Case Law Update

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Biographical Information

Robert Dawson holds the Bryant Smith Chair in Law at the University of Texas at Austin School of Law. He received his B.A. degree from the University of Missouri in 1960, his Doctor of Jurisprudence degree from Washington University in 1963 and his Doctor of Judicial Science degree from the University of Wisconsin in 1969. From 1964 to 1967 he was an Assistant Professor of Law at Washington University. He has been on the faculty of the University of Texas School of Law since 1967. In addition to his academic positions, he has been both a public defender and prosecutor. Dr. Dawson was the principal draftsman of Title 3 of the Texas Family Code and of the determinate sentence act. He was also involved in much of the drafting of the 1995 re-writing of Title 3. From 1967 to 1987, he was the Juvenile Law Editor of the State Bar of Texas Family Law Section Newsletter. With the creation of the Juvenile Law Section of the State Bar in 1987, he became the Editor of the State Bar of Texas Juvenile Law Section Newsletter. He has given lectures on juvenile law to probation officers and attorneys throughout the state. He is the author and co-author of several published books, articles, and law school coursework on the subjects of criminal procedure and juvenile law.

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I. CONFESSIONS

1. U.S. SUPREMES SAY AGE OF SUSPECT NOT A FACTOR IN DETERMINING WHETHER INTERROGATION WAS CUSTODIAL

Yarborough v. Alvarado, ___ U.S. ___, 124 S.Ct. 2140 (6/1/04) *Texas Juvenile Law* 283 (5th Ed. 2000).

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

Justice KENNEDY delivered the opinion of the Court.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a federal court can grant an application for a writ of habeas corpus on behalf of a person held pursuant to a state-court judgment if the state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The United States Court of Appeals for the Ninth Circuit ruled that a state court unreasonably applied clearly established law when it held that the respondent was not in custody for *Miranda* purposes. *Alvarado v. Hickman*, 316 F.3d 841 (2002). We disagree and reverse.

I

Paul Soto and respondent Michael Alvarado attempted to steal a truck in the parking lot of a shopping mall in Santa Fe Springs, California. Soto and Alvarado were part of a larger group of teenagers at the mall that night. Soto decided to steal the truck, and Alvarado agreed to help. Soto pulled out a .357 Magnum and approached the driver, Francisco Castaneda, who was standing near the truck emptying trash into a dumpster. Soto demanded money and the ignition keys from Castaneda. Alvarado, then five months short of his 18th birthday, approached the passenger side door of the truck and crouched down. When Castaneda refused to comply with Soto's demands, Soto shot Castaneda, killing him. Alvarado then helped hide Soto's gun.

Los Angeles County Sheriff's detective Cheryl Comstock led the investigation into the circumstances of Castaneda's death. About a month after the shooting, Comstock left word at Alvarado's house and also contacted Alvarado's mother at work with the message that she wished to speak with Alvarado. Alvarado's parents brought him to the Pico Rivera Sheriff's Station to be interviewed around lunchtime. They waited in the lobby while Alvarado went with Comstock to be interviewed. Alvarado contends that his parents asked to be present during the interview but were rebuffed.

Comstock brought Alvarado to a small interview room and began interviewing him at about 12:30 p.m. The interview lasted about two hours, and was recorded by Comstock with Alvarado's knowledge. Only Comstock and Alvarado were present. Alvarado was not given a warning under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Comstock began the interview by asking Alvarado to recount the events on the night of the shooting. On that night, Alvarado explained, he had been drinking alcohol at a friend's house with some other friends and acquaintances. After a few hours, part of the group went home and the rest walked to a nearby mall to use its public telephones. In Alvarado's initial telling, that was the end of it. The group went back to the friend's home and "just went to bed." App. 101.

Unpersuaded, Comstock pressed on:

> "Q. Okay. We did real good up until this point and everything you've said it's pretty accurate till this point, except for you left out the shooting.
>
> "A. The shooting?
>
> "Q. Uh huh, the shooting.
>
> "A. Well I had never seen no shooting.
>
> "Q. Well I'm afraid you did.
>
> "A. I had never seen no shooting.
>
> "Q. Well I beg to differ with you. I've been told quite the opposite and we have witnesses that are saying quite the opposite.
>
> "A. That I had seen the shooting?
>
> "Q. So why don't you take a deep breath, like I told you before, the very best thing is to be honest .... You can't have that many people get involved in a murder and expect that some of them aren't going to tell the truth, okay? Now granted if it was maybe one person, you might be able to keep your fingers crossed and say, god I hope he doesn't tell the truth, but the problem is is that they have to tell the truth, okay? Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story

and all of a sudden you tell something way far fetched different." *Id.,* at 101-102 (punctuation added).

At this point, Alvarado slowly began to change his story. First he acknowledged being present when the carjacking occurred but claimed that he did not know what happened or who had a gun. When he hesitated to say more, Comstock tried to encourage Alvarado to discuss what happened by appealing to his sense of honesty and the need to bring the man who shot Castaneda to justice. See, *e.g., id.,* at 106 ("[W]hat I'm looking for is to see if you'll tell the truth"); *id.,* at 105-106 ("I know it's very difficult when it comes time to 'drop the dime' on somebody[,] ... [but] if that had been your parent, your mother, or your brother, or your sister, you would darn well want [the killer] to go to jail 'cause no one has the right to take someone's life like that ..."). Alvarado then admitted he had helped the other man try to steal the truck by standing near the passenger side door. Next he admitted that the other man was Paul Soto, that he knew Soto was armed, and that he had helped hide the gun after the murder. Alvarado explained that he had expected Soto to scare the driver with the gun, but that he did not expect Soto to kill anyone. *Id.,* at 127. Toward the end of the interview, Comstock twice asked Alvarado if he needed to take a break. Alvarado declined. When the interview was over, Comstock returned with Alvarado to the lobby of the sheriff's station where his parents were waiting. Alvarado's father drove him home.

A few months later, the State of California charged Soto and Alvarado with first-degree murder and attempted robbery. Citing *Miranda, supra,* Alvarado moved to suppress his statements from the Comstock interview. The trial court denied the motion on the ground that the interview was noncustodial. App. 196. Alvarado and Soto were tried together, and Alvarado testified in his own defense. He offered an innocent explanation for his conduct, testifying that he happened to be standing in the parking lot of the mall when a gun went off nearby. The government's cross-examination relied on Alvarado's statement to Comstock. Alvarado admitted having made some of the statements but denied others. When Alvarado denied particular statements, the prosecution countered by playing excerpts from the audio recording of the interview.

During cross-examination, Alvarado agreed that the interview with Comstock "was a pretty friendly conversation," *id.,* at 438, 86 S.Ct. 1602, that there was "sort of a free flow between [Alvarado] and Detective Comstock," *id.,* at 439, 86 S.Ct. 1602, and that Alvarado did not "feel coerced or threatened in any way" during the interview, *ibid.* The jury convicted Soto and Alvarado of first-degree murder and attempted robbery. The trial judge later reduced Alvarado's conviction to second-degree murder for his comparatively minor role in the offense. The judge sentenced Soto to life in prison and Alvarado to 15-years-to-life.

On direct appeal, the Second Appellate District Court of Appeal (hereinafter state court) affirmed. *People v. Soto,* 74 Cal.App.4th 1099, 88 Cal.Rptr.2d 688 (1999) (unpublished in relevant part). The state court rejected Alvarado's contention that his statements to Comstock should have been excluded at trial because no *Miranda* warnings were given. The court ruled Alvarado had not been in custody during the interview, so no warning was required. The state court relied upon the custody test articulated in *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), which requires a court to consider the circumstances surrounding the interrogation and then determine whether a reasonable person would have felt at liberty to leave. The state court reviewed the facts of the Comstock interview and concluded Alvarado was not in custody. App. to Pet. for Cert. C-17. The court emphasized the absence of any intense or aggressive tactics and noted that Comstock had not told Alvarado that he could not leave. The California Supreme Court denied discretionary review.

Alvarado filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. The District Court agreed with the state court that Alvarado was not in custody for *Miranda* purposes during the interview. *Alvarado v. Hickman,* No. ED CV-00-326-VAP(E) (2000), App. to Pet. for Cert. B1-B10. "At a minimum," the District Court added, the deferential standard of review provided by 28 U.S.C. § 2254(d) foreclosed relief. App. to Pet. for Cert. B-7.

The Court of Appeals for the Ninth Circuit reversed. *Alvarado v. Hickman,* 316 F.3d 841 (2002). First, the Court of Appeals held that the state court erred in failing to account for Alvarado's youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave. It noted that this Court has considered a suspect's juvenile status when evaluating the voluntariness of confessions and the waiver of the privilege against self-incrimination. See *id.,* at 843 (citing, *inter alia, Haley v. Ohio,* 332 U.S. 596, 599-601, 68 S.Ct. 302, 92 L.Ed. 224 (1948), and *In re Gault,* 387 U.S. 1, 45, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)). The Court of Appeals held that in light of these authorities, Alvarado's age and experience must be a factor in the *Miranda* custody inquiry. 316 F.3d, at 843. A minor with no criminal record would be more

likely to feel coerced by police tactics and conclude he is under arrest than would an experienced adult, the Court of Appeals reasoned. This required extra "safeguards ... commensurate with the age and circumstances of a juvenile defendant." See *id.,* at 850. According to the Court of Appeals, the effect of Alvarado's age and inexperience was so substantial that it turned the interview into a custodial interrogation.

The Court of Appeals next considered whether Alvarado could obtain relief in light of the deference a federal court must give to a state-court determination on habeas review. The deference required by AEDPA did not bar relief, the Court of Appeals held, because the relevance of juvenile status in Supreme Court case law as a whole compelled the "extension of the principle that juvenile status is relevant" to the context of *Miranda* custody determinations. 316 F.3d, at 853. In light of the clearly established law considering juvenile status, it was "simply unreasonable to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was at liberty to terminate the interrogation and leave." *Id.,* at 854-855 (internal quotation marks omitted).

We granted certiorari. 539 U.S. 986, 124 S.Ct. 45, 156 L.Ed.2d 703 (2003).

II

We begin by determining the relevant clearly established law. For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by this Court "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). We look for "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade,* 538 U.S. 63, 71, 72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Miranda itself held that preinterrogation warnings are required in the context of custodial interrogations given "the compulsion inherent in custodial surroundings." 384 U.S., at 458, 86 S.Ct. 1602. The Court explained that "custodial interrogation" meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.,* at 444, 86 S.Ct. 1602. The *Miranda* decision did not provide the Court with an opportunity to apply that test to a set of facts.

After *Miranda,* the Court first applied the custody test in *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) *(per curiam).* In *Mathiason,* a police officer contacted the suspect after a burglary victim identified him. The officer arranged to meet the suspect at a nearby police station. At the outset of the questioning, the officer stated his belief that the suspect was involved in the burglary but that he was not under arrest. During the 30-minute interview, the suspect admitted his guilt. He was then allowed to leave. The Court held that the questioning was not custodial because there was "no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way." *Id.,* at 495, 97 S.Ct. 711. The Court noted that the suspect had come voluntarily to the police station, that he was informed that he was not under arrest, and that he was allowed to leave at the end of the interview. *Ibid.*

In *California v. Beheler,* 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) *(per curiam),* the Court reached the same result in a case with facts similar to those in *Mathiason.* In *Beheler,* the state court had distinguished *Mathiason* based on what it described as differences in the totality of the circumstances. The police interviewed Beheler shortly after the crime occurred; Beheler had been drinking earlier in the day; he was emotionally distraught; he was well known to the police; and he was a parolee who knew it was necessary for him to cooperate with the police. 463 U.S., at 1124-1125, 103 S.Ct. 3517. The Court agreed that "the circumstances of each case must certainly influence" the custody determination, but reemphasized that "the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.,* at 1125, 103 S.Ct. 3517 (internal quotation marks omitted). The Court found the case indistinguishable from *Mathiason.* It noted that how much the police knew about the suspect and how much time had elapsed after the crime occurred were irrelevant to the custody inquiry. 463 U.S., at 1125, 103 S.Ct. 3517.

Our more recent cases instruct that custody must be determined based on a how a reasonable person in the suspect's situation would perceive his circumstances. In *Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), a police officer stopped a suspected drunk driver and asked him some questions. Although the officer reached the decision to arrest the driver at the beginning of the traffic stop, he did not do so until the driver failed a sobriety test and acknowledged that he had been drinking beer and smoking marijuana. The Court held the traffic stop noncustodial despite the officer's intent to arrest because he had not communicated that intent to the driver. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time," the Court explained. *Id.,* at 442, 104 S.Ct. 3138. "[T]he only relevant inquiry is how a reason-

able man in the suspect's position would have understood his situation." *Ibid.* In a footnote, the Court cited a New York state case for the view that an objective test was preferable to a subjective test in part because it does not " 'place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.' " *Id.*, at 442, n. 35, 104 S.Ct. 3138 (quoting *People v. P.*, 21 N.Y.2d 1, 9-10, 286 N.Y.S.2d 225, 233 N.E.2d 255, 260 (1967)).

Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) *(per curiam)*, confirmed this analytical framework. *Stansbury* explained that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.*, at 323, 114 S.Ct. 1526. Courts must examine "all of the circumstances surrounding the interrogation" and determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Id.*, at 322, 325, 114 S.Ct. 1526 (internal quotation marks and alteration omitted).

Finally, in *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), the Court offered the following description of the *Miranda* custody test:

> "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." 516 U.S., at 112, 116 S.Ct. 457 (internal quotation marks omitted).

We turn now to the case before us and ask if the state-court adjudication of the claim "involved an unreasonable application" of clearly established law when it concluded that Alvarado was not in custody. 28 U.S.C. § 2254(d)(1). See *Williams*, 529 U.S., at 413, 120 S.Ct. 1495 ("Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case"). The term "unreasonable" is "a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Id.*, at 410, 120 S.Ct. 1495. At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations. Cf. *Wright v. West*, 505 U.S. 277, 308-309, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (KENNEDY, J., concurring in judgment).

Based on these principles, we conclude that the state court's application of our clearly established law was reasonable. Ignoring the deferential standard of § 2254(d)(1) for the moment, it can be said that fair-minded jurists could disagree over whether Alvarado was in custody. On one hand, certain facts weigh against a finding that Alvarado was in custody. The police did not transport Alvarado to the station or require him to appear at a particular time. Cf. *Mathiason*, 429 U.S., at 495, 97 S.Ct. 711. They did not threaten him or suggest he would be placed under arrest. *Ibid.* Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief. See *Berkemer*, 468 U.S., at 441-442, 104 S.Ct. 3138. In fact, according to trial counsel for Alvarado, he and his parents were told that the interview was " 'not going to be long.' " App. 186. During the interview, Comstock focused on Soto's crimes rather than Alvarado's. Instead of pressuring Alvarado with the threat of arrest and prosecution, she appealed to his interest in telling the truth and being helpful to a police officer. Cf. *Mathiason*, 429 U.S., at 495, 97 S.Ct. 711. In addition, Comstock twice asked Alvarado if he wanted to take a break. At the end of the interview, Alvarado went home. *Ibid.* All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave. Indeed, a number of the facts echo those of *Mathiason*, a *per curiam* summary reversal in which we found it "clear from these facts" that the suspect was not in custody. *Ibid.*

Other facts point in the opposite direction. Comstock interviewed Alvarado at the police station. The interview lasted two hours, four times longer than the 30-minute interview in *Mathiason*. Unlike the officer in *Mathiason*, Comstock did not tell Alvarado that he was free to leave. Alvarado was brought to the police station by his legal guardians

rather than arriving on his own accord, making the extent of his control over his presence unclear. Counsel for Alvarado alleges that Alvarado's parents asked to be present at the interview but were rebuffed, a fact that—if known to Alvarado—might reasonably have led someone in Alvarado's position to feel more restricted than otherwise. These facts weigh in favor of the view that Alvarado was in custody.

These differing indications lead us to hold that the state court's application of our custody standard was reasonable. The Court of Appeals was nowhere close to the mark when it concluded otherwise. Although the question of what an "unreasonable application" of law might be difficult in some cases, it is not difficult here. The custody test is general, and the state court's application of our law fits within the matrix of our prior decisions. We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) *(per curiam).* Relief is available under § 2254(d)(1) only if the state court's decision is objectively unreasonable. See *Williams, supra,* at 410, 120 S.Ct. 1495; *Andrade,* 538 U.S., at 75, 123 S.Ct. 1166. Under that standard, relief cannot be granted.

III

The Court of Appeals reached the opposite result by placing considerable reliance on Alvarado's age and inexperience with law enforcement. Our Court has not stated that a suspect's age or experience is relevant to the *Miranda* custody analysis, and counsel for Alvarado did not press the importance of either factor on direct appeal or in habeas proceedings. According to the Court of Appeals, however, our Court's emphasis on juvenile status in other contexts demanded consideration of Alvarado's age and inexperience here. The Court of Appeals viewed the state court's failure to "extend a clearly established legal principle [of the relevance of juvenile status] to a new context" as objectively unreasonable in this case, requiring issuance of the writ. 316 F.3d, at 853 (quoting *Anthony v. Cambra,* 236 F.3d 568, 578 (C.A.9 2000)).

The petitioner contends that if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision. Brief for Petitioner 10-24. See also *Hawkins v. Alabama,* 318 F.3d 1302, 1306, n. 3 (C.A.11 2003) (asserting a similar argument). There is force to this argument. Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law. Cf. *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). At the same time, the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.

This is not such a case, however. Our opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration. The only indications in the Court's opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors. See *Beheler,* 463 U.S., at 1125, 103 S.Ct. 3517 (rejecting a lower court's view that the defendant's prior interview with the police was relevant to the custody inquiry); *Berkemer, supra,* at 442, n. 35, 104 S.Ct. 3138 (citing *People v. P.,* 21 N.Y.2d, at 9-10, 286 N.Y.S.2d 225, 233 N.E.2d, at 260, which noted the difficulties of a subjective test that would require police to " 'anticipat[e] the frailties or idiosyncrasies of every person whom they question' "); 468 U.S., at 430-432, 104 S.Ct. 3138 (describing a suspect's criminal past and police record as a circumstance "unknowable to the police").

There is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test. As we stated in *Keohane,* "[o]nce the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry." 516 U.S., at 112, 116 S.Ct. 457 (internal quotation marks omitted). The objective test furthers "the clarity of [Miranda's] rule," *Berkemer,* 468 U.S., at 430, 104 S.Ct. 3138, ensuring that the police do not need "to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect." *Id.,* at 431, 104 S.Ct. 3138. To be sure, the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases. It is possible to subsume a subjective factor into an objective test by making the latter more specific in its formulation. Thus the Court of Appeals styled its inquiry as an objective test by considering what a "reasonable 17-year-old, with no prior history of arrest or police interviews" would perceive. 316 F.3d, at 854-855 (case below).

At the same time, the objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mind-

set of a particular suspect, where we do consider a suspect's age and experience. For example, the voluntariness of a statement is often said to depend on whether "the defendant's will was overborne," *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), a question that logically can depend on "the characteristics of the accused." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The characteristics of the accused can include the suspect's age, education, and intelligence, see *ibid.*, as well as a suspect's prior experience with law enforcement, see *Lynumn*, *supra*, at 534, 83 S.Ct. 917. In concluding that there was "no principled reason" why such factors should not also apply to the *Miranda* custody inquiry, 316 F.3d, at 850, the Court of Appeals ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry. Cf. *Mathiason*, 429 U.S., at 495-496, 97 S.Ct. 711 (noting that facts arguably relevant to whether an environment is coercive may have "nothing to do with whether respondent was in custody for purposes of the *Miranda* rule"). For these reasons, the state court's failure to consider Alvarado's age does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law.

Indeed, reliance on Alvarado's prior history with law enforcement was improper not only under the deferential standard of 28 U.S.C. § 2254(d)(1), but also as a *de novo* matter. In most cases, police officers will not know a suspect's interrogation history. See *Berkemer*, *supra*, at 430-431, 104 S.Ct. 3138. Even if they do, the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative. True, suspects with prior law enforcement experience may understand police procedures and reasonably feel free to leave unless told otherwise. On the other hand, they may view past as prologue and expect another in a string of arrests. We do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights. See *Berkemer*, *supra*, at 431-432, 104 S.Ct. 3138. The inquiry turns too much on the suspect's subjective state of mind and not enough on the "objective circumstances of the interrogation." *Stansbury*, 511 U.S., at 323, 114 S.Ct. 1526.

The state court considered the proper factors and reached a reasonable conclusion. The judgment of the Court of Appeals is

Reversed.

Justice O'CONNOR, concurring.

I join the opinion of the Court, but write separately to express an additional reason for reversal. There may be cases in which a suspect's age will be relevant to the *Miranda* "custody" inquiry. In this case, however, Alvarado was almost 18 years old at the time of his interview. It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority. Even when police do know a suspect's age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave. That is especially true here; 17 ½-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults. Given these difficulties, I agree that the state court's decision in this case cannot be called an unreasonable application of federal law simply because it failed explicitly to mention Alvarado's age.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

In my view, Michael Alvarado clearly was "in custody" when the police questioned him (without *Miranda* warnings) about the murder of Francisco Castaneda. To put the question in terms of federal law's well-established legal standards: Would a "reasonable person" in Alvarado's "position" have felt he was "at liberty to terminate the interrogation and leave"? *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995); *Stansbury v. California* 511 U.S. 318, 325, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) *(per curiam).* A court must answer this question in light of "all of the circumstances surrounding the interrogation." *Id.*, at 322, 114 S.Ct. 1526. And the obvious answer here is "no."

I

A

The law in this case asks judges to apply, not arcane or complex legal directives, but ordinary common sense. Would a reasonable person in Alvarado's position have felt free simply to get up and walk out of the small room in the station house at will during his 2-hour police interrogation? I ask the reader to put himself, or herself, in Alvarado's circumstances and then answer that question: Alvarado hears from his parents that he is needed for police questioning. His parents take him to the station. On

arrival, a police officer separates him from his parents. His parents ask to come along, but the officer says they may not. App. 185-186. Another officer says, " 'What do we have here; we are going to question a suspect.' " *Id.*, at 189.

The police take Alvarado to a small interrogation room, away from the station's public area. A single officer begins to question him, making clear in the process that the police have evidence that he participated in an attempted carjacking connected with a murder. When he says that he never saw any shooting, the officer suggests that he is lying, while adding that she is "giving [him] the opportunity to tell the truth" and "tak[e] care of [him]self." *Id.*, at 102, 105. Toward the end of the questioning, the officer gives him permission to take a bathroom or water break. After two hours, by which time he has admitted he was involved in the attempted theft, knew about the gun, and helped to hide it, the questioning ends.

What reasonable person in the circumstances—brought to a police station by his parents at police request, put in a small interrogation room, questioned for a solid two hours, and confronted with claims that there is strong evidence that he participated in a serious crime, could have thought to himself, "Well, anytime I want to leave I can just get up and walk out"? If the person harbored any doubts, would he still think he might be free to leave once he recalls that the police officer has just refused to let his parents remain with him during questioning? Would he still think that he, rather than the officer, controls the situation?

There is only one possible answer to these questions. A reasonable person would *not* have thought he was free simply to pick up and leave in the middle of the interrogation. I believe the California courts were clearly wrong to hold the contrary, and the Ninth Circuit was right in concluding that those state courts unreasonably applied clearly established federal law. See 28 U.S.C. § 2254(d)(1).

B

What about the majority's view that "fair-minded jurists could disagree over whether Alvarado was in custody"? *Ante*, at ___ 10. Consider each of the facts it says "weigh against a finding" of custody:

> (1) "*The police did not transport Alvarado to the station or require him to appear at a particular time.*" *Ibid.* True. His parents brought him to the station at police request. But why does that matter? The relevant question is whether Alvarado came to the station of his own free will or submitted to questioning voluntarily. Cf. *Oregon v. Mathiason*, 429 U.S. 492, 493-495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) *(per curiam); California v. Beheler*, 463 U.S. 1121, 1122-1123, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) *(per curiam); Thompson, supra*, at 118, 116 S.Ct. 457 (THOMAS, J., dissenting). And the involvement of Alvarado's parents suggests *in*voluntary, not voluntary, behavior on Alvarado's part.
>
> (2) *"Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief. In fact, [Alvarado] and his parents were told that the interview* '*was not going to be long.*' " *Ante*, at ___10-11 (citation omitted). Whatever was communicated to Alvarado *before* the questioning began, the fact is that the interview was not brief, nor, after the first half hour or so, would Alvarado have expected it to be brief. And those are the relevant considerations. See *Berkemer v. McCarty*, 468 U.S. 420, 441, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).
>
> (3) *"At the end of the interview, Alvarado went home.*" *Ante*, at ___ 11. As the majority acknowledges, our recent case law makes clear that the relevant question is how a reasonable person would have gauged his freedom to leave *during*, not *after*, the interview. See *ante*, at ____ 9 (citing *Stansbury*, *supra*, at 325, 114 S.Ct. 1526).
>
> (4) "*During the interview, [Officer] Comstock focused on Soto's crimes rather than Alvarado's.*" *Ante*, at ____ 11. In fact, the police officer characterized Soto as the ringleader, while making clear that she knew Alvarado had participated in the attempted carjacking during which Castaneda was killed. See App. 102-103, 109. Her questioning would have reinforced, not diminished, Alvarado's fear that he was not simply a witness, but also suspected of having been involved in a serious crime. See *Stansbury*, 511 U.S., at 325, 114 S.Ct. 1526.
>
> (5) *"[The officer did not] pressur[e] Alvarado with the threat of arrest and prosecution ... [but instead] appealed to his interest in telling the truth and being helpful to a police officer." Ante*, at ___ 11. This factor might be highly significant were the question one of "coercion." But it is not. The question is whether Alvarado would have felt free to terminate the interrogation and leave. In respect to that question, police politeness, while commendable, does not significantly help the majority.

(6) *"Comstock twice asked Alvarado if he wanted to take a break." Ibid.* This circumstance, emphasizing the officer's control of Alvarado's movements, makes it *less* likely, not *more* likely, that Alvarado would have thought he was free to leave at will.

The facts to which the majority points make clear what the police did *not* do, for example, come to Alvarado's house, tell him he was under arrest, handcuff him, place him in a locked cell, threaten him, or tell him explicitly that he was not free to leave. But what is important here is what the police *did* do—namely, have Alvarado's parents bring him to the station, put him with a single officer in a small room, keep his parents out, let him know that he was a suspect, and question him for two hours. These latter facts compel a single conclusion: A reasonable person in Alvarado's circumstances would *not* have felt free to terminate the interrogation and leave.

C

What about Alvarado's youth? The fact that Alvarado was 17 helps to show that he was unlikely to have felt free to ignore his parents' request to come to the station. See *Schall v. Martin,* 467 U.S. 253, 265, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) (juveniles assumed "to be subject to the control of their parents"). And a 17-year-old is more likely than, say, a 35-year-old, to take a police officer's assertion of authority to keep parents outside the room as an assertion of authority to keep their child inside as well.

The majority suggests that the law might *prevent* a judge from taking account of the fact that Alvarado was 17. See *ante,* at ____ 13-14. I can find nothing in the law that supports that conclusion. Our cases do instruct lower courts to apply a "reasonable person" standard. But the "reasonable person" standard does not require a court to pretend that Alvarado was a 35-year-old with aging parents whose middle-aged children do what their parents ask only out of respect. Nor does it say that a court should pretend that Alvarado was the statistically determined "average person"—a working, married, 35-year-old white female with a high school degree. See U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2003 (123d ed.).

Rather, the precise legal definition of "reasonable person" may, depending on legal context, appropriately account for certain personal characteristics. In negligence suits, for example, the question is what would a "reasonable person" do " 'under the same or similar circumstances.' " In answering that question, courts enjoy "latitude" and may make "allowance not only for external facts, but sometimes for certain characteristics of the actor himself," including physical disability, youth, or advanced age. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 32, pp. 174-179 (5th ed.1984); see *id.,* at 179-181; see also Restatement (Third) of Torts § 10, Comment b, pp. 128-130 (Tent. Draft No. 1, Mar. 28, 2001) (all American jurisdictions count a person's childhood as a "relevant circumstance" in negligence determinations). This allowance makes sense in light of the tort standard's recognized purpose: deterrence. Given that purpose, why pretend that a child is an adult or that a blind man can see? See O. Holmes, The Common Law 85-89 (M. Howe ed.1963).

In the present context, that of *Miranda*'s "in custody" inquiry, the law has introduced the concept of a "reasonable person" to avoid judicial inquiry into subjective states of mind, and to focus the inquiry instead upon objective circumstances that are known to both the officer and the suspect and that are likely relevant to the way a person would understand his situation. See *Stansbury, supra,* at 323-325, 114 S.Ct. 1526; *Berkemer,* 468 U.S., at 442, and n. 35, 104 S.Ct. 3138. This focus helps to keep *Miranda* a workable rule. See *Berkemer, supra,* at 430-431, 104 S.Ct. 3138.

In this case, Alvarado's youth is an objective circumstance that was known to the police. It is not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception. To focus on the circumstance of age in a case like this does not complicate the "in custody" inquiry. And to say that courts should ignore widely shared, objective characteristics, like age, on the ground that only a (large) *minority* of the population possesses them would produce absurd results, the present instance being a case in point. I am not surprised that the majority points to no case suggesting any such limitation. Cf. *Alvarado v. Hickman,* 316 F.3d 841, 848, 851, n. 5 (C.A.9 2002) (case below) (listing 12 cases from 12 different jurisdictions suggesting the contrary).

Nor am I surprised that the majority makes no real argument at all explaining *why* any court would believe that the objective fact of a suspect's age could *never* be relevant. But see *ante,* at ___ 1 (O'CONNOR, J., concurring) ("There may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry"). The majority does discuss a suspect's "history with law enforcement," *ante,* at ___ 15—a bright red herring in the present context where Alvarado's youth (an objective fact) simply helps to show (with the help of a legal presumption) that his appearance at the police station was not voluntary. See *supra,* at ___ 5.

II

As I have said, the law in this case is clear. This Court's cases establish that, even if the police do not tell a suspect he is under arrest, do not handcuff him, do not lock him in a cell, and do not threaten him, he may nonetheless reasonably believe he is not free to leave the place of questioning—and thus be in custody for *Miranda* purposes. See *Stansbury*, 511 U.S., at 325-326, 114 S.Ct. 1526; *Berkemer*, *supra*, at 440, 104 S.Ct. 3138.

Our cases also make clear that to determine how a suspect would have "gaug [ed]" his "freedom of movement," a court must carefully examine "all of the circumstances surrounding the interrogation," *Stansbury*, *supra*, at 322, 325, 114 S.Ct. 1526 (internal quotation marks omitted), including, for example, how long the interrogation lasted (brief and routine or protracted?), see, *e.g.*, *Berkemer*, *supra*, at 441, 104 S.Ct. 3138; how the suspect came to be questioned (voluntarily or against his will?), see, *e.g.*, *Mathiason*, 429 U.S., at 495, 97 S.Ct. 711; where the questioning took place (at a police station or in public?), see, *e.g.*, *Berkemer*, *supra*, at 438-439, 104 S.Ct. 3138; and what the officer communicated to the individual during the interrogation (that he was a suspect? that he was under arrest? that he was free to leave at will?) see, *e.g.*, *Stansbury*, *supra*, at 325, 114 S.Ct. 1526. In the present case, every one of these factors argues—and argues strongly—that Alvarado was in custody for *Miranda* purposes when the police questioned him.

Common sense, and an understanding of the law's basic purpose in this area, are enough to make clear that Alvarado's age—an objective, widely shared characteristic about which the police plainly knew—is also relevant to the inquiry. Cf. *Kaupp v. Texas*, 538 U.S. 626, 629-631, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003) *(per curiam)*. Unless one is prepared to pretend that Alvarado is someone he is not, a middle-aged gentleman, well-versed in police practices, it seems to me clear that the California courts made a serious mistake. I agree with the Ninth Circuit's similar conclusions. Consequently, I dissent.

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2. JUVENILE PROCESSING OFFICE VIOLATION REQUIRES SHOWING OF CAUSATION TO MAKE STATEMENT INADMISSIBLE

¶ 04-4-03. **In the Matter of J.M.S.**, UNPUBLISHED, No. 06-04-00008-CV, 2004 WL 1968644, 2004 Tex.App.Lexis 8139 (Tex.App.—Texarkana 9/8/04) *Texas Juvenile Law* 358 (6th Ed. 2004).

Facts: In a single point of error, J.M.S., a minor, asserts his probation was improperly modified, placing him in the custody of the Texas Youth Commission until his twenty-first birthday, because his statement detailing his involvement in a burglary was improperly admitted into evidence at his probation modification trial. [FN1] J.M.S. bases his assertion on the argument that his statement was taken in violation of juvenile processing and detention provisions of the Texas Family Code. Our answers to two questions will determine the outcome of his appeal:

> FN1. In November 2002, then fourteen-year-old J.M.S. pled true to allegations of delinquent conduct and was placed on two years' probation. Less than a year later, the State filed a motion to modify disposition, alleging he had violated the terms of probation by committing burglary of a habitation. After hearing the evidence, the court agreed, declared J.M.S. a child engaged in delinquent conduct, and modified his probation. J.M.S. claims that, without admission of his statement, any remaining inculpatory evidence is factually insufficient to support this modification.

1. Did any violation in J.M.S.'s initial questioning by investigators cause him to make his statement about being involved in the burglary?

2. Was J.M.S.'s statement "signed in the presence of a magistrate" as required by Section 51.095(a) (1)(B)(i) of the Texas Family Code, although J.M.S. had first signed the statement in the presence of an investigator?

Because we hold that (1) J.M.S.'s statement did not result from any violation in his initial questioning, and (2) his statement was ultimately properly signed in the presence of a magistrate, we affirm the trial court's modification of J.M.S.'s probation.

Held: Affirmed.

Opinion Text:

1. *J.M.S.'s Statement Did Not Result From Any Violation in His Initial Questioning*

J.M.S. first argues that investigators improperly questioned him about his possible involvement in a burglary by conducting his interview in a room not designated as a juvenile processing office. According to J.M.S., investigators should have taken him "without unnecessary delay" to an office so designated or complied with any one of six other enumerated options. *See* Tex. Fam.Code Ann. § 52.02(a) (Vernon Supp.2004-2005), § 52.025(a) (Vernon 2002). Because they did not do so, J.M.S. says, the trial court erred by admitting his statement into evidence.

We are to review the admission of evidence for an abuse of discretion by the trial court. *Salazar v. State,* 38 S.W.3d 141, 153 (Tex.Crim.App.2001). We should affirm the trial court's decision if it is within "the zone of reasonable disagreement." *Id.* The "trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony." *State v. Ross,* 32 S.W.3d 853, 855 (Tex.Crim.App. 2000). Where the trial court makes no explicit finding of fact, we assume the court made implied findings that support its ruling, provided such implied findings are supported in the record. *Roquemore v. State,* 60 S.W.3d 862, 866 (Tex.Crim.App.2001). [FN2] If the trial court's ruling is correct under any theory of law applicable to the case, it will be sustained. *Id.*

> FN2. Though *Roquemore* involved a motion to suppress evidence, "[a] 'motion to suppress' evidence is nothing more than a specialized objection to the admissibility of that evidence." *Galitz v. State,* 617 S.W.2d 949, 952, n. 10 (Tex.Crim.App.1981).

We are not required to determine whether investigators violated Section 52.02 or Section 52.025 when they initially questioned J.M.S. before taking him to the juvenile processing office, because we believe the trial court was within its discretion in impliedly finding that J.M.S.'s statement was not obtained as a result of any such violation. Even if J.M.S. was in custody at the time of his initial questioning—and therefore his questioning violated Section 52.02 of the Texas Family Code—exclusion of his statement on that basis would also require the trial court to have found that the violation resulted in J.M.S.'s statement. In *Gonzales v. State,* 67 S.W.3d 910, 912 (Tex.Crim.App.2002), the Texas Court of Criminal Appeals ruled that a Section 52.02 violation does not require exclusion of evidence unless the evidence was obtained as a result of the violation and thus was evidence "obtained ... in violation" of law as proscribed by Article 38.23(a) of the Texas Code of Criminal Procedure. *See* Tex.Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp.2004-2005). We believe the trial court was at least in the zone of reasonable disagreement in impliedly finding no such causal connection. *See Salazar,* 38 S.W.3d at 154. Therefore, the trial court did not abuse its discretion in admitting the statement over J.M.S.'s objection premised on his initial questioning.

2. J.M.S.'s Statement Was Properly Signed in the Presence of a Magistrate

J.M.S. also claims the trial court erroneously admitted his statement because he initially signed it in the presence of an investigator instead of the appropriate magistrate. We disagree.

Section 51.095 provides, among other things, that "the statement of a child is admissible in evidence ... if ... the statement [is] signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present." Tex. Fam.Code Ann. § 51.095(a)(1)(B)(i) (Vernon 2002).

It is undisputed that the investigator questioning J.M.S. took him to the magistrate's office, a designated juvenile processing office, after determining he had been involved in the burglary. Once there, the investigator left J.M.S. alone with the magistrate, who advised J.M.S. of his rights. After determining J.M.S. understood his rights and still wanted to make a statement, the magistrate exited and allowed the investigator to re-enter the room to record J.M.S.'s dictated confession. The complained-of conduct occurred at the conclusion of J.M.S.'s meeting with the investigator. With the one-page statement nearly completed, the investigator noted the date and time at the bottom of the page and asked J.M.S. to sign the document, adopting it as his own. The parties do not dispute that this action constituted a clear violation of Section 51 .095(a)(1)(B)(i); the question is whether the initial error was made irrelevant or was cured by the magistrate's subsequent actions resulting in the statement being re-signed.

The magistrate testified she re-entered her office after the investigator indicated he was finished taking J.M.S.'s statement. Once again alone with J.M.S., the magistrate began reviewing the one-page statement, asking whether J.M.S. acknowledged making the statement, whether it was correct, and whether it contained the information he wished to convey. Reaching the bottom of the page, the magistrate noticed that J.M.S. had already signed the statement. She recognized that this did not comport with proper procedure, so she corrected the time and crossed out J.M.S.'s signature. Then, only after she was satisfied that J.M.S. fully understood the nature and contents of his statement and that he knowingly, intelligently, and voluntarily waived his rights, the magistrate asked J.M.S. to sign the statement again.

The magistrate testified:

> Q And then after you were satisfied that [J.M.S.] understood and that this was his statement, is that when he signed the second time?
> A It was.
> ....
> Q Okay. Now after he signed that did you then proceed to certify the statement?
> A I did.
> Q And how did you do that?

A I read over this form. It's a certification form, and I go through it and make sure that I did everything that I said I did in the first part of the form. Read over it, make sure that, you know, the statement's in writing, that the child was in my office, that I gave him his juvenile warning, make sure that he signed it in my presence, and make sure that he, you know, understands.
....
Q Okay, and is it your belief that he knowingly and intelligently waived his rights and made this statement?
A It is.
....
Q Now, ... are you telling the Court that you took this statement, and you certified that you read him all his rights and that he signed the statement, and that's what he wanted to do? Nobody made him?
A This is correct.
Q No coercion?
A No, sir.

There is no question that the Texas Court of Criminal Appeals requires strict compliance with those provisions of the Texas Family Code dealing with the release or delivery of juveniles and the admissibility of juvenile statements. *Roquemore,* 60 S.W.3d at 868; *Baptist Vie Le v. State*, 993 S.W.2d 650, 655-56 (Tex.Crim.App.1999); *Comer v. State*, 776 S.W.2d 191, 196-97 (Tex . Crim.App.1989). We believe that, despite the investigating officer's error, J.M.S.'s rights and privileges were protected when the magistrate spoke privately with J.M.S. and determined that he not only understood the nature and contents of his statement, but that he was also signing it knowingly, intelligently, and voluntarily. We hold the trial court correctly found the magistrate's actions, resulting in J.M.S.'s re-signing the statement, adequately complied with the statute, notwithstanding the earlier error, making the statement admissible.

Conclusion

Having determined that there was no error in admitting J.M.S.'s statement, we affirm the judgment of the trial court.

II. CERTIFICATION PROCEEDINGS

FAILURE TO SERVE RESPONDENT'S FATHER IS JURISDICTIONAL DEFECT IN CERTIFICATION PROCEEDINGS

Carlson v. State, ___ S.W.3d ____, No. 11-03-00001-CR, 2004 WL 2331339, 2004 Tex.App.Lexis 9208 (Tex.App.—Eastland 10/14/04) *Texas Juvenile Law* 132 (6th Ed. 2004).

Facts: After the juvenile court waived jurisdiction and transferred this case to district court, Brian Carlson pleaded guilty to the offense of aggravated assault with a deadly weapon. The district court convicted appellant and assessed his punishment at confinement for three years. We reverse and remand.

In both issues on appeal, appellant challenges the juvenile court's jurisdiction to transfer appellant to district court to be tried as an adult. [FN1] In the first issue, appellant contends that his parent did not receive adequate service of the summons to appear at the transfer hearing. In the second issue, appellant argues that the proof at the transfer hearing was not sufficient with respect to appellant's age.

FN1. We note that a direct appeal from the transfer or certification order is no longer available under TEX. FAM. CODE ANN. § 56.01 (Vernon 2002). *See Small v. State,* 23 S.W.3d 549 (Tex.App.—Houston [1st Dist.] 2000, pet'n ref'd). Thus, issues relating to the transfer proceeding are properly raised in an appeal from a conviction after transfer.

Held: Reversed and remanded.

Opinion Text: Juvenile proceedings were initiated against the 15-year-old appellant for beating the victim with a metal rod in May 2002. On July 9, 2002, the State filed a petition for discretionary transfer of appellant's case to district court pursuant to TEX. FAM. CODE ANN. § 54.02 (Vernon 2002). The hearing was set for July 16 at 10:00 a.m. Appellant was duly summoned and served with a copy of the petition on July 9. On July 10, the summons to be served upon appellant's father was mailed to the Craven County Sheriff's Office in North Carolina. However, the Craven County Sheriff's Office did not receive the summons until July 16, too late to timely serve it upon appellant's father. The transfer hearing commenced on July 16, but was recessed pending service upon appellant's father. The hearing resumed on July 18, 2002, at 11:15 a.m. In the meantime, appellant's father had been served in North Carolina

on July 17 at 4:09 p.m. The summons that was served upon appellant's father on the 17th was the original summons indicating that the hearing was to be held on the 16th.

Neither appellant's father nor mother attended the hearing. Service of a summons upon appellant's mother was not attempted. The record indicates that she was suffering from severe mental problems and was in the Big Spring State Hospital at the time of the hearing. Appellant's attorney was appointed to serve as appellant's guardian ad litem for the purpose of the transfer hearing. At the conclusion of the transfer hearing, the county court, sitting as a juvenile court, waived jurisdiction and transferred appellant to the appropriate criminal court to be tried as an adult.

Section 54.02(b) provides that the "petition and notice requirements" of TEX. FAM. CODE ANN. §§ 53.04, 53.05, 53.06, & 53.07 (Vernon 2002) "must be satisfied." Section 53.06(a)(2) provides that the juvenile court "shall direct issuance of a summons" to the child's parent, guardian, or custodian. Service upon either parent is sufficient to satisfy this mandate. *In the Matter of Edwards*, 644 S.W.2d 815, 818 (Tex.App.-Corpus Christi 1982, writ ref'd n.r.e.). Although service upon a parent is a "waivable right" pursuant to the waiver provisions in Section 53.06(e), no such waiver occurred in this case. Neither of appellant's parents attended the hearing or waived service of the summons in writing. Since the right to service of the summons was not waived, service upon a parent was mandatory.

The service that was eventually had upon appellant's father was not effective. With respect to service upon a nonresident, Section 53.07(a) provides as follows:

> If a person to be served with a summons ... is outside this state but he can be found or his address is known, or his whereabouts or address can with reasonable diligence be ascertained, service of the summons may be made either by delivering a copy to him personally or mailing a copy to him by registered or certified mail, return receipt requested, at least five days before the day of the hearing.

Appellant's father was not served five days prior to the transfer hearing. In fact, he was served one day after the date upon which the summons indicated the hearing was to be held.

Previous cases addressing the lack of service of a summons upon the child or a parent have held that the issue is jurisdictional. *Grayless v. State*, 567 S.W.2d 216 (Tex.Cr.App.1978); *Ex parte Burkhart*, 253 S.W. 259 (Tex.Cr.App.1923). Consequently, we must conclude that, because appellant's parent was not duly served with the summons in this case, the juvenile court was without jurisdiction to transfer appellant to district court. Furthermore, because the juvenile court lacked jurisdiction to enter a valid transfer and certification of appellant, the district court lacked jurisdiction to try appellant for the offense. TEX. PENAL CODE ANN. § 8.07 (Vernon Supp.2004-2005); *Grayless v. State*, *supra* at 220.

The State argues that, because appellant's father was not a resident of Texas, his attendance at the transfer hearing was excused. We do not dispute such an assertion. TEX. FAM. CODE ANN. § 51.115 (Vernon 2002) provides an exception to the mandatory attendance at a transfer hearing of a parent if that parent is not a resident of this state. However, Section 51.115 deals with attendance, not service. Section 51.115 does not excuse the State's failure to serve a summons in compliance with the mandate of Section 54.02(b) and the sections referred to therein.

Having found error, we must determine whether the error is reversible. Even jurisdictional errors may be subject to a harmless error analysis. *Mendez v. State*, 138 S.W.3d 334, 339-40 (Tex.Cr .App.2004)(Except for certain federal constitutional errors labeled as "structural," no error—including an error relating to jurisdiction, voluntariness of the plea, or any other mandatory requirement—is categorically immune to a harmless error analysis). The court in *Mendez* recognized that some errors defy analysis and that "some kinds of errors (particularly jurisdictional ones) will never be harmless." *Id.* at 340. We cannot find that the error in this case did not affect appellant's substantial rights. Therefore, the error was not harmless under TEX.R.APP.P. 44.2(b). Appellant's first issue is sustained. Accordingly, we need not address the second issue. TEX.R.APP.P. 47.1.

Both the order of the Brown County Court (sitting as a juvenile court) waiving jurisdiction and transferring appellant to district court and the judgment of the district court convicting appellant of the offense of aggravated assault are void. Consequently, the judgment of conviction is reversed, and the cause is remanded to the Brown County Court for further proceedings.

III. DETERMINATE SENTENCE ACT

1. UNFITNESS TO STAND TRIAL RULES APPLY TO RELEASE/TRANSFER HEARING; ORAL MOTION FOR PSYCHIATRIC EXAM OKAY

¶ 04-1-22. **In the Matter of N.S.**, UNPUBLISHED, No. 10-01-319-CV, 2004 WL 254215, 2004 Tex. App.Lexis 1449 (Tex.App.—Waco 2/11/04, rev. denied) *Texas Juvenile Law* (5th Ed. 2000).

Facts: In this appeal we decide what if anything a juvenile court must do when a juvenile offender whom the Texas Youth Commission ("TYC") has referred for transfer to the institutional division of the Texas Department of Criminal Justice ("TDCJ") alleges himself to be incompetent. N.S. contends in his sole issue that the court abused its discretion by failing to appoint a psychiatric expert to evaluate his competency when his counsel raised the issue at the beginning of the transfer hearing.

The State initiated proceedings against N.S. in juvenile court by filing a petition on February 2, 2000 alleging that he had engaged in delinquent conduct by committing the offense of capital murder on or about May 9, 1999. The State filed an application for court-ordered temporary mental health services on February 7 alleging N.S. to be mentally ill. The court signed an order on February 18 finding that N.S. was mentally ill and that he posed a danger to himself and others. The court ordered that he receive temporary inpatient mental health services.

After N.S. was treated and released, he entered a negotiated plea. The court found that N.S. had engaged in delinquent conduct as alleged. Pursuant to the plea agreement, the court assessed a determinate sentence of forty years and committed N.S. to TYC.

TYC referred N.S. to the juvenile court for transfer to TDCJ after he turned sixteen. At the commencement of the transfer hearing, N.S.'s counsel informed the court that he had experienced great difficulty communicating with N.S. and had "serious concerns ... that [N.S.] [wa]s not able to assist [counsel] in th[e] hearing." Counsel stated, "I can't certif[y] to the court that I think my client understands what's going on." Counsel asked the court to appoint a psychiatrist to determine whether N.S. was competent for the hearing.

The court made a brief recitation of N.S.'s history regarding mental health issues. The court stated:

> I believe that there is enough documentation in the record from the mental health professionals that the court of necessity has to rely on to find that there is—there is no probable cause ... to believe that he has a mental illness, so therefore I'm going to overrule your motion....

The court then asked N.S. a series of basic questions (*e.g.*, "Are you [N.S.]?") to which the court received mostly unintelligible responses.

N.S.'s counsel informed the court that these were the same kind of responses he had obtained from N.S. when he tried to discuss the case with him. The court concluded, "To the court [N.S.'s responses] match the behavior that is detailed in the papers forwarded to the court by [TYC], so I'm going to maintain my ruling here, so let's proceed with the hearing."

At the conclusion of the hearing, the court ordered N.S.'s transfer to TDCJ to serve out the remainder of his sentence.

Held: Affirmed.

Opinion Text: PERTINENT AUTHORITIES

Based on the date of N.S.'s delinquent conduct, a former version of section 54.11 of the Juvenile Justice Code applied to the transfer hearing. [FN1] That statute provides in pertinent part:

> (d) At a hearing under this section the court may consider written reports from probation officers, professional court employees, or professional consultants, in addition to the testimony of witnesses. At least one day before the hearing, the court shall provide the attorney for the person to be transferred or released under supervision with access to all written matter to be considered by the court.
>
> (e) At the hearing, the person to be transferred or released under supervision is entitled to an attorney, to examine all witnesses against him, to present evidence and oral argument, and to previous examination of all reports on and evaluations and examinations of or relating to him that may be used in the hearing.
>
> ....
>
> (i) On conclusion of the hearing on a person who is referred for transfer under Section 61.079(a), Human

> Resources Code, the court may order:
>
> (1) the return of the person to the Texas Youth Commission; or
>
> (2) the transfer of the person to the custody of the institutional division of the Texas Department of Criminal Justice for the completion of the person's sentence.
>
> ....
>
> (k) In making a determination under this section, the court may consider the experiences and character of the person before and after commitment to the youth commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 46, 1995 Tex. Gen. Laws 2517, 2542 (amended 2001) (current version at Tex. Fam.Code. Ann. § 54.11 (Vernon Supp.2004)) (hereinafter cited as "Tex. Fam.Code. Ann. § 54.11").

The former section [FN2] 55.04 (governing juvenile offenders "unfit to proceed") potentially applies to N.S.'s case. [FN3] That statute provides in pertinent part:

> (a) A child alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in his own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures.
>
> (b) If on motion by a party or the court it is alleged that a child may be unfit to proceed as a result of mental illness or mental retardation, the court shall order appropriate examinations as provided by Section 55.01 of this chapter. The information obtained from the examinations must include expert opinion as to whether the child is unfit to proceed as a result of mental illness or mental retardation.

FN2. The term "section" refers hereinafter to a section of the Juvenile Justice Code unless otherwise indicated.

FN3. The Legislature amended section 55.04 and recodified it as section 55.31 in the same year N.S. engaged in the delinquent conduct for which he was adjudicated. Act of May 27, 1999, 76th Leg ., R.S., ch. 1477, § 14, sec. 55.31, 1999 Tex. Gen. Laws 5067, 5076. However, the amended version of the statute applies "only to conduct that occurs on or after the effective date [September 1, 1999] of [the] Act." Act of May 27, 1999, 76th Leg., R.S., ch. 1477, §§ 39(a), 41, 1999 Tex. Gen. Laws 5067, 5090.

Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, sec. 55.04, 1995 Tex. Gen. Laws 2517, 2545 (amended 1999) (current version at Tex. Fam. Code. Ann. § 55.31 (Vernon 2002)) (hereinafter cited as "Tex. Fam.Code. Ann. § 55.04").

Section 55.04 expressly applies to "discretionary transfer[s] to criminal court, adjudication[s], disposition[s], [and] modification[s] of disposition [s]." *Id.* The statute does not on its face seem to apply to section 54.11 transfer hearings. Nevertheless, N.S. contends that due process requires that a juvenile be competent before he can be made to participate in a transfer hearing.

Settled law establishes that juvenile delinquency proceedings must provide constitutionally-mandated due process of law. *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967); *L.G.R. v. State*, 724 S.W.2d 775, 776 (Tex.1987); *In re J.S.S.*, 20 S.W.3d 837, 841-42 (Tex.App—El Paso 2000, pet. denied); *see also R.X.F. v. State*, 921 S.W.2d 888, 895 (Tex. App .—Waco 1996, no writ) ("Our view is that the state can no more deny a juvenile equal protection of the law in a determinate-sentence proceeding than it can an adult in a criminal proceeding."). However, the process due a juvenile delinquent does not equate to that due an adult offender in every instance. *See Gault*, 387 U.S. at 14, 87 S.Ct. at 1436; *In re J.R.R.*, 696 S.W.2d 382, 383-84 (Tex.1985) (per curiam); *J.S.S.*, 20 S.W.3d at 842.

In *Lanes v. State*, the Court of Criminal Appeals adopted a balancing test it distilled from eight foundational decisions of the Supreme Court of the United States "to determine whether and to what degree" a particular constitutional protection must be afforded a juvenile. [FN4] 767 S.W.2d 789, 794 (Tex.Crim.App.1989); *accord Hidalgo v. State*, 983 S.W.2d 746, 751 (Tex.Crim.App.1999). This test requires an appellate court to "balance[ ] the function that [the asserted] constitutional or procedural right serve[s] against its impact or degree of impair-

ment on the unique processes of the juvenile court." *Lanes*, 767 S.W.2d at 794; *accord Hidalgo*, 983 S.W.2d at 751-52.

> FN4. The eight foundational decisions in chronological order: (1) *Haley v. Ohio*, 332 U.S. 596, 601, 68 S.Ct. 302, 304, 92 L.Ed. 224 (1948) (coerced confession cannot be used against juvenile); (2) *Kent v. U.S.*, 383 U.S. 541, 557, 86 S.Ct. 1045, 1055, 16 L.Ed.2d 84 (1966) (juvenile entitled to procedural protections in transfer hearing); (3) *In re Gault*, 387 U.S. 1, 31-55, 87 S.Ct. 1428, 1445-58, 18 L.Ed.2d 527 (1967) (juvenile has due process rights of notice, counsel, confrontation, cross-examination, and privilege against self- incrimination); (4) *In re Winship*, 397 U.S. 358, 368, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970) (State must prove allegation of delinquent conduct beyond a reasonable doubt); (5) *McKeiver v. Pa.*, 403 U.S. 528, 545, 91 S.Ct. 1976, 1986, 29 L.Ed.2d 647 (1971) (juvenile has no constitutional right to jury trial); (6) *Breed v. Jones*, 421 U.S. 519, 528-29, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975) (double jeopardy protections apply to juveniles); (7) *Schall v. Martin*, 467 U.S. 253, 281, 104 S.Ct. 2403, 2419, 81 L.Ed.2d 207 (1984) (pretrial detention of juvenile does not violate due process); (8) *New Jersey v. T.L.O* ., 469 U.S. 325, 341-42, 105 S.Ct. 733, 742-43, 83 L.Ed.2d 720 (1985) (Fourth Amendment does not require probable cause to justify school search).

According to our research, two intermediate appellate courts have employed this test. *See J.S.S.*, 20 S.W.3d at 842-44; *S.D.G. v.. State*, 936 S.W.2d 371, 378-79 (Tex.App—Houston [14th Dist.] 1996, writ denied). We do so as well.

PURPOSES OF JUVENILE JUSTICE SYSTEM

As the Court noted in *Lanes*, the Legislature codified the purposes of the juvenile justice system in the Juvenile Justice Code. *See* 767 S.W.2d at 794. Section 51.01 provides:

> This title shall be construed to effectuate the following public purposes:
>
> (1) to provide for the protection of the public and public safety;
>
> (2) consistent with the protection of the public and public safety:
>
> (A) to promote the concept of punishment for criminal acts;
>
> (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and
>
> (C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
>
> (3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;
>
> (4) to protect the welfare of the community and to control the commission of unlawful acts by children;
>
> (5) to achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and
>
> (6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

Tex. Fam.Code. Ann. § 51.01 (Vernon 2002).

In addition, the statute which authorizes TYC to refer a juvenile for transfer to TDCJ provides for such a referral if "the child's conduct ... indicates that the welfare of the community requires the transfer." Tex. Hum. Res.Code Ann. § 61.079(a)(2) (Vernon 2001). As noted above, section 54.11 allows the court to consider a great many factors in determining whether to order the requested transfer:

> the court may consider the experiences and character of the person before and after commitment to the youth commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Tex. Fam.Code. Ann. § 54.11(k).

In sum, the Texas juvenile justice system (particularly in the context of a transfer hearing under section 54.11) requires courts to balance the need for public safety and punishment for criminal conduct with the medical, educational and rehabilitative needs and the best interests of the juvenile delinquent, while simultaneously ensuring that his "constitutional and other legal rights" are protected.

COMPETENCY REQUIREMENT

Due process requires that an adult criminal defendant be competent to stand trial. *Cooper v. Okla.*, 517 U.S. 348, 354, 116 S.Ct. 1373, 1376, 134 L.Ed.2d 498 (1996); *Drope v. Mo.*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 903-004, 43 L.Ed.2d 103 (1975); *Alcott v. State*, 51 S.W.3d 596, 598 (Tex.Crim.App.2001).

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Cooper, 517 U.S. at 354, 116 S.Ct. at 1376 (quoting *Riggins v. Nev.*, 504 U.S. 127, 139-40, 112 S.Ct. 1810, 1817, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring)); *accord Baltierra v. State*, 586 S.W.2d 553, 556 (Tex.Crim.App.1979); *Garnica v. State*, 53 S.W.3d 457, 458 (Tex.App.—Texarkana 2001, no pet.).

Texas courts have extended this fundamental requirement to criminal proceedings other than a traditional trial. *E.g., Ex parte Potter*, 21 S.W.3d 290, 296-98 (Tex.Crim.App.2000) (extradition); *Thompson v. State*, 654 S.W.2d 26, 27-28 (Tex. App.–Tyler 1983, no pet.) (probation revocation).

The Juvenile Justice Code likewise provides that a juvenile must be competent to "be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition." Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, § 55.04(a), 1995 Tex. Gen. Laws 2517, 2545 (amended 1999); *accord* Tex. Fam.Code. Ann. § 55.31(a). The Legislature's failure to expressly refer to transfer hearings under section 54.11 in this statute could be construed as an expression of legislative intent that the competency procedures of section 55.04 do not apply to transfer hearings. *Cf. J.S.S.*, 20 S.W.3d at 842 (Legislature's failure to expressly provide for privilege against self-incrimination in statute governing disposition hearings "could be interpreted as indicating a legislative determination that the Fifth Amendment privilege does not apply during the disposition hearing").

However, section 311.021(1) of the Code Construction Act provides a presumption that the Legislature enacted section 55.04 intending "compliance with the constitutions of this state and the United States." Tex. Gov't Code Ann. § 311.021(1) (Vernon 1998). Thus, we must interpret section 55.04 in a manner which renders it constitutional if possible. *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 706 (Tex.2002).

In addition, the Legislature expressly provided that the Juvenile Justice Code must be construed in such a manner that "the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced." Tex. Fam.Code. Ann. § 51.01(6). Construing section 55.04 so that it does not apply to transfer hearings could arguably be contrary to these directives.

IMPACT ON JUVENILE JUSTICE SYSTEM

The Beaumont Court has characterized the transfer hearing as one which provides the juvenile offender "a second chance to persuade the court that he or she should not be imprisoned." *In re J.E.H.*, 972 S.W.2d 928, 931 (Tex.App—Beaumont 1998, pet. denied); *accord In re H.V.R.*, 974 S.W.2d 213, 216 (Tex.App.—San Antonio 1998, no pet.); *In re D.S.*, 921 S.W.2d 383, 386 (Tex.App.—Corpus Christi 1996, writ dism'd w.o.j.).

The Beaumont Court concluded in *J.E.H.* that due process requires the appointment of an expert witness for a juvenile offender in a transfer hearing if the juvenile shows the need for the expert "and the fact that the issue concerning which the expert is requested is to be a significant factor in the trial." 972 S.W.2d at 929 (citing *Ake v. Okla.*, 470 U.S. 68, 83, 105 S.Ct. 1087, 1096, 84 L.Ed.2d 53 (1985)). Other courts have recognized that the juvenile has a right to effective assistance of counsel and the right to confront adverse witnesses in a transfer hearing. *See In re R.D.B.*, 20 S.W.3d 255, 258 (Tex.App—Texarkana 2000, no pet.); *In re J.M.O.*, 980 S.W.2d 811, 813 (Tex.App.—San Antonio 1998, no pet.).

A transfer hearing under section 54.11 is more summary in nature than a trial on the merits. It can thus be argued that requiring a separate competency inquiry in the context of a transfer hearing would merely serve to delay what the Legislature intended to be an expedited matter.

However, a juvenile offender in a transfer hearing has: (1) a right to counsel; (2) a right to confront the witnesses against him; (3) a right to present evidence and argument; and (4) a right to examine before hearing all documentary evidence which may be used in the hearing. Tex. Fam.Code. Ann. § 54.11(e). A juvenile's ability to fully enjoy these rights depends in large part on his competence. *See Cooper*, 517 U.S. at 354, 116 S.Ct. at 1376; *Baltierra*, 586 S.W.2d at 556; *Garnica*, 53 S.W.3d at 458. Accordingly, we conclude that due process demands that a juvenile offender be competent before being subjected to a transfer hearing under section 54.11.

The Court of Criminal Appeals reached a similar conclusion when it held that an adult challenging extradition "must be sufficiently competent to consult with his counsel." *Potter,* 21 S.W.3d at 296. The Court determined that, if an accused sufficiently raises the issue of competency in this context, the trial court should conduct a hearing to determine whether the accused is competent. *Id.* at 297-98. Because of the expedited nature of extradition proceedings, the Court concluded that a trial court can refer to the competency provisions of the Code of Criminal Procedure for guidance but such provisions do not necessarily control. *Id.* at 298 n. 11.

A transfer hearing under section 54.11 is likewise expedited in nature. However, section 54.11 provides for much more participation by the juvenile offender than permitted in a habeas proceeding challenging extradition. As the Court of Criminal Appeals noted in *Potter,* a habeas applicant challenging extradition "could conceivably have knowledge of facts relating to" only two pertinent issues: (1) whether he is the person identified in the extradition request; and (2) whether he was present in the demanding state at the time of the alleged offense. *Id.* at 297.

Conversely, a juvenile offender in a transfer hearing must be able to consult with counsel regarding: (1) the witnesses against him; (2) any evidence they may decide to present in opposition to the transfer request; and (3) any documentary evidence which may be used in the hearing. *See* Tex. Fam.Code. Ann. § 54.11(e); *see also id.* § 54.11(k) (providing for broad range of evidence which juvenile court may consider in determining whether to order transfer). Accordingly, we do not purport to promulgate an expedited competency inquiry tailored to the purposes of the transfer hearing. *Cf. Potter,* 21 S.W.3d at 298 n. 11.

Rather, we look to section 55.04 which provides a familiar procedure for juvenile courts to follow. We have concluded that due process requires that a juvenile offender be competent to participate in a transfer hearing. Thus, section 55.04 is arguably unconstitutional to the extent that it does not apply to a transfer hearing. However, we must interpret section 55.04 in a manner which renders it constitutional if possible. Tex. Gov't Code Ann. § 311.021(1); *Marcus Cable Assocs.,* 90 S.W.3d at 706; *see also* Tex. Fam.Code. Ann. § 51.01(6) (Juvenile Justice Code must be construed so that constitutional rights are recognized and enforced).

As stated, section 55.04 expressly applies to "discretionary transfer [s] to criminal court, adjudication[s], disposition[s], [and] modification[s] of disposition[s]." Tex. Fam.Code. Ann. § 55.04(a). The term "modification of disposition" has generally been associated with a hearing to modify a non-TYC disposition under section 54.05 of the Juvenile Justice Code. *See* Tex. Fam.Code. Ann. § 54.05 (Vernon Supp.2004); *e.g., In re L.R.,* 67 S.W.3d 332, 335 (Tex.App.—El Paso 2001, no pet.). However, that precise phrase is not defined in the Juvenile Justice Code. Accordingly, we must apply the ordinary and common meaning of the phrase. Tex. Gov't Code Ann. § 311.011 (Vernon 1998); *City of Austin v. Sw. Bell Tel. Co.,* 92 S.W.3d 434, 442 (Tex.2002).

Section 54.05 applies to "[a]ny disposition, except a commitment to the Texas Youth Commission." Tex. Fam.Code. Ann. § 54.05(a). Thus, a commitment to TYC is a "disposition" under the Juvenile Justice Code. In fact, section 54.04(g) refers to a commitment to TYC under a determinate sentence as "a disposition under Subsection (d)(3)." Tex. Fam.Code. Ann. § 54.04(g) (Vernon Supp.2004). Webster's defines a "modification" in pertinent part as "the making of a limited change in something." *Merriam-Webster's Collegiate Dictionary* 748 (10th ed., 1993).

The court originally imposed a disposition committing N.S. to TYC. Because TYC asked the court to change N.S.'s place of commitment from TYC to TDCJ, TYC was necessarily requesting a modification of the original disposition. Accordingly, we conclude that a transfer hearing under section 54.11 is a "modification of disposition" proceeding to which section 55.04 applies. Now, we determine whether and/or to what extent the juvenile court complied with section 55.04.

SECTION 55.04

Section 55.04(b) provides in pertinent part, "If on motion by a party or the court it is alleged that a child may be unfit to proceed as a result of mental illness or mental retardation, the court *shall* order appropriate examinations as provided by Section 55.01 of this chapter." Tex. Fam.Code. Ann. § 55.04(b) (emphasis added). The State contends that N.S. failed to properly raise the issue because he did not file a written motion alleging his incompetency. We disagree.

Section 55.04(b) requires a "motion." The Juvenile Justice Code does not define the term "motion." *See* Tex. Fam.Code. Ann. § 51.02 (Vernon Supp.2004) ("Definitions" applicable to Juvenile Justice Code). Accordingly, we must apply the ordinary and common meaning of the term. Tex. Gov't Code Ann. § 311.011; *Sw. Bell Tel. Co.,* 92 S.W.3d at 442. Black's Law Dictionary defines a "motion" as a "written or oral application requesting a court to make a specified ruling or order." *Black's Law Dic-*

tionary 1031 (Bryan A. Garner ed., 7th ed., West 1999).

In addition, section 51.17(a) of the Juvenile Justice Code provides that the Rules of Civil Procedure govern juvenile delinquency proceedings except with respect to the burden of proof or when in conflict with a provision of the code. Tex. Fam.Code. Ann. § 51.17(a) (Vernon Supp.2004). Rule of Civil Procedure 21 permits oral motions if presented during the hearing. [FN5] Tex.R. Civ. P. 21; *accord City of Houston v. Sam P. Wallace & Co.*, 585 S.W.2d 669, 673 (Tex.1979); *Lee v. Palo Pinto County*, 966 S.W.2d 83, 85 (Tex.App—Eastland), *pet. denied per curiam*, 988 S.W.2d 739 (Tex.1998).

> FN5. Rule 21 provides in pertinent part:
>
> > Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, *unless presented during a hearing or trial*, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket.
>
> Tex.R. Civ. P. 21 (emphasis added).

Finally, we note that, if the Legislature had intended to require a written motion under section 55.04(b), it could easily have said so. *Cf.* Tex. Fam.Code. Ann. §§ 54.034(2), 56.01(n)(2) (Vernon 2002) (both discussing plea-bargaining juvenile's limited right to appeal rulings on matters raised by pretrial "written motion"). The Legislature's failure to expressly require a written motion indicates that it did not so intend. *See Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 549 (Tex.2001); *Walker v. City of Georgetown*, 86 S.W.3d 249, 257 (Tex. App—Austin 2002, pet. denied).

For the foregoing reasons, we conclude that N.S.'s oral motion sufficiently invoked the court's obligation under section 55.04(b) to "order appropriate examinations as provided by Section 55.01." Tex. Fam.Code. Ann. § 55.04(b).

The version of section 55.01 applicable to N.S.'s case provides in pertinent part,

> "At any stage of the proceedings under this title, the juvenile court may order a child alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision to be examined by appropriate experts, including a physician, psychiatrist, or psychologist." Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, sec. 55.01(a), 1995 Tex. Gen. Laws at 2542-43 (amended 1999) (current version at Tex. Fam.Code. Ann. § 55.11 (Vernon 2002)).

Section 55.04(b) requires a juvenile court on motion to order the examination of the child by an "appropriate expert." The court failed to do so in N.S.'s case. We must determine whether N.S. was harmed by this error.

HARM ANALYSIS

Because N.S. received a determinate sentence, we apply the harmless error standards of Rule of Appellate Procedure 44.2, usually applicable to criminal appeals. *In re L.R.*, 84 S.W.3d 701, 706-07 (Tex.App.—Houston [1st Dist.] 2002, no pet.); *In re C .R.*, 995 S.W.2d 778, 785-86 (Tex. App.—Austin 1999, pet. denied). The proper harm analysis depends on whether the error at issue is "constitutional" or "non-constitutional." *See* Tex.R.App. P. 44.2; *Aguirre-Mata v. State*, 992 S.W.2d 495, 498 (Tex.Crim.App.1999).

N.S. does not complain that the court erred by making him proceed with the transfer hearing even though he was incompetent. That would be a constitutional error. Instead, N.S. complains that the court used an erroneous procedure to determine whether he was competent. This constitutes a "non-constitutional" error. *See Carranza v. State*, 980 S.W.2d 653, 656 (Tex.Crim.App.1998); *Rachuig v. State*, 972 S.W.2d 170, 174-76 (Tex.App.—Waco 1998, pet. ref'd).

Such error does not require reversal unless we conclude that N.S.'s "substantial rights" were affected thereby. Tex.R.App. P. 44.2(b). As this Court has explained,

> In applying the test for "harmless error," our primary question is what effect the error had, or reasonably may have had, upon the jury's decision. We must view the error, not in isolation, but in relation to the entire proceedings. An error is harmless if the reviewing court, after viewing the entire record, determines that no substantial rights of the defendant were affected because the error did not influence or had only a slight influence on the verdict. Stated another way, an error is harmless if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict.
>
> The error must have affected the outcome of the lower court proceedings. That is to say, if we have "grave doubts" about whether an error did not affect the outcome, we must treat

> the error as if it did. "Grave doubt," means that, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." The uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a "substantial and injurious effect or influence in determining the jury's verdict").

Fowler v. State, 958 S.W.2d 853, 865 (Tex.App.—Waco 1997) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 994, 130 L.Ed.2d 947 (1995)), *aff'd*, 991 S.W.2d 258 (Tex.Crim.App. 1999).

Rather than ordering a psychiatric examination, the court reviewed "the papers forwarded to the court by [TYC]." The court also took judicial notice of "all the paperwork filed regarding [N.S.'s] mental health status and all the findings that were made pursuant to that." Although the court did not specifically identify these "papers," the reporter's record contains four TYC reports concerning N.S.: (1) a psychological evaluation report regarding four evaluations, the most recent having been conducted on April 23, 2001 (the "Cuppett report"); (2) at TYC Corsicana Residential Treatment Center report regarding a November 25, 2000 psychological consultation (the "Lloyd report"); (3) a memorandum prepared by a psychiatrist at the residential treatment center regarding a May 1, 2001 mental health status review hearing held to determine whether N.S. should be admitted to TYC's Corsicana Stabilization Unit (the "Taft report"); and (4) an August 25, 2001 report prepared by TYC personnel reviewing N.S.'s history and recommending that he be transferred to TDCJ (the "Cucolo report"). In addition, N.S. offered a report regarding a June 25, 1999 psychological evaluation (the "Shinder report") and a January 12, 2000 psychiatric report (the "Blaisdell report").

Paul Cuppett, a licensed professional counselor employed by TYC, prepared the Cuppett report and testified at the transfer hearing. Cuppett testified and his report reflects his opinion that N.S. is malingering (*i.e.*, faking his psychiatric symptoms). He testified that N.S.'s non-responsive conduct is consistent with his behavior throughout the course of his incarceration and, specifically, during his various psychiatric/psychological evaluations. Cuppett opined that another psychiatric examination would not likely yield different results. He testified, "The preponderance, though, of the data from my evaluation and prior evaluations all suggest malingering is at least a piece of what's going on with [N.S.]." He noted that any expert who was called upon to conduct an additional evaluation "would once again be reliant on data generated by other evaluators as well as their impressions on what the lack of interaction means."

The Lloyd report, the Taft report, and the Cucolo report all conclude that N.S. has been malingering throughout the course of his incarceration.

The Shinder report similarly notes that N.S. "did not put forth optimal effort in [his] evaluation." The Shinder report reflects that N.S. understood the charges against him at that time and understood the probable disposition of his case. [FN6] The Shinder report also indicates that N.S. understood the nature of the proceedings against him. [FN7]

> FN6. N.S. told Dr. Shinder in this evaluation, "They say I will probably go to TYC for a while. I don't want to go, but if I have to go, I'll go and just take it."

> FN7. N.S. referred to his lawyer as "someone who helps me try to get out of this" and the judge as "someone who may give me a chance if I cooperate."

The Blaisdell report provides information most likely to support a conclusion that N.S. was not competent at the time of the transfer hearing. Dr. Blaisdell opined that N.S. seemed to have difficulty understanding the nature of the proceedings or the probable disposition of his case. He concluded:

> This case involves the analysis of several pieces of data, many of which do not point to the same conclusion, if analyzed at different points in time. If [N.S.] had been interviewed and assessed for this through much of 1999, he would likely have been found competent to stand trial. It is clear from the videotape shortly after his arrest that he was able to understand and appreciate the charges and would have likely been able to assist his attorney in his defense. This is supported by some of the findings from both psychological evaluations performed in the first half of 1999. However, beginning this past Fall, I believe that the evaluee began experiencing a deterioration of his mental status and his psychiatric functioning. This is clearly a young man with some sociopathic traits; as such, the probability of malingering cannot be discounted. However, in my professional medical opinion, I believe that this is not the most relevant problem at this point.

In sum, all but the Blaisdell report suggest that N.S. is competent and malingering. Even Dr. Blaisdell could not discount "the probability of malinger-

ing." Cuppett testified that N.S.'s behavior while in TYC custody and his conduct at each of his psychiatric/psychological evaluations has remained consistent. He opined that an additional evaluation would not likely yield a different conclusion.

For the foregoing reasons, the court's erroneous failure to appoint an "appropriate expert" to evaluate N.S.'s competency did not affect his substantial rights. *See* Tex.R.App. P. 44.2(b). Accordingly, we conclude that his sole issue is without merit.

Chief Justice GRAY concurring.

I agree that the order transferring N.S. to prison should be affirmed. But, if we have to spend 18 pages to address an issue not raised by the parties, we need to reexamine what it is we are doing. This is such a case.

Pursuant to a plea agreement, the juvenile court adjudicated N.S. delinquent for committing capital murder, assessed a determinant sentence of 40 years, and committed N.S. to the Texas Youth Commission with the possibility of a transfer to prison. Tex. Fam.Code Ann. § 54.04(d)(3) (Vernon 2002). N.S. did not appeal his adjudication or disposition.

After N.S. turned 16 years old, the Texas Youth Commission referred N.S. to the juvenile court for transfer to prison. *See* Tex. Hum. Res.Code Ann. § 61.079 (Vernon 2001). A release/transfer [FN1] hearing before the juvenile court was scheduled within 60 days of the Commission's referral. *See* Tex. Fam.Code Ann. § 54.11 (Vernon 2002). At the hearing, N.S.'s counsel informed the juvenile court that he had difficulty communicating with N.S. and had "serious concerns" that N.S. was not able to assist him during the hearing. Counsel asked the court to consider delaying the hearing and appointing a psychiatrist to determine if N.S. was competent to proceed with the hearing. The juvenile court denied counsel's request.

> FN1. The record contains a letter from the Texas Youth Commission requesting a transfer hearing to determine whether N.S. should be transferred to prison. According to section 54.11 of the Texas Family Code, the trial court may, on conclusion of a hearing on a person referred for transfer, order the return of the person to the Texas Youth Commission or the transfer of the person to prison for completion of the person's sentence. Tex. Fam.Code Ann. § 54.11(i)(Vernon Supp. 2004). The Texas Youth Commission has the option to request a release hearing or a transfer hearing. *See* Tex. Hum. Resources Code Ann. §§ 61.079(a) & 61.081(f)(Vernon 2001). We use the phrase "release/transfer hearing" rather than "transfer hearing" as the majority does to avoid confusion of this post-trial, post-sentence hearing with the ability of the juvenile court to waive its jurisdiction prior to adjudication and transfer the juvenile to criminal court. *See* Tex. Fam.Code Ann. § 54.02 (Vernon 2002).

The hearing continued, and the court ordered N.S. transferred to prison. *Id.* § 54.11(i)(2).

While I agree that the juvenile court's order should be affirmed, I disagree with the analysis conducted by the majority.

DUE PROCESS IS NOT THE ISSUE

The majority opinion spends a great deal of time discussing whether due process requires N.S. to be competent before being subjected to a "transfer hearing." This entire discussion is unnecessary, and I express no opinion on the issue.

Constitutional rights, including allegations of due process violations, can be waived by a failure to present the argument to the trial court. *See Whatley v. State*, 946 S.W.2d 73, 75 (Tex.Crim. App.1997); *Cockrell v. State*, 933 S.W.2d 73, 94-95 (Tex.Crim.App.1996) (Maloney, J., concurring); *Ieppert v. State*, 908 S.W.2d 217, 219 (Tex.Crim.App.1995). N.S. did not argue to the trial court that due process required that he be competent before being subjected to a "transfer hearing." He simply wanted a delay in the proceedings to have a psychiatrist appointed to examine him. The majority's due process discussion is not responsive to any issue raised by N.S. and should not be addressed.

Likewise, even constitutional issues must be adequately briefed. *See Chuong Duong Tong v. State*, 25 S.W.3d 707, 710 (Tex.Crim.App.2000). The only argument made by N.S. that could remotely be considered an argument concerning due process came in a letter brief to the court after oral argument. N.S. stated that a "transfer hearing" was "roughly equivalent" to the punishment phase of a criminal trial and that the guarantee of the due process right to be competent applied during a probation revocation hearing. There was no discussion as to why a release/transfer hearing was equivalent to the punishment phase of a criminal trial. There was also no connection made between a release/transfer hearing and a probation revocation hearing. Thus, a due process argument was not properly briefed and should not be considered.

With that said, I write to discuss the issue *actually* presented by the parties at trial and in their briefs.

THE ISSUE

N.S. contends that the trial court erred in failing to continue his release/transfer hearing and in

failing to appoint a psychiatric expert to determine N.S.'s competency. N.S. relies primarily on the provisions of Texas Family Code section 55.31 in support of his appeal. That section provides in part:

> A child ... found to have engaged in delinquent conduct ... who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures.

Tex. Fam.Code Ann. § 55.31(a) (Vernon 2002). This section further provides that on a motion by a party, the juvenile court shall determine whether probable cause exists to believe that the juvenile is unfit to proceed as a result of mental illness or mental retardation. *Id.* at (b). If the court determines that there is probable cause to believe the juvenile is unfit to proceed, the court shall temporarily stay the proceeding and order the juvenile to be examined by a mental health agency or professional. *Id.* at (c); Tex. Fam.Code Ann. § 51.20 (Vernon 2002). It is this probable cause determination about which N.S. complains.

Without argument to the juvenile court or citation of authority to this Court, N.S. takes the position that the provisions of section 55.31 apply to a release/transfer hearing held under section 54.11 of the Texas Family Code. In its response to N.S.'s issue, the State challenges the applicability of section 55.31 to a release/transfer hearing. After argument, N.S. submitted a letter brief in which he contended, in effect, that regardless of whether section 55.31 applied, section 55.11 would apply to a release/transfer hearing. Section 55.11 pertains to juvenile mental illness determinations and examinations. *See* Tex. Fam.Code Ann. § 55.11 (Vernon 2002).

But sections 55.11 and 55.31 do not control this appeal. N.S.'s delinquent conduct occurred in May of 1999. Sections 55.11 and 55.31 became effective on September 1, 1999 and apply "only to conduct that occurs on or after the effective date of this Act." Act of May 27, 1999, 76th Leg., R.S., ch. 1477, §§ 39(a), 41, 1999 Tex. Gen. Laws 5067, 5090. Conduct violating a penal law of the State occurs on or after the effective date of these sections if every element of the violation occurs on or after that date. *Id.* Conduct that occurs *before* the effective date of these sections is covered by the law in effect at the time the conduct occurred, and the former law is continued in effect for that purpose. *Id.* The statute in effect at the time N.S.'s conduct occurred was former section 55.04. *See* Act of May 27, 1995, 74th Leg., R .S., ch. 262, § 47, 1995 Tex. Gen. Laws 2517, 2545 (amended 1999) (hereinafter referred to as "former section 55.04"). [FN2]

> FN2. There is no comparable statute to section 55.11 other than former section 55.04. Former section 55.02, entitled "Child with Mental Illness," did not contain a mechanism to require the court to order psychiatric examinations. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, 1995 Tex. Gen. Laws 2517, 2543 (amended 1999).

At the release/transfer hearing and in their briefs, the parties argued whether there was evidence of probable cause to determine that N.S. was unfit to proceed. Probable cause is only relevant under the current provisions, not former section 55.04. Thus, the parties were effectively relying on the application of the current provisions in their arguments to the juvenile court regarding N.S.'s fitness to proceed and the trial court's duty to ha7(ile cou)-4.7(r to (ei cod")-4.8(t)1a2) (h)-3

This hearing had already occurred and is not the subject of this appeal.

Section 54.03 provides for an "Adjudication Hearing," where it is determined whether the juvenile engaged in delinquent conduct. Tex. Fam.Code Ann. § 54.03 (Vernon 2002). This hearing is similar to the guilt/innocence phase of a criminal trial. And the State has the burden of proving the juvenile en-

sion ("TYC") to the Institutional Division of the Texas Department of Criminal Justice ("TDCJ"). In two issues, C.G. contends that the trial court erred in admitting the testimony of a TYC official at the transfer hearing and that the evidence is insufficient to support the trial court's transfer order.

In March of 2000, C.G. waived his right to a jury trial and pled true to aggravated sexual assault of his five-year-old half-sister. *See* Tex. Penal Code Ann. § 22.021 (Vernon 2000). The trial court entered its order of adjudication and sentenced C.G. to a five-year determinate sentence to commence at TYC. After conducting a transfer hearing on February 3, 2003, the trial court ordered C.G. to be transferred to TDCJ for the remainder of his sentence. This appeal ensued.

Held: Affirmed.

Opinion Text: STANDARD OF REVIEW

When reviewing the trial court's decision to transfer a juvenile from TYC to TDCJ, the reviewing court employs an abuse of discretion standard. *In the Matter of J.M.O.*, 980 S.W.2d 811, 813 (Tex. App.—San Antonio 1998, pet. denied). The entire record must be reviewed to determine if the trial court acted without reference to guiding rules and in an arbitrary manner. *Id.* If some evidence exists to support the trial court's decision, there is no abuse of discretion. *Id.*

ANALYSIS

In deciding whether to transfer a juvenile to TDCJ, a court may consider: 1) the experiences and character of the juvenile before and after commitment to TYC; 2) the nature of the offense that the juvenile committed and the manner in which it was committed; 3) the ability of the juvenile to contribute to society; 4) the protection of the victim of the offense or any member of the victim's family; 5) the recommendations of TYC and prosecuting attorney; 6) the best interest of the juvenile; and 7) any other relevant factor. Tex. Fam.Code Ann. § 54.11(k) (Vernon 2002). Additionally, the court may consider written reports from probation officers, court employees, professional consultants, and testimony from witnesses. Tex. Fam.Code Ann. § 54.11(d). At least one day before the hearing, the court must provide the juvenile's counsel with access to all written materials to be considered by the court. *Id.* The juvenile is entitled to examine all witnesses against him, to present evidence and argument, and to review all reports and evaluations that may be used at the hearing. Tex. Fam.Code Ann. § 54.11(e); *see In the Matter of M.R.*, 5 S.W.3d 879, 881 (Tex.App.—San Antonio 1999, pet. denied).

1. Admission of Cucolo's Testimony

In his first issue, C.G. contends the trial court erred in permitting Leonard Cucolo ("Cucolo"), a TYC official, to testify on behalf of the State based on his report summarizing C.G.'s behavior at TYC. He 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 was inadmissible hearsay. *See* Tex.R. Evid. 602, 703, 802.

Upon commencement of the hearing, the trial court asked C.G.'s attorney if he had received a copy of the report and access to other court documents at least one day prior to the hearing. After C.G.'s attorney confirmed that he had received the TYC report as well as access to the other documents, the State called Cucolo to testify about C.G.'s progress while incarcerated at TYC. When the State attempted to introduce Cucolo's report into evidence, C.G.'s attorney objected to the portions of the report regarding C.G.'s treatment and behavioral summary because they were not based on Cucolo's personal knowledge. The argument raised on appeal is that Cucolo's testimony was inadmissible; however, C.G.'s objection at the hearing dealt only with the admissibility of the report itself, not Cucolo's testimony. Therefore, C.G.'s argument on appeal was not preserved for appellate review. Tex.R.App. P. 33.1.

Even if C.G.'s issue on appeal had been preserved, it would have failed. When the juvenile has received a copy of the TYC summary report before the hearing, a TYC official may testify to hearsay contained in the report. *In the Matter of M.R.*, 5 S.W.3d at 882; *In the Matter of J.M.O.*, 980 S.W.2d at 813. A transfer hearing does not have the same stringent due process requirements as a trial where a defendant's guilt or innocence is decided. *In the Matter of M.R.*, 5 S.W.3d at 881-82; *In the Matter of J.M.O.*, 980 S.W.2d at 813. The juvenile's limited right of confrontation at a transfer hearing is adequately protected by his ability to call the authors of the report for purposes of cross-examination. *In the Matter of J.M.O.*, 980 S.W.2d at 813. Therefore, it was not error to permit Cucolo to testify based on the report at the transfer hearing.

2. Sufficiency of the Evidence

In his second issue, C.G. argues the trial court erred in transferring him to TDCJ because there was insufficient evidence that he posed a continuing threat to his half-sister or that he was unable to make a positive contribution to society.

Cucolo testified that the purpose of his report was to evaluate C .G.'s overall progress and his risk of re-offending, and to make a recommendation regarding the status of C.G.'s incarceration. Cucolo

testified that while in TYC custody, C.G. had committed 81 conduct violations, was placed in solitary confinement on ten different occasions for aggressive behavior, and failed to fully participate in the rehabilitation program for sex offenders. He stated that while C.G. had made excellent academic progress, he posed a high risk of committing another offense if released. Cucolo recommended that because C.G. had continued his gang-related activity and still experienced sexual fantasies about his half-sister, C.G. should be transferred to TDCJ for the remainder of his sentence. Furthermore, C.G.'s last conduct violation occurred less than one month before the transfer hearing.

C.G. testified on his own behalf at the hearing. He acknowledged that he had not completed the sex offender rehabilitation program due to his past immaturity and failure to accept responsibility for his actions. He testified that over time, however, his attitude had changed. He stated that if he was allowed to return to TYC to complete the program, he would not pose a risk upon his release. Yet, when asked about the gang-related circumstances surrounding his cousin's death, C.G. testified he wanted to "get" the individual responsible for killing him; he later denied he would act upon his emotions. C.G. also admitted to participating in a rape and described it as an act of vengeance.

After a complete review of the record, it is clear the trial court did not abuse its discretion in declining to release C.G. and transferring him from TYC to TDCJ. Accordingly, we affirm the order of the trial court.

IV. DETENTION

1. COURT OF APPEALS HAS NO ORIGINAL HABEAS JURISDICTION IN JUVENILE CASE

In re L.L., UNPUBLISHED, No. 04-03-00895-CV, 2003 WL 22905193, 2003 Tex.App. Lexis 10272 (Tex.App.—San Antonio 12/10/03) *Texas Juvenile Law* 337 (5th Ed. 2000).

L.L., a juvenile, seeks habeas relief from the trial court's order detaining L.L. despite the recommendation by L.L.'s probation officer that he be continued on electronic monitoring release. This court only has original jurisdiction to issue a writ of habeas corpus when it appears that a person is restrained in his liberty "by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case." Tex. Gov't Code Ann. § 22.221 (Vernon Supp.2003); *see also* Tex. Const. art. V, § 6 (courts have such jurisdiction, original and appellate, as may be prescribed by law); *In re S.G.*, 935 S.W.2d 919, 922 n. 1 (Tex. App.—San Antonio 1996, writ dism'd w.o.j.) (noting in appeal from trial court's order denying habeas relief in a juvenile delinquency case that court of appeals would not have original jurisdiction to issue a writ of habeas corpus in those circumstances). Although we do not have original habeas jurisdiction to consider a trial court's detention order, we would have jurisdiction to consider an appeal from a trial court's ruling on the merits of a habeas application challenging a juvenile detention order. *See In re S.G.*, 935 S.W.2d at 923; *In re M.C.*, 915 S.W.2d 118 (Tex.App.—San Antonio 1996, no writ). Because we do not have original jurisdiction to consider L.L.'s application for habeas corpus relief, the application is dismissed for lack of jurisdiction.

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2. CHILD REFERRED FOR CONTEMPT OF JP COURT MAY BE DETAINED IF CRITERIA WARRANT, BUT NOT PLACED IN SECURE POST-ADJUDICATION FACILITY

Opinion Attorney General No. GA-0131, 2003 WL 22969288 (12/15/03) *Texas Juvenile Law* 411 (5th Ed. 2000).

Office of the Attorney General
State of Texas
Opinion No. GA-0131
December 15, 2003

Re: Whether a juvenile court may detain a child under section 53.02 or 54.01, Family Code, before adjudicating and disposing of a charge of delinquent conduct, such as contempt of a justice court order (RQ-0072-GA)

The Honorable Charles A. Rosenthal, Jr.
Harris County District Attorney
1201 Franklin Street, Suite 600
Houston, Texas 77002

Dear Mr. Rosenthal:

You ask generally whether a juvenile court may detain a child under section 53.02 or 54.01 of the Family Code before adjudicating and disposing of a charge of delinquent conduct, such as contempt of a justice court order. See Tex. Fam. Code Ann. §§ 51.03(a), 53.02, 54.01 (Vernon 2002 & Supp. 2004). You are specifically concerned that Attorney General Opinion JC-0454 [Juvenile Law Newsletter ¶ 02-1-19] erroneously construes sections 53.02(b) and 54.01(e) of the Family Code, concerning juvenile detention, with respect to detaining children charged with violating a justice court order. See id. §§ 53.02(b), 54.01(e) (Vernon 2002 & Supp. 2004); Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; Brief attached to Request Letter, supra note 1, at 3; see also Probation Commission Letter, supra note 1, at 1.

The statutes you cite are spread throughout the Juvenile Justice Code (the "Code"), chapters 51 through 61 of the Family Code. See Tex. Fam. Code Ann. tit. 3, chs. 51-60 (Vernon 2002 & Supp. 2004); id. ch. 61 (Vernon Supp. 2004) ("Rights and Responsibilities of Parents and Other Eligible Persons"). Section 51.03(a)(2) defines the term "delinquent conduct" to include "conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court in:... (A) a justice... court." Id. § 51.03(a)(2)(A) (Vernon Supp. 2004).

A law-enforcement officer may take custody of a child who has allegedly violated a penal law or ordinance, engaged in delinquent conduct, or engaged in conduct indicating2n2onsue.sio.i
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cle 45.050 of the Code of Criminal Procedure forbids a justice court to order the child confined. See Tex. Code Crim. Proc. Ann. art. 45.050(b)(2) (Vernon Supp. 2004). Instead, the justice court may, "after providing notice and an opportunity to be heard,"

> (1) refer the child to the appropriate juvenile court for delinquent conduct for contempt of the justice... court order; [FN2] or
>
> (2) retain jurisdiction of the case, hold the child in contempt of the justice... court, and order either or both of the following:
>
> (A) that the contemnor pay a fine not to exceed $500; or
>
> (B) that the Department of Public Safety suspend the contemnor's driver's license or permit or, if the contemnor does not have a license or permit, to deny the issuance of a license or permit to the contemnor until the contemnor fully complies with the orders of the court.

Id. art. 45.050(c) (footnote added); see id. art. 45.058(h) (defining the term "child" for purposes of article 45.050); id. art. 45.050(a).

> [FN2]. Under article 45.058 of the Code of Criminal Procedure, a child whom the justice court has referred to a juvenile court for contempt of a justice court order may be detained if the justice court has jurisdiction of the case under article 4.11 of the Code of Criminal Procedure unless the child is charged with public intoxication. See Tex. Code Crim. Proc. Ann. art. 45.058(f)(2) (Vernon Supp. 2004) (providing that "[a] child taken into custody for an offense that a justice... court has jurisdiction of..., other than public intoxication, may be presented or detained in a detention facility designated by the juvenile court under [s]ection 52.02(a)(3), Family Code, only if:... the child is referred to the juvenile court by a justice... court for contempt of court"); see also id. art. 4.11(a) (providing justices of the peace with jurisdiction in criminal cases punishable in fine-only cases and in other cases that are not punishable by imprisonment).

In Attorney General Opinion JC-0454 this office concluded, among other things, that article 45.050 expressly prohibits a justice court from ordering a child confined "for contempt of a justice court order." [FN3] Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; see Tex. Code Crim. Proc. Ann. art. 45.050 (Vernon Supp. 2004). Rather, article 45.050 limits a justice court "to referring the case to a juvenile court, holding the child in contempt and imposing a fine not to exceed $500, or ordering the Department of Public Safety to suspend the child's driver's license." Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6.

> [FN3]. Opinion JC-0454 considered article 45.050 of the Code of Criminal Procedure in conjunction with section 54.023 of the Family Code, which was repealed in the most recent regular session of the legislature. See Tex. Att'y Gen. Op. No. JC-0454 (2002) at 3-6; Act of May 24, 2001, 77th Leg., R.S., ch. 1297, § 21, 2001 Tex. Gen. Laws 3142, 3149-50, repealed by Act of May 30, 2003, 78th Leg., R.S., ch. 283, § 61(1), 2003 Tex. Gen. Laws 1221, 1245 (repealing section 54.023, Family Code). Section 54.023 largely duplicated article 45.050, and its repeal does not affect Attorney General Opinion JC-0454's conclusions.

Although the language of article 45.050 was sufficient to reach the conclusion that a justice court is forbidden to order detention for a child who allegedly has violated a justice court order, the opinion also suggested that sections 53.02 and 54.01 of the Family Code are probative:

> Moreover, section 53.02 of the Family Code specifies the reasons for which a child may be detained prior to a detention hearing and contempt is not one of them. Tex. Fam. Code Ann. § 53.02 (Vernon Supp. 2002). Section 54.01 of the Family Code sets forth the reasons that a child may be detained at a detention hearing, and, again, contempt is not one of them. Id. § 54.01. In fact, only after a child has been adjudicated by a juvenile court as engaging in delinquent conduct for violating a court order and is held to be in contempt may the child be confined if the court so orders at the later disposition hearing. Id. §§ 51.03(a)(2) (defining delinquent conduct to include "conduct that violates a lawful order of a municipal court or justice court under circumstances that would constitute contempt of that court"); 54.03 (adjudication hearing); 54.04 (disposition hearing).

Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6.

You agree with the opinion's conclusion, but you believe that these three sentences discussing sections 53.02 and 54.01 inaccurately suggest that unless "a particular type of delinquent conduct [is] expressly listed in section 53.02 or 54.01,... pre-disposition detention for that conduct is not authorized." Brief attached to Request Letter, supra note 1, at 2; see Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6. You are similarly concerned about the broader implication that, regardless of the conduct charged, a juvenile court may not order the detention

of a child prior to an adjudication hearing unless the conduct is expressly listed in section 53.02 or 54.01. See Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; Brief attached to Request Letter, supra note 1, at 3. Accordingly, while you believe that "the opinion [is] largely correct," these "inaccuracies... unnecessarily limit" a juvenile court's "authority... to use all... resources" available under Texas law, and you ask us to clarify a juvenile court's authority in this regard. Brief attached to Request Letter, supra note 1, at 1.

To the extent Opinion JC-0454 suggests that a juvenile court may not, prior to an adjudication hearing in accordance with section 53.02 or 54.01 of the Family Code, order the detention of a child who is charged with violating a justice court order, it requires clarification. The opinion relies upon the fact that contempt is not among the factors listed in section 53.02 or 54.01, the presence of any one of which warrants detaining a child. See Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; see also Tex. Fam. Code Ann. §§ 53.02(b), 54.01(e) (Vernon 2002 & Supp. 2004). But neither section 53.02 nor 54.01 list the types of conduct defined as "delinquent conduct" or "conduct in need of supervision" as factors warranting detention. Compare Tex. Fam. Code Ann. § 51.03(a)-(b) (Vernon Supp. 2004), with id. §§ 53.02(b), 54.01(e) (Vernon 2002 & Supp. 2004). Rather, as you correctly indicate, a juvenile court may order the detention of any child who is taken into custody "if the additional requirements of section 53.02 or 54.01 are met," regardless of the type of delinquent conduct with which the child is charged. Brief attached to Request Letter, supra note 1, at 2. Thus, any type of delinquent conduct might form a basis for detention if a circumstance listed in section 53.02 or 54.01 is present.

To directly answer the first issue you raise, we conclude that a juvenile court may order the detention of a child who has been taken into custody for any type of delinquent conduct if a factor listed in section 53.02 or 54.01 is present. See Tex. Fam. Code Ann. §§ 51.03(a), 53.02, 54.01 (Vernon 2002 & Supp. 2004). Accordingly, a child who is charged with contempt of a justice court order may be detained prior to adjudication by the juvenile court if detention is warranted under section 53.02 or 54.01.

You are also concerned that Opinion JC-0454 incorrectly suggests that a juvenile court may order that a child adjudged in contempt of court be detained in a secure post-adjudicative facility. See id. § 54.04(o)(3) (Vernon Supp. 2004); Tex. Att'y Gen. Op. No. JC-0454 (2002) at 6; Brief attached to Request Letter, supra note 1, at 2-3; see also Probation Commission Letter, supra note 1, at 3. Section 54.04(o)(3) of the Family Code expressly prohibits a juvenile court from placing a child adjudicated for contempt of a justice court order "in a post-adjudication secure correctional facility or committed to the Texas Youth Commission for that conduct." Tex. Fam. Code Ann. § 54.04(o)(3) (Vernon Supp. 2004). Consequently, a juvenile court may not order a child adjudicated for contempt of a justice court order to be placed in a secure correctional facility. To the extent Opinion JC-0454 suggests to the contrary, it is clarified.

As clarified here, we affirm Attorney General Opinion JC-0454 (2002).

SUMMARY

Regardless of the type of delinquent conduct with which a child is charged, the child may be detained by a juvenile court before an adjudication hearing if a factor listed in section 53.02 or 54.01 of the Family Code is present. Accordingly, a child who is charged with contempt of a justice court order may be detained by a juvenile court if detention is warranted under section 53.02 or 54.01. A juvenile court may not order a child adjudicated for contempt of a justice court order to be placed in a secure correctional facility.

To the extent Attorney General Opinion JC-0454 (2002) suggests otherwise, it is clarified. Otherwise, it is affirmed.

Very truly yours,
Greg Abbott, Attorney General of Texas
Barry Mcbee, First Assistant Attorney General
Don R. Willett, Deputy Attorney General For Legal Counsel
Nancy S. Fuller, Chair, Opinion Committee
Kymberly K. Oltrogge, Assistant Attorney General, Opinion Committee

V. JUDICIAL IMMUNITY

STATE JUDGES NOT ENTITLED IN FEDERAL LAWSUIT TO JUDICIAL IMMUNITY FOR DECISIONS AS MEMBERS OF ADULT PROBATION JUDICIAL BOARD

Alexander v. Tarrant County, No. Civ.A. 403CV1280Y, 2004 WL 1884579 (N.D. Tex. 8/23/04) *Texas Juvenile Law* 524 (6th Ed. 2004).

Facts: Pending before the Court are several motions to dismiss: (1) defendant judges' Motion to Dismiss [doc. # 57-1], filed November 26, 2003; (2) defendant James Wilson's Motion to Dismiss [doc. # 69-1], filed January 27, 2004; and (3) defendant Sharen Wilson's Motion to Dismiss [doc. # 75-1], filed February 26. Having carefully considered the motions, response, and replies, the Court concludes that the defendant judges' motions should be DENIED.

This suit is one of several that arises as a result of the death of Bryan Dale Alexander ("Alexander"), which occurred while he was incarcerated at the Tarrant County Community Correctional Facility ("the Facility") in Mansfield, Texas. [FN3] On December 31, 2002, the plaintiffs filed suit, alleging claims against the defendant judges for civil-rights violations, [FN5] negligence, [FN6] violation of a non-delegable duty, and for damages. The defendant judges are being sued for the actions they took while serving as members of a legislatively established board that has informally become known as the "Tarrant County Board of Criminal Judges" ("the Board"). The plaintiffs allege, in essence, that the Board failed to properly staff and manage the Tarrant County Supervision and Corrections Department ("CSCD"), the Correctional Services Corporation ("CSC"), [FN7] and the Facility. The defendant judges, in their motions, claim they should be dismissed from the case because, *inter alia*, they are entitled to judicial, legislative, or sovereign immunity. They also argue that any claims against the Board as the "Tarrant County Board of Criminal Judges" should also be dismissed because the board is a "nonexistent and fictitious entity" that cannot be sued.

> FN3. Alexander was placed at the Facility in the "Shock Incarceration Facility," which was "initially set up as and subsequently operated as a residential military style boot camp for treating the needs of young non-violent offenders." (Pls.' Compl. at 14.)
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> FN5. Specifically, the plaintiffs allege:
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> > The Defendant Judges, as supervisory officials acting in their administrative capacity, failed to institute adequate TCCCF policies for providing timely and adequate medical evaluation and treatment. This failure reflects a deliberate and conscious choice to follow one course of action among various alternatives. In light of the excessive duties and demands assigned to the sole facility nurse and the part time doctor and the lack of an available county hospital, the need for additional medical care was obvious to Defendants. The inadequacy of the medical treatment available to probationers at the TCCCF was likely to result in violations of constitutional rights, the Defendants knew that the medical treatment available to probationers was inadequate, and the Defendants can reasonably be said to have been deliberately indifferent to the medical needs of probationers such as Bryan.
> >
> > ....
> >
> > ...In the alternative, the Defendants are liable under the standard announced by the Supreme Court in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), which provides that the standard for determining whether the state has adequately protected the rights of an individual involuntarily committed to a state institution is not deliberate indifference but instead whether professional judgment was in fact exercised.
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> (Pls.' Compl. at 40-42.)
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> FN6. As to negligence, the plaintiffs state:
>
> > ...Plaintiffs allege that Defendants were negligen[t] and such negligence was the proximate cause of Bryan's death. The Defendants, including the Judges in their administrative capacity, owed a legal duty to Bryan to supervise the terms of his confinement and to ensure the district personnel were employed as necessary to adequately staff the TCCCF to which he was confined. The Defendants had a statutory or ministerial duty to provide sufficient medical personnel, equipment, budgets, resources, and facilities to ensure the timely and adequate availability of medical evaluation and treatment. The Defendants had a statutory and ministerial duty to oversee the operation and management of the TCCCF, including the availability of medical evaluation and treatment.
>
> (Pls.' Compl. at 42-43.)
>
> FN7. CSCD contracted with CSC to operate the Facility.

Held: Motions to dismiss denied.

Opinion Text: "A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir.1982), *cert. denied,* 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983) (quoting Wright & Miller, *Federal Practice and Procedure* § 1357 (1969)). The court must accept as true all well pleaded, non-conclusory allegations in the complaint, and must liberally construe the complaint in favor of the plaintiffs. *Kaiser Aluminum,* 677 F.2d at 1050. A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt from the face of the plaintiff's pleadings that he can prove no set of facts in support of his claim that would entitle him to relief. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Garrett v. Commonwealth Mortgage Corp.,* 938 F.2d 592, 594 (5th Cir.1991); *Kaiser Aluminum,* 677 F.2d at 1050.

Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Under federal law, judges are entitled to absolute immunity against civil actions based upon their judicial acts, even if the acts exceed their jurisdiction and were allegedly performed maliciously or corruptly. *See Mireles v. Waco,* 502 U.S. 9, 11-12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991); *Stump v. Sparkman,* 453 U.S. 349, 355-56 (1978). [FN8] To determine whether a judge's act is a "judicial" one, the Court is to consider four factors: (1) whether the act complained of is one normally performed by a judge; (2) whether the act occurred in the courtroom or an appropriate adjunct such as the judge's chambers; (3) whether the controversy centered around a case pending before the judge; and (4) whether the act arose out of a visit to the judge in his judicial capacity." *Malina v. Gonzales,* 994 F.2d 1121, 1124 (5th Cir.1993). These four factors are to be broadly construed in favor of immunity, and the absence of one or more factors does not prevent a determination that judicial immunity applies in a particular case. *See Malina,* 994 F.2d at 1124; *Adams v. McIlhany,* 764 F.2d 294, 297 (5th Cir.1985). The policy underlying judicial immunity is to recognize and guarantee the need for independent and disinterested decision making. [FN9] *See Johnson v. Kegans,* 870 F.2d 992, 997 (5th Cir.1989) (recognizing immunity for a judge's letter to a parole board years after sentencing urging denial of parole). If the denial of immunity creates a potential of concern in the mind of a future judge that any action taken might carry personal liability and thereby distort the decision-making process, then immunity should not be denied. *See Adams,* 764 F.2d at 297.

> FN8. There are only two circumstances when a judge is not entitled to judicial immunity: (1) when he performs acts not in his judicial capacity and (2) when he performs act, although judicial in nature, in the complete absence of all jurisdiction. *Mireles,* 502 U.S. at 11-12.

> FN9. "Although unfairness and injustice to a litigant may result on occasion, 'it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." ' *Mireles,* 502 U.S. at 9 (quoting *Bradley v. Fisher,* 13 Wall. 335, 347, 20 L.Ed. 646 (1872)).

In this case, the plaintiffs' allegations against the defendant judges are based on decisions they made in their capacity as members of the Board. The plaintiffs allege that the defendant judges made decisions regarding the management and staffing at the Facility that led to the death of Alexander. The Board was established by the Texas legislature through section 76.002 of the Texas Government Code, which states:

> (a) The district judge or district judges trying criminal cases in each judicial district shall:
>
> (1) establish a community supervision and corrections department; and
>
> (2) employ district personnel as necessary to conduct presentence investigations, supervise and rehabilitate defendants placed on community supervision, enforce the conditions of community supervision, and staff community corrections facilities.
>
> (b) The district judges trying criminal cases and judges of statutory county courts trying criminal cases that are served by a community supervision and corrections department are entitled to participate in the management of the department.

Tex. Gov't Code Ann. § 76.002 (Vernon 1998) (emphasis added). The supervision of persons placed on probation is inherently judicial. *See* Tex. Gov't Code Ann. § 76.002 (Vernon 1998); Tex.Code Crim. Proc. Ann. Art. 42.12, § 1 (Vernon Supp.2004); *Cobb v. State,* 851 S.W.2d 871 (Tex.Crim.App.1993). [FN10]

> FN10. Article 42.21 of the Texas Code of Criminal Procedure states:

> It is the purpose of this article to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas.
>
> Tex.Code Crim. Proc. Ann. art. 42.12, § 1 (Vernon Supp.2004).

With respect to judicial immunity, the defendant judges argue that they should be dismissed from the case because the alleged actions they took relating to the Facility where Alexander died were judicial in nature. The plaintiffs, on the other hand, argue that the actions of the defendant judges relating to the Facility were administrative, not judicial acts. In support of this argument, the plaintiffs assert that the actions taken by the defendant judges: (1) took place in various places, both at the courthouse and at the bootcamp itself; (2) did not take place in the context of holding court; and (3) did not center around any case pending before any particular judge.

After reviewing the parties' arguments, the relevant case law, and the policy underlying judicial immunity, the Court concludes that the defendant judges are not entitled to judicial immunity. While the defendant judges would be entitled to judicial immunity for all the decisions they made in furtherance of their legislatively mandated responsibilities as judges in establishing the CSCD and making personnel decisions pursuant to section 76.002(a) of the Texas Government Code, the plaintiffs allege that the defendant judges acted in excess of these responsibilities. Pursuant to 76.002(b) of the Texas Government Code, the defendant judges "are entitled [but are not required] to participate in the management of the CSCD." Consequently, if the defendant judges decide to take on such managerial duties, these duties are administrative duties, not judicial duties entitling them to judicial immunity.

In this case, the plaintiffs specifically allege:

> The Board of Judges established the budgets for the operation of the CSCD and the [Facility], approved the selection of CSC as the operator of the [Facility] in spite of a significant history of operational deficiencies by CSC as a private prison operator, monitored the operation of the [Facility] for compliance with the contract with CSC, failed to make any provision for the residents at the Facility to have timely and appropriate access to county or other appropriate medical facilities, and were responsible for the establishment of the programs, policies, and procedures for the operation of the [Facility].

(Pls.' Compl. at 4.) In support of these allegations, the plaintiffs claim that the defendant judges "performed their administrative tasks regarding the CSCD and its facilities by participating in the establishment of the Contract terms, participating in selecting the contractor to operate the facility, participating in the establishment of minimum staffing levels for the [Facility], and participating in the establishment of the budgets for the operation of the [Facility]." (Pls.' Compl. at 8.) In addition, the plaintiffs claim that the defendant judges "also exercised control and judgment over the adoption and promulgation of rules, policies, and procedures which went into affect at the [Facility]." (Pls.' Compl. at 9.) Based upon these allegations that the defendant judges acted outside of their statutorily required duties and were making administrative decisions, the Court concludes that the defendant judges are not entitled to judicial immunity.

As to the defendant judges' claims that they are entitled to legislative or sovereign immunity, the Court concludes that these claims should be denied for the reasons stated by the plaintiffs in their response.

As to the defendant judges' claim that the Tarrant County Board of Criminal Judges should be dismissed as a defendant because it is a nonexistent and fictitious entity that cannot be sued, the Court notes that the plaintiffs wholly fail to address this issue. Instead the plaintiffs state in their response that "the Defendant Tarrant County Board of Judges has neither appeared nor moved for relief, despite being served." Because the plaintiffs have failed to plead any facts indicating that Tarrant County Board of Judges is a legal entity that is capable of being sued, the Court concludes that it should be dismissed from this suit. [FN11]

> FN11. Even assuming that the Board was a legal entity that could be sued, the Court concludes that it would be entitled to immunity pursuant to the Eleventh Amendment of the United States Constitution as to the plaintiff's section 1983 claims against it because it is an arm of the state. *See, e.g. Clark v. Tarrant County, Tex.*, 798 F.2d 736 (5th Cir.1986) (explaining the relationship between the state, probation departments, judges, and counties, in the context of the Eleventh Amendment).

Based on the foregoing, it is ORDERED that the defendant judges' Motion to Dismiss [doc. # 57-1] is DENIED.

VI. RESTITUTION

ONLY PARENT ORDERED TO PAY RESTITUTION MAY CHALLENGE IT ON APPEAL; JUVENILE MAY NOT DO SO FOR PARENT

In the Matter of D.D.H., 143 S.W.3d 906 (Tex. App.—Beaumont 8/26/04) *Texas Juvenile Law* 328 (5th Ed. 2000).

Facts: A jury found that D.D.H., a juvenile, engaged in delinquent conduct by committing a burglary of a habitation. The trial court placed D.D.H. on probation for two years. In a separate order, the trial court ordered D.D.H.'s parents to pay restitution in the amount of $5,000. D.D.H. appealed. Only the restitution order is challenged on appeal.

Held: Affirmed.

Opinion Text: D.D.H. contends that he was ordered to pay restitution as a condition of probation. Neither the written orders in the clerk's record nor the oral pronouncements in the reporter's record support this argument. The trial court stated in open court that the restitution was to be paid by the parents. The probation order contains twenty conditions of probation, none of which concern payment of restitution. The order for payment of fees is directed solely to the parents of D.D.H., neither of whom appealed. [FN1]

> FN1. Under Family Code Section 61.004, the parents' appeal from a Section 54.041(b) restitution order runs independent of the proceedings against the juvenile. Tex. Fam.Code Ann. § 61.004 (Vernon Supp.2004). Section 61.004 applies to cases in which the conduct occurred on or after September 1, 2003. *See* Act of June 2, 2003, 78th Leg., R.S., Ch. 283, §§ 28, 62, 2003 Tex. Gen. Laws 1221, 1231, 1245. Because neither parent filed notice of appeal, we do not decide whether D.D.H.'s parents could have appealed under Section 61.004 or under the law in effect before September 1, 2003.

Although the State does not question the minor's standing to assert this issue on appeal, we question whether he is the proper party to challenge the restitution order. D.D.H. argues "[t]he $5,000 restitution ordered by the trial court is erroneous and without any factual basis in the record." Assuming for the sake of argument that D.D.H. may assert a due process challenge to the factual basis of the order for payment of restitution by a third party, the amount of restitution ordered by the judge is supported by the record. The victim testified that the personal property stolen in the burglary included a $200 DVD player, approximately 25 Playstation games worth $25-$60 each, a $100 telephone/answering machine, a $15 memory card, about 15 DVD movies worth $15-$25 each, and a $25 pocket knife. In addition, a $100 stereo was destroyed in the burglary. The victim testified that she obtained a $4,417.00 bid to repair the damage to her home resulting from the breaking into the habitation and from extensive vandalism to the interior of the home committed in the course of the burglary. The estimate was admitted into evidence. The only line item challenged by the defense was the $159 charge for replacing the door, as opposed to replacing the broken glass pane in the existing door. On cross-examination, the victim admitted that she did not know if the $1,300 charge for carpet was for carpet of identical quality to that ruined by the appellant. Although D.D.H. testified that Playstation games cost $10-$20 each, the trial court could have found the victim's testimony to be credible. The victim's actual damages were, according to her testimony, at least $5,423. We conclude that the restitution order had a factual basis and thus complied with due process. *See Idowu v. State*, 73 S.W.3d 918, 922 n. 11 (Tex.Crim.App. 2002) ("Under our precedent, the amount of restitution ordered must be 'just,' it must have a factual basis in the record, and it must compensate the victim."). The sole issue presented in this appeal is overruled.

VII. DISPOSITION AND MODIFICATION

1. REQUIREMENT OF DNA SAMPLE AS PROBATION CONDITION CONSTITUTIONAL; APPLIES TO PROBATIONERS WITH EXCUSED REGISTRATION

In the Matter of D.L.C., 124 S.W.3d 354 (Tex.App.—Fort Worth 12/18/03) *Texas Juvenile Law* 268 (5th Ed. 2000).

Facts: I. INTRODUCTION

This is a consolidated appeal involving issues of first impression in Texas. The five consolidated cases involve juvenile probation conditions that were amended to require Appellants D.L.C., D.L.G., C.S.P., and R.W.W. (collectively "Appellants") to submit blood samples or other specimens for the purpose of creating a DNA record. *See* Tex. Fam.Code Ann. § 54.0405(a)(2), (b) (Vernon 2002). In four issues, Appellants contend that: (1) requiring them to submit a DNA sample is unconstitutional based on ex post facto and double jeopardy protections; (2) requiring them to submit a DNA sample is unconstitutional based on the protections against unlawful search and seizure; (3) requiring them to submit a DNA sample violates Appellants' rights against self-incrimination; and (4) the evidence was legally and factually insufficient to support the trial court's finding that they should be subject to the DNA statute.

II. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background in each of the five consolidated cases is similar. At the adjudication hearings conducted in accordance with Texas Family Code section 54.03, each Appellant pleaded guilty to either indecency with a child or aggravated sexual assault of a child, or both. *Id.* § 54.03 (Vernon Supp.2004). Subsequently, the trial court conducted disposition hearings, and each Appellant was placed on probation and was required to register in the sex offender registration program. *See id.* § 54.04; TEX.CODE CRIM. PROC. ANN. ch. 62 (Vernon Supp.2004).

After Appellants were placed on probation, the Legislature passed section 54.0405 of the Texas Family Code. Tex. Fam.Code Ann. § 54.0405. That section requires a child who must register as a sex offender to also submit, as a condition of probation, a blood sample or other specimen for the purpose of creating a DNA record. *Id.* Based on the new legislation, the State sought to amend the terms and conditions of Appellants' probation to require them to submit a DNA sample for inclusion in the DNA databank. Following contested hearings, the court granted the State's motions to amend and ordered Appellants to submit a blood sample or other specimen for the purpose of creating a DNA record. [FN1]

> FN1. The court did not issue warrants for collection of the blood samples.

After being ordered to submit a blood sample, R.W.W. filed a motion to excuse further sex offender registration. *See* Tex.Code Crim. Proc. Ann. art. 62.13(l). The trial court granted R.W.W.'s motion to excuse further sex offender registration, and R.W .W. then filed a motion to rescind the DNA order. The trial court refused to rescind R.W.W.'s DNA order.

Held: Affirmed.

Opinion Text: III. STANDARD OF REVIEW FOR CONSTITUTIONAL ISSUES

If possible, we interpret a statute in a manner that renders it constitutional. *FM Props. Operating Co. v. City of Austin,* 22 S.W.3d 868, 873 (Tex. 2000); *Quick v. City of Austin,* 7 S.W.3d 109, 115 (Tex.1998). A party raising a facial challenge to the constitutionality of a statute must demonstrate that the statute always operates unconstitutionally. *Wilson v. Andrews,* 10 S.W.3d 663, 670 (Tex. 1999). In other words, a challenger must establish that no set of circumstances exists under which the statute would be valid. *Id.* In reviewing a facial challenge to a statute's constitutionality, we consider the statute as written, rather than as it operates in practice. *See Barshop v. Medina County Underground Water Conservation Dist.,* 925 S.W.2d 618, 626-27 (Tex.1996).

However, an "as applied challenge" only requires the challenger to demonstrate that the statute operates unconstitutionally when applied to the challenger's particular circumstances. *In re B.S.W .,* 87 S.W.3d 766, 771 (Tex.App.—Texarkana 2002, pet. denied). When reviewing the constitutionality of a statute as applied, we presume the statute is valid and that the Legislature has not acted unreasonably or arbitrarily in enacting it. *Ex parte Granviel,* 561 S.W.2d 503, 511 (Tex.Crim.App.1978); *Sisk v. State,* 74 S.W.3d 893, 901 (Tex.App.—Fort Worth 2002, no pet.). It is the challenger's burden to show that the statute is unconstitutional. *Ex parte Anderson,* 902 S.W.2d 695, 698 (Tex.App. -Austin 1995, pet. ref'd).

IV. DNA STATUTE DOES NOT VIOLATE EX POST FACTO OR DOUBLE JEOPARDY CLAUSES

Appellants contend in their first issue that the DNA statute, as applied to them, unconstitutionally violates the ex post facto and double jeopardy protections of the United States and Texas Constitutions. Specifically, Appellants argue that the DNA statute's retroactive application to them is unconstitutional because the statute was not enacted until after they had committed their offenses and had accepted agreed dispositions. And, they argue that the

statute is punitive on its face, as well as punitive in purpose and effect. The State responds that the DNA statute violates neither ex post facto nor double jeopardy protections because neither the purpose nor the effect of the statute is punitive.

A. The DNA Statute

Texas Family Code section 54.0405 ("the DNA statute") provides:

> (a) If a court or jury makes a disposition under Section 54.04 in which a child described by Subsection (b) is placed on probation, the court:
>
> ....
>
> (2) shall require as a condition of probation that the child:
>
> (A) register under Chapter 62, Code of Criminal Procedure; and
>
> (B) submit a blood sample or other specimen to the Department of Public Safety under Subchapter G, Chapter 411, Government Code, for the purpose of creating a DNA record of the child, unless the child has already submitted the required specimen under other state law.
>
> (b) This section applies to a child placed on probation for conduct constituting an offense for which the child is required to register as a sex offender under Chapter 62, Code of Criminal Procedure.

Tex. Fam.Code Ann. § 54.0405(a)(2), (b). The Legislature made the change in law applicable to an offense committed before, on, or after the effective date of the statute--September 1, 2001. Act of May 8, 2001, 77th Leg., R.S., ch. 211, §§ 18(a), 23, 2001 Tex. Gen. Laws 399, 405.

B. Ex Post Facto Analysis

The U.S. Constitution provides that "No ... ex post facto Law shall be passed" by Congress. U.S. Const. art. I, § 9, cl. 3. [FN2] The Ex Post Facto Clause prohibits two types of laws that purportedly are at issue in this case: (1) a law that criminalizes an action done before the passing of the law; and (2) a law that inflicts greater punishment for a crime than was possible when the crime was committed. *Rogers v. Tennessee,* 532 U.S. 451, 456, 121 S.Ct. 1693, 1697 (2001); *Carmell v. Texas,* 529 U.S. 513, 521-25, 120 S.Ct. 1620, 1626-28 (2000); *United States v. Reynard,* 220 F.Supp.2d 1142, 1157 (S.D.Cal.2002); *Rodriguez v. State,* 93 S.W.3d 60, 66 (Tex.Crim.App.2002). Appellants argue that the DNA statute, as applied to them, violates the first ex post facto prohibition because it "became effective after the date of their offenses and after they had accepted agreed adjudications and dispositions in their cases." While Appellants' position is procedurally accurate, the DNA statute does not retroactively criminalize acts performed by Appellants before the DNA statute was passed. Appellants were adjudicated delinquent based on qualifying sex offenses. These offenses constituted criminal acts before the DNA statute was passed. The DNA statute does not retroactively alter the definition of a particular criminal act. *See Reynard,* 220 F.Supp.2d at 1158. To the contrary, under the statute, DNA material is extracted after adjudication and has no effect on the underlying offense or punishment. *See* Tex. Fam.Code Ann. § 54.0405. Thus, the DNA statute does not criminalize an act that occurred prior to enactment of the statute. *See In re Appeal in Maricopa County Juvenile Action Nos. JV-512600 and JV-512797,* 930 P.2d 496, 499 (Ariz.Ct.App.1996).

> FN2. Appellants have not separately briefed or analyzed their state constitutional claims; therefore, we will not address them. *Black v. State,* 26 S.W.3d 895, 901 n. 4 (Tex.Crim.App.2000); *Heitman v.. State,* 815 S.W.2d 681, 691 n. 23 (Tex.Crim. App.1991).

Appellants also contend that the retroactive application of the DNA statute violates the Ex Post Facto Clause because the statute is punitive on its face, or in the alternative, it is punitive in its purpose and effect. The State, on the other hand, contends that the statute is not penal in nature. No Texas court has addressed whether the DNA statute constitutes retroactive punishment forbidden by the Ex Post Facto Clause. [FN3] The framework for our ex post facto analysis is, however, well established. *See Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140, 1146 (2003) (holding Alaska's retroactive sex offender registration statute not violative of the Ex Post Facto Clause); *Rodriguez,* 93 S.W.3d at 67-68 (holding Texas's retroactive amendments to sex offender registration statute not violative of the Ex Post Facto Clause). Under the required analysis, we must ascertain whether by enacting the statute the Legislature meant the statute to establish "civil" proceedings. *Smith,* 123 S.Ct. at 1146-47 (quoting *Kansas v. Hendricks,* 521 U.S. 346, 361, 117 S.Ct. 2072, 2082 (1997)). If the Legislature manifested an expressly punitive intent, the inquiry is at an end and the statute is a violation of the Ex Post Facto Clause. *Smith,* 123 S.Ct. at 1147; *Rodriguez,* 93 S.W.3d at 67. If, however, the Legislature intended to enact a civil, nonpunitive regulatory scheme, then we must further examine whether the statutory scheme is nonetheless " 'so punitive either in purpose or effect as to negate

[the State's] intention' to deem it 'civil.' " *Smith*, 123 S.Ct. at 1147. We defer to the Legislature's stated intent, so only the clearest proof will suffice to override legislative intent and transform what has been legislatively denominated a civil remedy into a criminal penalty. *Id.; Rodriguez*, 93 S.W.3d at 67.

> FN3. In fact, Texas Family Code section 54.0405 has been cited only once: in a footnote in a dissent. *See Beeman v. State*, 86 S.W.3d 613, 620-21 n. 3 (Tex.Crim.App.2002) (Johnson, J., dissenting) (using statute as example of invasive search authorized by statute).

Appellants argue that the DNA statute is punitive because the Legislature placed it in the "dispositional, or punishment, portions" of the Juvenile Justice Code. However, the location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one. [FN4] *Smith*, 123 S.Ct. at 1148. Moreover, Appellants' argument contradicts the legislatively stated purpose of the DNA statute:

> (a) The principal purpose of the DNA database is to assist federal, state, or local criminal justice or law enforcement agencies in the investigation or prosecution of sex-related offenses or other offenses in which biological evidence is recovered.
>
> (b) In criminal cases, the purposes of the DNA database are only for use in the investigation of an offense, the exclusion or identification of suspects, and the prosecution of the case.
>
> (c) Other purpose of the database include:
>
> (1) assisting in the recovery or identification of human remains from a disaster or for humanitarian purposes;
>
> (2) assisting in the identification of living or deceased missing persons; and
>
> (3) if personal identifying information is removed:
>
> (A) establishing a population statistics database;
>
> (B) assisting in identification research and protocol development; and
>
> (C) assisting in database or DNA laboratory quality control.

Tex. Gov't Code Ann. § 411.143(a)-(c) (Vernon 1998). The Legislature's express, primary intent in creating a DNA record, as set forth above, is for identification purposes in past and future sex offenses, not to further punish a person for the offense at hand.

> FN4. Chapter 54 of the Texas Family Code contains many provisions that do not involve criminal punishment, including procedures for: conducting detention hearings via interactive video; hearsay rule exceptions; testing for sexually transmitted diseases, AIDS, or HIV infection; and limited right to appeal warnings. Tex. Fam.Code Ann. §§ 54.012, 54.031, 54.033, 54.034 (Vernon 2002).

Next, we address whether, despite the intended civil, regulatory nature of the DNA statute, it is nonetheless so punitive in effect that this punitive effect overrides the Legislature's nonpunitive intent. *Smith*, 123 S.Ct. at 1147. In making this determination, we apply the seven nonexclusive factors set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68 (1963):(1) whether the DNA statute imposes an affirmative disability on qualifying offenders; (2) whether collection of blood has historically been regarded as punishment; (3) whether the DNA statute's provisions are effective only upon a finding of scienter; (4) whether operation of the DNA statute will promote the traditional aims of punishment--i.e., retribution and deterrence; (5) whether the DNA statute regulates behavior that is already a crime; (6) whether the DNA statute serves some nonpunitive purpose; and (7) whether the DNA blood-draw provisions are excessive in relation to the nonpunitive purpose, if any. *See Reynard*, 220 F.Supp.2d at 1161-62 (citing *Kennedy*, 372 U.S. at 168-69, 83 S.Ct. at 567-68)). Our task is not simply to count the factors, but also to weigh them. *Rodriguez*, 93 S.W.3d at 68. Accordingly, we will discuss the varying weight to be given each factor. *See id.*

Appellants argue under the first *Kennedy* factor that the disabilities imposed on them by being chronicled in a DNA database are: (1) the prospect of infinite government monitoring in violation of their right to privacy; (2) interference with their right to receive effective assistance of counsel because they were not advised of the nature and possible consequences of their plea at their adjudication hearing; and (3) the inability to have their records fully sealed. An inmate or probationer has diminished constitutional rights, including a diminished right to privacy. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 874, 107 S.Ct. 3164, 3169 (1987). Additionally, because the statute allows limited DNA analysis of blood samples and limited distribution of the information acquired from the samples, wrongful disclosures that may violate privacy rights should be minimized. *See* Tex. Gov't Code Ann. § 411.143(c)(3) (requiring personal identification information to be removed prior to establishing a population statistics database, etc.); *see also Landry v. Attorney General*, 709 N.E.2d 1085, 1095-96

(Mass.1999) (holding that where DNA Act provides safeguards against wrongful use of DNA information and limits purposes for which DNA records may be distributed, plaintiffs' speculation that data may be used wrongfully is contrary to language of Act), *cert. denied,* 528 U.S. 1073 (2000). Appellants' privacy concerns do not demonstrate the present imposition of an affirmative disability on them.

Appellants' next contention, that because they were not advised of a yet-to-be enacted law requiring them to submit a DNA sample, they received ineffective assistance of counsel at their adjudication hearings, likewise, does not demonstrate the imposition of an affirmative disability on Appellants. The record before us does not show, nor do Appellants argue, that they would not have pleaded guilty at their adjudication hearings had they been advised of the possibility that at some point in time they could be required to submit a DNA sample. In the absence of such evidence, the second prong of the *Strickland* ineffective assistance of counsel claim cannot be met. *See Brasfield v. State,* 30 S.W.3d 502, 505 (Tex.App.—Texarkana 2000, no pet.); *see also Appeal in Maricopa County,* 930 P.2d at 499.

Finally, Appellants' arguments that they will be unable to have their juvenile records fully sealed if they provide a DNA sample do not demonstrate the imposition of an affirmative disability upon Appellants. Appellants cite no evidence showing any efforts, unsuccessful or otherwise, that they have made to have their records sealed; therefore, their sealing argument is premature. *See In re J.R.,* 793 N.E.2d 687, 702 (Ill.App.Ct.2003) (holding that respondent's argument that statute barring expungement of previously submitted blood specimens was unconstitutional was premature because he had made no effort to expunge the information). We simply cannot say whether or not Appellants may be successful in a future action to seal their records.

Thus, applying the first *Kennedy* factor, we conclude that the Texas DNA statute imposes only a minimal affirmative disability, if any, on qualifying offenders because it merely requires them to contribute a one-time "DNA fingerprint" to the State's DNA database. *See, e.g., Smith,* 123 S.Ct. at 1145-46, 1154 (holding Alaska's sex offender registration statute was nonpunitive and did not violate Ex Post Facto Clause, despite lifetime registration and quarterly verification requirements); *Ex parte Robinson,* 116 S.W.3d 794, 798 (Tex.Crim.App. 2003) (holding 1999 version of Texas's Sex Offender Registration Program, like the 1997 version, was nonpunitive in both intent and effect); *Rodriguez,* 93 S.W.3d at 69-79 (holding Texas's sex offender registration statute was nonpunitive and did not violate Ex Post Facto Clause); *State v. Ward,* 869 P.2d 1062, 1066 (Wash.1994) (holding Washington's sex offender registration statute was nonpunitive and did not violate Ex Post Facto Clause).

With regard to the second *Kennedy* factor--whether the collection of blood historically constituted punishment--Appellants contend that requiring submission of a DNA sample, while not traditional in the sense that DNA technology is modern, is primarily linked with punishment for criminal and juvenile offenses. In support of this argument, Appellants rely on Texas Government Code sections 411.1471, 411.1472, 411.148, and 411.150. Tex. Gov't Code Ann. §§ 411.1471-.1472, 411.148, 411.150 (Vernon Supp.2004). These provisions were, however, enacted or amended within the past four years and cannot be viewed as a historical pattern evidencing the use of blood draws as punishment. *See Rodriguez,* 93 S.W.3d at 72 (noting that no historic analog existed for viewing sex offender registration statutes as historically punitive). We have located no authority to support the proposition that the collection of blood, for identification purposes or otherwise, has historically been regarded as punishment. *See generally Breithaupt v. Abram,* 352 U.S. 432, 435, 437, 77 S.Ct. 408, 410-11 (1957) (recognizing that "there is nothing 'brutal' or 'offensive in the taking of a sample of blood when done, ... under the protective eye of a physician" and holding that "a blood test taken by a skilled technician is not such 'conduct that shocks the conscience' ... [or] such a method of obtaining evidence that it offends a 'sense of justice.' "). Accordingly, to the extent the second *Kennedy* factor is weighed, we weigh it in favor of a finding that the DNA statute is nonpunitive. *See Rodriguez,* 93 S.W.3d at 72.

Appellants concede that, under the third *Kennedy* factor, because the DNA statute automatically applies to juveniles adjudicated of qualifying offenses, no scienter is required to trigger its application. *See Reynard,* 220 F.Supp.2d at 1162. The lack of scienter element supports a nonpunitive construction of the statute. *Rodriguez,* 93 S.W.3d at 72.

Under the fourth *Kennedy* factor--whether the statute promotes the traditional aims of punishment--Appellants argue that the overreaching consequences of the DNA statute deter sex offenses and that imposition of the additional penalty of a DNA sample requirement on past criminal conduct alone is a form of retribution. The establishment of a DNA databank may deter recidivism on the part of convicted persons. *State v. Olivas,* 856 P.2d 1076, 1085-86 (Wash.1993); *In re Nicholson,* 724 N.E.2d 1217, 1221 (Ohio Ct.App. 1999); *compare People v. King,* 99 Cal.Rptr.2d 220, 228 (Cal.Ct.App.2000) (stating that "[s]peedy identification and apprehension of an offender, therefore, will prevent crime even if DNA

testing has no deterrent effect"), *cert. denied,* 532 U.S. 950 (2001). Thus, the Texas DNA statute may promote, to some extent, the traditional deterrent aim of punishment. Nonetheless, the legislatively stated purpose of the statute is identification, i.e. to exclude or include registrants as suspects in *past* and *future* offenses, not deterrence. *See* Tex. Gov't Code Ann. § 411.143(a). And, the "threat" of submitting to a blood draw, i.e. a needle stick, does not, in itself, seem significant enough to deter possible offenders from committing sex offenses. *See, e.g., Schmerber v. California,* 384 U.S. 757, 771, 86 S.Ct. 1826, 1836 (1966) (noting, in DWI case, that blood tests are commonplace and for most people involve no risk, trauma, or pain). Consequently, although the DNA statute may serve some incidental deterrent purpose, the mere presence of a deterrent purpose does not render the DNA statute criminal in effect. *Smith,* 123 S.Ct. at 1152. This *Kennedy* factor also weighs in favor of a nonpunitive construction of the DNA statute.

Appellants submit that under the fifth *Kennedy* factor the DNA statute applies to conduct that has already been deemed a crime because a juvenile must have committed a qualifying offense before he is required to provide a DNA sample. We agree that the DNA statute applies to behavior that is already a crime and that a statute's retroactive application to criminal behavior is more likely to be characterized as a penal sanction. *See Rodriguez,* 93 S.W.3d at 74. This factor alone, however, is insufficient to render the statute punitive because the fact that an adjudication for a qualifying offense triggers application of the DNA statute is a characteristic common to all regulatory disabilities that follow from a prior conviction, such as the loss of the right to vote. *Id.* Moreover, the submission of a DNA sample does not alter the punishment assessed or imposed upon a juvenile. As the State points out, the DNA statute provides new penalties only if a juvenile refuses to provide a DNA specimen and thereby violates a condition of his probation. *See* Tex. Gov't Code Ann. § 411.154 (Vernon 1998) (stating that order issued to enforce compliance with DNA statute is appealable as criminal matter and is reviewable for abuse of discretion). Because noncompliance with the DNA statute is punished as a separate offense, any potential ex post facto problem is diminished. *Reynard,* 220 F.Supp.2d at 1162 (citing *Russell v. Gregoire,* 124 F.3d 1079, 1088-89 (9th Cir.1997), *cert. denied,* 523 U.S. 1007 (1998)).

Appellants argue that the sixth *Kennedy* factor is of minimal importance because almost any statute encompasses some nonpunitive, rational purpose. The DNA statute serves a nonpunitive purpose by reducing the risk that innocent persons may be wrongly held for crimes that they did not commit. 146 CONG. REC. H8572-01, and *H8576; *see also* 146 CONG. REC. S11645-02, at *S11646 (reporting that DNA testing has exonerated over seventy-five convicted persons in the United States and Canada). Thus, the sixth *Kennedy* factor weighs in favor of a nonpunitive construction of the DNA statute. With regard to the final *Kennedy* factor, Appellants contend that the DNA statute is excessive because the public is already protected from sex offenders by the sex offender registration laws. Consequently, Appellants argue that "the risks of the DNA statute greatly outweigh any legitimate government interest." The sex offender registration law does not, however, create the type of information that the DNA statute seeks to obtain. Sex offender registration information cannot assist law enforcement in exonerating those convicted of crimes involving DNA evidence. *See* Tex. Gov't Code Ann. § 411.143(b); *see generally Nicholas v. Goord,* No. 01Civ.7891 (RCC) (GWG., 2003 WL 256774, at *9, 11 (S.D.N.Y. Feb. 6, 2003). [FN5] Thus, the DNA statute seeks different information than the sex offender registration statute, and the information is used for a different purpose. Additionally, possible privacy risks posed by the DNA statute have been legislatively minimized by specific statutory provisions mandating that identifying information be removed from the samples when they are used for certain purposes. *See* Tex. Gov't Code Ann. § 411.143(c)(3). We hold that the blood draw provisions of the DNA statute are not excessive in relation to the nonpunitive purposes for which the statute was enacted. *Accord Robinson,* 116 S.W.3d 794 (pointing out that court had already thoroughly applied *Kennedy* factors to 1997 version of Sex Offender Registration Program and found it nonpunitive in effect); *Rodriguez,* 93 S.W.3d at 68-79 (holding, after applying *Kennedy* factors, sex offender registration statute was not excessive in relation to nonpunitive purpose of statute).

FN5. In a publishing quirk, *Goord* is not designated as either a published opinion or an unpublished opinion. To date, however, five courts and a law review article have cited this case. Accordingly, we likewise u[(l d)4-Ge*oor'sy*

as regulatory in nature. *See Reynard,* 220 F.Supp.2d at 1162. Accordingly, we hold that Appellants have failed to demonstrate that, as applied to them, the Texas DNA statute violates the Ex Post Facto Clause. [FN6]

> FN6. Other jurisdictions have likewise found that their DNA statutes did not violate the Ex Post Facto Clause. *See Shaffer v. Saffle,* 148 F.3d 1180, 1182 (10th Cir.), *cert. denied,* 525 U.S. 1005 (1998); *Rise v. Oregon,* 59 F.3d 1556, 1562 (9th Cir.1995), *cert. denied,* 517 U.S. 1160 (1996); *Gilbert v. Peters,* 55 F.3d 237, 238-39 (7th Cir.1995); *Ewell v. Murray,* 11 F.3d 482, 486 (4th Cir.1993), *cert. denied,* 511 U.S. 1111 (1994); *Jones v. Murray,* 962 F.2d 302, 309 (4th Cir.), *cert. denied,* 506 U.S. 977 (1992); *Miller v. United States Parole Comm'n,* 259 F.Supp.2d 1166, 1170-72 (D.Kan. 2003); *United States v. Sczubelek,* 255 F.Supp.2d 315, 324-26 (D.Del. 2003); *Vore v. United States Dep't of Justice,* 281 F.Supp.2d 1129, 1138 (D. Ariz.2003); *Reynard,* 220 F.Supp.2d at 1162; *Kruger v. Erickson,* 875 F.Supp. 583, 588-89 (D. Minn.1995), *aff'd,* 77 F.3d 1071 (8th Cir.1996); *Vanderlinden v. State,* 874 F.Supp. 1210, 1216 (D.Kan.1995), *aff'd,* 103 F.3d 940 (10th Cir.1996); *Appeal in Maricopa County,* 930 P.2d at 500 (dealing with juveniles and DNA statute); *Jamison v. People,* 988 P.2d 177, 180 (Colo.Ct.App.1999); *Doe v.. Gainer,* 642 N.E.2d 114, 116-17 (Ill.1994), *cert. denied,* 513 U.S. 1168 (1995); *Cooper v. Gammon,* 943 S.W.2d 699, 704, 707 (Mo . Ct.App.W.D.1997); *State v. Norman,* 660 N.W.2d 549, 556-57 (N.D.2003) (not reaching the merits of the ex post facto argument but citing with approval numerous cases from other jurisdictions); *Kellogg v. Travis,* 728 N.Y.S.2d 645, 647 (N.Y.Sup.Ct. 2001), *aff'd as modified,* 750 N.Y.S.2d 12 (2002); *Dial v. Vaughn,* 733 A.2d 1, 4-5 (Pa.Commw. Ct.1999).

C. Double Jeopardy Analysis

Appellants also argue that the DNA statute violates the Double Jeopardy Clause of the United States Constitution. That Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense and then only when such occur in successive proceedings. *Hudson v. United States,* 522 U.S. 93, 99, 118 S.Ct. 488, 493 (1997).

Here, Appellants were neither prosecuted a second time for the crimes for which they were adjudicated nor were they punished a second time for those crimes. Thus, Appellants have not been placed in double jeopardy by the DNA statute, and the Double Jeopardy Clause does not apply here. *See Kellogg,* 728 N.Y.S.2d at 647 (holding retroactive application of DNA statute did not violate Double Jeopardy Clause). Appellants have failed to demonstrate that, as applied to them, the Texas DNA statute violates the Double Jeopardy Clause. We overrule Appellants' first issue.

V. DNA STATUTE IS NOT AN UNREASONABLE SEARCH OR SEIZURE

In their second issue, Appellants argue that a blood draw ordered pursuant to the DNA statute constitutes an unreasonable search and seizure under the Fourth Amendment. Appellants argue that in these cases no probable cause or exigent circumstances exist justifying a warrantless search and seizure. The State contends that requiring a DNA specimen from a person who has committed a qualifying offense does not offend the Fourth Amendment. The Fourth Amendment states,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Blood testing procedures plainly constitute searches of persons and depend antecedently upon seizures of persons within the meaning of the Fourth Amendment. *See Schmerber,* 384 U.S. at 767, 86 S.Ct. at 1834. The Fourth Amendment does not, however, proscribe all searches and seizures, but only those that are unreasonable. *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 619, 109 S.Ct. 1402, 1414 (1989). The reasonableness of a search or seizure "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Id.* (citing *United States v. Montoya de Hernandez,* 473 U.S. 531, 537, 105 S.Ct. 3304, 3308 (1985)).

Traditionally, courts evaluating the reasonableness of a search or seizure have applied a classic Fourth Amendment "balancing" analysis. Under the balancing analysis, a reviewing court determines whether the search was reasonable by weighing the government's interest in conducting the search and the degree to which the search actually advances that interest against the gravity of the intrusion upon personal privacy. *Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 2640 (1979). A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to

arbitrary invasions solely at the unfettered discretion of officers in the field. *Id.* Three Texas cases have applied, or followed precedent that has applied, the balancing test to claims that an order requiring submission of a DNA sample constituted an unreasonable search and seizure and have found no Fourth Amendment violation. *See Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir.2003) (following *Shaffer, Rise,* and *Jones,* applying balancing test, as well as Second Circuit case applying special needs analysis); *Rome v. Burden,* No. 03-01-629-CV, 2002 WL 31426177, at *2 (Tex.App.—Austin Oct. 31, 2002, pet. denied) (not designated for publication); *Groceman v. United States Dep't of Justice,* No. CIV.A.301CV1619G, 2002 WL 1398559, at *3-4 (N.D.Tex. Jun. 26, 2002) (memo.order).

Two recent United States Supreme Court cases, however, cast doubt upon the continuing applicability of a pure traditional balancing test analysis as the proper test for determining the reasonableness of a search or seizure, at least in evaluating warrantless, suspicionless searches. *Ferguson v. City of Charleston,* 532 U.S. 67, 121 S.Ct. 1281 (2001); *City of Indianapolis v. Edmond,* 531 U.S. 32, 121 S.Ct. 447 (2000); *see also Goord,* 2003 WL 256774, at *9, 11. In *Ferguson,* the Supreme Court held that a statute authorizing a state hospital to test the urine of pregnant women receiving prenatal care at the hospital was unreasonable under the Fourth Amendment because the State failed to show a special need for the information acquired apart from the normal need for law enforcement. 532 U.S. at 84, 121 S.Ct. at 1292. In *Edmond,* the Supreme Court held that a warrantless, suspicionless stop of random motor vehicles at a drug interdiction checkpoint for the purpose of an exterior canine sniff was unreasonable under the Fourth Amendment because the State failed to show a special need for the information acquired in the search apart from the normal need for law enforcement; indeed, the very purpose of the stop was law enforcement. 531 U.S. at 46-47, 121 S.Ct. at 456-57.

In both *Ferguson* and *Edmond,* the Supreme Court began with the premise that warrantless searches or seizures not based upon an individualized suspicion of wrongdoing violate the Fourth Amendment. *Ferguson,* 532 U.S. at 76-77, 121 S.Ct. at 1287-88; *Edmond,* 531 U.S. at 37, 121 S.Ct. at 451. The Court recognized that it had, however, in limited circumstances upheld the constitutionality of certain regimes of warrantless, suspicionless searches where the program compelling the search or seizure was designed to serve "special needs, beyond the normal need for law enforcement." *Edmond,* 531 U.S. at 37, 121 S.Ct. at 451 (recognizing prior case upholding constitutionality of brief, suspicionless seizures of motorists at fixed border patrol checkpoints). The Court then analyzed the programs at issue in *Ferguson* and *Edmond* to determine whether the warrantless, suspicionless searches and seizures in those cases fell into this narrow category of permissible, constitutional searches and seizures based on special needs of law enforcement. *Ferguson,* 532 U.S. at 81-86, 121 S.Ct. 1290-93; *Edmond,* 531 U.S. at 40-48, 121 S.Ct. at 453-58. Concluding that the programs had as their primary purpose the discovery of evidence against particular individuals suspected of committing a specific crime—ordinary or normal law enforcement function—the Supreme Court declared the searches and seizures in both *Ferguson* and *Edmond* unreasonable under the Fourth Amendment. *Ferguson,* 532 U.S. at 85-86, 121 S.Ct. 1292-93; *Edmond,* 531 U.S. at 48, 121 S.Ct. at 458.

Under the analysis utilized by the Supreme Court in *Ferguson* and *Edmond,* we must determine whether the warrantless, suspicionless search and seizure mandated by the DNA statute constitutes a "special need, beyond the normal need for law enforcement." *See Goord,* 2003 WL 256774, at *11. To answer this question, we must first ascertain the "primary purpose" of the Texas DNA statute. *See id.* We have already determined under our ex post facto analysis that the principal purpose of the Texas DNA database is to assist in the investigation or prosecution of sex-related offenses or other offenses in which biological evidence is recovered and to exclude or identify suspects. Tex. Gov't Code Ann. § 411.143(a)-(b). The secondary purposes of the DNA database are to assist in the recovery or identification of human remains from a disaster or for humanitarian purposes; to assist in the identification of living or deceased missing persons; and, after personal identifying information is removed, to establish a population statistics database, assist in identification research and protocol development, and assist in database or DNA laboratory quality control. *Id.* § 411.143(c)(1)-(3).

We next analyze whether these purposes demonstrate a need for the DNA samples beyond the normal need for law enforcement. *See Goord,* 2003 WL 256774, at *12 (citing *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 665, 109 S.Ct. 1384, 1390-91 (1989)); *see also Edmond,* 531 U.S. at 41- 42, 121 S.Ct. at 454-55. The *Goord* court, reviewing a Fourth Amendment challenge to a DNA statute similar to the Texas DNA statute, explained that the New York DNA indexing statute's primary purpose was not a "normal" or "ordinary" purpose of law enforcement:

> Obviously, obtaining a DNA sample for a databank is within the scope of law enforcement, broadly defined, and certainly has a relationship to the solving of crimes. But the primary purpose of collecting samples for the databank is not for the State to determine that a particular individual has engaged in some specific wrongdoing. Unlike a blood or urine sample that may contain traces of drugs, the samples of blood for the DNA databank prove nothing by themselves regarding whether the donor has committed a crime.... They merely offer the potential that some very small percentage may be relevant to solving a crime that in all likelihood has not even been committed at the time of the search.

2003 WL 256774, at *13; *see also Reynard,* 220 F.Supp.2d at 1166-68 (holding federal DNA indexing statute served special needs, beyond normal or ordinary needs of law enforcement).

Unlike the programs in *Edmond* and *Ferguson,* the Texas DNA statute is not designed to discover and produce evidence of a specific individual's criminal wrongdoing. *Goord,* 2003 WL 256774, at *13. The purposes of the Texas DNA statute serve "special needs," not "normal" or "ordinary" purposes of law enforcement. *See United States v. Kimler,* 335 F.3d 1132, 1146 (10th Cir.) (holding federal DNA Backlog Elimination Act of 2000 constitutional under special needs analysis), *cert. denied,* --- S.Ct. ----, 2003 WL 22736543 (U.S. Dec. 8, 2003); *Goord,* 2003 WL 256774, at *14 (holding New York's DNA indexing program constitutional under special needs analysis); *Miller,* 259 F.Supp.2d at 1177 (holding Patriot Act's DNA provision constitutional under special needs analysis); *Sczubelek,* 255 F.Supp.2d at 319-23 (holding federal DNA Backlog Elimination Act of 2000 constitutional under special needs analysis); *Vore,* 281 F.Supp.2d at 1134, 1137 (same); *Reynard,* 220 F.Supp.2d at 1169 (same); *Kellogg,* 728 N.Y.S.2d at 647 (holding New York's DNA statute constitutional under special needs analysis); *Olivas,* 856 P.2d at 1086 (holding Washington's DNA statute constitutional under special needs analysis).

Even where a court concludes that a statute or program qualifies as a "special need, beyond the normal need for law enforcement," the reasonableness of the intrusion must then still be evaluated through a balancing analysis. *See Goord,* 2003 WL 256774, at *11, 14. Thus, having determined that the Texas DNA statute falls within the "special needs" exception to the unconstitutionality of a warrantless, suspicionless search or seizure, we next conduct a fact-specific balancing of the intrusion on Appellants' Fourth Amendment rights against the promotion of legitimate governmental interests in solving past and future crimes, identifying human remains and missing persons, establishing a population statistics database, and assisting in identification research, protocol development, and database or DNA laboratory quality control. *Id.; see also Miller,* 259 F.Supp.2d at 1177.

The physical intrusion of providing a blood sample for DNA testing is minimal. *See, e.g., Skinner,* 489 U.S. at 624-26, 109 S.Ct. at 1417-18 (discussing how slight an intrusion blood and breath tests pose). Additionally, a juvenile's expectation of privacy is significantly diminished by the fact that he or she has been adjudicated delinquent for committing a sexual offense. *See Appeal in Maricopa County,* 930 P.2d at 501 (recognizing diminished privacy right of juvenile delinquent); *see also Goord,* 2003 WL 256774, at * 16 (recognizing "convicted felons should be entitled to almost no expectation that their identities will remain secret"). We balance the fairly minimal intrusiveness of the sampling and a juvenile's reduced privacy expectations [FN10] against the public's interest in effective law enforcement, crime prevention, and the identification and apprehension of those who commit sex offenses and conclude that the governmental interest promoted by the DNA statute rightfully outweighs its corresponding minimal physical intrusion and encroachment upon a juvenile's privacy. *See Appeal in Maricopa County,* 930 P.2d at 501. Consequently, under either existing federal case law in Texas applying the traditional balancing analysis [FN11] or under the *Ferguson* and *Edmond* special needs analysis, we hold that the search and seizure occasioned by the DNA statute does not violate the Fourth Amendment to the United States Constitution. [FN12] In their facial Fourth Amendment challenge, Appellants have failed to establish that the Texas DNA statute operates unconstitutionally. We overrule Appellants' second issue.

> FN10. We note the DNA statute's procedural safeguards are more stringent than those required for the issuance of a warrant based on a finding of probable cause. An order for a blood draw follows either an adjudication of delinquency, which is based on a determination beyond a reasonable doubt, or a constitutionally safeguarded admission by a juvenile that an enumerated sexual offense was committed. *See Appeal in Maricopa County,* 930 P.2d at 500. In effect, the beyond-a-reasonable-doubt standard implicit in the DNA statute is a substantially greater burden than the finding of probable cause required for a search warrant. *See id.*

FN11. *See Velasquez,* 329 F.3d at 421; *Groceman,* 2002 WL 1398559, at *3-4.

FN12. Our research has revealed two cases holding that a statutorily required blood draw violates the Fourth Amendment. *See United States v. Kincade,* 345 F.3d 1095, 1112-14 (9th Cir.2003); *United States v. Miles,* 228 F.Supp.2d 1130, 1140 (E.D.Cal.2002). *Kincade* has only been used for comparison. *See United States v. Plotts,* 347 F.3d 873, 877 (10th Cir.2003); *Padgett v. Ferrero,* No. 1:01-CV-1936-TWT, --- F.Supp.2d ----, 2003 WL 22927490, at *3 (N.D.Ga. Dec. 10, 2003); *State v. Hauge,* 79 P.3d 131, 146 n. 6 (Hawaii 2003). *Miles* has not, however, been followed by any other courts; the *Miller, Kimler, Sczubelek,* and *Vore* courts disagreed with or declined to follow *Miles;* and the *Goord* court distinguished *Miles.*

VI. DNA STATUTE DOES NOT VIOLATE RIGHT AGAINST SELF-INCRIMINATION

Appellants argue in their third issue that ordering them to place their DNA samples in the DNA database for the purpose of investigation and prosecution of future crimes violates their rights against self-incrimination under the United States and Texas Constitutions. Their argument is based on the dissent in *Schmerber,* which emphasizes the testimonial value of a person's DNA imprint; on their assertion that the Texas Constitution provides greater protections against self-incrimination than the United States Constitution; [FN13] and on their understanding of *Ex parte Renfro,* 999 S.W.2d 557 (Tex.App.—Houston [14th Dist.] 1999, pet. ref'd). The State responds that a blood sample is not testimonial in nature; thus, the DNA statute does not violate the Self- Incrimination Clause.

FN13. Appellants cite no cases supporting, and do not separately analyze, their contention that the Texas Constitution confers greater protection in this area of the law than the federal constitution. Therefore, we will not address their state constitutional arguments. *See Black,* 26 S.W.3d at 901 n. 4; *Heitman,* 815 S.W.2d at 691 n. 23.

The Fifth Amendment to the United States Constitution states, "No person shall be ... compelled in any criminal case to be a witness against himself...." U.S. Const. amend. V. In applying the Fifth Amendment privilege against self-incrimination, the United States Supreme Court draws a distinction between a suspect's communications or testimony and real or physical evidence obtained from the suspect. *Schmerber,* 384 U.S. at 760-61, 86 S.Ct. at 1832. While the Fifth Amendment protects a suspect from being compelled to provide evidence of a testimonial or communicative nature, it does not protect a suspect from being compelled to provide real or physical evidence. *Id.* at 763-64, 86 S.Ct. at 1832. In *Schmerber,* the Supreme Court held that a compelled extraction of a blood sample and its chemical analysis, for blood alcohol content, does not amount to testimonial or communicative evidence and therefore is not prohibited by the Fifth Amendment. *Id.* at 765, 86 S.Ct. at 1832-33. Likewise, the Fifth Amendment privilege against self-incrimination is not violated by the taking of blood under Texas Family Code § 54.0405(a) (2)(B) for DNA analysis. *See Shaffer,* 148 F.3d at 1181; *Belgarde v. Montana,* 123 F.3d 1210, 1214 (9th Cir.1997); *Boling,* 101 F.3d at 1340; *Vore,* 281 F.Supp.2d at 1137-38; *Reynard,* 220 F.Supp.2d at 1174; *Forrest v. State,*

VII. LEGAL AND FACTUAL SUFFICIENCY

Appellants complain in issue four that the evidence is both legally and factually insufficient to support the trial court's finding that they should be subject to the DNA statute. Appellants base their argument on the fact that R.W.W. has been excused from sex offender registration and contend that the other Appellants may still exercise their right to request to be excused from registration. Consequently, they contend that the evidence is insufficient to subject them to the DNA statute's blood draw requirement. The State responds that each of the Appellants was adjudicated of a qualifying offense and is therefore subject to the requirements of the DNA statute.

A. Standard of Review

In reviewing Appellants' sufficiency challenge to the evidence supporting their dispositions, we review the evidence under the civil standard. *In re J.D.P.*, 85 S.W.3d 420, 422 (Tex.App.—Fort Worth 2002, no pet.). In reviewing 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. *In re T.K.E.*, 5 S.W.3d 782, 785 (Tex.App.—San Antonio 1999, no pet.); *see In re A.S.*, 954 S.W.2d 855, 858 (Tex.App.—El Paso 1997, no pet.); *In re S.A.M.*, 933 S.W.2d 744, 745 (Tex.App.—San Antonio 1996, no writ). In reviewing Appellants' factual sufficiency claim, we consider and weigh all the evidence 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. *T.K.E.*, 5 S.W.3d at 785; *see In re K.L.C.*, 972 S.W.2d 203, 206 (Tex.App.—Beaumont 1998, no pet.); *A.S.*, 954 S.W.2d at 862.

B. Sufficiency of the Evidence

The evidence in each of Appellants' records demonstrates that they were all adjudicated for either indecency with a child or aggravated sexual assault of a child, or both. Each of these offenses is a "reportable conviction or adjudication" subject to the sex offender registration program. *See* Tex.Code Crim. Proc. Ann. art. 62.01(5)(A), 62.02(a) (Vernon Supp.2004). At the disposition hearings conducted in accordance with Texas Family Code section 54.04, each Appellant was placed on probation. Tex. Fam.Code Ann. § 54.04. As a condition of probation, each Appellant was required to register in the sex offender registration program. Then, after the DNA statute was passed, the trial court amended each Appellants' probation conditions to require him to submit a DNA specimen.

Appellants' argument that R.W.W. has been excused from sex offender registration and therefore cannot be required to comply with the DNA statute is contrary to the statute's terms. R.W.W. and the other Appellants were adjudicated of a qualifying offense under Chapter 62. *See* Tex.Code Crim. Proc. Ann. art. 62.01(5)(A). A plain reading of the DNA statute requires the court to include two terms in a juvenile sex offender's conditions of probation: one of which is the registration as a sex offender; the other, which is not contingent upon the first, is submission of a DNA specimen. Tex. Fam.Code Ann. § 54.0405(a)(2); *see also See Sanchez v. State*, 995 S.W.2d 677, 683 (Tex.Crim. App.) (stating we interpret a statute in accordance with the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results), *cert. denied*, 528 U.S. 1021 (1999). The fact that a juvenile may be excused from registration does not alter the fact that he was placed on probation for an offense requiring sex offender registration or nullify the independent requirement of a DNA sample. [FN14] Thus, here, because Appellants were adjudicated of a qualifying offense and were placed on probation, the prerequisites for applying the DNA statute were met. *See* Tex. Fam.Code Ann . § 54.0405(b) (specifying that DNA statute applies to child placed on probation for conduct constituting an offense requiring registration as sex offender).

> FN14. Neither the Texas Family Code nor Chapter 62 of the Code of Criminal Procedure prohibits a court from requiring a DNA specimen as a condition of probation for a juvenile who has succeeded in having the sex offender registration requirement excused. *See*

file a motion to excuse sex offender registration. Such a reading is not permissible. *See Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.,* 19 S.W.3d 393, 402 (Tex.2000) (stating that courts should avoid a statutory construction that renders all or a part of a statute meaningless).

We hold that there was evidence of probative force supporting the trial court's amendment of Appellants' probation conditions to add the requirement that they provide a DNA specimen. *Accord J.D.P.*, 85 S.W.3d at 429 (holding evidence legally sufficient to support jury's finding that appellant should be placed in Texas Youth Commission). The trial court's amendment of the probation conditions in each case was, likewise, not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See In re C.C.*, 13 S.W.3d 854, 859 (Tex.App.—Austin 2000, no pet.) (holding evidence factually sufficient to support juvenile court's finding that reasonable efforts were made to prevent need to remove appellant from home). Accordingly, we overrule Appellants' fourth issue.

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2. PROBATION REPORT AUTHORIZED COURT TO PLACE RUNAWAY IN SECURE CONFINEMENT

In the Matter of E.D., 127 S.W.3d 860 (Tex.App.—Austin 1/29/04) *Texas Juvenile Law* 77 (5th Ed. 2000).

Facts: Appellant E.D., a juvenile, appeals from the trial court's order modifying her probation by extending her probation and placing her in secure confinement at the Travis County Leadership Academy. In a single issue, appellant contends that the order is void because it does not satisfy the requirements of family code section 54.04(n) for placing a status offender [FN1] in secure confinement. She contends in the alternative that the trial court abused its discretion in modifying her probation. For the reasons stated below, we affirm the order of the trial court.

> FN1. "Status offender" means a "child who is accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult." Tex. Fam.Code Ann. § 51.02(15) (West Supp.2004).

The facts in this case are not in dispute. On March 21, 2003, appellant at age fourteen was adjudicated a status offender for being a runaway, which is conduct indicating a need for supervision. [FN2] She was placed on six months' probation in the custody of her mother. Conditions of her probation included: being at home between 7:30 p.m. and 6:00 a.m. every day, unless accompanied by a parent or guardian or with her probation officer's permission; not associating with anyone two or more years older than herself, including her 22-year-old boyfriend, who was specifically named; and not using alcohol, inhalants, or illegal drugs.

> FN2. A child who is adjudicated of running away from home is a status offender. *Id.* § 51.02(15)(B). "[T]he voluntary absence of a child from the child's home without the consent of the child's parent or guardian for a substantial length of time or without intent to return" is conduct indicating a need for supervision. *Id.* § 51.03(b)(3) (West Supp.2004).

On May 5, appellant's mother reported to the probation officer that appellant had left home after school on Friday and did not return until Monday morning. Appellant's mother suspected that appellant had stayed with her boyfriend's sister. The probation officer detained appellant at school for violating probation and obtained a urine sample. After appellant tested positive for marihuana, appellant told the probation officer that she had smoked marihuana with her friends when she was gone from home the previous weekend. The trial court held detention hearings on May 6 and May 13, and released appellant on probation on May 13 on the conditions that she begin intensive outpatient drug treatment, terminate contact with her boyfriend and other "negative peers," and enroll in summer school. The court also warned appellant that if she violated her probation rules again, she would be ordered into the Leadership Academy.

On May 30, appellant's mother reported that appellant had left home and had not returned. On June 3, the probation officer met with appellant, who said that she had run away because things were too stressful at home with her mother's use of alcohol. Appellant also told the probation officer that she had seen her boyfriend the night before, but did so to break up with him. Appellant was detained for several days.

On June 9, the State filed a motion to modify disposition on the ground that appellant violated the terms of her probation by testing positive for marihuana and leaving home each weekend. On June 10, appellant's probation officer filed a report recommending twelve months' probation and placement at the Leadership Academy. The officer recommended this placement because of appellant's "excessive runaway history and behavioral issues as well as substance abuse." On June 12, after hearing evidence, the trial court found that appellant had violated the terms of her probation by being away from home after curfew. The trial court ordered that ap-

pellant be placed at the Leadership Academy in part because she "cannot be provided the quality of care and level of support and supervision that [she] needs to meet the conditions of probation." The court issued *nunc pro tunc* orders on July 28 and August 8 to correct the omission of an exhibit and correctly state the reason for the modification of probation.

Held: Affirmed.

Opinion Text: Juvenile courts are granted broad powers and discretion in determining a suitable disposition for a juvenile who has been adjudicated to have engaged in conduct indicating a need for supervision, particularly in a proceeding to modify a disposition. *See In re J.M.*, 25 S.W.3d 364, 367 (Tex.App.—Fort Worth 2000, no pet.); *In re J.L.*, 664 S.W.2d 119, 120 (Tex.App.—Corpus Christi 1983, no writ). Accordingly, we will not disturb the juvenile court's findings regarding the modification of a disposition absent a clear abuse of discretion. *See In re C.C.*, 930 S.W.2d 929, 930 (Tex.App.-Austin 1996, no writ). The juvenile court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to guiding rules and principles. *In re C.L., Jr.*, 874 S.W.2d 880, 884 (Tex. App.—Austin 1994, no writ).

In one issue, appellant contends that the order modifying probation is void because it does not satisfy the requirements of family code section 54.04(n), in that the order did not state, among other requirements, that "all dispositions, including treatment, other than placement in a secure detention facility or secure correctional facility, have been exhausted or are clearly inappropriate." Tex. Fam.Code Ann. § 54.04(n)(2)(C) (West Supp. 2004). Appellant alleges in the alternative that the trial court abused its discretion in modifying her probation.

At the outset, we disagree with appellant's contention that the order modifying appellant's disposition must meet the requirements of section 54.04(n). This provision sets forth the requirements of a probation officer's report as a *prerequisite* to the court's order, stating:

> A court may order a disposition of secure confinement of a status offender adjudicated for violating a valid court order only if:
>
> ....
>
> (2) the *juvenile probation department in a report* authorized by Subsection (b):
>
> (A) reviewed the behavior of the child and the circumstances under which the child was brought before the court;
>
> (B) determined the reasons for the behavior that caused the child to be brought before the court; and
>
> (C) determined that all dispositions, including treatment, other than placement in a secure detention facility or secure correctional facility, have been exhausted or are clearly inappropriate.

Id. § 54.04(n)(2) (emphasis added). Section 54.04(i), on the other hand, sets forth the requirements of a trial court's order if the court places the child on probation outside of the home. The order must state that: (i) it is in the child's best interests to be placed outside of the home; (ii) reasonable efforts were made to prevent or eliminate the need for the child's removal from home; and (iii) the child, in the child's home, cannot be provided the quality of care and level of support that the child needs to meet the conditions of probation. *Id.* § 54.04(i)(1) (West Supp.2004). Appellant does not dispute that the trial court's order fulfilled these requirements. Furthermore, the trial court stated at the hearing to modify the disposition that the requirements of section 54.04(n) were met. Because section 54.04(n) speaks only to the elements of the probation officer's report, not the trial court's order, we reject appellant's argument that the trial court's order modifying probation is void for failure to meet the requirements of section 54.04(n).

We now turn to appellant's argument that the trial court abused its discretion in modifying appellant's probation. Section 54.05 of the family code governs hearings to modify dispositions. *Id.* § 54.05 (West Supp.2004). A trial court may modify its original or a prior disposition if it finds by a preponderance of the evidence that a child violated a reasonable and lawful order of the court. *Id.* § 54.05(f). The trial court must give specific reasons for the disposition of or modification of the disposition of a juvenile. *Id.* §§ 54.04(i), .05(i). This requirement assures that the child will be advised of the reasons for the disposition and will be in a position to challenge those reasons on appeal. *See In re J.R .*, 907 S.W.2d 107, 110 (Tex.App.—Austin 1995, no writ). Such specificity also allows an appellate court to review the reasons for the disposition and determine whether they are (i) supported by the evidence and (ii) sufficient to justify the disposition ordered. *See id.* at 110 (citing *In re L.G.*, 728 S.W.2d 939, 944-45 (Tex.App.—Austin 1987, writ ref'd n.r.e.)). We may reverse for an abuse of discretion if the record does not support the findings. *See L.G.*, 728 S.W.2d at 946.

Section 54.05(e) requires a two-step modification hearing. First, the court determines whether

probation has been violated. *See* Tex. Fam.Code Ann. § 54.05(e) (West Supp.2004); Robert O. Dawson, *Texas Juvenile Law* 222 (5th ed.2000); *see also In re D.S.S.*, 72 S.W.3d 725, 728-29 (Tex.App.—Waco 2002, no pet.). "After a hearing on the merits, the court may consider written reports from probation officers ... in addition to the testimony of other witnesses." Tex. Fam.Code Ann. § 54.05(e). In the first part of the modification hearing, appellant's probation officer testified that appellant told her that she had stayed at a friend's house on May 6 and that appellant did not have permission to do so. Appellant did not present any controverting evidence. The record reflects that as a condition of her probation, appellant was to be at home between 7:30 p.m. and 6:00 a.m. every day, unless accompanied by a parent or guardian or with prior approval of her probation officer. Based on this testimony, the court granted the modification, having determined that the probation officer had proven a violation of the probation rule by a preponderance of the evidence. Further, in its order modifying probation, the trial court found that appellant violated a condition of probation by leaving her home on May 6, 2003 and returning at 4:00 a.m. the next morning. We do not find that the trial court abused its discretion in making this determination.

The trial court further determined in its order, as required by family code section 54.04(i), that (i) at home, appellant cannot be provided the quality of care and level of support and supervision that she needs to meet the conditions of probation; (ii) all reasonable efforts were made to prevent or eliminate the need to remove appellant from home; and (iii) it is in the best interest of appellant and society to place her on probation outside of her home at the Leadership Academy. *Id.* § 54.04(i). In making these determinations, the trial court could consider both the probation officer's report and testimony of witnesses. *Id.* § 54.04(e). In her report, the probation officer stated that appellant "continues to associate with negative peers," "continues to leave the home for a few days at a time," and that appellant reported to her that things are stressful at home because of her mother's use of alcohol. In the time between her original adjudication and the modification hearing, appellant was detained four times because of running away and substance abuse. At one detention hearing, appellant was ordered to intensive outpatient treatment for marihuana abuse. Appellant was warned several times that if she continued to violate her probation, she would be ordered to the Leadership Academy. Because of appellant's excessive runaway history and substance abuse, the probation officer recommended in her report that the Leadership Academy "can provide a secured structured environment that can provide her with responsibility and accountability skills as well as how her actions affect others."

In the second part of the modification hearing, the probation officer testified that appellant had a pattern of leaving home. She was concerned for appellant's safety because appellant kept associating with "negative peers," including her 22-year-old boyfriend. Further, appellant had previously cut off her ankle monitor. Appellant's attorney argued that options other than secure confinement had not been exhausted, suggesting first that appellant be placed in Phoenix Academy, a nonsecure facility. The trial court rejected that suggestion because the facility's purpose is drug treatment, which appellant's attorney agreed was not appellant's primary problem. Appellant's attorney then suggested a nonsecure facility in West Texas. Appellant's mother was agreeable to that suggestion and said she could visit her daughter at least once or twice in the year that appellant would be there. The trial court stated that although that would not be a bad place for appellant, "she and her mom have work to do, I don't know how they can do it with her out there." Additionally, when asked by the trial court if she wanted to go to West Texas, appellant said no.

When appellant's attorney argued that other services had not been exhausted, appellant's mother testified:

> I disagree with that statement. I think [appellant] and I have been given a lot of chances and that anything that was put into place she's either taken off or we've gotten to a place where we haven't been able to see it through.... So she needs something secure and I'll do a program with her.

After hearing the testimony, the trial court stated that "the Court doesn't really want to find [appellant] dead on the side of the street one day; and frankly that's the direction I am afraid I see her going.... There is no way this Court could put her back on the street with [her boyfriend] out there." Because "less restrictive means ... have been unsuccessful," the trial court ordered twelve months of probation at the Leadership Academy. Simply because the trial court made a judgment call does not mean that the trial court abused its discretion. That the court's determination was based not on its inclination but its *judgment* as guided by sound legal principles is the essence of the court's proper exercise of its jurisdiction. Based on the probation officer's report and evidence presented at the modification hearing, we cannot say that the trial court abused its discretion in placing appellant in secure confinement.

Even reviewing the probation officer's report for sufficiency under section 54.04(n), appellant has not shown that the trial court abused its discretion in placing appellant in secure confinement. As detailed above, the probation officer described appellant's behavior of continuing to run away and determined that the running away caused the child to be brought before the court. She further reported that appellant's mother "feels that the child needs to be placed in a more structured environment in order to provide the necessary skills for the child to be successful." Because of her excessive runaway history, behavioral issues, and substance abuse, the probation officer recommended that the Leadership Academy would provide appellant "with responsibility and accountability skills as well as how her actions affect others." The probation officer's report, in recounting appellant's pattern of running away and endangering herself, satisfies the requirements of section 54.04(n), establishing that all dispositions other than placement in secure confinement were clearly inappropriate. *See id.* § 54.04(n). Accordingly, we overrule appellant's sole issue on appeal.

Because family code section 54.04(n) speaks only to the elements of the probation officer's report, not the trial court's order, we reject appellant's argument that the trial court's order modifying probation is void for failure to meet the requirements of section 54 .04(n). *Id.* Given the broad powers of discretion with which juvenile courts are vested when modifying dispositions, we review the trial court's order under an abuse of discretion standard. *J.M.*, 25 S.W.3d at 367. Here, the evidence established that appellant violated the terms of her probation and that placement in secure confinement was appropriate, based on appellant's pattern of running away from home. Accordingly, we do not find that the trial court abused its discretion in modifying appellant's probation and ordering her to secure confinement.

Furthermore, the probation officer's report fulfills the requirements of family code section 54.04(n), establishing that all dispositions other than placement in secure confinement were clearly inappropriate. Tex. Fam.Code Ann. § 54.04(n). Having overruled appellant's issue, we affirm the trial court's August 8, 2003 *nunc pro tunc* order modifying probation.

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3. TEXAS SUPREMES SAY REMOVAL FROM HOME FINDINGS NOT REQUIRED

In the Matter of J.P., 136 S.W.3d 629 (Tex. 5/14/04) *Texas Juvenile Law* 223 (5th Ed. 2000).

Facts: The trial court modified a prior juvenile order to commit J.P., an eleven-year-old boy, to the Texas Youth Commission (TYC). He appeals, arguing the trial court failed to make certain findings during modification that the statute expressly requires only in original commitment orders. We granted the petition because of a conflict in the courts of appeals on this question. We hold the plain words of the statute do not require the explicit findings J.P. demands.

At his original adjudication hearing, J.P. was found to have engaged in delinquent conduct by (1) hitting and kicking a teacher at his school, (2) threatening to murder the teacher, an assistant principal, and some of his fellow students, and (3) threatening his mother a week later with a knife. Had he been an adult, these offenses could have constituted, respectively, a third-degree felony, a Class A misdemeanor, and a second-degree felony.

J.P. was placed on one year's probation in the custody of his parents. Four days later, sheriff's deputies were called to his home and found him breaking out windows with a broom handle. He was taken into custody, and shortly thereafter agreed (with the approval of his appointed attorney) to an order modifying his probation to provide for placement at the Hood County Regional Detention Center. After a number of incidents at the detention center, the disposition was again modified on April 22, 2002 to commit J.P. to TYC. He appeals from this last order.

Held: Afffirmed.

Opinion Text: The Legislature provided different rules for different stages of a juvenile proceeding. An adjudication hearing incorporates many of the features of a criminal trial, including the right to a jury trial, the right to remain silent, and the right to exclude evidence inadmissible under the rules governing criminal proceedings. By contrast, at a disposition hearing after adjudication, a juvenile has a right to a jury only in cases of possible transfer to the Texas Department of Criminal Justice, and written reports may be considered even if the author does not testify. Finally, at a hearing to modify disposition, there is no right to a jury trial at all.

The Legislature also provided for differences in disposition orders depending on the stage of the proceedings. In all such orders, the court must state in writing its reasons for the order and furnish a copy to the child. But if an initial disposition order places a child in TYC or on probation outside the home, it must expressly state that (1) removal from the home is in the child's best interests, (2) reasonable efforts were made to avoid removal, and (3) care and supervision the child needs to meet the conditions of pro-

bation cannot be provided at home. By contrast, none of these additional findings is expressly required in a modification order, which instead can provide for commitment to TYC if (1) the original disposition was for conduct constituting a felony or multiple misdemeanors, and (2) the court finds the child violated a reasonable and lawful order of the court.

J.P. first argues that the modification order had to include written findings regarding best interests, reasonable efforts, and quality of in-home care. In drafting the Family Code (and other statutes as well), the Legislature often requires judges to "find" certain matters before taking certain actions, but only occasionally requires those findings to be made in writing. Here, the Legislature required several written findings in original orders, but did not require them in modified orders. We cannot interpret the statute to require otherwise without rewriting it.

Alternatively, J.P. argues that before making the modification order, the trial court had to make the same findings as would have been required for an original order, even if they did not have to be written into the modification order. He also argues the modification order here was improper because there was insufficient evidence to support these necessary but implied findings.

As noted, the plain language of the Family Code requires written findings regarding best interests, reasonable efforts, and quality of in-home care in an *original* disposition order, but not in a *modified* one. We must give effect to this difference in plain language unless doing so violates other provisions of the statute. Several appellate courts, including the court of appeals in this case, have held it does not.

But the Eighth Court of Appeals has held to the contrary, requiring trial courts to make each of these findings and state them expressly in modification orders committing a juvenile to TYC. The court appeared to have two main concerns about applying the statute as written.

First, the court feared children could be removed from their homes and placed in TYC for probation infractions without considering their best interests or alternative arrangements. But it must be kept in mind that no original disposition of any kind could have been made unless the best interests of the child indicated protection or rehabilitation was needed. Further, the act of modification itself indicates an in-home alternative has been tried, and undoubtedly most trial courts would find these efforts reasonable *because they ordered them.* Finally, by finding a violation of probation, a court necessarily finds that in-home supervision was insufficient to ensure there were no such violations. Given the circumstances in which modified orders of commitment arise, the Legislature could have decided separate findings regarding the child's best interests and alternative arrangements were not necessary because they were necessarily included.

Second, the court feared that effective appellate review of commitment orders based on minor infractions would be precluded if the order simply stated that the child "violated a reasonable and lawful order of the court." But 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 abuse of that discretion. If a trial court arbitrarily removes a child from home for a trivial infraction, nothing in the statute prohibits the appellate judges of Texas from doing something about it.

Finally, neither of these concerns addresses what the Juvenile Justice Code itself indicates is its primary concern the safety of the public:

> § 51.01. Purpose and Interpretation
>
> This title shall be construed to effectuate the following public purposes:
>
> (1) to provide for the protection of the public and public safety;
>
> (2) consistent with the protection of the public and public safety:
>
> (A) to promote the concept of punishment for criminal acts;
>
> (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and
>
> (C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
>
> (3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;
>
> (4) to protect the welfare of the community and to control the commission of unlawful acts by children;
>
> (5) to achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and
>
> (6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their consti-

tutional and other legal rights recognized and enforced.

In other parts of the Family Code, the best interests of children are often paramount; but in the Juvenile Justice Code, the best interests of children who engage in serious and repeated delinquent conduct are superseded to the extent they conflict with public safety.

Commitment to TYC by modification order is proper only if a juvenile originally committed a felony or multiple misdemeanors, and subsequently violated one or more conditions of probation. In such circumstances, the statute allows a trial court to decline third and fourth chances to a juvenile who has abused a second one.

Here, the evidence at the modification hearing showed that J.P. assaulted detention center officers, created a flood by plugging his toilet, assaulted other residents, and on several occasions threatened to commit suicide. On the other hand, there was evidence the death of his father shortly after he entered the detention center contributed to the deterioration of his behavior, and a grandfather from New Hampshire indicated willingness to raise J.P. there. The trial judge's comments indicate careful consideration of J.P.'s circumstances, of possible alternatives to commitment, and of potential dangers each option provided. Given J.P.'s original adjudication of delinquency for serious offenses (which he does not contest), the previous commitment to the Hood County Detention Center for further delinquent conduct (which he does not contest), and the many offenses at the Center (which he excuses but does not contest), we hold the trial court did not abuse its discretion in modifying the previous disposition orders to commit J.P. to TYC.

The plain language of the Juvenile Justice Code requires different findings in initial orders committing a juvenile to TYC than in modified orders that do so. For the reasons stated above, applying the statute as written compels neither arbitrary commitment nor meaningless review. Accordingly, we affirm the judgment of the court of appeals.

Justice SCHNEIDER, joined by Justice O'NEILL and Justice JEFFERSON, concurring.

I join the Court's opinion but write separately to express my concern and bring to the Legislature's attention the result that the statute could have in certain circumstances.

A plain reading of subsections 54.04(I), 54.05(f), and 54.05(k) allows a juvenile that has committed a relatively minor infraction to be committed to TYC without a finding by the trial court that such disposition is in his or her best interests or necessary to protect the public safety. Tex. Fam.Code § 54.04(I) and 54.05(f), (k). As Justice Rickhoff has emphasized, *In re H.G.* provides one such example. 993 S.W.2d 211, 215 (Tex.App.San Antonio 1999, no pet.) (Rickhoff, J., concurring). There, the juvenile was initially adjudicated for criminal mischief, $20-500. *Id.* His initial disposition resulted in six months of home probation. *Id.* While serving that probation, his disposition was modified, and he was committed to TYC. The acts that resulted in his committal were failing to attend the required probation counseling because his father "did not approve of it" and failing to pay restitution because his mother vetoed his job prospect. *Id.* I agree with Justice Rickhoff that such acts alone should not warrant commitment to an institutional juvenile facility without a finding that it is in the child's best interest. Yet, under this statute, the trial court was within its discretion in committing the child in *In re H .G.* to TYC without that finding.

The Court here emphasizes that "[i]f a trial court abuses its discretion by arbitrarily removing a child from home for trivial infractions, nothing in the statute prohibits the appellate judges of Texas from doing something about it." ___S.W.3d ___. While this may be true, results like that in *In re H.G.* suggest that the amount of discretion afforded trial courts in this area is exceedingly broad. And nothing in the statute or in our opinion today gives sufficient guidance to trial courts on how to deal with those cases that are on the margins.

TYC is the most severe form of incarceration contemplated in the juvenile justice scheme for an eleven-year-old child. Historically, the Legislature has expressed its intent that the commitment be reserved for only serious juvenile offenders. *See, e.g.*, Criminal Justice Policy Council, The Changing Profile of the Texas Youth Commission Population 4 *available at*

www.cjpc.state.tx.us/reports/alphalist/index.html (Sept.1996).

For one, a juvenile commitment, away from the child's family, will undoubtedly have a permanent, lasting effect on any child that goes to TYC. Also, the Legislature has not overlooked the fact that TYC commitment costs the State over $50,000 a year per child. *See* Criminal Justice Policy Council, Mangos to Mangos: Comparing the Operating Costs of Juvenile and Adult Correctional Programs in Texas 10, 12 (Jan.2003), *available at* www.cjpc.state.tx.us/reports/alphalist/index.html.

In certain cases, sending a child to TYC may provide a more proper environment and be in that child's best interests. However, I find it hard to believe that the Legislature intended for children that committed only minor infractions to be sent to TYC

without first finding that it is in the child's best interests. But on its face, this statute allows that result.

As the Court points out, the first purpose of the juvenile justice code is to provide for the protection of the public safety. Tex. Fam.Code 51.01(1). If a child poses a legitimate physical threat to those around him or her, TYC is a proper alternative. However, not all children that may be committed to TYC under this statute pose such a threat. Consistent with protecting the public, the code also encourages "separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety." Tex. Fam.Code 51.01(5). Thus, according to this purpose, it appears that the Legislature intended for the child's interests to be considered before separating the child from his parents and sending him to TYC. But, as we properly hold today, the plain wording of the statute does not require this when juvenile dispositions are being modified. *See* Tex. Fam.Code 54.05. I would urge the Legislature to reevaluate this statute and to change it if the Legislature intended to require more before committing a child to TYC.

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4. CANNOT REVOKE MISDEMEANOR PROBATION WHEN THE TWO PRIOR OFFENSES WERE ADJUDICATED IN THE SAME PROCEEDING

In the Matter of T.B., UNPUBLISHED, No. 12-03-00271-CV, 2004 WL 1202975, 2004 Tex.App.Lexis 4926 (Tex.App.—Tyler 6/2/04) *Texas Juvenile Law* 223 (5th Ed. 2000).

Facts: Appellant T.B., a juvenile, appeals the trial court's order committing him to the Texas Youth Commission for an indeterminate period pursuant to section 54.05 of the Texas Family Code. T.B. raises two issues on appeal.

On April 28, 2003, the State filed its original petition against T.B., alleging that on or about February 26, T.B. committed the class B misdemeanor offense of evading detention. On May 29, the State amended its original petition, contending that on or about April 10, T.B. committed the class A misdemeanor offense of escape when he "intentionally or knowingly escape[d] from the custody of Garry Hults, who was then and there the Deputy Director of the Smith County Juvenile Detention Center." The amended petition also included the evading detention charge.

On June 6, T.B. pleaded "true" to the State's allegations and was placed on probation until April 28, 2004, the date T.B. turned eighteen years old. As a part of the terms of T.B.'s probation, he was placed in the "Intensive Supervision Probation Program," and subjected to electronic monitoring by wearing a "non-removable, tamper-proof ankle bracelet" twenty-four hours a day for thirty days. The order placing T.B. on the electronic monitoring program stated that T.B. was to remain at home at all times except those approved by the court, except in cases of a "serious emergency." The order also stated that

> [a]s the purpose of the monitoring equipment is to report curfew compliance, the loss of a receiving signal, receipt of a tampering signal, the receipt of a signal indicating absence from home during curfew and physical evidence indicating the monitoring device has been tampered with or removed shall constitute a violation of this Court Order.

On June 27, 2003, the State filed a "Petition to Modify Disposition" of the trial court's order placing T.B. on probation, contending that on June 11, 17, and 22, T.B. violated the conditions of his probation by not obeying the rules of the electronic monitor. On July 29, the trial court held a hearing on the State's petition and found that T.B. violated the terms of his probation on the dates alleged by not obeying the rules of the electronic monitor. The trial court also entered an order modifying its previous disposition of T.B.'s case and committing T.B. to the Texas Youth Commission ("TYC") for an indeterminate period.

Held: Reversed and remanded.

Opinion Text: On appeal, T.B. argues that (1) the trial court abused its discretion in committing him to TYC when it did not make a specific pronouncement or finding of two prior misdemeanor adjudications and (2) the trial court erroneously admitted documents that demonstrated T.B.'s failure to obey the rules of the electronic monitor.

We first note that the record indicates that T.B. raises the abuse of discretion argument for the first time on appeal. However, a criminal sentence unauthorized by law is void, and a defect that renders a sentence void may be raised at any time. *See In the Matter of A.I.*, 82 S.W.3d 377, 379 (Tex.App.—Austin 2002, pet. denied); *In re Q.D.M.*, 45 S.W.3d 797, 800 (Tex.App.—Beaumont 2001, pet. denied). Accordingly, we will consider T.B.'s argument.

DID THE TRIAL COURT ERR BY COMMITTING T.B. TO THE TEXAS YOUTH COMMISSION?

Juvenile courts have broad discretion when determining the suitable disposition of children who have engaged in delinquent conduct. *In re M.A.L.*, 995 S.W.2d 322, 324 (Tex.App.—Waco 1999, no pet.). We review a juvenile court's decision to see whether the court acted in an unreasonable or arbitrary manner. *In re C.L.*, 874 S.W.2d 880, 886 (Tex.App—Austin 1994, no writ).

Applicable Law

Section 54.04 of the Texas Family Code sets forth the parameters a trial court must follow when committing a juvenile to TYC. After a juvenile is adjudicated delinquent, a separate disposition hearing must be held after the adjudication hearing. Tex. Fam.Code Ann. § 54.04(a) (Vernon Supp.2004). If the trial court finds that a child has engaged in misdemeanor delinquent conduct and a disposition is required, a juvenile court may commit a child to TYC without a determinate sentence if:

> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of misdemeanor on at least two previous occasions;
>
> (2) of the previous adjudications, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication; and
>
> (3) the conduct that is the basis of the current adjudication occurred after the date of at least two previous adjudications.

Tex. Fam.Code Ann. § 54.04(d)(2), (s). A trial court may also commit a juvenile to TYC if:

> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony on at least one previous occasion; and
>
> (2) the conduct that is the basis of the current adjudication occurred after the date of that previous adjudication.

Tex. Fam.Code Ann. § 54.04(d)(2), (t).

At the time T.B. committed the offense and the disposition of his case was modified, the Texas Family Code stated that a juvenile court may modify a disposition based on an adjudication for misdemeanor conduct so as to commit the juvenile to TYC if the court finds that the child has violated a reasonable and lawful order of the court and a finding that the child engaged in misdemeanor delinquent conduct if:

> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least two previous occasions; and
>
> (2) of the previous adjudications, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication.

Tex. Fam.Code Ann. § 54.05(f), (k) (Vernon 2002). In 2003, the Texas Legislature amended section (k) of section 54.05 to allow the court to modify a disposition based on an adjudication for misdemeanor conduct if it found that a juvenile violated a reasonable and lawful order of the court or if it found that

> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least *one* previous occasion before the adjudication that prompted the disposition that is being modified; and
>
> (2) the conduct that was the basis of the adjudication that prompted the disposition that is being modified occurred after the date of the previous adjudication.

Tex. Fam.Code Ann. § 54.05(k) (Vernon Supp. 2004) (emphasis added). [FN1] Therefore, the amendment made it possible for courts to modify a previous disposition and commit a juvenile to TYC for an indeterminate period of time if the child had been adjudicated after committing a misdemeanor on one previous occasion, compared to the earlier version which allowed for a commitment to TYC if the child had been adjudicated on two previous occasions after engaging in misdemeanor or felony delinquent conduct.

> FN1. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 283 § 21, 2003 Tex. Gen. Laws 1227.

Courts analyzing section 54.04 and the earlier version of section 54.05 have held that in order to commit a juvenile to TYC in a disposition of an adjudication based upon misdemeanor delinquent conduct, the child must have at least two adjudications prior to the one on which the State is seeking a modification of disposition. *See In the Matter of A.I.*, 82 S.W.3d at 380-81 (holding that before a juvenile may be sent to TYC under section 54.05(k), the child must have been adjudicated delinquent on at least two earlier occasions separate from the adjudication for which disposition is being modified); *see also In re A.N.*, 54 S.W.3d 487, 493 (Tex.App.—

Fort Worth 2001, pet. denied). A modification of a previous disposition does not substitute for a third adjudication. *In the Matter of A.I.*, 82 S.W.3d at 381.

Analysis

At the hearing on the State's motion to modify, the court heard testimony from various witnesses regarding T.B.'s violation of the terms of his probation. After the court heard this testimony, it found that T.B. violated the terms and conditions of his probation by failing to obey the rules of the electronic monitor on June 11, 17, and 22. The court then proceeded to hear evidence on T.B.'s prior adjudications.

Tara Erwin ("Erwin"), a juvenile probation officer for the Smith County Juvenile Services, testified during this portion of the hearing on the State's motion to modify. As Erwin began to testify, the court interrupted her and the following exchange took place:

> THE COURT: And for the purpose of proceedings here right now, I will take notice of the prior proceedings, the contents of the court's file which does include the predisposition report from when I placed [T.B.] on probation for this particular case.
>
> STATE'S COUNSEL: Okay.
>
> THE COURT: So you don't have to rehash things that are on already of a matter of record here.
>
> STATE'S COUNSEL: I was just going to briefly ask her about prior adjudications and the dates.
>
> THE COURT: I'm well aware of those since they were all done in this particular case.
>
> STATE'S COUNSEL: Okay. All right.

Erwin resumed testifying, and stated that

> [T.B.] has been supervised by this department before. This is his second of [*sic*] supervision. Usually when they're placed on ISP probation and electronic monitor, that's the last option that we give them. And as far as I know, that was why the recommendation was made.

The State then asked Erwin whether T.B. was eligible to be sent to TYC, and Erwin replied, "He is eligible." After Erwin testified and both sides argued their cases, the court found that T.B. "is a juvenile in need of rehabilitation and protection and the public needs protection" and committed T.B. to TYC for an indeterminate period. In the written order modifying T.B.'s disposition, the court stated that it was committing T.B. to the TYC because 1) T.B. had a history of persistent delinquent behavior, and 2) the local resources of the court are inadequate to properly rehabilitate T.B. To the right of the statement that T.B. had a "history of persistent delinquent behavior," the trial judge made the following handwritten notation: "—and is TYC eligible based on prior adjudications."

* * *

The State contends that the trial court properly committed T.B. to TYC based on prior adjudications because T.B. had been adjudicated delinquent for evading arrest/detention on June 25, 2002, and again on June 6, 2003 for the February 26, 2003 evading arrest/detention charge and the April 10, 2003 escape charge. [FN2] In other words, the State contends that T.B. has had three adjudications: the first occurring on June 25, 2002, and the second and third on June 6, 2003 when the trial court found that T.B. had engaged in delinquent conduct. [FN3] We disagree.

> FN2. In its brief, the State maintains that "[b]ecause there were two additional adjudications that occurred prior to the adjudication that is the basis of the disposition, the court did not err."

> FN3. The State does not contend that the October 18, 2002 and December 16, 2002 charges for violation of a juvenile court order and failure to identify fugitive counted as prior adjudications because the disposition of those cases in the pre-disposition report merely states that they were "consolidated." The State has not directed us to, nor can we find, anywhere in the record where a final adjudication was reached after an adjudication hearing conducted pursuant to section 54.03 in those cases. Therefore, we will not consider them for the purposes of this appeal.

The State erroneously assumes that the two prior separate offenses, coupled with the June 25, 2002 adjudication, constitute three totally separate adjudications. The State does not direct us to, nor can we find, any statute in the Texas Family Code that allows separate instances of delinquent conduct or conduct indicating a need for supervision, consolidated at a single adjudication hearing, to substitute for separate adjudications.

Specifically, section 54.03 governs adjudications of delinquency, and subsection (a) states that

> [a] child may be found to have engaged in delinquent conduct or conduct indicating a need for supervision only after an adjudication hearing conducted in accordance with the provisions of this section.

Tex. Fam.Code Ann. § 54.03(a) (Vernon Supp.2004). Furthermore, at the conclusion of the adjudication hearing, the court or jury shall find whether or not the child has engaged in delinquent conduct or conduct indicating a need for supervision. Tex. Fam.Code Ann. § 54.03(f) (Vernon Supp.2004).

Section 54.05(k) clearly requires two previous adjudications separate from the one for which disposition is being modified. *In the Matter of A.I.,* 82 S.W.3d at 381. The term "previous" means "going or existing before in time"; therefore, "previous adjudication" implies that

> there exist a *present* adjudication, or one that is subsequent to the two other adjudications required. This present adjudication is the "finding that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor," referenced in the first sentence of section 54.05(j) [now section (k)], upon which the modification of disposition is based.

In re A.N., 54 S.W.3d at 491. "The statute [section 54.05(k)] requires that 'the adjudications' (the plural of 'adjudication' meaning 'at least two') occur after the date of 'another previous adjudication.' " *In re Q.D.M.,* 45 S.W.3d 797, 802 (Tex.App.—Beaumont 2001, pet. denied). The sum of "at least two" plus "another previous" equals three. *Id.*

In the instant case, the trial court found that T.B. engaged in delinquent conduct on February 26, 2003 and April 10, 2003. Furthermore, the order states that "after reviewing all of the evidence, [the court] finds that a disposition must be made because the child is in need of rehabilitation and for the protection of the public and the child for the following reasons...." The order does not distinguish between the two offenses because the trial court's only duty, after T.B. pleaded "true" on June 6, was to find that he engaged in delinquent conduct. Therefore, the trial court's order placing T.B. on probation after finding that he engaged in delinquent conduct resulted in a single adjudication.

Our review of both the clerk's record and the reporter's record reveals that the only adjudication T.B. had prior to the one the State sought to modify (the June 6 adjudication) was on June 25, 2002. Because T.B. had only one adjudication prior to the one the State sought to modify, the State could not establish the two prior adjudications that are required to commit him to TYC. Therefore, the trial court erred in modifying T.B.'s disposition to commit him to TYC. We sustain T.B.'s first issue.

CONCLUSION

The judgment of the trial court is *reversed* and *remanded* for a new hearing on the State's motion to modify. Because we have sustained T.B.'s first issue, we need not address the remaining evidentiary issue. *See* Tex.R.App. P. 47.1.

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5. COURT HAD JURISDICTION TO REVOKE PROBATION OF 18 YEAR OLD; CANNOT CHALLENGE REASONABLENESS OF CONDITION AT REVOCATION

In the Matter of V.A., 140 S.W.3d 858 (Tex.App.—Fort Worth 7/1/04) *Texas Juvenile Law* 222 (5th Ed. 2000).

Facts: V.A., a juvenile, appeals from a modification order revoking his community supervision and ordering his commitment to the Texas Youth Commission ("TYC"). In two points, appellant complains that the trial court lacked jurisdiction to modify V.A.'s disposition after his eighteenth birthday and that the condition of community supervision that he violated was not reasonable.

V.A. was born on June 16, 1985 and turned eighteen on June 16, 2003. In May of 2002, V.A. was adjudicated delinquent and placed on community supervision. Shortly thereafter, V.A. absconded and a directive was issued to apprehend him. V.A. was not apprehended, however, until June 3, 2003. The State filed a motion to modify his disposition on June 6. The juvenile court set a hearing on the motion for June 12, four days before V.A.'s eighteenth birthday. Later, V.A.'s counsel asked for a contested hearing, and the hearing on the motion was reset for June 27. At the hearing, the juvenile court found that V.A. had violated the reasonable terms of his community supervision. The court revoked V.A.'s community supervision and ordered his commitment to TYC for an indeterminate period. Later, the juvenile court entered a finding that the prosecuting attorney exercised due diligence in an attempt to complete the proceeding before V.A. turned eighteen. [FN1]

> FN1. We abated this case so that the trial court could hold a hearing to determine whether the prosecutor had exercised due diligence in an attempt to complete the proceeding before V.A.'s eighteenth birthday. *See* Tex.R.App. P. 44.4. The judge found that the prosecutor had exercised due diligence, and this finding has not been challenged.

Held: Affirmed.

Opinion Text: In his first point, V.A. contends that the juvenile court did not have jurisdiction to modify his disposition because he turned eighteen before the modification hearing took place.

Generally, when a child reaches the age of eighteen the juvenile court's jurisdiction is limited to either dismissing the case or transferring the person to a district court or criminal district court for a criminal proceeding. *In re N.J.A.*, 997 S.W.2d 554, 556 (Tex.1999). There is an exception to this rule, however, for incomplete proceedings. Texas Family Code section 51.0412 provides as follows:

> The court retains jurisdiction over a person, without regard to the age of the person, who is a respondent in an adjudication proceeding, a disposition proceeding, or a proceeding to modify disposition if:
>
> (1) the petition or motion to modify was filed while the respondent was younger than 18 years of age;
>
> (2) the proceeding is not complete before the respondent becomes 18 years of age; and
>
> (3) the court enters a finding in the proceeding that the prosecuting attorney exercised due diligence in an attempt to complete the proceeding before the respondent became 18 years of age.

Tex. Fam.Code Ann. § 51.0412 (Vernon 2002).

Because the State filed its motion to modify before V.A. turned eighteen, the proceeding was not complete on V.A.'s eighteenth birthday, and the court entered a finding that the prosecutor used due diligence in attempting to complete the proceeding before V.A. turned eighteen, the juvenile court retained jurisdiction over V.A. under family code section 51.0412. *Id.* We overrule V.A.'s first point.

In his second point, V.A. contends that the condition of community supervision requiring him to attend sex offender treatment was unreasonable. This challenge should have been raised by timely appeal of the original disposition order after V.A. was placed on community supervision. *See In re G.C.F.*, 42 S.W.3d 194, 196 (Tex.App.—Fort Worth 2001, no pet.) (holding that appellate court had no jurisdiction to decide issues arising out of adjudication proceeding when juvenile appealed from modification order); *Anthony v. State*, 962 S.W.2d 242, 246 (Tex.App.—Fort Worth 1998, no pet.) (op. on PDR) (dismissing complaints about conditions of community supervision for lack of jurisdiction in appeal of order revoking community supervision). We dismiss this point because we have no jurisdiction to hear V.A.'s complaint about the sex offender treatment condition of community supervision. *G.C.F.*, 42 S.W.3d at 196; *Anthony*, 962 S.W.2d at 246.

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6. EXTENSION OF TERM AFTER EXPIRATION REQUIRES THAT MOTION BE FILED BEFORE EXPIRATION, BUT NOT THAT A CAPIAS ALSO BE ISSUED

In the Interest of A.N.A., 141 S.W.3d 765 (Tex. App.—Texarkana 7/20/04) *Texas Juvenile Law* 222 (5th Ed. 2000).

Facts: A.N.A. appeals from an order modifying her probation in a juvenile case. She had been placed on twelve months' probation for truancy, which expired January 7, 2004. The order of modification, signed by the trial court March 8, 2004, extended her probation by an additional twelve months from that date. The petition to modify was filed December 30, 2003. It alleged A.N.A. had failed to attend school during the term of her probation, accumulating over thirteen absences during that time period.

A.N.A. contends we should reverse because the probationary period had expired: there was nothing to modify. She acknowledges that the motion to modify predated the expiration of probation, but argues that we should apply a criminal law parallel and hold, because no warrant or capias was issued before the probationary period's expiration, the State simply waited too long to request modification.

Held: Affirmed.

Opinion Text: As pointed out by A.N. A., a trial court can hear a motion to revoke community supervision in a criminal case even after the period of community supervision has expired, but in order for the jurisdiction of the trial court to extend beyond the expiration of the defendant's community supervision, two things must first occur: 1) a motion to revoke community supervision must be filed; and 2) a capias must be issued. *Peacock v. State*, 77 S.W.3d 285, 287 (Tex.Crim.App.2002). As long as both a motion alleging a violation of community supervision terms is filed and a capias or arrest warrant is issued before the expiration of the term, followed by due diligence to apprehend the person on community supervision and to hear and determine the allegations in the motion, the trial court's jurisdiction continues. *Rodriguez v. State*, 804 S.W.2d 516, 517 (Tex.Crim.App.1991).

Juvenile proceedings have many of the same aspects as do criminal proceedings. [FN1] However, in this situation, there is a specific section of the

Family Code that controls the outcome of this argument. Tex. Fam.Code Ann. § 54.05(*l*) (Vernon Supp.2004) provides explicitly that a court may modify and extend a period of probation either (a) during the period of probation, or (b) if the motion to modify is filed before the supervision ends, "before the first anniversary of the date on which the period of probation expires."

FN1. *See In re D.A.S.,* 973 S.W.2d 296, 299 (Tex.1998) (extending *Anders v. California,* 386 U.S. 738 (1967), to juvenile delinquency proceedings based, in part, on quasi-criminal nature of proceedings). The adjudication of a juvenile as a delinquent is based on the criminal standard of proof: "beyond a reasonable doubt." Tex. Fam.Code Ann. § 54.03(f) (Vernon Supp.2004). The Texas Supreme Court has recognized juvenile delinquency cases as "quasi-riminal" because, under the Family Code, the Texas Rules of Evidence applicable to criminal cases and Chapter 38 of the Texas Code of Criminal Procedure govern juvenile delinquency proceedings. Tex. Fam.Code Ann. § 51.17(c) (Vernon Supp.2004); *In re B.L.D.,* 113 S.W.3d 340, 351 (Tex.2003).

In this case, the motion to modify was filed before the supervision ended, and the order extending probation was entered before the first anniversary following the date on which the probationary period expired. The trial court's action falls squarely within the ambit of the rule. No error is apparent. [FN2]

FN2. 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).

A.N.A. also argues the court had no authority to extend the probation for, effectively, more than a period of twelve months. In making this argument, she calculates the length of probation from the date on which the original probationary period expired to the end of the period under the modification: twelve months after March 8, 2004. She bases her argument on *In re R.G.,* 687 S.W.2d 774, 776-7 (Tex.App.—Amarillo 1985, no writ). The Amarillo court held that the trial court had the authority to modify the order placing R.G. on probation despite the expiration of the probationary period's term because the application to modify was filed within the probationary period. In reaching its decision, the Amarillo court recognized that the trial court had authority only to place the child on probation for a period not to exceed one year. In so doing, the court recognized that language then found at Tex. Fam.Code Ann. § 54.04(d)(1) [FN3] allowed the court to initially place a child on probation for a period not to exceed one year, subject to extensions of no more than one year each. That portion of the Code was modified in 1993. Counsel has directed us to no similar restrictive language in the current version of the Code, and we are aware of none. We conclude that this argument is likewise without merit.

FN3. Tex. Fam.Code Ann. § 54.04(d)(1), *modified by* Act of May 30, 1993, 73rd Leg., R.S., ch. 1048, § 1, 1993 Tex. Gen. Laws 4473, 4474.

VIII. LAW ENFORCEMENT

1. OFFICER'S WEAPONS FRISK DURING DAYTIME CURFEW STOP WAS JUSTIFIED BY SELF-PROTECTION

In the Matter of K.E., UNPUBLISHED, No. 04-03-00504-CV, 2004 WL 892112, 2004 Tex.App. Lexis 3697 (Tex.App.—San Antonio 4/28/04) *Texas Juvenile Law* 314 (5th Ed. 2000).

Facts: K.E. appeals the trial court's order of adjudication. The sole issue presented on appeal is whether the trial court erred in denying K.E.'s motion to suppress.

A trial court's ruling on a motion to suppress is reviewed under an abuse of discretion standard. *Balentine v. State,* 71 S.W.3d 763, 768 (Tex.Crim. App.2002). In this review, we give almost total deference to the trial court's determination of historical facts and review the court's application of the law to the facts *de novo. Id* . Since the trial court did not make explicit findings of historical facts in this case, we review the evidence in a light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact supported in the record. *Id.* When the suppression issue is consensually re-litigated by the parties during the trial on the merits, our review is not limited to the evidence introduced at the suppression hearing. *See Rachal v. State,* 917 S.W.2d 799, 809 (Tex.Crim.App.1996). Instead, consideration of the relevant trial testimony is appropriate in our review. *Id.*

"An officer may conduct a brief investigative detention, or *Terry* stop, when he has a reasonable suspicion to believe that an individual is involved in

criminal activity." *Balentine*, 71 S.W.3d at 768. "The reasonableness of a temporary detention must be examined in terms of the totality of the circumstances and will be justified when the detaining officer has specific, articulable facts, which, taken together with rational inferences from those facts, lead him to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity." *Id.* "Law enforcement personnel may conduct a limited search for weapons of a suspect's outer clothing, even in the absence of probable cause, where an officer reasonably believes that the suspect is armed and dangerous to the officer or others in the area." *Id.* "Such a 'weapons frisk' will be justified only where the officer can point to specific and articulable facts which reasonably led him to conclude that the suspect might possess a weapon." *Id.* "The officer need not be absolutely certain that an individual is armed; the issue is whether a reasonably prudent person would justifiably believe that he or others were in danger." *Id.*

Around 1:00 p.m. on a school day, Officer Peter Ovalle was on patrol in a high crime area. Office Ovalle pulled beside K.E. and another male and asked them if they were of the age to be in school. K.E. told the officer that he was sixteen. Based on this response, Officer Ovalle believed K.E. was in violation of the curfew established by city ordinance. Officer Ovalle stated that the normal procedure is to write a curfew violation notice and transport the juvenile either back to school or to their guardian. After Office Ovalle determined that K.E. was underage and in violation of curfew, Office Ovalle conducted a pat-down search. Officer Ovalle stated that he conducted the pat-down search because it was fairly warm but K.E. was wearing a heavy, bomber-type jacket. This testimony was disputed at trial by K.E.'s mother, who stated that K.E. was wearing a light jacket. Officer Ovalle stated the he felt uneasy because weapons could easily be concealed in the jacket. Officer Ovalle decided to conduct a pat-down search because he knew he "was going to have more contact with him as far as writing him a curfew violation." As he was conducting the frisk, K.E. placed his left hand in his jacket. At Officer Ovalle's request, K.E. removed his hand from his jacket. As he removed his hand, K.E. dropped a folded piece of paper. Officer Ovalle believed K.E. was discarding some type of contraband or paraphernalia. Based on his experience, Officer Ovalle handcuffed K.E. because he believed K.E. might attempt to run away while Officer Ovalle retrieved the item K.E. had dropped. The paper contained two rocks of crack cocaine.

Deferring to the trial court's implied findings of historical facts, Officer Ovalle was justified in detaining K.E. based on his belief that K.E. was in violation of a curfew. In addition, because the stop occurred in a high crime area and K.E. was wearing a jacket that led Officer Ovalle to question whether K.E. was in possession of a weapon, Officer Ovalle was justified in conducting a limited search for weapons. Although handcuffing suspects during a temporary detention is not usual, Officer Ovalle testified that he needed to restrain K.E. while he retrieved the item K.E. had dropped, which Officer Ovalle believed was some type of contraband or paraphernalia. Under the circumstances, the use of handcuffs was reasonable for Officer Ovalle's safety and to further the status quo while he retrieved the item. *See Rhodes v. State*, 945 S.W.2d 115, 117 (Tex.Crim.App.1997) (upholding use of handcuffs during temporary detention); *In re A.T.*, No. 04-99-00218-CV, 2000 WL 1918880, at *2-3 (Tex.App.—San Antonio Dec. 20, 2000, no pet.) (same) (not designated for publication). Because Officer Ovalle was justified in stopping K.E. and conducting a pat-down search for weapons, the trial court did not abuse its discretion in denying K.E .'s motion to suppress.

The trial court's judgment is affirmed.

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2. ANONYMOUS TIP BY STUDENT DID NOT PROVIDE REASONABLE SUSPICION FOR SEARCH OF STUDENT BY ASSISTANT PRINCIPAL

In the Matter of K.C.B., 141 S.W.3d 303 (Tex. App.—Austin 7/15/04) *Texas Juvenile Law* 313 (5th Ed. 2000).

Facts: Appellant K.C.B., a juvenile, was adjudicated delinquent for possession of marihuana in a drug-free zone at Del Valle Junior High School and was placed on probation. *See* Tex. Health & Safety Code Ann. §§ 481.121, .134 (West 2003); Tex. Fam.Code Ann. § 54.03 (West 2002). He appeals contending that the trial court erred in denying his motion to suppress the State's evidence because (1) the school official did not have the requisite reasonable suspicion to search him, and (2) the evidence was inadmissible under the Texas exclusionary rule because the school official assaulted him while obtaining the evidence. Tex.Code Crim. Proc. Ann. art. 38.23 (West Supp.2004); Tex. Fam.Code Ann. § 51.17(c) (West 2002).

The Travis County Sheriff's Office Incident Report, the veracity of which both the State and K.C.B. agreed upon at trial, lays out the only facts on record in this case. On September 23, 2002, Clif-

ford Bowser, the Del Valle Junior High School hall monitor, received a tip from an anonymous student that K.C.B. had a plastic bag containing marihuana in his underwear. Bowser escorted K.C.B. to the office of Assistant Principal Jackie Garrett, where Bowser asked K.C.B. if he had "anything in his possession which he should not have." After K.C.B. responded that he did not, Bowser had him remove his shoes and socks, in which he found nothing. Bowser then informed Garrett that the tip indicated that the marihuana was in K.C.B.'s underwear. Garrett asked K.C.B. to lift up his shirt, at which time Garrett approached K.C.B. and extended the elastic on K.C .B.'s shorts. Observing a plastic bag in K.C.B.'s waistline, Garrett removed it, and K.C.B. was taken to the campus security office where Deputy Salazar, the school resource officer, arrested him for possession of marihuana.

K.C.B. was charged with possession of marihuana in a drug-free zone. He moved to have the marihuana evidence suppressed, arguing that the search and seizure violated his rights under the United States and Texas Constitutions. The trial court overruled K.C.B.'s motion to suppress, determining that "the actions taken by the school were not overly invasive in this situation." With his motion denied, K.C.B. pleaded true to the charge of possession of marihuana in a drug-free zone. Accordingly, the trial court adjudicated K.C.B. delinquent and sentenced him to six months' probation.

K.C.B. now raises two issues on appeal: (1) the trial court erred in denying the motion to suppress because the search was unreasonable and violated the United States and Texas Constitutions; and (2) the trial court erred in denying the motion to suppress because an assault was committed by the retrieval of the evidence, invoking the Texas exclusionary rule.

Held: Reversed and remanded.

Opinion Text: *Standard of Review*

A trial court's ruling on a motion to suppress will be set aside only on a showing of an abuse of discretion. *Villarreal v. State,* 935 S.W.2d 134, 138 (Tex.Crim.App.1996); *In re V.P.,* 55 S.W.3d 25, 30 (Tex.App.—Austin 2001, pet. denied). The trial court is the sole trier of fact and judge of the weight and credibility to be given a witness's testimony. *State v. Ballard,* 987 S.W.2d 889, 891 (Tex.Crim.App.1999); *Villarreal,* 935 S.W.2d at 138; *V . P.,* 55 S.W.3d at 30. We give almost total deference to a trial court's determination of the facts and "mixed questions of law and fact" that turn on an evaluation of witness credibility and demeanor. *V.P.,* 55 S.W.3d at 30-31; *In re L.M.,* 993 S.W.2d 276, 286 (Tex.App.—Austin 1999, pet. denied); *see Guzman v. State,* 955 S.W.2d 85, 89 (Tex.Crim.App.1997). In a case such as this where there is no disagreement about the facts, we review de novo questions not turning on credibility and demeanor. *V.P.,* 55 S.W.3d at 31; *L.M.,* 993 S.W.2d at 286. Because both issues fall into this category, we will review *de novo* the trial court's resolution of both issues.

Reasonableness of the Search

K.C.B.'s first issue is that the trial court erred in denying his motion to suppress because the evidence was obtained during an unreasonable search by Garrett in violation of K.C.B.'s Fourth Amendment rights.

In searches of students conducted by public school officials, [FN1] the standard of suspicion necessary to comport with the Fourth Amendment is *reasonable suspicion,* not the usual *probable cause. New Jersey v. T.L.O.,* 469 U.S. 325, 340-41 (1986). The *T.L.O.* test to determine whether the facts lead to "reasonable suspicion" dictates that we look at (1) whether the action was justified at its inception; and (2) whether the search as actually conducted was reasonably related in scope to the circumstances that justified the original interference. *Id.* at 341-42. K.C.B. argues that the actions of Garrett and Bowser fail both prongs of this test.

> FN1. Neither party argues that the school official was acting as a police officer.

According to the United States Supreme Court, "under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* K.C.B. argues that because the tip that led Bowser and Garrett to search him was made by an anonymous student, there were no reasonable grounds for suspecting a violation. K.C.B. contends that the first prong of the *T.L.O.* test fails here because there is no evidence that school officials based their search on anything other than the anonymous tip.

The State agrees that there is no evidence in the record that the anonymous tip was corroborated, but argues that because of the nature of the public school setting, the tip was sufficient to give the school officials reasonable suspicion even if it may not have sufficed elsewhere. The State relies on those cases acknowledging that because of the schools' custodial and tutelary responsibility, students' Fourth Amendment rights at school are differ-

ent from those that exist outside of it. Additionally, the State argues that for the safety of the students and the benefit of the learning process there is a special need for immediate response to student behavior. *See Florida v. J.L.,* 529 U.S. 266, 274 (2000); *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 656-57 (1995); *T.L.O.,* 469 U .S. at 353.

The State argues that it is necessary to continue to recognize the diminished rights of students in this case because in a closed setting such as a school, people are less likely to give important information to authorities if they are not certain that their anonymity will be protected. The State further notes that the Supreme Court has recognized that with respect to anonymous tips, officials in locations such as schools, where Fourth Amendment rights are diminished, may conduct protective searches based on information that would be insufficient elsewhere. *J.L.,* 529 U.S. at 274.

Under the Fourth Amendment, the primary focus of an assessment of the reasonableness of a search by a member of the government requires analysis of the government interest being advanced to support the intrusion on the individual's rights. *Terry v. Ohio,* 392 U.S. 1, 21 (1968). "There is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' " *Id.* (quoting *Camara v. Municipal Court,* 387 U.S. 523, 534-35, 536-37 (1967)). It was under this principle that the *Terry* Court crafted the test for reasonableness that was later adopted by the *T.L.O.* Court for searches by school officials. *Id.* Thus, in determining whether a search is justified at its inception, this overarching balance must be kept in mind.

In cases in which reasonable suspicion is the standard for law enforcement officials, the Supreme Court has held that in order to conclude that an anonymous tip is reliable, thereby justifying the search, there normally must be some further indicia of reliability contained within the tip. *J.L.,* 529 U.S. at 271; *Alabama v. White,* 496 U.S. 325, 326 (1990). The Supreme Court has further held that in these cases an anonymous tip must be corroborated by more than just easily observable facts, such as attire or location, in order to rise to the level of reasonable suspicion. *J.L.,* 529 U.S. at 271-72.

The *T.L.O.* Court expressly stated that *under ordinary circumstances* a search by a school official will be justified at its inception only when there are reasonable grounds for suspecting that the search will turn up evidence. *T.L.O.,* 469 U.S. at 341-42. Uncorroborated anonymous tips do not ordinarily rise to the requisite level of reasonable suspicion. We have, in fact, previously held so. *In re A.T.H.,* 106 S.W.3d 338, 344 (Tex. App .-Austin 2003, no pet.). In *A.T.H.,* a law enforcement officer working at the school received a tip from an unidentified caller that a group of likely-students were smoking marihuana behind a nearby business. As the suspects walked back through the school parking lot, one of them was apprehended and searched by the officer, and drugs were found. We did not reach the issue of whether the officer acted as a school official because we held that he "lacked justification for his pat-down of A.T.H. even under the *T.L.O.* standard." *A.T.H.,* 106 S.W.3d at 341-42.

In this case, we are bound by the facts as stipulated to by both parties, and so are unable to determine whether the tip was truly anonymous, allowing for no indicia of reliability, or rather made to Bowser by a known student who asked the hall monitor that his name not be revealed. Under the latter circumstance there might be an added indicia of reliability, thus allowing him to reasonably rely upon the tip.

We recognize, however, that the State is correct in its assertion that the diminished right of privacy for students in schools and the custodial nature of the relationship between school official and student do play a role in determining the reasonableness of such a search. Had the anonymous tip involved the presence of a weapon, for example, the circumstances presented might not be characterized as "ordinary" and the balance might tilt more strongly in favor of the government interest involved.

The legality of a search of a student is governed by "the reasonableness, under all the circumstances, of the search." *T.L.O.,* 469 U.S. at 341. It is from this overall sense of reasonableness under the circumstances that the necessity that a search be justified at its inception flows. *Id. Under ordinary circumstances,* the Supreme Court held, this is judged based on the presence of reasonable grounds for suspecting the search to turn up evidence, *id.,* but this still must be assessed in light of the overall reasonableness required by the Fourth Amendment. The compelling state interest required to infringe upon the rights of the individual is not a fixed, minimum quantum of government concern. *Vernonia,* 515 U.S. at 661. Rather, the phrase "compelling state interest" "describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Id.* It is for this reason that an anonymous tip alleging the presence of a weapon might very well present an extraordinary circumstance and could result in a search similar to the one in the case at bar being viewed as justified at its inception.

In determining the reasonableness of the caution being taken, it is necessary to take into account

the nature of the relationship between the students and the school officials. In *Vernonia,* in which the random drug testing of students who chose to participate in inter-scholastic sports and signed waivers was held to be reasonable, the Court stated that the most significant element of its analysis was that the searches were "undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.... [W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake." *Id.* at 665.

Although the Supreme Court has found an anonymous tip regarding a person carrying a weapon to be inadequate to provide reasonable suspicion for a police officer to conduct a stop and frisk, *J.L.*, 529 U.S. at 274, because of the different nature of the government interest and the level of expectation of privacy in the school setting, a search by a school official might be reasonable if performed in the school setting. In *J.L.*, the Supreme Court stated that the facts of the case did not require it to consider under which circumstances the danger alleged in an anonymous tip might be so great as to justify a search without a showing of reliability. *Id.* at 273. It went on to clarify that it specifically was not holding in its opinion that "public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct searches on the basis of information insufficient to justify searches elsewhere." *Id.* at 275 (internal citations omitted).

In contrast to a law enforcement officer, school officials' custodial responsibility results in a greater government interest in protecting the students from harm. The "government has a heightened obligation to safeguard students whom it compels to attend school." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). In *Terry,* the Court held that in making the assessment as to whether an intrusion is called for in a particular situation, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Terry,* 392 U.S. at 21-22 (internal quotations omitted). The imminent risk of harm posed by the presence of a weapon in a school setting makes immediate action all the more appropriate under such extraordinary circumstances.

While children do not lose their constitutional rights when in school, the nature of their rights is different than it is when they are not in school. *Vernonia,* 515 U.S. at 655-56. Specifically, the Supreme Court has held that at school, students have a lesser expectation of privacy than those outside of the school setting normally have. *Id.* at 657; *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). By balancing these diminished rights against the increased level of government interest in the protection of students in the school setting, a search for weapons in a school triggered by an anonymous tip might be found to be justified at its inception despite the fact that "under normal circumstances" there must be reasonable grounds for suspecting a search will uncover evidence.

The presence of drugs on a student, however, does not tip the balance far enough for the search in this case to be deemed justified at its inception. Immediacy of action is not as necessary as could be found with a tip regarding a weapon. Furthermore, although the *Vernonia* Court found the government interest compelling enough to justify further infringement on students' rights by randomly testing athletes for drugs, the Supreme Court noted that the average student has a higher expectation of privacy than those of the athletes being tested. *Vernonia,* 515 U.S. 657. The Court stressed that by choosing to participate in extra-curricular school athletics, the students voluntarily subjected themselves to more oversight than was imposed on other students. *Id.* For these reasons, we do not believe that the search of K.C.B., which turned up the marihuana evidence, was justified at its inception, and so it fails the test set out in *T.L.O.*

We therefore hold that the search was not based on a reasonable suspicion by the school officials, and therefore was not justified at its inception. The trial court abused its discretion in denying K.C.B.'s motion to suppress on the grounds that the search was unreasonable and violative of K.C.B.'s constitutional rights. We sustain K.C.B.'s first issue.

CONCLUSION

We conclude that the trial court erred in denying K.C.B.'s motion to suppress on the grounds that the search was unreasonable and violative of K.C.B.'s constitutional rights. The standard of reasonableness constitutionally required of searches of students by school officials was not satisfied in the search for the marihuana. Accordingly, we reverse the trial court's judgment and remand the cause for further proceedings. [FN2]

> FN2. Having decided that the evidence should have been suppressed because it was obtained without reasonable suspicion, it is unnecessary for us to reach the second issue concerning the possible commission of an assault by Garrett during the search. *See* Tex.R.App. P. 47.1 (opinions should be as brief as practicable while addressing every issue necessary to final disposition of appeal).

3. TELEPHONIC OFFER TO SELL DRUGS GAVE REASONABLE SUSPICION TO DETAIN PASSENGER IN VEHICLE DESCRIBED IN THE TELEPHONE CONVERSATION

In the Matter of D.P.M., UNPUBLISHED, No. 13-02-395-CV, 2004 WL 1797576, 2004 Tex.App. Lexis 7223 (Tex.App.—Corpus Christi-Edinburg 8/12/04) *Texas Juvenile Law* 306 (5th Ed. 2000).

Facts: The State charged appellant D.P.M., a juvenile, with possession of more than four ounces but less than five pounds of marijuana. The State petitioned for an adjudication that D.P.M. had engaged in delinquent conduct. Following denial of his motion to suppress, D.P.M. pleaded true to the charge. The trial court accepted an agreed disposition committing D.P.M. to the Texas Youth Commission. By one issue, D.P.M. challenges the trial court's denial of his motion to suppress.

JURISDICTION

Section 56.01(n) of the Texas Family Code provides a juvenile applicant the right to appeal under certain circumstances:

> A child who enters a plea or agrees to a stipulation of evidence in a proceeding held under this title may not appeal an order of the juvenile court entered under Section 54.03, 54.04, or 54.05 if the court makes a disposition in accordance with the agreement between the state and the child regarding the disposition of the case, unless:
>
> (1) the court gives the child permission to appeal; or
>
> (2) the appeal is based on a matter raised by written motion filed before the proceeding in which the child entered the plea or agreed to the stipulation of evidence.

Tex. Fam.Code Ann. § 56.01(n) (Vernon Supp. 2004). This appeal challenges the trial court's ruling on D.P.M.'s written motion to suppress, which was filed before D.P.M. pleaded true to the allegations. Accordingly, D.P.M. has the right to appeal his suppression issue. *See id.; see also In re D.A.R.*, 73 S.W.3d 505, 509 (Tex.App.—El Paso 2002, no pet.).

Ricky Redmon telephoned the Montgomery County Sheriff's Office, asking for help in a drug-related matter. According to Don Likens, [FN3] a member of the special investigations unit at the Montgomery County Sheriff's Office, Redmon had intercepted a telephone call at his house apparently intended for his son. Redmon, whose voice sounds much like his son's, allowed the caller to believe he was talking to his son. The caller said they had met recently at a party. "I have a kilo coming in," the caller reported. "How much money do you have?" Redmon replied that he had $100. The caller told him to see if he could get more money and call him back. Redmon agreed. The caller gave Redmon a telephone number at which to reach him. Likens met Redmon at his house and discussed the telephone call. Redmon told Likens that his son was out of town. Redmon was very concerned. His son had been through "rehab," he told the officer. He was worried his son was using drugs again. Likens found Redmon credible.

> FN3. Officer Likens was the only witness who testified at the hearing on D.P.M.'s motion to suppress.

At 4:00 p.m. that day, Likens and Redmon telephoned the caller. They recorded the conversation. Redmon told the caller he had sold his stereo equipment for $450. He asked what that would get him. The caller told Redmon he could purchase a half pound for $270. Given the price and the quantity, Likens concluded that the drug being offered for sale was marijuana.

Redmon agreed to the purchase. The caller told him to drive to a specific street in a wooded residential area and pull over to the side of the road. The caller would walk out to Redmon's car with the drugs. The exchange was scheduled for 5:00 p.m. The caller told Redmon to call him back and let him know when Redmon was leaving for the meeting.

Likens investigated the proposed meeting place. He decided he wanted more control over the meeting. For safety reasons and ease of surveillance, he wanted the meeting to occur in a more open area. He suggested changing the location to a shopping center parking lot about a half mile away from the initial meeting site. He arranged for surveillance by multiple unmarked police units.

As planned, Redmon telephoned the caller at 5:00 p.m. He said he was in front of an Albertsons store in the shopping center parking lot. The caller said he was twenty to thirty minutes away. At 5:40 p.m., Redmon again telephoned. The caller told him that he was approximately five minutes away. The caller said he would meet Redmon in front of Brother's Pizza, next to Albertsons in the same shopping center. Redmon told the caller he would be waiting in a beige Lincoln. The caller said he would be arriving in a black Yukon.

After the meeting was arranged, Likens waited in the beige Lincoln. Within minutes, a sur-

veillance unit contacted Likens by radio. A black Yukon had entered the parking lot. The Yukon traveled slowly through the parking lot. It pulled behind the Lincoln but did not stop.

A marked police unit stopped the Yukon. The unmarked surveillance units surrounded the vehicle. Officers ordered the driver and his passenger out of the vehicle and onto the ground. They handcuffed them "for officer safety and their safety." According to Likens, "There were a lot of people in the parking lot," and it was "merely a way to control the situation so it didn't escalate."

Likens spoke with the driver and owner of the Yukon, who consented to a search of the vehicle. Likens asked D.P.M., the passenger, his name and if he knew why he was in the parking lot. D .P.M. responded he "had no idea" why he was there.

Officers took the driver and D.P.M. to a patrol vehicle. Others began searching the Yukon. They found three clear plastic bags containing 11.67 ounces of marijuana in the console between the front seats. [FN4]

> FN4. Likens later linked D.P.M. to the cell phone used to make and receive the Redmon calls.

Likens testified to the foregoing facts at the suppression hearing. He said he had probable cause to make an arrest based on D .P.M.'s arrival at the place identified in the phone call, in the vehicle described in the phone call, at the time stated in the phone call.

Held: Affirmed.

Opinion Text: MOTION TO SUPPRESS

D.P.M. contends that the trial court should have granted his motion to suppress because his rights were violated when the authorities stopped the vehicle in which he was riding without adequate cause or reasonable suspicion. He asserts that detention of the vehicle and its passengers violated his right to be free from unreasonable seizure. He argues that the search that followed is the only source of evidence leading to his adjudication.

A. Standard of Review

We review the trial court's ruling on a motion to suppress in a juvenile proceeding under an abuse-of-discretion standard. *See In re R.J.H.,* 79 S.W.3d 1, 6 (Tex.2002); *see also In re D.G.*, 96 S.W.3d 465, 467 (Tex.App.—Austin 2002, no pet.). We defer to the trial court's findings of historical fact. *R.J.H.,* 79 S.W.3d at 6. We review de novo the trial court's application of law to those facts. *Id.* Specifically, we review de novo questions of reasonable suspicion and probable cause. *See Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex.Crim. App.1997). Absent findings of fact, we view the record in the light most favorable to the trial court's ruling. *R.J.H.,* 79 S.W.3d at 6.

B. Applicable Law

An officer may conduct a brief investigative detention, or *Terry* stop, on reasonable suspicion to believe that an individual is involved in criminal activity. *Terry v. Ohio*, 392 U.S.1, 21 (1968); *Balentine v. State*, 71 S.W.3d 763, 767 (Tex.Crim. App.2002). We examine the reasonableness of a temporary detention in terms of the totality of the circumstances. Specific, articulable facts, taken together with reasonable inferences from those facts, justify a temporary detention when the circumstances lead the detaining officer to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity. *Balentine*, 71 S.W.3d at 768 (citing *Woods v. State*, 956 S.W .2d 33, 38 (Tex.Crim.App.1997)). Reasonable suspicion is dependent on both the content of the information possessed by the officer and the degree of reliability of the information. *See Bilyeu v. State*, 136 S.W.3d 691, at *5 (Tex.App.—Texarkana 2004, no pet. h.). In determining whether reasonable suspicion existed, we look to the facts available to the officer at the moment of detention. *See Terry*, 392 U.S. at 21-22; *see also Davis v. State*, 947 S.W.2d 240, 243 (Tex.Crim.App.1997).

C. Analysis

As part of his initial investigation, Likens relied on information provided by Redmon. Likens found Redmon credible. We conclude it was reasonable for Likens to find Redmon's information trustworthy, particularly given Redmon's status as a known citizen and independent source. *See, e.g., Hawes v. State*, 125 S.W.3d 535, 539-40 (Tex.App.—Houston [1st Dist.] 2002, no pet.) (contrasting reliability of information from known and unknown informants); *State v. Garcia*, 25 S.W.3d 908, 913 (Tex.App.—Houston [14th Dist.] 2000, no pet.) (contrasting reliability of information provided by unnamed informants, paid informants, and identified citizens). Moreover, by participating in and directing the recorded telephone calls with D.P.M., Likens corroborated the information he received from Redmon regarding the proposed drug transaction. *See Reesing v. State*, No. 03-03-471-CR, 2004 Tex.App. LEXIS 5090, at *6 (Tex.App.—Austin June 10, 2004, no pet. h.) (finding that corroboration of information related by informant may increase reliability of information); *see also Hawes*, 125 S.W.3d at 540 (finding that known informant provided indicia

of reliability, which, combined with officer's corroboration of identification details, created reasonable suspicion). Further, D.P .M. arrived at the designated location at the appointed time in a black Yukon, all of which matched the details the caller arranged with Redmon. Based on the totality of the circumstances, we conclude that Likens articulated specific facts that led him to conclude that the occupants of the car, including D.P.M., were or would soon be engaged in criminal activity.

We conclude that the totality of the circumstances gave Likens reasonable suspicion to stop and detain the occupants of the black Yukon. *Woods*, 956 S.W.2d at 38. We hold that the trial court did not abuse its discretion in denying D.P.M.'s motion to suppress. Accordingly, we overrule D.P.M.'s sole issue on appeal.

IX. ATTORNEY GENERAL

1. UNEMANCIPATED 17 YEAR OLD WHO VOLUNTARILY LEAVES HOME IS NOT A MISSING CHILD IF PARENTS KNOW OF CHILD'S WHEREABOUTS

Attorney General Opinion No. GA-0125, 2003 WL 22814516, 2003 Tex AG Lexis 9605 (11/25/03) *Texas Juvenile Law* 304 (5th Ed. 2000).

Re: Whether a minor may be classified as a "missing child" under article 63.001, Code of Criminal Procedure, if the minor's legal custodian knows the minor's whereabouts (RQ-0057-GA)

The Honorable Florence Shapiro
Chair, Education Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Dear Senator Shapiro:

You request our opinion on the definition of "missing child" in Code of Criminal Procedure article 63.001(3). One of your constituents reported his seventeen-year-old daughter as a missing child. See Request Letter, supra note 1. She had left home voluntarily, and your constituent soon determined his daughter's location and relayed that information to the police. See id. The police department declined to take possession of the child, stating that because her location was known, she could no longer be reported as missing and the department had no authority to act.

The age of the child is significant because a seventeen-year-old who voluntarily leaves home without parental consent and without intending to return may not be taken into custody under the Juvenile Justice Code, Family Code title III. An unemancipated seventeen-year-old is not a "child" within the Juvenile Justice Code. See Tex. Fam. Code Ann. § 51.02(2)(A)- (B) (Vernon 2004) (defining "child" as a person ten years of age or older and under 17, or a person between 17 and 18 who engaged in or is alleged to have engaged in certain conduct before becoming 17). A child under 17 who is voluntarily absent from home without the consent of his or her parent or guardian "for a substantial length of time or without intent to return" has engaged in "conduct indicating a need for supervision," id. § 51.03(b), and may be taken into custody by a law enforcement officer. See id. § 52.01(a)(3). In contrast, a seventeen-year-old who engages in the same conduct may not be taken into custody pursuant to the Juvenile Justice Code. See Tex. Att'y Gen. Op. No. JC-0229 (2000) at 4-5.

A brief addressing your request suggests that Code of Criminal Procedure chapter 63, which provides for the investigation of missing person and missing child reports, may provide a "legal mechanism... for parents in the state of Texas to secure their lawful right to possession of an unemancipated seventeen- year-old who has voluntarily left home." See Tex. Code Crim. Proc. Ann. art. 63.001(1) (Vernon Supp. 2004) ("child" is a person under 18 years of age); Tex. Fam. Code Ann. § 151.001(a)(1) (Vernon Supp. 2004) (parent of a child under 18 has the right to physical possession of and to establish the residence of the child). Article 63.009(g) states that "[o]n determining the location of a child... an officer shall take possession of the child and shall deliver or arrange for the delivery of the child to a person entitled to possession of the child." Tex. Code Crim. Proc. Ann. art. 63.009(g) (Vernon Supp. 2004); see also id. art. 2.13(c) (reiterating officer's duty under article 63.009(g)). Attorney General Opinion JC-0229 (2000) determined that a law enforcement officer has an affirmative duty under article 63.009(g) to take possession of a missing child whom he or she has located and can use reasonable force to do so. See Tex. Att'y Gen. Op. No. JC-0229 (2000) at 3, 7-9. As you indicate, Attorney General

Opinion JC-0229 does not address the duties of law enforcement officers "where a seventeen-year-old child is unemancipated and reported missing by the legal guardian who knows the whereabouts of the child." Request Letter, supra note 1. Thus, you ask whether a child may still be a "missing child" when the legal guardian knows where he or she is.

Chapter 63, Code of Criminal Procedure requires a local law enforcement agency that receives a report of a missing person or missing child to investigate the present location of the person or child. See Tex. Code Crim. Proc. Ann. art. 63.009(a) (Vernon Supp. 2004). Chapter 63 defines a "child" as "a person under 18 years of age." Id. art. 63.001(1). A "missing child" means a child whose whereabouts are unknown to the child's legal custodian, the circumstances of whose absence indicate that:

> (A) the child did not voluntarily leave the care and control of the custodian, and the taking of the child was not authorized by law;
>
> (B) the child voluntarily left the care and control of his legal custodian without the custodian's consent and without intent to return; or
>
> (C) the child was taken or retained in violation of the terms of a court order for possession of or access to the child.

Id. art. 63.001(3). A "missing child" is "a child whose whereabouts are unknown to the child's legal custodian," subject to the circumstances of absence set out in article 63.001(3)(A)-(C).

Article 63.001(4) states additional circumstances that would define a child as missing.

> "Missing child" or "missing person" also includes a person of any age who is missing and:
>
> (A) under proven physical or mental disability or is senile, and because of one or more of these conditions is subject to immediate danger or is a danger to others;
>
> (B) is in the company of another person or is in a situation the circumstances of which indicate that the missing child's or missing person's safety is in doubt; or
>
> (C) is unemancipated as defined by the law of this state.

Id. art. 63.001(4) (emphasis added).

At first glance, the definition of "missing child" in sections 3 and 4 of article 63.001 might appear to conflict. The section 3 definition imposes the requirement that the "whereabouts [of the child] are unknown to the child's legal custodian," and, in addition, requires that one of three additional circumstances be present: (1) the child was taken involuntarily from her legal guardian's custody; (2) the child voluntarily left the custody of her legal guardian without intent to return; or (3) the child was taken from her guardian's custody in violation of a court order. Id. art. 63.001(3). In the situation you present, the child does not fall within the definition of "missing child" in section 3 because her absence does not fulfill the threshold requirement, i.e., her whereabouts are not unknown to her legal custodian. See Request Letter, supra note 1.

Section 4, on the other hand, applies to a missing person of any age. See Tex. Code Crim. Proc. Ann. art. 63.001(4) (Vernon Supp. 2004). Section 4(C) includes within the definition a person who "is unemancipated as defined by the law of this state." Id. art. 63.001(4)(C). Your request letter indicates that the person who is the subject of this inquiry is a seventeen- year-old unemancipated minor child. See Request Letter, supra note 1.

If section 4(C) were applied in isolation to this fact situation, section 3 would be rendered meaningless. Whether the child's legal custodian had knowledge of her whereabouts would be irrelevant, because the mere fact of the child's status as an unemancipated minor would be sufficient to trigger the duties of law enforcement personnel under chapter 63 with regard to any missing child. A construction should be avoided that will render any part of a statute inoperative, nugatory, or superfluous. See City of San Antonio v. City of Boerne, 11 S.W.3d 22, 29 (Tex. 2003) (quoting Spence v. Fenchler, 180 S.W. 597, 601 (Tex. 1915)); Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578, 580 (Tex. 2000) (citations omitted).

Furthermore, we are not permitted to read section 4(C) in isolation. Rather, we must attempt to harmonize sections 3 and 4. See Tex. Gov't Code Ann. § 311.021(2) (Vernon 1998) (entire statute intended to be effective); City of Amarillo v. Martin, 971 S.W.2d 426, 430 (Tex. 1998) (statutes should be read to avoid conflict and superfluities if possible). Both sections 3 and 4 of article 63.001 were adopted as part of the same bill in 1985. See Act of May 6, 1985, 69th Leg., R.S., ch. 132, § 1, 1985 Tex. Gen. Laws 614, 614. In order to harmonize sections 3 and 4, we read section 3 as placing additional conditions upon the definition of "missing child" in section 4. Thus, a missing person who is unemancipated is a missing child under article 63.001 only if, in addition, the person's "whereabouts are unknown to the child's legal custodian," and one of the three conditions of section 3 also pertain. See Tex. Code Crim. Proc. Ann. art. 63.001 (Vernon Supp. 2004). Under

the facts you describe, the child in question does not fall within the definition of "missing child," because her whereabouts are not unknown to her legal custodian. See Request Letter, supra note 1.

You also ask about the duty of law enforcement personnel under chapter 63 in this fact situation. See id. The duties of law enforcement agencies regarding a missing child are described in article 63.009. See Tex. Code Crim. Proc. Ann. art. 63.009 (Vernon Supp. 2004). Because we have determined that the child, in the circumstances you describe, is not encompassed within the definition of "missing child," no duty of law enforcement under article 63.009 is triggered.

We emphasize that this opinion is limited to the facts described, i.e., an unemancipated seventeen-year-old who voluntarily left the care and control of her legal custodian, and whose whereabouts are not unknown to her legal custodian. See Request Letter, supra note 1.

SUMMARY

While a child under 17 who is voluntarily absent from home without the consent of his or her parent or guardian "for a substantial length of time or without intent to return" may be taken into custody by a law enforcement officer pursuant to Family Code provisions, a seventeen-year-old who engages in the same conduct may not be.

A child, including an unemancipated seventeen-year-old, who voluntarily leaves the care and control of his or her legal custodian without the custodian's consent and without intent to return is not a "missing child" under Code of Criminal Procedure chapter 63 if the custodian knows where the child is located. If the custodian determines the child's loca-

has access to the records. See Tex. Fam. Code Ann. § 58.007(a) (Vernon 2002).

Section 58.007 of the Family Code concerns the physical records of a child who is involved in the juvenile justice system. See id. The provision applies only to the inspection and maintenance of a physical record or file concerning a child and the storage of information, by electronic means or otherwise, concerning the child from which a physical record or file could be generated. See id. Subsection (c) prohibits the disclosure to the public of law enforcement records and files concerning a child:

> (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.

Id. § 58.007(c). Thus, in addition to prohibiting the release to the public of the information it covers, the statute also requires law enforcement agencies to maintain the information in a certain way: (1) in separate files from adult files; (2) under separate controls from controls for access to the adult data if the data are maintained in a computer system with adult files; and (3) on a local basis only and not sent to a central database, except as otherwise provided by subchapter B. See id. ; Op. Tex. Att'y Gen. No. DM-435 (1997) at 2.

The school district argues that section 58.007(c) does not apply to information on citations for violation of section 106.04 or 106.05 of the Alcoholic Beverage Code because that information is not "juvenile justice information" under section 58.104(a) of the Family Code. In the alternative, the school district contends that even if section 58.007(c) covers the information, the police department nevertheless may disclose it to the school district based on the interagency transfer doctrine, a doctrine that in some situations permits the transfer of confidential information between governmental bodies without violating its confidential character.

II. Relatedness of Sections 58.007 and 58.104 of the Family Code

The school district contends that section 58.104(a) of the Family Code, which lists the information in the state juvenile justice system computerized database, limits the kind of information covered by section 58.007(c). The Texas Department of Public Safety ("DPS") must maintain a database for a computerized system of juvenile justice information. See Tex. Fam. Code Ann. § 58.102 (Vernon 2002). Section 58.104 sets out the information that DPS must include in the database. Section 58.104(a) states that

> subject to Subsection (f), the juvenile justice information system shall consist of information relating to delinquent conduct committed by a juvenile offender that, if the conduct had been committed by an adult, would constitute a criminal offense other than an offense punishable by a fine only.

Id. § 58.104. Section 58.104(a) then goes on to specify the kinds of information the system should include. The school district argues that section 58.007 only applies to the juvenile justice information found in section 58.104, that is, information relating to delinquent conduct committed by a juvenile offender that, if committed by an adult, would constitute a criminal offense other than an offense punishable by a fine only. Therefore, because the conduct of a child offender of sections 106.04 and 106.05 if committed by an adult does not constitute a criminal offense, the school district argues section 58.007 does not cover the police department's records of such violations.

We find no indication in the language of section 58.007 or elsewhere in chapter 58 of the Family Code that the requirement in section 58.104(a) for the types of information that DPS must collect for inclusion in the central state juvenile justice information system is intended to limit the kinds of re-

records of children, the photographs and fingerprints of children, fingerprints or photographs for comparison in investigation, fingerprints or photographs to identify runaways, sealing of records, confidentiality of treatment records, inter-agency sharing of certain records, and the destruction of certain physical records and files. See id. §§ 58.001-.0071. In contrast, in subchapter B, we find provisions that require DPS to maintain a database for a computerized system of juvenile justice information, provisions that give the purpose of the system, provisions for the confidentiality of the system information, and other provisions providing for the operation of the system. See id. §§ 58.102-.104, 58.106.

Moreover, the provisions in subchapter A, and section 58.007 in particular, are not by their terms limited to the juvenile justice information addressed in subchapter B. By its plain language, section 58.007 concerns a broad category of information: "a physical record or file... and the storage of information concerning a child." Id. § 58.007(a). Similarly, section 58.007(c) refers to records "concerning a child": "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." Id. § 58.007(c). The Juvenile Justice Code, chapters 51 through 60 of the Family Code, covers cases involving two categories of conduct engaged in by a child: delinquent conduct and conduct in need of supervision, as those terms are defined in the Code. See id. § 51.04. Thus, it is reasonable to conclude that "records and files concerning a child" includes records of allegations that a child engaged in conduct described in either one of these categories and not just delinquent conduct that, if committed by an adult, would constitute a criminal offense other than an offense punishable by a fine only. See id. § 58.007(c).

Furthermore, the language of section 58.007 makes clear that the two provisions were intended to operate separately from each other. Section 58.007 states that it does not affect the collection, dissemination, or maintenance of information as provided by Subchapter B. See id. § 58.007(a). Furthermore, section 58.007(c)(3) states that "the law enforcement records and files concerning a child... may not be disclosed to the public and shall be maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B." Id. § 58.007(c)(3); see also id. § 58.102 (c) (prohibiting the department from collecting or retaining information relating to juvenile where prohibited under chapter 58). Thus, the implication of section 58.007(c)(3) is that "law enforcement records and files concerning a child" that "must be maintained on a local basis only" must refer to information concerning a child that is not subject to subchapter B, that is, law enforcement information concerning all other cases covered by the Juvenile Justice Code.

In addition, we are unaware of any reason the legislature would treat differently the confidentiality of the law enforcement records of a child whose conduct if committed by an adult would constitute a criminal offense from the records of a child who commits other unlawful conduct, such as conduct indicating a need for supervision. Affording the same confidentiality to each type of misconduct effectuates one of the public purposes of the Juvenile Justice Code, the removal, where appropriate, of the taint of criminality from children committing unlawful acts. See id. § 51.01(2)(B). Without a link between the two statutes by language or otherwise, we believe section 58.007 operates independently from section 58.104. Consequently, section 58.104 does not limit the information section 58.007(c) covers to the information that DPS must include in the juvenile justice information system.

Law Enforcement Records Concerning a Child's Violation of Section 106.05 or106.04 of the Alcoholic Beverage Code

As we have already stated, the Juvenile Justice Code covers the proceedings in all cases involving delinquent conduct or conduct indicating a need for supervision, as those terms are defined in the Code. See id. § 51.03(a)-(b). Such conduct can only be committed by a "child." See id. Section 58.007 covers "law enforcement records" of any school district student who is a "child" as defined in section 51.02. See id. § 58.007. A "child" means a person who is ten years of age or older and under 17, or 17 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age. See id. § 51.02(2). The status as a "child" is determined by the age of the person on the date of the commission of the alleged offense. See id. § 51.04(a).

Section 106.04 of the Alcoholic Beverage Code, consumption of alcohol by a minor, and section 106.05 of the Alcoholic Beverage Code, possession of alcohol by a minor, are Class C misdemeanors if committed by a child. See Tex. Alco. Bev. Code Ann. § 106.071 (Vernon Supp. 2003). A Class C misdemeanor is punishable by a fine not to exceed $500. See Tex. Pen. Code Ann. § 12.23 (Vernon 2003). One of the definitions of "conduct indicating a need for supervision" is conduct which violates a penal law of the State of Texas of the grade of misdemeanor that is punishable by fine only but only if the case was first filed in municipal or justice court

and then was transferred by that court to the juvenile court. See Tex. Fam. Code Ann. § 51.03 (b), (f) (Vernon 2002). Thus, here, if the individual is of the age of a "child" as defined by section 51.02 of the Family Code, the juvenile court has jurisdiction over the individual for a single alleged violation of section 106.04 or 106.05 of the Alcoholic Beverage Code if the case was first filed in municipal or justice court and transferred by that court to the juvenile court. See id. §§ 51.03(b)(1), 51.04; see also id. § 54.047 (authorizing juvenile court to impose sanctions where court finds child violates sections 106.04 and 106.05 of Alcoholic Beverage Code).

We note that, except for public intoxication, fineable misdemeanors committed by a child, such as violations of sections 106.04 and 106.05, can be handled in municipal or justice courts rather than the juvenile court. Municipal and justice courts have both discretionary and mandatory authority to transfer to a juvenile court fineable only cases involving a child. Municipal and justice courts may transfer any such case to the juvenile court if the offender is a child and must transfer the case if the child has two prior convictions of fineable-only cases unless the court has implemented a case manager system under article 45.054 of the Code of Criminal Procedure. See id. §§ 51.03(f); 51.08(b), (d); see also Tex. Gov't Code Ann. § 29.003(b)(2) (Vernon Supp. 2003) (municipal court concurrent jurisdiction with justice court of cases arising under chapter 106 of Alcoholic Beverage Code); Tex. Code Crim. Proc. Ann. art. 4.14 (b)(2) (same); Tex. Pen. Code Ann. § 8.07(4) (Vernon 2003); Tex. Fam. Code Ann. § 51.08(c) (requiring court to notify juvenile court of final disposition of any matter for which court does not waive its jurisdiction under section 51.08(b)); see generally Robert O. Dawson, Texas Juvenile Law: An Analysis of Juvenile Statutory and Case Law for Texas Juvenile Justice Officials through the 76th Texas Legislature, ch. 4 (5th ed. 2000 & Supp. 2001) (discussing "shadow juvenile justice system" under which municipal and justice courts dispose of juvenile cases). We understand that the school district seeks the information before the case is heard in a court so that the school district can intervene earlier in its efforts to steer students away from drinking alcohol. Because a child's alleged violation of section 106.04 or 106.05 of the Alcoholic Beverage Code is a matter that can be handled in juvenile court as a "child in need of supervision" case, section 58.007(c) applies to the law enforcement records concerning the case. See Tex. Fam. Code Ann. §§ 51.03(b)(1)(A), 51.04, 58.007(c) (Vernon 2002).

Thus, in compliance with section 58.007(c), the police department must not release information from the records of a child's alleged violation of section 106.04 or 106.05 of the Alcoholic Beverage Code, including a child's name and address and the date of citation. Furthermore, the police department must keep records of such violations separate from its adult files and, if maintained in a computer system, under separate controls from the controls used to access electronic data concerning adults, and maintained on a local basis only. See id. § 58.007(c).

IV. Interagency Transfer Doctrine

Your predecessor asked whether, under the interagency transfer doctrine, the police department may nevertheless release to the school district the names, addresses, and dates that tickets were issued to school-age individuals for section 106.04 or 106.05 violations. For many years, this office has recognized that it is the public policy of Texas that governmental bodies should cooperate with each other in the interest of the efficient and economical administration of statutory duties. In adherence to this policy, this office has acknowledged in numerous opinions and decisions that information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. See, e.g., Op. Tex. Att'y Gen. Nos. GA-0055 (2003), H-836 (1976), M-713 (1970); Tex. Att'y Gen. ORD-667 (2000), ORD-661 (1999). However, this office has also found that an interagency transfer is prohibited where a confidentiality statute enumerates specific entities to which release of confidential information is authorized and where the receiving agency is not among the statute's enumerated entities. See Op. Tex. Att'y Gen. Nos. GA-0055 (2003), JM-590 (1986); Tex. Att'y Gen. ORD-655 (1997). This is so because where the statute lists the entities authorized to receive confidential information, a release to an unlisted entity would be contrary to the statute's plain language. The legislature's express mention or enumeration of one person, thing, consequence, or classis tantamount to an express exclusion of all others. See Op. Tex. Att'y Gen. No.JM-590 (1986) at 4.

In this situation, the interagency transfer doctrine cannot operate to allow the police department to transfer the confidential juvenile information to the school district. The statute enumerates specific entities for the transfer and inspection of confidential information, but a school district is not among the statute's enumerated entities. Section 58.007(c) specifies a permissible transfer of confidential information to the Texas Department of Criminal Justice with the phrase,"[e]xcept as provided by Subsection (d)." Tex. Fam. Code Ann. § 58.007(c) (Vernon 2002). Subsection (d) permits the transfer

of law enforcement files and records of a person who is transferred from the Texas Youth Commission to the institutional division or the pardons and paroles division of the Texas Department of Criminal Justice. See id. § 58.007(d). In addition, section 58.007(e) permits a juvenile justice agency and a criminal justice agency to inspect law enforcement records and files concerning a child. See id. § 58.007(e); see also id. § 58.101 (defining "juvenile justice agency"); Tex. Gov't Code Ann. § 411.082 (Vernon 1998) (defining "criminal justice agency"). Also, if a child has been reported missing by a parent, guardian, or conservator of that child, information about the child may be forwarded to and disseminated by the Texas Crime Information Center and the National Crime Information Center. See Tex. Fam. Code Ann. § 58.007(f) (Vernon 2002); see also 28 U.S.C. § 534(a)(3) (2001) (requiring Federal Bureau of Investigation's National Crime Information Center to include information that would assist in location of any missing person). Thus, to permit the transfer to the school district would be contrary to the intent of section 58.007 that the confidentiality for juvenile law enforcement records exists in all cases except the three set out in the statute.

Furthermore, our conclusion that section 58.007(c) does not permit the department to transfer law enforcement records to the school district is supported by other legislation. In 1993, the Seventy-third Legislature recognized that the interagency transfer doctrine was not applicable to juvenile law enforcement records requested by a school district when it passed House Bill 23, which added article 15.27 of the Code of Criminal Procedure. Article15.27 requires law enforcement agencies to notify school officials about an arrest or referral of a child for violation of certain offenses. Tex. Code Crim. Proc. Ann. art. 15.27 (Vernon Supp. 2003). Because juvenile law enforcement records were confidential and as part of an effort to prevent future juvenile violence, House Bill 23 was enacted to authorize the exchange of information about certain juvenile criminal activity between law enforcement agencies and schools. See Op. Tex. Att'y Gen. No. DM-294 (1994) at 2-4 (discussing legislative intent of House Bill 23; citing pertinent analysis). The duty to notify school officials under article 15.27 applies only to the offenses listed in subsection (h) of the article: any felony offense and certain misdemeanor offenses, which does not include violations of section 106.04 or 106.05 of the Alcoholic Beverage Code. See Tex. Code Crim Proc. Ann. art. 15.27(h) (Vernon Supp. 2003). Thus, article 15.27 is an exception to the confidentiality of section 58.007(c) that permits law enforcement agencies to disclose

3. RACING ON THE HIGHWAY BY A JUVENILE IS A TRAFFIC OFFENSE WITHIN THE JURISDICTION OF JUSTICE AND MUNICIPAL COURTS

Attorney General Opinion No. GA-0157, 2004 WL 367366, 2004 Tex.Ag.Lexis 1449 (2/24/04) *Texas Juvenile Law* 37 (5th Ed. 2000).

Re: Whether the offense of "racing on the highway" under section 545.420 of the Transportation Code, when committed by a juvenile, is "delinquent conduct," "conduct indicating a need for supervision," or a "traffic offense," as those terms are defined by the Family Code (RQ-0105-GA)

The Honorable Jeri Yenne
Brazoria County Criminal District Attorney
County Courthouse
111 East Locust, Suite 408A
Angleton, Texas 77515

Dear Ms. Yenne:

You ask how the offense of "racing on the highway," section 545.420 of the Transportation Code, should be classified under the Family Code, and whether juvenile courts or the justice and municipal courts have jurisdiction when a juvenile is charged with such an offense.

I. Relevant Law

The Juvenile Justice Code (the "JJC"), title 3 of the Family Code, provides for one or more juvenile courts for each county to be "presided over by a judge who has a sympathetic understanding of the problems of child welfare." Tex. Fam. Code Ann. § 51.04(a)-(h) (Vernon 2002);see generally id. §§ 51.01-61.107 (Vernon 2002 & Supp. 2004) (the JJC). Generally, the juvenile court has exclusive jurisdiction over "the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of [the JJC] at the time the person engaged in the conduct." Id. § 51.04(a) (Vernon 2002). A "child" under the JJC is generally defined as a person ten years old or older but less than seventeen years old. Id. § 51.02(2) (Vernon Supp. 2004). Delinquent conduct includes violations, other than traffic offenses, of state or federal penal laws punishable by imprisonment or confinement in jail. Id. § 51.03(a)(1). Conduct indicating a need for supervision includes conduct, other than traffic offenses, that is a state-law misdemeanor punishable by fine only and penal offenses of political subdivisions. See id. § 51.03(b)(1). Consequently, juvenile courts have exclusive jurisdiction over penal violations by a child, from misdemeanors to felonies, other than traffic offenses.

The JJC defines traffic offenses as including penal violations cognizable under chapter 729 of the Transportation Code, with certain enumerated exceptions. See id. § 51.02(16). In particular, section 729.001 of the Transportation Code provides that a person "younger than 17 years of age commits an offense if the person operates a motor vehicle on a public road or highway, a street or alley in a municipality, or a public beach in violation of any traffic law of this state," with certain enumerated exceptions. Tex. Transp. Code Ann. § 729.001(a) (Vernon Supp. 2004). An offense under section 729.001 is punishable by fine or other sanction, other than confinement or imprisonment, as the applicable traffic law provides. See id. § 729.001(c).

Section 545.420 of the Transportation Code proscribes certain conduct involving racing on a highway:

> (a) A person may not participate in any manner in:
>
> (1) a race;
>
> (2) a vehicle speed competition or contest;
>
> (3) a drag race or acceleration contest;
>
> (4) a test of physical endurance of the operator of a vehicle; or
>
> (5) in connection with a drag race, an exhibition of vehicle speed or acceleration or to make a vehicle speed record.
>
> (b) In this section:
>
> (1) "Drag race" means the operation of:
>
> (A) two or more vehicles from a point side by side at accelerating speeds in a competitive attempt to outdistance each other; or
>
> (B) one or more vehicles over a common selected course, from the same place to the same place, for the purpose of comparing the relative speeds or power of acceleration of the vehicle or vehicles in a specified distance or time.
>
> (2) "Race" means the use of one or more vehicles in an attempt to:
>
> (A) outgain or outdistance another vehicle or prevent another vehicle from passing;
>
> (B) arrive at a given destination ahead of another vehicle or vehicles; or

(C) test the physical stamina or endurance of an operator over a long- distance driving route.

(c) [Blank]

(d) Except as provided by Subsections (e)-(h), an offense under Subsection (a) is a Class B misdemeanor.

(e) An offense under Subsection (a) is a Class A misdemeanor if it is shown on the trial of the offense that:

(1) the person has previously been convicted one time of an offense under that subsection; or

(2) the person, at the time of the offense:

(A) was operating the vehicle while intoxicated, as defined by Section 49.01, Penal Code; or

(B) was in possession of an open container, as defined by Section 49.031, Penal Code.

(f) An offense under Subsection (a) is a state jail felony if it is shown on the trial of the offense that the person has previously been convicted two times of an offense under that subsection.

(g) An offense under Subsection (a) is a felony of the third degree if it is shown on the trial of the offense that as a result of the offense, an individual suffered bodily injury.

(h) An offense under Subsection (a) is a felony of the second degree if it is shown on the trial of the offense that as a result of the offense, an individual suffered serious bodily injury or death.

Id. § 545.420. Previously, the statute prohibited such conduct but did not prescribe a penal sanction. See Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1025-1832. Since September 1, 2003, however, a violation of section 545.420 is a penal offense subject to punishment ranging from a Class B misdemeanor to a second degree felony, depending on a particular violation's circumstances. See Tex. Transp. Code Ann. § 545.420(d)-(h) (Vernon Supp. 2004); Act of May 30, 2003, 78th Leg., R.S., ch. 535, §§ 1-2, 2003 Tex. Gen. Laws 1825, 1825-26.

In light of the 2003 amendment to section 545.420, you ask:

1. Is a violation of Section 545.420 of the Texas Transportation Code a "traffic offense" as defined in Section 51.02(16) of the Texas Family Code?

2. Is a violation of Section 545.420 of the Texas Transportation Code "delinquent conduct" as defined in Section 51.03 of the Texas Family Code?

3. Is a violation of Section 545.420 of the Texas Transportation Code "conduct indicating a need for supervision" as defined in Section 51.03 of the Texas Family Code?

4. Is a violation of Section 545.420 of the Texas Transportation Code referred to juvenile court, a justice of the peace court, or a municipal court?

Request Letter,supra note 1, at 2.

II. Analysis

We begin by examining the plain and common meaning of the statutes. Courts generally interpret an unambiguous statute according to its plain language unless a literal construction would lead to absurd results. See City of San Antonio v. City of Boerne, 111 S.W.3d 22, 25 (Tex. 2003) ("If a statute's meaning is unambiguous, we generally interpret the statute according to its plain meaning."); Fleming Foods of Tex., Inc. v. Rylander, 6 S.W.3d 278, 284 (Tex. 1999) (citations omitted) (unambiguous statutes "should not be construed by a court to mean something other than the plain words say unless there is an obvious error such as a typographical one that resulted in the omission of a word, or application of the literal language of a legislative enactment would produce an absurd result"); Wolfe v. State, 120 S.W.3d 368, 370 (Tex. Crim. App. 2003) ("Whenever possible, this Court interprets a statute pursuant to its 'plain [textual] meaning' and will not consult outside sources unless the statute is ambiguous or unless its literal translation will result in 'absurd consequences.'").

The JJC expressly defines delinquent conduct and conduct indicating a need for supervision to exclude traffic offenses. See Tex. Fam. Code Ann. §§ 51.03(a)(1), (b)(1) (Vernon Supp. 2004). A traffic offense under the JJC is an offense cognizable under chapter 729 of the Transportation Code. Id. § 51.02(16). The offenses cognizable under section 729.001 of the Transportation Code include operating a vehicle on a public highway in "violation of any traffic law of this state," and specifically include subtitle C of the Transportation Code. Tex. Transp. Code Ann. § 729.001(a)(3) (Vernon Supp. 2004). Section 545.420 is located in subtitle C of the Transportation Code. Section 545.420 is not among the various exceptions to the definition of a traffic offense in the Family Code nor to the offenses cognizable in chapter 729 of the Transportation Code. See Tex. Fam. Code Ann. § 51.02(16)(A)(i)-(v) (Vernon

Supp. 2004); Tex. Transp. Code Ann. § 729.001(a)(1)-(3) (Vernon Supp. 2004). Consequently, according to the plain language of the JJC and the Transportation Code, a violation of section 545.420 by a child is a traffic offense. As such, a violation of section 545.420 by a child is neither delinquent conduct nor conduct indicating a need for supervision as those terms are defined in the Family Code. And because a violation of section 545.420 is a traffic offense, proceedings for its violation are not within the juvenile court's jurisdiction. See Tex. Fam. Code Ann. §§ 51.04(a) (Vernon 2002) (defining juvenile court jurisdiction in terms of delinquent conduct and conduct indicating a need for supervision), § 51.03(a)(1) (Vernon Supp. 2004) (excluding traffic offenses from definition of delinquent conduct), § 51.03(b)(1) (excluding traffic offenses from definition of conduct indicating a need for supervision).

Justice courts and municipal courts have jurisdiction over criminal violations punishable by fine only or by fine and a statutory sanction other than confinement or imprisonment. See Tex. Code Crim. Proc. Ann. arts. 4.11, 4.14(b)(1), (c) (Vernon Supp. 2004). A violation of section 729.001 is punishable by fine or sanction other than confinement or imprisonment. See Tex. Transp. Code Ann. § 729.001(c) (Vernon Supp. 2004). Accordingly, a violation of section 545.420 of the Transportation Code, which violates section 729.001 when committed by a child, would be within the jurisdiction of justice courts and municipal courts.

The Texas Juvenile Probation Commission (the "Commission") has tendered a brief in which it takes the position that the offense of racing on the highway should be classified as delinquent conduct within the jurisdiction of the juvenile court and not as a traffic offense. The Commission acknowledges that the "letter of the law" is contrary to its position. It notes, however, that the legislature in 2003 excepted two other penal offenses punishable by confinement in jail from the definition of a "traffic offense" in Family Code § 51.02(1). The Commission contends that when the legislature categorized racing on the highway as an offense ranging from a Class B misdemeanor to a second degree felony, it never intended that justice courts would have jurisdiction of the offense when committed by a child. See Commission Brief, supra note 6, at 3. Furthermore, the Commission suggests that classifying racing on the highway as a traffic offense would be contrary to the spirit of juvenile justice theory reflected in the Family Code that "offenses which carry a penalty of confinement in jail or imprisonment not be classified as traffic offenses but as delinquent conduct under the jurisdiction of the juvenile court." Id.

However, the plain language of the statutes classifies the offense of racing on the highway under Transportation Code § 545.420 as a traffic offense. We cannot construe the offense as conduct other than a traffic offense without rewriting the statutes. The legislature's failure to exclude section 545.420 of the Transportation Code from offenses cognizable under section 729.001 could have been an oversight or deliberate; the legislative history does not reveal an obvious error that would permit a contrary construction. Generally, courts are careful to avoid rewriting a statute when attempting to construe it. See Campbell v. State, 49 S.W.3d 874, 878 (Tex. Crim. App. 2001) (holding that if claimed omission "was in fact an oversight in the statute, it is the business of the legislature, rather than this court, to correct it"); Fleming Foods, 6 S.W.3d at 284 (where codified statute is unambiguous, plain meaning rule applies even if codification is inconsistent with its statutory predecessor).

Moreover, construing section 729.001 of the Transportation Code as including section 545.420 does not lead to absurd results. Before 1999, a violation of section 729.001 was expressly punished as a Class C misdemeanor, regardless of the punishment an adult might receive for violating the underlying offense. In 1999, the legislature amended section 729.001(c) to provide that a cognizable offense committed by a child is "punishable by the fine or other sanction, other than confinement or imprisonment, authorized by statute for violation of the [listed] traffic law... that is the basis of the prosecution under this section." Tex. Transp. Code Ann. § 729.001(c) (Vernon Supp. 2004). In other words, after 1999, a violation of section 729.001(c) is not necessarily a Class C misdemeanor; rather, punishment corresponds to the punishment provided for the underlying offense other than confinement or imprisonment. Although the legislature has generally excluded more serious violations from offenses cognizable under 729.001 of the Transportation Code and the definition of a traffic offense under 51.02(16) of the Family Code, it has not done so uniformly. See, e.g., id. §§ 545.066(c)(1)-(2) (offense of passing a school bus ranges from misdemeanor to state jail felony), § 548.603(d) (Vernon 1999) (offense involving fictitious or counterfeit inspection sticker or insurance document ranges from Class B misdemeanor to second degree felony), § 601.371(d)4(at)4(u5a)13.4 B, i0032 T.4(a)6(f)-0.7o.ec0actit3.4 B[(§

aggravate punishment to a second or third degree felony, may also violate a section of the Transportation Code that is excluded from the definition of a traffic offense in the Family Code or the offenses cognizable in chapter 729 of the Transportation Code. Compare Tex. Transp. Code Ann. § 545.420(e)(2), (g)-(h) (Vernon Supp. 2004) (offense of racing on the highway involving alcohol or personal injury or death), with id. §§ 550.021 (Vernon 1999) (offense of causing an accident involving personal injury or death), 550.022 (offense of accident involving vehicle damage if Class B misdemeanor). See also id. § 729.001(a) (Vernon Supp. 2004) (excluding sections 550.021 and 550.022 from offenses cognizable under chapter 729); Tex. Fam. Code Ann. §§ 51.03(a)(3)-(4) (Vernon Supp. 2004) (defining delinquent conduct as including alcohol-related driving offenses), § 51.02(16)(A)(ii) (excluding accidents involving personal injury or death from the definition of traffic offense). A charge that a child has violated a penal provision excluded from the definition of a traffic offense would be within the exclusive jurisdiction of the juvenile court. See Tex. Fam. Code Ann. § 51.04(a) (Vernon 2002).

SUMMARY

Operation of a vehicle on a highway in violation of section 545.420 of the Transportation Code—"racing on the highway" by a person younger than seventeen years of age—is a violation of section 729.001 of the Transportation Code, and under the Family Code is a traffic offense rather than delinquent conduct or conduct indicating a need for supervision within the jurisdiction of the juvenile court. A violation of section 729.001 is within the jurisdiction of justice and municipal courts.

Very truly yours,
Greg Abbott, Attorney General of Texas
Barry Mcbee, First Assistant Attorney General
Don R. Willett, Deputy Attorney General For Legal Counsel
Nancy S. Fuller, Chair, Opinion Committee
William A. Hill, Assistant Attorney General, Opinion Committee

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4. STATUTE PERMITTING PROBATION INTAKE TO SCREEN MISDEMEANORS NOT INVOLVING VIOLENCE OR WEAPONS IS NOT UNCONSTITUTIONAL

Texas Attorney General Opinion No. GA-0205, 2004 WL 1380294, 2004 Tex.Ag.Lexis 5374 (6/18/04) *Texas Juvenile Law* 52 (5th Ed. 2000).

Re: Whether a juvenile board may designate a juvenile probation department as the office authorized to determine whether to defer prosecution of a child referred to juvenile court for certain nonviolent misdemeanor offenses (RQ-0152-GA)

The Honorable Mike Stafford
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002-1700

Dear Mr. Stafford:

You ask whether a juvenile board may designate a juvenile probation department as the office authorized to determine whether to defer prosecution of a child referred to juvenile court for nonviolent misdemeanor offenses instead of forwarding such referrals to a prosecuting attorney.

BACKGROUND

The Texas Juvenile Probation Commission oversees juvenile probation services for the state. See Tex. Hum. Res. Code Ann. § 141.001 (Vernon 2001). The commission distributes state funds to local juvenile boards and establishes uniform standards for the local juvenile justice system. See id. s 141.001(3)-(4). At the county level, the juvenile justice system functions primarily under the guidance of the juvenile board, which is a "body established by law to provide juvenile probation services to a county." Id. § 141.002(4). Each juvenile board is composed of "the county judge, the district judges in the county, and the judges of any statutory court[ ] designated as a juvenile court" whose duty is to administer the juvenile justice system in the county. See id. §§ 152.0032 (Vernon 2001), .0007(Vernon Supp. 2004). The board is responsible for establishing a juvenile probation department and policies for juvenile services within the jurisdiction of the board. See id. § 152.0007(a)(1)-(2) (Vernon Supp. 2004). The juvenile probation department implements the policies of the juvenile board, and through its probation officers provides juvenile probation services to juveniles referred to juvenile court. See id. § 152.0007(b); see also id. ss 142.001(1), .002 (Vernon 2001). Juvenile probation services are "services provided by or under the direction of a juvenile probation officer in response to an order issued by a juvenile court and under the court's direction, including... deferred prosecution." See id. § 142.001(1)(D).

Title 3 of the Family Code is designated the "Juvenile Justice Code." In each county, the juvenile board "shall designate one or more district, criminal district, domestic relations, juvenile, or county

courts or county courts at law as the juvenile court." Tex. Fam. Code Ann. § 51.04(b) (Vernon 2002). The juvenile court has exclusive original jurisdiction over "all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child... at the time the person engaged in the conduct." Id. § 51.04(a).

Section 53.01 of the Family Code, originally enacted in 1973, provides:

> (a) On referral of a person believed to be a child or on referral of the person's case to the office or official designated by the juvenile board, the intake officer, probation officer, or other person authorized by the board shall conduct a preliminary investigation to determine whether:
>
> (1) the person referred to juvenile court is a child within the meaning of this title; and
>
> (2) there is probable cause to believe the person:
>
> (A) engaged in delinquent conduct or conduct indicating a need for supervision; or
>
> (B) is a nonoffender who has been taken into custody and is being held solely for deportation out of the United States.
>
> ....
>
> (d)Unless the juvenile board approves a written procedure proposed by the office of prosecuting attorney and chief juvenile probation officer which provides otherwise, if it is determined that the person is a child and, regardless of a finding of probable cause, or a lack thereof, there is an allegation that the child engaged in delinquent conduct of the grade of felony or conduct constituting a misdemeanor offense involving violence to a person or the use or possession of a firearm, illegal knife, or club, as those terms are defined by Section 46.01, Penal Code, or prohibited weapon, as described by Section 46.05, Penal Code, the case shall be promptly forwarded to the office of the prosecuting attorney....

Id. § 53.01(a), (d) (Vernon Supp. 2004) (emphasis added).

When a referral to the prosecuting attorney is required to be made under section 53.01(d), section 53.012 prescribes the duties of the prosecuting attorney:

> (a) The prosecuting attorney shall promptly review the circumstances and allegations of a referral made under Section 53.01 for legal sufficiency and the desirability of prosecution and may file a petition without regard to whether probable cause was found under Section 53.01.
>
> (b) If the prosecuting attorney does not file a petition requesting the adjudication of the child referred to the prosecuting attorney, the prosecuting attorney shall:
>
> (1) terminate all proceedings, if the reason is for lack of probable cause; or
>
> (2) return the referral to the juvenile probation department for further proceedings.
>
> (c) The juvenile probation department shall promptly refer a child who has been returned to the department under Subsection (b)(2) and who fails or refuses to participate in a program of the department to the prosecuting attorney for review of the child's case and determination of whether to file a petition.

Id. § 53.012 (Vernon 2002).

Under the circumstances in which a referral is not required to be made to the prosecuting attorney, section 53.03 permits deferred adjudication of the child, provided that:

> (a) Subject to Subsections (e) and (g), if the preliminary investigation required by Section 53.01 of this code results in a determination that further proceedings in the case are authorized, the probation officer or other designated officer of the court, subject to the direction of the juvenile court, may advise the parties for a reasonable period of time not to exceed six months concerning deferred prosecution and rehabilitation of a child if:
>
> (1) deferred prosecution would be in the interest of the public and the child;
>
> (2) the child and his parent, guardian, or custodian consent with knowledge that consent is not obligatory; and
>
> (3) the child and his parent, guardian, or custodian are informed that they may terminate the deferred prosecution at any point and petition the court for a court hearing in the case.

Id. § 53.03(a) (Vernon Supp. 2004).

However, subsections (e) and (g) of section 53.03 circumscribe the probation officer's, as well as the prosecuting attorney's, authority in such cases. Subsection (e) states that although "[a] prosecuting attorney may defer adjudication for any child," a probation officer may not do so for any "case that is

required to be forwarded to the prosecuting attorney under Section 53.01(d)," unless the prosecuting attorney consents in writing. Id. § 53.03(e). Subsection (g) declares that prosecution may in no case be deferred for any child who commits an offense under sections 49.04-.08 of the Penal Code (driving, flying or boating while intoxicated, or intoxication manslaughter), or commits a third or subsequent offense under sections 106.04 (consumption of alcoholic beverages by a minor), or 106.041 of the Alcoholic Beverage Code (minor driving while intoxicated). See id. § 53.03(g). Thus, a probation officer or other official designated by the juvenile court is granted the discretion to defer prosecution of a juvenile in limited circumstances. The statute makes clear, in this relatively narrow class of cases, that the prosecutor has no role in determining the fate of the juvenile. The Harris County District Attorney contends that these statutes are unconstitutional to the extent that they violate the separation of powers doctrine and grant "prosecutorial discretion" to the probation department.

ANALYSIS

The relevant provisions of the Juvenile Justice Code have been in effect since 1973. We begin with the proposition that all statutes are presumed to be constitutional. See Tex. Gov't Code Ann. s 311.021(1) (Vernon 1998); see also Tex. Mun. League Intergov'tl Risk Pool v. Tex. Workers' Comp. Comm'n, 74 S.W.3d 377, 383 (Tex. 2002) ("We presume that the Legislature intended for the law to comply with the United States and Texas Constitutions....").

A. Separation of Powers

The Harris County District Attorney argues first that the separation of powers doctrine prohibits the juvenile probation department from performing functions properly allocated to the judicial branch of government. See DA's Brief, supra note 4, at 6-8. Article II, section 1 of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. art. II, s 1. It is well established that the offices of county and district attorney, which are created under article V of the Texas Constitution, the judicial article, are included within the judicial branch of government. See Meshell v. State, 739 S.W.2d 246, 253 (Tex. Crim. App. 1987). Moreover, there can be no doubt that a juvenile probation department is also a part of the judicial branch of government. As we have indicated, a county's juvenile board is composed of judges charged with the administration of the juvenile justice system in the county. See Tex. Hum. Res. Code Ann. §§ 152.0007 (Vernon Supp. 2004), .0032, .0051 (Vernon 2001). The juvenile board in turn establishes the juvenile probation department. See id. § 152.0007(a)(1)-(2) (Vernon Supp. 2004). Thus, it is clear that both the district attorney's office and the juvenile probation department are included within the judicial branch of government. See also Tex. Att'y Gen. LA-137 (1977) at 2 (county adult probation officer exercises powers of the judicial department). Where two entities exist within the same branch of government, the separation of powers doctrine is not applicable.

B. District Attorney's Authority to Represent the State and Prosecutorial Discretion

The Harris County District Attorney also contends that those provisions of the Juvenile Justice Code that accord prosecutorial discretion to the juvenile probation department infringe on his power to represent the state under article V, section 21 of the Texas Constitution. See DA's Brief, supra note 4, at 8-11. That provision states, in relevant part:

> The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature.

Tex. Const. art. V, s 21. In Harris County, the legislature has bifurcated the duties of the county attorney and the district attorney. The Harris County Attorney is responsible for all civil cases in the various courts of Harris County. See Tex. Gov't Code Ann. s 45.201 (Vernon 2004). The Harris County District Attorney, on the other hand, "has all the powers, duties, and privileges in Harris County relating to criminal matters for and in behalf of the state that are conferred on district attorneys in the various counties and districts." Id. s 43.180(c). Thus, in Harris County, the district attorney is the designated official for all criminal prosecutions.

1. Juvenile Cases are Civil in Nature

We find no conflict between the Juvenile Justice Code and section 43.180 of the Government Code, which grants exclusive criminal prosecution in Harris County to the district attorney. A juvenile court "is not a criminal court... [but] is a special court created by statute, and the statute specifically provides what disposition may be made of a 'delinquent child.'" Dendy v. Wilson, 179 S.W.2d 269, 273 (Tex. 1944). Juvenile proceedings are governed, "as far as practica[ble]," by the Rules of Civil Procedure, and are "civil in nature." J.R.W. v. State, 879 S.W.2d 254, 256 (Tex. App.—Dallas 1994, no writ); see also Tex. Fam. Code Ann. ss 51.13(a) (Vernon Supp. 2004) (providing that generally an order of adjudication or disposition pursuant to the Juvenile Justice Code is not a conviction of a crime), 51.17(a) (providing that "[e]xcept for the burden of proof to be borne by the state in adjudicating a child... or otherwise when in conflict with a provision of [title 3], the Texas Rules of Civil Procedure govern proceedings under [title 3]"), 56.01(a) (Vernon 2002) (providing that an appeal from an order of a juvenile court is predicated "as in civil cases generally").

Moreover, the Texas Code of Criminal Procedure does not apply to juvenile proceedings "unless the Legislature evinces a contrary intent." Vasquez v. State, 739 S.W.2d 37, 42 (Tex. Crim. App. 1987); see also Tex. Fam. Code Ann. ss 52.01(a)(2) (Vernon Supp. 2004) (providing that a child may be taken into custody "pursuant to the laws of arrest"), 51.17(b) (providing that discovery in a proceeding under title 3 "is governed by the Code of Criminal Procedure"), 51.17(c) (providing that "[e]xcept as otherwise provided by [title 3], the Texas Rules of Evidence applicable to criminal cases and Chapter 38, Code of Criminal Procedure, apply in a judicial proceeding under [title 3]"), 51.19(a) (Vernon 2002) (providing that "limitation periods under Chapter 12, Code of Criminal Procedure... apply to proceedings under [title 3]").

Finally, even if juvenile prosecutions were to be construed as criminal in nature, the Juvenile Justice Code's delegation of authority in this narrow class of cases constitutes a more specific statute than section 43.180 of the Government Code because it applies only to nonviolent misdemeanor offenses that do not involve the use of a prohibited weapon.

2. Article V, Section 21

The Harris County District Attorney also argues that because juvenile cases are quasi-criminal in nature, and article V, section 21 of the Texas Constitution declares that all criminal cases are within his constitutional jurisdiction, the legislature, in enacting the Juvenile Justice Code, has unconstitutionally delegated prosecutorial discretion to an official other than himself. See DA's Brief, supra note 4, at 2-5. As we have noted, however, all actions involving juveniles begin as civil cases. More significantly, article V, section 21 does not even commit all criminal prosecutions to the district or county attorney. It states first that a county attorney must represent the state in the "District and inferior courts" in their county. Tex. Const. art. V, § 21. The provision then declares that, in counties where there is a district attorney, "the respective duties" of both officers "shall... be regulated by the Legislature." Id. Nothing in article V, section 21 requires that in Harris County or elsewhere the legislature must commit all representation in court to one of those two officials. See id. Indeed, the Texas Supreme Court has recognized that in civil cases a commissioners court is at liberty to contract with attorneys other than a county, district, or criminal district attorney. See Guynes v. Galveston County, 861 S.W.2d 861, 863-64 (Tex. 1993).

In enacting the Juvenile Justice Code, the legislature has recognized that certain kinds of juvenile cases, specifically those enumerated in section 53.01(d) of the Family Code (felonies and misdemeanors involving either violence to a person or use or possession of a firearm, illegal knife, club, or other prohibited weapon), are exclusively within the province of the prosecuting attorney. See Tex. Fam. Code Ann. §§ 53.01(d), 53.03(e), (g) (Vernon Supp. 2004). The legislature has merely carved out a narrow class of cases—nonviolent misdemeanors—that fall within the jurisdiction of the juvenile probation department. In such cases, in accordance with subsection 53.03(a), "the probation officer or other designated officer of the court, subject to the direction of the juvenile court" may defer prosecution, provided that the child and his parent, guardian, or custodian consent, and the probation officer finds that deferred prosecution "would be in the interest of the public and the child." Id. § 53.03(a) (emphasis added). Thus, the legislature has in this instance determined "the respective duties of District Attorneys and County Attorneys" pursuant to the terms of article V, section 21 of the Texas Constitution. See Tex. Const. art. V, § 21.

In sum, the Harris County District Attorney's authority to represent the state in criminal matters is not contravened by the legislature's grant of deferred prosecution in a relatively narrow class of juvenile cases to the Harris County Juvenile Probation Department. Under the terms of article V, section 21 of the Texas Constitution, the legislature is at liberty to regulate the duties of the county and district attorneys. Furthermore, juvenile cases are, at least ini-

tially, civil in nature and are governed by the Rules of Civil Procedure. It is only in those instances—felonies and misdemeanors involving violence to a person or the use or possession of prohibited weapons—in which the Juvenile Justice Code removes a child, sometimes temporarily, sometimes permanently, from the juvenile justice system that the Harris County District Attorney is granted full prosecutorial discretion.

SUMMARY

A juvenile board may, without contravening article V, section 21 or article II, section 1 of the Texas Constitution, designate a juvenile probation department as the office with the authority to defer prosecution of a child referred to juvenile court for certain nonviolent misdemeanor offenses.

Very truly yours,
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