burden of proof for admissibility of confessions lies with the State, and argue that this Court did not create a separate causal connection analysis in *Gonzales II*.

The State argues in these cases that the court of appeals did not err in placing the burden of *production* on Appellants to offer evidence to prove that violations of the Family Code occurred, and that they were causally connected to the ensuing confessions. The State contends that Appellants failed to meet the burden of production, i.e. they did not produce any evidence that their statements were obtained in violation of any laws. Additionally, the State argues that causal connection and attenuation-of-taint are two separate analyses by which a court will determine whether evidence was obtained in violation of the law as set out in *article 38.23*.

We granted review in both of these cases to clarify the causal connection analysis which must be undertaken in *article 38.23* suppression of evidence claims. In Appellant Pham's case, we granted the following two grounds for review: 1) did the court of appeals err in holding that causal connection and attenuation-of-taint constitute separate analyses, and 2) did the court of appeals err by requiring Appellant to prove a causal connection between the violation of *section 52.02(b) of the Texas Family Code* and Appellant's confession? In Appellant Gonzales' case, we granted the following ground for review: did the court of appeals adopt the wrong standard by which a causal connection must be established under *article 38.23* to justify suppression of evidence seized in violation of the Family Code?

Held: Affirm in both cases.

Opinion: Neither party argues with the settled law that the burden of proof is initially on the defendant to raise the exclusionary issue by producing evidence of a statutory violation, and that this burden then shifts to the State to prove compliance. The main issue we face here is whether the defendant has the burden of producing evidence that shows the violation is connected to the obtaining of the evidence sought to be suppressed.

Appellants argue that a causal connection analysis cannot be separated from an attenuation analysis, and thus, since it is well settled that the State bears the burden of proving attenuation of taint, the burden is also upon it to produce evidence of a causal connection. We disagree. If we follow this circular argument, anytime an appellant asserted a statutory violation of *Family Code section 52.02(b)*, a court would immediately have to conduct an attenuation-of-taint analysis because it is part of the causal connection analysis. This would further the assumption that once Appellant shows a violation of the statute under 52.02(b), the evidence is automatically assumed inadmissible unless the State demonstrates attenuation-of-taint, an assumption which we expressly rejected in *Gonzales II*.

We have held that the State may make an attenuation-of-taint argument which is included under an *Article 38.23* analysis. n16 However, this argument is discussed by a court only if the State raises it. n17 Analysis of causal connection and attenuation-of-taint are not the same. An attenuation-of-taint analysis is not always required and therefore need not always be conducted. We have expressly held that a causal connection between a violation of *section 52.02(b)* and the obtaining of evidence *must be shown* before the evidence is rendered inadmissible. n18 If there is no causal connection shown in the first place, there is no reason for the State to argue that the taint of the violation is so far removed that the causal connection is broken. Attenuation-of-taint breaks this connection. It does not negate the existence of the causal connection.

n16 *Johnson v. State, 871 S.W.2d 744 (Tex. Crim. App. 1994).*
n17 *Roquemore v. State, 60 S.W. 3d 862 (Tex. Crim. App. 2001).*
n18 *Gonzales v. State, 67 S. W. 3d 910 (Tex. Crim. App. 2002)(Gonzales II).*

If the defendant produces evidence that there is a causal connection, the State may either try to disprove this causal evidence, i.e. disproving that there is a causal connection in existence at all, or, the State may make an attenuation-of-taint argument. Attenuation-of-taint is evaluated under the four-step *Brown v. Illinois* n19 analysis, in which the State may argue that although the defendant has demonstrated evidence of a causal connection, the taint of the violation was so far removed from the obtaining of the evidence that the causal chain the defendant demonstrated is in fact broken. In short, without first establishing that there is a causal connection between the violation and the obtaining of the evidence, there can be nothing for the State to assert has been broken through the attenuation-of-taint factors. Thus, we uphold the court of appeals' conclusion that a causal connection analysis regarding *Family Code section 52.02(b)*, as required by this Court in *Gonzales II* before evidence may be deemed inadmissible, is a separate from an attenuation-of-taint analysis, which may be used by the State to rebut a defendant's causal connection argument.

n19 *Brown v. Illinois, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975).*

We also uphold the court of appeals' distribution of the burdens of proof in both of these cases. We have long held that "the burden of persuasion is properly and permanently placed upon the shoulders of the

moving party. When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case." n20 In *Russell v. State*, we again cited this holding. Recognizing that this analysis was used for federal claims of illegal search and seizure under the *Fourth Amendment*, and because Texas statutory law is silent as to how the burden of proof is distributed on a motion to suppress, this Court adopted some of the rules followed by federal courts in distributing burdens of proof. n21

n20 *Mattei v. State, 455 S.W.2d 761, 766 (Tex. Crim. App. 1970)* (quoting *Rogers v. United States, 330 F.2d 535 (5th Cir. 1964), cert. denied, 379 U.S. 916, 13 L. Ed. 2d 186 (1964)*).

n21 *Russell v. State, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986).*

Appellant argues that the burden should be on the State to show the causal connection, and analogizes this situation to the admissibility of confessions when issues of voluntariness are raised. Although the burden is on the State to prove that a defendant's confession was voluntary once the issue has been raised, that situation may be distinguished from the statutory violation of the Texas Family Code we have here. All a defendant must do on a claim of involuntary confession is to demonstrate there a cognizable violation, and the confession is immediately presumed inadmissible unless the State can prove by a preponderance of the evidence that it was made voluntarily. n22 There is no requirement that a defendant establish any causal connection between the illegal conduct and the ensuing confession; the defendant simply must raise the voluntariness issue. In this case, it is not enough for the defendant to merely establish a violation. Under Texas case law, it is required that a causal connection be established, and we hold that the defendant, as the moving party wishing to exclude the evidence, is responsible for the burden of proving this connection.

n22 *United States v. Reynolds, 367 F.3d 294 (5th Cir. 2004).*

Thus, the court of appeals correctly held that the burden is on the defendant, as the moving party in a motion to suppress evidence obtained in violation of the law under *Art. 38.23*, to produce evidence demonstrating the causal connection which this court required in *Gonzales II*. 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.

Conclusion: In the case of Appellant Pham, we hold that the court of appeals conducted the appropriate analysis, and that the court did not err in requiring Appellant Pham to produce evidence to prove a causal connection between the violation of *section 52.02(b) of the Texas Family Code* and his ensuing confession. The decision of the court of appeals is affirmed.

In the case of Appellant Gonzales, we hold that the court of appeals adopted the correct standard by which a causal connection must be established under *Art. 38.23* to justify the suppression of evidence seized in violation of the Family Code. The decision of the court of appeals is affirmed.

ROUTINE TRAFFIC STOP WAS "PRESUMPTIVELY TEMPORARY AND BRIEF" AND AS A RESULT, NON-CUSTODIAL, AND QUESTIONS ASKED BY THE OFFICER WERE NOT CONSIDERED CUSTODIAL INTERROGATION.

¶ 05-3-13. **In the Matter of R.A.**, MEMORANDUM, No. 03-04-00483-CV, 2005 Tex.App.Lexis 4663 (Tex.App.— Austin, 6/15/05).

A DIAGNOSTIC EXAMINATION (FOR DISCRETIONARY TRANSFER TO ADULT CRIMINAL COURT) WHICH EXCEEDED ITS INTENDED PURPOSE AND BECAME A SOURCE OF INCRIMINATING EVIDENCE CONSTITUTED A CUSTODIAL INTERROGATION TO WHICH FIFTH AMENDMENT PROTECTIONS APPLY.

¶ 05-4-22. **Simpson v. State,** MEMORANDUM, No. 12-03-00379-CR, 2005 Tex.App.Lexis 9047 (Tex.App.— Tyler, 10/31/05).

DISCRETIONARY TRANSFER—

HEARSAY TESTIMONY PERMISSABLE BY TYC REPRESENTATIVE AT TRANSFER HEARING

¶ 05-2-04. **In the Matter of R.M.**, UNPUBLISHED, No. 04-03-00505-CV, 4004 Tex.App.Lexis 11908 (Tex.App.— San Antonio 11/3/04).

Facts: R.M. was sentenced to a ten-year determinate sentence after pleading true to aggravated sexual assault of a child. R.M. appeals the trial court's order transferring him from the Texas Youth Commission to the Texas Department of Criminal Justice - Institutional Division. Because the issues in this appeal involve the application of well-settled principles of law, we affirm the trial court's order in this memorandum opinion under *Texas Rule of Appellate Procedure 47.4* for the following reasons:

Held: Affirmed

Memorandum Opinion:

[Text Omitted]

In his second issue, R.M. contends the trial court erred in permitting Cucolo to testify based on his report summarizing R.M.'s behavior while at TYC. R.M. argues that, because Cucolo did not have personal knowledge of all the information summarized in the report and was not qualified as an expert, his testimony constituted inadmissible hearsay. R.M.'s argument, however, ignores that a transfer/release hearing is a "second chance hearing" after the juvenile has already been sentenced to a determinate number of years. *In re D.S., 921 S.W.2d 383, 387 (Tex. App.-Corpus Christi 1996, writ dism'd w.o.j.).* The hearing does not need to meet the same stringent due process requirements as a trial in which a person's guilt or innocence is decided. *In re J.M.O., 980 S.W.2d 811, 813 (Tex. App.-San Antonio 1998, pet. denied).* Therefore, the court is not precluded from considering hearsay testimony at a transfer/release hearing. *In re C.D.T., 98 S.W.3d 280, 283 (Tex. App.-Houston [1st Dist.] 2003, pet. denied).* We therefore hold the trial court did not err in permitting Cucolo to testify based on his report summarizing R.M.'s behavior while at TYC. *See id.* (holding juvenile's constitutional rights were not violated by the admission of hearsay evidence).

3. In his third issue, R.M. contends his due process rights were violated because he did not receive adequate notice of his conduct that warranted his transfer to TYC. However, R.M. failed to raise this complaint when the transfer/release hearing began. Because R.M. did not raise his complaint in the trial court, we hold he has waived this contention. *See TEX. R. APP. P. 33.1(a).*

4. In his fourth issue, R.M. contends the conditions of his confinement are cruel and unusual in

violation of the *Eighth* and *Fourteenth Amendments of the United States Constitution* because he has been denied treatment for his "sexual disease." Again, however, R.M. failed to raise this complaint in the trial court and thus waived his right to raise this issue on appeal. *See id.* In any event, the record demonstrates that R.M. received treatment for his condition while at TYC through counseling sessions with a psychologist and a resocialization program offered by TYC.

Conclusion: The trial court's judgment is affirmed.

IN DETERMINATE SENTENCE TRANSFER HEARING APPELLANT WAIVED HIS COMPLAINT AND FAILED TO PROPERLY PRESERVE HIS ISSUE FOR APPEAL.

¶ 05-2-29. **In The Matter of L.D.M.,** MEMORANDUM, No. 01-04-00699-CV, 2005 Tex. App. Lexis 3027 [Tex. App-Houston (1st Dist.) 4/21/05].

Facts: The County Court at Law No. 1, Galveston County, Texas, entered an order transferring juvenile from a youth facility to the Texas Department of Criminal Justice (TDCJ) to complete the remainder of his 15-year determinate sentence for the offenses of Aggravated Robbery. Juvenile appealed.

Held: Affirmed

Memorandum Opinion: In his sole issue, appellant contends the trial court erred in failing to *sua sponte* declare a mistrial. In order to preserve error on appeal, a party must make a specific objection and obtain a ruling from the trial court, or object to the trial court's refusal to rule. TEX. R. APP. P. 33.1. Arguments on appeal must comport with the objection at trial, or the error is waived. *See Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *see also Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). This is true even when the complaint is on constitutional grounds. *Espinosa v. State*, 29 S.W.3d 257, 260 (Tex. App.--Houston [14th Dist.] 2000, pet. ref'd).See *In re K.H.*, 2003 Tex. App. LEXIS 4617, No. 12-01-00342, 2003 WL 744067, (Tex. App.--Tyler, Mar. 5, 2003, no pet.) (memorandum opinion), in which the court held that (1) section 54.11(d) is not jurisdictional in nature, and (2) the purpose of the section is to provide appellant's counsel with sufficient time to review pertinent records before the trial court receives evidence. *See In re D.S.*, 921 S.W.2d 383, 387 (Tex. App.--Corpus Christi 1996, writ dism'd w.o.j.) (rejecting appellant's ineffective assistance of counsel issue and stating that on appeal, appellant may not complain about "allegedly unconstitutional hypothetical possibility" because trial counsel conceded that he had adequate time to review written materials pursuant to section 54.11(d)).

On the first day of the transfer hearing, Appellant's trial counsel learned that she had reviewed only a five-page summary report from TYC. Appellant's trial counsel stated that she was unaware that the individual incident reports were part of the court's file, and then requested her twenty-four hour period to review the documents. The trial court granted her request. She continued her cross-examination of Leonard Cuculo, the TYC representative, the State re-examined Cuculo, and then the trial court recessed Appellant's transfer hearing.

When the transfer hearing reconvened two days later, the following exchange occurred:

THE COURT: Ms. Meier, are you ready?

TRIAL COUNSEL: Yes, Your Honor. And let me-as a preliminary matter, I guess I should give the Court

back the volumes of reports.

THE COURT: Okay. For the record, have you had a chance to review all the Court's written material, Ms. Meier?

TRIAL COUNSEL: Yes, Your Honor, I have.

Appellant's trial counsel conceded in open court that she had an opportunity to review all of the TYC's reports. She never objected to the failure to receive them more than twenty-four hours before the beginning of the hearing, nor did she request a mistrial on that basis. Moreover, she was given a twenty-four hour period to review the materials before the second day of the transfer hearing. Appellant did not object at the transfer hearing when trial counsel learned that she had not reviewed all 160 of the TYC reports, nor did she request a mistrial. Instead, she continued her cross-examination. Two days later, when the transfer hearing reconvened, trial counsel conceded in open court that she had an opportunity to review all of the written materials. We conclude that Appellant waived his complaint as to the lack of the twenty-four hour period and failed to properly preserve his issue for appeal.

Conclusion: We affirm the trial court's order.

TRANSFER OF DETERMINATE SENTENCE PROBATION TO ADULT PROBATION IS NOT AN APPEALABLE ORDER.

¶ 05-4-25. **In the Matter of J.H.**, ___S.W.3d ___, No. 05-05-00073-CV, 2005 Tex.App.Lexis 9528 [Tex.App.— Dallas (5th Dist.), 11/14/05].

Facts: On October 17, 2001, when J.H. was fifteen years of age, the trial court adjudicated J.H. a child engaged in delinquent conduct for committing aggravated sexual assault of a child. The trial court committed J.H. to the Texas Youth Commission for ten years, probated for ten years. n1 J.H. was placed in his mother's custody. On August 13, 2004, the trial court granted the State's motion to transfer determinate sentence probation to a criminal court and ordered J.H.'s probation transferred to the 283rd Judicial District Court, effective September 16, 2004, J.H.'s eighteenth birthday.

> n1 The grand jury approved the State's petition regarding a child engaged in delinquent conduct and found there was probable cause to believe that appellant engaged in delinquent conduct by committing the offense of aggravated sexual assault of a child. The grand jury certified the petition to the juvenile court.

J.H. argues the trial court abused its discretion in ordering his probation transferred. The State responds that the trial court's order is not appealable. We agree with the State.

Held: Dismissed
Opinion: *Section 56.01 of the Texas Family Code* sets out a child's right to appeal a juvenile court's orders and describes which of those orders are appealable. Subsection (c) provides an appeal may be taken:

> (1) except as provided by Subsection (n) n2, by or on behalf of a child from an order entered under:
>
> (A) Section 54.03 with regard to delinquent conduct or conduct indicating a need for supervision;

(B) Section 54.04 disposing of a case;

(C) Section 54.05 respecting modification of a previous juvenile court disposition; or

(D) Chapter 55 by a juvenile court committing a child to a facility for the mentally ill or mentally retarded; or

(2) by a person from an order entered under Section 54.11(i)(2) transferring the person to the custody of the institutional division of the Texas Department of Criminal Justice.
Id. § 56.01(c) (Vernon 2003).
n2 Subsection (n) deals with plea or stipulation of evidence agreements between the State and the child regarding the disposition of the case.

An order entered under Section 54.051 to transfer a determinate sentence probation to an appropriate district court is not one of the orders enumerated in the statute. Therefore, applying the plain language of subsection (c), we conclude the trial court's order transferring determinate sentence probation to an appropriate criminal district court is not an appealable order. *Id*.

Appellant also argues that if we determine section 56.01 precludes an appeal of the order, as we have done, then the section is unconstitutional because it violates the due process and equal protection clauses of the United States and Texas Constitutions. *See* U.S. CONST. AMEND. XIV; TEX. CONST. ART. I, § 19. Specifically, appellant contends section 56.01 allows some juveniles to appeal while denying other juveniles the same appeal rights and, therefore, discriminates against certain juveniles simply because of the type of hearing held by a juvenile court. The State responds that section 56.01 is not unconstitutional either on its face or as applied to appellant.

The Texas and United States Constitutions do not provide for a right of appeal. *See Phynes v. State, 828 S.W.2d 1, 2 (Tex. Crim. App. 1992); see also In re Jenevein, 158 S.W.3d 116, 119 (Tex. Spec. Ct. Rev. 2003)* (right to appeal not of constitutional magnitude). The right to appeal is regulated by the legislature, and the legislature "may deny the right to appeal entirely, the right to appeal only some things, or the right to appeal all things only under some circumstances." *See In re Jenevein, 158 S.W.3d at 119.* Thus, when a legislative enactment says a juvenile may appeal orders delineated in the statute, there is no right to appeal orders not so included. *See id*. Further, because appellant is treated the same as all similarly situated juveniles whose determinate sentence probation is transferred to a criminal district court, his argument fails. *See Sonnier v. State, 913 S.W.2d 511, 520-21 (Tex. Crim. App. 1995).* Accordingly, we reject appellant's claim that section 56.01 is unconstitutional.

Conclusion: We dismiss the appeal for want of jurisdiction.

DISPOSITION PROCEEDINGS—

EVIDENCE WAS SUFFICIENT TO COMMIT CHILD TO TYC ON 3RD MISDEAMNOR ADJUDICATION

¶ 05-2-05. **In the Matter of H.R.C.**, 153 S.W.3d 266, 2004 Tex.App.Lexis 11717 (Tex.App.— El Paso 12/23/04).

Facts: On April 7, 2003, H.R.C. was adjudicated of having engaged in delinquent conduct for theft over $ 50 but less than $ 500. This was her third adjudication as she had previously been adjudicated for a similar theft and evading arrest. After the second adjudication, the juvenile was placed under house arrest on supervised probation and electronic monitoring. She was required to take all required medication and to attend family counseling. On February 27, 2003, she was referred to the Juvenile Probation Department for theft over $ 50 but less than $ 500. The next day she absconded from school and was found at a restricted peer's home. On March 6, 2003, the juvenile again absconded and she did not return home until March 9, 2003. These actions led to her third adjudication which provided the basis for the court's commitment of the juvenile to the TYC. At the disposition hearing, a report from the Juvenile Probation Department was admitted into evidence. This report recommended that H.R.C. required intensive supervised probation, psychiatric treatment, medication, urinalysis testing, and residency at a drug treatment center. This report was revised to indicate that the juvenile required a structured and secure environment such as being placed under the care, custody, and control of the TYC.

A psychiatric evaluation was admitted into evidence at the disposition hearing. Dr. Raul Jimenez assessed the juvenile as having bipolar disorder, disruptive behavior, and mixed substance abuse including marijuana and alcohol. She had poor compliance with medications.

A letter from a psychiatrist, Dr. Katz, was admitted into evidence. This letter stated that the juvenile was under his care and that she suffered from attention deficit disorder, systhymic disorder, and personality disorder. She required medication and therapy.

A psychological evaluation performed by Dr. Basurto was admitted into evidence. He found that the juvenile's overall treatment outlook was poor in that she suffered from early onset depression including two suicide attempts. Dr. Basurto stated that she had difficulty developing coping skills in dealing with frustration and interpersonal conflicts. In difficult situations he predicted that she could become impulsive and act out against herself. He recommended that she be placed in a residential treatment facility-a highly secured environment.

Dora Rodarte, H.R.C.'s juvenile probation officer, testified regarding incidents where the juvenile engaged in rebellious, uncooperative, and risky behavior. She had altercations with her mother, she interacted with prohibited teens, was truant from school, engaged in sexual promiscuity, drinking, drug taking, and at least one suicide attempt. Rodarte testified that the juvenile continually runs away from home and school on a regular basis. She stated that placing H.R.C. with her father posed difficulties in that he was out of town often due to his job, and he could not adequately supervise the juvenile. Rodarte testified that she had explored the possibility of placing H.R.C. at Peak Hospital for in-patient care. She was informed that she did not qualify for their program. The hospital staff recommended some form of long-term residential treatment. Rodarte testified that other available residential treatment facilities were ineffective and there were no other available resources. They did not present viable options for placement. She testified that both the juvenile's parents felt they could not adequately supervise her. She was not aware of any local residential treatment facility that could take the juvenile. H.R.C.'s father testified that, after hearing all the evidence, he thought his daughter needed constant supervision that he was not able to provide and he stated that a commitment to TYC was a proper action. The juvenile's mother agreed with that assessment.

The court found that the juvenile was in need of rehabilitation and that the protection of the public and her own protection required that a disposition be made. The court found that reasonable efforts had

been made to prevent or eliminate the need for the juvenile to be removed from her home. The court stated the reasons for her commitment to TYC: (1) that the juvenile needed to be held accountable for her delinquent behavior; (2) that she posed a risk to the safety and protection of the community; (3) that there were no community-based, intermediate sanctions available to adequately address her needs; and (4) her prior record of delinquency indicated that she needed to be confined in a secure facility.

Held: Affirmed

Opinion Text: In two issues, H.R.C. maintains that the evidence was legally and factually insufficient to support her commitment to the Texas Youth Council. The juvenile court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards as are applied in reviewing the legal or factual sufficiency of the evidence supporting a jury's answers to a charge. *In re A.S., 954 S.W.2d 855, 861 (Tex. App.--El Paso 1997, no pet.)*; *In re J.P.O., 904 S.W.2d 695, 699-700 (Tex. App.--Corpus Christi 1995, writ denied).* We do not disturb the juvenile court's disposition order in the absence of an abuse of discretion. *A.S., 954 S.W.2d at 861*; *In re E. F., 535 S.W.2d 213, 215 (Tex. Civ. App.--Corpus Christi 1976, no writ).* The juvenile court's exercise of discretion in making an appropriate disposition is guided by the requirements of *Section 54.04 of the Family Code*. *A.S., 954 S.W.2d at 861*. *Section 54.04(c)* provides that the trial court may not place a juvenile outside of his home unless it finds that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation. *TEX. FAM. CODE ANN. § 54.04(c)* (Vernon Supp. 2004-05). Further, in order to commit a child to TYC, the court must additionally find that placement outside of the child's home is in the child's best interest and that reasonable efforts were made to prevent or eliminate the need for the child's removal from the home. *TEX. FAM. CODE ANN. § 54.04(i).*

Regarding the legal sufficiency of the evidence, we have traditionally applied the civil no evidence standard of review to legal sufficiency challenges of juvenile disposition orders. *See A.S., 954 S.W.2d at 858*. In reviewing the legal sufficiency, we consider only the evidence and inferences tending to support the findings under attack and set aside the judgment only if there is no evidence of probative force to support the findings. *A.S., 954 S.W.2d at 858*; *In re T.K.E.., 5 S.W.3d 782, 785 (Tex. App.--San Antonio 1999, no pet.).*

In reviewing this factual sufficiency challenge, we view all of the evidence but do not view it in the light most favorable to the challenged findings. *See A.S., 954 S.W.2d at 860*; *R.X.F. v. State, 921 S.W.2d 888, 900 (Tex. App.--Waco 1996, no writ)*; *see also Clewis v. State, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)*. Only if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust will we conclude that the evidence is factually insufficient. *See A.S., 954 S.W.2d at 860*; *R.X.F., 921 S.W.2d at 900* (citing *Cain v. Bain, 709 S.W.2d 175, 176, 29 Tex. Sup. Ct. J. 214 (Tex. 1986)* and *Clewis, 922 S.W.2d at 129*).

Regarding the legal sufficiency of the evidence, we find that the court had sufficient information to commit H.R.C. to TYC. All the evidence indicated that there was no available source to provide the supervision and structure that the juvenile required. All past efforts at rehabilitation had failed and H.R.C. required constant structured supervision. The court did not abuse its discretion.

Regarding the factual sufficiency of the evidence, H.R.C. cites five factors that indicate the evidence is factually insufficient: (1) the juvenile had engaged in a short period of delinquent behavior; (2) that she had mental health needs which had not been addressed; (3) that she should not be placed with her mother because of her proven propensity to run away; (4) that her father was willing to take her into his

home; and (5) she had not been placed in available treatment facilities as an alternative to commitment to TYC.

Regarding the first factor, it is clear that the juvenile did engage in repeated delinquent behavior and this serves to support the court's action. The second contention ignores the fact that H.R.C. had undergone extensive mental health treatment and one of her examining psychologists, Dr. Basurto, recommended that the juvenile be placed in a residential treatment facility or other highly structured environment due to her mental condition.

With regard to the third factor, all the evidence before the court indicated [*9] that placement in the mother's home was not an option. However, in her fourth assertion, H.RC. asserts that she could have been placed with her father. While her father did express an initial desire for her to live with him, he ultimately admitted that he could not adequately supervise her and the TYC commitment was in her best interest.

Lastly, the juvenile maintains that she had not been placed in available treatment facilities as an alternative to commitment to TYC and as a condition of probation. [HN3] The applicable statutes requires only that "reasonable efforts were made to prevent or eliminate the need for the child's removal from the home . . . ." *TEX. FAM. CODE ANN. § 54.04(i)(1)(B)* (Vernon Supp. 2004-05). In the present case, the court heard testimony that none of the residential treatment centers which contracted with Juvenile Probation Department were appropriate for H.R.C.'s situation because of her inability to qualify for their programs, their poor performance with past probationers, and the inability to provide for their expenses. Ms. Rodarte testified that she was not aware of any facilities in El Paso County or nearby where the juvenile could be placed. Given the gravity of H.R.C.'s problems and mental difficulties, the court was caused to state, "we just don't have the services anymore that we can rely on to help us with young people that have these kinds of problems." We do not find that the evidence is contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust and we find that the evidence is factually sufficient to support the judgment. Issue Nos. One and Two are overruled in their entirety.

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

TRIAL COURT ABUSED ITS DISCRETION IN COMMITTING 11 YEAR OLD TO TYC FOR VIOLATING CONDITIONS OF PROBATION.

¶ 05-2-25. **In the Matter of S.G.**, MEMORANDUM, No. 04-04-00475-CV, 2005 Tex.App.Lexis 2560 (Tex.App.– San Antonio, 4/6/05).

Facts: In her initial appearance in court, S.G. was adjudicated as a child who engaged in delinquent conduct for committing the offense of burglary of a habitation, a second degree felony. *TEX. PEN. CODE ANN. § 30.02(a)(1), (c)* (Vernon 2003). S.G. was eleven years old at the time of the offense. S.G. was placed on probation for twelve months in the custody of her mother and ordered to pay $ 5000 restitution in monthly installments of $ 208. S.G. was also ordered to abide by a 7:00 p.m. curfew, perform 30 hours of community service, attend a victim impact panel, submit to drug testing, and attend school.

In its original motion to modify disposition, the State alleged S.G. violated the terms of her probation by her failure to pay the full restitution amount. The trial court modified its previous disposition, extending S.G.'s probation an additional twelve months, in the custody of her mother, with the remaining restitution amount of $ 1,276 to be paid in $ 208 monthly payments.

In its second motion to modify disposition, the State alleged S.G. violated the terms of her probation by her failure to pay the full restitution, and by her expulsion from school. The record is silent as to the reason for S.G.'s expulsion from school, but the State did not file a motion to modify disposition at the time expulsion occurred. The second motion to modify was filed fifteen days before S.G.'s probation was to expire. The trial court modified S.G.'s probation again and extended her probation an additional twelve months, in the custody of her mother, with the remaining restitution amount of $ 1,126 to be paid in $ 94 monthly payments.

S.G.'s fourth appearance in the trial court was in June 2003 for a second adjudication for possession of an asthma inhaler at school. No motion to modify was filed for this adjudication, and S.G. continued her probation.

The State filed a third motion to modify disposition in December 2003, again alleging S.G. had violated the terms of her probation by her failure to pay restitution. The trial court modified S.G.'s probation on January 27, 2004, extending it an additional nine months. S.G. was to remain in her mother's custody and continue to make payments on the remaining $ 1126 restitution. The trial court also ordered treatment programs for S.G.: individual and family counseling; submitting to drug testing; attending a day treatment center for six months; attending the KAPS program, and spending sixty days on the electronic monitoring (ELM) program.

The State filed a fourth motion to modify disposition less than three months later, on April 26, 2004. The State alleged that S.G. violated the terms of her probation by failing to participate in and cooperate fully with the ELM program and the day treatment program. The violations arose out of the same incident, which occurred on April 13, 2004, when S.G. was dropped off at the mall where she was to ride a van to her day treatment program. S.G. stated that she missed the bus because she went inside the mall to use the restroom. Instead of calling her mother, S.G. went inside the mall with her boyfriend and did not return home until the next day, thus committing two violations of her probation.

S.G. pled true to the allegations. At the hearing, the State and S.G.'s counsel agreed that proper punishment called for probation in the physical custody of the chief probation officer for eighteen months, with placement outside of S.G.'s home at the Southton treatment facility, rather than placement at TYC. Two members of the probation department staffing committee also suggested secured placement other than TYC in their report to the court. The State's attorney explained that S.G.'s prior motions to modify were for failure to pay restitution and one expulsion charge; S.G. was eleven years old when the offense was committed; S.G. had completed and cooperated with the conditions of probation, and she had never tested positive for drugs. The State informed the court that Southton would be the most appropriate placement to address S.G.'s rehabilitative and behavioral issues. n1

n1 In her mother's written statement to the court, she stated that S.G. suffers from Attention Deficit Hyperactivity Disorder (ADHD) and manic depression, for which she takes medication. S.G. has seen various counselors, but not on a regular basis. S.G. has had behavioral issues at school where she has been in trouble for such conduct as burning attendance slips and possessing markers when they were disallowed. The incidents at school have never been the subject of a motion to modify disposition.

The probation officer, however, recommended commitment to TYC. The probation officer argued Southton was not an appropriate placement because it was "probation resources," and argued S.G. had

received rehabilitative services in every available program, including felony ISP. The probation officer testified the only treatment option that had not been offered to S.G. was a supervised out-of-home placement at Southton. The record does not reflect that the trial court ever ordered felony ISP in any of its disposition orders. The services received by S.G. were the programs ordered on January 27, 2004 in the third modification order.

At the conclusion of the hearing, the trial judge decided to commit S.G. to TYC until her 21st birthday. The trial judge stated:

> I think the probation department has really gone beyond their duty for [S.G.]...this court will find there is a need for a disposition in this case for your rehabilitation and for the protection of the public. I am going to commit you to the Texas Youth Commission. And the specific reasons is this is your sixth appearance before the Court with violations of probation for the fifth time. And the probation department has expended numerous resources, including and not limited to, and these-this is why I will not be able to give you your request for placement. You have had intensive clinical services, felony ISP, electronic monitoring, day treatment, KAPS program. n2 Even with all those different services beyond the normal conditions of probation and services you continue to have problems at home and at school. And you continue to violate your conditions of probation. So the Court is not going to extend your probation.

In its written order committing S.G. to TYC, the court's stated reasons for its finding were: "6th Appearance in court, and probation expended all resources." The court made specific findings that it was in S.G.'s best interests to be placed outside her home; that reasonable efforts had been made to prevent or eliminate the need to remove S.G. from home; and S.G. could not be provided the quality of care and level of support and supervision at home needed to meet the conditions of her probation.

> n2 The record does not reflect that the trial court has ever ordered intensive clinical services or felony ISP services for S.G. or that S.G. has ever received such services.

Held: Reversed and remanded for a new disposition hearing.

Memorandum Opinion: A trial court may modify a juvenile's disposition if the court, after a hearing to modify disposition, finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court. *TEX. FAM. CODE ANN. § 54.05(f)* (Vernon Supp. 2004-05). Juvenile courts are vested with a great amount of discretion in determining the suitable disposition of children found to have engaged in delinquent conduct, especially in hearings to modify disposition. *See In re H.G., 993 S.W.2d 211, 213 (Tex. App.-San Antonio 1999, no pet.).*

Where a child has previously been found delinquent for commission of a felony, an appellate court reviews the record to determine if the trial court abused its discretion in finding, by a preponderance of the evidence, that the juvenile violated a condition of her probation. *Id.* A plea of true to a violation of probation is analogous to a judicial confession which justifies the court's finding the violation was committed by a preponderance of the evidence. *In re M.A.L., 995 S.W.2d 322, 323 (Tex. App.-Waco 1999, no pet.).* There is no requirement, however, that a trial court commit a child to TYC for every probation violation; the decision to commit a child to TYC is a discretionary decision of the trial court subject to review for an abuse of that discretion. *In re J.P., 136 S.W.3d 629, 632, 47 Tex. Sup. Ct. J. 579 (Tex. 2004).* A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to guiding rules or principles. Merely because a trial court may decide a matter within its discretion in a different

manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *In re C.J.H., 79 S.W.3d 698, 702 (Tex. App.-Fort Worth 2002, no pet.)*.

DISCUSSION

S.G. does not dispute that the evidence was legally and factually sufficient to find she committed a violation of her probation conditions. S.G. contends that the trial court's decision to commit her to TYC was arbitrary and unreasonable because the evidence contained in the record is insufficient to support the trial court's findings; the trial court did not take reasonable steps to avoid sending her to TYC; the trial court's decision was based on monetary concerns rather than her best interests; and the disposition failed to conform to the stated goals of the juvenile justice code. n3

n3 S.G. also raises an argument that the trial court abused its discretion because it failed to follow the Progressive Sanctions Guidelines. *Compare TEX. FAM. CODE ANN. § 59.007* (recommending intensive supervision plus probation for commission of a second degree felony), *with id. § § 59.008-.010* (incrementally suggesting placement at a secured correctional facility before commission to TYC). The Family Code does not permit a juvenile to bring this complaint on appeal, however. *See TEX. FAM. CODE ANN. § 59.014(3)* (Vernon Supp. 2004-05) ("A child may not bring an appeal or a postconviction writ of habeas corpus based on...a departure from the sanction level assignment model provided by this chapter"). A juvenile court's decision is guided by the Progressive Sanctions Guidelines, but the guidelines are not mandatory. *Id*.; *In re C.C., 13 S.W.3d 854, 858 (Tex. App.-Austin 2000, no pet.)*.

According to a plain reading of the statute, commitment to TYC by modification order is permissible if: 1) a juvenile originally committed a felony or multiple misdemeanors; and 2) the juvenile subsequently violates one or more conditions of her probation. *TEX. FAM. CODE ANN. § 54.05(f)*. The Texas Supreme Court recently reiterated, however, that:

The statute does not *require* commitment to TYC for every probation violation; it provides only that a trial court's disposition "*may* be modified" in such circumstances. This is a discretionary decision, and subject to review for an abuse of that discretion.

In re J.P., 136 S.W.2d at 632 (emphasis in original). TYC is the "most severe form of incarceration contemplated in the juvenile justice scheme" that has historically been "reserved for only serious juvenile offenders." *Id. at 634* (Schneider, J., concurring) (discussing the permanent, lasting effects of placement at TYC). A proper commitment to TYC generally occurs when the delinquent child involved has engaged in some type of violent activity which makes him or her potentially dangerous to the public, or where the child has been given a negative recommendation for probation. *See In re L.G., 728 S.W.2d 939, 945 (Tex. App.-Austin, 1987, writ ref'd n.r.e.)*. This is supported by the goals of the juvenile justice code. The primary concern of the juvenile code is to provide for the protection of the public and public safety. *TEX. FAM. CODE. ANN. § 51.01* (Vernon 2002). Balanced with that interest, however, is the juvenile code's goal to provide for the care and protection of the juvenile, placing an emphasis on a program of treatment, training, and rehabilitation. *See id. § 51.01(2)(C), (3)*.

The only evidence adduced at the hearing supporting commitment to TYC was the recommendation of the probation officer. The probation officer stated placement at Southton was inappropriate because it was "probation resources." The trial court agreed, reasoning that TYC was more appropriate because "resources would come from the State rather than the County." This reason for placement at TYC does not conform to the stated goals of the juvenile justice code, *see id. § 51.01*, and is not a proper reason for committing a child to TYC. The probation officer also emphasized that S. G. exhausted probation resources

and received all the rehabilitative services available to her. While we are mindful that we may not substitute our decision for the trial court's decision, we also may not affirm its decision when there is insufficient evidence in the record to support the conclusions made. In its written order and at trial, the court stated as its primary reason for revoking S.G.'s probation was S.G. had exhausted probation's attempts to rehabilitate her. The court, relying on the testimony of the probation officer, stated S.G. received intensive clinical services, felony ISP, electronic monitoring, day treatment, and the KAPS program. None of the disposition orders in the record reflect that the trial court has ever ordered felony ISP or intensive clinical services for S.G. She was ordered on January 27, 2004 to receive individual and family counseling, attend the day treatment program, submit to drug testing, spend sixty days on the electronic monitor (ELM), and attend the KAPS program. The record is silent as to the reason S.G. was offered these services only during the last seventy-five days of a three and a half year probation. n4 Based on the record, this is insufficient evidence to support the trial court's conclusion that probation had expended all resources in an effort to rehabilitate S.G.

> n4 We note that, other than the expulsion, which was not grounds for a motion to modify probation at the time of expulsion, the sole reason S.G.'s probation was extended for such a long period is that she was unable to comply with the restitution order. At all times relevant, S.G. has been under the age of sixteen.

Further, there is insufficient evidence in the record to support the conclusion that S.G. poses a threat to the community. The violations resulting in placement at TYC consisted of S.G.'s act of skipping her day treatment program to go to the mall with her boyfriend. Because we agree that the trial court's decision in this particular instance was arbitrary and unreasonable, we sustain S.G.'s sole issue. We reverse and remand the cause for a new disposition hearing.

Conclusion: The evidence was insufficient to support the trial court's conclusion that probation had expended all resources in an effort to rehabilitate the juvenile, and there was no showing that she posed a threat to the community.

QUESTIONING OF RESPONDENT BY TRIAL COURT DURING DISPOSITION HEARING WAS NOT REVERSIBLE ERROR.

¶ 05-2-35**. In the Matter of K.P.S.**, MEMORANDUM, No. 2-04-228-CV, 2005 Tex.App.Lexis 3285, (Tex.App.– Fort Worth 4/28/05).

Background: Appellant was charged with one count of arson and one count of forgery. See *TEX. PENAL CODE ANN. § 28.02* (Vernon 2003), *§ 32.21* (Vernon Supp. 2004-05). Appellant waived his right to a jury trial and stipulated to the forgery count. After an adjudication and disposition hearing, the trial court adjudicated appellant delinquent on both counts and ordered that appellant be committed to the Texas Youth Commission for an indeterminate period not to exceed his twenty-first birthday.

Facts: In his first four issues, appellant complains that the trial court violated his right to due process and his Fifth Amendment right not to testify against himself by soliciting and considering information relating to an infraction that appellant had allegedly committed while he was in detention. During appellant's disposition hearing, appellant's counsel contended during his closing argument that appellant has been on "Level One" and has not committed any infractions while he has been in detention. The following exchange then occurred between the trial court and appellant:

THE COURT: Actually, I think he had a problem last night, is that right?

[APPELLANT]: Huh-uh.

THE COURT: You're not on Level Two Unacceptable?

[APPELLANT]: No ma'am.

THE COURT: That's not what my report dated today indicates.
[APPELLANT]: No, ma'am, the guy told me, he read us our levels, and he told me I was on Level One, still Outstanding.

THE COURT: When did he say that?

[APPELLANT]: This morning.

THE COURT: So there wasn't a problem with you getting a major infraction for talking at the table last night?

[APPELLANT]: No ma'am.

THE COURT: Mr. Sumpter, can you check on that?

PROBATION OFFICER SUMPTER: Yes, Your Honor, I'll check on that.

Appellant's counsel completed his closing argument, and then the following occurred:

THE COURT: Thank You. Ms. Kelleher, did you find out anything?

PROBATION OFFICER KELLEHER: Your Honor, I spoke with the Detention Supervisor, Greg Frick, and your report is correct.

THE COURT: All right. All right. So are you saying nothing happened last night? Are you still saying that?

[APPELLANT]: They didn't tell me anything.

THE COURT: Well, you're the one that would have gotten in trouble. Did you get into any trouble last night?

[APPELLANT]: No, ma'am, I thought I sat by myself last night when I was eating.

THE COURT: You can't remember?

[APPELLANT]: No, ma'am.

Appellant did not object during either exchange.

Held: Affirmed

Memorandum Opinion: To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. *TEX. R. APP. P. 33.1(a)(1)*; *Mosley v. State, 983 S.W.2d 249, 265 (Tex. Crim. App. 1998)* (op. on reh'g), *cert. denied, 526 U.S. 1070, 143 L. Ed. 2d 550 (1999)*. Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. *TEX. R. APP. P. 33.1(a)(2)*; *Mendez v. State, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004)*. "Except for complaints involving systemic (or absolute) requirements, or rights that are waivable only, . . . all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with *Rule 33.1(a)*." *Mendez, 138 S.W.3d at 342*.

Appellant argues that the trial court committed fundamental error when it improperly solicited and considered information relating to the alleged infraction. As support for his argument, appellant relies primarily on *Blue v. State, 41 S.W.3d 129 (Tex. Crim. App. 2000)*. In *Blue*, the trial judge apologized to a group of prospective jurors during the jury selection process, telling them that he would have preferred that the defendant plead guilty rather than go to trial. *Id. at 130*. The court of criminal appeals held that the comments "tainted appellant's presumption of innocence in front of the venire, were fundamental error of constitutional dimension and required no objection." *Id. at 132*.

The present case differs significantly from *Blue*. The trial court's actions did not taint appellant's presumption of innocence. At the time the trial court questioned appellant, it had already adjudicated appellant delinquent. Further, while the trial court in *Blue* directed its comments at prospective jurors, appellant waived his right to a jury trial, and therefore there were no jurors to be affected by the trial court's conduct. Thus, unlike *Blue*, the trial court's conduct did not taint the presumption of appellant's innocence or vitiate the jury's impartiality. Finally, we agree with Justice Keasler, who wrote that *Blue* was "highly unique and litigants should not view [its] holding as an invitation to appeal without making proper timely objections. " *Id. at 139* (Keasler, J., concurring).

Conclusion: The trial court's actions did not constitute fundamental error, and appellant had to object in order to preserve error for appeal. The court overruled appellant's first four issues. The court also held that the evidence was factually sufficient to support the finding that appellant committed arson [opinion omitted].

TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EXTRANEOUS OFFENSE IN AGGRAVATED SEXUAL ASSAULT DISPOSITION HEARING.

¶ 05-3-11. **In the Matter of C.J.M.**, 167 S.W.3d 892, No. 2-04-250-CV, 2005 Tex.App.Lexis 4606 (Tex.App.— Fort Worth 6/16/05). pet. for review filed 7/25/05.

Facts: Appellant pled true before a jury to the aggravated sexual assault of a seven-year-old girl, C.S. The jury found that he was delinquent. During the disposition phase, the State called L.J., a five-year-old girl, to the stand. Appellant timely objected to her testimony "based on 51.17 of the Texas Family Code, which specifically says that the Texas Rules of Evidence as well as Chapter 38 of the Code of Criminal Procedure apply" and "that this is an alleged extraneous offense which is not allowed to be admitted into court." Appellant secured a running objection on these grounds to the child's testimony. The trial court admitted the evidence before the jury over Appellant's objection and without giving a timely limiting instruction. L.J., Appellant's cousin, ultimately testified that when she was four years old, Appellant penetrated her

vaginally and anally with his penis. L.J.'s aunt and guardian, Brandy Broushard, confirmed that L.J. had made an outcry against Appellant and discussed the changes in L.J. that were allegedly related to Appellant's actions. Appellant's counsel secured a running objection under *Rule 404* to Broushard's testimony. The State questioned Appellant about the alleged extraneous act when he testified, resulting in his asserting his *Fifth Amendment* right not to incriminate himself before the jury. Evidence of other, less serious bad acts, adjudicated and unadjudicated, was also admitted but is not complained of here. The State relied on the evidence of the alleged aggravated sexual assault against L.J. in its closing argument. The limiting instruction in the charge provided that the jury should not consider the evidence of extraneous crimes or bad acts unless they had been proven beyond a reasonable doubt. Appellant timely appealed.

Held: Reversed & remanded for new disposition.

Opinion: As both parties point out, had Appellant been certified to stand trial as an adult, Article 37.07 of the Texas Code of Criminal Procedure would have governed. That statute allows the admission of,

> notwithstanding *Rules 404* and *405*, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. n3

But Chapter 37 of the Texas Code of Criminal Procedure is not applicable to juvenile proceedings. n4 The juvenile justice code expressly provides,

> 51.17. Procedure and Evidence
> (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.
>
> (c) Except as otherwise provided by this title, the Texas Rules of Evidence applicable to criminal cases and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under this title. n5

Chapter 38 of the Texas Code of Criminal Procedure expressly allows evidence of an accused's extraneous offenses or acts against the same complainant in the case with which he is charged, n6 but the chapter does not address extraneous offense evidence involving a different complainant. The juvenile justice code does not otherwise speak to the issue before us. We therefore must resort to the Texas Rules of Evidence. n7

> n3 *TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1)* (Vernon Supp. 2004- 05).
> n4 *See TEX. FAM. CODE ANN. § 51.17(c)* (Vernon Supp. 2004-05).
> n5 *Id. § 51.17(a)-(c).*
> n6 *See TEX. CODE CRIM. PROC. ANN. art. 38.37* (Vernon 2005).
> n7 *See TEX. FAM. CODE ANN. § 51.17.*

As the State points out, *Texas Rule of Evidence 404(b)*, which specifically governs the admissibility of extraneous offenses, does not speak to the admissibility of extraneous offenses in the punishment phase of criminal cases. n8 *Rule 404(b)* provides that:

> evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. n9

n8 *See Harrell v. State, 884 S.W.2d 154, 166 n.13 (Tex. Crim. App. 1994)*; *Patton v. State, 25 S.W.3d 387, 392 (Tex. App.--Austin 2000, pets. ref'd)*; *Ramirez v. State, 967 S.W.2d 919, 923 (Tex. App.--Beaumont 1998, no pet.).*
n9 *TEX. R. EVID. 404(b).*

The State argues that there appears to be a gap in the statutory law and that we should fill the gap ourselves by applying *Article 37.07* to determinate sentencing cases, not *Rule 404(b)*, because juveniles who are subject to determinate sentencing commit "adult" crimes and should be treated like adults. But we cannot usurp the Texas Legislature's power. n10 Until the Texas Legislature or the Texas Supreme Court otherwise instructs us, we shall follow *section 51.17* of the juvenile code and apply the rules of evidence applicable to criminal cases to issues of admissibility at the disposition phase of all juvenile cases. *Rule 404(b)* is applicable to criminal cases. n11

n10 *See Brown v. De La Cruz, 156 S.W.3d 560, 566, 48 Tex. Sup. Ct. J. 164 (Tex. 2004)* ("That does not give us the power (as the United State Supreme Court has stated) 'to legislate . . . to fill any hiatus Congress has left.'") (quoting *Touche Ross & Co. v. Redington, 442 U.S. 560, 579, 99 S. Ct. 2479, 2491, 61 L. Ed. 2d 82 (1979))*.
n11 *See, e.g., Johnston v. State, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004).*

At the time of the admission of the evidence, Appellant had already pled true to the allegations in the petition to adjudicate and had already been found delinquent by the jury. No exception under *Rule 404(b)* would allow the evidence about L.J. to come in, and, indeed, the State did not advance a *Rule 404(b)* exception for offering the evidence, either at trial or here. The only purpose for offering the evidence was to show that Appellant, while on probation, had sexually assaulted another young child just months earlier than the offense alleged in the petition to adjudicate. That is, the State wanted to show that Appellant was someone who would continue to sexually assault young girls unless he was confined--he would act in conformity with his character. We therefore hold that the trial court abused its discretion by admitting the evidence in violation of *Rule 404(b).*

HARM ANALYSIS

Having found error, we must conduct a harm analysis to determine whether the error calls for reversal of the judgment. We agree with both parties and several of our sister courts that harm in juvenile appeals from determinate sentences should be analyzed under *Rule 44.2*. n12 Because the error is not constitutional, n13 we apply *Rule 44.2(b)* and disregard the error if it does not affect Appellant's substantial rights. n14 A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. n15 In making this determination, we review the record as a whole. n16 The record shows that Appellant, sixteen years old at the time of trial, had been classified as mentally retarded since he was nine years old and functioned at the level of an eight-year-old. He had also been diagnosed as having bipolar, attention deficit hyperactivity, and oppositional/defiant disorders. His own upbringing had been marred by sexual and physical abuse, and the juvenile detention center nurse testified that he was scarred from head to foot. At the time of the sexual assault of C.S., which involved oral-genital contact, vaginal and anal digital penetration, and anal penetration with his penis, Appellant was at the home of his mother, who allowed him to smoke marijuana and drink alcohol. He was also taking his prescription medications. He testified that at the time, he did not know his conduct was wrong or that he would get in trouble. Also, at the time of the offense, Appellant was on juvenile probation for theft, assault bodily injury,

and burglary of a habitation. There was evidence that he was often hard to control, both in and out of institutional settings. None of these other extraneous offenses and bad acts, however, indicated that Appellant was a repeat sexual offender of young girls.

n12 *See TEX. R. APP. P. 44.2, In re J.H., 150 S.W.3d 477, 485 (Tex. App.--Austin 2004, pet. denied)*; *In re L.R., 84 S.W.3d 701, 707 (Tex. App.--Houston [1st Dist.] 2002, no pet.)*; *In re D.V., 955 S.W.2d 379, 380 (Tex. App.--San Antonio 1997, no pet.)*; *In re K.W.G., 953 S.W.2d 483, 488 (Tex. App.--Texarkana 1997, pet. denied)*; *In re D.Z., 869 S.W.2d 561, 565-66 (Tex. App.--Corpus Christi 1993, writ denied).*
n13 *See Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).*
n14 *TEX. R. APP. P. 44.2(b)*; *see Mosley v. State, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)* (op. on reh'g), *cert. denied, 526 U.S. 1070, 143 L. Ed. 2d 550, 119 S. Ct. 1466 (1999)*; *Coggeshall v. State, 961 S.W.2d 639, 642-43 (Tex. App.--Fort Worth 1998, pet. ref'd).*
n15 *King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)* (citing *Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946)*); *Coggeshall, 961 S.W.2d at 643*.
n16 *See Johnson, 967 S.W.2d at 417*.

In his closing argument, the prosecutor emphasized the alleged sexual assault against L.J. as much, if not more than, the charged sexual assault against C.S., the theme of his argument being that Appellant could not help himself, that he would go on sexually assaulting little girls if not confined. Based upon our review of all the evidence, as discussed above, we must conclude that the trial court's error in admitting the evidence about the alleged extraneous offense had a significant or injurious effect on the jury's verdict such that Appellant's substantial rights were affected. n17 We sustain Appellant's sole point.

n17 *See Curtis v. State, 89 S.W.3d 163, 170 (Tex. App.--Fort Worth 2002, pet. ref'd).*

Conclusion: Having sustained Appellant's point, we reverse the disposition judgment and the order of commitment and remand this case to the trial court for a new trial on disposition.

Concurring Opinion: While I agree with the conclusion the majority opinion reaches, I respectfully write separately to make a couple of observations.

When a statute is clear and unambiguous, we "should give the statute its common meaning." *St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 505, 40 Tex. Sup. Ct. J. 712 (Tex. 1997)*; *see also Sisk v. State, 131 S.W.3d 492, 494 (Tex. Crim. App. 2004)*; *Hernandez v. State, 127 S.W.3d 768, 771 (Tex. Crim. App. 2004).* When language in a statute is unambiguous, we will seek the intent of the legislature as found in the plain and common meaning of the words and terms used. *St. Luke's Episcopal Hosp., 952 S.W.2d at 505*; *In re K.L.V., 109 S.W.3d 61, 65 (Tex. App.--Fort Worth 2003, pet. denied).* We should not adopt a construction that would render a law or provision meaningless. *Centurion Planning Corp. v. Seabrook Venture II, 2004 Tex. App. LEXIS 11079, No. 01-02-00518-CV, 2004 WL 2823125, at *3 (Tex. App.--Houston [1st Dist.] Dec. 9, 2004, no pet. h.).*

While I agree that there is a gap in the juvenile justice code's instructions to the courts on what additional rules of criminal procedure apply in a Title III action, I believe there are two justifications for reaching the conclusion that we reach today.

First, as observed by the majority, *section 51.17(c)* of the juvenile justice code tells us specifically that courts may apply and use chapter 38 of the code of criminal procedure in Title III cases. *TEX. FAM.*

CODE ANN. § 51.17(c) (Vernon Supp. 2004-05). Had the legislature so desired, it could have included a reference to chapter 37 of the code of criminal procedure as well, but it did not do so. Under the rules of statutory construction, we should not assume the omission was unintentional. *See Upjohn Co. v. Rylander, 38 S.W.3d 600, 607 (Tex. App.--Austin 2000, pet. denied)*.

Second, we also know under rule of evidence 609(d) that in juvenile justice proceedings under Title III, evidence of prior juvenile adjudications are admissible in the limited situation in which the witness is a party. *TEX. R. EVID. 609(d)*. This provision, not mentioned by appellant, the State, or the majority opinion, tells us that during a juvenile proceeding, evidence of prior juvenile adjudications against that particular juvenile are admissible to attack the juvenile's credibility if the juvenile testifies. *Id*. Thus, we have clear authority from the supreme court to admit prior juvenile adjudications of a witness/party during a pending juvenile proceeding of that witness/party, but not prior extraneous, unadjudicated offenses. In this case, had the extraneous offense testified to by L.J. been previously adjudicated against C.J.M., it would have been admissible to attack C.J.M.'s credibility. Since it had not yet been pursued to an adjudication, it was not admissible.

I believe the unadjudicated offense was inadmissible for these additional reasons and therefore concur in the majority opinion and judgment.

WITH RESPECT TO FEES AND COSTS, A SEPARATE EVIDENTIARY HEARING WAS NOT NECESSARY TO SHOW THAT PARENTS "HAVE BY WILFUL ACT OR OMISSION, CONTRIBUTED TO, CAUSED, OR ENCOURAGED [CHILD'S] DELINQUENT CONDUCT."

¶ 05-3-34. **In the Matter of J.A.G.**, 172 S.W.3d. 155, No. 09-04-459-CV, 2005 Tex.App.Lexis 6334 (Tex.App.— Beaumont, 8/11/05).

Background: The trial court found J.A.G., Jr., engaged in delinquent conduct by committing the offense of burglary of a habitation. The trial court further found his parents, Maria Zamora and Jose Garcia, Sr., "have by wilful act or omission, contributed to, caused, or encouraged [J.A.G.'s] delinquent conduct." Pursuant to *Tex. Fam. Code Ann. § 54.041* (Vernon Supp. 2005), the trial court entered an Order Affecting Parents and Others. The trial court also entered an Order for Payment of Fees in accordance with *Tex. Fam. Code Ann. § 54.0411(b)* (Vernon 2002). Subsequently, Zamora and Garcia filed a notice of restricted appeal.

Held: Appeal Dismissed

Facts: Zamora and Garcia alleged that neither participated in a hearing that resulted in the Order for Payment of Fees, entered August 25, 2004. The Order for Payment of Fees recites that a hearing was held on August 25, 2004. Appellants assert they are not aware of any hearing that took place on that date and that if it did, neither of them received notice of the hearing. Further, appellants allege that neither participated in a hearing that resulted in the Order Affecting Parents and Others, entered August 16, 2004. The Order Affecting Parents and Others recites that on August 16, 2004, the Motion for Parenting Orders "came on to be heard." Appellants assert the motion was not addressed at the August 16 hearing, therefore there was no hearing on the motion and the Order did not result from a hearing in which either Zamora or Garcia participated. Appellants also claim Garcia was not present on August 16.

Opinion: A restricted appeal must: (1) be brought within six months after the trial court signs the

judgment, (2) by a party to the suit, (3) who did not participate in the actual trial, and (4) the error complained of must be apparent from the face of the record. *Norman Communications v. Texas Eastman Co., 955 S.W.2d 269, 270, 41 Tex. Sup. Ct. J. 83 (Tex. 1997)*. The record reflects appeal was brought within six months of entry of the trial court's orders. Zamora and Garcia became parties to the proceedings when they were served with the original petition and issued a summons to appear at a hearing in their son's case. *See Adair v. Kupper, 890 S.W.2d 216, 217-18 (Tex. App.--Amarillo 1994, no pet.)*. Accordingly, the first two requirements for a restricted appeal have been met.

We now turn to the issue of whether Zamora or Garcia participated in the proceedings. When analyzing the participation requirement, the question is whether the appellant took part in the decision-making event that resulted in the adjudication of his rights. *Texaco, Inc. v. Cent. Power & Light Co., 925 S.W.2d 586, 589, 39 Tex. Sup. Ct. J. 655 (Tex. 1996)*. "Participation in the decision-making event producing the final judgment adjudicating a party's rights will cut off that party's ability to proceed by restricted appeal." *Clopton v. Pak, 66 S.W.3d 513, 516 (Tex. App.--Fort Worth 2001, pet. denied)*. The nature and extent of participation that precludes a restricted appeal is a matter of degree. *Texaco, Inc., 925 S.W.2d at 589*.

The record reflects Zamora signed a "Waiver of Rights" form which provides, "I further do hereby enter by appearance for all purposes, including the assessment of fees, costs, and restitution, if appropriate." She was present at the hearing conducted August 16, 2004. On the same day, Zamora signed the Order Affecting Parents and Others. Above her signature is the following:

"WARNING: You are hereby notified that failure to comply with the attached orders can result in contempt. . . ."

1. Order Affecting Parents and Others

2. Order for Payment of Fees

The Order for Payment of Fees, although not signed until August 25, was filed for record on August 16.

The decision-making event in this case is the August 16 hearing. Zamora was present and signed the Order Affecting Parents and Others, which includes an acknowledgment of the Order for Payment of Fees. Under these facts, we conclude that Zamora participated in the decision-making events that resulted in the orders at issue in this case. Accordingly Zamora's appeal is dismissed for want of jurisdiction. *See Tex. R. App. P. 30*.

Regarding Garcia, the record reflects he was not present at the August 16 hearing. While the State asserts Garcia received adequate notice, the State makes no argument that Garcia participated in the decision-making event so as to cut off his ability to proceed by restricted appeal. *See Rivero v. Blue Keel Funding, L.L.C., 127 S.W.3d 421, 423 (Tex. App.--Dallas 2004, no pet.)*. We find Garcia did not participate in the decision-making event that produced the orders in question.

The final requirement is that the complained-of error appear on the face of the record.

Review by restricted appeal entitles the appellant to the same scope of appeal as an ordinary appeal, except the error must appear on the face of the record. *Tex. R. App. P. 30*; *Norman Communications v. Texas Eastman Co., 955 S.W.2d 269, 270, 41 Tex. Sup. Ct. J. 83 (Tex. 1997)* (per curiam). For purposes of

a restricted appeal, the record consists of all documents on file with the trial court at the time of judgment. *Norman Communications, 955 S.W.2d at 270*.
Armendariz v. Barragan, 143 S.W.3d 853, 854 (Tex. App.--El Paso 2004, no pet.).

Garcia alleges there is error on the face of the record in that the Orders were entered in violation of his right to due process because he never received notice. Garcia further complains the State failed to obtain a hearing and adduce evidence on the issues addressed by the Orders.

The Family Code provides that in order to comply with due process requirements, the juvenile court shall provide notice of a proposed juvenile order and a sufficient opportunity for the parent to be heard regarding the proposed order. *See Tex. Fam. Code Ann. § 61.003* (Vernon Supp. 2005). The record reflects Garcia was served with the original petition and issued a summons to appear in court at the place, date and time of the original hearing. The original petition gave Garcia notice of the claims for fees and restitution sought by the County. *Section 51.115 of the Texas Family Code* mandates that each parent of a child attend each hearing affecting the child, subject to contempt powers of the court. *See Tex. Fam. Code Ann. § 51.115* (Vernon 2002). At the August 16, 2004 hearing, the trial court asked where Garcia was and Zamora replied, "Working." She admitted they live together as man and wife and the record reflects they are married. The trial court questioned whether Garcia had signed the parent order and counsel for J.A.G. stated, "He is not coming, Judge." Zamora said, "Sir, what can I say? I'm here for my son, and I can't make my husband do it."

A defendant who makes an appearance following service of process is entitled to notice of the trial setting as a matter of constitutional due process. *Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86, 108 S. Ct. 896, 899-900, 99 L. Ed. 2d 75, (1988)*; *LBL Oil Co. v. Int'l Power Serv., Inc., 777 S.W.2d 390, 390-91, 32 Tex. Sup. Ct. J. 619 (Tex.1989)*. The same is not true if the defendant fails to answer or otherwise appear. The law imposes no duty on the plaintiff to notify a defendant before taking a default judgment when he has been served properly with the citation and petition, and nonetheless has failed to answer or otherwise appear. *See Brooks v. Assoc. Fin. Servs. Corp., 892 S.W.2d 91, 94 (Tex. App. - Houston [14th Dist.] 1994, no writ).*

Wilson v. Wilson, 132 S.W.3d 533, 536 (Tex. App.--Houston [1st Dist.] 2004, pet. denied). It is uncontested that Garcia was served. Garcia does not contest the propriety of the citation or the method of service. Although the record does not reflect Garcia was informed of the date of the August 16 hearing, he had been put on notice of the claims that were adjudicated at that hearing. Because he failed to appear in response to the original citation, the court could adjudicate those claims without further notice. We find Garcia has failed to show error on the face of the record regarding his claim that he had no notice. n1

n1 We note that Garcia is entitled to raise as an affirmative defense to enforcement of a juvenile court order that the juvenile court did not provide him with due process of law in the proceeding in which the order was entered. *Tex. Fam. Code Ann. § 61.055(g)* (Vernon Supp. 2005).

We now turn to Garcia's complaint that the record is insufficient to support the trial court's orders. Specifically, Garcia claims there is no evidence (1) that J.A.G.'s parents, by willful act or omission, contributed to, caused or encouraged J.A.G.'s delinquent conduct; (2) that J.A.G.'s parents are financially able to pay; and (3) of the amounts ordered by the trial court.

The record contains Recommendations for Detention by Referee wherein the Referee found, "The parent/guardian lacks sufficient parenting skills to provide adequate supervision." Also in the record is a

Social History Summary for J.A.G. It states, "Based on the two referrals received . . . it appears that the parents are having a difficult time keeping the child under control. Neither incident was reported to the department by the parents nor had they reported difficulty controlling the child. The parents present the appearance that they are trying to control the child. They have taken no action that would support that appearance." Thus, there is evidence on the face of the record to support the trial court's finding.

The record does not show, on its face, that the parents are unable to pay and the Summary states both parents are employed. Moreover, Garcia does not refer this court to any authority that a finding of ability to pay is required to enter an Order for Payment of Fees. It is, however, an affirmative defense in an enforcement hearing. *See Tex. Fam. Code Ann. § 61.056* (Vernon Supp. 2005).

The Summary reflects amounts for restitution, detention, UA fees, court costs, and Kid Chat. The record contains an Affidavit of the Itemized Time, Services and Expenses for Court Appointed Counsel. A report from the court-appointed investigator contains facts regarding the amount owed in restitution and the investigator's rates and expenses. This constitutes some evidence supporting the fees ordered to be paid.

Garcia relies on the fact that no evidentiary hearing was conducted and fails to address the evidence filed with the trial court or explain why that evidence is insufficient to support the trial court's orders. *SeeTex. R. App. P. 38.1(h). See Michiana Easy Livin' Country, Inc. v. Holten, 48 Tex. Sup. Ct. J. 789, No. 04-0016, 2005 WL 1252268, at *2 (Tex. May 27, 2005, pet. for rehearing filed)* (not yet released for publication) ("both the Legislature and this Court have discouraged oral presentation of testimony and evidence when they can be fairly submitted in writing.") For all these reasons, we find Garcia has failed to show error on the face of the record. Having failed to meet all the requirements for a restricted appeal, we dismiss Garcia's appeal for want of jurisdiction. *See Tex. R. App. P. 30.*

Conclusion: Dismissed for want of jurisdiction.

DOUBLE JEOPARDY—

JEOPARDY ATTACHES IN A JUVENILE PROCEEDING, AS IN AN ADULT PROCEEDING, WHEN THE JURY HAS BEEN EMPANELED AND SWORN.

¶ 06-1-12. **State v. C.J.F.**, ___S.W.3d ___, No. 01-04-00257-CV, 2005 Tex.App.Lexis 10673 [Tex.App.— Houston (1st Dist), 12/29/05).

Background. The State of Texas appeals from dismissal of charges filed against a juvenile, appellee, C.J.F., for engaging in delinquent conduct by committing the felony offense of manslaughter. The trial court dismissed appellee's charges with prejudice on the grounds that the State's petition violated appellee's rights against double jeopardy. The State contends that the trial court's dismissal was erroneous for four reasons. First, the State asserts that appellee failed to satisfy her burden to produce evidence that the facts of the offense were barred by double jeopardy. Second, the State asserts that its nonsuits of the third and fourth amended petitions in cause number 2002-07732J, the pleadings that preceded this cause number, do not constitute a dismissal of the prosecution for the purposes of appellee's right against double jeopardy because the nonsuits were timely taken before any evidence was heard in the case. Third, the State asserts that double jeopardy could not have attached from the third and fourth amended petitions in cause number 2002-07732J because the third amended petition was superseded by the fourth amended petition and was therefore no longer a live pleading, and because the trial court had no jurisdiction over the fourth amended

pleading due to lack of service of that petition on appellee. Fourth, as a matter of first impression in Texas, the State contends that, unlike other criminal proceedings, in which jeopardy attaches when the jury is sworn, jeopardy does not attach in a juvenile proceeding until the trier of fact begins to hear evidence or when the first witness is sworn.

Held. Affirmed

Facts. On April 18, 2002, appellee, a 15-year-old juvenile, was involved in an automobile collision that resulted in the death of Kathryn Sanchez. On September 20, 2002, the State filed its original petition in cause number 2002-07732J, which asserted that appellee intentionally, knowingly, and recklessly caused Sanchez's death. The State filed its first amended petition on October 9, 2002, and filed a second amended petition on January 31, 2003.

On May 1, 2003, the grand jury returned the State's third amended petition, which, like the original petition, alleged that appellee intentionally, knowingly, and recklessly caused Sanchez's death, but, in addition, authorized a determinate sentence. n1 In response to the State's motion to abandon the words "intentionally" and "knowingly" from the third amended petition, the trial court struck those words from that petition. Believing that the grand jury might have authorized a determinate sentence based on the higher culpable mental states for conduct that was "intentionally" and "knowingly" performed, as compared to "recklessly" performed, the trial court quashed the determinate sentence portion of the petition. After the trial court deleted the higher culpable mental states and quashed the authorization for determinate sentencing, the third amended petition charged only reckless manslaughter against a juvenile, with no authorization for a determinate sentence. On October 16, 2003, the grand jury returned the State's fourth amended petition, which was identical to the third amended petition's remaining charge of reckless manslaughter, but, in addition, authorized a determinate sentence.

> n1 A determinate sentence permits the court to commit the juvenile to the Youth Commission, followed by a possible transfer to the Department of Criminal Justice. *TEX. FAM. CODE ANN. § 54.04(d)(3)* (Vernon Supp. 2005). For a juvenile to be subject to a determinate sentence the following three requirements must be met: (1) the grand jury must have approved the petition under *Section 53.045*, (2) the court must have found that the child is in need of rehabilitation or that the public is in need of protection, and (3) the child must have engaged in delinquent conduct that consisted of a violation of a penal law listed in *Section 53.045(a)*, which includes manslaughter. *TEX. FAM. CODE ANN. § 53.045* (Vernon 2002); *TEX. FAM. CODE ANN. § 54.04(c), (d)(3)*.

On January 5, 2004, appellee was admonished concerning the range of punishment for the reckless manslaughter charge in the fourth amended petition, which included authorization for a determinate sentence. During the trial court's voir dire of the jury, which followed, the trial court informed the jurors that appellee was charged with reckless manslaughter and that the punishment range included the possibility of 20 years in prison as a determinate sentence if appellee were transferred to adult prison when she turned 21 years of age. A jury was then empaneled and sworn. Immediately after the jury was released for the day, appellee's attorney informed the trial court, for the first time, that appellee had not been properly served with the fourth amended petition and that the trial court therefore lacked jurisdiction to rule on the allegations in the State's fourth amended petition, for which the jury had already been empaneled. Appellee's attorney also stated that, although the trial court lacked jurisdiction over appellee's fourth amended petition, appellee was ready to proceed on the allegations in the third amended petition, which authorized appellee to be sentenced as a juvenile for reckless manslaughter, but did not authorize determinate sentencing. After the State's attorney requested a hearing to determine whether appellee had

been properly served, the trial court conducted an evidentiary hearing on the issue.

Following the hearing and after the trial court questioned whether appellee had been served with the fourth amended petition, appellee and the State's attorney each represented to the trial court that the trial court lacked jurisdiction over the fourth amended petition because it had not been served on appellee. Appellee and the State's attorney disputed, however, whether the third amended petition remained a live pleading in the trial court.

The State argued that the third amended petition had been superseded by the fourth amended petition and that it was therefore no longer a live pleading. Appellee's attorney restated his readiness to proceed on the third amended petition, which did not include the possibility of a determinate sentence, argued that jeopardy had attached on the third amended petition because a jury had been selected and sworn, and objected to dismissal of the jury or declaration of a mistrial.

In the State's arguments to the trial court concerning its impending ruling on whether to dismiss the empaneled jury, the prosecutor criticized appellee's decision to wait to object about the lack of service until after the jury was empaneled and sworn and argued that appellee's "sandbag" technique was unfair. The prosecutor refused to proceed to trial before the jury that had been empaneled on the grounds that the trial court had no jurisdiction to proceed with the fourth amended petition due to the lack of service of that petition on appellee. The State further contended that the jury had never been empaneled to decide the third amended petition because that petition was no longer a live pleading due to the existence of the fourth amended petition. The State requested a nonsuit of both the third and fourth amended petitions, which the trial court granted, and the empaneled jury was dismissed over appellee's objection.

On January 13, 2004, the State filed its original petition in new cause number 2004-00332J. Like the fourth amended petition, the new original petition charged appellee with reckless manslaughter and included authorization for a determinate sentence. Appellee filed a motion to dismiss the cause based on double-jeopardy violations, along with a supporting brief. The State responded in writing to the motion to dismiss by asserting (1) that the trial court had no jurisdiction to entertain the fourth amended petition due to lack of service of that petition and therefore jeopardy could not attach on a matter that the trial court had no jurisdiction to hear, and (2) that a dismissal of a petition does not constitute an adjudication of the merits of the dismissed action because the dismissal merely places the parties in the same positions they held before the court's jurisdiction was invoked. The trial court dismissed the cause with prejudice, holding that double jeopardy barred any future prosecutions arising out of the same transaction.

Opinion: The State's second and fourth arguments assert that charging appellee is not barred by double jeopardy because the State's nonsuits were timely as a matter of civil law, having been taken before any evidence was heard in the case. The State also asserts that, unlike other criminal proceedings, in which jeopardy attaches when the jury is sworn, jeopardy does not attach in juvenile proceedings until the trier of fact begins to hear evidence or when the first witness is sworn. We address these contentions together.

Juvenile proceedings and appeals from those proceedings are governed by an unlikely and sometimes perplexing hybrid of civil and criminal law. *In re R.S.C., 940 S.W.2d 750, 751-52 (Tex. App.--El Paso 1997, no writ).* An appeal from an order of a juvenile court is governed by the requirements pertaining to civil cases generally. *TEX. FAM. CODE ANN. § 56.01(a)-(b)* (Vernon 2002). A juvenile-delinquency proceeding is considered a civil proceeding, but is quasi-criminal in nature. *In re J.R., 907 S.W.2d 107, 109 (Tex. App.--Austin 1995, no writ)*; *C.E.J. v. State, 788 S.W.2d 849, 852 (Tex. App.--Dallas 1990, writ denied)*; *Smith v. Rankin, 661 S.W.2d 152, 153 (Tex. App.--Houston [1st Dist.] 1983,*

orig. proceeding). The juvenile is guaranteed the same constitutional rights as an adult in a criminal proceeding because a juvenile-delinquency proceeding seeks to deprive the juvenile of his liberty. *In re Winship, 397 U.S. 358, 359, 90 S. Ct. 1068, 1070, 25 L. Ed. 2d 368 (1970)* ("The *Due Process Clause* does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment.'"); *J.R., 907 S.W.2d at 109*; *C.E.J., 788 S.W.2d at 852*; *Smith, 661 S.W.2d at 153* (*citing In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967))*. Neither the *Fourteenth Amendment* nor the *Bill of Rights* is for adults alone. *In re Gault, 387 U.S. at 13, 87 S. Ct. at 1436*.

The doctrine of double jeopardy, which is derived from the *Fifth Amendment to the Constitution of the United States* and applied to the states through the *Fourteenth Amendment*, prohibits a state from placing a defendant in jeopardy twice for the same offense. *See generally Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978)*; *Breed v. Jones, 421 U.S. 519, 541, 95 S. Ct. 1779, 1791, 44 L. Ed. 2d 346 (1975)* (*applying* due process right against double jeopardy to juveniles); *Downum v. United States, 372 U.S. 734, 737-38, 83 S. Ct. 1033, 1035-36, 10 L. Ed. 2d 100 (1963)*; *Ex parte Little, 887 S.W.2d 62, 64 (Tex. Crim. App. 1994)* (*citing Arizona v. Washington, 434 U.S. 497, 503, 98 S. Ct. 824, 829, 54 L. Ed. 2d 717 (1978))*. In a jury trial of an adult charged with a crime, jeopardy attaches when the jury is empaneled and sworn. *Crist, 437 U.S. at 38, 98 S. Ct. at 2162*. The rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy. *Id.* A defendant's "valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy, because that right lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn. *See Crist, 437 U.S. at 36, 98 S. Ct. at 2161*. The time when jeopardy attaches in a jury trial "serves as the lynchpin for all double-jeopardy jurisprudence." *Crist, 437 U.S. at 38, 98 S. Ct. at 2162*. After jeopardy attaches, any charge that is dismissed, waived, abandoned or on which the jury returns an acquittal, may not be retried. *Ex parte Scelles, 511 S.W.2d 300, 301 (Tex. Crim. App. 1974)*.

Double-jeopardy constitutional protections that adults accused of crimes enjoy apply also to juveniles. *Schall v. Martin, 467 U.S. 253, 263, 104 S. Ct. 2403, 2409, 81 L. Ed. 2d 207 (1984)* (citing *Breed v. Jones, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975))*; *In re J.R.R., 696 S.W.2d 382, 384, 28 Tex. Sup. Ct. J. 606 (Tex. 1985)*. The proceeding puts the juvenile in jeopardy when it seeks to determine whether a juvenile has committed acts that violate a criminal law and the potential consequences of the proceeding include both the stigma inherent in such a determination and the deprivation of liberty for many years. *Breed, 421 U.S. at 529, 95 S. Ct. at 1785*. We are not aware that any court has held that jeopardy attaches in a juvenile case at the same time as in an adult criminal proceeding, *i.e.*, when the jury is sworn. Yet, the constitutional protections afforded to adult criminal defendants must also be afforded to juvenile defendants whose liberty is at stake. *See id.* Court's must "eschew 'the "civil" label-of-convenience which has been attached to juvenile proceedings'" when a constitutional right is at stake. *Id*. (*citing In re Gault, 387 U.S. at 50, 87 S. Ct. at 1455*).

We hold that the constitutional guarantee that jeopardy attaches when the jury is empaneled and sworn, as recognized by *Crist* concerning adult criminal defendants, applies equally to a juvenile proceeding whose object is to determine whether the juvenile has committed acts that violate a criminal law and whose potential consequences include the deprivation of liberty for many years. More simply stated, jeopardy attaches in a juvenile proceeding, as in an adult criminal proceeding, when the jury has been empaneled and sworn. *See Schall, 467 U.S. at 263, 104 S. Ct. at 2409*; *Breed, 421 U.S. at 529, 95 S. Ct. at 1785*; *Crist, 437 U.S. at 38, 98 S. Ct. at 2162*. Accordingly, jeopardy attached to appellee's juvenile proceedings here when the jury was empaneled and sworn.

The State insists, however, that the Rules of Civil Procedure control here-not the criminal law principles of double jeopardy-and that its nonsuits were timely filed in accordance with the civil rules. Although the State relies on *In re S.B.C.* as demonstrating that the civil rules control over jeopardy principles in a juvenile proceeding, that case did not address the effect of a dismissal after the jury had been sworn, as here, and is distinguishable from the case before us for that reason. *See In re S.B.C., 805 S.W.2d 1, 9 (Tex. App.--Tyler 1991, writ denied)* (*holding* that double jeopardy did not bar refiling of original cause dismissed after detention hearing under circumstances demonstrating no adjudication of merits of original cause). We therefore conclude that, even if the State filed its nonsuits timely according to the Rules of Civil Procedure, jeopardy attached to appellee's juvenile proceedings when the jury was empaneled, and we thus hold that the Rules of Civil Procedure must yield to the constitutional protections against double jeopardy. *See Schall, 467 U.S. at 263, 104 S. Ct. at 2409*; *Breed, 421 U.S. at 531, 95 S. Ct. at 1787*; *Crist, 437 U.S. at 38, 98 S. Ct. at 2162*.

We are not persuaded by the State's second and fourth contentions regarding the trial court's ruling, and overrule those contentions.

Appellee's Burden to Present the Trial Court with a Sufficient Record

In its first challenge to the trial court's ruling, the State contends that appellee failed her burden to present the trial court with a sufficient record to prove that the prosecution of cause number 2004-00332J would violate her double-jeopardy rights. The State further contends that appellee did not satisfy her burden to prove a double-jeopardy violation because the parties litigated appellee's double-jeopardy claim by written motions alone.

The Court of Criminal Appeals addressed these issues recently in *Hill v. State*, in which the defendant filed a motion contending that his trial was barred by double jeopardy. *90 S.W.3d 308, 311, 313 (Tex. Crim. App. 2002)* (*analyzing State v. Torres, 805 S.W.2d 418, 421 (Tex. Crim. App. 1991)*, and *stating* that the "initial burden of proving the double jeopardy is on the defendant."). In *Hill*, the trial court ruled on the motion after discussing the events of the previous trial with the prosecutor and defense counsel. *Id. at 311-12*. On appeal, the State argued that the defendant's double-jeopardy claim failed because the defendant did not introduce any supporting evidence. *Id. at 312*. The Court of Criminal Appeals disagreed and held that, although the defendant did not introduce evidence on the motion, "the State did not object to the format of the hearing or the manner in which the Court made its findings. In fact, the State readily participated in the proceedings." *Id.* Moreover, the court concluded that when "a plea of jeopardy is before the same court and judge," the "requirements concerning the plea are relaxed." *Id.*

The court reiterated the rationale supporting this conclusion, first explained in *Shaffer v. State*, by stating, "the requirement that the defendant present evidence in support of his allegation of former jeopardy serves a legitimate state interest" because "the trial court has no way of knowing that the allegations in the plea are true." *Hill, 90 S.W.3d at 312* (*quoting Shaffer v. State, 477 S.W.2d 873, 875 (Tex. Crim. App. 1971)).* But, "the procedural requirements which must be followed are not arid rituals of meaningless form." *Id.* Instead, "former jeopardy need not be specially pled in those instances where the trial court either knows or should know of the former proceeding, such as in those cases where the former jeopardy arose in the same case." *Id.* The rule does not apply, therefore, when it is unnecessary or would serve no purpose. *Id.* (*citing Shaffer, 477 S.W.2d at 875-76*).

Here, as in *Hill* and *Torres*, requiring a defendant to present evidence in support of his double-jeopardy claim would exalt form over substance. *See id.*; *Torres, 805 S.W.2d at 422*. The motion to dismiss

based on double jeopardy was before the same trial court and judge and was made shortly after the State filed the new original petition in cause No. 2004-00332J. Requiring appellee to present evidence to the trial court in this instance would "serve no purpose" because the trial court knew of the former proceeding, and, moreover, the trial court, as well as both parties, had discussed double jeopardy when the State nonsuited the third and fourth amended petitions. *See Hill, 90 S.W.3d at 312.* We note further that, as in *Hill* and *Torres*, the State neither objected to the format of the hearing nor requested a hearing on the motion to dismiss. *See Hill, 90 S.W.3d at 312*; *Torres, 805 S.W.2d at 421*. Instead, the State readily participated in the proceedings by filing a written response to appellee's motion to dismiss.

Having neither objected to the format of the hearing nor the manner in which the trial court made its findings, and having actually participated in those former proceedings before the same trial-court judge, who was well aware of the underlying pertinent facts, the State may not claim now that appellee did not meet her burden of producing sufficient evidence. *See Torres, 805 S.W.2d at 421*. Likewise, the State may not object now to the nature of the proceedings. *See id. at 421-22*.

We are not persuaded by the State's first contention that the trial court erred and therefore overrule that contention.

Jurisdiction and Lack of Service for the Fourth Amended Petition

In its third challenge to the trial court's ruling, the State contends that jeopardy could not have attached because the trial court lacked jurisdiction over the fourth amended petition due to lack of service.

The record shows that the trial court concluded that appellee might not have been served with the fourth amended petition, which was identical to the third amended petition that had been served on appellant, except that the fourth amended petition allowed for the possibility of a determinate sentence, which the third amended petition did not.

The State contends that, regardless of whether a juvenile has been properly served with the original petition, we should hold that service of a later amended petition is required for the trial court to have jurisdiction over a juvenile. The State contends that the Rules of Civil Procedure require service on a defendant when subsequent pleadings would impose a more onerous judgment on the defendant. Because the fourth amended petition imposed a more onerous judgment on appellee than the third amended petition, which did not include the possibility of a determinate sentence, the State contends that service of the fourth amended petition on appellee was required for the trial court to have jurisdiction to adjudicate the allegations in that petition. The State explains that the trial court's voir dire and jury selection concerned the fourth amended petition only and contends that the trial court had no jurisdiction over that petition due to lack of service. The State further asserts that the third amended petition was no longer a live pleading because it had been superseded by the fourth amended petition. The State thus contends that no jeopardy attached in this case.

We agree with the State that jeopardy cannot attach on a matter that the trial court had no jurisdiction to hear. *See Hoang v. State, 872 S.W.2d 694, 699 (Tex. Crim. App. 1993)* (*holding* that jeopardy does not attach when court lacks jurisdiction over matter); *In re D.M., 611 S.W.2d 880, 883-84 (Tex. Civ. App.--Amarillo 1980, no writ)* (same); *Allen v. State, 657 S.W.2d 815, 816-17 (Tex. App.--Houston [1st Dist.] 1982, writ dism'd)* (*holding* that lack of service of petition resulted in lack of jurisdiction in trial court and thus no jeopardy attached). We also agree with the State that dismissal of a petition before a jury is sworn does not constitute an adjudication of the merits of the dismissed action because the dismissal

merely places the parties where they were before the court's jurisdiction was invoked. *See In re S.B.C., 805 S.W.2d 1, 9 (Tex. App.--Tyler 1991, writ denied)* (*holding* that dismissal of cause that occurred after preliminary hearings concerning whether to place defendant in home arrest or detention pending trial placed parties in position they were in before court's jurisdiction was invoked; nothing in opinion suggests that dismissal occurred after jury was empaneled and sworn).

We further agree with the State that a trial court lacks jurisdiction over a juvenile when the record lacks an affirmative showing that a petition was served. *See In re M.D.R., 113 S.W.3d 552, 553 (Tex.App.--Texarkana 2003, no pet.)* (*citing In re D.W.M., 562 S.W.2d 851, 852-53, 21 Tex. Sup. Ct. J. 242 (Tex. 1978))*; *In re A.B., 938 S.W.2d 537, 538-39 (Tex. App.--Texarkana 2003, writ denied)*; *TEX. FAM. CODE ANN. § § 53.04, 53.06, 53.07* (Vernon 2002). Stated conversely, the trial court's jurisdiction over a juvenile vests when the juvenile is served with the summons and the original petition, which provides notice to the juvenile of the State's charges. *TEX. FAM. CODE ANN. § § 53.04, 53.06, 53.07*; *Johnson v. State, 551 S.W.2d 379, 382 (Tex. Crim. App. 1977).*

We cannot agree, however, with the State's contention that service of all subsequent petitions on a juvenile is required for the court to retain jurisdiction when the State restates the same charges against the juvenile in an amended petition, albeit with different punishment ranges. We have already determined that, when a juvenile has been served with the original petition, the trial court does not lose jurisdiction for lack of service if the charges are refiled in a later amended petition. *See In re S.D.W., 811 S.W.2d 739, 746 (Tex. App.--Houston [1st Dist.] 1991, no writ)* (*citing McBride v. State, 655 S.W.2d 280, 283 (Tex. App.--Houston [14th Dist.] 1983, no writ))* ("When jurisdiction attached by virtue of a properly served citation in the original petition], the court did not lose jurisdiction because the State may have failed to follow the statutory guidelines in serving appellant with an amended petition."); *In re G.A.T., 16 S.W.3d 818, 823 (Tex. App. --Houston [14th Dist.] 2000, pet. denied)* (*holding* that juvenile court acquires jurisdiction over respondent when served with original petition and that court does not lose jurisdiction for lack of service of amended petition).

Despite controlling precedent on this issue, the State contends that we should revisit these holdings because they conflict with the provisions of the Rules of Civil Procedure that require service on the defendant when subsequent pleadings impose a more onerous judgment. The State relies on the following authority: *Atwood v. B & R Supply & Equip. Co., 52 S.W.3d 265, 267-68 (Tex. App.--Corpus Christi 2001, no pet.)* (*reversing* default judgment because second petition alleging suit on sworn account imposed more onerous judgment than original petition for "simple suit alleging breach of contract"; *explaining* that pleadings in suit on sworn account are taken as prima facie evidence of claim, including unliquidated damages, but in breach of contract, unliquidated contract damages cannot be assessed without evidentiary hearing); *Caprock Const. Co. v. Guaranteed Floorcovering, Inc., 950 S.W.2d 203, 204-05 (Tex. App.--Dallas 1997, no writ)* (*reversing* default judgment because addition of new plaintiff in later petition exposed defendant to additional liability); *Onwukwe v. Ike, 137 S.W.3d 159, 165-66 (Tex. App.--Houston [1st Dist.] 2004, no pet.)* (*affirming* default judgment, but *acknowledging* that subsequent pleadings imposing more onerous judgment on defendant must be served on defendant) (*citing Rose v. Rose, 117 S.W.3d 84, 91 (Tex. App.--Waco 2003, no pet)* (*stating*, "A plaintiff must serve a non-answering defendant with amended pleadings only when the amended pleading sets up a new cause of action or seeks a more onerous judgment against the defendant.")).

All of these cases, however, assess pleadings from which default judgments were entered when the defendant did not appear in court to answer the lawsuit. These cases do not stand for the proposition that a trial court's jurisdiction over a lawsuit terminates because the subsequent pleadings imposed a more

onerous judgment on the defendant. Instead, the dispositive issue in these cases is lack of proper notice of the pleadings against the defendant, which precluded any admission of liability due to lack of an answer.

This is not a default-judgment case. Appellee was properly served with the charge of reckless manslaughter and appeared in court to answer the reckless manslaughter charge. Although the determinate sentence authorization by the grand jury changed the punishment range for the offense, the reckless manslaughter charge was asserted in each of the petitions filed against appellee. We cannot conclude, therefore, that when an amended petition charges the same crime against the defendant for which the defendant has been served, the Rules of Civil Procedure require service of a petition that adds only authorization by the grand jury to seek a determinate sentence. *See In re S.D.W., 811 S.W.2d at 746*. For the same reasons, we cannot conclude that the trial court lost jurisdiction over appellee merely because she was not served with the later petition.

We conclude that the trial court acquired jurisdiction over appellee, who was properly served with the original petition, regardless of whether appellee was served with the subsequent amended petition. *See id*.

For the first time on appeal, the State further contends both that juvenile defendants should be served in the same manner as adult defendants, who must receive service of subsequent indictments, and that the trial court, State's attorney, and appellee's attorney were all "of the opinion" that the trial court lost jurisdiction over appellee's fourth amended petition due to lack of service. Although subject matter jurisdiction may be raised for the first time on appeal, whether the trial court had personal jurisdiction may not. *See Univ. of Tex. S.W. Med. Ctr. v. Loutzenhiser, 140 S.W.3d 351, 353, 47 Tex. Sup. Ct. J. 869 (Tex. 2004)* (*citing Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 445-46, 36 Tex. Sup. Ct. J. 607 (Tex. 1993)*); *see also In re A.D.D., 974 S.W.2d 299, 303 (Tex. App.--San Antonio 1998, no pet.)* (*citing Fed. Underwriters Exch. v. Pugh, 141 Tex. 539, 541, 174 S.W.2d 598, 600 (1943))* (*stating* that personal jurisdiction "concerns the court's power to bind a particular person or party" and "can be conferred by consent or waiver."). Whether the trial court had jurisdiction over a juvenile due to improper service is a question of personal jurisdiction, which, accordingly, can be waived. *See In re M.D.R., 113 S.W.3d 552, 553 (Tex. App.--Texarkana 2003, no pet.)* (*citing D.W.M., 562 S.W.2d at 852-53*; *see also TEX. FAM. CODE ANN. § § 53.06(e), 53.07*.

Although not usually in the position of appellant, the State must follow the Rules of Appellate Procedure when acting as appellant. *State v. Mercado, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998)*. Accordingly, arguments that the State wishes to assert on appeal must have first been made at trial to avoid waiver. *Id.*; *see TEX. R. APP. P. 33.1*. As the Court of Criminal Appeals recently reaffirmed, *rule 33.1*'s "raise it or waive it" forfeiture rule applies equally to the State and the defendant. *Martinez v. State, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002)*. Because the State did not raise these issues in the trial court, the State has not preserved them for our review and has waived any error. *See TEX. R. APP. P. 33.1*; *Martinez, 91 S.W.3d at 336-37*.

The State further contends that appellee's rights to due process required that she be served with the fourth amended petition because it alleged the possibility of a determinate sentence not included in the third amended petition. Furthermore, and in the alternative, the State contends that even if the trial court had jurisdiction to proceed on the fourth amended petition, there was a "manifest necessity" for the trial court to grant the dismissal. These two arguments do not pertain to the trial court's subject-matter jurisdiction over appellant's case, which could be raised for the first time on appeal, but rather concern violation of appellee's due process rights due to lack of service of the indictment and whether there was a "manifest necessity" for

the trial court to dismiss the case. Again, because the State did not raise these issues in the trial court, the State has not preserved them for our review and has waived any error. *See TEX. R. APP. P. 33.1*; *Martinez, 91 S.W.3d at 336-37*.

We therefore reject the State's third assertion of trial-court error.

Conclusion: The trial court properly dismissed cause No. 2004-00332J. We affirm the judgment of the trial court.

EVIDENCE—

TESTIMONY FROM THE OUTCRY WITNESS BORE SUFFICIENT INDICIA OF RELIABILITY TO BE ADMISSIBLE

¶ 05-2-02. **In The Matter Of V.B.**, UNPUBLISHED, No. 04-04-00167-CV & 04-04-00168-CV, 2005 Tex.App.Lexis 1424 (Tex.App.– San Antonio 2/23/05).

Facts: Appellant, a juvenile, challenged the delinquency adjudication entered by the 289th Judicial District Court of Bexar County, Texas, for aggravated sexual assault, *Tex. Penal Code Ann. § 22.021* (Supp. 2004-2005), and committing him to the Texas Youth Commission.

Overview**:** Appellant was charged with the offense of aggravated sexual assault in two separate, but related, cases arising from incidents occurring on the same date and in the same location, but involving two different victims. The two child victims testified at trial, along with several other State witnesses. Appellant argued that the trial court erred in allowing testimony from an outcry witness pursuant to *Tex. Fam. Code Ann. § 54.031* (2002). The appellate court found no evidence in the record that the trial court abused its discretion in finding the victims' statements reliable, and the testimony from the outcry witness bore sufficient indicia of reliability with respect to the time, content, and circumstances of the statements for the testimony to be admissible. The victims made statements to their mother about the assaults after appellant had instructed them not to tell anyone what had happened. The statements made to the mother were clear and unambiguous in describing the incident, where it occurred, the sequence of events, the positions of the child victims and the perpetrator, and each child's reaction.

Held: Affirmed

Memorandum Opinion: V.B. appeals from his delinquency adjudication for aggravated sexual assault and commitment to the Texas Youth Commission. V.B. claims on appeal that the trial court erred in allowing testimony from an outcry witness pursuant to Texas Family Code *§ 54.031. TEX. FAM. CODE ANN. § 54.031* (Vernon 2002). We affirm the judgment of the trial court.
Background: V.B. was charged with the offense of aggravated sexual assault in two separate, but related, cases arising from incidents occurring on the same date and in the same location, but involving two different victims. *See TEX. PEN. CODE ANN. § 22.021* (Vernon Supp. 2004-05). The State alleged that in January 2003, Bessie Tellez, the victims' mother, had taken her two sons, ages five and seven, to stay overnight with a neighbor, Vivian, who lived in the apartment upstairs. The children told their mother that they did not want to stay at Vivian's because her brother, V.B., who sometimes stayed there, had been rough with them on previous occasions. Ms. Tellez took the children to stay with Vivian anyway. The following day, Ms. Tellez became more concerned about the situation and asked her sons some more direct

questions about what had happened with V.B. the previous week. The children then each made separate outcry statements to Ms. Tellez alleging that V.B. had sexually assaulted each of them, as well as a third child, while they were at Vivian's apartment.

At trial, V.B. objected to hearsay when the State asked Ms. Tellez to testify as to the statements made to her by her sons. The State responded that V.B. had been given proper notice of the State's intent to use the outcry witness at trial, and requested that the trial judge hold a hearing outside the presence of the jury to determine the reliability of the statements as authorized by *Texas Family Code § 54.031*. The parties agreed that the only issue at the hearing was the reliability of the statements. After hearing testimony from Ms. Tellez outside the presence of the jury, the trial court ruled that the children's statements were admissible through Ms. Tellez as the designated outcry witness.

The two child victims also testified at trial, along with several other State witnesses. The jury found the State's allegations true, and the trial judge entered a finding of delinquent conduct and committed V.B. to the Texas Youth Commission for an indeterminate period. This appeal timely followed.

ANALYSIS

Texas Family Code § 54.031 provides an exception to the general rule excluding hearsay for the first report of sexual abuse that a child victim makes to an adult. *TEX. FAM. CODE ANN. § 54.031 (c)*. For the exception to apply, the State must provide the defendant with at least fourteen days' notice of its intent to use the statement at trial; the court must conduct a hearing outside the jury's presence and make a determination that the statement is reliable with respect to the time, content, and circumstances of the statement; and, the child victim must testify or be available to testify at the trial. *Id*.

V.B.'s only issue on appeal is that the trial court erred in admitting the outcry witness testimony because the statements were unreliable. In response, the State contends (1) that the issue was not properly preserved for appeal because V.B. failed to make a specific objection to the outcry witness testimony; (2) that the statement was properly admitted; and, (3) even if the outcry statement was erroneously admitted, any error was harmless because there was sufficient evidence outside of this testimony to adjudicate V.B. delinquent and commit him to the Texas Youth Commission.

We review a trial court's rulings admitting or excluding evidence under an abuse of discretion standard. *Rachal v. State, 917 S.W.2d 799, 816 (Tex. Crim. App. 1996)*; *Aguilera v. State, 75 S.W.3d 60, 64 (Tex. App. -- San Antonio 2002, pet. ref'd)*. The trial court abuses its discretion when it acts without reference to any guiding rules and principles, or acts in a manner that is arbitrary or capricious. *Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)* If the trial court's decision is within the bounds of reasonable disagreement, we will not disturb it on appeal. *Id*. The trial court has broad discretion in determining whether a child's statement falls within the hearsay exception provided by *Texas Family Code § 54.031*, and the trial court's exercise of that discretion will not be disturbed on appeal unless a clear abuse of discretion is established by the record. *See Garcia v. State, 792 S.W.2d 88, 92 (Tex. Crim. App. 1990)*; *Reed v. State, 974 S.W.2d 838, 841 (Tex. App. -- San Antonio 1998, pet. ref'd)*; *see also In re Z.L.B., 102 S.W.3d 120, 123, 46 Tex. Sup. Ct. J. 512 (Tex. 2003)* (holding that the outcry statute found in the Family Code should be interpreted and applied in a juvenile trial in the same manner as the parallel rule in the Code of Criminal Procedure is applied in an adult criminal trial).

When the State sought to elicit testimony from Ms. Tellez about the statement made to her by one of her sons, V.B.'s counsel objected, "Your Honor, object to hearsay. The child is here to testify as to what

he said." The provisions of the outcry statute are mandatory and must be complied with for a statement to be admissible over a hearsay objection. *Long v. State, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990)*. Once an objection to outcry witness testimony is made, the State has the burden to show compliance with each element of the statute for the testimony to be admissible. *Id. at 548*. While objections must be specific enough to inform the trial judge of the basis of the objection and to afford opposing counsel with an opportunity to remove the objection, a general objection will not waive error if the complaint is obvious to the trial court and the State from its context. *Id*. Where, in an aggravated sexual assault trial, a general hearsay objection is raised immediately before the witness begins to testify to an outcry statement, such objection will normally be sufficient to apprise the trial court of the purpose of the complaint, thereby preserving the issue for appellate review. *Id*. Given the timing and context of the objection here, and the State's response to it, we conclude that V.B.'s hearsay objection in this instance was sufficient to preserve his complaint regarding the reliability of the statements for appellate review.

Following V.B.'s objection, the State requested that the trial court conduct a hearing to determine whether the statements were admissible pursuant to *§ 54.031*. The parties agreed that the only issue for the court to determine at the hearing was reliability. n1 As a predicate for admission of the testimony, the trial court must find that the outcry statement is reliable based on "the time, content, and circumstances of the statement." *TEX. FAM. CODE ANN. § 54.031 (c)(2)*. The phrase "time, content, and circumstances" refers to the time the child makes the statement to the proffered outcry witness, the content of the statement, and the circumstances surrounding the making of the statement. *Broderick v. State, 89 S.W.3d 696, 699 (Tex. App. -- Houston [1st Dist.] 2002, pet. ref'd)*. The determination of whether outcry testimony is reliable must be made on a case-by-case basis. *Davidson v. State, 80 S.W.3d 132, 139 (Tex. App. -- Texarkana 2002, pet. ref'd)*. Texas courts have identified a number of indicia of reliability that the trial court may consider when evaluating the reliability of outcry testimony, including: (1) whether the child victim testifies at trial and admits making the out-of-court statement; (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate; (3) whether other evidence corroborates the statement; (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults; (5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty; (6) whether the statement is consistent with other evidence; (7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate; (8) whether the child behaves abnormally after the contact; (9) whether the child has a motive to fabricate the statement; (10) whether the child expects punishment because of the report; and (11) whether the accused had the opportunity to commit the offense. *Id.; Norris v. State, 788 S.W.2d 65, 71 (Tex. App. -- Dallas 1990, pet. ref'd)*.

> n1 V.B. stipulated that he had received at least fourteen days' notice of the State's intent to use the statements, that he was aware of the general content of the statements, and that the child victims were available to testify. *See TEX. FAM. CODE ANN. § 54.031 ©)*.

Here, the victims made statements to Ms. Tellez about the assaults after V.B. had instructed them not to tell anyone what had happened. Ms. Tellez instructed the children not to lie to her about such things and the children confirmed, both then and prior to their testimony at trial, that they understood the difference between the truth and a lie and that they were being truthful. The children maintained their statements, even when asked by their mother to repeat them in front of V.B. While the younger child had some difficulty testifying at trial, there is no indication that he had similar difficulty in narrating his statement to his mother. The statements made to Ms. Tellez were clear and unambiguous in describing the incident, where it occurred, the sequence of events, the positions of the child victims and the perpetrator, and each child's reaction. Ms. Tellez's testimony indicated that the children described the assaults to her in

significant detail using their own immature terminology, in a manner consistent with their developmental ages. Each of the boys' statements was corroborated by the other's, and their outcry statements were consistent with their testimony and the testimony of other witnesses at trial. While the children made the statements in response to questioning by Ms. Tellez, there is no indication in the record that the victims were prompted as to the substance of the statements. *See Davidson, 80 S.W.3d at 139*. The record also contains evidence suggesting that, based on the children's ages and lack of prior exposure to sexually explicit material, it is unlikely that they could be expected to fabricate the events described in their statements. There is nothing in the record to suggest that the victims had any motive to accuse V.B. of a crime.

We find no evidence in the record before us that the trial court abused its discretion in finding the victims' statements reliable. We conclude that the testimony from the outcry witness bore sufficient indicia of reliability with respect to the time, content, and circumstances of the statements for the testimony to be admissible pursuant to *Texas Family Code § 54.031*.

Conclusion: Accordingly, we overrule V.B.'s issue on appeal and affirm the judgment of the trial court.

BAGGIE OF MARIJUANA AND ROLLING PAPERS FOUND ON FLOORBOARD WAS SUFFICIENT TO ESTABLISH AFFIRMATIVE LINK TO DRIVER OF VEHICLE.

¶ 05-2-08. **In The Matter of N.B.**, MEMORANDUM, No. 05-04-00545-CV, 2005 Tex.App.Lexis 901 (Tex.App.– Dallas 2/3/05).

Facts: The police reports showed appellant driving an extended cab pick-up truck with two passengers. They were pulled over by police. Appellant was asked to exit the vehicle at which time one officer detected the odor of burnt marijuana coming from the truck. The front seat passenger was also asked to exit. The officers observed a plastic baggie of marijuana, later found to be approximately 3.26 grams, and rolling papers on the front passenger floorboard. This evidence affirmatively linked appellant to the marijuana in question and established that the marijuana was a "usable quantity." The evidence was sufficient to support the trial court's finding that he engaged in delinquent conduct by unlawfully possessing a usable quantity of marijuana.

Held: Affirmed

Memorandum Opinion: An individual possesses a controlled substance when he (i) exercises care, control, and management over the controlled substance and (ii) knows the matter is contraband. *Frierson v. State, 839 S.W.2d 841, 848 (Tex. App.-Dallas 1992, pet. ref'd)* (citing *Martin v. State, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988))*. When the accused is not in exclusive control or possession of the place where the contraband is found, the accused cannot be charged with knowledge and control over the contraband unless there are additional independent facts and circumstances affirmatively linking him to the contraband in such a manner and to such an extent that a reasonable inference may arise that he knew of the contraband's existence and exercised control over it. *Porter v. State, 873 S.W.2d 729, 732 (Tex. App.-Dallas 1994, pet. ref'd)*. "Joint possession over a controlled substance in a vehicle may be established if the controlled substance is in open or plain view, there is a noticeable odor in the car, and the substance is conveniently accessible to the driver." *In re K.T., 107 S.W.3d 65, 72 (Tex. App.-San Antonio 2003, no pet.)*; *see Duff v. State, 546 S.W.2d 283, 287 (Tex. Crim. App. 1977)* (holding conflicting statements about trip, odor of marijuana emanating from car, and marijuana seeds on floorboard sufficient evidence to link appellant to

contraband).

Although N.B. claims the evidence is legally and factually insufficient to show (i) he exercised care, control, and management over the marijuana and (ii) that the amount of marijuana was a "usable quantity," we disagree. During the hearing, the State and N.B. "stipulated to the facts as stated in the police report(s)." The police reports show N.B. was driving an extended cab pick-up truck with Juan Manuel Briones and a third male passenger when they were pulled over by Corporal Stansell. Shortly thereafter, Officer Haak arrived to assist. According to the stipulated evidence, N.B. was asked to exit the vehicle at which time one officer detected the odor of burnt marijuana coming from the truck. Briones, the front seat passenger, was also asked to exit. The officers observed a plastic baggie of marijuana ("later found to be approximately 3.26 grams") and rolling papers on the front passenger floorboard. This evidence affirmatively links N.B. to the marijuana in question and establishes that the marijuana was a "usable quantity." *See In re K.T., 107 S.W.3d at 72*; *Parson, 432 S.W.2d at 91*; *see also Duff, 546 S.W.2d at 287*. Thus, we conclude the evidence is legally and factually sufficient to support the trial court's finding that he engaged in delinquent conduct by unlawfully possessing a usable quantity of marijuana. We overrule N.B.'s first and second issues.

Conclusion: We affirm the trial court's judgment

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING DRUG TEST RESULTS ON THE BASES OF RELIABILITY AND JURY CONFUSION.

¶ 05-3-15. **In the Matter of J.A.C.**, MEMORANDUM, No 14-02-00806-CV, 2005 Tex.App.Lexis 4519 (Tex.App.— Houston[14th], 6/14/05).

Facts: The day after appellant was arrested, he went to his regularly-scheduled visit with his probation officer, who administered a routine drug test. The test result was negative. However, the probation officer failed to test the sample for adulterants that could produce a false negative because she was out of the necessary supplies. She told appellant to go to an official lab the next day for retesting to verify the negative result, but, for reasons not specified in the record, appellant did not obtain the follow-up test.

Appellant sought to admit the drug test result and have an expert testify about the accuracy of the test and the meaning of the results. Appellant contends the negative drug test result is relevant and highly probative because, contrary to the testimony of the undercover officer, it would show appellant did not smoke marijuana and therefore likely did not possess it either. The trial court held a hearing outside the presence of the jury and then excluded all evidence regarding the drug test results on the bases of reliability and jury confusion. In his third issue, appellant challenges this ruling.

Held: Affirmed.

Opinion: For scientific evidence to be admissible, the proponent must establish that the evidence is both relevant and reliable. *Robinson, 923 S.W.2d at 556-57*; *Kelly v. State, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992)*. The trial court is the gatekeeper and is to admit evidence only if it is sufficiently reliable and relevant to assist the jury. *Owens v. State, 135 S.W.3d 302, 306-07 (Tex. App.--Houston [14th Dist.] 2004, no pet.)*. Unreliable evidence is of no assistance to the trier of fact. *Robinson, 923 S.W.2d at 557*.

Appellant's expert testified that the type of urinalysis the probation officer conducted was, as a general matter, accurate and reliable. However, he also testified that there are many possible ways to

adulterate a urine sample and that without testing for such adulterants, "we would not know if it was a true test or not" and the test would not provide a "complete analysis." A reliability analysis concerns not just the soundness of the test but also the proper application of the test. *See Kelly, 824 S.W.2d at 573*; *Porath v. State, 148 S.W.3d 402, 416 (Tex. App.--Houston [14th Dist.] 2004, no pet.)*. Errors in conducting an otherwise valid test can render the result unreliable. *See McRae v. State, 152 S.W.3d 739, 743-44 (Tex. App.--Houston [1st Dist.] 2004, pet. filed)* (holding that the trial court abused its discretion in admitting the results of a field sobriety test based on officer's admitted significant errors in administering the test). Based on the evidence from appellant's own expert, the trial court determined the test result was unreliable and refused to admit appellant's proposed evidence. The evidence in the record supports this conclusion, and we cannot say the trial court abused its discretion in excluding the evidence on this basis.

The trial court also found that the evidence had low probative value and was outweighed by the risk of jury confusion under *Texas Rule of Evidence 403*. The undercover officer testified that he saw appellant take approximately two puffs from the marijuana cigar. Appellant's expert testified that if appellant had only smoked such a small amount of marijuana, there was only a fifteen percent chance that he would have tested positive for marijuana on a urinalysis test. Thus, the trial court concluded, the test result had little probative value to rebut the possession charge. Further, because only the undercover officer testified that he saw appellant smoking the marijuana but all three officers said they saw appellant holding the marijuana cigar, the test results, at most, could have impeached one officer's credibility and thus had little probative value for impeachment. Because the evidence supports the trial court's findings, the trial court did not abuse its discretion in excluding the drug test evidence under *Rule 403*.

Conclusion: We overrule appellant's third issue.

DOCUMENTS THAT ARE CORRECT COPIES OF THOSE UPON WHICH A CLERK'S OFFICE RELIES IN ACCOUNTING FOR A JUVENILE'S RECORD, CONSTITUTES EXTRINSIC EVIDENCE THAT THE RECORDS ARE WHAT THE PROPONENT CLAIMS THEM TO BE.

¶ 05-4-23. **Hull v. State**, 172 S.W.3d 186, 2005 Tex.App.Lexis 6502 [Tex.App.— Dallas (5th Dist.), 8/16/05].

Background: Defendant pled no contest to robbery and aggravated robbery. Defendant argued that the judgments in two earlier juvenile cases should not have been admitted at the punishment hearing because they contained no seals as required by *Tex. R. Evid. 902(1)*, (2), and (4) and thus were not properly certified. The 203rd Judicial District Court, Dallas County, Texas, sentenced him to concurrent 20-year and 12-year terms of confinement.

Facts: At the punishment hearing, the State asked appellant whether he had a juvenile record. Appellant objected "to going into anything other than a final adjudication." Appellant stated, "It's improper impeachment, Your Honor, to try to impeach this witness with anything like that but with the final adjudication of juvenile determination." The trial court sustained the objection.

The State then offered two exhibits. Exhibit No. 2 consisted of copies of (i) an April 1998 order of adjudication for a 1997 burglary offense, (ii) an April 1998 original order granting probation for that offense, and (iii) a November 2000 original order granting probation for offenses in 2000. n4 Exhibit No. 3 consisted of copies of (i) a November 2000 order of adjudication for a series of offenses from May to September 2000, including aggravated assault and other offenses, and (ii) a December 2000 "Order on Motion to Modify Revoking Probation and TYC Commitment" for the 2000 offenses. Appellant objected,

"Judge, I've looked at them, and they, in my view, don't appear to be properly certified, and we would object to them on that basis." The trial court inspected the exhibits, overruled appellant's objection, and admitted them.

> n4 The November 2000 original order granting probation clearly relates to the offenses that were the subject of the order of adjudication and order granting probation in Exhibit No. 3, and was apparently mistakenly offered as part of Exhibit No. 2, as acknowledged by appellant and the State in their briefs.

In his single issue on appeal, appellant contends the juvenile judgments were not properly certified and should not have been admitted because they contained no seals as required by rule of evidence 902(1), (2), and (4). Appellant does not dispute that the exhibits relate to his juvenile adjudications.

The two orders of adjudication, the April 1998 original order granting probation, and the December 2000 order on motion to modify are multi-page documents. On the last page of each document is a stamp which states as follows:

> A CERTIFICATED COPY
> ATTEST *4-14* 2*004*
> LINDA BROOKS, COUNTY CLERK
> HUNT COUNTY, TEXAS
> BY *Christy n5 Wooten* DEPUTY
> (Italics indicate handwriting.) On each preceding page is a stamp that reads:

> TRUE AND CORRECT
> COPY OF ORIGINAL
> FILED IN HUNT
> COUNTY CLERK'S OFFICE

In addition, the April 1998 original order granting probation bears the seal of the Hunt County Court and the following statement: "GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the *20* day of *April*, 19*98*. Receipt acknowledged on day of entry thereof, one (1) certified copy of the above order." Following this statement is the signature of the Hunt County Juvenile Court Clerk. Likewise, the November 2000 order granting probation bears the seal of the Hunt County Court and the following statement: "GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the *6* day of *November*, 20*00*. Receipt acknowledged on day of entry thereof, one (1) certified copy of the above order." It is signed by the Hunt County Juvenile Court Clerk. However, the November 2000 order granting probation does not bear the Hunt County Clerk's April 14, 2004 "certified copy" stamp, as do the other documents.

> n5 The handwriting is such that it is difficult to read the deputy's first name, but this appears to be her first name.

Opinion: A document may be properly authenticated under either rule of evidence 901 or 902, and need not be authenticated under both. *Reed v. State, 811 S.W.2d 582, 586 (Tex. Crim. App. 1991)*. Rule 901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." TEX. R. EVID. 901(a). This provision does not limit the type of extrinsic evidence which may be used. *Reed, 811 S.W.2d at 586*. Rule 901(b) then provides illustrations of the type of extrinsic evidence

which would satisfy the requirement of authentication. TEX. R. EVID. 901(b); *Reed, 811 S.W.2d at 586*. Example (7) specifically addresses "public records or reports," and provides that authentication is established by "evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." TEX. R. EVID. 901(b)(7). Thus, one means of authenticating a public record under 901 is showing that the document is from a public office authorized to keep such a record. *Reed, 811 S.W.2d at 587*.

Rule of evidence 902 provides for self-authentication of domestic public documents under seal. TEX. R. EVID. 902(1). Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to these documents. Instead, "[a] document bearing a seal purporting to be that of . . . any State, . . . or of a . . . department, officer, or agency thereof, and a signature purporting to be an attestation or execution" is self-authenticating. *Id.*

IV. ANALYSIS AND CONCLUSION

Here, the April 14, 2004 certification on the two orders of adjudication, the April 1998 original order granting probation, and the December 2000 order on motion to modify shows these documents are from the Hunt County clerk's office. Because the documents are from the Hunt County Juvenile Court, it seems clear that the Hunt County clerk's office is authorized to keep them. *See Reed, 811 S.W.2d at 587* (noting that "it seems clear" that the TDCJID was authorized to keep records of judgment and sentence in the "pen packet" for a prisoner is custody). Pursuant to *Reed*, we need not decide whether the Hunt County clerk's office is a public office because the fact that the documents are correct copies of those upon which the clerk's office relies in accounting for a juvenile's record "constitutes extrinsic evidence that the records are what the proponent claims them to be." *See id.* (citing rule of evidence 901(a)); *see also United States v. Jimenez Lopez, 873 F.2d 769, 770-71 (5th Cir. 1989)* (conclusive proof of authenticity not required for admission; testimony of chain of custody of photocopy combined with "internal indicia of reliability within the document" justified admission pursuant to federal rule of evidence 901). Moreover, rule 901(b)(7) does not require seals. *See* TEX. R. EVID. 901(b)(7); *see also Tex. Dep't of Pub. Safety v. Guajardo, 970 S.W.2d 602, 608-09* (Tex. App.-Houston [14th Dist.] 1998, no pet.) (holding certified copy of DPS document met requirements of rule 901); *Redd v. State, 768 S.W.2d 439, 440* (Tex. App.-Houston [1st Dist.] 1989, pet. ref'd) (holding certified copy of pen packet met requirement of rule 901). We conclude these documents were sufficiently authenticated in accordance with rule 901(b)(7). *See Reed, 811 S.W.2d at 587*. Therefore, we need not consider appellant's argument that they are not properly certified pursuant to rule 902. *See id. at 586*.

The November 2000 original order granting probation does not contain the April 14, 2004 certification. However, it is properly self-authenticated pursuant to rule of evidence 902(1) because it contains the seal of the Hunt County Court and the signature of the Hunt County Juvenile Court Clerk. *See* TEX. R. EVID. 902(1).

Conclusion: We resolve appellant's single issue against him and affirm the trial court's judgments.

JURY INSTRUCTIONS—

JURY INSTRUCTIONS CONSIDERED PROPER IN CAPITAL MURDER ADJUDICATION.

¶ 05-2-23B. **Vargas v. State**, MEMORANDUM, No. 01-03-00870-CR, 2005 Tex.App.Lexis 2417 [Tex.App.– Houston (1st Dist.) 3/31/05].

Facts: A jury found appellant, Thomas Vargas, guilty of capital murder, and the trial court sentenced him to life in prison, the only possible sentence for a juvenile certified to be tried as an adult. In six points of error, appellant contends that the trial court erred (1) in admitting his statements that were involuntarily made, (2) in admitting unduly prejudicial photographs of the complainant, (3) in allowing a jury charge that commented on the weight of the evidence, and (4) in denying his request for lesser included offenses. We affirm.

For additional facts of offense see ¶ 05-2-23A.

Held: Affirmed

Memorandum Opinion: In point of error five, appellant contends that the trial court erred by allowing, despite appellant's objection, a jury charge that commented on the weight of the evidence. The complained-of charge contained the following instruction concerning the admissibility of appellant's taped confession:

> An oral statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made.
>
> No oral statement made by an accused juvenile as a result of custodial interrogation (while the accused was in jail or other place of confinement or in the custody of a peace officer) is admissible as evidence against him in any criminal proceeding unless:
> . . . .
>
> (b) Prior to the statement but during the recording the accused is given the following warning by a magistrate:
>
> > (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used in evidence against him;
> > (2) he has the right to have a lawyer present to advise him prior to or during any questioning;
> > (3) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to him to advise him prior to or during any questioning or interviews with peace officers or attorneys representing the state;
> > (4) he has the right to terminate the interview at any time; and
> > (5) the juvenile must knowingly, intelligently, and voluntarily waive each right stated in the warning;
> . . . .
>
> *A statement invoking one of the rights above must be clear and unambiguous*. A statement is not voluntarily made if prior to or during the statement, the accused invokes one of the rights set out above.
>
> So in this case, if you find from the evidence, or if you have a reasonable doubt thereof, that prior to the time the defendant gave the alleged statement to Detective Armando Garza, if he did give it, the foregoing provisions were not complied with or if you find the oral statement, if any, was not freely and voluntarily made, then you will wholly disregard the alleged statement and not consider it for any purpose; if, however, you find beyond a reasonable doubt that the defendant was warned in the respects outlined above prior to

his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, . . .

(Emphasis added.) Appellant specifically complains of the italicized portion of the charge.

Standard of Review

In reviewing a trial court's charge to the jury, we must engage in a two-step analysis to determine: (1) whether the charge was erroneous and, if so, (2) whether the error was harmful. *Gibson v. State, 726 S.W.2d 129, 133 (Tex. Crim. App. 1987)*; *Nguyen v. State, 811 S.W.2d 165, 167 (Tex. App.--Houston [1st Dist.] 1991, pet. ref'd)*. The degree of harm required to reverse an individual case depends upon whether the error was preserved in the trial court. *Gibson, 726 S.W.2d at 133*. If the error was properly preserved at trial, any actual harm, regardless of degree, is sufficient to require a reversal of the conviction. *Almanza, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)*; [*26] *Jones v. State, 962 S.W.2d 96, 98 (Tex. App.--Houston [1st Dist.] 1997), aff'd, 984 S.W.2d 254 (Tex. Crim. App. 1984)*. If the error is not properly preserved, the harm must be so egregious that it deprives the accused of a "fair and impartial trial." *Almanza, 686 S.W.2d at 171*; *Jones, 962 S.W.2d at 98*. To preserve error related to the jury charge, the appellant must either object or request a charge at trial. *Vasquez v. State, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996)*.

Here, because appellant objected to the jury charge, the alleged error was properly preserved, and a finding of any actual harm is sufficient to reverse appellant's life sentence. However, any harm must be evaluated in light of the entire charge, the arguments of counsel, the state of the evidence, and any other relevant information revealed by the trial record as a whole. *Saunders v. State, 913 S.W.2d 564, 574 (Tex. Crim. App. 1995)*; *Blok v. State, 986 S.W.2d 389, 391 (Tex. App.--Houston [1st Dist.] 1999, pet. ref'd)*.

The Jury Charge

The function of the jury charge is to instruct the jury on the law applicable to the case. *Abdnor v. State, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994)*. The statement of the law in the charge must be correct because it is the instrument by which the jury convicts. *Benson v. State, 661 S.W.2d 708, 713 (Tex. Crim. App. 1982)*. Generally, when evidence at trial raises a defensive issue and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury. *Mendoza v. State, 88 S.W.3d 236, 239 (Tex. Crim. App. 2002)*. Specifically, when evidence presented at trial raises a factual dispute over whether a defendant's statement was voluntary, the defendant is entitled to an instruction in the jury charge advising the jury generally on the law relevant to the statement. *Dinkins v. State, 894 S.W.2d 330, 353 (Tex. Crim. App. 1995)*. The evidence that raises the issue may be strong, weak, impeached, undisputed, or even beyond belief. *Mendoza, 88 S.W.3d at 239*.

Section 51.095 of the Texas Family Code allows the statement of a child to be used as evidence only if it appears that the statement was freely and voluntarily made. *TEX. FAM. CODE ANN. § 51.095* (Vernon 2002). Under *article 38.23*, the jury shall be instructed that, if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the laws of Texas, including *section 51.095*, then the jury shall disregard such evidence. *TEX. CODE CRIM. PROC. ANN. art. 38.23* (Vernon 1979). The terms of *article 38.23* are mandatory. *Mendoza, 88 S.W.3d at 239*.

The instruction that "a statement invoking one of the rights above must be clear and unambiguous" does not involve a recitation of specific facts or call attention to a specific piece of evidence. Rather, it is a correct statement of the law, under *Dowthitt*, that cannot be construed as a comment on the weight of the

evidence. *See Dowthitt, 931 S.W.2d at 257*.

We overrule point of error five.

Conclusion: Jury instructions proper, case affirmed.

MODIFICATION OF DISPOSITION—

HEARSAY ALLOWED IN MOTION TO MODIFY HEARING REGARDING VIOLATIONS OF PROBATION.

¶ 05-2-30. **In The Matter of M.W.R.**, MEMORANDUM, No. 04-04-00305-CV & 04-04-00306-CV, 2005 Tex. App. LEXIS 2778 [Tex. App– San Antonio (4th Dist.) 4/13/05].

Facts: The 289th Judicial District Court, Bexar County, Texas, entered an order modifying disposition and committing juvenile to Texas Youth Commission for an indeterminate sentence. Juvenile appealed.

Held: Affirmed

Memorandum Opinion: In his first issue, appellant contends the trial court's admission of hearsay testimony at the modification hearing deprived him of his constitutional right of confrontation. The Sixth Amendment's Confrontation Clause provides: "In all *criminal prosecutions*, the accused shall enjoy the right to...be confronted with the witnesses against him...." U.S. CONST. amend. VI. (Emphasis added). The Fourteenth Amendment of the Constitution makes the Confrontation Clause applicable to the states. *Pointer v. Texas*, 380 U.S. 400, 401, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). Article I, Section 10 of the Texas Constitution and Article 1.05 of the Texas Code of Criminal Procedure also guarantee the accused the right to confront witnesses in all criminal prosecutions. TEX. CONST. art. I, § 10; TEX. CODE. CRIM. PROC. ANN. art. 1.05. Modification of a juvenile probation, like revocation of criminal community supervision, is not a "criminal prosecution" within the meaning of the Sixth Amendment constitutional guarantee. *Compare* TEX. FAM. CODE ANN. § 54.03(b), (e) (Vernon 2002) (explaining that at an adjudication hearing in which the juvenile court's purpose is to decide whether the juvenile is delinquent of a felony or misdemeanor, the juvenile is entitled to a jury trial, counsel, confrontation of witnesses and the right against self-incrimination) *with id*. § 54.05(c) (specifically denying the juvenile the right to a jury in a modification hearing); *see also In re A.M.B.*, 676 S.W.2d 448, 450-51 (Tex. App.-Houston [1st Dist.] 1984, no pet.) (citing *Hood v. State*, 458 S.W.2d 662, 663 (Tex. Crim. App. 1970)) (modification of juvenile probation is not a "trial" for purposes of the Sixth Amendment).

Appellant contends his confrontation rights were violated when the trial court permitted Tracy Munoz, his probation officer, to testify that appellant's mother informed her that appellant was not at home during his curfew hours. However, appellant had already been adjudicated of the underlying offenses. The purpose of the motion to modify disposition was not to determine whether appellant violated any laws of the United States or Texas, but rather to determine whether appellant violated the curfew conditions of his probation. Appellant's first issue is overruled.

In his second issue, appellant contends the trial court erred in revoking his probation because the evidence was insufficient to find he violated a reasonable and lawful court order.

We review a court's decision to modify a juvenile disposition under an abuse of discretion standard. *In re M.A.L.*, 995 S.W.2d 322, 324 (Tex. App.-Waco 1999, no pet.). Because this appeal arises from a proceeding to modify a disposition based on an adjudication of delinquent conduct, we must determine "whether the record shows that the court abused its discretion in finding, by a preponderance of the evidence, a violation of a condition of probation." *Id*. When a juvenile challenges the legal sufficiency of the evidence, we consider only the evidence and inferences tending to support the judgment. *In re S.A.M.*, 933 S.W.2d 744, 745 (Tex. App.-San Antonio 1996, no writ). In reviewing a factual sufficiency claim, we consider and weigh all the evidence in the case and set aside the judgment only if the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *In re J.J.*, 916 S.W.2d 532, 535-36 (Tex. App.-Dallas 1995, no writ). The trial court is the sole trier of facts and judge of the credibility of the witnesses and the weight to be given their testimony. *See Grant v. State*, 566 S.W.2d 954, 956 (Tex. Crim. App. 1978).

The evidence adduced at the modification hearing established appellant was not present at his residence during his curfew hours. Munoz testified she did not encounter appellant at his residence, and he did not come to the door. Munoz was informed by appellant's family members that he was not at home. We disagree with Appellant that the trial court erred in finding, by a preponderance of the evidence, that he violated a reasonable and lawful order of the court.

Conclusion: We affirm the trial court's order.

A VIOLATION OF PROBATION OCCURRING PRIOR TO A PREVIOUS MOTION TO MODIFY HEARING (PLACING CHILD ON PROBATION) MAY BE USED FOR NEW (SECOND) MOTION TO MODIFY (COMMITTING CHILD TO TYC).

¶ 05-3-22. **In the Matter of J.L.E.**, MEMORANDUM, No. 13-04-00058-CV, 2005 Tex.App.Lexis 5452 (Tex.App.— Corpus Christi 7/14/05).

Facts: On June 12, 2003, J.L.E. was adjudicated to have engaged in delinquent conduct and placed on probation. On September 11, 2003, the State filed a motion to modify the disposition. The State alleged that on July 31, 2003, J.L.E. violated the conditions of his probation by (1) violating a lawful court order and his curfew and (2) intentionally fleeing from a peace officer who was attempting to arrest him. After a hearing on the motion, the trial court found that J.L.E. had violated the conditions of his probation and placed him on Intensive Supervision Probation.

On November 13, 2003, the State again moved to modify the disposition. The State alleged that on September 26, 2003, J.L.E. violated the conditions of his probation by (1) violating a lawful court order regarding "inhalant paraphernalia use," (2) violating his curfew, and (3) associating "with other juveniles on parole using drugs." After a hearing on the motion, the trial court found that J.L.E. had violated the conditions of his probation, remanded him to the custody of the juvenile probation department, and ordered him admitted to the TAPS facility in Carrizo Springs, Texas.

Held: Affirmed

Memorandum Opinion: In his first issue, J.L.E. contends the evidence is legally and factually insufficient to prove any violation of the conditions of his probation. Specifically, J.L.E. argues that evidence of a violation of a condition of probation that occurred before he was placed on Intensive

Supervision Probation is insufficient to revoke his probation.

The relevant inquiry under *section 54.05(f) of the family code* is whether the child violated a reasonable and lawful order of the court. *See TEX. FAM. CODE ANN. § 54.05(f)* (Vernon Supp. 2004-05). Therefore, the date of the offense giving rise to the adjudication which the State is seeking to modify is irrelevant to the trial court's determination on a motion to modify a disposition.

Conclusion: After reviewing the entire record, we conclude that more than a scintilla of evidence exists to support the trial court's finding (1) that J.L.E had violated the conditions of his probation and (2) that he be removed from his home. We further conclude that the trial court's findings are not so against the great weight and preponderance of the evidence that they are manifestly unjust. Accordingly, we hold the trial court did not abuse its discretion in (1) finding a violation of the conditions of probation and (2) removing J.L.E. from his home and placing him in the TAPS facility. Appellant's first and second issues are overruled.

Editor's Note: While the case did not state it specifically, it is assumed that the date of the hearing placing the child on Intensive Supervision probation was held after September 26, 2003.

CHANGE IN 2003 MOTION TO MODIFY STATUTE REQUIRING ONLY ONE PRIOR MISDEMEANOR ADJUDICATION IS NOT *EX POST FACTO* VIOLATION FOR JUVENILES PLACED ON PROBATION PRIOR TO EFFECTIVE DATE OF STATUTE.

¶ 05-3-23. **In the Matter of U.G.V.**, ___ S.W.3d ___, No. 08-04-00039-CV, 2005 Tex.App.Lexis 5490 (Tex.App.— El Paso 7/14/05).

SERVICE OF PROCESS IS NOT REQUIRED IN A MODIFICATION OF DISPOSITION, ONLY REASONABLE NOTICE.

On July 7, 2005, the Austin Court of Appeals held that in a Motion to Modify, when a child's attorney appears, does not file a motion for continuance, and the child and parents are present and fully advised by the court as to the issues before the court, reasonable notice is presumed.

¶ 05-3-36. **In the Matter of T. E.**, ___S.W.3d.___, No. 03-04-00590-CV, 2005 Tex.App.Lexis 5266 (Tex.App.— Austin, 7/7/05), rel. for pub. 7/8/05.

Background: T.E., then thirteen years old, was adjudicated delinquent on two counts of aggravated sexual assault in May 2003. *See Tex. Pen. Code Ann. § 22.021* (West Supp. 2004-05). He was placed on probation in the custody of his mother. In April 2004, the State filed a motion to modify disposition that alleged T.E. had violated his probation. A hearing was held on the motion, and T.E. was committed to the Texas Youth Commission.

Held: Affirmed.

Facts: On May 8, 2003, the district court, sitting as a juvenile court, found beyond a reasonable doubt that T.E. had committed two sexual acts with a child younger than fourteen; these acts constituted aggravated

sexual assault. *See id. § § 22.021(a)(1), .021(a)(2)(B)*. T.E. was sentenced to probation in the custody of his mother, Brenda Elendu, with the probation set to expire on May 20, 2004. Among the conditions of the probation were: School attendance and obedience to published school rules and regulations; and full participation, attendance, and completion of counseling with Dr. Nicolas Carrasco. Suspension from school counted as an unexcused absence.

T.E. violated the rules of his probation. Among other things, he was suspended from school; he skipped meetings with Dr. Carrasco; and he was caught in possession of pornographic materials, which violated the rules of his counseling. After T.E. was taken into custody, his mother successfully sought to have the juvenile public defender replaced with appointed counsel, Don Morehart. The State filed a motion to modify disposition and to have T.E. committed to the Texas Youth Commission. T.E. was served with a summons and a copy of the motion in advance of an April 13, 2004 hearing; his mother refused to accept service. At the April 13 hearing, Morehart announced not ready, and the hearing was postponed until April 23. At that hearing, the district court granted the State's motion to modify.

The hearing began with Ms. Elendu protesting that she was not ready for trial:

MS. ELENDU: Your Honor, I need to reset this thing because I'm not ready and I--I'm going to hire someone else.

THE COURT: No, ma'am.

She repeatedly requested more time saying that she wanted to retain counsel to replace Morehart, her son's court-appointed attorney. The court refused to grant a continuance, informing Ms. Elendu that she should have other counsel present if she did not want Morehart to represent T.E.

The State and Morehart announced ready. The district judge informed T.E. of the State's allegations and of his constitutional rights. The other witnesses were sworn, but Ms. Elendu renewed her protestations:

MS. ELENDU: I'm not aware of what's going on.

THE COURT: Raise your--

MS. ELENDU: I don't know what's going on. And I can't talk if I don't know what's going on.

When called to testify as the State's first witness, Ms. Elendu said she wanted her own attorney before she would answer questions. She relented after the judge informed her that she could be arrested. During the State's direct examination, she repeatedly stated that she did not know what was going on and that she wanted a lawyer. Morehart recalled Ms. Elendu later in the proceeding, and she answered his questions without complaint.

After argument, the judge found T.E. to be a threat to the community and committed him to the Texas Youth Commission. T.E. brings this appeal.

Memorandum Opinion: T.E. contends that his mother lacked "reasonable notice" of the hearing and the contents of the motion to modify disposition, and that this violated his due process rights and the requirements of the Texas Family Code. *U.S. Const. amend. XIV*; *Tex. Fam. Code Ann. § 54.05(d)* (West 2004-05). ("Reasonable notice of a hearing to modify disposition shall be given to all parties."). He

emphasizes the fact that his mother did not receive a summons or a copy of the State's petition and directs us to Ms. Elendu's statements on the record that she did not know what was going on and needed more time to hire a new lawyer. Neither of these points is dispositive of the matter before us. The defendant in a modification hearing is not entitled to service of process but only reasonable notice. *See Tex. Fam. Code Ann. § 54.05(d)*; *In re D.E.P., 512 S.W.2d 789, 791* (Tex. Civ. App.--Houston [14th Dist.] 1974, no writ). When a child's attorney appears, does not file a motion for continuance, and the child and parents are present and fully advised by the court as to the issues before the court, reasonable notice is presumed. *See In re. B.N., No. 03-98-575-CV, 1999 Tex. App. LEXIS 6331*, at * 2 (Austin August 26, 1999, no pet.) (not designated for publication) (citing *In re. D.E.P., 512 S.W.2d at 791*).

Here, T.E. and his mother were present at the hearing and T.E.'s counsel announced ready. n1 The court then described at length those activities that the State alleged violated T.E.'s probation:

.on two days he failed to attend counseling, on another day was 20 minutes late and spent 30 minutes in the bathroom;

.at times he would come to counseling without a notebook or a writing instrument, and would fail to complete assignments;

.he lied in group therapy;

.he imitated a striptease on a pole at school and made a lewd gesture by placing a water bottle at his groin and squirting water out of the bottle;

.he was found in possession of "sexually inappropriate reading material"; and

he was frequently late to school and otherwise broke school rules.

The court further explained to T.E. his rights to be represented by counsel, to refrain from self-incrimination, to confront witnesses, and to put the State to its proof. T.E. indicated that he understood his rights and the charges against him. Ms. Elendu was present during the court's explanations.

n1 The record reflects that T.E. and Morehart met twice before the hearing in question.

In addition, Ms. Elendu's participation in her son's judicial process casts doubt on her assertions of ignorance of the purpose of the April 23 hearing. The return of summons for the April 13 hearing indicates that Ms. Elendu personally refused service of the motion to modify. She was involved enough in the proceedings to decide that her son's juvenile public defender should be replaced, to request that Morehart be replaced, to attend prior hearings, and to be present at the April 23 hearing.

We hold that the district court satisfied the notice standard for the hearing on the motion to modify. n2 *See Tex. Fam. Code Ann. § 54.05*; *In re D.E.P., 512 S.W.2d at 791*.

n2 The trial court treated Ms. Elendu's requests for more time as a motion for continuance, which the court denied. Whether to grant a motion for continuance is within the sound discretion of the trial court. *BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 800, 45 Tex. Sup. Ct. J. 930 (Tex. 2002)*; *see also Burgess v. State, 816 S.W.2d 424, 428 (Tex. Crim. App. 1991)* ("A request for change in counsel cannot be made so as to obstruct the orderly procedure in the courts or to interfere with the fair

administration of justice."). To the extent that T.E.'s appeal may be construed as an attack on the denial of his mother's request for a continuance, we find that because T.E. and Ms. Elendu had reasonable notice of the hearing to modify, the trial court did not abuse its discretion by denying a continuance.

Conclusion: Because we find that all parties had reasonable notice of hearing on the Motion to Modify, we affirm T.E.'s committal to the Texas Youth Commission.

IN MODIFICATION OF DISPOSITION HEARING, ALLEGATION THAT RESPONDENT VIOLATED CONDITION 14, WHILE EVIDENCE ESTABLISHED VIOLATION OF CONDITION 15, WERE NOT MATERIAL OR FATAL.

¶ 05-3-37A **In the Matter of A.D.**, ___S.W.3d.___, No. 12-04-00039-CV, 2005 Tex.App.Lexis 4007 (Tex.App.— Tyler, 5/25/05) rel for pub. 8/4/05.

Background: A jury found that defendant engaged in delinquent conduct. He was placed on juvenile probation. The trial court modified disposition and ordered defendant committed to the Texas Youth Commission.

Held: Affirmed.

Facts: On August 19, 2002, the juvenile court found beyond a reasonable doubt that, on or about December 13, 2001, A.D. engaged in delinquent conduct by committing the offense of indecency with a child in violation of *section 21.11 of the Texas Penal Code*. *See TEX. PEN. CODE ANN. § 21.11* (Vernon 2003). The juvenile court ordered that A.D. be placed on juvenile probation under the terms of *Section 54.04(d) of the Texas Family Code* until he reached eighteen years of age. *See TEX. FAM. CODE ANN. § 54.04(d)* (Vernon 2002). The terms and conditions of his probation included the following:

1. Commit no offense against the laws of this or any other State, or any political subdivision thereof, or of the United States.

10. Reside in the home of [your parents] and obey all the rules and regulations of the person to whom you are released.

14. Remain in the company of the person(s) to whom you are released at all times unless you ask for and receive permission prior to leaving their company at which time you will notify the person(s) to whom you were released by the Court as to where you are, who you are with, and what you are doing at all times.

15. Remain in the home of the person(s) to whom you were released between the hours of 6:00 p.m. and 6:00 a.m. Sunday-Thursday, and 6:00 p.m. and 6:00 a.m. Friday-Saturday, unless the person(s) to whom you are released are given permission by the Probation Officer for you to do otherwise or unless you are with the person(s) to whom you were released.

On December 18, 2003, the State filed a petition to modify disposition alleging that on or about December 4, A.D. violated a condition of his court-ordered probation in that he did not remain in the home of the person to whom he was released during curfew hours in direct violation of condition number 14. The State also alleged that A.D. violated conditions 1 and 10.

At the hearing on the State's petition, A.D.'s mother testified that although A.D. did break some rules of her house, he stopped as soon as he was told to do so. Officer Scott Behrend, a police officer with the Tyler Police Department, testified that at approximately 8:00 p.m. on December 4, he was dispatched to Douglas Elementary School after an alarm was sounded on the front door. He observed one person standing outside a propped-open door and, after noticing the police, that person and four other persons left the building running, carrying boxes. Behrend caught and arrested one of the individuals who, after questioning, gave police the names of the four other individuals who were involved in the alleged burglary. One of those named was A.D., who was taken into custody at his home. The other three were also arrested. Behrend testified that ice cream was in the boxes taken from the school.

While being processed by the police department, A.D. stated that he was not involved. Later, according to Behrend, A.D. contradicted this statement. As Behrend was writing his report, all five persons arrested for the alleged burglary at the school were being observed by the police in a briefing room. As they began to talk among themselves, A.D. stated that he had run through his yard and in a certain route to get away from the police. A.D. also made statements about trading the ice cream and told the other persons to remain silent. After Behrend's testimony, A.D. moved for and was granted a directed verdict on the first count of the State's petition, a violation of condition 10.

A.D. testified that on December 4, he was at his residence. Around 6:30 p.m., his mother sent him to look for his brother. A.D. complied. Shortly thereafter, the police arrived at his home. A.D. admitted that he had to obey his mother and that he knew that his curfew was 6:00 p.m. Further, A.D. knew that his mother was supposed to ensure that he abided by the conditions of his probation, including his curfew. Based on the evidence, the juvenile court found that on December 4, A.D. intentionally and knowingly violated a condition of his court-ordered probation in that he did not remain in the home of the person to whom he was released during curfew hours, conduct in direct violation of condition 14. Further, the juvenile court failed to find that A.D. violated condition 1. The juvenile court committed A.D. to the Texas Youth Commission indeterminately and signed an order incorporating its ruling. This appeal followed.

Opinion: In his second issue, A.D. contends that there is either no evidence or the evidence is factually insufficient to support the trial court's finding that he violated a condition of his probation. More specifically, A.D. argues that condition 14 of his court-ordered probation did not include a curfew and that a curfew allegation is a separate and distinct violation of his probation that must be separately pleaded and proved. Further, A.D. contends that to allow the State to prove he violated condition 14 where the State alleged violation of condition 15 would be clearly wrong and unjust.

A trial court's modification of a juvenile disposition is reviewed under an abuse of discretion standard. ***Matter of T.R.S.****, 115 S.W.3d 318, 320 (Tex. App.-Texarkana 2003, no pet.)*. In a probation revocation hearing, the decision whether to revoke rests within the discretion of the trial court. ***Id.*** The trial court is not authorized to revoke probation without a showing that the probationer has violated a condition of the probation imposed by the court. ***Id.*** The burden of proof in a probation revocation hearing is by a preponderance of the evidence. ***Cobb v. State****, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993)*; ***Cardona v. State****, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984)*.

When a juvenile challenges the legal sufficiency of the evidence by a no-evidence issue, we consider only that evidence and those inferences which tend to support the challenged findings and disregard any and all evidence and inferences to the contrary. ***In re H.G.****, 993 S.W.2d 211, 213 (Tex. App.-San Antonio 1999, no pet.)*. When reviewing a factual sufficiency challenge in a juvenile case, we consider the totality

of the evidence to determine whether the evidence supporting the finding is so weak or the evidence contrary to the finding is so overwhelming that it is clearly wrong and unjust. ***Id.*** The trier of fact is the exclusive judge of the credibility of the witnesses and, as such, may believe or disbelieve any witness and resolve any inconsistencies in the testimony of any witness. ***Matter of T.R.S.****, 115 S.W.3d at 321*; ***In re H.G.****, 993 S.W.2d at 213*.

Officer Behrend testified that he arrested A.D. for allegedly burglarizing an elementary school on December 4, 2003. Behrend testified that the burglary occurred at approximately 8:00 p.m. He also testified that A.D. stated he evaded police on that date and talked about trading the stolen items. A.D. testified that in response to his mother's instructions on that same date, he left his residence around 6:30 p.m. to look for his brother A.D. also admitted that he knew his curfew was 6:00 p.m. Considering only the evidence and inferences tending to support the findings, we conclude that the juvenile court did not abuse its discretion by finding that A.D. violated a condition of his probation by not remaining in the home of the person to whom he was released during curfew hours. *See* ***In re H.G.****, 993 S.W.2d at 213*.

Having found the evidence legally sufficient, we consider A.D.'s challenge to the factual sufficiency, considering the totality of the evidence. ***Id.*** Behrend admitted that he caught only one alleged burglar at the school, who gave the police A.D.'s name. Behrend acknowledged that while A.D. was being processed at the police department, he denied being involved in the alleged burglary. A.D. testified that he had to comply with his mother's instructions to look for his brother and that his mother was supposed to ensure that he abided by the conditions of his probation. All this evidence tends to favor A.D. However, the trier of fact is the sole judge of the credibility of witnesses, may believe or disbelieve any witness, and may resolve See

variance, if any, was not material or fatal. *See **Gollihar**, 46 S.W.3d at 246*.

Conclusion: Appellant's second issue is overruled.

Defense of Necessity Issue Omitted.

ADMONISHMENTS REQUIRED FOR ADJUDICATION PLEAS DO NOT APPLY TO MODIFICATION HEARINGS.

¶ 05-4-1. **In the Matter of K.L.S.**, MEMORANDUM, No. 13-04-397-CV, 2005 Tex.App.Lexis 6656 (Tex.App.— Corpus Christi, 8/18/05).

Background: Appellant, appeals a court order modifying his disposition by committing him to the Texas Youth Commission. He raises claims of failure to admonish and abuse of discretion.

Held: Affirmed.

Facts: In his first issue, appellant claims the trial court committed a fundamental error by failing to admonish him, as required by statute, of the direct consequences that would result if he pled true. Appellant cites *Texas Family Code section 54.03(b)*, which requires a juvenile court judge in an adjudication hearing to explain to the child and his parent the allegations, the nature and possible consequences of the proceedings, and his rights and privileges. *See TEX. FAM. CODE ANN. § 54.03(b)* (Vernon Supp. 2004-05). However, as noted in appellant's brief, the hearing was a modification hearing, not an adjudication hearing.

Memorandum Opinion: Modification hearings are governed by *section 54.05*, which does not enumerate the same requirements as those set out in *section 54.03(b)(6)* for a juvenile court judge. *See TEX. FAM. CODE ANN. § 54.05* (Vernon Supp. 2004-05). We find persuasive authority from our sister courts of appeal that the admonishments required by *section 54.03* do not apply to modification hearings. *See In re S.J., 940 S.W.2d 332, 334 (Tex. App.-San Antonio 1997, no writ)* ("S.J. concedes that there is no requirement that the admonishments required for acceptance of guilty pleas be given at a hearing on a motion to modify, because the original admonitions from the adjudication hearing carry over into the disposition."); *Murphy v. State, 860 S.W.2d 639, 643 (Tex. App.-Fort Worth 1993, no writ)* ("The hearing to modify disposition is not a new adjudication of delinquency under *54.03*."). Appellant does not complain the trial court failed to satisfy the requirements of the applicable section, *section 54.05*.

Conclusion: We therefore find no fundamental error as claimed by appellant. This issue is overruled.

Abuse of Discretion Issues Omitted.

A TRIAL COURT LACKS JURISDICTION TO COMMIT A CHILD TO TYC WHEN THE CHILD'S PROBATION HAS EXPIRED AND THERE IS NO ORDER IN WRITING, SIGNED BY THE TRIAL COURT EXTENDING THE PROBATION, A DOCKET SHEET ENTRY ALONE IS INSUFFICIENT.

¶ 05-4-10. **In the Matter of P.B.B.**, MEMORANDUM, No. 11-04-00061-CV, 2005 Tex.App.Lexis 7651

(Tex.App.— Eastland, 9/15/05).

Facts: On April 5, 2001, appellant was placed on juvenile probation. Appellant was to remain on probation until April 4, 2002. On June 14, 2001, the State filed a motion to modify appellant's disposition and for commitment to the Texas Youth Commission. The juvenile court granted the motion and ordered that appellant's probation be extended an additional 12 months until April 6, 2003. On October 4, 2001, the State filed another motion to modify appellant's disposition and for commitment to the Texas Youth Commission. There is no evidence in the record that any action was taken on this motion.

The State filed another motion to modify appellant's disposition and for commitment to the Texas Youth Commission on April 10, 2002. On May 9, 2002, the trial court ordered that appellant be committed to the Texas Youth Commission. On May 14, 2002, appellant filed a motion for new trial, arguing that the trial court's May 9 order was contrary to the law and not supported by the pleadings and evidence. The trial court granted the motion for new trial on July 17, 2002, thus invalidating the prior order. A new disposition hearing was set for July 18, 2002. There is no evidence in the record of what took place at that hearing, other than a notation on the court's docket sheet, "Prob until 18th birthday (10/20/04) original terms of probation." There is, however, no court order in the record.

No further action was taken until January 19, 2004, when the State filed another motion to modify appellant's disposition and for commitment to the Texas Youth Commission. The motion stated that, "on July 18, 2002, the child's probation was extended until October 20, 2004." On January 29, 2004, appellant filed a motion to dismiss motion to modify, alleging that there was no written order in the record "announcing the extension of probation on July 18, 2002." Appellant asserted that, consequently, the jurisdiction of the juvenile court expired on April 6, 2003. The trial court denied appellant's motion. On January 30, 2004, the trial court ordered that appellant be committed to the Texas Youth Commission.

Held: Reversed
Opinion: In two issues on appeal, appellant argues that (1) the trial court no longer had jurisdiction to modify appellant's disposition and (2) the search and seizure of the marihuana he was accused of possessing was illegal under the *Fourth Amendment of the United States Constitution*. n1

n1 We note that the State failed to submit a brief to this court in response to appellant's arguments.

Appellant first argues that the trial court did not have jurisdiction to modify the terms of his probation because appellant's probation expired prior to the modification hearing. We agree.

Juvenile courts possess only limited jurisdiction. *See In re D.C., 49 S.W.3d 26, 28 (Tex. App. - San Antonio 2001, no pet'n)*. The original jurisdiction of a juvenile court attaches when a petition is filed alleging that the child has engaged in delinquent conduct or conduct indicating a need for supervision and a summons is served on the child. *In re J.L.S., 47 S.W.3d 128, 130 (Tex.App. - Waco 2001, no pet'n)*. Unless the juvenile court decides to waive its exclusive jurisdiction and transfer the child to a district court, the court can continue to exercise jurisdiction over the child even after adjudication and disposition. In re J.L.S., supra.

The juvenile court's continuing jurisdiction, however, is not without limits. In most cases, the court retains continuing jurisdiction to modify a juvenile's disposition only until the child reaches his 18th birthday or the child is earlier discharged by the court or operation of law. *See TEX. FAM. CODE ANN. § 54.05(a)* (Vernon Supp. 2004 - 2005). In other cases, the court may extend a period of probation at any

time before the first anniversary of the date on which the period of probation expires provided that a motion for revocation or modification of probation is filed before the period of supervision ends. *See TEX. FAM. CODE ANN. § 54.05(l)* (Vernon Supp. 2004 - 2005). n2 A juvenile court also has jurisdiction to commit a child to the Texas Youth Commission for violations of probation that occurred prior to the expiration of the probationary term when the motion to modify is filed before the probationary term expires and the hearing is conducted without undue delay. *In re D.C., supra.* In no case, however, is the court allowed to exercise unlimited jurisdiction over a juvenile.

n2 Subsection (*l*) was added to the Family Code by Act of June 2, 2003, 78th Leg., R.S., ch. 283, § 21, 2003 Tex. Gen. Laws 1221, 1227 (effective September 1, 2003).

When there is a time limit placed on a court's jurisdiction to act on a matter, orders must be in writing and signed by the trial court. *Westbrook v. State, 753 S.W.2d 158, 159 (Tex.Cr.App. 1988).* In this case, the court's time limit was April 6, 2003, the date on which appellant's probation was set to expire. An order to extend appellant's probation beyond that date needed to be in writing because, to be effective, an order must appear somewhere in the court's record. *See In re Fuentes, 960 S.W.2d 261, 264 (Tex.App. - Corpus Christi 1997, no pet'n).* Oral pronouncements are inadequate. *See In re Wal-Mart Stores, Inc., 20 S.W.3d 734, 740 (Tex.App. - El Paso 2000, no pet'n).*

Before proceeding, we think it may be helpful to provide a brief summary of the critical dates in this case:

April 5, 2001 The court placed appellant on probation until April 4, 2002.

July 19, 2001 The court extended appellant's probation until April 6, 2003.

May 9, 2002 The court committed appellant to the Texas Youth Commission.

May 14, 2002 In response to the May 9 court order, appellant filed a motion for new trial.

July 17, 2002 The court granted appellant's motion.

July 18, 2002 The court held a new hearing to modify the terms of appellant's probation, but there was no written order in the record to provide evidence of what occurred at this hearing.

April 6, 2003 According to the last effective written order in the record, appellant's probation expired.

January 30, 2004 The court committed appellant to the Texas Youth Commission.

There is no written order in the record extending appellant's probation beyond April 6, 2003. The only evidence in the record of such an extension is a docket sheet entry on July 18, 2002. A docket sheet entry, however, does not suffice as a written order. *State v. Shaw, 4 S.W.3d 875, 876 (Tex.App. - Dallas 1999, no pet'n).* Docket sheet entries are inherently unreliable, lacking the formality of orders and judgments. *State v. Shaw, supra at 878.* Without a written order extending appellant's probation beyond April 6, 2003, we must conclude that the court's jurisdiction over appellant terminated on that date.

An order is void when a court has no power or jurisdiction to render it. *Urbish v. 127th Judicial District Court, 708 S.W.2d 429, 431, 29 Tex. Sup. Ct. J. 202 (Tex.1986).* We hold that, because appellant's

probation expired on April 6, 2003, the court did not have jurisdiction to revoke appellant's probation on January 30, 2004. Therefore, the order committing appellant to the Texas Youth Commission is void. We sustain appellant's first issue on appeal.

Because we sustain appellant's first issue on appeal, we need not address his second issue.

Conclusion: The judgment of the trial court is reversed, and we render judgment that the order committing appellant to the Texas Youth Commission is set aside.

PETITION AND SUMMONS—

IN MISDEMEANOR OFFENSE, STATE NEED NOT PLEAD FORMER MISDEMEANOR ADJUDICATIONS IN ORDER TO COMMIT A JUVENILE OFFENDER TO TYC.

¶ 05-4-14. **In the Matter of J.D.L.Z.**, MEMORANDUM, No. 2-05-037-CV, 2005 Tex.App.Lexis 8139 (Tex.App.— Fort Worth, 9/29/05).

Facts: J.D.L.Z. was adjudicated delinquent and committed to the Texas Youth Commission (TYC) for an indeterminate period, not to exceed his twenty-first birthday. In his sole issue on appeal, J.D.L.Z. argues that the disposition is void because the State's petition did not authorize commitment to TYC nor did it give fair notice of the State's intent to seek commitment to TYC. n2 He also argues that the legislature's failure to include a notice provision regarding habitual misdemeanor conduct is a legislative oversight, and that case law requires the State to plead prior misdemeanor adjudications in order to commit a juvenile to TYC.

Held: Affirmed

Memorandum Opinion: J.D.L.Z. contends that because the State did not allege his prior misdemeanor adjudications in its pleading, commitment to TYC is not authorized by law. This action is in juvenile court; therefore, it is the Texas Family Code which in controlling, not the Texas Code of Criminal Procedure. *Robinson v. State, 707 S.W.2d 47, 48-49 (Tex. Crim. App. 1986)*; *In the Matter of T.R.S. v. State, 663 S.W.2d 920, 921 (Tex. App.--Fort Worth 1984, no writ)*. The statutory requirements of a petition are found in *section 53.04 of the Texas Family Code*. *TEX. FAM. CODE ANN. § 53.04(d)* (Vernon 2002). *Section 53.04* specifies the form, the necessary content of the allegations, the identity of all interested parties, and where each may be served with summons. *See id. § 53.04(a)-(d)*; *see also id. § 53.06* (summons) and *§ 53.07* (service of summons). The statute further provides that the State must plead a child's prior *felony* adjudications if the child is alleged to have engaged in habitual felony conduct. *See id. § 53.04(d)(5)*. But the statute does not require the State to plead former *misdemeanor* adjudications. *See id.* A review of the petition filed by the State shows that it is in full compliance with the Texas Family Code. *See id. § 53.04*.

To commit a juvenile offender to TYC for an indeterminate sentence, the court or jury must find at the conclusion of the adjudication hearing that the juvenile engaged in delinquent conduct that violated a felony penal law on at least one previous occasion, or delinquent conduct that violated a misdemeanor penal law on at least two previous occasions. *See id. § § 54.04(d)(2)* (Vernon Supp. 2004-05); *54.04(s)* (Vernon Supp. 2004-05); *54.04(t)* (Vernon Supp. 2004-05). Again the statute does not require the State to plead previous misdemeanor adjudications in order to commit a juvenile offender to TYC. *See id.*

In this case, at the conclusion of the adjudication hearing, the court found that J.D.L.Z. had been

adjudicated as having engaged in delinquent conduct violating a penal law of the grade of misdemeanor on at least two previous occasions. Thus, his commitment to TYC "for an indeterminate period of time not to exceed the time when [J.D.L.Z.] shall be [twenty-one] years of age" was one of the possible consequences of the adjudication of delinquency. *See id. § 54.04(d)(2).*

J.D.L.Z. also contends that the disposition is void because the State failed to give him did adequate notice of its intent to seek commitment to TYC. He argues that the petition did not provide information sufficient to enable him to prepare a defense. J.D.L.Z. states that *Rule 47 of the Texas Rules of Civil Procedure* requires the State to provide in its petition a short statement of the cause of action sufficient to give fair notice of the claim involved. *See TEX. R. CIV. P. 47.* To support his assertion, J.D.L.Z. cites to criminal cases that discuss the accused's right to be advised that the State is seeking a greater penalty. *See Brooks v. State, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997)*; *Hollins v. State, 571 S.W.2d 873, 876 (Tex. Crim. App. 1978).* However, a reading of the petition shows that J.D.L.Z. was put on fair notice that he was charged with delinquent conduct and that his liberty was at stake. n3 *See Matter of S.B.C., 805 S.W.2d 1, 7 (Tex. App.--Tyler 1991, writ denied)* (juvenile was put on fair notice that he was charged with delinquent conduct and that his liberty was at stake where petition showed the State sought "such disposition of the care, control and custody," of the juvenile as the trial court deemed "just and proper"). In any event, as a juvenile court case, this cause is controlled by the Texas Family Code. *See TEX. FAM. CODE ANN. § 53.04.* Accordingly, the general sufficiency of the petition is governed by *Texas Family Code section 53.04. Id.* As previously discussed, the State's petition complied fully with the statutory requirements.

n3 The State's pleading says that J.D.L.Z. committed an offense that is punishable by imprisonment. The State's prayer requests that J.D.L.Z. be ordered to pay a reasonable sum for support if he is committed to TYC.

MISDEMEANOR NOTICE PROVISION

Finally, J.D.L.Z. contends that the legislature's failure to include a misdemeanor notice provision comparable to the habitual felony notice pleading requirement could only be attributed to legislative oversight. But *section 53.04(d)(5)* demonstrates that the legislature knows how to include language requiring the State to plead certain allegations in its pleading. *See id. § 53.04(d)(5).* And as a general rule, statues are to be strictly construed and not extended to meet facts and circumstances for which no provision is made. *Yates Ford, Inc. v. Ramirez, 692 S.W.2d 51, 55 (Tex. 1985).*

We hold that the State's petition complied with the statutory requirements and that J.D.L.Z. was given sufficient notice to enable him to prepare a defense. We further hold that the legislature did not intend to require the State to plead habitual misdemeanor conduct. Accordingly, J.D.L.Z.'s disposition was not illegal, and thus not void.

Conclusion: Because J.D.L.Z. has failed to allege an error that could render the disposition void, his sole issue on appeal is overruled. The judgment of the trial court is affirmed.

PROCEDURE—

TEXAS RULES OF CIVIL PROCEDURE GOVERNS CONSOLIDATION OF OFFENSES IN JUVENILE COURT

¶ 05-2-03B. **In the Matter of D.L.**, 160 S.W.3d 155, No. 12-03-00071-CV, 2005 Tex.App.Lexis 1447

(Tex.App.– Tyler 2/23/05).

Facts: A jury of the County Court at Law no. 1 of Gregg County, Texas, found that defendant juvenile had committed six acts of aggravated sexual assault involving five victims and that he used or exhibited a deadly weapon during one of the incidents. He was sentenced to 10 years of probation and was required to register as a sex offender pursuant to Tex. Code Crim. Proc. Ann. ch. 62. Defendant appealed arguing that ch. 62 was unconstitutional on its face under the Eighth Amendment prohibition against cruel and unusual punishment

Held: Affirmed

Opinion Text: The court found that, as applied to juveniles, the registration procedure was non-punitive in both intent and effect and therefore could not constitute cruel and unusual punishment. Any "shaming" that occurred from registration was the result of community response and not the requirement itself. Therefore, any public embarrassment of juvenile registrants could not be considered an affirmative disability or restraint under the intent-effects test. The court also found no error in denying defendant's motion to sever the six counts for separate trials, reasoning that the legal elements of proof were similar for each victim, the cases shared common witnesses and fact patterns, and defendant made no showing that evidence of the extraneous offenses would not have been admissible in severed cases. In addition, an officer's testimony regarding a polygraph test taken by defendant's sister did not result in reversible error, and the evidence was sufficient to find that defendant used a knife in a manner making it a deadly weapon.

A jury found that D.L., a juvenile, had committed six acts of aggravated sexual assault against five different victims and that he used or exhibited a deadly weapon during one of the incidents. He was sentenced to ten years of probation and was required to register as a sex offender pursuant to Chapter 62 of the Texas Code of Criminal Procedure. On appeal, D.L. raises five issues relating to cruel and unusual punishment, the trial court's denial of his motions for severance and mistrial, the terms of his community supervision, and the sufficiency of the evidence to support the deadly weapon finding. We affirm.

BACKGROUND

Around the first of April in 2002, C.L. was sleeping with his grandmother, M.L. In the middle of the night, M.L. was awakened by C.L., who was "on all fours," still asleep, and crying out: "[B.S.], help me! Stop! Stop! [D.L.], you're hurting me! Stop it! Get off of me." C.L. was approximately four years old at the time.

The next morning, C.L.'s grandmother asked him if somebody "had been messing with him." C.L. told his grandmother that D.L. "put his thing up my ass. I was crying. I was trying to get away." Later in the day, M.L. questioned B.S. and S.L., two of C.L.'s older cousins, about whether they had "fooled" with C.L. The boys went outside for a short time. Upon their return, S.L. stated that it was D.L. and that D.L. "got both me and [B.S.]."

M.L. reported the information to the Gregg County Sheriff's Office. Detective Tim Bryan, the investigator who spoke to M.L., notified Child Protective Services and also set up interviews for C.L., S.L., and B.S. at the Child Advocacy Center of East Texas. In separate interviews, each child restated his allegations against D.L. At least one of the children told the interviewer that D.L. had also sexually assaulted another cousin, C.H., and a neighbor, R.H. All of the alleged victims were under the age of fourteen.

A grand jury certified the State's third amended petition in which it alleged that D.L. had engaged in delinquent conduct by committing aggravated sexual assault against C.H., S.L., B.S., C.L., and R.H. *See TEX. PEN. CODE ANN. § 22.021(a)(2)(B)* (Vernon Supp. 2004-2005) (aggravated sexual assault occurs where sexual assault is committed against a person who is younger than fourteen). The State also alleged that D.L. used or exhibited a deadly weapon, a knife, during the incident involving R.H. The matter proceeded to a jury trial. The jury found D.L. guilty on all counts and made a deadly weapon finding. D.L. was sentenced to probation for ten years and removed from his home. By agreement of the parties, D.L. was placed in the managing conservatorship of the Texas Department of Protective and Regulatory Services, who placed D.L. at a juvenile sex offender treatment facility. He was also required to register as a sex offender. This appeal followed.

[TEXT OMITTED]

MOTION TO SEVER

In his second issue, D.L. urges that the trial court erred in denying his motion to sever the six counts of aggravated sexual assault for separate trials. Citing *Texas Penal Code section 3.04*, D.L. acknowledges that he has no right to mandatory severance. *See TEX. PEN. CODE ANN. § 3.04(c)* (Vernon 2003) (no right to severance for aggravated sexual assault committed against a victim younger than 17 years of age at time offense committed). However, he points out that the trial court has the discretion to grant a severance if the court determines that the defendant or the State would be unfairly prejudiced by the joinder of offenses. *See **id***.

We first note that D.L.'s reliance on *section 3.04* is misplaced. The Texas Rules of Civil Procedure govern juvenile proceedings unless otherwise provided. *See TEX. FAM. CODE ANN. § 51.17(a)*; ***In re J.K.R.**, 986 S.W.2d 278, 285 (Tex. App.--Eastland 1998, pet. denied)*. The Juvenile Justice Code contemplates liberal joinder of offenses, but no specific provision addresses joinder and consolidation of actions. Because no specific provision exists, the Texas Rules of Civil Procedure apply as directed by *section 51.17*. *Id*.

Texas Rule of Civil Procedure 41 permits the consolidation of suits filed separately and the severance and docketing as separate suits of actions that have been improperly joined. *TEX. R. CIV. P. 41*. Moreover, actions that involve common questions of law or fact may be consolidated by the trial court. *TEX. R. CIV. P. 174(a)*. A trial court has broad discretion in the matter of severance and consolidation of actions. ***Liberty Nat'l Fire Ins. Co. v. Akin**, 927 S.W.2d 627, 629, 39 Tex. Sup. Ct. J. 934 (Tex. 1996)*. Therefore, a trial court's decision to deny a severance will not be reversed unless it has abused its discretion. *See **id**. at 630*. When all the facts and circumstances of the case require separate trials in order to prevent manifest injustice, when there is no fact or circumstance that supports or tends to support a contrary conclusion, and when the legal rights of the parties will not be prejudiced thereby, then there is no room for the exercise of discretion. ***In re C.P.**, 998 S.W.2d 703, 710 (Tex. App.-Waco 1999, no pet.)* (citations omitted). In that instance, a trial court has a duty to order separate trials. *Id*.

Here, D.L. was alleged to have committed aggravated sexual assault against five victims. Thus, the legal elements of proof were similar for each count of the State's petition. With one exception, the alleged victims were D.L.'s cousins and had at one time lived in the same home with him. Each offense was alleged to have occurred in the family residence or in a "club house" that the children frequented. The cases share common witnesses, particularly since one or more of the alleged victims stated that he had seen D.L. sexually assault other victims named in the State's petition. The cases also share common fact patterns in that the alleged sexual assaults were similar and occurred under similar circumstances. Finally, D.L. has

made no showing that evidence of the extraneous offenses would not have been admissible in severed cases. *See TEX. R. EVID. 404(b)* (evidence of other crimes, wrongs, or acts may be admissible for purposes of showing motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident); *see also* ***In re C.P.****, 998 S.W.2d at 711* (likely that trial court's refusal to sever was not an abuse of discretion where evidence of extraneous acts was admissible). Consequently, we hold that the trial court did not abuse its discretion in denying D.L.'s motion for severance. D.L.'s second issue is overruled.

[TEXT OMITTED]

Conclusion: Having overruled D.L.'s first, second, third, fourth, and fifth issues, the judgment of the trial court is ***affirmed***.

SEARCHES—

STRIP SEARCHES OF HIGH SCHOOL STUDENTS TO FIND MONEY UNCONSTITUTIONAL.

¶ 05-2-33. **Beard v. Whitmore Lake School District**, 402 F.3d 598, 2005 U.S. App. Lexis 5323, 2005 Fed. App. 0155P (6th Cir.) 4/4/05.

SEX OFFENDER REGISTRATION—

SEX OFFENDER REGISTRATION STATUTE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

¶ 05-2-03A. **In the Matter of D.L.**, 160 S.W.3d 155, No. 12-03-00071-CV, 2005 Tex.App.Lexis 1447 (Tex.App.– Tyler 2/23/05).

Facts: A jury of the County Court at Law no. 1 of Gregg County, Texas, found that defendant juvenile had committed six acts of aggravated sexual assault involving five victims and that he used or exhibited a deadly weapon during one of the incidents. He was sentenced to 10 years of probation and was required to register as a sex offender pursuant to Tex. Code Crim. Proc. Ann. ch. 62. Defendant appealed arguing that ch. 62 was unconstitutional on its face under the Eighth Amendment prohibition against cruel and unusual punishment

Held: Affirmed
Opinion Text: The court found that, as applied to juveniles, the registration procedure was nonpunitive in both intent and effect and therefore could not constitute cruel and unusual punishment. Any "shaming" that occurred from registration was the result of community response and not the requirement itself. Therefore, any public embarrassment of juvenile registrants could not be considered an affirmative disability or restraint under the intent-effects test. The court also found no error in denying defendant's motion to sever the six counts for separate trials, reasoning that the legal elements of proof were similar for each victim, the cases shared common witnesses and fact patterns, and defendant made no showing that evidence of the extraneous offenses would not have been admissible in severed cases. In addition, an officer's testimony regarding a polygraph test taken by defendant's sister did not result in reversible error, and the evidence was sufficient to find that defendant used a knife in a manner making it a deadly weapon.

A jury found that D.L., a juvenile, had committed six acts of aggravated sexual assault against five different victims and that he used or exhibited a deadly weapon during one of the incidents. He was sentenced to ten years of probation and was required to register as a sex offender pursuant to Chapter 62 of the Texas Code of Criminal Procedure. On appeal, D.L. raises five issues relating to cruel and unusual punishment, the trial court's denial of his motions for severance and mistrial, the terms of his community supervision, and the sufficiency of the evidence to support the deadly weapon finding. We affirm.

Around the first of April in 2002, C.L. was sleeping with his grandmother, M.L. In the middle of the night, M.L. was awakened by C.L., who was "on all fours," still asleep, and crying out: "[B.S.], help me! Stop! Stop! [D.L.], you're hurting me! Stop it! Get off of me." C.L. was approximately four years old at the time.

The next morning, C.L.'s grandmother asked him if somebody "had been messing with him." C.L. told his grandmother that D.L. "put his thing up my ass. I was crying. I was trying to get away." Later in the day, M.L. questioned B.S. and S.L., two of C.L.'s older cousins, about whether they had "fooled" with C.L. The boys went outside for a short time. Upon their return, S.L. stated that it was D.L. and that D.L. "got both me and [B.S.]."

M.L. reported the information to the Gregg County Sheriff's Office. Detective Tim Bryan, the investigator who spoke to M.L., notified Child Protective Services and also set up interviews for C.L., S.L., and B.S. at the Child Advocacy Center of East Texas. In separate interviews, each child restated his allegations against D.L. At least one of the children told the interviewer that D.L. had also sexually assaulted another cousin, C.H., and a neighbor, R.H. All of the alleged victims were under the age of fourteen.

A grand jury certified the State's third amended petition in which it alleged that D.L. had engaged in delinquent conduct by committing aggravated sexual assault against C.H., S.L., B.S., C.L., and R.H. *See TEX. PEN. CODE ANN. § 22.021(a)(2)(B)*(Vernon Supp. 2004-2005) (aggravated sexual assault occurs where sexual assault is committed against a person who is younger than fourteen). The State also alleged that D.L. used or exhibited a deadly weapon, a knife, during the incident involving R.H. The matter proceeded to a jury trial. The jury found D.L. guilty on all counts and made a deadly weapon finding. D.L. was sentenced to probation for ten years and removed from his home. By agreement of the parties, D.L. was placed in the managing conservatorship of the Texas Department of Protective and Regulatory Services, who placed D.L. at a juvenile sex offender treatment facility. He was also required to register as a sex offender. This appeal followed.

CRUEL AND UNUSUAL PUNISHMENT

Chapter 62 of the Texas Code of Criminal Procedure prescribes the registration procedure for persons convicted of sex-related offenses. The requirements of Chapter 62 apply to juveniles. *TEX. CODE CRIM. PROC. ANN. art. 62.12(b)(1)* (Vernon Supp. 2004-2005). In his first issue, D.L. argues that Chapter 62 is unconstitutional on its face as a violation of the *Eighth Amendment* prohibition against cruel and unusual punishment for a juvenile**.** n1 *See U.S. CONST. amend. VIII*. The State counters that the reporting requirement is not punitive and therefore cannot constitute cruel and unusual punishment.

n1 D.L. did not raise this issue in the trial court. However, a facial challenge to the constitutionality of a statute may be raised for the first time on appeal. ***In re B.S.W.****, 87 S.W.3d 766, 771 (Tex. App.-Texarkana 2002, pet. denied).*

A statute is presumptively constitutional. ***Barshop v. Medina County Underground Water Conservation Dist.***, *925 S.W.2d 618, 629, 39 Tex. Sup. Ct. J. 858 (Tex. 1996)*. If possible, we interpret a statute in a manner that renders it constitutional. ***Id***. The burden of proof is on the party challenging the presumption of constitutionality. ***Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.***, *39 S.W.3d 591, 598, 44 Tex. Sup. Ct. J. 397 (Tex. 2001)*. The party raising a facial challenge must demonstrate that the statute always operates unconstitutionally. ***Wilson v. Andrews***, *10 S.W.3d 663, 670, 43 Tex. Sup. Ct. J. 220 (Tex. 1999)*. In other words, the party must establish that no set of circumstances exists under which the statute would be valid. ***In re B.S.W.***, *87 S.W.3d at 771*.

Constitutional Analysis

It is rudimentary that the Chapter 62 reporting requirements cannot be cruel and unusual punishment when applied to juveniles if the requirement is not punishment for constitutional purposes. *See* ***Ex parte Robinson***, *116 S.W.3d 794, 797 (Tex. Crim. App. 2003)*. Whether the provisions of a particular statute constitute punishment for constitutional purposes can be answered by application of what is known as the "intent-effects" test. ***Rodriguez v. State***, *93 S.W.3d 60, 67 (Tex. Crim. App. 2002)*.

Under the "intent-effects test," a reviewing court must first ask whether the legislature intended the statute to be a criminal punishment. ***Id.*** If that question is answered in the negative, the court must then examine "whether the statutory scheme [is] so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." ***Id.*** (citing ***Hudson v. United States***, *522 U.S. 93, 99, 118 S. Ct. 488, [493], 139 L. Ed. 2d 450 (1997)*). The manifest intent of a statute will be rejected only where the party challenging the statute provides the "clearest proof" that the statute is actually criminally punitive in operation. ***Rodriguez***, *93 S.W.3d at 67* (citing ***Kansas v. Hendricks***, *521 U.S. 346, 361, 117 S. Ct. 2072, [2082], 138 L. Ed. 2d 501 (1997)*).

To evaluate whether the effects of a statute are criminally punitive, courts generally look to the factors set forth by the Supreme Court in ***Kennedy v. Mendoza-Martinez***, *372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)*. ***Rodriguez***, *93 S.W.3d at 68*. Those factors include (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has traditionally been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment--retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable to it; and (7) whether it appears excessive in relation to the alternative purpose assigned. ***Id.*** (citing ***Kennedy***, *372 U.S. at 168-69, 83 S. Ct. at 567-68*).

The court of criminal appeals has twice considered whether certain provisions of Chapter 62 are punitive in effect. In ***Rodriguez***, the court held, after applying the ***Kennedy*** factors, that certain 1997 amendments were nonpunitive. ***Rodriguez***, *93 S.W.3d at 67-68*. In addressing an *Eighth Amendment* challenge the following year, the court concluded that "the 1999 version of the [sex offender registration program], like the 1997 version, [was] nonpunitive in both intent and effect" and therefore did not constitute cruel and unusual punishment. ***Ex parte Robinson***, *116 S.W.3d at 797-98* ("We have already thoroughly applied the ***Kennedy*** factors to the 1997 version of the [sex offender registration program] and found it nonpunitive in effect.").

D.L. points out that these cases dealt with adult offenders and whether Chapter 62 constitutes cruel and unusual punishment when applied to juveniles is an open question. D.L. argues that juveniles are often

treated differently from adults in our laws. He states that, based upon the differences in the maturity and culpability of juveniles and adults, the practice of "shaming" juvenile sexual offenders by public registration is inconsistent with evolving standards of decency in a civilized society. Consequently, he concludes, when applied to juveniles, Chapter 62 is cruel and unusual punishment.

We recognize that children who violate the law are frequently treated less severely than adults who commit the same violation. *See* ***In re M.A.H.****, 20 S.W.3d 860, 865 (Tex. App.-Fort Worth 2000, no pet.).* That policy is especially evident in cases such as the one at hand where, although a juvenile commits a crime that would be a first-degree felony if committed by an adult, the juvenile matter, subject to certain exceptions not applicable here, is adjudicated under the Texas Juvenile Justice Code. *See TEX. FAM. CODE ANN. § § 51.01-61.107* (Vernon 2002 & Supp. 2004-2005). However, the legislature clearly intended to subject juveniles adjudicated for sexually-related offenses to the mandates of the registration and reporting provisions. *See TEX. CODE CRIM. PROC. ANN. art. 62.12(b)(1)*. Therefore, as previously stated, D.L. cannot succeed in his challenge here unless he shows that the public registration requirements of Chapter 62 always constitute cruel and unusual punishment when applied to juveniles. D.L.'s first step in meeting that burden is to show that these requirements are punitive. *See* ***Rodriguez****, 93 S.W.3d at 67*.

In considering D.L.'s issue, we have carefully reviewed the analysis in ***Rodriguez***. We iterate that we must presume the legislature acted in a constitutionally sound fashion when it enacted Chapter 62. ***Id.*** *at 69*. D.L. has not presented any argument to rebut this presumption. Therefore, as to the first prong of our inquiry, legislative intent, we must presume that the legislature intended Chapter 62 to be civil and remedial, and not criminal or punitive, in relation to the claim D.L. asserts here. *See* ***id.*** As to the second prong, punitive effect, D.L. does not challenge the ***Rodriguez*** analysis, but merely asserts that Chapter 62 creates a practice of "shaming" juveniles who are required to register as sex offenders. We interpret this statement as a reference to the first ***Kennedy*** factor: whether the reporting requirement involves an affirmative disability or restraint.

In ***Rodriguez***, the court of criminal appeals stated that when applying this factor, the question is whether the provisions of the statute itself, as opposed to the speculative response of the community, work an affirmative disability or restraint. ***Id.*** *at 71*. Any "shaming" that occurs from registration as a sex offender is the result of community response and not Chapter 62 itself. Therefore, any potential public embarrassment of juvenile registrants cannot be considered an affirmative disability or restraint. Moreover, we conclude that the ***Rodriguez*** analysis and application of the remaining ***Kennedy*** factors would not differ in the case at hand. Therefore, we hold that, as applied to juveniles, Chapter 62 is nonpunitive in both intent and effect. Because Chapter 62 is not punitive, it cannot constitute cruel and unusual punishment. D.L.'s first issue is overruled.

[TEXT OMITTED]

Conclusion: Having overruled D.L.'s first, second, third, fourth, and fifth issues, the judgment of the trial court is ***affirmed***.

SUFFICIENCY OF THE EVIDENCE—

EVIDENCE SUFFICIENT TO SUPPORT THE TRIAL COURT'S ADJUDICATION ON AGGRAVATED SEXUAL ASSAULT AND INDECENCY WITH A CHILD

¶ 05-2-06. **In the Matter of M.D.T.**, 153 S.W.3d 285, 2004 Tex.App.Lexis 11718 (Tex.App.— El Paso 12/23/04).

Facts: This is an appeal from a juvenile proceeding tried to the court. The court issued an order of adjudication finding that the juvenile, M.D.T., engaged in delinquent conduct. The disposition hearing resulted in the assessment of a two-year community supervision sentence.

Held: Affirm and reform.

Summary of Evidence

At about 12:30 p.m. on April 17, 2003, the complainant, a seven-year-old child, went with two other children after school to M.D.T.'s house. M.D.T. was a thirteen-year-old juvenile. The complainant then went to play at a neighborhood park. He purportedly threw some dirt on two children and he was taken back to M.D.T.'s house. He then entered M.D.T.'s room while M.D.T. was taking a shower. The complainant related that M.D.T. then pulled down his pants and "put his private parts" in the complainant's bottom, at least twice.

At 3 p.m., the complainant's grandmother, Ms. Bean, came to pick up the complainant at the house. Phillip, one of M.D.T.'s brothers, answered the door. When asked about the complainant's whereabouts, he turned and tried to open M.D.T.'s bedroom door. He did not respond to Ms. Bean's inquiry. The door was locked and Phillip knocked and M.D.T. called out that he was changing his clothes. She looked into the kitchen and saw David, one of M.D.T.'s siblings. M.D.T.'s mother then approached from the rear of the house and she and Ms. Bean conversed. Bean got the impression that the complainant was not in the house but he soon emerged from M.D.T.'s bedroom and was soon followed out by M.D.T. who was only wearing black sweat pants.

When they were alone in the car, Ms. Bean asked the complainant what went on in the bedroom. After initially denying that anything had occurred, the complainant stated that sexual contact had occurred notwithstanding the fact that the complainant had asked M.D.T. to stop. The complainant was taken to a hospital for a rape examination which proved negative; although there was some evidence that no physical damage was shown as M.D.T. was not fully developed.

M.D.T. presented a number of witnesses including the complainant's school principal who stated that the complainant had a bad reputation for truth and veracity and he had received a large number of disciplinary referrals.

Various of M.D.T.'s brothers and sisters testified indicating that they had all been in M.D.T.'s room at varying times and that no sexual assault had occurred. His sister testified that she was in the house when Ms. Bean came to pick up the complainant and the sister stated that another brother, David, was in the room with M.D.T. and the complainant. The brother she referenced testified that he was in M.D.T.'s room the whole time the complainant was in the room and he never witnessed a sexual assault. The brother, Phillip, who answered the door when Ms. Bean arrived stated that Ms. Bean never asked about the complainant's whereabouts and denied that anyone attempted to open the door of M.D.T.'s room. A friend of the children, Larry Arellano, stated that David was in the room with the complainant and M.D.T. at all times when the assault could have occurred. M.D.T.'s mother testified that the complainant was out of her sight for, at most, fifteen minutes during the operative period when the assault could have occurred.

Opinion Text: In Issue Nos. One and Four, Appellant asserts that the evidence in legally and factually insufficient to demonstrate that M.D.T. committed the offense of aggravated sexual assault. In the State's petition it was alleged that M.D.T. committed the offense of aggravated sexual assault by causing the anus of the complainant of a child younger that fourteen years of age to contact the sexual organ of M.D.T. In a second count, it was alleged that M.D.T. committed the offense of indecency with a child by engaging in sexual contact with a child younger than seventeen years of age with intent to arouse and gratify the sexual desire of M.D.T. When reviewing challenges to the legal sufficiency of the evidence to establish the elements of the penal offense that forms the basis of the finding that the juvenile engaged in delinquent conduct, we apply the standard set forth in *Jackson v. Virginia, 443 U.S. 307, 320, 99 S. Ct. 2781, 2789-90, 61 L. Ed. 2d 560 (1979). In re A.S., 954 S.W.2d 855, 858* (Tex. App.--El Paso 1997, no pet.). Under this standard, an appellate court must review all the evidence, both State and defense, in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson, 443 U.S. at 318-19, 99 S. Ct. at 2789*; *Alvarado v. State, 912 S.W.2d 199, 207 (Tex. Crim. App. 1995).*

In reviewing this factual sufficiency challenge, we view all of the evidence but do not view it in the light most favorable to the verdict in determining whether the State met its burden of proof beyond a reasonable doubt. *A.S., 954 S.W.2d at 860*; *see also Clewis v. State, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)*. Our factual sufficiency review must be appropriately deferential so as to avoid substituting our judgment for that of the fact finder. *Clewis, 922 S.W.2d at 133*. Only if the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust will we conclude that the State failed to carry its burden. *A.S., 954 S.W.2d at 860*.

Regarding the legal sufficiency of the evidence, we find that the evidence is sufficient to support the court's finding that M.D.T. engaged in delinquent conduct. M.D.T. asserts that there is insufficient evidence to show that there was illicit sexual contact. The evidence adduced at trial clearly indicated that, "He put-he put where they use number one inside my bottom." The complainant indicated that, "number one" was when you go to the bathroom. He further indicated that this happened on at least two occasions and had happened several times in the past. We find that the evidence is legally sufficient to support the court's finding.

Regarding the factual sufficiency of the court's finding, we note the State's evidence indicated that M.D.T. was alone in the locked bedroom and he pulled down the complainant's pants and penetrated his bottom with his penis. Ms. Bean testified that she was suspicious of what had occurred in the house and she testified to the actions of those in the household as being suspicious. After some inquiry, the complainant told her of the various illicit incidents. Countering this evidence, is the testimony of various of M.D.T.'s siblings and friends to the effect that someone else was in the room at all times and the incident could not have happened.

However, this evidence has various inconsistencies. The evidence is conflicting as to which siblings were in the bedroom at any given time. While there was evidence David was in the room the whole time, the sister testified that she only saw David in the bedroom after Ms. Bean had picked up the complainant and that she did not know who was in the bedroom when the door was shut. Ms. Bean testified that she saw David in the kitchen when she first came to the house. While David claimed the bedroom door was never locked during the operative time, Phillip stated that the bedroom door was locked. Giving due deference to the judgment of the fact finder, we do not view M.D.T.'s evidence as being so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The evidence is factually sufficient. Issue Nos. One and Four are overruled.

In Issue No. Five, M.D.T. asserts that the failure of the trial court to administer the warnings mandated in the Family Code prior to commencing the adjudication hearing resulted in reversible error. At the commencement of the adjudication hearing, the court inquired about the voluntariness of M.D.T.'s written waiver of a right to a jury. The court did not make any inquiries about the admonishments contained in Family Code Section 54.03(b). However, the record does not reflect that M.D.T.'s attorney made any objection in the trial court regarding any complaint about these admonishments. Consequently, he has failed to preserve error. *In re C. C., 13 S.W.3d 854, 859-60* (Tex. App.--Austin 2000, no pet.); *In re R.J.C., 2002 Tex. App. LEXIS 6623,* No. 04-01-00686-*CV, 2002 WL 31015532* (Tex. App.--San Antonio Sept. 11, 2002, no pet.) (not designated for publication); *In re R.R.,* No. 08-01-00245-*CV, 2002 WL 1859101* (Tex. App.--El Paso Aug. 14, 2002, no pet.) (not designated for publication). Issue No. Five is overruled.

Conclusion: Having overruled Appellant's Issue Nos. One, Four, and Five, and having found that we need not address any remaining issues, we affirm the judgment of the trial court as reformed.

DRIVER CONSIDERED IN JOINT POSSESSION OF MARIJUANA FOUND ON FRONT PASSENGER FLOORBOARD (IN PLAIN VIEW).

¶ 05-2-15. **In the Matter of N.B.**, ___ S.W.3d ___, No. 05-04-00545-CV, 2005 Tex.App.Lexis 901 (Tex.App.– Dallas 2/3/05).

Facts: Appellant juvenile appealed the judgment of the 366th Judicial District Court, Collin County, Texas, finding he engaged in delinquent conduct by possessing two ounces or less of marijuana.

The police reports showed appellant driving an extended cab pick-up truck with two passengers. They were pulled over by police. Appellant was asked to exit the vehicle at which time one officer detected the odor of burnt marijuana coming from the truck. The front seat passenger was also asked to exit. The officers observed a plastic baggie of marijuana, later found to be approximately 3.26 grams, and rolling papers on the front passenger floorboard.

Held: Affirmed

Memorandum Opinion: We apply well-known standards when reviewing challenges to the legal and factual sufficiency of the evidence. *See Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*; *Escamilla v. State, 143 S.W.3d 814, 817 (Tex. Crim. App. 2004), petition for cert. filed,* No. 04-7807 (U.S. Dec. 12, 2004); *Zuniga v. State, 144 S.W.3d 477, 484-85 (Tex. Crim. App. 2004) Garcia v. State, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001), cert. denied, 537 U.S. 1195, 154 L. Ed. 2d 1030, 123 S. Ct. 1351 (2003).* To show N.B. engaged in delinquent conduct by unlawfully possessing marijuana, the State was required to prove he knowingly or intentionally possessed a usable quantity of marijuana. *See TEX. FAM. CODE ANN. § 51.03(a)(1)* (Vernon Supp. 2004-05); *TEX. HEALTH & SAFETY CODE ANN. § 481.121(a)* (Vernon 2003); *Lejeune v. State, 538 S.W.2d 775, 777 (Tex. Crim. App. 1976).* A usable quantity is an amount "such as is capable of being applied to the use commonly made thereof." *Pelham v. State, 298 S.W.2d 171, 173 164 Tex. Crim. 226 (1957)*; *see Parson v. State, 432 S.W.2d 89, 91 (Tex. Crim. App. 1968)* (State's evidence of 1.41 grams of marihuana was sufficient to show possession of usable amount of marijuana).

An individual possesses a controlled substance when he (i) exercises care, control, and management

over the controlled substance and (ii) knows the matter is contraband. *Frierson v. State, 839 S.W.2d 841, 848 (Tex. App.-Dallas 1992, pet. ref'd)* (citing *Martin v. State, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988))*. When the accused is not in exclusive control or possession of the place where the contraband is found, the accused cannot be charged with knowledge and control over the contraband unless there are additional independent facts and circumstances affirmatively linking him to the contraband in such a manner and to such an extent that a reasonable inference may arise that he knew of the contraband's existence and exercised control over it. *Porter v. State, 873 S.W.2d 729, 732 (Tex. App.-Dallas 1994, pet. ref'd)*. "Joint possession over a controlled substance in a vehicle may be established if the controlled substance is in open or plain view, there is a noticeable odor in the car, and the substance is conveniently accessible to the driver." *In re K.T., 107 S.W.3d 65, 72 (Tex. App.-San Antonio 2003, no pet.)*; *see Duff v. State, 546 S.W.2d 283, 287 (Tex. Crim. App. 1977)* (holding conflicting statements about trip, odor of marijuana emanating from car, and marijuana seeds on floorboard sufficient evidence to link appellant to contraband).

Although N.B. claims the evidence is legally and factually insufficient to show (i) he exercised care, control, and management over the marijuana and (ii) that the amount of marijuana was a "usable quantity," we disagree. During the hearing, the State and N.B. "stipulated to the facts as stated in the police report(s)." The police reports show N.B. was driving an extended cab pick-up truck with Juan Manuel Briones and a third male passenger when they were pulled over by Corporal Stansell. Shortly thereafter, Officer Haak arrived to assist. According to the stipulated evidence, N.B. was asked to exit the vehicle at which time one officer detected the odor of burnt marijuana coming from the truck. Briones, the front seat passenger, was also asked to exit. The officers observed a plastic baggie of marijuana ("later found to be approximately 3.26 grams") and rolling papers on the front passenger floorboard. This evidence affirmatively links N.B. to the marijuana in question and establishes that the marijuana was a "usable quantity." *See In re K.T., 107 S.W.3d at 72*; *Parson, 432 S.W.2d at 91*; *see also Duff, 546 S.W.2d at 287*. Thus, we conclude the evidence is legally and factually sufficient to support the trial court's finding that he engaged in delinquent conduct by unlawfully possessing a usable quantity of marijuana. We overrule N.B.'s first and second issues.

Conclusion: We affirm the trial court's judgment.

WAIVER AND DISCRETIONARY TRANSFER—

DURING A CERTIFICATION AND TRANSFER HEARING, THE JUVENILE COURT DID NOT ERR IN ADMITTING A PSYCHOLOGICAL REPORT INTO EVIDENCE WITHOUT THE STATE CALLING THE DOCTOR WHO AUTHORED THE REPORT.

¶ 05-4-6A. **McKaine v. State,** 170 S.W.3d 285; 2005 Tex. App. Lexis 7147 (Tex.App.— Corpus Christi, 8/31/05).

Background. Defendant was originally charged as a juvenile, but was successfully transfer to district court to be prosecuted as an adult. Defendant pleaded guilty to burglary of a habitation and committing aggravated assault therein. The District Court sentenced him to 75 years' imprisonment.

The Appellate Court originally reversed and remanded the case to the trial court for a new punishment hearing. The state filed a motion for rehearing, which was granted.

Held. Previous opinion withdrawn, judgment of the trial court affirmed.

Facts. On November 12, 2002, McKaine and three other people used force to unlawfully enter the residence of Charles and Amy in Cuero, Texas. n2 McKaine entered the home carrying a twenty-gauge shotgun. His cohorts were armed with handguns. With their weapons drawn, the group forced Charles down onto the kitchen floor, threatening to kill him if he resisted. McKaine then pointed his shotgun at Charles's wife, Amy, and told her to take off her shirt. With her husband and three small children watching, Amy removed her shirt for McKaine, exposing her breasts. McKaine's companions then took Charles into the couple's bedroom, and McKaine took Amy and two of her children into a second bedroom. Once inside, he began to touch Amy, fondling her breasts and repeatedly telling her that he wanted to have sex and that he was going to have sex with her on her child's bed in front of her children. He threatened to kill her, her husband, and her children if she told anyone. McKaine then took Amy into the living room and in front of all three of her children, ordered her to pull down her pants. She refused. McKaine repeated his demand, and again, she refused, saying that she was "on her period." McKaine put his shotgun against the head of Amy's three year old son and said, "Pull down your pants and spread your legs, or I'm going to kill your son." She complied, but McKaine did not have sex with her. He and his companions left, taking a knife, cigarettes, and money belonging to the family. Before leaving, McKaine repeated his threat that he would kill all of them if they told anyone what happened.

n2 We withhold the couple's last name because of the nature of the crimes committed against them.

At the time of the incident, McKaine was sixteen years old. He was originally charged as a juvenile, but the State petitioned the juvenile court to transfer the case to district court so that he could be prosecuted as an adult. After a hearing, the juvenile court certified McKaine as an adult and transferred the case. Before the district court, McKaine pleaded guilty to burglary of a habitation and committing aggravated assault therein, a first-degree felony. n3 He requested that a jury determine his punishment. The jury sentenced him to seventy-five years' imprisonment.

n3 *See id.*

McKaine raises two issues on appeal. First, he challenges the juvenile court's decision to transfer his case to district court for trial as an adult. Second, he argues that the trial court abused its discretion during the punishment phase of the trial by not allowing his attorney to question Amy and Charles regarding their involvement in drug activities.

Opinion. In his first issue, McKaine claims that the juvenile court erred in transferring his case to district court. n4 He complains that the court erred by considering a psychological report because it amounted to inadmissible hearsay. McKaine also contends that the author of the report should have been present at the transfer hearing to explain her evaluation and the basis for her findings. Finally, he maintains that the juvenile court had insufficient evidence to transfer his case to district court for trial as an adult.

n4 Under *Article 44.47 of the Texas Code of Criminal Procedure*, an appeal from a juvenile court's decision to certify a defendant as an adult and to transfer the case under *section 54.02 of the family code* is a criminal matter. *TEX. CODE CRIM. PROC. ANN. art. 44.47(a), (c)* (Vernon Supp. 2004). A challenge to the certification and transfer order can be made only in conjunction with the appeal of a conviction of or an order of deferred adjudication for the offense for which the defendant was transferred to criminal court. *Id.* at *art. 44.47(b).*

The juvenile court has exclusive, original jurisdiction over children seventeen years of age and

younger. *Ex parte Waggoner, 61 S.W.3d 429, 431 (Tex. Crim. App. 2001)*; *see TEX. FAM. CODE ANN. § § 51.04(a), 51.02(2)* (Vernon 2002) (discussing the jurisdiction of juvenile courts and defining "child"). *Texas Family Code Section 54.02(a)* provides that the juvenile court may waive its exclusive, original jurisdiction and transfer a child to the appropriate district court for criminal proceedings if the child is alleged to have committed a first-degree felony and was aged fourteen or older at the time of the alleged offense. *TEX. FAM. CODE ANN. § 54.02(a)* (Vernon 2002). A juvenile court's discretionary power to transfer a juvenile can be exercised only after the State files a petition or motion requesting waiver and transfer. *Hidalgo v. State, 983 S.W.2d 746, 749 n.3 (Tex. Crim. App. 1999)*; *see TEX. FAM. CODE ANN. § § 53.04, 54.02(b)* (Vernon 2002). When the State requests a transfer, the juvenile court is required to conduct a hearing without a jury to consider transfer of the child for criminal proceedings. *TEX. FAM. CODE ANN. § 54.02(c)*. Before the transfer hearing, the court must 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)*; *In re J.S.C., 875 S.W.2d 325, 326 (Tex. App.--Corpus Christi 1994, writ dism'd by agr.*). Based on this information, the court must determine whether there is probable cause to believe that the child committed the offense alleged and whether the welfare of the community requires criminal proceedings because of the seriousness of the offense or the background of the child. *See TEX. FAM. CODE ANN. § 54.02(a)*; *In re J.S.C., 875 S.W.2d at 326*. The juvenile court's decision to transfer a case to district court is reviewed for abuse of discretion. *Faisst v. State, 105 S.W.3d 8, 12 (Tex. App.--Tyler 2003, no pet.)*; *see In re J.S.C., 875 S.W.2d at 326*.

We first consider McKaine's argument that the trial court erred by considering a psychological report because it was inadmissible hearsay. Strict rules of evidence are not applied in transfer proceedings. *In re J.S.C., 875 S.W.2d at 330*; *see also In re J.P.O., 904 S.W.2d 695, 699 (Tex. App.--Corpus Christi 1995, writ denied)*. *Section 54.02(e)* authorizes the juvenile court to "consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." *TEX. FAM. CODE ANN. § 54.02(e)*. In previous case involving the use of a psychiatric evaluation in a transfer hearing, this Court overruled an alleged hearsay error, noting that juvenile courts are authorized to consider such evidence. *See In re J.S.C., 875 S.W.2d at 330* (holding that there was "no error in . . . the use of records even though [they] . . . may not be admissible as evidence at an adjudication hearing"). n5 We reach the same conclusion in this case. The juvenile court did not err in admitting the psychological report into evidence.

> n5 Other courts of appeals have also reached this conclusion. *See In re J.A.W., 976 S.W.2d 260, 264 (Tex. App.--San Antonio 1998, no pet.)* ("*Section 54.02(e) of the Family Code,* which allows the court to consider written reports from probation officers, professional court employees, and professional consultants, provides an explicit exception to the hearsay rule in a transfer to criminal court proceeding."); *In re S.J.M., 922 S.W.2d 241, 242 (Tex. App.--Houston [14th Dist.] 1996, no writ)* ("Because a juvenile transfer hearing is dispositional, rather than adjudicational in nature, a juvenile court may consider hearsay reports without violating the juvenile's right of confrontation."); *In re G.B.B., 638 S.W.2d 162, 164 (Tex. Civ. App.--Houston [1st Dist.] 1982, no writ)* ("[A] juvenile court may consider hearsay reports . . . ."); *In re Q.D., 600 S.W.2d 392, 394 (Tex. Civ. App.--Fort Worth 1980, no writ)* ("*Section 54.02 of the Family Code* is a statutory exception to the hearsay rule and authorizes the introduction of specified reports that would otherwise be objectionable."); *In re R.G.S., 575 S.W.2d 113, 119 (Tex. Civ. App.--Eastland 1978, writ ref'd n.r.e.)* ("A juvenile court may consider certain hearsay reports at a transfer . . . hearing that would not be admissible at an adjudication hearing.").

McKaine also argues that Dr. Karan Redus, who conducted his psychological evaluation and

authored the report, should have testified at the transfer hearing. He contends that the juvenile court's duty to conduct a "full investigation and hearing" is not complete without live testimony from the author of any reports relied upon under *section 54.02(e). TEX. FAM. CODE ANN. § 54.02(c), (e)*. The State has not responded to this argument. Nevertheless, we cannot conclude that the juvenile court abused its discretion. The family code does not specifically require that the juvenile court hear live testimony from a professional consultant whose written report is considered under *section 54.02(e). Id. § 54.02(e)*. It allows the court to consider "written reports from . . . professional consultants in addition to the testimony of witnesses." *Id.* Although McKaine makes compelling arguments regarding the court's duty to be fully informed of the juvenile's circumstances, he has cited no cases holding that the court must receive live testimony in addition to the written reports. Our research has unearthed no such authority. Thus, we cannot conclude that the trial court abused its discretion. In so holding, we note that although McKaine's trial counsel complained of Dr. Redus's absence at the hearing, the record does not show that he ever attempted to subpoena her or otherwise solicit her testimony. The record shows that McKaine's trial counsel received proper notice of Dr. Redus's report under *section 54.02(e). Id.*

Finally, McKaine argues that the juvenile court erred in transferring his case to district court because the evidence was insufficient to support a transfer. McKaine has not specified whether his challenge is to the legal or factual sufficiency of the evidence or to both. *See In re J.P.O., 904 S.W.2d at 699-700* ("The juvenile court's findings of fact are reviewed by the same standards that are applied in reviewing the legal or factual sufficiency of the evidence supporting a jury's answers to a charge."). He also has not cited authorities for his contention that the evidence is insufficient. *See TEX. R. APP. P. 38.1(h)* ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). McKaine argues that the evidence adduced at the transfer hearing was insufficient to support a transfer because it showed that (1) he had never been adjudicated of a felony as a juvenile, (2) he suffered from drug addiction and had not received treatment, and (3) the Texas Youth Commission offered services that could assist in rehabilitating him. The State has not responded to McKaine's sufficiency arguments. Assuming without deciding that McKaine has properly presented this issue for review, we hold that it does not warrant reversal because his arguments do not address all of the grounds for the juvenile court's decision. Specifically, McKaine has not addressed the court's finding that the seriousness of the offense necessitated criminal proceedings to protect the welfare of the community.

As noted above, the juvenile court has discretion to waive its jurisdiction and transfer a case to criminal court if it finds that there is probable cause to believe that the child committed the offense alleged and that the welfare of the community requires criminal proceedings because of the seriousness of the offense or the background of the child. *See TEX. FAM. CODE ANN. § 54.02(a)*; *In re J.S.C., 875 S.W.2d at 326*. In making this determination, the court is required to consider (1) whether the alleged offense was against a person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities available to the juvenile court. *TEX. FAM. CODE ANN. § 54.02(f)*. While the juvenile court must consider all of these factors before transferring the case to district court, it is not required to find that each factor is established by the evidence. *In re D.D., 938 S.W.2d 172, 176 (Tex. App.--Fort Worth 1996, no writ)*; *In re J.S.C., 875 S.W.2d at 329*; *In re M.D.B., 757 S.W.2d 415, 417 (Tex. App.--Houston [14th Dist.] 1988, no writ)*. The court is also not required to give each factor equal weight as long as each is considered. *In re J.J., 916 S.W.2d 532, 535 (Tex. App.--Dallas 1995, no writ)*; *In re C.C.G., 805 S.W.2d 10, 15 (Tex. App.--Tyler 1991, writ denied)*.

In its order, the juvenile court discussed each of the foregoing factors and how they influenced its

decision. The court also noted that "after conducting . . . [a] full investigation, including evidence and argument of counsel, the Court finds that the welfare of the community requires criminal proceedings, because of the seriousness of the offenses and the background of the child and . . . [because] there is probable cause to believe the child committed the offenses . . . ." On appeal, McKaine argues that his background did not require criminal proceedings for the protection of the community's welfare, but he does not challenge the court's finding that the seriousness of the offense warranted criminal proceedings. A court does not abuse its discretion by finding the community's welfare requires transfer due to the seriousness of the crime alone, regardless of the child's background. *See In re D.D., 938 S.W.2d at 177*; *In re C.C.G., 805 S.W.2d at 15*. Thus, even if we were to sustain McKaine's challenge regarding his background, his failure to challenge the court's finding regarding the seriousness of the offense would preclude relief on his sufficiency arguments.

Conclusion. Appellant's first issue is therefore overruled.
Other Issues Omitted.