CASE LAW UPDATE

Professor Robert O. Dawson
The University of Texas School of Law

17th Annual Juvenile Law Conference
San Antonio, Texas
February 18-20, 2004

TABLE OF CONTENTS

I. CONFESSIONS 1
1. **State v. Simpson**, 105 S.W.3d 238 (Tex.App.—Tyler 4/23/03) 1
2. **Pham v. State**, ___ S.W.3d ___, No. 01-99-00631-CR, 2003 WL 22807944, 2003 Tex.App. Lexis 10073 (Tex.App.—Houston [1st Dist.] 11/26/03) 4
3. **Gonzales v. State**, ___ S.W.3d ____, No. 01-98-00540-CR, 2003 WL 22807847, 2003 Tex.App. Lexis 10072 (Tex.App.—Houston [1st Dist.] 11/26/03) 9

II. LAW ENFORCEMENT 12
1. **In the Matter of A.T.H.**, 106 S.W.3d 338 (Tex.App.—Austin 5/8/03) 12
2. **In the Matter of O.E.**, UNPUBLISHED, No. 03-02-00516-CV, 2003 WL 22669014, 2003 Tex. App.Lexis 9586 (Tex.App.—Austin 11/13/03) 18

III. CERTIFICATIONS 21
Montgomery v. State, UNPUBLISHED, No. 07-00-05740-CR, 2003 WL 1623315 (Tex. App.—Amarillo 3/28/03) 21

IV. DISPOSITIONS 22
1. **In the Matter of K.T.**, 107 S.W.3d 65 (Tex.App.—San Antonio, en banc 2/12/03) 22
2. **In the Matter of D.L.C.**, ___ S.W.3d ____, No. 2-02-163-CV, 2003 WL 22976095, 2003 Tex.App.Lexis ____ (Tex.App.—Fort Worth 12/18/03) 29

V. MODIFICATIONS 40
1. **In the Interest of B.J.**, 100 S.W.3d 448 (Tex.App.—Texarkana 1/14/03) 40
2. **In the Matter of P.L.**, 106 S.W.3d 334 (Tex.App.—Dallas 5/7/03) 43
3. **In the Matter of J.M., III**, ___ S.W.3d ___, No. 13-02-139-CV, 2003 WL 22415869, 2003 Tex.App. Lexis 9087 (Tex.App.—Corpus Christi 10/23/03) 45

VI. INEFFECTIVE ASSISTANCE 48
1. **In the Matter of T.T.G.**, UNPUBLISHED, No. 12-02-00268-CV, 2003 WL 21688120, 2003 Tex.App.Lexis 6263 (Tex.App.—Tyler 7/16/03) 48
2. **In the Matter of I.R.**, ___ S.W.3d ____, No. 08-03-00230-CV, 2003 WL 22870805, 2003 Tex.App.Lexis ____ (Tex.App.—El Paso 12/4/03) 49

VII. PARENTAL LIABILITY 54
Mitz v. State, UNPUBLISHED, No. 13-02-229-CR, 2003 WL 21666624, 2003 Tex.App. Lexis 6200 (Tex.App.—Corpus Christi 7/17/03) 54

VIII. CHAPTER 55 55
In the Matter of J.K.N., 115 S.W.3d 166 (Tex.App.—Fort Worth 8/14/03) 55

IX. APPEALS 61
1. **In the Matter of J.P.D.**, UNPUBLISHED, No. 03-02-00425-CV, 2003 WL 1922466, 2003 Tex.App.Lexis 3466 (Tex.App.—Austin 4/24/03) 61
2. **In the Matter of F.C.**, 108 S.W.3d 384 (Tex.App.—Tyler 4/30/03) 62

X. ATTORNEY GENERAL 63
1. **Attorney General Opinion No. GA-0056**, 2003 WL 1849299, 2003 Tex.AG Lexis 3060 (4/7/03) 63
2. **Attorney General Opinion No. GA-0125**, 2003 WL 22814516, 2003 Tex AG Lexis ____ (11/25/03) 66
3. **Opinion Attorney General No. GA-0131**, 2003 WL 22969288. 2003 TexAGLexis ___ (12/15/03) 68

I. CONFESSIONS

1. TYLER COURT FINDS THAT DELAY IN NOTIFIYING PARENTS OF ARREST INVALIDATED CONFESSION UNDER CAUSAL CONNNECTION RULE OF GONZALES

State v. Simpson, 105 S.W.3d 238 (Tex.App.—Tyler 4/23/03) *Texas Juvenile Law* 301 (5th Ed. 2000).

Facts: On original submission to this court, we addressed the State's appeal from the granting of a motion to suppress in the case of Lionel Simpson ("Appellee"). Appellee was indicted for capital murder. He was a juvenile at the time of the offense. The trial court granted Appellee's motion to suppress his confession because the authorities violated section 52.02(b) of the Texas Family Code by not promptly notifying Appellee's parents of his detention. We concluded that the evidence supported the trial court's decision that Appellee's confession was illegally obtained. Based on this conclusion, we affirmed the judgment of the trial court. *State v. Simpson,* 51 S.W.3d 633 (Tex.App.—Tyler 2000) [Juvenile Law Newsletter ¶ 01-1-11].

On petition for discretionary review, the State argued that no causal connection exists between the failure to notify Appellee's parents and the confession subsequently obtained from Appellee. The court of criminal appeals vacated our judgment and remanded the appeal to us for consideration of this issue, in light of its recent opinion in *Gonzalez v. State*, 67 S.W.3d 910 (Tex.Crim. App.2002). *State v. Simpson*, 74 S.W.3d 408 (Tex.Crim.App.2002)(per curiam) [Juvenile Law Newsletter ¶ 02-2-16]. Consistent with *Gonzalez,* we affirm the trial court's suppression of Appellee's confession.

BACKGROUND

Appellee and his brother, Danielle, were arrested at 11:00 a.m. on Friday, January 28, 2000, in connection with an investigation of the murder of an elderly retired school teacher, Geraldine Davidson. Appellee was fifteen years of age at the time. Prior to interviewing Appellee, law enforcement investigators took him before Justice of the Peace James Todd. At 12:25 p.m., Judge Todd gave Appellee a comprehensive magistrate's juvenile warning, outside the presence of law enforcement officers, pursuant to section 51.095 of the Family Code. [FN1] Judge Todd testified that Appellee understood his rights, including his right to an attorney, and voluntarily relinquished them.

FN1. Judge Todd read and explained the following rights and warnings to Simpson:

1. You may remain silent and not make any statement at all;
2. Any statement that you make may be used in evidence against you;
3. You have the right to an attorney;
4. You have the right to have an attorney present to advise you before or during questioning;
5. If you are unable to employ an attorney, you have the right to have an attorney appointed for you;
6. You have the right to have the attorney counsel you before or during any interviews with peace officers or attorneys representing the state; and
7. You have the right to terminate the interview at any time.

Judge Todd also inquired whether Appellee understood these rights and whether he had any questions.

See Tex. Fam.Code Ann. § 51.095 (Vernon Supp.1999).

Appellee was then interviewed by Texas Ranger Rudy Flores. Flores testified Appellee was relaxed and cooperative as he answered questions. He was provided lunch, food, soda pop and restroom breaks during the interview. Flores' interview of Appellee, however, lasted for seven and one-half hours, culminating in a written statement by Appellee in his own handwriting implicating himself in the murder. Before signing the statement, Appellee was again taken before Judge Todd.

Judge Todd gave Appellee a second magistrate's juvenile warning [FN2] at approximately 8:15 p.m. As with the first warning, the second warning was given outside the presence of the law enforcement officers. Judge Todd then reviewed Appellee's written statement and advised him he was under no obligation to make or sign the statement. Appellee nevertheless proceeded to sign the statement, initialing each page. Appellee remained in the juvenile detention center through the weekend.

FN2. The second warning was as follows:

1. You may remain silent and not make any statement;
2. Any statement that you make may be used in evidence against you;
3. You have the right to an attorney;
4. You have the right to have an attorney present to advise you before or during questioning;
5. If you are unable to employ an attorney, you have the right to have an attorney appointed for you;

6. You have the right to have the attorney counsel you before or during any interviews with peace officers or attorneys representing the state; and

7. You have the right to terminate the interview at any time.

From the time of his arrest on Friday, January 28, 2000, until Sunday evening, January 30, 2000, neither Appellee's mother nor any other parent, guardian, or custodian was notified of his arrest and detention. Appellee's mother, Brenda Simpson, first learned that her son was in the juvenile detention center when a police officer served her with a juvenile petition and told her to be in court for Appellee's initial detention hearing at 9:00 a.m. on Monday, January 31, 2000. Appellee had already been detained for over forty-eight hours when the officer notified Ms. Simpson of the scheduled court hearing. However, the officer still did not tell her why Appellee was being detained.

Held: Affirmed.

Opinion Text: STANDARD OF REVIEW

A trial court's ruling on a motion to suppress is generally reviewed by an abuse of discretion standard. *Jackson v. State,* 33 S.W.3d 828, 838 (Tex. Crim.App.2000); *Oles v. State,* 993 S.W.2d 103, 106 (Tex.Crim.App.1999); *Maddox v. State,* 682 S.W.2d 563, 564 (Tex.Crim.App.1997). In this case, the resolution of the issue before us does not turn on an evaluation of the credibility and demeanor of the witnesses, and the facts relating to the issues are undisputed. Therefore, we conduct a de novo review. *Oles,* 993 S.W.2d at 106; *see also Guzman v. State,* 955 S.W.2d 85, 89 (Tex.Crim. App.1997).

Section 52.02(b) and Gonzalez v. State

Section 52.02(b) of the Family Code provides that "[a] person taking a child into custody *shall promptly* give notice of his action and a statement of the reason for taking the child into custody, to ... the child's parent, guardian, or custodian...." Tex. Fam.Code Ann. § 52.02(b) (Vernon Supp.1999) (emphasis added). The State admits that the law enforcement officials in this case failed to promptly notify Appellee's parents that he was in custody, thus violating section 52.02(b). The State argues, however, that no causal connection exists between this violation and the confession obtained from Appellee. Therefore, the State reasons, since Appellee was properly admonished, his confession is admissible. The holding in *Gonzales v. State,* 67 S.W.2d 910 (Tex.Crim.App.2002) provides the basis for the State's argument.

The appellant in *Gonzales* was fifteen years old at the time he shot and killed a convenience store clerk. He was subsequently arrested and given *Miranda* warnings en route to a designated juvenile processing center. Upon arrival, the officers took the appellant's written statement. His parents were not notified of his arrest until he was processed into the detention facility, which was five or six hours after his arrest. The appellant filed a motion to suppress his statement contending that suppression was required because his parents were not promptly notified of his arrest. The trial court denied the motion. The Houston First Court of Appeals held that the trial court erred in denying the motion and that the statement was automatically inadmissible because the officers violated section 52.02(b). *Gonzales v. State,* 9 S.W.3d 267, 271 (Tex.App.-Houston [1st Dist.] 1999).

The State filed a petition for discretionary review asserting that a juvenile's written statement should not be suppressed without some showing of a causal connection between the failure to notify the juvenile's parents and the juvenile's execution of a written statement. *Id.* at 912. The court of criminal appeals granted review. In addressing the State's argument, the court first noted that in order for a juvenile's written statement to be suppressed because of a violation of section 52.02(b), there must be some exclusionary mechanism. *Id.* However, section 52.02(b) is "not an independent exclusionary statute." *Id.* Thus, a violation of this section does not make a juvenile's confession automatically inadmissible. *Id.* Family Code section 51.17 provides that Chapter 38 of the Code of Criminal Procedure applies in a judicial proceeding under Title 3 of the Family Code (the Juvenile Justice Code). Tex. Fam.Code Ann. § 51.17(c) (Vernon Supp.2000). Consequently, if evidence is to be excluded because of a section 52 .02(b) violation, it must be excluded through the operation of article 38.23(a). *Gonzales,* 67 S.W.3d at 912.

Article 38.23(a) provides that "no evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the State of Texas ... shall be admitted into evidence." Tex.Code Crim. Proc. Ann. 38.23(a) (Vernon 1987). Consistent with its previous opinion in *Comer v. State,* the court of criminal appeals stated in *Gonzalez* that an exclusionary analysis under article 38.23(a) necessarily entails a causal connection analysis. *Gonzalez,* 67 S.W.3d at 912-13; *Comer v. State,* 776 S.W.2d 191, 197 (Tex.Crim. App.1989). Following the reasoning in its prior decisions, the court held that a juvenile's confession is not obtained in violation of the law, and is therefore admissible under article 38.23(a), if there is no causal connec-

tion between the illegal conduct and the acquisition of the evidence. *Id.* (citations omitted). We therefore consider whether a causal connection exists between the violation of section 52.02(b) in the instant case and Appellee's confession.

ANALYSIS

Appellee's mother, Brenda Simpson, testified at the hearing on the motion to suppress. According to Ms. Simpson's testimony, she had lived with Appellee's father, James Bolton, for thirty years and has seven children living in her household. She works at Palestine Regional Medical Center in Palestine, begins her workday at 7:00 a.m ., and sometimes arrives home from work as late as 7:00 or 8:00 in the evening, "according to how the emergency room is going." Despite her early work schedule, she makes sure "everybody is at least halfway dressed [for school] before she leaves." If her children do not finish getting ready on time and miss the school bus, she leaves work and takes them to school. She testified that she and Mr. Bolton try to keep Appellee and his brother, Danielle, away from troublemakers, but admitted that both Danielle and Appellee had been in trouble before. She further testified that

> [a]nytime that someone came to me and told me that Danielle and [Appellee] was in trouble, the first thing I always do is call the police to find out why. And when they tell me that, they asked me where are my sons, I told them that they weren't at my house. I would find them and bring them to them. And that's what I always do. Unless we're at the house and they don't want to go, I call the police and have the police come to my house. And they would come to my house and pick them up.

Ms. Simpson stated that she arrived home from work about 4:00 p.m. on January 28, 2000, and learned that Danielle had been arrested. When she arrived, Mr. Bolton was at home, "nervous and upset, worried about Danielle" and about Appellee. Neither she nor Mr. Bolton knew that Appellee had also been arrested, and she assumed he was with another brother or at a sister's house because he "would normally be with them." She admitted, however, that when Appellee was with a sister or brother, he usually called her to let her know where he was. Ms. Simpson made no effort to try to find Appellee other than talking to one of her daughters. She did not think it was unusual that Danielle was in jail on the same day that she could not find Appellee because Appellee "doesn't go to jail every time Danielle goes." She and Mr. Bolton decided they would "wait and see what was going to happen" because if Appellee was in jail, "a police officer would come by and tell [them]." Mr. Bolton was not present at the hearing, and Ms. Simpson's testimony is uncontroverted. The State introduced no evidence explaining the failure to notify Appellee's parents of his arrest or to inform them of the reason he was being detained.

Based upon our review of the record, we find nothing to persuade us that, on January 28, Ms. Simpson would not have immediately proceeded to where Appellee was detained if she had received the prompt notification required by section 52.02(b). Ms. Simpson described her efforts to care for her children. She also expressed her concern for Appellee and her distress over the arrest of Danielle. She explained that she did not call the police to find out if Appellee had been arrested because she was so distraught and because she believed the police would let her know if Appellee had in fact been arrested. Furthermore, she had initiated contact with the police on prior occasions only after learning from another source that one or both of her sons were in trouble. According to her testimony, she always acted promptly to make certain her sons were made available to the police, but nothing in the record suggests that she had no further involvement after that point. Therefore, it is reasonable to conclude from her testimony, especially in light of the gravity of the crime of which Appellee was suspected, that if either Ms. Simpson or Mr. Bolton had received the required notice, at least one of them would have proceeded to the location where Appellee was being detained.

Moreover, we find no showing that Ms. Simpson, if she had been promptly notified, could not have reached Appellee either before he was interviewed by law enforcement or before he signed a statement. To the contrary, her testimony reveals that she works at a local hospital and can leave work when her children need her assistance. Even if she were unable to leave, however, Ms. Simpson arrived home from work at 4:00 p.m. on January 28, which was four and one-half hours prior to the time Appellee signed his statement. Furthermore, Ms. Simpson testified that Mr. Bolton was at home on the day Appellee was arrested and when she arrived home from work. Consequently, we cannot conclude that Appellee would not have had access to one or both of his parents before signing his statement if they had received the notification required by section 52.02(b).

CONCLUSION

Appellee's statement was obtained, without notification to or the involvement of his parents, during the first nine and one-half hours of his deten-

tion, which began at 11:00 a.m. on January 28, 2000. After Appellee signed his statement, at approximately 8:30 p.m., Appellee's detention continued, and he remained isolated from his parents until the time of his juvenile hearing at 9:00 a.m. on Monday, January 31. If Appellee's parents had received the notification required by section 52.02(b), we cannot conclude that they would not have proceeded to where Appellee was detained before he gave his statement. Moreover, we do find nothing in the record to indicate that either of Appellee's parents would have advised Appellee to make or sign a statement implicating himself in the commission of capital murder. Therefore, we also cannot say with any degree of certainty, after examining the record before us, that Appellee would have still chosen to confess his crime if his parents had been promptly notified and he had access to them, and possibly to counsel. *See Comer v. State*, 776 S.W.2d 191, 197 (Tex.Crim.App.1999) (court could not say with any degree of confidence that juvenile would have confessed if, instead of being detained for three hours, he had been transported "forthwith" to juvenile facility, where he may have had access to at least his parents, if not counsel). Consequently, we hold that the trial court did not err in suppressing Appellee's confession.

The judgment of the trial court is *affirmed.*

---

2. BURDEN TO SHOW CAUSAL CONNECTION BETWEEN FAILURE TO NOTIFY PARENTS AND CONFESSION IS ON JUVENILE RESPONDENT

Pham v. State, ___ S.W.3d ___, No. 01-99-00631-CR, 2003 WL 22807944, 2003 Tex.App. Lexis 10073 (Tex.App.—Houston [1st Dist.] 11/26/03) *Texas Juvenile Law* 301 (5th Ed. 2000).

Facts: A jury found appellant, John Tuy Pham, guilty of murder and assessed punishment at life in prison. This Court reversed the conviction because the trial court had erred in admitting appellant's confession. *Pham v. State*, 36 S.W.3d 199 (Tex.App.—Houston [1st Dist.] 2001) (*Pham I*). On petition for discretionary review, the Court of Criminal Appeals vacated our judgment and remanded the cause for reconsideration in light of *Gonzales v. State*, 67 S.W.3d 910 (Tex. Crim.App.2002). *Pham v. State*, 72 S.W.3d 346 (Tex.Crim.App.2002) (*Pham II*). We apply *Gonzales* by considering whether there was a causal connection between (1) the failure to notify appellant's parents of his custody and whereabouts and (2) the acquisition of appellant's confession. We also address (1) whether appellant preserved his complaint that the trial court should have suppressed his oral statement because he was not taken to a juvenile processing office without unnecessary delay; (2) whether the trial court reversibly erred in refusing appellant's requested jury instructions regarding the admissibility of appellant's illegally taken oral confession; and (3) whether the trial court abused its discretion in excluding expert testimony regarding the impact or desirability of probation versus incarceration.

Appellant was a 16-year-old high school junior when he became a suspect in a drive-by shooting that had resulted in the death of the complainant, Dung Van Ha. Houston Police Department officers went to appellant's school and took him into custody about 2:35 p.m. The officers were told by a school security guard that the principal would contact appellant's family and that the guard himself would contact appellant's brother. The officers took appellant to be warned by a magistrate about 3:35 p.m. Appellant was then taken to the downtown police station and questioned by an investigator. About 4:38 p.m., appellant admitted having fired a .45-caliber weapon at the car that the complainant was driving. The officers who had taken appellant into custody then took appellant to a juvenile facility be processed, fingerprinted, and photographed.

The first notification of appellant's family was made by an officer at the juvenile processing facility. The officer spoke to appellant's sister around 8:15 p.m. Someone from the Juvenile Probation Department contacted appellant's father about 9:50 p.m. It was not until the following day that appellant's parents went to see appellant and found out why he had been taken into custody.

Held: Affirmed.

Opinion Text: *Requirement of Causal Connection Between Failure to Notify Parents and Child's Ensuing Confession*

In his first and second points of error, appellant contends that his confession should have been suppressed pursuant to article 38.23 of the Code of Criminal Procedure (the Texas statutory exclusionary rule) because the police did not comply with section 52.02(b) of the Family Code. *See* Tex.Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp.2004); Tex. Fam.Code Ann. § 52.02(b) (Vernon Supp.2004). Section 52.02(b) requires that a person taking a child into custody promptly give notice of the person's action, and a statement of the reason for taking the child into custody, to the child's parent, guardian, or custodian and to the office or official

designated by the juvenile board. Tex. Fam.Code Ann. § 52.02(b). Appellant's complaint focuses on the failure to notify his parents promptly.

In *Pham I,* we held that the officers failed to notify appellant's parents promptly. *Id.,* 36 S.W.3 at 203-04. A juvenile's written statement obtained after a violation of section 52.02(b) of the Family Code is not automatically inadmissible, however. *See Gonzales,* 67 S.W.3d at 912-13. If evidence obtained in violation of the Family Code is to be excluded, article 38.23 of the Code of Criminal Procedure is the proper mechanism for exclusion. *Id.* Article 38.23(a) provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas ... shall be admitted in evidence...." Tex.Code Crim. Proc. Ann. art. 38.23(a). Evidence is not obtained in violation of a provision of law if there is no causal connection between the illegal conduct and the acquisition of evidence. *Gonzales,* 67 S.W.3d at 912. Therefore, in light of article 38.23(a), before a juvenile's written statement can be excluded, there must be a causal connection between the violation of section 52.02(b) and the making of the statement. *See id.*

In our original opinion, we conducted a taint-attenuation analysis, tracking *Comer v. State,* 776 S.W.2d 191 (Tex.Crim.App.1989). *See Pham I,* 36 S.W.3d at 204-05. This was apparently an insufficient analysis to avoid a remand for reconsideration in light of *Gonzales.* Therefore, at the outset, we determine whether causal connection and attenuation of the taint constitute separate analyses.

A. Whether Causal Connection and Attenuation of the Taint Involve Separate Analyses

The case most clearly demonstrating separate analyses for causal connection and attenuation of the taint, and the order in which they are to be undertaken, is *Roquemore v. State,* 60 S.W.3d 862 (Tex.Crim. App.2001). In *Roquemore,* the Court of Criminal Appeals first found a causal connection between the recovery of the stolen property and the illegality of the police conduct. *Id.* at 871. The Court found it unnecessary, however, to proceed to an attenuation-of-the-taint analysis because the State did not raise the argument. *Id.* at n.14.

Based on *Roquemore,* and based on the fact that our attenuation-of-the-taint analysis in *Pham I* was found inadequate to satisfy a *Gonzales* causal-connection analysis, we conclude that there are separate analyses for causal connection and attenuation of the taint. Based on *Roquemore,* we also conclude that the causal-connection analysis precedes the attenuation-of-the- taint analysis. We next determine who has the burden in a causal-connection analysis.

B. Who Has the Burden

1. Causal connection

No direct authority establishes who has the burden of proving a causal connection between a Family Code violation and a juvenile defendant's statement. The Court of Criminal Appeals has directed us to conduct a causal- connection analysis, but has not set out whether the State or the defendant has the burden of proof. Not surprisingly, both parties have argued that the other party should have the burden.

Appellant argues that the burden of disproving a causal connection lies with the State. Appellant relies on (1) an analogy to how the burden shifts to the State to show compliance with a statute once the accused has raised some evidence of a violation; (2) an analogy to the State's ultimate burden of proving that the voluntariness of a confession; and (3) a commentator's observation that *Gonzales* recognized with approval a statement from *Comer* that appeared to conclude that the evidence failed to show the lack of a causal connection between the statutory violation and the making of the statement. We agree with appellant that, once a defendant raises some evidence of a Family Code violation, the State then has the burden of proving compliance with the statute. *Roquemore,* 60 S.W.3d at 869. This does not resolve the issue of who has the burden of proving a causal connection between the violation of the statute and the ensuing statement, however. We also agree with appellant that the State has the ultimate burden of proving that a statement is admissible under an attenuation-of-the-taint analysis, just as the State has the ultimate burden of proving a confession is voluntary, but the issue before us is who has the initial burden regarding a causal connection, not who has the ultimate burden of persuasion. Finally, the practice commentary cited by appellant does not address the issue of who has the initial burden regarding causal connection.

The State argues that placing the burden on appellant to demonstrate a causal connection is proper because (1) inadmissibility is not established by violation of a statute alone, but only upon a showing of a causal connection between the violation and the ensuing confession and (2) it is well settled that the failure to take an arrestee before a magistrate promptly will not invalidate a confession unless there is proof of a causal connection between the delay and the confession. The State cites *Cantu v. State* for the latter proposition. *See id.,* 842 S.W.2d 667 (Tex.Crim.App. 1992). In *Cantu,* the Court of Criminal Appeals looked to the appellant to demonstrate a connection between the violation of the statute and the confession. *Id.* at 680.

We agree with the State that it is appropriate to look to analogous circumstances involving a violation of a statute after which evidence, primarily a confession, is obtained. There are many cases holding that, absent a showing of a causal connection between the failure to take an accused before a magistrate promptly, as required by statute, and the accused's ensuing confession, the validity of the confession is not affected. *See, e.g., Boyd v. State*, 811 S.W.2d 105, 124 (Tex.Crim.App.1991). The appellant is generally expected to make the showing. *Id.* at 125 ("Appellant fails to demonstrate any causal connection between his statement and the failure of the authorities to take him before a magistrate."); *Schultz v. State*, 510 S.W.2d 940, 943 (Tex.Crim.App.1974) ("[A]ppellant must show a causal connection between [the failure to take appellant before a magistrate] and his confession."); *Shadrick v. State*, 491 S.W.2d 681, 684 (Tex.Crim. App.1973) (same). This Court has also held that it is a defendant's burden to show a causal connection between the failure to take him before a magistrate and a subsequent confession in order to obtain suppression of the confession. *See Bonner v. State*, 804 S.W.2d 580, 582 (Tex.App.—Houston [1st Dist.] 1991, pet. ref'd); *Straughter v. State*, 801 S.W.2d 607, 610 (Tex.App.— Houston [1st Dist.] 1990, no pet.). In another analogous situation, this Court has placed the burden on the defendant to show a causal connection between an improper warning and a decision to submit to a breath test. *See Schafer v. State*, 95 S.W.3d 452, 455 (Tex.App.—Houston [1st Dist.] 2002, pet. ref'd).

We see no reason to apply a different burden regarding the causal-connection analysis between violations of the Family Code requirement to notify a juvenile's parents and a subsequent statement. This is particularly appropriate where the Court of Criminal Appeals has held that evidence is not obtained in violation of the law if there is no causal connection between the illegal conduct and the acquisition of the evidence. *See Gonzales*, 67 S.W.3d at 912.

Moreover, as a practical matter, it is reasonable to place the burden on the defendant to produce evidence to which only the defendant has access. The defendant alone has access to his own thought processes, and the defendant has much better access to his own parents, who are likely to be much more cooperative with their accused child and his attorney than with the State. *See, e.g., State v. Simpson*, 105 S.W.3d 238, 242-43 (Tex. App.—Tyler 2003, no pet. h.) (relying on testimony of juvenile defendant's mother that she and her husband waited to take action concerning the defendant, having confidence that police would contact them if the child had been taken into custody). On the other hand, it is more reasonable to place the burden on the State to show attenuation of the taint because the State has control of the detention and interrogation process so that it may engage in conduct that dissipates and neutralizes the taint from any unlawful police conduct.

Accordingly, we conclude that the burden is on the juvenile defendant to show some evidence of a causal connection between the failure to notify the juvenile detainee's parents and an ensuing confession.

2. Attenuation of the taint

As pointed out above, the *Roquemore* court looked to the State to establish attenuation of the taint. *Id.*, 60 S.W.3d at 871 n.14. The parties do not even argue about this proposition. We conclude that it is the State's burden to demonstrate attenuation of the taint, once a causal connection is shown between police illegality and the recovery of evidence.

C. Summary

For the foregoing reasons, we hold that, when a juvenile defendant seeks to suppress a confession given after the failure to notify the juvenile's parents promptly of the juvenile's whereabouts and the reason for taking the juvenile into custody, the burden is initially upon the defendant to raise the issue by producing evidence of a violation of the statutory requirement. *Roquemore*, 60 S.W.3d at 869. The burden then shifts to the State to prove compliance with the statute. *Id.* Because a violation of the statute is not alone sufficient to require exclusion of the confession, the burden then reverts to the defendant to produce evidence of a causal connection between the statutory violation and the ensuing confession. *Cf. Cantu*, 842 S.W.2d at 680. Once the defendant meets this burden, the State must then shoulder the burden of either disproving a causal connection or demonstrating attenuation of the taint. *See* GEORGE E. DIX & ROBERT O. DAWSON, 41 TEXAS CRIMINAL PRACTICE & PROCEDURE § 13.339, at 29 (2d ed. Supp.2003) ("Most likely, however, a defendant challenging evidence must show a causal connection between the section 52.02 illegality and the obtaining of the evidence. If this is shown, the State may raise and undertake to establish that the taint of the illegality was attenuated by the time the challenged evidence was obtained."). Because we addressed the violation of the statute in our original opinion, holding that the statute requiring parental notification was violated, it is unnecessary to repeat that analysis in this opinion. We thus proceed directly to a causal-connection analysis.

D. Causal-Connection Analysis

Despite arguing that it was the State's burden to negate a causal connection, appellant maintains that the causal link was clear and obvious in this case. First, appellant anticipates that the State will argue that the short length of time that appellant was detained before giving the confession negates any causal link. Appellant urges us to reject what he characterizes as a facially- appealing argument because it would reward police officers for quickly obtaining confessions in disregard of statutory requirements. Appellant argues that a causal connection was shown by the limitless, potentially different outcomes that might have resulted if appellant's parents had been promptly notified. Appellant argues that (1) his parents might have arranged counsel for him; (2) they might have intervened with the investigators; (3) they might have arranged for appellant to be interviewed in a less coercive setting; (4) they might have advised appellant not to make any statement; or (5) any of a multitude of possibilities might have transpired. The State argues that there is no evidence of any causal connection, citing a recent case from the Fourteenth Court of Appeals. *See Vann v. State*, 93 S.W.3d 182, 185-86 (Tex.App. — Houston [14th Dist.] 2002, pet. ref'd) (finding no causal link between two-and-one-half hour delay in notifying defendant's cousin and making of defendant's written statement, when cousin was present at detention and arrest and at station during time that defendant confessed).

Regarding what effect the failure to notify appellant's parents promptly had upon his decision to confess, the record does not yield any evidence whatsoever. There is no evidence as to what appellant's parents would have done if they had been notified more promptly. There is no evidence that appellant was aware that his parents were supposed to be notified or that he was aware that they were not more promptly notified. There is no evidence that appellant asked to speak with his parents. To the contrary, there is evidence he did not ask for his parents "or anything like that." It is noteworthy that, upon being notified at 9:50 p.m., appellant's parents did not immediately attempt to contact appellant or an attorney. Instead, they waited until the following day to visit appellant. There is also evidence that appellant did not ask to speak to an attorney when given his rights, including his right to consult with counsel.

Because appellant had the burden of producing evidence of a causal connection, and because appellant produced no evidence, but only speculation, of what might have happened, we conclude that appellant has not met his burden. It is, thus, unnecessary to conduct an attenuation-of-the-taint analysis.

We overrule appellant's first and second points of error.

Failure to Take Detained Juvenile Without Unnecessary Delay to an Office or Official Designated by the Juvenile Court

In his third and fourth points of error, appellant contends that the trial court reversibly erred in denying appellant's motion to suppress his oral statement because it was taken in violation of section 52.02(a) of the Texas Family Code. *See* Tex. Fam.Code Ann. § 52.02(a) (Vernon Supp.2004). Appellant argues that he was not taken to a juvenile processing office as designated by section 52.025(a) of the Texas Family Code and that he was not taken without unnecessary delay to an office or official properly designated by the juvenile court, as required by section 52.02(a)(2) of the Texas Family Code. *See id.* §§ 52.02(a)(2), 52.025(a) (Vernon 2002 & Supp.2004). Specifically, appellant argues that, even if the entire police station at 1200 Travis is a designated facility, appellant was not taken to an office inside designated exclusively for processing juveniles.

The Texas Family Code requires that, without unnecessary delay, a detained juvenile be released to his parents (etc.), brought before the office or official designated by the juvenile court, brought to a juvenile detention facility, or brought to a medical facility under certain conditions, but the Code provides an exception to allow a detained juvenile first to be taken to a juvenile processing office. *Id.* § 52.02(a). A juvenile processing office is defined in section 52.025 of the Texas Family Code as an office or room designated by the juvenile board for the temporary detention of a juvenile in order to return the child to his parent or custodian (etc.), to complete required paper work, to photograph and to fingerprint, to issue warnings, or to receive a statement by the juvenile. *Id.* § 52.025(a), (b).

Appellant acknowledges that there was conflicting testimony supporting the trial court's conclusion of law that appellant's statement was taken in a designated juvenile processing office. Appellant claims that this case is controlled by *Baptist Vie Le v. State*, in which the juvenile defendant was taken to the same place that appellant was taken and that place was held not to be a designated juvenile processing office. *Id.*, 993 S.W.2d 650, 654-55 (Tex.Crim.App.1999). In *Baptist Vie Le*, however, there was nothing in the record to indicate that the homicide division of the Houston Police Department was a designated juvenile processing office. *Id.* at 654.

Nevertheless, appellant argues that, even if the homicide division was a designated juvenile processing office, appellant was not taken to a particular room designated only for processing juveniles. Appellant relies on *Anthony v. State* for the proposition that, even though a police station is designated a facility for processing juveniles, the police must use an area designated exclusively for juveniles in order to protect the juvenile from the stigma of criminality or exposure to adult offenders. *Id.*, 954 S.W.2d 132, 135-36 (Tex.App.—San Antonio 1997, no pet.), *overruled on other grounds by Gonzales*, 67 S.W.3d at 912-13, 912 n.6 (holding that violation of Family Code does not automatically lead to exclusion of evidence). The State argues that appellant did not present this specific complaint to the trial court so as to preserve error on appeal. Appellant filed a written motion to suppress evidence. The motion specified both article 38.23 of the Texas Code of Criminal Procedure and section 52.02(b) of the Texas Family Code, but it did not mention section 52.02(a) or section 52.025 of the Texas Family Code or complain about the failure to take appellant to a designated juvenile processing office. During arguments presented in support of his motion to suppress, after having presented evidence, appellant again did not mention sections 52.02(a) or 52.025 or, in any way, allude to the failure of the police to take appellant to a designated juvenile processing office, much less one that was used exclusively for processing juveniles. Accordingly, we overrule appellant's third and fourth points of error because we conclude that he failed to preserve them by objecting on those grounds below. *See* Tex.R.App. P. 33.1(a)(1)(A).

Refusing Jury Instruction to Disregard Illegally Taken Confession

In his fifth point of error, appellant contends that the trial court reversibly erred in refusing his requested jury instruction regarding the admissibility of his illegally taken oral confession. Appellant appears to include both the rejection of his request for a jury instruction pursuant to article 38.23 of the Code of Criminal Procedure (Texas statutory exclusionary rule) and section 52.02(b) of the Texas Family Code (failure to notify parents promptly). Appellant argues that he was entitled to the instruction because the evidence, from both the State and the defense, showed that appellant's parents were not promptly notified.

The State points out, as did the trial court below, that there was no controverted evidence regarding the issue. It is well settled that a defendant is entitled to an evidence-excluding instruction to the jury only when the evidence raises a factual issue for the jury to resolve. *Bell v. State*, 938 S.W.2d 35, 48 (Tex.Crim. App. 1996). Accordingly, we overrule appellant's fifth point of error.

The en banc Court consists of Chief Justice Radack and Justices Hedges, Taft, Nuchia, Jennings, Keyes, Alcala, Hanks, Higley, Mirabal, and Duggan.

Justice Mirabal, joined by Justices Keyes and Duggan, dissenting.

DISSENTING OPINION

A jury found appellant, John Tuy Pham, guilty of murder and assessed punishment at confinement for life. By opinion dated December 28, 2000, we reversed the judgment and remanded the cause. *Pham v. State*, 36 S.W.3d 199, 205 (Tex.App.—Houston [1st Dist.] 2001), *vacated and remanded*, 72 S.W.3d 346 (Tex.Crim.App.2002). The specific reason for the remand of this case to us is stated in the Court of Criminal Appeals's opinion as follows:

> Recently, in *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App.2002), we ... concluded that before a juvenile's written statement can be excluded, there must be a causal connection between the Family Code violation and the making of the statement. *Id.* at 912. The Court of Appeals in the instant case did not have the benefit of our opinion in *Gonzales.*

72 S.W.3d at 346. Accordingly, the court remanded this case to us for reconsideration in light of *Gonzales. Id.*

DISCUSSION

Gonzales states that article 38.23(a) of the Texas Code of Criminal Procedure provides the proper mechanism for excluding evidence in violation of the Family Code. *Gonzales*, 67 S.W.3d at 913; *see* Tex.Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp.2004). In our original *Pham* opinion, we acknowledged that whether or not the juvenile's written statement should be excluded was to be determined under article 38.23(a). *Pham*, 36 S.W.3d at 202 n.2, 205. In *Gonzales*, the court noted that "an exclusionary analysis under article 38.23(a) necessarily entails a causal connection analysis" and pointed to *Comer* as an example of a similar case in which a causal connection analysis had been performed. *Gonzales*, 67 S.W.3d at 913 n.8. In our original *Pham* opinion, we carefully followed the same causal connection analysis utilized by *Comer*. *Pham*, 36 S.W.3d 204- 05. I note that the Court of Criminal Appeals also pointed to the *Comer* analysis as an example of an appropriate article 38.23 causal connection analysis in *Roquemore v. State*, 60 S.W.3d 862, 870 (Tex.Crim.App.2001), and that the

Roquemore opinion cited our original *Pham* opinion with approval. *Id.* at 869.

I further note that in our original opinion, we pointed to the evidence that appellant's parents were not notified about appellant's arrest until almost 10 p.m. and that it was not until the following morning that they found out why appellant had been arrested. *Id.* at 201. Appellant's parents should have been promptly notified shortly after their son's arrest at 2:35 in the afternoon so that they could have had an opportunity to join appellant at the juvenile processing office and could have arranged for an attorney to join appellant at the juvenile processing office if they had wished.

Family Code subsection 52.025(c) specifically provides as follows: "A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney." Tex. Fam.Code Ann. § 52.025(c) (Vernon 2002). As the court in *Comer* concluded, I likewise conclude that we cannot say with any degree of confidence that if appellant had had access to his parents or his attorney, he would still have chosen to confess to the crime. *See Comer*, 776 S.W.2d at 197. Accordingly, applying the same causal connection analysis utilized by *Comer*, which the Court of Criminal Appeals cited as an example of an appropriate article 38.23 causal connection analysis in *Gonzales* and *Roquemore*, I conclude that appellant's statement should have been suppressed under article 38.23 of the Texas Code of Criminal Procedure. For the foregoing reasons, and the reasons stated in our original *Pham* opinion, which I incorporate by reference, I would reverse the judgment and remand the cause to the trial court for further proceedings.

---

3. JUVENILE FAILED TO PROVE CAUSAL CONNECTION BETWEEN FAILURE TO NOTIFY PARENTS AND HIS CONFESSION

Gonzales v. State, ___ S.W.3d ____, No. 01-98-00540-CR, 2003 WL 22807847, 2003 Tex.App. Lexis 10072 (Tex.App.—Houston [1st Dist.] 11/26/03) *Texas Juvenile Law* 301 (5th Ed. 2000).

Facts: Having been certified to be tried as an adult for capital murder, appellant, Chance Derrick Gonzales, pled guilty to murder after the trial court had denied a motion to suppress his written confession. Pursuant to a plea-bargain agreement, the trial court assessed punishment at 45 years in prison. This Court originally affirmed the trial court's judgment. On rehearing, on November 4, 1999, this Court reversed the trial court's judgment in an opinion withdrawing and superseding its first opinion. *See Gonzales v. State*, 9 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 1999) (*Gonzales I*). The Texas Court of Criminal Appeals reversed this Court's judgment, holding that we failed to consider whether there was a causal connection between the violation of Section 52.02(b) of the Family Code, requiring the prompt notification of parents after taking a juvenile into custody, and the acquisition of appellant's confession. *Gonzales v. State*, 67 S.W.3d 910, 913-14 (Tex.Crim. App.2002) (*Gonzales II*). That court remanded the cause for us to determine the existence, if any, of a causal connection. *Id.*

On February 18, 1996, appellant, then a juvenile, shot and killed a convenience store clerk during an attempted robbery. The police investigators received information from a confidential informant, which information eventually led them to appellant, who was identified as the shooter. On March 8, 1996, appellant was found at a house, where he and several other juveniles were having a party, and was taken into custody between midnight and 1:30 a.m. Appellant was taken to a juvenile processing office, where he was placed in a room by himself for 20 to 30 minutes, while the arresting officers picked up a surveillance videotape of a beer theft involving appellant at a different convenience store on the night of the murder. Officers then took appellant to the homicide division of the sheriff's department at 610 Lockwood in Houston, another designated juvenile processing office, around 2:30 a.m. Appellant was given his warnings in the car on the way to the Lockwood office. Appellant was kept at the Lockwood office for approximately 40 to 45 minutes while one of the officers located a municipal judge in the area.

The officers then took appellant to the municipal judge's chambers, arriving there about 3:35 a.m. Between 3:39 a.m. and 3:49 a.m., the municipal judge gave appellant the warnings required by the Family Code and then left appellant alone with the officers in the judge's office. The officers then took appellant's written statement. After the statement was completed, the judge returned to his chambers, and the officers left appellant alone with the judge. At 4:42 a.m., the judge began his determination that appellant had knowingly and voluntarily given his written statement. The judge completed his determination and witnessed the execution of the statement at 5:11 a.m.

Held: Affirmed.

Opinion Text: *Causal-Connection Requirement*

As part of his second point of error, appellant contends that his confession should have been suppressed because the police did not comply with Family Code requirements. Section 52.02(b) of the Family Code requires that a person taking a child into custody promptly give notice of the person's action, and a statement of the reason for taking the child into custody, to the child's parent, guardian, or custodian and to the office or official designated by the juvenile board. Tex. Fam.Code Ann. § 52.02(b) (Vernon Supp.2004). Appellant's complaint focuses on the failure to notify his parents promptly.

This day, in a case raising the same issue, we have held that, when a juvenile seeks to suppress a confession given after a failure to notify the juvenile's parents promptly of the juvenile's whereabouts and the reason for taking the juvenile into custody, the burden is initially upon the defendant to show a violation of the statutory requirement and a causal connection between that violation and the ensuing confession. *See Pham v. State,* No. 01-99-00631-CR, slip op. at 10-11 (Tex.App.—Houston [1st Dist.] Nov. 26, 2003, no pet. h.). Once the defendant meets his burden, the State must then shoulder the burden of demonstrating attenuation of the taint. *Id.*

In its original brief, the State argued that appellant had not shown a causal connection between the delay in notifying appellant's parents and appellant's decision to give a statement. On remand, appellant argues that this causal connection must be determined by reference to the attenuation standard. Having held in *Pham* that the initial burden is on the defendant to show a causal connection, we look to appellant to meet this burden. *See id.* Appellant points to no evidence in the record demonstrating a causal connection between the failure to notify his parents and his decision to give a statement to the police, and we have found no such evidence. Accordingly, we overrule that portion of appellant's second point of error complaining of the police's failure to notify appellant's parents.

Having addressed and overruled appellant's remaining contentions in our original opinion, *Gonzales I,* we affirm the judgment of the trial court.

The en banc Court consists of Chief Justice Radack and Justices Hedges, Taft, Nuchia, Jennings, Keyes, Alcala, Hanks, Higley, and Price.

Justice Keyes, joined by Justice Price, dissenting.

Evelyn V. Keyes Justice

Because I believe the majority has misconstrued and misapplied the law in this case, I respectfully dissent.

Family Code Section 52.02(b) and Code of Criminal Procedure Article 38.23

This case is the remand of *Gonzales v. State,* 9 S.W.3d 267 (Tex.App.—Houston [1st Dist.] 1999) (*Gonzales I*). The Texas Court of Criminal Appeals held that we failed to consider whether there was a causal connection between the violation of section 52.02(b) of the Family Code, which requires the prompt notification of parents after taking a juvenile into custody, and the acquisition of appellant's confession, which would require exclusion of the confession under article 38.23 of the Code of Criminal Procedure. *Gonzales v. State,* 67 S.W.3d 910, 913-14 (Tex.Crim. App.2002) (*Gonzales II*). It vacated our judgment and remanded the case for further proceedings consistent with its opinion. *Id.* I believe the majority has misinterpreted the court's instructions.

In *Gonzales I,* we had held that appellant's written statement was *automatically* inadmissible because his parents were not given prompt notice of his being taken into custody and the reason for taking him into custody, in accordance with Family Code § 52.02(b). *See Gonzales II,* 67 S.W.3d at 910-911. The Court of Criminal Appeals explained that " § 52.02(b) is not an independent exclusionary statute"; thus, if evidence is to be excluded because of a § 52.02(b) violation, it must be excluded through the operation of article 38.23(a) of the Texas Code of Criminal Procedure, which necessarily entails a causal connection analysis between the section 52.02 violation and the acquisition of the evidence sought to be suppressed. [FN1] *See id.* at 912-13.

> FN1. The Family Code expressly makes Chapter 38 of the Code of Criminal Procedure applicable to juvenile proceedings. *See* Tex. Fam.Code Ann. § 51.17(c) (Vernon Supp.2003); *see also Le v. State,* 993 S.W.2d 650, 656 (Tex.Crim.App.1999).

Article 38.23(a) provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas ... shall be admitted in evidence." *Id.* (quoting Tex.Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp. 2003)). Illegally obtained evidence is inadmissible against an accused. *Id.*; *In re C.R.,* 995 S.W.2d 778, 783 (Tex.App.—Austin 1999, pet. denied). Evidence is not "obtained" in violation of a provision of law, however, unless there is a causal connection between the illegal conduct and the acquisition of the evidence. *Gonzales,* 67 S.W.3d at 912. Article 38.23 thus embraces the attenuation doctrine under which "evidence sufficiently attenuated from the violation of the law is not considered to be 'obtained' therefrom." *See Johnson v. State,*

871 S.W.2d 744, 750-51 (Tex.Crim.App.1994); *see also Gonzales II*, 67 S.W.3d at 915 (Keasler, J., concurring). Therefore, "an otherwise valid confession following a detention that is illegal as a matter of state law will not be excludable under article 38.23 when it is determined that the taint of the illegality has dissipated by the time the confession was taken." *Comer v. State*, 776 S.W.2d 191, 196 (Tex.Crim. App.1989) (citing *Bell v. State*, 724 S.W.2d 780, 787 (Tex.Crim.App.1986)). To determine whether the causal chain between the violation of law and the illegally obtained statement is broken, the *Bell* court (cited in *Comer*) relied on four relevant factors from *Brown v. Illinois:* [FN2] "(1) the giving of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct." *Bell*, 724 S.W.2d at 788 (citing *Brown*, 422 U.S. at 604-05, 95 S.Ct. at 2261-62).

> FN2. *Brown v. Illinois*, 422 U.S. 603, 95 S.Ct. 2254 (1975).

Our task is, therefore, is first to determine whether section 52.02(b) was violated. If we find a violation of section 52.02(b), we must determine whether there is a causal connection between the violation and the acquisition of appellant's statement, requiring exclusion of the statement under article 38.23, or whether the taint of the violation had so dissipated by the time appellant gave his statement that it is not considered to have been obtained in violation of law and thus exclusion is not required by article 38.23.

Burden of Proof

When, as here, a defendant seeks to suppress evidence, the burden of proof is initially on the defendant. *Russell v. State*, 717 S.W.2d 7, 9 (Tex.Crim. App. 1986); *Ashcraft v. State*, 934 S.W.2d 727, 735 (Tex.App. —Corpus Christi 1996, pet. ref'd). The defendant must produce evidence that defeats a presumption of proper police conduct, which then shifts the burden to the State to prove compliance. *Russell*, 717 S.W.2d at 9; *Ashcraft*, 934 S.W.2d at 735. Therefore, once a juvenile defendant puts on evidence that section 52.02(b) of the Family Code was violated, the burden shifts to the State to show that the juvenile's statement was taken in compliance with section 52.02(b); if the court finds a violation, it must determine whether exclusion is appropriate or whether the taint of the violation of section 52.02(b) was so attenuated that article 38.23 does not require exclusion. *Roquemore v. State*, 60 S.W.3d 862, 869-70 (Tex.Crim.App.2001).

Discussion

Here, appellant was arrested between midnight and 1:30 a.m. for the murder of a convenience store clerk and began his statement no earlier than 3:40 a.m., at least 2 1/2 hours after his arrest. During this time, he was taken to a juvenile processing office and left alone while the arresting officers picked up a surveillance videotape involving appellant recorded that night at a different convenience store. He was then taken to another designated juvenile processing office around 2:30 a.m. and, on the way, was informed of his *Miranda* rights. He was kept there while the officers located a municipal judge, then taken to the judge's chambers, where he was left alone with the judge between 3:35 a.m. and 3:49 a.m. and was again informed of his rights. He was then left alone with the officers in the judge's office and his statement taken. After that, the judge returned to his chambers and appellant was again left alone with the judge from 4:42 a.m., when the judge began his determination that appellant had knowingly and voluntarily given his written statement, until 5:11 a.m., when the judge completed his determination and witnessed the execution of the statement. Only after that were appellant's parents notified.

In *Comer*, the Court of Criminal Appeals held that detaining a juvenile for approximately three hours to obtain his confession violated the requirement of section 52.02(a) of the Family Code that the juvenile be taken immediately to either an authorized officer of the juvenile court or to a juvenile detention center and that the taint of the unlawful detention under section 52.02(a) had not dissipated by the time appellant gave his confession; therefore, the statement should have been suppressed under article 38.23. 776 S.W.2d 191, 196-97 (Tex.Crim. App.1989). Here, as the Court of Criminal Appeals observed in *Gonzales II*,

> The entire process, from the moment of appellant's arrest until later release to the juvenile detention facility, lasted about five hours. The arresting officer made no attempt to notify appellant's parents. Furthermore the record suggests that appellant's parents were not notified of his arrest until he was processed into the juvenile detention facility, five to six hours after he was initially taken into custody.

67 S.W.3d at 911.

A five to six hour delay before notifying appellant's parents of his detention, or making any attempt to notify them, during which time appellant's statement was obtained and he was processed into a juvenile detention facility, is an even more egregious

violation of both the spirit and the letter of section 52.02(b) than the violation of section 52.02(a) at issue in *Comer*. *See Hill v. State*, 78 S.W.3d 374, 382-84 (Tex.App.—Tyler 2001, pet. ref'd) (holding notice not prompt under section 52.02(b) where officers waited 4 hours and 20 minutes before notifying mother, after defendant had confessed, and reversing case); *In re C.R.*, 995 S.W.2d at 782 (holding juvenile's confession inadmissible because of violation of section 52.02(b) where no attempt was made to contact mother until after officers took juvenile to juvenile processing center, issued warnings, and took statement). Nothing in the record indicates any attempt by the officers to comply with section 52.02(b). Therefore, I would hold that section 52.02(b) was violated.

Although appellant had an absolute right to have his parents or an attorney accompany him in the juvenile processing office, he did not have that opportunity because his parents were not promptly notified. The fact that the officers made no attempt to notify appellant's parents of his whereabouts or the reason for his detention for five to six hours—three hours of which were spent obtaining his confession—supports the inference that the officers' violation of section 52.02(b) caused appellant to give the officers the confession they wanted.

Here, as in *Comer*, none of the factors that attenuate the taint of an illegally obtained confession were satisfied, other than the giving of *Miranda* warnings. *See* 776 S.W.2d at 196. Instead, the officers took 2 1/2 to 3 hours to obtain appellant's confession in the absence of his parents or an attorney and without even attempting to notify his parents of his whereabouts or the reason for his detention; only after the officers had obtained appellant's confession and processed him into a juvenile facility were appellant's parents notified—five to six hours after he was taken into custody. I would find therefore, that the taint of the violation of section 52.02(b) was *not* attenuated.

The Court of Criminal Appeals has established a practice of strict compliance with section 52.02. *Roquemore*, 60 S.W.3d at 872. Applying that standard, I would hold that appellant's confession was obtained in violation of law and should have been suppressed under article 38.23.

I would reverse the judgment of the trial court and remand for a new trial.

II. LAW ENFORCEMENT

1. ANONYMOUS TIP DID NOT PROVIDE REASONABLE SUSPICION FOR STOP AND FRISK BY SCHOOL RESOURCE OFFICER

In the Matter of A.T.H., 106 S.W.3d 338 (Tex. App.—Austin 5/8/03) *Texas Juvenile Law* 306 (5th Ed. 2000).

Facts: A.T.H. was adjudicated delinquent for possession of marihuana within 1,000 feet of a school and placed on probation. *See* Tex. Health & Safety Code Ann. §§ 481.121, .134 (West Supp.2003); Tex. Fam.Code Ann. § 54.03 (West 2002). He appeals, contending that the district court erred in denying his motion to suppress the State's evidence because the police officer had neither reasonable suspicion nor probable cause to conduct the pat-down during which the drugs were discovered.

Austin Police Officer Joe Chavez testified that he was stationed at Travis High School in January 2002. At about 9:40 a.m., he received a phone call from a caller who refused to give his name and told Chavez that he "was near a business or at the business" located about twenty-five feet from the school's eastern fence line. The unidentified caller complained that four juveniles who he assumed were Travis High School students were smoking marihuana behind the business. Chavez testified that the caller said, "[A]s we're speaking they're walking off and the only person I could really identify for you is a black male wearing a Dion Sanders football jersey." Chavez walked into the eastern parking lot to see if he could intercept the students, and "the only person I saw was, you know, a black man wearing a ... Dion Sanders football Jersey walking onto the parking lot which is our campus." When Chavez approached, the man, identified at the hearing as A.T.H., was cooperative and told Chavez his name and birth date. Chavez was wearing his uniform, badge, and gun at the time. Chavez did not know A.T.H., so, "For my safety and his safety I asked him—I told him that I was going to, you know, do a pat-down for officer's safety and for his safety." Chavez told A.T.H., "I'm just going to need you to put your hands on top of your head or behind your head," and "[r]ight before he did, I hadn't even touched him yet, he reached in his front left pocket and retrieved a clear plastic baggie which contained a green leafy substance." Chavez said, "I was di-

rectly behind him—so when he did he had the clear plastic baggie cuffed inside of his hand right here behind his head where it was actually right in front of my eyes at that time." The baggie contained marihuana. On cross-examination, Chavez testified, "[I]t wasn't a search, it's what we call a pat-down just for weapons." He said, "As soon as I, you know, identified him, I told him I was going to do a pat-down, to put his hands back behind his head." Chavez arrested A.T.H., who attended high school elsewhere, and issued a criminal trespass warning.

The district court overruled A.T.H.'s motion to suppress, concluding that Chavez acted reasonably in stopping A.T.H. based on the anonymous tip because A.T.H. "looked like a student, was student age, and only later was it determined he was a student at a different school," and because "a policeman stationed at a school as a school resource officer stands in the same place as a school administrator and so can search a student based on an anonymous tip of illegality." The court stated, "I do not believe that [A.T.H.] abandoned the property or voluntarily disclosed it when he tried to hide it from the police because he would not have been hiding it but for the policeman's actions, so it was a stop. He was in control of the police when he did that. But I believe the stop, the investigatory stop was permitted because of, as I said, he's acting as a school administrator and was on a school campus even though it was just an anonymous tip."

Held: Reversed and Remanded.

Opinion Text: 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). Where there is no disagreement about the facts, we may review questions not turning on credibility and demeanor *de novo. V.P.*, 55 S.W.2d at 31; *L.M.*, 993 S.W.2d at 286.

A.T.H. first argues that the "reduced standard of reasonable suspicion" set out in *New Jersey v. T.L.O.,* 469 U.S. 325, 340-41 (1985), only applies to school officials, not to police officers like Chavez staffed as "student resource officers" to investigate disruptive and criminal activity on campuses, and that the district court therefore erred in applying the *T.L.O.* standard to this pat-down. However, because we believe that Chavez lacked justification for his pat-down of A.T.H. even under the *T.L .O.* standard, we need not address the question of what standard should be applied in student encounters with police officers staffed on campuses. [FN1]

> FN1. The search of a student by a school official is governed by standards similar to those applied to an investigative stop or a pat-down for weapons conducted by a police officer in a non-school setting. *See New Jersey v. T.L.O.,* 469 U.S. 325, 341-42 (1985) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The Waco Court of Appeals recently examined the issue of "what standard should apply to a school search in which a law enforcement official is involved." *Russell v. State*, 74 S.W.3d 887, 891 (Tex.App.-Waco 2002, pet. ref'd). The *Russell* court, after reviewing cases from across the country, noted that searches of students involving police officers in a school setting are divided into "(1) those where school officials initiate a search or where police involvement is minimal, (2) those involving school police or liaison officers acting on their own authority, and (3) those where outside police officers initiate a search," and adopted those categories in its analysis. *Id.* at 891-92 (quoting *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996)).

Ordinarily, a police officer may not conduct a seizure [FN2] and search of a suspect without "probable cause" that a crime has been committed. *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *see T.L.O.*, 469 U.S. at 340. An exception to the requirement of probable cause allows the police to make a "*Terry* stop" and "briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citing *Terry*, 392 U.S. at 30). Reasonable suspicion is a less demanding standard than probable cause, but the officer still must be able to articulate something better than an inchoate suspicion or hunch. *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 27). Reasonable suspicion is shown if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the police intrusion into the suspect's constitutionally protected interests. *Terry*, 392 U.S. at 21. Reasonable suspicion is dependent upon the content of the officer's information and its reliability, and both factors must be consid-

ered when examining reasonable suspicion under "the totality of the circumstances." *Alabama v. White*, 496 U.S. 325, 330 (1990); *see Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). Reasonable suspicion can arise from information that is less reliable than that required for probable cause. *White*, 496 U.S. at 330.

> FN2. An individual is not seized simply because a police officer approaches and asks a few questions. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). If a reasonable person would feel able to decline the request or otherwise terminate the encounter and go about his business, the encounter is consensual and does not trigger constitutional scrutiny. *Id.; Johnson v. State*, 912 S.W.2d 227, 235 (Tex.Crim. App. 1995); *see California v. Hodari D.*, 499 U.S. 621, 627-28 (1991); *Terry*, 392 U.S. at 19 n. 16 (1968). A seizure occurs when a reasonable person would believe he was not free to leave and has yielded to a show of authority or has been physically forced to yield. *Hodari D.*, 499 U.S. at 627-28; *Johnson*, 912 S.W.2d at 236. An investigative detention is a seizure for purposes of constitutional analysis. *Johnson*, 912 S.W.2d at 235. The age of a juvenile involved in a police encounter is a factor to be considered when determining whether the juvenile would have believed he was in custody. *In re D.A.R.*, 73 S.W.3d 505, 510 (Tex.App. -El Paso 2002, no pet.).

An anonymous tip, standing alone, may justify the initiation of an investigation but rarely provides the reasonable suspicion necessary to justify an investigative detention or search. *Id.* at 329; *Dowler v. State*, 44 S.W.3d 666, 669 (Tex.App.—Austin 2001, pet. ref'd); *Stewart v. State*, 22 S.W.3d 646, 648 (Tex.App.—Austin 2000, pet. ref'd); *Davis v. State*, 989 S.W.2d 859, 863 (Tex. App.—Austin 1999, pet. ref'd). Generally, an officer "must have additional facts before the officer may reasonably conclude that the tip is reliable and an investigatory detention is justified." *Stewart*, 22 S.W.3d at 648; *see Florida v. J.L.*, 529 U.S. 266, 270 (2000); *White*, 496 U.S. at 330-31. The officer's experience and prior knowledge, along with corroboration of the details of the tip, may give the officer reasonable suspicion. *Stewart*, 22 S.W.3d at 648; *Davis*, 989 S.W.2d at 864. Corroboration of details that are easily obtainable at the time the tip is made, however, does not furnish a basis for reasonable suspicion. *J.L.*, 529 U.S. at 271-72; *Stewart*, 22 S.W.3d at 648; *Davis*, 989 S.W.2d at 864. Descriptions of a subject's observable appearance or location may help an officer identify the person being accused, but do not corroborate the tipster's knowledge of concealed criminal activity. [FN3] *J.L.*, 529 U.S. at 272; *Dowler*, 44 S.W.3d at 670. In other words,

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

J.L., 529 U.S. at 272. Easily ascertainable details such as a subject's clothing could be used by a tipster seeking to cause trouble for or play a prank on the subject. *Davis*, 989 S.W.2d at 864. To give rise to reasonable suspicion, the officer must be able to corroborate the improper nature of the subject's behavior. *Hall v. State*, 74 S.W.3d 521, 525 (Tex.App. —Amarillo 2002, no pet.). Corroborating information that can give rise to reasonable suspicion includes details that accurately predict the subject's future behavior, link the subject to the alleged criminal activity, or give a particularized and objective reason to suspect the subject. *Davis*, 989 S.W.2d at 864 (quoting *Glenn v. State*, 967 S.W.2d 467, 470 (Tex.App. —Amarillo 1998), *pet. dism'd*, 988 S.W.2d 769 (Tex.1999)); *see Dowler*, 44 S.W.3d at 670 ("even innocent acts can give rise to reasonable suspicion under the proper circumstances").

> FN3. *See, e.g., Florida v. J.L.*, 529 U.S. 266, 268-69 (2000) (anonymous tip that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun" was not corroborated by police observation of three black males "hanging out" at bus stop, one wearing plaid shirt; "accurate description of a subject's readily observable location and appearance" helps police identify subject, but "does not show that the tipster has knowledge of concealed criminal activity"); *Alabama v. White*, 496 U.S. 325, 332 (1990) (anonymous tip corroborated when defendant left particular apartment building at specified time, drove car matching description to described destination; tip sufficiently predicted defendant's behavior as to demonstrate reliability); *Illinois v. Gates*, 462 U.S. 213, 243-44 (1983) (details set out in anonymous letter sufficiently corroborated where letter closely predicted defendants' future and suspicious behavior); *Adams v. Williams*, 407 U.S. 143, 146-47 (1972) (unverified tip reliable because officer knew informant personally and informant had provided accurate information in the past and would be subject to prosecution for making a false tip); *Hall v. State*, 74 S.W.3d 521, 526-27 (Tex.App. -Amarillo 2002, no pet.) (anonymous tip that red truck had been driving in wrong lane on highway was uncorroborated; but for tip, police had no rea-

son to stop truck and, "[w]hile the indicia used as corroboration needed not be *per se* criminal, they must still be sufficient to permit one to reasonably deduce that appellant engaged in the misconduct for which he was accused by the tipster."); *Dowler v. State*, 44 S.W.3d 666, 670 (Tex.App.-Austin 2001, pet. ref'd) (anonymous tip of possible drunk driving sufficiently corroborated where police observed car weaving within lane, driving twenty miles below speed limit, and failing to respond when officer turned on his emergency lights; combined with tip that described truck and gave license plate number, innocent conduct gave rise to reasonable suspicion); *Stewart v. State*, 22 S.W.3d 646, 649 (Tex.App.-Austin 2000, pet. ref'd) (anonymous tip that driver appeared to be drunk was not corroborated by officer's observation of car matching description when no erratic or illegal driving was observed); *Davis v. State*, 989 S.W.2d 859, 864-65 (Tex.App.-Austin 1999, pet. ref'd) (anonymous tip reported reckless driving and possible marihuana use by "three white males" and described car, dealer's tag number, and general location; held to be uncorroborated because officer did not observe any erratic or suspicious driving and caller did not indicate why she believed the men were smoking marihuana; "[a]nyone with enough knowledge about a given person to make him the target of a prank, or to harbor a grudge against him, will certainly be able to formulate an anonymous tip hoping to initiate an investigation and perhaps a forcible stop or detention"); *State v. Adkins*, 829 S.W.2d 900, 901 (Tex.App.-Fort Worth 1992, pet. ref'd) (anonymous face-to-face tip of drunk driving corroborated when officer observed described car being driven with flat tire and severely damaged wheel).

Another exception to the requirement of probable cause is the "narrowly drawn" exception that allows an officer to conduct a pat-down search or frisk for weapons during an investigative stop when the officer has reasonable suspicion to believe that the suspect might be armed and dangerous. *Terry*, 392 U.S. at 27, 30-31. The officer need not be certain that the suspect is armed; "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27. The purpose of a *Terry* frisk is not to discover evidence of illegal activity, but to allow the officer to investigate without fear of violence. [FN4] *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993); *Ybarra v. Illinois*, 444 U .S. 85, 93-94 (1979); *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Wood v. State*, 515 S.W.2d 300, 306 (Tex. Crim.App. 1974); *Guevara v. State*, 6 S.W.3d 759, 764 (Tex.App.—Houston [1st Dist .] 1999, pet. ref'd). Instead, a "protective search" conducted without a warrant and based on reasonable suspicion is limited strictly to situations when it is necessary to ensure the safety of the officer or others nearby. *Dickerson*, 508 U.S. at 373 (quoting *Terry*, 392 U.S. at 26). "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context"; however, if the initial pat-down is constitutionally invalid, the seizure of any contraband discovered is likewise unconstitutional. *Id.* at 375-76, 379; *see Guevara*, 6 S.W.3d at 764 (investigative detention justified by sufficient corroboration of anonymous tip, but articulated facts and circumstances did not support inference that officer had reasonable belief that suspect might be armed, therefore, pat-down unjustified). Routine alone is insufficient to justify a pat-down for weapons, but not every pat-down conducted as a matter of routine is automatically invalid. *O'Hara v. State*, 27 S.W.3d 548, 554 (Tex. Crim.App.2000). The question is whether a reasonably prudent officer would believe that his safety or the safety of others was in danger, thus justifying a pat-down weapons search. *Id.* at 551; *see Terry*, 392 U.S. at 27.

FN4. In *Wright v. State*, the court stated that "a temporary investigative detention and pat down search for possible weapons *or contraband* without a warrant is permissible provided the officer has a reasonable belief the individual has been engaged in criminal activity or is armed." 7 S.W.3d 148, 150 (Tex.Crim.App.1999) (emphasis added) (citing *United States v. Cortez*, 449 U.S. 411 (1981); *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968)). However, *Cortez* analyzed only the legality of the investigative stop and specifically did *not* examine the legality of the search, conducted with the defendant's permission after the police made the investigative stop. *See Cortez*, 449 U.S. at 421. *Ybarra* and *Terry* only address pat-downs for weapons. *Ybarra*, 444 U.S. at 93-94; *Terry*, 392 U.S. at 27. Furthermore, the *Terry* line of cases is clear in limiting such frisks to ensure that a suspect is not armed and dangerous. *See Ybarra*, 444 U.S. at 93-94; *Terry*, 392 U.S. at 27; *Wood v. State*, 515 S.W.2d 300, 306 (Tex.Crim.App.1974); *Guevara v. State*, 6 S.W.3d 759, 764 (Tex.App.- Houston [1st Dist.] 1999, pet. ref'd). In fact, in *Ybarra*, the court said,

> The Terry case created an exception to the requirement of probable cause, an exception whose "narrow scope" this Court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find

> weapons that he reasonably believes or suspects are then in the possession of the person he has accosted.... Nothing in Terry can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons.
>
> *Ybarra,* 444 U.S. at 93-94 (citations omitted).

Thus, applying the *T.L.O.* standard, whether a school police officer performs a search for contraband under reasonable suspicion of illegal activity [FN5] or conducts a pat-down weapons frisk under reasonable suspicion that the suspect might be armed and dangerous, [FN6] the searching officer must have reasonable suspicion to conduct the frisk or search. The officer must be able to articulate specific facts giving rise to a reasonable suspicion that a person might be armed and dangerous or involved in illegal activity; an inchoate hunch is not enough. *See Sokolow,* 490 U.S. at 7; *Ybarra,* 444 U.S. at 92-93. To rise to the level of reasonable suspicion, an anonymous tip must be corroborated by facts more substantial than those easily observable, such as attire or location. *See J.L.,* 529 U.S. at 271-72; *Stewart,* 22 S.W.3d at 648.

> FN5. *See T.L.O.,* 469 U.S. at 341-42 (school official's search of student suspected of violating school rules must be supported by reasonable suspicion); *Coronado v. State,* 835 S.W.2d 636, 639-41 (Tex.Crim.App.1992) (applying *T.L.O.* reasonable suspicion requirement to search by school official and school peace officer).
>
> FN6. *See Minnesota v. Dickerson,* 508 U.S. 366, 373 (1993); *Terry,* 392 U.S. at 27; *Guevara,* 6 S.W.3d at 764.

Under this record, Chavez was justified in approaching A.T.H. and asking him his name and whether he attended Travis High School. His further detention of A.T.H. was an investigative detention, not a consensual encounter. *See Gamble v. State,* 8 S.W.3d 452, 453 (Tex.App.—Houston [1st Dist.] 1999, no pet.) (citing *State v. Velasquez,* 994 S.W.2d 676, 678-79 (Tex.Crim.App.1999)). Assuming Chavez was justified in detaining A.T.H. based on the anonymous tip, the pat-down must have been reasonably related to the circumstances that initially justified the detention. *See T.L.O.,* 469 U.S. at 341; *Terry,* 392 U.S. at 19-20. In other words, Chavez must have had specific, articulable facts that, combined with his experience, gave him reasonable suspicion that A.T.H. was committing a criminal act, breaking school rules, or armed and possibly dangerous. *See Terry,* 392 U.S. at 30-31; *Dowler,* 44 S.W.3d at 669.

First, we note that Chavez testified that he conducted the pat-down *only for routine safety concerns.* This does not mean that the pat-down is automatically invalid, but the record must indicate that a reasonably prudent officer would believe that he or others might be at risk, thus justifying a pat-down weapons search. *O'Hara,* 27 S.W.3d at 551, 554; *see Terry,* 392 U.S. at 21. Chavez did not articulate and the totality of the circumstances do not show any facts to indicate that he was justified in conducting a *Terry* frisk for weapons. This encounter occurred in a high school parking lot in broad daylight during a school day. A.T.H., who appeared to be a teenager, was cooperative when approached by Chavez. Although Chavez did not recognize A.T.H. from campus, there was no testimony to indicate that he felt A.T.H. was dangerous. He did not testify that A.T.H. made any erratic, suspicious, furtive, or threatening gestures, acted reluctant to speak to Chavez, or was anything other than cooperative when asked his name and birthday. He did not testify that A.T.H. was dressed in such a way as to conceal a weapon. *See Russell v. State,* 74 S.W.3d 887, 892 (Tex.App.—Waco 2002, pet. ref'd) (principal testified that "she was concerned that [student] might be concealing a weapon in the pocket" of his baggy shorts and school police officer testified that "when people don't want to empty their pockets for a school administrator, they're hiding something they don't want to have found"). Although the State argues that the anonymous tip gave Chavez reasonable suspicion to conduct the pat-down, the tip related only to alleged drug use and Chavez verbalized only that he was conducting a routine pat-down for weapons. As observed above, the *Terry* pat-down exception to probable cause is very narrowly drawn and applies only to frisks for weapons conducted for the safety of the officer or others nearby. *Dickerson,* 508 U.S. at 373; *Ybarra,* 444 U.S. at 93-94. Viewed in the light most favorable to Chavez's action and the trial court's decision, the record does not support a finding that Chavez or another reasonably prudent officer would believe that A.T.H. might be armed. Chavez did not have reasonable suspicion for conducting a weapons frisk of A.T.H.

As for reasonable suspicion that A.T.H. possessed contraband, Chavez did not testify that he had any reason for approaching A.T.H., much less patting him down, other than the anonymous tip. [FN7] The tipster reported that several high school-aged students, one of whom was wearing a Dion Sanders football jersey, were smoking marihuana behind a business on the east side of campus. At the end of the conversation, the caller said the youths were "walking off." The caller did not give his name or his reason for being at or near the business and did

not state how he knew the youths were smoking marihuana. Chavez walked toward the edge of the campus, where he saw one young man wearing a Dion Sanders jersey. Chavez did not testify that he saw any other young people with A.T.H. or in the area. He did not testify that A.T.H. had glassy eyes, smelled of marihuana, was uncooperative, acted nervous, or made any furtive or suspicious gestures. In fact, Chavez testified that he only conducted the pat-down as a routine check for weapons; he did not testify that he was seeking evidence that A.T.H. had been using drugs. Chavez did not observe any suspicious behavior, and A.T.H.'s attire and his general location are by themselves too easily ascertainable to rise to the level that courts have held to be corroborative of illegal conduct. *See J.L.*, 529 U.S. at 271-72; *Hall*, 74 S.W.3d at 525-26; *Stewart*, 22 S.W.3d at 649; *Davis*, 989 S.W.2d at 864. Indeed, these two facts, Chavez's only independent corroboration of the anonymous tip, are exactly the kinds of facts singled out by the United States Supreme Court as *non-corroborative* of criminal activity and *insufficient* to give rise to reasonable suspicion. *J.L.*, 529 U.S. at 272 (description of subject's "readily observable location and appearance" helps police identify subject but does not show tipster's knowledge of concealed criminal activity); *see Hall*, 74 S.W.3d at 525-26 (general description of truck insufficient); *Stewart*, 22 S.W.3d at 649 (general description of car and location insufficient); *Davis*, 989 S.W.2d at 864-65 (description of car, license plate number, general location, and number of passengers insufficient). The tip was not corroborated by any independent observations giving rise to reasonable suspicion that criminal activity was afoot. Therefore, a search for contraband was unjustified.

> FN7. The State argues that the tip should be considered more reliable than the typical anonymous tip because the caller gave enough details about his own location, "near ... or at" a particular nearby business, to "expose [ ] himself to the possibility of being held to account for his tip." Although conceding that the information was "perhaps available to anyone who cared to look behind the [ ] business," the State argues it was "not as *easily obtainable* as information" found to be non-corroborative in other cases. We disagree. The caller refused to give his name and did not explain his connection to the business or how he came to see the youths. This call was no more reliable than the tips in *J.L.*, 529 U.S. at 271; *Hall*, 74 S.W.3d at 525-27; *Stewart*, 22 S.W.3d at 649; or *Davis*, 989 S.W.2d at 864-65.

Because Chavez lacked reasonable suspicion to conduct either a weapons frisk or a pat-down for contraband, this pat-down was not based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed] that intrusion." *Terry*, 392 U.S. at 21.

The State argues that, even if Chavez lacked reasonable suspicion to conduct the pat-down, when A.T.H. attempted to conceal the drugs when asked to put his hands on his head, he was no longer "seized" by Chavez because he was attempting to defy the officer. We disagree. Chavez, an armed, uniformed police officer, approached A.T.H., a teenager he did not recognize or know from prior dealings on campus, told A.T.H. that he was going to pat him down for both their safety, and asked A.T.H. to place his hands on his head. That A.T.H. attempted to conceal a baggie while still complying with Chavez's request is a very different situation than the one in *California v. Hodari D.*, 499 U.S. 621 (1991), which the State cites as support. In *Hodari D.*, the police chased a group of boys who fled as the police car approached, and as he fled, the defendant threw a rock of cocaine away; the Court held that a seizure does not occur until the subject yields to a show of authority. *Id.* at 623, 627-28; *see also Johnson v. State*, 912 S.W.2d 227, 234 (Tex.Crim.App.1995) (defendant, who turned and ran when confronted by police, was not seized when he failed to yield to police commands to stop).

As discussed above, a seizure occurs when a reasonable person would believe he was not free to leave and has yielded to a show of authority or has been physically forced to yield. *Hodari D.*, 499 U.S. at 627-28; *Johnson*, 912 S.W.2d at 236. If a reasonable person would feel free to disregard the police, the encounter is consensual, but if the show of authority would cause a reasonable person to feel restrained, the encounter is involuntary and whether a seizure occurs depends on whether the person flees or submits; an investigative detention is a seizure for purposes of constitutional analysis. *Johnson*, 912 S.W.2d at 235 (citing *Hodari D.*, 499 U.S. at 628). It is appropriate to consider a juvenile's age when determining whether he would have believed he was in custody. *In re D.A.R.*, 73 S.W.3d 505, 510 (Tex.App.—El Paso 2002, no pet.). Property abandoned before a police seizure occurs is not constitutionally protected, but property abandoned in response to unlawful police conduct is protected. *Hawkins v. State*, 758 S.W.2d 255, 257-58 (Tex.Crim. App.1988); *State v. Shamsie*, 940 S.W.2d 223, 226 (Tex.App.—Austin 1997), *overruled on other grounds by Woods v. State*, 956 S.W.2d 33, 38 (Tex.Crim.App.1997); *see Hodari D.*, 499 U.S. at 629. In determining whether property abandoned by a defendant was the fruit of an illegal detention, we consider (1) whether the defendant intended to abandon the property, and (2) if so, whether his de-

cision to do so was the result of police misconduct. *Hawkins*, 758 S.W.2d at 257-58.

When A.T.H. complied with Chavez's instruction and raised his hands above his head, he submitted to Chavez's authority. The district court was correct in its observation that, "I do not believe that [A.T.H.] in this case abandoned the property or voluntarily disclosed it when he tried to hide it from the police because he would not have been hiding it but for the policeman's actions." As discussed above, Chavez's pat-down was not justified. Therefore, the marihuana was the fruit of an illegal detention and should be suppressed. *See Shamsie*, 940 S.W.2d at 226.

We sustain A.T.H.'s issue on appeal, and we reverse the trial court's judgment and remand the cause for further proceedings.

---

2. REQUIRING JUVENILE TO REMOVE SHOES TO ENTER ALTERNATIVE LEARNING CENTER WAS A VALID ADMINISTRATIVE SEARCH

In the Matter of O.E., UNPUBLISHED, No. 03-02-00516-CV, 2003 WL 22669014, 2003 Tex. App.Lexis 9586 (Tex.App.—Austin 11/13/03) *Texas Juvenile Law* 311 (5th Ed. 2000).

Facts: O.E. was adjudicated delinquent based on his possession of marihuana in a drug-free zone. *See* Tex. Health & Safety Code Ann. § 481.121 (West 2003). After the trial court denied appellant's motion to suppress evidence, appellant waived trial by jury, pled true to the allegations in the petition, was adjudicated delinquent by the trial court, and placed on probation for a six- month period. In one issue on appeal, appellant contends that the trial court erred in denying his motion to suppress.

Val Barnes, a seven-year veteran of the Austin Independent School District Police Department, was the only witness at the hearing on the motion to suppress. [FN1] Barnes worked at the Alternative Learning Center (the "Center"). Students from throughout the district are placed in the Center for various disciplinary violations, including drug-related offenses and gang- related issues; only students with such violations attend the Center. The Center has a uniform security policy: every day, all students entering the Center must pass through a metal detector, be patted down, empty their pockets onto a tray, remove their shoes, and place those shoes on a table for inspection. If no contraband is found, the student is allowed to retrieve the belongings and go to class. Before attending the Center, every student and parent is required to attend an orientation session outlining the Center's rules and regulations, including the search policy. The policy had been in place during the entire seven years that Barnes worked at the Center.

> FN1. The Austin Independent School District has its own police force; Barnes was not an officer from the Austin Police Department assigned to patrol the school. The AISD police force provides security, assists school administrators in carrying out security, and serves in a law enforcement capacity.

On the morning of May 2, 2002, appellant emptied his pockets, went through the metal detector, removed his shoes, and placed them on the table. Officer Barnes saw a white tissue inside the right shoe, removed the tissue, and found a marihuana cigarette. This juvenile proceeding ensued.

Held: Affirmed.

Opinion Text: We review the ruling on a motion to suppress in a juvenile case using an abuse of discretion standard of review. *See In re R.J. H .*, 79 S.W.3d 1, 6 (Tex.2002) (adopting standard). [FN2] An appellate court reviewing such a ruling defers to the trial court's findings of historical fact but determines *de novo* the court's application of the law to those facts. *Id.; see State v. Ross*, 32 S.W.3d 853, 856 (Tex.Crim.App. 2000); *Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex.Crim. App.1997). The reviewing court may not disturb supported findings absent an abuse of discretion. *See Etheridge v. State*, 903 S.W.2d 1, 15 (Tex.Crim.App. 1994).

> FN2. The Texas Supreme Court noted that the Texas Court of Criminal Appeals used an abuse of discretion standard but "has not said whether that standard of review is different from the standard under federal law." *In re R.J. H.*, 79 S.W.3d 1, 6 (Tex.2002). In adopting the criminal standard for juvenile cases, the Texas Supreme Court said that "for purposes of this case at least we take [that standard] to be essentially identical to the federal standard." *Id.* Although appellant asserts that the challenged evidence was secured "in violation of Appellant's federal and state constitutional rights," he has not provided any citation, analysis, or argument specifically directed at the applicability of the Texas Constitution. *See Heitman v. State*, 815 S.W.2d 681, 690-91 n. 23 (Tex. Crim.App.1990) (brief asserting right under Texas constitution inadequate if fails to provide argument or authority in support of assertion). For purposes of this case, we will assume the rights under the United States and Texas Constitutions are essentially identical. *See R.J. H.*, 79 S.W.3d at 6.

Although the court in this case made detailed findings, to the extent that the juvenile court's findings might not sufficiently address all factual issues, the appellate court examines the record in the light most favorable to the trial court's ruling. *See State v. Ballard*, 987 S.W.2d 889, 891 (Tex.Crim.App. 1999). Viewing the evidence in that light, the reviewing court may infer all findings necessary to support the juvenile court's ruling. The court must defer to those findings and must sustain that lower court's ruling if the record reasonably supports the ruling and the ruling is correct on any theory of law applicable to the case. *See Ross*, 32 S.W.2d at 855-56.

Administrative Searches

The uncontradicted evidence in this case shows this search was not targeted at a particular person based on a tip, suspicious behavior, or any other form of individual suspicion. [FN3] Rather, appellant was searched as part of a daily routine during which all students entering the Center were searched. Thus, this search falls within the general category of "administrative searches." *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 537 (1967).

> FN3. *Cf., e.g., In re A.T.H.*, 106 S.W.3d 338, 341-42 (Tex.App.-Austin 2003, no pet.) (officer had neither reasonable suspicion nor probable cause to conduct pat-down search based on uncorroborated anonymous tip concerning "juveniles" smoking marihuana; fact that description of individual as "black male wearing Dion Sanders jersey" matched person searched insufficient corroboration standing alone).

An administrative search is conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of a crime. *See Gibson v. State*, 921 S.W.2d 747, 757-62 (Tex.App.—El Paso 1996, pet. denied) (metal detector at courthouse entrance). As such, it is may be permissible under the Fourth Amendment although not supported by a demonstration of probable cause directed to a particular place or person to be searched. *Gibson*, 747 S.W.2d at 758 (citing *United States v. Davis*, 482 F.2d 893, 908 (9th cir.1973)). "Designed to prevent the occurrence of a dangerous event, an administrative search is aimed at a group or class of people rather than a particular person." *Id.* (quoting *People v. Dukes*, 151 Misc.2d 295, 580 N.Y.S.2d 850, 851-52 (City Crim. Ct.1992)). An administrative search will be upheld as reasonable when the intrusion involved is no greater than necessary to satisfy the governmental interest underlying the need for the search. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (random drug testing of athletes); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (random sobriety checkpoints); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (post-accident drug testing of railroad employees); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (vehicle stops at fixed checkpoints to search for illegal aliens); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967) (searches of residences by housing code inspectors); *Gibson*, 921 S.W.2d at 765 (magnetometer search at courthouse entrance).

School Searches

The Fourth Amendment applies to searches of students by school authorities. *See New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). However, "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.... Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Board of Education v. Earls*, 536 U.S. 822, 830-31 (2002); *Marble Falls Indep. Sch. Dist. v. Shell*, No. 03-02-00652-CV, 2003 Tex.App. LEXIS 2845, at *16 (Tex.App.—Austin April 3, 2003, no pet.) (memorandum opinion) (citing *Earls*, 536 U.S. at 830-31). The legality of a search of a student depends on the reasonableness, under all the circumstances, of the search. *T.L.O.*, 469 U.S. at 341.

Administrative searches at schools have been upheld in various circumstances. Random drug testing of athletes without any individualized suspicion was upheld in *Vernonia*, 515 U.S. at 664-65. Although the court recognized that the drug testing at issue was inherently intrusive, it concluded that the privacy invasion was justified by the important government interest in reducing drug abuse by student athletes. *Earls*, essentially following *Vernonia*, approved random drug testing for all students participating in extracurricular activities. *Earls*, 536 U.S. at 838.

In *In re F.B.*, 658 A.2d 1378 (Pa.Super.Ct. 1995), students entering a public high school were routinely required to empty their pockets, and surrender their jackets and any bags. While the belongings were searched, the students were scanned with a metal detector. If no drugs or weapons were found, the student was allowed to retrieve his belongings. Signs were posted notifying students of this procedure. *Id.* at 1380. The defendant was found to have engaged in delinquent conduct by possessing a weapon on school property, a knife found when he

emptied his pockets. In upholding the search, the court held that the search of the student during a student-wide search by school officials was reasonable even though the school officials had no individualized suspicion that the student was armed. *Id.* at 1379-80. The court concluded that the search was justified at its inception because of the high rate of violence in the Philadelphia public schools. Further, "it was reasonable to search all students prior to entering the school because there is no way to know which students are carrying weapons." *Id.* at 1382. A similar search procedure was upheld in *In re S.S.*, 680 A.2d 1172 (Pa.Super.Ct.1996). An important factor in the court's analysis was that a uniform procedure was followed when each student was searched. "This uniformity served as a safeguard, assuring that a student's expectation of privacy was not subjected to officials' discretion." *Id.* at 1176.

Analysis of this Search

In analyzing an administrative search, we weigh the intrusion involved against the governmental interest underlying the need for the search to determine its reasonableness. [FN4] *See, e.g., Vernonia*, 515 U.S. at 664-65. In that weighing process, we keep in mind the diminished expectation of a student's privacy in a school setting and the State's compelling interest in maintaining a safe and disciplined environment. *See* Tex. Educ.Code Ann. § 4.001 (West 1996) (one of objectives of public education is that "[s]chool campuses will maintain a safe and disciplined environment conducive to student learning."). In this case, Barnes' testimony made it clear that the search had as its main objective the security of the school. During the seven years Barnes worked at the Center, contraband items such as knives, razor blades, marihuana, and cocaine were regularly found. More than one court has noted the increasing violence in public schools. *See T.L.O.*, 469 U.S. at 339 (drug use and violent crime in the schools have become major social problems); *People v. Pruitt*, 662 N.E.2d 540, 546 (Ill.App. Ct.1996) ("violence and the threat of violence are present in the public schools[;][s]choolchildren are harming each other with regularity"). All of the students attending the Center had been removed from other campuses for disciplinary problems, increasing the difficulty of the State's task to maintain order and provide a safe environment conducive to learning. *Cf. In re F. B.*, 658 A.2d at 1378 (all students entering school searched; no indication campus was disciplinary school facility). The search procedure was justified at its inception as a method of furthering the State's interest in maintaining a safe and disciplined learning environment in a setting at high risk for drugs and violence.

FN4. Because conducting these searches was a routine part of his duties as an Austin Independent School District police officer, and because this search is an administrative search, and not one conducted pursuant to any particularized suspicion, we do not think concerns about the status of the person performing the search are implicated. *Cf. Russell v. State*, 74 S.W.3d 887, 891-92 (Tex. App.-Waco 2002, pet. ref'd) (applying three-part test to determine whether reasonable suspicion or probable cause test should apply depending on status of person conducting search as school official, school police or liaison officials, or outside police officers; search involved individual suspicion).

We also must evaluate the level of intrusion on the individual's privacy. In general, although students in public schools have an expectation of privacy in their persons and belongings, because of the state's custodial and tutorial authority over the students, public school students are subject to a greater degree of control and administrative supervision than adults. *Earls*, 536 U.S. at 830-31.

In this case, appellant and his parents were notified in advance of the school's daily screening process. Such a notice has been held to reduce the expectation of privacy. *See Shoemaker v. State*, 971 S.W.2d 178, 182 (Tex.App.—Beaumont 1998, no pet.) (student had no reasonable expectation of privacy in locker when school authorities had keys to all lockers and student handbook warned that lockers could be searched at any time there was "reasonable cause" to do so).

Emptying pockets and searching backpacks previously has been upheld in other school searches; the level of intrusion into any given individual's privacy is less than that approved in the cases allowing random drug testing. Removing one's shoes for inspection has been deemed "minimally intrusive" in at least one case. *See Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 981-83 (8th Cir.1996) (suspicion that weapons brought to school, all male students asked to take off shoes and socks and empty pockets; "generalized but minimally intrusive search for dangerous weapons was constitutionally reasonable").

The school district has developed a uniform procedure to search students. Such uniformity serves as a safeguard against an abuse of discretion on the part of school officials in making a determination of which persons will be searched. *See In re S.S.*, 680 A.2d at 1176. It is tailored to meet the needs of a school setting at higher risk than usual for disciplinary problems involving weapons and drugs. The intrusion on the students more limited expectation of privacy is reasonable. Accordingly, the search was

an administrative search of the sort permissible under the Fourth Amendment. *See Earls,* 536 U.S. at 838; *Vernonia,* 515 U.S. at 664-65.

III. CERTIFICATIONS

REFUSAL OF RESPONDENT ON ADVICE OF COUNSEL TO UNDERGO MENTAL EXAMINATIONS DOES NOT INVALIDATE CERTIFICATION

Montgomery v. State, UNPUBLISHED, No. 07-00-05740-CR, 2003 WL 1623315 (Tex. App.—Amarillo 3/28/03) *Texas Juvenile Law* 131 (5th Ed. 2000).

Facts: Pending before this court is the motion for rehearing of appellant Michael Lee Montgomery. Though he asserts several matters, we conclude that only one necessitates extended consideration. It involves his contention that we failed to address his argument in his supplemental brief that the Family Code and his right to due process were violated by the failure of his counsel at his juvenile proceeding to obtain a psychiatric and a psychological examination. The argument was made within the context of alleging that his attorney was ineffective in specifically requesting that those examinations not be conducted. Appellant did not separately argue and brief the contentions, however. Again, he merely alluded to them in passing via a conclusory statement. Thus, the matters were inadequately briefed and, therefore, presented nothing for review. Tex.R.App. P. 38.1(h) (providing that the brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record); *Billy v. State*, 77 S.W.3d 427, 429 (Tex.App.-Dallas 2002, pet. ref'd) (holding same).

Held: Motion for rehearing overruled.

Opinion Text: Furthermore, even if they had been preserved, we disagree with appellant's contention that the failure of a juvenile to undergo a mental examination per § 54.02(d) of the Texas Family Code *ipso facto* renders invalid his certification as an adult. The statute does require a juvenile court to "order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense" as a condition of certifying a minor to stand trial as an adult. Tex. Fam.Code Ann. § 54.02(d) (Vernon 2002). Yet, if psychological exams are not completed due to interference by the juvenile or his attorney, certification may nevertheless result. For instance, in *R.E.M. v. State*, 541 S.W.2d 841 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.), the accused juvenile refused to answer questions asked by psychiatrists since his attorney advised him to remain silent. Consequently, those examining him could and did not provide the juvenile court with complete diagnostic studies on the boy. Nonetheless, the appellate court concluded that the absence of the studies did not alone preclude certification. *Id.* at 845. Simply put, the court held that § 54.02(d) did not require the accomplishment of that which the juvenile and his attorney prevented. *Id.* And, a corollary to this holding would be that due process is not denied to one who intentionally prevents application of the process allegedly due. Indeed, this is nothing more than the application of the invited error doctrine. One cannot complain about a situation he caused.

Given *R.E.M.*, we deduce several conclusions. First, a juvenile defendant and his attorney may indeed impede or thwart the trial court's compliance with aspects of § 54.02(d). Second, actively thwarting compliance with aspects of the statute does not alone prevent the certification of the juvenile as an adult or result in the denial of any process due the youth. And, because the juvenile and attorney may thwart compliance, the decision to do so may well be a part of some reasonable trial strategy, as described in our original opinion. Finally, since the trial court at bar ordered appellant to undergo testing, his attorney demanded that he not be so tested and, consequently, he was not tested, the absence of such testing did not in and of itself constitute a violation of § 54.02(d). Nor did it negate appellant's subsequent certification as an adult or deny him due process.

IV. DISPOSITIONS

1. COURT EN BANC APPLIES ONLY ABUSE OF DISCRETION STANDARD TO REVIEW TYC COMMITMENT, OVERRULING PRECEDENT

In the Matter of K.T., 107 S.W.3d 65 (Tex.App.—San Antonio, en banc 2/12/03) *Texas Juvenile Law* 188 (5th Ed. 2000).

Facts: K.T. appeals the trial court's judgment, which found that K.T. engaged in delinquent conduct by possessing marijuana and committed him to the Texas Youth Commission until his twenty-first birthday or until TYC orders his release. K.T. contends the evidence is insufficient to support the adjudication portion of the order and the trial court abused its discretion in committing him to TYC. On our own motion, we have taken this appeal en banc to clarify the standard for reviewing orders committing a juvenile to TYC for an indeterminate sentence.

Held: Affirmed.

Opinion Text: All members of this Court agree the trial court's judgment should be affirmed. But we disagree on the proper standard of review. A minority of the members of the court would follow earlier court of appeals' opinions, including opinions of this court, which hold that, although a juvenile disposition order is reviewed under an abuse of discretion standard, the trial court's findings of fact are reviewed for legal and factual sufficiency. *See, e.g., In re K.R.*, 82 S.W.3d 660, 661 (Tex.App.—San Antonio 2002, no pet.). A majority of the court disagrees. We hold the order must be reviewed under an abuse of discretion standard divorced from legal and factual sufficiency standards. We must therefore defer to the trial court's findings of fact but determine de novo whether the facts supported by the record justify the trial court's disposition order in light of the purposes of Texas' Juvenile Justice Code. Therefore, to the extent of the conflict, we overrule *K.R.* and similar cases.

OVERVIEW OF APPLICABLE LAW

Before delving into the particular facts and issues involved in this appeal, we believe it would be helpful to provide a brief overview of the applicable law.

Under Texas' Juvenile Justice Code, a juvenile proceeding may consist of an adjudication hearing and a disposition hearing. *See* Tex. Fam.Code Ann. § 54.04(a) (Vernon 2002). At the adjudication hearing, the court or jury must determine whether the juvenile has "engaged in delinquent conduct or conduct indicating a need for supervision." *Id.* at § 54.03(a). "[D]isposition is a euphemism for sentencing[ ] and is used to honor the non-criminal character of the proceedings." *In re C.S.*, 804 A.2d 307, 309 n.2 (D.C.App.2002).

Once it is decided that a juvenile has "engaged in delinquent conduct or conduct indicating a need for supervision," "the court shall dismiss the child and enter a final judgment without any disposition" unless the court or jury finds "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." Tex. Fam.Code Ann. § 54.04(c) (Vernon 2002). Only if this required finding is made may the court proceed to disposition. *See id.*

The Juvenile Justice Code sets forth a range of permissible dispositions, including probation, *id.* at § 54.04(d)(1); enjoining contact between the child and any adult who has contributed to the child's delinquent conduct, *see id.* at 54.041(a)(2); ordering the child to participate in psychological counseling, *see id.* at § 54.0407; and commitment to TYC with or without a determinate sentence, *see id.* at § 54.04(d) (2)-(3). Unless the equivalent of an indictment is obtained under section 53.045, a court may not commit a juvenile to TYC without a determinate sentence for a misdemeanor offense unless "the requirements of Subsection (s) or (t) are met. *Id.* § 54.04(d)(2). Subsection (s) permits commitment to TYC under these circumstances 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.

Id. § 54.04(s).

Regardless of the disposition selected, "[t]he court shall state specifically in [its disposition] order its reasons for the disposition and shall furnish a copy of the order to the child." *Id.* at § 54.04(f);

see, e.g., In re J.L.R., No. 04-99-00217-CV, 2000 WL 424033, at 2 (Tex.App.—San Antonio Apr. 19, 2000, no pet.) (not designated for publication); *In re T.R.W.*, 533 S.W.2d 139, 140-41 (Tex.Civ.App.—Dallas 1976, no writ), *overruled on other grounds, In re K.K.H.*, 612 S.W.2d 657 (Tex.Civ.App.-Dallas 1981, no writ); *but see In re J.C.C.*, 952 S.W.2d 47, 49 (Tex.App.-San Antonio 1997, no writ) (holding that a court's failure to include required findings in its order was harmless because the court's oral findings were unambiguous and clearly identifiable). "Specification of the reasons for the disposition in an order and furnishing a copy to the child, as subdivision (f) requires, provide assurance that the child and his family will be advised of the reasons for commitment and will be in a position to challenge those reasons on appeal. The appellate court may then review the reasons recited and determine whether they are supported by the evidence and whether they are sufficient to justify the particular disposition ordered." *In re T.R.W.*, 533 S.W.2d at 141. [FN1]

> FN1. Neither a statement of the offense nor a statement of the need for protection of the public and for rehabilitation of the child constitute "a specific statement of reasons for the disposition." *In re T.R.W.*, 533 S.W.2d at 140-41. By requiring the court to state its "reasons," "the legislature 'meant that the Juvenile Court must set out the rationale of its order....' " *Id.* at 141-42 (quoting *In re J.R.C.*, 522 S.W.2d 579, 583 (Tex.Civ. App.-Texarkana 1975, writ ref'd n.r.e.) (construing similar language in section 54.02(h)).

If commitment to TYC is ordered, the court must also include in its order the following three findings:

> (1) it is in the child's best interests to be placed outside the child's home;
>
> (2) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> (3) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

Tex. Fam.Code Ann. § 54.04(i)(1) (Vernon 2002). The section 54.04(i) findings requirement, which was added in 1993, "derives from federal law," which makes federal monies "available to the states for certain children who are placed outside their homes, in foster homes or elsewhere, but only upon judicial findings that removal from the home is necessary." Robert O. Dawson, Texas Juvenile Law 179 (5th ed.2000). Although the section 54.04(i) findings are an essential prerequisite to an order committing a juvenile to TYC, neither section 54.04(i) nor any other provision of the Code makes these federally-mandated findings the functional equivalent of the statement of "reasons" required by section 54.04(f) to justify a disposition order. Accordingly, even if the evidence supporting the trial court's section 54.04(i)(1) findings is "scant," other evidence may justify an order committing a juvenile to TYC. *See In re T.K.E.*, 5 S.W.3d 782, 785-86 (Tex.App.—San Antonio 1999, no pet.).

In *In re T.K.E.*, T.K.E. pled true to the State's allegation that he sexually assaulted a child by contact by forcing a young male cousin to perform oral sex on him. *Id.* at 783. The trial court adjudicated T.K.E. delinquent and ordered him committed to TYC for a determinate sentence of six years. *Id.* at 783-84. On appeal, T.K.E. challenged the sufficiency of the evidence to support the disposition order. *Id.* at 784. Although noting that "[t]he record in this case does not contain much evidence from either T.K.E. or the State," the court held "[t]he scant evidence that is before us, however, supports the juvenile court's section 54.04(i) findings." *Id.* at 785- 86. But the remainder of the court's opinion focuses not on the inquiries mandated by section 54.04(i) but on a much more specific question—where could T.K.E., a repeat sexual offender, receive the best possible treatment? Because a reasonable person could have concluded from the evidence before the juvenile court that that place was TYC, this court affirmed. *Id.*

FACTUAL AND PROCEDURAL BACKGROUND

On July 19, 2001, K.T. was pulled over for speeding. The police officer detected a "very, very, very strong odor" of marijuana emanating from the vehicle. After K.T. and two passengers exited the vehicle, it was searched. The search yielded some cigars in boxes, plastic baggies, and three marijuana blunts, which are made by removing the tobacco from a cigar and packing it with marijuana. Two of the blunts were found in a cigar box under the front passenger seat; the third blunt was found in a lidded cup, which was found either in the cup holder immediately to the right of the driver's seat or in the driver's seat. When K.T. emerged from the vehicle, the officer detected an odor of marijuana on K.T.'s clothing. K.T. and the two passengers were arrested for possession of marijuana.

In its original petition, the State alleged K.T. "knowingly and intentionally possess[ed] a usable quantity of marihuana of two (2) ounces or less," which is a misdemeanor offense "punishable by confinement in jail." *See* Tex. Health & Safety Code Ann. § 481.121(b) (Vernon Supp.2002). At the en-

suing bench trial, the passenger in the front seat of the vehicle, Josephus Duncan, testified that all of the marijuana belonged to him. The trial court found beyond a reasonable doubt that K.T. had been in possession of marijuana and adjudged him to have engaged in delinquent conduct. The court then made the findings required by section 54.04(c)—that K.T. "is in need of rehabilitation and that the protection of the public and [K.T.] requires a disposition to be made." Considering "the prospect of adequate protection of the public and what services the Texas Youth Commission has available through their facilities," the court concluded that it would be in the "best interests of [K.T.] and of society that disposition be commitment to the Texas Youth Commission." The court also made the findings required by section 54.04(i)—it is in K.T.'s "best interest to be placed outside [his] home; and reasonable efforts were made to prevent or eliminate the need for [K.T.'s] removal from the home and to make it possible for [K.T.] to return to [his] home; and [K.T.], in [his] home, cannot be provided the quality of care and level of support and supervision that [he] needs to meet the conditions of probation." The rationale for the trial judge's decision is not contained in the court's written order but in her dialogue with K.T. at the disposition hearing:

> K.T.: Do I—Do I really have to be sent to the Texas Youth Commission? Because I don't—I don't really have no problem with this. Weed, that's not really an addictive drug. You know, I don't have no problems with leaving it alone. I don't really have no weed or drug problem. I just do it just—just on occasion—just—it's not really like a problem.
>
> They've got-You know, they've got drug counseling that I have attended on probation before. I could attend them classes. I know-I know going to the Texas Youth Commission, that's not going-that's not going to make it any better. They've got the same classes there.
>
> I started getting my GED at Technology Academy. I was supposed to start the day after I had—they took me into the County. I was supposed to start on a Monday, but they took me in on a Sunday. So I didn't get to start that yet.
>
> I was on a holiday so I wasn't going to be able to go and I have court today, and that's why I haven't really started going to—attending the school yet.
>
> Court: Yes, sir, I understand. And that was my concern, also. But I'm more concerned to see that your participation, whatever it be, whether it's been actual possession of marijuana or it's being associated with other individuals that possess marijuana or cocaine stops.
>
> K.T.: Yes, ma'am.
>
> Court: And your mom has made a fantastic effort in straightening her life out. And she is to be commended for doing that. But at the same time, that doesn't help you.
>
> And my concern is we need to help you to see that you don't actually do what she has in the past. I don't want you going to adult jail. I want you to live a responsible life. And in order to do that, you're going to have to have an education.
>
> K.T.: Yes, ma'am.
>
> Court: You've had the choices since last year, 2000, to be able to enroll in school. And I understand what your mom is saying about the problems that she's had in getting you enrolled in school. They are always there when you've been placed on probation before.
>
> But you've not been in school at all to do that. She could even have you studying at home, being home-schooled, to see that you have the equivalent of a GED. And that's not occurred either.
>
> There are lots of varieties of things out there that could have been accomplished. You cannot go anywhere in this life without an education and that's first and foremost.
>
> And then my concern is the individuals that you're associating with. I know you love your brother. And I know you love your other brothers and sisters. Your twin brother, I'm talking about, and your other brothers and sisters.
>
> But there are some other individuals that are not in your family that you're associating with that have drug backgrounds or drug histories of some sort. I'm not going to go into the details. I don't know any of the details of that. But those are bad choices.
>
> What I want to see happening is not only do you get an education, but you also learn how to make right choices. Because if we start going through life making wrong choices, at your age, they just continue and they get worse and worse and worse. And so that's why.
>
> And because of that reason and that reason only am I sending you to TYC is to see that

those choices—or that you're given the choices and shown how to make those choices because you haven't seen how to make those choices in the past.

And I want you to see how to make those in the future, so you won't be back in here and down at the criminal justice center in the future when you've completed your TYC. Do you understand why I'm doing that?

K.T.: Yes, ma'am.

Court: It's not because of any criminal offense that's so heinous that you need to be there, but it's the place that we find that's going to be the best one.

K.T.: Yes, ma'am. But at the time I stayed with my grandmother in the west side where all my friends are at. And, now, I live with my mother, I can stay away from there because I go over to my -

Court: That's okay. Go ahead and finish.

K.T.: I go over to my grandmother's house every—every day. And if you could just give me some kind of program where I don't—I could just be at—stay at home because I don't need to associate with them. I go to my grandmother's house. That's where I'm at over there. If I stay with my mother, she don't stay around there.

Court: I understand that, sir. But, obviously, it could have been done in the past and it hasn't. And so we're going to do it for you now to see if we can't change the circumstances.

SUFFICIENCY OF THE EVIDENCE

K.T. first complains that the evidence is legally and factually insufficient to support the juvenile court's finding that he was in possession of a controlled substance. We disagree.

Scope and Standards of Review

Findings in a bench trial "are entitled to the same weight as the verdict of a jury" and are reviewed under the same standards. *See McGalliard v. Kuhlmann,* 722 S.W.2d 694, 696 (Tex.1986). Accordingly, to decide whether the juvenile court's finding is supported by legally sufficient evidence, we consider all the evidence in its most favorable light to determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979); *e.g., In re J.M.B.*, 990 S.W.2d 294, 297 (Tex.App.—San Antonio 1998, pet. denied). To decide whether the juvenile court's finding is supported by factually sufficient evidence, we again consider all the evidence, but we will set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State,* 922 S.W.2d 126, 129 (Tex.Crim.App. 1996); *e.g., In re R.P.*, 37 S.W.3d 76, 78 (Tex.App.—San Antonio 2000, no pet.).

Discussion

K.T. engaged in delinquent conduct if he "knowingly or intentionally" possessed "a usable quantity of marijuana." Tex. Health & Safety Code Ann. § 481.121(a)(b)(1) (Vernon Supp.2002); Tex. Family Code Ann. § 51.03(a)(1) (Vernon 2002). A person possesses a controlled substance if he: (1) exercises care, control, and management of the substance; and (2) knows that the substance is contraband. *Puente v. State,* 888 S.W.2d 521, 526 (Tex.App.—San Antonio 1994, no pet.) (citing *Cude v. State,* 716 S.W.2d 46 (Tex.Crim.App. 1986)). However, a person's possession of the contraband need not be exclusive; it is sufficient if the evidence establishes the accused and another jointly possessed the contraband. *Martin v. State,* 753 S.W.2d 384, 386 (Tex.Crim.App.1988). To show joint possession, "the evidence must affirmatively link the accused to the contraband in such a manner that it can be concluded that he had knowledge of the contraband as well as control over it." *Id.* The affirmative links can be established by additional facts and circumstances indicating the accused's knowledge of and control over the contraband. *Pollan v. State,* 612 S.W.2d 594, 596 (Tex.Crim.App. [Panel Op.] 1981). Thus, joint possession over a controlled substance in a vehicle may be established if the controlled substance is in open or plain view, there is a noticeable odor in the car, and the substance is conveniently accessible to the driver. *See Duff v. State,* 546 S.W.2d 283, 287-88 (Tex.Crim.App. 1977); *Heltcel v. State,* 583 S.W.2d 791, 792 (Tex.Crim.App. [Panel Op.] 1979). The trier of fact must resolve any conflicts in the evidence, determine the weight to be given any particular piece of evidence, and evaluate the credibility of the witnesses. *See Sharp v. State,* 707 S.W.2d 611, 614 (Tex.Crim.App.1986), *cert. denied,* 488 U.S. 872 (1988).

Here, the arresting officer noticed a very strong odor of marijuana emanating from the vehicle; and Duncan admitted the car "probably could have" smelled of marijuana. Duncan also testified that, immediately before they were pulled over, the

blunts and cigars were in a center cupholder in K.T.'s clear view; indeed, one of the blunts was found in a cup in very close proximity to where K.T. was seated as the driver or in the driver's seat itself. We hold this evidence, when viewed in the light most favorable to the juvenile court's finding, is sufficient for a rational trier of fact to have found that K.T. exercised care, control, and management over the marijuana and knew that the substance was contraband. This finding is not so against the great weight of the evidence as to be manifestly unjust.

COMMITMENT TO TYC

K.T. next complains that the trial court abused its discretion in committing him to the Texas Youth Commission until his twenty-first birthday or until TYC orders his release. More specifically, K.T. argues the trial court erred "by using his referral history to justify the [c]ourt's decision to send him to the Texas Youth Commission"; the record contains little evidentiary support for the trial court's finding that K.T. "in [his] home, cannot be provided the quality of care and level of support and supervision that [he] needs to meet the conditions of probation"; and the court's statement that "[i]t's not because of any criminal offense that's so heinous that you need to be there, but it's the place that we find that's going to be the best one" establishes that the court did not believe the possession charge justified commitment to TYC.

Which Standard of Review?

As set forth above, Texas' Juvenile Justice Code vests the trial court with discretion to commit a juvenile to the Texas Youth Commission for a misdemeanor offense under certain circumstances. *See* Tex. Fam.Code Ann. § 54.04(d)(2)(Vernon 2002). However, neither the Juvenile Justice Code nor the Texas Rules of Appellate Procedure sets forth the standard of review to be employed in reviewing commitment orders. This and other courts of appeals have held that, although review of a juvenile disposition order is conducted under an abuse of discretion standard, the trial court's findings of fact are reviewed for legal and factual sufficiency of the evidence. *See, e.g., In re of K.R.,* 82 S.W.3d 660, 661 (Tex.App.—San Antonio 2002, no pet.); *In re J.S.*, 993 S.W.2d 370, 372 (Tex.App.—San Antonio 1999, no pet.); *In re A.S.*, 954 S.W.2d 855, 861 (Tex. App.—El Paso 1997, no pet.). In our view, the application of legal and factual sufficiency standards of review in this context is inappropriate.

When an issue involving both questions of law and questions of fact may be decided by either the court or the jury, legal and factual sufficiency review of the fact findings, by whomever made, is appropriate. For instance, if a trial court makes an award of attorney's fees under the Declaratory Judgment Act, it resolves both questions of fact (whether the fees sought are reasonable and necessary), as well as questions of law (whether an award of fees is equitable and just); and, while the trial court's award is subject to an abuse of discretion standard, its resolution of the fact questions is subject to sufficiency review. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex.1998). "This multi-faceted review involving both evidentiary and discretionary matters is required by the language of the Act," *id.*, but it also promotes consistency since the factual determinations are reviewed under the same standards, regardless of whether they are made by the court or by the jury. But if an issue involving both questions of fact and law is entrusted by statute to the trial court's discretion, Texas courts generally employ the abuse of discretion standard without regard to the standards for evidentiary review. *See Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 820 (Tex.App.—San Antonio 1996, no writ) (citing cases).

In keeping with this general principle, in *R.J.H*, the supreme court held the abuse of discretion standard applies when reviewing the voluntariness of a juvenile's confession—another mixed question of law and fact. *In re R.J.H.*, 79 S.W.3d 1, 6 (Tex. 2002). In so doing, the court reasoned that, in the absence of a rule, statute, or court decision, "an abuse-of-discretion standard ... seems ... to make the most sense and is most consistent with appellate procedure in civil cases generally." *Id.* Thus, the court "deferr[ed] to the trial court's findings of historical fact but determine[d] de novo whether those facts show that a juvenile's statements were made voluntarily for purposes of constitutional due process." *Id.* at 6-7.

By employing an abuse of discretion standard divorced from the standards for evidentiary review, we simultaneously serve two equally important objectives. First, because we do not conduct factual sufficiency review, we afford significantly more deference to the trial court's factual determinations. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002) ("The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision."). This is appropriate, as a general rule, because of the trial judge's superior ability to judge witnesses' credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997). But it is even more appropriate when the decision being reviewed emanates from a specialized court. *See In re T.K.E.*, 5 S.W.3d at 786 (Rickhoff, J., concurring) (noting that in the specialized juvenile courts, the "trial judges develop

a great deal of perceptive power not revealed in the record"). It is also particularly appropriate when it is helpful for the trial judge to "view[ ] the facts of a particular case in light of the distinctive features and events of the community." *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

The second advantage of the abuse of discretion standard is that it permits the appellate court to review questions of law de novo, which "tends to unify precedent" since "legal rules ... acquire content only through application" and which enables "appellate courts ... to maintain control of and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697. Both of these advantages weigh heavily in favor of employing the abuse of discretion standard in the context of a trial court's order committing a juvenile to TYC under section 54.04(d)(2). By employing this standard, we simultaneously afford the greatest measure of deference available to the trial court's factual determinations, while enabling the appellate courts to develop the legal principles involved and encourage their consistent application to similar facts.

The concurring justices contend the abuse of discretion standard should not be employed because in this context unlike the suppression context involved in *R.J.H.*, "the trial court is not applying a set legal standard to the facts." While we recognize that Texas' Juvenile Justice Code, unlike its counterpart in other some other states, [FN2] does not itself contain such a standard, denominated as such, this omission does not mean the Code does not contain a standard. In similar circumstances, the courts in other jurisdictions have derived the standard from the legislatively-expressed purposes of the state's juvenile system and held the ultimate legal question in reviewing a disposition order is whether, under an abuse of discretion standard, the trial court's disposition conforms to "the purposes of the Juvenile Court Law." *In re Michael R.*, 140 Cal.Rptr. 716, 720 (Cal.Ct.App.1977). We believe that, when an appropriate case is presented, a similar approach will yield the standard for reviewing disposition orders in Texas. *See* Tex. Fam.Code Ann. § 51.01 (Vernon 2002). But to adopt the concurring justices' view that there is no set legal standard prevents the applicable legal rules from acquiring content through application and ensures that the appellate courts will neither maintain control of nor clarify the legal principles involved. *See Ornelas*, 517 U.S. at 697. Even more importantly, to say there is no legal standard would effectively insulate these orders from meaningful appellate review. This result would seem to us to be fundamentally inconsistent with the legislatively-mandated right to appeal a juvenile disposition order. *See* Tex. Fam.Code Ann. § 56.01(c)(1)(B) (Vernon 2002).

> FN2. For instance, the juvenile code in North Carolina expressly provides:
>
> > The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public. The court should develop a disposition in each case that:
> >
> > (1) Promotes public safety;
> >
> > (2) Emphasizes accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile's conduct; and
> >
> > (3) Provides the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.
>
> *State v. Tucker*, 573 S.E.2d 197, 201 (N.C.Ct.App. 2002) (quoting N.C. Gen.Stat. § 7B-2500 (2001)). *See also K.A. v. State*, 775 N.E.2d 382, 386 (Ct.App.Ind.2002) (quoting Indiana Code section 31-37-18-6, which sets forth factors the juvenile court must consider when entering a dispositional decree).

In light of *R.J.H.* and fundamental precepts of appellate review, we hold that the criminal abuse of discretion standard—divorced from evidentiary standards of legal and factual sufficiency—applies to a trial court's juvenile disposition order under section 54.04(d)(2).

Standard of Review

In the criminal context, the abuse of discretion standard requires that we "view the evidence in the light most favorable to the trial court's ruling," affording almost total deference to findings of historical fact that are supported by the record. *Guzman*, 955 S.W.2d at 89. However, when the resolution of the factual issue does not turn upon an evaluation of credibility or demeanor, we review the trial court's determination of the applicable law, as well as its application of the appropriate law to the facts it has found, de novo. *Id.*

Referral History

K.T. contends the trial court erred in "using his referral history to justify the [c]ourt's decision to send him to the Texas Youth Commission." We disagree. K.T. has not cited, and we have not found, any statutory or case law authority prohibiting the juvenile court from considering a juvenile's referral history when deciding whether to commit him to

TYC under section 54.04(d)(2). Indeed, consideration of the juvenile's referral history is mandated if the court is considering commitment to TYC without a determinate sentence and the juvenile's previous adjudications were for misdemeanor offenses. *See* Tex. Fam.Code Ann. §§ 54.04(d)(2), 54.04(s).

Probation in Home Setting

K.T. also contends the record contains little evidentiary support for the trial court's finding that K.T. "in [his] home, cannot be provided the quality of care and level of support and supervision that [he] needs to meet the conditions of probation." We again disagree.

According to K.T.'s probation officer, Alberta Ortiz, K.T. was seventeen years old at the time of the disposition hearing and had a history dating back over two years of adjudicated and unadjudicated referrals for possession of a controlled substance, truancy, and criminal trespass; he had twice been placed on probation for possession of marijuana; and, although his probation expired and he had completed Project Spotlight, he did not complete the second drug abuse program to which he was referred. Ortiz also testified that the last documented grade K.T. completed in school was the ninth grade; he had not attended school for the past year; and he had not enrolled in the YO general equivalency program to which Ortiz had referred him. Finally, Ortiz testified that K.T.'s home and social life were not conducive to rehabilitation; family members and friends had been convicted or adjudicated of drug charges; and K.T., who was unemployed, had associated with a gang. According to Ortiz, these factors led the probation department to recommend that K.T. be committed to TYC. If K.T. were not committed to TYC, when he turned eighteen, any non-TYC disposition—including referral to residential treatment programs—would automatically terminate. But if he were committed to TYC, he would have the opportunity to obtain an education and substance abuse counseling beyond the ten months remaining until his eighteenth birthday.

Given this evidence, we hold the trial court was authorized to find that K.T. "in [his] home, cannot be provided the quality of care and level of support and supervision that [he] needs to meet the conditions of probation."

Criminal Offense

Finally, K.T. contends that the court's statement that "[i]t's not because of any criminal offense that's so heinous that you need to be there, but it's the place that we find that's going to be the best one" establishes that the court did not believe the current misdemeanor possession charge justified commitment to TYC. We agree. But a juvenile court's order committing a juvenile to TYC without a determinate sentence for a misdemeanor offense need not—indeed, cannot—rest solely on the current offense. *See* Tex. Fam.Code Ann. §§ 54.04(d)(2), 54.04(s). As noted above, the court must consider previous adjudications. *See id.* The court must also consider the juvenile's best interests, previous rehabilitative efforts, the juvenile's home environment, *see id.* § 54.04.(i), and the myriad of factors dictated by the purposes of the Juvenile Justice Code. *See id.* § 54.01.

CONCLUSION

K.T. has not demonstrated that the juvenile court abused its discretion in committing him to TYC without a determinate sentence. Nor has he shown that the evidence is insufficient to support the court's adjudication order. We therefore affirm the judgment.

Concurring opinion by: Catherine Stone, Justice, joined by Alma L. Lopez, Chief Justice

I concur with the judgment of the court; I write separately, however, because I believe the majority needlessly overrules prior decisions of this court and alters the standard of review.

In justifying its alteration of the standard of review, the majority relies on the supreme court's recent decision in of *In re R.J.H.*, 79 S.W.3d 1 (Tex. 2002). In that case, the supreme court noted that "no rule, statute, or court decision" prescribed a standard for appellate review of a ruling on a motion to suppress in juvenile cases. For this reason, the Texas Supreme Court adopted the abuse of discretion standard applicable in reviewing a trial court's ruling on a motion to suppress in criminal cases. The court announced that it would "defer to the trial court's findings of historical fact but determine de novo whether those facts show that a juvenile's statements were made voluntarily for purposes of constitutional due process." This standard was adopted by the Texas Court of Criminal

There are numerous reasons an abuse of discretion standard should not apply in this context. First, in determining an appropriate disposition in a juvenile case, the trial court is not applying a set legal standard to the facts. Although the trial court is guided by the requirements contained in section 54.04(i) of the Family Code, the ultimate decision of whether disposition should include placement outside the child's home or commitment to TYC is within the trial court's discretion. On review, "[t]he question is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action, but whether the court acted

without reference to any guiding rules and principles." *In re L.R.*, 67 S.W.3d 332, 338-39 (Tex.App.—El Paso 2001, no pet.). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Id.* Although a reviewing court may consider the sufficiency of the evidence to support the required findings under section 54.04 as a factor in considering whether the trial court abused its discretion, we are not permitted to determine *de novo* whether those facts supported the disposition ruling because we may not substitute our opinion for that of the trial court. A trial court that routinely handles juvenile dispositions is in an appreciably better position than an appellate court to decide an appropriate disposition in a given case; therefore, an appellate court should not independently determine whether the disposition was appropriate. Finally, unlike the situation in *In re R.J.H.*, there are numerous court decisions prescribing a standard for appellate review of a disposition ruling.

The findings required by section 54.04(i) do not remove the trial court's discretion in ordering a particular disposition in any given case. A trial court may determine that each of the requirements set forth in section 54.04(i) are present and for some reason still exercise its discretion not to order placement outside the home. The trial court cannot, however, order placement outside the home without the required findings. A trial court acts without reference to guiding rules and principles if the trial court orders placement outside the home in the absence of evidence to support the findings required by section 54.04(i). For this reason, a sufficiency review is the appropriate standard.

In *In re J.S.*, J.S. challenged the sufficiency of the evidence to support the trial court's finding that he could not be provided the quality of care and level of support and supervision within his home. 993 S.W.2d 370, 374 (Tex.App.—San Antonio 1999, no pet.). After reviewing the evidence, we determined that the only evidence supporting a finding that J.S. was not being provided adequate support in his home "stemmed from a time period in which [J.S.] was living with his mother, the same time at which the offense occurred." *Id.* at 374. We then noted that J.S. had been living with his father for over a year after the offense occurred and prior to the hearings on adjudication and disposition. *Id.* During that time, J.S. had attended individual, group and family counseling, his father actively participated in counseling, the counselors noted J.S.'s progress in acknowledging and accepting what he had done wrong and expressing remorse for his actions. *Id.* Accordingly, we held that there was no evidence that J.S.'s father could not provide the quality of care and level of support and supervision J.S. needed. *Id.* In the absence of evidence to support this finding, the trial court did not have the discretion to order placement outside the home.

In my view, although the majority advocates an abuse of discretion standard, the majority applies a sufficiency analysis in considering whether the evidence in this case is sufficient to support the trial court's finding that K.T. cannot be provided the quality of care and level of support and supervision in his home. After reviewing the evidence relevant to the trial court's finding, the majority concludes, "Given this evidence, we hold the trial court was authorized to find that K.T. 'in [his] home, cannot be provided the quality of care and level of support and supervision that [he] needs to meet the conditions of probation.' " In holding that the trial court was authorized to make the finding because evidence supported that finding, the majority necessarily reviewed the sufficiency of the evidence to support the finding, thereby using the same standard of review and applying the same analysis used in *J.S.* and our prior decisions.

For these reasons, I would continue to follow this court's prior rulings in *In re K.R.* and *In re S.J.*

---

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

In the Matter of D.L.C., ___ S.W.3d ____, No. 2-02-163-CV, 2003 WL 22976095, 2003 Tex.App. Lexis ____ (Tex.App.—Fort Worth 12/18/03) *Texas Juvenile Law* (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 imposi-

tion 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 utilize *Goord's* analysis to the extent it is helpful, despite the case's uncertain precedential value.

In summary, the DNA statute does not criminalize any act or omission that Appellants committed prior to enactment of the statute and does not inflict greater punishment on Appellants for their adjudicated offenses. An application and weighing of the *Kennedy* factors demonstrates that the DNA statute is not "so punitive" in effect that it prevents this court from legitimately viewing the DNA statute 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,* No.2002-KA-00206- COA, --- So.2d ----, 2003 WL 21916440, at *3 (Miss. Ct.App. Aug. 12 2003); *Cooper,* 943 S.W.2d at 705; *Norman,* 660 N.W.2d at 557 (holding that obtaining DNA sample by oral swab does not violate Fifth Amendment); *Johnson,* 529 S.E.2d at 779.

Moreover, *Renfro* does not support Appellants' position. In *Renfro,* the court analyzed a condition of probation that required the defendant to take a polygraph to determine whether the condition violated the privilege against self-incrimination:

> Although the Appellant has a duty to answer the polygraph examiner's questions truthfully, unless he invokes the privilege, shows a realistic threat of self-incrimination and nevertheless is required to answer, no violation of his right against self-incrimination is suffered. The mere requirement of taking the test in itself is insufficient to constitute an infringement of the privilege.

999 S.W.2d at 561 (citations omitted). Here, Appellants claim that the order requiring them to place their DNA in an accessible DNA database exposes them to a realistic threat of self-incrimination and that therefore they are being forced to submit evidence against themselves. Appellants, however, have not yet submitted blood samples. Therefore, this issue is not ripe. *See Waco ISD v. Gibson,* 22 S.W.3d 849, 853 (Tex.2000) (stating that ripeness doctrine prevents premature adjudication of hypothetical or contingent situations). We hold that the Texas DNA statute does not violate the Self-Incrimination Clause. Appellants have failed to demonstrate that, as applied to them, the Texas DNA statute violates the Self-Incrimination Clause. We overrule Appellants' third issue.

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* Tex.Code Crim. Proc. Ann. art. 62.13(a) (stating only that "[a] person who has an adjudication of delinquent conduct that would otherwise be reportable ... does not have a reportable adjudication of delinquent conduct ... if the juvenile court enters an order ... excusing compliance").

Likewise, we decline to adopt Appellants' position that, because Appellants other than R.W.W. may still avail themselves of the opportunity to have their sex offender registration excused, their adjudications do not trigger the DNA statute's application. The statute allowing juveniles to request to be excused from sex offender registration does not have a time limit. *See* Tex.Code Crim. Proc. Ann. art. 62.13(l) (stating that a person who has registered as a sex offender, *regardless of when the delinquent conduct or the adjudication for the conduct occurred*, may file a motion seeking excusal from registration). Consequently, Appellants' argument would render the DNA statute meaningless because it could not take effect until the juvenile decided to 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.

V. MODIFICATIONS

1. ASSOCIATION VIOLATION REQUIRES PROOF JUVENILE KNEW OF OTHER'S PROBATION STATUS; SCHOOL RECORDS ADMISSIBLE AS PUBLIC RECORD

In the Interest of B.J., 100 S.W.3d 448 (Tex.App.—Texarkana 1/14/03) *Texas Juvenile Law* 217 (5th Ed. 2000).

Facts: The trial court granted the State's motion to revoke probation and modify disposition. Consequently, the appellant, B. J., was committed to the Texas Youth Commission. B.J. brings the following points of error: (1) the trial court erred by admitting the audiotape of a 9-1-1 call; (2) the trial court erred by revoking probation for B. J.'s committing an offense against this State; (3) the trial court erred by revoking probation for B. J.'s associating with persons that violate the law or are on probation or parole, whether juvenile or adult; (4) the trial court erred by revoking probation for B. J.'s failing to report to his juvenile probation officer; and (5) the trial court erred by revoking probation for B. J.'s failing to obey school rules and regulations.

On August 13, 2001, the trial court found B.J. engaged in delinquent conduct through burglary of a habitation. See TEX. PEN. CODE ANN. § 30.02 (Vernon Supp.2003). As a result, B.J. was placed on probation until he reached the age of eighteen. On January 17, 2002, the State filed a motion to revoke probation and modify disposition, alleging B.J. violated four conditions of his probation. Specifically, the State alleged B. J.: (1) committed an offense against this State by placing a call to 9-1-1 with a bomb threat known to be false and baseless; (2) associated with persons on probation; (3) failed to report to his juvenile probation officer; and (4) failed to obey the rules and regulations of his school. The trial court granted the State's motion and committed B.J. to the Texas Youth Commission.

Held: Modified and affirmed.

Opinion Text: *The 9-1-1 Call*

In his first point of error, B.J. contends the trial court erred by admitting a recording of the 9-1-1 call. We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. Green v. State, 934 S.W.2d 92, 101-02 (Tex.Crim.App.1996); Montgomery v. State, 810 S.W.2d 372, 379-80 (Tex.Crim.App. 1990). A trial court abuses its discretion if its decision "is arbitrary, unreasonable, and without reference to any guiding rules and principles." Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex.1997) (citing Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex.1996)).

Texas Rule of Evidence 901 governs the admission of electronic recordings. TEX. R. EVID. 901; Leos v. State, 883 S.W.2d 209, 211-12 (Tex.Crim.App.1994). The rule provides the recording must be authenticated by introducing evidence sufficient to support a finding that the matter in question is what its proponent claims. TEX. R. EVID. 901(a). The rule also gives illustrations of how evidence may be authenticated, but the illustrations were not intended to exclude other methods. TEX. R. EVID. 901(b). For example, the rule provides that telephone conversations can be authenticated by introducing "evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if ... in case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone." TEX. R. EVID. 901(b)(6).

Despite the language expressly limiting the application of the illustration, B.J. contends the trial court erred by admitting the recording because the State did not authenticate the 9-1-1 call exactly as illustrated in the statute. B. J.'s argument directly contradicts the statute. In order to authenticate the call, the State need merely show the recording is what it claims the recording is, a bomb threat on the 9-1-1 line, placed October 30, 2001, to the Upshur County, Texas, Sheriff's Office from a particular convenience store in or near Gilmer, Texas. The State offered the testimony of Sherry Fennell to authenticate the call. Fennell testified she was the

communications supervisor for the Upshur County Sheriff's Office and had been employed there for eleven years. Fennell testified that, on the morning of October 30, 2001, she was working in the sheriff's office when a call came in on the 9-1-1 line at approximately 7:15 a.m. Further, she testified that she answered the call, that the call came from a Texaco convenience store on West Highway 154, and that the caller threatened that Gilmer schools were going to be bombed. Fennell also testified she had listened to the recording that morning, and it was the same call she received on October 30, 2001.

Based on Fennell's testimony, the court admitted the recording into evidence. There may be a concern, however, that because the State claimed the call was made by B. J., the State must have presented evidence properly identifying B. J.'s voice on the recording before admission. See TEX. R. EVID. 901; Herzing v. Metropolitan Life Ins. Co., 907 S.W.2d 574, 580-81 (Tex.App.— Corpus Christi 1995, writ denied). We need not address that concern. Despite the State's failure to present voice identification evidence before admission, B.J. did not object to the lack of voice identification, and the State later produced evidence identifying B. J.'s voice on the recording. See TEX. R. APP. P. 33.1. Therefore, the trial court did not abuse its discretion by admitting the recording into evidence. We overrule B. J.'s first point of error.

Bomb Threat

In his second point of error, B.J. contends the trial court erred by revoking probation based on the allegation he committed an offense against the laws of this State. In a probation revocation hearing, the trial court is the sole trier of fact and determines the credibility of witnesses and the weight to be given their testimony. Battle v. State, 571 S.W.2d 20, 21 (Tex.Crim.App.1978). Appellate courts review an order revoking probation under an abuse of discretion standard. Cardona v. State, 665 S.W.2d 492, 493 (Tex.Crim.App.1984); Moore v. State, 11 S.W.3d 495, 498 (Tex.App.—Houston [14th Dist.] 2000, no pet.). In making this determination, we examine the evidence in a light most favorable to the verdict. Garrett v. State, 619 S.W.2d 172, 174 (Tex.Crim.App.1981).

In the present case, the State charged B.J. with violating Section 42.06 of the Texas Penal Code, which provides in relevant part:

> (a) [a] person commits an offense if he knowingly initiates, communicates or circulates a report of a present, past, or future bombing, fire, offense, or other emergency that he knows is false or baseless and that would ordinarily: (1) cause action by an official or volunteer agency organized to deal with emergencies....

TEX. PEN. CODE ANN. § 42.06 (Vernon 1999).

B.J. contends the State failed to properly identify the voice on the 9-1-1 recording as his. Again, Texas Rule of Evidence 901 controls voice identification. TEX. R. EVID. 901. By way of illustration, the rule states that voice identification is satisfied by anyone who, after hearing the recording, can identify the voice as the same heard by them any time under circumstances connecting it with the alleged speaker. TEX. R. EVID. 901(b)(5).

In order to meet its burden, the State elicited testimony from Milton Wiley, B. J.'s probation officer. Wiley testified he was ninety-five percent certain the last voice on the recording was B. J .'s. Wiley also testified he was familiar with the way B.J. talks, that he had spoken with him on numerous occasions, and that he had heard the same voice inflections in B. J.'s voice as those heard in the recording. When viewing the evidence in a light most favorable to the verdict, a reasonable trier of fact could have made the determination that B. J.'s voice was on the recording. See Garrett, 619 S.W.2d at 174. Accordingly, the trial court did not abuse its discretion by finding B.J. guilty of violating Section 42 .06 of the Texas Penal Code. We overrule B. J.'s second point of error.

Association

In his third point of error, B.J. contends the trial court erred by revoking his probation based on the allegation he associated with persons who violate the law or are on probation, parole, or community supervision, whether juvenile or adult. For a child found to have engaged in delinquent conduct, the trial court may modify a disposition if the child violates a reasonable and lawful court order. TEX. FAM. CODE ANN. § 54.05(f) (Vernon 2002). In order to find error in the trial court's decision, the record must show the court abused its discretion in finding, by a preponderance of the evidence, a violation of a condition of probation. In re M.A.L., 995 S.W.2d 322, 324 (Tex.App.—Waco 1999, no pet.).

In Scroggins v. State, 815 S.W.2d 898, 899 (Tex.App.—Fort Worth 1991, pet. ref'd), the trial court revoked Scroggins' community supervision. Scroggins was found to have violated a condition of his community supervision, requiring him to avoid persons of disreputable or harmful character. Id. Specifically, Scroggins was arrested along with Kevin Barnes for car theft. Id. at 900. The court held Scroggins knew Barnes was a person of disreputable character by the fact they were codefendants. Id.

Further, there was testimony Scroggins told his community supervision officer he was not associating with Barnes, which indicated Scroggins was aware of Barnes' disreputable character, and his community supervision officer specifically told Scroggins to refrain from associating with Barnes. Id. Therefore, because Scroggins was aware Barnes was a person of disreputable and harmful character, the court held Scroggins violated a condition of his community supervision by continuing to associate with him. Id.

In the present case, the State produced a videotape taken from the Texaco convenience store on West Highway 154 from which the 9-1-1 call was placed, depicting B. J., his brother, and a third individual entering and leaving the store. Wiley identified the third individual on the videotape as Michael Jones. Wiley also testified that, at the time the videotape was recorded, Jones was on juvenile probation. Further, the State introduced written statements from both Jones and B. J.'s brother stating they had all three been together that morning. However, unlike Scroggins, the State failed to produce evidence that B.J. was aware of Jones' probationary status. See id. at 899. There was no evidence B.J. and Jones acted together in placing the 9-1-1 call. The court in Scroggins held he violated the condition because an element of knowledge was satisfied. Id. at 900. However, in the present case, there is nothing in the record indicating that B.J. was aware that Jones was on probation. Therefore, while the condition itself is certainly reasonable, the trial court abused its discretion by holding B.J. in violation.

Failure to Report

In his fourth point of error, B.J. contends the trial court abused its discretion by revoking probation based on B. J.'s failure to report to his probation officer. As a condition of his probation, B.J. was required to report to his probation officer in person on Wednesday after school every two weeks and by telephone twice a week, or as directed by the trial court. Wiley testified that, "to the best of [his] knowledge," B.J. failed to report in person for the following weeks: (1) August 19, 2001; (2) August 26, 2001; (3) September 2, 2001; (4) September 23, 2001; (5) September 30, 2001; (6) October 7, 2001; (7) October 14, 2001; (8) October 21, 2001; (9) October 28, 2001; (10) November 4, 2001; (11) November 18, 2001; and (12) November 25, 2001. Wiley also testified that, "to the best of [his] knowledge," B.J. failed to report by telephone for the following weeks: (1) August 19, 2001; (2) August 26, 2001; (3) September 2, 2001; (4) September 9, 2001; (5) September 16, 2001; (6) September 23, 2001; (7) September 30, 2001; (8) October 7, 2001; (9) October 14, 2001; (10) October 21, 2001; (11) October 28, 001; (12) November 4, 2001; (13) November 11, 2001; and (14) November 25, 2001.

B.J. contends that, because Wiley qualified his testimony with "to the best of my knowledge," the State failed to show B.J. violated this probationary condition by a preponderance of the evidence. However, the trier of fact is the sole judge of the witness' credibility and the weight to be given to his or her testimony. Battle, 571 S.W.2d at 21. When viewing the evidence in a light most favorable to the verdict, a reasonable trier of fact could have found B.J. guilty of violating this condition of his probation. See Garrett, 619 S.W.2d at 174. Accordingly, the trial court did not abuse its discretion. We overrule B. J.'s fourth point of error.

School Rules

In his fifth point of error, B.J. contends the trial court erred by revoking his probation based on his failure to obey school rules and regulations. Specifically, B.J. contends the trial court improperly admitted disciplinary reports over hearsay objections. Whether evidence is admissible as an exception to the hearsay rule is for the trial court to decide, reviewable under an abuse of discretion standard. Nat'l Liab. & Fire Ins. Co. v. Allen, 15 S.W.3d 525, 527-28 (Tex.2000).

The State produced evidence B.J. had been subject to discipline for disobeying school rules and regulations on October 2, 2001, and November 1, 2001. Kathy Musik, assistant principal at Gilmer Junior High School, testified that on each occasion the teachers submitted detention referrals, giving their descriptions of B. J.'s behavior. While offering the referrals into evidence, the following exchange took place:

> [State]: The documents you are relying on, are those documents kept in the regular course of business there at the Gilmer school?
>
> [Musik]: Yes, I have two copies and both the copies were made from B. J.'s discipline folder.
>
> [State]: Are the entries made on the documents you are referring to, relying on, and testifying about made with persons with actual knowledge of the events?
>
> [Musik]: Yes.
>
> [State]: Is it the regular practice of business to keep those memorandums and those records you are relying on?
>
> [Musik]: Yes sir, that is the regular practice and procedure.
>
> [State]: Those been altered or changed to your knowledge in any way, form, or fashion?

[Musik]: No, sir.

[State]: And are you indeed a custodian of those particular records?

[Musik]: Yes, I am.

[State]: Are you familiar with the manner and method in which they are kept?

[Musik]: Yes.

[State]: Are they kept with an effort to make sure they are trustworthy and accurate?

[Musik]: Yes, sir.

Based on the foregoing, the trial court overruled B. J.'s hearsay objection and admitted the records. According to Texas Rule of Evidence 803, a business record is admissible as an exception to the hearsay rule if it was recorded at or near the time of the event, by someone with personal knowledge, if kept in the course of a regularly conducted business activity, and if it was a regular business practice to keep the records. TEX. R. EVID. 803(6).

B.J. contends the evidence was inadmissible because the State did not ask if the referrals were recorded at or near the time of the event. It has been held that, to lay a proper predicate for a document's admission under the business records exception, the proponent must establish the record was made at or near the time of the event being recorded. TEX. R. EVID. 803(6); Philpot v. State, 897 S.W.2d 848, 851-52 (Tex.App.—Dallas 1995, pet. ref'd). The record contains no evidence that the referrals were made at or near the time of the punishable offense. Therefore, the State did not lay the proper predicate, and the documents should not have been admitted under the business records exception. See Philpot, 897 S.W.2d at 851-52.

The school records, however, were properly admitted. When the trial court's ruling on the admission of evidence is correct, though for a wrong or insufficient reason, it will not result in a reversal if the evidence is admissible for any reason. Spann v. State, 448 S.W.2d 128, 130 (Tex.Crim.App. 1969); Salas v. State, 629 S.W.2d 796, 799 (Tex.App.—Houston [14th Dist.] 1981, no pet.). Under Texas Rule of Evidence 803(8), reports, of any form, from a public office or agency, are admissible if they set forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report. TEX. R. EVID. 803(8)(B). It has been well settled that teachers have a duty imposed by law to monitor the behavior of children under their supervision. See TEX. EDUC. CODE ANN. § 22.051 (Vernon 1996); Downing v. Brown, 935 S.W.2d 112, 113-14 (Tex.1996); Williams v. Chatman, 17 S.W.3d 694, 700 (Tex.App. —Amarillo 1999, pet. denied). Further, "a teacher with knowledge that a student has violated the student code of conduct shall file with the school principal or other appropriate administrator a written report, not to exceed one page, documenting the violation." TEX. EDUC. CODE ANN. § 37.001(b) (Vernon Supp.2003).

In the present case, the teachers, who are employees of a public agency, [FN1] had a duty imposed by law to supervise the children and report any violations of the student code of conduct. See TEX. EDUC. CODE ANN. § 37.001(b); Downing, 935 S.W.2d at 113-14. While B.J. was under their supervision, he violated the student code of conduct, [FN2] and the teachers, pursuant to their duty imposed by law, observed and reported these violations. Accordingly, because the disciplinary referrals set forth matters observed pursuant to a duty imposed by law, the referrals were admissible under the public records exception. TEX. R. EVID. 803(8).

FN1. See Fibreboard Corp. v. Pool, 813 S.W.2d 658, 676 (Tex.App.— Texarkana 1991, writ denied) (public records exception applicable only when exhibit is prepared by public officials or employees under their supervision in performance of their official duties).

FN2. Musik testified B. J.'s behavior constituted a violation of school rules and regulations.

Conclusion

Despite erroneously finding B.J. violated a condition of his probation by knowingly associating with persons that violate the law or are on probation, parole, or community supervision, whether juvenile or adult, the trial court was justified in modifying B. J.'s disposition given the other three conditions that were properly found to have been violated. See Moore v. State, 605 S.W.2d 924, 926 (Tex.Crim.App.1980) (one sufficient ground for revocation will support the court's order to revoke).

For the reasons stated, we affirm the judgment.

---

2. TRIAL COURT RESET MODIFICATION HEARING WITHOUT RULING ON MOTION; POST-TERMINATION OF PROBATION MODIFICATION VALID

In the Matter of P.L., 106 S.W.3d 334 (Tex.App.—Dallas 5/7/03) *Texas Juvenile Law* 223 (5th Ed. 2000).

Facts: P.L., a juvenile, challenges the trial court's order modifying his disposition and committing him to the Texas Youth Commission (TYC). In two is-

sues, P.L. argues the commitment order (1) is void for want of jurisdiction because it was rendered after his original probationary term had expired and (2) is erroneous because it relies on an invalid statutory basis.

On March 26, 2001, the trial court adjudicated P.L. for engaging in delinquent conduct by possessing cocaine and placed him on probation for twelve months. About one month later, the State filed a motion to modify disposition, alleging P.L. violated the conditions of his probation by failing to obey all published school rules and regulations, by failing to participate in the 30 Day Drug Assessment Program, and by testing positive for illegal drug usage. At a July 25, 2001 hearing on the motion, P.L. pleaded true to all allegations. The trial court accepted the pleas and found P.L. to be a child engaged in delinquent conduct. Pursuant to an agreement between P.L. and the State, the trial court ordered P.L. to the Dallas Youth Academy, a boot camp, but deferred disposition until after his return. The judge explained that P.L. would return to court a couple of weeks after completion of boot camp. The judge further explained that if P.L. did not do well at boot camp or after he returned home, he could be sentenced to TYC.

P.L. successfully completed boot camp and was discharged in early October; however, he did poorly once he returned home. His misconduct was reported in predisposition report addenda filed by the juvenile department. In November, P.L. "absconded from supervision," and a warrant was issued for his arrest. Thereafter, P.L. failed to appear at the disposition hearing set for December 4. Police eventually arrested P.L. on June 28, 2002, three months after his probationary term was to expire. At the disposition hearing held on July 25, 2002, the trial court sentenced P.L. to TYC.

Held: Affirmed.

Opinion Text: In his first issue, P.L. makes a two-part argument. First, he complains that the trial court had ruled on the original motion to modify at the July 2001 hearing and the State did not subsequently file a new motion. Thus, citing as authority adult probation revocation cases, he argues the procedure used at the July 2002 disposition hearing violated his due process rights. However, P.L. did not make this objection at the disposition hearing or in his subsequent motion for new trial; consequently, he has waived any error. *See Rogers v. State*, 640 S.W.2d 248, 263-64 (Tex.Crim.App. 1981) (op. on State's second motion for reh'g); *Trifovesti v. State*, 759 S.W.2d 507, 509 (Tex.App.—Dallas 1988, pet. ref'd).

Recognizing his failure to object, P.L. attempts to distinguish his case by making his second argument: his revocation occurred after his probationary term expired. He complains that because the prior motion had been ruled on and no new motion was filed, the trial court had no jurisdiction over him at the time he was ultimately sentenced. We disagree.

When a motion to modify a disposition is filed within the probationary term for an alleged violation of the terms and conditions of probation which occurred within the probationary period, and the court proceeds to orderly disposition of that petition within a reasonable time with full regard for the procedural and substantive rights of the child, the court has authority to modify the prior disposition order even though the modification occurs after the termination date specified by the prior order. *In re H.G.*, 993 S.W.2d 211, 213 fn.1 (Tex.App.—San Antonio 1999, no pet.). The question here is whether the original motion was pending at the time the trial court acted.

At the July 2001 hearing, the judge specifically advised P.L. as follows:

> For about eight weeks you go to [boot camp], and if you do well, then you get to come home and stay there for a couple of weeks before we come back to court.
>
> If you do well on the residential part, and if you do well at home, the probation officer comes back to court and recommends that you get a years probation at home on intensive supervision, instead of recommending that you go somewhere for long-term placement or be committed to the Texas Youth Commission. But if you don't do well either in the residential part or after you get home, then you have got to be back in detention, and you will be looking at either long-term placement or the Texas Youth Commission.

After assuring that P.L. understood, the trial court then "reset the disposition." It is clear from the trial court's comments no disposition was made at the July 2001 hearing and that the disposition hearing was continued until after P.L. completed boot camp. Thus, we conclude the motion was pending at the time P.L. was sentenced to TYC. By continuing the original hearing and sending P.L. to boot camp, the judge gave P.L. the opportunity to avoid TYC for violating his probation. After P.L.'s discharge from boot camp, a disposition hearing was set for December, a time within the probationary term. P.L., however, failed to appear at the hearing. The disposition hearing was ultimately held within one month

of P.L.'s arrest. Under the facts presented, we conclude the court proceeded to an orderly disposition of the petition and had authority to modify disposition, even though it was after the termination date set out in the prior order. *Cf. Guillot v. State,* 543 S.W.2d 650, 652 (Tex.Crim.App.1976) (in adult probation case, where revocation motion is filed and arrest warrant issues prior to expiration of probationary period, hearing conducted after expiration of such but shortly after arrest is proper, particularly where delay is due to actions of defendant). We resolve the first issue against P.L.

In his second issue, P.L. complains the commitment order is erroneous because it recites that P.L. was eligible for commitment to TYC pursuant to section 54.04(q), which governs original dispositions. Because this proceeding was a modification and not an original disposition, P.L. argues the trial court should have relied on section 54.05 and its failure to do so was an abuse of discretion requiring reversal. We agree with P.L. that section 54.05 of the family code governs this case; however, we are not persuaded that the trial court's mistake in reciting the wrong statute requires reversal.

The Legislature has vested Juvenile Courts with great discretion in determining the suitable disposition of children found to have engaged in delinquent conduct. This is especially so regarding hearings to modify disposition. *In re J.M.,* 25 S.W.3d 364, 367 (Tex.App.—Fort Worth 2000, no pet.). The trial court abuses its discretion if it acts unreasonably or arbitrarily. *In re J.R.W.,* 879 S.W.2d 254, 257 (Tex.App.—Dallas 1994, no writ). We review the entire record to determine if the trial court acted without reference to any guiding rules or principles. *Id.*

Section 54.05(i) requires a trial court to "specifically state in the order its reasons for modifying the disposition and shall furnish a copy of the order to the child." Tex. Fam.Code Ann. § 54.05(i) (Vernon 2002). This requirement allows the appellate court to determine whether the evidence supports the reasons recited and whether those reasons are sufficient to justify the order of disposition. *In re A.R.D.,* No. 05-02-00292-CV, slip op. at 2 (Tex. App.—Dallas March 19, 2003, no pet. h.). This assures the child will have notice of the court's reason for modifying the disposition and will be in a position to challenge those reasons on appeal. *Id.*

In its commitment order, the trial court found P.L. (1) was previously adjudged to be a child engaged in delinquent conduct, was placed on probation, and received a copy of the terms and conditions of probation and (2) violated specific conditions of probation to which P.L. had pleaded true. The order further provided:

> The Court further finds that the Respondent Child is eligible for commitment to the Texas Youth Commission pursuant to Section 54.04(q) of the Juvenile Justice Code for engaging in delinquent conduct that violates a penal law of this State; and the Respondent Child has been adjudicated as having engaged in delinquent conduct for violating a penal law of the grade of felony to wit: on JUNE 26, 2000 the Respondent Child committed the FELONY offense of POSSESSION OF COCAINE and was adjudicated for said offense on MARCH 12, 2001.

Section 54.05(f) provides that, in a disposition based on a finding that a child engaged in delinquent conduct that violates a felony law, as here, a trial court can modify disposition to commit the child to TYC if, after a hearing, it finds "by a preponderance of the evidence that the child violated a reasonable and lawful order of the court." *See* Tex. Fam.Code Ann. § 54.05(f) (Vernon 2002).

The written order in this case tracks the language of section 54.05(f). Although the trial court mistakenly recited section 54.04(q), it specifically explained the reasons for the court's action, and the order clearly gave P.L. notice of the trial court's reasons for modifying his disposition. Under these circumstances, we cannot conclude the trial court acted without any reference to any guiding rules or principles and abused its discretion. We resolve the second issue against P.L.

We affirm the trial court's order modifying disposition with TYC commitment.

---

3. CANNOT REVOKE FOR FAILURE TO PAY RESTITUTION WITHOUT PROOF THE FAILURE WAS WILLFUL; NO VIOLATION FOR LEAVING PLACEMENT

In the Matter of J.M., III, ___ S.W.3d ___, No. 13-02-139-CV, 2003 WL 22415869, 2003 Tex.App. Lexis 9087 (Tex.App.—Corpus Christi 10/23/03) *Texas Juvenile Law* 219 (5th Ed. 2000).

Facts: Appellant, J.M., III, appeals from the juvenile court's modified order of disposition committing him to the Texas Youth Commission. Through four issues appellant argues: (1) the evidence presented was legally insufficient to support the trial court's findings that he violated the terms of his probation; (2) the evidence was also factually insufficient; (3) the trial court erred in allowing a witness to testify;

and (4) appellant received ineffective assistance of counsel. Because we conclude the evidence presented was legally insufficient to support the trial court's findings, we need not address appellant's remaining contentions. *See* Tex.R.App. P. 47.1. We reverse and render judgment in appellant's favor.

In September 2000, the court entered a judgment of adjudication and disposition in cause number J-323-00-A, finding appellant had engaged in delinquent conduct. Appellant was placed on probation in his father's custody until his eighteenth birthday subject to numerous conditions.

On December 4, 2000, appellant was again found to have engaged in delinquent conduct under cause number J-491-00-A. The court placed appellant on probation in that case.

On June 25, 2001, the court modified the dispositions in both cases, imposing probation in each to be served concurrently. The orders also imposed identical conditions of probation in the two cases. Relevant to this appeal are conditions number one and number thirteen.

Condition number one required appellant to:

> 1. Remain and stay in the custody of Bokenkamp Children's Treatment Center ... during the said probationary period, or until further orders of the court.
>
> a. Upon successful completion of program, the custody be given back to his parent(s)....
>
> b. Upon unsuccessful termination from program, the custody be given back to the Hidalgo County Juvenile Probation Department, Edinburg, Texas.

Condition number thirteen required appellant to pay restitution in the amount of $456.99, payable in monthly installments of $38.08 beginning in July 2001.

On August 23, 2001, the State filed a motion in each case to modify the disposition. In the motions, the State contended appellant violated condition number one by being "wilfully[,] unsuccessfully discharged" from Bokenkamp. The State later amended its motions to include an allegation that appellant violated condition number thirteen by failing to make the first two scheduled payments.

On October 1, 2001, the court held a hearing on both motions. During the adjudication phase of the hearing, Alma Nely Ozuna, appellant's probation officer, testified that appellant was unsuccessfully terminated from Bokenkamp on August 9. Ozuna said he did not run away from Bokenkamp. Rather, he was transported by the Probation Department from Bokenkamp to the Juvenile Detention Center.

Ozuna also testified appellant did not make any restitution payments. She stated appellant was thirteen at the time and not able to legally work. She also stated that neither Bokenkamp nor the Juvenile Detention Center had any programs that would have allowed appellant to earn credit toward the payment of the monetary restitution. She said appellant's father was not consistent in providing support for appellant, and his mother was both ill and unemployed. As far as she was aware, appellant had no funds with which to make the restitution payments.

At the conclusion of the adjudication phase, the court found appellant violated condition number one. The court also found appellant willfully failed to make the first two scheduled restitution payments in violation of condition number thirteen. After hearing additional evidence during the disposition phase of the hearing, the court stated probation and at-home placement were unsatisfactory and entered an order in each case modifying the disposition and placing appellant in the care, custody, and control of the Texas Youth Commission.

This appeal arises from the judgment entered in cause number J-323-00-A. The judgment entered in cause number J-491-00-A is the subject of a separate, but identical, appeal.

Held: Reversed and rendered.

Opinion Text: In his first issue, appellant challenges the legal sufficiency of the evidence presented. He attacks the juvenile court's determination that he failed to remain in the custody of Bokenkamp and wilfully failed to pay restitution.

A. Standard of Review

We review a trial court's modification of a juvenile disposition for abuse of discretion. *In re J.G.*, 112 S.W.3d 256, 259 (Tex.App.—Corpus Christi 2003, no pet.); *In re H.G.*, 993 S.W.2d 211, 213 (Tex.App.—San Antonio 1999, no pet.); *In re J.L.*, 664 S.W.2d 119, 120 (Tex.App.—Corpus Christi 1983, no writ). In this type of review, we conduct a two-pronged analysis: (1) did the trial court have sufficient evidence on which to exercise its discretion; and (2) did the trial court err in applying its discretion. *In re L.R.*, 67 S.W.3d 332, 338 (Tex.App.—El Paso 2001, no pet.).

In considering the first prong, we turn to the standards employed in determining the sufficiency of the evidence. *Id.* When a juvenile challenges the legal sufficiency of the evidence, we consider only the evidence and inferences that tend to support the challenged finding, and disregard any and all evidence and inferences to the contrary. *In re H.G.*, 993 S.W.2d at 213. If more than a scintilla of evidence

exists to support the finding, the challenge fails. *In re L.R.*, 67 S.W.3d at 338. In evaluating the second prong, that is, whether the trial court erred in its application of discretion, we consider whether the trial court acted arbitrarily or unreasonably, or without reference to guiding rules or principles. *Id.*

B. Modification of the Disposition

A juvenile court may modify its prior disposition and order that the juvenile be committed to the Texas Youth Commission if the court finds by a preponderance of the evidence "that the child violated a reasonable and lawful order of the court." Tex. Fam.Code Ann. § 54.05(f) (Vernon 2002).

1. Condition Number One

Appellant first attacks the order modifying the disposition by claiming there is no evidence showing he violated condition one. Condition number one required appellant to "remain and stay" at Bokenkamp.

The State provided no evidence that appellant voluntarily violated condition number one. Ozuna testified appellant did not run away from the facility. Rather, according to Ozuna's testimony, law enforcement authorities transported appellant from Bokenkamp to another location after appellant was unsuccessfully terminated from the program.

The State contends that because appellant was unsuccessfully terminated from the program, he violated subpart (b) of condition one, which states appellant will be returned to the custody of the Juvenile Probation Department upon unsuccessful termination from the program. The State's argument fails because the only condition imposed by number one is that appellant "remain and stay" at Bokenkamp. Subpart (b) is not worded in such a manner as to make successful completion a condition of probation. Rather, the subpart merely explains the result of unsuccessful termination from the program.

We note that condition number twenty-one required appellant to comply with Bokenkamp's rules and regulations. Had the State wanted to pursue modification of the disposition based on appellant's unsuccessful termination from the program, condition number twenty-one would have been the more appropriate vehicle to accomplish that goal. However, the State did not allege or prove, and the trial court did not find, appellant violated condition number twenty-one.

We conclude the State provided no evidence supporting the trial court's finding that appellant violated condition number one. Thus, the trial court did not have sufficient evidence on which to exercise its discretion. *See In re L.R.*, 67 S.W.3d at 338.

2. Condition Number Thirteen

Appellant also contends the evidence was insufficient to support the trial court's finding that he willfully failed to make restitution payments in violation of condition number thirteen. Appellant does not dispute the evidence showed he missed payments as required by the condition. However, he contends the evidence also affirmatively established his inability to pay and the State did not prove his failure to pay was intentional.

We have previously addressed the issue of revocation of juvenile probation for failure to pay court-ordered restitution in *In re M.H.*, 662 S.W.2d 764, 768 (Tex.App. —Corpus Christi 1983, no writ). In that case, we held the inability of a juvenile to pay restitution was an affirmative defense to the revocation of probation and the burden of proof was on the juvenile. *Id.* In reaching this conclusion, we relied on the code of criminal procedure regarding the revocation of probation in adult proceedings for failure to pay restitution. *Id.* (citing Tex.Code Crim. Proc. Ann. art. 42.12 § 8(c) (Vernon Supp.1982)).

Since our decision in *In re M.H.*, the court of criminal appeals has held that under the code of criminal procedure, even though the inability to pay is an affirmative defense, the State still has the burden of proving the failure to pay restitution was intentional. *Stanfield v. State*, 718 S.W.2d 734, 737-38 (Tex.Crim. App.1986). Failure to raise the defense merely allows the State to meet its burden without difficulty. *Id.* at 738. This is so because nonpayment by a person with the ability to pay gives rise to a strong inference that failure to pay was intentional. *Id.* We use the analysis in *Stanfield* as guidance in this case.

The State had the initial burden of proving appellant failed to make the required restitution payments. Through the testimony of Ozuna, the State met its burden.

However, appellant raised his inability to pay through the cross-examination of Ozuna. She testified appellant was not old enough to work. She also stated that he was either at Bokenkamp or the Juvenile Detention Center during the time the missed payments were due. Neither Bokenkamp nor the Juvenile Detention Center had a program giving appellant the opportunity to earn credit toward the payment of restitution. Ozuna also believed appellant had no access to funds and received only inconsistent support from his father. His mother was ill and unemployed.

The State did not provide any evidence contradicting Ozuna's testimony about appellant's inability to pay or showing that his failure to pay was intentional. The trial court did not have legally suffi-

cient evidence on which to exercise its discretion. *See In re L.R.*, 67 S.W.3d at 338.

The evidence supporting the findings that appellant violated conditions one and thirteen of his probation was legally insufficient. Therefore, the trial court abused its discretion in modifying the disposition. We sustain appellant's first issue and reverse the trial court's July 25, 2001 order. We render judgment denying the State's motion to modify the disposition.

VI. INEFFECTIVE ASSISTANCE

1. FAILURE TO ASSERT MENTAL ILLNESS DEFENSE NOT INEFFECTIVE ASSISTANCE

In the Matter of T.T.G., UNPUBLISHED, No. 12-02-00268-CV, 2003 WL 21688120, 2003 Tex.App.Lexis 6263 (Tex.App.—Tyler 7/16/03) *Texas Juvenile Law* 222 (5th Ed. 2000).

Facts: T.T.G. appeals the modification of her probation, following which she was committed to the Texas Youth Commission for an indeterminate period. T.T.G. raises one issue on appeal.

On February 14, 2002, T.T.G. was found to have engaged in delinquent conduct by committing the offenses of theft and assault and was placed on probation with the Wichita County Juvenile Probation Department. On July 29, 2002, the State filed a petition to modify and extend T.T.G.'s disposition, alleging that T.T.G. had violated certain terms of her probation. Specifically, the State alleged in four separate counts that T.T.G. (1) failed to attend school, (2) left Wichita County without court approval, (3) failed to be inside her residence at the designated curfew time, and (4) tampered with or removed her electronic ankle monitor.

On August 8, 2002, a hearing was held on the State's motion. T.T.G. pleaded true to the four allegations in the State's petition. The trial court found that T.T.G. had violated the terms of her probation and ordered that T.T.G. be committed to the Texas Youth Commission for an indeterminate period.

Held: Affirmed.

Opinion Text: In her sole issue, T.T.G. contends that her trial counsel was ineffective. Among the reasons cited by T.T.G. are that her attorney (1) failed to make adequate inquiries into T.T.G.'s documented mental health history and diagnoses by failing to have T.T.G. reevaluated for disposition purposes, (2) failed to call the mental health professionals who had previously evaluated T.T.G. to give expert testimony about appropriate disposition, (3) failed to have T.T.G. evaluated for fitness, and (4) failed to move that the court hold fitness proceedings as provided in the Texas Family Code. [FN1]

> FN1. *See* Tex. Fam.Code Ann. § 55.31 (Vernon 2002).

The proper standard by which to gauge the adequacy of representation by counsel is articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). *See also Hernandez v. State*, 726 S.W.2d 53, 57 (Tex.Crim.App.1986). The test set forth in *Strickland* requires a two-step analysis:

> 1. Did the attorney's performance fail to constitute "reasonably effective assistance," *i.e.*, did the defense attorney's representation fall below an objective standard of reasonableness under prevailing professional norms?
>
> 2. If so, was there a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings could have been different?

See Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. The test in *Strickland* applies to juvenile cases as well. *See, e.g., In the Matter of R.D.B.*, 20 S.W.3d 255, 258 (Tex. App.—Texarkana 2000, no pet.).

A "reasonable probability" was defined by the Supreme Court as a "probability sufficient to undermine confidence in the outcome." *Id.* Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. *See Hernandez*, 726 S.W.2d at 55. The burden is on the appellant to overcome that presumption. *See Burruss v. State*, 20 S.W.3d 179, 186 (Tex. App.—Texarkana 2000, pet. ref'd). The appellant must show specific acts or omissions that constitute ineffective assistance and affirmatively prove that those acts fall below the professional norm for reasonableness. *Id.*

After proving error, the appellant must affirmatively prove prejudice. *Id.* The appellant must prove that his attorney's errors, judged by the totality

of the representation and not by isolated instances of error, denied him a fair trial. *Id.* It is not enough for the appellant to show that the errors had some conceivable effect on the outcome of the proceedings. *Id.* He must show that there is a reasonable probability that, but for his attorney's errors, the jury would have had a reasonable doubt about his guilt. *Id.*

In the case at hand, T.T.G. argues at length as to why certain actions on her trial counsel's behalf fell below the professional norm. However, even assuming arguendo that T.T.G.'s trial counsel's actions, as noted in T.T.G.'s brief, satisfied the first prong of the *Strickland* test, T.T.G. must still affirmatively prove prejudice. *See Burruss,* 20 S.W.3d at 186. It is not enough for the appellant to merely show that the errors had some conceivable effect on the outcome of the proceedings. *Id.*

In her brief, after noting her burden under the second prong of the *Strickland* test, T.T.G. states, "Appellant argues in the case at bar that if Defense counsel had either obtained a more current evaluation of Appellant, at least subpoenaed Dr. Sabine to testify about his prior evaluation and report, or had Appellant evaluated for fitness, a 'reasonable probability' exists that the result would have been different and that disposition would not have been commitment to TYC." Such a conclusory statement is not an adequate means by which T.T.G. can satisfy her burden of proof. Despite repeated readings of T.T.G.'s brief, we can uncover no argument specifically addressing the second prong of the *Strickland* test.

We iterate that the burden of proof as to this issue rests squarely upon T.T.G.. *See Burruss,* 20 S.W.3d at 186. As such, we will neither surmise nor devise our own conclusions absent some cogent argument on T.T.G.'s behalf that but for her counsel's alleged unprofessional errors, there exists a reasonable probability that the result of the proceedings would have been different.

Since T.T.G. has failed to satisfy her burden under *Strickland,* we hold that she was not denied her right to effective assistance of counsel. T.T.G.'s sole issue is overruled and the judgment of the trial court is *affirmed.*

---

2. FAILURE TO SUBPOENA ALIBI WITNESS WAS INEFFECTIVE ASSISTANCE OF COUNSEL

In the Matter of I.R., ___ S.W.3d ____, No. 08-03-00230-CV, 2003 WL 22870805, 2003 Tex.App.Lexis ____ (Tex.App.—El Paso 12/4/03) *Texas Juvenile Law* (5th Ed. 2000).

Facts: I.R. was adjudicated delinquent for committing an assault and was placed on probation until his eighteenth birthday. In his sole issue on appeal, he asserts that his trial counsel was ineffective.

The State's first witness at the adjudication hearing was the fifteen-year-old complainant, Jessie Braun. He testified that on August 4, 2002, he and his older sister were walking down an El Paso street when I.R. and another boy rode up behind them on bikes and began throwing rocks. One of the rocks hit Jessie on the back of his neck. Jessie identified I.R. as the person who threw the rock that hit him. He knew I.R. because they had previously gone to the same school. According to Jessie, I.R. had "beat [him] up" when they were in the sixth grade. Jessie also accused I.R. of saying "sexual things" to his little sister.

On cross-examination, defense counsel established that Jessie was certain about the date of the assault:

> Q: And this is on August the 4th, right?
> A: Yes.
> Q: You sure?
> A: Yes, sir.
> Q: I mean, you sure on August the 4th that [I.R.] was here in town?
> A: Yes.
> Q: Absolutely, right?
> A: Yes.

Counsel also established that Jessie was bigger than I.R. at the time of the hearing. Counsel then engaged in a line of questioning that was apparently intended to make Jessie seem infantile:

> Q: You're coming into court saying this little kid here is picking on you?
> A: Because I've been taught not to hit him. .... Go along, let them hit you, and go tell mom.
> Q: Did you tell your mommy that this happened?
> A: Yes.
> ...
> Q: So you went home. You went running home and you told mom and she called the police?
> A: Yes, and I was on an ambulance, thank you.
> ...
> Q: But you did tell your mommy what happened here, right?
> A: Yes.
> Q: And you're glad you did. And next time you have a problem with one of the kids on

> the street in the playground you're going to call mommy again.

At this point, the prosecutor objected on the ground that counsel was badgering the witness. The objection was sustained. Counsel then concluded by stating: "Pass the witness. Go call mommy." This comment prompted the judge to say "Please."

Jessie's older sister, Denise, corroborated Jessie's account of the assault. She also testified that she remembered I.R. because when he and Jessie went to school together they would "always fight ."

Patrol Officer Michelle Ojeda testified next. She stated that when she arrived on the scene, she observed an injury on the back of Jessie's neck. Ojeda called for medical assistance because Jessie's mother told her that Jessie "had a history of medical conditions." On cross-examination, defense counsel attempted to determine whether Jessie's history of medical conditions included mental problems, but Ojeda did not have any information about that issue.

The State rested at the conclusion of Ojeda's testimony. When asked if he had any witnesses, defense counsel responded, "Well, if Jessie's mom's here I would like to call her. I want to find out whether he has a history of mental problems." Jessie's mother testified that he is on medication for attention deficit hyperactivity disorder.

Defense counsel then called I.R. to the witness stand. I.R. testified that he was fourteen-years-old. He denied that he was involved in the assault. He claimed that on August 4, 2002, he was in Elephant Butte, New Mexico, with his next-door neighbor Roger Hayden and Hayden's son Jacob. At the conclusion of the adjudication hearing, the trial judge found that I.R. engaged in delinquent conduct as alleged in the State's petition.

Thereafter, defense counsel filed a motion for new trial based upon two grounds: (1) "the interest of justice" and (2) "Juvenile's chief defense witness, Roger Hayden was unavailable and unable to attend Court. He will testify as to the actual innocence of the juvenile." An affidavit by Hayden was attached to the motion. The affidavit states that I.R. was with Hayden and his family in Elephant Butte on August 4, 2002.

At the commencement of the hearing on the motion for new trial, defense counsel announced, "My client's mother informed me that Mr. Hayden may have been a material witness. I thought he was going to show on the day of trial, but he didn't, so we ended up issuing a subpoena for him today." Hayden testified that he has known I.R. for all of I.R.'s life and that I.R. does yard work for him. He further testified that from Friday, August 2, 2002, at approximately 4 p.m., to August 4, 2002, at approximately 5:30 p.m., I.R. was with him and his family at Elephant Butte Lake. According to Hayden, there was "no way" that I.R. could have been in El Paso before 5 p .m. on August 4, 2002.

On cross-examination, Hayden testified that I.R.'s mother knew that I.R. was with him on the day in question. He also testified that he was not subpoenaed for the adjudication hearing. The prosecutor did not attempt to impeach Hayden's testimony regarding I .R.'s whereabouts on August 4, 2002.

The trial judge asked Hayden several questions to determine why he did not appear for the adjudication hearing. Hayden testified that he "did not know anything about this [case] until they asked me if I could go see their attorney...." The judge asked, "The mother didn't tell you anything?" and Hayden responded:

> I didn't hear anything at all until I guess it was after the trial and they came back and [I.R.] had said that he was--that he had had this problem on this date and I told him, "How could you have that? You were with us at the lake." And that's when I found out about it.

The defense's only other witness was I.R.'s mother. Defense counsel asked her if she told Hayden about the adjudication hearing. She responded that she was not able to notify him because she does not speak English.

In her closing argument, the prosecutor argued, "[M]aybe the mother should have made more efforts--and I can understand [defense counsel's] position in this case--but, quite frankly, the witness was never notified properly to be here on that day." The judge took the matter under advisement and later signed an order denying the motion for new trial.

At the disposition hearing, defense counsel moved to withdraw as I.R.'s attorney "because of certain issues, ... it would be more appropriate that a different lawyer do the appeal." He also requested that the judge "appoint counsel to pursue an appeal so they may test the Motion for New Trial in addition to any claim of ineffect [sic]." The judge granted the motion to withdraw and appointed new appellate counsel.

Held: Reversed and remanded.

Opinion Text: The Law Governing Ineffective Assistance of Counsel Claims

A two-pronged test governs our review of ineffective assistance of counsel claims. *Thompson v. State,* 9 S.W.3d 808, 812 (Tex.Crim.App.1999).

First, we must determine whether counsel's performance was deficient. *Id.* To establish that counsel's performance was deficient, the defendant must show that the performance fell below an objective standard of reasonableness. *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984); *Thompson,* 9 S.W.3d at 812. Second, we must determine whether counsel's deficient performance prejudiced the defendant. *Thompson,* 9 S.W.3d at 812. To establish prejudice, the defendant must show that there is a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *Thompson,* 9 S.W.3d at 812. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *Thompson,* 9 S.W.3d at 812.

Our review is highly deferential and presumes that counsel's actions fell within a wide range of reasonable professional assistance. *Mallett v. State,* 65 S.W.3d 59, 63 (Tex.Crim.App.2001); *Thompson,* 9 S.W.3d at 813. The defendant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson,* 9 S.W.3d at 813. We look to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel. *Id.* In some cases, a single egregious error may constitute ineffective assistance. *Id.*

An allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id.* For example, the failure to call a witness does not amount to ineffective assistance unless the record shows that the witness was available and would have provided testimony beneficial to the defendant. *Butler v. State,* 716 S.W.2d 48, 55 (Tex. Crim.App.1986). Moreover, when the record is silent as to the motivations underlying counsel's decisions, the defendant usually cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett,* 65 S.W.3d at 63.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

The First Prong: Deficient Performance

I.R. argues that his trial counsel was ineffective in failing to subpoena Hayden to testify at the adjudication hearing. Hayden's testimony at the new-trial hearing establishes that he was available and that his testimony would have been beneficial. *See Butler,* 716 S.W.2d at 55. The record also establishes that the failure to call Hayden as a witness was not a strategic or tactical decision by counsel. At the commencement of the new-trial hearing, counsel admitted, "My client's mother informed me that Mr. Hayden may have been a material witness. I thought he was going to show on the day of trial, but he didn't, so we ended up issuing a subpoena for him today." Apparently recognizing his mistake, counsel moved to withdraw so I.R. could pursue a claim of "ineffect" on appeal.

An attorney has a professional duty to present all available testimony in support of the client's defense. *See State v. Thomas,* 768 S.W.2d 335, 336 (Tex.App.-Houston [14th Dist.] 1989, no pet.). To fulfill this duty, counsel should arrange for the issuance of subpoenas on individuals whom counsel intends to call as witnesses at trial. In determining whether the defense was entitled to a continuance because of a missing witness, one appellate court stated:

> Because a missing witness is a risk inherent in almost every case, the party seeking to present the witness must exercise reasonable diligence to protect against the possibility that a witness will not appear as promised. Taking appropriate measures (i .e., arranging for the timely issuance and service of a subpoena to compel the witness's appearance at trial) is especially critical when the witness is material to the case. Failure to take the necessary steps to secure the attendance of a key witness demonstrates a lack of reasonable diligence.

Rodriguez v. State, 21 S.W.3d 562, 566 (Tex.App.—Houston [14th Dist.] 2000, pet. ref'd). Moreover, a witness's promise to appear for trial is no excuse for failing to subpoena the witness. *Drew v. State,* 743 S.W.2d 207, 228 n. 17 (Tex.Crim.App. 1987). We conclude that counsel was deficient in failing to arrange for the issuance of a subpoena on Hayden.

Furthermore, an attorney has a duty to make an independent investigation of the facts supporting the defense. *Butler,* 716 S.W.2d at 54. This includes the responsibility to seek out and interview potential witnesses. *Id.; Thomas,* 768 S.W.2d at 336-37. Defense counsel acknowledged at the new-trial hearing that I.R.'s mother told him about Hayden. But Hayden's testimony at that hearing reveals that he did not meet defense counsel until after the adjudication hearing. We conclude that counsel was deficient in failing to seek out and interview potential witnesses. [FN2]

> FN2. I.R. also argues that counsel's questioning of Jessie's mother and Officer Ojeda was deficient. This argument is based on information in the pre-disposition report that was prepared after the

> adjudication hearing. The report states that Jessie's mother initially told Officer Ojeda that her children had been assaulted "with several huge rocks thrown by *unknown suspects* " (emphasis added). The report also states that I.R. was taken into custody at school. Because the assault occurred on a Sunday, it can be inferred that I.R. was not taken into custody on the day of the assault. I.R. argues that this information from the pre-disposition report supports his claim that he was not the culprit and that he was not in town when the assault occurred. While it seems likely that a reasonable investigation would have uncovered this information, the record does not disclose counsel's reasons for failing to elicit the information. Therefore, we do not base our determination of deficient performance on this argument. *See Mallett,* 65 S.W.3d at 63.

The Second Prong: Prejudice

The failure to interview or call a witness satisfies the prejudice prong if it results in the failure to advance a viable defense. *See Butler*, 716 S.W.2d at 56; *Shelton v. State*, 841 S.W.2d 526, 526 (Tex.App.-Fort Worth 1992, no pet.); *Thomas*, 768 S.W.2d at 336-37. In *Shelton*, the State's only evidence was the testimony of the sixteen-year-old complaining witness. *See* 841 S.W.2d at 526. At the first trial, defense counsel presented the alibi testimony of the defendant's great niece, whose testimony "so completely contradicted that of the complainant that it would have been impossible for the jury to have believed both witnesses." *Id.* The defendant was convicted, but the conviction was overturned on appeal because of an erroneous venue ruling. *Id.* The attorney who represented the defendant at the first trial also represented him at the second trial. *Id.* At the second trial, however, counsel failed to contact the defendant's great niece to testify. *Id.* The appellate court reversed the conviction again, concluding that counsel's failure to secure the great niece's testimony robbed the defendant of his only viable defense. *Id.*

In *Thomas*, the defendant was convicted of aggravated sexual assault. *See* 768 S.W.2d at 336. He testified at trial, relying on the defense of consent. *See id.* He claimed that the complainant offered him sex in exchange for cocaine. *Id.* At a hearing on a motion for new trial, six witnesses testified that the defendant and the complainant had an ongoing sexual relationship, and one witness testified that the complainant had previously traded sex for drugs. *Id.* at 337. The appellate court affirmed the trial court's decision to grant a new trial based on ineffective assistance of counsel. *Id.* The appellate court held that the evidence at the new-trial hearing established that the defense of consent was not fully advanced because of counsel's failure to interview and call witnesses. *Id.*

The facts of this case are analogous to those of *Shelton* and *Thomas*. The only evidence implicating I.R. was the testimony of the teenage victim and his teenage sister. There was also evidence of bad blood between the victim and I.R., thus giving Jessie and Denise motivation to accuse I.R. I.R.'s testimony raised the defense of alibi, but there was no evidence to corroborate this testimony. Hayden's testimony would not only have corroborated the alibi, but would have completely contradicted the testimony of Jessie and Denise, such that it would have been impossible for the fact finder to have believed both him and Jessie and Denise.

The State suggests that Hayden's testimony would have been merely cumulative of I.R.'s testimony. We disagree. Hayden was relatively disinterested; there was no other disinterested-witness testimony regarding whether I.R. was the culprit. *See Thomas*, 768 S.W.2d at 336 (upholding trial court's finding of ineffective assistance because witnesses who would have corroborated the defendant's testimony on the defense of consent were not called as witnesses); *see also State v. Zapata*, No. 04-00-00238-CR, 2001 WL 80466, at *2 (Tex.App. -San Antonio Jan.31, 2001, no pet.) (not designated for publication) (holding that disinterested-witness testimony that would have supported alibi defense was not cumulative).

The State also argues that I.R. gave two accounts of his whereabouts on the day of the assault and that Hayden's testimony would have only corroborated one of those accounts. According to the State, I.R. first testified that he was at Walmart when the assault occurred. We believe the State has misread the record.

Defense counsel asked I.R. whether Jessie's mother ever confronted him. After I.R. answered affirmatively, the following colloquy occurred:

> Q: Well, what happened?....
> A: She was just like telling me that why did I fight with her son.
> Q: All right. This was about a week later; right?
> A: Yes. Like when they said that this happened that I threw a rock at him, I was coming down from Walmart--
> Q: Let's talk about August 4, 2002. Were you here in El Paso that day?

I.R. responded that he was at Elephant Butte on that day. Thus, I.R. testified that he was returning from Walmart when Jessie's mother accused him of

fighting with her son, but he was at Elephant Butte when the assault occurred.

Finally, the State argues that Hayden's testimony at the new-trial hearing negated any prejudice that might have resulted from counsel's failure to subpoena him for the adjudication hearing. The State notes that the same judge who presided at the new-trial hearing was the fact finder at the adjudication hearing. The State suggests that the judge weighed Hayden's testimony at the new-trial hearing against the testimony at the adjudication hearing and denied the motion for new trial because he found Hayden's testimony not credible. This argument is not supported by the law or the record.

In *Armstrong v. Manzo*, a father was not given notice of proceedings to adopt his child until after the adoption decree was entered. 380 U.S. 545, 546-48, 85 S.Ct. 1187, 1188-89, 14 L.Ed.2d 62 (1965). Upon learning of the adoption, the father promptly filed a motion for new trial. *Id.* at 548, 85 S.Ct. at 1189. The trial court denied the motion. *Id.* at 549, 85 S.Ct. at 1190. This Court affirmed, holding that the failure to notify the father of the adoption proceedings was cured by the hearing on the motion for new trial, when the father had an opportunity to present evidence as to why the adoption should not occur. *Id.* at 549-51, 85 S.Ct. at 1190-91. The U.S. Supreme Court reversed. The Court noted that if the father had been given proper notice, the parties seeking the adoption would have had the burden of proving grounds for the adoption. *Id.* at 551, 85 S.Ct. at 1191. But at the hearing on the motion for new trial, the father had the burden of disproving grounds for the adoption. *Id.*, 85 S.Ct. at 1191. Therefore, the Court held that the father could be accorded due process only by granting his motion for new trial, so that the trial court could "consider the case anew." According to the Court, "Only that would have wiped the slate clean [and][o]nly that would have restored the [father] to the position he would have occupied had due process of law been accorded to him in the first place." *Id.* at 552, 85 S.Ct. at 1191.

Similarly, in this case, the State had the burden at the adjudication hearing to prove I.R.'s delinquency beyond a reasonable doubt. *See* Tex. Fam.Code Ann. § 54.03(f) (Vernon Supp.2004); *see also Hunt v. State*, 779 S.W.2d 926, 927 (Tex.App.-Corpus Christi 1989, pet. ref'd) (holding that the State is required to disprove a defense beyond a reasonable doubt if there is some evidence supporting the defense). At the new-trial hearing, however, I.R. had the burden to prove that he was entitled to a new trial. *See Patrick v. State*, 906 S.W.2d 481, 498 (Tex.Crim.App.1995); *Godoy v. State*, --- S.W.3d ----, ----, 2003 WL 22382616, at *2 (Tex.App.-Houston [1st Dist.] Oct. 16, 2003, no pet. h.).

I.R.'s motion for new trial alleged that Hayden was unavailable at the time of the adjudication hearing and that he would testify to I.R.'s actual innocence. To be entitled to a new trial on this ground, I.R. had to prove: (1) he did not know of Hayden's potential testimony at the time of the adjudication hearing; (2) his failure to discover the potential testimony was not due to a want of due diligence; (3) the testimony would probably bring about a different result in another trial; and (4) the testimony is admissible and not merely cumulative, corroborative, collateral, or impeaching. *See State v. Balderas*, 915 S.W.2d 913, 916 (Tex.App.-Houston [1st Dist.] 1996, no pet.). Both the prosecutor and the trial judge focused on the first two requirements at the new-trial hearing. During cross-examination of Hayden, the prosecutor uncovered that I .R.'s mother knew that I.R. was with Hayden on the day in question and that Hayden was not subpoenaed for the adjudication hearing. Likewise, the judge asked Hayden several questions to determine why he did not appear for the adjudication hearing.

Based on *Armstrong* and the record in this case, we cannot conclude that the failure of counsel to secure Hayden's presence at the adjudication hearing was cured by Hayden's testimony at the new-trial hearing. Instead, we conclude that there is a reasonable probability--*i.e.*, a probability sufficient to undermine our confidence in the outcome--that the result of the adjudication proceeding would have been different if counsel had subpoenaed Hayden.

CONCLUSION

For the reasons stated herein, we sustain I.R.'s sole issue on appeal. The trial court's judgment is reversed, and this cause is remanded for a new trial.

VII. PARENTAL LIABILITY

MOTHER'S FAILURE TO TAKE CHILD TO PLACEMENT FACILITY IS HINDERING APPREHENSION OF DELINQUENT CHILD

Mitz v. State, UNPUBLISHED, No. 13-02-229-CR, 2003 WL 21666624, 2003 Tex.App. Lexis 6200 (Tex.App.—Corpus Christi 7/17/03) *Texas Juvenile Law* 193 (5th Ed. 2000).

Facts: Appellant, Morgan Mitz, brings this appeal following a conviction for hindering apprehension or prosecution. By three points of error, appellant contends: (1) the jury's verdict form was erroneous; (2) the evidence was legally insufficient to support the conviction; and (3) the evidence was factually insufficient to support the conviction.

As this is a memorandum opinion, and the parties are familiar with the facts, we will not recite them here. Tex.R.App. P. 47.4.

Held: Affirmed.

Opinion Text: II. JURY CHARGE

By her first point of error, appellant contends the jury charge was erroneous because the conduct described in the jury verdict form was not defined as an offense under section 38.05(a) of the Texas Penal Code. *See* Tex. Pen.Code Ann. § 38.05(a) (Vernon 2003).

A. Standard of Review

When we review alleged charge error, we determine: (1) whether error actually exists in the charge; and (2) whether any resulting harm requires reversal. *Castanedav. State*, 28 S.W.3d 685, 694 (Tex.App.—Corpus Christi 2000, no pet.); *see Mann v. State*, 964 S.W.2d 639, 641 (Tex.Crim.App.1998). If we conclude there is jury charge error, we must determine if the error caused sufficient harm to warrant reversal. *See Ovalle v. State*, 13 S.W.3d 774, 786 (Tex. Crim.App.2000). The extent of harm requiring reversal is dictated by whether the error was preserved. *See id.; Escobar v. State*, 28 S.W.3d 767, 777 (Tex. App.—Corpus Christi 2000, pet. ref'd). If the error in the charge was the subject of a timely objection, reversal is required if the error was calculated to injure the rights of the defendant, or in other words, whether there was "some harm." *Trevino v. State*, 100 S.W.3d 232, 242 (Tex.Crim.App.2003); *Escobar*, 28 S.W.3d at 777. On the other hand, if the error was not properly objected to, we may reverse only if the record shows that the error was so egregiously harmful that the defendant was denied a fair and impartial trial. *See Ovalle*, 13 S.W.3d at 786; *Escobar*, 28 S.W.3d at 777.

B. Analysis

Section 38.05 of the Texas Penal Code provides the following for hindering apprehension or prosecution of juveniles:

> (a) A person commits an offense if, with intent to hinder the arrest, detention, adjudication, or disposition of a child for engaging in the delinquent conduct that violates a penal law of the grade of felony, he: (1) harbors or conceals the other, (2) provides or aids in providing the other with any means of avoiding arrest or effecting escape, or (3) warns the other of impending discovery or apprehension.

Tex. Pen.Code Ann. § 38.05(a). Paragraph four of the jury charge in this case read as follows:

Now, if you find from the evidence beyond a reasonable doubt that on or about the 20th day of April, 2001, in Aransas County, Texas, the [appellant] ... did then and there, with the intent to hinder the disposition of G.A.M. for engaging in delinquent conduct that violates a penal law for the grade of felony, namely, Burglary of a Habitation, intentionally or knowingly harbored or concealed the said G.A.M., then you will find [appellant] guilty as charged in the indictment.

In addition, the jury's verdict form states, "We, the jury, find the defendant, [appellant], guilty of hindering apprehension or prosecution as charged in the indictment."

Appellant contends the conduct described in the jury verdict form, hindering apprehension or prosecution, is not defined as an offense under section 38.05(a) of the Texas Penal Code. This argument is without merit. The verdict form includes the title of the pertinent section of the penal code as charged in the indictment. Also, the charge to the jury correctly tracks the penal code. *See id.* There is nothing in the record to support a finding of error in the jury charge. Appellant's first point of error is overruled.

III. LEGAL AND FACTUAL SUFFICIENCY

By her second and third points of error, appellant contends the evidence is legally and factually insufficient to support a conviction.

A. Standard of Review

When reviewing the legal sufficiency of the evidence, we look at all the evidence in the light most favorable to the verdict to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Johnson v. State*, 23 S.W.3d 1, 7 (Tex.Crim.App. 2000). Any inconsistencies in the evidence should be resolved in favor of the verdict. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim.App.1988).

In reviewing factual sufficiency, we examine all of the evidence impartially and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson*, 23 S.W.3d at 7. A clearly wrong and unjust verdict is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Rojas v. State*, 986 S.W.2d 241, 247 (Tex.Crim.App.1998). We reverse a judgment of conviction only if the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by the contrary proof. *Swearingen v. State*, 101 S.W.3d 89, 97 (Tex.Crim .App.2003); *see Johnson*, 23 S.W.3d at 11. This Court must give due deference to the fact finder's determinations concerning the weight and credibility of the evidence. *Swearingen*, 101 S.W.3d at 97; *see Johnson*, 23 S.W.3d at 11.

B. Analysis

Appellant was convicted of hindering apprehension or prosecution. Again, section 38.05(a) of the Texas Penal Code provides that it is an offense to hinder the disposition of a child by harboring or concealing the child. *See* Tex. Pen.Code Ann. § 38.05(a).

Testimony at trial revealed that appellant and her son, G.A.M., attended a modification hearing on his disposition. At the hearing, the juvenile court judge required G.A.M. to voluntarily admit himself to the High Frontier Residential Treatment Center, located in Fort Davis, Texas, no later than April 20, 2001. Appellant was granted permission to transport G.A.M. to the treatment facility. However, appellant never transported her son to the facility despite the clear instructions to do so. Instead appellant, G.A.M., and a female friend fled to Louisiana, Arkansas, and eventually Florida. Testimony as to why they fled is inconsistent. Appellant did testify, however, that she never called the authorities to explain.

Viewing the evidence in the light most favorable to the verdict, a rational jury could have found beyond a reasonable doubt that appellant hindered the disposition of G.A.M. by harboring or concealing him from the treatment center. *Jackson*, 443 U.S. at 319. Although there were some inconsistencies in the testimony, these should be resolved in favor of the verdict because the jury is the ultimate fact-finder. *Moreno*, 755 S.W.2d at 867. Thus, we find that the testimony by all of the witnesses is legally sufficient to support a conviction. *Jackson*, 443 U.S. at 319.

Moreover, viewing all of the evidence impartially shows the verdict is not contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson*, 23 S.W.3d at 7. We find the testimony at trial was factually sufficient to support the conviction. Appellant's second and third points of error are overruled.

V. Conclusion

Accordingly, we affirm the judgment of the trial court.

VIII. CHAPTER 55

JUVENILE COURT WAS NOT REQUIRED TO INITIATE FITNESS INQUIRY WITHOUT MOTION; EVIDENCE SUFFICIENT TO SUPPORT REMOVAL FROM HOME

In the Matter of J.K.N., 115 S.W.3d 166 (Tex.App.—Fort Worth 8/14/03) *Texas Juvenile Law* 235 (5th Ed. 2000).

Facts: Based upon a stipulation of evidence demonstrating J.K.N.'s unauthorized use of a motor vehicle, the juvenile court adjudicated Appellant J.K.N. delinquent and committed him to an indeterminate sentence in the Texas Youth Commission (TYC). In three points, J.K.N. complains that: the trial court erred by failing to order a psychiatric examination to determine his fitness to proceed; the evidence is insufficient to support the findings required for disposition and commitment to TYC; and the judgment and order of commitment are fundamentally defective.

On July 9, 2002, the State filed its third amended petition alleging that J.K.N. had engaged in delinquent conduct by (1) knowingly, and with the

intent to deceive, making a false statement to a law enforcement officer conducting a criminal investigation; (2) intentionally or knowingly damaging or destroying the interior walls and furniture of a residence by hitting, smashing, and/or kicking them; (3) unlawfully appropriating a motor vehicle with intent to deprive the owner of the property; and (4) operating a motor vehicle without the effective consent of the owner. J.K.N. waived his right to a jury trial in writing and consented to the stipulation of evidence and introduction of testimony by oral stipulation, affidavits, written witness statements, and other documentary evidence.

A combined adjudication and disposition hearing was conducted on July 18, 2002. At the outset, the State waived the auto theft allegation set forth in paragraph three of its petition and chose to proceed only on paragraphs one, two, and four. After setting forth the evidence for stipulation on each of the three paragraphs, J.K.N. informed his attorney that he wished to stipulate only to paragraph four, unauthorized use of a motor vehicle. After conferring with J.K.N. and his attorney, the State agreed to J.K.N.'s stipulation and dropped the allegations contained in paragraphs one and two. The juvenile court adjudicated J.K.N. delinquent based upon his stipulation to paragraph four- unauthorized use of a motor vehicle. Moving immediately into a disposition hearing, the juvenile court heard evidence and argument and ultimately committed J.K.N. to "the care, custody and control of the Texas Youth Commission ... for an indeterminate period of time not to exceed the time when he shall be 21 years of age or until duly discharged...."

Held: Affirmed as modified.

Opinion Text: FITNESS TO PROCEED

In his first point, J.K.N. contends that the trial court erred by failing to sua sponte order a psychiatric examination to determine his mental competence and fitness to proceed. We find no error and overrule J.K.N.'s point.

The family code provides a framework for determinations of mental illness and fitness to proceed within the juvenile justice system. Section 55.31 provides in part that:

> (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 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.
>
> (b) *On a motion by a party,* the juvenile court shall determine whether probable cause exists to believe that a child who is alleged by petition or who is found to have engaged in delinquent conduct or conduct indicating a need for supervision is unfit to proceed as a result of mental illness or mental retardation.

Tex. Fam.Code Ann. § 55.31(a)-(b) (Vernon 2002) (emphasis added). If the court finds probable cause to believe that the child is unfit to proceed, then the court shall temporarily stay the juvenile proceedings and immediately order the child to be examined. *Id.*

J.K.N. concedes that the motion contemplated by section 55.31 was never made in this case. And, although a juvenile court has the power to order a physical or mental examination on its own motion at any stage of juvenile proceedings, it is not statutorily required to do so. *Id.* § 51.20; *accord In re E.M.R.*, 55 S.W.3d 712, 719 (Tex.App.-Corpus Christi 2001, no pet.) (refusing to impose on trial court duty of holding sua sponte hearing on child's fitness to proceed in absence of statutory mandate). Consequently, here, the juvenile court was not statutorily required to make any determination regarding J.K.N.'s fitness to proceed.

Nonetheless, J.K.N. argues that due process considerations require the court to have a juvenile examined on its own motion "where there is such blatant and extensive evidence of mental illness raised."

Although a juvenile delinquency trial is a civil proceeding, it is quasi-criminal in nature. *Smith v. Rankin*, 661 S.W.2d 152, 153 (Tex.App.-Houston [1st Dist.] 1983, orig. proceeding). Accordingly, a child under our juvenile justice system is afforded the basic constitutional protections of an adult. *In re J.E.H.*, 972 S.W.2d 928, 929 (Tex.App.—Beaumont 1998, pet. denied); *In re D.S.*, 921 S.W.2d 383, 386 (Tex.App.—Corpus Christi 1996, writ dism'd w.o.j.). As the court of criminal appeals recently explained in *McDaniel v. State*,

> In both Texas and the federal system, "[i]t has long been accepted that a person whose mental condition is such that he *lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense* may not be subjected to a trial." The conviction of an accused person while he is legally incompetent violates due process. Thus, to protect a criminal defendant's constitutional

> rights, a trial court must inquire into the accused's mental competence once the issue is sufficiently raised.

98 S.W.3d 704, 709-10 (Tex.Crim.App.2003) (emphasis added) (citations omitted).

Accordingly, we will examine the record to see whether evidence exists that the trial court should have reasonably concluded that, as a result of mental illness, J.K.N. lacked the capacity to understand the proceedings, to consult with counsel, or to assist in his own defense, so that the court's failure to order a psychiatric examination violated J.K.N.'s due process rights. *See In re K.A.H .,* 700 S.W.2d 782, 784 (Tex.App.—Fort Worth 1985, no writ).

For purposes of the juvenile justice code, a "mental illness" is defined as "an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency" that "substantially impairs a person's thought, perception of reality, emotional process, or judgment" or "grossly impairs behavior as demonstrated by recent disturbed behavior." Tex. Health & Safety Code Ann. § 571.003(14) (Vernon 2003); *see also* Tex. Fam.Code Ann. § 55.01 (Vernon 2002).

An examination of the record does reveal some evidence that J.K.N. suffers from "mental illness." It is undisputed that J.K.N. was referred to and spent about a week at Millwood, a facility that treats mental and psychiatric problems. Curtis Thompson, J.K.N.'s probation officer, explained that J.K.N. was transferred from the juvenile detention facility to Millwood for psychological evaluation due to "suicidal ideations, report of hallucinations, as well as threatening behavior to staff" while in detention. Thompson also indicated that J.K.N. was on the MHMR caseload for people with emotional and/or psychiatric problems and agreed that J.K.N.'s problems "at times ... presented as severe." He stated that J .K.N. "clearly has some psychiatric needs.... However, ... these needs can be addressed at TYC."

Thompson's testimony certainly indicates that J.K.N. is a troubled child with psychiatric needs. However, taken in context, the evidence does not indicate that J.K.N.'s problems rise to the level of a mental illness rendering him unfit to proceed with the adjudication and disposition of the delinquency charges brought in this case. In fact, the record as a whole clearly reflects that, in spite of his psychiatric needs, J.K.N. understood the nature of the proceedings and was able to consult with counsel and to assist in his own defense.

At the adjudication hearing, J.K.N. indicated to the court that he had reviewed the alleged offenses with his attorney and understood the range of possible punishments available to the court if he were adjudicated delinquent. He said he understood his right to have the State bring witnesses forward to testify and to be cross-examined by him, and that agreeing to stipulate to the evidence would waive those rights. J.K.N. and his attorney then had the following exchange in open court:

> MR. YOUNG: [J.K.N.], I've talked to you several times since this matter has been pending in Juvenile Court, have I not?
>
> [J.K.N.]: Yes, sir.
>
> MR. YOUNG: And I told you that in the petition, you're charged with essentially giving a false report to the police, criminal mischief; that is, damage to property, and either theft or unauthorized use of a motor vehicle.
>
> Do you understand that?
>
> [J.K.N.]: Yes, sir.
>
> MR. YOUNG: And I talked to you today about stipulating to the false report to the police officer, causing the property damage to the house, and in regard to the car, not theft, but unauthorized use of a motor vehicle?
>
> [J.K.N.]: Yes, sir.
>
> MR. YOUNG: And you understand that's why we are here today?
>
> [J.K.N.]: Uh-huh.
>
> MR. YOUNG: And you also understand we have an absolute right to a trial if we want to. In other words, we can make the State call witnesses and make the State prove its case, okay? Or we can agree to what the witnesses would testify; that is, stipulate to what the witnesses would testify if they were called to testify and if they took the stand.
>
> Do you understand that?
>
> [J.K.N.]: Yes, sir.
>
> THE COURT: And I know that you came from Millwood this morning, is that correct?
>
> [J.K.N.]: Yes.
>
> MR. YOUNG: And you've recently arrived here at Juvenile Court from Millwood approximately 30 minutes ago, is that correct?
>
> [J.K.N.]: Yes, sir.
>
> MR. YOUNG: And you still understand everything that's going on and you have a clear understanding of everything that I've explained to you?
>
> [J.K.N.]: Yes, sir.
>
> MR. YOUNG: And do you still want to testify, or I mean, do you want a trial or do you want to stipulate?
>
> [J.K.N.]: Stipulate.
>
> ....

MR. YOUNG: And you understand that at the end of this hearing, if the Judge finds you engaged in delinquent conduct, he may assess punishment. That is, we may move to a disposition phase.

Do you understand that?

[J.K.N.]: Yes, sir.

MR. YOUNG: And I have told you, have I not, that although I'm not going to ask for it, there is a possibility that the Judge can and has the option of disposing of the case by committing you to TYC for an indeterminate amount of time.

Do you understand that?

[J.K.N.]: Yes, sir.

THE COURT: And I've been very up-front in letting you know that's a possible, very possible, consequence out of this case, have I not?

[J.K.N.]: Yes, sir.

THE COURT: Okay, and now do you still want to proceed with the stipulation?

[J.K.N.]: Yes, sir.

MR. YOUNG: Okay, and do you feel like you're in your right mind to make this decision?

[J.K.N.]: Yes, sir.

As illustrated, the record clearly shows that J.K.N. expressed his understanding of the delinquent conduct alleged, the consequences of being adjudicated delinquent, and the effect of stipulating to evidence rather than requiring live witness testimony on the allegations. J.K.N. also indicated that his recent stay at the Millwood mental treatment center did not adversely affect his understanding of the proceedings. In addition to demonstrating his understanding of the proceedings, J.K.N. actively participated in his own defense. Following the State's presentation of stipulated evidence on paragraphs one, two and four, J.K.N. conferred with his attorney and decided that he was only willing to stipulate to paragraph four, unauthorized use of a motor vehicle.

After examining the record, we conclude that the juvenile court's failure to order a psychiatric examination of J.K.N. on its own motion was not a violation of due process. *Accord E.M.R.*, 55 S.W.3d at 719 (holding sua sponte hearing on juvenile's mental competency not required even though juvenile's special education teacher testified that he read at a second grade level and physician testified that juvenile had impulse-control problems, attention deficit hyperactivity disorder, and was bipolar). Accordingly, we hold that the trial court did not err by failing to sua sponte order an examination of J.K.N.'s mental state. J.K.N.'s first point is overruled.

SUFFICIENCY OF THE EVIDENCE

In his second point, J.K.N. complains that the evidence is insufficient to sustain the findings required for a proper disposition of his case. We disagree and overrule J.K.N.'s second point.

First, J.K.N. argues that the evidence shows that he is in need of treatment for mental illness, not rehabilitation; therefore, no disposition can be made under section 54.04 of the family code. Section 54.04 provides in part that "No disposition may be made ... unless the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." Tex. Fam.Code Ann. § 54.04(c).

The juvenile court specifically found in the order of commitment that J.K.N. "is in need of rehabilitation and that the protection of the public and the child requires that disposition be made." These findings are supported by the evidence. J.K.N.'s social history, which was reviewed by the juvenile court prior to committing J.K.N. to TYC, reflects that J.K.N. has had numerous previous offenses, including: possession of marijuana; unauthorized use of a motor vehicle; forgery; possession of a volatile chemical--gasoline; and terroristic threat. The social history also reveals that J.K.N. has received in-patient drug treatment on multiple occasions, as well as mental health treatment. J.K.N. was unsuccessfully discharged from one of these in- patient programs "due to his behavior and for reportedly assaulting a teacher."

In addition to the social history report, Probation Officer Thompson testified that:

> Prior to coming to us, [J.K.N.]'s been with our Traditional Probation, he's been with our Intensive Supervision Probation plan. He's also been in our Post program as well as been on our Electronic Monitor system.
>
> [J.K.N.] basically has *exhausted all the resources we have.* I've met with the JPD Resource Staffing Committee twice within the last couple of weeks, and they don't feel that there is any other placement options for [J.K.N.] other than TYC at this point.
>
> [J.K.N.] clearly has some psychiatric needs that we need to get him to be cognizant of. However, they felt that these *needs can be addressed at TYC.* [J.K.N.]'s behavior of late in the last three months has been *spiraling out of control.* He's had a number of referrals. These incidents make about ten referrals to JPD, so *we have concerns about [his] behavior out in the community and the safety of the community.*

> [J.K.N.] has made some progress while on our caseload. He completed a successful school year in an alternative education program and has complied with some of the behavioral management requests that we had. However, again, his behavior and criminal activity has seemed to spiral, become more frequent and more severe, so at this time, we feel, from JPD's standpoint, we don't have any other resources we can offer [him]. [Emphasis added.]

Finally, Thompson offered his opinion that:

> any program that would be appropriate for [J.K.N.] would include attention to the psychiatric needs, but also would provide a structured, secure environment for [him] that would protect him as well as the people around him, but that would also allow him to pursue academic activities and building skills, so a program such as TYC certainly offers that.

The above evidence shows that, in addition to a structured environment conducive to rehabilitation, TYC also offers appropriate treatment for J.K.N.'s psychiatric needs. In light of this evidence, we hold that the court's findings that J.K.N. needs rehabilitation and that J.K.N. and the public require protection from his destructive behavior are both supported by the evidence and justify J.K.N.'s commitment to TYC.

J.K.N. next complains that the juvenile court's "routine rendition" of the three specific findings required by section 54.04(i) lack stated reasons and are unsupported by the evidence. Section 54.04(i) reads in part:

> (i) If the court places the child on probation outside the child's home or commits the child to the Texas Youth Commission, the court:
>
> (1) shall include in its order its determination that:
>
> (A) it is in the child's best interests to be placed outside the child's home;
>
> (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

Tex. Fam.Code Ann. § 54.04(i).

The order of commitment issued by the juvenile court specifically states:

> The Court finds it is in the child's best interest to be placed outside the child's home. The court also finds that reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home and the child, in the child's home cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation.

We conclude that the evidence contained in the record and already discussed herein is more than sufficient to support each of the findings required by 54.04(i). J.K.N.'s social history evidences his repeated problematic and criminal behavior. Probation Officer Thompson testified to the varied forms of treatment and probation attempted with J.K.N. and concluded that J.K.N. had exhausted these options. Clearly, numerous attempts have been made to cope with J.K.N.'s behavior without resorting to commitment to TYC. Unfortunately, J.K.N. continues to exhibit delinquent and criminal behavior in spite of the measures taken to conform his conduct to the law. Considering the efforts already made, the avenues exhausted, and the concerns regarding J.K.N.'s threatening and suicidal behavior, we hold that the juvenile court had sufficient evidence before it to support a commitment to TYC in compliance with section 54.04(i).

Finally, J.K.N. contends that "[t]he specific reasons for the Court's findings are nowhere stated in the order," which violates section 54.04(f)'s mandate that "[t]he court shall state specifically in the order its reasons for the disposition...." Tex. Fam.Code Ann. § 54.04(f).

J.K.N.'s assertion in this regard is simply not accurate. After making the necessary findings listed under section 54.04(i), the order of commitment goes on to state:

> It further appears to the Court that the best interest of the child and the best interest of society will be served by committing him to the care, custody and control of the Texas Youth Commission, for the following reasons:
>
> (1) There are no facilities, services or programs available which would meet the needs of the child;
>
> (2) The Court finds that the educational needs of the child can be met by the Texas Youth Commission;

> (3) The child has been found by the COURT to have violated Section ... 31.07(FEL) of the Texas Penal Code, on or about ... JUNE 20, 2002, and was adjudicated delinquent on JULY 18, 2002.

In addition to the above listed reasons, the order of commitment stated that J.K.N. had been previously adjudicated delinquent for four misdemeanor offenses and one felony offense since September 6, 2000.

Because the juvenile court's order of commitment contains all of the findings and reasons required by section 54.04, subsections (c), (i), and (f), and because we conclude that all such findings and reasons are supported by sufficient evidence, we overrule J.K.N.'s second point.

JUDGMENT AND ORDER OF COMMITMENT

In his third point, J.K.N. complains that the judgment and order of commitment are fundamentally defective. Specifically, J.K.N. complains that the judgment reflects an impossible date of birth-July 3, 2002, and that both the judgment and order of commitment incorrectly state that J.K.N. was adjudicated delinquent based upon paragraphs one, two and four of the State's petition, rather than just on paragraph four-unauthorized use of a motor vehicle.

The judgment of delinquency reads in pertinent part:

> [T]he Court after hearing the pleading of all the parties and after hearing the evidence and argument of counsel, finds beyond a reasonable doubt that the allegations in Paragraph(s), ONE, TWO, and FOUR, of the petition filed herein are true and supported by the evidence.
>
> The Court finds that on this the 18th day of JULY 2002, said child was adjudicated in Paragraph(s) ONE, TWO, and FOUR of the petition for the offense(s) of FALSE REPORT TO PEACE OFFICER OR LAW ENFORCEMENT EMPLOYEE, Section(s) 37.08, which is a MISDEMEANOR, CRIMINAL MISCHIEF, Section(s) 28.03, which is a MISDEMEANOR, and UNAUTHORIZED USE OF MOTOR VEHICLE, Section(s) 31.07, which is a FELONY, and the dates of offenses were MAY 6, 2002 and JUNE 20, 2002.
>
> The Court also finds that the said child was born JULY 3, 2002 .

The order of commitment reads, in relevant part:

> (3) The child has been found by the COURT to have violated Section(s) 37.08 (MISD), 28.03(MISD), and 31.07(FEL) of the Texas Penal Code, on or about MAY 6, 2002 and JUNE 20, 2002, and was adjudicated delinquent on JULY 18, 2002.

This court is authorized to modify the juvenile court's judgment. *See* Tex.R.App. P. 43.2(b); *see also Asberry v. State*, 813 S.W.2d 526, 531 (Tex.App.—Dallas 1991, pet. ref'd) (holding an appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source); *accord French v. State,* 830 S.W.2d 607, 609 (Tex.Crim.App.1992). Here, modification of the judgment of delinquency and order of commitment is necessary so that the record accurately reflects the outcome of J.K.N.'s juvenile adjudication. Accordingly, we modify the juvenile court's judgment of delinquency and order of commitment as follows:

> (1) the statement in the first quoted paragraph of the judgment of delinquency shall be modified to read: "the allegation in Paragraph FOUR of the petition filed herein is true and supported by the evidence";
>
> (2) the statement in the second quoted paragraph of the judgment of delinquency shall be modified to read: "said child was adjudicated in Paragraph FOUR of the petition for the offense of UNAUTHORIZED USE OF MOTOR VEHICLE, Section 31.07, which is a FELONY, and the date of offense was JUNE 20, 2002";
>
> (3) the statement in the order of commitment shall be modified to read that J.K.N.: "has been found by the COURT to have violated Section 31.07(FEL) of the Texas Penal Code, on or about JUNE 20, 2002"; and
>
> (4) the statement in the judgment of delinquency regarding J.K.N.'s birth date shall be modified to read: "the said child was born JULY 3, 1985."

CONCLUSION

We overrule J.K.N.'s first and second points, modify the judgment of delinquency and order of commitment as set forth in section V above, and, as modified, affirm the judgment of the juvenile court committing J.K.N. to the Texas Youth Commission for an indeterminate sentence.

IX. APPEALS

1. APPEAL CHALLENGING 30 DAY CONFINEMENT AS PROBATION CONDITION MOOT BECAUSE TERM ALREADY SERVED

In the Matter of J.P.D., UNPUBLISHED, No. 03-02-00425-CV, 2003 WL 1922466, 2003 Tex.App. Lexis 3466 (Tex.App.—Austin 4/24/03) *Texas Juvenile Law* 326 (5th Ed. 2000).

Facts: Appellant J.P.D., a juvenile, appeals the juvenile court's disposition order, placing him on probation for one year in the custody of his parents and as a condition of probation ordering him to voluntarily commit himself to a juvenile facility in Killeen. Because J.P.D. has completed his thirty-day confinement—the only condition of his probation that he complains about on appeal—his issue has become moot. We will therefore dismiss his appeal as moot.

J.P.D. pleaded true to the offense of criminal mischief resulting in damage of at least $1,500 but less than $20,000. [FN1] There was no plea agreement between the State and J.P.D. During the disposition hearing, the juvenile court considered J.P.D.'s social history and testimony from his mother. In sum, the juvenile court heard that J.P.D. had never been in trouble before, was a good student, had no history of alcohol or drug problems, was an only child of two supportive parents, and had complied with temporary pre-court monitoring conditions. At the conclusion of the hearing, the juvenile court placed J.P.D. on one-year probation "in the custody of his parents" and as a condition of probation, ordered J.P.D. to voluntarily commit himself "at CSC Long Term, Killeen, TX for 30 days." The juvenile court made no findings that J.P.D. could not be provided the quality of care and level of support and supervision necessary to meet the conditions of probation in his home. *See* Tex. Fam.Code Ann. § 54.04(c) (West 2002). On appeal, J.P.D. does not challenge the court's adjudication judgment. He challenges only the condition of probation that requires him to commit himself to the CSC facility. He, however, has already completed his 30 days at the facility.

> FN1. J.P.D. confessed to scratching into the paint of his high school principal's car a racial epithet and the letters "KKK" as well as damaging the principal's mailbox.

Held: Appeal dismissed as moot.

Opinion Text: Because J.P.D. concedes in his appellate brief that he has already completed his 30-day confinement in the juvenile facility, we must first address whether his issue on appeal is now moot. In general, a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980); *Powell v. McCormack*, 395 U.S. 486, 496 (1969)) (internal quotations omitted). Under this general rule, it is evident that once J.P.D. completed his 30-day commitment in the juvenile facility, his claim that the juvenile court erred in imposing such a condition to his probation was moot. The issue is no longer live because there is no decision that this Court could render regarding the juvenile court's decision that would have any effect. *Id.* at 481-82; *Bennet v. State*, 818 S.W.2d 199, 200 (Tex.App.—Houston [14th Dist.] 1991, no pet.).

J.P.D. maintains that his issue falls within the two exceptions to the mootness doctrine: (1) capable of repetition yet evading review and (2) collateral consequences. *General Land Office v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex.1990). The "capable of repetition yet evading review" exception applies when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). In other words, to satisfy the *Weinstein* test, J.P.D. would have to show that there is a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same parties. *Murphy*, 455 U .S. at 482. A mere theoretical possibility is not sufficient to satisfy the test. *Id.* Although J.P.D. argues that his 30-day confinement was such a short duration that it could not be fully litigated prior to its expiration, on this record, J.P.D. has not demonstrated that there is a reasonable expectation that he would be subjected to the same action again. Indeed, it appears from the record that J.P.D. is now seventeen years old. While it is possible that J.P.D. might have to appear before the juvenile court again before his eighteenth birthday, he has not shown that this possibility rises to the level of a reasonable expectation or a demonstrated probability. He thus has failed to prove that he falls within the "capable of

repetition yet evading review" exception to the mootness doctrine.

The collateral consequences exception pertains to severely prejudicial events, the effects of which continue to stigmatize helpless or hated individuals long after the unconstitutional judgment has ceased to operate. *State v. Lodge,* 608 S.W.2d 910, 912 (Tex.1980); *Spring Branch I.S.D. v. Reynolds,* 764 S.W.2d 16, 19 (Tex.App.—Houston [1st Dist.] 1988, no writ). J.P.D. cites *Carrillo v. State,* 480 S.W.2d 612 (Tex.1972), for support in arguing that his appeal falls within the collateral consequences exception to the mootness doctrine. In *Carrillo,* the juvenile had served his sentence and was discharged from probation while his case was on appeal. The supreme court held that Carrillo's case was nevertheless not moot because "a minor should have the right to clear himself by appeal" and this right should not disappear when the sentence given is so short that it expires before the appellate process is completed. *Id.* at 617. The court further noted that adjudications carry "deleterious collateral effects and legal consequences in addition to any stigma attached to being adjudged a juvenile delinquent." *Id.* The court, therefore, concluded that Carrillo's appeal fell within the collateral consequences exception to the mootness doctrine. *Id.*

A significant distinction between *Carrillo* and this case is that J.P.D. has not appealed his adjudication. Indeed, he pleaded true to the allegations against him. Thus, any collateral consequences associated with his adjudication would not be affected were we to conclude that the juvenile court erred in assessing punishment. Moreover, we cannot say that J.P.D.'s sentence carries collateral consequences that are any different or more deleterious than those flowing from his adjudication as a delinquent. Thus, we conclude that J.P.D.'s appeal of the disposition order does not fall within the collateral consequences exception to the mootness doctrine.

Ordinarily, when a case becomes moot, the appellate court must dismiss the cause, not just the appeal. *City of Garland v. Louton,* 691 S.W.2d 603, 605 (Tex.1985). In this appeal, however, we are not presented with the issue of whether the entire cause is moot. Rather, we conclude that the single issue presented by the appellant is moot. Therefore, we dismiss this appeal as moot.

Having concluded that J.P.D.'s appeal of the juvenile court's disposition order is moot because he has completed his 30-day confinement and the appeal does not fall under either of the two exceptions to the mootness doctrine, we dismiss this appeal as moot.

Dismissed as Moot.

---

2. STATE MAY NOT APPEAL FROM ORDER SUPPRESSING EVIDENCE

In the Matter of F.C., 108 S.W.3d 384 (Tex.App.—Tyler 4/30/03) *Texas Juvenile Law* 328 (5th Ed. 2000).

Facts: In one issue, the State of Texas appeals the trial court's suppression of evidence relating to F.C.'s charge of evading detention

On August 22, 2001, the State filed an "Original Petition Alleging Delinquent Conduct" against F.C., contending that on or about August 1, F.C. "did then and there, intentionally flee from Chris Callas, a person the defendant knew was a peace officer who was attempting lawfully to arrest the defendant." On October 16, F.C. filed a motion to suppress the evidence of his arrest because the arrest was 1) without any reasonable suspicion that he engaged in criminal activity, 2) not pursuant to a reasonable investigative detention, 3) not pursuant to an arrest warrant, 4) absent exigent circumstances, and 5) without probable cause to believe he was engaged in criminal activity.

On November 7, the State amended its original petition, alleging that F.C. "did then and there, intentionally flee from Chris Callas, a person the defendant knew was a peace officer who was attempting lawfully to detain the defendant." The amended petition changed the offense from evading arrest to evading detention, in violation of section 38.04 of the Texas Penal Code. [FN1]

> FN1. Section 38.04 of the Texas Penal Code makes it a Class B misdemeanor to "intentionally flee from a person he knows is a peace officer attempting lawfully to arrest or detain him." Tex. Penal Code Ann. § 38.04 (Vernon 2003).

That same day, the trial court heard F.C.'s motion to suppress and at the conclusion of the hearing, the trial court took the matter under advisement. On October 30, 2002, the trial court granted F.C.'s motion to suppress. In one issue, the State appeals the trial court's order suppressing F.C.'s arrest and contends that because the officers had "reasonable suspicion" to detain F.C., the evidence of his arrest should not have been suppressed.

Held: Appealed dismissed for want of jurisdiction.

Opinion Text: The State has the right to appeal certain orders in criminal cases, including a trial court's grant of a motion to suppress evidence. *See* Tex. Crim. Proc.Code Ann. art. 44.01(a)(5) (Vernon Supp.2003). However, juvenile cases, although

quasi-criminal in nature, are civil proceedings that are governed by the Texas Family Code and not the Texas Code of Criminal Procedure. The right to appeal in a juvenile case rests solely with the child, leaving the State without any statutory or common-law authority to appeal from an adverse ruling in such a case. *See* Tex. Fam.Code Ann. § 56.01 (Vernon 2002); *see also C.L.B. v. State*, 567 S.W.2d 795, 796 (Tex.1978); *In the Matter of S.N.*, 95 S.W.3d 535, 537 (Tex.App.—Houston [1st Dist.] 2003, pet. filed). Therefore, the State lacks standing to bring this appeal. *Id.*

We *dismiss* this appeal for want of jurisdiction.

IX. ATTORNEY GENERAL

1. LOCAL GOVERNMENT MAY BROADCAST INFORMATION ABOUT REGISTERED SEX OFFENDERS ON LOCAL CABLE CHANNEL

Attorney General Opinion No. GA-0056, 2003 WL 1849299, 2003 Tex.AG Lexis 3060 (4/7/03) *Texas Juvenile Law* 201 (5th Ed. 2000).

Re: Whether a local government may broadcast information about registered sex offenders on a local cable television channel (RQ-0623-JC)

The Honorable Joe Crabb, Chair
Committee on Redistricting
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Dear Representative Crabb:

Your predecessor as Chair of the House Committee on Redistricting asked whether a local government may broadcast information about registered sex offenders on a local cable television channel.

The Sex Offender Registration Program is detailed in chapter 62 of the Texas Code of Criminal Procedure. Chapter 62 requires the registration of every individual who has a "reportable conviction or adjudication" for specified sexual offenses. See Tex. Code Crim. Proc. Ann. art. 62.02(a) (Vernon Supp. 2003); see also id. art. 62.01(5). The Texas Department of Public Safety ("DPS") is directed to "provide the Texas Department of Criminal Justice, the Texas Youth Commission, the Texas Juvenile Probation Commission, and each local law enforcement authority, county jail, and court with a form for registering" such persons. Id. art. 62.02(b). The registration form must include:

> (1) the person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, social security number, driver's license number, shoe size, and home address;
>
> (2) a recent color photograph or, if possible, an electronic digital image of the person and a complete set of the person's fingerprints;
>
> (3) the type of offense the person was convicted of, the age of the victim, the date of conviction, and the punishment received;
>
> (4) an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision;
>
> (5) an indication of each license, as defined by Article 62.08(f), that is held or sought by the person; and
>
> (6) any other information required by [DPS].

Id. art. 62.02(b)(1)-(6).

Article 62.08 requires DPS to "maintain a computerized central database containing only the information required for registration." Id. art. 62.08(a). Subsection (b) of the statute provides:

> The information contained in the database is public information, with the exception of any information:
>
> (1) regarding the person's social security number, driver's license number, or telephone number;
>
> (2) that is required by [DPS] under Article 62.02(b)(6); or
>
> (3) that would identify the victim of the offense for which the person is subject to registration.

Id. art. 62.08(b). DPS must "maintain in the database, and . . . post on any department website related to the database, any photograph of the person that is available through the process for obtaining or renewing a personal identification certificate or driver's license," and must "update the photograph in the

database and on the website annually or as the photograph otherwise becomes available." Id. art. 62.08(c). Any local law enforcement authority is required to "release public information described under Subsection (b) to any person who submits to the authority a written request for the information." Id. art. 62.08(d). Thus, the information in the DPS database, with the exception of that information listed in subsection (b) of section 62.08, is specifically deemed to be "public information," and is available to any person. The question at issue is whether a local governmental body may broadcast public information from the DPS database on a local television cable channel.

The Public Information Act, chapter 552 of the Government Code, provides:

> (a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

Tex. Gov't Code Ann. § 552.007(a) (Vernon Supp. 2003). Thus, the Public Information Act itself implies that a governmental body may disclose any information that is not "expressly prohibited" or "confidential" by law. See id. The information you specify is not only not confidential, the Texas Code of Criminal Procedure affirmatively declares it to be "public information." See Tex. Code Crim. Proc. Ann. art. 62.08(b) (Vernon Supp. 2003). In addition, it is clear that a governmental body has inherent authority, in the exercise of its own discretion, to make public any information that constitutes "public information" and to do so in any format whatsoever, including the broadcast of such information on a cable television station. See Tex. Gov't Code Ann. § 552.007(a) (Vernon Supp. 2003).

Moreover, article 62.09(b) of the Code of Criminal Procedure provides that "[a]n individual, agency, entity, or authority is not liable under Chapter 101, Civil Practice and Remedies Code, or any other law for damages arising from" the release of public information under chapter 62. Tex. Code Crim. Proc. Ann. art. 62.09(b) (Vernon Supp. 2003). The Texas Supreme Court has declared that "[o]nce information is made a matter of public record, the protection accorded freedom of speech and press by the First Amendment may prohibit recovery for injuries caused by any further disclosure of and publicity given to such information, at least if the information is at all newsworthy." Indus. Found. of the S. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 684 (Tex. 1976).

In Hogan v. Hearst Corp., 945 S.W.2d 246, 250 (Tex. App.—San Antonio 1997, no writ), a person had committed suicide after a newspaper had published a report that listed his name and the fact of his arrest for indecent exposure in a city park. In response, the individual's family brought an action against the newspaper. The court, in finding that the newspaper had obtained the information from a public record, said that "[t]he state may not protect an individual's privacy interests by recognizing a cause of action in tort for giving publicity to highly private facts if those facts are a matter of public record." Hogan, 945 S.W.2d at 250 (citations omitted). With regard to the victim, "the article simply printed what case law has previously determined to be public information - [his] name, birth date, and the offense for which he was arrested." Id. at 251; see also Crumrine v. Harte-Hanks Television, Inc., 37 S.W.3d 124 (Tex. App.—San Antonio 2001, pet. denied) (father in child custody dispute brought action against television station for broadcasting stories asserting he was gay, HIV-positive police officer, and court entered summary judgment for defendant noting that "the information broadcast was revealed during a judicial proceeding" and because the information was obtained from a public record—a court proceeding—an action for invasion of privacy could not be maintained).

In the situation you pose, the information contained in the DPS database of registered sex offenders is expressly declared to be "public information," with limited exceptions. Tex. Code Crim. Proc. Ann. art. 62.08(b) (Vernon Supp. 2003). Accordingly, a local government is free to broadcast that information on a local cable television channel.

The second question is whether a local government that broadcasts information about registered sex offenders may include the numeric risk level assigned to a particular individual under article 62.03(a) of the Code of Criminal Procedure. See Request Letter, supra note 1, at 1. Article 62.035 requires the Texas Department of Criminal Justice to "establish a risk assessment review committee," whose duty it is, inter alia, to "develop or select from among existing tools a sex offender screening tool to be used in determining the level of risk of a person subject to registration under this chapter." Tex. Code Crim. Proc. Ann. art. 62.035(a)-(b)(1) (Vernon Supp. 2003). The committee is required to "select a screening tool that may be adapted to use the following general guidelines:

(1) level one (low): a designated range of points on the sex offender screening tool indicating that the person poses a low danger to the community and will not likely engage in criminal sexual conduct;

(2) level two (moderate): a designated range of points on the sex offender screening tool indicating that the person poses a moderate danger to the community and may continue to engage in criminal sexual conduct; and

(3) level three (high): a designated range of points on the sex offender screening tool indicating that the person poses a serious danger to the community and will continue to engage in criminal sexual conduct.

Id. art. 62.035(c)(1)-(3). Article 62.03 of the Code of Criminal Procedure directs that "[b]efore a person who will be subject to registration . . . is due to be released from a penal institution, the Texas Department of Criminal Justice or the Texas Youth Commission shall determine the person's level of risk to the community using the sex offender screening tool . . . and assign to the person a numeric risk level of one, two, or three." Id. art. 62.03(a).

Because the numeric risk level of a particular individual is not part of the sex offender registration form required by article 62.02(b), and consequently, is not part of the DPS database, the numeric risk level is not deemed to be "public information" by virtue of article 62.08. On the other hand, chapter 62 provides that the numeric risk level does, under certain circumstances, constitute information that must be made public. Article 62.03(e) requires a local law enforcement authority to publish a notice in the newspaper of greatest paid circulation in the county in which the registrant intends to reside "if the victim is a child younger than 17 years of age and the basis on which the person is subject to registration is not an adjudication of delinquent conduct and is not a conviction or a deferred adjudication for an offense under Section 25.02, Penal Code." Id. art. 62.03(e). The newspaper notice must include "the following information only":

(1) the [registrant's] full name, age, and gender;

(2) a brief description of the offense for which the person is subject to registration;

(3) the municipality, numeric street address or physical address, if a numeric street address is not available, and zip code number where the person intends to reside;

(4) either a recent photograph of the person or the Internet address of a website on which the person's photograph is accessible free of charge; and

(5) the person's numeric risk level assigned under this chapter and the guidelines used to determine a person's risk level generally.

Id. arts. 62.03(f), 62.04(g).

Chapter 62 thus specifically requires that information about certain registered sex offenders be published in a newspaper and that the information include the person's numeric risk level assigned by the Texas Department of Criminal Justice. In this case, the fact that the information is provided in a newspaper means that the information is public and thus authorized to be republished. Accordingly, we conclude that the registered sex offender's numeric risk level constitutes public information at any time after that information is published in a newspaper in accordance with chapter 62 of the Code of Criminal Procedure. It necessarily follows that the numeric risk level may be broadcast on a local cable television channel only after it has been published in the newspaper in accordance with chapter 62.

SUMMARY

A local government may broadcast on a local cable television station all information about a registered sex offender that is contained in the registration form for sex offenders, except for information that is excepted by article 62.08(b). See Tex. Code Crim. Proc. Ann. art. 62.08(a), (b) (Vernon Supp. 2003). A registrant's numeric risk level is not public information until it first appears in a newspaper in accordance with the provisions of chapter 62 of the Code of Criminal Procedure that require notice to be published.

Very truly yours,

Greg Abbott
Attorney General of Texas

Barry R. Mcbee
First Assistant Attorney General

Don R. Willett
Deputy Attorney General - General Counsel

Nancy S. Fuller, Chair
Opinion Committee

Rick Gilpin
Assistant Attorney General
Opinion Committee

---

2. 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 ____ (11/25/03) *Texas Juvenile Law* (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). [FN1] 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 [FN2] 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." [FN3] 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 location after filing a missing child report and notifies the investigating law enforcement agency, the agency has no duty to continue the investigation or to take possession of the child and return him or her to the custodian.

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

Susan L. Garrison
Assistant Attorney General
Opinion Committee

[FN1]. Letter from Honorable Florence Shapiro, Chair, Education Committee, Texas State Senate, to Honorable Greg Abbott, Texas Attorney General (May 22, 2003) (on file with Opinion Committee) [hereinafter Request Letter].

[FN2]. An "emancipated child" has been freed of the disabilities of minority. See Tex. Fam. Code Ann. § 1.104 (Vernon 1998) (removal of disabilities of minority by marriage), ch. 31 (Vernon 2002) (petition to have disabilities of minority removed), § 101.003(a) (Vernon 2002) ("child" is a person under 18 who is not married or has not had disabilities of minority removed), § 154.001(a)(2) (Vernon 2002) (emancipation by marriage, removal of disabilities of minority, or operation of law for purposes of child support) [hereinafter "emancipated child"].

[FN3]. Brief from Nydia D. Thomas, Senior Staff Attorney, Texas Juvenile Probation Commission, to Honorable Greg Abbott, Texas Attorney General at 2 (July 8, 2003) (on file with Opinion Committee) [hereinafter Thomas Brief].

---

3. 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. 2003 TexAGLexis ___ (12/15/03) *Texas Juvenile Law* (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. ss 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. ss 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 indicating a need for supervision. See id. § 52.01(a). After taking the child to a juvenile processing office, the officer may release the child to a parent or guardian; bring the child to a detention or medical facility; or dispose of the case in accordance with section 52.03, Family Code. Id. § 52.02(a); see also id. § 52.025 (Vernon 2002) (providing for and restricting the use of a juvenile processing office). If the child's case is referred to a juvenile court, or if the child is brought to a secure detention facility, the child typically is released until later proceedings unless a preliminary investigation indicates that section 53.02(b) authorizes detaining the child. Id. § 53.02(a) (Vernon 2002); see infra (listing factors warranting detention under sections 53.02 and 54.01). If a child is detained, the court promptly must hold a detention hearing and release the child unless the court finds that continued detention is warranted under section 54.01(e). See Tex. Fam. Code Ann. § 54.01(a) (Vernon Supp. 2004); see infra (listing factors warranting detention under sections 53.02 and 54.01). A juvenile court determines the truth or falsity of the allegations against a child at a subsequent, separate adjudication hearing. See Tex. Fam. Code Ann. § 54.03(a) (Vernon Supp. 2004).

Sections 53.02(b) and 54.01(e) both authorize a juvenile court to order a child's detention before adjudication if one of five circumstances is present:

> (1) the child is likely to abscond or be removed from the jurisdiction of the court;
>
> (2) suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodian, or other person;
>
> (3) the child has no parent, guardian, custodian, or other person able to return the child to the court when required;
>
> (4) the child may be dangerous to himself or herself or the child may threaten the safety of the public if released;
>
> (5) the child has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released;
>
> ....

Id. § 53.02(b) (Vernon 2002); see id. § 54.01(e) (Vernon Supp. 2004). In addition, section 53.02(b) authorizes a juvenile court, before a detention hearing, to order a child detained if the child is alleged to have engaged in delinquent conduct involving possession of a firearm. See id. § 53.02(b), (f) (Vernon 2002).

While a county's juvenile court generally has exclusive original jurisdiction over proceedings involving a child's alleged delinquent conduct or conduct indicating a need for supervision, juvenile and justice courts have concurrent jurisdiction over truancy cases in counties with populations of less than 100,000. Id. § 51.04(a), (h); see also Tex. Educ. Code Ann. § 25.094(a)- (c) (Vernon Supp. 2004) (creating an offense for failure to attend school); Tex. Fam. Code Ann. § 54.021 (Vernon Supp. 2004) (permitting juvenile court to waive its exclusive jurisdiction in a truancy case). A justice court also may have jurisdiction over certain traffic offense proceedings involving juveniles. See Tex. Fam. Code Ann. § 51.03(a)-(g) (Vernon Supp. 2004) (defining the phrases "delinquent conduct" and "conduct indicating a need for supervision" to exclude traffic offenses); Tex. Code Crim. Proc. Ann. art. 4.11(a) (Vernon Supp. 2004) (outlining justice courts' original jurisdiction).

If a child whose case is before a justice court is accused of violating a court order under circumstances that would constitute contempt of court, article 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. ss 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. ss 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. ss 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. ss 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