ROBERT O. DAWSON
JUVENILE LAW
INSTITUTE
CASELAW UPDATE

Pat Garza
Associate Judge
386th District Court
February, 2015

ROBERT O. DAWSON

1939 - 2005

In the Matter of S.A.

Tex.App.-Texarkana, 12/31/14

THE FAILURE OF A TRIAL COURT TO PROPERLY ADMONISH A CHILD PRIOR TO HIS PLEA OR TRIAL REQUIRES AN OBJECTION FROM HIS LAWYER TO PRESERVE ERROR FOR APPELLATE REVIEW.+

TFC § 54.03(b)

At the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and his parent, guardian, or guardian ad litem:

(1) the allegations made against the child;

(2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;

(3) the child's privilege against self-incrimination;

(4) the child's right to trial and to confrontation of witnesses;

(5) the child's right to representation by an attorney if he is not already represented; and

(6) the child's right to trial by jury.+

TFC § 54.03(i)

In order to preserve for appellate or collateral review the failure of the court to provide the child the explanation required by Subsection (b), the attorney for the child must comply with Rule 33.1, Texas Rules of Appellate Procedure, before testimony begins or, if the adjudication is uncontested, before the child pleads to the petition or agrees to a stipulation of evidence.+

Texas Rules of Appellate Procedure
Rule 33.1(a)(1)(A)

THIS RULE REQUIRES THAT A *"TIMELY REQUEST, OBJECTION, OR MOTION"* BE MADE TO THE TRIAL COURT THAT:

(A) states the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context;

In the Matter of B.S.P.
Tex.App.-San Antonio, 10/29/14

THREATS BY VICTIM'S MOTHER REGARDING SEXUAL ASSAULT ALLEGATIONS WHILE HOLDING A BAT AND PROMISING TO NOT CALL POLICE, THEN CALLING THEM, DID NOT MAKE JUVENILE'S STATEMENT INVOLUNTARY.

In the Matter of X.J.T.
Tex.App.—Fort Worth, 2/27/14

JUVENILE STATEMENT TAKEN IN MISSISSIPPI IN VIOLATION OF FAMILY CODE RULED ADMISSIBLE WHERE JUVENILE FAILED TO MEET HIS BURDEN TO SHOW A CAUSAL CONNECTION BETWEEN ANY VIOLATION OF TEXAS OR MISSISSIPPI LAW AND HIS STATEMENT. +

TFC § 51.095(b)(2)(B)(i)(ii)

(b) This section and Section 51.09 do not preclude the admission of a statement made by the child if:

(2) without regard to whether the statement stems from interrogation of the child under a circumstance described by Subsection (d), the statement is:

(B) recorded by an electronic recording device, including a device that records images, and is obtained:

(i) in another state in compliance with the laws of that state or this state; or

(ii) by a federal law enforcement officer in this state or another state in compliance with the laws of the United States.

Ex Parte Ragston
Tex.App.—Fort Worth, 2/27/14

A JUVENILE CHARGED WITH A CAPITAL FELONY IS "PER SE BAILABLE" AND MUST HAVE BAIL SET.

In the Matter of D.V.W.
Tex.App.-Texarkana, 1/14/15

IN A DETERMINATE SENTENCE TRANSFER HEARING, THERE WAS NO ABUSE OF DISCRETION WHERE THERE WAS "SOME EVIDENCE" IN THE RECORD TO SUPPORT THE TRIAL COURT'S DECISION.

In the Matter of J.M.S.M.
Tex.App.-Corpus Christi, 10/2/14

THE DETERMINATE SENTENCE TRANSFER HEARING IS A "SECOND CHANCE HEARING" AND IS NOT PART OF THE GUILT/INNOCENCE DETERMINATION, AS A RESULT, EXTENSIVE DUE PROCESS REQUIREMENTS OF AN ACTUAL TRIAL ARE NOT REQUIRED.+

Release or Transfer Hearing
TFC § 54.11(d)

At a hearing under this section the court may consider written reports and supporting documents from probation officers, professional court employees, professional consultants, or employees of the Texas Juvenile Justice Department, in addition to the testimony of witnesses.

Ex Parte Criss
Tex.Crim.App., 12/17/14

SEVENTEEN YEAR OLD WHO WAS CONVICTED OF CAPITAL MURDER AND AUTOMATICALLY SENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE GETS A NEW PUNISHMENT HEARING TO DECIDE BETWEEN A SENTENCE OF LIFE WITH PAROLE AND LIFE WITHOUT PAROLE.

In the Matter of M.O.
Tex.App.-El Paso, 12/3/15

TRIAL COURTS ARE NOT REQUIRED TO DETERMINE THAT NO COMMUNITY-BASED INTERMEDIATE SANCTION ARE AVAILABLE TO COMMIT A JUVENILE TO TJJD, ONLY THAT REASONABLE EFFORTS HAVE BEEN MADE TO PREVENT THE JUVENILE'S REMOVAL FROM HIS HOME. +

TFC § 54.04(i)

If the court places the child on probation outside the child's home or commits the child to the Texas Youth Commission, the court:

(1) shall include in its order its determination that:

(A) it is in the child's best interests to be placed outside the child's home;

(B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and

(C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation;

In the Matter of C.A.G.
Tex.App.—San Antonio, 7/9/14

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY MODIFYING THE JUVENILE'S DISPOSITION FROM PROBATION TO CONFINEMENT IN A TJJD FACILITY WHERE THE EVIDENCE WAS SUFFICIENT FOR COMMITMENT PRIOR TO THE DELAY IN THE DISPOSITION. +

"You mess up, you're going to TJJD."

In the Matter of J.M.
Tex.App.—Dallas, 5/22/14

THERE WAS NO ABUSE OF DISCRETION WHERE THE TRIAL COURT DELAYED THE DISPOSITION FOR A THIRTY-DAY TRIAL PERIOD AT HOME BEFORE DECIDING THAT PLACEMENT WAS IN THE CHILD'S BEST INTEREST.

In the Matter of J.G.M.
Tex.App.-Corpus Christi, 1/8/15

WHEN A JUVENILE VOLUNTARILY TAKES THE STAND TO TESTIFY IN HIS OWN DEFENSE, HE WAIVES HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

In the Matter of A.J.R.P.
Tex.App.–San Antonio, 7/16/14

THE TEXAS PENAL CODE DOES NOT REQUIRE THAT THE VICTIM OF AN AGGRAVATED ROBBERY BY THREAT, ACTUALLY HAVE TO PERCEIVE THE THREAT, ONLY THAT THERE WAS EVIDENCE OF A THREAT.

In the Matter of V.G.V., Jr.
Tex.App.—Austin, 4/1/14

VIDEOTAPED STATEMENTS TO POLICE BY CO-DEFENDANTS, USED IN COURT AGAINST THE JUVENILE, WAS NOT CONSIDERED ACCOMPLICE-WITNESS TESTIMONY.

In the Matter of X.J.T.
Tex.App.-- Fort Worth, 2/27/14

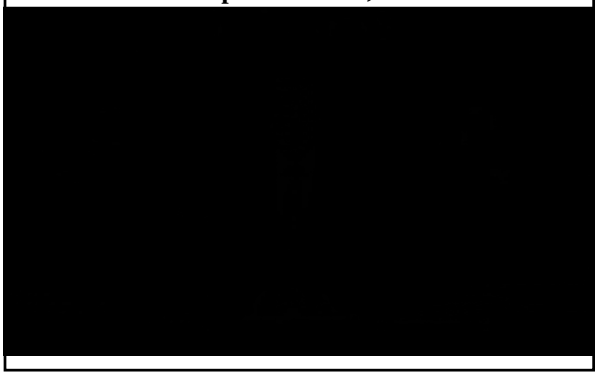
THE JUDICIAL PRONOUNCEMENT IN THE COMMITMENT ORDER OF A DEADLY WEAPON FINDING, WAS CONSIDERED SUFFICIENT TO COMPLY WITH THE FAMILY CODE AND NO ORAL PRONOUNCEMENT BY THE COURT WAS NECESSARY.

Burt v. State
Tex.Crim.App., 10/15/14

THERE ARE THREE LIMITATIONS ON A RESTITUTION ORDER:

(1) IT MUST BE ONLY FOR THE OFFENSE FOR WHICH THE DEFENDANT IS CRIMINALLY RESPONSIBLE;
(2) IT MUST BE ONLY FOR THE VICTIM OR VICTIMS OF THE OFFENSE FOR WHICH THE DEFENDANT IS CHARGED; AND
(3) THE AMOUNT MUST BE JUST AND SUPPORTED BY A FACTUAL BASIS WITHIN THE RECORD.

Riley v. California
U.S. Supreme Court, 6/25/14



Riley v. California
U.S. Supreme Court, 6/25/14

WITH A FEW EXCEPTIONS, THE POLICE MAY NOT, WITHOUT A WARRANT, SEARCH DIGITAL INFORMATION ON A CELL PHONE SEIZED FROM AN INDIVIDUAL WHO HAS BEEN ARRESTED, SIMPLY BECAUSE HE HAS BEEN ARRESTED.+

Search of Cell Phones at School
Reasonable Grounds

1. **Valid Possession of Phone**

2. **Must be Justified at Inception**
   Current contents of phone will lead to violation of school rules or the law.

3. **Reasonable in Scope**
   Search of phone's contents limited by information received.

4. **Not to be used by law enforcement to circumvent probable cause or a warrant.**

In the Matter of J.B.
Tex.App.-Hous. (1 Dist.), 12/11/14

TRIAL COURT DID NOT ERR IN ACCEPTING JUVENILE'S PLEA WHERE TRIAL COURT ACCEPTED PLEA BASED ON AN ERRONEOUS BELIEF THAT AGGRAVATED ROBBERY COULD BE COMMITTED WITH A TOY GUN.

Palacios v. State,
Tex.App.-Corpus Christi, 7/31/14

EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR OFFICIAL OPPRESSION BY JP, WHERE EVIDENCE SHOWED THAT JP INTERPRETED THE LAW DIFFERENT FROM THE STATE AND FROM WITNESSES, AND AS A RESULT, ACTED WITH A REASONABLE BELIEF THAT HER COURT HAD BEEN GRANTED JURISDICTION TO DO THE COMPLAINED-OF ACTS.

In the Matter of S.A. (2nd)
Tex.App.-Texarkana, 12/31/14

A PARENT TESTIFYING AGAINST A CHILD DOES NOT WARRANT A "SUA SPONTE" APPOINTMENT OF A GUARDIAN AD LITEM BY THE COURT WHERE THERE WAS NOTHING IN THE RECORD TO SUGGEST THAT THE PARENTS WERE INCAPABLE OR UNWILLING TO MAKE DECISIONS IN THE CHILD'S BEST INTEREST.

Womack v. State
Tex.App.-Tyler, 9/17/14

A JUVENILE ADJUDICATION CANNOT BE USED FOR ENHANCEMENT UNLESS THE JUVENILE WAS A CHILD UNDER THE FAMILY CODE AND THE CONDUCT OCCURRED ON OR AFTER JANUARY 1, 1996.

In the Matter of E.A.
Tex.App.-El Paso, 8/20/14

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING JUVENILE'S MOTION FOR MISTRIAL BECAUSE THERE WAS NO SHOWING THAT THE SPECTATOR (ACCUSED OF "MAD-DOGGING" THE JURY) ENGAGED IN ANY CONDUCT OR EXPRESSION THAT WOULD HAVE INTERFERED WITH THE JURY'S VERDICT AND DEPRIVED THE JUVENILE OF DUE PROCESS OF LAW.

Moore v. State
Tex.App.-Hous. (1 Dist.), 7/24/14

IN A DISCRETIONARY TRANSFER TO ADULT COURT, A HEAVY CASELOAD AND A MISTAKE BY LAW ENFORCEMENT AS TO THE JUVENILE'S AGE, WAS NOT CONSIDERED A REASON "BEYOND THE STATE'S CONTROL." LAW ENFORCEMENT IS CONSIDERED WITHIN THE STATE'S CONTROL UNDER TFC §54.02(j)(4)(A).

Moon v. State
Tex.Crim.App., 12/10/13
On state's petition for discretionary review from the First Court of Appeals, Harris County

IN A DISCRETIONARY TRANSFER TO ADULT COURT, A FINDING BASED ON THE SERIOUSNESS OF THE OFFENSE ALONE IS NOT ENOUGH FOR TRANSFER.

Criminal Court of Appeals

"In order to justify the broad discretion invested in the juvenile court, that court should take pains to "show its work," as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable…"

Criminal Court of Appeals

"The juvenile court did not "show its work" in the transfer order... The only reason specifically stated on the face of the transfer order… is that the offense alleged is a serious one. The only fact specified in the written transfer order… is that the offense… is an offense against the person of another.

… a waiver of juvenile jurisdiction based on this particular reason, fortified only by this fact, constitutes an abuse of discretion."

Criminal Court of Appeals

"…this legislative purpose is not well served by a transfer order so lacking in specifics that the appellate court is forced to speculate as to the juvenile court's reasons for finding transfer to be appropriate or the facts the juvenile court found to substantiate those reasons. Section 54.02(h) requires the juvenile court to do the heavy lifting in this process if it expects its discretionary judgment to be ratified on appeal. By the same token, the juvenile court that shows its work should rarely be reversed."

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CASELAW UPDATE

28th Annual Juvenile Law Conference
ROBERT O. DAWSON JUVENLE LAW INSTITUTE
February 16 - 18, 2015
The Worthington Renaissance Hotel
Fort Worth, Texas

Pat Garza
Associate Judge
386TH District Court
Bexar County, Texas
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PAT GARZA

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235 E. Mitchell St.
San Antonio, Texas 78210

EDUCATION

Board Certified – Juvenile Law – by the Texas Board of Legal Specialization
1980: Admitted to the Texas Bar.
1977 - 1980: Jurist Doctor, South Texas College of Law, Houston, Texas.
1977: B.A., University of Texas at Austin, Texas.

PROFESSIONAL

2009 – 2015: Texas Board of Legal Specialization Juvenile Law Exam Commissioner
Life Fellow of the Texas Bar Foundation
Editor – State Bar Juvenile Law Section Report.
2007 Franklin Jones Best Continuing Legal Education Article Award by the State Bar College Board of Directors. Police Interactions with Juveniles.
2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation. Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent.
1999 - Present, Juvenile Court Associate Judge/Referee, 386th Judicial District Court.
1997 - 1999, Juvenile Court Associate Judge/Referee, 73rd Judicial District Court.
1989 - 1997, Juvenile Court Master (Associate Judge)/Referee, 289th Judicial District Court.
Fall 1997, Adjunct Professor of Law (Juvenile Law), St. Mary's Law School, San Antonio, Texas.

SPEECHES AND PRESENTATIONS

- Juvenile Law: Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Third Annual Juvenile Law Seminar, Sponsored by the San Antonio Bar Association, San Antonio, Texas, October, 2014.
- Caselaw Update; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
- Arrest, Confessions, and Search and Seizure; Fifth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2014.
- Caselaw Updates; Nuts and Bolts of Juvenile Law, Sponsored by the Texas Juvenile Justice Department and the Juvenile Law Section of the State Bar of Texas, August, 2014.
- Police Interactions with Juveniles; Nuts and Bolts of Juvenile Law, Sponsored by the Texas Juvenile Justice Department and the Juvenile Law Section of the State Bar of Texas, August, 2014.
- Juvenile Law; 2014 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2014.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 51st Annual Criminal Law Institute, Sponsored by the San Antonio Bar Association, San Antonio, Texas, April, 2014.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 27th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2014.
- Caselaw Updates; 27th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, Corpus Christi, Texas, February, 2014.
- Caselaw Update; Fourth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2013.

- Arrest, Confessions, and Search and Seizure; Fourth Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2013.
- Juvenile Law; 2013 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2013.
- Caselaw Updates; Juvenile Delinquency Boot Camp and Advanced Topics, Sponsored by the Juvenile Justice Committee of the Dallas Bar Association, Dallas, Texas, June, 2013.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 26th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2013.
- Caselaw Updates; 26th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2013.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; Juvenile Law CLE, Sponsored by the San Antonio Bar Association, San Antonio, Texas, September, 2012.
- Arrest, Confessions, and Search and Seizure; Third Annual Juvenile Law Conference, Sponsored by the Juvenile Court Judges of Harris County and the Juvenile Law Section of the Houston Bar Association, Houston, Texas, September, 2012.
- Juvenile Law; 2012 State Bar College Summer School, Sponsored by the Texas State Bar College, Galveston, Texas, July, 2012.
- Police Interactions with Juveniles – Arrest, Confessions, and Search and Seizure; 25th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2012.
- Caselaw Updates; 25th Annual Juvenile Law Conference, Sponsored by the Juvenile Law Section of the State Bar, San Antonio, Texas, February, 2012.

PUBLICATIONS

- Riley v. California and Cell Phone Searches in School. Texas Juvenile Law Reporter, Volume 28, Number 3, September, 2014. An article discussing the Supreme Court's holding in Riley v. California and its impact on school cell phone searches.
- "Any Detectable Amount of Alcohol": Taking a Breath or Blood Specimen of a Juvenile. Texas Bar Journal, Volume 75, Number 2, February, 2012. A legal article analyzing the taking of a Breath or Blood Specimen of a Juvenile.
- Police Interactions with Juveniles. 20th Annual Juvenile Law Conference Article, February, 2007. This article won the Franklin Jones Best Continuing Legal Education Article for 2007, as voted on by the State Bar College Board of Directors, February 2, 2008.
- Juvenile Legislation. The San Antonio Lawyer, Sept–October 2007. An article hi-lighting the 2007 legislative changes in juvenile law.
- TYC and Proposed Legislation. State Bar Section Report Juvenile Law, Volume 21, Number 2, June 2007. An article discussing the proposed juvenile legislative changes from the 2007 legislative session.
- Mandatory Drug Testing of All Students, It's Closer Than You Think. State Bar Section Report Juvenile Law, Volume 20, Number 3, September 2006. An article discussing the Supreme Court's decisions on mandatory drug testing in schools.
- Juvenile Confession Law: Every Child Needs a Professor Dumbledore, Or Maybe Just a Parent. The San Antonio Lawyer, July–August 2003. An article discussing the requirements of parental presence during juvenile confessions. This article received a 2004 Outstanding Bar Journal Honorable Mention Award by the Texas Bar Foundation.
- Juvenile Law: 2003 Legislative Proposals. The San Antonio Defender, Volume IV, Issue 9, April 2003. An early look at proposed Juvenile Legislation for this 2003 session.
- A Synopsis of Earls. The San Antonio Defender, Volume IV, Issue 9, April 2003. A synopsis of the Supreme Court's decision in *Board of Education v. Earls* and the random drug testing of students involved in extracurricular activities.
- Police Interactions with Juveniles and Their Effect on Juvenile Confessions. State Bar Section Report Juvenile Law, Volume 16, Number 2, June 2002. An article regarding the requirements for law enforcement during the taking of a confession.

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REVIEW OF RECENT CASES

APPEALS—

In the Matter of S.A., MEMORANDUM, No. 06-14-00055-CV, 2014 WL 7442507, Tex.Juv.Rep. Vol. 29, No. 1 ¶ 15-1-4B (Tex.App.-Texarkana, 12/31/14).

FAILURE OF TRIAL COURT TO PROPERLY ADMONISH CHILD PRIOR TO PLEA OR TRIAL REQUIRES AN OBJECTION TO PRESERVE ERROR FOR APPELLATE REVIEW.

Facts: In the first five months of 2014, fifteen-year-old Sandra had, let's say, a tumultuous relationship with her sixty-five-year-old father, marked by three documented instances in which Sandra assaulted or injured him. The first two instances resulted in Sandra's probation.

The final confrontation occurred the afternoon of May 10, 2014. That afternoon, Sandra was listening to music on a cellular telephone while she sunbathed outside her home. Wanting to hear different music, Sandra went inside to download more music from the computer. Since the conditions of Sandra's existing probation forbad her to use the computer, her father sought to stop her. Her father, who had broken his foot several days before, stumbled as he tried to get between Sandra and the computer. As he sought to stop her, he grabbed the base of the back of her neck. At about the same time, Sandra stomped his broken foot, which was in a cast, on top and at the ankle, and kicked his shin. Her mother then restrained her as her father tried to get out of the door. As she was being restrained, she slung her telephone with its charger, and it struck and cut her father's arm.

At Sandra's June 12, 2014, hearing, Sandra's mother appeared at trial, sat at the counsel table with Sandra, and was ultimately called as a witness by the State. Sandra's mother's testimony generally confirmed the testimony of Sandra's father—that Sandra had assaulted him on the occasion in question.

On appeal, Sandra complains that the trial court did not appoint a guardian ad litem because her mother was incapable of making decisions in her best interest. Sandra asserts that her mother had an inherent conflict of interest because she was the victim's wife, a witness to the incident, and a key witness for the State. At the hearing below, Sandra did not ask for a guardian ad litem to be appointed or point to any conflict of interest her mother may have had. Nevertheless, Sandra maintains that the right to a guardian ad litem is a "bailable only" right and that the right to a guardian ad litem is on par with the right to counsel. She cites no authority, however, and we have found none, that has so held when a parent is present at the hearing.

Held: Affirmed

Memorandum Opinion: Sandra also complains that the trial court did not admonish her regarding her right to confront witnesses. Sandra is correct in asserting that the trial court had a duty to admonish her regarding her right to confront witnesses. The trial court is obligated, at the beginning of the hearing, to explain to the child and her parent, inter alia, "the child's right ... to confrontation of witnesses." TEX. FAM.CODE ANN. § 54.03(b)(4) (West 2014). The failure of a trial court to give any of the admonishments in Section 54.03 is error. See In re C.O.S., 988 S.W.2d 760, 763 (Tex.1999). To preserve the error for appeal, however, "the failure of the court to provide the child the explanation required by Subsection (b), the attorney for the child must comply with Rule 33.1, Texas Rules of Appellate Procedure, before testimony begins.... " TEX. FAM.CODE ANN. § 54.03(i) (West 2014) (emphasis added); In re M.D.T., 153 S.W.3d 285, 288–89 (Tex.App.—El Paso 2004, no pet.). Rule 33.1 of the Texas Rules of Appellate Procedure requires a "timely request, objection, or motion" be made to the trial court that

(**A) states the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; TEX.R.APP.P. 33.1(a)(1)(A).**

Conclusion: Neither Sandra nor her trial counsel complained about any deficiency in the statutory admonishments before testimony began. Thus, we hold that Sandra failed to preserve any error related to the failure of the trial court to admonish her on her right to confront witnesses. We affirm the judgment of the trial court.

COLLATERAL ATTACK

In re D.A.B., MEMORANDUM, No. 12—14—00147—CV, 2014 WL 2609722, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-4 (Tex.App.—Tyler, 6/11/14).

TEXAS COURT OF APPEALS LACKS ORIGINAL JURISDICTION TO ISSUE A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM HIS CONVICTION FOR AGGRAVATED ROBBERY BECAUSE IT IS NOT A CIVIL CASE.

Facts: On July 15, 2008, D.A.B., a juvenile, was detained on a charge of aggravated robbery. He was subsequently prosecuted and convicted for the offense and sent to the Texas Youth Commission. Later, he was transferred to the Texas Department of Criminal Justice–Institutional Division, where he is presently incarcerated.

On February 7, 2013, D.A.B. filed a petition for writ of habeas corpus in the juvenile court alleging new evidence of actual innocence and prosecutorial misconduct. The juvenile court conducted an evidentiary hearing, and eleven months later, forwarded findings of fact and conclusions of law to the Texas Court of Criminal Appeals. That court dismissed the writ for want of jurisdiction. The juvenile court then directed the Angelina County District Clerk to forward the court's findings of fact and conclusions of law, along with the reporter's record of the evidentiary hearing, to the Texas Supreme Court. According to D.A.B. that court is "holding the Writ filed [on] April 12, 2014]" pending this court's disposition in the instant proceeding.

Held: Dismissed for want of jurisdiction

Memorandum Opinion: A person confined pursuant to an adjudication and disposition in juvenile court is entitled to seek habeas corpus relief in the appropriate court. See TEX. FAM.CODE ANN. § 56.01(o) (West 2014). However, the circumstances under which this court has original habeas jurisdiction are narrow. Specifically, this court has original jurisdiction to issue a writ of habeas corpus only when it appears that a person is restrained in his liberty "by virtue of an order, process, or commitment issued by a court or judge because of the violation of an order, judgment, or decree previously made, rendered, or entered by the court or judge in a civil case." See TEX. GOV'T CODE ANN. § 22.221(d) (West 2004).

We do, however, have jurisdiction to review, by direct appeal, a trial court's denial of a juvenile's postconviction petition for writ of habeas corpus. See generally, e.g., In re M.P.A., No. 03–08–00337–CV, 2010 WL 2789649 (Tex.App.-Austin July 14, 2010) (mem.op.), rev'd in part and remanded on other grounds, 364 S.W.3d 277 (Tex.2012); In re J.W.A., No. 03–03–00464–CV, 2005 WL 2574024 (Tex.App.-Austin Oct. 13, 2005, no pet.). D.A.B. did not file a notice of appeal in this case. Moreover, D.A.B.'s habeas petition does not meet the requirements for a notice of appeal. See TEX.R.APP. P. 25.1. But even if we could construe the petition as a notice of appeal, we cannot determine from the documents provided that an appealable order, such as an order denying habeas relief, has been signed. See TEX.R.APP. P. 25.1(d)(2) (requiring that notice of appeal state date of judgment or order appealed from).

Conclusion: This court lacks original jurisdiction to issue a writ of habeas corpus under the facts presented here. Moreover, D.A.B.'s habeas petition cannot be construed as a notice of appeal. Accordingly, we dismiss D.A.B.'s petition for writ of habeas corpus. See TEX. GOV'T CODE ANN. § 22.221(d).

CONFESSIONS—

In the Matter of B.S.P., MEMORANDUM, No. 04-14-00067-CV, 2014 WL 5464072, Tex.Juv.Rep. Vol.28, No. 4 ¶ 14-4-6 (Tex.App.-San Antonio, 10/29/14).

THREATS BY VICTIM'S MOTHER REGARDING SEXUAL ASSAULT ALLEGATIONS WHILE HOLDING A BAT AND PROMISING TO NOT CALL POLICE, THEN CALLING THEM, DID NOT MAKE JUVENILE'S STATEMENT INVOLUNTARY.

Facts: On June 17, 2012, at around 11:00 p.m., the complainant, who was eleven years old, told his mother that he had been sexually assaulted by B.S.P., who was sixteen years old. The complainant and his mother were living with B.S.P. and his family. The assault had occurred two days earlier. After hearing the details of the assault, the complainant's mother decided to talk to B.S.P.'s mother about the assault. After learning of the complainant's allegation, B.S.P.'s mother awakened B.S.P., who was asleep in his bedroom. B.S.P. and his mother then went to the dining room to talk to the complainant's mother, who asked B.S.P. if he knew anything about the assault and if he had in fact assaulted the complainant.

Witnesses offered somewhat different accounts of the exchange that took place between the complainant's mother and B.S.P. Nevertheless, it was undisputed that, at some point, B.S.P. asked the complainant's mother whether she would call the police if he told her what happened, and the complainant's mother said she would not call the police. B.S.P. then stated, "Okay, yeah, I did. I did it." Thereafter, both B.S.P.'s grandmother and the complainant's mother called 9–1–1 and the police were dispatched to the residence to investigate.

At the suppression hearing, B.S.P. challenged the admissibility of his statement, "Okay, yeah, I did. I did it." B.S.P. argued his statement should be suppressed because it was involuntary. The trial court disagreed, explained its ruling on the record, and denied the motion to suppress. Written findings of fact were not requested or filed. The matter was subsequently tried to a jury, which was instructed that it should not consider B.S.P.'s statement unless it believed beyond a reasonable doubt that the statement was freely and voluntarily made. The jury found that B.S.P. engaged in delinquent conduct as alleged by the State. B.S.P. appealed.

Held: Affirmed.

Memorandum Opinion: Juvenile proceedings are quasi-criminal in nature. Therefore, when analyzing juvenile proceedings, courts sometimes consider analogous cases in similar adult proceedings. At a suppression hearing, the burden of proof is on the State to prove by a preponderance of the evidence that the challenged statement was given voluntarily. In considering the voluntariness of a juvenile's statement, we examine the totality of the circumstances. If the circumstances show the juvenile was threatened, coerced, or promised something in exchange for the confession, the confession is involuntary.

B.S.P. first argues his statement, "Okay, yeah, I did. I did it," was involuntary because it was induced by a promise from the complainant's mother that she would not call the police. B.S.P. acknowledges that most cases challenging the voluntariness of statements or confessions involve statements made to police officers or their agents. However, B.S.P. points out that the voluntariness of a statement or confession may also be challenged when it is induced by a promise made by a person other than a police officer, provided that the person is a person in authority. B.S.P. maintains that his statement to the complainant's mother was involuntary because it was induced by her promise not to call the police.

In order for the statement of an accused to be involuntary because it was induced by a promised benefit, the promise must: (1) be of some benefit to the defendant; (2) be positive; (3) be made or sanctioned by a person in authority; and (4) be of such character as would be likely to influence the defendant to speak untruthfully. As to the third factor, whether the person making the promise is a person in authority, courts consider the actual relationship between the parties as it appeared to the person making the statement. As to the fourth factor, whether the promise was of such character as would be likely to influence the defendant to speak untruthfully, courts consider whether the circumstances of the promise made the defendant inclined to admit to a crime he had not committed. "[I]f the influence applied was such as to make the defendant believe his condition would be bettered by making a confession,

true or false, then the confession should be excluded." Fisher, 379. S.W.2d at 902.

Even if we assume that the first two factors described in Fisher were satisfied here, the third and fourth factors were not. The evidence showed that the complainant's mother was a family friend and a guest in the house belonging to B.S.P.'s family. At the time B.S.P. made the statement, B.S.P. was seated at the table in his own home. His mother and grandmother were seated next to him. B.S.P. initially refused to answer the questions posed by the complainant's mother and later expressed anger toward her. This evidence shows that, as it appeared to B.S.P., the complainant's mother was not a person in authority. Moreover, given the circumstances under which the promise was made, including the presence of others who could have called the police, it was unlikely to have influenced B.S.P. to speak untruthfully. For these reasons, we conclude that B.S.P.'s statement was not involuntary because it was induced by a promised benefit.

B.S.P. next argues his statement was involuntary because he was threatened or coerced by the complainant's mother. In support of this argument, B.S.P. cites to article 38.22, section 6, of the Texas Code of Criminal Procedure, which provides, in part, "In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions." TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (West Supp.2014). Fact scenarios raising a state-law claim of voluntariness have included the following: (1) the suspect was ill and on medication and that fact may have rendered his confession involuntary; (2) the suspect was mentally retarded and may not have knowingly, intelligently, and voluntarily waived his rights; (3) the suspect lacked the mental capacity to understand his rights; (4) the suspect was intoxicated, and he did not know what he was signing and thought it was an accident report; (5) the suspect was confronted by the brother-in-law of his murder victim and beaten; and (6) the suspect was returned to the store he broke into for questioning by several persons armed with six-shooters. Youth, intoxication, mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible under Article 38.22. However, they are factors that a jury, armed with a proper instruction, is entitled to consider.

According to B.S.P., his "youth, his mental impairment, and the effects of his prescription medication, and [the complainant's mother]'s severely threatening demeanor and language, followed by her promise not to call the police, coalesced into a forced confession." In making this argument, B.S.P. points to the evidence regarding his emotional and mental condition, his medical history, and the complainant's mother's behavior during the confrontation.

As to B.S.P.'s emotional and mental condition, a psychologist stated in a report that B.S.P. "presents as much younger than his stated age of 17." As to B.S.P.'s medical history, B.S.P.'s mother testified that B.S.P. suffered a brain injury at birth. As a result, B.S.P. was placed in special education-type classes. B.S.P. took medication for his brain injury and a sedative at night to help him sleep. B.S.P. also experienced seizures when he was fourteen and this caused him to regress developmentally. However, B.S.P. was not mentally retarded. B.S.P. attended school on a regular basis and knew right from wrong.

As to the complainant's mother's behavior during the confrontation, B.S.P.'s grandmother testified that the complainant's mother was extremely angry, very hostile, and her whole presence was threatening. The complainant's mother was screaming at B.S.P. and telling him she was "going to fucking kill [him]." She was holding a bat. B.S.P. was extremely disoriented because he had taken sleeping pills that night and was awakened from a drug-induced sleep. After B.S.P. woke up, he was "scared to death" and "terrorized" by the complainant's mother. However, even according to B.S.P.'s grandmother, the complainant's mother never hit or punched B.S.P., and she never pushed him to the ground. At one point, when B.S.P. came around the table to where the complainant's mother was standing, the complainant's mother turned, bumped into B.S.P., and he lost his balance and fell.

On the other hand, the complainant's mother testified that she was not holding a bat when she confronted B.S.P. She denied that she verbally or physically threatened B.S.P. She further denied that she shoved or hit B.S.P. She touched B.S.P.'s shirt one time. This happened when she lunged across the table and grabbed B.S.P.'s shirt. In response, B.S.P. pulled away from her and fell off the bench where he was sitting. However, this happened after B.S.P. admitted to the sexual assault.

At a suppression hearing, the trial court is the sole trier of fact. It may choose to believe or disbelieve any or all of a witness's testimony.

Conclusion: In light of the inconsistent evidence regarding B.S.P.'s impairments and the complainant's mother's behavior, the trial court acted within its discretion in finding that B.S.P.'s statement was not involuntary as a matter of law because of threats or coercion. Furthermore, the jury was later instructed that it should not consider B.S.P.'s statement unless it believed beyond a reasonable doubt that the statement was freely and voluntarily made. We hold that the trial court did not abuse its discretion in denying the motion to suppress. The trial court's judgment is affirmed.

In the Matter of X.J.T., MEMORANDUM, No. 02-13-00176-CV, 2014 WL 787832, Tex.Juv.Rep. Vol.28, No. 2 ¶ 14-2-1A (Tex.App.—Fort Worth, 2/27/14).

JUVENILE STATEMENT TAKEN IN MISSISSIPPI IN VIOLATION OF FAMILY CODE RULED ADMISSIBLE WHERE JUVENILE FAILED TO MEET HIS BURDEN TO SHOW A CAUSAL CONNECTION BETWEEN ANY VIOLATION OF TEXAS OR MISSISSIPPI LAW AND HIS STATEMENT.

Facts: At a hearing outside the jury's presence, Detective Edward Raynsford from the Fort Worth police department testified that he and Detective K.D. Koralewski interviewed appellant in Mississippi in January 2013 at the Leflore County Correctional Facility. An officer from the Greenwood, Mississippi police department, Sergeant Byars, was also present. They recorded a statement from appellant that was about an hour long.

Before the officers obtained the statement, a deputy brought appellant to them from the secured part of the correctional facility. Detectives Raynsford and Koralewski, and Sergeant Byars, walked with appellant into a courtroom and sat in the jury box while appellant appeared before the judge. The judge asked them to approach; Detective Raynsford showed his paperwork and placed a recorder between the judge and appellant. According to Detective Raynsford, everything that took place in the courtroom was recorded. The judge read appellant his rights. The detectives were then "shown out of the back of the courtroom" and went into an interview room. Detective Raynsford testified that the officers had taken their guns off before entering the courtroom, did not have them in the interview room, and were never armed in front of appellant.

Detective Raynsford denied threatening appellant, depriving him of anything he asked for, or making promises to elicit a statement. But he did admit that he told appellant that his brother had made some statements that Detective Raynsford believed "were true at that time" to see how appellant would react. Detective Raynsford explained that he had told appellant truthfully what he had been hearing from other people. Detective Raynsford did not remember appellant's asking for a lawyer or a parent, nor asking to terminate the interview.

Judge Palmer, the justice court judge of Leflore County, testified that his understanding when the detectives visited him was that they were in Mississippi to extradite appellant and transport him back to Texas. Judge Palmer confirmed that appellant would have been considered a juvenile under Mississippi law but that a juvenile charged with armed robbery—the Mississippi equivalent of aggravated robbery—would be treated as an adult. He testified about the initial appearance a person charged with armed robbery would face:
And at that initial appearance, they are read the charge or charges against them, whatever the matter—it may be one or several counts. And they also go through basically a checklist of rights that have to be read to that person who is charged with that felony. The judge makes sure they understand those rights.
They are asked whether or not they can afford an attorney. If they cannot afford an attorney, one is provided with—for them through the public defender's office. And also the bond is also set at that particular proceeding.

He characterized appellant's appearance before him with Detectives Raynsford and Koralewski as such an initial appearance. Judge Palmer confirmed that he read appellant his rights as set forth in exhibits 75 and 76 and that appellant initialed each box, indicating "that he understood his rights ... based upon the form."

Judge Palmer testified that neither detective made "any moves toward" appellant or threatened him while in the courtroom. He verified that the conversation was recorded. The judge did not remember the officers being in the jury box; he said he thought they were nearby but did not barricade appellant. He also did not remember whether the officers had their weapons, but he said law enforcement officers were allowed to carry weapons in the courtroom.

Judge Palmer did not recall setting a bond and thought appellant was before him only to read him his rights. It was the judge's understanding that Texas had a hold on appellant at the time. Judge Palmer also testified that it was possible appellant was being held without bond because of the hold, but he did not know if that was the case. He said during cross-examination that "based upon this situation, it was not requested a bond be set due to the fact that this young person was being extradited." However, Judge Palmer also testified that, regardless, whether appellant was being held without bond did not bear upon the voluntariness of the statement.

Appellant testified that he had been held in a holding cell with "the other grown people" and that he was transported before the judge in handcuffs and shackles. Although Detective Raynsford had denied talking to appellant outside the courtroom other than to say hello, appellant testified that the officers told him how to respond to the judge, that they needed him to sign some papers, and that they needed a statement from him. According to appellant, one of the detectives was armed in the courtroom, the other took out his gun when they came out of the courtroom, and they were both armed in the interview room. Appellant said they had a conversation outside the interview room about what appellant had been involved in and who the officers believed had been involved.

Appellant testified that he felt that he had to talk to the detectives because he had to ride all the way back to Texas with them and they had a "Class A" warrant out for him, which appellant explained meant that he was not supposed to be apprehended and that if he "moved a certain way or flinched or made an attempt to flee," the officers were supposed to shoot him for the purpose of killing him. He said his uncle had told him he heard on the police scanner that Texas had issued a shoot-to-kill warrant for him and his brother. Appellant said he initialed the forms, but he did not understand what the judge read to him. He said Detective Raynsford told him outside the interrogation room that others had told him appellant was involved "so don't BS him." These conversations were not recorded.

Appellant denied that the detectives verbally threatened him, but he also said one of the detectives unclipped his gun holster when appellant said he did not know someone in a photo the detective showed him.

After appellant testified, the State called Detective Raynsford to testify again. Detective Raynsford again denied having a weapon and testified that none of the three officers had a weapon. He did not remember appellant's being handcuffed and shackled. He denied telling appellant what to say or telling him he needed a statement from him. He stated that neither he nor the other officers unsnapped a holster and said that his own holster at the time did not have a snap. He did not know about Detective Koralewski's however. Detective Raynsford denied talking to appellant about returning to Texas, said that he would not have been the one to transport him, and stated that he had never heard of a shoot-to-kill warrant. He denied threatening appellant at any time.

Detective Koralewski testified that appellant was not shackled and handcuffed when he was brought to the officers, which surprised him. Detective Koralewski remembered the officers securing their weapons after having been in the courtroom and before going into the interview room. According to Detective Koralewski, the officers were not sitting in the jury box when the judge read appellant his rights but were about five feet away from appellant.

Detective Koralewski testified that Sergeant Byars did not accompany them into the interview room. He also did not recall anyone having a conversation with appellant before they entered the interview room. According to Detective Koralewski, appellant was not handcuffed and shackled in the interview room. He testified that none of the three unsnapped a holster and that he did not have a snap on his holster. He denied that any of the officers threatened appellant or told him it would be a long ride back to Texas.

In his first issue, appellant, who was a sixteen-year-old eleventh-grader at the time of the offenses, contends that the trial court erred by denying his motion to suppress statements he made to Texas law enforcement officers while

he was in Mississippi. Appellant argues that the statements were inadmissible because they were taken in violation of section 51.095 of the Texas family code and the State did not introduce any alternative evidence that the statements were taken in compliance with Mississippi law.

Held: Affirmed

Memorandum Opinion: Section 51.095 of the family code provides that a juvenile's statement to officers during a custodial interrogation is admissible only if it complies with a laundry list of safeguards. Tex. Fam. Code Ann. § 51.095(a), (d) (West Supp.2013). However, section 51.095(b)(2)(B)(i) provides that a statement may otherwise be admissible if it was recorded by an electronic recording device in another state in compliance with that state's laws. Id. § 51.095(b)(2)(B)(i). The State does not dispute that appellant was in custody when he made the statement at issue and that the statement was not taken in compliance with section 51.095(a). However, the State contends that appellant has pointed to no evidence showing that the statement was not taken in compliance with Mississippi law.

At the conclusion of the hearing, appellant's counsel argued that, to be admissible, appellant's recorded statement either had to be in compliance with Texas law or Mississippi law, and it complied with neither. Based on Judge Palmer's testimony that a juvenile defendant in Mississippi is treated like an adult on an aggravated robbery charge and that he usually sets a bond at an initial appearance, counsel argued that appellant should have been given a chance to have an extradition bond set and that because he did not, the evidence shows appellant's statement was not taken in compliance with Mississippi law.

The State contended that it briefed sufficient Mississippi law and that it was sufficiently complied with. The State also argued that there was no competent testimony about extradition bonds, and even if there had been, the setting of a bond would not affect the voluntariness of appellant's statement or whether it was taken under a proper procedure. The State also pointed out that the totality of the evidence shows that appellant's statement was voluntary. The trial court did not give its reasons for denying the motion to suppress.

At the hearing, both appellant and the State agreed that the recorded statement did not fully comply with section 51.095(a) of the family code. Thus, they also both agreed that if it was otherwise taken in compliance with Mississippi law, then it was procedurally valid and admissible.

On appeal, the State contends that appellant's complaint was not preserved because before the jury, his counsel stated that he had no objection when the statement was introduced. We disagree. "[T]he rule that a later statement of 'no objection' will forfeit earlier-preserved error is context-dependent." Thomas v. State, 408 S.W.3d 877, 885 (Tex.Crim.App.2013); see also Tex.R. Evid. 103(a)(1) (providing that when judge hears objection to evidence offered outside presence of jury and rules evidence admissible, objection need not be repeated when evidence is admitted before jury). Here, the parties litigated the voluntariness of the statement before the jury, including the issue of Judge Palmer's normal procedures in an initial appearance. Additionally, appellant's counsel asked for and received an instruction in the jury charge regarding the admissibility of the statement and argued to the jury that it should consider whether the statement was voluntary in reaching its verdict. Thus, the record as a whole indicates an understanding by the judge and counsel that appellant's counsel did not intend to forfeit the issue of admissibility of the statement by stating, "no objection," when it was offered at trial. See Thomas, 408 S.W.3d at 885 ("If the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his 'no objection' statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal, then the appellate court should not regard the claim as 'waived,' but should resolve it on the merits."). Thus, we will consider the merits of the issue.

It is settled law that the burden is initially on the defendant to raise an issue regarding the exclusion of proferred evidence by producing evidence of a statutory violation, which then shifts to the State to prove compliance. Pham v. State, 175 S.W.3d 767, 772 (Tex.Crim.App.) (reviewing juvenile conviction), cert. denied, 546 U.S. 961 (2005). Here, it is doubtful whether appellant met his initial burden. He introduced no evidence that Mississippi law required the consideration or setting of a bond, and Judge Palmer did not testify that appellant would have been entitled to a bond; he just testified generally that consideration of a bond would normally be part of an initial appearance. But

even if appellant had introduced evidence showing that Mississippi law would have entitled him to a bond, he nevertheless also had the burden of proving a causal connection between any violation of section 51.095(a) and the statement. See id. at 772–74.

Appellant argues on appeal that if he had been able to obtain a bond, he would not have felt it necessary to talk to the detectives. But appellant did not testify to this at the hearing, nor did he argue it before the trial court. The trial court was entitled to believe the testimony of Judge Palmer and the detectives and to resolve any inconsistencies in favor of the voluntariness of the statement.

Conclusion: After reviewing all of the evidence presented at the hearing, we hold that appellant failed to meet his burden to show a causal connection between any violation of Texas or Mississippi law and his statement. We overrule his first issue.

CRIMINAL PROCEDINGS

Ex Parte Ragston, No. 14-13-00584, 2014 WL 486606, Tex.Juv.Rep. Vol. 28, No. 2 ¶ 14-2-2B [Tex.App.—Houston (14th Dist.), 2/6/14].

JUVENILE CHARGED WITH CAPITAL FELONY IS "PER SE BAILABLE" AND MUST HAVE BAIL SET.

Facts: This is an appeal from the denial of a pretrial writ of habeas corpus. We consider the following three issues: (1) whether the prosecution established that it was ready for trial within the time allotted by the Code of Criminal Procedure; (2) whether the trial court abused its discretion by refusing to set bail on two of appellant's three charged offenses; and (3) whether the trial court set an excessive amount of bail on appellant's third remaining charge. We reform the trial court's order and set bail for all three charges at $250,000. As reformed, we affirm the trial court's order denying habeas relief.

BACKGROUND

On June 22, 2012, appellant was arrested for the homicide of a liquor store owner in Navasota, Texas. A grand jury returned an indictment on August 16, 2012, charging appellant with capital murder, murder in the first degree, and aggravated robbery. All three offenses are alleged to have arisen out of the same set of facts.

Initially, the trial court ordered that appellant be held without bond on the capital murder charge, and that bond be set at $500,000 for each of the two remaining charges. Appellant filed a motion for bond reduction, claiming that his bail was excessive and punitive. Appellant also filed a separate application for writ of habeas corpus, claiming that his status as a juvenile precluded the State from prosecuting him. Appellant's habeas petition relied specifically on Miller v. Alabama, a recent decision in which the United States Supreme Court held that juveniles could not be sentenced to a mandatory punishment of life without parole. 132 S.Ct. 2455, 2469 (2012). Appellant contended that Texas's capital sentencing statute ran afoul of Miller as applied to him because, if convicted, he similarly faced an automatic sentence of life without parole. Appellant accordingly argued that he could not be tried, and that he should therefore be released.

The trial court denied appellant's habeas petition but granted partial relief on the bond motion. The court reduced appellant's bail to $250,000 on the charge of aggravated robbery. As for the charges of capital murder and murder in the first degree, the court ordered that appellant be held without bond.

Appellant challenged all aspects of the trial court's judgment in a previous appeal before a different panel of this court. In that previous appeal, we construed appellant's habeas complaint as an "as-applied" challenge to the constitutionality of the capital sentencing statute. See Ex parte Ragston, 402 S.W.3d 472, 475–76 (Tex.App.-Houston [14th Dist.] 2013), aff'd, No. PD–0824–13, 2014 WL 440964, —— S.W.3d ——, slip op. at 5 (Tex.Crim .App. Feb. 5, 2014). Because "as-applied" challenges are not cognizable for purposes of pretrial habeas, we affirmed the trial

court's order denying habeas relief. Id. at 477. Appellant's remaining complaints challenged the trial court's ruling on his separate motion for bond reduction. We dismissed these complaints on jurisdictional grounds, concluding that "no interlocutory appeal lies from the trial court's order on a pretrial motion for bond reduction." Id. at 478.

During the pendency of this previous appeal, appellant filed a second application for writ of habeas corpus. In the application, appellant reasserted the same arguments that had previously been raised in his separate motion for bond reduction—i.e., that his bail was excessive and punitive. Appellant also asserted a modified argument with regards to his juvenile status. Claiming again that he could not be sentenced if convicted of capital murder, appellant argued that there was no possible way for the State to announce ready for trial within ninety days of the commencement of his detention. Appellant accordingly contended that, under article 17.151 of the Code of Criminal Procedure, he was entitled to release on his own recognizance.

The trial court conducted a hearing on June 10, 2013, exactly one day before our opinion issued in appellant's first appeal. After considering all of the evidence presented at the hearing, the court denied the application, found that the State had been ready for trial, and left its previous bond order intact. Appellant brings this, his second appeal, challenging the trial court's most recent ruling on his application for writ of habeas corpus.

Held: Trial court's order reformed and bail for all three charges at $250,000.

Opinion: We now consider appellant's final two complaints, which focus on the denial and excessiveness of bail. We have jurisdiction to address these complaints because they are presented to us by way of habeas corpus. See Ex parte Gray, 564 S.W.2d 713, 714 (Tex.Crim.App. [Panel Op.] 1978) ("The proper method for challenging the denial or excessiveness of bail, whether prior to trial or after conviction, is by habeas corpus."); see also Ragston, 402 S.W.2d at 477–79 (concluding that reviewing court lacks jurisdiction to consider these issues when raised in a separate motion for bond reduction).

Appellant contends that the trial court erred by denying bond on his charges for capital murder and murder in the first degree. The State agrees with appellant that bail should have been set on both charges. See Beck v. State, 648 S.W.2d 7, 9 (Tex.Crim.App.1983) (concluding that a juvenile charged with a capital felony is "per se bailable"). The State has requested that we reform the trial court's order and set bail for all three charges at $250,000. Appellant opposed this amount at oral argument, contending that it would still be excessive. Based on the record as a whole, we conclude that the amount is not excessive.

The amount of bail in any case must adhere to these rules:
1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
2. The power to require bail is not to be so used as to make it an instrument of oppression.
3. The nature of the offense and the circumstances under which it was committed are to be considered.
4. The ability to make bail is to be regarded, and proof may be taken upon this point.
5. The future safety of a victim of the alleged offense and the community shall be considered. Tex. Code Crim. Proc. art. 17.15.

Courts may also consider the following set of factors when assessing whether the amount of bail is reasonable: (1) the defendant's work record; (2) the defendant's family and community ties; (3) the defendant's length of residency; (4) the defendant's prior criminal record; (5) the defendant's conformity with previous bond conditions; (6) the existence of other outstanding bonds, if any; and (7) the aggravating circumstances alleged to have been involved in the charged offense. See Ex parte Rubac, 611 S.W.2d 848, 849–50 (Tex.Crim.App. [Panel Op.] 1981); Ex parte Castellanos, Nos. 14–13–00538–C R, 14–13–00539–CR, & 14–13–00540–CR, —— S.W.3d ——, 2014 WL 258559, at *2 (Tex.App.-Houston [14th Dist.] Jan. 23, 2014, no pet. h.).

Appellant contends that $250,000 is excessive because he is indigent and unable to post any bond. While the ability to make bail is to be regarded, a defendant's financial situation is not a determinative factor. See Ex parte Charlesworth, 600 S.W.2d 316, 317 (Tex.Crim.App. [Panel Op.] 1980). The nature and circumstances of the alleged offense must also be considered. See Tex. Code Crim. Proc. art. 17.15. The record reflects that appellant robbed the

liquor store with a co-defendant, and together, they allegedly killed the complainant in a violent and callous manner. Appellant and his co-defendant allegedly targeted the liquor store on a day when the complainant was known to have extra cash on hand. They allegedly shot the complainant multiple times with a shotgun at point blank range, then made off with several thousand dollars. The incident occurred in July of 2009, and they remained on the run for several years.

The violent nature of the offense demonstrates a potential risk to the community if appellant were released on bond. Indeed, at the time of his arrest, appellant was already facing robbery charges in another county. Based on all of these factors, we conclude that a bail of $250,000 is not excessive. Cf. Ex parte Guerra, 383 S.W.3d 229, 234 (Tex.App.-San Antonio 2012, no pet.) (bail of $950,000 was not excessive for indigent defendant charged with capital murder, aggravated robbery, and unauthorized use of a vehicle). Accordingly, we reform the trial court's order and fix appellant's bail at $250,000 for all three charged offenses. See Ludwig v. State, 812 S.W.2d 323, 324–25 (Tex.Crim.App.1991) (per curiam) (reviewing court may reduce an excessive amount of bail without remanding to the trial court); Ex parte Ivey, 594 S.W.2d 98, 100 (Tex.Crim.App. [Panel Op.] 1980) (same).

Conclusion: The trial court did err by holding appellant without bond on his charges of capital murder and murder in the first degree. We reform the trial court's order and fix bail at $250,000 for all three of appellant's charged offenses. As reformed, we affirm the trial court's order denying habeas relief.

DETERMINATE SENTENCE TRANSFER

In the Matter of D.V.W., MEMORANDUM, No. 06-14-00054-CV, 2015 WL 167682, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-8 (Tex.App.-Texarkana, 1/14/15).

IN A DETERMINATE SENTENCE TRANSFER HEARING, THERE WAS NO ABUSE OF DISCRETION WHERE THERE WAS "SOME EVIDENCE" IN THE RECORD TO SUPPORT THE TRIAL COURT'S DECISION.

Facts: D.V.W., previously adjudicated for aggravated assault, had his community supervision revoked, received a determinate sentence of three years, and was committed to the Texas Juvenile Justice Department (TJJD) February 5, 2013. Because D.V.W. will not complete the statutory minimum period of confinement for his offenses before turning eighteen years of age, a hearing was conducted to determine whether he should be released on parole or finish serving his sentence as an adult. More formally, the trial court's choice was between supervision by the Texas Department of Criminal Justice–Parole Division (Parole Division) or custody in the Texas Department of Criminal Justice–Institutions Division (Institutions Division).FN1 After the hearing, the trial court ordered D.V.W. transferred to the Institutions Division.

FN1. See TEX. FAM.CODE ANN. § 54.11 (West 2014); TEX. RES.CODE ANN . § 244.014 (West Supp.2014), § 245.051 (West 2013).

On appeal, D.V.W. contends that the trial court abused its discretion in transferring him to the Institutions Division rather than the Parole Division.

Held: Affirmed.

Memorandum Opinion: We review for an abuse of discretion a trial court's decision to transfer a juvenile from the TJJD to the TDCJ. In re D.L., 198 S.W.3d 228, 229 (Tex.App.—San Antonio 2006, pet. denied); In re J.L.C., 160 S.W.3d 312, 313 (Tex.App.—Dallas 2005, no pet.). In determining whether the trial court abused its discretion, we review the entire record to determine if the trial court acted without reference to any guiding principles or rules. D.L., 198 S.W.3d at 229; J.L.C., 160 S.W.3d at 313. We do not substitute our opinion for the trial court's discretion and reverse only if the trial court acted in an unreasonable or arbitrary manner. In re T.D.H., 971 S.W.2d 606, 610 (Tex.App.—Dallas 1998, no pet.).

Section 54.11 of the Texas Family Code governs release or transfer proceedings involving juveniles. See TEX. FAM.CODE ANN. § 54.11. In determining whether the youthful offender should be released on parole or transferred to the Institutions Division, the trial court may consider the experiences and character of the person before and after commitment to the [TJJD] or post-adjudication secure correctional facility, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the [TJJD], county juvenile board, local juvenile probation department, and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided. TEX. FAM.CODE ANN. § 54.11(k).

Evidence of each factor is not required, and the trial court need not consider every factor in making its decision. In re R.G., 994 S.W.2d 309, 312 (Tex.App.—Houston [1st Dist.] 1999, pet. denied). In making its determination, "the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the [TJJD], in addition to the testimony of witnesses." TEX. FAM.CODE ANN. § 54.11(d); In re F.D., 245 S.W.3d 110, 113 (Tex.App.—Dallas 2008, no pet.). At the conclusion of the hearing, the trial court may order the person back to the TJJD, released under parole supervision, or order the person transferred to the Institutions Division for the completion of his sentence.FN2 TEX. FAM.CODE. ANN. § 54.11(i), (j).

FN2. The transfer hearing is a "second chance hearing" after a child, such as D.V.W., has already been sentenced to a determinate number of years. See F.D., 245 S.W.2d at 113. It is not part of the guilt/innocence determination and need not meet the extensive due process requirements of an actual trial. Id. (juvenile has no right of confrontation at transfer hearing because it is dispositional rather than adjudicative in nature); In re D.S., 921 S.W.2d 383, 387 (Tex.App.—Corpus Christi 1996, writ dism'd w.o.j.).

At the hearing, Leonard Cucolo, court liaison for the TJJD, testified for the State, and Cucolo's report was admitted into evidence. Cucolo testified that D.V.W. does not have any mental health issues that would interfere with his ability to fully participate in the TJJD program. According to Cucolo, D.V.W. has all the abilities needed to succeed. D.V.W. completed the required alcohol and drug treatment programs. D.V.W., however, was unable to complete the "Serious Violent Offender Treatment Program" because he was removed from the group due to poor behavior and poor participation. Cucolo noted, "[T]o be fair[,] ... once he was removed there was little time for him to be able to reenter the group, because it's a closed group, and another group wouldn't have started. And even if it did start, he wouldn't have enough time to complete it."

Cucolo's report includes an evaluation of D.V.W. by Dewayne K. Jones, M.A., a psychologist. In the report, Jones stated that D.V.W.'s profile indicates that he has "an increased probably of delinquent, externalizing, and aggressive behaviors," but, ultimately, Jones recommended that D.V.W. be released to parole rather than Institutions Division.FN3 D.V.W. performed "exceptionally well" academically while at the TJJD, has a high school diploma, completed college-level classes, and obtained two vocational certifications.

FN3. Jones noted that, if D.V.W. were transferred to the Institutions Division, "he would be exposed to individuals who would likely reinforce his tendency to use thinking errors to justify criminal behavior but more importantly he would not likely receive any time on parole to supervise his transition to the community."

Cucolo also testified that D.V.W. had serious behavioral issues. He had fifty-three documented incidents of misconduct, for which he was "placed in the security unit on 24 occasions." FN4 The report noted that seven of the incidents were for horseplay, four were for threatening others, two were for assault, and one was for fighting. Cucolo was concerned because, despite being in the program for fourteen or fifteen months, D.V.W. consistently had behavioral problems and made poor decisions, but his behavior began to improve the month before the hearing. D.V.W. was "still struggling with maintaining good, stable behavior while he was still confined," and that made Cucolo question D.V.W.'s ability to "make it on parole." However, based on an objective review of D.V.W.'s case, every member of the special services committee, the body making the TJJD's recommendation, agreed that D.V.W. should be released on parole because "his risk factors can be managed in the community."

FN4. The report noted that one incident was "a self-referral and not considered behavioral in nature."

Ultimately, the trial court ordered D.V.W. transferred to the TDCJ–ID to continue serving his sentence. There is evidence in the record to support the court's decision: (a) D.V.W. continued to have behavioral problems while in TJJD's custody; (b) the prosecuting attorney recommended transfer to TDCJ–ID; and (c) the underlying offense was violent. See TEX. FAM.CODE ANN. § 54.11(k).

Conclusion: As there is "some evidence" in the record to support the trial court's decision, there is no abuse of discretion. See D.L., 198 S.W.3d at 229. Accordingly, we overrule this point of error. We affirm the trial court's order transferring D.V.W. to the TDCJ–ID.

In the Matter of J.M.S.M., MEMORANDUM, No. 13-13-00353-CV, 2014 WL 4952763, Tex.Juv.Rep. Vol. 28 No. 4 ¶14-4-4 (Tex.App.-Corpus Christi, 10/2/14).

SINCE THE TRANSFER HEARING IS A "SECOND CHANCE HEARING" AND NOT PART OF THE GUILT/INNOCENCE DETERMINATION EXTENSIVE DUE PROCESS REQUIREMENTS OF AN ACTUAL TRIAL ARE NOT REQUIRED.

Facts: When he was sixteen years old, J.M.S.M. was adjudicated delinquent for the offense of engaging in delinquent conduct, namely knowingly and intentionally possessing, with intent to deliver, a controlled substance—cocaine in an amount by aggregate weight including adulterants and dilutants, of more than 400 grams. See TEX. HEALTH & SAFETY CODE ANN. § 481.112 (West, Westlaw through 2013 3d C.S.). The trial court committed J.M.S.M. to the TJJD for a determinate sentence of eight years, subject to transfer to the TDCJ for the completion of his determinate sentence. See TEX. FAM.CODE ANN. § 53.045 (West, Westlaw through 2013 3d C.S.). Before J.M.S.M. reached his nineteenth birthday, the State filed a motion seeking J.M.S.M.'s release from the TJJD and transfer to the TDCJ. On May 23, 2013, the trial court, sitting as a juvenile court, held J.M.S.M.'s transfer hearing.

The State called Leonard Cucolo as its witness. Cucolo testified that he was employed by the TJJD as a court liaison and that his principal responsibility was to provide the trial court with case files and summary reports on youths being considered for either parole or prison. Regarding his report on J.M.S.M., Cucolo testified as to J.M.S.M.'s age, the offense for which he was committed, when he was committed to TJJD, and the sentence he received. Cucolo also discussed J.M.S.M.'s participation at the Orientation and Assessment Unit, his assessed needs, and where he was placed—the Evins Regional Juvenile Center-to address those needs. Regarding J.M.S.M.'s education, Cucolo testified that J.M.S.M. received eleven of twenty-two credits necessary for a high school diploma, performing inconsistently in his courses—doing well in some and failing others. According to Cucolo, J.M.S.M. did not pass all subject areas when he tested for a GED the preceding January. J.M.S.M. did complete the alcohol and drug treatment program, a moderate level aggressive retraining program, and the gang intervention curriculum. Cucolo then answered questions regarding the CoNextions Program, a five-stage program that manages and evaluates a youth's progress on a monthly cycle throughout his stay. The stages of the program build on one another and have different treatment objectives. Cucolo explained that between July 2011 and October 2012, J.M.S.M. advanced through the first three stages of the program. J.M.S.M. was promoted to stage four in October and had not yet been promoted to the final stage of the program. According to his review of the records, Cucolo testified that J.M.S.M. was retained at stage four every month for the past seven months because of "a variety of inconsistent effort on [his] individual case plan, inconsistent effort in behavior, and maintaining behavior."

Cucolo testified that J.M.S.M. had thirty-eight documented incidents of misconduct since being committed to TJJD, thirty-five of which were security referrals (two self-referrals) and seventeen of which resulted in actual placements in the security unit. He explained that the majority of the incidents were for disruption of the program—for example, not participating in the program or not following staff instructions. But according to Cucolo, J.M.S.M. had a variety of major rule violations over time, including tattooing, fleeing apprehension, vandalism, assaults, fighting, and threatening staff and other youths. Cucolo testified that J.M.S.M. "has been engaging in a lot of

delinquent conduct that he was engaging in prior to his commitment up until a couple of months ago, even last month. So this has really kind of indicated to us that he is just not parole ready."

According to Cucolo, if a youth has engaged in three or more major rule violations, an informal (level 2) hearing is held, and if those violations are found to be true, the youth can be sanctioned. J.M.S.M.'s last level 2 hearing was in April 2013 and was for fighting. Cucolo explained that this occurred after J.M.S.M. had completed the aggression replacement therapy and the gang intervention curriculum. Cucolo continued,

> *And with our criteria when we look at youth for return to court, if the youth has engaged in three or more major rule violations that's been confirmed through a level 2 hearing, then they're meeting the criteria for transfer. [J.M.S.M.] has five. He has multiple rule violations that he's engaged in. And as a result of that, that's pretty much why we're kind of making the recommendation we are today.*

When asked what the TJJD was recommending for J.M.S.M., Cucolo responded as follows:

> *Well, we're recommending that [J.M.S.M.] be transferred to the Institutional Division of the Texas Department of Criminal Justice for the remainder of his sentence ... because of what we just talked about, that he's not ready to be released to parole. He's having difficulty—even up until now—following even the basic rules, following staff instructions. And that's within a highly structured setting with staff providing the necessary supervision for him. He's engaged in several new offenses while he's been confined. He has had the benefit of multiple interventions. And they have not really impeded his behavior. And he has not reduced, we believe, his risk to the community if he is released.*

On cross-examination, Cucolo testified that J.M.S.M. did not have a relationship with his mother, who had returned to Mexico. He did not know about any relationship J.M.S.M. had with his three older siblings or his father, who, according to defense counsel, had died. And as summarized by J.M.S.M. on appeal, on cross-examination Cucolo also testified as follows: (1) he was aware of J.M.S.M.'s previous delinquent history; (2) in preparing his report, he reviewed written documentation submitted in March 2013 by J.M.S.M.'s school, including, among others, psychological evaluations, behavior summaries, and academic assessments by staff; (3) the referenced violations could be considered misleading because they involved only one "probation"; and (4) in preparing his report, he did not speak to J.M.S.M., his mother, case manager, teachers, or uncle. Cucolo also explained that he had no personal knowledge of any of J.M.S.M.'s incidents of misconduct and had to rely on the reports of other staff and that he could not identify which events were assaults and which were fights. Cucolo also agreed that in the 700 days that J.M.S.M. had been at the TJJD, he only had thirty-eight incidents of misbehavior.

Without objection, the trial court admitted Cucolo's April 22, 2013 report as State's Exhibit 1. Case Manager III Ismelda Huerta prepared a second report sometime after April 2013. Huerta's report summarized J.M.S.M.'s behavior over the preceding ninety days. This second report provided information that was consistent with Exhibit 1 and Cucolo's testimony. The trial court admitted Huerta's behavior summary as State's Exhibit 2.

J.M.S.M. called Esther Olivia Castillo and Alfredo Yanez to testify on his behalf. Castillo, J.M.S.M.'s aunt, testified that she was willing to house and assist J.M.S.M. if paroled. Yanez testified that he was prepared to offer J.M.S.M. a job. Through these witnesses, the trial court admitted (1) two letters of reference from J.M.S.M.'s teachers; (2) one letter of reference from a juvenile correction officer; (3) a participation ribbon in volleyball; and (4) a ribbon and a certificate recognizing his participation in the Relay for Life Run.

At the conclusion of the hearing, the trial court ordered J.M.S.M. transferred to TDCJ for completion of his original sentence. See TEX. HUM. RES.CODE ANN.. §§ 244.014, 244.151(c) (West, Westlaw through 2013 3d C.S.); TEX. FAM.CODE ANN. § 54.11(i)(2) (West, Westlaw through 2013 3d C.S.). J.M.S.M. appeals from the trial court's transfer order. See TEX. FAM.CODE ANN. § 56.01(c)(2) (West, Westlaw through 2013 3d C.S.).

Held: Affirmed.

Memorandum Opinion: By his first issue, J.M.S.M. contends that the trial court erred in allowing Cucolo to testify to records that were testimonial in nature. He asserts "the State introduced this evidence in violation of the Confrontation Clause" when Cucolo "testified to records pertaining to conduct of [J.M.S.M.] to which he had no personal knowledge and was testimonial in nature because it presented the impressions contained in the reports." He also complains of evidence of other crimes, wrongs, or acts by J.M.S.M. that the State offered, apparently through Cucolo's report or his testimony. Finally, J.M.S.M. asserts that the evidence is barred by the hearsay rule.

Section 54.11 of the Texas Family Code governs release or transfer proceedings involving juveniles. See TEX. FAM.CODE ANN. § 54.11. And at a transfer hearing, "the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the [TJJD], in addition to the testimony of witnesses." ID. § 54.11(d); In re F.D., 245 S.W.3d 110, 113 (Tex.App.-Dallas 2008, no pet.). The transfer hearing is a "second chance hearing" after a child, such as J.M.S.M., has already been sentenced to a determinate number of years. In re F.D., 245 S.W.2d at 113. It is not part of the guilt/innocence determination and need not meet the extensive due process requirements of an actual trial. Id. (explaining that a juvenile has no right of confrontation at a transfer hearing because it is dispositional rather than adjudicative in nature); In re D.S., 921 S.W.2d 383, 387 (Tex.App.-Corpus Christi 1996, writ dism'd w.o.j.).

The trial court considered the written report prepared by an employee of the TJJD and heard Cucolo's testimony. See TEX. FAM.CODE ANN. § 54.11(d); In re F.D., 245 S.W.3d at 113. Cucolo testified at the transfer hearing. He testified as a TJJD employee and described himself as its court liaison who provides trial courts with case files and summary reports on youths being considered for either parole or prison. Cucolo answered questions about information that was contained in his written report. The trial court also considered Huerta's behavior summary, a second report that provided similar information.

Conclusion: Because the legislature has determined that such evidence may be considered in transfer hearings, the trial court acted with reference to guiding principles or rules. See In re D.L., 198 S .W.3d at 229; In re J.L.C., 160 S.W.3d at 313. Having reviewed the entire record, we conclude the trial court did not abuse its discretion when it allowed Cucolo to testify and when it admitted the reports. See In re S.M., 207 S.W.3d 421, 424–25 (Tex.App.-Fort Worth 2006, pet. denied); In re D.L., 198 S.W.3d at 230. We overrule J.M.S.M.'s first issue.

DISPOSITION PROCEEDINGS—

Ex Parte Criss, UNPUBLISHED, No. WR-78,242-02, 2014 WL 7188949, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-6 (Tex.Crim.App, 12/17/14).

SEVENTEEN YEAR OLD WHO WAS CONVICTED OF CAPITAL MURDER AND AUTOMATICALLY SENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE GETS A NEW PUNISHMENT HEARING TO DECIDE BETWEEN A SENTENCE OF LIFE WITH PAROLE AND LIFE WITHOUT PAROLE.

Facts: Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for writ of habeas corpus. Ex parte Young, 418 S.W.2d 824, 826 (Tex.Crim.App.1967). Applicant was convicted of capital murder and automatically sentenced to life imprisonment without the possibility of parole in April 2008. The Fifth Court of Appeals affirmed the conviction. Criss v. State, No. 05–08–00491–CR (Tex.App.–Dallas June 30, 2010).

Applicant contends that his sentence of automatic life without parole violates the Eighth Amendment of the U.S. Constitution because he was a juvenile at the time of the offense. Miller v. Alabama, 132 S.Ct. 2455 (2012). This Court recently held that Miller applies retroactively in Texas. Ex parte Maxwell, AP–74,964 (Tex.Crim.App. Mar. 12, 2014)(designated for publication).

Applicant was seventeen years old at the time of the offense. After being found guilty by a jury, he was automatically sentenced to life in prison without the possibility of parole under the law at the time. Tex. Penal Code § 12.31(a)(2007).

Held: Writ Granted

Per Curiam Opinion: Both the State and the trial court recommend granting relief. That recommendation is supported by the record. Applicant is entitled to relief.

Conclusion: Relief is granted. The sentence in Cause No. 07–49170–Q in the 204th District Court of Dallas County is set aside, and Applicant is remanded to the custody of the Sheriff of Dallas County for a new punishment hearing to decide between a sentence of life with parole and life without parole. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

In the Matter of M.O., No. 08-13-00148-CV, --- S.W.3d ----, 2014 WL 6865451, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-2 (Tex.App.-El Paso, 12/3/15).

TRIAL COURTS ARE NOT REQUIRED TO DETERMINE THAT NO COMMUNITY-BASED INTERMEDIATE SANCTION ARE AVAILABLE TO COMMIT A JUVENILE TO TJJD, ONLY THAT REASONABLE EFFORTS HAVE BEEN MADE TO PREVENT THE JUVENILE'S REMOVAL FROM HIS HOME.

Facts: On August 29, 2011, M.O. was adjudicated for committing aggravated assault with a deadly weapon, a felony. See TEX. PENAL CODE ANN. §§ 22.01(a)(1), 22.02(a)(2), (b), 71.02(a). M.O.'s initial disposition in September 2011 placed him on probation in his mother's home under standard supervision at home and at school. Subsequently, the State moved to modify the disposition, and in January 2012, M.O.'s disposition was modified to Intensive Supervised Probation (ISP) under the terms and conditions of the Serious Habitual Offender Comprehensive Action Program (SHOCAP).

In March 2013, the State moved a second time to modify M.O.'s disposition. The State alleged that M.O. had violated the terms and conditions of his supervised probation by: (1) committing arson and aggravated assault with a deadly weapon; (2) using, consuming, or possessing marijuana; (3) twice leaving electronic-monitoring premises without the court's permission; and (4) committing school-related infractions resulting in his suspension and expulsion from public school. M.O. entered into an agreed modification order committing him to TJJD. M.O. then filed a motion for new trial contending he had agreed to the disposition to TJJD by mistake, believing he had no other option and could not contest the disposition. The trial court granted M.O.'s motion and set a modification-disposition hearing for May 3, 2013.

At the modification-disposition hearing, the trial court admitted into evidence a modification-disposition report prepared by Juvenile Probation Department Officer Oscar Miranda. Miranda's report noted that from January 2012 to February 2013, M.O. had been charged with aggravated assault against a public servant, had committed arson at his public school, had used or possessed marijuana, had absconded from his home for several days, and had been suspended and then expelled from school. In February 2013, M.O. was placed in detention, and while there attempted to assault and twice assaulted other juveniles, flooded his room, and was caught in possession of a utensil he intended to make into a shank. The report indicated that in April 2013, the SHOCAP team, the "staffing committee," and the Chief Juvenile Probation Officer all unanimously recommended M.O. be committed to TJJD due to his referral history, his continued commission of serious felony offenses while on probation in the community, and because he constituted a danger to himself and others. The report noted M.O. had received psychological assessments, Emotional Regulation Group Counseling, and services from the El Paso Emergence Health Network and MRT, from which he was discharged due to non-attendance. The report concluded and recommended that M.O. be committed to TJJD because despite being given the opportunity to correct his behavior through ISP under SHOCAP and being afforded counseling services in the community, M.O. continued to violate the terms of his probation by committing felony

offenses, abusing drugs, failing to attend school, and leaving his home premises.FN1TJJD was recommended not only for the safety of M.O. and the community, but also because TJJD would provide a secure, structured setting that would restrict M.O.'s interactions with negative peers and ensure he received educational services, vocational training, therapeutic services, and independent living skills. The report noted that reasonable efforts had been made to avoid removing M.O. from his home, as he had been afforded community-based counseling services, community-based supervision through two intensive programs, and out-of-home placement in the local Challenge Academy program. The report stated that M.O's mother was the subject of on-going contempt hearings and concluded that M.O's home could not provide the level of support needed to complete probation as shown by M.O's continued disregard for the conditions of his probation.

FN1. M.O. was also determined to have a high risk to re-offend.

The trial court also admitted into evidence a March 2013 Psychological Assessment Report prepared by clinical psychologist, Dr. Michael P. Hand. Dr. Hand's report included diagnoses of childhood-onset conduct disorder, attention-deficit/hyperactivity disorder (hyperactive-impulsive type), learning disorder, and mild mental retardation. Dr. Hand made no recommendation on M.O.'s placement, but rather recommended in part that the trial court consider M.O.'s low intellectual functioning and ADHD, and the limits those disabilities placed on M.O.'s judgment, impulse control, and susceptibility to influence by others. He further recommended that medications appropriate to M.O.'s treatment be continued, that M.O. receive special education, and that M.O. be given individual psychotherapy to assess his mood, behavior, coping skills, and self-concept. Juvenile Probation Department Officer Oscar Miranda was the only witness to testify at the hearing. On the whole, his testimony confirmed and elaborated on what was contained in his modification-disposition report. For instance, Miranda testified that after being placed on SHOCAP probation, M.O. had committed two felony offenses, including an unadjudicated charge of arson to which M.O. had admitted. M.O. also left his school campus, tested positive for marijuana, and absconded from home for four to five days. After being placed in detention on February 7, 2013, M.O. was involved in three assaults and twice flooded his room. Miranda testified that he presented M.O.'s case to the SHOCAP team, the "staffing committee," and the Chief Juvenile Probation Officer, all of whom recommended that M.O. be committed to TJJD.

Miranda noted that the Juvenile Probation Department had provided M.O. with standard supervision at home and at school, but opined that M.O.'s mother could not adequately supervise him. According to Miranda, TJJD was the only remaining option for providing any kind of help to M.O., both because M.O. needed the rehabilitation TJJD would provide and because the protection of the public required that disposition. Miranda testified that the Juvenile Probation Department offered M.O. counseling services through El Paso Emergence Health Network, MRT, and the Emotional Regulation Group Counseling, and that the Department had attempted and exhausted rehabilitation efforts to address the diagnoses noted in a prior psychology report prepared in January 2012.

On cross-examination, Miranda stated that he did not "staff" M.O. for any other programs in January 2012, and did not think that M.O. would need a mental health program other than the programs to which M.O. had already been referred. Miranda acknowledged that SHOCAP is not a mental health program, and that MRT and the Emotional Regulation Counseling Group are standard SHOCAP programs for all gang-involved youth. Miranda explained that he was in the process of referring M.O. to the El Paso Mental Health Collaborative in 2012, but acknowledged that the Department had not modified its programs to address M.O.'s impulse control, low intellectual functioning, low vocabulary, low verbal comprehension, difficulty with information retention, or learning difficulties. Miranda testified that an El Paso Emergence caseworker had been working with M.O. to address the depressive features of M.O.'s conduct disorders but admitted the Department had not verified whether El Paso Emergence was addressing the issues identified in a January 2012 psychology report. Miranda admitted that M.O.'s anger issues continued after the Emotional Regulation Group Counseling and agreed that M.O.'s negative behaviors accelerated during his detention in February 2013. Miranda explained, however, that TJJD differs from the Department's local detention facilities because TJJD has an assessment center. He also stated that despite M.O.'s mental health issues and learning disabilities, when M.O. desires, he can perform well in school.

At the conclusion of the modification-disposition hearing, the trial court committed M.O. to TJJD. The trial court found that (1) it was in M.O.'s best interest to be placed outside his home; (2) reasonable efforts were made to

prevent or eliminate the need for M.O.'s removal from the home and to make it possible for him to return to his home; and (3) M.O could not be provided the quality of care and level of support in his home necessary to meet the standards of his probation. In particular, the trial court found that reasonable efforts had been made to prevent M.O.'s removal from his mother's home, including previously placing M.O. on probation, previously referring him to the Intensive Supervised Probation program under SHOCAP, previously referring him to counseling or psychological services with El Paso Emergence Health Network, Emotional Regulation Group, and MRT, and providing him psychological evaluations and assessments. The trial court also found that it was contrary to M.O.'s welfare to remain in his mother's home and in his best interest to be placed outside of his home, because M.O. had a history of running away, a history of aggression, had been on probation previously, and was a known gang member, and because his mother lacked sufficient skills to provide adequate supervision and had refused to cooperate with court orders. The court also found that M.O. needed to be held accountable for his delinquent behavior, that he posed a risk to the safety and protection of the community, that no community-based intermediate sanction was available to adequately address M.O.'s needs or to adequately protect the needs of the community, and that the gravity of the offense and M.O's prior juvenile record required he be confined to a secure facility.

In his sole issue on appeal, M.O. contends the trial court abused its discretion when it committed him to TJJD because other community-based alternatives for addressing M.O.'s mental health issues had not been considered.

Held: Affirmed

Opinion: M.O. contends the trial court abused its discretion when it committed him to TJJD because other community-based alternatives for addressing M.O.'s mental health issues had not been considered. In particular, M.O. argues that short of the commitment to TJJD, "they had never before considered placing the Juvenile in an out-of-home facility," that there were alternatives that admittedly were not explored, and that the finding that "no community-based intermediate sanction is available to adequately address the needs of the juvenile" is not supported by the evidence.

First, we note that despite the trial court's finding, it was not required to determine that no community-based intermediate sanction was available to adequately address M.O.s' needs, before modifying M.O.'s disposition and committing him to TJJD.FN2 The applicable standard is contained in section 54.05 of the Family Code, which governs modifications to dispositions. Under section 54 .05 the trial court was required to determine, in pertinent part, that "reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home[.]"TEX. FAM.CODE ANN. § 54.05(m)(l)(B). Finding that "reasonable efforts were made" is a different and lesser standard from a determination that "no community-based intermediate sanction is available." The exhaustion of all possible alternatives to commitment is not required before a court modifies a disposition and commits a juvenile to TJJD. In re M.A.S., 438 S.W.3d at 807; In re J.R.C., 236 S.W.3d 870, 875 (Tex.App.-Texarkana 2007, no pet.). Nor is a court required to consider alternative dispositions in a modification hearing regarding a juvenile adjudicated delinquent based on conduct that would constitute a felony. In re A.T.M., 281 S.W.3d at 72; see TEX. FAM.CODE ANN. § 54.05(f). Further, the trial court is permitted to decline third or fourth chances to a juvenile who has abused a second chance. In re M.A.S., 438 S.W.3d at 807. Rather, the trial court was required to find that reasonable efforts had been made to prevent removal from and to permit M.O. to remain in his home. See TEX. FAM.CODE ANN. § 54.05(m)(l)(B).

FN2. In making this finding, the trial court cites to "Section 54.04(f), Title Three, Family Code." But, section 54.04 governs initial dispositions, not the modification of a prior disposition, and subsection (f) does not require a finding that no community-based intermediate sanction is available. See TEX. FAM.CODE ANN. § 54.04(f) (requiring the court to "state specifically in the order its reasons for the disposition," to furnish a copy of the order to the child, and to include in the order any terms of probation). In fact, section 54.04(i) governing original dispositions requires the same findings when committing the child to TJJD as those required by section 54.05(m) for modifications of disposition. Cf. TEX. FAM.CODE ANN. § 54.04(i) with § 54.05(m).

Here, M.O. was initially placed on probation in his home under standard supervision, but violated his probation. He was then given a second chance at probation when he agreed to a modification to Intensive Supervised Probation.

But, M.O. failed his second chance at probation. From January 2012 to February 2013, M.O. was charged with aggravated assault against a public servant, committed arson at his public school, used or possessed marijuana, absconded from his home for several days, and was suspended and then expelled from school. In February 2013, after he was placed in detention, he attempted to assault and twice assaulted other juveniles, flooded his room, and was caught in possession of a utensil he intended to make into a shank. Based on this behavior, the SHOCAP team, the "staffing committee," and the Chief Juvenile Probation Officer all recommended that M.O. be committed to TJJD. And, Miranda testified that based on his experience, TJJD was the only remaining option for providing any kind of help to M.O., both because M.O. needed the rehabilitation that could be provided at TJJD and because the protection of the public required that disposition. Thus, there was some evidence to support the trial court's determination that reasonable efforts had been made to prevent M.O.'s removal from his home and to support the trial court's decision to commit M.O. to TJJD.

Conclusion: Because some evidence of substantive and probative character exists to support the trial court's decision to commit M.O. to TJJD, we are unable to conclude the trial court acted arbitrarily or unreasonably. See In re M.A.S., 438 S.W.3d at 806; In re A.T.M., 281 S.W.3d at 70. Because the trial court did not abuse its discretion in committing Appellant to TJJD, Appellant's issue on appeal is overruled. The trial court's judgment is affirmed.

In the Matter of C.A.G., MEMORANDUM, No. 04-13-00686-CV, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-10 (Tex.App.—San Antonio, 7/9/14).

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY MODIFYING THE JUVENILE'S DISPOSITION FROM PROBATION TO CONFINEMENT IN A TJJD FACILITY WHERE THE EVIDENCE WAS SUFFICIENT FOR COMMITMENT PRIOR TO THE DELAY IN THE DISPOSITION.

Facts: In February 2013, appellant pled true to assault causing bodily injury to a peace officer; was placed in the care, custody, and control of the Chief Probation Officer; and committed to the Cyndi Taylor Krier Juvenile Correctional Treatment Center (the "Krier Center"). Among the rules of his probation was that he obey all rules of placement. About five months after his placement, appellant was discharged, unsuccessfully, for not completing the program at the Krier Center. The State subsequently filed a motion to modify disposition.

At appellant's first modification hearing, on July 25, 2013, he pled true to failing to obey the rules of the placement for which he was unsuccessfully discharged from the Krier Center based on "continued behavioral misconduct and non-compliance." At this hearing, Jeff Garza, appellant's probation officer, testified that appellant (who was seventeen years old at the time of the hearing) had "an extensive history [beginning at age twelve] with" the probation department, and appellant had a total of seventeen referrals to the department. Garza said appellant was on two separate probation terms, one for assault bodily injury that was adjudicated in June 2011; and due to subsequent violations, appellant was ordered into secure placement at the Krier Center on July 12, 2012. While at the Krier Center, appellant committed the felony offense of assault on a public servant, for which he was adjudicated; was placed on probation until his eighteenth birthday; and his placement at the Krier Center was continued.

Garza testified appellant was unsuccessfully discharged from the Krier Center on June 5, 2013, and the discharge was a culmination of behavior sanctions that occurred over his eleven-month placement. Garza said appellant amassed over 270 behavior sanctions during his placement, the majority of which were related to fighting with peers, gang-related behavior, and verbal aggression. Prior to his June discharge, a special staffing occurred on March 6, 2013, at which it was decided to alter appellant's treatment plan. Garza said appellant did not take advantage of the opportunity the treatment team put in place for him. A second special staffing occurred on May 10, 2013, this time with appellant's mother present, following which appellant was given thirty days in which to improve his behavior. However, by June 5, 2013, appellant again threatened the staff and had "well over 200 refusals for BTOs and the BCUs." Appellant was released from the Krier Center on July 11, 2013, and placed on electronic monitoring while he was in his mother's home. Garza said a recent evaluation of appellant revealed his level of risk to re-offend is high; his risk factors include aggression; and a mental health history that includes anxiety, depression, ADHD, conduct disorder, and cannabis dependence.

Appellant's mother testified that appellant has been well-behaved since returning home from the Krier Center.

At the close of the July 25 hearing, the trial court continued appellant on electronic monitoring until August 15, 2013, imposed a curfew, and withheld disposition until September 10, 2013. The court noted it would "let [appellant's] actions tell me what I'm going to do." The court told appellant, "You mess up, you're going to TJJD." Appellant responded, "Yes, ma'am." In the less than two months between the July 25 hearing and the September 10 hearing, appellant left the county without permission from the probation department, failed to comply with curfew, and tested positive for marijuana use.

At the September 10 hearing, Garza said appellant did well while he was on electronic monitoring, he reported weekly, and his drug tests were clean. However, on August 15, the monitor was removed, and on August 17, appellant left the county without permission. Appellant reported back to Garza on August 28, and his drug test showed positive for marijuana. Garza reminded the court that appellant's unsuccessful discharge from the Krier Center was based on over 270 documented behavior infractions over an eleven-month period. Appellant's mother said she did not know appellant was not allowed to leave the county without permission. Appellant admitted he "messed up," but he has been trying to do what he is required of him. Following the September 10 hearing, the trial court committed appellant to the TJJD and this appeal followed.

Held: Affirmed

Memorandum Opinion: On appeal, appellant concedes he "faces many problems," but he contends he was compliant with his counseling sessions while at the Krier Center and individual counseling appeared to help him. He asserts it is in his best interest to keep him near his family, in residential placement or on probation. We review the court's disposition order and findings under an abuse of discretion standard separate and apart from legal and factual sufficiency standards. In re K.T., 107 S.W.3d 65, 74–75 (Tex.App.-San Antonio 2003, no pet.). We view the evidence in the light most favorable to the court's ruling, affording almost total deference to its findings of historical fact supported by the record, but review de novo the court's determination of the applicable law, its application of the law to the facts, and its resolution of any factual issues that do not involve credibility assessments. Id. at 75.

Section 54.05 of the Texas Family Code controls what the trial court must find before a modification committing the child to the TJJD is authorized. TEX. FAM.CODE ANN. § 54.05 (West 2014). A disposition based on a finding that the child engaged in delinquent conduct may be modified to commit the child to the TJJD 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. Id. § 54.05(f). The court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of other witnesses. Id. § 54.05(e).

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 on hearings to modify disposition. In the Matter of J.L., 664 S.W.2d 119, 120 (Tex.App.-Corpus Christi 1983, no writ). Therefore, the controlling issue when a court modifies a disposition that was based on a finding of delinquent conduct is whether the record shows that the court abused its discretion in finding, by a preponderance of the evidence, a violation of a condition of probation. See In the Matter of P.A.O., 530 S.W.2d 902, 904 (Tex.Civ.App.-Houston [1st Dist.] 1975, no writ); In the Matter of Cockrell, 493 S.W.2d 620, 626 (Tex.Civ.App.-Amarillo 1973, writ ref'd n.r.e.).

Appellant pled true to violating a condition of his probation. A plea of true to a violation of probation is analogous to a judicial confession that justifies the court's finding the violation was committed by a preponderance of the evidence. See In re J.P., 150 S.W.3d 189, 190–91 (Tex.App.-Fort Worth 2003), aff'd, 136 S .W.3d 629 (Tex.2004); In re M.A.L., 995 S.W.2d 322, 324 (Tex.App.-Waco 1999, no pet.); In the Matter of J.L., 664 S.W.2d at 120–21. Therefore, based on appellant's plea of true, the trial court found, by a preponderance of the evidence, that appellant had violated one condition of his probation. Also, between the July hearing and the September hearing, the trial court afforded appellant the opportunity to avoid commitment to the TJJD, and expressly told appellant at the

end of the July hearing, "You mess up, you're going to TJJD." Within days of being released from electronic monitoring, appellant left the county without consent, and, upon his return, tested positive for marijuana use.

Conclusion: On this record, we cannot conclude the trial court abused its discretion by modifying the disposition from probation to confinement in a TJJD facility. We overrule appellant's issue on appeal and affirm the trial court's order.

In the Matter of J.M., No. 05-14-00055-CV, 2014 WL 2134539, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-1 (Tex.App.—Dallas, 5/22/14).

THERE WAS NO ABUSE OF DISCRETION WHERE THE TRIAL COURT DELAYED THE DISPOSITION FOR A THIRTY-DAY TRIAL PERIOD AT HOME, BEFORE DECIDING THAT PLACEMENT WAS IN THE BEST INTEREST OF THE CHILD.

Facts: J.M. was sixteen years old when she entered the juvenile justice system. Her mother called police after J.M. threatened her older brother with a knife and said she wanted to kill him. She was initially charged with aggravated assault; that charge was reduced to a misdemeanor charge of making a terroristic threat. J.M. entered a plea of true, and the trial court found her to be a child engaged in delinquent activity.

At the disposition hearing, the State offered J.M.'s psychological evaluations and predisposition reports. In those reports J.M. conceded that she had not been enrolled in school for some time, and testing revealed her to function at below-average levels in all subjects. J.M. reported that her mother took her out of high school after the ninth grade because J.M. was being "continually harassed by her peers." J.M. told the interviewer that she did not even attempt to interact with her classmates. She related an incident that occurred when she was fifteen, when—frustrated with what she saw as parental misunderstanding—she "stood in the middle of the street waiting to be struck by a car." Her father found her and brought her home; she said she had not felt suicidal since then. The reports described J.M.'s history of aggressive behavior, including starting a fire in an ant hill. J.M. also related that she routinely suffered from both auditory hallucinations and visual hallucinations including auditory hallucinations during one of her psychological interviews. She spoke of experiencing mood swings, and she exhibited signs of depression. She admitted she tortures the family dog. The reports indicate her mother and brother are both diagnosed with schizophrenia and bipolar disorder and that J.M. was diagnosed as having "Psychosis and Major Depressive Disorder with psychotic features," for which "[s]hort-term placement was recommended."

Maury Sauls, the court judicial liaison, testified at the disposition hearing on behalf of J.M.'s assigned probation officer. Based on the reports in evidence, Sauls testified J.M. was in need of rehabilitation and that the protection of the public as well as J .M. required that disposition be made. He relayed the recommendation of the juvenile department: that J.M. be placed on probation for a period of one year, in the custody of the chief probation officer for placement at the New Life Center. He agreed that probation in her home was "not an option" because J.M. needed residential treatment, with constant supervision and a therapist at hand.

J.M., in turn, offered the report from her Initial Psychiatric Consultation with Doctor Ayo Afejuku. The doctor concluded J.M. did not require medication at that time because her mental status and functioning were stable. However, Afejuku's "Diagnostic Impressions" indicated J.M. displayed Anxiety Disorder, Social Anxiety Disorder, Psychosis, Major Depressive Disorder with psychotic features, and Conduct Disorder. Afejuku recommended "consistent treatment providers" as well as individual therapy.

The evidence was consistent in recommending a structured environment and therapy for J.M. Where the placement issue was raised, the reports recommended J.M. be placed away from her parents' home. Nevertheless, rather than make a disposition immediately, the trial court suspended J.M.'s hearing, allowing her to return home for a thirty-day trial period.

When the disposition hearing resumed, the State offered J.M.'s updated predisposition reports. These reports indicated J.M. had been participating in the Youth Advocate Program, and her advocate mentor was pleased with J.M.'s compliance with the program. However, the reports also indicated that J.M. had failed to abide by her curfew consistently and that her parents were not cooperating with services related to family therapy sessions provided by J.M.'s mentor. The reports also noted J.M. had failed to attend school every day, although the primary attendance issue appears to have been related to violation of school rules concerning hair styles. Finally, the report states that J.M.'s mother failed to take J.M. to Dallas Metro Care for completion of a recommended mental health evaluation. (J.M. actually missed a day of school when she unsuccessfully attempted to attend the appointment without her mother.)

The State also called J.M.'s probation officer, Billy Middleton to testify. He discussed all the observations made in the predisposition reports, and he testified to the department's recommendations for J.M. as follows:

The Juvenile Department finds that reasonable efforts have been made to maintain the subject at home; however, the subject's rehabilitation needs are greater than what can be provided in the home.

The subject warrants placement in New Life Program where her level of care will be specialized in the needs of individual and group therapy, as well as sufficient consequences for aggressive behavior will be addressed in a well-structured and supervised environment. Her family should be involved in all relevant interventions.

It is respectfully recommended the subject be assigned to Progressive Sanction Level 4 and placed on probation for a period of one year in the custody of the Chief Probation Officer for placement at New Life.

Middleton testified that J.M.'s academic needs could be met with this placement and that both group and individual therapy would be available to her. He stated that all reasonable efforts had been made to keep her in her parents' home and that reasonable efforts would be made to return her home as soon as possible. However, it was his opinion that she could not be given the quality of care and level of support she needed at home at that time.

J.M. called her parents to testify. Her mother testified that she had seen improvement in J.M.'s behavior and that J.M. was complying with her curfew with only five-to-ten minute violations. Her father also testified that he saw improvement in J.M.'s behavior. He stated he would supervise J.M. and would be sure she got to school and to medical appointments. Both parents asked the court to allow J.M. to stay at home with them.

The trial court concluded remaining in her parents' home was not in J.M.'s best interest. The court found she was in need of rehabilitation and that her protection—and the protection of the public—required her to be placed on a one-year probation, in the custody of the chief probation officer, for placement at New Life Center. J.M. appeals her placement and seeks to be allowed to return to her parents' home.

Held: Affirmed

Opinion: The single question before us is whether the trial court abused its discretion by placing J.M. away from her parents' home. Before the trial court can place a child on probation outside the child's home, the court must find: it is in the child's best interests to be so placed; 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 her home; and the child, in her home, cannot be provided the quality of care and level of support and supervision that she needs to meet the conditions of probation. TEX. FAM.CODE ANN. § 54.04(i)(1) (West 2014). We review a trial court's disposition of a child found to be engaging in delinquent behavior for an abuse of discretion. In the Matter of K.E., 316 S.W.3d 776, 781 (Tex.App.-Dallas 2010, no pet.) ("A juvenile court has broad discretion in determining the appropriate placement for a juvenile who has been adjudicated as engaging in delinquent behavior."); In the Matter of J.M., 25 S.W.3d 364, 367 (Tex.App.-Fort Worth 2000, no pet.). The test for abuse of discretion is whether the trial court acted in an unreasonable or arbitrary manner, without reference to guiding rules and principles. K.E., 316 S.W.3d at 781.

In this case, the court gave J.M. a thirty-day trial period at home to determine whether that environment would allow her to receive the care she needed. There were no reports she exhibited any extreme or violent behavior during the trial period. However, there was evidence—in the form of missed curfews—that J.M.'s home environment was not sufficiently structured and supervised. There was also evidence that J.M. missed an appointment for a psychological evaluation during this trial period, and evidence her parents were not cooperating sufficiently with respect to J.M.'s treatment.1

J.M.'s probation officer testified that J.M. needed to have a highly structured environment with consistent supervision and a therapist always present. He testified she was not able to receive the care and supervision she needed in her home.

The trial court found it was in J.M.'s best interests to be placed at the New Life Center where her educational and mental health needs could be met. The trial court further found that reasonable efforts had been made to prevent the need for J.M.'s removal from her home and to make it possible for her to return to her home as soon as possible. In the end, the court found that—if J.M. remained at home—she could not be provided the quality of care and level of support and supervision that she needed to meet the conditions of probation. See TEX. FAM.CODE ANN. § 54.04(c), (i)(1). Based on those findings, the trial court signed its judgment placing J.M. on probation for one year with placement at the New Life Center.

We conclude the trial court's ruling is reasonable in light of the evidence and was made in reference to the requirements of the statute. We discern no abuse of discretion in J.M.'s placement. See K.E., 316 S.W.3d at 781. We overrule her single issue.

Conclusion: We affirm the trial court's judgment.

Lewis v. Nolley, No. PD—0833-13, PD—0999-13, 428 S.W.3d 860, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-2 (Tex.Crim.App, 4/30/14).

A JUVENILE WHOSE "LIFE WITHOUT PAROLE" SENTENCE HAS BEEN MODIFIED TO "LIFE," IS NOT ENTITLED TO AN INDIVIDUALIZED PUNISHMENT HEARING BEFORE THE NEW SENTENCE CAN BE ASSESSED.

Facts: On or about August 28, 2008, Appellant Lewis killed Jaime Lujan while in the course of committing or attempting to commit retaliation against Lujan's coworker, who had provided police with information that led to the arrest of Lewis's friend. Appellant Lewis was born on August 29, 1991, meaning that he was sixteen on the date of the offense. He was originally detained as a juvenile but was later certified to be tried as an adult. See TEX. FAM.CODE ANN. § 54.02. He was eventually convicted of capital murder and assessed a mandatory sentence of life imprisonment without the possibility of parole as required by the then-current version of Section 12.31 of the Penal Code. TEX. PENAL CODE ANN. § 12.31(a) (2008) ("An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the institutional division for life without parole."). He was not afforded the opportunity to present mitigating evidence at a punishment hearing because life imprisonment without parole was automatic under the statutory scheme. Lewis filed a timely appeal, and the appellate court affirmed his conviction. Lewis v. State, No. 07–11–0444–CR (Tex.App.-Amarillo Apr. 17, 2013), withdrawn by Lewis v. State, 402 S.W.3d 852 (Tex.App.-Amarillo 2013). In 2013, after the Supreme Court announced its decision in Miller, he filed a supplemental brief contending that his life-without-parole sentence was unconstitutional in light of Miller v. Alabama, 567 U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (holding mandatory life without parole cruel and unusual punishment when imposed on juvenile offenders). The appellate court reaffirmed appellant Lewis's conviction but reformed his sentence to life imprisonment. Lewis v. State, 402 S.W.3d 852, 867 (Tex.App.-Amarillo 2013).

Appellant Nolley was also sixteen years old when he shot and killed Larry Ayala during a robbery and home invasion on July 27, 2010. His case was also transferred from the juvenile district court to the criminal district court.

See TEX. FAM.CODE ANN. § 54.02. On April 19, 2012, a jury convicted appellant Nolley of capital murder. Without a hearing at which to present mitigating evidence, appellant Nolley was sentenced to life imprisonment without the possibility of parole. On appeal, he challenged the legality of his sentence under the 2009 version of Section 12.31(a) of the Texas Penal Code and Miller v. Alabama. The appellate court reformed appellant Nolley's sentence to life imprisonment to comport with Section 12.31(a) of the Penal Code and Supreme Court precedent but affirmed the trial court's judgment in all other respects. Nolley v. State, No. 14–12–00394–CR, 2013 WL 3326796, at *5 (Tex.App.-Houston [14th Dist.] Jun. 27, 2013) (mem. op., not designated for publication).

Both appellants filed petitions for discretionary review, claiming that their reformed sentences are unconstitutional because Miller requires individualized sentencing of juvenile offenders. Appellant Nolley contends, more specifically, that Miller mandates individualized sentencing when juveniles in Texas face life imprisonment because it is the most severe punishment for which juveniles are eligible in this state.

Held: Affirmed

Opinion: Appellants argue that they are entitled to individualized sentencing hearings before being assessed sentences of life imprisonment because they were juveniles at the time of their offenses. This is not what Miller requires. Miller does not entitle all juvenile offenders to individualized sentencing. It requires an individualized hearing only when a juvenile can be sentenced to life without the possibility of parole. After the reformations by the appellate courts, appellants are not sentenced to life without parole, and under Section 12.31 of the Penal Code, juvenile offenders in Texas do not now face life without parole at all. Therefore, appellants' cases do not fall within the scope of the narrow holding in Miller.

Appellant Nolley argues that, because Section 12.31 makes life imprisonment the most severe penalty available to juveniles in the state of Texas, he is entitled to an individualized hearing before he can be assessed that sentence. He cites the Supreme Court's language that "Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," Miller, 132 S.Ct. at 2475, for the proposition that courts should read Miller to apply to their jurisdiction's strictest penalty. Appellant's reliance is misplaced. The sentence immediately following that one reiterates that mandatory life imprisonment without the possibility of parole for juvenile offenders violates the principle of proportionality and, accordingly, the Eighth Amendment's ban on cruel and unusual punishment. In light of the simultaneous references to Graham and Roper, the United States Supreme Court's choice of "the harshest possible punishment," rather than "a state's harshest punishment," indicates that it was referring to sentencing a juvenile to life without parole. Finally, and most devastating to appellant's cause, is another sentence from the Miller opinion: "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " Miller, 132 S.Ct. at 2460. Appellant's suggested interpretation is broader than the Supreme Court's choice of language supports.

Conclusion: Because the holding in Miller is limited to a prohibition on mandatory life without parole for juvenile offenders, appellants are not entitled to punishment hearings. We therefore affirm the judgment of the appellate courts.

In the Matter of J.D.H.M., MEMORANDUM, No. 04—13—00235—CV, 2014 WL 1089748, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-3 (Tex.App.—San Antonio, 3/19/14).

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN TRANSFERRING THE JUVENILE TO TDCJ AS OPPOSED TO RELEASING HIM ON PAROLE BECAUSE THERE WAS SOME EVIDENCE TO SUPPORT THE COURT'S DECISION.

Facts: According to documents in the record, J.D.H.M. received a call from a female individual asking him if he wanted some marijuana. The female claimed she knew a drug dealer they could rob. The female individual and a male individual picked up J.D.H.M., who claimed to be using Xanax and marijuana that day. The male individual

had a gun. When the three arrived at the drug dealer's house, only J.D.H.M. went inside—he took the gun with him. Once inside, J.D.H.M. pointed the gun at the individuals in the house and demanded marijuana, a scale, and the television. One of the individuals in the home carried the television outside and loaded it into the waiting car. J.D.H.M. and the others left.

Ultimately, J.D.H.M. was arrested. The State filed a petition alleging J.D.H.M. engaged in delinquent conduct in that he committed an aggravated robbery. J.D.H.M. stipulated to the charge and pursuant to a plea bargain agreement with the State, the juvenile court committed J.D.H.M. to TJJD for a fifteen-year determinate sentence, with the possibility of transfer to TDCJ.

After J.D.H.M. spent approximately two years in the TJJD, the Executive Director of the TJJD advised the juvenile court that the agency was requesting J.D.H.M. be transferred to TDCJ because he would not have completed his minimum required stay at TJJD before his nineteenth birthday. After a hearing, the juvenile court ordered J.D.H.M. transferred to TDCJ to complete his sentence. J.D.H.M. perfected this appeal.

J.D.H.M. contends that the trial court abused its discretion in transferring him to TDCJ rather than placing him on parole.

Held: Affirmed

Memorandum Opinion: In determining whether a juvenile should be transferred, the juvenile court may consider several factors, including:
• the experiences and character of the juvenile before and after commitment to TJJD;
• the nature of the offense the juvenile committed and the manner in which it was committed;
• the abilities of the juvenile to contribute to society;
• the protection of the victim of the offense or any member of the victim's family;
• the recommendations of the TJJD and the prosecutor;
• the best interests of the juvenile; and
• any other factor relevant to the issue to be decided.
TEX. FAM.CODE ANN. § 54.11(k).

Although the court may consider these factors, it is not required to consider each one, and is expressly permitted to consider relevant factors not set forth in section 54.11(k). J.J., 276 S.W.3d at 178; see TEX. FAM.CODE ANN. § 54.11(k).

The record establishes the juvenile court looked at the evidence in light of the relevant section 54.11(k) factors. The court noted "the good things" J.D.H.M. accomplished, but recalled that at the time of sentencing, she warns those like J.D.H.M. with determinate sentences about their behavior and its possible ramifications with regard to subsequent transfers to TDCJ. The juvenile court stated it was possible J.D.H.M.'s behavior had changed simply because he realized he was turning nineteen and he would have to come back to court with regard to a transfer to TDCJ.

Considering J.D.H.M.'s offense—aggravated robbery—and his extensive behavioral issues during his time in TJJD, coupled with the recommendations from Mr. Cucolo and TJJD, we cannot say the juvenile court abused its discretion in ordering J.D.H.M. transferred to TDCJ. Mr. Cucolo presented evidence that J.D.H.M. was not a good candidate for even structured parole based on his behavioral problems while at TJJD, his drug and alcohol issues, and the fact that he had not yet fulfilled the minimum three years of his sentence. Although Dr. Covarrubias thought that it was in J.D.H .M.'s best interest to be released into a structured parole environment based on his recent behavioral improvements, mental stability, and academic success, the court did not find his opinion compelling, perhaps because J.D.H.M's recent improvement was at a time when he knew transfer was possible.

Clearly, there was some evidence to support the juvenile court's decision to transfer J.D.H.M. to TDCJ as opposed to releasing him on parole. Because there was some evidence to support the court's decision, we hold there was no abuse of discretion. See L.G.G., 398 S.W.3d at 855; D.L., 198 S.W.3d at 229.

Conclusion: Based on the foregoing, we overrule J.D.H.M.'s point of error and affirm the trial court's judgment.

EVIDENCE—

In the Matter of J.G.M., MEMORANDUM, No. 13-13-00704-CV, 2015 WL 124177, Tex.Juv.Rep. Vol. 29, No. 1 ¶ 15-1-7 (Tex.App.-Corpus Christi, 1/8/15).

WHEN A JUVENILE VOLUNTARILY TAKES THE STAND TO TESTIFY IN HIS OWN DEFENSE, HE WAIVES HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

Facts: Appellant pleaded "true" to the State's allegations that she engaged in delinquent conduct by committing the felony offense of assault on a public servant. See TEX. PENAL CODE ANN. § 22.01(a), (b)(1) (West, Westlaw through 2013 3d C.S.). The trial court held a contested disposition hearing. At the beginning of the hearing, appellant's counsel objected to the admission of an amended disposition report prepared by Sandy Perez, a probation officer with the Cameron County Juvenile Probation Department. Perez prepared the report based on information obtained in an interview with appellant, but did not advise appellant of her Miranda rights prior to the interview. Appellant's counsel argued that the report included incriminating statements made by appellant during the interview and therefore violated appellant's Fifth Amendment privilege against self-incrimination. See U.S. CONST. amend. V. The trial court noted that there were two sentences in the report in which appellant admitted prior drug use. The trial court struck the two sentences from the report, stated that it would disregard the statements, and admitted the remainder of the report.

Perez testified that she did not read appellant her Miranda rights before interviewing her. The State concedes that the statements made by appellant during the interview were taken in violation of article 38.22 of the code of criminal procedure. See TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a) (West, Westlaw through 2013 3d C.S.) (providing statutory warnings virtually identical to Miranda warnings, except that article 38.22 includes a warning that the accused has the right to terminate the interview at any time, which is not required by Miranda). The State argues, however, that appellant's Fifth Amendment rights were not violated because the trial court properly excluded the statements and disregarded them.

Held: Affirmed

Memorandum Opinion: Appellant relies on In the Matter of J.S.S., in which the El Paso Court of Appeals held that, under the specific facts of that case, the Fifth Amendment applied to a probation officer's pre-disposition interview with a juvenile, and the juvenile should have been warned of his rights and informed that his statements could be used against him during the disposition hearing. 20 S.W.3d 837, 846–47 (Tex. App.–El Paso 2000, pet. denied). The El Paso Court found that the probation officer's interview of the juvenile "exceeded any arguably neutral purposes" by questioning the juvenile about two extraneous offenses. See id. at 846. The El Paso Court noted that the trial court explicitly stated that, in making his disposition decision, the trial judge "took into account that J.S.S. had committed the same offense on two prior occasions." Id. at 840. Moreover, the J.S.S. Court emphasized that its holding was limited to the facts in the case before it. Id. at 846 n.7. The El Paso Court added the following footnote:

Our opinion should not be read as holding that the Fifth Amendment applies to all pre-disposition interviews because of the facts in a given case may show that the interview served more neutral purposes, and therefore, did not implicate the juvenile's Fifth Amendment rights. Rather than focusing on the type of proceeding involved, we believe the better approach is to examine the nature of the statement or admission and the exposure which it invites. Id.

In a more recent case, In re C.R.R.E., the El Paso Court of Appeals found J.S.S. distinguishable and found that a juvenile's Fifth Amendment rights were not violated where the juvenile's probation officer did not ask the juvenile about extraneous offenses and the trial court made its disposition decision without taking into account the juvenile's prior acts. See No. 08–02–00476–CV, 2004 WL 231928, at *5 (Tex. App.–El Paso Feb. 5, 2004, no pet.)(mem.op.).

In the present case, the State concedes that the incriminating statements made by appellant during the interview were taken in violation of article 38.22. See TEX. CODE CRIM. PROC. ANN. art. 38.22, § 2(a). However, the trial court struck the statements from the report and specifically stated that it would not consider the inadmissible statements. We assume the trial court disregarded the evidence unless the record clearly shows the contrary. See Herford v. State, 139 S.W.3d 733, 735 (Tex. App.–Fort Worth 2004, no pet.)(stating that while an appellate court no longer automatically presumes the trial court did not consider inadmissible evidence, it can assume that the trial court disregarded irrelevant or inadmissible evidence when it indicated it would and the record fails to show that the court did otherwise); see also Chavira v. State, No. 13–10–00002–CR, 2011 WL 2732610, at *5 (Tex. App.–Corpus Christi July 14, 2011, no pet.)(mem. op., not designated for publication) (holding the same). The trial court did not abuse its discretion in admitting the disposition report.

Appellant also argued that the trial court violated her Fifth Amendment rights by eliciting testimony from her during the disposition hearing. Appellant testified on her own behalf at the disposition hearing. The State declined to cross-examine appellant, but the trial court questioned appellant. The trial court asked appellant whom she stayed with during an earlier period when she ran away. Appellant's counsel objected and urged appellant to "invoke her [F]ifth [A]mendment privilege." The trial court denied the objection and stated that appellant waived her Fifth Amendment privilege by testifying. Thereafter, appellant responded to the trial court's questions by stating that she did not remember.

"When a criminal defendant voluntarily takes the stand to testify in his own defense, he waives his privilege against self-incrimination." Ramirez v. State, 74 S.W.3d 152, 155 (Tex. App.–Amarillo 2002, pet. ref'd) (citing Nelson v. State, 765 S.W.2d 401, 403 (Tex. Crim. App. 1989)); see Felder v. State, 848 S.W.2d 85, 99 (Tex. Crim. App. 1992) (en banc) ("Once an appellant decides to testify at trial he opens himself up to questioning by the prosecutor on any subject matter which is relevant.").

Conclusion: Here, appellant testified about incidents involving her mother and step-father that made her feel like running away. The trial court asked appellant about her whereabouts when she was on runaway status. We hold that appellant's Fifth Amendment privilege was not violated when the trial court questioned her. We overrule appellant's sole issue. We affirm the trial court's judgment.

In the Matter of A.J.R.P., No. 04-13-00734-CV, ___S.W.3d.___, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-7 (Tex.App.–San Antonio, 7/16/14).

IN A JUVENILE CASE, THE TEXAS PENAL CODE DOES NOT REQUIRE THAT THE VICTIM OF AN AGGRAVATED ROBBERY BY THREATS, ACTUALLY PERCEIVE THE THREAT, ONLY THAT THERE WAS EVIDENCE OF A THREAT.

Facts: T.S., a high school student, was the victim of the aggravated robbery. He testified before a jury that, on the day of the robbery, he rode the school bus home. When he got off the bus in his neighborhood, he was listening to very loud music through headphones that were attached to his iPhone. According to T.S., he saw something unusual out of the corner of his eye. A.J.R.P. was following him, running and ducking behind a truck that was on the same side of the street that T.S. was walking on. Because this was not A.J.R.P.'s usual bus stop, T.S. thought A.J.R.P. was running toward somebody else. T.S. got out his keys, and a couple of seconds after he saw A.J.R.P., he was hit on the back of his head. He blacked out and fell to the ground. T.S. testified that when he came to, he thought he was dead. His body was numb and he started yelling. He was in a lot of pain. A lady came from across the street to help him up. She called 911. T.S. noticed some scattered rocks on the ground. He then realized his phone was gone. When the

police came, he was able to tell them that he thought A.J.R.P. had attacked him. A.J.R.P. was the only person on the street right before T.S. was attacked. At the time of the attack, T.S. was just two houses down from his own house. He testified that the pain in his head was the worst pain he had felt in his life. T.S. believed that A.J.R.P. used the rock to threaten him and to steal his iPhone. A couple of days later, he used a "find-a-phone" app and got a "ping" around the neighborhood where A.J.R.P. lives.

L.P., another student, testified that he exited the bus at the same time as T.S. and A.J.R.P. According to L.P., A.J.R.P. told him he wanted to get someone's iPhone. L.P. saw A.J.R.P. pick up a landscaping stone as he was walking behind T.S. At that point, L.P. turned around and went home. He heard a sound, but did not know what it was. He did not witness the robbery.

Several police officers responded to the scene of the robbery and testified at trial. Among those who testified was Officer Jonathan Kennedy of the Selma Police Department. Officer Kennedy testified that when he arrived at the scene, T.S. was injured and reported that someone had hit him. T.S. was treated by emergency technicians in an ambulance. Officer Kennedy and another officer found a broken rock and blood on the driveway where the robbery had occurred. Officer Donald Couser, also of the Selma Police Department, interviewed T.S. while he was being treated in the ambulance. He determined that T.S. had been assaulted by A.J.R.P. and that T.S.'s keys and cell phone had been stolen. Officer Keith Osborn, another Selma police officer, testified that on the evening of the robbery, he and another officer went to A.J.R.P.'s house and spoke with

A.J.R.P. and his mother. A.J.R.P. said that he and T.S. went to school together, rode the bus together, and were friends. A.J.R.P. said he had gotten off the school bus that day at his own bus stop and had not been in T.S.'s neighborhood that day. Officer Osborn, however, testified that he watched the bus video and it showed A.J.R.P. getting off the school bus at T.S.'s bus stop, not his own bus stop. The school bus driver, Daniel Jembarowski, confirmed that A.J.R.P. did not get off at his normal stop that day, which Jembarowski testified was unusual for him.

After hearing all the evidence, the jury found A.J.R.P. had engaged in delinquent conduct as charged by the State.

Held: Affirmed

Opinion: Although juvenile proceedings are civil matters, the standard applicable in criminal matters is used to assess the sufficiency of the evidence underlying a finding the juvenile engaged in delinquent conduct. In re R.R., 373 S.W.3d 730, 734 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); In re A.O., 342 S.W.3d 236, 239 (Tex. App.—Amarillo 2011, pet. denied). And, the Texas Court of Criminal Appeals has determined that the legal-sufficiency standard as enunciated in Jackson v. Virginia, 443 U.S. 307, 319 (1979), is the only standard that should apply in determining whether the evidence is sufficient to support each element that the State is required to prove beyond a reasonable doubt. See Brooks v. State, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). In a Jackson v. Virginia evidentiary-sufficiency review, we view all 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 crime beyond a reasonable doubt. Jackson, 443 U.S. at 319; Adames v. State, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011), cert. denied, 132 S. Ct. 1763 (2012). The court of criminal appeals has explained that this standard "recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence after drawing reasonable inferences from the evidence." Adames, 353 S.W.3d at 860. Therefore, on appellate review, we determine whether based on "cumulative force of all the evidence" the necessary inferences made by the trier of fact are reasonable. Id. We conduct this constitutional review by measuring the evidentiary sufficiency with "explicit reference to the substantive elements of the criminal offense as defined by state law." Id.

A.J.R.P. was charged with aggravated robbery under sections 29.02(a)(2) and 29.03(a)(2) of the Texas Penal Code. Section 29.02(a)(2) provides that a person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a)(2) (West 2011). Section 29.03(a)(2) elevates the robbery to aggravated robbery if he uses or exhibits a deadly weapon. Id. § 29.03(a)(2).

A.J.R.P. contends that the evidence is legally insufficient to support the jury's verdict because no rational trier of fact could have found that he threatened the victim or placed him in fear of imminent bodily injury. A.J.R.P.'s argument is specifically based on the fact that the evidence shows the attack was unexpected and, thus, T.S. did not perceive a threat. Further, A.J.R.P. points to the evidence showing T.S. was struck in the back of the head and did not witness anybody coming up behind him to hit him. A.J.R.P. also focuses on T.S.'s statement that he thought A.J.R.P. was running toward someone else. In other words, according to A.J.R.P., because the blow to T.S.'s head was a surprise, there is no evidence A.J.R.P. threatened T.S. or placed him in fear before striking him on the back of the head and taking his iPhone.

A.J.R.P. suggests that it might have been more appropriate for the State to allege that he committed aggravated robbery by assault, as set forth in sections 29.02(a)(1) of the Texas Penal Code. That section provides that an offense is committed if, in the course of committing theft, the actor intentionally, knowingly, or recklessly causes bodily injury to another. TEX. PENAL CODE
ANN. § 29.02(a)(1) (West 2011). However, as A.J.R.P. points out, the sufficiency of the evidence must be measured against the statutory element that was actually pleaded—in this case, aggravated robbery by threat or by placing in fear. See Cada v. State, 334 S.W.3d 766, 773-74 (Tex. Crim. App. 2011) (explaining that because sufficiency of evidence is measured by hypothetical jury charge as "authorized by the indictment," "if the State pleads one specific element from a penal offense that contains alternatives for that element, the sufficiency of the evidence is measured by the element that was actually pleaded, not any other statutory alternative element").

The State counters that the evidence is legally sufficient to show A.J.R.P. committed aggravated robbery by threat or by placing in fear because, although T.S. did not state he was in fear before he was attacked, he did testify that (1) he was aware A.J.R.P. was behind him and (2) he believed A.J.R.P. threatened him with a rock.

Because of the sudden nature of the attack from behind, we agree with A.J.R.P. that the evidence is insufficient to show A.J.R.P. placed T.S. in fear of imminent bodily injury or death. See Howard v. State, 333 S.W.3d 137, 140 (Tex. Crim. App. 2011) (holding robbery by placing in fear requires that (1) the defendant is aware his conduct reasonably certain to place someone in fear and (2) someone actually is placed in fear). Whether there is sufficient evidence of robbery by threat, however, is not easily answered.

The Texas Court of Criminal Appeals has considered, in several cases, the issue of whether a threat must be perceived by the victim in order to satisfy the threat element of the various statutes that criminalize threatening conduct. In McGowan v. State, 664 S.W.2d 355, 357-58 (Tex. Crim. App. 1984), the court of criminal appeals found the evidence insufficient to sustain a conviction for aggravated assault by threat where there was no evidence of any threat being made against the victim. In McGowan, the evidence showed the victim was stabbed in the back of the head while trying to help her daughter who was being attacked by the defendant. Id. at 357. In its discussion of the evidence, the court stated it is undisputed that [the mother] did not know what appellant struck her with. [The mother] was merely trying to pull her daughter away from appellant. There is no evidence that prior to stabbing her appellant threatened her in any way. She never saw appellant holding a knife nor did she testify that appellant threatened her with a knife. Finally, the evidence shows that after appellant stabbed [the mother], he fled. Thus, we are constrained to hold that the evidence is insufficient [ ] to show aggravated assault by threats even though it shows bodily injury. Id. at 357-58.

One way to read the holding in McGowan is to conclude that, because the victim did not perceive a threat, there was insufficient evidence to sustain the conviction for aggravated assault by threat. However, a few years after McGowan, in Olivas v. State, 203 S.W.3d 341 (Tex. Crim. App. 2006), the court of criminal appeals clarified its holding in McGowan when it considered, again, the sufficiency of the evidence to sustain a conviction for assault by threat. The court discussed the definition of "threat." Because the word is not statutorily defined in the Texas Penal Code, the court looked to the dictionary definition. Olivas, 203 S.W.3d at 345. It noted that Webster's Dictionary defines "threaten" as:

1. to declare an intention of hurting or punishing; to make threat against;
2. to be a menacing indication of (something dangerous, evil, etc.); as the clouds threaten rain or a storm;
3. to express intention to inflict (injury, retaliation, etc.);

4. to be a source of danger, harm, etc. to. Olivas, 203 S.W.3d at 345 (emphasis in original).

The Olivas court noted that "each of these definitions indicates an act being performed, as opposed to an act which is perceived by an outside party." Id. "Thus, these definitions indicate that a threat occurs, not when the victim perceived the threat, but as soon as the actor utters the threatening words or otherwise initiates the threatening conduct." Id. Then, after noting that Black's Law Dictionary defined "threat" as "[a] communicated intent to inflict harm or loss on another or on another's property," the court found the "assault-by-threat" statute to be ambiguous. Olivas, 203 S.W.3d at 345-46. The court then considered other statutes that criminalize threatening behavior. Id. at 346. In looking at the robbery-by-threat statute, the court noted that "[b]y defining robbery to be theft plus either threatening or placing another in fear, this statute demonstrates that the term 'threaten' means something other than placing a person 'in fear of imminent bodily injury or death.'" Id. (emphasis in original). Then, in looking at the terroristic-threat statute, the court explained that "[l]ike robbery by threat, this statute indicates that 'threaten' and 'place any person in fear of imminent serious bodily injury' have two distinct meanings.'" Id. According to the court, "[b]oth statutes imply that one can threaten without necessarily placing another in fear of imminent bodily injury." Id. (emphasis in original). "A logical inference from this is that 'threatening,' as used in the Penal Code, does not require that the intended victim perceive or receive the threat, but 'placing another in fear of imminent bodily injury' does." Id. (emphasis added).

The court then noted that some courts of appeals had too broadly construed McGowan "as holding that the Texas assault-by-threat and robbery-by-threat statutes require a victim to perceive a threat as it occurs–that is, the offense requires a successfully communicated threat." Olivas, 203 S.W.3d at 347. In clarifying what it meant in McGowan, the court of criminal appeals stated that
McGowan "did not define assault by threat as requiring a victim's perception of the threat." Olivas, 203 S.W.3d at 348. Rather, according to the court, "it was the lack of any evidence, not the mother's lack of perception of a threat, that led this Court to conclude that the State failed to prove assault by threat." Id. at 349 (emphasis in original). Further, the court of criminal appeals stated, "a more accurate description of the holding in McGowan is that there must be some evidence of a threat being made to sustain a conviction of assault by threat." Olivas, 203 S.W.3d at 349 (emphasis in original). The court then noted that McGowan did not address the question of whether assault by threat requires an intended victim to perceive the threat. Olivas, 203 S.W.3d at 349. "That question remains open." Id. The court of criminal appeals then declined to resolve this open question because it found that there was sufficient evidence in that case that the victim had, in fact, perceived a threat. See id. at 349-51.

The concurring opinion in Olivas, authored by Presiding Judge Keller and joined by two others, agreed with the majority's "conclusion that the assault statute does not require that the victim perceive the defendant's conduct for that conduct to constitute a 'threat.'" Id. at 351 (Keller, P.J., concurring) (emphasis added). However, the concurring opinion criticized the majority, noting "the Court gains nothing by stopping just short of making it a holding." Id. According to the concurring opinion, "it would be better simply to hold, as the Court almost does, that a threat need not be perceived in order to be a threat." Id. at 352.

Again, in Schmidt v. State, 232 S.W.3d 66, 67-68 (Tex. Crim. App. 2007), the court of criminal appeals considered the issue of whether a victim must perceive a threat and, once again, did not reach the issue left open by Olivas. As it had in Olivas, the court determined it need not decide the issues because there was ample evidence that the defendant communicated a threat to the victim. Id. at 68-69.

And, most recently, in Boston v. State, 410 S.W.3d 321, 322 (Tex. Crim. App. 2013), the court of criminal appeals again considered the issue of whether the victim of an aggravated robbery by threat must perceive a threat. In Boston, the court briefly reflected on its analysis and conclusion in Olivas that one could logically infer that the Texas Penal Code does not require the intended victim to perceive or receive the threat but, once again, declined to reach the issue, finding sufficient evidence that the victim perceived the defendant's threatening behavior. Boston, 410 S.W.3d at 326-27. Thus, the court of criminal appeals again left the issue open.

Turning to the evidence in the case before us, because of the suddenness of the attack, T.S. did not perceive a threat from A.J.R.P before he was hit in the back of the head. Thus, we must answer the question that the Court of

Criminal Appeals left open—whether the Texas Penal Code requires the victim of an aggravated robbery by threat to perceive the threat. We note that, although the court of criminal appeals has not directly and ultimately answered the question, the court has, in fact, given us some clear guidance. As noted above, the court concluded, and came just short of holding, that the victim does not have to perceive the threat. Olivas, 203 S.W.3d at 346. In light of this guidance, we hold that the Texas Penal Code does not require the victim of an aggravated robbery by threat to perceive the threat. That being said, we must then consider whether, in this case, there was evidence of a threat that was not perceived by T.S.

The evidence shows A.J.R.P. followed T.S. as he got off the school bus. Although this was the proper bus stop for T.S., it was not A.J.R.P.'s usual bus stop. The evidence further shows A.J.R.P. expressed to another student, L.P., his intent to take someone's iPhone and that A.J.R.P. then picked up a landscaping stone as he was following T.S. toward T.S.'s home. Further, as A.J.R.P. followed T.S., he was running and ducking behind a truck on the same side of the street that T.S. was on. T.S. was then hit on the back of the head with the landscaping stone. We find this evidence sufficient for the jury to conclude that A.J.R.P.'s behavior toward T.S. was threatening, despite T.S.'s failure to perceive such behavior as threatening.

Conclusion: Accordingly, we hold the evidence is sufficient to support the finding that A.J.R.P. engaged in delinquent conduct. We thus affirm the trial court's judgment.

In the Matter of V.G.V., Jr., MEMORANDUM, No. 03—13—00335—CV, 2014 WL 1362646, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-8 (Tex.App.—Austin, 4/1/14).

A VIDEOTAPED STATEMENTS TO POLICE BY CO-DEFENDANTS, USED IN COURT AGAINST THE JUVENILE, WAS NOT CONSIDERED ACCOMPLICE-WITNESS TESTIMONY.

Facts: A jury found that V.G.V., Jr., appellant, engaged in delinquent conduct by committing the offenses of theft, criminal trespass, and burglary of a motor vehicle. The trial court adjudicated appellant delinquent based on the jury's findings and committed him to the Texas Youth Commission for an indeterminate period of time. In three issues, appellant contends his adjudications of delinquency were based on uncorroborated accomplice testimony and that the non-accomplice evidence is insufficient to connect him to the delinquent conduct. We will affirm.

The State alleged that on the night of December 5, 2012, appellant, a 16–year–old male, and two other men who were not juveniles committed theft of a firearm, criminally trespassed on two properties, and burglarized two motor vehicles. After a jury was empanelled, appellant pleaded "true" to both allegations of criminal trespass and "not true" to the remaining allegations. The two men who were alleged to have committed the offenses with appellant did not testify as witnesses at trial, but their videotaped statements to the police and a video of the two men taken during their detention in a patrol car were shown to the jury during trial. During their discussions in the patrol car and in their statements made to the police, the two men implicated appellant in the criminal activities that occurred on the night of December 5, 2012.

In this appeal, appellant argues that the two other men were accomplices as a matter of law, attacks the legal sufficiency of the evidence to corroborate their testimony, and contends that the trial court erred by not granting his motion for directed verdict on the ground that the State failed to present sufficient evidence corroborating the alleged accomplice-witness testimony.

Held: Affirmed

Memorandum Opinion: Section 54.03(e) of the Texas Family Code requires corroboration of accomplice-witness testimony in juvenile delinquency proceedings:
An adjudication of delinquent conduct or conduct indicating a need for supervision cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the child with the alleged delinquent conduct or conduct indicating a need for supervision; and the corroboration is not sufficient if it merely shows the

commission of the alleged conduct. Tex. Fam.Code § 54.03(e). The accomplice-witness language in the Family Code is identical in substance to that of article 38.14 of the Texas Code of Criminal Procedure. See Tex.Code Crim. Proc. art. 38.14; In the Matter of C.M.G., 905 S.W.2d 56, 58 (Tex. App .-Austin 1995, no writ).

The accomplice-witness rule reflects a legislative determination that accomplice testimony implicating another person should be viewed with caution because "accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person." Blake v. State, 971 S.W.2d 451, 454 (Tex.Crim.App.1998). Under this rule, it is not necessary for the non-accomplice evidence to be sufficient in itself to establish the accused's guilt beyond a reasonable doubt. Gill v. State, 873 S.W.2d 45, 48 (Tex.Crim.App.1994). Nor is it required that the non-accomplice evidence directly link the accused to the crime. Id.; Reed v. State, 744 S.W.2d 112, 126 (Tex.Crim.App.1988). "All that is required is that there be some non-accomplice evidence which tends to connect the accused to the commission of the offense alleged in the indictment." Gill, 873 S.W.2d at 48 (emphasis in original). The phrase "tends to connect" has the ordinary dictionary definition, "to serve, contribute or conduce in some degree or way ... to have a more or less direct bearing or effect." Holladay v. State, 709 S.W.2d 194, 198 (Tex.Crim.App.1986) (quoting Boone v. State, 235 S.W. 580, 584 (Tex.Crim.App.1922)). There is no precise rule as to the amount of evidence that is required to corroborate the testimony of an accomplice; each case must be judged on its own facts. Gill, 873 S.W.2d at 48.

In the present case, however, neither of the two alleged accomplices testified at trial. Their out-of-court statements recorded on the videotapes played for the jury did not constitute "testimony" of an accomplice and therefore did not need to be corroborated.
[T]he "testimony" that must be corroborated is that which is adduced "through live witnesses speaking under oath or affirmation in presence of tribunal." ... [W]e construe the "testimony" contemplated by Article 38.14 to be of the narrower, evidentiary kind, the kind adduced in open court by live witnesses under oath. Bingham v. State, 913 S.W.2d 208, 210 (Tex.Crim.App.1995) (quoting Black's Law Dictionary 1476 (6th ed.1990)).

Conclusion: Because there was no accomplice-witness testimony adduced at appellant's trial, the corroboration requirement of Family Code section 54.03 was not implicated. The trial court therefore did not err in denying appellant's directed verdict based on the assertion that the State failed to sufficiently corroborate accomplice-witness testimony. We overrule appellant's three issues. Having overruled appellant's three issues, we affirm the trial court's order of commitment.

MODIFICATION OF DISPOSITION

In the Matter of M.A.S., No. 08—13—00085—CV, 2014 WL 2881561, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-6 (Tex.App.—El Paso, 6/25/14).

IN A MOTION TO MODIFY HEARING, THE TRIAL COURT DID NOT ACT ARBITRARILY OR WITHOUT REFERENCE TO GUIDING PRINCIPLES OR ABUSE ITS DISCRETION BY COMMITTING JUVENILE TO THE TJJD.

Facts: On December 1, 2011, M.A.S. was adjudicated for committing the offense of injury to a child, a state jail felony. See TEX. PENAL CODE ANN. § 22.04 (West 2011). In July 2012, M.A.S. was placed on supervised probation under the terms and conditions of intensive supervised probation. In October 2012, the juvenile court sustained the State's motion to modify M.A.S.'s supervised probation. In December 2012, M.A.S. was placed on out-of-home placement at New Life Treatment Center (RTC). In February 2013, the State filed a motion to modify the prior disposition, alleging that M.A.S. violated the terms and conditions of her supervised probation because she was "discharged unsuccessfully from the [RTC]." The court sustained the State's motion and set a disposition hearing.

At the hearing on the State's motion to modify, the court heard testimony regarding M.A.S.'s history with respect to probation. Jennifer Parada, M.A.S.'s probation officer, testified that M.A.S. had prior adjudications. During M.A.S.'s current probation, M.A.S. was placed on intensive supervised probation on three occasions. Parada

reported that M.A.S. was placed in residential care at RTC on February 1, 2013, but was unsuccessfully discharged after 41 days due to M.A.S.'s ongoing negative behavior.

Parada testified that prior to living in RTC, M.A.S. lived with her grandmother who had been M.A.S.'s caretaker from a very young age due to M.A.S.'s mother's severe drug use.1 According to Parada, M.A.S. has a lot of issues at home including family discord which results from M.A.S.'s failure to listen to her grandmother's directives. Parada indicated the grandmother was not in agreement with Parada's recommendation that M.A.S. be placed in the TJJD. Parada did not believe the grandmother was able to properly supervise M.A.S. Parada reported that M.A.S. had informed her that other family friends or people who had acted in a mentoring-type role to M.A.S. might be willing to have M.A.S. placed in their homes. Parada did not follow up with any of those individuals. Parada felt that placement in the TJJD was the appropriate sentence for M.A .S.

Parada also testified about M.A.S.'s treatment needs. According to Parada, M.A.S. would benefit from a behavioral modification-type program that would assess M.A.S's behavior and restrain her when dealing with issues that could put M.A.S. and others in danger. It was also necessary for M.A.S. to continue her medication regimen and take anger management courses. Parada believed M.A.S.'s needs could be adequately addressed by the TJJD.

Parada felt that the protection of the public and the rehabilitation and protection of M.A.S. required that a disposition be made. Parada also provided testimony concerning the efforts that she or the El Paso County Juvenile Probation Department (the Department) made to rehabilitate M.A.S. When asked whether she felt she had exhausted all the options available at this point, Parada responded that M.A.S. had been provided with every service of the Department. Parada felt the only option left was to place M.A.S. in the care, custody, and control of the TJJD. On cross-examination, Parada testified that the Department placed M.A.S. in several services, but did not try placing M.A.S. in Lee Moor or any foster home.

M.A.S.'s modification-disposition report, the RTC discharge summary, and the TJJD eligibility letter were also admitted into evidence at the hearing. The modification-disposition report provided a summary of M.A.S.'s probation history. The report also showed that M.A.S. acquired numerous incident reports while at RTC including, "Requesting Extra Food/Self Harm, Possessing Contraband: Tongue Ring, Contraband: Scissors (verbal threats to harm a staff member), Attempted Assault of Peer/Inciting Peer/Use of Foul Language, Evading Staff Supervision, Verbal Aggression, Inciting Peer, and Destruction of Property." The report also reflected that despite the RTC staff's efforts to assist M.A.S., M.A.S.'s behavior did not improve. While at RTC, M.A.S. attended a charter school where she accumulated 21 discipline referrals for the following behaviors: "disrespecting teacher, leaving class without permission, disrespecting teachers ... use of foul language, refusal to participate in class, not complying with uniform, threatening to attack staff and refusal to attend school."

The RTC discharge summary indicates M.A.S. was discharged unsuccessfully from RTC because "[s]he ... set up a threatening environment for the other girls...." The summary describes in part, that M.A.S. tried to assault a younger peer, was combative and continued to incite and threaten peers and staff on January 7, 2013, and was restrained at school on two separate occasions for displaying threatening conduct towards others.

At the modification-disposition hearing, M.A.S.'s grandmother expressed that she wanted the best for her kids and that she wanted to take M.A.S. home. M.A.S. also read a letter she wrote to the court in which she stated that her conduct was wrong, apologized for her actions, and noted that she had changed her behavior and worked harder. Letters from two of M.A.S.'s teachers at the Delta Academy reporting that an improvement in M.A.S.'s behavior and attitude had been observed since M.A.S.'s return to the Academy were also admitted into evidence.

At the end of the disposition hearing, the court made the required statutory findings that M.A.S. was in need of rehabilitation and that protection of the child and the public required that disposition be made. The court further found that (1) it was in M.A.S.'s best interest to be placed outside of her home, (2) reasonable efforts were made to prevent or eliminate the need for her removal from the home and to make it possible for her return, and that (2) M.A.S. could not be provided the quality of care and level of support and supervision that she needs to meet the condition of probation. Based on her findings, the court committed M .A.S. to the TJJD. This appeal followed.

Held: Affirmed

Opinion: M.A.S. argues the court abused its discretion by committing her to the TJJD because there were other community based alternatives available. In support of her argument, M.A.S. refers us to Parada's testimony indicating that Parada did not follow up on the names of family friends who might have been willing to place M.A.S. in their homes and that Parada did not consider placing M.A.S. in Lee Moor home or any foster home. However, as correctly noted by the State, a trial court is not required to exhaust all possible alternatives before committing a juvenile to the TJJD. In re J.A.M., No. 04–07–00489–CV, 2008 WL 723327, at *2 (Tex.App.-San Antonio Mar. 19, 2008, no. pet.) (mem.op.) (citing In re J.R.C., 236 S.W.3d 870, 875 (Tex.App. Texarkana 2007, no pet.)). Additionally, pursuant to the Texas Family Code, a trial court is permitted to decline third and fourth chances to a juvenile who has abused a second chance. In re J.P., 136 S.W.3d at 633.

M.A.S. also contends the court abused its discretion because there was no evidence the community needed to be protected from M.A.S. and M.A.S. is not the type of serious offender that requires confinement in the TJJD. The record shows M.A.S. was adjudicated for the offense of injury to a child. The State also introduced evidence that M.A.S. was violent and aggressive with others.

The RTC discharge summary reports that M.A.S. has a history of physical aggression. The summary reflects M.A.S. acquired "10 Serious Incident Reports" during her admission at RTC. M.A.S. was unsuccessfully discharged from RTC because she "set up a threatening environment for the other girls...." The modification-disposition report similarly reflects that M.A.S. had a history of violent and aggressive behavior. While in school at RTC, M.A.S. accumulated 21 discipline referrals which included threats to attack staff. The report also indicates that M.A.S. has had seven referrals to the Department, two prior adjudications, and that her supervised probation had previously been modified on two occasions. We further note that in her letter to the court, M.A.S. conceded that her behaviors and actions which included fighting, stealing, and disobeying her family were wrong. She further conceded that her behavior while in RTC was unacceptable. She also explained that while in RTC, she felt stressed out and picked on, and that she dealt with those feeling by fighting and being aggressive.

Parada testified that the Department had provided M.A.S. with every service they had available and that she felt the only option left was to commit M.A.S. to the care, custody, and control of the TJJD. The modification-disposition report lists the various services the Department provided to M.A.S. The court found that the Department exhausted all resources.

Conclusion: Based on M.A.S.'s probation history, her continued inability to follow the terms and conditions of her probation, the inadequacies present in her home environment, and her ongoing violent and aggressive behavior which led to her unsuccessful discharge from RTC, the court could have reasonably concluded that the Department has exhausted all of its options and that the protection of the public and the juvenile required that disposition be made. The court did not act arbitrarily or without reference to guiding principles. Accordingly, we conclude the court did not abuse its discretion by committing M.A.S. to the TJJD. In re J.P., 136 S.W.3d at 632. Issue One is overruled. The juvenile court's judgment is affirmed.

In the Matter of A.K.A., MEMORANDUM, No. 04—13—00666—CV, 2014 WL 2601731, Tex.Juv.Rep. Vol. 28, No. 3 ¶ 14-3-5 (Tex.App.—San Antonio, 6/11/14).

IN A MOTION TO MODIFY HEARING, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE APPELLANT HAD FAILED TO SHOW THAT THE TRIAL COURT ACTED WITHOUT REFERENCE TO THE RELEVANT GUIDING RULES OR PRINCIPLES IN CHOOSING TO COMMIT HIM TO TJJD.

Facts: In 2012, the State alleged that appellant, when he was fifteen-years old, had engaged in delinquent conduct—specifically, one count of aggravated sexual assault and one count of indecency with a child. Appellant pled true to

the allegation of indecency with a child, and the State abandoned the other allegation. After considering the stipulated evidence, the trial court found that appellant had engaged in delinquent conduct.

At the disposition hearing, the trial court placed him on probation outside the home and committed him to the custody of the Bexar County Juvenile Probation Department until his eighteenth birthday. Condition 23 of appellant's probation required him to cooperate fully and obey all the rules of the residential placement facility where he was placed and to remain at such facility until he completed a treatment program for sex offenders. Condition 27 of his probation required him to comply with section 54.0405 of the Texas Family Code by attending and completing sex offender treatment and counseling, submitting a DNA sample, submitting to polygraph exams, and having his parents actively participate in his treatment sessions. See TEX. FAM.CODE ANN. § 54.0405 (West 2014). Appellant was placed at the Judge Ricardo H. Garcia Post–Adjudication Facility to participate in its rehabilitation program. Appellant was discharged from the facility after seven months because he did not successfully complete the program.

In August 2013, the State moved for the trial court to modify appellant's disposition, alleging that appellant had violated the terms of his probation and requesting the trial court to commit him to the TJJD. Appellant pled true to two of the State's allegations. The trial court held a hearing, and after considering the stipulated evidence and arguments of counsel, it found that appellant had violated the terms of his probation and modified his disposition to commit him to the TJJD. On appeal, appellant argues that the trial court abused its discretion when it committed him to the TJJD because the record indicates that a continuation of probation would have been a more appropriate disposition.

Held: Affirmed

Memorandum Opinion: The trial court may modify its original disposition in a juvenile justice proceeding and commit the juvenile to the TJJD if: (1) the juvenile was originally found to have committed a felony; and (2) after a hearing to modify the disposition, the court finds that the juvenile violated a reasonable and lawful court order. TEX. FAM.CODE ANN. 54.05(f) (West 2014); In re J.P., 136 S.W.3d 629, 633 (Tex.2004). The trial court originally found that appellant had engaged in delinquent conduct by committing indecency with a child-a felony offense. See TEX. PENAL CODE ANN. § 21.11(d) (West 2011). Appellant's subsequent plea of true to violations of the conditions of his probation and his stipulation to the evidence supporting his plea are analogous to a judicial confession that justified a finding that appellant had violated a reasonable and lawful court order. See In re M.A.L., 995 S.W.2d 322, 324 (Tex.App.-Waco 1998, no pet.); In re N.I.N., No. 04–11–00464–CV, 2011 WL 6739579, at *2 (Tex.App.-San Antonio Dec. 21, 2011, no pet.) (mem.op.). Thus, the trial court was authorized to modify appellant's disposition and commit him to the TJJD's custody. See In re J.P., 136 S.W.3d at 633.

The trial court's decision to modify a juvenile's disposition to commit them to the TJJD is discretionary, and subject to review for abuse of that discretion. In re J.P., 136 S.W.3d at 633. The trial court has broad discretion in determining a suitable disposition for a juvenile who has been adjudicated to have engaged in delinquent conduct, particularly in a proceeding to modify a disposition. In re E.D., 127 S.W.3d 860, 862–63 (Tex.App.-Austin 2004, no pet.). The trial court abuses its discretion if it acts arbitrarily or unreasonably, or without reference to guiding rules and principles. Id. at 863. Although most of the trial court's decisions under the Family Code are guided by consideration of the juvenile's best interest, the best interests of juveniles who engage in serious and repeated delinquent conduct are superseded to the extent they conflict with public safety. In re J.P., 136 S.W.3d at 633; see TEX. FAM.CODE ANN. § 51.01 (West 2014).

The record reflects that, although appellant successfully participated in many of the detention facility's rehabilitation programs, he failed to successfully complete his sex-offender therapy, and he was discharged from the program and the facility for that failure. Appellant failed three polygraph tests relating to his sex-offender-therapy sessions. After he failed his second polygraph test, his probation officer met with him and told him that he needed to be truthful during his sessions. The officer informed appellant that he would seek to revoke appellant's probation if he continued to lie because lying would prevent him from successfully completing sex-offender therapy. Appellant then failed a third polygraph test and did not admit that he was lying until after he was confronted with the results, at

which point he admitted that he had been repeatedly lying throughout therapy. For instance, appellant admitted that he lied about not having intercourse with his victim. Appellant would also lie to his therapist about what questions he was asked in the polygraph tests and what answers he gave the polygraph examiner. For instance, after the third polygraph test, he told his therapist that he had lied to the polygraph examiner by denying that he continued to have sexual fantasies about his victim. However, when the therapist reviewed the polygraph results, they showed that appellant had actually admitted to the examiner that he continued to have sexual fantasies about the victim. Due to appellant's constant lies, his therapist concluded that appellant "was a counseling failure." His caseworker recommended that appellant be committed to the TJJD because it has "an excellent sex offender treatment program." His therapist and probation officer also recommended committing appellant to the TJJD.

At the modification hearing, the trial court found that appellant's commitment to the TJJD was appropriate because appellant's delinquent conduct was of a serious nature, appellant had violated the terms of his probation, and the appellant had failed his treatment program.

On appeal, appellant argues that the trial court should have placed him back on probation because he had a generally successful stay at the detention facility. He further argues that he should have been sent to the Pegasus School, a residential treatment facility offering a program specifically aimed at rehabilitating adolescent sex offenders. He argues that this disposition would be far less restrictive than commitment to the TJJD and would appear to promote the same result. He points out that the facility where he had been placed did not have a special unit designated for sex offenders. Appellant argues that because the trial court declined to place him in a less restrictive environment that would meet his needs and protect the public equally as well as commitment to the TJJD, the trial court abused its discretion.

"The Texas Family Code permits a trial court to decline third and fourth chances to a juvenile who has abused a second chance." In re J.R.C., 236 S.W.3d 870, 875 (Tex.App.-Texarkana 2007, no pet.) (citing In re J.P., 136 S.W.3d at 633). The trial court did not need to "exhaust all possible alternatives" before committing appellant to the TJJD on a motion to modify appellant's disposition. See id. (citing In re M.A., 198 S.W.3d 388, 391 (Tex.App.-Texarkana 2006, no pet.)); In re N.I.N., 2011 WL 6739579, at *3. Although appellant suggested commitment to the Pegasus School as an alternative to commitment to the TJJD, there is nothing shown by this record that would require the trial court commit appellant to the Pegasus School rather than the TJJD. See In re J.R.C., 236 S.W.3d at 875.

On the contrary, appellant's failure to successfully participate in and complete sex-offender therapy was not merely a trivial infraction of the terms of his probation. Cf. In re J.P., 136 S .W.3d at 632 (suggesting that a trial court may abuse its discretion if it removes a juvenile from his home and commits him to the TJJD for a trivial infraction of his probation). The requirement that appellant complete sex-offender therapy was imposed in order to correct the actions and behaviors that led to appellant's adjudication for delinquent conduct. His failure to successfully complete that therapy implicates public-safety concerns and supports the trial court's determination that public safety would be better served if appellant continued his rehabilitation while in the TJJD. Thus, the record justifies the trial court's exercise of its discretion to commit appellant to the TJJD, and appellant has failed to show that the trial court acted without reference to the relevant guiding rules or principles in choosing to exercise that discretion.

Conclusion: We affirm the trial court's order modifying appellant's disposition.

ORDERS AND JUDGEMENTS—

In the Matter of X.J.T., MEMORANDUM, No. 02-13-00176-CV, 2014 WL 787832, Tex.Juv.Rep. Vol. 28, No. 2 ¶ 14-2-1B (Tex.App.—Fort Worth, 2/27/14).

A JUDICIAL PRONOUNCEMENT IN THE COMMITMENT ORDER OF A DEADLY WEAPON FINDING WAS SUFFICIENT TO COMPLY WITH THE FAMILY CODE. AS A RESULT, NO ORAL PRONOUNCEMENT BY THE COURT WAS NECESSARY.

Facts: X.J.T. appeals a jury verdict adjudicating him guilty of delinquent conduct by committing two counts of aggravated robbery with a deadly weapon and the trial court's order committing him to the Texas Juvenile Justice Department for five years. We modify the trial court's judgment in part and affirm as modified.

Held: Affirmed

Memorandum Opinion: In his sixth issue, appellant argues that the commitment order should be reformed to delete the deadly weapon finding because the trial judge never found at the conclusion of the disposition hearing that appellant used or exhibited a deadly weapon. Because a deadly weapon finding is not part of a sentence in a criminal case, the trial court is not required to orally pronounce such a finding as part of the sentence if the allegation of use of a deadly weapon is clear from the face of the charging instrument. Ex parte Huskins, 176 S.W.3d 818, 820–21 (Tex.Crim.App.2005). Here, the petition to adjudicate clearly alleged that appellant used a firearm in the commission of both offenses. Appellant points to no law applicable to juvenile cases that would require the trial judge to orally pronounce a deadly weapon finding before it could be included in the commitment order.

Conclusion: We overrule appellant's sixth issue.

RESTITUTION—

Burt v. State, No. PD-1563-13, --- S.W.3d ----, 2014 WL 5248051, Tex.Juv.Rep. Vol. 28 No. 4 ¶ 14-4-5 (Tex.Crim.App, 10/15/14).

THERE ARE THREE LIMITATIONS ON THE RESTITUTION BY A TRIAL JUDGE: (1) IT MUST BE ONLY FOR THE OFFENSE FOR WHICH THE DEFENDANT IS CRIMINALLY RESPONSIBLE; (2) IT MUST BE ONLY FOR THE VICTIM OR VICTIMS OF THE OFFENSE FOR WHICH THE DEFENDANT IS CHARGED; AND (3) THE AMOUNT MUST BE JUST AND SUPPORTED BY A FACTUAL BASIS WITHIN THE RECORD.

Facts: The State alleged that appellant was involved in an elaborate Ponzi scheme. The record shows that he operated two programs in tandem. First, with his Credit Home Investment Program, appellant would lease-purchase a home, and then sell the contract rights to an investor for a profit. He promised the investors that they could immediately sell their newly acquired homes to downstream purchasers for a profit.

Second, through his Down Payment Assistance Program, appellant supplied the initial investors with home buyers who, if they lacked sufficient credit or down payment, could receive loans from appellant to obtain a mortgage. Appellant persuaded a separate pool of investors to provide the funds for this second program by promising $2,500 profit for every $10,000 invested. Appellant thus generated his own supply of home buyers and investors to make his Credit Home Investment Program profitable.

However, if the targeted home buyers from the Down Payment Assistance Program were not approved for mortgages, they could not purchase houses from the investors in the Credit Home Investment Program, and those investors were left with the mortgage payments. Appellant initially used funds from the Down Payment Assistance Program to pay the investors' mortgage payments, but he eventually ran out of money.

A jury convicted appellant of misapplication of fiduciary property in excess of $200,000. At the end of the punishment hearing, and immediately after sending the jury to deliberate, the trial judge stated,

On the record. I am going to need the State to prepare a proposed order of restitution in the case, probably with some sort of supporting memorandum to justify whatever number you come up with. You can rely on everything that was introduced in the case. We don't need to have a hearing on it as far as an evidentiary hearing, but if y'all can't come up with an agreed figure, then we will need to have a hearing on it at some point in the future, okay? And the sooner, the better.

The jury assessed punishment at fourteen years' confinement and a $10,000 fine. The trial judge formally pronounced the sentence, and before adjourning, he stated, "The sooner we can get that restitution matter taken care of, the better." The next day, in the absence of the parties, without a hearing, and without any agreement by the parties, the trial judge entered a restitution order for $591,000 into the written judgment.

On appeal, appellant argued that the restitution order should be deleted because restitution was not orally pronounced in open court. However, the appellate court did not originally reach this claim because it held that the issue had not been preserved for appeal.

Held: Reversed and remanded.

Opinion: Restitution is a victim's statutory right, and it serves a number of important purposes. First, it restores the victim to the "status quo ante" position he was in before the offense. Second, restitution serves as appropriate punishment for the convicted criminal. We have said, "[a]s punishment, restitution attempts to redress the wrongs for which a defendant has been charged and convicted in court." Third, because restitution forces the offender to "address and remedy the specific harm that he has caused," it aids in the rehabilitation process as "it forces the defendant to confront, in concrete terms, the harm his actions have caused." Fourth, restitution acts as a deterrent to crime. Indeed, the law so favors crime victims' compensation that our restitution statute requires the trial judge to justify his decision not to order restitution to a crime victim. Further, the statute provides that a parole panel "shall order the payment of restitution ordered" under Article 42.037, and it may revoke a defendant's parole or mandatory supervision if he fails to comply with the trial judge's restitution order. For all of these reasons, we have interpreted restitution statutes liberally to effectuate fairness to the victims of crime.

On the other hand, fairness to the defendant requires that his sentence be "pronounced orally in his presence." A written judgment is simply the "declaration and embodiment" of that pronouncement. Therefore, when there is a conflict between the oral pronouncement and the written judgment, the oral pronouncement controls.

A trial judge has neither the statutory authority nor the discretion to orally pronounce one sentence in front of the defendant, but then enter a different written judgment outside the defendant's presence. Rather, due process requires that the defendant be given fair notice of all of the terms of his sentence, so that he may object and offer a defense to any terms he believes are inappropriate. The appellant then has a "legitimate expectation" that the punishment he heard at trial match the punishment he actually receives.

We have held that the deletion of a written restitution order is appropriate in at least two scenarios. The first scenario is when the trial judge does not have statutory authority to impose the specific restitution order. For example, a court has no authority to order restitution for injuries or damages for which the defendant is not responsible. And a trial judge does not have authority to order restitution to anyone except the victim(s) of the offense for which the defendant is convicted. The second scenario in which deletion of a restitution order is appropriate is when the trial judge is authorized to assess restitution, but the evidence does not show proximate cause between the defendant's criminal conduct and the victim's injury.

Put another way, due process places three limitations on the restitution a trial judge may order: (1) the restitution ordered must be for only the offense for which the defendant is criminally responsible; (2) the restitution must be for only the victim or victims of the offense for which the defendant is charged; and (3) the amount must be just and supported by a factual basis within the record.

In this third situation—if there is a lack of a sufficient factual basis—appellate courts should vacate and remand the case for a restitution hearing because the trial judge is authorized to assess restitution, but the amount of restitution is not (yet) supported by the record. This is in keeping with the liberal public-policy purpose of Article 42.037, which favors restitution to crime victims. Other state and federal courts embrace the principle that vacating a restitution order and remanding the case to the trial court for a restitution hearing is appropriate when the record lacks

sufficient evidence of the damages. Of course, if the parties agree on a restitution amount through stipulation or a plea deal, that agreement itself is a sufficient factual basis to support the restitution order.

With that general background, we turn to the issue in the present case.

The trial judge in this case orally pronounced the "fact" of restitution at sentencing, but he did not state an amount. He told both parties that, if they could not agree upon a restitution amount, there would need to be a restitution hearing, and said, "The sooner we can get that restitution matter taken care of, the better." This colloquy clearly put the defendant on notice that restitution was part of his sentence.

This case is not like those in which neither the parties nor the judge ever mentioned restitution during the sentencing hearing or as part of the oral pronouncement of sentence. In those cases, the defendant was never put on notice that restitution might be ordered until it first appeared in the written judgment. That scenario leaves the defendant without notice and incapable of objecting or preparing a defense to the restitution order. That procedure—failing to mention restitution until its entry in the written judgment—also violates a defendant's legitimate expectation that the sentence actually received is the same as that orally pronounced in open court. In effect, the restitution order popped up unexpectedly in the written judgment. In those cases, the defendant was entitled to have the restitution order deleted because the written judgment did not match the oral pronouncement of sentence. In this case, however, restitution was part of the trial judge's oral pronouncement of sentence. The evidence at trial showed that a significant amount of restitution was a certainty as eighteen victims testified to losses exceeding $591,000. There is no dispute that appellant is criminally responsible for the offense of misapplication of fiduciary property. There is no dispute that the losses were caused by the defendant's criminal conduct. There is no dispute that restitution under Article 42.037 is authorized. And there is no dispute that the trial judge told the defendant when orally pronouncing his sentence that restitution would be ordered.

The problem in this case is that appellant was never told of the specific amount of restitution in open court and given an opportunity to challenge the sufficiency of the evidence or the specific amount of restitution due to each victim.

This case more comfortably falls within that body of our case law in which the trial judge has the authority to order restitution and did order restitution, but the evidence is insufficient to support the restitution amount ordered. In those cases, there was never a question about the defendant's responsibility for restitution. Rather, the relevant question was what the restitution amount should be. In those cases, we vacated the restitution orders and remanded the cases for a hearing in which the parties could offer evidence, object, and reach an accurate restitution amount.

Because the trial judge in this case made restitution a part of his oral pronouncement of sentence, the restitution order should not be deleted. Instead, the case should be remanded to the trial court for a hearing in which appellant will have the opportunity to object to the amount, introduce evidence to support his position, and exercise all of his due process rights. He is entitled to what the sentencing judge promised him: a restitution hearing if the parties themselves could not agree on the amount of restitution. Notably, had the parties agreed to a specific restitution amount and had that amount been entered into the record, the need to remand could have been avoided and appellant's trip in the appellate orbit could have ended years ago.

Conclusion: We agree with the court of appeals that it is appropriate to remand a case for a restitution hearing when it is clear during the sentencing hearing that restitution will be ordered, but the amount or recipients of restitution are not orally pronounced. We therefore affirm the judgment of the court of appeals.

SEARCH & SEIZURE—

Riley v. California, No. 13–132, 573 U.S.___ , Tex.Juv.Rep. Vol. 28 No. 3 ¶ 14-3-9 (6/25/2014). On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One.

WITH SOME EXCEPTIONS, THE POLICE MAY NOT, WITHOUT A WARRANT, SEARCH DIGITAL INFORMATION ON A CELL PHONE SEIZED FROM AN INDIVIDUAL WHO HAS BEEN ARRESTED.

Riley v. California, No. 13–132, 573 U.S.___ , Tex.Juv.Rep. Vol. 28 No. 3 ¶ 14-3-9 (6/25/2014). On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One.

Facts: Petitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood. See Cal. Penal Code Ann. §§12025(a)(1), 12031(a)(1) (West 2009).

An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with the guns." App. in No. 13–132, p. 20. Although there was "a lot of stuff " on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the moniker "Blood." Id., at 11–13. The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. Compare Cal. Penal Code Ann. §246 (2008) with §186.22(b)(4)(B) (2014). Prior to trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. App. in No. 13–132, at 24, 26. At Riley's trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison. The California Court of Appeal affirmed. No. D059840 (Cal. App., Feb. 8, 2013), App. to Pet. for Cert. in No. 13–132, pp. 1a–23a. The court relied on the California Supreme Court's decision in People v. Diaz, 51 Cal. 4th 84, 244 P. 3d 501 (2011), which held that the Fourth Amendment permits a warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee's person. See id., at 93, 244 P. 3d, at 505–506.

The California Supreme Court denied Riley's petition for review, App. to Pet. for Cert. in No. 13–132, at 24a, and we granted certiorari, 571 U. S. ___ (2014).

Held: reversed and remanded

Opinion: ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, T HOMAS, G INSBURG, B REYER, S OTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment.

The Fourth Amendment provides:

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

As the text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Brigham City v. Stuart, 547 U. S. 398, 403 (2006). Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant." Vernonia School Dist. 47J v. Acton, 515 U. S. 646, 653 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U. S. 10, 14 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See Kentucky v. King, 563 U. S. ___, ___ (2011) (slip op., at 5–6).

The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest. In 1914, this Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." Weeks v. United States, 232 U. S. 383, 392. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the label "exception" is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant. See 3 W. LaFave, Search and Seizure §5.2(b), p. 132, and n. 15 (5th ed. 2012).

Although the existence of the exception for such searches has been recognized for a century, its scope has been de- bated for nearly as long. See Arizona v. Gant, 556 U. S. 332, 350 (2009) (noting the exception's "checkered history"). That debate has focused on the extent to which officers may search property found on or near the arrestee. Three related precedents set forth the rules governing such searches:

The first, Chimel v. California, 395 U. S. 752 (1969), laid the groundwork for most of the existing search incident to arrest doctrine. Police officers in that case arrested Chimel inside his home and proceeded to search his entire three-bedroom house, including the attic and garage. In particular rooms, they also looked through the contents of drawers. Id., at 753–754.

The extensive warrantless search of Chimel's home did not fit within this exception, because it was not needed to protect officer safety or to preserve evidence. Id., at 763, 768.

A

We first consider each Chimel concern in turn. In doing so, we do not overlook Robinson's admonition that searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." 414 U. S., at 235. Rather than requiring the "case-by-case adjudication" that Robinson rejected, ibid., we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would "untether the rule from the justifications underlying the Chimel exception," Gant, supra, at 343. See also Knowles v. Iowa, 525 U. S. 113, 119 (1998) (declining to extend Robinson to the issuance of citations, "a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all").

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

2

The United States and California focus primarily on the second Chimel rationale: preventing the destruction of evidence.

Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. See Brief for Petitioner in No. 13–132, p. 20; Brief for Respondent in No. 13–212, p. 41. That is a sensible concession. See Illinois v. McArthur, 531 U. S. 326, 331–333 (2001); Chadwick, supra, at 13, and n. 8. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data— remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing"). See Dept. of Commerce, National Institute of Standards and Technology, R. Ayers, S. Brothers, & W. Jansen, Guidelines on Mobile Device Forensics (Draft) 29, 31 (SP 800– 101 Rev. 1, Sept. 2013) (hereinafter Ayers). Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that renders a phone all but "unbreakable" unless police know the password. Brief for United States as Amicus Curiae in No. 13–132, p. 11.

As an initial matter, these broader concerns about the loss of evidence are distinct from Chimel's focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. See 395 U. S., at 763–764. With respect to remote wiping, the Government's primary concern turns on the actions of third parties who are not present at the scene of arrest. And data encryption is even further afield. There, the Government focuses on the ordinary operation of a phone's security features, apart from any active attempt by a defendant or his associates to conceal or destroy evidence upon arrest.

We have also been given little reason to believe that either problem is prevalent. The briefing reveals only a couple of anecdotal examples of remote wiping triggered by an arrest. See Brief for Association of State Criminal Investigative Agencies et al. as Amici Curiae in No. 13– 132, pp. 9–10; see also Tr. of Oral Arg. in No. 13–132, p. 48. Similarly, the opportunities for officers to search a password-protected phone before data becomes encrypted are quite limited. Law enforcement officers are very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity. See, e.g., iPhone User Guide for iOS 7.1 Software 10 (2014) (default lock after about one minute). This may explain why the encryption argument was not made until the merits stage in this Court, and has never been considered by the Courts of Appeals.

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. See Ayers 30–31. Such devices are commonly called "Faraday bags," after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. See Brief for Criminal Law Professors as Amici Curiae 9. They may not be a complete answer to the problem, see Ayers 32, but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies around the country already encourage the use of Faraday bags. See, e.g., Dept. of Justice, National Institute of Justice, Electronic Crime Scene Investigation: A Guide for First Responders 14, 32 (2d ed. Apr. 2008); Brief for Criminal Law Professors as Amici Curiae 4–6.

B

The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody. The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of

these sorts of physical items. Brief for United States in No. 13–212, p. 26. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

1

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. See Kerr, Foreword: Accounting for Technological Change, 36 Harv. J. L. & Pub. Pol'y 403, 404–405 (2013).

But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video— that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See United States v. Jones, 565 U. S. ___, ___ (2012) (SOTOMAYOR, J., concurring) (slip op., at 3) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life. See Brief for Electronic Privacy Information Center as Amicus Curiae in No. 13–132, p. 9. In 1926, Learned Hand observed (in an opinion later quoted in Chimel) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." United States v. Kirschenblatt, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains

in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form— unless the phone is.

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter.

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." Coolidge v. New Hampshire, 403 U. S. 443, 481 (1971). Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. See McNeely, 569 U. S., at ___ (slip op., at 11–12); id., at ___ (ROBERTS, C. J., concurring in part and dissenting in part) (slip op., at 8) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes").

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" Kentucky v. King, 563 U. S., at ___ (slip op., at 6) (quoting Mincey v. Arizona, 437 U. S. 385, 394 (1978)).

Conclusion: Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," Boyd, supra, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant.

We reverse the judgment of the California Court of Appeal in No. 13–132 and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the First Circuit.
It is so ordered.

SUFFICIENCY OF THE EVIDENCE—

In the Matter of J.B. MEMORANDUM, No. 01-13-00844-CV, 2014 WL 6998068, Tex.Juv.Rep. Vol. 29 No. 1 ¶ 15-1-3 (Tex.App.-Hous. (1 Dist.), 12/11/14).

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE JUVENILE'S PLEA WHERE THE TRIAL COURT ACCEPTED HIS PLEA BASED ON AN ERRONEOUS BELIEF THAT AGGRAVATED ROBBERY COULD BE COMMITTED WITH A TOY GUN.

Facts: J.B. stipulated that, while committing theft of property from the complainant, he exhibited a firearm. The following exchange occurred after the trial court admonished J.B. and before the trial court accepted the stipulation:

The Court: I'm going to show you your stipulation of evidence. Is this your signature?

J.B.: Yes, ma'am.

The Court: Did you sign it because it's true?

J.B.: No, ma'am.

(Speaking simultaneously.)

The Court: Is it true?

Defense counsel: Tell her what you're—

J.B.: Yes, ma'am.

The Court: This charge is true?

J.B.: Yes, ma'am.

The Court: You signed it because it's true?

J.B.: Yes, ma'am.

The trial court then accepted the signed stipulation, in which J.B. waived his right to a jury trial, and adjudicated J.B. delinquent.

Following the adjudication of delinquency, the trial court considered disposition. The probation report was admitted without objection. The trial court confirmed that J.B.'s agreement with the State was for 18 months' probation. The trial court then asked whether a weapon was used and whether there were coactors.

Defense counsel: No.

The Court: No?

The State: No coactors, Your Honor.

The Court: But he had a gun? Where'd he get the gun from?

J.B.: I didn't have a gun, ma'am.

Defense counsel: It wasn't a real gun, but it was—

The Court: No bullets?

Defense counsel: The complainant thought it was a gun.

The Court: Blanks? No bullets in it?

Defense counsel: Toy.

J.B.: No, ma'am.

The Court: Well, you scared somebody. The fact that you scared them is enough. Whether it was real or not is another issue; but the fact that you scared somebody and you're charged with a felony is pretty serious.

The parties then discussed the terms of probation, and the trial court accepted the recommendation of 18 months' probation.

In his first issue, J.B. contends that his plea was not voluntary, knowing, or intelligent because it was premised on his, his attorney's, and the trial court's erroneous belief that aggravated robbery could be committed with a toy gun.

A. Standard of Review and Juvenile Pleas

To satisfy due process, a guilty plea "must be entered knowingly, intelligently, and voluntarily." Kniatt v. State, 206 S.W.3d 657, 664 (Tex.Crim.App.2006); see also TEX.CODE CRIM. PROC. ANN. art. 26.13(b) (West Supp.2014) (requiring that guilty plea be made voluntarily and freely). In examining the voluntariness of a guilty plea, we examine the record as a whole. Martinez v. State, 981 S.W.2d 195, 197 (Tex.Crim.App.1998). When the record reflects that a defendant was duly admonished by the trial court before entering a guilty plea, it constitutes a prima facie showing that the plea was both knowing and voluntary. Id. Section 54.03(b) of the Family Code sets forth the admonishments required in juvenile proceedings:

(1) the allegations made against the child;

(2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;

(3) the child's privilege against self-incrimination;

(4) the child's right to trial and to confrontation of witnesses;

(5) the child's right to representation by an attorney if he is not already represented; and

(6) the child's right to trial by jury.
TEX. FAM. CODE ANN. § 54.03(b) (West 2014).

When the record demonstrates that the defendant was properly admonished, the burden then shifts to the defendant to show that he entered the plea without understanding the consequences of his actions and was harmed as a result. Martinez, 981 S.W.2d at 197. "The trial court is not required to withdraw a plea of guilty sua sponte and enter a plea of not guilty for a defendant when the defendant enters a plea of guilty before the court after waiving a jury, even if evidence is adduced that reasonably and fairly raises an issue as to his guilt." Rivera v. State, 123 S.W.3d 21, 32–33 (Tex.App.–Houston [1st Dist.] 2003, pet. ref'd) (citing Thomas v. State, 599 S.W.2d 823, 824 (Tex.Crim.App.1980)).

Whether the defendant used a real gun or a toy gun in committing a robbery affects the type of crime committed. If the defendant uses a real gun in robbing the complainant, he is guilty of aggravated robbery. See TEX. PENAL CODE ANN. § 29.03(a)(2). If the gun is a toy, however, the defendant is guilty of robbery only. See TEX. PENAL

CODE ANN. § 29.02(a)(2) (West 2011); Payne v. State, 790 S.W.2d 649, 652 n.3 (Tex.Crim.App.1990). In Payne, the defendant moved to withdraw his guilty pleas after he testified in open court during sentencing that he used a toy gun, and not a real gun, when committing four robberies. 790 S.W.2d at 651–52. He testified that he did not tell his lawyer that the gun was a toy because he did not know that it mattered and that he signed his pleas without knowing that he could not be convicted for aggravated robbery if he used a toy gun. Id. at 651. The trial court refused the defendant's motion to withdraw his pleas, but the Court of Criminal Appeals reversed, holding the defendant's testimony raised an issue regarding the voluntariness of his confessions. Id. at 652.

Held: Affirmed

Memorandum Opinion: Here, the record reflects that the trial court admonished J.B., who was represented by counsel, regarding the allegations against him, the consequences of the proceeding, including the admissibility of his juvenile record in criminal proceedings, his right to remain silent, and his right to trial, a trial by jury, and to confront witnesses. See TEX. FAM. CODE ANN. § 54.03(b). Thus, J.B. bears the burden to show that he entered his plea without understanding the consequences of his actions and was harmed as a result. See Martinez, 981 S.W.2d at 197.

In support of his claim that his plea was involuntary, J.B. points to the portion of the record in which he told the trial court that the gun he used was a toy. But this occurred after he waived a jury and the trial court accepted his plea and adjudicated him delinquent. Thus, the question we consider is not whether the trial court erred in accepting the plea, but, rather, whether it erred in failing to withdraw the plea after J.B. asserted during the disposition inquiry that the gun he used in the robbery was a toy. See Rivera, 123 S.W.3d at 32–33.

The record does not reflect that J.B. requested that he be allowed to withdraw his plea. See Thomas, 599 S.W.2d at 824 (where defendant is admonished and does not request to withdraw plea, court reviews only whether trial court should have withdrawn plea). And "[t]he trial court is not required to withdraw a plea of guilty sua sponte and enter a plea of not guilty for a defendant when the defendant enters a plea of guilty before the court after waiving a jury, even if evidence is adduced that reasonably and fairly raises an issue as to his guilt." Rivera, 123 S.W.3d at 32–33.

The primary case upon which J.B. relies, Payne, involves a defendant who affirmatively requested that the trial court permit him to withdraw his plea. 790 S.W.2d at 651–52. Payne thus does not support J.B.'s argument that the trial court erred because J.B. never asked the trial court to allow him to withdraw his plea, and the trial court was not required to withdraw J.B.'s plea sua sponte. See Thomas, 599 S.W.2d at 824; Rivera, 123 S.W.3d at 32–33; see also Lawal v. State, 368 S.W.3d 876, 882 n.1 (Tex.App.–Houston [14th Dist.] 2012, no pet.) (Payne is distinguishable from cases where no timely motion to withdraw plea was made because in Payne a timely motion to withdraw plea was raised during plea hearing).

Moreover, in the other cases relied upon by J.B., In re T.W.C., 258 S.W.3d 218 (Tex.App.–Houston [1st Dist.] 2008, no pet.), In re S.F., 2 S.W.3d 389 (Tex.App.–San Antonio 1999, no pet.), and In re E.Q., 839 S.W.2d 144 (Tex.App.–Austin 1992, no writ), the record affirmatively showed that the juvenile was misadvised and would not have entered a guilty plea but for the faulty advice. Here, the record does not affirmatively show that J.B. was misadvised. To the extent that J.B. argues that his plea or his failure to withdraw the plea was the result of faulty advice amounting to ineffective assistance of counsel, it is J.B's burden to prove ineffective assistance by showing that (1) counsel's performance was so deficient that counsel was not functioning as acceptable counsel under the Sixth Amendment, and (2) but for counsel's error, the result of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

J.B.'s appellate counsel filed a motion for new trial, but did not allege that his trial counsel was ineffective, and no hearing was held on the motion. The motion sought only a new trial or in the alternative, a modified judgment striking the deadly weapon finding, and did not seek to withdraw J.B.'s plea. Nothing in the record demonstrates why

J.B.'s trial counsel did not seek to withdraw his guilty plea or what advice J.B.'s trial counsel gave him. Moreover, the probation report indicates that the complainant stated that J.B. pointed a black semi-automatic pistol at him and told the complainant that he would shoot him if he followed J.B. On this record, we cannot determine what, if any, conflicting evidence may have informed council's recommendations or J.B.'s decision to plead guilty. Accordingly, we must presume that counsel acted reasonably. See Rylander v. State, 101 S.W.3d 107, 111 (Tex.Crim.App.2003) (ordinarily, courts will not find counsel ineffective where counsel has not been afforded an opportunity to explain actions because presumption that counsel acted reasonably has not been rebutted); Thompson v. State, 9 S.W.3d 808, 814 (Tex.Crim.App.1999) (where record is silent regarding reasons for counsel's actions, presumption of reasonableness is not rebutted). We note, however, that the appeal procedures in the Family Code do "not limit a child's right to obtain a writ of habeas corpus." TEX. FAM. CODE ANN. § 56.01(o) (West 2014); see In re Hall, 286 S.W.3d 925, 926–27 (Tex.2009) (juvenile court had jurisdiction to hear writ of habeas corpus); In re R.G., 388 S.W.3d 820, 824 (Tex.App.–Houston [1st Dist.] 2012, no pet.)(juvenile court had jurisdiction to entertain application for writ of habeas corpus). The Court of Criminal Appeals has recognized that a defendant who shows that he pleaded guilty to aggravated robbery because his counsel did not inform him that aggravated robbery cannot be proven if a toy gun was used may be entitled to habeas relief. See Ex Parte Carriker, No. WR–77916–01, 2012 WL 3600313, at *1 (Tex.Crim.App. Aug. 22, 2012).

Accordingly, we hold that, on this record, J.B. has not met his burden to show that his plea was involuntary, the trial court did not err in failing to withdraw J.B.'s plea, and J.B. is not entitled to reversal based upon his ineffective assistance claim. See Thomas, 599 S.W.2d at 824 (following acceptance of possession of controlled substance plea, defendant's testimony that she did not buy drug or know she had it did not require trial court to sua sponte withdraw guilty plea); Rivera, 123 S.W.3d at 32–33 (where defendant argued on appeal that he involuntarily pleaded guilty due to ineffective assistance of counsel, trial court did not err in failing to sua sponte withdraw guilty plea); see also Quintanilla v. State, No. 01–02–00722–CR, 2003 WL 1938224, at *2 (Tex.App.–Houston [1st Dist.] Apr. 24, 2003, pet. ref'd) (where appellant never requested to withdraw guilty plea but claimed during sentencing that he committed offense because family's safety was threatened, trial court did not err in failing to sua sponte withdraw plea).

We overrule J.B.'s first issue.

Conclusion: We affirm the trial court's judgment.

In the Matter of R.D., MEMORNADUM, No. 04-13-00876-CV, 2014 WL 5837543, Tex.Juv.Rep. Vol. 29 No. 1 ¶ 15-1-1 (Tex.App.-San Antonio, 11/12/14).

EVIDENCE WAS CONSIDERED SUFFICIENT EVEN WHERE THERE WERE DISCREPANCIES IN THE TESTIMONY FROM EYE WITNESSES.

Facts: The evidence showed that while they were away from home, April and Roy Medellin received a phone call from a neighbor who claimed someone was burglarizing the Medellin home. Ms. Medellin immediately called her cousin, Stephanie Correa, who lived near the Medellin home, and asked Ms. Correa and her husband, Raymond Correa, to investigate the claim. Ms. Medellin then called the police.

The Correas were first to arrive at the Medellin home. Ms. Correa went to the front of the house, and Mr. Correa went to the back. According to their testimony, they both could hear noises coming from inside the house. Mr. Correa saw two young men crawl out of a window at the back of the house. An altercation ensued, and one of the young men jumped over a fence and escaped. The other young man, later identified as R.D., ran around to the front of the house. Ms. Correa threw a small metal bar at R.D. as he was fleeing and struck him on his lower leg. Mr. Correa came within two feet of the young man, and Ms. Correa was almost pushed off the front step as R.D. ran by.

R.D. was able to evade the Correas. Both Mr. and Ms. Correa identified R.D. at trial as one of the young men who was inside the Medellin home. With some discrepancies in the exact colors of the young men's clothes, both testified the young men were wearing shorts and one was wearing a striped shirt.

After R.D. fled, Mr. Correa drove around looking for him and his companion. Mr. Correa stated he found them outside of a home in the neighborhood, but testified they were wearing different clothes. Officer Gabriel Mendoza arrived at the Medellin home and was told Mr. Correa had found the alleged perpetrators at another home in the neighborhood.

Officers went to the home where Mr. Correa claimed to have spotted the two perpetrators. Mr. Correa and three young men were taken back to the Medellin residence. Law enforcement personnel separated the Correas, placing each in a separate police car. Thereafter, the three young men were shown to the Correas in one-on-one show ups. The Correas were advised that simply because they were shown a specific person did not necessarily mean the person committed a crime. Mr. and Mrs. Correa each identified R.D. as one of the young men that emerged from the Medellin home. Mr. Correa testified he was one hundred percent certain, identifying R.D. by his facial features, earrings, and haircut. Mrs. Correa testified she was sixty to seventy percent sure the young man she saw at the Medellin home was R.D., basing her identification on her encounter with him and an earring he was wearing. The Correas and relevant law enforcement personnel testified no improper influence or suggestion was used in the identification process.

The Medellins testified their air conditioning unit was removed from a window as an entry point for R.D. and his partner. The window unit's removal caused structural damage to the window sill and damaged an electrical outlet. The couple testified many of the drawers in the home were rifled through, pillowcases were taken from the bedroom to the front of the home, and things were strewn about. However, nothing was taken.

Ultimately, the jury found R.D. engaged in delinquent conduct by committing a burglary of a habitation. After disposition, R.D. perfected this appeal.

R.D. first complains the evidence is legally insufficient to support the jury's finding of "true" with regard to the charge of burglary of a habitation. More specifically, he contends the evidence was legally insufficient to establish R.D.'s: (1) identity as one of the young men who entered the Medellin home, and (2) intent to burglarize the home.

Held: Affirmed

Memorandum Opinion: To support the jury's finding of "true" to the burglary of a habitation allegation, the State had to prove R.D. intentionally or knowingly, with intent to commit theft, entered the Medellin home without the owner's consent. See TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2011). R.D. contends the State failed to establish he was one of the young men in the Medellin home or that he intended to take anything from it.

In support of his contentions, R.D. points out that other than the testimony from the Correas, there is no evidence establishing he was one of the young men who entered the Medellin home. He notes his fingerprints were not found in the home, there was no testimony that any footprints outside the home matched shoes he owned, and he was not found to be in possession of any property taken from the Medellin home. In fact, he points out the Medellins admitted no property was taken from the home. Thus, according to R.D., there is no evidence of identity or intent to commit theft. We disagree.

As to intent in a burglary prosecution, Texas courts, including this court, have long held specific intent to commit theft may be inferred from the circumstances. Stine v. State, 300 S.W.3d 52, 57 (Tex.App.—Texarkana 2009, pet. ref'd, untimely filed) (citing McGee v. State, 774 S.W.2d 229, 234 (Tex.Crim.App.1989)); see Simmons v.

State, 590 S.W.2d 137, 138 (Tex.Crim.App. [Panel Op.] 1979); Bailey v. State, 722 S.W.2d 202, 204 (Tex. App—San Antonio 1986, no writ). Moreover, it is not necessary that property actually be taken for the jury to conclude the defendant intended to commit theft. Jones v. State, 418 S.W.3d 745, 747 (Tex.App.—Houston [14th Dist.] 2013, no pet.) (citing Ortega v. State, 626 S.W.2d 746, 749 (Tex.Crim.App. [Panel Op.] 1981)).

We hold the evidence in this case was legally sufficient to establish identity and intent. The Correas testified they saw R.D. exiting the Medellin home. According to their testimony, it was still light outside when they saw R.D. leave the house. Further, Ms. Correa testified R.D. ran right by her, and Mr. Correa stated he saw both young men jump from the window. They separately identified R.D. at the scene as one of the young men who came out of the Medellin house through the window from which the air conditioning unit had been removed. It is true the lighting at the scene during the one-on-one show up was less than optimal and Ms. Correa was only sixty to seventy percent sure of her identification. However, these are issues relating to the weight of Ms. Correa's testimony and the credibility of the identification, which are to be resolved by the jury. See Brooks, 323 S.W.3d at 899; Orellana, 381 S.W.3d at 653.

As to Mr. Correa, however, he specifically testified he was one hundred percent certain R.D. was one of the young men who left the Medellin house through the window. He testified to close contact with R.D., struggling with him at the back of the house. Admittedly, there are some discrepancies in his testimony when compared with his wife's, but on whole, these discrepancies are not such that a jury could not rationally resolve them in favor of a finding that R.D. was one of the men who entered the Medellin home and then attempted to escape when the Correas arrived. See Gonzales, 330 S.W.3d at 694. That the young men were wearing different clothes when Mr. Correa located them does not impugn the testimony provided by the Correas. The jury could have reasonably inferred the young men changed clothes to avoid identification. See Orellana, 381 S.W.3d at 653.

It is true no property belonging to the Medellins was taken. However, this is not necessary to support a finding of intent to steal. See Jones, 418 S.W.3d at 747. The Medellins testified the air conditioning unit in a window was removed to allow the thieves ingress into the home. The removal damaged the home. There was testimony that drawers in the home were opened and rummaged through by the thieves, as if they were looking for items to steal. There was also testimony that pillowcases were moved from the bedroom to the front of the house, permitting an inference they were placed there to allow transport of items to be stolen. From this evidence, the jury could have rationally inferred the young men entered the home without consent, intending to steal items from the Medellin home. See Orellana, 381 S.W.3d at 653; see also Gear v. State, 340 S.W.3d 743, 746 (Tex.Crim.App.2011) (holding evidence sufficient to sustain theft conviction where defendant entered home through broken window and fled when interrupted).

Conclusion: Accordingly, we hold, after viewing the evidence in the light most favorable to the jury's finding, there was sufficient evidence for the jury to conclude beyond a reasonable doubt R.D. was one of the persons who entered the Medellin home without consent and with the intent to commit theft. See Orellana, 381 S.W.3d at 652. We therefore overrule R.D.'s first point of error. Based on the foregoing, we hold the evidence was legally sufficient to support a finding that R.D. committed a burglary of a habitation. Accordingly, we overrule R.D.'s points of error and affirm the trial court's judgment.

Palacios v. State, No. 13-11-00254-CR, --- S.W.3d ----, 2014 WL 3778170, Tex.Juv.Rep. Vol. 28 No. 3 ¶ 14-3-12 (Tex.App.-Corpus Christi, 7/31/14).

EVIDENCE WAS CONSIDERED INSUFFICIENT TO SUPPORT A CONVICTION FOR OFFICIAL OPPRESSION BY JP, WHERE EVIDENCE SHOWED THAT APPELLANT'S INTERPRETATION OF THE LAW WAS DIFFERENT FROM THE STATE'S INTERPRETATION AND FROM WITNESSES'

INTERPRETATION, AND AS A RESULT, APPELLANT ACTED WITH A REASONABLE BELIEF THAT HER COURT HAD BEEN GRANTED JURISDICTION TO DO THE COMPLAINED-OF ACTS.

Facts: At appellant's trial, the State presented testimony from a variety of lay witnesses as to whether appellant's court lacked jurisdiction to issue the warrants for De Luna. The State also presented testimony from De Luna and Trevino, among others. The trial court admitted State's Exhibits 1 through 16, which include a variety of documents filed in appellant's court and with the Hidalgo County Sheriff's Office (the "HCSO").FN10 The trial court also admitted copies of the text of articles 45.057, 45.058, 45.059, and 45.060 of the Texas Code of Criminal Procedure. Appellant presented testimony from several witnesses. The trial court also admitted Defendant's Exhibit 1, which is a memo sent on May 5, 2008 to the Hidalgo County Sheriffs Office requesting that any defendant incarcerated for a capias pro fine issued under her authority be released on a promise to appear.FN11

FN10. Specifically, we have reviewed, among many other things, the following pertinent documents: (1) An order signed on January 28, 2010 granting De Luna's application for writ of habeas corpus seeking release for lack of probable cause; (2) an order discharging De Luna from custody; (3) documents filed in appellant's court regarding Trevino; (4) documents filed in appellant's court regarding Diaz; (5) documents filed in appellant's court regarding De Luna; (6) a handwritten list of the employees of appellant's court and their respective titles; (7) a handwritten note appearing to detail appellant's actions in Trevino's case; (8) a form from the Hidalgo County Juvenile Center's Probation Department stating that De Luna was placed on Judicial Probation on January 24, 2008 due to contempt of court; and (9) a memo sent on October 8, 2009 from appellant to Guadalupe "Lupe" Trevino, then the Hidalgo County Sheriff, requesting that any person that was incarcerated for a capias pro fine be arraigned.

FN11.Article 45.045 of the Texas Code of Criminal Procedure provides that

(b) A capias pro fine may not be issued for an individual convicted for an offense committed before the individual's 17th birthday unless:
(1) the individual is 17 years of age or older;
(2) the court finds that the issuance of the capias pro fine is justified after considering:
(A) the sophistication and maturity of the individual;
(B) the criminal record and history of the individual; and
(C) the reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court; and
(3) the court has proceeded under Article 45.050 to compel the individual to discharge the judgment.
See TEX.CODE CRIM. PROC. ART. 45.045 (West, Westlaw through 2013 3d C.S.) (Emphasis added).

Neither party provided this statute to the jury. However, this statute establishes that a justice court is authorized, under the circumstances listed, to issue a pro capias fine for an individual who committed an offense when under the age of seventeen.

In its opening remarks, the State prosecutor stated the following: FN12

FN12. We have included the State's opening and closing remarks because those remarks are relevant to our understanding of the State's theories as to how appellant's acts were unlawful.

May it please the Court, opposing counsel, co-counsel. Good afternoon.

In January of last year, 2010, Public Defender Jaime Gonzalez was happening just to go through a list of the jail rosters. He came across a name, Francisco De Luna, and he noticed that he was in jail approximately 18 days on

a Class C misdemeanor, raised all types of red flags for him because normally, for him, he notices when somebody is in jail more than 15 days on a Class B misdemeanor. He tries to get them out. They've been in jail too long.

It's his responsibility as a public defender. He's been charged or he's been requested by the County Commissioner's Court to ensure that—that—to make sure that all of those defendants who are in jail, especially those misdemeanor offenses, that they are not spending too much time in jail because we have—we spend so much money every day on these defendants that every time they are in county jail, taxpayers have to pay so much money per day for them and also to protect their rights.

So this is what started the whole thing. And when—about the case, the eventual civil case and the eventual criminal case against Judge Mary Alice Palacios. You're going to find through the evidence—and the evidence is going to be in the form of exhibits and the form of testimony. And those exhibits all are going to come from Judge Mary Alice Palacios's court.

You're going to find that these exhibits are very—they're dismal. But—but the evidence is there nonetheless. And all of this is from her court, all of these exhibits, primarily all of them.

And you're going to notice with Francisco De Luna that he had multiple failure to attend cases, including, also, failure to comply cases, as well, but, regardless, they were all Class C misdemeanors, juvenile offenses.

You're going to find that Judge Mary Alice Palacios signed orders transferring each and every one of [De Luna's] cases, except for the last one, 22 orders transferring. You're going to learn that by doing so, she no longer has jurisdiction of a case. And just like Judge Aida Salinas Flores mentioned during voir dire, a Court must have jurisdiction over a defendant. She waived that jurisdiction by sending all those cases over to juvenile court.

He [De Luna] goes to juvenile court. There is a—at some point there is a letter sent to Judge Mary Alice Palacios's court, this is a letter by the juvenile court that's sent to all public officials, including police departments, that says that the family did not respond to services and the cases are being closed. Nowhere on that letter is there a signature by the judge transferring the case back, nothing of that nature.

Francisco De Luna goes to juvenile court, he's put on probation for the cases that Judge Mary Alice Palacios transfers up to juvenile court, he does his time, [and] he does his juvenile probation. The day—or close around about the time he turned 17, Judge Mary Alice Palacios issues out what's called a birthday letter under 45.060 [of the Texas Code of Criminal Procedure FN13]. It's one of the statutes you got to view during voir dire.

FN13.Article 45.060 appears in the Texas Code of Criminal Procedure chapter forty-five, subchapter B, which sets out the procedures for justice and municipal courts. Article 45.060 states:

Unadjudicated Children, Now Adults; Notice on Reaching Age of Majority; Offense

(a) Except as provided by Articles 45.058 and 45.059, an individual may not be taken into secured custody for offenses alleged to have occurred before the individual's 17th birthday.
(b) On or after an individual's 17th birthday, if the court has used all available procedures under this chapter to secure the individual's appearance to answer allegations made before the individual's 17th birthday, the court may issue a notice of continuing obligation to appear by personal service or by mail to the last known address and residence of the individual. The notice must order the individual to appear at a designated time, place, and date to answer the allegations detailed in the notice.
(c) Failure to appear as ordered by the notice under Subsection (b) is a Class C misdemeanor independent of Section 38.10, Penal Code, and Section 543.003, Transportation Code.

(d) It is an affirmative defense to prosecution under Subsection (c) that the individual was not informed of the individual's obligation under Articles 45.057(h) and (i) or did not receive notice as required by Subsection (b).
(e) A notice of continuing obligation to appear issued under this article must contain the following statement provided in boldfaced type or capital letters:

"WARNING: COURT RECORDS REVEAL THAT BEFORE YOUR 17TH BIRTHDAY YOU WERE ACCUSED OF A CRIMINAL OFFENSE AND HAVE FAILED TO MAKE AN APPEARANCE OR ENTER A PLEA IN THIS MATTER. AS AN ADULT, YOU ARE NOTIFIED THAT YOU HAVE A CONTINUING OBLIGATION TO APPEAR IN THIS CASE. FAILURE TO APPEAR AS REQUIRED BY THIS NOTICE MAY BE AN ADDITIONAL CRIMINAL OFFENSE AND RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST."
See id.art. 45.060 (West, Westlaw through 2013 3d C.S.).

And that letter, she sends it out, and then she has him arrested. He was originally supposed to spend, according to her—her order of arrest—she adjudicated him to arrest. He was supposed to spend 100 and some odd days for about $10,000 worth of fines. She stacked all of the fines in the cases he had been in her court for, even though she knew she had already transferred the cases. How do we know she knew? She signed 22 orders transferring.

That individual who was in here, he would have spent a long time in the county if it hadn't been for Jaime Gonzalez seeing the injustice. So essentially, Ladies and Gentlemen, what we discussed during voir dire, double jeopardy violation of a Fifth Amendment right. He served two punishments for the same crime. There is no getting around orders to transfer. That's just one.
....
The last one Leroy Trevino. This is an individual who did everything and appeared every time he was supposed to report. He appeared multiple times. He was told to go to—he was put under full disposition.

And then eventually—when he was told to come back, he came back every time and, actually, there is a notation in his file that says the case was going to be closed by her court staff because he was doing everything he needed to do. And then the next entry says, no, he needs to pay court costs and fines. There is eight months of inactivity on this file, eight months of inactivity.

A birthday letter is sent out, sent out, and he appears. He appears at her court. We know that because it's in the file. Yet she still arrests him for failure to appear even though he showed up on the date the summons told him to. It will state on the warrant, failure to attend school, and in parenthesis it will say FTA. According to her court staff, that's failure to appear. Regardless if they say otherwise, it's failure to attend school.

Remember the statutes we read during voir dire. You can't jail them for those fines because those are juvenile cases.

Ladies and Gentlemen, we bring these three before you and ask you that you not judge those individuals for their actions. We're here on Judge Mary Alice Palacios. And I know that you would want the same rights for yourself and your children and everybody else you know. Everybody has a fair trial, including the judge. It should be the same way those individuals who appeared before her.

They came with their parents before her. Pay up or you're going to jail, no ifs, ands or buts. I don't understand. Why do I have to pay when I'm on deferred? Why am I going to have to suddenly pay? Why am I being subjected to arrest? Just take him away.

Ladies and Gentlemen, she knew the law. He appeared before her, and he was arrested. Those are constants. The orders are constants, the summons are constants. They cannot change at all.

The witnesses that you will hear, the majority of them, are all her court staff. They are very loyal to her. But they are State's witnesses because we have to have them to testify. I just want you to remember that. Just because they're State's witnesses—they are still employed by her office. And a lot of those people that you saw in here come in—she has 20 some odd employees.

There is going to be a lot of testimony, I'm sure, that she has a big docket. You're going to learn that she goes out and recruits—and recruit business, recruit truancy, failure to attend cases, from the school districts.

When someone goes out and runs for this position, gets paid quite a bit of money from Hidalgo County, goes out and tries to round up more business from school districts and also more monies from them, she knows the law.

We don't know why she's doing this, bending the law to her favor, but it was happening, and the evidence is there. The law is there. We are confident when you look at these documents and hear testimony, the law—the law, you will find Mary Alice Palacios guilty of three counts of official misconduct. Thank you.

A. The Chief Public Defender, Jaime Gonzalez

Gonzalez testified that the Public Defender's Office of Hidalgo County "absorb [s] currently 40 percent of the caseload in misdemeanor cases" and that he reviews the jail roster log in order to assist defendants who are in jail for misdemeanor offenses to get out of jail as quickly as possible. Gonzalez stated that his office "normally" "covers Class A and Class B misdemeanors. "According to Gonzalez, Class C misdemeanors are fine-only offenses. Gonzalez stated that he was reviewing a client's case who had committed a Class C misdemeanor, and he was conducting a "random check[ ]" of the jail roster because "people fall through the cracks and even though they're disposed of, they should be released, they remain in custody. "Gonzalez testified that while he was checking on his client, FN14 he dis-covered that De Luna had been in jail for eighteen days for similar reasons as his cli-ent.FN15Gonzalez believed that De Luna had been confined due to warrants that appellant had issued. Gonzalez could not recall exactly how long De Luna had been ordered to stay in custody but believed De Luna was required to serve approximately fifty or sixty days. Gonzalez stated that De Luna told him that he had "roughly, $8thou [sic] or so of fines, and he could not pay it and that he was told if he could not pay it, he had to serve time in jail."

FN14. Jaime Gonzalez could not recall his client's name. Gonzalez explained that he recalled that his client's cases had arisen out of the Justice of the Peace Court, Precinct 4, Place 2 appellant's court.

FN15. Gonzalez did not elaborate.

According to Gonzalez, he reviewed the Texas Code of Criminal Procedure and stated, "[I] basically just did a—in my opinion, a quick look over, if there was anything that I could see that if this was correct under the law. "The prosecutor then asked, "So once you determined that he was in there improperly, what did you do?" Gonzalez responded, "At that point I—again, I wasn't confident of my interpretation of—of the Juvenile Code section, so I contacted Eric Schreiber with the District Attorney's Office to explain to him my position of my concern with Mr. De Luna and the other [unnamed] individual, their incarceration, and I—that was the next thing."FN16Gonzalez testified that "Mr. Schreiber ... considered it a gray area. He didn't—he didn't understand what I was saying either. We were kind of talking back and forth, so with Mr. Schreiber, I know that Mr. Schreiber and myself wanted to speak to Homer Vasquez with the District Attorney's Office.[FN17] And I again explained my position on the interpretation of the law."

FN16. Eric Schreiber did not testify at trial.

FN17. Homer Vasquez did not testify at appellant's trial.

Gonzalez stated that after conferring with the other men, he filed a petition for writ of habeas corpus requesting that De Luna be released because he was being held improperly. Gonzalez testified that he filed the writ of habeas corpus because he "believe[d De Luna] was in custody illegally and that is the order to the [c]ourt, and it was granted by Judge Rudy Gonzalez."FN18The trial court admitted the orders signed by the District Court judge granting habeas corpus relief and ordering that De Luna be released from jail. The trial court overruled defense counsel's objections to the orders on the bases that: (1) they were not relevant to the arrest issue because the orders concerned confinement issues; and (2) admission violated rule of evidence 404(b).

FN18. Although the trial court admitted the order granting De Luna's writ of habeas corpus, in this case, the State did not seek admission of the reporter's record of the habeas corpus proceeding.

Gonzalez admitted that he did not review the documents that were filed in appellant's court regarding De Luna. Gonzalez stated he did not conduct an investigation into the facts, and "[i]t was just a cursory review of the law and what [he] saw off the criminal case management system, Able Term, on my computer, basically." According to Gonzalez, the Able Term system documented that De Luna was arrested "for possession of marijuana, a Class B misdemeanor." When the prosecutor asked, "And then he was—then that case [the marihuana possession case] was taken care of.... And then he was arrested on those [juvenile] offenses," Gonzalez replied, "He was arrested for possession of marijuana, Class B misdemeanor, and he disposed of the case and he continued to remain in custody on the [juvenile] offenses listed in [State's] Exhibit No. 2."FN19 The prosecutor asked, "And in order for him to have been in custody on those offenses, he had to have been originally arrested for those," Gonzalez responded, "Correct." Gonzalez believed "[f]rom what [he] saw" that De Luna committed all of the offenses before he turned seventeen and that De Luna was arrested for those offenses.

FN19. The offenses listed in State's Exhibit 2 include the following: (1) eight counts of "Failure to Comply with Directive—Class C Misdemeanor," one count with a fine of $407.00 and the others each with a fine of $416.00; (2) one count of "Excessive Tardies—Class C Misdemeanor" with a $407.00 fine; (3) ten counts of "Fail to At-tend School—Class C Misdemeanor" each with a fine of $533.00; (4) three counts of "Abusive Language in School—Class C Misdemeanor," each with a fine of $416.00; (5) one count of "Disruption of Class—Class C Misdemeanor," with a $416.00 fine; and (6) one count of "Rules and Penalties—Class C Misdemeanor," with a $416.00 fine.

When asked to describe his understanding of "double jeopardy," Gonzalez said,

My understanding is when a person is accused of a crime, when he—either when he's acquitted or found not guilty in a trial or there is a conviction, he cannot be retried in a trial or there is a conviction, he cannot be retried for the same crime or a similar crime after he's been acquitted or convicted. [FN20]

FN20. The trial court admitted Gonzalez's testimony regarding his understanding of double jeopardy after overruling appellant's objection that Gonzalez was not designated an expert witness. The trial court explained that the State designated Gonzalez as a witness and all parties were aware that he is a lawyer. The trial court also took judicial notice that as a lawyer, Gonzalez has "specific knowledge and understanding" of double jeopardy.

Gonzalez agreed with the prosecutor that double jeopardy encompasses "multiple punishments for the same crime."

The State asked Gonzalez if he was "aware of where Mr. De Luna was arrested," and Gonzalez replied, "I am not aware exactly where he was arrested. I know that he was originally arrested for a possession of marijuana charge." Gonzalez testified that he spoke with appellant about De Luna's case and that appellant "had a different

interpretation than" his own interpretation of the "two article sections" they discussed. The prosecutor asked if appellant was "angry." Gonzalez replied, "I wouldn't say she was angry, but she was—I recall that she did—she was forceful, raising her voice and her position, defending her position."

On cross-examination, Gonzalez stated that he did not know that there were twenty-two warrants for De Luna's arrest. Gonzalez knew that there were ten offenses related to failure to attend school. Gonzalez agreed with appellant's defense counsel that in a criminal case, the accused will make several appearances in court. Appellant's defense counsel asked, "Now, sir, tell the jury what a judge can do if an accused individual fails to make any of those appearances?" Gonzalez replied, "A judge can order what's—an order for their arrest for failure to appear [in court]." Gonzalez did not know who would have had the obligation to notify the accused that he was summoned to appear in court, but he "believed" the notice would come from either the "County Clerk's Office or from the actual court." Gonzalez testified that an accused has an obligation to keep the authorities "apprised" of his address. Gonzalez explained that he wanted Schreiber's opinion regarding De Luna's situation because Schreiber was a prosecutor in appellant's court. When appellant's trial counsel asked Gonzalez if appellant had issued the warrants for De Luna's arrest for his failure to appear, Gonzalez said, "The warrant that I saw, the ten that are listed on Exhibit 2, were for failure to attend school, from what I saw, and other charges, abusive language, I believe is one of them, I can't remember exactly."FN21

FN21. The State and Gonzalez interpreted the "FTA" notations differently. In Trevino's case, the State alleged that "FTA" meant that the warrants were issued for failure to appear in court. Gonzalez stated that none of the warrants in De Luna's case were for failure to appear in court, although all of the warrants in De Luna's case have the "FTA" notation.

On re-direct examination, the prosecutor stated, "Now, you're not familiar with JP law or Municipal Court law, are you?" Gonzalez responded, "I am not familiar with it [especially when it comes to juveniles]." Gonzalez testified that he does not "handle" truancy or failure to attend cases. The prosecutor then published article 45.060(a) of the Texas Code of Criminal Procedure and asked Gonzalez to read it. Gonzalez said, "It says, A, Except as provided by Articles 45.058 and 45.059, an individual may not be taken into secured custody for offenses alleged to have occurred before the individual's 17th birthday." The prosecutor asked, "Okay. Now, the offenses in which you have said that the defendant [De Luna] was arrested on and—and detained were on offenses he committed before his 17th birthday?" Gonzalez replied, "That was my—that was my interpretation, yes."

On re-cross examination, Gonzalez stated that a person is considered an adult when he or she turns seventeen and agreed that a person who is seventeen can be placed in "se-cured custody" and go to jail. Gonzalez recalled that all of the offenses occurred when De Luna was younger than seventeen. Gonzalez stated that he did not know when appellant issued warrants for "the failure to appear offenses." FN22

FN22. Previously, when asked if appellant had issued the warrants against De Luna for his failure to appear, Gonzalez stated, "The warrant that I saw, the ten that are listed on Exhibit 2, were for failure to attend school, from what I saw, and other charges, abusive language, I believe is one of them, I can't remember exactly ."

B. Appellant's Court Coordinator, Roberto Leal

Leal testified that he had worked as the court coordinator for appellant's court for approximately seven years. Leal stated, "I pretty much handle a variety of things, the scheduling of her dockets, civil, criminal, you know, truancy court dates." On cross-examination, Leal explained that appellant's court "has a civil docket which have to do with small lawsuits under [$]10,000, evictions. Lately we're doing towing hearings, unlawful towing. We do justice civil courts, we do peace bonds, we do criminal traffic" and death inquests.

Leal testified that appellant was required to have eighty hours of training in her first year on the bench and then she was required to attend twenty hours of training every year. Leal agreed that the majority of appellant's cases were truancy cases. Leal explained "the process that a person goes through when they are accused of being truant" as follows:

It goes from the filing of a case, whether it's a juvenile or an adult, either in the form of a complaint or a citation, and it gets given a docket number. It's processed. And a process, we mean—I mean it's input into the system of Able Term, as the County uses it through our clerks, the truancy clerks. From there on out, it's taken to the case managers, and we send up the ticket—if it's a ticket, for the most part, a court date is already on the ticket that's signed by the juvenile or the defendant, in particular, whether it's a juvenile or an adult. When it's a complaint, we send out to—a summons to the address that's provided to us once it's filed. If—if it's a—and that's on a complaint or a ticket.

Once we go to court, everybody signs in, everybody gets the parent—the parents, if it's a juvenile, they have sign-in sheets to get their information, to get John Doe's mother's name, their date of birth, their current address. They fill it out for us so we can put it in the file, and if for whatever reason they have to come back, at least that's what we know that we have for them. Once they are seated in, the Judge would admonish them, once they are all there, give them their rights, whatnot.

From there on out, the case managers would get the file, start looking through them to see which ones are their first times there; first timers I mean they've never been in trouble before, it's the first time they appear in court and just talk to the parents. Everything was a case-by-case basis.

They would also assess the cases that were set for status. These were people asked to come back under Court order to see how they're doing, to do a checkup. You know, they were all referred for a drug test to see if anyone were positive or negative, just so we can narrow down why they're being truant. If they're positive for drugs, we can focus on that. If they were negative, they would do community service at the Boys and Girls Club Teen Court, you know, but that's pretty much how the process was.

Everything was on a case-by-case basis. If they are asked to come back, it varies. It would vary if they didn't come back. I mean, it's a big process.

Leal explained that once the child comes into the court on a charge of truancy, that child is read his rights and enters a plea of guilty or not guilty. Leal stated that if the child pleads guilty, the court defers disposition and puts the child on probation. If the child complies with the conditions of probation, then "there is [sic] no court fees that are actually collected if he is compliant." The judgments are written, and the conditions are pro-vided in writing to the child.

Leal stated that as the judge, appellant would sign the orders that the child was responsible for following. "The case managers would assess the cases.... If they would say they need to do Teen Court or whatever that they—the person or the defendant was asked to do by a case manager, and the judge would enforce the judgment if she agreed with that." Leal agreed that only the judge has the authority to issue a fine and enforce the conditions. However, the case managers would make recommendations and fill out the paperwork. "Signing the judgment would be the judge. Of course, she would look over them before to make sure everything was where it was supposed to be, and the case managers would fill out, if they could, and not leave the judge on the stand."

Leal explained that "deferred adjudication" occurs when the defendant is "put on probation from the date of judgment," and there are several conditions "just on truancy that she can ask you to be on throughout probation. The probation can vary from one month, two months, [or] three months. What it is [ ] that during that deferral period,

whatever the time frame may be, the judge is—if [the defendant] complied again, the original fine assessed is waived, which is the County fine." Leal agreed with the prosecutor that in deferred adjudication situations, the fine was also being deferred. Leal testified that court costs are not deferred and are mandatory according to the county auditors because court costs are only waived if the district attorney's office dismisses the case.

Leal stated that if the defendant did not comply with the conditions, the defendant is "brought back to court, and we had—we work with several agencies so they give us stats, statistics on—John Doe was referred and he hasn't gone, even though it was on his judgment." The defendant is then "brought back" to the court for a "show-cause hearing" where the defendant is asked to explain to the judge his or her reasons for not complying with the conditions of probation.

On cross-examination, appellant's defense counsel asked, "Are you able to tell the jury how many of [25,000 to 26,000 children in the] truancy cases" that appellant presided over came back to appellant's court, Leal said, "You would—honestly between those cases, you could say that—I would say maybe a fourth or maybe half, towards the middle, come back. Other first-timers we never see again." Leal stated that the "success rate of the truancy program conducted by" appellant is "about 89 to 90 percent success rate based on statistics [the court] receives from the other agencies, which are New Beginnings and Teen Court."

Defense counsel then asked Leal to review the documents admitted into evidence regarding De Luna's case. Leal agreed that there were "about" twenty-five truancy exhibits regarding De Luna. Leal reviewed Exhibit 90 and described it as "a warrant for Francisco De Luna." Leal testified that the Edinburg Consolidated Independent School District had filed in appellant's court a complaint alleging that De Luna had failed to attend school. Warrants had then been "drafted and done in [the court's] office." Leal testified that the records also contained three letters that were "FTA, which is failure to appear." When asked if the warrant was for failure to appear, Leal replied, "It's more for a case manager, but, I mean, it runs the same as ours. You could say that they failed to appear for that original court setting that they were asked to as an adult." Leal testified that based on the documents, De Luna failed to appear "about 23, 22, 23, yes" times.

Leal explained that they mail the notices to the defendant's residence at the addresses provided by the school districts and that it is the defendant's duty to keep the court in-formed of his or her change of address. Citations are sent to the defendants telling them when and where to appear. Leal testified that based on the documents before him, De Luna and his mother missed the court dates that they were ordered to attend. Leal stated that without the paperwork, he has no independent recollection of De Luna.FN23

FN23. Leal also testified regarding Diaz's documents.

Defense counsel asked Leal to explain appellant's philosophy regarding the truancy cases. Leal said:

Judge Palacios is not so much about collecting revenue. As far as these cases go, if you want to run numbers on how many delinquent—or how many fines we have out there for students that haven't appeared, we have a lot to collect. If anything, it's about getting kids back in school, you know, for the most part because nothing is collected. And to say that Jane Doe or John Doe was in court—we didn't collect anything there, no. Everything waits after the case is finalized, whatever the outcomes may be, but it's more about having these kids go to school, and if they have a drug problem, to take care of that, a family problem, to take care of that. It varies.

Leal explained that the forms that are used in appellant's court are approved by the "D.A.'s office ... particularly Eric Schreiber because he is the ADA that's assigned to our court. You know, that's who we have gone to for the most part if anything—we have questions in reference to a particular case or circumstances of a case." According to Leal, Schreiber "never" alerted him "to any potential problems" concerning the truancy cases in appellant's court.

On re-direct-examination, the prosecutor asked Leal to review the documents related to De Luna's case in appellant's court. Leal established that appellant signed an order transferring De Luna's case to the juvenile court on March 8, 2007, issued the "birthday letter" on December 17, 2008, and issued the warrant for De Luna's arrest on January 21, 2009. Leal agreed with the prosecutor that a notation regarding the transfer of De Luna's case to juvenile court appeared on the docket sheet. Leal clarified that there were twenty-two orders of transfer in De Luna's case. The prosecutor asked, "All these cases are on this birthday letter for basically notifying them, setting them up to get arrested when he turns 17 for the same offenses that were transferred to juvenile court. Are all of these the same cases?" Leal responded, "Yes, ma'am."

Leal acknowledged that State's Exhibit 9X did not include "anything about [an] order transferring [De Luna's] cases back" to appellant's court. State's Exhibit 9X is a document from the Hidalgo County Juvenile Center entitled, "Disposition." It states, in relevant part, that "On 3/23/07 a referral was received" from appellant's court regarding De Luna's alleged "contempt of court." The document states, "Please be advised the following action has been taken." The document then lists several possible actions. However, none of these actions are checked. Instead, in a section entitled "Additional Information," the document states in hand writing the following: "[The] family did not respond for services." The document is signed by a juvenile probation officer.FN24On re-cross examination, appellant's trial counsel asked if State's Exhibit 9X was sent in response "to your requests or to Palacios's requests to appear in your court on this case," Leal said, "No." On re-direct examination, Leal agreed with the prosecutor that State's Exhibit 9X was sent before the transfer of De Luna's cases to juvenile court.

FN24. We are unable to determine who signed the document because the signature is illegible.

C. Appellant's Former Case Manager, Marcela Adela Cherry

Cherry testified that she is currently employed with the Texas Attorney General's Office as a field investigator. Cherry began working in that office on December 13, 2010. Prior to that date, Cherry worked in appellant's court as a case manager. Cherry held that position from "September of 2008 up until December of 2010."Specifically, Cherry handled "[t]ruancy or school-related offenses ." Cherry said, "The majority of the training [that she] received was on-the-job training" from appellant. The prosecutor asked if Cherry was aware that appellant "signed arrest warrants for failure to appear for those who turn 17," and Cherry replied, "After a notice for continuing obligation was mailed.... Yes." Cherry could not tell the jury how many of the notices had been mailed from appellant's court to defendants.

When asked by the prosecutor, Cherry identified State's Exhibit 9A as "a notice of continuing obligation." Cherry read the notice as follows:

Our court records reveal that before [your] 17th birthday, you were accused of a criminal offense and have failed to make an appearance or enter a plea in this matter. As an adult, you are notified that you have a continuing obligation to appear in this case. Failure to appear as required by this notice may be an additional criminal offense and [may] result in a warrant being issued for your arrest. [FN25]

FN25. This notice tracks the language of article 45.060 of the Texas Code of Criminal Procedure. See TEX.CODE CRIM. PROC. ANN. art. 45.060.

Cherry acknowledged that there was an order transferring De Luna's cases from appellant's justice court to the juvenile court. The prosecutor asked, "Once this order is signed and the case is transferred—once this order is signed, the judge, Mary Alice Palacios, loses jurisdiction; isn't that right?" Cherry responded, "It's my understanding that at least for a time being she does." The prosecutor asked, "What's the time being," and Cherry said, "Well, if the juvenile probation sends us a letter back saying that they are not going to take on the case, we—we, in a sense, keep it again."

The prosecutor asked Cherry to review the documents included in State's Exhibit 7A and 7B.FN26Cherry said that a "commitment order" signed by appellant appeared in the documents included in State's Exhibit 7A and explained that she understood that a "commitment order" signed by a justice of the peace "commit[s] that person to jail for a specific charge." Cherry stated that the specific charge against Trevino was "Failure to at-tend school, failure to appear." Cherry explained that the "Notice of continuing obligation" would have been sent before the individual could be arrested for failure to appear. Cherry had never heard the "notice of continuing obligation" referred to as "a birthday letter."

FN26. State's exhibits 7A and 7B contain over thirty pages of documents. It is un-clear exactly which documents Cherry reviewed during her testimony. However, we have reviewed all of the documents in State's Exhibit 7A, which include: (1) the docket sheet for Trevino's case; (2) two forms from appellant's court regarding Trevino's case with handwritten notes (the handwriting is messy and in some places indecipherable); (3) a "Student Information" form, received in appellant's court on February 11, 2008, with an absent record log showing that Trevino was absent from school on January 21, 22, 24, 28, and February 1, 4, 5, and 6; (4) a referral for failure to attend school classes from Tiburcio Canas regarding Trevino's absences from school; (5) a complaint signed by Canas alleging that Trevino failed to attend school for three or more days or part of days in a four week period; (6) Canas's affidavit stating that Trevino failed to attend school; (7) three summons from appellant's court to Trevino's parents informing them that Trevino had to appear in her court on March 13, 2008, April 10, 2008, and October 16, 2008; (8) the "birthday letter" sent from appellant's court to Trevino ordering him to appear on August 4, 2009; (9) a "Notice to Show Cause for Failing to Obey Deferred Disposition Order"; (10) an order for Trevino to "pay the entire fine and costs adjudged at the end of this hearing"; (11) a "Waiver of Alternative Sentencing and Request for Incarceration in Satisfaction of Fine and Costs" signed by Trevino; (12) an order of commitment issued by appellant stating that Trevino should remain in custody "for the time required by law to satisfy the amount of" his fine of $537.00; and (13) a warrant to arrest Trevino issued by appellant.

We have also reviewed the documents in State's Exhibit 7B which include the following: (1) case manager's notes regarding Trevino's case; (2) two forms from appellant's court with handwritten notes regarding Trevino's case; (3) an affidavit signed by Canas stating that Trevino had failed to attend school; (4) a complaint signed by Canas; (5) a "Student Information" form with an absent record log showing that Trevino had been absent on February 7, 8, 11, 12, 13, 18, 19, 20, 21, 28, 29 and March 3, and 6, which was received on March 11, 2008 by appellant's court; (6) a "Referral for Failure to Attend School Classes" from Canas to appellant's court regarding Trevino; (7) "Minutes of the Justice of the Peace Court" deferring Trevino's adjudication; (8) a summons for Trevino to appear in appellant's court on October 16, 2008; (9) a "birthday letter" summoning Trevino to appear in appellant's court on August 4, 2009; (10) a "Notice to Show Cause for Failing to Obey Deferred Disposition Order"; (11) Trevino's report card from October 15, 2008; (12) Trevino's "Report card/Progress Summary" for April 14, 2008 to May 30, 2008; (13) Trevino's "Report Card" for August 25, 2008 through October 3, 2008; (14) an order from appellant's court ordering Trevino to "pay the entire fine and costs adjudged at the end of this hearing"; (15) a commitment order issued by appellant; (16) a warrant for Trevino's arrest issued by appellant; and (17) a "Waiver of Alternative Sentencing and Request for Incarceration in Satisfaction of Fine and Costs" signed by Trevino.

Cherry testified that she did not know why Trevino was arrested and that she believed that he did appear on the date he was required to appear. Cherry believed that there was a clerical error on the documents included in State's Exhibits 7A and 7B. When the prosecutor asked, "So what was he arrested for, then," Cherry replied, "there was a waiver that he, I guess, declined to do community service or waive any other type of—waive any other type of alternative sentencing." Cherry agreed with the prosecutor that by signing the waiver, Trevino asserted that "he couldn't pay the fine, essentially, and so because he couldn't pay the fine, he had to go to jail, right?" The following exchange then occurred between the prosecutor and Cherry:

Q He appeared on August 4th, 2009, yet, the warrant says failure to attend school, FTA, and the FTA, it is your representation, stands for failure to appear?

A That's correct, yes.

Q So if you're saying it was a clerical error and he was obviously incarceration [sic] and arrested by Judge Mary Alice Palacios on August 4, 2009, what was he arrested for, then?

A I would—I don't know if I can answer that question, but my understanding would be then that he was there for the failure to attend school, but to satisfy the fines and costs of that.

Q Oh, so it's going back to an offense he committed prior to the age of 17 then? Is that what your testimony is now?

A Right.

....

Q Okay. Now, you are aware, though, that an individual who is 17 cannot be jailed for offenses that happened prior to his 17th birthday, correct?

A Yes, ma'am.

Cherry testified that according to the case manager's notes regarding Trevino's case, he was doing well, and it had been recommended that his case be closed in October of 2008 when he completed his probation. Cherry stated that the period of probation in Trevino's case could only be set for a maximum of six months and that there was no document or order in the record indicating that his probation had been extended. Later, Cherry clarified that the docket sheet indicated that Trevino's probation had been extended. Cherry agreed with the prosecutor that although the probationary period had ended, the court could reset the cases beyond the six months. Cherry agreed that in Trevino's case, appellant ordered Trevino to pay the fines, he was unable to do so, Trevino signed a waiver, he was arrested in appellant's courtroom, and appellant committed him to jail. Cherry testified that the order sent to Trevino to appear in appellant's court was sent ten months after he completed the terms of his probation.

Cherry explained that the reason there were two cause numbers related to Trevino's case is because "it's assigned a juvenile—a juvenile cause number and then an adult cause number." Cherry agreed with the prosecutor that there was only one judgment in the court's file and that the only judgment on file indicated a probationary period of six months. When asked if the judgment included a fine, Cherry replied, "No, I didn't see any." Cherry agreed that in "November [Trevino was] ordered to pay a fine and court costs." However, Cherry could not recall if the case sheet or the docket sheet reflected imposition of the fine and court costs.

Cherry stated that "the notice of continuing obligation birthday letter" went out on July 22, 2009 ordering Trevino to appear in appellant's court on August 4, 2009. Cherry agreed that Trevino appeared on that date. Cherry agreed that appellant signed the warrant for Trevino's arrest on the "failure to attend school, failure to appear." Cherry stated she believed that, according to the docket sheet, Trevino appeared every time he was summoned to appear in appellant's court.

On cross-examination, Cherry testified that Trevino would have been told that he could pay the fine and court costs at a later date, that a payment plan could have been arranged, and that he could perform community service in lieu of paying the fine. Cherry stated that based on Trevino's signature on the waiver, he had chosen to go to jail and

not pay the fine or perform community supervision. Cherry explained, that although a case manager recommended that Trevino's case be closed, appellant made the final decision whether to close the case. Cherry stated that appellant apparently had not accepted the recommendation because according to the case manager's notes, Trevino had additional absences. Defense counsel asked if Cherry agreed that Trevino was told he had to immediately pay the fine or go to jail, and Cherry disagreed.FN27 Cherry clarified that the language used in the warning that is included in the "birthday letter" or what Cherry referred to as the notice of continuing obligation came "straight out of the [Texas] Code [of Criminal Procedure]."FN28

FN27. Defense counsel's questions appear to be in response to the prosecutor's questions characterizing appellant's actions as demanding immediate payment from Trevino and sending him to jail when he could not pay the fines and court costs.

FN28. A copy of article 45.060 of the Texas Code of Criminal Procedure was ad-mitted at appellant's trial as State's Exhibit 3. See TEX.CODE CRIM. PROC. ANN. art. 45.060.

Cherry testified that most of the forms used in appellant's court were provided by the Justice Training Center, which is the same agency that trains the justices of the peace in Texas. Cherry stated that the other forms that were not provided by the Justice Training Center had been approved by the District Attorney's Office. Cherry testified that Schreiber handled all of the cases in appellant's court where the defendant pleaded "not guilty," which included "failure to attend cases." According to Cherry, Schreiber never expressed that there was a problem with the procedures followed in appellant's court. Cherry testified that she presented the notice of continuing obligation forms to Schreiber before she sent them to the defendants and that Schreiber never expressed a concern with the forms. When asked if any of the forms used in appellant's court were created by "her office," Cherry replied, "Not to my knowledge, no."

On re-direct examination, the prosecutor asked, "[l]sn't it true that Judge Mary Alice Palacios was going to Valley View, Hidalgo and Donna ISD and recruiting truancy work?" Cherry responded, "Recruiting work, I've never seen that, no." Cherry elaborated, "Well, actually, I was approached by the attendance clerk for Valley View when I just started, a few months after I started, and they told me that they had seen an article in the paper for what [appellant] was doing for the [ECISD]."

Cherry agreed with the prosecutor that appellant's staff writes in the information regarding the defendant on the "birthday letter." The prosecutor asked, "You could actually put my name in there and say I failed to appear, couldn't you? You could put that in the birthday letter if you wanted to? Yes or no?" Cherry said, "No, you can't do that." FN29

FN29. The prosecutor also asked, "Okay. These, essentially—these birthday letter, notice of continuing obligation letters, they are basically weapons that you can use at your disposal, isn't it?" However, after defense counsel objected, the prosecutor stated, "Withdraw the question, Your Honor." The State presented no evidence that appellant used the obligation letters as "weapons" for any purpose.

The prosecutor asked, "So essentially the way that [defense counsel] is insinuating it and the way you are answering his questions, LeRoy Trevino was arrested on a clerical error," and Cherry responded, "No, he was not arrested on a clerical error." Cherry agreed with the prosecutor that the commitment and warrant documented that Trevino was arrested for failure to appear.

The prosecutor asked Cherry to read articles 45.041 and 45.048 of the Texas Code of Criminal Procedure silently. After following the prosecutor's directions, Cherry agreed that "the word community service" did not appear in the articles. On re-cross examination, Cherry explained that the code of criminal procedure did not authorize the

imposition of community supervision or an option to pay at a later date but that appellant "wanted to [do] it for them." Cherry agreed with defense counsel that Trevino "said no" to any alter-native sentencing. Cherry stated that the organizations where the "young people" could perform community service included "the Humane Society, the library, Boys and Girls Club. There were so many. The museum. There were so many places that they could perform the hours."

D. Trevino

Trevino testified that he was eighteen years old at the time of appellant's trial. When asked why he was cited for truancy, Trevino said, "I just wasn't going to school." Trevino testified that while he was attending high school in McAllen, he was transferred to alter-native school in Weslaco. According to Trevino, someone from McAllen caused a problem on the bus, and thereafter, no one from McAllen was allowed to ride the van that trans-ported the McAllen students to Weslaco. Trevino stated that he could not find a ride to Weslaco and that is why he was absent.

Trevino testified that appellant told him to pay a fine, and his parents would pay a portion of the fine every time they appeared with him in appellant's court. Trevino did not receive any receipts for payment and did not receive "a piece of paper telling [him] what [he] had to do." Trevino testified that he "always appeared" when he was summoned to appear in appellant's court.

Trevino recalled receiving a letter when he turned seventeen informing him that he "had to go to court and take care of some payment plans that [he] hadn't taken care of or [he] was going to be arrested." Trevino stated that he went to court, and he was arrested "[b]ecause he hadn't finished paying off [his] fines." Trevino believed that he owed about $1,000.00 in fines, but he did not have any money at the time. When the prosecutor asked, "Were you offered community service," Trevino replied, "No, ma'am. My mother was." The prosecutor asked why Trevino had chosen to go to jail; he responded, "Because it was my behalf, you know what I mean? It was my mistake so I was going to have it." Trevino stated that he spent "[m]aybe like a week and a half" in county jail after he was arrested.

On cross-examination, Trevino agreed that appellant had placed him on probation and had ordered him to pay a fine. Trevino did not pay the fine, and appellant gave him the option of additional time to pay the fine. He refused that option. Trevino agreed that while he was on probation for his truancy, he had the option of paying the fine in installments but was not able to make those payments.

On re-direct examination, Trevino testified that appellant ordered his mother to serve community service hours and "extended [his] six-month probation to a nine-month." Trevino claimed that appellant threatened to "lock up" his disabled mother for his truancy and that his mother cried.

E. De Luna

De Luna testified that he was nineteen years old at the time of appellant's trial. De Luna recalled that when he was in high school at "Johnny Economedes," he "was missing too much school" and was "told to go to court." When asked, "And did you go to court," De Luna said, "Not all the times." De Luna testified that he went to appellant's court twice. De Luna recalled that he went to a different court that ordered him to serve probation; he served and successfully finished his probation. De Luna believed that once he completed the probation, he "thought it was over" because that is what his probation officer told him. De Luna testified that he had approximately twenty tickets and that he had "to serve the time" in jail for all of those tickets. De Luna spent eighteen days in jail.

On cross-examination, defense counsel asked, "Okay. And out of the 22 citations, you only went to court on two of them; is that right," De Luna said, "Yes, sir." De Luna agreed that he received notices from the judge to appear in court when he received the tickets, but he "just didn't go." De Luna testified that his mother wanted to take him to court, but he would not go.

De Luna acknowledged that he had a pending federal lawsuit against appellant, but denied that he was asking for money. De Luna admitted that the $10,000 or $11,000 fine he was ordered to pay was not paid. When defense counsel again asked De Luna if he was seeking money damages in his federal lawsuit against appellant, De Luna said, "Well, money damages.... Yes, sir."

E. De Luna's Mother, Elsa De Luna

Elsa testified that De Luna was diagnosed with A.D.H.D. in third grade. She added that De Luna "has had a lot of learning disorders." Elsa stated that De Luna began getting in trouble for truancy "shortly after his father died." Elsa testified that she appeared once with De Luna in appellant's court where he was ordered to pay a fine. Elsa said that they went to appellant's court two other times, "but she was not there, so they told [her] that they would contact [them] both times, and then after that, they never contacted [them], but, that was, like, years after."

Elsa testified that De Luna went to juvenile court and received probation with com-munity service, which he completed. Elsa was informed by the juvenile court that De Luna's case was closed. Elsa stated that subsequently, De Luna was arrested for "PI," and was told that the bail was $168.00. Once Elsa obtained the money, she was told that De Luna owed $10,000 in tickets due to his truancy. Elsa believed that De Luna had already served his probation on those tickets, so she went to speak with appellant. Elsa stated that she spoke with a man at appellant's court who told her that she had to pay $10,000 for De Luna's release. However, Elsa did not have the money, so she asked if she could make payments. Elsa testified that she was told that she had to pay the entire amount before De Luna would be released from jail. Elsa stated that she informed the court that De Luna had already completed his probation for those truancy tickets. When asked to describe appellant's court's employees' attitude, Elsa said, "I believe it was very unprofessional, because I did ask them to please, please—I pleaded with them to please let me make some kind of arrangement to get my son out. I mean, I was devastated. He had never been in jail, and as a mother you don't know what's going to go on or happen in there. And they didn't give me the opportunity." Elsa was told that her son would have to serve 101 days in jail for the fines.

F. Juvenile Probation Officer, Juan Tijerina

Tijerina testified that he is assigned to "the court unit as a court officer" and is currently assigned to the 430th District Court. Tijerina described the juvenile court as "a court that has jurisdiction over juvenile cases, juveniles that commit crimes within the community and are arrested, those offenses that are committed are submitted to the probation department for review, and those are submitted to the District Attorney's Office to see if they will file a petition on those cases." When the prosecutor asked if juvenile cases are handled in the "JP court or a different court," Tijerina said, "No. They are handled in the—currently it's the 449th District Court that handles juvenile cases, the 430th District Court and the 332nd."Tijerina agreed with the prosecutor that cases can be transferred from the justice of the peace courts to the juvenile court. Tijerina explained that "what happens is that if an order to transfer is signed by a JP judge, it's submitted to the probation department's intake unit, and they assign the case accordingly." Tijerina stated that once a case is transferred to the juvenile court, it does not to his knowledge get transferred back to the justice of the peace court.

Tijerina agreed with the prosecutor that there were several different orders from appellant's court transferring De Luna's cases to juvenile court included in the court's documents admitted as State's Exhibits 9–5, 9–B, 9–S, 9–T, 9–U, 9–D, 9–C, 9–E, 9–F, 9–G, 9–H, 9–1, 9–J, 9–K, 9–L, 9–M, 9–0, 9–P, 9–Q, and 9–R. Tijerina stated that "[t]o [his] knowledge," if the justice of the peace court transfers a case to the juvenile court, the juvenile court "retains jurisdiction" and the justice of the peace court loses jurisdiction.

Tijerina stated that De Luna was ordered to serve one year of probation. Tijerina was not aware if De Luna successfully completed probation. However, Tijerina could tell from his file that Veronica Calvillo, the probation officer who was assigned to De Luna's case, "closed out the case." FN30Tijerina explained that if the child does not "successfully complete [probation], we [the probation officers] usually-it depends. If the child ages out of the—of the

system, which is he turns 17 or 18, depending on the term of the probation, we can normally—if—if he—if he commits another offense, then we revoke the probation, but normally if—if everything seems to be well, then we just usually close the case out once he completes probation." Tijerina said that in the disposition letter, Calvillo documented that De Luna's probation term had expired. Tijerina explained that meant "that the 12–month period ended and usually if there wasn't any kind of subsequent offense, then the case was closed, successfully or not. It—it would depend on what that probation officer."

FN30. Neither party requested admission of Tijerina's file.

When asked what "does [double jeopardy] mean," Tijerina replied, "When somebody is charged with a crime the second time around once they've been found true or guilty of the offense." Tijerina agreed with the prosecutor that regarding all of De Luna's cases, "it would be fair to say that Francisco De Luna paid for those crimes." When asked, "And so if he was ordered to go to jail on those same crimes, that would be double jeopardy, would it not," Tijerina responded, "I would think so."

On cross-examination, Tijerina testified that one of the charges De Luna had in the juvenile court concerned his running away from home and the other charge was for con-tempt of court. Tijerina clarified that "there was one set of contempts [sic] that were submitted [to the juvenile court], and then there were a second set of contempts [sic] that were submitted June 2007, and then there were another set of contempts [sic] that were submitted October the 4th of 2007."Tijerina stated that the juvenile court dealt with "[o]ne of the contempts [sic] [which] involved Mr. De Luna having tardies, another con-tempt involved Mr. De Luna having excessive tardies, and another contempt involved him having failure to attend school, another contempt for failure to attend school." Tijerina continued, "Another contempt for failure to attend school, subsequent failure to attend school, I believe the child having contraband or a weapon, another failure to attend school, a subsequent—this one involves failure to comply, [with] rules and penalties." Appellant's trial counsel stated, "Now, Mr. Tijerina, contempt is a separate offense from failure to at-tend school; is that right?" Tijerina replied, "To my understanding" and agreed that contempt and failure to attend school are different crimes. When asked what the State alleged in its petition in the juvenile court that De Luna had done, Tijerina stated that [the petition] included the runaway that occurred on August 20, 2007 and also included in Count Number 2 that Mr. De Luna failed to attend school on September—August the 22nd, 24th of 2006, September 1st, 25th, 20th, 2006; Count 3, failed to attend school October 11th, 7th, 24th, 30th, and 31st of 2006, also; Count 4, November 3rd, 10th, 16th, 29th, 2006; December 13th, 2006; Count 5 included January 8th, 10th, 11th, 17th, of 2007; and Count 6 included February the 5th, 15th, 2007, March 19th, 21st, 26th of 2007.

Tijerina testified that once the justice of the peace court transfers the cases to the juvenile court, the juvenile court alone maintains jurisdiction over those cases. Tijerina stated that as a courtesy, someone from his department sometimes sends a disposition letter to the justice of the peace court indicating that the cases have been disposed. Tijerina testified that such a letter was included in his file regarding De Luna's cases, which was dated January 4, 2008.FN31

FN31. This January 4, 2008 disposition letter was not admitted into evidence, and there is nothing in the record showing that this letter was received by appellant's court. The record includes a disposition letter signed on July 13, 2007 by a probation officer regarding De Luna's case in the juvenile court. However, the offense listed is "Contempt of Court (11 cts)." A second disposition letter signed on January 8, 2008 is also included in the record. However, it lists the offense committed as "cont of court." No disposition letters regarding De Luna's multiple offenses committed at school for among other things, truancy, appear in the record.

During re-direct examination, Tijerina testified that the probation department notified appellant of "the action that was taken in the juvenile court" regarding De Luna's probation. Tijerina stated that State's Exhibit 9X, a document entitled "Disposition" from the Hidalgo County Juvenile Center and signed by a juvenile probation officer,

was sent to appellant's court as a courtesy and "a way to inform the referring agency of what action was taken in the case." When asked "what was the action taken in this case," Tijerina said, "In this particular one, I believe that the probation officer marked off—or wrote in, Family did not respond for services." Tijerina stated that the disposition letter did not transfer the cases back to appellant's court and that the form indicated that the case was not closed. However, Tijerina did not explain what the notation "[The] Family did not respond for services" meant. The trial court also admitted into evidence State's Exhibit 12, which is another "disposition letter" sent to appellant's court. State's Exhibit 12 documents that the juvenile court took action in De Luna's case and that he was "placed on Judicial Probation" on January 24, 2008 for "cont of court." Tijerina agreed with the prosecutor that based on the disposition letter, appellant should have "had knowledge" that the juvenile court had placed De Luna on probation. However, Tijerina did not acknowledge that the probation was for contempt of court.

On re-cross examination, when appellant's defense attorney asked if De Luna pleaded guilty to contempt of court, Tijerina responded, "Correct." The disposition letter states that De Luna had been placed on "judicial probation" for the offense of contempt of court based on a referral received from appellant's court. It does not state that De Luna was punished for any other violations, which included the excessive absences and other Class C misdemeanor offenses. Although Tijerina referred to his file during his testimony, that file was not admitted into evidence.

G. Probation Intake Supervisor, Rafael Ocon

Ocon, a probation intake supervisor with the Hidalgo County Juvenile Probation Department, testified that he had reviewed the files from appellant's court in De Luna's case. Ocon observed that the file includes "orders to transfer, failure to attend" that indicated that appellant had transferred De Luna's cases on those Class C misdemeanor charges from her court to the juvenile court. Ocon stated that once appellant signed the transfer orders, "[s]he loses jurisdiction of those cases" and the juvenile court and the juvenile probation department "retain" jurisdiction. Ocon agreed with the prosecutor that appellant transferred all of De Luna's cases to the juvenile court and lost jurisdiction over the cases. According to Ocon, the judgment reflected that the probation department filed the cases against De Luna as "truancies." FN32Ocon explained that a truancy is the same charge as a failure to attend school charge. Ocon testified that De Luna was placed on probation for a year, ordered to perform fifty hours of community service, and that De Luna completed those conditions. Ocon agreed that De Luna "completed the probation." FN33

FN32. This judgment is not in the record. Thus, although Ocon testified that it "reflected" that the probation department filed the cases against De Luna as "truancies," there is nothing in the record showing that the juvenile court disposed of those "truancies ." Moreover, there were other charges against De Luna pending that were not "truancies," and Ocon did not testify as to what occurred in those cases against De Luna.

FN33. As stated above, the only documents from the juvenile court are the disposition letters that show that the juvenile court had disposed of contempt of court charges against De Luna. There is no evidence that the juvenile court ever disposed of the Class C misdemeanor charges against De Luna. Thus, although Ocon testified that the judgment reflected that the probation department filed its case against De Luna as "truancies," there is nothing in the record showing that the juvenile court disposed of any truancy charges.

H. Closing and the Verdict

The State rested, and defense counsel requested an instructed verdict on the basis that "there is no evidence at all or insufficient evidence as a matter of law from which the jury or any fact finder could find all of the elements beyond a reasonable doubt" because "[t]here is no evidence from any source" that appellant: (1) 'intentionally with intent as defined by the—by this Penal Code subjected' the alleged victims to arrest"; or (2) "knew that any acts that she understood or she did were unlawful." The State responded that the evidence showed "that each of the warrants that were signed on each of the individuals, warrants for their arrest" by appellant and that appellant "intentionally

subjected each of those individuals to arrest by signing the warrants." The prosecutor said, "When she signed those warrants, she intended—it was her conscious objective to arrest these particular individuals." The prosecutor argued that "the law is imputed to [appellant] to know the law, and "[s]he signed 22 orders transferring [De Luna's cases]. She knew the law of transfer. She lost jurisdiction in that case." Finally, the prosecutor argued that appellant "knew by sending that [letter of continuing obligation to Trevino]—it's her position she should have never sent that letter out. She still sent it out. And she—he came in on the designated time and place on that letter, and she still arrested him for failure to appear. That was clear. The arrest warrants and commitment letters all reflects failure to appear because it's through testimony that FTA stands for failure to appear." The trial court denied defense counsel's request for a directed verdict.

In closing argument, the State prosecutor stated, in pertinent part, the following:

I'm just going to read one of the counts to you, but basically says if you find from the evidence beyond a reasonable doubt that on or about—and then there is a different date for each victim in the—in the case—in Hidalgo County, Texas, had proof that these offenses happened in Hidalgo County, Texas, then Mary Alice Palacios, who we've had pointed out to you numerous times by most of the witnesses that came to testify, that she did intentionally subject each of the victims, [Trevino and De Luna] to an arrest—all she had to do was have them arrested—and that she knew her conduct was unlawful. Then you'll find—and that she was acting under the color of her title—color of her title of her public office, in other words, if she was acting as judge when she did these things, then you'll find her guilty.

One other thing I want to point out to you. Most of the charge is self-explanatory, but it is not required that the prosecution prove guilt beyond all possible doubt. All we have to do is prove to you beyond a reasonable doubt....

Now, you want to look at the circumstances surrounding each of these arrests to try to determine the intent and the knowledge in each one of these cases.

Now, Mary Alice Palacios, Judge Palacios, has been a judge for quite a few years. We know that she's gone to training. The first year she was elected judge, she—now, these are required trainings. In addition to the required trainings, she can voluntarily go to more training, but she's required the first year to take 80 hours of training. Each year thereafter she has to take 20 hours of training. And—and throughout—which was done in each case.

Now, how would you know a person intended to do wrong? Okay. She signed a warrant on [Trevino's] case. He comes to court. He appears as directed by the judge. And he shows up in court. She signs a warrant, failure to appear. It's very obvious from all the testimony he did not fail to appear. She intentionally signed the warrant. She intention-ally had him arrested. She knew he didn't fail to appear. He did appear. So she obviously intended her conduct, and she knew that conduct was wrong.

Now, when you look at these warrants—and I'll get a couple of them to show you. In State's Exhibits—in State's Exhibit 9–B—we'll take that one first. You'll have a warrant. But we also brought the sheriff's records, their warrants, copies of warrants, so you can compare if you care to. But it says, Violation: Failure to Attend School, FTA. Well, you could interpret that FTA to mean failure to attend school; however, you've heard a lot of testimony that FTA in parenthesis means failure to appear.

And I think one way that we can clear that up is if you'll take a look, especially in De Luna's cases, his warrant in 9–A is a different warrant. It says Violation, Failure to Comply with Directive. Then in parenthesis is FTA, Failure to Appear. So we know these arrests were for failure to appear.

Francisco—I mean [Trevino] clearly could not have been arrested for failure to appear when he appeared. I mean, that's obvious, very obvious. There is no two ways you can interpret that. If you don't appear, you've been summoned to appear, you don't appear, then you—then you can take a failure to appear warrant. And if you do appear, they can't take a failure to appear warrant. It's very, very obvious.

Now, secondly, we come to [De Luna]. He had numerous cases, many, many, many cases. And all these cases were transferred by the Court to the juvenile court. [FN34] And you've heard testimony. Go back and read this order of transfer. What does it say? It says, on the Court's own motion, we transfer [De Luna's] case to the juvenile court. Remember, she is the JP court. She moved these cases from her court to the juvenile court. She moved all of them to the court, all but one. She lost jurisdiction of those cases.

FN34. The State concedes that appellant had not transferred one of De Luna's cases before she issued an arrest warrant.

And she has attached to each one of these exhibits—I'm not going to go through each one with you. She has attached to these exhibits the order transferring the case. And if you will look through these exhibits, there is no order transferring the case back to the Court. She transferred this particular case I'm looking at on the 8th day of March of 2007.

The next thing she does is on December 17th of 2008. That's a year and about three-quarters, a year and eight or nine months later. A year and eight or nine months later, she sends out what they refer to as the birthday letter or the notice of continuing obligation on all these cases. You count these, these JP numbers up here, one, two, three, four, five, [and] six. It comes up to, like, 22 or 23 cases that she transferred—I mean that she is noticing him to appear in court on; however, when you look at the file, there is no order transferring these cases back, none whatsoever. It's very obvious she did not have jurisdiction in this case.

Yet she also gets a letter from the probation department, which I'd like to remind you of. She got a letter from the probation department telling her, in all these cases you've transferred to our court, we have put [De Luna] on probation. [FN35] She had notice of that.

FN35. The letter does not state that De Luna was placed on probation in all of the cases that appellant transferred to the juvenile court. The form letter filled in by a juvenile probation officer has one cause number which is J–07702. The only offense listed is contempt of court. We have reviewed all of the charges that were transferred to the juvenile court by appellant. De Luna was not accused of contempt of court in any of those transferred cases. The State presented no evidence linking the contempt of court charge with those transferred cases. SeeTEX.CODE OF CRIM. PROC. ANN. art. 45.050 (West, Westlaw through 2013 3d C.S.) (establishing that a justice court may, among other things, "refer the child to the appropriate juvenile court for delinquent conduct [or] for contempt of the justice or municipal court order" if that child has failed "to obey an order of a justice or municipal court under circumstances that would constitute contempt of court"). Without an explanation of the procedures that are followed and how and when a justice court loses jurisdiction, it is very difficult to determine whether appellant's court had jurisdiction in this case.

But in spite of all that, he took out all his warrants for failure to appear. And then if you'll look at these warrants carefully, it's a command to any peace officer that if they come across [De Luna] to arrest him. So when [De Luna] was arrested for a public intoxication charge, the sheriff's office had all these warrants on file, so they arrested him for all these.[FN36] Clearly wrong, clearly wrong. Anybody would know it's wrong.

FN36. As explained further below, the State presented no evidence that the sheriffs office arrested De Luna again after he was arrested for either public intoxication or possession of marihuana.

It's double jeopardy. That's a very basic fundamental right that we all have. Everybody knows about double jeopardy. It's not something that you would make a mistake on. You know it's wrong. You can't punish a person twice. You can't try a person twice for the same offense. If you have a murderer—if we try a murderer, as a prosecutor, if I lose that case, it's over. We don't get another shot at him. It's over. If we try him for murder and we don't like the punishment, whatever he gets, it's over. We can't go back and assess some more punishment. It's over. We can only punish him once for the offense. It's a very basic, very fundamental right that was violated by this Judge.[FN37]

FN37. In her brief, appellant argues that one of the State's theories was that she lost jurisdiction over Trevino's cases by the time she issued the warrants for his arrest. However, after reviewing the State's opening and closing argument and the evidence, we disagree that the State offered this theory as to Trevino to the jury.

The jury convicted appellant of official oppression of Trevino and De Luna. Appellant filed a motion for new trial, and after a hearing, the trial court denied the motion. This appeal followed.

Held: Judgment of Acquittal

Opinion: As previously held, a judge is not subject to criminal liability when it is proven that the court she presides over does not have jurisdiction or if that judge commits a double jeopardy violation. Nonetheless, as explained below, we have also determined that the evidence is insufficient to support any of the State's theories.

Specifically, appellant, by her first, second, and third issues, argues that the evidence was insufficient to show that she knew that her acts were unlawful and that the State did not provide any evidence that she was not justified when she signed the complained-of warrants. The State claims that the fact finder in this case could have inferred from the evidence that appellant knew that her court lacked the requisite jurisdiction in De Luna's case and that in Trevino's case, even a lay person knows that one cannot arrest a person for failure to appear when the person did in fact appear.

We agree with appellant. All of the alleged acts involve appellant's discharge of official duties and her judicial interpretation of the applicable law. If appellant signed the warrant for Trevino's arrest for a crime he did not commit, the State was still required to prove that appellant intended to subject Trevino to an arrest that she knew was unlawful.

A. Trevino

In our sufficiency review, we must review all of the evidence presented in order to determine whether the jury's finding of guilt is a rational finding. See Brooks, 323 S.W.3d at 907 (explaining that although a jury may believe one witness and disregard some of the evidence, "based on all the evidence" the jury's finding of guilt must be rational). There-fore, we will set out all of the evidence below and explain how that evidence is insufficient under the State's theories.

1. The "FTA" Notation

At appellant's trial, the State relied on evidence that Trevino's arrest warrants had the notation "FTA." The State argued this meant that Trevino was arrested for failure to appear, and it was undisputed that Trevino always appeared in appellant's court when summoned.

The evidence presented at trial showed that Trevino owed court imposed fines in two cases for failure to attend school. The evidence shows that when Trevino appeared in appellant's courtroom on the day that appellant signed

the arrest warrant (August 4, 2009), he signed a waiver indicating that he would serve a sentence in jail in lieu of paying the fines that he had been ordered to pay for two counts of failure to attend school.

The docket sheets from appellant's court show that appellant ordered Trevino to pay fines in two causes by August 4, 2009. In addition, Trevino acknowledged that appellant had ordered him to pay fines and that he had not done so. Trevino testified that he believed he owed about $1,000.00 in fines. Trevino also agreed that, although appellant had offered to give him more time to pay the fines, he refused her offer. The State presented no evidence that Trevino did not owe the fines and court costs or that appellant committed any improper acts in allowing Trevino to waive payment of his fines and go to jail. More-over, when the prosecutor asked why he was arrested, Trevino replied, "Because I hadn't finished paying off my fines." Trevino explained that he chose to go to jail instead of paying his fines or his mother doing community service "[b]ecause it was my behalf, you know what I mean? It was my mistake so I was going to have it." Trevino never stated that he had been arrested for failing to appear in appellant's court.

State's Exhibit 7A and 7B include a "Waiver of Alternative Sentencing and Request for Incarceration in Satisfaction of Fine and Costs" signed by Trevino on August 4, 2009 under two separate cause numbers in appellant's court. Each waiver states:

The Court has explained to me my right to be released to pay the fine(s) and court costs at some later date in the manner prescribed in Art. 45.041, C.A.C.C.P.[FN42] I understand that I have such a right and I do hereby expressly waive this right in the above-styled case and request that I be imprisoned in jail for a sufficient length of time to discharge the full amount of fine(s) and costs adjudge [sic] against me as provided by Art. 45.048.

The warrants set out that appellant ordered the arrest of Trevino "for an offense against the laws of said State, to wit" a "Fine $537" and that the complainant was the "JJAEP" for the violation of "Failure to Attend School (FTA)." FN44 The violation noted on the warrant is for "Failure to Attend School (FTA)" on the basis of a complaint filed by Trevino's school, "JJAEP." The failure to attend school complaint was filed on March 7, 2008, and the offense date documented on the warrant was March 7, 2008.FN45Thus, the warrant clearly documents that Trevino's offense occurred on March 7, 2008 and was based on a com-plaint filed in appellant's court by his school.FN46The warrant does not state that appellant's court is the complainant.FN47

FN44. "JJAEP" is the alternative school that Trevino attended.

FN45. If Trevino had been arrested for failure to appear, the warrant should have listed the date of the offense for that charge and the complainant would have been appellant's court. Moreover, the date on the warrant would not have been March 7, 2008, and the complainant would not have been Trevino's school.

FN46. The record contains copies of the complaints filed in appellant's court by Trevino's school.

FN47. Therefore, we interpret the warrants as documenting that appellant ordered Trevino's arrest because he had not paid the fines for two separate failure-to-attend-school offenses. We emphasize that we respectfully disagree with the State's interpretation of the warrants.

In summary, Trevino signed the waiver on August 4, 2009, and appellant signed the arrest warrants and commitment orders on August 4, 2009. The waivers state that appellant had explained to Trevino that he had a right to be released to pay the fines and court costs at some later date in the manner prescribed in article 45.041, Thus, because Trevino signed the waiver to spend time in jail in lieu of paying the fines, no rational jury could have inferred that the "FTA" notation on the arrest warrants proved beyond a reasonable doubt that appellant issued the

warrants to arrest Trevino for failure to appear. Accordingly, there is no evidence that appellant knew that arresting Trevino was "unlawful" for the reasons claimed by the State.

The commitment orders signed by appellant committing Trevino to the jail were filed in the Hidalgo County Sheriff's Office ("HCSO") by the custodian of records. In those commitment orders, the "Officer's Return" has been completed and documents that the commitment orders were executed on August 4, 2009 at 12:00 p.m. However, the HCSO File does not contain any arrest warrants for Trevino. Thus, there is nothing in the record showing that the arrest warrants with the "FTA" notation were actually served on Trevino. Trevino was placed in confinement on August 4, 2009, thus, at some point perhaps he was arrested. However, the evidence undisputedly shows that if Trevino was in fact arrested, he was arrested after signing the waivers. And there is no evidence in the record that the HCSO ever executed the warrants with the erroneous "FTA" notation. See id. art. 15.22 (West, Westlaw through 3d C.S.) ("A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant."). Although we cannot discern from the record under which authority Trevino may have been arrested, it was the State's burden to prove beyond a reasonable doubt that Trevino's arrest was unlawful due to these allegedly erroneous warrants. Finally, the docket sheets from appellant's court in Trevino's cases state that on August 4, 2009, Trevino's cases were closed due to "Time served." If Trevino had in fact been arrested for failure to appear, Trevino's unpaid fines would have still been pending in appellant's court, and Trevino's cases would not have been closed.

Here, viewing the evidence in the light most favorable to the jury's verdict, we conclude that based on all of the evidence presented, no rational juror could have found beyond a reasonable doubt that appellant ordered Trevino's arrest for failure to appear. Moreover, because Trevino signed the waiver, the evidence presented in this case does not support a finding that appellant's act in signing the arrest warrant with the "FTA" notation was in any way unlawful.

2. Article 45.060

The State also attempted to invoke article 45.060 as proving that appellant was precluded from having Trevino arrested for offenses he committed before the age of seven-teen. Article 45.060 is entitled, "Unadjudicated Children, Now Adults; Notice on Reaching Age of Majority; Offense," and it states, in relevant part, "Except as provided by Articles 45.058 and 45.059, an individual may not be taken into secured custody for offenses alleged to have occurred before the individual's 17th birthday." However, the State did not provide any evidence regarding the meaning of the term "secured custody." And, it is well established that individuals under the age of seventeen can be arrested under certain circumstances. See Lanes v. State, 767 S.W.2d 789 (Tex.Crim.App.1989) (establishing that a juvenile may be arrested if probable cause exists). Because there is no evidence regarding the meaning of "secured custody" as used in article 45.060, no rational jury could have found beyond a reasonable doubt that article 45.060 prohibits the arrest of an individual for offenses committed before the age of seventeen. Moreover, article 45.045 allows a justice of the peace to issue a capias pro fine for person who committed an offense before the age of seventeen if the individual is seventeen years of age or older, and "the court finds that the issuance of the capias pro fine is justified after considering" (1) "the sophistication and maturity of the individual;" (2) "the criminal record and history of the individual;" and (3) "the reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court;" and "the court has proceeded under Article 45.050 to compel the individual to discharge the judgment." TEX.CODE CRIM. PROC. art. 45.045. Article 45.045 further states, that "(a) If the defendant is not in custody when the judgment is rendered or if the defendant fails to satisfy the judgment according to its terms, the court may order a capias pro fine issued for the defendant's arrest." ID. (Emphasis added).

Nonetheless, even assuming without deciding, that the State showed that pursuant to article 45.060, appellant's placing Trevino in "secured custody" for his failure to pay the fines and court costs was improper, the State did not provide any evidence that appellant's act was criminal, tortious, or both. At best, the State showed that appellant

misinterpreted the applicable law. The State cites no authority, and we find none, providing that a judge's misinterpretation of a statute amounts to a crime or tort. Therefore, the State failed to prove that appellant's act, even if true, was unlawful. See TEX. PENAL CODE ANN. § 1.07(a)(48) (defining unlawful as criminal or tortious without a justification or privilege).

3. Knowledge and Justification

Finally, the evidence fails to support a finding that appellant did not reasonably believe that her conduct was required or authorized by law when she signed the warrants for Trevino's arrest. See TEX. PENAL CODE ANN. § 9.21(a). The "FTA" notation is no more than a mere modicum of evidence, and as previously stated, no rational jury could have reasonably inferred that the "FTA" notation proved beyond a reasonable doubt that appellant had Trevino arrested for failing to appear in her court. Instead, the evidence undisputedly shows that Trevino signed a waiver and chose to serve a jail sentence in lieu of paying his fines. Thus, the evidence does not support a conclusion that appellant knew that she lacked authority to sign the arrest warrants for Trevino, despite any documentation or testimony that he was arrested for "failure to appear." Accordingly, we conclude that the evidence was insufficient to prove beyond a reasonable doubt that appellant commit-ted the offense of official oppression under these facts.

C. De Luna

Regarding De Luna, the State claimed that appellant's court lacked jurisdiction to issue the warrants for De Luna's arrest and that she allegedly violated double jeopardy principles by punishing De Luna for crimes that he had already been punished for committing by the juvenile court. The State's theory was that once appellant transferred De Luna's cases to the juvenile court, her court lost jurisdiction to perform any acts in De Luna's cases. And once De Luna served his sentence in the juvenile court, he had already been punished for the offenses that appellant had transferred.

In order to convict appellant under the State's theory, the jury had to determine whether appellant's court had jurisdiction over De Luna's cases and whether De Luna had already been punished by the juvenile court for the offenses that he was allegedly arrested for committing. The State cites no authority, and we find none, which allows a fact finder to determine whether a trial court lacked jurisdiction to perform a certain act or to determine whether a judge's order violates double jeopardy. The usual procedure in these matters is for the defendant to appeal the case to a higher court or to seek relief by filing a writ of habeas corpus.

By presenting the issue of whether appellant's court lacked jurisdiction to the jury, the trial court judge in appellant's case agreed that jurisdiction may be determined from the testimony of lay witnesses as a factual issue. We find no authority, and the State cites none, supporting a conclusion that the issue of whether a court has jurisdiction can be determined by lay witness testimony or that a fact finder may determine jurisdiction by either believing or disbelieving the witnesses. Instead, whether a court has jurisdiction is determined as a matter of law. See Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226, 228 (Tex.2004) (determining whether a court has subject matter jurisdiction is question of law that is reviewed de novo by an appellate court); Tex. Natural Res. Conservation Comm'n v. IT–Davy, 74 S.W.3d 849, 855 (Tex.2002); Robinson v. Neeley, 192 S.W.3d 904, 907 (Tex.App.-Dallas 2006, no pet.). To determine as a matter of law whether a court has jurisdiction, we review the Texas Constitution or applicable statutes granting the court its jurisdiction. See Gallagher v. State, 690 S.W.2d 587, 593 (Tex.Crim.App.1985) ("Where jurisdiction is given by the Constitution over cases involving designated kinds of subject matters, the grant is exclusive, unless a contrary intent is shown by the context. Further, it has been stated that the jurisdiction of the district court is fixed by the state Constitution and is immutable except by constitutional method of amendment"); Simpson v. State, 137 S.W .2d 1035, 1037 (1940) (determining whether a district court lacked jurisdiction to try a police officer for official misconduct by construing the Texas Constitution); Hall v. State, 736 S.W.2d 818 (Tex.App.-Houston [14th Dist.] 1987, pet. ref'd) (analyzing jurisdiction of a district court by reviewing the articles of the Texas Code of Criminal Procedure); State v. Hall, 829 S.W.2d 184, 188

(Tex.Crim.App.1992) (reviewing whether the lower court lacked jurisdiction by analyzing both the Texas Code of Criminal Procedure and the Texas Constitution).

In this case, the State failed to present to the jury the statute conferring jurisdiction to the justice courts or the statute conferring jurisdiction to the juvenile courts. The State made no effort to show that as a matter of law, appellant's court lacked jurisdiction when she issued the complained-of warrants to arrest De Luna. The State further failed to recognize that appellant's acts were done in the administration of her court's docket and that, as the judge, appellant had a duty to make those administrative decisions and to interpret the law. Instead, the State presented testimony from lay witnesses who stated that it was their understanding and belief that once appellant transferred the cases to the juvenile court, the justice court lost jurisdiction completely. We have reviewed the records from appellant's court and the disposition letters sent by the juvenile court. The documents signed by appellant transferring the cases to the juvenile court do not mention any con-tempt-of-court charges against De Luna. However, it is undisputed and the evidence shows that the juvenile court disposed of several contempt of court charges filed by appellant's court against De Luna and that De Luna served probation on those charges.

The evidence the State presented regarding De Luna's case was not clearly explained. For example, the State presented no evidence regarding what punishment, if any, De Luna received in the Class C misdemeanor charges. Also, there is no evidence that the juvenile court disposed of the twenty-two Class C misdemeanor charges or that the State dismissed those charges. The State also failed to provide any law on this issue. Thus, the State did not fully explain the procedure a justice court follows when the juvenile court does not dispose of class C misdemeanor offenses that have initially been transferred to the justice court but not disposed of by that court. It appears that more information was necessary to determine whether appellant's court lost jurisdiction overall of De Luna's cases. Moreover, the State did not offer into evidence the entire file from the juvenile court regarding De Luna's cases. Finally, appellant did not transfer one of De Luna's cases to the juvenile court, and the State failed to explain the impact of that decision. It was the State's burden to show that appellant's acts were unlawful, and it insisted on proving that her court's alleged lack of jurisdiction made her acts unlawful. Therefore, the State had the burden of providing the necessary information to the jury.

Also, there are questions regarding a "disposition letter" sent by the probation department to appellant's court stating that the "family had refused services" in one of the cases she transferred to the juvenile court. The State presented no evidence regarding how a family can refuse services when a child has been accused of a misdemeanor offense. When asked, Cherry, a former case manager in appellant's court, stated that the letter "would be something we would get back from juvenile probation as to whether or not they were going to pursue the matter or not." Cherry then testified that her interpretation of this letter was that the juvenile court did not have jurisdiction over that particular case. Thus, although a probation officer testified that the disposition letter did not transfer jurisdiction back to appellant's court, a legal conclusion that the officer was not qualified to make or for which the jury was not entitled to pass judgment upon, the only evidence before the jury shows that appellant's court personnel believed that the letter did in fact transfer jurisdiction back to her court. Thus, even if the State proved that Cherry was mistaken, the State did not prove that appellant knew that Cherry was mistaken. In other words, the evidence before the jury only supports a finding that appellant did not interpret the dis-position letter in the same way that the probation officer interpreted it. Therefore, the evidence does not support a finding that appellant knew that her court lacked jurisdiction and that her acts were as the State alleged "unlawful."

The difficulty in determining the legal sufficiency of the evidence under our standard of review is readily apparent because the offenses, as alleged by the State turn on a determination of questions of law. This includes a determination of whether a defendant's double jeopardy rights have been violated. Nonetheless, we will address the sufficiency of the evidence to the extent that we find that it is possible.

The evidence presented showed that De Luna had twenty-two Class C misdemeanor charges pending in appellant's court. De Luna committed those offenses at school. The record contains multiple transfer orders signed by appellant, transferring De Luna's cases to the juvenile court. The evidence further showed that appellant did not transfer one of De Luna's cases to the juvenile court. However, the evidence presented undisputedly shows that the juvenile court placed De Luna on probation only for contempt-of-court offenses. There is nothing in the record showing that the juvenile court made any ruling on the Class C misdemeanor cases or otherwise disposed of them.

Next, it was undisputed at trial that De Luna was not initially arrested pursuant to the warrants issued by appellant and that he was instead arrested for either public intoxication or possession of marihuana. In fact, the State conceded at trial that De Luna was originally arrested for public intoxication. The prosecutor stated in closing argument the following: "So when [De Luna] was arrested for a public intoxication charge, the sheriff's office had all these warrants on file, so they arrested him for all these. Clearly wrong, clearly wrong. Anybody would know it's wrong." It was further undisputed that the reason that De Luna was not released from jail when his mother went to post his bail after he was arrested for public intoxication was due to De Luna's failure to pay the fines he had not paid in appellant's court. However, there is no evidence in the record that if appellant's court had jurisdiction, she was not allowed to issue the capias pro fine warrants for De Luna's arrest. The entirety of the State's case rests on whether appellant subjected De Luna to an unlawful arrest because her court lacked jurisdiction and she somehow violated his right against double jeopardy.

At trial and on appeal, the State relies on the theory of constructive arrest wherein the State argues once a person has been arrested for an offense, if a separate arrest warrant has been issued for that person, the person is then re-arrested on the warrants. At trial, although the State made this argument, it did not provide any evidence to the jury regarding the theory of constructive arrest.

However, in its brief, the State claims that De Luna's mother "indicated that [De Luna] had been arrested for failure to appear in January of 2010."

Next, the State asked, "And then [after his possession of marihuana charge was dis-posed of,] he [De Luna] was arrested on those offenses [the offenses for which appellant issued the warrants]?" Gonzalez, the Chief Public Defender, replied, "He was arrested for possession of marijuana, Class B misdemeanor, and he disposed of the case and he is continued [sic] to remain in custody on the offenses listed in Exhibit 2 [(the offenses for which appellant issued the warrants])." Also, when the prosecutor attempted to elicit testimony from him that De Luna was arrested for "failure to appear," Gonzalez did not agree and stated that the Able Term system documented that De Luna was arrested for possession of marihuana, and held in jail due to the warrants signed by appellant. Again, the State did not allege that appellant subjected De Luna to unlawful continued confinement.

We acknowledge that Gonzalez agreed with the prosecutor when asked, that "in order for [De Luna] to have been in custody on those offenses, [De Luna] had to have been originally arrested for those" and responded "yes" when the prosecutor asked, "And in order for [De Luna] to have been in custody on those offenses, he had to have been originally arrested for those?" And Gonzalez "believed" that De Luna was arrested for those offenses. However, when asked by the State where the warrants issued by appellant were served, Gonzalez replied, "That, I don't know. Exactly I don't know where they were served." Moreover, Gonzalez admitted that in De Luna's case, he only conducted a "cursory review of the law", that he "wasn't confident" of his interpretation of the Juvenile Code, he sought advice from an employee of the district attorney's office, Schreiber, on the issue, and that he did not review De Luna's files from appellant's court or "do any kind of investigation." Gonzalez further testified that Schreiber "didn't understand what [Gonzalez] was saying" and informed Gonzalez that this area of the law is in his opinion "a gray area." The evidence must support a rational finding, and we cannot conclude that a rational juror could have concluded beyond a reasonable doubt that De Luna was arrested again pursuant to the warrants on the basis of Gonzalez's "belief." Instead, the undisputed evidence shows that those warrants were never served.

In its brief, the State also cites portions of testimony of appellant's court coordinator, Leal, for support that De Luna was arrested pursuant to the warrants signed by appellant. However, the portion of the record cited by the State is in the form of a voir dire conducted by the prosecutor during defense counsel's direct examination of Leal. Defense counsel attempted to elicit testimony from Leal regarding the judges who arraigned Trevino and De Luna. However, the State objected on the basis of hearsay. The trial court allowed the prosecutor to take Leal on voir dire. During the voir dire, the prosecutor asked, "And the arraignment at the County Jail, those—that's after [Trevino and De Luna] having been arrested on the warrants issued by Judge Mary Alice Palacios; is that correct," Leal replied, "Yes, ma'am." After the prosecutor completed the voir dire of Leal, the trial court sustained the State's objection to Leal's testimony regarding who arraigned De Luna and Trevino. The trial court allowed the above cited questions for the purpose of determining whether Leal's testimony was based on hearsay, and it sustained the State's hearsay objection. Therefore, we will not consider the prosecutor's voir dire of Leal as admitted evidence.

Also, the documentary evidence shows that the warrants signed by appellant for De Luna's arrest were not actually executed. Thus, the evidence in the record contradicts Gonzalez's testimony that he believed De Luna was arrested pursuant to the warrants signed by appellant. Each docket sheet from appellant's court in De Luna's cases states that on January 11, 2010, the "warrant[s] [were] recalled/Pending jail rpt fm HCSO."No one explained what was meant when appellant documented that the warrants had been recalled.

The State asked Leal, "So, essentially, that was—you are aware that Francisco De Luna was arrested and jailed and then you recall the warrant on this particular case," Leal re-plied, "Yes. It was recalled at the Sheriff's Office when he was served with it." However, when Leal made this statement, he was reviewing the one case that appellant did not transfer to the juvenile court. Thus, the State could not argue that appellant lacked jurisdiction to issue the warrant in that case. The State did not ask Leal to review any of the other warrants pertaining to De Luna. Therefore, there is no evidence that, in general, the notation "warrant recalled/pending jail report fm HCSO" meant that the warrant had been officially served. Leal simply stated that he remembered that in that particular case, the warrant had been served. Moreover, all of the warrants for De Luna's arrest filed by the HCSO's custodian of records have blank Officer's Return sections. In contrast, the Officer's Return in the commitment orders in Trevino's case filed by the HCSO's custodian of records is completed and documents that it was executed on August 4, 2009 at twelve o'clock p.m. The Officer's Return on the warrant for Diaz's arrest is also completed and documents that it was executed on February 25, 2010 at 1:37 p.m. FN60

FN60. Although the State called the custodian of records, Faustina Tijerina, to testify, it did not ask her to explain the process of "constructive arrest" to the jury.

Nonetheless, even assuming without deciding that the arrest warrants had been served on De Luna and that he was in fact arrested pursuant to those warrants, there is no evidence that appellant knew her acts were improper in any way or that she was not justified when she issued those warrants as further explained below. The State alleged that appellant transferred all of De Luna's cases to the juvenile court. However, the "Docket Sheets" from appellant's court in De Luna's cases show that before appellant transferred De Luna's cases involving the tickets he received for the various offenses he committed, De Luna failed to appear in appellant's court on several of those cases.FN61The docket sheets in De Luna's cases also show that before appellant transferred several of the cases, De Luna pleaded guilty to some of the charges, and appellant signed a judgment ordering De Luna to pay those fines. In those cases, the docket sheet shows that the court received the disposition letter from the juvenile center that De Luna's family did not respond for services. The disposition letter states that the offenses De Luna committed were contempt of court offenses. However, the disposition letter does not mention any of the class C misdemeanor offenses that De Luna pleaded guilty to committing in appellant's court.

FN61. The court of criminal appeals has stated that failure to appear before a judge is an offense and a warrant issued for that offense is expressly authorized under article 45.103 of the Texas Code of Criminal Procedure. Black v. State, 362 S.W.3d 626, 629, 637 (Tex.Crim.App.2012) (citing TEX.CODE CRIM. PROC. ANN. art. 45.103 (West, Westlaw through 2013 3d C.S.) ("If a criminal offense that a justice of the peace has jurisdiction to try is committed within the view of the justice, the justice may issue a warrant for the arrest of the offender.")). In this case, the State presented no evidence that appellant's court lacked jurisdiction to issue the war-rants for De Luna's multiple failures to appear in her court or that these multiple failures to appear were not separate offenses from the cases she transferred to the juvenile court. See id. Moreover, the jury heard evidence that "failure to appear" is considered contempt of court. Thus, assuming arguendo that this is a jury issue, a rational juror could not have found beyond a reasonable doubt that appellant lacked jurisdiction to cite De Luna for his multiple instances of contempt of court. We note that the Black court stated that there is no rule requiring that the face of the arrest warrant identify the source for the issuing magistrate's finding of probable cause to arrest the defendant. Id. at 637.

In addition, the trial court admitted article 45.060 into evidence which allows a court that has "used all available procedures under this chapter to secure the individual's appearance to answer allegations made before the individual's 17th birthday, the court may issue a notice of continuing obligation to appear." See TEX.CODE CRIM. PROC. art. 45.060. The notice of continuing obligation requires that the court warn the individual that failure to appear pursuant to the notice of continuing obligation may be an additional offense and result in a war-rant being issued for the individual's arrest. See id. In this case, evidence was presented that De Luna failed to appear in appellant's court on multiple occasions before she transferred the cases, that appellant sent out the so-called "birthday letters" after De Luna turned seventeen, and that De Luna again failed to appear in her court.

The record also shows that appellant summoned De Luna to appear in her court after he turned seventeen possibly for his failure to appear or in order to pay the fines appellant ordered him to pay. The State presented no evidence that a justice court that has transferred cases involving violations, such as, for example, truancy, to the juvenile court loses jurisdiction over the failure to appear charges committed in the justice court prior to the transfer and that the justice court is not authorized to send the so-called "birthday letter" to that person for the separate offense of failure to appear in the justice court prior to the transfer.FN62From our review of the record, it appears that appellant transferred the cases to the juvenile court to determine whether De Luna's multiple failure to appear violations in her court constituted contempt-of-court. This explains why the disposition letter from the juvenile court states that De Luna was put on probation for contempt of court offenses and that appellant's court was the complainant in those cases. The disposition letter does not concern De Luna's class C misdemeanor offenses because appellant's court was not the complainant in the class C misdemeanor cases against De Luna, and those complaints were filed by school district personnel for offenses committed at school—not for contempt of court.

FN62. We make no legal determination regarding whether appellant's court had jurisdiction under these circumstances. Instead, we are merely reviewing the evidence to determine whether the State met its burden of proving beyond a reasonable doubt that appellant's acts were unlawful under its theories. Whether her court lacked jurisdiction over De Luna's failure to appear violations is a question of law that is not for the finder of fact to determine. We do not intend to imply that the State could have proven that appellant's court lacked jurisdiction as a matter of fact in this case.

The State presented no evidence regarding the procedure that a justice and juvenile court must follow when the justice court transfers a case to the juvenile court for a de-termination of whether the defendant committed contempt of court. The State had this burden because its theory was that appellant's transfer orders resulted in her court losing jurisdiction over De Luna's cases. The evidence presented to the jury does not include the juvenile court records. The State did not explain what happened to the class C misdemeanor offenses that De Luna pleaded guilty to committing in appellant's court. The evidence undisputedly shows that De Luna pleaded guilty to those offenses, and appellant ordered him to pay the fines for those offenses prior to appellant's transfers to the juvenile court.FN63Without any of

this information, even assuming arguendo it is a jury issue, the jury was in no position to determine whether appellant's court lacked jurisdiction.FN64

FN63. This is where we believe the confusion occurred. Appellant signed the transfer orders listing the class C misdemeanor offenses. However, the documentary evidence shows that the juvenile court disposed of contempt-of-court charges against De Luna. We cannot explain such a discrepancy, and the State made no attempt to do so. Moreover, this does not support a finding that appellant's court lacked jurisdiction.

FN64. As set out earlier, it is our interpretation of the law that a jury is not entitled to make the legal determination of whether a court has jurisdiction. However, we are merely explaining that the State failed to fully explain to the jury its own theory that appellant's court lacked jurisdiction.

Moreover, appellant's court sent De Luna several notices of continuing obligation regarding the underlying class C misdemeanor offenses ordering that De Luna appear in appellant's court because those causes of action were still pending. It is undisputed that De Luna failed to appear when summoned pursuant to the notices of continuing obligation, also called the "birthday letters" by the State. Article 45.060, which was admitted into evidence and reviewed by the jury, states that a court that "has used all available procedures under this chapter to secure the individual's appearance to answer allegations made before the individual's 17th birthday" may issue a notice of continuing obligation to appear in that court. TEX.CODE CRIM. PROC. ANN. art. 45.060(b). "Failure to appear as ordered by the notice under Subsection (b) is a Class C misdemeanor independent of section 38.10, Penal Code, and Section 543.003, Transportation Code." Id. art. 45.060(c). However, article 45.060 does not state that there are any exceptions allowing a person to disregard the notice of continuing obligation and not appear to answer for those charges. Thus, De Luna was required to appear when summoned and inform appellant of the fact that he had already been punished by the juvenile court for those offenses, if that had in fact happened. De Luna did not testify that he disregarded the notice of continuing obligation because appellant's court lacked jurisdiction or because he believed that appellant was violating double jeopardy principles. Instead, the evidence presented show that failure to appear after receiving the notice of continuing obligation is a separate class C misdemeanor offense from the underlying charges. The undisputed evidence shows that De Luna failed to appear in appellant's court after he turned seventeen and therefore, committed separate class C misdemeanor offenses of failure to appear after being summoned, which is punishable by arrest. Appellant then issued the warrants for De Luna's arrest.

We conclude that based on the complexity of the issue before the jury, the evidence does not support an inference that appellant knew that her act of issuing the warrants for De Luna's arrest was in any way improper. This is so because the only evidence presented shows that appellant's interpretation of the law was different from the State's interpretation and from witnesses' interpretation. Our conclusion is further supported by the evidence that De Luna failed to appear in appellant's court after receiving the letters of continuing obligation, which is a class C misdemeanor. Thus, the evidence does not support a finding that appellant knew that her court lacked jurisdiction, even if it did.FN65

FN65. Again, even if her court did lack jurisdiction, the remedy for a court acting without jurisdiction, which is not uncommon, is reversal on appeal, not criminal punishment.

Furthermore, although the State insisted that appellant's court did not have jurisdiction and that the disposition letter did not grant her court jurisdiction, Cherry testified that she understood the letter as giving appellant's court jurisdiction. However, even if the letter did not mean what Cherry claimed, the State was still required to prove beyond a reasonable doubt that appellant knew that her court lacked jurisdiction or that De Luna had already been punished for the offenses. As explained above, it did not do so. As set out in detail above, the evidence clearly shows that the State's witnesses were confused by the transfer orders and the disposition letter.FN66 The State's theory was that appellant knew she lacked jurisdiction because the law is so clear. We disagree.

FN66. We are not able to determine from the limited information admitted at appellant's trial the effect that the transfer orders and disposition letter had on De Luna's cases.

Finally, we conclude that the evidence does not support a finding that appellant was not justified when she signed the warrants for De Luna's arrest because the undisputed evidence shows that he failed to appear in appellant's court after her court sent him the letters of continuing obligation; thus, he committed a separate class C misdemeanor offense for which appellant could have reasonably believed allowed her to sign the warrants. Moreover, the State cites no authority, and we find none, making it unlawful as defined by the penal code for a trial judge to perform her statutory duties even if it is later determined as a matter of law that the court lacked jurisdiction to act. In addition, the State cites no authority, and we find none, making jurisdiction of appellant's court an element of the offense of official oppression. Thus, although we usually give the jury deference to believe or disbelieve the witnesses, in this case, whether appellant's court lacked jurisdiction to sign the warrants was a question of law and not one of fact for a jury to decide. We conclude that appellant acted with a reasonable belief that her court had been granted jurisdiction to do the complained-of acts; therefore, she did not know that the act of signing the arrest warrants was unlawful, if it was. See id. § 39.03(a)(1). Accordingly, we conclude that the evidence was insufficient to support the jury's verdict that appellant committed the offense of official oppression under these facts. We sustain appellant's first, second, and third issues.

Conclusion: Having concluded that the evidence is insufficient to support the jury's finding that appellant committed two counts of official oppression, we must acquit appellant. See Aldrich v. State, 296 S.W.2d 225, 230 (Tex.App.-Fort Worth 2009, pet. ref'd); Jacobs v. State, 230 S.W.3d 225, 232 (Tex.App.-Houston [14th Dist.] 2006, pet. ref'd) (citing Clewis v. State, 922 S.W.2d 126, 133 (Tex.Crim.App.1996) (en banc)). We therefore re-verse the judgment, dismiss the indictments, and render a judgment of acquittal in both counts. FN67

FN67. Having rendered a judgment of acquittal, we do not reach appellant's remaining issues.

TRIAL PROCEDURE—

In the Matter of S.A., MEMORANDUM, No. 06-14-00055-CV, 2014 WL 7442507, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-4A (Tex.App.-Texarkana, 12/31/14).

A PARENT TESTIFYING AGAINST A CHILD DOES NOT WARRANT A "SUA SPONTE" APPOINTMENT OF A GUARDIAN AD LITEM BY THE COURT, SINCE THERE WAS NOTHING IN THE RECORD TO SUGGEST THAT THE PARENTS WERE INCAPABLE OR UNWILLING TO MAKE DECISIONS IN THE CHILD'S BEST INTEREST.

Facts: In the first five months of 2014, fifteen-year-old Sandra had, let's say, a tumultuous relationship with her sixty-five-year-old father, marked by three documented instances in which Sandra assaulted or injured him. The first two instances resulted in Sandra's probation.

The final confrontation occurred the afternoon of May 10, 2014. That afternoon, Sandra was listening to music on a cellular telephone while she sunbathed outside her home. Wanting to hear different music, Sandra went inside to download more music from the computer. Since the conditions of Sandra's existing probation forbad her to use the computer, her father sought to stop her. Her father, who had broken his foot several days before, stumbled as he tried to get between Sandra and the computer. As he sought to stop her, he grabbed the base of the back of her neck. At about the same time, Sandra stomped his broken foot, which was in a cast, on top and at the ankle, and kicked his shin. Her mother then restrained her as her father tried to get out of the door. As she was being restrained, she slung her telephone with its charger, and it struck and cut her father's arm.

At Sandra's June 12, 2014, hearing, Sandra's mother appeared at trial, sat at the counsel table with Sandra, and was ultimately called as a witness by the State. Sandra's mother's testimony generally confirmed the testimony of Sandra's father—that Sandra had assaulted him on the occasion in question.

On appeal, Sandra complains that the trial court did not appoint a guardian ad litem because her mother was incapable of making decisions in her best interest. Sandra asserts that her mother had an inherent conflict of interest because she was the victim's wife, a witness to the incident, and a key witness for the State. At the hearing below, Sandra did not ask for a guardian ad litem to be appointed or point to any conflict of interest her mother may have had. Nevertheless, Sandra maintains that the right to a guardian ad litem is a "waivable only" right and that the right to a guardian ad litem is on par with the right to counsel. She cites no authority, however, and we have found none, that has so held when a parent is present at the hearing.

Held: Affirmed

Memorandum Opinion: In any case in which it appears to the juvenile court that the child's parent or guardian is incapable or unwilling to make decisions in the best interest of the child with respect to proceedings under this title, the court may appoint a guardian ad litem to protect the interests of the child in the proceedings. TEX. FAM.CODE ANN. § 51.11(b) (West 2014) (emphasis added).

When a parent is present at the hearing, the appointment of a guardian ad litem is in the sound discretion of the trial court. In the Matter of P.S.G., 942 S.W.2d 227, 229 (Tex.App.—Beaumont 1997, no writ). In P.S.G., P.S.G.'s mother was present at trial and was called as a witness on behalf of her son. Nevertheless, P.S.G. asserted that since she was the mother of the alleged victim, she had an inherent conflict of interest and was therefore incapable of acting in P.S.G.'s best interest and rendering friendly support and guidance. Id. at 228. Since, under the statute, the decision to appoint a guardian ad litem is discretionary, the court of appeals found nothing in the statute to support the contention that the trial court's failure to sua sponte appoint a guardian ad litem deprived P.S.G. of any fundamental right. Id. at 229. Further, the court refused to assume, without evidence, that P.S.G.'s mother could not render the necessary support and guidance. Id.FN4

FN4. The court of appeals went on to hold that P.S.G., by failing to object at the hearing below, had not preserved his error. Id.; see TEX. R. APP. P. 33.1(a). We also doubt that Sandra preserved error in this case.

While acknowledging that Texas courts have not found error when a trial court does not sua sponte appoint a guardian ad litem, Sandra asserts that none have involved a parent who was closely related to the victim and testified on behalf of the State. Several cases, however, have involved parents who have been present at trial and gave testimony adverse to the juvenile. In the Matter of P.A.C. concerned the father of the juvenile who was present and seated at the counsel table with his daughter at her certification hearing. The State introduced the affidavit of the father, which, along with other documents, tended to implicate his daughter in the alleged crime. In the Matter of P.A.C., 562 S.W.2d 913, 917 (Tex.Civ.App.—Amarillo 1978, no writ). Finding nothing in the affidavit or record to indicate the father's lack of willingness to make decisions in the best interest of his daughter or his adversary position, the court of appeals found the trial court had not erred in failing to appoint a guardian ad litem. Id. In two cases the San Antonio court of appeals has also found no error when a parent testified adverse to the juvenile, but there was nothing in the record to show that the parent was incapable of making or unwilling to make decisions in the best interest of the juvenile. In re J.W.M.D., No. 04–08–00908–CV, 2009 WL 2878111 (Tex.App.—San Antonio Sept. 9, 2009, no pet.)(mem. op., not designated for publication); In re L.A.P., No. 04–07–00143–CV, 2008 WL 312704 (Tex.App.—San Antonio Feb. 6, 2008, no pet.)(mem.op.). In L.A.P., the fifteen-year-old juvenile was charged with two counts of assault causing bodily injury to her father. L.A.P., 2008 WL 312704, at *1. Both her father and mother testified against allowing L.A.P. to serve probation in the home because they feared for their own and her safety based on L.A.P.'s gang affiliation and threats she had made against her father. Id. at *1–2. The court of appeals held that, since (1) the father was present at the adjudication and disposition hearing and both parents were present at the continuation and (2) there was nothing in the record to suggest that the parents were incapable or unwilling to make decisions in L.A.P's best interest, the trial court had not abused its discretion in not appointing a guardian ad litem. Id. at *4.

In this case, Sandra's mother testified at the hearing, and her testimony confirmed the testimony of her husband, which had been placed in question by the vigorous cross-examination of Sandra's trial counsel. There is nothing in the record, however, to suggest that her mother was incapable or unwilling to make decisions in Sandra's best interest. Further, at no time did Sandra request that a guardian ad litem be appointed. Nor did she claim to the trial court that her mother was not giving her friendly support and guidance or that she was incapable of making or unwilling to make decisions in her best interest.

Sandra also asserts that additional harm caused by the trial court not appointing a guardian ad litem "is ... that [her] counsel would have been unable to invoke 'the rule' excluding witnesses from the courtroom." See TEX.R. EVID. 614. Sandra's counsel, however, invoked this rule before any testimony and, although the State had identified her mother as a witness before trial began, did not object to her remaining in the courtroom, nor did she object when her mother was eventually called as a witness by the State.

Conclusion: Under these facts, we find that the trial court did not abuse its discretion in failing to sua sponte appoint a guardian ad litem. We overrule this point of error.

Womack v. State, MEMORNADUM, No. 12-14-00019-CR, 2014 WL 4637968, Tex.Juv.Rep. Vol. 28 No. 4 ¶14-4-2 (Tex.App.-Tyler, 9/17/14).

A JUVENILE ADJUDICATION CANNOT BE USED FOR ENHANCEMENT UNLESS THE JUVENILE WAS A CHILD UNDER THE FAMILY CODE AND THE CONDUCT OCCURRED ON OR AFTER JANUARY 1, 1996.

Facts: A jury convicted Appellant, Willie Womack, of the offense of assault on a public servant and assessed his punishment at imprisonment for twenty years.

Appellant assaulted correctional officer Dakota Acker in the Mark W. Michael Unit in Anderson County, Texas. In the attack, Acker suffered a laceration to his left temple, contusions to his right elbow and a finger of his left hand, and chipped upper incisors requiring dental surgery to repair.

While a juvenile, Appellant was found to have engaged in delinquent conduct, namely aggravated sexual assault, criminal solicitation to commit aggravated robbery, criminal solicitation to commit aggravated assault with a deadly weapon on a public servant, criminal solicitation to commit escape, and retaliation. Thereafter, on October 20, 2000, a disposition hearing was held, and Appellant was committed to the Texas Youth Commission under a determinate sentence. The court sentenced Appellant to twenty-five years of imprisonment and ordered him transferred to the Texas Department of Criminal Justice.

Before Appellant's trial for assault on the correctional officer, the State gave notice that it intended to use his juvenile offenses to enhance his punishment. Appellant pleaded "not true" to the enhancement allegation. To prove the enhancement allegation, the State offered into evidence a penitentiary packet containing the "Order to Transfer to the Institutional Division of the Texas Department of Criminal Justice" that stated Appellant's date of birth to be May 22, 1986. However, his fingerprint card in the same packet showed his date of birth as May 22, 1985.

At the close of the punishment evidence, Appellant requested the trial court instruct the jury, as follows:

I think in addition to finding [the enhancement allegation] true, the—that it should also include, "and that the Defendant was adjudicated by a juvenile court under Texas Family Code"—Let's see the statute. Has a section I believe it's 54.03, "and that the child engaged in delinquent conduct on or after January 1st, 1996, constituting a felony offense for which the child was committed to the Texas Youth Commission," I believe is what the statute says. And that conviction—let's see if it says, "became final prior to the"—"the commission of the offense of assault on a public servant."

In opposition to Appellant's requested instruction, the State argued that because Appellant's juvenile adjudication occurred on or before October 20, 2000 (the date of the adjudication), "his juvenile adjudication statutorily became a final felony conviction before Womack committed this offense in TDC."

The trial judge, however, was fully cognizant that a juvenile adjudication cannot be used for enhancement unless the conduct occurred on or after January 1, 1996, the effective date of the provisions of Section 12.42(f) of the penal code. The trial judge noted that the transfer order showed Appellant's date of birth as May 22, 1986. She reasoned that Appellant could not have been ten years old and subject to the juvenile code until after January 1, 1996. Therefore, she determined that Appellant could not have committed the delinquent acts before January 1, 1996.

The trial court instructed the jury using the ordinary language for enhancement for a prior felony conviction.

Now, if you find from the evidence beyond a reasonable doubt that the defendant WILLIE WOMACK is the same person who was finally convicted of the offense listed in the enhancement paragraph and that the conviction alleged in [the] enhancement paragraph became final prior to the offense in this case, then you will assess his punishment at confinement in the Texas Department of Criminal Justice for any term of not more than twenty years (20) or less than two years (2) and in addition to imprisonment, a fine not to exceed $10,000.00 may be imposed.

The jury found the enhancement allegation "true" and assessed Appellant's punishment at imprisonment for twenty years.

In his second issue, Appellant insists that the trial court's punishment charge failed to instruct the jury properly under Texas Penal Code Section 12.42(f)—that before it can find the enhancement allegation true, it must find that he engaged in the delinquent conduct forming the basis of his prior juvenile adjudication on or after January 1, 1996.

The trial court is required to deliver to the jury "a written charge distinctly setting forth the law applicable to the case." TEX.CODE CRIM. PROC. ANN. art. 36.14 (West 2007). "After the introduction of [punishment] evidence has been concluded, ... the court shall give such additional written instructions as may be necessary...."Id. art. 37.07 § 3(b) (West Supp.2014). A plea of "not true" forces the state to prove the enhancement allegations in the indictment beyond a reasonable doubt. Kucha v. State, 686 S.W.2d 154, 155 (Tex.Crim.App.1985) (en banc).

Errors in the jury charge are reviewed under a special harm standard and not under the general harmless error standard set out in Rule 44.2 of the Texas Rules of Appellate Procedure. Flores v. State, 224 S.W.3d 212, 212–13 (Tex.Crim.App.2007). Error that is called to the trial court's attention requires reversal if the error caused "some" actual harm to the appellant; unobjected to error will not result in reversal unless the error was so egregious as to deprive the appellant of a fair and impartial trial. Almanza v. State, 686 S.W.2d 157, 171 (Tex.Crim.App.1984); Flores, 224 S.W.3d at 213. "In both situations, the actual degree of harm must be assayed in the light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel [,] and any other relevant information revealed by the record of the trial as a whole." Almanza, 686 S.W.2d at 171.

To be subject to the juvenile code, one must be a "child" of ten years of age or older and under seventeen years of age. TEX. FAM.CODE ANN. §§ 51.02(2)(A); 51.04(a) (West 2014). An order of adjudication is not a conviction of a crime except as provided in section 51.13(d) of the family code. Id. § 51.13(a) (West 2014).Section 51.13(d) provides that only a felony adjudication in which a child engaged in conduct that occurred on or after January 1, 1996, can be a final felony conviction for enhancement purposes. Id; TEX. PENAL CODE ANN. § 12.42(f) (West Supp.2014).

Held: Reversed and remanded for a new trial on punishment.

Memorandum Opinion: The critical inquiry in this case is when Appellant committed the acts for which he was adjudicated. There is no evidence of when the conduct occurred, and the record contains conflicting evidence

regarding Appellant's date of birth. According to the date of birth stated in the transfer order, May 22, 1986, Appellant could not have been ten years old and subject to the juvenile code until after January 1, 1996. It would, therefore, be safe to assume that Appellant committed the delinquent conduct after January 1, 1996.

However, according to Appellant's birth date as shown on his fingerprint card, May 22, 1985, Appellant would have become ten years of age and subject to adjudication seven months and nine days before the effective date of Section 12.42(f). Therefore, the possibility exists that the conduct for which Appellant was adjudicated occurred during that period. In that event, his adjudication could not be used for enhancement.

In response to Appellant's first issue challenging the sufficiency of the evidence, the State argues that it is the jury's province to resolve conflicts in the evidence. Both birth dates were in evidence. The State contends the jury was free to choose the birth date, May 22, 1986, which eliminated any possibility that the conduct occurred before January 1, 1996.

However, the charge given by the trial judge foreclosed any consideration of the issue by the jury. The jury was left unaware that there was an issue to decide. Without instruction by the trial court, the jury could not have known that the decision as to the date of Appellant's conduct was a crucial question to be decided before they could find the enhancement to be true. Without the court's guidance, the jury could not possibly have understood that the date of Appellant's delinquent conduct was a fact of great consequence nor could they have appreciated the evidentiary significance of the conflicting dates of birth.

The trial court is required to deliver to the jury "a written charge distinctly setting forth the law applicable to the case." TEX.CODE CRIM. PROC. ANN. art. 36.14. The trial court erred in failing to instruct the jury that before it could find the enhancement allegation "true" as a final felony conviction, it must first find that Appellant was a child (as defined by Section 51 .02(2) of the family code) who engaged in the delinquent conduct for which he was adjudicated on or before January 1, 1996.

The State contends that by not bringing the conflict in the evidence to the court's attention, Appellant waived error. Although incorrect, Appellant's requested instruction was sufficient to direct the trial court's attention to the omission in the charge, and it correctly set forth the legal basis for his objection to the charge and for an instruction under Section 12.42(f) of the penal code. See Mays v. State, 318 S.W.3d 368, 384 (Tex.Crim.App.2010).

"Some harm" is readily apparent. The jury found Appellant guilty of a third degree felony. Properly instructed with the language of Section 12.42(f) of the penal code and with the definition of a "child" in Section 51.02(2) of the family code, the jury could have returned a finding of "not true." In that case, the jury could have assessed no more than a ten year sentence, only half of the sentence Appellant received. Appellant's second issue is sustained.

It is unnecessary that we address Appellant's first issue because of our disposition of his second issue. See TEX.R.APP. P. 47.1.

Conclusion: We reverse the trial court's judgment as to punishment, and remand the case for a new trial on punishment.

In the Matter of E.A., No. 08-12-00183-CV, --- S.W.3d ----, 2014 WL 4100710, Tex.Juv.Rep. Vol. 28 No. 4 ¶14-4-3 (Tex.App.-El Paso, 8/20/14).

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE JUVENILE'S MOTION FOR MISTRIAL BECAUSE THERE WAS NO SHOWING THAT THE SPECTATOR (ACCUSED OF "MAD-DOGGING" THE JURY) ENGAGED IN ANY CONDUCT OR EXPRESSION THAT WOULD HAVE INTERFERED WITH THE JURY'S VERDICT AND DEPRIVED THE JUVENILE OF DUE PROCESS OF LAW.

Facts: The State filed its first amended petition based on delinquent conduct and notice of intent to seek a determinate sentence under the Texas Family Code alleging the E.A. had engaged in delinquent conduct. This petition charged that E.A. intentionally, knowingly, or recklessly caused bodily injury of the complaining witness by (1) striking him about the head with a baseball bat, (2) by kicking him about the face with the foot, and (3) kicking him about the ribs with the foot. After the adjudication hearing, the jury found that E.A. had engaged in delinquent conduct by committing the offense of aggravated assault with a deadly weapon. The following day, the bailiff informed the trial court that a juror had notified him that a spectator was seen "mad-dogging" the jurors after the verdict was read in court and that another had observed the spectator standing at the parking garage exit, watching the vehicles exit. E.A.'s counsel asked that a record be made and then proceeded to move for a mistrial which the trial court denied.

At the close of the disposition hearing, the jury (1) found that a disposition was required in this case, (2) sentenced E.A. to the Texas Juvenile Justice Department with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice for ten years, (3) refused to place E.A. on probation as an alternative to committing him to the TDCJ, and (4) found E.A. could not be provided with the quality of care, level of support, and supervision needed to meet the conditions of probation in his home or elsewhere. The trial court subsequently imposed a determinate sentence of ten years, and ordered that E.A. be committed to the care, custody, and control of the TJJD. This appeal followed.

Held: Affirmed

Opinion: In Issue One, E.A. contends the trial court abused its discretion in denying his motion for mistrial after the jury expressed experiencing fear due to a spectator's antagonistic conduct towards the jury. E.A. asserts that because a spectator "mad-dogged" the jury in open court and at the designated exit of the El Paso County Parking Garage the jury was actually and inherently prejudiced and as a result, E.A. was denied due process of law.

The record shows that the bailiff informed the court and parties that a juror had informed him that a spectator in the courtroom was "mad-dogging" the jury shortly after the jury's verdict on adjudication was read in court. After the bailiff was notified of the spectator's conduct, the bailiff asked the spectator to leave the courtroom for the remainder of the trial.FN1The following morning another juror notified the bailiff that she saw the spectator standing at the parking garage exit, watching as the vehicles left the garage the previous day. According to the bailiff, the two jurors were feeling intimidated by the spectator's conduct.

FN1. According to the bailiff, after informing the spectator as to the reason he was asked to leave the courtroom, the spectator responded that "he was not mad-dogging them."

Upon questioning by the State, the bailiff stated that he believed the spectator was E.A.'s brother-in-law. When asked if the two jurors relayed their fear to the other members of the jury, the bailiff answered: "Not to my knowledge. I mean, I was in the jury room with them this morning when it was relayed to me that he was seen at the county garage exit ... yesterday afternoon." E.A.'s counsel subsequently moved for a mistrial arguing that E.A. could not get a fair trial when it was clear that the jury exhibited "some fear." E.A.'s motion was denied.

An appellant bears the burden of showing that the jury was prejudiced by the spectator's conduct. Alfaro v. State, 224 S.W .3d 426, 432 (Tex.App.-Houston [1st Dist.] 2006, no pet.). To prevail on a claim of prejudice resulting from external influence on the jury, an appellant must show either actual or inherent prejudice. Howard v. State, 941 S.W.2d 102, 117 (Tex.Crim.App.1996). To determine actual prejudice we look at whether jurors actually articulated "a consciousness of some prejudicial effect." See id. On the other hand, inherent prejudice is determined by looking at whether "an unacceptable risk is presented of impermissible factors coming into play." Holbrook v. Flynn, 475 U.S. 560, 569–70, 106 S.Ct. 1340, 1346–47 (1986). Inherent prejudice rarely occurs and "is reserved for extreme situations." Howard, 941 S.W.2d at 117. Spectator conduct or expression which impedes normal trial proceedings will not result in reversible error unless an appellant shows "a reasonable probability that the conduct or expression interfered with the jury's verdict." Id.; Landry v. State, 706 S.W.2d 105, 112 (Tex.Crim.App.1985).

Appellant argues that the jury was actually prejudiced because jurors articulated that they were influenced by the presence and conduct of the antagonizing spectator. In support of this argument, Appellant refers us to the bailiff's testimony that the jurors felt threatened, were fearful, and intimated by the spectator's conduct. Appellant further contends that "the in-court aggression, coupled with and aggravated by the out-of-court occurrences in the El Paso County Garage, was inherently prejudicial." Although there is some evidence in the record that the jurors articulated to the bailiff that they felt threatened, fearful, and were intimated by the spectator's conduct, we do not agree with E.A. that this shows actual prejudice because the jurors did not indicate that they were influenced in any way by the spectator's conduct or expression. Moreover, there was no evidence that the spectator actually threatened anyone or attempted to influence the jury by conduct or expression. We cannot conclude without speculating what was meant by the spectator's conduct or expression in this case. See Hill v. State, 153 Tex.Crim. 105, 217 S.W.2d 1009, 1010–12 (1948) (where appellant moved for new trial based in part on fact that trial judge made "facial expressions in the nature of scowls or frowns" and "shook his head from side to side in a negative manner," the Court concluded appellant failed to present any error as the Court was at a loss on how to rule on a facial expression, or what was meant by a scowl, frown, or movement of the head and the trial seemed to have been fairly held and appellant was given wide latitude in presenting his evidence). Thus, E.A. has failed to show the jury was actually prejudiced.

E.A. has also failed to show inherent prejudice. The record reflects that the spectator was seen "mad-dogging" the jury after the jury's verdict on adjudication was read in court and that he was subsequently asked to leave the courtroom outside of the presence of the jury. Inherent prejudice rarely occurs and "is reserved for extreme situations." Howard, 941 S.W.2d at 117.

Conclusion: Based on the record before us, we cannot conclude that this is an extreme situation which merits a mistrial. Thus, because there is no showing that the spectator engaged in any conduct or expression that would have interfered with the jury's verdict, E.A. was not deprived of due process of law. Accordingly, we conclude the trial court did not abuse its discretion in denying E.A.'s motion for mistrial. Coble, 330 S.W.3d at 292. Issue One is overruled.

Ex Parte Ragston, No. 14-13-00584, 2014 WL 486606, Tex.Juv.Rep. Vol. 28 No. 2 ¶14-2-2A [Tex.App.—Houston (14th Dist.), 2/6/14].

THE CONCEPT OF "READY" REFERS TO THE PROSECUTION'S PREPAREDNESS, NOT THE TRIAL COURT, ITS DOCKET, OR "WHATEVER PROBLEMS" [THAT] MAY HAVE THEN JUDICIALLY EXISTED.

Facts: This is an appeal from the denial of a pretrial writ of habeas corpus. We consider the following three issues: (1) whether the prosecution established that it was ready for trial within the time allotted by the Code of Criminal Procedure; (2) whether the trial court abused its discretion by refusing to set bail on two of appellant's three charged offenses; and (3) whether the trial court set an excessive amount of bail on appellant's third remaining charge. We reform the trial court's order and set bail for all three charges at $250,000. As reformed, we affirm the trial court's order denying habeas relief.

BACKGROUND

On June 22, 2012, appellant was arrested for the homicide of a liquor store owner in Navasota, Texas. A grand jury returned an indictment on August 16, 2012, charging appellant with capital murder, murder in the first degree, and aggravated robbery. All three offenses are alleged to have arisen out of the same set of facts.

Initially, the trial court ordered that appellant be held without bond on the capital murder charge, and that bond be set at $500,000 for each of the two remaining charges. Appellant filed a motion for bond reduction, claiming that his bail was excessive and punitive. Appellant also filed a separate application for writ of habeas corpus, claiming that his status as a juvenile precluded the State from prosecuting him. Appellant's habeas petition relied specifically on Miller v. Alabama, a recent decision in which the United States Supreme Court held that juveniles could not be sentenced to a mandatory punishment of life without parole. 132 S.Ct. 2455, 2469 (2012). Appellant contended that

Texas's capital sentencing statute ran afoul of Miller as applied to him because, if convicted, he similarly faced an automatic sentence of life without parole. Appellant accordingly argued that he could not be tried, and that he should therefore be released.

The trial court denied appellant's habeas petition but granted partial relief on the bond motion. The court reduced appellant's bail to $250,000 on the charge of aggravated robbery. As for the charges of capital murder and murder in the first degree, the court ordered that appellant be held without bond.

Appellant challenged all aspects of the trial court's judgment in a previous appeal before a different panel of this court. In that previous appeal, we construed appellant's habeas complaint as an "as-applied" challenge to the constitutionality of the capital sentencing statute. See Ex parte Ragston, 402 S.W.3d 472, 475–76 (Tex.App.-Houston [14th Dist.] 2013), aff'd, No. PD–0824–13, 2014 WL 440964, —— S.W.3d ——, slip op. at 5 (Tex.Crim .App. Feb. 5, 2014). Because "as-applied" challenges are not cognizable for purposes of pretrial habeas, we affirmed the trial court's order denying habeas relief. Id. at 477. Appellant's remaining complaints challenged the trial court's ruling on his separate motion for bond reduction. We dismissed these complaints on jurisdictional grounds, concluding that "no interlocutory appeal lies from the trial court's order on a pretrial motion for bond reduction." Id. at 478.

During the pendency of this previous appeal, appellant filed a second application for writ of habeas corpus. In the application, appellant reasserted the same arguments that had previously been raised in his separate motion for bond reduction—i.e., that his bail was excessive and punitive. Appellant also asserted a modified argument with regards to his juvenile status. Claiming again that he could not be sentenced if convicted of capital murder, appellant argued that there was no possible way for the State to announce ready for trial within ninety days of the commencement of his detention. Appellant accordingly contended that, under article 17.151 of the Code of Criminal Procedure, he was entitled to release on his own recognizance.

The trial court conducted a hearing on June 10, 2013, exactly one day before our opinion issued in appellant's first appeal. After considering all of the evidence presented at the hearing, the court denied the application, found that the State had been ready for trial, and left its previous bond order intact. Appellant brings this, his second appeal, challenging the trial court's most recent ruling on his application for writ of habeas corpus.

Held: Trial court's order reformed and bail for all three charges at $250,000. Trial court's order denying habeas relief affirmed as reformed.

Opinion: In his first issue, appellant argues that the trial court erred by failing to grant him a personal recognizance bond on the capital murder charge. Appellant bases his complaint on Article 17.151, which provides as follows:
A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within ... 90 days from the commencement of his detention if he is accused of a felony. Tex. Code Crim. Proc. art. 17.151, § 1(1).

Under Article 17.151, the State has the initial burden to make a prima facie showing that it was ready for trial within the applicable time period. See Ex parte Jones, 803 S.W.2d 712, 717 (Tex.Crim.App.1991). "The State may accomplish this either by announcing within the allotted time that it is ready, or by announcing retrospectively that it had been ready within the allotted time." Id. The State satisfied this burden at the hearing on June 10, 2013, when the prosecutor represented as follows: "For the record, the State is ready for trial; has been ready since the date of indictment, which was done within 90 days from the date of Mr. Ragston's incarceration on these charges. We have continued to be ready subject to a trial setting."

Appellant contends that the State's announcement was ineffective because there was no constitutional punishment scheme for capital murder at the time of the trial court's decision. Although we recognize that the scope of punishment should be known before trial in order to voir dire prospective jurors, appellant has not cited any authority demonstrating that an uncertainty in sentencing may prevent the State from announcing ready. Traditionally, the concept of "ready" refers to the prosecution's preparedness, not the trial court, its docket, or

"whatever problems [that] may have then judicially existed." See Santibanez v. State, 717 S.W.2d 326, 329 (Tex.Crim.App.1986); see also Barfield v. State, 586 S.W.2d 538, 541 (Tex.Crim.App. [Panel Op.] 1979).

In what appears to have been a good faith effort to proceed to trial, the prosecutor urged the trial court to sever those portions from the capital sentencing statute that were rendered invalid by the Supreme Court's decision in Miller. The prosecutor invoked the Code Construction Act, which provides that "if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application." See Tex. Gov't Code § 311.032(c). Thus, in the absence of a legislative fix, the prosecutor argued that the trial court could sever the "without parole" language from the sentencing statute, and instruct the jury that appellant, if convicted of the capital murder charge, faced an automatic sentence of life imprisonment. We agree that this would have been an acceptable approach as applied, especially considering the legislative developments that shortly followed the trial court's decision to deny habeas relief.

In July of 2013, the legislature responded to Miller by passing a bill that amended the capital sentencing statute. See Act approved July 22, 2013, 83d Leg., 2d C.S., ch. 2, § 1, 2013 Tex. Gen. Laws 5020, 5020–21. As amended, the sentencing statute now provides that a person convicted of a capital felony shall be sentenced to a term of life imprisonment with the possibility of parole if the person was younger than eighteen years of age at the time of the offense. See Tex. Penal Code § 12.31(a)(1). Appellant did not contend at oral argument that the statute, as currently written, would operate unconstitutionally if he were to proceed to trial today and be convicted of capital murder. The record reveals nothing that would prevent this case from being tried expeditiously, and we anticipate that the trial court will do so. Based on the foregoing, we conclude that the State was ready for trial and that the trial court correctly denied appellant's request for release on his own recognizance.

Conclusion: The trial court did not err by denying habeas relief on the asserted basis that the State was not ready for trial. The trial court did err, however, by holding appellant without bond on his charges of capital murder and murder in the first degree. We reform the trial court's order and fix bail at $250,000 for all three of appellant's charged offenses. As reformed, we affirm the trial court's order denying habeas relief.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT—

Moon v. State, No. PD-1215-13, --- S.W.3d ----, 2014 WL 6997366, Tex.Juv.Rep. Vol. 29 No. 1 ¶15-1-5 (Tex.Crim.App., 12/10/13). On state's petition for discretionary review from the First Court of Appeals, Harris County.

IN A DISCRETIONARY TRANSFER TO ADULT COURT, A FINDING BASED ON THE SERIOUSNESS OF THE OFFENSE ALONE IS NOT ENOUGH FOR TRANSFER.

Facts: On November 19, 2008, the State filed a petition in the 313th Juvenile Court in Harris County alleging that the appellant engaged in delinquent conduct by committing an intentional or knowing murder. On the same date, the State also filed a motion for the juvenile court to waive its exclusive jurisdiction and transfer the appellant to criminal district court for prosecution as an adult, alleging as grounds for the transfer that, because of the seriousness of the offense alleged, ensuring the welfare of the community required waiver of juvenile jurisdiction. The juvenile court granted the State's request for a hearing on the motion and, pursuant to Section 54.02(d) of the Juvenile Justice Code in the Texas Family Code,FN1 ordered that the Chief Juvenile Probation Officer obtain a complete diagnostic study, social evaluation, and full investigation of the appellant's background and the circumstances of the alleged offenses.FN2 The juvenile court also ordered the Mental Health and Mental Retardation Authority of Harris County to conduct an examination and file its report.

FN1. TEX. FAM.CODE title 3, Juvenile Justice Code (hereinafter, "the Juvenile Justice Code").

FN2. TEX. FAM.CODE § 54.02(d). The appellant complains that "[p]rior to the hearing, the State failed to conduct the statutorily mandated diagnostic or social evaluation[.]" Appellant's Response to the State's Brief on Discretionary Review at 1. But the appellant did not raise this issue as grounds for reversal on direct appeal, and we have no occasion to speak to it. See Appellant's Brief on Direct Appeal at 16.

At the hearing, the State called a single witness to testify: Detective Jason Meredith, the Deer Park Police officer who investigated the crime scene and interviewed a number of potential suspects, including the appellant. Meredith's testimony on direct examination took the form of a non-chronological account of his investigation of the murder, up to and including his interrogation of the appellant. At the end of his testimony, over no objection from the appellant, the State introduced the following documents: (1) a juvenile offense report revealing the appellant's "Previous Referral" for "MISCHIEF-$500/$1499.99," which, subsequent testimony would show, resulted from the appellant's alleged "keying" of another student's vehicle; (2) a "Juvenile Probation Certification Report" detailing the positive and negative behaviors, as well as the academic history, of the appellant while he was under the observation of the juvenile-justice system; and (3) a "Physician's Medical Assessment" prepared by the Harris County Juvenile Probation Health Services Division, which listed the findings of the appellant's physical—but not any psychological or behavioral—examination.

For his part, the appellant elicited testimony from seven witnesses. Various family members, friends, and acquaintances testified both generally and specifically about the appellant's disadvantaged upbringing, fractured family life, and positive personal qualities, including politeness and pliability to adult supervision. Various actors within the juvenile-justice system testified both generally and specifically about the appellant's constructive conduct within, and positive progression through, the juvenile-justice system, characterizing him as "one of the best kids [to] come through as far as his intelligence and obedience and the way he carries himself in the facility." The appellant also introduced into evidence, among other things, forensic psychiatrist Dr. Seth W. Silverman's detailed and thorough recommendation as to whether [the] facilities currently available to the juvenile court will provide adequate protection to the public, and ... the likelihood that the respondent will be rehabilitated should the court decide to use the facilities available to the juvenile court as well as the sophistication, maturity, and aggressiveness [of the appellant].

It was Dr. Silverman's ultimate opinion that the appellant, as a "dependent, easily influenced individual" whose "thought process lacks sophistication" (a characteristic Silverman considered "indicative of immaturity") "would probably benefit from placement in a therapeutic environment specifically designed for adolescent offenders[.]" Silverman contrasted this environment to the "adult criminal justice programs[,]" which he deemed to have "few constructive, and possibly many destructive, influences to offer" the appellant. Silverman also noted that the appellant had, during his stint within the juvenile-justice system, already "responded to therapy."

At the close of evidence, and after both parties delivered closing arguments, the juvenile court granted the State's motion to waive jurisdiction. At the behest of the appellant's counsel, the court also made the following oral findings: (1) "that there is insufficient time to work with the juvenile in the juvenile system"; (2) "that the seriousness of the offense, murder, makes it inappropriate to deal with in this system"; (3) that "the respondent did have a prior criminal mischief probation"; (4) that the instant offense "actually occurr[ed] at the time respondent was on probation which ... makes the services and resources of the juvenile system look to be inadequate"; (5) "that because there is a co-respondent [certified to stand trial in the adult criminal courts], there is a logic in putting respondents, where they are a year apart or two years apart, together"; and (6) that "judicial economy, although not the driving factor, is an issue" because "sometimes it's more convenient to hear the same matter, even though there are different people involved, in the same court for the convenience of the witnesses, the attorneys, and the system in general."

The following day, the juvenile court signed and entered a written order waiving its jurisdiction. Closely following the language of the juvenile transfer statute, the order affirmed that the juvenile court had determined "that there is probable cause to believe that the child committed the OFFENSE alleged and that because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceeding." FN3 The juvenile court again simply recited from the statute when it stated that:

[i]n making that determination, the Court ... considered among other matters:

1. Whether the alleged OFFENSE WAS against person or property, with the greater weight in favor of waiver given to offenses against the person;

2. The sophistication and maturity of the child;

3. The record and previous history of the child; and

4. The prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child by use of procedures, services and facilities currently available to the Juvenile Court.FN4

The juvenile court also specifically found in its written order: (1) that the appellant "is of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived[,] ... to have aided in the preparation of HIS defense and to be responsible for HIS conduct;" (2) that the alleged offense "WAS against the person of another;" and that (3) "there is little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of" the appellant "by use of procedures, services, and facilities currently available to the Juvenile Court."

FN3. TEX. FAM.CODE § 54.02(a).

FN4. Id. § 54.02(f).

Per the trial court's order, the appellant's case was transferred to the jurisdiction of the 178th District Court in Harris County, where he stood trial, certified as an adult, against the first-degree felony charge of murder. The jury convicted the appellant and sentenced him to thirty years' confinement in the penitentiary.

B. The Appeal

Before the First Court of Appeals, the appellant complained that the juvenile court's stated "reasons for waiver" were supported by insufficient evidence and that the juvenile court therefore abused its discretion by waiving jurisdiction over the appellant.FN5 Specifically, the appellant contended that, by focusing on the appellant's ability to "intelligently, knowingly, and voluntarily waive[ ] all constitutional rights heretofore waived," the juvenile court "misunderstood and misapplied the 'sophistication and maturity' element" of Section 54.02(f)—and that, even if it did not, there was still "no evidence to support the [juvenile] court's sophistication and maturity finding" as expressed.FN6 Indeed, given that this Court opined in Hidalgo that the purpose of the Section 54.02(d) "psychological examination" is to "provide[ ] insight on the juvenile's sophistication, maturity, potential for rehabilitation, decision-making ability, metacognitive skills, psychological development, and other sociological and cultural factors[,]" the appellant found it troubling that "the State presented no evidence of this type whatsoever." FN7 The appellant also maintained that there was "no evidence supporting the juvenile court's findings relating to adequate protection [of] the public and likelihood of rehabilitation," FN8 since "the only evidence was that" the appellant "is amenable to rehabilitation" and the "State presented no contrary evidence." FN9

FN5. See TEX. FAM.CODE § 54.02(h) ("If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver[.]").

FN6. Appellant's Brief on Direct Appeal at 27.

FN7. Id. (emphasis added) (quoting Hidalgo v. State, 983 S.W.2d 746, 754 (Tex.Crim.App.1999)).

FN8. Id. at 30.

FN9. Id. at 34.

In a published opinion, the court of appeals agreed with the appellant that the evidence supported neither the juvenile court's "sophistication-and-maturity" finding nor its "adequate-protection-of-the-public-and-likelihood-of-rehabilitation" finding.FN10 The court noted that an "appellate court reviews a juvenile court's decision to certify a juvenile defendant as an adult ... under an abuse of discretion standard" and cited another of its own opinions for the proposition that "if an appellate court finds the evidence factually or legally insufficient to support the juvenile court's order ... it will necessarily find the juvenile judge has abused his discretion." FN11 At the same time, the court of appeals recognized that "the juvenile court may order a transfer on the strength of any of the criteria listed in" Section 54.02(f).

FN10. Moon v. State, S.W.3d 366 (Tex.App.—Houston [1st Dist.] 2013).

FN11. Id. at 370–71 (citing In re G.F.O., 874 S.W.2d 729, 731–32 (Tex.App.—Houston [1st Dist.] 1994, no writ)).

Regarding the juvenile court's sophistication-and-maturity finding, while the State argued that "[the appellant]'s efforts to conceal the crime and avoid apprehension demonstrate that he knew the difference between right and wrong and that his conduct was wrong," the court of appeals pointed out that the "finding of the juvenile court ... was based on [the appellant]'s ability to waive his rights and assist counsel in preparing his defense, not an appreciation of the nature of his actions[.]" FN12 And since the State's evidence of the appellant's "efforts to conceal the crime" consisted primarily of the appellant's "text messages instructing [a compatriot] to not 'say a word,' [and to] '[t]ell them ... you don't know where I live,' " the court of appeals determined that there was "no evidence supporting the juvenile court's finding that [the appellant] was sufficiently sophisticated and mature to waive his rights and assist in his defense." FN13

FN12. Id. at 374.

FN13. Id.

With respect to the juvenile court's finding that "there is little, if any, prospect of adequate protection of the public and likelihood of rehabilitation ... by use of procedures, services, and facilities currently available to the Juvenile Court[,]" the court of appeals found it significant that the appellant "had a sole misdemeanor conviction for 'keying' a car, and while locked up in the juvenile facility was accused of four infractions." FN14 The court of appeals took this to be "more than a scintilla of evidence" to "support the court's finding" in this regard, and thus found the evidence to be at least "legally sufficient to support the court's determination" that the lack of "adequate protection of the public and likelihood of reasonable rehabilitation" weighed in favor of waiver.FN15 "However," the court of appeals continued, "careful consideration of all of the evidence[,]" including Dr. Silverman's report, led to the "further ... conclusion that the evidence is factually insufficient to support the juvenile court's finding." FN16 Responding to the State's argument to the contrary, the court of appeals described the appellant's act of "keying a car" as "an undeniably low level misdemeanor mischief offense" and "hardly the sort of offense for which 'there is little, if any, prospect of adequate protection of the public.' " FN17 The court of appeals was also influenced by the fact that the appellant's juvenile custodial officers testified that "he followed orders, attended classes, and was not aggressive or mean-spirited." FN18 Finally, the court of appeals was clearly influenced by Dr. Silverman's assessment that the appellant "would probably benefit from placement in a therapeutic environment specifically designed for adolescent offenders[.]" FN19

FN14. Id. at 376.

FN15. Id. at 377.

FN16. Id.

FN17. Id.

FN18. Id.

FN19. Id. at 376–77.

Thus, of the three "reasons for waiver" that the juvenile court specifically gave in its written order, the court of appeals determined that one reason, sophistication and maturity, was supported by legally insufficient evidence. It determined that another reason, the protection of the public and likelihood of rehabilitation, was supported by factually insufficient evidence. With respect to the juvenile court's third reason for waiving jurisdiction—that the appellant's offense constituted a crime against the person of another, and not a mere property crime—the court of appeals regarded this as an inadequate justification, by itself, for waiver. To transfer jurisdiction to the criminal court for this reason alone was, the court of appeals ultimately concluded, an abuse of discretion.FN20 The court of appeals reasoned that, "[i]f, as the State argues, the nature of the offense alone justified waiver, transfer would automatically be authorized in certain classes of 'serious' crimes such as murder, and the subsection (f) factors would be rendered superfluous." FN21 Concluding that the juvenile court abused its discretion to waive jurisdiction, the court of appeals vacated the district court's judgment of conviction, dismissed the criminal proceedings, and declared the case to be still "pending in the juvenile court." FN22

FN20. Id. at 378.

FN21. Id. at 375 (citing R.E.M. v. State, 541 S.W.2d 841, 846 (Tex.Civ.App.—San Antonio 1976, writ ref'd n.r.e.), for the proposition that there is "nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a 'serious' crime.").

FN22. Id. at 378.

C. The Petition for Discretionary Review

The State now challenges the court of appeals's ruling on four fronts. It argues that the court of appeals erred:

• to apply factual-sufficiency review to any aspect of its analysis of the question whether the juvenile court abused its discretion to waive jurisdiction.

• in failing to consider whether the seriousness of the offense could, by itself, justify the juvenile court's discretionary decision to waive jurisdiction.

• in limiting its abuse-of-discretion analysis to the reasons for waiver set forth in the juvenile court's written order, and failing to consider the reasons that the juvenile court proclaimed orally from the bench at the conclusion of the hearing.

• in limiting its abuse-of-discretion analysis to a review of the specific reasons the juvenile court gave (whether written or oral), rather than to assay the entire record for any evidence that would support a valid reason to waive jurisdiction, regardless of whether the juvenile court purported to rely on that evidence/reason.

Review of these various assertions necessitates a fairly global exegesis of the statutory scheme for the waiver of juvenile-court jurisdiction in Texas, as well as the abundant case law that has been generated in the courts of appeals over the past half a century.

Held: Court of Appeals order affirmed

Opinion: A. Kent v. United States

The transfer of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be "protected and rehabilitated rather than subjected to the harshness of the criminal system[.]" FN23 Because the waiver of juvenile-court jurisdiction means the loss of that protected status, in Kent v. United States, the United States Supreme Court characterized the statutory transfer proceedings in the District of

Columbia as "critically important," and held that any statutory mechanism for waiving juvenile-court jurisdiction must at least "measure up to the essentials of due process and fair treatment." FN24 Among the requisites of a minimally fair transfer process, the Supreme Court tacitly assumed in Kent, is the opportunity for meaningful appellate review.FN25 The appellate court must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not assume that there are adequate reasons, nor may it merely assume that full investigation has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the [relevant District of Columbia] statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of full investigation has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.FN26

In an appendix to its opinion in Kent, the Supreme Court included a policy memorandum promulgated by the District of Columbia Juvenile Court that describes "determinative factors" for guiding the juvenile court's discretion in deciding whether waiver of its jurisdiction over a particular juvenile offender is appropriate.FN27 The Texas Legislature soon incorporated those factors, albeit non-exclusively, into our own statutory scheme.FN28 Missing from the Supreme Court's Kent opinion, however, is any detailed description of a standard for appellate review of the juvenile court's transfer decision.

FN23. Hidalgo, S.W.2d at 754. See TEX. FAM.CODE § 51.01(2) (Juvenile Justice Code is to be construed to balance "the concept of punishment for criminal acts" with the ideal "to remove, where appropriate, the taint of criminality from children committing certain unlawful acts"—all "consistent with the protection of the public and public safety").

FN24. U.S. 541, 560–62 (1966).

FN25. See id. at 561 ("Meaningful review requires that the reviewing court should review.").

FN26. Id. (internal quotation marks omitted).

FN27. Id. at 565–67.

FN28. Acts 1967, 60th Leg., ch. 475, § 4, p. 1083–84, eff. Aug. 28, 1967 (currently codified at TEX. FAM.CODE § 54.02(f)). See Robert O. Dawson, Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code, 5 TEX. TECH. L.REV. 509, 562 (1974) ("Most of the procedural safeguards incorporated in [§ 54.02] are probably required as a matter of federal constitutional law by the Supreme Court's decision in Kent v. United States, 383 U.S. 541 (1966)."). But see, contra: Galloway v. State, 578 S.W.2d 142, 143 (Tex.Crim.App.1979) ("Kent did not purport to do more than construe the District of Columbia juvenile statutes, and it is not clear that it sets constitutional requirements.").

B. The Statutory Scheme

The Juvenile Justice Code of the Texas Family Code specifically provides that the designated juvenile court of each county has "exclusive original jurisdiction over proceedings in all cases involving ... delinquent conduct ... engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct." FN29 "Delinquent conduct" includes "conduct ... that violates a penal law of this state ... punishable by imprisonment or by confinement in jail;" FN30 and a "child," as defined by the Juvenile Justice Code, is any "person ... ten years of age or older and under 17 years of age[.]" FN31 Thus, any person accused of committing a felony offense between his tenth and seventeenth birthdays is subject to the exclusive original jurisdiction of a juvenile court, meaning that the juvenile court has the "power to hear and decide" matters pertaining to the juvenile offender's case "before any other court[,]" including the criminal district court, can review them.FN32

FN29. TEX. FAM.CODE § 51.04(a).

FN30. Id. § 51.03(a)(1).

FN31. Id. § 51.02(2)(a).

FN32. BLACK'S LAW DICTIONARY (10th ed.2014) (defining "original jurisdiction" as "[a] court's power to hear and decide a matter before any other court can review the matter"). See also id. at 981 (defining "exclusive jurisdiction" as "[a] court's power to adjudicate an action or class of actions to the exclusion of all other courts").

The right of the juvenile offender to remain outside the jurisdiction of the criminal district court, however, is not absolute. Section 54.02 of the Juvenile Justice Code provides that, if certain conditions are met, the "juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court ... for criminal proceedings [.]" FN33 Before it may exercise its discretion to waive jurisdiction over an alleged child offender, the juvenile court must find that (1) the child is alleged to have violated a penal law of the grade of felony; (2) the child was ... 14 years of age or older at the time [of the alleged] offense, if the offense is ... a felony of the first degree[;] and (3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings in the proper adult criminal court.FN34 "In making the determination required by Subsection [54.02](a)"—that is, whether the "welfare of the community" indeed requires adult criminal proceedings to be instituted against the juvenile, the [juvenile] court shall consider, among other matters: (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.FN35

These non-exclusive factors serve, we have said, to facilitate the juvenile court's balancing of "the potential danger to the public" posed by the particular juvenile offender "with the juvenile offender's amenability to treatment." FN36 Finally, should the juvenile court choose to exercise its discretion to waive jurisdiction over the child, then the Juvenile Justice Code directs it to "state specifically" in a written order "its reasons for waiver and [to] certify its action, including the written order and findings of the court." FN37

FN33. TEX. FAM.CODE § 54.02(a).

FN34. Id.

FN35. Id. § 54.02(f). These are the factors that derive from the Kent appendix. See note 27, ante. They are "intended to guide the [juvenile] court's discretion in making the determination to transfer." Dawson, 5 TEX. TECH. L.REV. at 564. Initially, Section 54.02(f) embraced all six of the Kent factors, but the statute was amended in 1996 to remove two of them. Acts 1995, 74th Leg., ch. 262, § 34, p. 2533, eff. Jan. 1, 1996.

FN36. Hidalgo, S.W.2d at 754.

FN37. TEX. FAM.CODE § 54.02(h)

For the juvenile, there are a number of advantages to remaining outside of the jurisdiction of the adult criminal courts. Not the least of these advantages is that, with but a few exceptions, a "child may not be committed or transferred to a penal institution or other facility used primarily for the execution of sentences of persons convicted of crime, except... after transfer for prosecution in criminal court under Section 54.02[.]" FN38 Indeed, a juvenile offender may not even be handed a sentence—"no disposition may be made"—upon his being "found to have engaged in delinquent conduct" unless and until the juvenile court or a jury determines that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." FN39 And we ourselves

have acknowledged the goals of the criminal justice system and the juvenile-justice system to be fundamentally different, describing the former as more "retributive" than its "rehabilitative" juvenile counterpart.FN40

FN38. There are other exceptions to this general rule not implicated in this case, including an exception for "temporary detention in a jail or lockup pending juvenile court hearing," id. § 51.13(c)(1), as well as one for "transfer ... under Section 245.151(c), Human Resources Code." Id. § 51.13(c)(3); see also TEX. HUM. RES.CODE § 245.151(c) (the Texas Juvenile Justice Department "shall transfer" an adjudicated juvenile offender "to the custody of the Texas Department of Criminal Justice for the completion of the person's sentence" when, pursuant to court order under TEX. FAM.CODE § 54.11(i)(2) and TEX. HUM. RES.CODE § 244.014(a), the juvenile court determines that "the child's conduct" while under State supervision "indicates that the welfare of the community requires the transfer").

FN39. See TEX. FAM.CODE § 54.04(c) ("If the court or jury does not so find, the court shall dismiss the child and enter a final judgment without any disposition."). In keeping with the Juvenile Justice Code's stated purpose to "remove, where appropriate, the taint of criminality from children committing certain unlawful acts[,]"TEX. FAM.CODE § 51.01(2)(B), the juvenile-justice equivalent of a "conviction" for delinquent conduct is referred to instead as an "adjudication," TEX. FAM.CODE § 54.03, and the juvenile-justice equivalent of a "sentence" for an adjudication is instead referred to as a "disposition." TEX. FAM.CODE § 54.04.

FN40. Hidalgo, S.W.2d at 755.

Prior to January 1, 1996, Section 56.01 of the Juvenile Justice Code provided, in one phrasing or another, that an appeal "from an order entered under ...Section 54.02 of this code respecting transfer of the child to criminal court for prosecution as an adult" could be taken "by or on behalf of a child" directly from the juvenile court to the proper court of appeals.FN41 What this meant in practical terms was that an alleged juvenile offender could complain immediately of the juvenile court's order waiving its jurisdiction, and, if appropriate, seek discretionary review from the Texas Supreme Court "as in civil cases generally." FN42 In 1995, however, the Legislature approved an amendment to the Juvenile Justice Code, effective January 1, 1996, in which the portion of Section 56.01(c) that provides for the direct, civil appealability of Section 54.02 waivers was struck.FN43 Contemporaneous with this amendment, the Legislature added Article 44.47 to the Texas Code of Criminal Procedure, providing in Section (b) thereof that a "defendant may appeal a transfer under [Section 54.02, Family Code] only in conjunction with the appeal of a conviction of ... the offense for which the defendant was transferred to criminal court." FN44 What this means in practical terms is that an alleged juvenile offender may no longer immediately appeal from the juvenile court's waiver of jurisdiction; instead, he must wait until such time as he may be convicted in an adult criminal court to complain, on appeal, of some error in the juvenile court's transfer ruling. Although the Legislature designated an appeal from a juvenile court's Section 54.02 order to be a "criminal matter ... governed by [the Code of Criminal Procedure] and the Texas Rules of Appellate Procedure that apply to a criminal case[,]" it nevertheless expressly provided, in Article 44.47(d), that an appeal under Article 44.47(b)"may include any claims under the law that existed before January 1, 1996, that could have been raised on direct appeal in a transfer under Section 54.02, Family Code." FN45

FN41. See Acts 1973, 63d Leg., ch. 544, § 1. p. 1483, eff. Sept. 1, 1973.

FN42. Id.

FN43. Acts 1995, 74th Leg., ch. 262, § 48, p. 2546, eff. Jan. 1, 1996.

FN44. Id. at § 85, p. 2584 (emphasis added).

FN45. Id.

What is lacking in our statutory scheme—as is lacking in Kent—is any express statement of the applicable standard of appellate review of the juvenile court's transfer order. In the absence of an explicit statutory standard of

appellate review, the courts of appeals have filled the void with decisional law spelling out how they will go about providing the "meaningful review" contemplated by Kent.

C. The Consensus in the Courts of Appeals

In the absence of explicit provisions in the Juvenile Justice Code that define a standard for appellate review of juvenile transfer orders, the general consensus of the various courts of appeals has been as follows. The burden is on the petitioning party, the State, to produce evidence to inform the juvenile court's discretion as to whether waiving its otherwise-exclusive jurisdiction is appropriate in the particular case.FN46 Transfer of a juvenile offender to criminal court is appropriate only when the State can persuade the juvenile court, by a preponderance of the evidence,FN47 that the welfare of the community requires transfer of jurisdiction for criminal proceedings, either because of the seriousness of the offense or the background of the child (or both).FN48 In exercising its discretion, the juvenile court must consider all of the Kent factors as currently codified in Section 54.02(f) of the Juvenile Justice Code; FN49 "it is from the evidence concerning [the Section 54.02(f)] factors that a [juvenile] court makes its final determination." FN50 But it need not find that each and every one of those factors favors transfer before it may exercise its discretion to waive jurisdiction.FN51 It may transfer the juvenile so long as it is satisfied by a preponderance of the evidence that the seriousness of the offense or the background of the child (or both) indicates that the welfare of the community requires criminal proceedings.FN52

FN46. Matter of Honsaker, S.W.2d 198, 201 (Tex.Civ.App.—Dallas 1976, ref'd n.r.e.); B.R.D. v. State, 575 S.W.2d 126, 131 (Tex.Civ.App.—Corpus Christi 1978, writ ref'd n.r.e.); Matter of M.I.L., 601 S.W.2d 175, 177 (Tex.Civ.App.—Corpus Christi 1980, no writ); Matter of E.D.N., 635 S.W.2d 798, 800 (Tex.App.—Corpus Christi 1982, no writ); Moore v. State, 713 S.W.2d 766, 768 (Tex.App.—Houston [14th Dist.] 1986, no writ).

FN47. Matter of P.B.C., S.W.2d.448, 453 (Tex.Civ.App.—El Paso 1976, no writ).

FN48. Faisst v. State, S.W.3d 8, 11 (Tex.App.—Tyler 2003, no pet.).

FN49. See In re J.R.C., S.W.2d 579, 584 (Tex.Civ.App.—Texarkana 1975, ref'd n.r.e.) (juvenile court's "findings should show an investigation in every material field [listed in Section 54.02(f)] was undertaken and the result thereof").

FN50. Matter of M.I.L., S.W.2d at 177.

FN51. E.g., Matter of J.R.C., S.W.2d 748, 753 (Tex.Civ.App.—Texarkana 1977, ref'd n.r.e.); D.J.R. v. State, 565 S.W.2d 392, 395 (Tex.Civ.App.—Fort Worth 1978, no writ); Matter of G.B.B., 572 S.W.2d 751, 756 (Tex.Civ.App.—El Paso 1978, ref'd n.r.e.); Casiano v. State, 687 S.W.2d 447, 449 (Tex.App.—Houston [14th Dist.] 1985, no writ); Matter of K.D.S., 808 S.W.2d 299, 302 (Tex.App.—Houston [1st Dist.] 1991, no writ); C.M. v. State, 884 S.W.2d 562, 564 (Tex.App.—San Antonio 1994, no writ).

FN52. See, e.g., Matter of J.R.C., S.W.2d at 753 ("Section 54.02 does not require that, in order for the juvenile court to waive its jurisdiction, all of the matters listed in Subsection (f) must be established. * * * The statute only directs that the juvenile court consider the matters listed under Subsection (f) in making its determination. * * * They are the criteria by which it may be determined if the juvenile court properly concluded that the seriousness of the offense or the background of the child required a transfer to criminal court."); In re Q.D., 600 S.W.2d 392, 395 (Tex.Civ.App.—Fort Worth 1980, no writ) ("[T]he [juvenile] court is bound only to consider all [of the Subsection (f)] factors. It need not find that each factor is established by the evidence."); P.G. v. State, 616 S.W.2d 635, 639 (Tex.Civ.App.—San Antonio 1981, ref'd n.r.e.) ("The [juvenile] court need not find that all the factors in subdivision (f) have been established, but it must consider all these factors and state the reasons for its transfer so that the appellate court may review the basis on which the conclusion was made and can determine whether the evidence so considered does in fact justify that conclusion."); Matter of E.D.N., 635 S.W.2d at 800 ("If the evidence establishes enough of the factors in subdivision (f) to convince the [juvenile] court that a transfer is in the best interest of the child and community, we will not disturb that order."); McKaine v. State, 170 S.W.3d 285, 291 (Tex.App.—Corpus Christi 2005, no pet.) ("While the juvenile court must consider all of these factors before transferring the case to

district court, it is not required to find that each factor is established by the evidence. * * * The court is also not required to give each factor equal weight as long as each is considered.").

With respect to the adequacy of the written order mandated by Section 54.02(h), the courts of appeals have generally agreed, first of all, that the written order must reflect the juvenile court's "reasons" for waiving jurisdiction.FN53 Despite the express edict of the statute (i.e., the written order "shall state specifically [the juvenile court's] reasons for waiver"), the courts of appeals have sometimes sanctioned orders that recited the reasons for transfer in terms no more specific than the bare statutory language, namely, that because of the seriousness of the offense or the background of the child, transfer is required to ensure the welfare of the community.FN54 In addition to specifying "reasons," the order should also expressly recite that the juvenile court actually took the Section 54.02(f) factors into account in making this determination.FN55 But it need make no particular findings of fact with respect to those factors, FN56 notwithstanding Section 54.02(h)'s pointed requirement that the juvenile court "certify its action, including the ... findings of the court[.]"

FN53. See e.g., In re J.R.C., S.W.2d at 584 ("The reasons motivating the Juvenile Court's waiver of jurisdiction must expressly appear."); P.G., 616 S.W.2d at 639 (juvenile court must "state the reasons for its transfer").

FN54. Matter of Honsaker, S.W.2d at 200, 201–02 (construing In re J.R.C. and holding that a transfer order that recited the statutory criteria for waiver of juvenile jurisdiction and found them to be satisfied provided "sufficient specificity ... to allow an appellate court to review and understand the reason for the juvenile court's determination"); D.L.C. v. State, 533 S.W.2d 157, 159 (Tex.Civ.App.—Austin 1976, no writ) (order stating in conclusory terms that the Subsection (f) factors were satisfied, without going into detail, was nevertheless sufficient to comply with the requirement of written "reasons" in Subsection (h)); In re W.R.M., 534 S.W.2d 178, 181 (Tex.Civ.App.—Eastland 1976, no writ) ("In the instant case, the order discloses that the matters listed in Subsection (f) were considered, and the order states specific reasons for waiver. The fact that some of the recitations constitute conclusions does not require a reversal of the court's order."); Q.V. v. State, 564 S.W.2d 781, 784 (Tex.Civ.App.—San Antonio 1978, ref'd n.r.e.) (written transfer order that merely stated conclusorily that Subsection (f) factors were satisfied, sans any detailed description of the evidence, was nevertheless "sufficiently specific as to the 'reasons' for" the juvenile court's decision to waive jurisdiction); In re C.L.Y., 570 S.W.2d 238, 239, 241 (Tex.Civ.App.—Houston [1st Dist.] 1978, no writ) (same); Appeal of B.Y., 585 S.W.2d 349, 351 (Tex.Civ.App.—El Paso 1979, no writ) ("Reversible error is not present here by the fact that the [juvenile court's] order seems to parrot the Section 54.02 list of factors the [juvenile court] should consider in making a transfer; the enumerated reasons are supported by evidence. The order is sufficient."); In re I.B., 619 S.W.2d 584, 587 (Tex.Civ.App.—Amarillo 1981, no writ) (same); Matter of T.D., 817 S.W.2d 771, 775–77 (Tex.App.—Houston [1st Dist.] 1991, writ denied) (same).

FN55. In re W.R.M., S.W.2d at 182 (order is sufficient if it "discloses that the matters listed in Subsection (f) were considered"); In re C.L.Y., 570 S.W.2d at 239 (transfer order stated that the juvenile court "has considered" the Subsection 54.02(f) factors); P.G., 616 S.W.2d at 638–39 (juvenile court's order "listed the ... factors of section 54.02(f) and stated that each had been considered in making a determination" that waiver of jurisdiction was appropriate); Casiano, 687 S.W.2d at 449 ("An order is sufficient which states [inter alia] that all factors listed in § 54.02(f) were considered by the [juvenile] court[.]").

FN56. See note 54, ante. Early case law seemed to contemplate that greater specificity might be necessary to satisfy Kent's emphasis on meaningful appellate review. See In re J.R.C., 522 S.W.2d at 583–84 ("To sum up, besides giving reasons for waiver in its order the Juvenile Court has a mandatory duty to file findings covering matters actually considered, including all matters mentioned in Subsection (f), and to certify such order and findings to the appropriate district court."). This insistence on "rigid adherence to the governing statutes ... in proceedings of this nature[,]" id. at 584, however, soon gave way to a laxer attitude that, so long as the juvenile court's order identified the relevant factors (however conclusorily) and the evidence would support a transfer based on those factors, the order would be regarded as sufficient. See Douglas A. Hager, Does the Texas Juvenile Waiver Statute Comport with the Requirements of Due Process?, 26 TEX. TECH. L.REV. 813, 838–45 (1995) (tracing the retreat of the courts of appeals from "the procedural safeguards inherent in the J.R.C. holding"); Robert O. Dawson, Delinquent Children and Children in Need of Supervision: Draftsman's Comments to Title 3 of the Texas Family Code, 5 TEX. TECH.

L.REV. 509, 564–65 (1974) (“The committee's draft [of Section 54.02(h)] stated that if the juvenile court waives jurisdiction ‘it shall briefly state in the order its reasons for waiver.’ The fact that the Legislature changed ‘briefly state’ to ‘state specifically’ indicates that it contemplated more than merely an adherence to printed forms and, indeed, contemplated a true revelation [sic] of reasons for making this discretionary decision.”).

The courts of appeals have also uniformly agreed that, absent an abuse of discretion, a reviewing court should not set aside the juvenile court's order transferring jurisdiction.FN57 What they mean by “abuse of discretion” in this context is not altogether clear. Some courts of appeals have declared that the juvenile court's decision must simply be a guided one, not arbitrary or capricious.FN58 Even so, the courts of appeals have entertained various challenges to the legal and/or factual sufficiency of the evidence presented at the transfer hearing to support the juvenile court's decision to waive its jurisdiction.FN59 Some courts of appeals (like the court of appeals in this case) have examined the evidence to determine its sufficiency to support specific findings of fact with respect to the Section 54.02(f) factors,FN60 while mindful that not every factor must support transfer before the juvenile court may exercise its discretion to waive jurisdiction.FN61 Other courts of appeals have accepted the juvenile offender's invitation to measure the sufficiency of the evidence to support the juvenile court's ultimate conclusion, pursuant to Section 54.02(a), that the seriousness of the offense or background of the child indicated the need for transfer in order to ensure the welfare of the community.FN62 No court of last resort in Texas, insofar as our research reveals, has yet spoken on these matters.

FN57. E.g., Matter of Honsaker, S.W.2d at 201; C.M., 884 S.W.2d at 563; Matter of J.P.O., 904 S.W.2d 695, 698 (Tex.App.—Corpus Christi 1995, writ denied); Matter of K.B.H., 913 S.W.2d 684, 687–88 (Tex.App.—Texarkana 1995, no pet.); In re J.J., 916 S.W.2d 532, 535 (Tex.App.—Dallas 1995, no writ); State v. Lopez, 196 S.W.3d 872, 874 (Tex.App.—Dallas 2006, pet. ref'd); Faisst, 105 S.W.3d at 12. Cf. T.P.S. v. State, 590 S.W.2d 946, 953–54 (Tex.Civ.App.—Dallas 1979, ref'd n.r.e.) (observing that Kent “recognizes that the statute of the District of Columbia there in question gave the juvenile court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached”) (internal quotation marks omitted).

FN58. See, e.g., Matter of M.D.B., S.W.2d 415, 417 (Tex.App.—Houston [14th Dist.] 1988, no writ) (“In reviewing the [juvenile] court's action for an abuse of discretion, this court must determine if the [juvenile] court acted without reference to any guiding rules and principles.”); Matter of T.D., 817 S.W.2d at 773 (“The [juvenile] court must act with reference to guiding rules and principles, reasonably, not arbitrarily, and in accordance with the law.”).

FN59. See, e.g., Matter of I.J., Jr., S.W.2d 110, 111 (Tex.Civ.App. App.—Eastland 1977, no writ) (finding the evidence to support “the findings in the transfer order” to be both legally and factually sufficient); Matter of T.D., 817 S.W.2d at 777 (“The [juvenile] court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the legal or factual sufficiency of the evidence supporting the jury's answers to special issues.”); Matter of G.F.O., 874 S.W.2d 729, 731–32 (Tex.App.—Houston [1st Dist.] 1994, no writ) (“If an appellate court finds the evidence factually or legally insufficient to support the juvenile court's order transferring jurisdiction of a youth to the criminal district court, it will necessarily find the juvenile court has abused its discretion.”); Matter of J.P.O, 904 S.W.2d at 699–700 (“The juvenile court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards as are applied in reviewing the legal or factual sufficiency of the evidence supporting a jury's answers to a charge.”); Matter of K.B.H., 913 S.W.2d at 688 (“Under an abuse of discretion standard, the legal sufficiency of the evidence is not an independent ground of error, but is a relevant factor in assessing whether the [juvenile] court abused its discretion.”); Faisst, 105 S.W.3d at 12 (“Relevant factors to be considered when determining if the [juvenile] court abused its discretion include legal and factual sufficiency of the evidence.”); Bleys v. State, 319 S.W.3d 857, 861 (Tex.App.—San Antonio 2010, no pet.)(same).

FN60. See, e.g., Matter of P.A.C., S.W.2d at 916–17 (finding that the evidence was factually sufficient to support the juvenile court's findings with respect to several of the subsection (f) factors); Moore, 713 S.W.2d at 768–70 (reviewing both the legal and factual sufficiency of the evidence to support the juvenile court's findings with respect to various subsection (f) factors); Matter of T.D., 817 S.W.2d at 777–79 (conducting legal and factual sufficiency analysis of the last subsection (f) factor); In re J.J., 916 S.W.2d at 537 (“Additionally, there was legally and factually

sufficient evidence before the [juvenile] court supporting affirmative findings regarding each of the ... factors set forth in section 54.02(f) of the family code."); Matter of D.D., 938 S.W.2d 172, 174–76 (Tex.App.—Fort Worth 1996, no writ) (reviewing the factual sufficiency of the evidence to support the juvenile court's finding regarding two of the subsection (f) factors); Bleys, 319 S.W.3d at 862–63 (reviewing the factual sufficiency of the evidence to support the juvenile court's finding under Section 54.02(f)(4)).

FN61. See, e.g., L.M. v. State, S.W.2d 808, 813 (Tex.Civ.App.—Houston [1st Dist.] 1981, ref'd n.r.e.) ("Although all of the factors enumerated in section 54.02(f) must be considered by the [juvenile] judge, each one need not be present in a specific case."); Matter of E.D.N., 635 S.W.2d at 800 ("While the court must consider all of these factors, it need not find that they have all been established."); C.W. v. State, 738 S.W.2d 72, 75 (Tex.App.—Dallas 1987, no writ) ("The [juvenile] court is bound to consider, as it did in this case, all [of the] statutory factors, among other matters. It need not find that each of the ... factors is established by the evidence."); Matter of M.D.B., 757 S.W.2d at 417 ("[W]hile the juvenile court is required to consider all [of the] factors of § 54.02(f)..., it is not required to find that each factor is established by the evidence."); Matter of C.C.G., 805 S.W.2d 10, 15 (Tex.App.—Tyler 1991, writ denied) (same); In re J.J., 916 S.W.2d at 535 (same); Matter of D.D., 938 S.W.2d at 176 (same); Bleys, 319 S.W.3d at 862 (same).

FN62. See, e.g., Moore, S.W.2d at 767–68, 770 (reviewing the legal and factual sufficiency of the evidence to support the juvenile court's determination that the seriousness of the offense and the child's background justified transfer); Matter of T.D., 817 S.W.2d at 777 (at least nominally reviewing legal and factual sufficiency of the ultimate question of whether there is "probative evidence that the welfare of the community required a waiver of jurisdiction of the juvenile court and criminal proceedings against appellant"); Matter of J.P.O., 904 S.W.2d at 700–02 (Reviewing both the legal and factual sufficiency of the evidence to support the juvenile court's bottom-line conclusion that transfer was appropriate); In re J.J., 916 S.W.2d at 536–37 (finding the evidence sufficient to support the juvenile court's determination that both the seriousness of the offense and the child's background merited waiving jurisdiction); Matter of D.D., 938 S.W.2d at 176–77 (reviewing the factual sufficiency of the evidence to support the juvenile court's subsection (a) determination whether the seriousness of the offense or the child's background warranted transfer); Bleys, 319 S.W.3d at 862–63 (reviewing the factual sufficiency of the evidence to support the juvenile court's conclusion under Section 54.02(a)(3)).

The State argues that the court of appeals in this case erred in four respects. First, the court of appeals erred to conduct a factual-sufficiency review, since appeal from a juvenile transfer order is now "a criminal matter" that is "governed" by the Texas Code of Criminal Procedure and the rules of appellate procedure that apply to criminal cases.FN63 After all, this Court, in Brooks v. State, rejected factual sufficiency for purposes of criminal appeals.FN64 Second, the court of appeals erred to conclude that the seriousness of the offense could not, by itself, justify the juvenile court's transfer order. Third and fourth, the court of appeals erred by failing to take into account the reasons for waiver of jurisdiction that the juvenile court gave orally on the record, and, for that matter, any other justifications for transfer that may appear in the record, regardless of whether the juvenile court purported to rely on them, either orally on the record or in its written order. These are questions that the courts of appeals have never explicitly addressed.

FN63. TEX.CODE CRIM. PROC. art. 44.47(c).

FN64. Brooks v. State, S.W.3d 893 (Tex.Crim.App.2010).

III. ANALYSIS

A. Factual Sufficiency Under Section 54.02

The State argues that the court of appeals erred to apply a factual-sufficiency standard to the Section 54.02(f)(4) factor, regarding "the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court." FN65 Indeed, in a supplemental brief filed after oral argument in this Court, the State argues that the appropriate standard of appellate review ought to be a bare abuse-of-discretion standard, unencumbered by any inquiry into the sufficiency of the evidence, either legal or factual, to support the juvenile court's transfer order. We disagree.

FN65. TEX. FAM.CODE § 54.02(f)(4). See Moon, 410 S.W.3d at 377 (holding that the evidence was legally sufficient to establish this factor, but factually insufficient).

That the appeal of a transfer order is now regarded as a "criminal matter," under Article 44.47(c), does not in itself control the question of whether factual-sufficiency review is available on direct appeal.FN66 The juvenile transfer proceeding remains civil in character, governed by the Juvenile Justice Code; the proceedings do not become criminal unless and until the juvenile court waives its exclusive jurisdiction and transfers the child to a criminal court for prosecution as an adult. More to the point, the availability of factual-sufficiency review is, in any event, not so much a function of the character of the proceeding—civil versus criminal—as it is a function of the applicable burden of proof. As we have already pointed out, in a juvenile transfer proceeding, the burden is on the State to produce evidence that persuades the juvenile court, by a preponderance of the evidence, that waiver of its exclusive jurisdiction is appropriate. Facts which must be proven by a preponderance of the evidence are ordinarily susceptible to appellate review for factual sufficiency.FN67 In arguing that factual-sufficiency review is unavailable, the State analogizes to the juvenile-adjudication proceedings.FN68 In that context, the courts of appeals have declined to conduct factual-sufficiency review, noting that adjudication proceedings are "quasi-criminal" in nature.FN69 But the burden of proof in a juvenile-adjudication proceeding is beyond a reasonable doubt,FN70 not a preponderance of the evidence. In that context, it is certainly arguable that our holding in Brooks applies.FN71 In the review of any issue that is subject to a burden of proof less than beyond a reasonable doubt, however, the Texas Supreme Court has authorized the courts of appeals to conduct a factual-sufficiency review.FN72 The particular appellate standard for factual sufficiency depends upon the level of confidence applicable to the burden of proof—whether preponderance of the evidence or clear and convincing evidence—in the trial court.FN73 But the courts of appeals have continued to address issues of factual sufficiency when they are raised on appeal in all but the juvenile-adjudication context. Indeed, even in criminal cases, we have said that the courts of appeals may conduct factual-sufficiency reviews when confronted with fact issues for which the burden of proof is by a preponderance of the evidence.FN74 The court of appeals did not err to address the appellant's contention that the evidence was factually insufficient to support the juvenile court's finding with respect to Section 52.04(f)(4).FN75

FN66. Indeed, in light of Article 44.47(d), it is arguable that factual sufficiency remains a viable claim on appeal from a transfer order, notwithstanding that it is now a "criminal matter." After all, factual sufficiency was a "claim[ ] under the law that existed before January 1, 1996, that could have been raised on direct appeal of a transfer under Section 54.02, Family Code." TEX.CODE CRIM. PROC. art. 44.47(d).

FN67. Matlock v. State, S.W.3d 662, 667 (Tex.Crim.App.2013).

FN68. State's Brief on the Merits at 12–13.

FN69. See In re R.R., S.W.3d 730, 734 (Tex.App.—Houston [14th Dist.] 2012, writ denied) ("Although juvenile [adjudication] proceedings are civil matters, the standard applicable in criminal matters [i.e., proof beyond a reasonable doubt] is used to assess the sufficiency of the evidence a finding the juvenile has engaged in delinquent conduct."); In re A.O., 342 S.W.3d 236, 239 (Tex.App.—Amarillo 2011, writ denied) (same). Cf., In re B.L.D., 113 S.W.3d 340, 351 (Tex.2003) (juvenile delinquency cases are considered to be "quasi-criminal"). The State cites only one case which suggests, and then only in obvious dicta, that factual-sufficiency review may likewise be inappropriate for appellate review of juvenile transfer proceedings after the enactment of Article 44.47. See In re M.A.V., 88 S.W.3d 327, 331 n.2 (Tex.App.—Amarillo 2002, no pet.).

FN70. See TEX. FAM.CODE § 54.03(f) ("The child shall be presumed to be innocent of the charges against the child and no finding that a child has engaged in delinquent conduct or conduct indicating a need for supervision may be returned unless the state has proved such beyond a reasonable doubt.").

FN71. In re R.R., S.W.3d at 734; In re A.O., 342 S.W.3d at 239; In re C.E.S., 400 S.W.3d 187, 194 (Tex.App.—El Paso 2013, no writ).

FN72. See In re C.H., S.W.3d 17, 25 (Tex.2002) (announcing the appropriate appellate standard for review of factual-sufficiency claims in cases of termination of parental rights, in which the State must satisfy a clear and convincing evidence burden of proof); In re J.F.C., 96 S.W.3d 256, 266–67 (Tex.2002) (same). And, indeed, in In re A.O., the Amarillo Court of Appeals, having refused to subject the juvenile-adjudication proceeding to factual-sufficiency review, in the next breath did conduct a factual-sufficiency review of the evidence proffered at the juvenile disposition hearing. 342 S.W.3d at 240.

FN73. See In re C.H., S.W.3d at 25 (distinguishing appropriate appellate standard for factual sufficiency depending upon whether the trial-level burden of proof is preponderance of the evidence or clear and convincing evidence); In re J.F.C., 96 S.W.3d at 267 (same). See also Southwestern Bell Telephone Co. v. Garza, 164 S.W.3d 607, 627 (Tex.2004) ("In sum, we think that whenever the standard of proof at trial is elevated, the standard of appellate review must likewise be elevated.").

FN74. See Matlock, S.W.3d at 667, 670 ("Prior to Brooks, we used the traditional Texas civil burdens of proof and standards of review in the context of affirmative defenses where the rejection of an affirmative defense is established by a 'preponderance of the evidence.' Our decision in Brooks did not affect that line of cases. * * * A criminal defendant might also raise a factual-sufficiency challenge to the jury's adverse finding on his affirmative defense.") (footnotes omitted).

FN75. The State does not take issue with the court of appeals's formulation of the difference, under current law, between legal- and factual-sufficiency analyses:

"Under a legal sufficiency challenge, we credit evidence favorable to the challenged finding and disregard contrary evidence unless a reasonable fact finder could not reject the evidence. * * * Under a factual sufficiency challenge, we consider all of the evidence presented to determine if the [juvenile] court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust." Moon, S.W.3d at 370–71 (citations omitted).

Having said that, we do agree with the State's contention to the limited extent that it may argue that sufficiency review should not apply to appellate review of the ultimate question under Section 54.02(a)(3), that is, whether "because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." The discretion of the juvenile court is at its apex when it makes this largely normative judgment.FN76 As long as the appellate court can determine that the juvenile court's judgment was based upon facts that are supported by the record, it should refrain from interfering with that judgment absent a scenario in which the facts identified in the transfer order, based on evidence produced at the transfer hearing as it relates to the non-exclusive Subsection (f) factors and beyond, bear no rational relation to the specific reasons the order gives to justify the conclusion that the seriousness of the offense and/or the juvenile's background warrant transfer. The appellate courts should conduct appellate review of the juvenile court's discretionary decision to waive jurisdiction in essentially the same way that the El Paso Court of Appeals has said that the juvenile court's discretion in determining juvenile dispositions should be scrutinized on appeal, to wit:

We apply a two-pronged analysis to determine an abuse of discretion: (1) did the [juvenile] court have sufficient information upon which to exercise its discretion; and (2) did the [juvenile] court err in its application of discretion? A traditional sufficiency of the evidence review helps answer the first question, and we look to whether the [juvenile] court acted without reference to any guiding rules or principles to answer the second.FN77

Similarly, we hold that, in evaluating a juvenile court's decision to waive its jurisdiction, an appellate court should first review the juvenile court's specific findings of fact regarding the Section 54.02(f) factors under "traditional sufficiency of the evidence review." But it should then review the juvenile court's ultimate waiver decision under an abuse of discretion standard. That is to say, in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the

juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria? And, of course, reviewing courts should bear in mind that not every Section 54.02(f) factor must weigh in favor of transfer to justify the juvenile court's discretionary decision to waive its jurisdiction.FN78

FN76. Whether the offense is serious enough, and/or the juvenile's background demonstrates, that waiver of the juvenile court's jurisdiction is warranted to ensure the welfare of the community is, in many respects, similar to the question of whether the non-exclusive Keeton factors warrant a jury's prediction, at the punishment phase of a capital-murder trial, that the accused will probably commit criminal acts of violence that would constitute a continuing threat to society. Even before Brooks was decided, we insisted that this special issue, while not "wholly normative in nature," is nevertheless too "value-laden" to be amenable to a factual-sufficiency review. McGinn v. State, 961 S.W.2d 161, 169 (Tex.Crim.App.1998); Keeton v. State, 724 S.W.2d 58, 61–64 (Tex.Crim.App.1987); TEX.CODE CRIM. PROC. art. 37.071 § 2(b)(1).

FN77. In re J.R.C.S., S.W.3d 903, 914 (Tex.App.—El Paso 2012, no writ). See also In re M.A.C., 999 S.W.2d 442, 446 (Tex.App.—El Paso 1999, no writ).

FN78. See Hidalgo, S.W.3d at 754 n. 16 ("The juvenile court is not required to find each criterion before it can transfer a case to district court. The court may order a transfer on the strength of any combination of the criteria.").

B. The Seriousness of the Offense

The State complains that the court of appeals should not have concluded that the juvenile court abused its discretion for waiving jurisdiction based upon the seriousness of the offense. The State points out that the juvenile court made an explicit finding of fact in its transfer order that the appellant's alleged offense was committed against the person of another, under Section 54.02(f)(1). This finding of fact was amply supported by the record, the State contends, and was sufficient by itself to provide a legitimate basis for the trial court's discretionary decision to waive jurisdiction. The court of appeals rejected this contention because "[i]f, as the State argues, the nature of the offense alone justified waiver, transfer would automatically be authorized in certain classes of 'serious' crimes such as murder, and the subsection (f) factors would be rendered superfluous." FN79 In support of the court of appeals's observation, the appellant reminds us that the Supreme Court in Kent seems to have disfavored the "routine waiver [of juvenile-court jurisdiction] in certain classes of alleged crime." FN80

FN79. Moon, S.W.3d at 375.

FN80. Appellant's Response to the State's Brief at 13 (citing Kent, 383 U.S. at 553 n. 15).

The courts of appeals have long held that the offense that the juvenile is alleged to have committed, so long as it is substantiated by evidence at the transfer hearing and of a sufficiently egregious character, will justify the juvenile court's waiver of jurisdiction regardless of what the evidence may show with respect to the child's background and other Section 54.02(f) factors.FN81 This is different from holding that the mere category of offense the juvenile is alleged to have committed, without more, will serve to justify transfer. If that is the only consideration informing the juvenile court's decision to waive jurisdiction—the category of crime alleged, rather than the specifics of the particular offense—then we agree with the Supreme Court's intimation in Kent that the transfer decision would almost certainly be too ill-informed to constitute anything but an arbitrary decision.

FN81. The earliest case to so hold was In re Buchanan, 433 S.W.2d 787, 789 (Tex.Civ.App.—Fort Worth 1968, ref'd n.r.e.). Almost eight years later, another court of appeals reversed a juvenile transfer order, inter alia, because of a lack of evidence substantiating a bare recitation in the transfer order that "the offense was murder, committed against the person of another[.]" R.E.M., 541 S.W.2d at 846–47. The San Antonio Court of Appeals distinguished Buchanan, observing that there, "the 'evidence introduced at the hearing show[ed] without dispute that appellant shot and killed a man without provocation or cause.' 433 S.W.2d at 789. Here there is no admissible evidence to that effect." R.E.M., supra, at 847. Later cases have likewise found the evidence sufficient to support waiver of juvenile

jurisdiction based on the seriousness of the offense alone, as established by evidence presented at the transfer hearing. See e.g., Matter of C.C.G., 805 S.W.2d at 14–15 ("[A]ssuming, arguendo that there is insufficient evidence concerning the background of appellant, the juvenile court's determination that the seriousness of the offense, as substantiated by the evidence, is alone sufficient."); C.M., 884 S.W.2d at 564 ("The [juvenile court] is free to decide to transfer the case due to the seriousness of the crime, even if the background of the child suggests the opposite."); Matter of D.D., 938 S.W.2d at 177 ("The seriousness of the offenses D.D. is charged with [capital murder, murder, aggravated kidnapping, among others] is sufficient to support his transfer despite his background."); Faisst, 105 S.W.3d at 11 ("[C]ourt does not abuse its discretion by finding the community's welfare requires transfer due to the seriousness of the crime [intoxication manslaughter] alone, despite the child's background."); McKaine, 170 S.W.3d at 291 (same).

The transfer order in this case made no findings about the specifics of the capital murder, finding no more than probable cause to believe that the appellant committed "the OFFENSE alleged." It gave as the juvenile court's sole reason for waiving jurisdiction that, "because of the seriousness of the OFFENSE, the welfare of the community requires criminal proceedings[,]" and then it simply recited "that the OFFENSE allege [sic] to have been committed WAS against the person of another[.]" FN82 The evidence at the hearing, of course, painted a much more graphic picture of the appellant's charged offense. Whether the court of appeals should have taken that evidence into account in evaluating the juvenile court's exercise of discretion depends upon whether the abuse-of-discretion evaluation must be limited to a review of the "specific reasons" and facts in support thereof that are expressly set out in the juvenile court's written transfer order as per Section 54.02(h), or whether the court of appeals may take into account other reasons and other facts not explicitly set out in the transfer order. We turn to that question next.

FN82. The other two Subsection (f) findings of fact, stated equally conclusorily in the juvenile court's transfer order, corresponded to the sophistication-and-maturity factor (Section 54.02(f)(2)) and the prospects-for-adequate-public-protection-and-rehabilitation-of-the-juvenile factor (Section 54.02(f)(4)). Both of these factors seem far more relevant to the background-of-the-child reason for concluding that the welfare of the community requires criminal proceedings than to the seriousness-of-the-offense reason—the latter of which was the only Section 54.02(a)(3) reason that the juvenile court actually provided in its transfer order to justify the waiver of jurisdiction.

C. Appellate Review of the Reasons/Facts Cited in the Transfer Order

There is an inherent tension between the broad discretion that the juvenile court is afforded in making the normative judgment of whether to waive jurisdiction, on the one hand, and Kent 's insistence upon the primacy of appellate review in order to assure that the juvenile court's broad discretion is not abused, on the other. The legislative response to this inherent tension was to mandate, in Section 54.02(h), that the juvenile court "shall state specifically in its order its reasons for waiver and certify its action, including the written order and findings of the court[.]" FN83 Although the committee that drafted the Juvenile Justice Code had recommended a version of this provision that would have required no more than a "brief" statement of the reasons justifying transfer, the Legislature deemed this insufficient: "The fact that the Legislature changed 'briefly state' to 'state specifically' indicates that it contemplated more than merely an adherence to printed forms and, indeed, contemplated a true revelation [sic] of reasons for making this discretionary decision." FN84 Moreover, Section 54.02(h) obviously contemplates that both the juvenile court's reasons for waiving its jurisdiction and the findings of fact that undergird those reasons should appear in the transfer order.FN85 In this way the Legislature has required that, in order to justify the broad discretion invested in the juvenile court, that court should take pains to "show its work," as it were, by spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine that its decision was in fact appropriately guided by the statutory criteria, principled, and reasonable—in short, that it is a decision demonstrably deserving of appellate imprimatur even if the appellate court might have reached a different result. This legislative purpose is not well served by a transfer order so lacking in specifics that the appellate court is forced to speculate as to the juvenile court's reasons for finding transfer to be appropriate or the facts the juvenile court found to substantiate those reasons.FN86 Section 54.02(h) requires the juvenile court to do the heavy lifting in this process if it expects its discretionary judgment to be ratified on appeal. By the same token, the juvenile court that shows its work should rarely be reversed.

FN83. TEX. FAM.CODE § 54.02(h).

FN84. Dawson, 5 TEX. TECH. L.REV. at 564–65.

FN85. In re J.R.C., S.W.2d at 583–84.

FN86. Cf. State v. Cullen, S.W.3d 696, 698 (Tex.Crim.App.2006) (requiring trial courts to enter explicit findings of fact in the pre-trial motion to suppress context because "courts of appeals should not be forced to make assumptions (or outright guesses) about a trial court's ruling on a motion to suppress"; thus ensuring "a resolution [on appeal] that is based on the reality of what happened rather than on assumptions that may be entirely fictitious").

Given this legislative regime, we think it only fitting that a reviewing court should measure sufficiency of the evidence to support the juvenile court's stated reasons for transfer by considering the sufficiency of the evidence to support the facts as they are expressly found by the juvenile court in its certified order. The appellate court should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order. We therefore hold that, in conducting a review of the sufficiency of the evidence to establish the facts relevant to the Section 54.02(f) factors and any other relevant historical facts, which are meant to inform the juvenile court's discretion whether the seriousness of the offense alleged or the background of the juvenile warrants transfer for the welfare of the community, the appellate court must limit its sufficiency review to the facts that the juvenile court expressly relied upon, as required to be explicitly set out in the juvenile transfer order under Section 54.02(h).

D. Application of Law to Fact

The juvenile court did not "show its work" in the transfer order in this case. The only reason specifically stated on the face of the transfer order to justify waiver of juvenile jurisdiction is that the offense alleged is a serious one. The only fact specified in the written transfer order in support of this reason is that the offense that the appellant is alleged to have committed is an offense against the person of another. We agree with the court of appeals's conclusion that a waiver of juvenile jurisdiction based on this particular reason, fortified only by this fact, constitutes an abuse of discretion.

It is true that the juvenile court found other facts that would have been relevant to support transfer for the alternative reason that the appellant's background was such as to render waiver of juvenile jurisdiction appropriate. First, without going into any relevant detail, the juvenile court's order found that the appellant was sophisticated and mature enough to have been able to waive his constitutional rights effectively and assist in the preparation of his defense at trial, just as an adult would.FN87 Second, again without elaboration, the juvenile court found "little, if any" prospect of protecting the public and rehabilitating the appellant given its available resources. But, because the juvenile court did not cite the appellant's background as a reason for his transfer in its written order, these findings of fact are superfluous.

FN87. In any event, it is doubtful that the Legislature meant for the sophistication-and-maturity factor to embrace the juvenile's ability to waive his constitutional rights and assist in his defense. It is true that a great many of the courts of appeals seem to think that it does. The juvenile court's transfer order in the early case of In re Buchanan included such a finding. 433 S.W.2d at 788. So did the juvenile court's orders in In re W.R.M., 534 S.W.2d at 181–82, Matter of Honsaker, 539 S.W.2d at 200, P.G., 616 S.W.2d at 639, Casiano, 687 S.W.2d at 449, and Matter of D.D., 938 S.W.2d at 175. Another relatively early case, however, found this emphasis on the juvenile's ability to waive his rights and assist in his defense "somewhat difficult to understand." R.E.M., 541 S.W.2d at 846. The San Antonio Court of Appeals "believe[d] that the requirement that the juvenile court consider the maturity and sophistication of the child refers to the question of culpability and responsibility for his conduct, and is not restricted to a consideration of whether he can intelligently waive rights and assist in the preparation of his defense." Id. Later, the Houston 1st Court of Appeals observed that "[o]ur courts have held that the requirement that the [juvenile] court consider the child's sophistication and maturity refers to the question of culpability and responsibility of the child for his conduct, as well as the consideration of whether he can intelligently waive his rights and assist in his defense." Matter of S.E.C., 605 S.W.2d at 958 (emphasis added). Thus did the latter view of the relevance of a juvenile's ability to waive his rights and assist in his defense as an adult creep into our jurisprudence. No case has ever undertaken to explain,

however, exactly how the juvenile's capacity (or lack thereof) to waive his constitutional rights and assist in his defense is relevant to whether the welfare of the community requires transfer, and we fail to see that it is. Other courts of appeals have rightly declared "the purpose of an inquiry into the mental ability and maturity of the juvenile [to be] to determine whether he appreciates the nature and effect of his voluntary actions and whether they were right or wrong." Matter of E.D.N., 635 S.W.2d at 801 (citing L.W.F. v. State, 559 S.W.2d 428, 431 (Tex.Civ.App.—Fort Worth 1977, ref'd n.r.e.)). In our view, the juvenile's capacity to waive his constitutional rights and help a lawyer to effectively represent him is almost as misguided as the juvenile court's logic in the present case when it orally pronounced that the appellant should be transferred, inter alia, merely for the sake of judicial economy, so that his case could be consolidated with that of his already-certified-as-an-adult co-defendant. Such a notion is the very antithesis of the kind of individualized assessment of the propriety of waiver of juvenile jurisdiction that both Kent and our statutory scheme expect of the juvenile court in the exercise of its transfer discretion.

Moreover, even were we to regard the recitation of these conclusory facts in the written transfer order to constitute an acceptably implicit indication that the juvenile court also considered the appellant's background as a reason for the transfer, we would nonetheless uphold the court of appeals's judgment. First, with respect to the appellant's sophistication and maturity, we agree with the court of appeals that the evidence was legally insufficient to support such a finding, since the State offered no evidence at the juvenile hearing to inform the juvenile court's consideration of that Section 54.02(f) factor.FN88 Second, with respect to the prospects for protecting the public and rehabilitating the appellant, we are not at liberty to second-guess the court of appeals's conclusion that the juvenile court's finding regarding this Section 54.02(f) factor was supported by factually insufficient evidence in that it was so against the great weight and preponderance of the evidence as to be manifestly unjust.FN89

FN88. See Moon, S.W.3d at 375 ("[T]here must be some evidence to support the juvenile court's finding that [the appellant] was sufficiently sophisticated and mature for the reasons specified by the court in order to uphold its waiver determination. Our review finds no evidence supportive of the court's finding that [the appellant] was 'of sufficient sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights heretofore waived ... [and] to have aided in the preparation of [his] defense.' "). We find no such evidence in the record either.

FN89. Id. at 377–78. See Cain v. State, 958 S.W.2d 404, 408 (Tex.Crim.App.1997) ("Our inability to decide questions of fact precludes de novo review of courts of appeals'[s] factual decisions."); Laster v. State, 275 S.W.3d 512, 519 (Tex.Crim.App.2009) ("We do not conduct a de novo factual sufficiency review."); Villarreal v. State, 286 S.W.3d 321, 328 (Tex.Crim.App.2009) ("Once a court of appeals has determined such a claim of 'factual' insufficiency, this Court may not conduct a de novo review of the lower court's determination.").

Conclusion: The court of appeals did not err to undertake a factual-sufficiency review of the evidence underlying the juvenile court's waiver of jurisdiction over the appellant. Because the juvenile court made no case-specific findings of fact with respect to the seriousness of the offense, we agree with the court of appeals that the evidence fails to support this as a valid reason for waiving juvenile-court jurisdiction. Even had the juvenile court cited the appellant's background as an alternative basis to justify his transfer, the court of appeals was correct to measure the sufficiency of the evidence to support this reason against the findings of fact made in the transfer order itself and to conclude that the evidence was insufficient to support those findings. We affirm the judgment of the court of appeals.FN90

FN90. Neither the State nor the appellant has contested the propriety of the court of appeals' ultimate disposition; neither party argues that the court of appeals erred, even in light of its holding that the juvenile court abused its discretion to waive jurisdiction, to declare that the cause remains "pending in the juvenile court." Moon, 410 S.W.3d at 378. The question nevertheless ineluctably presents itself: Pending for what? We leave that question for the juvenile court, but we do note that at least one legislatively provided alternative would seem to be for the juvenile court to conduct a new transfer hearing and enter another order transferring the appellant to the jurisdiction of the criminal court, assuming that the State can satisfy the criteria under Section 54.02(j) of the Juvenile Justice Code. See TEX. FAM.CODE § 54.02(j)("(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) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed ... an offense under Section 19.02, Penal Code; ... (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: ... (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because: ... (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."(emphasis supplied)).

It has been suggested that, rather than affirm the court of appeals's reversal of the juvenile court's transfer order, we should first remand the cause to the court of appeals with an order that the court of appeals remand the cause to the juvenile court for additional specific findings of fact to determine retroactively whether its original transfer order was valid. In State v. Elias, 339 S.W.3d 667, 675–77 (Tex.Crim.App.2011), for example, we held that the court of appeals should not have affirmed the trial court's grant of a motion to suppress without first remanding the case to the trial court to supply missing but critical findings of fact to inform appellate review of the ruling on that motion, under the aegis of Rule 44.4 of the Texas Rules of Appellate Procedure. Subsection (a) of this rule provides that "[a] court of appeals must not affirm or reverse a judgment or dismiss an appeal if: (1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals; and (2) the trial court can correct its action or failure to act." TEX.R.APP. P. 44.4(a). Subsection (b) requires the appellate court to "direct the trial court to correct the error." TEX.R.APP. P. 44.4(b). There are at least two problems with such a remand here. First of all, it is far from clear that Rule 44.4 can be read to authorize an appellate court to direct a juvenile court (not "the trial court") to supply a missing finding of fact. Secondly, and more fundamentally, there is a jurisdictional impediment to applying Rule 44.4 in the present context—a kind of chicken-and-egg paradox. The juvenile court has either validly waived its exclusive jurisdiction, thereby conferring jurisdiction on the criminal courts, or it has not. We cannot order the court of appeals to remand the cause to the juvenile court unless and until we affirm its judgment that the juvenile court's transfer order was invalid and that the criminal courts therefore never acquired jurisdiction. Unless and until the transfer order is declared invalid, the criminal courts retain jurisdiction, and the juvenile court lacks jurisdiction to retroactively supply critical findings of fact to establish whether or not it has validly waived its jurisdiction.

Moore v. State, No. 01-13-00663-CR, --- S.W.3d ----, 2014 WL 3673551, Tex.Juv.Rep. Vol. 28 No. 3 ¶14-3-11 [Tex.App.-Hous. (1 Dist.), 7/24/14]

IN A DISCRETIONARY TRANSFER TO ADULT COURT, A HEAVY CASELOAD AND A MISTAKE AS TO THE JUVENILE'S AGE BY LAW ENFORCEMENT WAS NOT CONSIDERED A REASON "BEYOND THE STATE'S CONTROL" SINCE LAW ENFORCEMENT IS CONSIDERED WITHIN THE STATE'S CONTROL UNDER TFC §54.02(j)(4)(A).

Facts: Aaron Moore was born on July 11, 1992. On or about August 29, 2008, six-teen-year-old Moore sexually assaulted a twelve-year-old, E .W. On September 19, 2008, E.W. identified Moore as her assailant and reported the incident to her mother, who in turn reported this information to the police. Three days later, while Moore was still sixteen, Detective M. Cox began to investigate E.W.'s complaint.

Almost two years' later, on July 22, 2010, Detective Cox forwarded Moore's case to the district attorney's office, believing Moore to be seventeen years old. Moore, however, had turned eighteen eleven days earlier. In delaying forwarding the charges, Detective Cox testified that she relied on an internal police report that mistakenly listed Moore's birthday as July 11, 1993, making him appear one year younger than his actual age. CPS records in the police file contained Moore's correct date of birth. Detective Cox also testified that she had a heavy caseload of 468 cases at the time.

On September 8, 2010, the juvenile court ordered that Moore be taken into custody, and then ordered his conditional release a few days later. More than a year later, on August 17, 2011, the State filed a petition for a discretionary transfer of the case from the juvenile court to a criminal district court. On February 10, 2012, the

juvenile court transferred the case, concluding that, for a reason beyond the control of the State, it was not practicable to proceed in juvenile court before Moore's eighteenth birthday. See id. Moore pleaded guilty to aggravated sexual assault of a child pursuant to a plea bargain; the criminal district court deferred adjudication and placed Moore on five years' community supervision.

Moore contends that the juvenile court improperly transferred the case to the criminal district court because the State failed to show that, for a reason beyond the control of the State, it was not practicable to proceed in juvenile court before Moore's eighteenth birthday.

Held: Judgment vacated, case dismissed

Opinion: We review a juvenile court's decision to transfer a case to an appropriate court for an abuse of discretion. State v. Lopez, 196 S.W.3d 872, 874 (Tex.App.-Dallas 2006, pet. ref'd); see also In re M.A., 935 S.W.2d 891, 896 (Tex.App.-San Antonio 1996, no writ). In applying this standard, we defer to the trial court's factual determinations while reviewing its legal determinations de novo. In re J.C.C., 952 S.W.2d 47, 49 (Tex.App.-San Antonio 1997, no writ).

A juvenile court has exclusive, original jurisdiction over all proceedings involving a person who has engaged in delinquent conduct as a result of acts committed before age seventeen. See TEX. FAM.CODE ANN. §§ 51.02(2), 51.04 (West 2014). A juvenile court does not lose jurisdiction when a juvenile turns eighteen, but its jurisdiction becomes limited. The juvenile court retains jurisdiction to either transfer the case to an appropriate court or to dismiss the case. In re B.R.H., 426 S.W.3d 163, 166 (Tex. App.-Houston [1st Dist.] 2012, orig. proceeding) (citing In re N.J.A., 997 S.W.2d 554, 556 (Tex.1999)). To transfer the case to an appropriate court, the State must satisfy the requirements listed in section 54.02(j).TEX. FAM.CODE ANN. § 54.02(j), which reads:

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) 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.

Pursuant to section 54.02(j), the juvenile court may transfer the case to a criminal district court only if, among other findings, it determines by a preponderance of the evidence that "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." ID. § 54.02(j)(4)(A). The State has the burden of showing that proceeding in juvenile court was not practicable because of circumstances outside the control of the State. See Webb v. State, 08–00–00161–CR, 2001 WL 1326894, at *7 (Tex.App.-El Paso, Oct. 25, 2001, pet. ref'd) (mem. op., not designated or publication).

In Webb, the El Paso Court of Appeals considered the State's burden under section 54.02(j) and held that the State failed to satisfy it. Id. There, the State claimed that the delay resulted from the trial court staff's failure to set a prompt hearing. Id. at *5. Law enforcement filed the defendant's case with the district attorney's office. Id. at *2. A few days later, the State filed in juvenile court a petition for a discretionary transfer of the case to criminal district court, but failed to notify the juvenile court of the defendant's upcoming eighteenth birthday. Id. at *2, *6. At a hearing after the defendant's eighteenth birthday, the juvenile court transferred the case to a criminal district court. Id. at *2. The court of appeals reversed, holding that the State's failure to notify the juvenile court of the defendant's upcoming birthday was not a reason for delay beyond the State's control. Id. at *7.

Here, the State contends that an investigative delay, stemming from Detective Cox's large caseload and mistake as to Moore's age, are reasons beyond the control of the State. The State concedes, however, that the offense was promptly reported and that Moore had been identified as the perpetrator within days after the offense was committed while he was still a juvenile and well short of his seventeenth birthday. The correct birthdate was evident in other police records. The State did not trace its error in the internal offense report to any outside source—Detective Cox testified that the report would have been created internally by an administrative assistant. The record demonstrates that it was the State's clerical error, coupled with its lengthy delay—unaided by any outside event—which caused the case to fall outside the juvenile court's jurisdiction. The State did not adduce proof that it could not have proceeded in juvenile court for reasons beyond its control.

The State attempts to distinguish Webb by emphasizing that Detective Cox forwarded Moore's case to the district attorney's office after Moore's eighteenth birthday—and that it was an investigative delay, not a prosecutorial delay, that caused the State to file charges after the time for filing them had expired. But for purposes of section 54.02(j)(4)(A), we include law enforcement as part of "the State." Cf. In re N.M.P., 969 S.W .2d 95, 101–02 (Tex.App.-Amarillo 1998, no pet.)(including law enforcement as part of "the State" for purposes of section 54.02(j)(4) due diligence exception). We analogize this case to the Brady v. Maryland line of authority, in which courts include law enforcement's conduct and knowledge of exculpatory evidence in determining a Brady violation. See Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567 (1995) (discussing rule announced in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)). For purposes of the Brady rule, "'the State' includes, in addition to the prosecutor ... members of law enforcement connected to the investigation and prosecution of the case." Pena v. State, 353 S.W.3d 797, 810 (Tex.Crim.App.2011) (citing Ex parte Reed, 271 S.W.3d 698, 726 (Tex.Crim.App.2008)).

Because "the State" includes law enforcement, we hold that Detective Cox's heavy caseload and mistake as to Moore's age are not reasons beyond the State's control. Accordingly, we hold that the juvenile court erred in finding that the State had satisfied its burden under section 54.02(j)(4)(A).

The State contends that any error in transferring the case to a criminal district court was harmless, because the juvenile court could have transferred the case under section 54.02(a).TEX. FAM.CODE ANN. § 54.02(a). But section 54.02(a) applies only to a "child" at the time of the transfer. Id. The Family Code defines "child" as a person 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.

Here, the State moved to transfer the case to a criminal district court on August 17, 2011. At the time, Moore was nineteen years old and thus not a "child." See id. To transfer the case to a criminal district court after a person's

eighteenth birthday, the juvenile court must find, by a preponderance of the evidence, that the State has satisfied the section 54.02(j) requirements—that the delay happened for reasons outside the control of the State. Id. § 54.02(j); N.J.A., 997 S.W.2d at 557 ("If the person is over age eighteen, and section 54.02(j)'s criteria are not satisfied, the juvenile court's only other option is to dismiss the case.").FN1 Because the State did not meet this burden, its non-compliance with section 54.02 deprived the juvenile court of jurisdiction. We therefore hold that the juvenile court lacked jurisdiction to transfer the case to a criminal district court and, as a result, the criminal district court never acquired jurisdiction. See Webb, 2001 WL 1326894, at *7.

FN1. We note that the Family Code provides an exception to this rule, which applies to incomplete proceedings. TEX. FAM.CODE ANN. § 51.0412 (West 2014); see also B.R.H., 426 S.W.3d at 166. This exception, however, does not apply here, and neither party raises it as an issue.

Conclusion: We vacate the trial court's judgment and dismiss the case for lack of jurisdiction.