CASE LAW UPDATE

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I. CONFESSIONS

1. FAILURE PROMPTLY TO NOTIFY PARENTS OF ARREST INVALIDATES MURDER CONFESSION

Pham v. State, 36 S.W.3d 199 (Tex.App.—Houston [1st Dist.] 12/28/00) [*Texas Juvenile Law* 301 (5th Ed. 2000].

Facts: A jury found appellant, John Tuy Pham, guilty of murder and assessed punishment at confinement for life.

In appellant's first point of error, he asserts the trial court erred in overruling his motion to suppress his oral confession because his parents were not notified about his arrest as required by Texas Family Code section 52.02(b).

Held: Reversed and remanded.

Opinion Text: EVIDENCE AT MOTION TO SUPPRESS HEARING

On August 22, 1998, Dung Van Ha, complainant, was killed in a drive by shooting. Appellant, a 16-year-old high school junior, became a suspect in complainant's murder. One of the lead investigators in the case was Houston Police Officer T. Miller of the homicide division. On September 9, 1998, at the direction of Officer Miller, Houston Police Officers Hale and Parish went to Clear Brook High School to take appellant into custody in connection with the murder of complainant. Hale and Parish met with Sergeant J. Gillane, a Galveston County Sheriff's Department Officer assigned to Clear Brook High School, and he told them he would locate appellant and bring him to the officers so they could talk with him. Appellant had skipped his last class of the day and was not in his classroom. School let out at 2:30 p.m. Gillane saw appellant riding as a passenger in a car about to leave the school parking lot at about 2:35 p.m., and Gillane asked appellant to step out of the car so Gillane could speak with him. Gillane and appellant knew each other, and appellant cooperated fully. Gillane walked with appellant to where Officers Hale and Parish were waiting.

Officers Hale and Parish took appellant into custody and drove him to 49 San Jacinto St. where, at about 3:35 p.m., Magistrate Howard Dixon gave him his legal warnings pursuant to section 51.095 of the Texas Family Code. Magistrate Dixon had been designated as a magistrate for purposes of the Family Code to give required warnings to juveniles. Hale and Parish then took appellant to the downtown police station at 1200 Travis St. Hale testified this was one of the designated juvenile processing offices in the city. Hale turned appellant over to Officer Miller, the lead investigator who had sent Hale and Parrish to the high school to arrest appellant. Neither Officer Hale nor Officer Parrish attempted to contact appellant's parents at any time.

Officer Miller listened to a tape recording of Judge Dixon giving appellant his legal warnings. Miller met with appellant. Miller did not attempt to contact appellant's parents. Around 4:38 p.m., appellant gave an oral statement in which he admitted that he fired a .45 caliber weapon at the car complainant was driving. Appellant was then turned over again to Officers Hale and Parrish. Again, neither Hale nor Parrish attempted to contact appellant's parents. They transported appellant to the juvenile processing office located at 8300 Mykawa Rd. so that he could be processed, fingerprinted, and photographed. Officer Parham at the juvenile processing office contacted appellant's sister at home around 8:15 p.m., and the Harris County Juvenile Probation Department contacted appellant's father at approximately 9:50 p.m.

Appellant's mother testified that neither she nor appellant's father was contacted by anyone from the high school, or from the Houston Police department, regarding her son's arrest until almost 10 p.m. that night when she received a call from a juvenile officer. It was not until the following morning that she found out why appellant had been arrested. There was no testimony from any representative of the high school as to any attempt by the principal's office to contact appellant's parents.

DISCUSSION

Provisions of the Texas Family Code control issues concerning juvenile confessions, although they are raised in a criminal forum. Griffin v. State, 765 S.W.2d 422, 427 (Tex.Crim.App.1989); Smith v. State, 881 S.W.2d 727, 731 (Tex.App.—Houston [1st Dist .] 1994, pet. ref'd). Therefore, when a juvenile is in custody, the requirements of the Texas Family Code must be strictly complied with. See Le v. State, 993 S.W.2d 650, 655 (Tex.Crim.App. 1999); Comer v. State, 776 S.W.2d 191, 194 (Tex. Crim.App.1989).

Section 52.02(b) of the Texas Family Code states 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: (1) the child's parent, guardian, or custodian; and (2) the office or official designated by the juvenile

court." Tex.Fam.Code § 52.02(b) (Vernon Supp. 2000) (emphasis added). Section 52.02(b) does not define the term "promptly."

When, as here, a defendant seeks to suppress evidence, the burden of proof is initially on the defendant. See 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). A defendant must produce evidence that defeats a presumption of proper police conduct, which then shifts the burden to the State. See 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 not complied with, the burden shifts to the State to show that the juvenile's statement was taken in compliance with section 52.02(b). In the Matter of C.R., 995 S.W.2d 778, 783 (Tex.App.—Austin 1999, pet. denied). Illegally obtained evidence is inadmissible against an accused. Tex.Crim.P.Code Ann. art. 38.23(a) (Vernon Supp. 2000). [FN2]

> FN2. The Texas Family Code expressly makes Chapter 38 of the Texas Code Criminal Procedure applicable to juvenile proceedings. See Tex.Fam. Code § 51.17(c) (Vernon Supp.2000); see also Le v. State, 993 S.W.2d 650, 656 (Tex.Crim.App. 1999).

We generally review a trial court's ruling on a motion to suppress for abuse of discretion. Villarreal v. State, 935 S.W.2d 134, 138 (Tex.Crim.App. 1996); Curry v. State, 965 S.W.2d 32, 33 (Tex. App.—Houston [1st Dist.] 1998, no pet.). In reviewing the trial court's ruling, we apply a bifurcated standard of review. Carmouche v. State, 10 S.W.3d 323, 327 (Tex.Crim.App.2000); Hernandez v. State, 957 S.W.2d 851, 852 (Tex.Crim.App. 1998) (applying standard of review from Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997) to claim of involuntariness of oral and written statements). We give almost total deference to the trial court's determination of historical facts, while we conduct a de novo review of the trial court's application of the law to those facts. Carmouche, 10 S.W.3d at 327. The trial court is the exclusive finder of fact in a motion to suppress hearing, and, as such, it may choose to believe or disbelieve any or all of any witness's testimony. Romero v. State, 800 S.W.2d 539, 543 (Tex. Crim.App.1990).

The trial court specifically found that appellant's parents were not notified about his arrest until after he had given the confession and had been transported to the Mykawa Road juvenile processing office. In written findings of fact and conclusions of law, the trial court stated, in part:

Findings of Fact

26. After Defendant was processed into the juvenile holding facility, Officer Parham contacted Defendant's sister regarding Defendant's whereabouts at approximately 8:15 p.m. At approximately 9:50 p.m. the same evening the juvenile probation department communicated with Defendant's father. Less than 6 hours elapsed from the time of Defendant's initial detention until a member of Defendant's family was notified of Defendant's arrest.

Conclusions of Law

6. Defendant's family was promptly notified within the requirements of Texas Family Code Section 52.02(b).

The issue presented, therefore, is whether notice from the officer at the juvenile holding facility to appellant's sister, approximately six hours after his arrest, was "prompt" notice to appellant's parents, by the "person taking a child into custody" within the meaning of section 52.02(b). [FN3]

> FN3. The State argues in its brief that the evidence supports the conclusion that appellant's parents were notified, at the earliest, when appellant was taken into custody at 2:45 p.m., based on Sargeant Gillane's testimony that he notified the high school principal of appellant's arrest about 2:45 p.m., and his explanation of school procedures. However, there is no evidence that the school actually notified, or even attempted to notify appellant's parents, and appellant's mother testified that no one from the school notified her. The trial judge found that there was no notice to appellant's family until 8:15 p.m., a finding that precludes our consideration of the State's argument that notice occurred earlier; the evidence supports the trial court's fact finding.

What is striking about this case is that the arresting officers, and their supervisor, Officer Miller, did not consider it their responsibility to notify appellant's parents about his arrest. Officer Miller testified as follows:

> Q: [Prosecutor]: As far as during the time period you had the defendant in your custody there, did you at any time talk with any family member of the defendant as far as where the defendant was and what was going on with the case at that point?
>
> A. [Officer Miller]: No, I didn't.
>
> Q. Subsequent to that did other officers do that?
>
> A. Yes, they did.
>
> Q. And who was that?
>
> A. Officer Parham in the juvenile division contacted the defendant's sister at 8:15.

And the Harris County juvenile probation contacted the defendant's father at approximately 9:50.

....

Q: [Defense Counsel]: And I think you testified that you did, not, and I may be wrong; but, you did not contact John Pham's parent, guardian or custodian once John Pham was taken into custody?

A: [Officer Miller]: I did not. It was done by Officer Parham in the juvenile division.

....

Q. Okay. Well, when was John Pham taken into custody?

A. When he was picked up out at the school.

Q. And when did Officer Parham contact or when was Officer Parham alerted as to the arrest of John Pham and the necessity by Officer Parham to comply with Sec. 52.02 of the Family Code relative to release or delivery to the court?

A. Officer Parham contacted the defendant's sister at 8:15 p.m.

....

Q. And did you talk to Officer Parham yourself?

A. Nope, I did not.

Q. Who did, if you know?

A. Who talked to Officer Parham?

Q. Correct.

A. From our division? I don't understand. I am sure that many people talk to Officer Parham, but pertaining to what?

Q. Well, pertaining to this case who contacted Officer Parham for purpose of alerting him that a juvenile was in custody and that he needed to contact the child's parent, guardian or custodian, if you know?

A. I don't know.

Q. [A]s I understand your testimony the only time or the first time that a person with the juvenile authorities is contacted is when Officer Parham ... was contacted relative to John Pham at 8:00 o'clock or 8:15 or something along those lines.

A. Basically that would be correct. The defendant was arrested. He made a statement, a voluntary statement. He was transferred to the juvenile division who notified the defendant's family and also notified Harris County Juvenile Probation who then, I assume, although I don't know who did it, notified the juvenile courts and it happened within that chronological order generally speaking.

It is obvious from Officer Miller's testimony that he was under the impression the arresting officers had no duty to notify the child's parents upon the child's arrest. Officer Miller, one of the lead investigators in this murder case, apparently believed that the homicide division could hold the juvenile appellant as long as necessary to interrogate him without any notice to appellant's parents-that it was the responsibility of juvenile officers to notify appellant's parents after homicide was finished with the interrogation and after homicide had transported appellant to the Mykawa Road juvenile processing office across town. During the almost six hours that appellant was in the custody of the homicide division officers, no attempt whatsoever was made to contact his parents.

Section 52.02(b) of the Family Code was clearly violated. The duty to notify a child's parents belonged to the "person taking a child into custody," i.e., Officers Hale and Parish, and their supervisor, Office Miller in this case. It was their responsibility to see to it that notice of appellant's arrest, with a statement of the reason for taking him into custody, was promptly given to appellant's parents and the official designated by the juvenile court. These officers were apparently oblivious to the fact they had such a duty, and they did not perform as required.

The Court of Criminal Appeals explained the rationale be hin21 Tw (hind Ti0.1875 ey ha

> we must not ignore the Legislature's mandatory provisions regarding the arrest of juveniles. We informed the citizenry, a decade ago in a unanimous opinion, of the Legislature's clear intent to reduce an officer's impact on a juvenile in custody. Today we remind police officers of the Family Code's strict requirements.

Le, 993 S.W.2d at 655.

In Comer, before reversing the case for failing to transport a juvenile "forthwith" to the custody of the juvenile custody facility, the Court of Criminal Appeals conducted a taint attenuation analysis, utilizing the four factors from Bell v. State, 724 S.W.2d 780 (Tex.Crim.App.1986). Comer, 776 S.W.2d at 196-97. Those factors are: (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. In the present case, Miranda warnings were given, as in Comer (Comer, 776 S.W.2d at 196); the confession came approximately two hours after the violation, as in Comer (id. at 193); an intervening circumstance is that appellant was taken before a neutral magistrate for warnings, as in Comer (id. at 193, 196); and the officers did not wilfully violate the law in order to obtain appellant's confession, as in Comer (id. at 197). The court in Comer concluded that the taint of the juvenile's unlawful detention had not dissipated by the time he gave his confession, noting that:

> We cannot say with any degree of confidence that, had appellant been transported 'forthwith' to the custody of the juvenile detention facility, where he may have had access to, if not counsel, at least his parents ... he would still have chosen to confess his crime.

Comer, 776 S.W.2d at 197.

Family Code section 52.025(c) specifically provides: "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 § 52.025(c) (Vernon Supp.2000). If the arresting officers had promptly notified appellant's parents of his arrest approximately two hours before his confession, there would have been time for them to get to the juvenile processing office at 1200 Travis before the confession. [FN4] As in Comer, we cannot say with any degree of confidence that if appellant had access to his parents or his attorney, he would still have chosen to confess to the crime. Accordingly, appellant's statement should have been suppressed under article 38.23 of the Texas Code of Criminal Procedure. See also In the Matter of C.R., 995 S.W.2d at 782 (holding juvenile's confession inadmissible because of violation of Family Code Section 52.02(b)).

> FN4. The trial court specifically found that "[t]he entire building at 1200 Travis, including the interview room where Miller and Defendant talked, is designated as a juvenile processing office."

HARM ANALYSIS

Because we find the trial court erred in overruling appellant's motion to suppress, we must now consider whether appellant was harmed by the admission of his oral confession. We apply Texas Rule of Appellate Procedure 44.2(b) to determine whether the trial court's error constitutes reversible error. See Tex. R.APP.P. 44.2(b). Non-constitutional error must be disregarded unless it affects substantial rights of the defendant. Id. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. King v. State, 953 S.W.2d 266, 271 (Tex.Crim.App. 1997). A conviction should not be overturned for

CONCLUSION

Because we have sustained appellant's first point of error, it is not necessary to reach the merits of appellant's remaining points of error, and we decline to do so. We reverse the judgment and remand the cause to the trial court for further proceedings.

2. CAPITAL MURDER CONFESSION SUPPRESSED BECAUSE POLICE FAILED TO NOTIFY PARENTS OF JUVENILE'S ARREST

State v. Simpson, 51 S.W.3d 633 (Tex.App. — Tyler 12/29/00, pet. filed 3/6/01) [*Texas Juvenile Law* 301 (5th Edition 2000)].

Facts: In a single issue, the State of Texas ("State"), appeals the trial court's order suppressing the written confession of Appellee, Lionel Simpson ("Simpson"), a 15 year old juvenile charged with the capital murder of Geraldine Davidson. The trial court held that the written statement was illegally obtained because of the failure of law enforcement officers to promptly notify Simpson's parent of his detention in violation of Texas Family Code section 52.02(b).

Simpson 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. Prior to being interviewed, law enforcement investigators took Simpson before Justice of the Peace James Todd. At 12:25 p.m. Judge Todd gave Simpson a comprehensive Magistrates Juvenile Warning pursuant to Family Code Section 51.095. [FN1] Judge Todd testified that Simpson understood his rights and voluntarily relinquished them including a waiver of his right to an attorney.

> 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.
> 8. Do you understand these rights?
> 9. Do you have any questions?

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

Judge Todd gave Simpson a second Magistrate's Juvenile Warning [FN2] at approximately 8:15 p.m. This was again outside the presence of the law enforcement officers. Judge Todd then reviewed Simpson's written statement and advised him he was under no obligation to make or sign the statement. Simpson nevertheless proceeded to sign the statement initialing each page. Simpson 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 Simpson's mother nor any other parent, guardian, or custodian was notified of Simpson's arrest and detention. His mother, Brenda Simpson, found out Sunday night that Simpson was in the Juvenile Detention Center. A police officer came to her house to serve her with a juvenile petition and told her to be in court for Simpson at 9:00 a.m. on Monday, January 29, 2000.

Simpson filed a motion to suppress his written statement alleging among other grounds that the law enforcement officials had violated sections 52.02(a) and (b) of the Texas Family Code. After a

hearing on the motion to suppress, the trial court held that while the State had complied with section 52.02(a) requiring the juvenile be taken to a juvenile processing office without delay, it had failed to comply with the parental notification requirements of section 52.02(b). The trial court ordered Simpson's written statement suppressed and inadmissible in his trial.

Held: Affirmed.

Opinion Text: The State brings this interlocutory appeal pursuant to Article 44.01(a)(5) of the Texas Code of Criminal Procedure. The sole issue on appeal is whether the failure to comply with section 52.02(b) of the Texas Family Code requires suppression of Simpson's written statement.

The standard of review in this case is de novo. While the standard of review on a motion to suppress is normally abuse of discretion, Cantu State, 817 S.W.2d 74, 77 (Tex.Crim.App.1991), where, as here, we have a question of law based on undisputed facts, a de novo standard is applied. Guzman v.. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997).

Section 52.02(b) provides that "A person taking a child into custody shall promptly give notice of the reason for taking the child into custody, to ... the child's parent, guardian, or custodian ...." (emphasis added). Tex.Fam.Code Ann. § 52.02(b) (Vernon 1999). The State admits that the law enforcement officials in this case failed to promptly notify Simpson's parent that he was in custody thus violating section 52.02(b). The State argues, however, that a violation of section 52.02(b) should not necessarily result in suppression of a written statement.

The State argues that Comer v. State, 776 S.W.2d 191 (Tex .Crim.App.1989) requires a two part test: first, whether there was a violation of the Family Code, and second, whether the taint of illegality had dissipated by the time the confession was taken. In Comer, the court also stated that "an otherwise valid confession following a detention that is illegal as a matter of state law will not be excludable under article 38.23, ... where it is determined that the taint of the illegality has dissipated by the time the confession was taken." Comer, 776 S.W.2d at 196, citing Bell v. State, 724 S.W2d 780, 787 (Tex.Crim. App.1986), cert. denied, 479 U.S. 1046 (1987).

The attenuation of taint analysis has been held to require a four part inquiry: "(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; accord Dowthitt v. State, 931 S.W.2d 244 (Tex.Crim.App.1996). The purpose of this four-part analysis is to determine whether the causal chain between an illegal arrest and the statement at issue has been broken so that the statements are shown to be the product of free will. Bell, 724 S.W.2d at 788. The State argues that these four prongs were satisfied and the confession should not have been suppressed. We disagree.

Although Simpson was given extensive Miranda warnings satisfying the first inquiry, for the reasons stated below, application of the latter three inquiries does not lead us to conclude that the taint was eliminated in this case. Moreover, unsatisfactory responses to the last three inquiries are not cured by compliance with the first. Maixner v. State, 753 S.W.2d 151, 156 (Tex.Crim.App.1988). Further, it must be noted that Bell, which first applied the four-part inquiry in Texas, and Dowhitt were both warrantless arrest cases. In those cases the illegality was the warrantless arrest. Thus, the time lapse and intervening circumstances (inquires 2 and 3) between the illegal arrest and the confession could well have the effect of eliminating the taint of the illegal arrest. However, we find it difficult to see how a lapse of time or intervening circumstances could eliminate the taint of the illegality in a parental notification case. Here the admitted violation of failing to notify Simpson's parents pursuant to section 52.02(b) was the illegality. If anything, the time lapse and intervening circumstances which occurred over the seven to eight hour time period between the arrest and the confession only aggravate the taint of the illegality. The duty of parental notification is an ongoing duty which does not dissipate with the passage of time or intervening circumstances. Law enforcement officials did not comply with section 52.02(b) for over fifty-eight hours after Simpson's arrest. No explanation for this extremely lengthy delay was offered by the State.

Under the fourth inquiry of whether the violation was purposeful or flagrant, we cannot say whether the delay and failure to notify Simpson's parent was purposeful, but it would seem that the violation was flagrant in that there is no evidence that law enforcement officials even attempted to contact his parents for over two days following his arrest.

If section 52.02(b), as adopted by the legislature, is to have any meaning it must be followed. The legislature has chosen to give juveniles certain additional protections including prompt notification of their parents when they are arrested. Simpson did not receive the benefit of this protection. No one can say what would have happened had the State promptly notified his mother, but having failed to do so the statute was obviously violated, and in apply-

ing Comer we cannot say the taint of the violation was eliminated in the written statement.

Two other courts of appeal have reached this same conclusion in applying Comer to section 52.02(b). See In re. C.R., 995 S.W.2d 778 (Tex.App.—Austin 1999, pet. denied); and Gonzales v. State, 9 S.W.3d 267 (Tex.App.—Houston [1st Dist .] 1999, pet. granted); but see Roquemore v. State, 11 S.W.3d 395 (Tex.App.—Houston [1st Dist.] 2000, pet. granted). Moreover, the Texas Court of Criminal Appeals has recently reaffirmed its commitment to the Legislature's mandatory protective provisions regarding the arrest of juveniles:

> Today we reaffirm our decision in Comer. The Legislature has set forth very specific actions which a law enforcement officer must take when arresting a juvenile. We are aware of the disturbing increase in juvenile crime in our state, and we are sympathetic to law enforcement's efforts to deal with violent juvenile offenders. Nevertheless, we must not ignore the Legislature's mandatory provisions regarding the arrest of juveniles. We informed the citizenry, a decade ago in a unanimous opinion, of the Legislature's clear intent to reduce an officer's impact on a juvenile in custody. Today we remind police officers of the Family Code's strict requirements.

Le v. State, 993 S.W.2d 650, 655 (Tex.Crim.App 1999). This case must unfortunately be yet another reminder that neither we nor the police can ignore the Legislature's mandatory provisions for parental notification in the arrest of juveniles.

We hold the trial court did not err in suppressing Simpson's written confession because of the failure of law enforcement officials to promptly notify his parent of his detention in violation of 52.02(b)Family Code section . The State's sole issue is overruled, and the trial court's Order Suppressing the Confession is affirmed.

3. MURDER CONFESSION SUPPRESSED BECAUSE POLICE FAILED TO NOTIFY PARENTS OF JUVENILE'S ARREST

Hampton v. State, 36 S.W.3d 921 (Tex.App.—El Paso 1/25/01) [*Texas Juvenile Law* 301 (5th Edition 2000)].

Facts: In two issues involving voluntariness of a juvenile's custodial statement and mid-trial disclosure of exculpatory evidence, Leon Hampton, Jr. appeals his conviction for murder.

On the evening of March 18, 1999, a man was shot and killed at an apartment complex in Ector County, Texas. Within three minutes of the shooting, Lashara Nicole Preston, who lived in an apartment near where the shooting took place, found appellant Leon Hampton, Jr. on her back porch, asking to be let inside. Jarvis Darnell Preston, her brother, offered to take Hampton home. Preston testified at trial that after the two men left the apartment complex, Hampton told Preston that he thought he had shot somebody in self-defense. On the night of March 22, 1999, Odessa Police found and arrested Hampton. At that time, Hampton's mother advised Detective Dean McCann that Hampton was a juvenile. Hampton was taken into custody for absconding from juvenile probation, not as a murder suspect. While at the police station, Detective McCann asked Hampton several times if he cared to give a statement. After Hampton settled down and stopped being "vocal and profane," he agreed. Once police were able to verify that Hampton was sixteen years old, officers transported him to the youth detention center. Because it was late, Detective McCann decided to postpone taking Hampton's statement until morning so that everyone could be well rested. The next morning, Detective McCann arrived at the youth center, asked Hampton if he wanted to give a statement, Hampton answered in the affirmative, and together they returned to the police station. Once there, after waiting forty-five-minutes, Hampton received his Miranda warnings. Immediately thereafter, Detective McCann videotaped Hampton's statement. Hampton was then arrested for murder and taken back to the youth center.

It was not until Hampton was giving his statement that Hampton's mother first learned of her son's change in status from absconder to murder suspect, and that he had agreed to make a statement.

The trial court held a pretrial hearing and denied Hampton's motion to suppress the statement. In that statement, which was admitted into evidence at trial over Hampton's objection, Hampton admitted to having shot the deceased, but maintained he had acted in self-defense.

Held: Reversed and remanded.

Opinion Text: In the first issue on appeal, Hampton asserts that the trial court erred in failing to suppress his videotaped statement and allowing it to be introduced into evidence at trial. He urges that the manner in which his statement was taken violated the Texas Family Code. [FN1] We agree.

FN1. Tex. Fam.Code Ann. § 52.02 (Vernon Supp. 2001).

Issues regarding a confession of a juvenile, though raised in a criminal forum, are controlled by the applicable provisions of the Family Code. [FN2] When a juvenile is in custody, the detaining authorities must comply with the Family Code's requirements. A juvenile's confession, if illegally taken, cannot be admitted against him in a subsequent criminal trial, consistent with Article 38.23 of the Texas Code of Criminal Procedure.

FN2. See Smith v. State, 881 S.W.2d 727, 731 (Tex.App.—Houston [1st Dist.] 1994, pet. ref'd).

Texas Family Code §§ 52.02(a) and (b) provide:

(a) ... a person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025, shall do one of the following:

...

(3) bring the child to a detention facility designated by the juvenile court [.]

(b) 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:

(1) the child's parent, guardian, or custodian; and

(2) the office or official designated by the juvenile court.

Here, Detective McMann complied with Section (a) when he initially took Hampton to the police station, as the specific room to which he brought Hampton (Room 203D) is a designated facility for the temporary detention of juveniles. There was, however, no compliance with the second section recited above. Although police initially informed Hampton's mother that he was being taken into custody on a juvenile absconder warrant, they did not tell her of the murder charge until Hampton was in the process of making his statement, and then only when she called authorities to find out about her son's status. Detective McCann did not promptly give notice to Hampton's mother of Detective McCann's action with regard to the murder charge, nor did he tell her why he was taking Hampton to the police station the following morning. Moreover, the record contains no evidence of any attempt to notify the office or official designated by the juvenile court. Because Detective McCann did not act in accordance with Texas Family Code Section 52.02(b), Hampton's confession was illegally obtained, and therefore, the trial court abused its discretion in not suppressing the statement and in admitting it into evidence.

Having determined that the trial court erred in failing to suppress Hampton's statement, we must now consider whether Hampton was harmed by the improperly admitted evidence under Tex.R.App. P. 44.2 governing reversible error in criminal cases. Even under the more lenient standard, which requires us to disregard non-constitutional error unless it affects substantial rights of the defendant, we conclude Hampton was harmed. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. In the present case, Hampton chose not to testify. Particularly in light of the undisclosed Brady evidence discussed below, we are concerned that Hampton's statement had a potentially dramatic effect on the jury's decision-making process. After examining the record as a whole, we cannot say with fair assurance that the error did not influence the jury, or had but a slight effect. We therefore conclude that the denial of Hampton's motion to suppress and the admission of his statement at trial affected Hampton's substantial rights and therefore constitutes reversible error. Hampton's first issue is sustained.

The judgment is reversed and the case is remanded to the trial court.

4. JUVENILE'S WAIVER OF RIGHTS NOT KNOWLEDGEABLE; OVER 4 HOUR DELAY IN NOTIFYING PARENTS TOO LONG

Hill v. State, ___ S.W.3d ___, No. 12-00-00172-CR, 2001 WL 493275, 2001 Tex.App. Lexis 3050 (Tex.App.—Tyler 5/9/01, pet. filed 8/20/01)[*Texas Juvenile Law* 290; 301 (5th Edition 2000)].

Facts: Appellant Edward Hill was certified to stand trial as an adult for the offense of capital murder committed when he was a juvenile. After the trial court overruled his motion to suppress his videotaped confession, Appellant pleaded guilty to capital murder and was sentenced to life in prison. In one issue, Appellant complains of error when the trial court overruled his motion to suppress his videotaped confession.

Held: Reversed and remanded.

Opinion Text: THE ISSUES

In one multifarious issue, Appellant argues that the trial court erred in overruling his motion to suppress his videotaped confession for the following

reasons: (1) that following his arrest he was not transported "without unnecessary delay," to a(2) "designated juvenile processing center" in violation of section 52.02(a) of the Texas Family Code, (3) that his parents were not promptly notified of his arrest in violation of section 52.02(b), and (4) that his confession was obtained after he had already indicated he did not wish to waive his rights to counsel and against self incrimination in violation of sections 51.09, 51.095 and 51.10, as well as the Fifth and Sixth Amendments to the Constitution of the United States. For purposes of this opinion, we shall treat each of Appellant's four arguments as separate issues.

The State correspondingly responds that the issues of (1) transporting without unnecessary delay, to a(2) designated juvenile processing center were waived and not preserved for appeal, (3) Appellant's mother was promptly notified, and (4) Appellant voluntarily, knowingly and intelligently waived his constitutional rights to counsel and against self-incrimination.

BACKGROUND

Arrest and Interrogation

On August 18, 1999 at approximately 9:10 a.m., Detective John Ragland, an investigator with the major crimes unit of the Tyler Police Department, was notified of a robbery and shooting at a Tyler convenience store. When he arrived at the crime scene around 9:25 a .m., Appellant, a sixteen-year-old juvenile, was already in the custody of one of several police officers who had given chase to Appellant and other suspects. Appellant, wearing blood- splattered clothing, was apprehended in the yard of a residence near the convenience store after a foot pursuit. Appellant was placed in a patrol car at the scene until he could be transported to the police station. He remained in the patrol car for about forty-six minutes before being transported to the Tyler police station.

Appellant arrived at the Tyler police station at approximately 10:16 a.m. Appellant was processed through technical services where he was fingerprinted and photographed. At approximately 12:35 p.m., a magistrate arrived to give Appellant his statutory Miranda warnings. The exchange between the magistrate and Appellant was recorded on videotape and is set forth verbatim as follows:

> Magistrate: Edward, what's your birthday?
> APPELLANT: August 27, '82.
> MAGISTRATE: Edward, I am going to administer to you at this time your statutory warnings as a juvenile. We are here present at the Tyler Police Department. You are charged by law enforcement with the offense of capital murder, which is a capital felony. You have the right to remain silent, not make any statement at all, and any statement that you make, may be used in evidence against you. You have the right to have an attorney present to advise you either prior to or during any questioning and during any questioning. If you are unable to employ an attorney, you have a right to have an attorney appointed as counsel with you with you (sic) prior to or during any interviews with peace officers or attorneys representing the State. You have the right to terminate the interview at any time. Present in the room at this time is [sic] just you and I; is that right, Edward?
> APPELLANT: Yes, sir.
> MAGISTRATE: Law enforcement officers have left when I began reading you the warnings. Have you listened carefully to and do you understand each of the above rights as they were read and explained to you by me?
> APPELLANT: Yes, sir.
> MAGISTRATE: Do you have any questions regarding any of these rights?
> APPELLANT: No, sir.
> MAGISTRATE: And do you at this time wish to voluntarily waive these rights?
> APPELLANT: No, sir.
> MAGISTRATE: Excuse me?
> APPELLANT: No, sir.
> [At this point, the magistrate appears to write on and initial the warnings form]
> MAGISTRATE: It is now 12:38 p.m. I'll ask you to sign the warnings where it says "signature of a juvenile."
> [Appellant signs the warning form as requested]
> Mr. Hill, do you understand what it means to waive any of these rights?
> APPELLANT: No, sir.
> MAGISTRATE: 'Waive' means, do you wish to at this time give up your right to remain silent and not make any statement at all? In other words, are you desiring to make a statement at this time.
> [Appellant nods his head in the affirmative.]
> MAGISTRATE: You don't understand what waive means, do you?
> [Appellant shakes head in the negative.]
> MAGISTRATE: Waive means that you give up a right, one of the rights that I just explained to you.
> APPELLANT: No. [The videotape seems to show Appellant shaking his head in the negative about waiving his rights.]

MAGISTRATE: Now, I'm going to ask you—do you understand what waive means now?
APPELLANT: Yes, sir.
MAGISTRATE: I'm going to ask you, do you wish to waive your right to remain silent?
APPELLANT: No, sir.
MAGISTRATE: So do you want to remain silent at this time?
APPELLANT: Yes, sir.
MAGISTRATE: Do you wish to waive or give up your right to have an attorney present to advise you either prior to or during any questioning?
APPELLANT: No, sir.
MAGISTRATE: Do you understand you have the right to terminate this interview at any time?
APPELLANT: Yes, sir.
MAGISTRATE: Do you understand if you're unable to employ an attorney, you have the right to have an attorney appointed to counsel with you prior to or during any interviews with peace officers or attorneys representing the State.
APPELLANT: Yes, sir.
MAGISTRATE: Very well. That concludes the statutory warnings. My understanding from our conversation is, Edward, you are or you are not wanting to give a statement at this time?
APPELLANT: What do you mean by "statement"?
MAGISTRATE: If you want to give up your right to remain silent, your right to have an attorney present with you and go ahead and give a statement and in the interview, police officers, who are not in the room at this time, will come in here and interview you.
APPELLANT: Yes, sir.
MAGISTRATE: Do you want them to do that, or do you want to not do that?
APPELLANT: I want to do that.
MAGISTRATE: Okay. Now, in order for you to do that, you will have to give up your right to remain silent and not make any statement at all.
APPELLANT: Yes, sir.
MAGISTRATE: Do you want to give up that right?
APPELLANT: Yes, sir.
MAGISTRATE: Okay. Then you will have to give up your right to have an attorney present to advise you either prior to or during any questioning. Do you want to give up that right—
APPELLANT: Yes, sir.
MAGISTRATE:—and make a statement at this time?
APPELLANT: Yes, sir.
MAGISTRATE: I am making an amendment to the statutory warning of juvenile by magistrate. I previously under the, answer, yes or no, put "no". I am scratching that putting my initials next to it, and I am putting in place, "yes". Okay. So where I put, yes, there, you understand that you listened to and now you understand the above rights, that they were read and explained to you, and that you have asked questions, and you and I have discussed these rights and you understand them, and you voluntarily wish to give up those rights and proceed with an interview; is that correct? [While the magistrate was saying this, he was amending the warnings form.]
APPELLANT: Yes, sir.
MAGISTRATE: Okay. That does conclude the statutory warnings by magistrate, and at this time I am going to ask the police officers to come back into the room and take your statement. Do you understand that, Edward?
APPELLANT: Yes, sir.

At this point, the officers returned and Appellant gave an incriminating statement on videotape which concluded at 1:04 p.m. In his statement, Appellant confessed to shooting Buford Hinton during the robbery of the convenience store. After the videotaped statement was concluded, the magistrate administered the magistrate's juvenile verification and completed the magistrate's certification form at 1:11 p.m. Appellant's mother was first contacted at 1:45 p.m. by Sergeant Barrentine of the Tyler Police Department.

The Suppression Hearing

After the juvenile court waived jurisdiction, Appellant was indicted in the district court to stand trial as an adult for capital murder. The trial court held a hearing on Appellant's motion to suppress his videotaped confession which was carried along over several days. At the hearing, Detective Ragland testified that when he arrived at the crime scene there were four suspects and six separate "crime scenes" which had to be processed: 1) the store, 2) the location where the gun was recovered, 3) the North Spring Street location where some of the suspects were apprehended, 4) the location where Appellant was apprehended, 5) the hospital where the victim, Buford Hinton, had been transported and died, and 6) the police station where the suspects were eventually transported. Blood-splattered clothing had to be

recovered from the persons of three of the suspects, and atomic absorption tests to detect gunshot residue were performed on their hands. In excess of ninety items of physical and forensic evidence were collected and secured at the various crime scenes.

Detective Ragland testified it was necessary to keep the suspects separate, and Appellant was placed in a patrol car at the scene to prevent further flight attempts and for his own safety and comfort until he could be transported to the police station. In the middle of August it was extremely hot outside, and the patrol car was air-conditioned. Appellant waited in the patrol car for about forty-six minutes before being transported to the police station. After he arrived at the Tyler Police Department, Appellant spent some time in the Technical Services Unit where he was fingerprinted and photographed. According to Detective Ragland, it would not be unusual for a suspect to spend hours in the Technical Services Unit when he is one of several suspects.

The magistrate also testified at the suppression hearing. When asked why he did not "stop the interview" when Appellant indicated that he did not wish to waive his Miranda rights, the magistrate replied that he was not "interviewing" Appellant and continued to make inquiries of Appellant because, as a magistrate administering warnings, he was charged not only with explaining the rights to Appellant, but also with verifying that Appellant understood his rights. He maintained he was not concerned with whether Appellant gave a statement or not—only with whether Appellant understood his rights.

After the administration of the magistrate's warnings to Appellant, Detective Ragland and Detective Frank Brewer took a videotaped statement from Appellant in which he confessed to shooting Buford Hinton during the robbery of the convenience store where Hinton was working. Detective Ragland testified that while he was making the statement, Appellant did not appear to be "high" or intoxicated nor did Appellant claim to be otherwise impaired. He said that Appellant was "cognitive" and gave appropriate responses to the questions asked.

Detective Ragland testified that he personally did not attempt to contact Appellant's parents at any time on August 18, 1999. It is unclear from the record whether Detective Brewer attempted to contact Appellant's parents earlier. Detective Brewer did not testify. Detective Ragland further stated that the investigation was not completed before Appellant's mother was notified.

Ruby Hill, Appellant's mother, testified that she was first contacted by telephone by Sergeant Barrentine of the Tyler Police Department at 1:45 p.m. on August 18, 1999, and was informed that her son was in custody and charged with murder. Mrs. Hill maintained she was home all morning and her phone did not ring before that call; she said she had no other calls on her voice mail or on her "Caller ID" on that day. Mrs. Hill was not aware of anyone involved in the case attempting to contact her at her place of employment on August 18, 1999. Mrs. Hill related that on the date of the offense, she was living apart from Appellant's father, Otis Hill, who did not have a telephone.

The trial court overruled Appellant's motion to suppress, and Appellant pleaded guilty to capital murder and was sentenced to life in prison. Appellant brings this appeal challenging the trial court's overruling of his motion to suppress.

STANDARD OF REVIEW

At a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. See Villarreal v. State, 935 S.W.2d 134, 138 (Tex.Crim.App.1996); In re LR., 975 S.W.2d 656, 658 (Tex.App.—San Antonio 1998, no pet.). Ordinarily, we view the evidence in the light most favorable to the trial court's ruling and afford almost total deference to its findings if they are supported by the record, especially when the trial court's fact findings are based upon an evaluation of credibility and demeanor. See Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997); In re A.D.D., 974 S.W.2d 299, 305 (Tex.App.—San Antonio 1998, no pet.). We afford the same amount of deference to the trial court's rulings on "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. Guzman, 955 S.W.2d at 89. However, when the resolution of the suppression issue does not turn upon an evaluation of credibility or demeanor, we review de novo the trial court's determination of the applicable law, as well as its application of the law to the facts. See Guzman, 955 S.W.2d at 89; In re A.D.D., 974 S.W.2d at 305. In the instant case, the facts are undisputed. Therefore, our review is de novo.

TRANSPORTATION TO DESIGNATED JUVENILE PROCESSING CENTER

In Appellant's first two issues, he contends that he was in custody in violation of Family Code sections 52.02(a) and 52.025, and, therefore, the court should have suppressed his confession. Section 52.02(a) provides that a person taking a child into custody must release the child to proper parties or take the child to one of several proscribed places "without unnecessary delay." See Tex. Fam.Code Ann. § 52.02(a). One such proscribed place is a ju-

venile processing office designated under section 52.025. See Tex. Fam.Code Ann. § 52.025.

Unnecessary Delay

Appellant contends that because he was not transported to the police station "without unnecessary delay" as required by section 52.02(a) of the Family Code, the trial court erred in not suppressing his confession. The State argues that this issue is waived. Appellant first raised this issue in a supplemental memorandum of law in support of his motion to suppress, apparently in response to Exhibit "A" of the State's memorandum of law filed May 5, 2000. Exhibit "A" inexplicably was not made part of the Clerk's Record on appeal. However, when the State was allowed to reopen the evidence on the motion to suppress, Detective Ragland testified to the contents of the affidavit, and, thus, the State itself injected the issue into the hearing. Under these circumstances, we make no determination as to whether the issue is waived but address the issue as if it were not waived.

Determination of what amounts to an "unnecessary delay" must be made on a case-by-case basis. Contreras v. State, 998 S.W.2d 656, 660 (Tex.App.—Amarillo 1999, pet. granted). The facts in the instant case are very different from the facts in Contreras where the Amarillo court held that a fifty-minute wait in a patrol car was an unnecessary delay. After stabbing her stepfather, Contreras called 911 herself, waited outside for the police to arrive, and immediately admitted to the responding officer what she had done. There was no indication of multiple suspects or multiple crime scenes. There was no evidence, such as the victim's blood, which had to be collected from the juvenile's person.

In this case, Appellant fled the scene of the shooting and was captured after a pursuit. There were multiple suspects who had to be kept separate, and the police were not certain that all of the actors had been apprehended. There were multiple crime scenes in the vicinity where Appellant was apprehended. Appellant was wearing blood-splattered clothing which had to be collected from his person, and, perhaps most importantly, atomic absorption tests had to be performed on Appellant's hands before any gunshot residue was removed inadvertently. We hold that under the facts in the instant case, Appellant's wait in the patrol car was not an "unnecessary delay" in violation of section 52.02(a) of the Family Code.

Designated Juvenile Processing Center

Appellant contends that the Tyler police station was not a designated juvenile processing office under section 52.025 of the Family Code, and the trial court therefore erred in not suppressing his confession. The State again argues that this issue is waived. We agree.

In order to preserve a complaint concerning the admission of evidence for appellate review, the complaining party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling he desired the court to make and obtained a ruling. Tex.R.App. P. 33.1. A motion which states one legal theory cannot be used to support a different legal theory on appeal. Broxton v. State, 909 S.W.2d 912, 918 (Tex.Crim. App.1995). A review of the record reveals that although Appellant urged several grounds for suppression of his confession, neither his written motion and legal memoranda, nor the evidence adduced at the hearing included a motion for suppression on the basis that the confession was obtained while Appellant was detained at a place not designated a juvenile processing center under section 52.025.

There is scant evidence in the record of the suppression hearing that the Tyler Police Department—or any part of it—is a designated juvenile processing center. However, the State had no burden to establish that fact because Appellant did not include such contention in his motion to suppress. See Contreras, 998 S.W.2d at 659 (holding it is the juvenile's burden to raise noncompliance with such statutory requirements.)

We hold that Appellant waived the issue of whether the Tyler Police Department was a designated juvenile processing office under sections 52.02(a) and 52.025 of the Family Code. [FN4] See Darden v. State, 629 S.W.2d 46 (Tex.Crim.App. [Panel Op.] 1982); Leno v. State, 934 S.W.2d 421 (Tex.App.— Waco 1996), pet. dism'd improvidently granted, 952 S.W.2d 860 (Tex.Crim.App.1997); In the Matter of T.R.S., 931 S.W.2d 756 (Tex.App.—Waco 1996, no pet.).

> FN4. We are, of course, aware of the trend in the appellate courts to apply the additional analyses of Marin v. State, 851 S.W.2d 275, 280 (Tex.Crim. App.1993), overruled on other grounds by, Matchett v. State, 941 S.W.2d 922 (Tex.Crim. App.1996), when determining waiver of a juvenile's statutory rights. See In re C.O.S., 988 S.W.2d 760 (Tex.1999). Under Marin there are three categories of rights. The first set of rights are those that are considered so fundamental that implementation of these requirements is not optional and cannot, therefore, be waived or forfeited by the parties. Marin, 851 S.W.2d at 280. The second category of rights are those that must be implemented by the system unless expressly waived. Id., at 278-79. The third set of rights are those that the trial court has no duty to enforce unless requested, and the law of procedural default applies. See id. at 279. This analysis has been explicitly endorsed and extended

to the juvenile offender context. See In re C.O.S., 988 S.W.2d 760 (holding that before the 1997 amendment to section 54.03 of the Family Code, a juvenile's rights under that statute must be implemented unless expressly waived); Childs v. State, 21 S.W.3d 631 (Tex.App.—Houston [14th Dist.] 2000, pet. ref'd) (holding that a juvenile's rights under section 51.095 of the Family Code must be implemented unless expressly waived). Neither the Supreme Court nor the Court of Criminal Appeals has yet held that Marin analysis is required in section 52.02(a) cases, but out of an abundance of caution, we take judicial notice of the fact that the "Technical Services" area, the "Interview Room and Investigative Services Area," and the "Gang Youth Investigators Office" of the Tyler Police Department were designated juvenile processing offices under an order signed by Judge Floyd T. Getz on July 19, 1999.

PARENTAL NOTIFICATION

Appellant contends that his confession should have been suppressed based on the failure of the officers having him in custody to promptly contact his parents as required by section 52.02(b) of the Family Code. Section 52.02(b)(1) provides that "a person taking a child into custody shall promptly give notice of the reason for taking the child into custody, to ... the child's parent, guardian, or custodian ...." (emphasis added). Tex. Fam.Code Ann. § 52.02(b)(1). Therefore, we must determine whether the parental notification in this case complied with section 52.02(b)(1).

There are few cases that specifically address the issue of prompt parental notification under section 52.02(b). In Gonzales v. State, 9 S.W.3d 267 (Tex.App.—Houston [1st Dist.] 1999, pet. granted) the court held that section 52.02(b)(1) was not satisfied where the evidence at the hearing on the juvenile's motion to suppress did not show that the juvenile's parents had been notified at all. In State v. Simpson, ___ S.W.3d ___ (Tex.App.—Tyler No. 12-00-00235-CR, December 29, 2000), this Court affirmed the trial court's suppression of a juvenile's confession pursuant to section 52.02(b) when the juvenile's mother was not notified until the Sunday evening following his arrest at 11:00 a.m. on the preceding Friday. In the Matter of C.R., 995 S.W.2d 778 (Tex.App.—Austin 1999, pet. denied), a juvenile was picked up for questioning as a witness by police between 7:30 p.m. and 9:30 p.m. The juvenile became a suspect when he implicated himself around 11:00 p.m. His mother was not contacted until around 1:00 a.m. and then only told that her son was "helping the officers 'on a job.' " She was not notified he was in custody until four hours later at 5:00 a.m. The court of appeals reversed, finding this was not prompt notification under section 52.02(b).

In the instant case, Appellant was arrested shortly before 9:25 a.m., but his mother was not contacted until 1:45 p.m., 4 hours and 20 minutes later. Detective Ragland never attempted to contact anyone, testifying he was busy working the crime scenes, collecting evidence, and taking Appellant's statement. It is unclear from the record whether or not Detective Brewer had attempted to contact Appellant's parents earlier, although Detective Ragland "believed" he had. Appellant's mother was not contacted until she was reached by Sergeant Barrentine at 1:45 p.m. While this four hour and twenty minute delay standing alone might not warrant reversal pursuant to section 52.02(b), the impact of the delay was enhanced by the fact that the juvenile was in the process of deciding whether or not to waive important constitutional rights. It is also noteworthy that his mother was reached by telephone on the very first attempt immediately after Appellant's confession had been obtained following his on-again off-again attempts to claim his constitutional rights. There was scant direct evidence in the record of any efforts to contact her or anyone else until after the confession was obtained. Under these circumstances we hold this was not prompt notification under section 52.02(b) of the Family Code. We, however, do not rely on the parental notification issue alone in to reversing the case. We turn now to the issue of Appellant's purported waiver of his constitutional rights to remain silent and to counsel.

WAIVER OF CONSTITUTIONAL RIGHTS

In his fourth issue, Appellant contends that his constitutional rights to remain silent and to counsel were violated when the magistrate continued his interview after Appellant made an unequivocal statement that he did not wish to waive his rights. The State responds that because of Appellant's demeanor and "contradictory" answers, the magistrate did not believe Appellant understood what waived meant and he was entitled to continue to discuss the meaning of the term until he was satisfied Appellant intelligently made a decision.

Even when an accused does not have the added protections afforded a juvenile under the Texas Family Code, the constitutional right to counsel and to remain silent have been zealously guarded by a long line of cases. Attempts to secure incriminating statements from an accused are among the pretrial phases of a criminal prosecution to which the supreme court has extended Sixth Amendment protection. See Maine v. Moulton, 474 U.S. 159, 176, 106 S.Ct. 477, 487, 88 L.Ed.2d 481 (1985). The prosecution may not use statements, whether excul-

patory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Miranda Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). The Fifth Amendment privilege is available under circumstances such as these and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. Id. at 467. If an accused indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. Id. at 474. "At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Id. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Id. "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Id. at 475, citing Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed.2d 78 (1962).

The determination of whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forego his rights to remain silent and have the assistance of counsel. Fare v. Michael C., 442 U.S. 707, 724-25, 99 S.Ct. 2560, 2571 572, 61 L.Ed.2d 197 (1979). When a defendant v. expresses his desire to deal with the police through counsel only, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with police. Edwards Arizona, 451 U.S. 477, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981); Hunt v. State, 632 S.W.2d 640, 641 (Tex.App.—Dallas 1982, pet. ref'd).

When an accused exercises his constitutional right to remain silent and to an attorney, if an interrogation continues without the presence of an attorney and a statement is taken, the burden is on the government to demonstrate that the defendant v. knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. Holloway State, 780 S.W.2d 787, 789 (Tex.Crim. App.1989). If, however, subsequent interrogation is initiated by law enforcement, no waiver of counsel (no matter how apparently knowingly and voluntary) is valid. Id. at 789-90; see also Hearne v. State, 534 S.W.2d 703 (Tex.Crim.App.1976); Cooper v. State, 961 S.W.2d 222, 225 (Tex.App.—Houston [1st Dist.] 1997, pet. ref'd), citing Minnick v. Mississippi, 498 U.S. 146, 153, 111 S.Ct. 486, 491, 112 L.Ed.2d 489 (1990). If an individual indicates in any manner at any time before or during questioning that he wishes to remain silent, the interrogation must cease. Id., citing Miranda, 384 U.S. at 473-74, 86 S.Ct. at 1627.

In the case before us we must evaluate the exchange between Appellant and the magistrate in light of these principles. The magistrate's interview can be broken down into three segments. The first occurred when Appellant and the magistrate entered the room and began their conversation. The magistrate read Appellant the statutory warnings and asked if he wished to waive his rights. Appellant clearly and distinctly indicated that he did not wish to waive them. The magistrate asked Appellant to repeat his answer and Appellant reiterated his refusal to waive his rights, whereupon the magistrate indicated a "no" response to the statement on the form: "At this time, I fully understand all my rights as they have been explained to me, and I voluntarily wish to waive them." The magistrate then asked Appellant to sign the waiver form on which the magistrate had indicated a waiver refusal which Appellant did.

According to his testimony at the suppression hearing, the magistrate decided to inquire whether Appellant understood what the term "waive" meant. Appellant answered, "No, sir" and the magistrate proceeded with an explanation of the term "waive." During this explanation, Appellant, while shaking his head in the negative, said "No," again indicating a desire not to waive his rights. When he was finished, the magistrate asked Appellant if he now understood what the term "waive" meant and Appellant answered, "Yes, sir." The magistrate then asked Appellant if he wished to "waive or give up" his right to remain silent. Appellant again answered, "No, sir." The magistrate then asked affirmatively if Appellant wished to remain silent and was told, "Yes, sir." This response was followed by Appellant being asked if he wished to "waive or give up" his right to have an attorney present to advise him. Again, Appellant responded, "No, sir." By this time, Appellant had unequivocally invoked his rights six times.

The magistrate then stated, "Very well. That concludes the statutory warnings." At this point, the interview should have ended. The magistrate had admirably done his job, and the Appellant had steadfastly declined to waive his constitutional rights. However, for whatever reason, the magistrate asked the proverbial one question too many. The magistrate continued "My understanding from our conversation is, Edward, you are or you are not wanting to

give a statement at this time?" This was an improper inquiry. It is not the magistrate's role or responsibility under the Family Code to find out whether an accused wishes to "give a statement." It is a magistrate's responsibility to ascertain if an accused juvenile wishes to waive his constitutional rights. The phrasing of this question, after six unequivocal responses invoking his constitutional rights, unfortunately opened a Pandora's box of further explanation of what Appellant needed to do in order to give a statement: he needed to waive his rights to remain silent and to counsel. Explaining what one needs to do in order to give a statement is not the purpose of the magistrate's warning provisions for juveniles under the Family Code.

Appellant unequivocally invoked his rights under the Fifth and Sixth Amendments at least six times. [FN5] See, e.g., Watson v. State, 762 S.W.2d 591, 600 (Tex.Crim.App.1988) (defendant's right to remain silent not scrupulously honored after the defendant refused to answer questions); Stone v. State, 612 S.W.2d 542 (Tex.Crim.App.1981) (state failed to meet its burden of proving that a defendant's incriminating response to questioning by district attorney was given after knowing and voluntary waiver of right to counsel); Faulder v. State, 611 S.W.2d 630 (Tex.Crim.App.1979) (request by defendant that he be allowed a couple of days to get matters straight in his mind was an invocation of the right to remain silent and law enforcement officers' failure to honor such request rendered statement inadmissible); Ochoa v. State, 573 S.W.2d 796 (Tex.Crim.App. 1978) (statement by the accused that he thought he ought to talk to an attorney before answering questions or signing anything was sufficient to invoke the right to counsel even though the request was not pressed); see also Mayes v. State, 8 S.W.3d 354, 361 (Tex.App.—Amarillo 1999, no pet.) (statement by defendant that she was "not talking" and was "going to shut up" as well as "I have to get one for both of us" when told she could talk to lawyer was an unambiguous invocation of the right to remain silent and to counsel); Sontag v. State, 841 S.W.2d 889 (Tex. App.—Corpus Christi 1992, pet. ref'd) (admission of the audio portion of a videotape made after a motorist invoked his right to counsel was reversible error).

> FN5. Those six times were as follows: (1) when the warnings were initially given and Appellant said "No, sir" when asked if he wanted to give up his rights, (2) when he was asked to repeat himself, (3) when, as the magistrate explained the meaning of "waiver" and Appellant said, "No" when the magistrate mentioned giving up his rights, (4) when the magistrate asked him if he wished to give up his right to remain silent a second time, (5) followed by asking him if he wanted to remain silent and Appellant said, "Yes," and (6) when the magistrate asked Appellant if he wished to give up his right to an attorney and he responded, "No."

Although Appellant clearly and unequivocally asserted his right to remain silent and his right to counsel, even after the magistrate had taken time to explain the meaning of waiver, the interview did not cease nor was an attorney provided. After the magistrate had stated that the warnings were concluded, he continued to interview Appellant regarding the giving of a statement. In this regard, the magistrate's action constituted a re-institution of the interview with Appellant. Appellant did not initiate the contact to reopen the discussion, the magistrate did. The interview should have stopped at the first indication by Appellant that he wished to invoke his rights. Accordingly, his right to remain silent was not scrupulously honored, rendering his subsequent confession inadmissible. Edwards v. Arizona, 451 U.S. at 486-87, 101 S.Ct. at 1886. Appellant's issue is sustained. [FN6]

> FN6. We note that in Le, the Court of Criminal Appeals remanded to the appellate court to conduct a harm analysis in light of the remaining evidence offered at the juvenile's trial. In the present case, Appellant pled guilty; thus, we are unable to conduct a harm analysis.

CONCLUSION

We must carefully comply with the mandatory provisions the legislature has chosen to enact for the protection of juvenile rights, as well as those constitutional rights guaranteed to all citizens regardless of age. As the Texas Court of Criminal Appeals has recently stated:

> The Legislature has set forth very specific actions which a law enforcement officer must take when arresting a juvenile. We are aware of the disturbing increase in juvenile crime in our state, and we are sympathetic to law enforcement's efforts to deal with violent juvenile offenders. Nevertheless, we must not ignore the Legislature's mandatory provisions regarding the arrest of juveniles. We informed the citizenry, a decade ago in a unanimous opinion, of the Legislature's clear intent to reduce an officer's impact on a juvenile in custody. Today we remind police officers of the Family Code's strict requirements.

Le v. State, 993 S.W.2d 650, 655 (Tex.Crim.App. 1999).

Having sustained Appellant's issue, we reverse the judgment of the trial court and remand this cause for a new trial.

5. PARENTAL NOTIFICATION REQUIREMENT DOES NOT APPLY TO JUVENILE QUESTIONED WHEN NOT IN CUSTODY

In the Matter of E.M.R., 55 S.W.3d 712 (Tex.App.—Corpus Christi 8/31/01)[*Texas Juvenile Law* 301 (5th Edition 2000)].

Facts: A jury found E.M.R. guilty of delinquent conduct by committing the offense of murder. The trial court assessed a determinate sentence of twenty- two years with a possible transfer to the Texas Department of Criminal Justice- Institutional Division. E.M.R. was thirteen at the time of the offense and fourteen at the time of adjudication. In five points of error, appellant challenges the admissibility of two written statements, contends the trial court erred in failing to order a fitness hearing, and complains that his trial counsel rendered ineffective assistance of counsel.

Sometime around 1:00 a.m. on September 10, 1999, Benjamin Rojas was assaulted and beaten with a stick. [FN1] Later that morning, the police began an investigation by contacting neighbors in the vicinity. One neighbor told the police that he did not witness the assault, but saw E.M.R. and Nick Ortiz following Rojas, then heard some "loud banging," and saw the boys return.

> FN1. Rojas died approximately a week later after his family made the decision to discontinue life support.

Sergeant Hugo Stimmler, a Corpus Christi police officer, testified at the suppression hearing that he and another officer, Ray Rivera, went to E.M.R.'s house on September 10th and spoke to E.M.R. and his mother. Stimmler testified they told E.M.R. they needed to talk to him and he agreed to go with them to the police station. Stimmler also testified that E.M.R.'s mother was told that E.M.R. was going to be taken to the police station to talk to him. Stimmler testified that E.M.R.'s mother agreed to the officers taking E.M.R. to the station, and he did not believe that she asked to go along. E.M.R. was taken to the station, and after being warned by a magistrate, gave a written statement implicating Nick Ortiz and denying participation in the assault. The police continued their investigation, including a photo-lineup in which Ortiz and E.M.R. were identified. A few days later, the police took Ortiz into custody and obtained a statement from him; the statement blamed E.M.R. for the assault.

On September 15, 1999, the officers returned to E.M. R.'s house and asked him to go with them to the station because they "needed to talk to him and resolve some things." Stimmler testified he "believe[s]" that Officer Rivera "might have said something to [E.M.R.'s mother] that, you know, we needed to talk a little bit more about the statement we had taken." E.M.R. was taken to the station, where he was again warned by a magistrate. E.M.R. gave a second statement, in which he admitted participating in the beating. Stimmler testified that both statements were given voluntarily. He also testified that the process of obtaining each of the statements took approximately one hour.

E.M.R was charged with capital murder and murder in the juvenile court. He filed a motion to suppress his two statements, arguing that the statements were made during "custodial interrogations" and without a knowing waiver of his right to remain silent under Miranda v. Arizona, 384 U.S. 436 (1966), and in violation of articles 1.05 and 38.22 of the Texas Code of Criminal Procedure. A pre-trial hearing on the motion to suppress was held on December 1, 1999. At the suppression hearing, E.M. R.'s counsel also argued that the statements had not been "intelligently and knowingly given, pursuant to Section 51.095 of the Texas Family Code." At the conclusion of the hearing, the court stated, "[b]ut in the final analysis, 51.095 gives fairly simple criteria to evaluate this—the admissibility of these statements. And based, particularly, on the testimony of the two judges, [FN2] I'm gonna deny the motion to suppress the statements and deny the motion." The order denying the motion to suppress was signed the same day.

> FN2. Two municipal court judges, Don Alex and Rudolfo Tamez, testified at the suppression hearing regarding their role in administering warnings to E.M.R.

E.M.R. pled "not true" and was tried by a jury. The jury found E.M.R. had committed delinquent conduct by committing the offense of murder. E.M.R. waived disposition by the jury and the trial court sentenced him to a determinate sentence of twenty-two years with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice.

Held: Affirmed.

Opinion Text: E.M.R's first and second points of error challenge the admission and use of his written

statements at the adjudication hearing. In his first point, E.M.R. contends the trial court erred in admitting the statements because: (1) the statements were inadmissible under section 51.095(a)(1)(C) of the family code because E.M. R.'s waiver of his constitutional and statutory rights was not done knowingly, intelligently, and voluntarily; and (2) admission of the statements also violated E.M.R's due process rights because his maturity level and reasoning ability rendered him incapable of voluntarily waiving his constitutional and statutory rights. [FN3] In his second point of error, E.M.R. argues the statements were inadmissible because they were obtained in violation of section 52.02(b) of the family code. E.M.R. contends he was in custody when his statements were given, and that the State failed to comply with section 52.02(b) by promptly notifying his mother that he was in custody and giving her a statement as to the reason he was in custody. The State argues E.M.R. was not in custody when his statements were taken. It also argues that even if he was in custody, the statements were taken in compliance with all requirements in the family code, were given voluntarily, and were therefore properly admitted. We hold that the trial court correctly admitted the statements.

> FN3. E.M.R.'s special education teacher testified at the suppression hearing that E.M.R. reads at a second or third-grade level. A doctor also testified that he has treated E.M.R. over several years, and that E.M.R. suffers from impulse-control problems, attention deficit hyperactivity disorder, and is bipolar.

I.

In his first two points of error, appellant complains of the trial court overruling his motion to suppress his confessions. In that motion to suppress he alleges that "[t]he statements allegedly made by the juvenile/defendant are at issue and were made as a result of custodial interrogation and without a knowing, intelligent and affirmative waiver by the juvenile/defendant of his rights to remain silent...." Section 51.095 of the Family Code is entitled "Admissibility of a statement of a Child" and sets out in detail what is required for a statement of a juvenile to be admissible. The trial court conducted a hearing on appellant's motion to suppress, with a number of witnesses testifying, both for the state and appellant. At issue was whether he understood the warnings he was given. Two municipal judges testified in detail as to the warnings they administered to appellant, as did the police officer. The child's teacher testified that the juvenile was a poor reader and wouldn't understand anything above the third grade level. The child's physician testified that he has a number of disorders, including being bi-polar, and was on medication. At the conclusion of the evidence appellant's lawyer argued that the statements were "not intelligently and knowingly given, pursuant to Section 51.095 of the Texas Family Code."

The trial court recognized the issue to be whether § 51.095 was complied with and stated that the section gives fairly simple criteria to evaluate the admissibility of the statements. No where is § 52.02(b) mentioned as a potential basis to suppress the statements.

We hold that appellant waived his ability to complain on appeal that his statement should have been suppressed because it was taken in violation of section 52.02(b) of Texas Family Code. See Tex. Fam.Code Ann. § 52.02(b) (Vernon Supp.2001). During the hearing on his motion to suppress, appellant argued that his statement should be suppressed because (1) section 51.095 of the Texas Family Code was violated, and (2) his statement was not given knowingly and intelligently. See Tex. Fam.Code Ann. § 51.095 (Vernon Supp.2001). On appeal, however, appellant urges that his statement should have been suppressed because family code section 52.02(b) was violated. See Tex. Fam.Code Ann. § 52.02(b) (Vernon Supp.2001). Section 52.02(b) requires that a person who takes a child into custody promptly give notice of his action and a statement of the reason for taking the child into custody to both the child's parent and a juvenile court official. See id. The appellant failed to preserve his complaint of a section 52.02(b) violation because he did not adequately notify the trial court of this complaint. See Tex.R.App. P. 33.1.

Rule 33.1 of the rules of appellate procedure states that as a prerequisite to making a complaint on appeal, the party complaining of error must make an objection to the trial court sufficiently specific to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. See Tex.R.App. P. 33.1. That was not done in this case. The purpose of the preservation requirement is to ensure that the trial court has a fair opportunity to make the correct ruling. In this case, this was not done. Thus, we hold that appellant waived his complaint regarding section 52.02(b).

Appellant argues that In re C.O.S. requires that we address this issue regardless of whether it was properly preserved. However, In re C.O.S. presented a distinguishable situation. C.O.S., 988 S.W.2d 760 (Tex.1999). The holding there was "when a statute directs a juvenile court to take certain action, the failure of the juvenile court to do so may be raised for the first time on appeal unless the juvenile defendant expressly waived the statutory requirement." Id. at 767. There the trial court did not

explain the juvenile's right to confront witnesses and that his juvenile record might be used in future proceedings as mandated by § 54.04(b) of the Family Code. The court followed the reasoning of the Court of Criminal Appeals in Marin v. State, 851 S.W.2d 275 (Tex.Crim.App.1993) in which that court divided rights of accused into three general categories: fundamental, forfeitable, and those that can be waived, but must be done so knowingly. Marin and C.O.S. both involved the failure of counsel to object to the trial court's actions, and questioned whether an objection was necessary to preserve error under the circumstances. The rule is not applicable here, where appellant moved to suppress his statements, but on a ground very different from the one urged on appeal.

II.

Even were we to hold that appellant's complaints regarding the alleged section 52.02(b) violations were not waived, we would still affirm the trial court's actions. Appellant argues that the trial court erred in refusing to suppress his statement because it was taken under circumstances contravening section 52.02(b). That is, appellant contends that the officers failed to promptly notify his mother of the reasons for taking him into custody. However, we would hold that E.M.R. was not in custody for purposes of that section when he gave his statement so that the provisions of section 52.02(b) were not implicated.

Section 52.02(b) states:

> 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:
>
> (1) the child's parent, guardian, or custodian; and
>
> (2) the office or official designated by the juvenile court.

Id. That subsection should not be read in isolation from its surroundings. The section quoted is contained in the chapter of the family code relating to proceedings before and including referral to juvenile court. See Tex. Fam.Code Ann. ch. 52 et seq.

Section 52.01 of that chapter outlines the circumstances in which taking a child into custody is allowed. See id. at § 52.01(a). A child may be taken into custody (1) pursuant to an order of the juvenile court, (2) pursuant to the laws of arrest; (3) by a law-enforcement officer, if there is probable cause to believe that the child has either engaged in the violation of a penal law or engaged in delinquent conduct; (4) by a probation officer if there is probable cause the juvenile violated a condition of his probation; or (5) pursuant to a "directive to apprehend" issued under section 52.015 (similar to an arrest warrant). Id. Section 52.01 also contains a provision expressly recognizing that "in custody" under this chapter is not an arrest for all purposes. See id. at 52.01(b). Subsection (b) of 52.01 states:

> The taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or of the United States.

Id.

In this case, the police officers testified that they did not have probable cause to arrest E.M.R. until he made the statement on September 15th implicating himself. They testified that only after taking that statement did they take E.M.R. into custody. They testified that all E.M.R.'s statements up until that point were given freely and voluntarily, and that prior to that time, he had not been detained or restrained in any way. We hold that the officers had no duty to notify E.M.R.'s parent until after he gave the incriminating statement and they placed him into custody.

Moreover, we do not agree that section 52.02 should be applied every time a police officer takes a juvenile to the police station for questioning regarding a crime. Cf. Roquemore v. State, 11 S .W.3d 395, 399-400 (Tex.App.—Houston [1st Dist.] 2000, pet. granted Sept. 13, 2000) (holding that statement taken without first complying with section 52.02 admissible because even though suspect was "in custody" at time statement was given, statement was not a result of police interrogation). The purpose of chapter 52 is to prevent a juvenile from being wrongfully taken into police custody and to prevent the juvenile from being wrongfully held in custody for long periods of time. See Tex. Fam.Code Ann. § 52.01-52.03 (Vernon Supp.2001). Under that chapter, a person taking a child into custody, must "without unnecessary delay and without first taking the child to any place other than a juvenile processing office," either (1) release the child to a parent, (2) bring the child before a juvenile court official if there is probable cause the child engaged in delinquent conduct, (3) bring the child to a juvenile detention facility, (4) bring the child to a secure detention facility complying with other sections of the juvenile code, (5) bring the child to a medical facility (if indicated), or (6) dispose of the case. Tex. Fam.Code Ann. § 52.02(a) (Vernon 2001). That section also contains the parental notification requirement that the majority contends was violated in this case, requiring suppression of E.M.J.'s statement. See id.

Appellant relies on a case from the Austin Court of Appeals, In re C.R., for the proposition that a police officer taking a child into custody must advise the parent that the child is being taken into custody, and not merely advise the parent that the officer is taking the child for questioning. See In re C.R., 995 S.W.2d 778, 783 (Tex.App.—Austin 1999, pet. denied). Additionally, that case holds that the officer must advise the parents of the reasons for taking the child. Id. However, the Austin court did not rule on the question of whether the child was taken into custody when he was initially picked up, or only after he had implicated himself during questioning. Id. at 782. We would hold that merely taking a child to the station for questioning does not amount to taking a child into custody for purposes of section 52.02.

Practical reasons dictate that 52.02(b) should not be strictly applied to situations where police officers take a child to the station for questioning. When an officer takes a juvenile to the station for questioning, the officer does not have probable cause to believe that the juvenile has committed in a crime. At that point, what is the officer to tell the child's parent? Here, the officers testified that they told the child's parent they were taking him to the station for questioning. That was the truth. They did not charge him until he gave a statement implicating himself in the crime. We would hold that the mandate of section 52.02(b) was satisfied in this case.

Likewise, because we have held that appellant was not in custody at the time he made the statements for purposes of section 52.02, we also hold that the statements were not taken in contravention of section 51.095(a)(1)(C) because appellant was not in custody at the time they were taken. We overrule appellant's first and second points of error.

6. DELAY IN TAKING TO PROCESSING OFFICE JUSTIFIED BY NEED TO SECURE THE SCENE OF THE ARREST

In the Matter of J.D., ___ S.W.3d ____, No. 04-00-00689-CV, 2001 WL 1193899, 2001 Tex.App.Lexis 6763 (Tex.App.—San Antonio 10/10/01, pet. filed 11/20/01) [*Texas Juvenile Law* 297 (5th Edition 2000)].

Facts: J.D. appeals his conviction and sentence for aggravated assault and conspiracy to murder.

On the morning of May 17, 2000, J.D. and another juvenile were spotted by a neighbor in the vicinity of Ogden Elementary School and Irving Middle School. According to the neighbor, the juveniles were carrying a rifle in a backpack and attempting to hide the weapon in an alley. tempting to hide the weapon in an alley. Concerned, the neighbor contacted the police and reported the incident.

An investigation led San Antonio police to a house on 3015 Perez Street—J.D.'s house. Under the belief he was dealing with a burglary in process, Officer Gilberto Gallegos, accompanied by Officer Javier Hernandez, entered and searched the residence after knocking and announcing himself but without first obtaining a warrant. Almost immediately after entering the residence, Gallegos was confronted by J.D. pointing a .22 caliber rifle at him. Gallegos drew his weapon and a stand-off ensued with each shouting at the other to drop his weapon. J.D. eventually surrendered the rifle. After J.D. was secured and handcuffed in the living room, Gallegos asked some basic questions: "name, date of birth, where do you live." This is when the officers first learned J.D. lived at 3015 Perez Street.

As Hernandez was handcuffing J.D., he noticed a rifle leaning against the living room sofa. Hernandez asked J.D. if there were any other weapons in the house. J.D. said there was a cross-bow in a backpack. Hernandez searched the backpack that was on the sofa next to J.D. but only found a box of .22 caliber bullets. Hernandez asked J.D. where the cross-bow was and J.D indicated that it was in a black back-pack in his bedroom. Hernandez located the black back-pack and found the cross-bow and what appeared to be homemade arrows. Hernandez also recovered a handful of loose bullets from J.D.'s pocket. When Hernandez asked J.D. what the bullets were for, J.D. said the bullets were for some kids at school who had been messing with him; that he was upset and mad because his girlfriend had broke up with him. Hernandez then asked if there was anyone else in the house and J.D. responded "no, only him." A witness, however, later told Hernandez he thought he saw two juveniles enter the house. Based on this information, Hernandez, assisted by Officer James Shirley, searched the house for the second juvenile, who was eventually found hiding in the bathroom armed with a handgun.

After the second juvenile was found and both were in custody, Detective Shirley Owen, a member of the San Antonio Police gang unit, briefly questioned the juveniles to determine if either were involved in gang activity. At some point, J.D.'s friend told Owen that he did not want to go to school and shoot anybody. J.D., however, told her he was tired of being humiliated and picked on by people at school. When Owen asked J.D. what the bullets were for, J .D. responded that they were going to use them to shoot at the school. Owen also asked J.D. why he wasn't in school and J.D. responded that he and his friend were on their way to school that morn-

ing when they decided to return to J.D.'s house to get more ammunition.

J.D. was charged with one count of aggravated assault with a deadly weapon against a public servant and two counts of conspiracy to commit capital murder. J.D. filed three motions to suppress his written and oral statements and all other illegally obtained evidence. A hearing was held and the trial court suppressed all of the oral statements J.D. made to Detective Owen except for one he made spontaneously while Owen was talking to the other juvenile. All other motions to suppress were denied. J.D. subsequently plead true to each of the counts and was sentenced by the trial court to a fifteen-year determinate sentence and committed to the Texas Youth Commission until his twenty-first birthday. J.D. appeals the trial court's denial of his motions to suppress.

Held: Affirmed.

Opinion Text: DESIGNATED JUVENILE PROCESSING OFFICE

In his second point of error, J.D. contends the trial court erred in admitting his written statement into evidence because he was taken to places other than a designated juvenile processing office under section 52.025 of the Texas Family Code.

Discussion

Because J.D. was a juvenile when he made the written statement, the Texas Family Code governs its admissibility. See Comer v. State, 776 S.W.2d 191, 196 (Tex.Crim.App.1989). When a child is taken into custody, he may be temporarily detained in a designated juvenile processing office. Tex. Fam.Code Ann. § 52.025 (Vernon Supp.2001).

Section 52.025(a) of the Family Code further provides that:

> The juvenile court may designate an office or a room, which may be located in a police facility or sheriff's offices, as the juvenile processing office for the temporary detention of a child taken into custody under Section 52.01 of this code. The office may not be a cell or holding facility used for detentions other than detentions under this section. The juvenile court by written order may prescribe the conditions of the designation and limit the activities that may occur in the office during the temporary detention.

Id. § 52.025(a). A juvenile may be detained in a juvenile processing office for "the receipt of a statement by the child...." Id. § 52.025(b)(5).

1. J.D.'s Living Room

J.D.'s specific complaint is twofold. He first complains the police illegally detained him in the living room of his house because his living room is not a designated processing office. J.D. maintains that because he was taken into custody in his bedroom, police should not have moved him to the living room before taking him to a juvenile processing office. We disagree.

Officers Gallegos and Hernandez testified they secured and handcuffed J.D. in the living room. This is also where J.D. was read his rights. Even if J.D. could prove he was taken into custody in his bedroom, the mere movement of J.D. from his bedroom to the living room within the same house would not violate section 52.02(a). In other cases where this same issue was raised, movement of the defendant was substantial, such as transporting the defendant somewhere away from the place he was taken into custody. See, e.g ., Roquemore v. State, 11 S.W.3d 395, 400 (Tex.App.—Houston [1st Dist.] 2000, pet. granted) (instead of taking defendant directly to a juvenile processing office, officer took defendant to place where defendant said stolen property was hidden); In re G.A.T., 16 S.W .3d 818, 825 (Tex.App.—Houston [14th Dist.] 2000, pet. denied) ("after taking the four juveniles into custody, [the officer] took them back to the scene of the crime for identification rather than taking them directly to a designated juvenile processing office."). This argument is therefore without merit.

2. Judge Teniente's Office

Next, J.D. argues he was illegally detained in Judge Richard Teniente's office because the order designating "the offices, hearing rooms and courtrooms of the Magistrates of Bexar County," is too general in that it does not designate a specific area to be used exclusively for processing juvenile offenders. He further contends Judge Teniente improperly participated in the taking of J.D .' s statement. We disagree.

For support that the designation is too general, J.D. relies on Anthony v. State, 954 S.W.2d 132 (Tex.App.—San Antonio 1997, no pet.). However, Anthony is distinguishable and, contrary to J.D.'s assertion, this court did not hold in Anthony that "the general designation of police stations and magistrates' offices" was improper. Id. at 135-36. Instead, we concluded the defendant's statement was taken in violation of the Family Code because the homicide office had not been designated solely for the purpose of processing juveniles; the magistrate who informed Anthony of his rights was unaware of any special designation making his courtroom a juvenile processing office; and police failed to contact

a juvenile officer. Id. at 134. Therefore, the court determined the police procedure failed to "supply the child with protection against the stigma of criminality or exposure to adult offenders." Id. at 136. See also Comer, 776 S.W.2d at 196 (reasoning behind the rule is to "avoid the 'taint of criminality' inherent in interrogation conducted at the unsupervised discretion of law enforcement officers.").

Unlike in Anthony, Judge Teniente testified he had been designated as one of the officials before whom juveniles may be brought when taken into custody. [FN1] The judge also testified that as part of his official duties as a designated official, he administers warnings to juveniles as required by the Family Code. Moreover, there is no evidence J.D. was subjected to the "taint of criminality." See id. The record shows J.D. was arrested and taken into custody in his home while his parents were present. He was then transported to 214 W. Nueva, Room 109, a place designated as a juvenile processing office. His parents were also present at the processing office.

> FN1. During the suppression hearing, the State showed Judge Teniente a 1997 designation order signed by Judge Andy Mireles. This is the order that J.D. contends is too general because it fails to designate a specific place to be used exclusively for juvenile processing. However, Judge Teniente testified his office had been designated by a later order signed by District Court Judge Carmen Kelsey.

Detective Thomas Matjeka testified he walked J.D. across the street to the office of Judge Teniente, who informed J.D. of his rights and gave him the warnings required by the Family Code. See Tex. Fam.Code Ann. § 51.095(a)(1)(A) (Vernon Supp.2000). Matjeka then returned J.D. to 214 W. Nueva, Room 109, took J .D.'s statement, and returned to Judge Teniente's office where J.D. signed the completed statement in the judge's presence as required by section 51.095(a)(1)(B).

Matjeka testified this was the procedure normally used when taking a juvenile's statement and that he did not accompany J.D. inside Judge Teniente's office. Judge Teniente testified only he and his clerks were present in his office; no law enforcement personnel or adult offenders were present. Thus, unlike Anthony, the purpose of requiring a specially designated area to protect juveniles from exposure to adult offenders and the stigma of criminality was achieved. See Williams v. State, 995 S.W.2d 754, 758-59 (Tex.App.—San Antonio 1999, no pet.) (distinguishing Anthony using similar reasoning). We therefore hold the trial court did not err in overruling J.D.'s motion to suppress on this basis. Accordingly, we overrule J.D.'s second point) of error.

DELAY IN TRANSPORTING AND PROCESSING JUVENILE

In his third point of error, J.D. argues the trial court erred in denying his motion to suppress because: (1) he was not delivered to the juvenile processing center without unnecessary delay; and (2) he was detained for an impermissible period of time at the juvenile processing center before being taken to a juvenile detention facility.

Discussion

1. Delay in Transporting J.D. to the Juvenile Processing Office

Section 52.02(a) of the Texas Family Code provides that a child taken into custody must be taken, without "unnecessary delay," to a juvenile processing office. See Tex. Fam.Code Ann. § 52.02(a) (Vernon Supp.2000). J.D. argues the length of time he was detained in his home before being transported to the juvenile processing office violated section 52.02(a). We disagree.

This section of the Family Code "by its very terms contemplates that 'necessary' delay is permissible." Contreras v. State, No. 1682-99-CR, 2001 WL 717495, *4 (Tex.Crim.App. June 27, 2001). Whether the delay is necessary is "determined on a case by case basis." Id. The Court of Criminal Appeals in Contreras held that police activities taken to secure the scene and save a victim's life are not only legitimate but necessary and therefore justify brief delays. Id. Contreras involved a forty-fifty minute delay. Therefore, the issue we must decide is whether the delay in this case was necessary.

The parties dispute the time J.D. was taken into custody and the total length of the delay. J.D. argues it was a three to four hour delay. The State, on the other hand, contends the delay was one and one-half to two hours. As the State notes, the record does not provide a detailed chronology of the events that took place that morning. Consequently, we do not know exactly how long J.D. was in custody before being taken to the juvenile processing office. At most, it appears J.D. could have been in custody for two or two and one-half hours before he was logged in at the juvenile processing office between 11:10 a.m. and 11:15 a.m.

During this time, three things happened: the officers secured the scene, J.D. was allowed to speak with his parents, and a gang unit detective questioned J.D. and the other juvenile. Of these, the latter took only twenty minutes. It is unclear, though, exactly how long the police spent securing the scene

and how long J.D.'s parents were permitted to talk to him.

Nevertheless, the evidence presented at the suppression hearing suggests much of the delay was attributable to the police securing the scene, which included steps the police took to search the house for weapons and the second juvenile who was thought to be armed and hiding somewhere in the house. Police eventually found the juvenile hiding in the bathroom where a standoff ensued with the juvenile threatening to kill himself. Thus, these steps were necessary not only for the safety of the officers at the scene but also for the safety of the two juveniles. See id. at *1.

J.D.'s statements regarding his plan to shoot and kill some children at a nearby school created further concern for public safety. See id. at *2. (citing Comer v. State and discussing the competing concerns of "protecting the public while insulating children from the taint of criminality"). With this concern in mind, the police, out of an abundance of precaution, questioned J.D. briefly before leaving the house to determine if there were other co- conspirators, whether the incident was gang related, and who were the intended targets of the crime. To protect J.D.'s rights, the police administered Miranda warnings twice before questioning him. To protect him from the "taint of criminality," the police had a detective dressed in civilian clothes question J.D. At no time during this period did the police attempt to obtain a written statement from J.D. And, as stated previously, Detective Owen spent a total of only twenty minutes questioning J.D. and the other juvenile.

Despite legitimate police concern for public safety, the trial court suppressed all of J.D.'s oral statements to Detective Owen in response to her direct questioning, but admitted a statement he made spontaneously while she was questioning the other juvenile. Nevertheless, the court concluded the delay at J.D.'s house was justified because of the public safety issues involved. Viewing the evidence in the light most favorable to the trial court's ruling, we hold that the trial court did not err in concluding the delay in transporting J.D. to the juvenile processing office was necessary under the circumstances.

2. J.D.'s Detention at the Juvenile Processing Center

J.D. next contends his written statement should have been suppressed because he was detained for an impermissible period of time before being taken to the juvenile detention center. We disagree.

Section 52.025(d) "contemplates that an officer may first, for a maximum of six hours, take a juvenile to a processing center" before delivering the juvenile to a juvenile detention center or one of the other five options listed in section 52.02(a). Baptist Vie Le v. State, 993 S.W.2d 650, 653-54 (Tex.Crim. App.1999). Thus, the issue here is whether J.D. was detained at the processing office for longer than six hours.

J.D. was logged in at the juvenile processing office between 11:10 and 11:15 a.m. Matjetka testified he had completed taking J.D.'s statement by 4:50 p.m. J.D. signed his statement in Judge Teniente's office at 5:14 p.m. and was then taken immediately back to the juvenile processing office to be booked at the Bexar County Juvenile Detention Center. J.D. concedes the record is silent as to the time he was actually delivered to the juvenile detention facility. Based on the available evidence, we hold the trial court correctly concluded J.D.'s detention at the processing office was within the parameters set forth in the Family Code and his written statement was therefore admissible. Accordingly, we overrule J.D.'s final point of error.

7. 50 MINUTE DELAY TO SECURE MURDER SCENE NOT UNNECESSARY UNDER SECTION 52.02

Contreras v. State, ___ S.W.3d ___, No. 1682-99, 2001 WL 717495, 2001 Tex.Crim.App. Lexis 58 (Tex.Crim.App. 6/27/01)[*Texas Juvenile Law* 297 (5th Ed. 2000)]

Facts: A jury convicted the appellant of murder and sentenced her to 40 years confinement. At the time of the offense, the appellant was a fifteen-year-old juvenile; she was certified and tried as an adult in district court. Finding that her written statement was taken in violation of the Texas Family Code and was therefore inadmissible, the Court of Appeals reversed the judgment of the trial court and remanded the case for further proceedings. See Contreras v. State, 998 S.W.2d 656, 657 (Tex.App.Amarillo 1999, pet. granted). We find the trial court properly admitted the appellant's statement and, therefore reverse the judgment of the Court of Appeals.

Viewed in the light most favorable to the trial court's ruling admitting the appellant's written statement, the evidence shows that appellant murdered her "stepfather" in the early morning hours of January 11, 1996, by stabbing him in the chest with a carving knife as he lay sleeping in bed. The police arrived at the residence at approximately 3 a.m. in response to a 911 call placed by the appellant. The appellant approached police from a field and said that she "stabbed him" after an officer asked her what had happened. The police arrested the appellant and placed her in the back of a patrol car and trans-

ported her to a duly designated juvenile office about 45 to 50 minutes after the arrest. The Court of Appeals's analysis of the delay in transporting the appellant focused on this forty-five minute period.

During this period, the police made attempts to save the victim's life, and they "secured the scene." The police did not interrogate or attempt to obtain a written statement from the appellant during this time.

The officer in charge of the crime scene, Farren, testified that trying to save the victim's life and "securing the scene" were police priorities.

> A. Our first priority is to determine whether, in fact, a crime has been committed. Once we determine a crime has been committed, then it would be the—after giving assistance to anybody who needs aid, then we would secure the scene.

This officer testified that "securing the scene" included taking steps to preserve "all the evidence at that scene" and to insure the appellant's safety and the safety of the police officers present at the scene.

> Q. Let me back up a second. Have you testified in front of this jury about going back to [appellant], shining a flashlight on her hands?
>
> A. No, sir, I have not.
>
> Q. Did that happen that night?)
>
> A. Yes, sir, it did.
>
> Q. Do you remember what time that happened?
>
> A. It was probably, oh, probably 25 minutes after we arrived. Once I had her secured in the back of the patrol car, we went ahead and approached the house. Once we determined that it was safe to enter the house, we entered and we discovered the victim in the condition he was in. We called for an ambulance to go ahead and come into the location. From viewing the victim, it was obvious that he was in very critical condition. At that time, we made a determination that we would begin first aid on the victim, moved the victim from the bed and began to do CPR on the victim. Probably three to five minutes later, the fire department arrived. They took over the first aid to the victim. At that time, it was determined that [appellant] should be transported down to the Juvenile Division for further processing. But before we did so, I wanted [appellant] checked for any additional weapons or any other physical evidence that might connect her to this crime.

This officer testified that "securing the scene" also included taking steps to prevent the destruction of evidence.

> Q. Now, you had an occasion to have a discourse with [appellant] later about some gloves; is that correct?
>
> A. Well, after we got inside the scene and discovered what we had and after her [oral] statement that she had stabbed him, we—a decision was made that she should be transported to the Juvenile Division of the Amarillo Police Department. Prior to her being transported, I wanted her searched for any additional weapons for not only our safety, but her safety, and if she had any further evidence on her, including any blood that might have been transferred from the knife or the victim onto her. I wanted to make sure that wasn't destroyed either by simply wiping it off or wetting her hands with her tongue or any possible way she could destroy this evidence.
>
> So we had her removed from the car. She-a metal detector wand was used to scan her for any additional metal objects, one, because she was a female, and two, because she was a juvenile.
>
> At that time, I asked her to show me her hands, at which time she put out her hands. I shined a flashlight over them and she said, 'Oh, no, I was wearing gloves.'

Appellant gave a voluntary, written statement after the police transported her to a juvenile office. The trial court admitted this written statement into evidence.

Held: Court of Appeals reversed and remanded.

Opinion Text: The Court of Appeals held that the 45 to 50 minutes it took the police to transport the arrested appellant from the crime scene to a juvenile office was an "unnecessary delay" and, therefore, violated Section 52.02(a)(2) of the Texas Family Code. [FN2] See Contreras, S.W.2d at 661. The Court of Appeals decided that the police "investigating the stabbing" was "an inadequate justification for the delay in transporting [appellant] to a duly designated juvenile office." See id.

> FN2. Section 52.02(a)(2), in relevant part, required the police to take the arrested appellant to the designated juvenile office "without unnecessary delay."

The Court of Appeals also found that admission of appellant's written statement harmed her because it was inconsistent with her necessity defense at trial and, therefore, could have contributed to the trial court's decision to deny appellant's requested jury instruction on this defense. See id. at 661- 64. This, according to the Court of Appeals, compromised "the integrity of the process leading to [appellant's] conviction." See id. at 664; but cf. Harris v. New York, 91 S.Ct. 643, 645-46 (1971) (shield provided by prophylactic rule requiring exclusion of voluntary and reliable statements "cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances").

Despite the harm standard the Court of Appeals purported to apply, whether the admission of the appellant's written statement had a "substantial or injurious effect" or a "very slight effect" on the jury's verdict, the Court of Appeals could not say the content of the written statement had no effect upon the jury in its determination of guilt. See Contereas, 998 S.W.2d at 661.

We granted the State's petition for discretionary review to decide: 1) whether the Court of Appeals erred in determining that the appellant's written statement was inadmissible because she was not transported "without unnecessary delay" to a juvenile processing office; and 2) whether the Court of Appeals erred in finding harm in the admission of said statement. Because we find that the Appellant was transported to a designated juvenile facility without unnecessary delay, we find it unnecessary to address the second ground for review.

Laws governing juveniles accused of delinquency have been enacted by the Legislature and are set out in Title 3 of the Family Code. See Matter of D.M.G.H., 553 S.W.2d 827, 828 (Tex.Civ.App.—El Paso 1977, no writ). That title of the Family Code is designed to serve the dual role of protecting the public while insulating children from the taint of criminality. See Comer v. State, 776 S.W.2d 191, 193 (Tex.Crim.App.1989). "Police officers, Courts, and others involved in the handling of juveniles are bound to comply with the detailed and explicit procedures enacted by the Legislature in that Code." See Matter of D.M.G.H., 553 S.W.2d at 828. "Where the officer deems it necessary to take the child into custody, § 52.02(a) ... dictates what he must then do 'without unnecessary delay[.]'" See Comer, 776 S.W.2d at 194; see also Baptist Vie Le v. State, 993 S.W.2d 650, 655 (Tex.Crim.App. 1999)(officers must follow "very specific actions" set up by the Legislature in dealing with juveniles; this case also explicitly reaffirms Comer); see also Anthony v. State, 954 S.W.2d 132, 134 (Tex.App.—San Antonio 1997) (when detaining juveniles, officers must follow § 52.02); see also Matter of R.R., 931 S.W.2d 11, 14 (Tex.App.—Corpus Christi 1996, no writ)(stating that those dealing with juveniles are "bound" by the Family Code's "explicit procedures"); see also State v. Langley, 852 S.W.2d 708, 709 (Tex.App.—Corpus Christi 1993, pet. ref'd)(stating that the Texas Family Code dictates what officers must do when delivering juveniles to the court).

In Comer, a sixteen year old juvenile was arrested at 6:24 p.m., driven to a police station to pick up some forms, taken to the home of a Justice of the Peace to have warnings administered, returned to the police station where a written statement was taken, returned to the home of the Justice of the Peace to have the statement signed, and finally, at approximately 9:30 p.m., he was taken to a juvenile detention center. See Comer, 776 S.W.2d at 192-93. The Comer court found that this police action violated Family Code § 52.02(a) and as a result, the statement taken should not have been admitted into evidence. See id. at 196-97. While the rules in Comer apply when juveniles are taken into custody, the facts before us are distinguishable. No interrogation of the juvenile took place before Family Code § 52.02(a) compliance had been met by the officers involved and officers "immediately" determined that compliance with § 52.02(a) was necessary. There were no attempts by the police to interrogate the appellant and no police action taken that could be construed as coercive before they complied with the requirements of § 52.02(a) of the Family Code.

Section 52.02(a)(2) requiring the police to transport an arrested juvenile to a designated juvenile office without "unnecessary delay" by its very terms contemplates that "necessary" delay is permissible. This can only be determined on a case by case basis. The issue that we address de novo in this case is whether the 45 to 50 minute delay attributable to police efforts to save the victim's life and to police efforts to "secure the scene" is a "necessary" delay. See Guzman, 955 S.W.2d at 88-90 (Courts of Appeals decisions in cases like this may be reviewed de novo by this Court).

We hold that the de minimis 45 to 50 minute delay in this case attributable to these police efforts is a "necessary" delay. No one should dispute that delay attributable to trying to save the victim's life was a "necessary" delay. The Court of Appeals failed to factor this into its analysis of the "unnecessary delay" issue. See Contreras, 998 S.W.2d at 661 (deciding only that police "investigating the stabbing" was inadequate justification for the delay).

Characterizing the delay as attributable only to the police "investigating the stabbing" does not

thoroughly account for the record evidence. The evidence supports a finding that the delay in this case was also attributable to the police "securing the scene." The trial court could have reasonably inferred from the testimony set out above that "securing the scene" was "necessary" to preserve the integrity of the crime scene and to prevent the destruction of evidence. This legitimate and necessary police activity of "securing the scene" likewise justifies the de minimis delay in this case.

Our decision in this case is consistent with Family Code policies discussed in this Court's decision in Comer. Unlike Comer where the police interrogated the arrested juvenile suspect for three hours before the police complied with relevant Section 52.02 Family Code provisions, the police in this case "immediately" decided upon the appellant's arrest that compliance with these statutory provisions was required. See Comer, 776 S.W.2d at 193- 94, 196 (Section 52.02 Family Code provisions must be complied with "immediately" upon taking a juvenile into custody).

Police involvement with the appellant was narrowly circumscribed to "securing the scene" which was necessary and legitimate police activity. See id. at 196 (Family Code provisions intend to narrowly circumscribe police involvement with arrested juveniles). The police did not stray beyond "securing the scene" by interrogating and attempting to obtain a statement from appellant during the 45 to 50 minutes that she was detained in the back of the patrol car. A contrary decision would fail to properly weigh the "competing purposes" in cases like this. See id. at 193 (discussing Family Code's "competing purposes").

Judge Johnson's dissenting opinion misapplies the standard of review by viewing the evidence in the light least favorable to the trial court's ruling admitting appellant's statement. The dissenting opinion does this by focusing on evidence that arguably does not support the trial court's ruling and by ignoring evidence that supports the trial court's ruling.

For example, the dissenting opinion discounts what it characterizes as "testimony that some of the officers attempted to help treat the victim," and emphasizes some testimony "that trained medical personnel were at the scene and treating the victim early on." Contreras, slip op. at 3 (Johnson, J., dissenting). This, however, in no way undermines a finding that some of the delay was due to police efforts to save the victim's life. Moreover, the evidence set out in the dissenting opinion about what the police were doing at the crime scene arguably lends support to a finding that these were police efforts to "secure the scene." Examples of this are photographing the crime scene and searching the field for weapons to prevent their possible loss.

Notwithstanding this, the record in this case is not at all clear about which officer was doing what at which time. Even the dissenting opinion cannot determine from this record the number of police vehicles at the scene. See Contreras, slip op. at 3. What is clear, however, is that the testimony of the officer in charge of the crime scene, Farren, supports findings that the entire delay was attributable to police efforts to save the victim's life and to "secure the scene" which included steps to prevent the destruction of evidence and to provide for the safety of appellant and the officers at the scene. The dissenting opinion does not discuss Farren's testimony and it makes no claim that Farren's testimony fails to support these findings even though it does acknowledge that efforts to "secure the scene" and to save the victim's life is a necessary delay.

The judgment of the Court of Appeals is reversed and this case is remanded there for further proceedings consistent with this opinion.

PRICE, J., concurs in the judgment of the Court.

Meyers, J., filed a dissenting opinion.

The majority says "in cases like this," the appropriate standard for review is set forth in Guzman v. State, 955 S.W.2d 85 (Tex.Crim.App.1997). But Guzman was not a "case like this." Guzman was a Fourth Amendment case. This is a case involving the application of a state statute. These are not the same. Discretionary review of this case should not have been granted, and I would hold our granting of review was improvident. This Court ought to take another look at the principles articulated in Arcila v. State, 834 S.W.2d 357 (Tex.Crim.App.1992).

In Guzman, we granted review to decide whether the Court of Appeals had erred in its application of law to facts under the Fourth Amendment. In determining the appropriate standard of review, we relied solely on the United States Supreme Court's opinion in Ornelas v. United States, 517 U.S. 690 (1996). Ornelas, also a Fourth Amendment case, stated the following with respect to review of issues under the Fourth Amendment: "the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles." Guzman, 955 S.W. at 87 (quoting Ornelas). But Guzman has been taken beyond the confines of the Fourth Amendment. It's as though this Court is compelled to "maintain control of, and [ ] clarify the legal principles" involved in virtually every issue

that comes before us, particularly if the result is one we do not like.

On the last day of our judicial session exactly nine years ago, Judge Benevides, writing for a majority of this Court, described the scope of our role as a court of discretionary review:

> Like this Court, the courts of appeals are duty-bound to uphold the constitution and laws of this State and of the United States. So long as it appears that they have discharged that duty conscientiously by impartial application of pertinent legal doctrine and fair consideration of the evidence, it is our duty in turn to respect their judgments. Our principal role as a court of last resort is the caretaker of Texas law, not the arbiter of individual applications. When different versions of the law, including unsettled applications of the law to significantly novel fact situations, compete for control of an issue, it is finally the job of this Court to identify and elaborate which is to control thereafter. But, except under compelling circumstances, ultimate responsibility for the resolution of factual disputes lies elsewhere. See Meraz v. State, 785 S.W.2d 146, 152-154 (Tex.Cr.App.1990) (Courts of appeals are the final arbiters of fact questions); Meeks v. State, 692 S.W.2d 504, 510 (Tex.Cr. App.1985) (Voluntariness of consent is a fact question).
>
> * * *
>
> ... the only basis for complaint here is that the Dallas Court of Appeals somehow managed to get it wrong. Even if our own decision might have been different on the question presented, we cannot accept the proposition that an appellate court's judgment ought to be subject to reversal on such basis, at least when the evidence is sufficient to support it. Doing so only tends to undermine the respective roles of this and the intermediate courts without significant contribution to the criminal jurisprudence of the State. This Court should reserve its discretionary review prerogative, for the most part, to dispel any confusion generated in the past by our own case law, to reconcile settled differences between the various courts of appeals, and to promote the fair administration of justice by trial and appellate courts throughout Texas. See Tex.R.App.P. 200(b), (c); DeGrate v. State, 712 S.W.2d 755 (Tex.Cr.App.1986).
>
> ... we decline, to substitute our own judgment on ultimate questions of fact for that of the lower courts.

Arcila v. State, 834 S.W.2d 357, 360-61 (Tex.Crim. App.1992).

A lot can happen in almost a decade. This is this last day or our 2000-2001 session. We do not currently seem to have a notion of our role within the system that bears any semblance to that described by Judge Benevides nearly a decade ago. Applying Guzman indiscriminately, and conducting de novo reviews without examining the appropriateness of such review in the context at issue, [FN4] we utilize our powers of discretionary review in a manner that resembles that of a super-appellate court.

> FN4. The instant case involves the application of facts to the law under a statute. I have found no case discussing the appropriate standard of review for statutory construction or for the application of law to a statute. It may be that de novo review is appropriate. Or perhaps statutes should be treated like rules of evidence, in which case abuse of discretion is appropriate. I don't really know and I decline to invest more time to research this question as a lone voice, at this juncture.

The Court of Appeals did its job in this fact-bound case. The court applied the statute to the facts and decided there was unnecessary delay. The appeals court did not misconstrue the statute. The State, and the majority, simply disagree with the conclusion reached by that court. A determination of what is "unnecessary delay" under the statute is subjective and calls for a case-by- case assessment. This is precisely the kind of assessment that falls smack within the realm of appellate review by our courts of appeals. We should not have granted review here. We should now hold that this case was improvidently granted. I dissent.

Johnson, J., joined by Holland, J. dissenting.

I respectfully dissent. Section 52.02(a) of the Texas Family Code provides that a child taken into custody must be taken, without "unnecessary delay," to a juvenile processing office. The majority characterizes the delay in this case as de minimis and appears to hold that, as a general matter, a delay of forty-five to fifty minutes is "necessary" when due to police efforts to save a victim's life and secure a crime scene. Ante, at —- (slip op. at 6-8). If the officers in this case were necessarily involved in such activities, the majority's holding would stand up to scrutiny. The record shows, however, that this is not the case.

It is true that the delay here was significantly shorter than in other cases in which unnecessary delay was found. Comer v. State, 776 S.W.2d 191 (Tex.Crim.App.1989) (delay of about three hours); In re D.M.G.H., 553 S.W.2d 827 (Tex.Civ.App.

1977, no writ) (delay of almost ten hours). However, as both the majority and the court of appeals note, whether there was an "unnecessary delay" in taking a minor to a juvenile processing center is a determination which must be made on a case-by-case basis. Ante, at —- (slip op. at 6); Contreras v. State, 998 S.W.2d 656, 660 (Tex.App.—Amarillo 1999). Yet, the majority fails to make its determination on this basis. The evidence, as set out in the record of this case, demonstrates that the delay was unnecessary. [FN1]

> FN1. The majority asserts that I have "misapplie[d] the standard of review by viewing the evidence in the light least favorable to the trial court's ruling...." Ante, at —— (slip op. at 8-9). To the contrary, by accepting as true everything testified to by the state's witnesses in support of the claim of "necessary delay," I have applied the appropriate standard of "in the light most favorable to the trial court's ruling."

According to the testimony presented at trial, Officers Farren and Coleman were the first officers to arrive on the scene. At about 3:00 a.m., they got out of their vehicles and were approached by appellant. After appellant made incriminating statements to the officers, the officers decided that she should be transported to the Juvenile Division of the Police Department. Appellant was taken to the officers' car and searched using a wand metal-detector. Officer Heaster and his partner, Officer Wertz, arrived at the scene at about 3:05 a.m. Appellant was placed in their patrol car. Employees of the Fire Department were already at the scene and were attempting to treat the victim when Charles Olsen and his partner, employees of Amarillo Medical Services, arrived at the scene and began treating the victim. Officer Haley collected evidence, and photographed, videotaped, and did a sketch of the crime scene.

Heaster testified that he went inside the residence briefly to try to assist with first aid, but he did not stay because the Fire Department and Amarillo Medical Services were already present and working on the victim. Within a few minutes, the victim was taken from the scene. Heaster then spent ten to fifteen minutes taking photographs inside the residence and searching the area from where appellant had been seen coming. Heaster and another officer, Sergeant Trupe, went to the school grounds across from the residence and spent about another three to five minutes searching for any possible evidence. Heaster then spoke with appellant's sister for a minute or less and then went back to his patrol car. He searched appellant and then took her to the Juvenile Division. However, Heaster also testified that "mainly" his duty was to sit with appellant in the patrol car.

Although there was testimony that some of the officers attempted to help treat the victim, it is clear that trained medical personnel were at the scene and treating the victim early on. There were at least six officers on the scene, with at least four present within five minutes of the first contact with appellant, and it is clear that the police were familiar with the requirements of § 52.02. Considering the number of officers at the scene(6), the number of police vehicles at the scene (4-5), the early arrival of paramedics, the fact that part of the delay included a search of school grounds across from the scene, and Heaster's testimony that he merely sat with appellant in the patrol car for some period of time, the delay between when appellant was taken into custody (about 3:05 a.m.) and when she was finally transported from the scene (about 3:46 a.m.) to the Juvenile Division (about 3:55 a.m.) cannot be justified as "necessary." Given all the evidence, I cannot say that the court of appeals erred in holding that the delay in taking appellant to the Juvenile Division was unnecessary.

I would affirm the judgment of the court of appeals. I dissent.

8. DETOUR TO RECOVER STOLEN PROPERTY ON WAY TO PROCESSING OFFICE VIOLATES FAMILY CODE

Roquemore v. State, 60 S.W.3d 862 (Tex.Crim. App. 11/14/01) [*Texas Juvenile Law* 297 (5th Edition 2000)].

Facts: Family Code section 52.02(a) requires that once an officer takes a juvenile into custody, the officer must do one of six enumerated acts without unnecessary delay and without first taking the juvenile to any place other than a juvenile processing office. Article 38.23 of the Code of Criminal Procedure requires the suppression of evidence if section 52.02(a) is not followed. The officers in this case obtained a confession and recovered stolen property after taking the appellant into custody but before taking him to a juvenile processing office. We must determine whether the trial court erred in admitting testimony regarding the oral statements and testimony concerning the recovery of stolen property. We hold that because the appellant's oral statements were not the result of custodial interrogation and were made en route to a juvenile processing office, the trial court properly admitted testimony regarding the oral statements. We also hold that, because the appellant was not first taken to a juvenile processing office before the stolen property was recovered, section 52.02(a) was not followed and the trial court

erred in admitting evidence concerning the recovery of the stolen property. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for a harm analysis.

I. FACTS

This case arises from two armed robberies in Houston. At a motion to suppress hearing, Officer Garcia testified that he and Officer Heimann went to the appellant's grandparent's home to take the appellant into custody for armed robbery. Garcia explained that the appellant's uncle brought the appellant out from a back room and that the uncle told the appellant that he needed to cover himself because people were pointing the finger at him. Garcia told the appellant that he was under arrest for a gas station robbery, placed the appellant in the police car, and proceeded to read the appellant his Miranda warnings.

Garcia testified that the appellant said that he wanted to cooperate with the police. Garcia further testified that the appellant admitted that he and two other men had robbed a woman at a gas station and offered to take the officers to the stolen property. Garcia explained that the appellant led them to a nearby house, where the officers recovered some pictures and a credit card receipt that bore the name of a robbery victim. Garcia stated that, after they recovered the property, the officers took the appellant to the juvenile division. In answer to the State's question on cross-examination, Garcia estimated that, from the time they took the appellant into custody to the time they recovered the property, between 20 and 25 minutes had elapsed.

At the hearing, the appellant argued that testimony concerning his oral statements and the recovery of the stolen property should be suppressed because he was not taken without unnecessary delay and was not taken first to a juvenile processing office, in violation of Family Code section 52.02(a). The trial court denied the motion to suppress without issuing written findings of fact or explaining its rationale. Garcia testified before the jury regarding both the appellant's oral statements and the recovery of the stolen property.

The appellant raised the same arguments on direct appeal. The Court of Appeals affirmed the conviction, Roquemore v. State, 11 S.W.3d 395, 400-01 (Tex.App.—Houston [1st Dist.] 2000) (op. on reh'g), [Juvenile Law Newsletter ¶ 00-1-14] holding that the confession and the offer to take the officers to the stolen property were voluntary statements and not the result of custodial interrogation. Because Comer v. State, 776 S.W.2d 191 (Tex. Crim.App.1989), interpreted section 52.02(a) to require both custody and interrogation, the Court of Appeals concluded that section 52.02(a) did not operate to exclude the officer's testimony concerning the appellant's statements. Roquemore, 11 S.W.3d at 399-400. The Court of Appeals also held that, even if section 52.02(a) was not followed, testimony about the recovery of stolen property was properly admitted. Id. at 400. The Court of Appeals limited Comer to its facts and held that, because there was no evidence of improper impact by the police officers and because there was no unnecessary delay, exclusion was unwarranted. Id.

We granted review to determine whether testimony describing the appellant's oral statements and testimony concerning the recovery of the stolen property should have been suppressed under section 52.02(a).

Held: Reversed and remanded.

Opinion Text: II. DISCUSSION

In reviewing a motion to suppress, we give great deference to a trial court's determination of historical facts. See Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). Mixed questions of law and fact that turn on the credibility and demeanor of a witness are reviewed under the almost-total-deference standard, and mixed questions of law and fact that do not turn on the credibility and demeanor of a witness are reviewed de novo. Id. Also, we examine the evidence in the light most favorable to the trial court's ruling. State v. Ballard, 987 S.W.2d 889, 891 (Tex.Crim.App.1999). When the trial court does not file findings of fact, we assume that the trial court made implicit findings that support its ruling, so long as those implied findings are supported by the record. State v. Ross, 32 S.W.3d 853, 855 (Tex.Crim.App.2000). If the decision is correct under any theory of law applicable to the case, the ruling will be sustained. Id. at 855-56.

Because the appellant was a juvenile at the time of his arrest, the provisions of the Family Code control issues involving the appellant's substantive rights. See Comer, 776 S.W.2d at 196 (holding that issues involving the substantive rights of pre-transfer juveniles are governed by the Family Code). Section 52 . 02(a), at the time of the appellant's arrest, read in relevant part: "A person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under Section 52.025 of this code, shall do one of the following [enumerated acts]." Act of May 26, 1991, 72d Leg., R.S., ch. 495, § 1, 1991 Tex. Gen. Laws 1738, 1738-39 (amended 1999) (current version at Tex. Fam.Code § 52.02(a) (Vernon Supp.2001)). Former Family Code section 51 .09(d)(2) read, "This section does

not preclude the admission of a statement made by the child if: ... the statement does not stem from custodial interrogation." Act of May 27, 1991, 72d Leg., R.S., ch. 593, § 1, 1991 Tex. Gen. Laws 2129, 2130 (amended 1999) (current version at Tex. Fam.Code § 51.095(b)(1) (Vernon Supp.2001)).

The appellant argues that because he was not taken first to a juvenile processing office before making statements to Garcia and before recovering the stolen property, the trial court erred by not suppressing Garcia's testimony. The appellant relies on our decision in Comer for the proposition that the Family Code's provisions should be strictly followed.

In Comer, we reviewed the question: whether a written statement by a juvenile should be suppressed when section 52.02(a) had not been followed but the statement appeared to be admissible under section 51.09(b)(1). The facts were that three hours had elapsed from the time Comer was taken into custody until he was transported to a juvenile detention center. In the interval, Comer was taken to a justice of the peace where he received the appropriate Family Code admonishments. Comer made a full confession in writing before the justice of the peace.

We held that the three-hour time-period was an unnecessary delay and that the written statement was inadmissible, notwithstanding section 51.09(b)(1). See Comer, 776 S.W.2d at 196. We noted that Title Three of the Family Code contained competing interests: to protect "the public from the unlawful acts of children while concomitantly insulating those children from the stigma of criminality and providing for their welfare and edification." Id. at 193. In the same vein, there is tension between section 52.02(a) and section 51.09(b)(1). We resolved the tension by requiring that the provisions of section 52.02(a) be followed before interrogation under section 51.09(b)(1) is permitted. "Where the officer deems it necessary to take the child into custody, section 52.02(a) ... dictates what he must then do 'without unnecessary delay and without first taking the child anywhere else.' " Id. at 194. We reasoned that "Title 3 contemplates that once he has found cause to initially take the child into custody and makes the decision to refer him to the intake officer ... a law enforcement officer relinquishes ultimate control over the investigative function of the case." Id. at 196. In other words, it was the legislature's intent that "the officer designated by the juvenile court make the initial decision whether to subject a child to custodial interrogation." Id. Because section 52.02(a)'s provisions were not followed, and the taint of illegality had not dissipated, we found a violation of article 38.23 of the Code of Criminal Procedure and remanded for a harm analysis. See id. at 196-97.

In Baptist Vie Le, we reviewed the question: whether a police officer complied with section 52.02(a) when he took the juvenile to a magistrate and then directly to the homicide division. 993 S.W.2d 650, 655 (Tex.Crim.App.1999). The facts were that the juvenile was taken into custody and then taken to a magistrate. Baptist Vie Le was then transported to the Houston Police Department where he gave a written statement.

We held that the statement should have been suppressed because nothing in the record indicated that the Houston Police Department was an office designated by the juvenile court under section 52.02(a). See id. at 654-55. We emphasized that the language of section 52.02(a) was both clear and mandatory. See id. at 655. "The Legislature has set forth very specific actions which a law enforcement officer must take when arresting a juvenile.... [W]e must not ignore the Legislature's mandatory provisions regarding the arrest of juveniles." Id. We reaffirmed our decision in Comer and noted that the legislature intended police involvement to be restricted to the initial seizure and prompt release or commitment of the juvenile. Id. (quoting Comer, 776 S.W.2d at 194-95). Because the evidence was obtained in violation of section 52.02(a), we held it was error not to suppress the confession and remanded for a harm analysis. See id. at 655-56 ("[The officer] was required to do one of the five options listed in section 52.02(a) 'without unnecessary delay.' Taking [Baptist Vie] Le to the homicide division did not constitute one of these five options.").

In Comer and Baptist Vie Le, it is clear that this Court established a policy of strict compliance with the Family Code provisions, especially section 52.02(a). We will adhere to Comer and Baptist Vie Le and continue to require strict compliance with the Family Code. See Baptist Vie Le, 993 S.W.2d at 655-56; Comer, 776 S.W.2d at 196-97.

A. Oral Statements

In applying the above principles, we cannot agree with the appellant's argument that the oral statements should have been suppressed because section 52.02(a) was not followed.

Under section 51.09(d)(2), if a statement does not stem from a custodial interrogation, the statement is admissible. See Act of May 27, 1991, 72d Leg., R.S., ch.593 § 1, 1991 Tex. Gen. Laws 2129, 2130 (amended 1999) (current version at Tex. Fam.Code § 51.095(b)(1)); cf. Tex.Crim. Proc.Code art. 38.22 § 5 (allowing admission of statements that do not stem from custodial interrogation); Jones v. State, 795 S.W.2d 171, 176 (Tex.Crim.App.1990)

(holding that voluntary statements that do not arise from custodial interrogations do not violate the Fifth Amendment). A custodial interrogation occurs when a defendant is in custody and is exposed "to any words or actions on the part of the police ... that [the police] should know are reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); Jones, 795 S.W.2d at 174. Words or actions by the police that normally attend an arrest and custody, such as informing a defendant of his Miranda rights, do not constitute a custodial interrogation. See Innis, 446 U.S. at 300; Jones, 795 S.W.2d at 174, 176. A statement by a juvenile that is otherwise admissible under section 51.09 may be found to be inadmissible if the requirements of section 52.02(a) are not followed. See Comer, 776 S.W.2d at 195-96 (holding a juvenile's statement inadmissible for violations of section 52.02(a) notwithstanding the fact that the statement was otherwise admissible under section 51.09(b)).

According to Garcia's testimony at the motion to suppress hearing, Garcia placed the appellant into the squad car, told the appellant that he was under arrest, and read him Miranda warnings. After hearing his Miranda warnings, the appellant said that he wanted to cooperate and then made the oral statements. The appellant made the statements moments after he was placed in the car and had received his Miranda warnings. The oral statements were not the result of any questions or conduct by Garcia. Furthermore, there is no indication of any delay between the time Garcia took the appellant into custody and the time the statements were made. The testimony indicates that the appellant made the statements spontaneously and voluntarily while en route to the juvenile division.

Based on Garcia's testimony, the trial court was free to conclude that the appellant made the oral statements while being transported to a juvenile office without unnecessary delay. See Tex. Fam.Code § 52.02(a); Ross, 32 S.W.3d at 855. The record supports the theory that the statements were freely made and were not the result of custodial interrogation. See Act of May 27, 1991, 72d Leg., R.S., ch.593 § 1, 1991 Tex. Gen. Laws 2129, 2130 (amended 1999) (current version at Tex. Fam.Code § 51.095(b)(1)); Innis, 446 U.S. at 300 301; Ross, 32 S.W.3d at 855-56. We hold that the trial court properly refused to suppress the testimony regarding the defendant's oral statements.

B. Recovery of Stolen Property

Although the testimony regarding the oral statements was properly admitted, the testimony concerning the recovery of the stolen property was allowed before the jury in violation of the Family Code. The State argues that section 52.02(a) requires neither that an officer immediately do one of the six enumerated acts nor that a juvenile be taken immediately to a juvenile processing office; rather, the statute only requires that the officer do one of these options without unnecessary delay. Because recovering the stolen property was the appellant's suggestion, and because the delay was only twenty to twenty-five minutes in duration, the delay was not unnecessary; therefore, the evidence was admissible. We disagree that the evidence was admissible.

We do agree with the State that section 52.02(a) does not require that a police officer immediately do one of the enumerated acts or that a juvenile be taken immediately to a juvenile processing office. The key for timing questions is without unnecessary delay. But, section 52.02(a) requires more than simply acting without unnecessary delay. The statute has three requirements once the juvenile is taken into custody: 1) the officer must do one of six enumerated acts; 2) without unnecessary delay; and 3) without first taking the child to any place other than a juvenile processing office. See Tex. Fam.Code § 52.02(a); Comer, 776 S.W.2d at 194-95. By the clear language of the statute, it is not merely a question of whether the officer did one of the six enumerated options without unnecessary delay, but also whether the officer took the juvenile to any other place first. Tex. Fam.Code § 52.02(a); Comer, 776 S.W.2d at 194-95.

In this case, because the trial court denied the motion to suppress, the implied finding is that the officers complied with section 52.02(a). The record, however, does not support this finding. Garcia's testimony established that the officers did not take the appellant to the juvenile division without first going to any other place.

In a similar case involving section 52.02(b), the Houston First Court of Appeals relied on our opinion in Russell v. State, 717 S.W.2d 7, 9 (Tex. Crim.App.1986), and on In re C.R., 995 S.W.2d 778, 783 (Tex.App.—Austin 1999, pet. denied), to hold that once the defendant produces evidence of a section 52.02(b) violation, the burden then shifts to the State to prove compliance with section 52.02(b). Pham v. State, 36 S.W.3d 199, 201-02 (Tex.App.—Houston [1st Dist.] 2000, no pet.). Although the issue in Pham centered around section 52.02(b), we see no reason why this analysis would not also apply to section 52.02(a). Therefore, once a juvenile produces evidence that section 52.02(a) was violated, the burden then shifts to the State to show compliance with section 52.02(a). See Id.; cf. Baptist Vie Le, 993 S.W.2d at 654-56 (noting that a statement should have been suppressed when the record did

not show compliance with section 52.02(a), and remanding for harm analysis when the evidence was admitted in violation of article 38.23 of the Code of Criminal Procedure).

Here, the appellant and the State elicited the same evidence at the hearing. This evidence showed that the officers first took the appellant to recover the stolen property before they transported him to the juvenile division. In fact, the State admitted that the officers took the appellant to the juvenile division after they recovered the stolen property. Ct. R. vol. III, at 446. The only evidence elicited by the State established that the appellant was not transported to the juvenile division "without first being taken to any other place." Accordingly, the record does not support the implied finding that section 52.02(a) was followed. See Ross, 32 S.W.3d at 855 (noting that implied finding must be supported by the record).

In Comer and in Baptist Vie Le, we established a practice of strict compliance with Family Code section 52.02. It is the legislature's intent that once a child has been taken into custody, the officer can only do one of six acts without unnecessary delay and without going to any other place first; the officer's investigative function is thus, expressly curtailed. See Baptist Vie Le, 993 S.W.2d at 655; Comer, 776 S.W.2d at 196. It does not matter that the appellant led Garcia to the stolen property since section 52.02(a) limits the officer's investigative function. See id. The procedure and options are clear in section 52.02(a), and first taking the juvenile, at his own suggestion, to the location of stolen property is not enumerated. Because the appellant was not transported to the juvenile division "without first being taken to any other place," the officers violated section 52.02(a). [FN11] Comer, 776 S.W.2d at 196-97.

> FN11. We note that a strict interpretation would not necessarily foreclose a case where exigent circumstances may justify not going first to any place other than a juvenile processing office. That question, however, is not before us, and there is no suggestion of exigent circumstances in this case.

Article 38.23

Having found a violation of section 52.02(a), we must determine whether exclusion is appropriate. Cf. Comer, 776 S.W.2d at 197 (holding that evidence should have been suppressed under article 38.23 where this Court could not say with confidence that had the juvenile been promptly taken to juvenile facility "he would still have chosen to confess his crime."). Article 38.23 requires the exclusion of evidence "obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas." Tex.Code Crim. Proc. art. 38.23(a). Evidence should be excluded once a causal connection between the illegality and the evidence is established. See State v. Daugherty, 931 S.W.2d 268, 270 (Tex.Crim.App. 1996) ("Once the illegality and its causal connection have been established, the evidence must be excluded.").

Here, the violation occurred when the officers deviated from their route to the juvenile division and instead went to the stolen property's location. Tex. Fam.Code § 52.02(a). Although the officers deviated from the proper route at the appellant's behest, a juvenile's request does not take precedence over the clear mandate of a statute designed to protect him. The evidence was obtained by violating section 52.02(a) and indeed would not have been obtained at that time [FN12] if section 52.02(a) had not been violated. There is clearly a causal connection [FN13] between the recovery of the stolen property and the illegality of going first to the location of the stolen property. Accordingly, the evidence concerning the recovery of the stolen property should have been suppressed. [FN15] Tex.Code Crim. Pro. art. 38.23(a); Tex. Fam.Code § 52.02(a).

> FN12. Of course, had the officers taken the appellant directly to the juvenile division and then gone to recover the stolen property by themselves, they would have acted in full compliance with the law. Similarly, under the "inevitable discovery" doctrine announced by the United States Supreme Court in Nix v. Williams, 467 U.S. 431, 448, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), testimony concerning the recovery of the stolen property would be admissible under this exception to the Fourth Amendment exclusionary rule. This Court, however, has held that the Texas statutory exclusionary rule codified in article 38.23 does not contain an "inevitable discovery" exception. See Daugherty, 931 S.W.2d at 271- 73. That issue is not before us.

> FN13. Presiding Judge Keller's dissent is wide of the mark when she argues that there was no causal connection between the detour and the recovery of the evidence. The dissent says that the evidence was recovered during the detour, but that the appellant's desire to cooperate caused the recovery of the property. The dissent is improperly focusing on the appellant's desire to cooperate and brushing over the illegality or violation of law. The officers were not authorized to first take the appellant to the stolen property at the appellant's desire, in fact the law forbids this conduct. If anything, the desire may have caused the officers to violate the law. But when the purpose of violating the law (the detour) is to recover the stolen property, we fail to see how there can be anything other than a causal connection between the violation of law and the

evidence concerning that very stolen property. Stated another way, the evidence concerning the recovery of the stolen property was obtained as a consequence of the officers first unlawfully taking the appellant to the stolen property. Cf. Janecka v. State, 937 S.W.2d 456, 465 (Tex.Crim.App.1996) (holding "any evidence seized pursuant to the warrant was not 'obtained' as a consequence of his perjury."); Chavez v. State, 9 S.W.3d 817, 820 (Tex.Crim.App.2000) (Keller, J., concurring) ("In order for Article 38.23 to apply, 'the officers must act illegally in obtaining existing evidence of an offense.") (citing State v. Mayorga, 901 S.W.2d 943, 946 (Tex.Crim.App.1995)). Here, the consequence of the illegal detour was the recovery of the property; the officers clearly acted illegally in obtaining the evidence.

Furthermore, we disagree with the dissent's distinction between evidence obtained "in violation of" as opposed to "during a violation of." In Ebarb v. State, 598 S.W.2d 842, 850 (Tex.Crim.App. 1980) (op. on reh'ing), we held that a gun should have been suppressed under article 38.23. Even though Ebarb had given permission to search her car (which was where the gun was found), we held that the police had illegally detained her, and the consent and the gun's recovery were the result of that illegal detention. Ebarb, 598 S.W.2d at 844-45, 850. It could just as easily be said in Ebarb that the evidence was obtained during a violation of law, that is the gun was found during the illegal detention, instead of in violation of law. Respectfully, "during a violation" or "in violation" is a semantic distinction without a difference; if the police act illegally in obtaining evidence, then that evidence is obtained in violation of the law for purposes of article 38.23. Mayorga, 901 S.W.2d at 946.

FN15. We note that the Court of Appeals did not expressly discuss article 38.23(a). The Court of Appeals did say that if there was a "literal and rigid" violation of section 52.02(a), such a violation did not warrant automatic suppression. Roquemore, 11 S.W.3d at 400. The Court of Appeals reasoned that the purpose of section 52.02(a) is to reduce improper impact on a juvenile in custody. Id. Because no improper impact occurred by taking the appellant to the stolen property, section 52.02(a) was not implicated. Id. We disagree with the Court of Appeals.

If evidence is obtained in violation of the laws of Texas, and there is a causal connection between the violation and the evidence, that evidence should be suppressed. Tex.Code Crim. Pro. art. 38.23(a); Daugherty, 931 S.W.2d at 270. "Neither Comer nor article 38.23 support [the] suggestion that evidence otherwise subject to suppression is rendered admissible if an examination of the details of the statutory violation suggest that the violation did not raise the dangers the statute was designed to prevent." 41 George E. Dix & Robert O. Dawson, Texas Practice: Criminal Practice and Procedure § 13.322 (2001). We disapprove of the Court of Appeals's analysis.

We also note that the Court of Appeals limited Comer to its facts; a written statement taken from a child approximately three hours before compliance with the Family Code is inadmissible. See Roquemore, 11 S.W.3d at 400. The Family Code seeks to strike a balance between the competing interests of public safety and child welfare. See Comer, 776 S.W.2d at 193. This balance is struck in part by limiting the investigative function of the police. See Comer, 776 S.W.2d at 196. The legislature's provision is clear, and we will give effect to its requirements by requiring strict compliance. See Baptist Vie Le, 993 S.W.2d at 655. As we said in Baptist Vie Le, "We are aware of the disturbing increase in juvenile crime in our State, and we are sympathetic to law enforcement's efforts to deal with violent juvenile offenders. Nevertheless, we must not ignore the Legislature's mandatory provisions regarding the arrest of juveniles." Id. The specific facts in Comer do give its rationale further meaning, but its rationale was not meant to deal only with written statements that resulted from a three hour delay. We disapprove of the Court of Appeals's limiting of Comer.

CONCLUSION

The testimony regarding the recovery of the stolen property was improperly allowed because the appellant was taken first to the location of the property, an option unavailable under section 52.02(a). This evidence was obtained in violation of section 52.02(a) and is therefore inadmissible. Tex.Crim. Proc.Code art. 38.23(a); Baptist Vie Le, 993 S.W.2d at 656.

Because the Court of Appeals found no error, it did not do a harm analysis. We remand the case for consideration of this issue.

WOMACK, J., filed a concurring opinion.
HOLCOMB, J., filed a concurring opinion.
KELLER, P.J., filed a dissenting opinion in which KEASLER, and HERVEY, J.J., joined.
WOMACK, J., filed a concurring opinion.

I join the judgment of the Court and Part II-A ("Oral Statements") of its opinion.

There can be exceptions to the requirements of laws, even ones that are very important and that must be obeyed strictly. Necessity justifies conduct that otherwise would be criminal, if the desirability and urgency of avoiding imminent harm clearly outweigh the harm sought to be prevented by the criminal law. Exigencies justify investigations that

otherwise would violate the proscriptions of the Fourth Amendment and the Self-incrimination Clause of the Fifth Amendment. What is required is a balancing of the need for the exception against the need to enforce the statutory or constitutional command.

While the need to preserve evidence may constitute an exigency in some circumstances, there is no indication here that the need to retrieve the stolen property was urgent or that it could not have been met by other means than taking the juvenile to the place where it was located before taking him to the juvenile division. The harm that section 52.02 of the Family Code seeks to prevent is not clearly outweighed by any exigency. I agree that the statute must be enforced in this case, and that it must be strictly observed in general. I write only to point out that the statute may not prevail against every other need of society in another case.

HOLCOMB, J., filed a concurring opinion.

The majority opinion states that we have "clear[ly]" "established a policy of strict compliance with the Family Code" and states further that we will "continue to require strict compliance with the Family Code." I am uncertain why these statements were included in the majority opinion or what these statements really mean. Neither of the cases relied on by the majority even mentioned "strict compliance," much less "clearly" established a policy of "strict compliance." See Baptist Vie Le v. State, 993 S.W.2d 650 (Tex.Crim.App.1999), and Comer v. State, 776 S.W.2d 191 (Tex.Crim.App.1989). In Baptist Vie Le, we did "remind police officers of the Family Code's strict requirements." Baptist Vie Le, 993 S.W.2d at 655. However, we certainly did not mean to imply that some laws should be enforced more strictly than others. All laws enacted by the Legislature are of equal dignity and deserve equal enforcement. Hence, it is clearly wrong to suggest that this Court can choose which laws require more (or less) compliance. With these comments, I respectfully join the opinion of the Court.

KELLER, P.J., filed a dissenting opinion in which KEASLER and HERVEY, JJ., joined.

In explaining why testimony about the physical evidence in this case should have been suppressed, the Court relies upon language in Comer explaining why the evidence in that case should have been suppressed. The Comer court said:

> We cannot say with any degree of confidence that, had appellant been transported "forthwith" to the custody of the juvenile detention facility ... he would still have chosen to con-

I have another disagreement with the Court's opinion. The Court makes an exception to its holding that § 52.02 is to be construed strictly by allowing for the possibility that evidence would be admissible if there were exigent circumstances. I do not know the source of this exception. We have never held that there is an "exigent circumstances" exception to the requirements of either § 52.02 or article 38.23. It seems the Court is saying that if it were really, really necessary, we would not strictly enforce those statutes. I find no justification for applying such a case-by-case balancing test. If the Court is going to say, as it does today, that evidence is inadmissible if obtained in violation of the "without taking the child anywhere else" language of § 52.02(a), then that holding should apply to all cases.

Moreover, if exigent circumstances permit the introduction of evidence this Court finds to have been obtained in violation of § 52 .02, then we should assume that the trial court found such exigent circumstances and defer to that implied finding. The trial court could reasonably have believed that when a confessing offender offers to lead police to evidence of a crime, it would be irresponsible for the police to say, "No thank you." There is always some degree of exigency when collecting evidence-that is why police go to crime scenes promptly instead of waiting a week or two.

I respectfully dissent.

9. ORAL STATEMENTS MADE TO JUVENILE PROBATION OFFICER WHILE JUVENILE WAS BEING DETAINED ARE ADMISSIBLE BECAUSE NO INTERROGATION

Rushing v. State, 50 S.W.3d 715 (Tex.App.—Waco 7/11/01, pet. filed 10/5/01) [*Texas Juvenile Law* 293 (5th Edition 2000)].

Facts: When he was sixteen, Jonathan Daniel Rushing was living in a foster home. The home was near the residence of seventy-three-year-old Houston Burgess. Burgess's body was located after a search; he had been missing five days. He was found stabbed to death with his throat cut; his car had been stolen.

Rushing and another juvenile were soon implicated, and they were arrested for the crime. Because Rushing was under age seventeen, the case was initially referred to the juvenile court. That court waived its jurisdiction and transferred the matter to district court for trial as an adult. Rushing was indicted for capital murder, and the case was tried to a jury. The State was statutorily prohibited from seeking the death penalty because of Rushing's age. Tex.Pen.Code Ann. § 8.07(c) (Vernon Supp.2001). Rushing was convicted and sentenced automatically to life in prison.

Held: Affirmed

Opinion Text: On appeal Rushing brings the following complaints:

> * * *
> 6. Incriminating statements he made to a juvenile probation officer should have been suppressed.
> * * *

RUSHING'S STATEMENTS

David Salazar, a Juvenile Probation Officer, was assigned to Rushing at the McLennan County Juvenile Detention Center where Rushing was held. Part of Salazar's regular duties was to visit with the juveniles on his case load, almost on a daily basis, to inform them of the status of their cases such as upcoming court proceedings, and to deal with any disciplinary or other problems the juveniles might be having. Salazar testified at trial that during some of his conversations with Rushing, the juvenile volunteered highly incriminating statements describing the crime and Rushing's role in it. Rushing filed a motion to suppress these statements, which was denied. Rushing claimed that Salazar was acting as an agent of law enforcement, and that the conversations were "custodial interrogations" conducted without Rushing being given his Miranda rights.

At the pre-trial hearing on the motion to suppress, the State stipulated that Rushing was in custody during the conversations. Salazar testified that his responsibilities did not include investigating the offenses for which juveniles were being held, that he never asked Rushing any questions about his offense, and that any incriminating statements made by Rushing were voluntarily offered. He said that before Rushing made the first incriminating statements, he had been before a magistrate and received his warnings, which include Miranda warnings, and that he had been appointed an attorney who had visited Rushing at the juvenile facility. Tex.Code Crim. Proc.Ann. arts. 14.06, 15.17 (Vernon Supp. 2001).

Salazar testified that the conversations usually occurred in the late afternoon in the day-room of the juvenile detention center. The day room is an open area, and other detention center personnel are always present. Whenever Rushing began to describe details of the crime, Salazar would tell him: "Jonathan, you have an attorney. You need to tell your attorney this. I can't help you in this matter." Salazar said: "I took

it at that point that he really didn't have anybody to talk to and he wanted to get things off his mind ... and he just needed somebody to vent to." Salazar also said: "I never make it a point to question anybody. Especially in a high profile case as this, I never solicited any information that would jeopardize the case. "Salazar said Rushing was adamant about getting to court as soon as possible; he said he would confess to the crime, and he wanted to "get his time done with." Salazar did not leave when Rushing began talking about the offense because "the whole thing was to get past that conversation so that I could get at the matter at hand which is his behavior in detention and what he needed to do to keep out of trouble and to make his stay in detention easier."

A trial court's denial of a motion to suppress is reviewed for abuse of discretion. Oles v. State, 993 S.W.2d 103, 106 (Tex.Crim.App.1999). The trial court's findings of fact are given "almost total deference," and in the absence of explicit findings, the appellate court assumes the trial court made implicit findings which were supported in the record. Carmouche v. State, 10 S.W.3d 323, 327-28 (Tex. Crim.App.2000); Guzman v. State, 955 S.W .2d 85, 89- 90 (Tex.Crim.App.1997). The application of the relevant law to the facts (including Fourth Amendment search and seizure law) is reviewed de novo. See Carmouche, 10 S.W.3d at 327.

A confession is illegal and must be suppressed if it is obtained pursuant to a "custodial interrogation" without the benefit of Miranda warnings. E.g., McCambridge v. State, 712 S.W.2d 499, 504-05 (Tex.Crim.App.1986); DeLeon v. State, 758 S.W.2d 621, 624-25 (Tex.App.—Houston [14th Dist.] 1988, no pet.). In addition to suppression under federal constitutional law, in Texas we have statutory suppression. Articles 38.21 and 38.22 of the Code of Criminal Procedure set forth requirements which must be met before a defendant's statements are admissible against him. Tex.Code Crim.Proc.Ann. arts. 38.21, 38.22 (Vernon Supp.2001). Similar provisions are contained in section 51.095 of the Family Code. Tex.Fam.Code Ann. § 51.095 (Vernon Supp.2001). If these requirements are violated, article 38.23(a) applies:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

Tex.Code Crim.Proc.Ann. art. 38.23(a) (Vernon Supp.2001).

In this case the State stipulated to "custody." Therefore the issue under common law or the Texas statutes is whether Rushing was being "interrogated" by Salazar when Rushing incriminated himself. If he was not, the issue of whether Rushing was given his Miranda rights is irrelevant. Likewise, if Salazar did not "interrogate" Rushing, whether or not Salazar was acting as an agent of law enforcement is irrelevant. Wicker v. State, 740 S.W .2d 779, 785 (Tex. Crim.App.1987) ("custodial interrogation" applies only to "questioning initiated by law enforcement officers" after being taken into custody).

There is nothing in the record to support a contention that Salazar expressly "interrogated" Rushing. The record shows that Rushing volunteered, against Salazar's advice, details about the crime during routine visits with his probation officer (Salazar).

Rushing's reliance on Henson v. State, 794 S.W.2d 385 (Tex.App.—Dallas 1990, pet. ref'd), is misplaced. There a citizen interrogated the defendant and obtained incriminating statements. The issue was whether the citizen was acting as an agent of law enforcement, because the interrogation was part of a "calculated practice which all agents of the State involved knew was reasonably likely to evoke an incriminating response from" the defendant. Id . However, unlike Rushing's case, in Henson there was an express "interrogation."

Rushing also relies on Wortham v. State, 704 S.W.2d 586 (Tex.App.—Austin 1986, no pet.). There the defendant was transported to jail in a patrol car by two sheriff's deputies. There was a conservation between the three during the trip, which consisted of small talk, questions by one of the officers about why the defendant committed the crime and whether the defendant "wanted to go ahead and talk to us," and a number of incriminating statements by the defendant. The court discussed the meaning of "interrogation." The court quoted Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980).

> [T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.... A practice that the police should

know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Wortham, 704 S.W.2d at 589 (citing Innis, 446 U.S. at 300-01, 100 S.Ct. at 1689) (footnotes omitted). The court held that there had been an express "interrogation" of the defendant.

Rushing says that because of his age, the seriousness of the offense, and the daily visits by Salazar, the conversations were reasonably likely to cause Rushing to make an incriminating statement, and therefore the conversations were the functional equivalent of an interrogation. However, questioning which is "normally attendant to arrest and custody" is not interrogation. McCambridge, 712 S.W.2d at 505 (citing Innis, 446 U.S. at 300-01, 100 S.Ct. at 1689-90); DeLeon, 758 S.W.2d at 625. The record shows that any questions Salazar may have asked Rushing concerned routine custodial matters such as how Rushing was getting along in detention, or whether Rushing had any questions about the status of his case. These questions, "normally attendant to arrest and custody," are not an "interrogation."

We do not find that the court misapplied the law to the undisputed facts. Carmouche, 10 S.W.3d at 327. The issue is overruled.

10. QUESTIONING BY ASSISTANT PRINCIPAL ABOUT HANDGUN ON CAMPUS WAS NOT CUSTODIAL

In the Matter of V.P., 55 S.W.3d 25 (Tex.App.—Austin 5/31/01, motion for time extension filed 10/29/01) [*Texas Juvenile Law* 286 (5th Ed. 2000)]

Facts: On February 16, 2000, appellant V.P., then fourteen years old, hid a gun in a friend's backpack during the bus ride to his middle school. When they arrived at school, he retrieved the gun and asked M.M. to hold it for him. The friend in whose backpack the gun was hidden approached Lance Cox, the Austin Independent School District Police Officer assigned to the school, and told Cox that V.P. had a gun on campus. Cox and Ira Williams, the school's hall monitor, excused V.P. from his class and brought him to speak to Vince Trevino, an assistant principal. V.P. eventually told Trevino where the gun was, and Cox arrested him. V.P. was adjudicated delinquent for the offense of bringing a weapon into a prohibited place and was placed on probation for fourteen months, to be served at a treatment facility in Corsicana. Tex. Penal Code Ann. § 46.03(a)(1) (West Supp.2001). He appeals in two points of error, arguing the district court erred in refusing to suppress his oral confession and the gun. We will affirm.

Held: Affirmed.

Opinion Text: *Factual Background*

V.P. testified that he brought the gun, which did not work, to school because he was afraid that a group of bullies who had been harassing him would jump him. He testified that when he got to school he retrieved the gun from his friend's backpack and put it in his own backpack. He asked another friend, M.M., to hold the gun for him because he did not want to be caught with it in his possession. The boys went into a restroom, V.P. gave M.M. the gun, and the boys returned to their classes. Williams and Cox then got V.P. out of class and said they had heard he had brought "something illegal" onto campus. V.P. denied knowing anything, and Cox frisked him. Cox and Williams walked V.P. to Trevino's office, where the adults questioned him; Cox left the office during the questioning. V.P. testified that he denied having the gun and asked to talk to his mother and his lawyer as soon as he was asked about it. He said he told the adults his lawyer's name and said they could contact his sister and reach his lawyer and mother through her. V.P. said he first denied knowing about the gun, but then admitted having brought it to school and given it to M.M. Trevino radioed Cox to report that M.M. had the gun, and V.P. and Williams went to M.M.'s classroom; V.P. said Cox and Trevino followed behind them. V.P. told M.M. that the adults knew about the gun and to "just give it up." M.M. walked back to the principal's office with V.P., Williams, Cox, and Trevino and gave the gun to the adults. Cox then handcuffed V.P. and took him to Cox's office, where Cox read V.P. his rights and asked him to fill in some papers and sign his name. Cox took V.P.'s photograph and fingerprints and drove him to Gardner-Betts Juvenile Center. V.P. did not try to leave Trevino's office at any point. He said he did not think he could leave "because [he] was in a serious situation."

Cox testified that the girl in whose backpack V.P. had originally hidden the gun approached Cox just before classes started and told him V.P. had brought a gun to school. She described the gun and said it had been hidden in her backpack on the way to school. Cox believed her, so he and Williams got V.P. out of class. Cox asked V.P. if he had anything he was not supposed to have, and V.P. said no. Cox asked if he could search V.P., and V.P. consented. He said they then walked V.P. to Trevino's office. [FN1] The adults asked V.P. about the gun, and V.P. denied it and "got somewhat defensive." About three or four minutes after he walked V.P. to Trevino's

office, Cox left to look elsewhere for the gun. While searching the halls and restrooms, he saw Williams walking M.M. towards Trevino's office, so he returned with them. Once the gun was located, Cox brought V.P. to his office, read him his rights from a written warning form, and had him read and sign the warning and a waiver on the bottom of the form. Cox then called V.P.'s mother to tell her about the situation and to ask her to come to the school.

> FN1. Cox's office, not Trevino's office, is the school's designated juvenile processing office, as defined by the Family Code. Tex. Fam.Code Ann. § 52.025 (West Supp.2001).

When asked if V.P. was free to leave the campus before the gun was found, Cox answered,

> Was he free to leave? At that point, we didn't have a weapon. All we had was these kids saying there was a weapon. In my mind, these kids were—they were trustworthy. These are kids I see every day. These girls were visibly upset. I believed that there was a weapon on campus. [V.P.] was, to my knowledge, never instructed not to leave. You know, you have to stay here until we are finished. At the same time, I don't believe it was ever said that you can get up and walk out.

Although he believed that the girl who reported the gun was credible, he did not think her statement that V.P. had a gun on campus was by itself enough to give him probable cause to detain V.P. or M.M. Cox was not present for most of Trevino's questioning and did not know whether V.P. asked to speak with his lawyer and mother. Cox was wearing his police uniform that day.

Williams testified similarly to Cox. He and Cox were approached by three female students shortly before classes began, and one of the students said V.P. had brought a gun onto campus. Williams notified Trevino and then went with Cox to get V.P. from his class. V.P. came into the hallway with them, and Cox asked if V.P. had anything at school he was not allowed to have. V.P. replied no, and Cox asked if he could search him. V.P. agreed, and Cox did a quick pat-down search. Cox, Williams, and V.P. then walked to Trevino's office. Cox soon left the office, leaving Trevino and Williams with V.P. For fifteen or twenty minutes, while Williams and Trevino questioned V.P. about the gun, V.P. denied being involved in anything. Williams said he and Trevino "asked for [V.P.'s] help to solve this situation, due to the seriousness of it and the safety of the other students at school." V.P. finally said the gun did not work and told them M.M. had it. V.P. and Williams called M.M. out of class and walked him to Trevino's office. Cox was speaking to a janitor in the hallway outside of M.M.'s class when Williams and V.P. went there. Williams said Cox kept his distance and "was in a supervisory role and ... monitoring [Williams's] safety." M.M. told the adults where the gun was, and Williams retrieved it. Williams then called Cox on the school radio and to report that he had the gun. Asked whether V.P. was free to leave Trevino's office or the campus before the gun was found, Williams answered, "No student is free to leave the campus. We have a closed campus during school hours."

Williams said he briefly left Trevino's office once while V.P. was being questioned. When asked whether V.P. was read his rights before he was questioned, Williams said, "School policy doesn't require me to [read a student his rights] in my job description." Williams said Cox was not in Trevino's office while V.P. was questioned and denied that Cox asked him to question V.P. because Cox could not do so without reading V.P. his rights. Williams said the school's policy allowed him to talk to students and search their backpacks. He said if he found drugs or other illegal items, "then it is turned over to Officer Cox, who handles the legal aspect of it. At that point it is just an administrative process." He said Cox's role at the school is to act as a deterrent for illegal activity and to enforce the law in the event of a crime. Williams's duties concern the safety of the students, faculty, and facilities.

Trevino testified that Williams approached him on the morning of February 16 to say that V.P. might have a weapon at school. Trevino asked Williams to bring V.P. to the office so they "could begin interviewing him and questioning him" about the gun. Trevino said when V.P. was brought to Trevino's office, Cox only stayed for three or five minutes. Cox did not brief Trevino on how to conduct the questioning. After Cox left, Trevino and V.P. continued talking about the gun. Williams was present for most of the thirty or forty minutes Trevino was questioning V.P. Trevino stopped questioning V.P. for about five minutes while Williams left to address another situation in the school. He did not attempt to contact V.P.'s mother until after V.P. admitted bringing the gun to school. He did not read V.P. his rights, nor did he hear Cox or Williams do so. Trevino said:

> My primary concern was to find a weapon. I felt initially that there was a strong possibility there was a weapon on campus. I did not know for sure until [V.P.] answered a few questions that led me to believe there was

> one.... Now the situation was I do now know there is one on campus.... I guess because of the current situations involving other things that are going on, we had just established a crisis management plan, what to do in case of these situations. It was a manner of alerting staff and taking action on how do we proceed, do we start locking down. We were in what is referred to as a time crunch. We were approaching changing bells, changing classes within a matter of a few minutes. Whatever chance we may have had of keeping that student and that weapon in that place we were going to lose if we moved 1200 students and trying to make a decision whether we move them or not. Yes, we were in a hurry to try to convince him that we needed to find that weapon, and we found it. It was turned over to us, I think, about 10, 12 minutes before classes changed.

Trevino told V.P. that it would be better for V.P. if he turned over the gun than if someone got hurt with it. He said during the conversation, V.P. seemed to become more willing to turn over the gun. Trevino said he and Williams never raised their voices while they talked to V.P. Trevino knew V.P. had recently lost his father, and he "asked [V.P.] if he felt that his dad would want him to turn the weapon over to us. Shortly after that, he began to tell us that he had given it to [M.M.]." V.P. cried and became emotional when they talked about his father.

When asked why Cox left the interview, Trevino said:

> Officer Cox was in my office. [V.P.], when I was asking him about the weapon, he would look at Officer Cox and he would make—you made a statement I didn't want to go to jail, but his focus was more on Officer Cox than myself, even though I was asking the question. We just, I guess, sensed that he was more concerned with Officer Cox being in the room than myself. And working together for four years, we just, you know, looked at each other and kind of just knew intuitively that Officer Cox's presence there was not good and possibly [V.P.] would not cooperate. So Officer Cox left and that's when [V.P.'s] dialog began to change and become cooperative. I guess we were right in our assessment.

He believed "that [V.P.] felt that he would not be able to have just a complete, honest dialog with ... a law enforcement officer present." Trevino explained Cox's role at the school as follows:

> [T]he school administration usually initiates the investigation of allegations and then Officer Cox is brought in for advice or when the determination is made that it is now a legal matter. We have several occasions where individuals are given to me as suspects for drug possession, things of this sort, and it is not until after possibly that I find the drugs or the individual admits to having drugs, then do I turn them over to Officer Cox. It is not out of the ordinary that he is not involved in the initial investigation of it, no.

Discussion

In his first point of error, V.P. contends he was in custody from the moment he stepped into the hall and was searched by Cox. V.P. argues that Trevino was an agent of the State and seems to suggest that Trevino specifically acted as Cox's agent during the questioning. Therefore, V.P. argues, Trevino violated V.P.'s rights by not ceasing questioning when V.P. asked to speak to his lawyer, his confession and the gun were inadmissible, and the trial court erred in overruling his motion to suppress.

A trial court's ruling on a motion to suppress will only be set aside on a showing of an abuse of discretion. Villarreal v. State, 935 S.W.2d 134, 138 (Tex.Crim.App.1996). In a hearing on a motion to suppress evidence, the trial court, as the trier of fact, determines the weight and credibility to be given a witness's testimony. Id. at 138. When reviewing a trial court's evidentiary rulings, we give almost total deference to the court's determination of the historical facts and "mixed questions of law and fact" that apply the law to the case's specific facts and turn on an evaluation of witness credibility and demeanor. In re L.M., 993 S.W.2d 276, 286 (Tex.App.—Austin 1999, pet. denied). We review de novo mixed questions that do not require such an evaluation. Id. Because there is no disagreement in this case about the facts, we will review de novo the district court's determination that appellant was not in custody when he was questioned in Trevino's office. Id.

A minor has the same constitutional privilege against self-incrimination as does an adult. Id. at 287. Someone taken into custody for questioning must be informed that anything he says may be used against him in court and of his rights to remain silent and to have an attorney present during questioning. Miranda v. Arizona, 384 U.S. 436, 467-70 (1966). Therefore, if a minor is in custody and asks to speak to his lawyer before or during questioning, questioning must stop until an attorney is present. Fare v. Michael C., 442 U.S. 707, 717-18 (1979). However, Miranda rights only apply to persons subject to custodial interrogation, defined as "the questioning by

law-enforcement officers after a person has been taken into custody or otherwise has been deprived of his freedom in a significant way." In re L.M., 993 S.W.2d at 286-87 (citing Cannon v. State, 691 S.W.2d 664, 671 (Tex.Crim.App.1985)).

In determining whether a minor was in custody at the time of questioning, courts consider the age of the defendant and all the circumstances surrounding the interrogation to decide whether there was a formal arrest or a restraint of movement to the degree associated with formal arrest. Id. at 287, 289. In other words, courts ask whether, based on the objective circumstances, a reasonable child of the same age would believe his or her freedom of movement was significantly restricted. Id. at 289. Factors relevant to the question of whether a child was in custody include whether there was probable cause to arrest, the focus of the investigation, the officer's subjective intent, and the child's subjective beliefs. Jeffley v. State, 38 S.W.3d 847, 855 (Tex. App.—Houston [14th Dist.] 2001, no pet. h.); see also In re L.M., 993 S.W.2d at 289-91. A child's statement made as a result of custodial interrogation may only be admitted at trial if the child is instructed on his rights and the statement is made under circumstances that satisfy section 51.095 of the Family Code. Tex. Fam Code Ann. § 51.095 (West Supp.2001); In re L.M., 993 S.W.2d at 291.

Appellant asserts that school officials are agents of the state and that the circumstances of his questioning amounted to custodial interrogation, citing to New Jersey v. T.L.O., 469 U.S. 325 (1985). T.L.O. concerned a Fourth Amendment challenge to the propriety of a school official's search of a student. 469 U.S. at 328. The United States Supreme Court held that students should have some protection against unreasonable searches and seizures by public school officials. Id. at 334. However, the Court also held that a school official's search of a student under his or her control need not meet the strict requirements of probable cause. Id. at 341. Instead, the legality of such a search depends on the reasonableness of the search-first, whether the search was justified at the inception of the action and second, whether the search, as conducted, was reasonably related in scope to the circumstances that justified the interference in the first place. Id. The Court noted that there was a balance to be struck between a student's expectation of privacy and a school's need to maintain an environment conducive to education:

> It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

Id. at 340. The Court, while acknowledging that a school official acts as a "representative[ ] of the State" in searching a student or carrying out some other disciplinary action, did not equate a school official with a law enforcement official, as appellant seeks to do. Id. at 336.

Appellant cites to no Texas cases, and we have been unable to find any, that support his contention that the questioning performed by Trevino, a school official seeking information in furtherance of his duty to protect the safety and well-being of students and faculty at the school, amounted to custodial interrogation and required Trevino to cease his questioning when appellant asked to speak to his lawyer. A review of case law from other jurisdictions weighs against appellant's argument. See In re Harold S., 731 A.2d 265, 267-68 (R.I.1999) (Miranda warnings only necessary when questioning is by law-enforcement officials; school official was not acting as agent of police in asking student about alleged assault in official's office while student's father was present); New Jersey v. Biancamano, 666 A.2d 199, 202-03 (N.J.Super.Ct.App.Div.1995) (while Miranda may have some application to interrogation by school officials, officials must have leeway to question students about violations of school rules); Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass.1992) (even if environment of questioning in principal's office was coercive, school officials were not law enforcement officials or agents, and Miranda did not apply); Florida v. V.C., 600 So.2d 1280, 1281 (Fla.Dist.Ct.App.1992) (questioning by assistant principal was reasonable under T.L.O., and was not custodial interrogation). We find the cases of In re Corey L., 250 Cal.Rptr. 359 (Cal.Ct.App.1988), and In re D.E.M., 727 A.2d 570 (Pa.Super.Ct.1999), particularly persuasive.

In re D.E.M. concerned facts very similar to the cause before us-a police officer reported to the school principal that D.E.M. was rumored to have a gun on campus. 727 A.2d at 572. The principal removed D.E.M. from class, asked if he had anything illegal on campus, and asked to search his bag and his person. Id. D.E.M. eventually admitted that the gun was in his jacket in another student's locker. Id. The principal removed the gun from the locker and called the police, who arrested D.E.M. Id. There was no indication that the police coerced, dominated, or directed the officials' actions, and the court deter-

mined that under the totality of the circumstances the officials were not acting as agents of the police. Id. at 573-74. The officials investigated whether D.E.M. had a gun "principally to execute their duty to ensure the safety and welfare of the students for whom they are responsible." Id. at 574.

In re Corey L. concerned a report to a school principal that a student had drugs on campus. 250 Cal.Rptr. at 360. The principal removed the student from his class and informed him of the report. Id. When the student denied having any drugs and allowed the principal to search him, the principal found two bags containing cocaine and called the police, who arrested the student. Id. The student moved to suppress the cocaine, arguing the principal should have read him his Miranda rights before questioning and searching him. Id. The court, while noting that the Supreme Court has held that school officials are agents of the government in the context of illegal searches, held that school officials need not read students their Miranda rights before questioning them about suspected violations of the law or school rules. Id. at 360-61. The court stated, "Questioning of a student by a principal, whose duties include the obligations to maintain order, protect the health and safety of pupils and maintain conditions conducive to learning, cannot be equated with custodial interrogation by law enforcement officers." Id.

We agree with the cases discussed above and conclude that V.P. was not in police custody during Trevino's questioning. Cox and Williams, the school hall monitor, removed V.P. from his class and walked him to Trevino's office. Cox then left the office while Trevino questioned appellant. Even assuming appellant was in custody as he walked with Cox from his classroom to Trevino's office, once Cox left the office, V.P. was no longer in custody as Trevino questioned him about the gun. Trevino questioned V.P. about the gun primarily because he was concerned about the safety of the other students and faculty. Until the gun was located and the matter turned over to Cox, Trevino was conducting a school investigation, not a criminal investigation. If Cox had not gotten the initial report about the gun on campus, Trevino would have been required to tell Cox that V.P. might have a weapon on campus. See Tex. Educ.Code Ann. § 37.015(a)(5) (West Supp. 2001). That Trevino questioned appellant on the basis of a tip from Cox did not transform the questioning into custodial interrogation, and we have not found any case law indicating that a student has the constitutional right to remain silent or to consult with a lawyer in the face of questioning by a school principal. Because V.P. was not in official custody when questioned, he did not have the legal right to remain silent or to speak to his lawyer. The trial court did not abuse its discretion in denying appellant's motion to suppress. We overrule appellant's first point of error.

In his second point of error, V.P. urges that his motion to suppress should have been granted because section 52.02 of the Family Code was not followed. See Tex. Fam.Code Ann. § 52.02 (West Supp.2001). Section 52.02 requires that certain procedures be followed when a juvenile is taken into custody. Id. V.P. specifically contends that section 52.02 was violated because he was questioned in Trevino's office, not the school's designated juvenile processing office. Id. § 52.02(a)(2). However, we have already determined that under the particular facts of this case V.P. was not in custody during Trevino's questioning, therefore section 52.02 did not apply to the questioning. Once the gun was located, V.P. was taken into custody by Cox, brought to the designated office, and processed according to section 52.02. The trial court did not err in overruling V.P.'s motion to suppress based on violations of section 52.02. We overrule V.P.'s second point of error.

Having overruled appellant's points of error, we affirm the trial court's judgment.

II. MODIFICATIONS OF DISPOSITION

l. COURT OF APPEALS REQUIRES THREE ADJUDICATIONS FOR COMMITMENT TO TYC ON MISDEMEANOR REVOCATION

In the Matter of Q.D.M., 45 S.W.3d 797 (Tex. App.—Beaumont 6/14/01, pet. filed 9/17/01) [*Texas Juvenile Law* 220 (5th Edition 2000)].

Facts: This is an appeal from a dispositional order dated October 3, 2000, committing appellant, Q.D.M., to an indeterminate stay at the Texas Youth Commission (TYC). The record before us reflects that on February 8, 2000, appellant was adjudicated as having engaged in delinquent Conduct by Having committed the offense of "Evading Detention Using a Vehicle-Class A Misdemeanor." For that particular adjudication, and on that same day, appellant was placed on probation until he reached eighteen years' of age. As a condition of this probation, appellant was initially placed at a facility named, "Daytop Residential Treatment Facility" for an unspecified length of time. The record further reflects that prior to having been adjudicated delinquent for the evading detention offense, appellant has been adjudicated on October 12, 1999, for having committed the misdemeanor offense of "Possession of Marijuana in a Drug Free Zone."

On August 9, 2000, the State filed a Motion to Modify Disposition alleging that appellant violated the terms of his February 8, 2000, probation by committing several non-jailable, administrative-type violations. It was this motion that resulted in the dispositional order placing appellant in the TYC facility from which the instant appeal lies. Appellant presents two issues for our consideration, viz:

> Issue 1: Did the court err in modifying disposition of Juvenile-Appellant by committing Juvenile Appellant to the Texas Youth Commission ("TYC") under authority of a statute that is inapplicable to modifications, where Juvenile Respondent (sic) is not eligible for commitment to TYC under the statute which ought to have been applied, and where the State failed to plead in its Motion to Modify prerequisites for commitment to TYC (under both the erroneously applied statute and the statute which should have been applied)?
>
> Issue 2: Is § 54.04(j) of the Juvenile Justice Code unconstitutionally void for vagueness?

Held: Reversed and remanded.

Opinion Text: We partially dispose of appellant's first issue by pointing out that the record does not indicate appellant objected to any defects in the State's pleadings or to any misapplication of the statutory modification scheme prior to or during the modification proceedings. As such, appellant has not preserved those issues for appellate review and we overrule Issue 1 to that extent. Tex.R.App.P. 33.1(a). While appellant also failed to complain of the lack of authority by the trial court of commit appellant to TYC under the applicable statutory scheme, we will address that portion of Issue 1 for reasons set out below. Because our treatment of Issue 1 will be dispositive of the appeal we will not reach the question presented under Issue 2.

Both parties agree that the provision in question is contained in Tex.Fam.Code Ann. § 54.05(j) (Vernon Supp.2001), which reads as follows:

> (j) The court may modify a disposition under Subsection (f) that is based on a finding that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if:
>
> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least two previous occasions; and
>
> (2) of the previous adjudications, the conduct that was the basis for the adjudications occurred after the date of another previous adjudication.

The State does not contest the fact that based upon this specific provision the trial court committed appellant to TYC. [FN3]

> FN3. While not germane to this appeal, we note that § 54.05 contains several provisions that are designated by the identical letter and appear to also apply to modification of dispositions. These identically lettered subsections were enacted during the same legislative session but appear in different chapters of the 1999 session laws. It is unclear, even after an examination of the legislative history, what reason the legislature had for the identical lettering of different provisions.

Before examining § 54.05(j) to determine whether it gave the trial court the authority to commit appellant to TYC, we must address appellant's failure to raise this issue initially with the trial court.

Juvenile justice matters are considered civil proceedings, but quasi-criminal in nature. In re C.O.S., 988 S.W.2d 760, 765 (Tex.1999). As such, different considerations obtain with regard to preservation of issues for appellate review. Id. In the purely civil context, it has been observed that "fundamental error" survives today in those rare instances in which the record shows the trial court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. Id., citing to Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex.1982). When confronted with a preservation of error situation in C.O.S., the Court found decisions of the Court of Criminal Appeals to be instructive in the area. Id., at 767.

Under either the state of federal constitutions, a sentence assessed to a criminal defendant not authorized by law is void. See Heath v. State, 817 S.W.2d 335, 339 (Tex.Crim.App.1991). This has been the law in Texas for well over a century. Id., citing to Fowler v. State, 9 Tex. Ct.App. 149 (1880) (punishment below statutory minimum held to be incapable of supporting a conviction). Consequently, it has been "long held" that a defect which renders a sentence void may be raised at any time. Ex parte Beck, 922 S.W.2d 181, 182 (Tex.Crim.App.1996), citing to Heath, 817 S.W.2d at 336. See also Ex parte McIver, 586 S.W.2d 851, 854 (Tex.Crim. App.1979) (Habeas corpus relief will issue to a person in custody under a sentence which is void because the punishment is unauthorized). We therefore find an abundance of authority from our highest appellate courts in support of our addressing the issue of unauthorized sentence raised by appellant for the first time on appeal.

In determining whether appellant's commitment to TYC was unauthorized by § 54.05(j), we must examine the provision itself. The Court of Criminal Appeals has described their approach to statutory construction as follows:

> [W]e look to the literal text of the statute for its meaning, and we give effect to the plain meaning unless the language is ambiguous or application of the statute's plain language would lead to an absurd result that the legislature could not possibly have intended. Boykin v. State, 818 S.W.2d 782, 785 (Tex.Crim. App.1991). In analyzing the language of a statute, we assume that every word has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible. State v. Hardy, 963 S.W.2d 516, 520 (Tex.Crim.App. 1997). We also give effect to the more specific provisions over more general provisions. Tex. Gov't.Code § 311.026.

Campbell v. State, No.2031-99, 2001 WL 219145 (Tex.Crim.App. March 7, 2001).

Appellant's position before us is that § 54.05(j) permits commitment to TYC following modification of a previous disposition only upon the finding of at least three prior adjudications rendered against the juvenile, and of the three (or more) prior adjudications, at least two must have occurred after the date of another previous adjudication. The State's position before us is summed up by the following response contained in its brief:

> Under § 54.05(j) of the Texas Family Code, TYC commitments are restricted to revocation of felony probation or revocation of misdemeanor probation if the child has two previous felony or misdemeanor adjudications, including the adjudication for which he was placed on probation. The current violation of probation for which the child stands charged acts as a third adjudication. The commentary following § 54.05 in the Texas Family Code states that, in § 54.05(j), the probation revocation counts as the equivalent of the third misdemeanor adjudication for purposes of this commitment restriction.

Tex.Fam.Code § 54.05 cmt.

In looking to the literal text of § 54.05(j), we see no problem with the first sentence of the State's response set out above insofar as it recognizes that the current "probation" for which the juvenile faces "revocation" may involve a previous adjudication which can be used as one of the "previous adjudications" for purposes of TYC commitment following said "revocation." However, even the State recognizes that a "third adjudication" is required to be proven in order for the juvenile to be eligible for commitment to TYC. [FN4] The plain meaning of § 54.05(j), as derived from its literal text, does not permit the State's further elasticized construction of "current revocation counts as the equivalent of the third misdemeanor adjudication." Indeed, nothing within the language of § 54.05(j) may be taken to even remotely infer such additional construction as the State places on it.

> FN4. Legislative intent seems to be fairly clear on this point when examining the language of the bill analysis of the enrolled version of H.B. 2947, which described subsection (j) in the following manner:
>
> > (j) Authorizes the court to modify a disposition under Subsection (f) that is based on a

> finding that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least three previous occasions, and the current delinquent behavior occurred for one adjudication, after the date of another previous adjudication. See HOUSE COMM. ON JUVENILE JUSTICE & FAMILY ISSUES, BILL ANALYSIS, Tex. H.B. 2947, 76th Leg., R.S. (1999).

In support for its position, the State refers us to "commentary following § 54.05(j)" in the Texas Family Code. However, we find no comments in the supplemental part of Vernon's Texas Family Code, § 54.05. The State does not indicate further what other publication or edition of the Texas Family Code it is relying on for such commentary. As further "authority," the State references in its brief to a "Memorandum" apparently circulated to juvenile court judges and prosecutors by the executive director of the Texas Juvenile Probation Commission. This memorandum appears in the record before us only as an attachment to the State's brief. The memorandum's main focus, however, is on eligibility for commitment to TYC under § 54.04(q) which, by its explicit terms, applies to disposition hearings, not to modification hearings.

The lone remaining "authority" the State relies on is taken from ROBERT O. DAWSON, TEXAS JUVENILE LAW, p. 220 (5th ed. Sept. 2000), which contains the following statement:

> Under this rule [§ 54.05(j)], a violation of misdemeanor probation may substitute for the third misdemeanor offense to enable to TYC commitment upon modification. For example, if a juvenile commits a jailable misdemeanor and is adjudicated for it and after that adjudication commits a second jailable misdemeanor and is placed on probation for it, a finding in a modification hearing of a violation of that probation will support a commitment to the TYC. The modification substitutes for the third misdemeanor adjudication.

This commentary is not supported by reference to any other section or provision of the Texas Family Code. The State provides us with no further authority in support of their construction of § 54.05(j) that "the modification substitutes for the third misdemeanor adjudication."

In the instant case, the undisputed evidence indicates that, prior to the modification hearing, appellant had been adjudicated only twice for delinquent conduct which violated penal laws punishable by imprisonment or confinement to jail. See § 51.03(a). The "plain meaning" of § 54.05(j), gleaned from its literal text, does not permit the trial court's modification of appellant's probationary disposition to be equated with an "adjudication" under the particular facts and circumstances presented. If such a procedure is contemplated by § 54.04(j), it must come from further judicial construction of the literal text of said statute, or from legislative enactment or amendment. We find the trial court's commitment of appellant to TYC was unauthorized by the provisions of § 54.05(j). We therefore sustain the portion of appellant's first issue raising this complaint, reverse the trial court's dispositional order of commitment of October 3, 2000, and remand this cause to said court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

OPINION ON REHEARING

We write here to clarify a point raised by the State and the amicus in their briefs on motion for rehearing. The State and amicus argue that the legislative intent of the statute is not as we stated in footnote 4 of our opinion. See In the Matter of Q .D.M., 45 S.W.3d 797, 801 (Tex.App.— Beaumont 2001, no pet. h.). We believe the State has taken our passing observation of perceived "legislative intent" contained in footnote 4 to mean much more than we intended.

As we stated in our opinion, in statutory construction we begin with the language of the statute; if the language is clear, it is not for the judiciary to add to or subtract from the statute. Id. at 800; Miller v. State, 33 S.W.3d 257, 260 (Tex.Crim.App. 2000). In Tune v. Texas Department of Public Safety, 23 S.W.3d 358, 363 (Tex.2000), the court stated as follows: "[Reviewing courts] must enforce the plain meaning of an unambiguous statute. If a statute is clear and unambiguous, we need not resort to rules of construction or other extrinsic aid to construe it." See also RepublicBank Dallas, N.A. v. Interkal, Inc., 691 S.W.2d 605, 607 (Tex.1985) ("Unless a statute is ambiguous, we must follow the clear language of the statute.").

Here, we enforce the clear language and plain meaning of section 54.05(j). A requirement for a third adjudication is found in the language of the statute itself. The statute requires that "the adjudications" (the plural of "adjudication" meaning "at least two") occur after the date of "another previous adju-

dication." The sum of "[a]t least two" plus "another previous" equals three.

We overrule the State's motion for rehearing.

MOTION FOR REHEARING DENIED.

2. COURT OF APPEALS HOLDS THAT THREE ADJUDICATIONS ARE REQUIRED BEFORE MISDEMEANOR PROBATION CAN BE REVOKED

In the Matter of A.N., 54 S.W.3d 487 (Tex.App.—Fort Worth 8/16/01) [*Texas Juvenile Law* 220 (5th Edition 2000)].

Facts: Appellant A.N. appeals from the juvenile court's order of commitment, committing her to the care, custody, and control of the Texas Youth Commission (TYC) for an indeterminate period of time. In a single issue on appeal, Appellant contends that the juvenile court abused its discretion in committing her to TYC.

On July 5, 2000, the juvenile court found that Appellant had engaged in delinquent conduct by committing the misdemeanor offense of assault causing bodily injury and placed her on probation for one year. On September 29, 2000, the State filed a motion to modify disposition alleging Appellant violated the conditions of her probation by removing an electronic monitor from her person without the juvenile court's permission. A hearing was held on the motion to modify on October 6, 2000, at which time Appellant agreed and stipulated to the State's evidence. The juvenile court found that Appellant had violated the terms and conditions of her probation as alleged by the State and signed an order committing Appellant to TYC. In its order, the court found that Appellant had previously been adjudicated delinquent on August 6, 1999, for the misdemeanor offense of evading arrest.

In her sole issue on appeal, Appellant contends that the juvenile court abused its discretion in committing her to TYC. Appellant does not challenge the trial court's finding that she violated a reasonable and lawful order of the court. Rather, Appellant argues that the juvenile court was without statutory authority to commit her to the custody of TYC. Specifically, Appellant insists that the court misinterpreted the pertinent provisions of section 54.05 of the Texas Family Code.

Held: Reversed and remanded.

Opinion Text: Section 54.05, which governs hearings to modify dispositions, provides in relevant part:

> (f) A disposition based on a finding that the child engaged in delinquent conduct that violates a penal law of this state or the United States of the grade of felony or, if the requirements of Subsection (j) are met, of the grade of misdemeanor, may be modified so as to commit the child to the Texas Youth Commission if the court after a hearing to modify disposition finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court....
>
> ....
>
> (j) The court may modify a disposition under Subsection (f) that is based on a finding that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if:
>
> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least two previous occasions; and
>
> (2) of the previous adjudications, the conduct that was the basis for the adjudications occurred after the date of another previous adjudication.

Under Appellant's interpretation, section 54.05(j) prohibits the juvenile court from committing a child to TYC following a misdemeanor probation violation unless the child has been adjudicated delinquent for a felony or misdemeanor on two separate occasions prior to the most recent misdemeanor for which the child is on probation. Thus, according to Appellant, because she had only one adjudication on her record prior to the misdemeanor offense that was the subject of the modification hearing, the juvenile court abused its discretion in committing her to TYC. The State disagrees with Appellant's construction of section 54.05(j), arguing that the statute's plain language requiring two "previous" adjudications "permits the trial court to count the adjudication for which the child was originally placed on probation as one of the two previous misdemeanor adjudications."

As we understand the parties' respective positions, Appellant contends that section 54.05(j) requires that the child have been adjudicated delinquent on at least three separate occasions, two of these occasions being before the adjudication for which disposition is being modified. The State, on the other hand, insists that section 54.05(j) requires only two adjudications in total, including the adjudication that is the subject of the hearing to modify disposition. Accordingly, the question before us is

whether the adjudication for which the child was placed on probation and which is the subject of the modification of disposition is a "previous" adjudication under section 54.05(j). After a careful study of the statutory language, we conclude that it is not.

Texas Supreme Court jurisprudence mandates that we enforce the plain meaning of an unambiguous statute. [FN6] If a statute is clear and unambiguous, we need not resort to rules of construction or other extrinsic aids to construe it. Whether a statute is ambiguous is a question of law. [FN8] Ambiguity exists if reasonable persons can find different meanings in the statute. [FN9]

FN6. Tune v. Tex. Dep't of Pub. Safety, 23 S.W.3d 358, 363 (Tex.2000).

FN8. Retama Dev. Corp. v. Tex. Workforce Comm'n, 971 S.W.2d 136, 139 (Tex.App.—Austin 1998, no pet.).

FN9. Teleprofits of Tex., Inc. v. Sharp, 875 S.W.2d 748, 750 (Tex.App.—Austin 1994, no writ).

If a statute is determined to be ambiguous, this court's primary objective in construing that statute is to ascertain the legislature's intent and to give effect to that intent. [FN10] We must construe a statute as written and, if possible, ascertain legislative intent from the statute's language. [FN11] Moreover, even when a statute is not ambiguous on its face, we can consider other factors to determine the Legislature's intent, including the object sought to be obtained, the circumstances of the statute's enactment, the legislative history, the common law or former statutory provisions, including laws on the same or similar subjects, the consequences of a particular construction, and administrative construction of the statute. [FN12]

FN10. Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436, 438 (Tex.1997).

FN11. Morrison v. Chan, 699 S.W.2d 205, 208 (Tex.1985).

FN12. Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex.2001).

Our research has uncovered only one other published case confronting the issue of the proper construction of section 54.05(j). In In re Q.D.M., the appellant argued that section 54.05(j) permits a court to commit a juvenile to TYC upon the modification of a previous disposition only if the juvenile has been adjudicated delinquent on three prior occasions. [FN13] The State contended that TYC commitment is authorized under section 54.05(j) if the child has two previous felony or misdemeanor adjudications, including the adjudication for which the child was placed on probation. The State further maintained that "[t]he current violation of probation for which the child stands charged acts as a third adjudication." The Beaumont court of appeals agreed with the State that "the current 'probation' for which the juvenile faces 'revocation' may involve a previous adjudication which can be used as one of the 'previous adjudications' for purposes of TYC commitment following said 'revocation.'" The court, however, disagreed that under the plain meaning of the statute, the "current revocation counts as the equivalent of the third misdemeanor adjudication."

FN13. 45 S.W.3d 797, 800 (Tex.App.—Beaumont 2001, no pet. h.) [Juvenile Law Newsletter ¶ 01-3-09].

In the case now before us, the State criticizes Appellant's interpretation of section 54.05(j) as inconsistent with the statute's plain language by requiring three prior misdemeanor adjudications before a child may be committed to TYC following a probation violation. As we understand Appellant's position, however, it is not that there must be three prior adjudications but, rather, that there must be at least three total adjudications, consisting of the current adjudication that is the basis for the modification of disposition and "two previous" adjudications. We believe that the language of section 54.05(j) supports Appellant's construction of the prerequisites for TYC commitment upon modification of disposition. We, therefore, disagree with the Beaumont court's decision insofar as it held, without explanation, that a juvenile court may, in committing a child to TYC after a modification of disposition, view the most recent adjudication for which the child is on probation as one of the "previous" adjudications required by section 54.05(j).

The State argues that the language of section 54.05(j), requiring adjudications for misdemeanor or felony offenses "on at least two previous occasions," requires only that the two adjudications be "previous" to the modification hearing. We disagree. "Previous" means "going or existing before in time." [FN18] The requirement that the two adjudications be on "previous occasions" necessarily implies that there exist a present adjudication, or one that is subsequent to the two other adjudications required. This present adjudication is the "finding that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor," referenced in the first sentence of section 54.05(j), upon which the modification of disposition is based. [FN19]

FN18. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1798 (1981).

FN19. Tex. Fam.Code Ann. § 54.05(j); see also Tex. Fam.Code Ann. § 54.03(a) ("A child may be found to have engaged in delinquent conduct ... only after an adjudication hearing.").

Our interpretation of section 54.05(j) in this manner is further supported by a reading of section 54.04 of the family code, governing disposition hearings. That section provides in pertinent part:

> (d) If the court or jury makes the finding specified in Subsection (c) allowing the court to make a disposition in the case:
>
> ....
>
> (2) if the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that violates a penal law of this state or the United States of the grade of felony or, if the requirements of Subsection (q) are met, of the grade of misdemeanor ... the court may commit the child to the Texas Youth Commission without a determinate sentence;
>
> ....
>
> (q) The court may make a disposition under Subsection (d)(2) for delinquent conduct that violates a penal law of the grade of misdemeanor if:
>
> (1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least two previous occasions;
>
> (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.

The State agrees with Appellant that "the current adjudication can't count as a previous adjudication for purposes of commitment under [section] 54.04(q)." Thus, the State does not contend that, under section 54.04(q), "two previous occasions" refers to instances previous to the disposition hearing that is the subject of section 54.04. Rather, the State concedes that the current adjudication that is the subject of the disposition hearing is not an adjudication on a "previous occasion" under section 54.04(q). We conclude that the same construction is mandated by the plain language of section 54.05(j). The requirement of two "previous" adjudications points to the Legislature's intent that a juvenile be eligible for TYC commitment upon modification of disposition only after having been adjudicated delinquent for a felony or misdemeanor offense on two separate occasions prior to the adjudication for which disposition is being modified.

As support for its position, the State points out that Professor Robert Dawson, as well as other commentators on the subject, have concluded that the "two previous occasions" language in section 54 .05(j) can include the adjudication that is the subject of the hearing to modify disposition. We respectfully disagree with this interpretation of the statute because it is contrary to the statute's plain meaning. Additionally, the State directs us to a memorandum of the Texas Juvenile Probation Commission (TJPC), which construes section 54.05(j) in a manner consistent with the State's position. Specifically, the memorandum provides, "A child currently on probation for a Class A or B Misdemeanor adjudication may be revoked and committed to TYC if the child has one prior felony or misdemeanor (A or B) adjudication. The modification may be based on either a technical violation or a new offense." [FN23]

FN23. Memorandum from Wesley Shackelford, Senior Staff Attorney/Intergovernmental Relations, and Lisa Capers, General Counsel, Texas Juvenile Probation Commission, to Juvenile Court Judges, Juvenile Prosecutors, and Chief Juvenile Probation Officers (Dec. 2, 1999) (on file with author).

We recognize that an administrative agency's construction or interpretation of a statute, which the agency is charged with enforcing, is entitled to serious consideration by a reviewing court, provided that construction is reasonable and does not contradict the plain language of the statute. [FN24] Here, the TJPC's interpretation of section 54.05(j) as requiring only "one prior" felony or misdemeanor adjudication before commitment to TYC is authorized upon a modification of disposition is contrary to the plain language of the statute, which clearly requires "two previous" adjudications. Consequently, because TJPC's construction of the statute is in conflict with the statute's plain language, we decline to defer to that construction.

FN24. Steering Comms. for Cities Served by TXU Elec. v. Pub. Util. Comm'n, 42 S.W.3d 296, 300 (Tex.App.—Austin 2001, no pet.).

The primary goal of statutory construction is to ascertain and give effect to the legislature's intent. We endeavor to discover what the Legislature intended from the actual language that the Legislature used, looking first to the plain and common meaning of the statute's words. Here, the language of section 54.05(j) is clear and unambiguous and compels us to conclude that, when commitment of a juvenile to TYC is a modification of a disposition based upon a misdemeanor offense, there must have been two separate adjudications for misdemeanor or felony offenses prior to the current adjudication that is the subject of the hearing to modify disposition. Consequently, we reject the State's position that the adjudicated offense for which disposition is being modified may serve as one of the "previous" adjudications required under section 54.05(j). We believe our holding comports with evidence regarding the Legislature's purpose in amending section 54.05 of the family code, which indicates that the Legislature sought to restrict the circumstances under which a juvenile is eligible for TYC commitment. [FN27]

> FN27. See HOUSE COMM. ON JUVENILE JUSTICE & FAMILY ISSUES, BILL ANALYSIS, Tex. H.B. 2947, 76th Leg., R.S. (1999) available at http:// tlo2.tlc.state.tx.us/cgi-bin/tlo/ textframe.cmd? LEG=76 & SESS=R & CHAMBER=H & BILLTYPE=B & BIL LSUFFIX=02947 & VERSION=5 & TYPE=A ("H.B. 2947 limits the offenses that make a child eligible for commitment to the Texas Youth Commission.").

In the case now before us, it is undisputed that, before Appellant's adjudication of delinquency for the misdemeanor offense of assault, for which the State sought to modify disposition, Appellant had been adjudicated as having engaged in delinquent conduct violating a penal law on only one previous occasion for the misdemeanor offense of evading arrest. Indeed, the portion of the juvenile court's order of commitment finding "that the child has been previously adjudicated delinquent for the following offenses on the following dates" lists only Appellant's August 6, 1999 adjudication for evading arrest. Accordingly, because the requirements of section 54.05(j) were not satisfied, we hold that the juvenile court was without authority to modify Appellant's disposition so as to commit her to TYC. We, therefore, sustain Appellant's sole issue on appeal.

We reverse the juvenile court's order of commitment and remand this cause to that court for further proceedings consistent with this opinion.

3. REMOVAL FROM HOME FINDINGS OF SECTION 54.04 NOT REQUIRED FOR TYC COMMITMENT UPON PROBATION REVOCATION

In the Matter of D.R.A., 47 S.W.3d 813 (Tex.App.—Fort Worth 5/31/01)[*Texas Juvenile Law* 224 (5th Ed. 2000)]

Facts: Appellant D.R.A. appeals from the trial court's orders modifying his prior dispositions and committing him to the Texas Youth Commission (TYC) for an indeterminate period of time. In a single point, Appellant contends that the trial court abused its discretion in committing him to TYC. We affirm.

On September 22, 1998, the trial court found that Appellant had engaged in delinquent conduct by committing the offense of indecency with a child and placed him on probation for two years. On July 20, 1999, Appellant was again adjudged to have engaged in delinquent conduct by committing the offense of aggravated sexual assault of a child, and the trial court placed him on two years' probation. The State subsequently filed petitions to modify disposition in both cases on August 28, 2000, alleging Appellant violated several conditions of his probation and requesting that he be committed to TYC for a period not to exceed his twenty-first birthday.

A hearing was held on both petitions on September 21, 2000, at which time Appellant entered pleas of true to two of the alleged probation violations in each petition. Appellant also signed stipulations of evidence in both cases, admitting the alleged violations. The trial court accepted Appellant's pleas of true and stipulations and found that Appellant had violated the conditions of his probation as alleged by the State. During the "disposition" phase of the modification hearing, Randy Lambert, Appellant's supervising probation officer, testified that it was his recommendation that Appellant be placed in TYC due to the seriousness of his past offenses and his failure to sufficiently progress in his treatment program and because he posed a high risk of re-offense. At the conclusion of the hearing, the trial court entered its orders modifying the disposition in both cases, finding that Appellant violated a reasonable and lawful order of the court, and committing him to TYC for an indeterminate period.

Held: Affirmed.

Opinion Text: In his sole point on appeal, Appellant argues that the trial court abused its discretion by committing him to TYC. Specifically, Appellant insists that the trial court did not properly make the determinations required by section 54.04(i) of the

family code before committing him to TYC. That section provides, in relevant part, as follows:

> (i) If the court ... commits the child to the Texas Youth Commission, the court shall include in its order its determination that:
>
> (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. [FN1]

FN1. Tex. Fam.Code Ann. § 54.04(i) (Vernon Supp.2001).

In its orders modifying disposition, the trial court specifically found the existence of each of these three conditions for commitment to TYC. Such a finding is not, however, a prerequisite to TYC commitment upon modification of a prior disposition. [FN2] Section 54.04 of the family code applies to an original disposition hearing. Here, Appellant was before the court on the State's petitions to modify his prior dispositions. Such modification proceedings are governed by section 54.05 of the family code. [FN3] That section permits a trial court to modify a disposition so as to commit the child to TYC if the court, after a hearing, finds by a preponderance of the evidence that "the child violated a reasonable and lawful order of the court." [FN4] Accordingly, the standards set forth in section 54.04(i) are not determinative of the trial court's authority to modify a juvenile disposition and to order commitment to TYC. The relevant inquiry is whether the child violated a reasonable and lawful order of the court. [FN5]

FN2. In re M.A.L., 995 S.W.2d 322, 324 (Tex.App.—Waco 1999, no pet.); In re H.G., 993 S.W.2d 211, 214 (Tex.App.—San Antonio 1999, no pet.).

FN3. Tex. Fam.Code Ann. § 54.05 (Vernon Supp.2001); H.G., 993 S.W.2d at 214.

FN4. Tex. Fam.Code Ann. § 54.05(f).

FN5. H.G., 993 S.W.2d at 214.

Juvenile courts are vested with a great amount of discretion in determining the suitable disposition of children found to have engaged in delinquent conduct, and this is especially so in hearings to modify disposition. [FN6] The controlling issue, therefore, is whether the record reveals that the trial court abused its discretion in finding, by a preponderance of the evidence, that Appellant violated a condition of his probation. [FN7] Appellant does not challenge the sufficiency of the evidence to support the trial court's finding that he violated the conditions of his probation, nor does he contend that the court's orders, placing him on probation and setting the terms and conditions of his probation, were not "reasonable and lawful." Consequently, the trial court acted well within its discretion in committing Appellant to TYC for an indeterminate period. We therefore overrule Appellant's sole point.

FN6. In re J.M., 25 S.W.3d 364, 367 (Tex.App.—Fort Worth 2000, no pet.); M.A.L., 995 S.W.2d at 324; In re J.L., 664 S.W.2d 119, 120 (Tex.App.—Corpus Christi 1983, no writ).

FN7. M.A.L., 995 S.W.2d at 324.

Having overruled Appellant's only point on appeal, we affirm the trial court's orders in both causes.

4. EL PASO COURT HOLDS THAT REMOVAL FROM HOME FINDINGS MUST BE USED AT MODIFICATION

In the Matter of L.R., ___ S.W.3d ____, No. 08-01-00095-CV, 2001 WL 1587615, 2001 Tex.App.Lexis 224 (Tex.App.—El Paso 12/13/01) [*Texas Juvenile Law* (5th Edition 2000)].

Facts: L.R., a juvenile, appeals from an order modifying disposition and judgment committing him to the Texas Youth Commission.

In April of 1998, L.R. carried a switchblade knife onto the premises of an El Paso middle school and displayed it during a confrontation with another individual. The State filed a petition alleging that L.R. engaged in delinquent conduct by intentionally, knowingly, and recklessly carrying a switchblade knife onto the premises of an El Paso middle school. L.R. waived various rights, including his right to a jury trial, and admitted that he had committed the offense alleged in the petition. Based on L.R.'s admission, the juvenile court referee entered an adjudication order. Following a disposition hearing, the juvenile court placed L.R. on juvenile probation.

During the course of the next two years, L.R. committed new offenses and violated the terms and conditions of probation. Consequently, the juvenile

court modified the terms and conditions of probation and placed him on electronic monitoring. Eventually, the juvenile court placed L.R. on intensive supervised probation in August of 2000. After L.R.'s alleged commission of aggravated assault with a knife, the State filed a petition to adjudicate. The State also filed a motion to modify disposition, alleging that L.R. had violated the terms and conditions of probation by committing aggravated assault with a deadly weapon and by consuming alcohol. The State later amended the motion to modify disposition and alleged that L.R. violated probation by possessing an illegal knife and by consuming alcohol. Significant to this appeal, the State later dismissed its petition to adjudicate because L.R. had agreed to stipulate to the motion to modify. At the modification hearing, L.R. admitted that he had violated the terms and conditions of probation by carrying an illegal knife and by consuming alcohol. The juvenile court sustained the State's motion to modify and set the matter for a disposition hearing.

The juvenile probation department filed a disposition report with the trial court prior to the disposition hearing. Because the juvenile probation department had exhausted all of its resources in attempting to reintegrate L.R. back into society, the juvenile probation officer recommended that L.R. be committed to TYC. Following the disposition hearing, the juvenile court modified the prior disposition and committed L.R. to TYC. The disposition order contains the findings required by Tex.Fam.Code Ann. § 54.04(i)(Vernon Supp.2001) and it also contains reasons for the disposition as required by Tex.Fam.Code Ann. § 54.05(i).

Held: Affirmed.

Opinion Text: SUFFICIENCY OF THE EVIDENCE

In two related issues, L.R. challenges the legal and factual sufficiency of the evidence to support the juvenile court's order committing him to TYC on the ground that other alternative placement programs would have better suited his individual needs. Thus, L.R. attacks the juvenile court's determination made pursuant to Section 54.05(i) that "no community-based intermediate sanction is available to adequately address the needs of the juvenile or to adequately protect the needs of the community." In making this argument, L.R. notes that the juvenile court was obligated to make the findings required by Section 54.04(i). He does not, however, challenge the sufficiency of the evidence supporting those findings. The State responds that since this is a modification of disposition, Section 54.05, rather than Section 54.04(i), governs this appeal, and therefore, it was unnecessary for the juvenile court to make the findings specified by that statute before committing L.R. to TYC. According to the State, the sole issue on appeal is whether the juvenile court abused its discretion in finding, by a preponderance of the evidence, that a violation of the conditions and terms of probation occurred. We must resolve the issue raised by the parties' arguments before examining the sufficiency of the evidence.

Relevant Statutes

Section 54.04(i) provides, in relevant part, as follows:

> If the court ... commits the child to the Texas Youth Commission, the court shall include in its order its determination that:
>
> (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).

As the State notes, Section 54.05 governs modification of disposition, and it provides in pertinent part that:

> A disposition based on a finding that the child engaged in delinquent conduct that violates a penal law of this state or the United States of the grade of felony or, if the requirements of Subsection (j) are met, of the grade of misdemeanor, may be modified so as to commit the child to the Texas Youth Commission if the court after a hearing to modify disposition finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court.

Tex.Fam.Code Ann. § 54.05(f).

At least three courts of appeals have held that the mandatory findings required by Section 54.04(i) are not a prerequisite to TYC commitment upon modification of a prior disposition. In re D.R.A., 47 S.W.3d 813, 814-15 (Tex.App.—Fort Worth 2001, no pet.); In re M.A.L., 995 S.W.2d 322, 324 (Tex.App.—Waco 1999, no pet.); In re H.G., 993 S.W.2d 211, 214 (Tex.App.—San Antonio 1999, no

pet.). Pointing to Section 54.05(f), those courts have concluded that the only relevant inquiry in such a case is whether the child violated a reasonable and lawful order of the court. See In re D.R.A., 47 S.W.3d at 815; In re M.A.L., 995 S.W.2d at 324. Under this approach, a child who commits even a relatively minor violation of a trial court's probation order may be committed to TYC without any inquiry as to whether it is in the child's best interests to be placed outside of the home, whether reasonable efforts have been made to prevent or eliminate the child's removal from the home, or whether the child, in the child's home, cannot be provided with the quality of care and level of support and supervision that the child needs to meet the conditions of probation. See In re H.G., 993 S.W.2d at 214-15 (Rickhoff, J ., concurring)(where juvenile violated probation order by failing to pay restitution, complete community service or attend counseling, the juvenile court committed child to TYC for being "sullen"). Such a construction completely fails to effectuate Title 3's stated purpose of preserving the family environment and separating a child from his parents only when necessary for the child's welfare or in the interest of public safety. See Tex.Fam.Code Ann. § 51.01(5)(Vernon 1996). For this reason alone, we question the validity of the holding in these three cases.

Further, D.R.A., M.A.L., and H.G. do not take into account Section 54.05(i)'s requirement that the juvenile court state in its order the reasons for modifying the disposition. See Tex.Fam.Code Ann. § 54.05(i). This provision mirrors Section 54 .04(f)'s requirement that the juvenile court specifically state its reasons for the disposition. See Tex.Fam.Code Ann. § 54.04(f). Section 54.04(f) has been construed as requiring the juvenile court to articulate in the judgment clear, specific reasons for the disposition. In the Matter of A.G.G., 860 S.W.2d 160, 162 (Tex.App.—Dallas 1993, no writ); J.L.E. v. State, 571 S.W.2d 556, 557 (Tex.Civ.App.—Houston [14th Dist.] 1978, no writ); In the Matter of A.N.M., 542 S.W.2d 916, 919 (Tex.Civ.App.—Dallas 1976, no writ). One reason underlying this requirement is that it furnishes a basis for the appellate court to determine whether the reasons recited are supported by the evidence and whether they are sufficient to justify the order of disposition. In the Matter of K.L.C., 972 S.W.2d 203, 206 (Tex.App.—Beaumont 1998, no pet.); In the Matter of J.R., 907 S.W.2d 107, 110 (Tex.App.—Austin 1995, no writ); In the Matter of L.G., 728 S.W .2d 939, 944-45 (Tex.App.—Austin 1987, writ ref'd n.r.e.); In the Matter of N.S.D., 555 S.W.2d 807, 809 (Tex.Civ.App.—El Paso 1977, no writ). Thus, error occurs if the juvenile court fails to comply with Section 54.04(f). See In the Matter of A.G.G., 860 S.W.2d at 162. If the only question on appeal is that raised by Section 54.05(f)—whether the child violated a reasonable and lawful order of the court—and the child may not challenge the disposition on any other ground, then the Legislature's requirement in Section 54.05(i) that the trial court specifically state the reasons for disposition is rendered meaningless. Such a result is, of course, contrary to well established rules of statutory construction that a court must presume that the entire statute is intended to be effective. See Tex.Gov't Code Ann. § 311.021(2)(Vernon 1998); Helena Chemical Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex.2001).

Because of the quasi-criminal nature of juvenile cases, there is a temptation to draw parallels between adult criminal procedure and the procedure specified in juvenile cases. In some instances, this is a valid approach. Although it is not articulated in D.R.A., M.A.L., or H.G. as a basis for the decisions, the holdings are consistent with the treatment of an adult offender who has been found to have violated the terms and conditions of probation. In such a case, the trial court's order revoking community supervision is reviewed for an abuse of discretion and the only issue on appeal is whether the evidence supports the finding that the defendant violated a term or condition of the order placing him on community supervision. See Becker v. State, 33 S.W.3d 64, 66-67 (Tex.App.—El Paso 2000, no pet.). However, there is a critical distinction between revocation of community supervision under Article 42.12, sections 21 and 23 and modification of a juvenile's disposition, at least where the juvenile has been placed on probation inside of the home. In the former case, the adult defendant's punishment has already been assessed at a term of imprisonment. Thus, the defendant has already been afforded due process and other constitutional protections in both the adjudication of guilt and the assessment of punishment. At that point, the revocation hearing is merely an administrative proceeding and the defendant is properly afforded only minimal due process. See Becker, 33 S.W.3d at 65-66. A parallel simply cannot be drawn between an adult defendant whose community supervision has been revoked and the original punishment imposed, and a child whose disposition has been modified from juvenile probation inside of his home to commitment to TYC.

For all of these reasons, we respectfully decline to follow the reasoning of our sister courts. Instead, we find that a juvenile court which modifies disposition so as to place the child on probation outside of the child's home or to commit the child to the Texas Youth Commission must state sufficient reasons to justify such a decision. These reasons must

include, but are not limited to, the findings stated in Section 54.04(i). On appeal, then, a juvenile may challenge both the juvenile court's finding that he violated a term or condition of probation and those reasons for disposition stated in the order pursuant to Sections 54.04(i) and 54.05(i).

Standard of Review

L.R. argues that in reviewing the juvenile court's decision to modify we must employ the legal sufficiency standard of review applicable in criminal cases rather than the civil "no evidence" standard. The standard of review advocated by L.R. was first enunciated in Jackson v. Virginia, 443 U.S. 307, 320, 99 S.Ct. 2781, 2789-90, 61 L.Ed.2d 560 (1979). Under this standard, an appellate court reviews all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. at 320, 99 S.Ct. at 2789-90. While this court has applied the Jackson v. Virginia standard in juvenile cases, we have limited its application to challenges to the legal sufficiency of the evidence to establish the elements of the penal offense that forms the basis of the finding that the juvenile engaged in delinquent conduct or conduct indicating a need for supervision because those elements must be proven beyond a reasonable doubt. See In the Matter of A.S ., 954 S.W.2d 855, 860 and n. 1 (Tex.App.—El Paso 1997, no pet.). In In the Matter of A.S., we declined to apply the Jackson v. Virginia standard to review of the disposition order because the juvenile court's findings supporting the disposition order are not required to be proven beyond a reasonable doubt. In the Matter of A.S., 954 S.W.2d at 861, and n. 3. Other courts have since reached the same conclusion. See In the Matter of T.K.E., 5 S.W.3d 782, 785 (Tex.App.—San Antonio 1999, no pet.). In contrast to Section 54.03(f), which requires the State to prove beyond a reasonable doubt that the child has engaged in delinquent conduct or conduct indicating a need for supervision, Section 54.05 requires the State to establish a violation of the juvenile court's order by a preponderance of the evidence. Accordingly, we find that application of the Jackson v. Virginia standard is inappropriate when reviewing the juvenile court's disposition order or its decision to modify disposition.

Juvenile courts are vested with broad discretion in determining the suitable disposition of children found to have engaged in delinquent conduct, and this is especially true in hearings to modify disposition. See In re J.M., 25 S.W.3d 364, 367 (Tex.App.—Fort Worth 2000, no pet.); In the Matter of A.S., 954 S.W.2d at 861; In the Matter of J.L., 664 S.W.2d 119, 120 (Tex.App.—Corpus Christi 1983, no writ). Absent an abuse of discretion, we will not disturb the juvenile court's determination. A.S., 954 S.W.2d at 861. In conducting this review, we engage in a two-pronged analysis: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion? In the Matter of M.A.C., 999 S.W.2d 442, 446 (Tex.App.—El Paso 1999, no pet.); see also Leibman v. Grand, 981 S.W.2d 426, 429 (Tex.App.—El Paso 1998, no pet.); Lindsey v. Lindsey, 965 S.W.2d 589, 591 (Tex.App. —El Paso 1998, no pet.). The traditional sufficiency of the evidence review, articulated below, comes into play when considering the first question. In the Matter of M.A.C., 999 S.W.2d at 446. We then proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision or whether it is arbitrary and unreasonable. Id. The 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. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex.1985), cert. denied, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986); In the Matter of M.A.C., 999 S.W.2d at 446. 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. Southwestern Bell Telephone Company v. Johnson, 389 S.W.2d 645, 648 (Tex.1965); In the Matter of M.A.C., 999 S.W.2d at 446.

In considering a "no evidence," or legal insufficiency point, we consider only the evidence that tends to support the jury's findings and disregard all evidence and inferences to the contrary. Garza v. Alviar, 395 S.W.2d 821 (Tex.1965); Lindsey, 965 S.W.2d at 591. If more than a scintilla of evidence exists to support the questioned finding, the "no evidence" point fails. Lindsey, 965 S.W.2d at 591.

A factual sufficiency point requires examination of all of the evidence in determining whether the finding in question is so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Lindsey, 965 S.W.2d at 591. We may not pass upon the witnesses' credibility nor will we substitute our judgment for that of the jury, even if the evidence would clearly support a different result; rather, if competent evidence of probative force supports the challenged finding, we will sustain it. Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 407 (Tex.1998); Gonzalez v. El Paso Hosp.

Dist., 940 S.W.2d 793, 796-97 (Tex.App.—El Paso 1997, no pet.).

Application of Standard to the Facts

L.R. does not challenge the juvenile court's determination that he violated a reasonable and lawful order of the juvenile court. [FN3] Likewise, he does not attack the evidentiary sufficiency supporting the Section 54.04(i) findings. Instead, he challenges the legal and factual sufficiency supporting only one of the reasons for disposition stated in the disposition order, namely, that no community-based intermediate sanction is available to adequately address the needs of the juvenile or to adequately protect the needs of the community. [FN4] Even if we determined that the evidence is legally or factually insufficient to support this reason for disposition, the remaining unchallenged reasons are sufficient to support the juvenile court's determination that L.R. should be committed to TYC. Unchallenged findings of fact are binding on an appellate court. S & A Restaurant Corp. v. Leal, 883 S.W.2d 221, 225 (Tex.App.—San Antonio 1994), rev'd on other grounds, 892 S.W.2d 855 (Tex.1995)(per curiam); Wade v. Anderson, 602 S.W.2d 347, 349 (Tex.Civ. App.—Beaumont 1980, writ ref'd n.r.e.). Finding no abuse of discretion, we overrule Issues One and Two and affirm the juvenile court's order modification order and judgment of commitment.

> FN3. L.R.'s judicial admission that he violated the order is sufficient to support the court's finding of a probation violation. In re M.A.L., 995 S.W.2d at 324.
>
> FN4. The other reasons for disposition are: The juvenile needs to be held accountable and responsible for his delinquent behavior; the juvenile poses a risk to the safety and protection of the community if no disposition is made; the gravity of the offense requires that the juvenile be confined to a secure facility; and the prior juvenile record of the juvenile requires that he be confined in a secure facility.

5. JUVENILE COURT LOSES JURISDICTION TO REVOKE WHEN JUVENILE TURNS 18

In the Matter of D.C., 49 S.W.3d 26 (Tex.App.—San Antonio 4/11/01) [*Texas Juvenile Law* 222 (5th Ed. 2001)]

Facts: D.C. was found to have violated the conditions of his probation by the juvenile court. The court entered an order modifying disposition and committed him to the Texas Youth Commission. D.C. appeals from the order of commitment. Because we hold the trial court was without authority to modify disposition after D.C. turned eighteen, we reverse the court's order.

Pursuant to a plea bargain, the juvenile court adjudicated D.C. for the delinquent conduct of auto theft. D.C. was placed on juvenile probation for twelve months beginning October 12, 1998. On September 24, 1999 the State filed a motion to modify disposition. The hearing to modify disposition was held on December 7, 1999, approximately one month after D.C. turned eighteen. At the hearing, it was proved that D.C. violated four conditions of his probation: (1) he failed to avoid the use of alcoholic beverages, dangerous drugs, and controlled substances; (2) he failed to report to his probation officer; (3) he failed to pay restitution; and (4) he failed to perform community service. The trial court ordered D.C. be committed to the Texas Youth Commission.

Held: Reversed.

Opinion Text: D.C. appeals the modification of his disposition in two points of error: he contends the juvenile court did not have authority to conduct this disposition hearing after he turned eighteen, and that the State failed to exercise due diligence in pursuing its motion to modify disposition before his eighteenth birthday. We hold the juvenile court's jurisdiction over D.C. was limited and did not include the authority to modify his disposition and commit him to the Texas Youth Commission.

JUVENILE COURT'S AUTHORITY

D.C. asserts in his first point of error that the juvenile court lacked authority to do anything other than dismiss this case because he turned eighteen prior to the hearing on the motion to modify disposition. D.C. relies on Tex.Fam.Code Ann. § 54.05 (Vernon Supp.2000) and In the Matter of N.J.A., 997 S.W.2d 554 (Tex.1999). The applicable portion of section 54.05 states:

> (a) Any disposition, except a commitment to the Texas Youth Commission, may be modified by the juvenile court as provided in this section until:
>
> (1) the child reaches his 18th birthday; or
>
> (2) the child is earlier discharged by the court or operation of law.
>
> (b) Except for a commitment to the Texas Youth Commission, all dispositions automatically terminate when the child reaches his 18th birthday.

Tex.Fam.Code Ann. § 54.05 (Vernon Supp.2000). The case of In the Matter of N.J.A. addresses the question of jurisdiction over a child who was adjudicated after her eighteenth birthday. In the present case, D.C. was adjudicated prior to his eighteenth birthday, but the motion to modify was not heard until after he turned eighteen.

All dispositions, with an exception for commitment to the Texas Youth Commission, terminate at age eighteen. In the Matter of N.J .A., 997 S.W.2d at 555. Therefore, the juvenile court does not have authority to modify disposition after a child is eighteen years old. See id. However, section 54.02(j) of the Family Code does allow for a juvenile court's limited authority over a person who is eighteen or older. See Tex.Fam.Code Ann. 54.02(j). This section enables the juvenile court to waive its exclusive, original jurisdiction and transfer a person who is eighteen or older if certain criteria are met. It states:

> (j) The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:
>
> (1) the person is 18 years of age or older;
>
> (2) the person was:
>
> (A) 14 years of age or older and under 17 years of age at the time he is alleged to have committed a capital felony, an aggravated controlled substance felony, or a felony of the first degree; or
>
> (B) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;
>
> (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
>
> (4) the juvenile court finds from a preponderance of the evidence that:
>
> (A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or
>
> (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
>
> (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;
>
> (ii) the person could not be found; or
>
> (iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and
>
> (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.

Tex.Fam.Code Ann. § 54.02(j). If the person is eighteen or older and section 54.02(j) criteria are not met, the juvenile court must dismiss the case. In the Matter of N.J.A., 997 S.W.2d at 557. A juvenile court does have authority to commit a child to the Texas Youth Commission for violations of probation that occurred prior to the expiration of the probationary term when the motion to modify is filed before the probationary term expires, and the hearing is conducted without undue delay. See In re H.G., 993 S.W.2d 211, 213 n. 1 (Tex.App.—San Antonio 1999, no pet.); In the Matter of R.G., 687 S.W.2d 774, 776 77 (Tex.App.—Amarillo) 1985, no writ). Although both of these cases which are relied upon by the State, permitted modification of juvenile probation after the initial term of probation expired, neither of them involved juveniles who had reached the age of eighteen. The instant case is distinguishable. Although the motion to modify was filed prior to the expiration of the probationary term and D.C.'s eighteenth birthday, the hearing was not conducted until after D.C.'s eighteenth birthday. Under these circumstances, the juvenile court did not have the authority to modify the disposition. See Tex.Fam. Code Ann. § 54.05 (Vernon Supp.2000); In the Matter of N.J.A., 997 S.W.2d at 557. We recognize that this interpretation presents a difficult "time crunch" for the State when dealing with a juvenile who is nearing eighteen; however, the statute's wording is clear, as is the supreme court's interpretation of the statute.

Because we sustain D.C.'s first point of error, we need not address his remaining point of error. We hold that the juvenile court had only limited jurisdiction over D.C. after his eighteenth birthday, and that jurisdiction did not include the authority to modify his disposition and commit him to the Texas Youth Commission. Therefore, we reverse the order of the juvenile court and remand the cause to the juvenile court for further proceedings consistent with this opinion.

RICKHOFF.

CONCURRING OPINION

If this escape valve is not closed by the Legislature, rational delinquents intent on remaining un-

supervised [FN1] will simply evade probation and warrant officers until they are eighteen years of age and defeat Texas Family Code Title III jurisdiction.

FN1. As a former district judge of a court with Title III preference, I must note that this could be a very limited class.

III. CERTIFICATION PROCEEDINGS

1. STATE DID NOT JUSTIFY DELAY IN SEEKING CERTIFICATION OF 18 YEAR OLD RESPONDENT; DEFECT IS JURISDICITONAL; HARM NEED NOT BE SHOWN

Webb v. State, UNPUBLISHED, No. 08-00-00161-CR, 2001 WL 1326894 (Tex.App.—El Paso 10/25/01) [*Texas Juvenile Law* 127 (5th Ed. 2000].

Facts: The sole issue before us is whether the juvenile court improperly waived jurisdiction and transferred the case to a criminal district court. Appellant was indicted for the offense of capital murder. He filed a motion to quash the indictment alleging that the State had failed to comply with the statutory requirements for the transfer. Upon denial of his motion, and pursuant to a negotiated plea agreement, Appellant entered a plea of guilty for the lesser-included offense of murder. The trial court accepted the plea of guilt, made an affirmative finding that a deadly weapon was used or exhibited during the commission of the offense, and pursuant to the plea agreement, assessed punishment at thirty years' confinement and a fine of $10,000. Finding error, we vacate the conviction and dismiss the juvenile proceedings.

Terrence Glen Webb, Appellant, was born on September 17, 1980. On January 20, 1997, when he was sixteen years old, Appellant and four others went to South Lamar Street in Dallas with the intention of committing a robbery. They saw a Borden's Milk tanker truck stopped on the side of the road; three of the boys remained at the back of the milk truck while Appellant and Dewayne Anderson made their way to the cab. Both Appellant and Anderson were armed. Appellant walked to the passenger side, opened the door, and attempted to rob the complainant. After gunshots were fired, they all took off running. The victim died from his wounds.

Due to conflicting witness statements and fabricated stories, the police were initially unable to identify the shooter. Cheryl Ayala told police she had seen Appellant, known to Ayala as "Temp" or "Tamp," running with a gun in the vicinity of the crime scene. When investigators first interviewed Appellant, he denied any involvement in the robbery. Cathy Washington then came forward and reported that two adults she knew as "Tall Man" and "Poor Boy," whose real names are Adonis Baxter and Reginald Wheeler, had approached the truck and "Tall Man" had shot the victim. Charges were brought against Baxter and Wheeler, but both passed polygraph tests. On September 26, 1997, an investigator employed by Baxter's defense counsel interviewed Appellant at the Texas Youth Commission [FN1] and obtained a statement in which Appellant claimed the shooter was Reno Polk. Polk passed a polygraph and police determined he had not been involved. The police then "basically started from scratch." They talked with Washington again, and she ultimately admitted she had lied when she identified Baxter and Wheeler as the individuals who had approached the truck. Officers then "located and interviewed everyone that we could find who had been present and in the area when the offense occurred." Through their investigation, the officers learned that Appellant, Anderson, Brandon McQueen, Edward Williams, and Tarvarius Bradford committed the robbery, that Appellant and Anderson were armed, and that Appellant was the shooter. Detective Linda Irwin interviewed Appellant, who told her "for the most part" the same story he told the investigator—Reno Polk was the shooter. Appellant failed a polygraph, and in a subsequent interview, admitted that he made up the story about Polk. He was arrested for capital murder and later confessed to shooting the driver.

FN1. Appellant was committed to the Texas Youth Commission on March 15, 1997, on a thirty-year determinate sentence for the offenses of aggravated robbery, aggravated assault with a deadly weapon, and misdemeanor possession of marijuana.

The Dallas Police Department officially filed the case with the District Attorney's office on either July 14 or 15, 1998. The original petition for discretionary transfer was filed July 17 and set for hearing on October 5. The first amended petition was filed on September 17, Appellant's eighteenth birthday.

At the hearing, the Honorable Harold C. Gaither, Jr. found that Appellant was sixteen at the time of the offense, but because he was now eight-

een, and for reasons beyond the control of the State, it was not practicable to proceed in juvenile court before his eighteenth birthday. The court reasoned that the offense was so serious that the transfer to a district court with criminal jurisdiction must be granted. The court then waived jurisdiction and granted the transfer. The court further concluded that there was probable cause to believe Appellant committed the offense.

Held: Convicted vacated and proceedings dismissed.

Opinion Text: WAIVER OF JURISDICTION

In his sole issue for review, Appellant contends that the district court never acquired jurisdiction because there was never a valid waiver of jurisdiction by the juvenile court. This jurisdictional complaint is premised on the argument that the State failed to establish by a preponderance of the evidence that it was not practicable to proceed in the juvenile court before Appellant's eighteenth birthday. We begin with the standard of review.

Standard of Review

Pure jurisdictional complaints arising under the Juvenile Justice Code are questions of law which we review de novo. In re A.D.D., 974 S.W.2d 299, 302 (Tex.App.—San Antonio 1998, no pet.). Here, however, the jurisdictional complaint springs directly from an evidentiary challenge. An evidentiary attack to a trial court's findings in a transfer case are reviewed for an abuse of discretion. In re J.C.C., 952 S.W.2d 47, 49 (Tex.App.—San Antonio 1997, no pet.). In applying this standard, we defer to the trial court's factual determinations while reviewing its legal determinations de novo. Id. Absent an abuse of discretion, the findings of the juvenile court in a transfer proceeding will not be disturbed. In re N.M.P., 969 S.W.2d 95, 98 (Tex.App.—Amarillo 1998, no pet.). We will review the entire record and set aside a juvenile court's decision to waive jurisdiction and transfer a matter only if the court acted without reference to guiding rules and principles. Id . Stated differently, the appropriate inquiry is whether the ruling was arbitrary or unreasonable. Smithson v. Cessna Aircraft Company, 665 S.W.2d 439, 443 (Tex.1984); Landry v. Travelers Insurance Co., 458 S.W.2d 649, 651 (Tex.1970).

Transfer Proceedings

The juvenile court has exclusive, original jurisdiction over all proceedings involving a defendant who is a "child" at the time of the offense. Tex.Fam.Code Ann. § 51.04(a)(Vernon Supp.2001); In re N.J.A., 997 S.W.2d 554, 554 (Tex.1999). The Family Code defines a "child" as one who is:

> (A) ten years of age or older and under 17 years of age; or
>
> (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Tex.Fam.Code Ann. § 51.02(2)(A)(B). It is undisputed that Appellant was a juvenile at the time of the murder.

Section 54.02 of the Texas Family Code governs the waiver of the juvenile court's exclusive original jurisdiction and transfer to the appropriate criminal district court. Tex.Fam.Code Ann. § 54.02. Before conducting the transfer hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. Tex.Fam.Code Ann. § 54.02(d); In re D.L.N., 930 S.W.2d 253, 255 (Tex.App.—Houston [14th Dist.] 1996, no pet.). The purpose of the hearing is not to determine guilt or innocence but to establish whether the best interests of the child and society are furthered by maintaining jurisdiction in the juvenile court or by transferring the child to district court for adult proceedings. Id. The juvenile court then determines whether there is probable cause to believe that the child committed the offense alleged, and whether because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings. Id. Unlike the delinquency adjudication hearing, a transfer proceeding is dispositional in nature. In re A.A., 929 S.W.2d 649, 653 (Tex.App.—San Antonio 1996, no writ). It is a nonadversarial preliminary hearing rather than a criminal accusation or adversarial trial on the merits. Id.

The Court of Criminal Appeals has determined that juvenile court jurisdiction is terminated by law at age eighteen. Ex parte Mercado, 590 S.W.2d 464, 465 (Tex.Crim.App.1979). While the juvenile court does not lose exclusive original jurisdiction when the juvenile turns eighteen, its jurisdiction is limited to either transferring the case or dismissing the case; it does not include the power to

adjudicate a juvenile who is eighteen or older. Id. Such were the choices of the trial court below.

Transfer When Offender is Eighteen or Older

Subsection (j) of Section 54.02 is triggered when the individual is over eighteen years of age. In re M.A.V., 954 S.W.2d 117, 119 (Tex.App.—San Antonio 1997, pet. denied). Under Subsection (j), a juvenile court may waive its jurisdiction if:

> (1) the person is 18 years of age or older;
>
> (2) the person was:
>
> (A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony, or an offense under Section 19.02, Penal Code;
>
> (B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed an aggravated controlled substance felony or a felony of the first degree other than an offense under Section 19.02, Penal Code; or
>
> (C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;
>
> (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
>
> (4) the juvenile court finds from a preponderance of the evidence that:
>
> (A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or
>
> (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
>
> (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;
>
> (ii) the person could not be found; or
>
> (iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and
>
> (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.

Tex.Fam.Code Ann. § 54.02(j).

The Trial Court's Findings

As required by Section 54.02(h), the trial court made written findings specifying its reason for the transfer. Pertinent to this appeal, the court found that for a reason beyond the control of the State, it was not practicable to proceed in the juvenile court before Appellant's eighteenth birthday. And it is this finding which Appellant challenges on appeal.

In the first amended petition for discretionary transfer, the State specifically pled:

> Petitioner alleges that after exercising due diligence, it was not practicable for the State to proceed in juvenile court before the Respondent's 18th birthday, to wit: The Respondent could not be found, and in the alternative, the State did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the Respondent.

Thus, the State relied upon Section 54.02(j)(4)(B) in seeking a transfer after Appellant's eighteenth birthday. However, the trial court in its waiver of jurisdiction and order of transfer, premised its ruling on Section 54.02(j)(4)(A):

> [F]or a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person.

During the transfer hearing, the court and the assistant district attorney engaged in a vigorous debate concerning the status of the case and the reasons why the transfer hearing was not held prior to Appellant's eighteenth birthday:

> COURT: 54.02(j) indicates that the juvenile court may waive its exclusive original jurisdiction if the person is eighteen years of age or older and the person was—and it goes through the same requirements for someone under the age of eighteen. Then you've got the additional requirements for a reason beyond the control of the State it was not practicable to proceed in juvenile court before the eighteenth birthday of the person, so that's one issue you've got to— you've got to resolve. Or after due diligence it was not practicable for the State to proceed in juvenile court before the eighteenth birthday of the person because you did not have probable cause and new evidence has been found since the eighteenth birthday, or the person could not be found or

a previous transfer order was reversed by an appellate court which doesn't apply.

So, I have not heard any evidence at all of new evidence being acquired after his eighteenth birthday.

STATE: That's correct.

COURT: So, Subsection (b) [sic] does not apply, because you've not found any new evidence since the eighteenth birthday. So that means you're going to have to show some reason beyond the control of the State that it was not practicable to proceed in juvenile court before the eighteenth birthday of the person; that's the issue you have to resolve.

* * *

COURT: Because the law says 54.02(j) capital A, 'for reason beyond the control of the State, it was not practicable to proceed in juvenile court before the eighteenth birthday of the person.' Or B, 'After due diligence of the State it was not practicable to proceed in juvenile court before the eighteenth birthday of the person because'—'i', little 'i', one 'i', 'The State did not have probable cause to proceed in juvenile court'—that's not the case, because you had probable cause before his eighteenth birthday—'and new evidence has been found since his eighteenth birthday'—and that's not the case, because everybody agrees that you already had the evidence before his eighteenth birthday—'or the person could not be found'—and that's not true, he was at TYC, so he could be found. And the last one has to do with an order of appeal that was reversed, and that's not the case.

So, it looks to me like you're going to be limited to show that there's some reason beyond the State's control it was not practicable to proceed in juvenile court before the eighteenth birthday of the person. And I don't take that to mean merely filing a petition. I take that to mean concluding the hearing. Because we lose jurisdiction at age eighteen.

Although the State did not rely upon Section 54.02(j)(4)(A) in its petition, the issue was raised sua sponte by the trial court. Once Judge Gaither indicated that Section 54.02(j)(4)(B) was inapplicable, he invited the State to present evidence and argument on why it was not practicable to proceed before Appellant's eighteenth birthday.

Was the Delay Beyond the State's Control?

In response to the court's inquiry, the State articulated only one reason for the delay—the failure of the court staff to set a prompt hearing. We detail here the timeline of pertinent events. On July 14 or 15, the Dallas Police Department officially filed the case with the District Attorney's office. On July 17, the State filed a petition for discretionary transfer. The clerk's office set an announcement hearing for August 31. Prior to the scheduled hearing, the State sought a bench warrant to have Appellant brought from TYC but was advised instead to have the warrant issued on August 31. On August 31, the warrant was issued, counsel was appointed, and a pretrial rather than an announcement hearing was set for September 15 to "proceed as quickly as possible." At the time of the pretrial, the State notified defense counsel that it would be filing an amended petition because of Appellant's upcoming eighteenth birthday. A hearing on the petition was scheduled for October 5.

Judge Gaither inquired why the State had done nothing between July 17 and August 31:

COURT: Why didn't you do something between July 17th and August 31st?

STATE: I came and asked for a bench warrant to be issued.

COURT: Did you say at that time, 'We've got to put this on a fast track, because this kid is going to be eighteen in the middle of September'?

STATE: I said that the kid was in TYC and we were bringing him back and I wanted to get him back for August the 31st.

COURT: Well, even with August the 31st, if somebody had indicated that you needed a hearing before September 17th, that could have been done; we've done it many times before. So ...

STATE: Well, my request to bench him back for August the 31st, I was told to wait and issue the warrant on the 31st.

COURT: And who told you to do that?

STATE: You did, Your Honor.

COURT: Did you tell me at that time—

STATE: I did not tell you he was going to be eighteen. I told you that the young man was in TYC and that we needed to get him back here for a certification hearing, and that I wanted to have the warrant issued so that he would be in court on August the 31st.

COURT: Well, all of that would have been well and good for somebody that wasn't fast approaching the eighteenth birthday. Why is it that I wasn't told that we had to put it on the fast track because he was going to be eighteen soon?

STATE: I don't recall whether or not I told you that; I don't think that I did. I said, 'He's in TYC, it's a capital murder, we want to get him here so we can proceed.'

COURT: Well—

STATE: And I advised you who had represented him on his prior offenses.

COURT: I am one hundred percent certain that the staff of this Court would not have set a hearing after his eighteenth birthday if they were told that that was an issue in the case and we needed to have the hearing before September the 17th. Now, I don't—I don't think anybody on this Court's staff would have waited until after the eighteenth birthday to have a hearing if they knew that that was going to be an issue in the case.

Well, I'll tell you what I'm going to do. I'm going to grant your motion for discretionary transfer, but I'll give you a hundred to one odds it will be turned around on that issue, because I don't think you—I don't think you acted appropriate—and I don't mean you personally, I mean the D.A.'s office in this case. If you had—you, the D.A.'s office—had said that there was a reason to get this thing heard before September 17th, given the fact that we had sixty days, that would have been done. I know that, you know that, everybody else knows that. One of the things we do in here is give fast settings.

On appeal, the State contends that it has demonstrated due diligence for two reasons. First, it argues that the delays were the product of scheduling by the court clerks. Yet the State admitted that it had not told either the clerks or the judge that Appellant's eighteenth birthday was looming, nor had it requested an earlier expedited hearing. And although we do not have a reporter's record of the September 15 pretrial hearing, we can discern from the colloquy that Judge Gaither was not advised even at that late date that Appellant would turn eighteen a mere two days later. Second, the State contends that neither the diagnostic study nor the psychological evaluation, both of which were ordered by the court, were completed prior to Appellant's eighteenth birthday. This theory was not even presented to the trial court for its consideration. The social evaluation and investigative report compiled by the Dallas County Juvenile Department was prepared on October 1 and filed October 2. The file stamp on the report of psychological evaluation and diagnostic study is illegible but the study itself indicates the evaluation was conducted on September 28. The clerk's record does not indicate the date these evaluations were ordered by the court. Nor does it indicate that the State took any steps to expedite preparation of the reports. Indeed, the State presented no evidence whatsoever that the reports could not have been prepared and filed earlier, particularly had the court been apprised in July that Appellant would turn eighteen in two months.

We first note that the State once again confuses Section 54.02(j)(4)(A) with Section 54.02(j)(4)(B). Subsection (A) requires the State to establish that the delay was attributable to "a reason beyond the control of the state." Subsection (B) requires a showing of due diligence. Because of the factual context presented here, the two concepts, while distinct, overlap considerably. Texas courts have not specifically defined due diligence as used in Section 54.02(j)(4). See In re N.M.P., 969 S.W.2d 95, 100 (Tex.App.—Amarillo 1998, no pet.). In general, due diligence requires that a party cannot simply sit on their rights or duties. Id. The Court of Criminal Appeals has determined that due diligence is not shown where delays are within the prosecutor's control. McClellan v. State, 742 S.W.2d 655, 656 (Tex.Crim.App.1987)(due diligence discussed in context of speedy trial violation). This Court has stated that the State fails to carry its burden of showing due diligence if there are unexplained delays. Sessions v. State, 939 S.W.2d 796, 798 (Tex.App.—El Paso 1997, no pet.)(discussing failure of State to explain delays in apprehending appellant and proceeding with revocation hearing).

We agree with Judge Gaither that the onus is upon the State "to get the thing set in a timely manner." We also agree with his assessment that "there was a period of six weeks that went by where apparently nothing was done on this case." Consequently, the State did not establish that the delay was beyond its control. In fairness, it does appear that the assistant district attorney may have believed she had "proceeded in the juvenile court" prior to Appellant's eighteenth birthday merely by filing the amended petition for discretionary transfer. At one point, the court pressed the issue:

COURT: And if you can give me some reason why it was not practicable for you to proceed prior to his eighteenth birthday, then we can move on.

STATE: Judge, our petition—again, our petition was filed prior to the eighteenth birthday—

COURT: I don't think that means that you filed the petition before his eighteenth birthday. I think it means you concluded the hearing before the eighteenth birthday.

We conclude, sadly, that Judge Gaither's prediction has come true. Further, we conclude that no harm analysis need be conducted. Non-compliance with Section 54.02 deprived the juvenile court of jurisdiction such that the district court never acquired jurisdiction. Light v. State, 993 S.W.2d 740, 750 (Tex.App.—Austin 1999), vacated and remanded on other grounds, 15 S.W.3d 104 (Tex. Crim.App.2000). We vacate the conviction and dismiss the juvenile proceedings for want of jurisdiction.

2. VISITING JUDGE SHOULD HAVE RECUSED HIMSELF ON REPONDENT'S DEMAND

In the Matter of M.A.V., 40 S.W.3d 581 (Tex.App.—San Antonio 1/31/01)[*Texas Juvenile Law* 11 (5th Edition 2000)].

Facts: M.A.V. appeals the juvenile court's order certifying him to be tried as an adult. [FN1] He attacks the certification and transfer order in four issues. We reverse the trial court's judgment and remand the cause for further proceedings.

> FN1. Because the alleged offense occurred before January 1, 1996, M.A.V. is entitled to appeal. See Act of May 23, 1991, 72nd Leg., R.S., ch. 680, § 1, 1991 Tex.Gen.Laws 2466, 2466, amended by Act of May 27, 1995, 74th Leg., R.S., ch. 262, §§ 48, 106(b), 1995 Tex Gen.Laws 2517, 2546, 2591 (section 56.01(c) of the Family Code no longer permits interlocutory appeal of the transfer and certification order).

In March, 1991, the State sought to certify M.A.V. to stand trial as an adult for crimes allegedly committed when he was sixteen. M.A.V. was charged with seven counts of capital murder, three counts of murder, eleven counts of burglary, and one count of theft. The trial court entered a certification order, which was reversed and remanded to the trial court to hold jury trials on temporary hospitalization and fitness to proceed. See M.A.V. v. Webb County Court at Law, 842 S.W.2d 739 (Tex.App.—San Antonio 1992, writ denied). M.A.V. was found fit to proceed. He escaped from juvenile custody in 1993 and was found in Mexico in 1995. Once M.A.V. was returned to Texas, the State reinitiated proceedings to certify him as an adult. The trial court waived its jurisdiction and ordered M.A.V. to criminal court to stand trial as an adult. This court, again, reversed and remanded the certification order, requiring the State to proceed under the proper Family Code section. In the Matter of M.A.V., 954 S.W.2d 117, 119 (Tex.App.—San Antonio 1997, pet. denied). The State, for the third time, undertook to certify M.A.V., and the trial court certified him to be tried as an adult in criminal court for the alleged offenses. It is from this certification and transfer order that M.A.V. appeals.

Held: Reversed and remanded.

Opinion Text: In four issues, M.A.V. challenges the certification and transfer order. First, M.A.V. asserts the trial judge erred in not removing himself from the certification hearing. Second, he claims there is no affirmative showing in the record that he received service of summons. Next, M.A.V. argues the trial court abused its discretion in finding the State exercised due diligence. And, finally, M.A.V. alleges that all the proceedings against him were not recorded in compliance with the Family Code and that he was harmed by that failure.

In his first issue, M.A.V. claims the trial judge, a visiting judge, erroneously refused to remove himself from the certification proceeding, over M.A.V.'s timely objection. The Texas Government Code allows a party to object to the assignment of a judge to his or her case. Tex.Gov't Code Ann. § 74.053 (Vernon 1998). When the objection is timely, the assigned judge "shall not hear the case." Id. § 74.053(b). Such an "objection is timely if the party files it before the first hearing or trial over which the assigned judge is to preside." Id. § 74.053(c); Flores v. Banner, 932 S.W.2d 500, 501 (Tex.1996); see In re Torch Energy Mktg., Inc., 989 S.W.2d 20, 21 (Tex.App.—San Antonio 1998, no pet.). "[W]hen a party files a motion requesting affirmative relief and the judge considers the merits of the arguments and rules on the matter, there has been a hearing within the meaning of section 74.053." Perkins v. Groff, 936 S.W.2d 661, 666 (Tex.App.— Dallas 1996, writ denied).

M.A.V. filed his "Peremptory Strike of Visiting Judge" on September 13, 1999, at 9:00 a.m. M.A.V.'s certification and transfer hearing was held the same day. Immediately after the trial judge called the case, he acknowledged that M.A.V. had filed the motion that morning. The following colloquy then took place:

> Judge: The first one that needs to be taken up is Respondent's peremptory strike for a visiting judge because if I'm not qualified to hear the matter then the rest of it becomes terribly moot.
>
> Mr. Gonzalez do you wish to offer anything additional in support of your motion to strike me as judge in the case?

Gonzalez: No, Your Honor.

Judge: Does the State have any response to it?

State: Your Honor, this particular aspect—we have been to this avenue before, Your Honor, and the State feels that he would be entitled to strike.

Judge: Well I think you and he are both wrong. We had a meeting in chambers at which I discussed the matter and told Mr. Gonzales if he wanted to raise a— a competency issue that he should file documents by a date in April. He filed nothing until today and therefore I feel that he has waived any right to strike me as judge in the case by failing to raise it in the time—raise it in a timely fashion.

The trial judge then asked the State if it had anything, in addition, to say. The State responded that it was unsure of the law on the point and requested a ten minute recess to research the issue. Once the court was back in session, the State again agreed to the motion. The judge, still, denied M.A.V.'s motion.

M.A.V. claims that the denial of his timely motion was erroneous. The State counters that "the visiting judge had already acted and ruled in the particular case," and that, accordingly, M.A.V.'s motion was untimely. The State characterizes the in-chambers meeting held regarding a "competency issue" as the hearing or trial necessary to render M.A.V.'s motion untimely. It is undisputed that this meeting occurred. The record, however, does not reflect that either party filed any motions, or that the trial judge ruled on the merits of any motions at the conference. Because the record does not indicate that either party made any formal requests or motions during that meeting, or that the trial judge ruled on the merits of any issue, we cannot assume that a hearing, as contemplated by section 74.053, was held before M.A.V. filed his motion. See Perkins, 936 S.W.2d at 666. We are, therefore, compelled to find that M.A.V.'s motion was filed timely. And, when a party files a timely objection to an assigned judge, the judge's disqualification is mandatory. Flores, 932 S.W.2d at 501; Curtis v. State, 762 S.W.2d 958, 959 (Tex.App.—Dallas 1988, no writ). The trial judge, here, upon M.A.V.'s timely objection was disqualified, and any judgment he rendered is, therefore, void. Flores, 932 S.W.2d at 501; Curtis, 762 S.W.2d at 960.

CONCLUSION

Because we find the trial court erred in refusing to remove himself over M.A.V.'s timely objection, we do not reach the remainder of M.A.V.'s claims. We reverse the trial court's judgment and remand the case for additional proceedings.

Dissenting opinion by Paul W. Green, Justice

The question is whether a party, who has known for more than six months that a certain visiting judge has been assigned to hear his case, may defer making any objection to the assigned judge until the time of the first hearing in the case, even if the objection causes the case to be delayed for the assignment of a new judge. The trial judge said no. However, the majority holds that an objection to an assigned judge may always be deferred to the time of the first hearing in the case, even if it causes unnecessary delay. The result of this holding is to render meaningless the requirement that parties be given notice of a visiting judge assignment. What is worse, it invites manipulation and disruption of the judicial process to the ends of delay. I believe the rule should be that an objection to an assigned judge must be filed as soon as reasonably practicable after notice of the assignment is given, but no later than the time of the first hearing in the case. Accordingly, I respectfully dissent.

M.A.V. knew, as early as February or March of 1999, that Judge Priest had been assigned to his case. We know this because the record indicates that at some time during late winter or early spring of that year Judge Priest called a pre- trial conference of the parties. The lawyers for M.A.V. and the State were present at the conference. What is more, we know Judge Priest addressed substantive docket control issues during the conference, including whether M.A.V. intended to raise an issue concerning M.A.V.'s competency to stand trial. Indeed, Judge Priest ordered M.A.V.'s attorney to file any allegations of incompetency no later than April . [FN2] Some time thereafter, a hearing was set on the state's petition to certify M.A.V. to stand trial as an adult. Yet, not until the day of the certification hearing in September, did M.A.V. raise any objection to Judge Priest's assignment to the case.

FN2. M.A.V. did not, in the end, make any claim of incompetency.

The majority takes the position that M.A.V.'s right to object was available to him from the time of notice up to the point of "the first hearing or trial." See Tex.Gov't Code Ann. § 74.053(c) (Vernon 1998). I agree up to a point. Although section 74.053 expressly specifies the time after which an objection is too late as a matter of law, the converse is not necessarily true. Id . The statute does not provide

that any objection filed before the first hearing or trial is timely as a matter of law:

> (b) If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case....
>
> (c) An objection under this section must be filed before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside.

To hold that it does is to read more into the statute than what is there and remove from trial judges the discretion the legislature intended to provide.

The majority follows a body of authority, which, on the surface, appears to hold that an objection to an assigned judge is timely if it is filed any time before the first hearing or trial over which the assigned judge is to preside. See, e.g., Flores v. Banner, 932 S.W.2d 500, 501-02 (Tex.1996) (objection timely "if the party files it before the first hearing or trial over which the assigned judge is to preside"); Mercer v. Driver, 923 S.W.2d 656, 658 (Tex.App.—Houston [1st Dist.] 1995, orig. proceeding) (objection timely "if it is made at any time before the assigned judge, sitting on the bench and in open court, calls the case to hearing or to trial"); Garcia v. Employers Ins. of Wausau, 856 S.W.2d 507, 509 (Tex.App.—Houston [1st Dist.] 1993, writ denied) (same).

These authorities, however, do not address the circumstance when the objecting party has known of the visiting judge assignment for several months and has failed to act. In Flores, for example, the objecting party was notified a former judge would be assigned to hear her motion one hour and 18 minutes before the hearing. Flores, 932 S.W.2d at 501. In Mercer, the objecting party had only one day's notice. Mercer, 923 S.W.2d at 657. In Garcia, the objecting party had virtually no notice. Clearly, under the facts of these cases, an objection filed immediately before the hearing or trial begins is timely—the objecting party could not have reasonably acted any sooner. Garcia, 856 S.W.2d at 508. These facts are quite different, however, from the facts of this case, where M.A.V. had known of Judge Priest's assignment to his case for more than six months. In my view, the authorities relied on by the majority do not support the notion, implicit in the holding, that it does not matter how long the objecting party has known of the assigned judge so long as the objection is filed before a formal hearing begins.

There must be a reason the statute requires that notice be given to the parties when a visiting judge is assigned to a case. See Tex.Gov't Code Ann. § 74.053(a) (Vernon 1998). In this context, notice is only meaningful if it is intended to put in issue whether the parties will accept the assigned judge. See Chevron Corp. v. Redmon, 745 S.W.2d 314, 316 (Tex.1987) (stating courts "must give effect to all words of a statute and not treat any statutory language as surplusage if possible"). The majority's interpretation of the statute, however, has completely dispensed with the salutary purpose and requirement of notice. Indeed, the majority offers no advantage to giving parties notice of judicial assignments. When an objection to an assigned judge may always be made on the day of the first hearing or trial, what is the purpose of notice? I submit that this is not a reasonable interpretation of the statute. Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 662 (Tex.1996) (stating "we must reject interpretations of a statute that defeat the purposes of the legislation so long as another reasonable interpretation exists").

The notice provision in the statute was intended to do more than merely give the parties a "heads-up" on who has been assigned to hear their case. It is designed to assist in the orderly administration of justice. See In re Houston Lighting & Power Co., 976 S.W.2d at 673 (Tex.1998) (stating "[t]he overriding purposes of judicial rules of procedure is to obtain 'a just, fair, equitable and impartial adjudication ... with as great expedition and dispatch ... as may be practicable"). Once a party has notice of an assigned judge, he is obligated to act or forbear concerning the assignment. Failing to object to the assignment within a reasonable time after notice may result in a waiver of the party's right to object if a later attempt to assert that right would cause unnecessary delay or other harm in the case.

M.A.V. was notified of the assignment of Judge Priest more than six months before the certification hearing on appeal in this case and he did not complain when Judge Priest conducted a pre-trial conference. Yet in spite of Judge Priest's lengthy, and arguably substantive, involvement in the case, M.A.V. raised no objection until the day of the certification hearing. The majority holds the objection was timely because it came before the hearing. However, I agree with Judge Priest that the objection was waived through M.A.V.'s failure to assert it within a reasonable time and because of the delay that would have otherwise ensued. In interpreting section 74.053, we must effectuate the legislature's intent to balance judicial efficiency with the party's limited right to object to a visiting judge:

Because of the enormous time commitment necessary to hear litigation involving numerous parties and claims, there is a compelling need to maintain continuity in judicial proceedings. Imposing limits on litigants' rights to strike visiting judges

encourages and protects the substantial time and resources a visiting judge invests developing a thorough knowledge of the case through consideration of pretrial motions and discovery matters. In re Hourani, 20 S.W.3d 819, 825 (Tex.App.—Houston [14th Dist.] 2000, no pet. h.) (holding that although the party objected to the visiting judge before the occurrence of the first hearing after the party was added to the lawsuit, the objection was untimely because it was made after the first hearing conducted by the visiting judge). It seems very unlikely the legislature intended to permit a party, given timely notice and a reasonable opportunity to object to a judge assignment, to wait until the last possible moment to object to the assigned judge and thus disrupt a scheduled trial or hearing date, wasting valuable time and judicial resources. See In re Houston Lighting & Power Co., 976 S.W.2d at 673; Nootsie, Ltd, 925 S.W.2d at 662. I would, therefore, hold that Judge Priest did not abuse his discretion when he ruled that M.A.V.'s objection to his assignment was untimely. We should address the remainder of M.A.V.'s complaints on appeal.

3. ENTERING UNNEGOTIATED PLEA IN CRIMINAL COURT WAIVES APPELLATE REVIEW OF ANY ERRORS IN THE CERTIFICATION PROCEEDINGS

Faisst v. State, ____ S.W.3d ____, No. 12-00-00289-CR, 2001 WL 1535453, 2001 Tex.App.Lexis ___ (Tex.App.—Tyler 11/30/01) [*Texas Juvenile Law* (5th Edition 2000)].

IV. RESTITUTION ORDERS

1. RESTITUTION MAY BE ORDERED FOR VEHICLE DAMAGE IN ACCIDENT WHEN THE RESPONDENT IS ADJUDICATED FOR FAILURE TO STOP AND GIVE INFORMATION

In the Matter of C.T., 43 S.W.3d 600 (Tex.App.—Corpus Christi 3/15/01)[*Texas Juvenile Law* 197 (5th Edition 2000)].

Facts: The State charged appellant, a juvenile, with committing delinquent conduct. After appellant pled "no contest," the juvenile court found that she had engaged in delinquent conduct and, after a disposition hearing, placed appellant on probation for a period of seven months. As a condition of that probation, the court ordered that appellant pay restitution in the amount of $2000.00. Appellant complains in a single issue that the juvenile court abused its discretion in ordering the payment of restitution.

Held: Affirmed.

Opinion Text: C.T., a juvenile, was charged with failure to stop and give information after being involved in a three-vehicle accident and fleeing the scene. Appellant pled "no contest" to the charge but protested the State's request for restitution for the damages sustained by one of the other vehicles involved in the accident. The juvenile court, after a hearing on the question of restitution, ordered appellant to pay the owner $2000.00 in restitution at the rate of $500.00 a month. Appellant appeals the judgment, contending that the damages sustained by the other vehicle arose out of the accident, not the failure to stop and give information, and were therefore not causally connected to the offense for which appellant was adjudicated. Appellant raises no issue on appeal as to the amount of restitution ordered but, rather, argues that without a causal connection between the offense and the damage, the juvenile court could not order any restitution. Appellant cites a single authority, In the Matter of D.S., a Juvenile, 921 S.W.2d 860 (Tex.App.—San Antonio 1996, no writ), in support of this position and asks this Court to vacate the juvenile court's order of restitution.

Restitution

The sole issue for our review is whether the juvenile court erred in ordering appellant to pay restitution in this case. Whether to order restitution is within the sound discretion of a trial court and so is reviewed under an abuse of discretion standard. Cartwright v. State, 605 S.W.2d 287, 289 (Tex.Crim. App.1980).

The Texas Family Code provides that a juvenile court, after due notice to affected persons and a hearing, may order a child, or the parent of a child, to make full or partial restitution to the victim of an offense when the child has been found to have engaged in delinquent conduct arising from the commission of an offense in which property damage or personal injury occurred. TEX. FAM. CODE ANN. § 54.041(b)(Vernon Supp.2001).

Appellant argues that in the present case, the trial court improperly ordered restitution because no offense was committed in which property damage occurred. It is appellant's contention that the property damage occurred as a result of the accident, not the offense of failure to stop and leave information. Appellant also argues that In the Matter of D.S. provides that restitution may only be ordered where the damage was occasioned by the offense.

In the Matter of D.S. involved a trial court order requiring a juvenile who was originally charged with burglary of a habitation, but actually adjudicated guilty of a criminal trespass, to pay restitution to the victim of the originally charged burglary. In the Matter of D.S., 921 S.W.2d at 861. The reviewing court reversed the order, finding that the property loss was not occasioned by the offense of criminal trespass. Id. The D.S. court reviewed several adult criminal cases in making its decision, holding that although juvenile proceedings are civil proceedings, they are quasi-criminal in nature and so it is appropriate to look to criminal cases for guidance in resolving issues on appeal. Id. We agree with the D.S. court that "the rules of restitution in criminal cases apply to juvenile cases". In the Matter of M.S., 985 S.W.2d 278, 281 (Tex.App.—Corpus Christi 1999, no pet.), citing In Re J.R, 907 S.W.2d 107, 109 (Tex.App.—Austin 1995, no writ). We accordingly look to similar criminal cases to determine the propriety of the trial court's order of restitution.

Appellant was found to have engaged in delinquent conduct by committing the offense of failure to stop and leave information under Texas Transportation Code, section 550.022. TEX. TRANSP. CODE ANN. § 550.022 (Vernon 1999). While there is no authority in Texas on the precise question of such restitution in the case of a failure to stop and give information offense, there is case law on the question of restitution for the related charge

of failure to stop and render aid [FN1] which is instructive.

> FN1. TEX. TRANSP. CODE ANN. § 550.021 (Vernon 1999).

The case of Lerma v. State, 758 S.W.2d 383 (Tex.App.—Austin 1988, no pet.), is particularly applicable. In Lerma, the defendant appealed the trial court order of restitution to the victim of the accident, arguing that there was no evidence that his offense was the cause of the victim's injuries, as it was the accident, not his failure to stop and render aid, that caused the injuries. Id. at 384. Appellant in the present case makes a similar contention that the property damage arose only as a part of the initial collision and not as a result of her failure to stop and give information [FN2].

> FN2. We note that a similar argument was also made to the Court of Criminal Appeals in Thompson v. State, 557 S.W.2d 521 (Tex.Crim.App. 1977). However, that court found that the facts of the particular case indicated that the injuries occurred due to dragging, which arose after the failure to stop, and thus did not address the question at issue of injuries arising solely as a part of the initial collision. Thompson, 557 S.W.2d at 524.

The Lerma court, in analyzing the causation argument and deciding it against the defendant, noted

> Appellant's effort to separate the accident and resulting injuries to the victim from his subsequent failure to stop and render aid is an effort to separate the inseparable. The defendant's involvement in an accident resulting in injury or death to any person is an element of the offense of failing to stop and render aid. Steen v. State, 640 S.W.2d 912, 915 (Tex.Cr. App. 1982). Contrary to appellant's assertion, there was a real and essential connection between the injuries suffered by the victim and appellant's failure to stop and render aid: had there been no injuries, appellant's failure to stop would not have been a crime.

Id.

We find the Lerma analysis persuasive. The elements of failure to stop and leave information under section 550.022 of the Texas Transportation Code are:

> 1. The operator of a vehicle
> 2. involved in an accident
> 3. resulting only in damage to a vehicle driven or attended by a person
> 4. does not stop or does not comply with the requirements of this section. [FN3]

TEX. TRANSP. CODE ANN. § 550.022 (Vernon 1999). Cf. Steen v. State, 640 S.W.2d 912, 915 (Tex. Crim.App.1982) (for the offense of failure to stop and render aid).

> FN3. The requirements of section 550.022(a) are that a person shall:
>
> (1) immediately stop the vehicle at the scene of the accident or as close as possible to the scene of the accident without obstructing traffic more than is necessary;
>
> (2) immediately return to the scene of the accident if the vehicle is not stopped at the scene of the accident; and
>
> (3) remain at the scene of the accident until the operator complies with the requirements of Section 550.023.

Conclusion

The involvement of a defendant in an accident and the requirement that there be damages to a vehicle resulting from the accident are essential elements of the offense of failure to stop and give information. Had there been no accident and had there been no damages to a vehicle, there would have been no crime in failing to stop or give information. See Lerma, 758 S.W.2d at 384. Accordingly, we find that the damages for which the trial court ordered restitution were occasioned by, and did arise from, the offense for which appellant was adjudged delinquent. The trial court did not abuse its discretion in ordering appellant to pay restitution as a condition of probation. We overrule appellant's single issue and affirm the decision of the trial court.

2. FATHER ORDERED TO MAKE RESTITUTION FOR DAMAGE TO MOBILE HOME; CIVIL STANDARD OF RESTITUTION NOT APPLICABLE

In the Matter of A.C.W.F., UNPUBLISHED, No. 05-00-00984-CV, 2001 WL 328160, 2001 Tex.App. Lexis 2200 (Tex.App.—Dallas 4/5/01, review denied)[*Texas Juvenile Law* 195 (5th Edition 2000)].

Facts: A.C.W.F., a juvenile, was adjudicated a child engaged in delinquent conduct for committing the offense of criminal mischief. The State subsequently filed a petition seeking restitution from appellant, A.C.W.F.'s father. The trial court held a hearing on the State's petition and entered a judgment ordering

appellant to pay restitution to the victim of A.C.W.F.'s offense. In three issues, appellant generally complains the trial court used the incorrect measure of damages.

On or about December 27, 1997, A.C.W.F. vandalized a vacant house owned by Robert Evans. At the time of the offense, Evans had moved to California and the house was on the market. Because of the vandalism, Evans returned to Texas to evaluate the damage. According to Evans, the flooring throughout the house had been destroyed, including its hardwood floors, carpeting and vinyl floors. Photographs of the damage were introduced into evidence. The State presented evidence of the cost to replace the floors. Specifically, Evans obtained five estimates to replace the hardwoods ranging from $5,906.85 to $10,684.13, and averaging $7,418. The cost to replace the carpet for the portion of the house that was carpeted was $2,850. Evans elected not to replace the hardwoods because it was too expensive and he did not know if he would be able to recover from the wrongdoers. Therefore, he carpeted the entire house at a cost of $4,660. Because of the vandalism, Evans also had to have the house cleaned and painted, fixtures replaced and repaired, and the locks replaced. The State presented evidence that the value of the house was still less after repairs than before the vandalism, not only because it no longer had hardwood floors, but also because of the stigma associated with the vandalism. The trial court ordered appellant to pay restitution for the cost to repair the house, including the cost to replace the hardwood floors and carpet. In this appeal, appellant challenges only the award of damages for replacing the floors.

Held: Affirmed.

Opinion Text: Once a trial court determines a juvenile has engaged in delinquent conduct, the court may order the juvenile or his parent to pay restitution. See Tex. Fam.Code Ann. § 54.041(b) (Vernon Supp.2001). The family code limits the amount of restitution ordered to the victim's actual damages. Tex. Fam.Code Ann. § 54.041(c) (Vernon 2001).

Although juvenile proceedings are considered civil proceedings, they are quasi-criminal in nature. See In re D.I.B., 988 S.W.2d 753, 756 (Tex.1999); In re K.J.O., 27 S.W.3d 340, 342 (Tex.App.—Dallas 2000, pet. denied). Therefore, in determining restitution in a juvenile case, the rules of restitution in criminal cases apply. In re M.S., 985 S.W.2d 278, 280 (Tex.App.—Corpus Christi 1999, no pet.); In re D.S., 921 S.W.2d 860, 861 (Tex.App.—San Antonio 1996, no writ); In re. J.R., 907 S.W.2d 107, 109 (Tex.App.—Austin 1995, no writ).

Whether to order restitution is within the sound discretion of the trial court. See Cartwright v. State, 605 S.W.2d 287, 289 (Tex.Crim.App.1980). The amount of restitution ordered must, however, be "just" and it must have a factual basis in the record. Campbell v. State, 5 S.W.3d 693, 696 (Tex.Crim. App.1999); Cartwright, 605 S.W.2d at 289. Although restitution in juvenile cases is limited to "actual damages," we construe that term in accordance with the approach to restitution in criminal cases. See In re J.R., 907 S.W.2d at 109. In criminal cases, the trial court has broad discretion in determining "just" restitution. See Long v. State, 7 S.W.3d 316, 323 (Tex.App.-Beaumont 1999, no pet.); see also Tex.Code Crim. Proc. Ann. art. 42.037 (Vernon Supp.2001).

Appellant asserts the proper measure of damages is limited to the cost to repair the floors to restore them to their condition immediately before the injury. Appellant therefore asserts the trial court could not order restitution for the damage to the floors because there was no evidence of the condition or value of the floors before the vandalism. To show the trial court used the incorrect measure of damages, appellant relies on civil cases applying the civil measure of damages with respect to damage to real property. However, in determining restitution, the trial court is not limited to the civil measure of damages. See Davis v. State, 757 S.W.2d 386, 389 (Tex.App.—Dallas 1988, no pet.). Rather, we determine only whether there is evidence that the restitution ordered is "just" and would tend to "make good" the injured party. See id.

In this case, there was evidence that after the vandalism the house was not marketable and needed to be repaired before it could be sold. In particular, the floors were completely destroyed and needed to be replaced. We cannot conclude the trial court abused its discretion in determining the victim's actual damages included the cost to replace those floors. We reject appellant's assertion the State was required to present evidence of the condition of those floors before they were destroyed. [FN1] Cf. Davis, 757 S.W.2d at 389 (refusing to equate statutory term "just" with civil concept of reasonable and necessary expenses). Nor did the State have to present specific evidence that the cost to repair the house was reasonable and necessary. See id; see also J.R. 907 S.W.2d at 109. After reviewing the record, we conclude the trial court's award of damages for the cost to replace the victim's floor was "just" and had a factual basis in the record.

FN1. Appellant indirectly suggests that the damages awarded exceeds actual damages because the victim recovered both what it would cost to replace

the hardwood floors and the cost he incurred in carpeting over those floors. Evans sought recovery only for what it would have cost to replace the hardwoods and what it would have cost to replace the carpet in the areas that were already carpeted. Appellant has not shown the trial court awarded both the cost of carpeting over the hardwoods in addition to the cost to recarpet the same area.

3. RESTITUTION FOR DECREASE IN VALUE OF VEHICLE PERMITTED FOR UNAUTHORIZED USE OF MOTOR VEHICLE

In the Matter of R.M.Z., UNPUBLISHED, No. 04-00-00465-CV, 2001 WL 417302, 2001 Tex.App.Lexis 2668 (Tex.App.—San Antonio 4/25/01)[*Texas Juvenile Law* 197 (5th Edition 2000)].

Facts: R.M.Z. was adjudicated before a jury for the unauthorized use of a motor vehicle. The jury found him guilty of engaging in delinquent conduct. The judge ordered him to be placed in the custody of the Texas Youth Commission. The judge also ordered restitution to be paid in the amount of $3,200.00. R.M.Z. appeals claiming the evidence was factually insufficient to order restitution.

Detectives Dustin and Gonzales were responding to an anonymous tip about stripped vehicles and parts when they spotted one stripped vehicle next to a primer red vehicle [FN2] and some parts. A police helicopter radioed that two men were getting into the red vehicle and driving off. The two detectives stopped the vehicle because it had an expired registration sticker and no state inspection sticker. The driver, R.M.Z., volunteered that he had been working on the car and had just gotten it running. R.M.Z. told the officers, "... this has been my car for a while." The detectives discovered the VIN (vehicle identification number) had been attached incorrectly; it was later determined to be that of another vehicle's. The license plates were also registered to another vehicle. The detectives determined that the car had been reported stolen three days before. R.M.Z. was arrested and charged with theft of a motor vehicle and unauthorized use of a motor vehicle. The State chose to proceed solely on the unauthorized use charge. A jury found that R.M.Z. engaged in delinquent conduct. The trial court placed him in the custody of the Texas Youth Commission and ordered restitution in the amount of $3,200.00. The amount of $3,200.00 was determined by the owner's testimony that he could have sold the car for $4,000.00 before the alterations and damage and that he sold it for $800.00 after it was recovered. R.M.Z. appeals the order of restitution.

> FN2. The primer coat is the base undercoat of paint applied before the final coat.

Held: Affirmed.

Opinion Text: SUFFICIENCY OF THE EVIDENCE

R.M.Z. argues that the damage to the automobile, for which he was assessed restitution, could not have naturally flowed from the offense of unauthorized use of a motor vehicle under the facts of this case. He asserts that since he was not charged with the theft of the vehicle, he cannot be assessed restitution for damages stemming from the theft. R.M.Z. claims that there is insufficient evidence that the changes or damages to the car resulted from any of his acts or his driving the car without permission.

Standard of Review

In a factual sufficiency review, we must view all the evidence without the prism of "in the light most favorable to the prosecution" 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. Clewis v. State, 922 S.W.2d 126, 129 (Tex. Crim.App.1996). A factual sufficiency review must be appropriately deferential. See Jones v. State, 944 S.W.2d 642, 648 (Tex.Crim.App.1996). The appellate court's evaluation cannot substantially intrude upon the role of the trier of fact as the sole judge of the weight and credibility of witness testimony. See id. A determination that the evidence is factually insufficient is proper only when the verdict is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." Id.

Restitution

Juvenile proceedings are "quasi-criminal" in nature, and therefore, because of the context in which the juvenile court may order restitution, the rules of restitution in criminal cases apply to juvenile proceedings. In re J.R., 907 S.W.2d 107, 109 (Tex.App.—Austin 1995, no writ). We review challenges to restitution orders under an abuse of discretion standard. Cartwright v. State, 605 S.W.2d 287, 288-89 (Tex.Crim.App.1980). The court abuses its discretion when it acts in an arbitrary or unreasonable manner. Montgomery v. State, 810 S.W.2d 372, 380 (Tex.Crim.App.1990). The court of criminal appeals recognizes three limits on the amount of restitution that a trial court can order. See Campbell v. State, 5 S.W.3d 693, 696-97 (Tex.Crim.App. 1999). First, the amount must be just, and it must be

supported by a factual basis within the loss of the victim. Id. Second, the restitution ordered must be for the offense for which the defendant is criminally responsible. Id. Third, restitution is proper only for the victim or victims of the offense with which the offender is charged. Id. A trial court's failure to abide by these guiding rules is an abuse of discretion.

The Texas Family Code provides that a juvenile court may order a child to make full or partial restitution to the victim of an offense when the child has been found to have engaged in delinquent conduct arising from the commission of an offense in which property damage or personal injury occurred. Tex.Fam.Code Ann. § 54.041(b) (Vernon Supp. 2001). The unauthorized use of a vehicle occurs when a person "intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner." Tex.Pen.Code Ann. § 31.07 (Vernon 1994). R.M.Z. argues that the unauthorized use of a vehicle for which he was adjudicated is not an offense in which the property damage could have occurred, citing to In the Matter of D.S., 921 S.W.2d 860, 861 (Tex.App.—San Antonio 1996, no writ). The State counters that the damages to the vehicle are those that would naturally flow from the offense of unauthorized use and cites to In the Matter of M.S., 985 S.W.2d 278, 280 (Tex.App.—Corpus Christi 1999, no pet.).

In the Matter of M.S. addressed damages culminating from the unauthorized use of a vehicle and the resulting wreck. 985 S.W.2d at 280. The court looked to the Family Code's definition of victim which now reads: "[v]ictim means a person who as the result of the delinquent conduct of a child suffers a pecuniary loss or personal injury or harm." Tex.Fam.Code Ann. § 57.001(3) (Vernon 1999). The court found the owner of the vehicle was the undisputed victim of the damage caused by the unauthorized use of the vehicle and awarded restitution. In the Matter of M.S., 985 S.W.2d at 280.

R.M.Z. contends he did not wreck the car as did M.S. He maintains since it was not proven beyond a reasonable doubt that he stole the car, he cannot be ordered to pay restitution for damages as a result of the theft. R.M.Z. claims that like In the Matter of D.S., he was adjudicated for a lessor offense that will not support an order of restitution under the facts of his case. We disagree.

The unauthorized use of the vehicle would not have occurred but for the alterations and damage to the car. R.M.Z.'s actions caused the alterations and damage to the car that enabled him to operate the vehicle without the owner's consent. There is an essential connection between the two. See Lerma v. State, 758 S.W.2d 383, 384 (Tex.App.—Austin 1988, no pet.) (finding a real and essential connection between the injuries suffered by the accident victim and appellant's failure to stop and render aid, thus supporting an order of restitution). R.M.Z.'s own voluntary statement to the detectives upon being stopped confirmed he had the car for a while. Since it had been stolen three days before, the evidence was sufficient to determine R.M.Z. had the car during that time. The car was parked next to a matching car which had been stripped of parts. The evidence supports the determination that to use the vehicle for which he had no key, R.M.Z. damaged the steering column and key entry. He also attempted to conceal the real identity of the car by altering the vehicle identification number and license plates. In the process of making various alterations in order to operate the vehicle without consent, R.M.Z. caused other damage to the car which resulted in the overall loss. There was no dispute as to the amount of damages and the loss in value to the property as a result of the unauthorized use. The pecuniary loss suffered by the owner of the car was a foreseeable consequence of R.M.Z.'s offense of an unauthorized use of a vehicle. See In the Matter of D.S., 921 S .W.2d at 861. Therefore, we hold there has been no abuse of discretion by the trial court and affirm the order of restitution.

V. APPEALS AND HABEAS

1. WACO COURT DECLARES CCP ARTICLE 4.18 UNCONSTITUTIONAL IN VIOLATION OF SEPARATION OF POWERS BUT AFFIRMS CONVICTION

Rushing v. State, 50 S.W.3d 715 (Tex. App.—Waco 7/11/01, pet. filed 10/5/01) [*Texas Juvenile Law* 28 (5th Edition 2000)].

Facts: When he was sixteen, Jonathan Daniel Rushing was living in a foster home. The home was near the residence of seventy-three-year-old Houston Burgess. Burgess's body was located after a search; he had been missing five days. He was found stabbed to death with his throat cut; his car had been stolen.

Rushing and another juvenile were soon implicated, and they were arrested for the crime. Because Rushing was under age seventeen, the case was initially referred to the juvenile court. That court waived its jurisdiction and transferred the matter to district court for trial as an adult. Rushing was indicted for capital murder, and the case was tried to a jury. The State was statutorily prohibited from seeking the death penalty because of Rushing's age. Tex.Pen.Code Ann. § 8.07(c) (Vernon Supp.2001). Rushing was convicted and sentenced automatically to life in prison.

Held: Affirmed

Opinion Text: On appeal Rushing brings the following complaints:

> 1. The criminal district court never acquired jurisdiction because the order from the juvenile court waiving jurisdiction and transferring the case was never filed among the papers of the criminal district court proceeding. [FN1]
>
> FN1. Rushing says this jurisdictional issue should be reviewed on appeal regardless of article 4.18 of the Code of Criminal Procedure, which requires that a jurisdictional challenge to a transfer from a juvenile court be made before trial. That was not done here.
>
> * * *

JURISDICTION OF THE TRIAL COURT

Rushing claims the judgment and sentence are void. He says the district court never acquired jurisdiction over his case because the order from the juvenile court waiving jurisdiction and transferring the case was not filed with the district court along with the indictment. However, before he can prevail on that issue, he must navigate around article 4.18 of the Code of Criminal Procedure, which requires that a jurisdictional challenge in a juvenile-transfer case be made before trial. Otherwise, appellate review is forfeited.

Article 4.18 reads in part:

> (a) A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.
>
> (b) The motion must be filed and presented to the presiding judge of the court:
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> * * *
>
> (2) if the defendant's guilt or punishment is tried or determined by a jury, before selection of the jury begins;
>
> * * *
>
> (d) A person may not contest the jurisdiction of the court on the ground that the juvenile court has exclusive jurisdiction if:
>
> (1) the person does not file a motion within the time requirements of this article;
>
> * * *

Tex.Code Crim.Proc.Ann. art. 4.18 (Vernon Supp.2001). It is undisputed that Rushing did not object to jurisdiction before trial. He asserts, however, that article 4.18 is unconstitutional because it violates the Separation of Powers Clause of the Texas Constitution, in that the appellate courts have a right to review the jurisdiction of the trial court which the Legislature cannot take away. Tex. Const. art. II, § 1 (Vernon 1997).

Jurisdiction of the Courts of Appeals, and the Right to Appeal

The general grant of jurisdiction of the Texas courts of appeals is found in the Texas Constitution:

> "... Said Court[s] of Appeals shall have appellate jurisdiction ... under such restrictions and regulations as may be prescribed by law.

> Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law."

Tex. Const. art. V, § 6; Clewis v. State, 922 S.W.2d 126 (Tex.Crim.App.1996). Section five makes it plain that our jurisdiction includes criminal cases. Tex. Const. art. V, § 5.

As noted in Carter v. State, 656 S.W.2d 468, 468 (Tex.Crim.App.1983):

> There is a fundamental proposition pertaining to appellate functions of the Judicial Department: A constitutional grant of appellate jurisdiction treats a right of appeal in criminal cases "as a remedy to revise the whole case upon the law and facts, as exhibited in the record," The Republic v. Smith, Dallam, 407 (Tex.), quoted approvingly by the Supreme Court of Texas in Bishop v. The State, 43 Tex. 390, 400 (1875). The Bishop Court noticed "error apparent upon the record," id., at 397, and corrected it by reversing the judgment of the trial court, id., at 403-404.

Although the Texas Constitution confers jurisdiction on the courts of appeals to dispose of an appeal once filed, it is the Legislature which gives a party the right to appeal in the first instance. Marin v. State, 851 S.W.2d 275, 278 (Tex.Crim.App. 1993); Tex. Const. art. V, §§ 5, 6. The Court of Criminal Appeals has observed that neither the United States Constitution nor the Texas Constitution confers a right on a defendant to a direct appeal of a criminal conviction. Phynes v. State, 828 S.W.2d 1, 2 (Tex.Crim.App.1992); Ex parte Shumake, 953 S.W.2d 842, 843-44 (Tex.App.—Austin 1997, no pet.). Thus, it upheld section 5(b) of article 42.12 of the Code of Criminal Procedure, which denies appeal from a trial court's decision to adjudicate guilt after a deferred adjudication, even in the face of a complaint that the defendant had been denied his constitutional right to counsel at the hearing on adjudication. Id.

We do not question the Legislature's authority to regulate an appellate court's subject matter jurisdiction. See Galitz v. State, 617 S.W.2d 949, 951 (Tex.Crim.App.1981). The Court of Criminal Appeals has stated that our lawmakers may deny the right to appeal entirely or the right to appeal only some things or the right to appeal all things only under some circumstances. Marin, 851 S .W.2d at 278.

The Legislature has granted a criminal defendant a general right of appeal. Tex.Code Crim. Proc.Ann. arts. 44.02, 44.07 (Vernon Supp.2001). However, it has limited that general right in some respects. For example, when there is a plea bargain agreement not exceeded by the trial court, the defendant must obtain the trial court's permission to appeal unless the appellate issue was raised by written motion filed prior to trial. Id. art. 44.02. There is no appeal from a trial court's decision to adjudicate guilt after placing a defendant on deferred adjudication community supervision. Tex.Code Crim.Proc. Ann. art. 42.12, § 5(b) (Vernon Supp.2001). Also, the Legislature has expressly limited the State's right of appeal to only specific matters. Tex.Code Crim.Proc. Ann. art. 44 .01 (Vernon Supp.2001).

Complaints About Jurisdiction

Article 4.18 might be considered a preservation-requirement statute. Normally a complaint not preserved will not be reviewed on appeal. Tex.R.App.P. 33.1 (formerly Rule 52(a)). This procedural rule was promulgated by the Court of Criminal Appeals under the statutory authority contained in article 44.33(a) of the Code of Criminal Procedure allowing the court to "make rules of posttrial and appellate procedure not inconsistent with this Code." Tex.Code Crim.Proc.Ann. art. 44.33(a) (Vernon Supp. 2001). Additional statutory authority is contained in section 22.108 of the Government Code: "The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant." Tex. Gov't Code Ann. § 22.108 (Vernon Supp.2001).

Jurisdictional requirements, however, fall into a special category. In Marin, the Court of Criminal Appeals stated that "jurisdiction" is a "nonwaivable, nonforfeitable systemic requirement" of a criminal proceeding. Marin, 851 S.W.2d at 278-79. For example, a minor "may not be tried as an adult, even with his permission, unless the juvenile court relinquishes jurisdiction of him." Id. (citing Ex parte Stanley, 703 S.W .2d 686 (Tex.Crim.App.1986)). Because Rule 33.1 "may not abridge, enlarge, or modify the substantive rights of a litigant," the question of "jurisdiction" ordinarily need not be preserved at trial. Id. Lack of jurisdiction is fundamental error, and is appealable at any time, even if raised for the first time on appeal. Stine v. State, 908 S.W.2d 429, 431 (Tex.Crim.App.1995). Lack of jurisdiction over a case renders the judgment void. See Ex parte Seidel, 39 S.W.3d 221 (Tex.Crim. App.2001) (citing Hoang v. State, 872 S.W.2d 694, 698 (Tex.Crim. App.1993)).

In cases involving juveniles, however, the Legislature has imposed a preservation requirement on the type of jurisdictional complaint that Rushing asserts. Tex.Code Crim.Proc.Ann. art. 4.18. Thus, we must determine whether the Constitution prohibits the Legislature from withdrawing Rushing's right to appeal the jurisdictional issue. His argument is that the Separation of Powers Clause prohibits the Legislature from denying a court of appeals the right to review whether a trial court had jurisdiction in this particular type of case, and therefore article 4.18 is unconstitutional.

Separation of Powers Clause

The Separation of Powers Clause states:

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

Tex Const. art. II, § 1. The provision is violated when: (1) one branch of government assumes a power "properly attached" to another branch, or (2) one branch unduly interferes with another branch effectively exercising its constitutionally assigned powers. State v. Williams, 938 S.W.2d 456, 458 (Tex.Crim.App.1997); Jones v. State, 803 S.W.2d 712, 715 (Tex.Crim.App.1991). The first type of violation has to do with a usurpation of one branch's powers by another branch. The second type has to do with the frustration or delay of one branch's powers by another branch. Rose v. State, 752 S.W.2d 529, 532 (Tex.Crim.App.1987) (citing Sanders v. State, 580 S.W.2d 349, 352 (Tex.Crim.App.1978)). Rushing's alleged violation is of the second sort.

The issue is whether the Legislature, in exercising its legislative prerogative in enacting article 4.18, has so interfered with our constitutional right and obligation to exercise the judicial power granted to us by the Constitution that it has violated the Separation of Powers Clause. We believe that it has.

In Meshell v. State, a case which declared the Speedy Trial Act unconstitutional, the Court of Criminal Appeals held that the county attorney in a criminal case had the "exclusive prosecutorial discretion in preparing for trial," including when to be "ready" for trial. 739 S.W.2d 246, 256-57 (Tex.Crim. App.1987). The court stated that the Legislature cannot "infringe upon the substantive power of the Judicial department under the guise of establishing 'rules of court,' thus rendering the separation of powers doctrine meaningless." Id. at 255. Applying that reasoning here, because jurisdiction is a "nonwaivable, nonforfeitable systemic requirement" of a criminal proceeding, we hold that article 4.18, in the guise of a preservation rule, infringes on the "substantive power of the Judicial department" to decide the jurisdiction of a lower court.

In Armadillo Bail Bonds, the Court of Criminal Appeals cited Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U.Pa.L.Rev. 1, 29-32 (1958):

> [T]here is a third realm of judicial activity, neither substantive nor adjective law, a realm of 'proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power.' This is the area of minimum functional integrity of the courts, 'what is essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court.' Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge or how he shall comport himself in judging or which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of the separation of powers and will be held invalid.
>
> * * *
>
> Should there not be some realm of judicial administration entirely free from legislative supervision? Or shall the legislature be permitted to dictate to the courts every detail of their internal regimen: command appellate courts to issue written opinions in every case, declare within what time cases shall be heard, deny to the court the power to issue its mandate until a prescribed period of time after judgment shall have passed? There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase judicial power.

Armadillo Bail Bonds v. State, 802 S.W.2d 237, 240-41 (Tex.Crim.App.1990).

In our view, article 4.18 infringes on that "realm of 'proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power.' " See id. The question of determining a lower court's jurisdiction is an "area of minimum functional integrity of the courts, 'what is essential to

the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court.' " See id.

We conclude that article 4.18 violates the Separation of Powers Clause to the extent that it requires that a jurisdictional complaint be presented to the trial court before it can be presented to an appellate court. Rushing's constitutional complaint is sustained, and we will address his jurisdictional issue.

Review of Jurisdiction

This case was initially referred to the juvenile court, which in McLennan County is the 19th District Court presided over by Judge Ralph Strother. Within a month, the State filed in the 19th District Court, Cause No. 99-149-J, a "Petition for Discretionary Transfer to a District Court." The transfer is authorized by section 54.02(a) of the Family Code. Tex.Fam.Code. Ann. § 54.02(a) (Vernon Supp. 2001). The statute allows the juvenile court, under certain circumstances applicable here, to waive its jurisdiction and transfer a minor to the appropriate district court for criminal proceedings in which the juvenile will be dealt with for all purposes as an adult. Id. at § 54.02(a), (h). Subsection "h" reads:

> If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings and cause the results of the diagnostic study of the person ordered under Subsection (d), including psychological information, to be transferred to the appropriate criminal prosecutor. On transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure. The transfer of custody is an arrest.

After the statutorily required hearing on the State's petition to transfer, which was held on July 15, 1999, Judge Strother issued a "Waiver of Jurisdiction and Order of Transfer to Criminal Court." The order was filed in Cause No. 99-149-J in the 19th District Court on July 20, 1999.

The order stated in part:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Court hereby waive its exclusive, original jurisdiction over the Juvenile Respondent, JONATHAN DANIEL RUSHING, and this cause, and immediately transfer this cause and the felony offense alleged in the State's Original Petition for Discretionary Transfer to Adult Criminal Court to the appropriate criminal district court, to wit: the 54th Judicial District Court of McLennan County, Texas.... IT IS FURTHER ORDERED AND DECREED by the said 19th Judicial District Court of McLennan County, Texas, that the clerk of said court transmit forthwith to the proper Criminal District Court of McLennan County, Texas, this written order and findings of the said 19th Judicial District Court of McLennan County, Texas, and said complaint attached hereto.

Also on July 15, Judge Strother issued an "Order of Commitment of a Juvenile after Discretionary Transfer Hearing," which was filed with the district clerk on July 20 in Cause No. 99-149-J in the 19th District Court. The Order commanded any sheriff or constable to take Rushing into custody, take him to the McLennan County Jail, and detain him.

On July 19, Judge Derwood Johnson (visiting judge) issued an "Order Referring Case to Grand Jury," which was filed on July 20 in the same Cause No. 99-149-J, but in the 54th District Court. It said in part:

> IT IS THEREFORE ORDERED that this cause be and hereby is referred to the Grand Jury for action ... [and] that the Clerk of this Court prepare a transcript consisting of the [transfer] Order, the Certification, and the Complaint and transmit the same forthwith to the Grand Jury of McLennan County, Texas.

Rushing was indicted for capital murder on August 18, 1999, in the 54th District Court under a new Cause No., 99-579-C. The trial was held in January of 2000. Judge Strother presided. After conviction, Notice of Appeal was filed on February 24, 2000.

While this appeal was pending, on December 12, 2000, the State filed in the original juvenile case, Cause No. 99-149-J in the 19th District Court, a "Motion to Transfer Records" requesting that all documents, including the transfer order, filed in cause No. 99-149-J be transferred to Cause No. 99-579- C in the 54th District Court "in order that they may be made part of the appellate record in that cause." The Motion was granted by Judge Strother on December 27, 2000. We later received those documents by supplemental clerk's record.

It is not disputed that the orders concerning the transfer of the case from the 19th District Court to the "proper Criminal District Court" were never

filed in Cause No. 99-579-C in the 54th District Court until after the appeal was filed. The issue is whether that shortcoming, if it was, caused the 54th District Court to lack jurisdiction to try the case. We conclude that it did not.

The July 15 transfer order directed the district clerk to "transmit forthwith to the proper Criminal District Court of McLennan County, Texas, this written order and findings of the said 19th Judicial District Court of McLennan County, Texas, and said complaint attached hereto." That was not done. However, neither the July 15 order nor section 54.02(h) requires that the transfer order actually be "filed" under the cause number of the case in the district court in which the adult proceedings occur. The key is whether (1) the juvenile court issued a proper transfer order, and (2) the transfer order was communicated to the judge in the adult-court proceedings, who accepted jurisdiction.

In Ellis v. State, the transfer order was not filed in the trial court until the appeal was filed. 543 S.W.2d 135 (Tex.Crim.App .1976). It was, as here, made available to the appellate court by supplemental clerk's record. Id. at 137. The Court of Criminal Appeals found that the order complied with section 54.02. Furthermore, in a transcript of an examining trial, the trial court referred to the order which he said was in his possession. The Court of Criminal Appeals stated:

> Regardless of whether the order of the juvenile court was actually on file with the papers in the case, the record reflects that the juvenile court had waived jurisdiction over appellant and had transferred it to the district court in which all subsequent criminal proceedings were had, and that the district court had such order in its possession and acted on the waiver and transfer and assumed jurisdiction when the examining trial was conducted before indictment was returned.

Id. Therefore, actual filing of the transfer order before trial with the court in the adult proceedings is not necessary, as long as the order is proper, and the trial court is aware of the order and assumes jurisdiction over the case.

In Moss v. State, the transfer order was misplaced and never filed. 13 S.W.3d 877 (Tex.App.—Fort Worth 2000, pet. ref'd). However, a copy was located, and after a hearing in the trial court to determine its authenticity, the appellate record was supplemented with the copy. In addition, other documents concerning the juvenile's waiver of an examining trial which were filed in the trial court clearly showed the trial court was aware of the transfer and accepted jurisdiction. The Fort Worth court found no authority, statutory or otherwise, requiring the transfer order to be filed in the trial court.

The July 15 transfer order complied with the requirements of section 54.02. Furthermore, because Judge Strother, the trial judge, signed the transfer order in his capacity as juvenile judge, he most surely was aware of the order and accepted jurisdiction of the matter in adult criminal court. The facts here accord with Ellis and Moss, and we reach the same conclusion those courts did.

This issue is overruled.

CONCURRING OPINION

The majority concludes that the separation-of-powers doctrine has been violated because the legislature has impermissibly interfered with our ability to review a trial court's jurisdiction. The majority seems to recognize that the legislature can preclude us from having jurisdiction to review certain types of cases, but refuses to allow the legislature the latitude to impose certain restrictions that must be complied with before we can review an issue on direct appeal.

I have no problem in recognizing that the legislature has the authority under the constitution to set certain procedural hurdles that must be overcome before a particular issue may be reviewed by us on direct appeal. If the legislature chooses to require a certain type of preservation for jurisdictional issues at the trial court level in criminal cases before we have jurisdiction for appellate review, that is within their province.

In this particular case, it means that if Rushing wants to challenge the trial court's jurisdiction, it must be done by some other procedure, presumably an application for writ of habeas corpus, not by direct appeal. This makes a lot of sense in this context. If the trial court had refused to order the record supplemented with the records of the juvenile proceeding, we would be unable to determine if the trial court's jurisdiction had been properly invoked as it pertains to a juvenile. But if challenged by application for writ of habeas corpus, an appropriate record could be made, showing that the juvenile court had in fact relinquished exclusive jurisdiction and that the case had properly proceeded to trial on the indictment in the criminal district court.

I would recognize that the legislature may limit the procedural manner in which an issue must be presented for us to have jurisdiction to review it, even if it involves the trial court's jurisdiction. Because the majority holds otherwise, I respectfully note my disagreement with that portion of the opinion. Because the majority reaches the same result by concluding that the record supports the fact that the juvenile court waived jurisdiction and that it was

accepted by the criminal district court, I concur in the result.

One further note. As I view it, the holding of the majority is very narrow. The only issue is whether the legislature may prevent us from reviewing a challenge to a trial court's jurisdiction by imposing a preservation requirement. The holding should be strictly limited to these facts.

2. COURT OF APPEALS SAYS MOTION FOR NEW TRIAL NOT NEEDED TO PRESERVE FACTUAL SUFFICIENCY CLAIM FOR REVIEW

In the Matter of J.L.H., ___ S.W.3d ____, No. 08-00-00548-CV, 2001 WL 1047014, 2001 Tex.App.Lexis ____ (Tex.App.—El Paso 9/13/01) [*Texas Juvenile Law* 332 (5th Edition 2000)].

Facts: J.L.H. appeals her adjudication of delinquency by committing the offense of burglary of a habitation. In two points for review, she challenges the legal and factual sufficiency of the evidence to support the adjudication.

Held: Affirmed.

Opinion Text: *Standard of Review*

Consistent with due process requirements, no person may be convicted of a criminal offense and denied his or her liberty unless criminal responsibility for the offense is proved beyond a reasonable doubt. [FN1] This due process requirement applies to suits alleging a juvenile has engaged in delinquent conduct. [FN2]

FN1. U.S. CONST. amend. XIV; Alvarado v. State, 912 S.W.2d 199, 206- 207 (Tex.Crim. App.1995) (citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970)).

FN2. Tex. Fam.Code Ann. § 54.03(f) (Vernon Supp.2001); In re M.M.R., 932 S.W.2d 112, 113 (Tex.App.—El Paso 1996, no pet.).

In reviewing the legal sufficiency of evidence supporting a finding that a juvenile committed an offense which constitutes delinquent conduct, we apply the Jackson v. Virginia [FN3] standard. [FN4] Under this standard, we review all evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

FN3. Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

FN4. In re A.S., 954 S.W.2d 855, 858 (Tex.App.—El Paso 1997, no pet.).

In reviewing the factual sufficiency of evidence supporting a finding that a juvenile committed an offense which constitutes delinquent conduct, we again review all the evidence in determining whether the State met its burden of proof beyond a reasonable doubt, but not in the light most favorable to the verdict. [FN6] Only if the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust will we conclude that there is factually insufficient evidence.

FN6. Id. at 860.

Waiver of factual sufficiency challenges

Initially, we note that the State contends J.L.H. waived her factual sufficiency challenges by failing to file a motion for new trial. Indeed, the Texas Supreme Court held in 1993 that Tex.R. Civ. P. 324(b), requiring a motion for new trial be filed in order to complain of factual sufficiency on appeal, applies to juvenile proceedings. [FN8] Our sister court has recently confirmed that holding. [FN9] Nevertheless, for the reasons set out here, we conclude that the Supreme Court's pronouncement on the issue has since been superceded by developments in our current juvenile system.

FN8. In re M.R., 858 S.W.2d 365, 366 (Tex.1993).

FN9. In re D.T.C., 30 S.W.3d 43, 51 (Tex.App.—Houston [14th Dist.] 2000, no pet.).

At one time, the safeguards afforded adults in criminal proceedings did not apply to juvenile proceedings. The juvenile system was originally created for treatment and rehabilitation of children, and focused on the best interest of the child. This distinguished the juvenile courts from adult criminal courts, which direct their efforts primarily toward punishment. Because of this difference in purpose, juveniles were denied many rights, both procedural and substantive, that were routinely afforded adults.

The juvenile system's philosophy of treatment and rehabilitation has metamorphosed, however, into one much focused on punishment that is in many ways barely distinguishable from our adult criminal system. Three of the purposes expressed in the Juvenile Justice Code are to provide for the protection of the public and public safety, to promote the concept of punishment for criminal acts, and to protect the welfare of the community and to control the com-

mission of unlawful acts by children. [FN13] The "grim reality" of today's juvenile system is a far cry from the days of its creation as a "system wherein juveniles were rehabilitated rather than incarcerated, protected rather than punished—the very antithesis of the adult criminal system." [FN14] We believe this change has eroded the original logic for denying juveniles the same procedural protections as adults. [FN15] We therefore recognize that the juvenile system is, in many ways, more closely related to criminal than civil proceedings and it follows that most advocates practicing in the juvenile system will possess greater expertise in criminal than civil procedure.

> FN13. Tex. Fam.Code Ann. § 51.01(1), (2)(A), and (4) (Vernon 1996).
>
> FN14. Lanes v. State, 767 S.W.2d 789, 791 (Tex.Crim.App.1989).
>
> FN15. In re J.S.S., 20 S.W.3d at 842; Hidalgo, 983 S.W.2d at 751.

Moreover, we note that in 1993 when the Supreme Court found a motion for new trial must be filed to preserve factual sufficiency in a juvenile case, there was no general factual sufficiency review in adult criminal cases. Only in 1996, with Clewis v. State, [FN16] did the Court of Criminal Appeals acknowledge a right to factual sufficiency review of a conviction. Following Clewis, this Court, in Davila v. State, [FN17] held that a factual sufficiency challenge need not be preserved by a motion for new trial in a criminal case. In discussing that question (which at the time was one of first impression) we stated:

> Without question, in the civil context, a motion for new trial is required to preserve a challenge to the factual sufficiency of the evidence to support a jury finding. This requirement has been applied in the quasi-criminal hybrid of juvenile proceedings. Although juveniles are prosecuted for criminal offenses, the Texas Family Code mandates that an appeal from an order of a juvenile court is to be predicated upon the civil standards. As a result, we have previously determined that a juvenile who complains on appeal of the factual sufficiency of the evidence must preserve the complaint in a motion for new trial. [FN19]
>
> FN16. Clewis v. State, 922 S.W.2d 126, 136 (Tex.Crim.App.1996).
>
> FN17. Davila v. State, 930 S.W.2d 641, 647 (Tex.App.—El Paso 1996, pet. ref'd).
>
> FN19. Id. at 647 (citations omitted).

We think the time has come, however, to acknowledge that juvenile law is much more criminal than civil in nature. In examining the drift of juvenile law from its civil roots to its criminal present, we conclude it makes no sense to require procedural hurdles of juveniles which adults need not meet in parallel circumstances. If anything, juveniles should be afforded more opportunity for appellate review of their claims, consistent with the stated purpose of the Juvenile Justice Code that it be construed:

> [T]o provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced. [FN20]
>
> FN20. Tex. Fam.Code Ann. § 51.01(6) (Vernon 1996).

We therefore conclude that a juvenile need not file a motion for new trial raising factual sufficiency of the evidence in order to raise that issue on appeal. Having reached that conclusion, we will address both J.L.H.'s points for review.

Facts

The State presented two witnesses at trial; the juvenile presented no evidence. The State called Francine Morrison and her mother Antonia Morrison. Both women live at 10308 Dyer Street, Space 304, El Paso, Texas. Antonia Morrison leases the trailer, and is required to list all persons living in the trailer on her lease, one of whom is Francine. Also living there are Francine's two daughters, two years old and two months old, and Francine's younger sister, Joanna Morrison, age fifteen (also Antonia's daughter).

On October 27, 2000, all five residents of the trailer were home. Francine was in her bedroom with the toddler. Antonia, Joanna, and the baby were watching television in the living room. Someone threw a brick through the window of the bedroom, almost hitting Francine's child. Immediately thereafter, J.L.H. and her companion, G., came into the trailer. Francine testified, "Well, nobody let them in the house. They opened the door themselves and they went straight for the [bed]room. And in the room, I followed them into the room and G. said to give her the money." The front door was closed but not locked. Francine did not give them permission to enter the house. "They just went in there to go get the money ... for Peanut's money." Both girls de-

manded the money. "They went in there to go get Peanut's gun." Francine had Peanut's gun, G. took it and gave it to J.L.H. G. also had another weapon of her own.

> G. put it against my [Francine's] head and said to give her the money, and I said I couldn't give it to her because I didn't have it because I didn't know if Peanut wanted me to give it to her.
>
> So after she did that, I just turned around and gave her the money. And then, well, G. said that next time she ask me for money, that I better give it to her.

Francine testified that this incident put her in fear for her life and her daughter's life.

Antonia Morrison testified that she was using the bathroom when she heard a car approaching with loud, "banging" music. She did not see who damaged her trailer with the brick. From the bathroom, she could hear her younger daughter arguing with someone. She tried to hurry so she could leave the bathroom when she heard this. She saw three girls entering the trailer, one of whom was J.L.H. Although Joanna was the one who met the girls at the front door, and Antonia did not know what exactly she told them, she believed they entered the door by force because "the thing was broken off." She testified, "I just saw my daughter and [J.L.H.] arguing over—I don't know what was going on, what they wanted, or this and that, and I just saw the gun being held to her head, that's all." Antonia testified she saw J.L.H. holding the gun inches from Francine's head. Antonia did not give permission for the intruders to enter her house that day, nor to hold a gun to her daughter's head. Her testimony was that she told them they had "just better run or do what you have to do and just leave, you know, go, leave us alone. You know, why do you have to come and, you know, break our windows and whatever, because they did, they damaged the trailer and now I've got to pay for it." She had seen J.L.H. before. "She used to come by with this guy named Peanut." J.L.H. had caused no trouble in the past, but this incident had scared both Antonia and her daughter. She called the police, and the girls took off right away as soon as they got what they wanted.

The petition alleging delinquent conduct charged:

> J.L.H., did then and there intentionally and knowingly enter a habitation without the effective consent of FRANCINE MORRISON, the owner thereof, and therein attempted to commit a felony to wit: Aggravated Assault with a deadly weapon to the said FRANCINE MORRISON, in violation of section 30.02 of the Texas Penal Code.

Lack of consent to enter habitation

Urging legal and factual insufficiency of the evidence in two points for review, J.L.H. first contends that the State did not prove beyond a reasonable doubt that the juvenile lacked consent of the owner to enter the habitation. J.L.H. argues that this element fails because the complaining witness, Francine Morrison, was not the residence's "owner," nor the person who answered the door, nor did she know exactly what happened when J.L.H. and her companion came to the door. The juvenile contends that because the State did not call Joanna Morrison to testify, a presumption arose that she gave permission for J.L.H. to enter. We disagree.

The Texas Penal Code defines "owner" as a person who "has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor." Although J.L.H. concedes that Francine had a greater right of possession to the trailer than did J.L.H., she nevertheless contends that Francine's testimony that she did not consent to J.L.H.'s entry is insufficient because there was no direct evidence on what occurred at the front door. We do not think such direct testimony was required.

Lack of an owner's consent may be proved by circumstantial evidence, just as may any other element of a criminal charge. Here, Francine Morrison, a listed resident, testified she did not give J.L.H. consent to enter the trailer; that "nobody let them in the house"; they opened the door themselves and went straight for the [bed]room. Antonia Morrison, the trailer's lessee, testified she did not give J.L.H. consent to enter; she heard her younger daughter arguing with someone at the front door; when she emerged from the bathroom, three people had entered the house, including J.L.H.; and they had got in through the front door because "the thing was broken off." (The record does not explain what "thing" on the door was broken). Only seconds elapsed between the brick being thrown through the window and the argument between Joanna Morrison and the people at the front door. Neither witness directly observed whatever occurred at the front door, and Joanna Morrison did not testify.

Viewing this evidence in the light most favorable to the verdict, we find a reasonable fact finder could find beyond a reasonable doubt that J.L.H. had entered the habitation without consent of the owners. Both Francine and Antonia Morrison were owners within the Penal Code definition. We cannot say that

the State's election not to call Joanna Morrison creates a presumption that she gave consent, as the juvenile argues. J.L.H.'s suggestion that Joanna was not called because she gave consent is mere speculation. Taking the evidence as a whole, we conclude the State met its burden of proof.

Similarly, viewing the evidence in a neutral light, we do not find that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. There is ample evidence from which a fact finder could conclude J.L.H. and her companion(s) forcibly entered the house. The evidence was both legally and factually sufficient on the element of lack of consent.

Intent to commit aggravated assault

J.L.H. next urges that the evidence is legally and factually insufficient to prove that J.L.H. entered the trailer with the intent to commit aggravated assault. In making this argument, J.L.H. appears to rely upon Tex. Pen.Code Ann. 30.02(a)(1), which provides that a person commits an offense if, without the effective consent of the owner, the person "enters a habitation ... with intent to commit a felony, theft, or an assault." The petition here, however, alleged delinquent conduct based upon Tex. Pen.Code Ann. 30.02(a)(3), which provides that a person commits an offense if, without the effective consent of the owner, the person "enters a building or habitation and commits or attempts to commit a felony, theft, or an assault." Under this section, the juvenile's intent at the time she entered the habitation is not the controlling element; rather, the State was required to prove beyond a reasonable doubt that she committed or attempted an assault after entering the habitation without consent. The attempted assault alleged under section 30.02(a)(3) supplants the intent upon entry required under 30.02(a)(1). Thus, this argument is without merit.

J.L.H. next argues that there was insufficient evidence from which the jury could conclude she attempted an aggravated assault, either as a principal or a party, urging that her mere presence was all the State could establish. To the contrary, we find there was ample evidence that J.L.H. attempted to commit aggravated assault, at least as a party.

It is true that mere presence at the scene of a crime is not sufficient to establish guilt, but it may be evidence of guilt when combined with other circumstances. Moreover, circumstantial evidence may be sufficient to establish guilt as a party. In reviewing the evidence establishing party status, this Court may examine the events occurring before, during, and after the commission of the offense.

Here, viewing the evidence in the light most favorable to the verdict, there was evidence that immediately before J.L.H. and G. entered the trailer, a brick was thrown through the bedroom window. J.L.H. and G. entered the trailer without consent. Both G. and J.L.H. demanded that Francine give them Peanut's money. When Francine gave G. Peanut's gun, G. handed it to J.L.H., who took the gun and held it. In J.L.H.'s immediate presence, G. held a second gun to Francine's head. The two girls left together, taking the gun and money. Antonia testified that it was J.L.H., not G., who held the gun to Francine's head. A reasonable fact finder could find J.L.H. was a party to attempted aggravated assault based on this evidence.

Viewing the evidence in a neutral light, we must discount the testimony that J.L.H. was the one holding a gun to Francine's head. Nevertheless, even without that evidence, we cannot say that the verdict was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. J.L.H.'s two points for review are overruled.

Conclusion

We affirm the trial court's adjudication of delinquency.

3. JUVENILE COURT UNDER CIVIL PROCEDURE RULE 329b(d) FOR 30 DAYS HAD PLENARY POWER TO CHANGE PROBATION TERM SET BY IT PREVIOUSLY

In the Matter of M.A.W., ___ S.W.3d ___, No. 07-00-0536-CV, 2001 WL 811048, 2001 Tex.App. Lexis 4790 (Tex.App.—Amarillo 7/18/01) [*Texas Juvenile Law* 218 (5th edition 2000)].

Facts: M.A.W., a juvenile who is referred to as M. herein, appeals from an order modifying his disposition and committing him to the care and custody of the Texas Youth Commission. Through his sole point, he contends that the trial court lacked jurisdiction to so dispose of him.

On February 4, 1998, the trial court found that M. engaged in delinquent conduct and placed him on probation for one year. Before that probationary term expired, the State moved to extend the period. The motion was granted and the term was extended until February 4, 2000. Thereafter, the State moved the juvenile court to modify M.'s disposition because he allegedly violated the terms of his probation. That motion resulted in the court entering an order signed March 24, 1999 and placing M. in the custody of a local probation officer for six months and directing "that [the minor's] term of probation be hereby extended for an additional term of six ... months,

commencing on the below date," *i.e.* March 24, 1999. In other words, the March 24th decree effectively reduced M.'s term of probation from February 4, 2000 to August 24, 1999.

Undoubtedly believing that the reduction in the probationary period was a mistake, the State filed, on April 5, 1999, a document entitled "Motion for Judgment Nunc Pro Tunc." Therein, it requested the juvenile court to redact from its March 24th decree the language that shortened the probationary period to August 24, 1999. On that same day, *i.e.*, April 5, 1999, the court also signed an order declaring "that the Judgment Nunc Pro Tunc be entered reforming the [March 24th] instrument as requested" by the State. So, in entering this judgment *nunc pro tunc*, the trial court once again extended the termination of M.'s probation to February 4, 2000. No one objected to this at the time. Nor did anyone appeal from the March 24th edict.

Held: Affirmed.

Opinion Text: Simply put, M. contends the juvenile court lacked jurisdiction to alter, via nunc pro tunc or otherwise, its March 24, 1999 order reducing the probationary term to August of 1999. This is allegedly so because 1) the error corrected was not the type susceptible to remediation through a nunc pro tunc order and 2) § 54.05(d) supplanted the trial court's ability to modify its judgments during the period in which it had plenary jurisdiction over the cause and its judgment. We address the latter ground first and, upon addressing it, overrule the point.

Plenary Jurisdiction to Alter Judgment

Except when in conflict with statute and matters concerning the burden of proof, the Texas Rules of Civil Procedure generally apply to proceedings arising under title 3 of the Texas Family Code. Tex. Fam.Code Ann. § 51.17(a) (Vernon Supp.2001). Furthermore, proceedings to modify the disposition of a juvenile arise under chapter 54, title 3 of the Family Code and, therefore, are generally governed by said rules of civil procedure.

Next, Texas Rule of Civil Procedure Rule 329b(d) states that a "trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed." In other words, it vests the court with plenary jurisdiction to change its final orders for a minimum of thirty days after the orders are signed. Lane Bank Equip. Co. v. Smith Southern Equip. Inc., 10 S.W.3d 308, 310 (Tex.2000).

Here, the final order in question was signed on March 24, 1999. So, for 30 days after March 24th, the trial court had plenary jurisdiction to modify it. Next, the order making the change now in dispute was signed on April 5, 1999, a period well within the 30 day span contemplated by Rule 329b(d) and Lane. Given this, the trial court had plenary jurisdiction to make the change.

M. argues otherwise by contending that Rule 329b(d) conflicts with § 54.05(d) of the Family Code and, given the supposed conflict, the Family Code provision controls. We acknowledge that when a rule of procedure conflicts with a statute, the statute prevails unless the rule has been passed subsequent to the statute and repeals the statute in accordance with the Texas Government Code. See Johnstone v. State, 22 S.W.3d 408, 409 (Tex.2000). We further acknowledge that § 54.05(d) of the Family Code suggests that proceedings to modify the disposition of a juvenile must be initiated through a petition. [FN1] Yet, we find no conflict between it and Rule 329b(d) for several reasons. First, our brethren on sister courts have applied the rule encapsulated in Rule 329b(d) to proceedings arising under title 3 of the Family Code. See Cornealius v. State, 870 S.W.2d 169, 176-77 (Tex.App.—Houston [14th Dist.] 1994), aff'd on other grounds, 900 S.W.2d 731 (Tex. Crim.App.1995) (involving the transfer of jurisdiction to a criminal court pursuant to § 54.02 of the Family Code). Second, nothing in § 54.05(d) expressly addresses Rule 329b(d) or the topic of judgments and the manner in which they can be vacated or changed. Rather, the proviso deals with the initiation of a proceeding to modify and the need for 1) a hearing, 2) reasonable notice of the hearing, and 3) the issuance of findings. It does not purport to expand or restrict the trial court's plenary power vis-a-vis judgments and decrees entered in complete resolution of a proceeding that has already been initiated. Consequently, we find no conflict between § 54.05(d) of the Family Code and Rule 329b(d).

> FN1. The pertinent part of the statute reads:
>
> a hearing to modify disposition shall be held on the petition of the child and his parent, guardian, guardian ad litem, or attorney, or on the petition of the state, a probation officer, or the court itself ... Tex. Fam.Code Ann. § 54.05(d) (Vernon Supp.2001).

In sum, when the trial court altered the March 24th decree on April 5th, it had plenary jurisdiction to do so. And, our so holding relieves us of having to consider the contention involving the law of nunc pro tunc judgments

The judgment is affirmed.

VI. ATTORNEY GENERAL

COUNTY MAY GIVE PUBLIC MONEY TO NON-PROFIT ORGANIZATIONS THAT SERVE CHILDREN

Attorney General Opinion No. JC-0439, 2001 WL 1539107 (12/3/01) [*Texas Juvenile Law* 8 (5th Edition 2000)].

Re: Whether statutes cited in various contracts under which Kerr County has transferred funds to certain nonprofit entities authorize the County to make the transfers (RQ-0398-JC)

The Honorable David M. Motley
Kerr County Attorney
Kerr County Courthouse, Suite BA-103
700 Main Street
Kerrville, Texas 78028

Dear Mr. Motley:

You question Kerr County's authority to transfer county funds to various nonprofit organizations, each of which "serve[s] children's needs." You state that Kerr County (the "County") "has been annually funding several non-profit entities" in accordance with contracts that specify the amount of funds, the nonprofit entity's obligations to the County, "the performance standards[,] and the right to inspect financial records to ensure compliance with the contract." A county may exercise those powers explicitly or implicitly conferred upon it by statute. See Tex. Att'y Gen. Op. No. JC-0171 (2000) at 1. Article III, section 52 of the Constitution bars a transfer of county funds to a private entity unless the transfer serves a public purpose of the county and the transfer is subject to adequate controls, contractual or otherwise, to ensure that the public purpose is accomplished. See Tex. Const. art. III, § 52; Tex. Att'y Gen. Op. No. JC-0335 (2001) at 6. You doubt that these expenditures serve any "public purpose tied to [a county's] express or implied powers," with the possible exception of the County's authority under section 81.027 of the Local Government Code to "provide for the support of paupers, residents of [the] county, who are unable to support themselves." Request Letter, supra note 1, at 4; see Tex. Loc. Gov't Code Ann. § 81.027 (Vernon Supp. 2001).

We conclude that, with respect to the nonprofit organizations and contracts to which you refer, the statutes cited in the contracts generally appear to provide the County with sufficient authority to make the expenditures of public funds, with a few exceptions. We assume that the Kerr County Commissioners Court has determined, with respect to each of the expenditures you mention, that the expenditure serves a public purpose and that adequate controls are in place to ensure that the public purpose will be accomplished. Whether a particular expenditure of public funds serves a public purpose is typically an issue for the commissioners court to resolve in the first instance. See Tex. Att'y Gen. Op. Nos. JC-0239 (2000) at 4 (stating that public officeholder must determine in first instance whether particular office closure serves public purpose); DM-317 (1995) at 4 (concluding that whether county commissioners court may expend county funds to pay travel expenses of applicant for pathologist position is determination for commissioners court in first instance); Tex. Att'y Gen. LO-96-028, at 3 n.2 (suggesting that commissioners court may determine in first instance whether travel allowance and in-kind reimbursement for county commissioner serves public purpose).

A county commissioners court may exercise only those powers that the state constitution and statutes confer upon it, either explicitly or implicitly. See Tex. Att'y Gen. Op. No. JC-0171 (2000) at 1. Moreover, a county commissioners court exercises powers and jurisdiction only over "county business" as conferred by law. Tex. Const. art. V, § 18(b). A commissioners court thus does not have power to accomplish something that is not county business. See id.; Tex. Att'y Gen. Op. No. JC-0036 (1999) at 6. The phrase "county business" has been broadly construed "to encompass matters of general concern to county residents." Tex. Att'y Gen. Op. No. JC-0036 (1999) at 6.

Article III, section 52 and article XI, section 3 of the Texas Constitution proscribe gratuitous transfers of public funds to private entities. See Tex. Const. art. III, § 52; id. art. XI, § 3. A county is not prohibited from contracting with a private nonprofit corporation to provide services that the county is authorized to provide so long as the county receives adequate consideration. See Tex. Att'y Gen. Op. No. JC-0335 (2001) at 7. The constitution limits a county's authority to grant public funds to a private nonprofit corporation to only those situations where the grant serves a public purpose that the county is authorized to accomplish and is subject to adequate controls, "contractual or otherwise, to ensure that the public purpose is accomplished." Id.; see Tex. Const. art. III, § 52; id. art. XI, § 3; see also id. art. VIII, § 3 (directing that taxes be collected "for public pur-

poses only"). A transfer for a public purpose is constitutionally permissible even if a private interest benefits incidentally. See Barrington v. Cokinos, 338 S.W.2d 133, 139 (Tex. 1960). A contract that imposes on the nonprofit organization an obligation to perform a function that benefits the public may provide adequate control. See Key v. Comm'rs Court of Marion County, 727 S.W.2d 667, 669 (Tex. App.-Texarkana 1987, no writ) (per curiam).

You are particularly concerned about the County's authority to transfer county funds to six organizations: Court Appointed Special Advocates (CASA); Hill Country Crisis Council; Kids' Advocacy Place; K'Star; Big Brothers and Sisters; and Families & Literacy, Inc. Request Letter, supra note 1, at 3-4. We have received and examined copies of the County's contracts with each of these entities, although we do not construe them because of the fact issues involved. See Tex. Att'y Gen. Op. Nos. JC-0395 (2001) at 2; JC-0032 (1999) at 4; DM-383 (1996) at 2; DM-192 (1992) at 10. We will summarize what we perceive to be the pertinent features of each of the contracts at issue.

The County cites, in its contract with CASA, its authority under section 264.006 of the Family Code. See CASA Contract at 1 (on file with Opinion Committee); see infra p. 5 (discussing section 264.006, Family Code). Under the contract, CASA, in consideration of $3,000 from the County, is bound to provide "guardians ad litem for use in" appropriate court cases relating to children, in accordance with a court order; and provides "family studies and... such other information gathering services" as the county courts request. CASA Contract at 2.

The County cites as authority for its contract with Hill Country Crisis Council section 81.007 of the Family Code and section 51.011 of the Human Resources Code. See Hill Country Crisis Council Contract at 1 (on file with Opinion Committee); see infra p. 7 (discussing section 81.007, Family Code and section 51.011, Human Resources Code). The Hill Country Crisis Council, in consideration of $5,000 from the County, provides "[i]ntake and referral services for qualified persons seeking family violence protective orders from the [county] attorney's office; and... maintain[s] a 'batterer's intervention and treatment program' designed to counsel and treat those who commit acts of family violence." Hill Country Crisis Council Contract at 1-2.

The County cites as authority for its contract with Kids' Advocacy Place sections 264.402 and 264.403 of the Family Code. See Kids' Advocacy Place, Inc. Contract at 1 (on file with Opinion Committee); see infra pp. 5, 6 (discussing sections 264.402 and.403, Family Code). Kids' Advocacy Place, in consideration of $3,000 from the County, provides a facility where "children who are the victims of sexual and/or physical abuse and their non-offending family members can go for evaluation, intervention, and counseling"; provides a forum for agencies and County professionals who work with abused children to "gather and work together in assisting victims and their families"; provides "a resource center for training and education in the area of child abuse and victimization"; provides a "warm, non-threatening environment in which the victims of child abuse and victimization and their families can work with law enforcement or protection services" to prepare for court appearances; and provides a location where local law enforcement agencies and others "may obtain evidence to be used to investigate and prosecute those accused of child abuse and neglect." Kids' Advocacy Place Contract at 1-2.

The County cites as authority for its contract with K'Star section 264.006 of the Family Code. See K'Star Contract at 1 (on file with Opinion Committee); see infra p. 5 (discussing section 264.006, Family Code). K'Star, in consideration of $5,000 from the County, provides short-term emergency shelter for youth "in need" or "at risk"; food, clothing, counseling, and education to youth "in need" or "at risk"; and facilities for residential placement of youth in need of protection or other assistance. K'Star Contract at 1.

The County cites as authority for its contract with Big Brothers and Sisters section 264.006 of the Family Code. See Big Brothers and Sisters Contract at 1 (on file with Opinion Committee); see infra p. 5 (discussing section 264.006, Family Code). Big Brothers and Sisters, in consideration for $3,000, provides to county residents "positive adult role models to children... from single-parent families" and "additional support to single-parent families by giving supplemental community resource referrals." Big Brothers and Sisters Contract at 1.

The County cites as authority for its contract with Families & Literacy, Inc. section 264.006 of the Family Code; county courts' "authority under various provisions of the Texas Family Code to order family studies, order parent education, and pursue other matters designed to aid the courts in the exercise of their duties regarding the welfare of children"; and article 42.12, section 11(c) of the Code of Criminal Procedure. See Families & Literacy, Inc. Contract at 1 (on file with Opinion Committee); see infra pp. 6, 7 (discussing section 264.006, Family Code; section 107.051, Family Code; and article 42.12, Code of Criminal Procedure). Families & Literacy, Inc. provides, in consideration of $2,000 from the County, "parent/family education for use by the [county] courts in appropriate cases relating to... juvenile delinquency"; family study courses to

"improve individual interpersonal relationships of various family members involved in the" county courts; and information to county court judges necessary to assess a defendant's educational skill level and to evaluate and place appropriate conditions upon a defendant's supervision. Families & Literacy, Inc. Contract at 2.

Your letter to this office lists none of the statutes that the contracts themselves cite. Without referencing these statutes, you suggest that the County has no express or implied authority to make the transfers, unless the authority fits under the County's authority to provide for indigent residents under section 81.027 of the Local Government Code. See generally Request Letter, supra note 1; cf. also Act of May 8, 2001, 77th Leg., R.S., ch. 254, § 1, 2001 Tex. Sess. Law Serv. 463 (to be codified as Tex. Loc. Gov't Code Ann. § 381.004(b)(6), (f)) (purporting to authorize county to contribute county funds to comprehensive literacy program or children's advocacy center "[t]o stimulate business and commercial activity in a county"). Section 81.027 simply authorizes a county commissioners court "to provide for the support of paupers, residents of their county, who are unable to support themselves." Tex. Loc. Gov't Code Ann. § 81.027 (Vernon Supp. 2001). You aver that, using its authority under section 81.027, a county might fund these six organizations in "two possible scenarios": "Certain children could be classified as paupers under the right factual scenario. A pauper child might be one who has parents who are unable to provide necessary resources for him or one who does not have parents at all." Request Letter, supra note 1, at 4. While we agree that the County's authority to provide for paupers may encompass the authority to provide funds to these organizations in certain circumstances, we believe that the County has other, more direct statutory authority, such as that cited in the contracts.

Section 264.006 of the Family Code, which is cited as authority for four of the contracts, expressly empowers a county to "provide for services to and support of children in need of protection and care without regard to the immigration status of the child or the child's family." Tex. Fam. Code Ann. § 264.006 (Vernon Supp. 2001); see Hill Country Court-Appointed Special Advocates ("CASA") Contract, K'Star Contract, Big Brothers and Sisters Contract, Families & Literacy, Inc. Contract (all on file with Opinion Committee). Unlike section 81.027 of the Local Government Code, which pertains only to indigent county residents, section 264.006 of the Family Code does not tie providing services and support of children to those who are indigent but to those "in need of protection and care." See Tex. Fam. Code Ann. § 264.006 (Vernon Supp. 2001); see Tex. Loc. Gov't Code Ann. § 81.027 (Vernon Supp. 2001); Request Letter, supra note 1, at 4. You do not contend that section 264.006 is unconstitutional, and, indeed, we must presume, without "clear and certain" evidence to the contrary, that it is constitutional and that providing services to children in need of protection and care is "county business." Salvatierra v. VIA Metro. Transit Auth., 974 S.W.2d 179, 182 (Tex. App.-San Antonio 1998, pet. denied); see Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 598 (Tex. 2001); McKinney v. Blankenship, 282 S.W.2d 691, 697 (Tex. 1955); Rooms With a View, Inc. v. Private Nat'l Mortgage Ass'n, 7 S.W.3d 840, 845 (Tex. App.-Austin 1999, pet. denied), cert. denied sub nom. Nat'l Ass'n of Remodeling Indus. v. Rooms With a View, Inc., 531 U.S. 826 (2000); see also Tex. Gov't Code Ann. § 311.021(1) (Vernon 1998) (stating that legislature is presumed to have intended to comply with state and federal constitutions).

We conclude that section 264.006 authorizes the County to transfer funds to CASA, K'Star, Big Brothers and Sisters, and Families & Literacy, Inc. to the extent these nonprofit organizations provide services to and support children who need protection and care, as section 264.006 contemplates. We assume that the County has determined that each of these contractual transfers of public funds serves the public purpose authorized by section 264.006 and that each transaction is adequately controlled by the County to ensure that the public purpose is accomplished. Whether in any particular case the County has adequate controls in place, which may include receiving adequate consideration from the nonprofit entity, is a question for the county commissioners court to determine in the first instance. See Tex. Att'y Gen. Op. No. JM-1039 (1989) at 7 (concluding that county commissioners court may determine adequacy of consideration in contract with water district).

The County's contract with Kids' Advocacy Place, Inc. relies upon the County's authority under sections 264.402 and 264.403 of the Family Code. Under these sections, a county may execute with representatives of the Texas Department of Protective and Regulatory Services, with county and municipal law enforcement agencies that investigate child abuse, with the county or district attorney's office which routinely prosecutes child-abuse cases, and with any other interested governmental entity a memorandum of understanding to establish and participate in a children's advocacy center. See Tex. Fam. Code Ann. §§ 264.402,.403 (Vernon 1996). A center's duties relate to intervening in cases of suspected child abuse and to coordinating the various governmental entities that may be involved in inves-

tigating or prosecuting a child-abuse case:

> A center shall:
>
> (1) assess victims of child abuse and their families to determine their need for services relating to the investigation of child abuse;
>
> (2) provide services determined to be needed under Subdivision (1);
>
> (3) provide a facility at which a multidisciplinary team appointed under Section 264.406 can meet to facilitate the efficient and appropriate disposition of child abuse cases through the civil and criminal justice systems; and
>
> (4) coordinate the activities of governmental entities relating to child abuse investigations and delivery of services to child abuse victims and their families.

Id. § 264.405. In the memorandum of understanding, all participating entities agree to cooperate in, among other things, "developing a... team approach to investigating child abuse" and "reducing, to the greatest extent possible, the number of interviews required of a victim of child abuse." Id. § 264.403(b). You do not contend that sections 264.402 and 264.403 are unconstitutional, and we consequently presume that they are consistent with the constitution.

We conclude that sections 264.402 and 264.403 authorize the County to transfer county funds to Kids' Advocacy Place, Inc. to accomplish the statutory purposes. We assume that the County has executed the requisite memorandum of understanding, that the County has determined that the expenditure to Kids' Advocacy Place, Inc. serves the public purpose authorized by sections 264.402 and 264.403, and that the County has determined that it has in place sufficient controls to ensure that the public purpose will be accomplished.

We have already determined that, to the extent the County's transfer of funds to Families & Literacy, Inc. provides for "services to and support of children in need of protection and care," section 264.006 of the Family Code authorizes the County to make the transfer. The County's contract with Families & Literacy, Inc. cites authority in addition to section 264.006, however. See Families & Literacy, Inc. Contract at 1. First, the contract cites county courts' authority "under various provisions of the Texas Family Code to order family studies, order parent education, and pursue other matters designed to aid the courts in the exercise of their duties regarding the welfare of children." See id. While the contract does not list particular sections of the Family Code, we note, as an example, that section 107.051 of the Family Code permits a court with jurisdiction in a suit affecting the parent-child relationship to order "a social study into the circumstances and condition of the child and of the home of any person requesting managing conservatorship or possession of the child." Tex. Fam. Code Ann. § 107.051(a) (Vernon Supp. 2001). Second, the contract cites county courts' authority under article 42.12, section 11(c) of the Code of Criminal Procedure, which directs a county court judge who places a capable defendant on community supervision to require the defendant to attain a specified level of educational skill. Families & Literacy, Inc. Contract at 1; see Tex. Code Crim. Proc. Ann. art. 42.12, § 11(c) (Vernon Supp. 2001).

The County's contract with the Hill Country Crisis Council cites, as authority for the county's contracting power, section 81.007 of the Family Code, which makes the county or district attorney's office responsible to file for County residents applications for protective orders in situations involving family violence, as well as section 51.011 of the Human Resources Code, which authorizes the Department of Human Services to finance family-violence shelters with public grants. See Tex. Fam. Code Ann. § 81.007(a) (Vernon Supp. 2001); Tex. Hum. Res. Code Ann. § 51.011(a) (Vernon 2001); Hill Country Crisis Council Contract; see also Act of Mar. 29, 2001, 77th Leg., R.S., ch. 6, § 5, 2001 Tex. Sess. Law Serv. 8, 9 (to be codified as an amendment to Tex. Hum. Res. Code Ann. § 51.003) (authorizing Department of Human Services to contract for services with family violence centers).

To the extent the contracts with Families & Literacy, Inc. and Hill Country Crisis Council rely on statutes other than section 264.006 of the Family Code, the statutes cited do not provide express authority for the County's transfer of funds. Nor, in our opinion, do these statutes implicitly authorize a county to grant public funds for the purposes set forth in the contracts. Nevertheless, as we have already determined, section 264.006 of the Family Code appears to authorize a transfer of funds to Families & Literacy, Inc., at least to the extent that the organization provides services to and supports children who need protection and care. See Tex. Fam. Code Ann. § 264.006 (Vernon Supp. 2001); supra at p. 5. Additionally, we believe that section 264.006 authorizes the County to transfer funds to Hill Country Crisis Council to the extent Hill Country Crisis Council provides services to and supports children who need protection and care. See Tex. Fam. Code Ann. § 264.006 (Vernon Supp. 2001).

SUMMARY

Under article III, section 52 of the Texas Constitution, a county may not grant public funds to a private nonprofit organization unless the county commissioners court determines that the grant serves a public purpose that the county is authorized to accomplish and the county adequately controls the transfer to ensure that the public purpose is accomplished. See Tex. Const. art. III, § 52; see also id. art. XI, § 3. Section 264.006 of the Family Code, which authorizes a county to provide services and support to children who need protection and care, empowers a county to transfer funds to a nonprofit organization that provides services and support to such children. Likewise, sections 264.402 and 264.403 of the Family Code authorize a county to participate in and provide funds to a child-advocacy center in accordance with a memorandum of understanding. A county may grant funds to a nonprofit entity to accomplish a statutorily authorized purpose, provided that the county determines the transaction will achieve a public purpose and that adequate controls are placed on the expenditure to ensure that the public purpose is accomplished.

Yours very truly,
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